IN THE SUPREME COURT OF OHIO

Carroll E. Newman, Adams County Auditor, Appellant v. William W. Wilkins, Tax Commissioner of Ohio Appellee v. Cincinnati Gas & Electric Co. and Dayton Power and Light Co. and Columbus Southern Power Co. Appellees	:	Case No. 07-1054 On Appeal from Ohio Board of Tax Appeals Ohio Board of Tax Appeals Case Nos. 2002-P-170, 171 and 172

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SUPREME COURT OF OHIO

APPELLEE/CROSS APPELLANT UTILITIES' MOTION TO DISMISS CLAIMS OF ERROR TWO, THREE, FOUR AND FIVE OF APPELLANT ADAMS COUNTY AUDITOR FOR LACK OF SUBJECT MATTER JURISDICTION.

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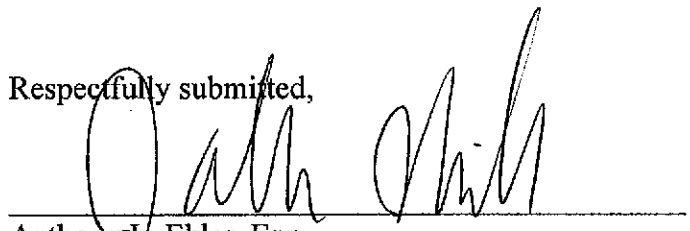
MOTION TO DISMISS

Appellees/Cross Appellants Cincinnati Gas & Electric Co., Dayton Power and Light Co., and Columbus Southern Power Company (the "Utilities") move the Court to dismiss claims of error numbers two, three, four and five in the Appellant Adams County Auditor's Notice of Appeal to this Court for lack of subject matter jurisdiction. A memorandum in support of this motion is attached.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. Summary Conclusions of Law

Claims of error number two and three request the Court to reweigh the evidence as a general matter contrary to the specificity requirements of R.C. 5717.04. E.g., *Deerhake v. Limbach* (1989), 47 Ohio St.3d 44, 546 N.E.2d 1327. Claim of error number four was not specifically plead in the notice of appeal to the Board of Tax Appeals (the "Board") as required by R.C. 5717.02. Accordingly, the Board lacked subject matter jurisdiction over that claim of error, and this Court also lacks subject matter jurisdiction. The County Auditor admitted in his Motion to Remand (filed with the Board on December 10, 2004) that claim of error number five was not specifically plead in the notice of appeal to the Board as required by R.C. 5717.02 and argued that the failure militated in support of remand to the Commissioner. Similarly, the County Auditor did not brief the argument raised in claim of error number five. Accordingly, the Board lacked subject matter jurisdiction over that claim and this Court suffers a corresponding lack of jurisdiction.

II. Procedural History and Factual Background

On May 1, 2000, Utilities filed applications with the Commissioner seeking to have specified equipment certified as thermal efficiency improvement facilities as defined in R.C. 5709.45.[1] On June 19, 2000, the Commissioner provided notice to the Adams County Auditor that he was in receipt of an Application for Thermal Efficiency Improvement Facility. Although the County Auditor had a statutory right to request a hearing and participate in the Commissioner's decision, the County Auditor elected to disregard the notice and to waive hearing.

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[1] R.C. 5709.45 *et seq.*, dealing with definitions and procedures respecting thermal efficiency improvement facility certification, was recodified at R.C. 5709.20 *et seq.* within 150 v. H.B. 95 (eff. 6-26-03). However, because the certificates were issued prior to the recodification, the prior statutory scheme governs this case. R.C. 5709.201. Accordingly, Utilities cite to the Revised Code as it existed when the certificates were issued.

As required by statute, the Commissioner transferred the applications to the Ohio Department of Development for that agency's review. That agency requested the opinion of Mr. Abdur Rahim, PhD, a professional engineer who stated at his deposition that he had evaluated over two hundred thermal efficiency improvement certification applications for the Ohio Department of Development. On June 2, 2001, Mr. Rahim issued his recommendation to grant certification to the equipment specified in the Utilities' applications. On June 20, 2001, the Director of the Ohio Department of Development adopted Mr. Rahim's findings and recommendation and provided that recommendation to the Commissioner. On December 7, 2001, the Commissioner approved Utilities applications and issued thermal efficiency improvement certificates.

Pursuant to a right of appeal granted by R.C. 5709.48 and 5709.49, the County Auditor appealed the Commissioner's finding and order to the Ohio Board of Tax Appeals (the "Board") on February 1, 2002. See Notice of Appeal to the Board attached at Tab A.[2] The Board rejected all the arguments briefed by the County Auditor with the exception of certification of the circulating water system (a portion of a general component known as the "main condenser").

Anomalously, the Commissioner had raised arguments against his own finding and order in his post hearing appellee's brief. Those arguments were admittedly not raised by the County Auditor (and were the subject of a motion to remand by the County Auditor for that reason). Yet, the Board took jurisdiction over the Commissioner's arguments and rejected them as a legal matter. Accordingly, the Board affirmed the Commissioner's issuance of the thermal efficiency improvement certificates in all respects except for the certification of the circulating water system.

[2] Utilities have attached certain documents from the record to this Motion for reference purposes because the record from the Board has not yet been certified to the Court. Counsel for Utilities represent the documents are accurate and that they should be part of the record certified to the Court.

The County Auditor appealed to this Court and raised five claims of error. The Commissioner also has appealed the Board's rejection of his arguments against his own finding and order. The County Auditor's claim of error number five is an adoption of the Commissioner's claims of error raised in brief to the Board.

III. Argument

A. Claims of error number two and number three should be dismissed because they are fatally general. They require the Court to reweigh the entire body of evidence in this case for all legal elements and specify nothing.

R.C. 5717.04 sets forth the procedure to seek reversal or modification of a decision made by the Board of Tax Appeals (the "Board"). Under this statute, the Court has repeatedly rejected general or blanket claims of error that baldly state that the decision of the Board "was against the manifest weight of the evidence" or "was unreasonable and unlawful." These types of claims are fatally non-specific under the statute and fail to vest the Court with jurisdiction. *E.g.*, *Deerhake v. Limbach* (1989), 47 Ohio St.3d 44, 546 N.E.2d 1327; *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St.579, 120 N.E.2d 310. (rejecting all of the following claims of error for being fatally general, "1. The decision is contrary to law. 2. The decision is not sustained by the evidence and is contrary to the evidence. 3. The decision is against the weight of the evidence. 4. The assessment placed upon the property involved is excessive, contrary to law and the evidence."). The Court's role is to review decisions of the Board on questions of law; it does not simply reweigh the evidence. *Citizens Financial Corp. v. Porterfield* (1971), 25 Ohio St.2d 53, 266 N.E.2d 828, paragraph one of syllabus.

Claims of error number two and number three in the County Auditor's Notice of Appeal to this Court are as follows:

2. It was an error and abuse of discretion for the Board of Tax Appeals to approve a tax exemption application when the taxpayer failed to prove that the property to be exempted satisfied each and every requirement of the exemption statute.

3. It was an error and abuse of discretion for the Board of Tax Appeals to fail to apply a strict scrutiny test and view the evidence most strongly against the exemption.

The language in claim of error number two directs the Court to reweigh the evidence as a general matter for "each and every requirement of the [tax] exemption statute." The claim fails to specify any particular evidence the Board may have overlooked and offers no specific requirement(s) of the tax exemption to which that evidence may have pertained. Under this claim, the Court is required to act as a super Board of Tax Appeals and review all of the evidence for "each and every" unspecified element of the tax exemption statute.

Claim of error number three makes a similarly general allegation. It asserts that the Board did not apply a strict scrutiny standard of review for all legal elements of the tax exemption in question to the entire body of evidence in the record (which consists of thousands of pages). This claim of error fails to specify the particular evidence the Board allegedly overlooked, or which legal element(s) of the tax exemption statutes are being questioned.

In fact, the Board's decision expressly stated that it *did* apply a strict scrutiny standard of review. See Board's Decision and Order at 5 stating "[A]s 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." In light of the Board's statement of its strict scrutiny review, the County Auditor's claim of error number three would have this Court analyze *all* of the evidence with regard to *all* legal elements of the tax exemption and determine whether the Board actually did what it said it did each time it applied law to facts. Such blanket claims ask the Court to replace the entire function the Board. As such, they are fatally non-specific.

The Court and Utilities are entitled to be advised of specific element(s) of the statute which the County Auditor believes is not supported by evidence. They are entitled to have some idea of the evidence the County Auditor believes cuts against the Board's decision as to those elements. The County Auditor should offer this information in its claimed errors by tying it to the express statutory element he intends to raise before this Court. These requirements are not new and the Court considers this level of specificity to be reasonable. In C*astle Aviation, Inc. v. Wilkin*s (2006), 109 Ohio St.3d 290, 2006 – Ohio – 2420 at ¶41, the Court held that a claim of error in an appeal from the Board failed to vest the Court with jurisdiction because it did not tie a legal claim to specific facts of the case. See also *Queen City Valves, Inc.*, supra.

County Auditor's claims of error number two and number three are variations of the fatally general claim of error that the Board's decision "was against the manifest weight of the evidence" or "was unreasonable and unlawful." They are so general that they provide notice of nothing other than that he disagrees with the Board. They leave such wide latitude that he can address any aspect of the entire case. The Court should follow its decisions in *Castle Aviation*, *Deerhake* and *Queen City Valves* and dismiss these general complaints about the Board's decision below.

B. The Court should dismiss claim of error number four because it was not specified as an error of the Commissioner in the Notice of Appeal to the Board.

1. The County Auditor failed to specify at the Board the legal error raised in claim of error number four to the Court.

The County Auditor's claim of error number four to this Court states:

> 4. It was an error and abuse of discretion for the Board of Tax Appeals to fail to apply the proper definition of waste heat and to fail to find support in the record for its conclusions concerning waste heat.

By its terms, this claim of error states that the Board failed to define "waste heat" properly and its decision was against the manifest weight of the evidence. The statutory term "waste heat" is

found in R.C. 5709.45(C), but the term "waste heat" does not appear in the County Auditor's notice of appeal to the Board assigning error to the Commissioner. Tab A. Indeed, none of the terms in R.C. 5709.45(C) appear in the County Auditor's notice of appeal to the Board and there is no citation or reference to R.C. 5709.45(C) at all in that document. Id.

As such, County Auditor's appeal to the Board does not provide notice of the "waste heat" argument to an objective and reasonable reader (which is the purpose of a notice of appeal). In C*astle Aviation, Inc. v. Wilkin*s (2006), 109 Ohio St.3d 290, 2006-Ohio- 2420 at ¶ 44, the Court held that it "can consider claims of error only when they were properly raised before the BTA." The Court set forth this limitation because its subject matter jurisdiction is no broader than the points properly raised in the notice of appeal to the Board. Accordingly, Utilities assert that the Board never had jurisdiction over the "waste heat" issue raised by the County Auditor in his Notice of Appeal to this Court because the County Auditor did not specify in his notice of appeal to the Board that the Commissioner used an erroneous definition of "waste heat."

R.C. 5717.02 requires an appellant to claim errors of the Commissioner in "definite and specific" terms when making an appeal to the Board. *Gochneaur v. Kosydar* (1976), 46 Ohio St.2d 59, 66 (citing to *Queen City Valves v. Peck* (1954), 161 Ohio St. 579, 120 N.E.2d 310); *Ladas v. Peck* (1954), 162 Ohio St. 159, 122 N.E.2d 12, syllabus. This requirement is jurisdictional and mandatory. Compliance with that requirement is necessary to invoke the jurisdiction of the Board. *American Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, 70 N.E.2d 93; *Clippard Instrument Laboratory, Inc. v. Lindley* (1977), 50 Ohio St.2d 121, 363 N.E.2d 592. When the Board has no jurisdiction over an appeal due to the appellant's failure to satisfy this requirement, the Board must dismiss the appeal. *Id.* The alleged errors must be "of a nature to call the Board's attention to those precise determinations of the Tax

Commissioner with which Appellant took issue." *Id.* Similarly, "to satisfy the specificity requirement [of R.C. 5717.02], the taxpayer must specify the actions and findings of the commissioner that the taxpayer contests and articulate the basis for the asserted error." *Goodyear Tire & Rubber Co. v. Limbach* (1991), 61 Ohio St.3d 381, 382, 575 N.E.2d 146. In short, blanket assertions of error do not invoke the jurisdiction of the Board.

More recently, the Court in *Satullo v. Wilkins* (2006), 111 Ohio St.3d 399, 2006 Ohio 5856, instructed that when the notice of appeal to the Board did not contain a reference to the statutory subsection or the language of that subsection, the Notice of Appeal to the Court which raised the error failed to vest the Court with jurisdiction under R.C. 5717.04. In *Cousino Construction Co. v. Wilkins* (2006), 108 Ohio St.3d 90, 2006-Ohio162, at ¶37 to 41, the Court similarly held that a taxpayer's failure to cite pertinent statutory subsection or include language from that subsection in the notice of appeal to Board precluded the Board's jurisdiction and as such would preclude the Court's authority over that issue. Several years earlier, the Court held that the taxpayer/appellant's failure to mention R.C. 5739.02(B)(14) in its notice of appeal or include relevant language from that tax exemption subsection was fatal. *Kern v. Tracy* (1995), 72 Ohio St.3d 347, 349, 650 N.E.2d 428.

The only claim of error in the County Auditor's notice of appeal to the Board that he can possibly argue is relevant to the "waste heat" claim of error raised in his Notice of Appeal to this Court is claim of error number four in his notice of appeal to the Board. That claim states as follows:

> 4. 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.

This claim of error borrows language from R.C. 5709.45(D) and specifies error with respect to the requirements of R.C. 5709.45(D) (subject to the failing that it does not specify which equipment it was intended to address, discussed *infra*).

However, the claim of error raised to the Court relies on R.C. 5709.45(C) which contains four statutory requirements. Those requirements are that the equipment (1) "recover;" and (2) "use" (3) "waste heat" or "waste steam" (4) "produced incidental to electric generation." The obvious question is, how was the "waste heat" error claimed by the County Auditor in its Notice of Appeal to the *Court* specified in his notice of appeal to the *Board* when "waste heat" is but one of four requirements in a statutory subsection that is not expressly or impliedly referenced at all in the notice of appeal to the Board? The Auditor may argue that he made a blanket claim of error. How else can a claim of error that does not mention "waste heat" or the statutory subsection that contains that term nonetheless include it? However, that argument is fatally flawed. Blanket claims of error are the opposite of a specific and definite claim of error. See *Queen City Valves, supra.*

Even without regard to the propriety of a blanket claim of error, Utilities do not believe the language of claim of error number four to the Board can stretch to cover the "waste heat" claim the County Auditor has made to this Court. The plain meaning of the claim made to the Board is that the equipment was necessary for the operation of the power plant, *regardless of the thermal efficiency aspects* of the machinery, equipment and property. R.C. 5709.45(C) defines "thermal efficiency improvement" as "the recovery and use of waste heat."

Substituting the statutory definition for "thermal efficiency improvement" into the County Auditor's claim of error number four to the Board, that claim of error reads, "the equipment was necessary for the operation of the plant *regardless of the recovery and use of waste heat* aspects of the equipment. Thus, claim of error number four to the Board states that--

without regard to whether the equipment recovers and uses waste heat--it is necessary for the operation of the plant and as such not deserving of certification. That claim, therefore, attacks application of the tax exemption to equipment necessary to plant operation as a mechanical matter without regard to the thermal efficiency benefits of the equipment (*i.e.*, without regard to recovery and use of waste heat and the implicit economic benefits of same).

No reasonable person could guess from the language used by the County Auditor at the Board that he intended to specify an error with regard to the statutory definition of "waste heat" used by the Commissioner. See *Cousino*, *supra* at ¶ 41 (dismissing claim of error when "no objective and reasonable reader" would be able to discern the claim of error from the Notice of Appeal to the Board). The County Auditor's claim did not reference the statutory subsection related to "waste heat" and it indicated the claim was being made regardless of thermal efficiency aspects of the equipment. The purpose of the Notice of Appeal is to put the Board and the parties on notice of the legal theory to be argued as applied to the pertinent facts. See *Manfredi Motor Transit Co. v. Limbach* (1988), 35 Ohio St.3d 73,77, 518 N.E.2d 936 (holding against a taxpayer by concluding an "intent to rely on that theory should have been specifically so stated in appellant's Notice of Appeal" and dismissing a claim of error asserting a legal theory that was not specifically asserted in the Notice of Appeal).

No objective and reasonable reader would be put on notice by claim of error number four to the Board that the County Auditor intended to argue that the Commissioner used an improper definition of "waste heat." If that claim was intended, it would have been simple to state. It would have been easy to have mentioned the term "waste heat" or the pertinent statutory subsection where that term is found. If "waste heat" was specifically plead without actually using the words "waste heat" or the proper statutory citation, then the other three elements of R.C. 5709.45(C) must also have been properly specified without actually reciting any of them

(and without actually referring to R.C. 5709.45(C) where they are found). This "blanket claim of error" is the slippery slope the Court's decisions have consistently avoided.

2. The County Auditor failed to specify at the Board which equipment he alleged was erroneously certified and he failed to tie such equipment to his legal theory.

In addition to the County Auditor's failure to specify in his notice of appeal to the Board the legal argument he now desires to argue before the Court, he also failed to specify any particular equipment with which he takes issue. Utilities note that although four component systems were included in the application with very different functions and locations within the plant, the County Auditor filed a "one size fits all" blanket claim against every item of equipment without specifying any.

Yet, the certified pieces of equipment perform very different functions and, therefore, fit the tax exemption requirements for different reasons. See the Board's Decision and Order (discussing the differing functions of the certified equipment). For example, the main condenser recovers waste *steam* exiting the exhaust of a turbine (and that is the basis of the Board's decision), whereas the air preheater recovers waste *heat* from exhaust flue gas and returns that heat to incoming air to be used in the boiler. These are two items of equipment that reside in entirely different systems hundreds of feet apart. One recovers and uses waste *steam* and the other waste *heat* (*i.e.*, they act on different substances that do not touch). The arguments and factual issues pertinent to an item of equipment that acts on waste *steam* (matter), versus an item that acts on waste *heat* (energy) are entirely different.

In like fashion, the certified flue gas heat exchangers at issue in this case recover and use waste heat from exhaust flue gas. They are components located in entirely different systems. The air preheater recovers waste heat from flue gas and adds that heat back to incoming air to the furnace. The economizer recovers waste heat from flue gas and adds that heat back to

condensate in the feed water system. The reheater recovers waste heat from flue gas and adds that heat back to steam in the main steam system after the steam has been utilized by a turbine. With such different pieces of equipment performing different functions, claimed errors against a function based tax exemption cannot be specifically plead without referencing or even acknowledging the differing functions (or without any citation to the facts as to why pertinent items of equipment fail to meet the functional criteria to qualify for the certification).

The Board of Tax Appeals recently dismissed an appeal by a taxpayer for failing to specify particular equipment that the Board should consider with regard to application of property taxes. In *Rumpke Waste, Inc. v. Wilkins* (March 30, 2007), BTA Case Nos. 2004-K-477, the Board held that a taxpayer needed to specify which particular items of equipment on garbage trucks it believed should not be subject to property tax. The Board concluded that the taxpayer could not utilize a blanket claim of error applicable to all equipment on the truck.

The Board stated the rule as follows, ". . . *the notice of appeal must indicate the transaction and the actual statutory or factual reason the tax does not apply.*" The Board interpreted this requirement to mean that the taxpayer was required to specify by name those items of equipment on the truck that it believed were not taxable. The Board expressly relied on a long line of cases from this Court to support that holding. Id. (citing, *Kern v. Tracy* (1995), 72 Ohio St.3d 347, 349; *Ellwood Engineered Castings Co. v. Zaino*, 98 Ohio St.3d 424, 427, 2003-Ohio-1812, at ¶20; *Gen. Motors Corp. v. Wilkins*, 102 Ohio St.3d 33, 2004-Ohio-1869, at ¶74; *Cousino Construction Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, at ¶41; *Castle Aviation, Inc. v. Zaino*, 109 Ohio St.3d 290, 2006-Ohio-2420, at ¶74; *Satullo v. Zaino*, 111 Ohio St.3d 399, 2006-Ohio-5856, at ¶74. see also, *E.F. MacDonald Co. v. Limbach* (Feb. 18, 1987), BTA No. 1983-G-543, unreported, at 10). This Court has consistently held that "what is good for the goose is good for the gander" and has held citizens and government to the same strict

jurisdictional standards. See *Hughes v. Ohio Dept. of Commerce* (2007), 114 Ohio St.3d 47, 2007 – Ohio 2877, at ¶17. Accordingly, for the Board to have jurisdiction over the County Auditor's claims of error, the notice of appeal to the Board must have *specified* the items of equipment or the general components that did not qualify for the thermal efficiency exemption, and have provided *specific* legal and factual reasons they did not qualify.

In this case, the Board, Commissioner and Utilities were left to guess from the County Auditor's notice of appeal to the Board (1) which equipment he believed was erroneously certified; (2) that his legal theory involved the definition of "waste heat" and the unmentioned requirements of R.C. 5709.45(C); and (3) the factual underpinning of his legal claims. No one reasonably could have predicted from the Auditor's notice of appeal to the Board, the "waste heat" argument he now has raised to this Court, nor could anyone accurately guess whether he intended to attack exemption of all of the discrete items of certified equipment, or only a portion. The notice of appeal is supposed to narrow the issues to be addressed by the Board, not be so open ended and general that it can address any legal issue for any discrete item of equipment. *Queen City Valves, supra*. For these reasons, the County Auditor's Notice of Appeal to this Court is not salvageable with regard to his "waste heat" claim of error that was never specified in the notice of appeal to the Board.

Utilities recognize that it is procedurally awkward to raise the question of subject matter jurisdiction over a claim of error at this stage in the proceedings. In *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282, 383 N.E.2d 896, the Court held that the "failure of a litigant to object to subject matter jurisdiction at the first opportunity is undesirable and procedurally awkward. But it does not give rise to a theory of waiver, which would have the force of investing subject matter jurisdiction in a court which has no such jurisdiction." Thus,

the question of the Board's subject matter jurisdiction over the County Auditor's claim of error number four in his Notice of Appeal to this Court is properly raised.

C. Claim of error number five should be dismissed because the County Auditor admits it was not raised in his Notice of Appeal to the Board. He also waived error by failing to raise it at hearing and by failing to brief it.

The Auditor's claim of error number five in his Notice of Appeal to this Court is as follows:

> 5. It was an error and abuse of discretion for the Board of Tax Appeals to approve an exemption from taxes for equipment that merely replaces equipment and does not reduce power usage under O.R.C. § 5709.46.

The word "replacement" does not appear in the County Auditor's notice of appeal to the Board. As is described in Utilities Motion to Dismiss the Tax Commissioner's Notice of Appeal filed this same date, this claim of error was not raised at the Board by the Auditor. Instead, the appellee Tax Commissioner raised it for the first time in his post-hearing brief.

When the Commissioner raised that claim, the County Auditor responded by filing a Motion to Remand to the Tax Commissioner (dated December 10, 2004). In his Motion to Remand, the County Auditor admitted he had not raised the replacement part claim of error. Attached at Tab B is the County Auditor's Motion to Remand which acknowledges:

> O.R.C. § 5717.03 expressly permits the Board to remand matters back to the Tax Commissioner if "issues not raised on the appeal are important to a determination of the controversy..." *In the instant case, the matter of the replacement nature of the equipment was not specifically raised by* [the County Auditor] *Appellant in its Notice of Appeal...* (Emphasis added).

The author of the notice of appeal to the Board (*i.e.*, the County Auditor) does not interpret it as including the Commissioner's replacement part argument. Similarly, the County Auditor failed to raise the argument at hearing or to brief it.[3] These failures punctuate the County Auditor's

[3] Utilities note that no one (including the Commissioner) has performed the analysis to quantify incremental thermal efficiency gains between the originals and replacement parts. No one (except the Commissioner) realized that those gains were to be an issue. For example, when the County Auditor's expert was asked at deposition by counsel for the Commissioner "... which ones, you know would constitute replacement, which ones would constitute

admission and would constitute a waiver of the argument even if he had specifically plead it. See *Bd. of Educ. of the Cleveland Municipal School Dist. v. Cuyahoga Cty. Bd. of Revision* (2005), 107 Ohio St.3d 250, 2005 Ohio 6434, at ¶21 and 22 (stating in an appeal from the Board, "we have dismissed issues if a party did not brief them."). Similarly, the Board routinely treats as waived claims of error that are not briefed. See e.g., *USX Corp. v. Tracy* (Jan. 22, 1999), BTA Case Nos. 92-H-1479, 1480, 1999 WL 35777, at 5; *Maxxim Medical, Inc. v. Tracy* (Nov. 3, 1995), BTA Case No. 94-X-224, 1995 WL 655105, at F.N. 3. The County Auditor's admission that he did not raise the replacement argument in his Notice of Appeal coupled with his failure to brief that issue ought to be dispositive with regard to the Board's jurisdiction.

In view of his admission, the only argument now available to the County Auditor is that even though he failed to raise the claim of error in his Notice of Appeal at the Board, this Court's holding in *Key Services v. Zaino* (2002), 95 Ohio St.3d 11, 202 – Ohio – 1488, ought to be extended to allow the Commissioner to graft new claims of error onto the County Auditor's Notice of Appeal after the hearing has concluded, such that those errors could be deemed to have complied with R.C. 5717.02. This wild leap outside R.C. 5717.02 should not be approved.

Utilities have addressed in their Motion to Dismiss the Commissioner's Notice of Appeal (filed this same date) the issue of the Commissioner's ability to raise new claims of error to the Board after the hearing has concluded, without statutory standing, and without complying with any statutory procedures required for those who do have standing. Utilities have explained the fatal jurisdictional and due process problems attendant to raising post-hearing claims of error in the fashion that the Commissioner has in this case. To the extent the legal arguments in that document are pertinent to the County Auditor's attempted adoption of the Commissioner's

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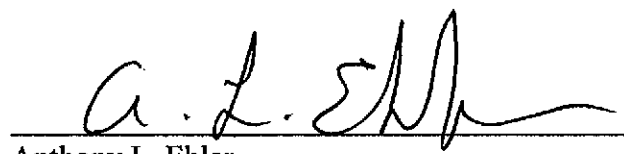
enhancement." Counsel for the County Auditor responded, "You didn't do that detailed analysis did you? The County Auditor's expert agreed with that conclusion. See Tab C. Similarly, Utilities did not present evidence of incremental thermal efficiency gains between originals and replacements because that alleged "error" was not raised.

replacement part argument in his own Notice of Appeal at the Court, those arguments are incorporated herein by reference.

IV. Conclusion

For all of the reasons provided above, Auditor's claims of error two, three, four and five in his Notice of Appeal should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,



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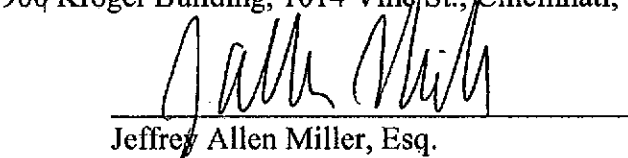
Columbus Southern Power Co.

CERTIFICATE OF SERVICE

I certify that a copy of Appellee/Cross Appellant Utilities' Appellee/Cross Appellant Utilities' Motion to Dismiss Claims of Error Two, Three, Four and Five of Appellant Adams County Auditor for Lack of Subject Matter Jurisdiction was sent by regular U.S. mail to counsel for Appellant Tax Commissioner of Ohio, Marc Dann and Janyce C. Katz, Esq., 30 E. Broad St., 25th Floor, Columbus, Ohio 43215, and Counsel for Appellant Adams County Auditor, David C. DiMuzio, David C. DiMuzio, inc., 1900 Kroger Building, 1014 Vine St., Cincinnati, Ohio 45202 on July 10, 2007.



Jeffrey Allen Miller, Esq.
Counsel for Appellee/Cross Appellants
Cincinnati Gas & Electric Co.
The Dayton Power and Light Company
Columbus Southern Power Co.

BOARD OF TAX APPEALS
STATE OF OHIO

CARROLL E. NEWMAN
ADAMS COUNTY AUDITOR
ADAMS COUNTY COURTHOUSE
110 West Main Street
West Union, Ohio 45693
(937) 544-2364

Appellant,

vs.

THOMAS M. ZAINO
TAX COMMISSIONER
STATE OF OHIO
P.O. Box 530
Columbus, Ohio 43216-0530

and

CINCINNATI GAS & ELECTRIC COMPANY
P.O. BOX 8825
Dayton, Ohio 45401

Appellees.

Case No. 2002P170

(Thermal Efficiency Improvement Certification)

Assessment Amount: $5,467,940

Amount in Controversy: $232,005

NOTICE OF APPEAL

FILED
FEB - 1 2002
BOARD OF TAX APPEALS
COLUMBUS, OHIO

Pursuant to R.C. § 5709.49, Appellant Carroll E. Newman, Adams County Auditor, hereby gives notice of his appeal of the finding and order of Thomas M. Zaino, Tax Commissioner dated December 7, 2001 in Certificate No. 377B. (A copy of such finding and order is attached hereto as Exhibit A and incorporated herein.)

The Tax Commissioner issued a Thermal Efficiency Improvement Certificate, claiming that certain machinery, equipment and property is designed primarily for thermal efficiency improvement and used exclusively for thermal efficiency improvement. Such finding, order and certificate were issued in violation of Ohio law.

Specific errors include:

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 machinery, 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.

Appellant hereby requests that said certificate be revoked and the finding and order of the Tax Commissioner be reversed and that no tax exemption be granted.

Respectfully submitted,

David C. DiMuzio
Wood & Lamping LLP
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202
Phone: (513) 852-6010
Facsimile: (513) 852-6087
Attorney for Appellant, Carroll E. Newman,
Adams County Auditor

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served on this 1st day of February, 2002 via Certified U.S. Mail upon the following:

Thomas M. Zaino
Tax Commissioners
State of Ohio
P.O. Box 530
Columbus, Ohio 43216-0530

Cincinnati Gas & Electric Company
P.O. Box 8825
Dayton, Ohio 45401

David C. DiMuzio

82899.1

Tax Form ERG 3

STATE OF OHIO
DEPARTMENT OF TAXATION
P. O. BOX 530, COLUMBUS, OHIO 43216-0530

PRESCRIBED BY THE TAX COMMISSIONER (08-01)

ENERGY CONVERSION OR SOLID WASTE ENERGY CONVERSION OR THERMAL EFFICIENCY IMPROVEMENT CERTIFICATE

(Section 5709.46 Ohio Revised Code)

Pursuant to the provisions of Section 5709.46, Revised Code, the Tax Commissioner hereby finds that certain machinery, equipment and property owned by CINCINNATI GAS & ELECTRIC COMPANY

for which application was made for certificates as a thermal efficiency improvement facility, and located at

U.S. ROUTE 52 (STREET ADDRESS) ABERDEEN OH 45101 (CITY AND ZONE)

Adams (COUNTY), Ohio, SPRIGG TWP-OHIO VALLEY LSD Taxing District, which

machinery, equipment and property is more particularly described in Application for Energy Conversion Facility or Solid Waste Energy Conversion Facility or Thermal Efficiency Improvement Facility Certificate No. 479 B, is designed primarily for thermal efficiency improvement, is suitable and reasonably adequate for such purpose and is intended for such purpose.

Therefore, for purposes of the tax exemptions provided by Sections 5709.50, Revised Code, the Tax Commissioner hereby certifies that the total cost of the facility is $14,663,101.30. The cost of that portion or part of the facility used exclusively for thermal efficiency improvement herein determined to be certified in accordance with the provisions of Section 5709.46, Revised Code, for purposes of the tax exemptions provided in Section 5709.50, Revised code, is $14,663,101.30, which amount is subject to review by audit.

This Thermal Efficiency Improvement Certificate is issued this 7 day of December, 2001 and is effective as of the 1 day of December, 1982.

CERTIFICATE NUMBER 377 B

Thomas M. Zaino

Tax Commissioner

RECEIVED
DEC 17 2001
CARROLL E. NEWMAN
ADAMS COUNTY AUDITOR
BY:

EXHIBIT
A

BOARD OF TAX APPEALS
STATE OF OHIO

CARROLL E. NEWMAN
ADAMS COUNTY AUDITOR
ADAMS COUNTY COURTHOUSE
110 West Main Street
West Union, Ohio 45693
(937) 544-2364

Appellant,

vs.

THOMAS M. ZAINO
TAX COMMISSIONER
STATE OF OHIO
P.O. Box 530
Columbus, Ohio 43216-0530

and

COLUMBUS AND SOUTHERN OHIO
ELECTRIC COMPANY
P.O. BOX 8825
Dayton, Ohio 45401

Appellees.

Case No. 2002P171

(Thermal Efficiency Improvement Certification)

Assessment Amount: $1,125,260

Amount in Controversy: $47,745

NOTICE OF APPEAL

FILED
FEB - 1 2002
BOARD OF TAX APPEALS
COLUMBUS, OHIO

Pursuant to R.C. § 5709.49, Appellant Carroll E. Newman, Adams County Auditor, hereby gives notice of his appeal of the finding and order of Thomas M. Zaino, Tax Commissioner dated December 7, 2001 in Certificate No. 378C. (A copy of such finding and order is attached hereto as Exhibit A and incorporated herein.)

The Tax Commissioner issued a Thermal Efficiency Improvement Certificate, claiming that certain machinery, equipment and property is designed primarily for thermal efficiency improvement and used exclusively for thermal efficiency improvement. Such finding, order and certificate were issued in violation of Ohio law.

Specific errors include:

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 machinery, 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.

Appellant hereby requests that said certificate be revoked and the findings and order of the Tax Commissioner be reversed and that no tax exemption be granted.

Respectfully submitted,

David C. DiMuzio
Wood & Lamping LLP
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202
Phone: (513) 852-6010
Facsimile: (513) 852-6087
Attorney for Appellant, Carroll E. Newman,
Adams County Auditor

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served on this 1st day of February, 2002 via Certified U.S. Mail upon the following:

Thomas M. Zaino
Tax Commissioners
State of Ohio
P.O. Box 530
Columbus, Ohio 43216-0530

Columbus and Southern Ohio Electric Company
P.O. Box 8825
Dayton, Ohio 45401

David C. DiMuzio

Tax Form ERG 3

STATE OF OHIO
DEPARTMENT OF TAXATION
P. O. BOX 530, COLUMBUS, OHIO 43216-0530

PRESCRIBED BY THE TAX COMMISSIONER (08-01)

ENERGY CONVERSION OR SOLID WASTE ENERGY CONVERSION OR THERMAL EFFICIENCY IMPROVEMENT CERTIFICATE

(Section 5709.46 Ohio Revised Code)

Pursuant to the provisions of Section 5709.46, Revised Code, the Tax Commissioner hereby finds that certain machinery, equipment and property owned by COLUMBUS & SOUTHERN OHIO ELECTRIC CO,

for which application was made for certificates as a thermal efficiency improvement facility, and located at

U.S. ROUTE 52 (STREET ADDRESS) ABERDEEN OH 45101 (CITY AND ZONE)

Adams (COUNTY), Ohio, SPRIGG TWP-OHIO VALLEY LSD Taxing District, which

machinery, equipment and property is more particularly described in Application for Energy Conversion Facility or Solid Waste Energy Conversion Facility or Thermal Efficiency Improvement Facility Certificate No. 479 C, is designed primarily for thermal efficiency improvement, is suitable and reasonably adequate for such purpose and is intended for such purpose.

Therefore, for purposes of the tax exemptions provided by Sections 5709.50, Revised Code, the Tax Commissioner hereby certifies that the total cost of the facility is $9,775,400.87. The cost of that portion or part of the facility used exclusively for thermal efficiency improvement herein determined to be certified in accordance with the provisions of Section 5709.46, Revised Code, for purposes of the tax exemptions provided in Section 5709.50, Revised code, is $9,775,400.87, which amount is subject to review by audit.

This Thermal Efficiency Improvement Certificate is issued this 7 day of December, 2001 and is effective as of the 1 day of January, 1970.

CERTIFICATE NUMBER 378 C

Thomas M. Zaiser
Tax Commissioner

RECEIVED
DEC 17 2001
CARROLL E. NEWMAN
ADAMS COUNTY AUDITOR
BY:

EXHIBIT A

BOARD OF TAX APPEALS
STATE OF OHIO

CARROLL E. NEWMAN
ADAMS COUNTY AUDITOR
ADAMS COUNTY COURTHOUSE
110 West Main Street
West Union, Ohio 45693
(937) 544-2364

Appellant,

vs.

THOMAS M. ZAINO
TAX COMMISSIONER
STATE OF OHIO
P.O. Box 530
Columbus, Ohio 43216-0530

and

DAYTON POWER & LIGHT COMPANY
P.O. BOX 8825
Dayton, Ohio 45401

Appellees.

Case No. 2002P172

(Thermal Efficiency Improvement Certification)

Assessment Amount: $5,464,300

Amount in Controversy: $231,850

NOTICE OF APPEAL

FILED
FEB 1 2002
BOARD OF TAX APPEALS
COLUMBUS, OHIO

Pursuant to R.C. § 5709.49, Appellant Carroll E. Newman, Adams County Auditor, hereby gives notice of his appeal of the finding and order of Thomas M. Zaino, Tax Commissioner dated December 7, 2001 in Certificate No. 376A. (A copy of such finding and order is attached hereto as Exhibit A and incorporated herein.)

The Tax Commissioner issued a Thermal Efficiency Improvement Certificate, claiming that certain machinery, equipment and property is designed primarily for thermal efficiency improvement and used exclusively for thermal efficiency improvement. Such finding, order and certificate were issued in violation of Ohio law.

Specific errors include:

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 machinery, 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.

Appellant hereby requests that said certificate be revoked and the findings and order of the Tax Commissioner be reversed and that no tax exemption be granted.

Respectfully submitted,

David C. DiMuzio
Wood & Lamping LLP
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202
Phone: (513) 852-6010
Facsimile: (513) 852-6087
Attorney for Appellant, Carroll E. Newman,
Adams County Auditor

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served on this 1st day of February, 2002 via Certified U.S. Mail upon the following:

Thomas M. Zaino
Tax Commissioners
State of Ohio
P.O. Box 530
Columbus, Ohio 43216-0530

Dayton Power & Light Company
P.O. Box 8825
Dayton, Ohio 45401

David C. DiMuzio

82878.1

Tax Form ERC 3

STATE OF OHIO
DEPARTMENT OF TAXATION
P. O. BOX 530, COLUMBUS, OHIO 43216-0530

PRESCRIBED BY THE TAX COMMISSIONER (08-01)

ENERGY CONVERSION OR SOLID WASTE ENERGY CONVERSION OR THERMAL EFFICIENCY IMPROVEMENT CERTIFICATE

(Section 5709.46 Ohio Revised Code)

Pursuant to the provisions of Section 5709.46, Revised Code, the Tax Commissioner hereby finds that certain machinery, equipment and property owned by DAYTON POWER & LIGHT COMPANY,

for which application was made for certificates as a thermal efficiency improvement facility, and located at

U.S. ROUTE 52 (STREET ADDRESS) ABERDEEN OH 45101 (CITY AND ZONE)

Adams (COUNTY), Ohio, SPRIGG TWP-OHIO VALLEY LSD Taxing District, which

machinery, equipment and property is more particularly described in Application for Energy Conversion Facility or Solid Waste Energy Conversion Facility or Thermal Efficiency Improvement Facility Certificate No. 479 A, is designed primarily for thermal efficiency improvement, is suitable and reasonably adequate for such purpose and is intended for such purpose.

Therefore, for purposes of the tax exemptions provided by Sections 5709.50, Revised Code, the Tax Commissioner hereby certifies that the total cost of the facility is $13,159,193.48. The cost of that portion or part of the facility used exclusively for thermal efficiency improvement herein determined to be certified in accordance with the provisions of Section 5709.46, Revised Code, for purposes of the tax exemptions provided in Section 5709.50, Revised code, is $13,159,193.48, which amount is subject to review by audit.

This Thermal Efficiency Improvement Certificate is issued this 7 day of December, 2001 and is effective as of the 1 day of January, 1970.

CERTIFICATE NUMBER 376 A

Thomas M. Zaiwoff
Tax Commissioner

RECEIVED
DEC 17 2001
CARROLL E. NEWMAN
ADAMS COUNTY AUDITOR
BY:

EXHIBIT
A

BOARD OF TAX APPEALS
STATE OF OHIO

CAROLL E. NEWMAN **Adams County Auditor** **Appellant,** **vs.** **THOMAS M. ZAINO,** **Tax Commissioner of Ohio** **and** **CINCINNATI GAS & ELECTRIC** **and** **COLUMBUS SOUTHERN POWER COMPANY** **and** **DAYTON POWER & LIGHT COMPANY** **Appellees.**	:	**Case No. 2002-P-170, 171, 172** **(H.E. McClennan)** **APPELLANT'S MOTION TO REMAND MATTER TO TAX COMMISSIONER**

The Tax Commissioner has recently changed his position with regard to the merits of the tax exemption certificates issued to the taxpayer Appellees. He now has taken the position, after learning new facts not available to him prior to his earlier decision, that the tax exemption should not have been issued because the equipment at issue does not meet the requirements of the statute. (See, generally, Tax Commissioner's post-hearing brief filed on November 1, 2004).

The Commissioner has concluded that key facts were not made known to him or the Director of Development's engineer prior to the granting of the exemption. Pursuant to this Board's holding in *S&R Fab., Inc. v. Thomas M. Zaino,* BTA No. 2002-V-1119 (July 11, 2003)

and R.C. §5717.03, Appellant hereby moves this Board for an order remanding the matter to the Tax Commissioner for the purpose of issuing a new final order. In addition, the matter should be remanded because the taxpayer's application did not meet statutory jurisdictional requirements under §5709.46 because the construction date was prior to 1974. (This last request is a partial renewal of the motion filed by Appellant July 9, 2002. The BTA overruled the 2002 motion, but indicated it was overruled because the factual record at that time was silent on whether the plant was constructed before the 1974 statutory date. Now that the record is clear on that point, the motion is ripe for review).

This motion is supported by the attached Memorandum in Support.

Respectfully submitted,

David C. DiMuzio (0034428)
David C. DiMuzio, Inc.
1900 Kroger Building
1014 Vine Street
Cincinnati, Ohio 45202
(513)621-2888
Fax No. (513)345-4449

Attorney for Appellant
Adams Co. Auditor

MEMORANDUM IN SUPPORT

A. Tax Commissioner's New Position

Although any fair and reasonable reading of the evidence submitted thus far in the pending case would undoubtedly be that the taxpayers have not met the statutory requirements to gain tax exemption, the new position taken by the Tax Commissioner necessitates a new procedural approach - - namely a remand to the Tax Commissioner to issue a new order that takes into consideration all relevant and necessary facts.

On page 3 of his recent Brief, the Tax Commissioner notes two facts he learned only after he had issued the exemption certificates:

- that the Stuart facility was completed before the 1974 effective date of the exemption statute; and
- that the equipment at issue consisted of mere replacement parts, and therefore did not increase thermal efficiency.

On page 4 of his Brief, the Tax Commissioner admits that he was given an "incomplete picture of what the equipment in question did as well as when it was installed and what it replaced..." He then states: "With new knowledge about the use and the function of the equipment in question, the Tax Commissioner now believes that the certificates were erroneously issued." Later, on page 41 of the Brief, the Tax Commissioner states: "Somewhere, there was a misrepresentation or misunderstanding of the nature of the equipment for which Appellee Electric Companies have submitted on application..."

It is clear that the final determination of the Tax Commissioner relied upon the inaccurate information contained in the taxpayer's application and the error in the engineer's report. Such

inaccuracies operated to prevent the merits of the exemption from being addressed. The failure to consider the proper construction date of the facility and the failure to consider the replacement nature of the equipment was important to the determination of the controversy that was before the Tax Commissioner.

O.R.C. §5717.03 expressly permits the Board to remand matters back to the Tax Commissioner if "issues not raised on the appeal are important to a determination of the controversy..." In the instant case, the matter of the replacement nature of the equipment was not specifically raised by Appellant in its Notice of Appeal, and therefore the matter must be remanded. In addition, although the construction date issue was raised in the Notice of Appeal, it is clear from the Tax Commissioner's recent statements that his office was not aware of the true 1970 construction date at the time the exemption certificates were issued. Such a situation has arisen before, in *S&R Fab., Inc. v. Thomas M. Zaino,* BTA No. 2002-V-1119 (July 11, 2003). The BTA held in that case that if the Tax Commissioner's original order was issued without the benefit of key information, the matter should be remanded to the Tax Commissioner for a new final determination.

Obviously, such a situation exists in the instant case. The Tax Commissioner's original order was based on false and inaccurate information, and it is clear that the original order would not have been issued if the information provided by the taxpayer and the engineers had been accurate. The matter should be remanded and a new order issued.

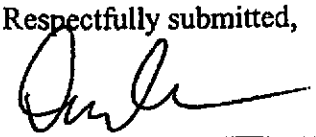
B. Jurisdictional Concerns

When the BTA overruled Appellant's Motion to Remand on October 25, 2002, it noted

on page 7 of the decision that the record had not "established with any degree of certainty the extent, if any, that the application and/or certificates failed to comply with the foregoing statutory requirements."

Now that the evidentiary hearing has been completed, it is clear that the Stuart facility was completed in 1970 (Appellant's Exhibit 1, p. 5). Since R.C. §5709.46 expressly states that the application "shall not relate to facilities upon which construction was completed on or before December 31, 1974", and since the Stuart plant was completed before December 31, 1974, there is no jurisdictional basis for ***any*** consideration of the exemptions requested. The matter should be remanded to the Tax Commissioner for official rejection of the application.

Respectfully submitted,



David C. DiMuzio (0034428)
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1014 Vine Street
Cincinnati, Ohio 45202
(513)621-2888
Fax No. (513)345-4449

Attorney for Appellant
Adams Co. Auditor

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon, **Janice Katz** Assistant Attorney General, 16th Floor - Rhodes Tower, 30 East Broad Street, Columbus, Ohio 43215, Attorney for Appellee Tax Commissioner, State of Ohio and **Anthony E. Ehler**, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008, Attorney for Appellee Cincinnati Gas & Electric Company, by facsimile, this 10 day of Dec., 2004.

David C. DiMuzio

MC GINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451
www.mcginniscourtreporters.com

BOARD OF TAX APPEALS

STATE OF OHIO

- - -

Carroll E. Newman, Adams County Auditor,	)	
Appellant,	)	
vs.	)	Case Nos. 2002-P-170, 171, 172
Thomas M. Zaino, et al.,	)	
Appellees.	)	

- - -

Continued deposition of George Sansoucy, a witness herein, called by the Appellees for further examination under the statute, taken before me, Maureen H. Hamby, Registered Professional Reporter and Notary Public in and for the State of Ohio, by agreement of counsel, at the offices of Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio, on Thursday, January 30, 2003, beginning at 9:10 o'clock a.m. and concluding on the same day.

- - -

VOLUME II

- - -

MC GINNIS & ASSOCIATES, INC.
614.431.1344 COLUMBUS, OHIO 800.498.2451
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2 ON BEHALF OF THE APPELLANT:

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7 ON BEHALF OF THE PUBLIC UTILITIES COMMISSION:

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Jeffrey Allen Miller, Esq.
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10 Columbus, Ohio 43216
(614) 464-6400
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12

ON BEHALF OF THE TAX COMMISSIONER OF OHIO:

13

Jim Petro, Esq.
14 Attorney General of Ohio

15 By: James C. Sauer, Esq.
Janyce C. Katz, Esq.
16 Assistant Attorney General
State Office Tower
17 30 East Broad Street
Columbus, Ohio 43215-3428
18 (614) 466-5967

19 ALSO PRESENT:

20 Bob Coleman

21 - - -

22

23

24

25

planned outage. Forced outage is something breaks and you fix it. But a planned outage, they will choose the time so it won't interfere with the peak; May, October. And they would coordinate it with all other plants in ECAR. Nuclear plants shut down, everything. So they will choose a time a year in advance from a major section.

Then the second thing they will do is stagger that because at no point would they have all four units out because they need that base-loaded capacity. So they will stagger the shutdown between years and stagger it between months. Then they will go in and they will schedule in advance the major component replacements, get them made, get them delivered to the site and ready to put in. Then, when they shut the unit down, people will go in, cut the unit, cut the economizer out, for example, put a new one in, go back up on line.

BY MR. SAUER:

Q. In preparing your report, doing your study, did you undertake any review of the scheduled maintenance and repair work for purposes of forming an opinion with respect to the costs that are subject and these various expenditures that were the subject of the certificates to determine the extent in which they were part of increases in efficiency, designed project increase efficiency as opposed to restore efficiency, that type of thing?

A. We looked at vendor operation manuals that

1 prescribed some of the fundamental maintenance procedures
2 related to Stuart. We also looked at the list of property
3 descriptions that were provided in the applications and very
4 quickly concluded that a large portion of these devices or
5 these costs were related to repairs and replacements as
6 opposed to enhancements or improvements.
7 Q. Is there anything either in the materials that are
8 included in the appendix or report or referenced in the
9 reports that would allow one to go and identify which was
10 replacement, which was enhancement?
11 A. We didn't put it into the report, but you can go to
12 the individual work orders that are listed. The utility,
13 under the federal law, is required to have a work order
14 system.
15 Q. Are there work orders listed here?
16 A. Should be a work order number listed.
17 Q. Okay.
18 A. There was one list from the company. Let me take a
19 look at that. There was a list from the company that listed
20 the actual work orders for each of these, and it is not in
21 this Bate stamp group.
22 Q. This is from the statutory transcript. This is part
23 of what the Commissioner had in reviewing --
24 MR. DI MUZIO: My recollection is, what it is, I am
25 thinking -- I think that's something I got from Jeff.

BY MR. SAUER:

Q. Is it referenced so that a breakdown can be identified from the report?

A. The way it is referenced is what we asked for and got work orders related to this.

Q. No. I mean, with what I have --

A. You don't have the work orders in your stuff, but the work orders will describe if it is a replacement, repair, improvement, or something that doesn't improve things. But it will tell you exactly what it is and why it is being done.

MR. DI MUZIO: Maybe I am wrong. I thought you had made a copy for Jim. You didn't make a copy for what I asked for?

MR. MILLER: As far as stuff we got when we were at the plant? Yeah, I chatted with him about that, actually, a while ago. I think you expressed --

MR. SAUER: What I am interested in is identifying not so much going through work orders forming my own opinion but to find out your opinion with respect to different work orders and different components as to which ones, you know, would constitute replacement, which ones would constitute enhancement.

MR. DI MUZIO: You didn't do that detailed analysis, did you?

THE WITNESS: No. We looked at it and said the

1 overwhelming majority of these are not improvements. For
2 example, the condenser vacuum pump, that's a replacement;
3 condenser tube are all replacements.
4 BY MR. SAUER:
5 Q. When you talk about intermediate turbine, am I
6 correct you are talking about net pressure --
7 A. Yes.
8 Q. -- somewhere between what's in the high pressure and
9 low pressure turbines?
10 A. Right.
11 (Recess taken.)
12 BY MR. SAUER:
13 Q. If I can have one more question, just to clear up
14 something. You were talking about the Stuart boiler being --
15 you were describing the Stuart boiler and the convection pass
16 being an essential component or set of components in part of
17 this type of boiler unit.
18 Do other kinds of furnaces, plants, such as nuclear
19 plant, do they include convection passes and heat transfer of
20 this type, or is that something that's peculiar to a boiler
21 that -- coal-fired boiler that's going to have flue gas coming
22 off of it?
23 A. The boiler, like Stuart, is similar, generally
24 similar to nearly all central station stationary boilers that
25 burn fossil fuel, oil, natural gas or coal, predominantly