

IN THE SUPREME COURT OF OHIO

Carroll E. Newman,  
Adams County Auditor,  
  
Appellant

Case No. 07-1054

v.

William W. Wilkins,  
Tax Commissioner of Ohio  
  
Appellee

On Appeal from the Ohio Board of Tax Appeals

Ohio Board of Tax Appeals Case Numbers  
2002-P-170, 171, and 172

Cincinnati Gas & Electric Co.

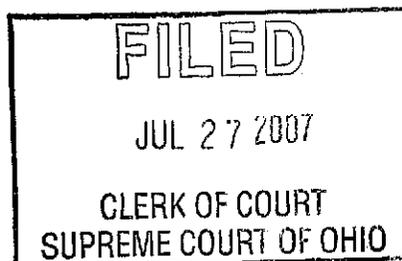
and

Dayton Power and Light Co.

and

Columbus Southern Power  
Co.

Appellees



---

**APPELLEE/CROSS APPELLANT UTILITIES' MOTION FOR ORAL ARGUMENT ON  
MOTION TO DISMISS NOTICE OF APPEAL OF TAX COMMISSIONER OF OHIO  
FOR LACK OF SUBJECT MATTER JURISDICTION**

---

Marc Dann (0039425)  
Attorney General of Ohio  
Janyce C. Katz (0042425)  
Assistant Attorney General  
30 East Broad Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215-3428  
Telephone: (614) 466-5967  
Facsimile: (614) 466-8226

Anthony L. Ehler (0039304)  
Douglas L. Rogers (0008125)  
Jeffrey Allen Miller (0072702)  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008  
Telephone: (614) 464-8282  
Facsimile (614) 719-4702

**Counsel for Appellee  
Tax Commissioner of Ohio  
David Kelley (0043619)  
Adams County Prosecutor  
David C. DiMuzio (0034428)  
Counsel of Record  
David C. DiMuzio, Inc.  
1900 Kroger Building  
1014 Vine Street  
Cincinnati, Ohio 45202**

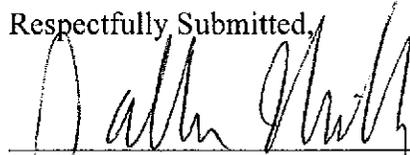
**Counsel for Appellee/Cross Appellants  
Cincinnati Gas & Electric Co.  
The Dayton Power and Light Company  
Columbus Southern Power Co.**

**Counsel for Appellant  
Adams County Auditor**

**Motion for Oral Argument**

Pursuant to S.Ct. Prac. R. IX(2), Appellees/Cross Appellants Cincinnati Gas & Electric Co., Dayton Power and Light Co. and Columbus Southern Power Company (“Utilities”) request separate oral argument on the jurisdictional issues raised by the Motion to Dismiss Notice of Appeal of Tax Commissioner of Ohio for Lack of Subject Matter Jurisdiction prior to the Court’s rendering of a decision on the Motion to Dismiss. A Memorandum in support of the Motion is attached.

Respectfully Submitted,



---

Anthony L. Ehler  
Douglas L. Rogers  
Jeffrey Allen Miller  
Vorys, Sater, Seymour and Pease LLP  
Counsel for Appellee/Cross Appellants  
Cincinnati Gas & Electric Co.  
The Dayton Power and Light Company  
Columbus Southern Power Co.

## Memorandum in Support

A request for oral argument on a jurisdictional motion before this Court is not common procedure. However, there are extraordinary procedural due process policy considerations at stake. The issue of a fair tax appeals system is more important to Ohio citizens and taxpayers than the dispute on the tax merits between the Utilities and the Commissioner. Accordingly, the issue is worthy of separate oral argument.

Utilities have borrowed the format for Motions for Oral Argument on the merits under S.Ct. Prac. R. IX(2) and applied that format to this Motion for Oral Argument on the Motion to Dismiss. Requests for oral argument subject to the Court's discretion generally are granted if there is a substantial constitutional issue, a conflict between courts of appeals, or complex issues of law or facts. *Woods v. Oak Hill Community Medical Center* (2001), 91 Ohio St.3d 459, 460, 746 N.E.2d 1108. Additionally, the Court requires that the moving party specify why oral argument would be beneficial under the facts of the case before the Court. *Id.*

**I. The Court should grant oral argument on the Motion to Dismiss because it involves substantial and complex constitutional and procedural issues.**

The Motion to Dismiss and Memo Contra raise deeply important procedural and constitutional issues of first impression that will affect all taxpayers and other parties seeking review of tax disputes. The jurisdictional question before the Court necessarily implicates the following Due Process and other procedural issues, because the statutes granting subject matter jurisdiction also mandate the process due appellees before the Board of Tax Appeals (the "Board"):

1. The basic important constitutional issue raised by this case that could affect large numbers of taxpayers in the future is whether procedures that satisfy Due Process when only the Tax Commission and a taxpayer are involved in the dispute also satisfy Due Process when the Tax Commissioner, a taxpayer and a county auditor are all involved? For

instance, in a case where the Commissioner and taxpayer are co-appellees, must the Commissioner identify himself during discovery as a party adverse to his co-appellee and announce his intention to oppose his own decision, or is it permissible for him to seek discovery, question witnesses, and brief under procedures applicable to appellees, while in secret developing his own undisclosed case as an appellant against the taxpayer co-appellee?

2. The important statutory procedural issues raised in this case involve the proper statutory procedure required for the Commissioner to assert new claims of error against his own decision. For instance, can the Commissioner seek judicial remedy from this Court regarding new errors he claims to have discovered during the Board's hearing without having exhausted his administrative remedies under either R.C. 5717.03(G) or R.C. 5709.47? Can and should R.C. 5715.271 be extended outside Chapter 5715 complaints against continuing exemption in real property tax cases to all tax cases throughout Title 57? If the burden of proof is on the appellee taxpayer as argued by the Commissioner, what procedure is required to ensure the taxpayer has proper notice of the legal issues raised by a co-appellee such that the hearing is constitutionally meaningful?

Each of the above areas are important beyond the current litigation, are issues of first impression, and will affect government officials and taxpayers throughout Ohio .

## **II. How oral argument would be helpful to the Court.**

Utilities believe there is an important procedural distinction between cases where the Commissioner is the sole appellee against a taxpayer (i.e., the two party paradigm) and can "concede" issues at will (why would the taxpayer ever resist such a concession?), and those cases following the three party paradigm where a co-appellee can be prejudiced by the Commissioner's attempt to act as an appellant. (Such prejudice is exacerbated when the Commissioner acts as an undisclosed appellant, as in this case, which creates another tier of due process issues.) The Commissioner believes that he should be able to protect the government fisc whenever and however he chooses, even if that means a co-appellee before the Board of Tax Appeals has no opportunity to gather evidence to counter the new arguments of the Commissioner. The Court would benefit from having an opportunity to ask the parties questions

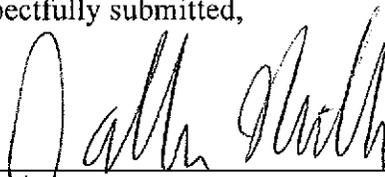
about the countervailing policy arguments and the implications on subject matter jurisdiction and procedural due process.

Lastly, since the Commissioner and Utilities have alleged different facts about the conduct of the Commissioner, Utilities and County Auditor. The Court would be aided by questions about how the different facts would affect the constitutional and other procedural issues involved in this case. As Justice Louis Brandeis said , “Sunlight is said to be the best of disinfectants. . .” L. Brandeis, *Other People’s Money*, 62 (National Home Library Foundation ed. 1933).

Because the Motion to Dismiss would substantially narrow the issues before the Court if granted, it is most efficient for both the Court and the parties that the Court clarify its subject matter jurisdiction prior to the parties briefing those issues on the merits. Accordingly, Utilities have requested the opportunity for oral argument on their Motion to Dismiss prior to the Court’s decision being rendered, and have presumed that they would not have such an opportunity at oral argument on the merits after briefing has been completed (because the decision is likely to have been rendered prior to that time).

For the above reasons, Utilities respectively request that the Court set oral argument on the Motion to Dismiss.

Respectfully submitted,

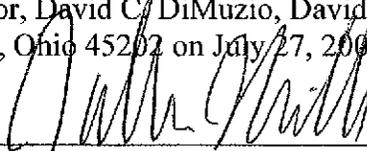


---

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

**CERTIFICATE OF SERVICE**

I certify that a copy of Appellee/Cross Appellant Utilities' Motion for Oral Argument on the Motion to Dismiss Notice of Appeal of Tax Commissioner of Ohio 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., 25<sup>th</sup> 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 27, 2007.



---

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