

IN THE SUPREME COURT OF OHIO

Carroll E. Newman  
Adams County Auditor

Appellant,

vs.

William W. Wilkine  
[Richard A. Levin]  
Tax Commissioner  
State of Ohio

and

Cincinnati Gas & Electric Company

and

Dayton Power & Light Company

and

Columbus Southern Power Company

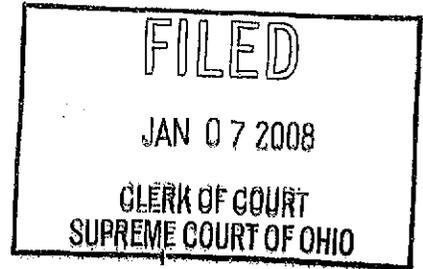
Appellees.

Case No. 07-1054

On Appeal from the Ohio Board of Tax Appeals

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

BRIEF OF APPELLEES/CROSS APPELLANTS  
CINCINNATI GAS & ELECTRIC COMPANY,  
DAYTON POWER & LIGHT COMPANY  
AND COLUMBUS SOUTHERN POWER  
COMPANY



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BRIEF OF APPELLEES/CROSS APPELLANTS

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## I. INTRODUCTION

The appeal and cross appeal before the Court in this case present the issues of whether this Court should (1) affirm the Decision and Order of the Ohio Board of Tax Appeals (“BTA”) affirming the Tax Commissioner’s (“Commissioner”) Final Determination to issue thermal efficiency improvement certificates for exhaust gas heat recovery devices and the main condenser at the J.M. Stuart Station (“Stuart”) coal fired electric generating plant (the “Plant”); and (2) reverse the Decision and Order of the BTA reversing the Commissioner’s Final Determination to issue thermal efficiency improvement certificates for the circulating water system at the Plant.

The thermal efficiency improvement tax application and certification statutes were recodified in 2003, after issuance of the certificates in question by the Commissioner. Am. Sub. H.B. 95 (eff. 6-26-03). References to statutes in this Brief will be to the Revised Code as written at the time the certificates were issued (i.e., 12-07-01).<sup>1</sup>

This brief first presents the procedural history of the case in part II and the facts of record on which the BTA relied in part III. Part IV discusses the standard of review at the Court for the issues it determines on the merits. Parts II, III and IV apply to both the Appellant’s appeal of the BTA’s ruling on exhaust gas heat recovery devices and the main condenser and to the cross appeal of Cross-Appellant of the BTA’s ruling with respect to the circulating water system.

Parts V and VI apply solely to the appeal of Appellant with respect to exhaust gas heat recovery devices and the main condenser. Part V discusses why this Court does not have jurisdiction to determine the merits of Appellant’s Claims of Error Two, Three and Four of its

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<sup>1</sup> Current R.C. 5709.21(A) provides that the Commissioner’s thermal efficiency improvement certificates issued in this case “shall continue in effect subject to the laws as they existed prior to the effective date of A. Sub. H.B. 95 (eff. 6-26-03).”

notice of appeal to this Court. Part VI addresses the merits of each of Appellant's Claims of Error, in the event this Court determines it has jurisdiction over them.

Finally, Part VII applies to the merits of the appeal of Cross-Appellant with respect to the circulating water system. Although Cross-Appellant also raised in its notice of appeal that the BTA should have sanctioned a witness for Appellant for contradictory and false testimony and believes the BTA should have sanctioned the witness, Cross-Appellant is no longer pursuing the issue of sanctions in this appeal. Cross-Appellant instead intends to consider the most appropriate alternate forum to pursue the misconduct of that witness.

## **II. PROCEDURAL HISTORY**

Cincinnati Gas & Electric Co., Dayton Power & Light Co. and Columbus Southern Power Company ("Appellees") co-own the J.M. Stuart Station ("Stuart") coal fired electric generating plant. (Supp. 17, S.T. No. 1: 15.)<sup>2</sup> Each owner filed a thermal efficiency improvement certificate application (cumulatively referred to as the "Applications") with the Commissioner reflecting ownership interest in the subject equipment. (S.T. No. 1, S.T. No. 2, S.T. No. 3.) Capital cost of all the equipment at issue is \$37,517,696 and represents less than 5% of Stuart's total capital investment of \$747 million. (Supp. 32, BTA Hearing Transcript Volume ("Vol.") 1: 39; see also Supp. 11-31, S.T. No. 1: 9-29.)

The Commissioner forwarded the Applications to the Ohio Department of Development ("ODOD") for the Director's opinion of qualification. R.C. 5709.46. Dr. Abdur Rahim, assisted ODOD in that review. (Supp. 90-91, Joint Ex. AA:20-21.) A professional engineer with graduate degrees in mechanical and structural engineering, Dr. Rahim has

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<sup>2</sup> Because each of the three certificates is the basis of a separate appeal, there are three Statutory Transcripts from the Commissioner. Each Statutory Transcript is substantially the same. Unless otherwise noted, Appellees will cite to one Statutory Transcript and refer to only a single page number or a single set of page numbers. Appellees include only one Statutory Transcript in its Supplement to avoid unnecessary duplication.

reviewed some 200 thermal efficiency certificate applications for ODOD over the years. (Supp. 95, Joint Ex. AA: 86.) Dr. Rahim submitted his expert opinion to the ODOD Director indicating that the equipment functioned as thermal efficiency devices by recovering and using waste heat which thereby saved significant amounts of fuel. (Supp. 6, S.T. No. 1: 4.) The Director of ODOD adopted Dr. Rahim's opinion and submitted his recommendation for certification to the Commissioner. (Supp. 5, S.T. No. 1: 3.) The Commissioner notified Appellant in writing and afforded him his statutory opportunity for a hearing prior to issuing final determination. (Supp. 7, S.T. No. 1: 5.) Appellant chose not to participate. BTA Order Overruling Motion To Remand/Motion To Consolidate October 25, 2002 at 5-6. The Commissioner issued final thermal efficiency certificates which Appellant appealed to the BTA.

The BTA conducted a hearing that took eleven days to complete. On the first day of hearing, after voir dire, the Attorney Examiner excluded the testimony of Appellant's expert George Sansoucy. (Supp. 35, Vol. 1: 202-205.). The BTA granted Appellant's motion to reopen the record to take Sansoucy's testimony. After the reopened hearing, Appellees filed a Motion for Sanctions alleging that Sansoucy had purposely testified falsely regarding his education, the work he claimed to have performed to support his report and other material matters.

In its Decision and Order on the merits, the BTA affirmed the Commissioner's certifications with respect to the exhaust gas heat recovery devices and the main condenser discussed below comprising approximately 95% of the \$37,517,696 capital costs of the equipment (the "Equipment") at issue in this case. (Appellant's Appx. 67, S.T. No. 1, S.T. No. 2, S.T. No. 3.) The BTA reversed the Commissioner's certification with respect to a distinct part of the Equipment, the "circulating water system" discussed below comprising approximately 5%

of the capital costs of the Equipment. (Appellant's Appx. 67.) The BTA also denied Appellees' request for sanctions. (Id.)

Appellant filed a notice of appeal to this Court with respect to exhaust gas heat recovery devices and the main condenser as did the Commissioner. (Appellant's Appx. 1-8.) Appellees cross appealed the BTA's reversal of the Commissioner's determination with respect to the circulating water system. Appellees filed a Motion to Dismiss the appeal of the Commissioner. The Court struck the Commissioner's appeal finding that the Commissioner could not be an aggrieved party with respect to a BTA decision affirming his own determination.

### III. STATEMENT OF FACTS

#### A. An overview: electric power generation at Stuart.

Stuart is located on the Ohio River about 30 miles east of Cincinnati in Adams County. (Supp. 17, S.T. No. 1: 15.) Stuart has four operating units each of which generate approximately 605 megawatts ("MW") of electricity. Id.

Each unit has a Babcock & Wilcox radiant heat boiler that converts feedwater (i.e., 4400 Mlb/hr) into steam at 1005° F and 3690 psig. Id. To do this, Appellees combust coal in the furnace region of the units to create a huge fireball. Radiant heat from the fire transfers to water flowing through tubes that make up the furnace walls. (Supp. 45-46, Vol. 3: 22-24.) This heated water converts to steam which drives turbines that generate electricity. Vol. 3: 20-21. (Supp. 45, Vol. 3: 20-21.)

Steam produced with sufficient temperature and pressure is piped through high, intermediate and low pressure turbines. (Supp. 66, Vol. 3: 107-110.) A turbine is a collection of fan blades arranged in rings. (Supp. 65-66, Vol. 3: 105-109.) The turbine spin as the steam pushes the fan blades. (Supp. 66, Vol. 3:110.) The turbine shaft is connected to an electric generator that makes electricity. (Supp. 67, Vol. 3: 111.) Steam that no longer has sufficient

heat or energy to push the turbine blades to make electricity exhausts from the turbine. (Id.) It is recovered in the main condenser. (Id.) The condenser physically captures depleted steam and condenses it into water. (Id.) The main condenser at Stuart operates at a vacuum which enhances thermal efficiency of the Plant. (Supp. 67-68, Vol. 3: 111-116.)

Roughly 50% - 60% of all heat produced by combusting coal at Stuart is absorbed into the water in the furnace region of the boiler. (Supp. 43, Vol. 3: 12.) The remaining heat escapes the furnace in the form of exhaust gas and is directed through ductwork towards the stack for release to the atmosphere. (Supp. 43, Vol. 3: 12-13.) There are heat exchangers situated in the ductwork to recover and use some of that convective heat. (Supp. 43-45, Vol. 3: 14-19; Supp. 109, Appellees' Ex. 2.) These exhaust gas heat recovery devices are able (in the aggregate) to recover about 30% to 40% of all heat produced. (Supp. 78, Vol. 4: 82.) The remaining 10% of heat is unavoidably lost out the stack to the atmosphere. Id. The exhaust gas heat recovery devices, the main condenser and the circulating water system are the subject of this certification dispute.

**B. Equipment required to make electricity.**

Dr. Coleman<sup>3</sup> testified that the equipment needed to make electricity from coal as an engineering matter is a boiler furnace to make steam, a turbine with attached electrical generator, a heat rejection mechanism (i.e., a place cooler than the steam itself) and a pump to place water into the boiler. (Supp. 41-42, Vol. 3: 6-7.) He testified that neither the exhaust gas

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<sup>3</sup> Dr. Coleman testified as expert witness for Appellees. (See Supp. 107-108, Appellees' Ex. 1.) (Dr. Coleman's curriculum vitae). Dr. Coleman is a Ph.D. mechanical engineer and a more than thirty-year veteran of the power industry. Id. He has taught mechanics, thermodynamics and the function of power plant components at the college level. (Supp. 36, Vol. 2:95.) He also has been the Chief Engineer designing, building and trouble shooting many types of fossil fuel burning power plants (including coal fired super critical plants like Stuart) all over the world. (See e.g., Supp. 37-38, Vol. 2:101-103.)

heat recovery devices nor the condenser at issue in this case is necessary to make electricity. (Id.; see also Supp. 102, 104-105, Joint Ex. CC: 62, 65-66) (Mr. Harrell, the plant engineer at Stuart, stating that neither the condenser nor exhaust gas heat recovery devices is necessary to make steam and produce electricity). The ODOD engineer, Dr. Rahim, agreed with those conclusions and stated that waste heat recovered at Stuart by the certified equipment could have been exhausted instead of used with a corresponding loss of heat energy. (Supp. 97-98, Joint Ex. AA: 101-102.) These experts agreed that the certified equipment is not essential to make electricity; rather, their use is a matter of thermal efficiency. (Id.; Supp. 41-42, Vol. 3: 6-7; Supp. 101, 104-105, Joint Ex. CC: 62, 65-66.)

Appellant's own evidence helped establish that the devices at issue function as thermal efficiency improvement equipment and are not "essential" to make electricity. Appellant presented a chart compiled from Federal Energy Regulatory Commission public records of all of the electric generating power plants in the East Central Accountability Region ("ECAR"). (Supp. 168-172, Appellant's Ex. 1 at App. D (shown by ascending order of heat rate.<sup>4</sup>) This Exhibit and related testimony discussed next show that a great many coal-fired power plants generate electricity without the exhaust gas heat recovery devices in place at Stuart.

Of 193 plants shown, Stuart is fifth most thermally efficient in the region. Stuart's heat rate is 9539. The best heat rate shown for a fossil fuel fired plant is 9326. (Id.) The worst is 46,784. (Id.) Expert testimony indicated that Stuart would operate at a heat rate of around 15,000 without exhaust gas heat recovery devices at issue in this case. (Supp. 72, Vol. 3: 159-160.) Notably, the worst stationary coal fired power plant in the same class as Stuart is Marysville with a heat rate of 16,934. (Supp. 172, Appellant's Ex. 1 at App. D.) There are

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<sup>4</sup> "Heat rate" is an industry term for thermal efficiency. (Supp. 42, Vol. 3: 8.) It is the inverse of thermal efficiency. (Id.) Thus, a lower number indicates a better thermal efficiency. (Id.)

numerous stationary coal fired power plants ranging at all heat rates between Stuart and Marysville. (Id.)

Despite this evidence, Appellant cites in his brief Dr. Coleman as a source for the proposition that the certified equipment is “essential.” (Appellant’s Merits Brief, 4.) What Dr. Coleman stated was that the certified equipment was integral “as it [Stuart] stands” because it was integrated into the Plant’s systems. (Supp. 73, Vol. 3: 196.) Dr. Coleman explained that what he meant when he said the equipment was “integral” was that it had been “integrated” into the overall design of the plant. (Supp. 77, Vol. 4: 80.) Mr. Coleman described his job of designing power plants as one of “integration of the equipment each piece with another.” (Supp. 39, Vol. 2: 143.) Thus, Dr. Coleman’s comments regarding “essential” or “integral” equipment were observations that the certified exhaust gas heat recovery devices had been integrated into the design of Stuart such that the Plant could utilize their thermal efficiency benefits. He testified that these devices made Stuart “better than typical” with regard to its thermal efficiency. (Supp. 73, Vol. 3: 196.)

Thus, the evidence of record establishes that: (1) exhaust gas heat recovery devices, the main condenser and the circulating water system at issue are not required to produce electricity; (2) power plants with thermal efficiency levels of approximately 25% of that at Stuart exist, operate, and are connected to the power grid; and (3) coal fired power plants in the same class as Stuart (i.e., stationary, coal fired) exist and operate today that use nearly 75% more fuel (i.e., heat or energy) to produce the same amount of electricity as Stuart. The evidence supports the BTA’s finding that the exhaust gas heat recovery devices and the main condenser reduce fuel consumption by recovering and using heat in exhaust gas or depleted steam that otherwise would be lost. There is no contrary evidence.

**C. Equipment function related to waste heat recovery.**

**1. Exhaust gas waste heat and its recovery.**

Exhaust gas is an unavoidable product from the combustion process that must be “gotten rid of.” (Supp. 46, Vol. 3: 24-25.) This gas is oxygen depleted and cannot support combustion. (Supp. 47, Vol. 3: 32.) The exhaust gas (sometimes referred to as “flue gas”) naturally rises out of the boiler furnace where it is directed through ductwork (i.e., the convection pass) toward the exhaust stack for release. (Supp. 74, Vol. 4: 12-13.)

The convection pass is ductwork that directs the waste gas from furnace combustion toward the stack. *Id.* Heat in the exhaust gas is recovered for use by the exhaust gas heat exchangers via convective heat transfer. (Supp. 184, Commissioner Ex. 3: 18-1; Supp. 182-183, Commissioner Ex. 2: 19-1, 19-6; Supp. 112-113, 128-130, 131, 132-133, 134-136, Appellees’ Exs. 19, 26, 27, 28 and 29; Supp. 173-181, Appellant’s Ex. D (Bates No. ACD 0376) and H (all referring to exhaust flue gas as containing waste heat that can be recovered).) Within the power industry, the convection pass heat exchangers and air preheater together are commonly called the “heat recovery” system. (Supp. 49, Vol. 3: 40-41; Supp. 125-127, Appellees’ Ex. 25; Supp. 81, Vol. 4: 103-104.) Only 30% - 40% of all heat produced by combusting coal is recovered as waste heat within this heat recovery system. (Supp. 78, Vol. 4: 82; Supp. 57, Vol. 3: 71, 74.) The remaining heat in the exhaust gas is unavoidably lost out of the stack. (Supp. 78, Vol. 4: 82-83.)

The primary function of the exhaust gas heat exchangers is to recover waste heat from exhaust gas and to use it to improve the thermal efficiency of generating electricity. (Supp. 58, Vol. 3: 78; Supp. 81, Vol. 4: 103-104; Supp. 104-105, Joint Ex. CC: 65-66 (Mr. Harrell explaining that the convection pass heat exchanges could be replaced with an exhaust chimney

built straight off the boiler but that the production of electricity would be much less thermally efficient due to heat loss, i.e., more fuel would be consumed).)

The first heat exchanger at issue in the convection pass that the flue gas meets on its way to the stack is the reheater. (Supp. 17-23, S.T. No. 1: 15-21.) The next heat exchanger is the economizer. The final heat exchanger is the air preheater. *Id.* These heat recovery devices are described in detail below.

## **2. Air preheater.**

The furnace requires a constant stream of fresh air (oxygen) to support combustion. At Stuart, a fan blows air into the boiler. (Supp. 21-22, S.T. No. 1: 19-20.) As the fresh combustible air makes its way to the furnace, it passes over the air preheater located in the stream of waste exhaust gas from the furnace. (Supp. 18-19, S.T. No. 1: 16-17; Supp. 183, Commissioner's Ex. 2: 19-16; Supp. 173-175, Appellant's Ex. D; Supp. 176-181, Appellant's Ex. H.) The air preheater is a collection of metal plates that rotate through the hot exhaust gas stream and then into the incoming fresh air stream. (*Id.*) The rotating plates absorb waste heat from the exhausting gas and transfer it to the incoming fresh air. (*Id.*) The function of the air preheater is to recover and use heat in exhaust gas that otherwise would be lost and this function contributes to increased thermal efficiency. (Supp. 55, Vol. 3: 65; Supp. 182, Commissioner's Ex. 2: 19-1; Supp. 114-115, Appellees' Ex. 20; Supp. 125-127, Appellees' Ex. 25; Supp. 132-133, Appellees' Ex. 28.

The recovered exhaust gas heat greatly improves cycle efficiency (otherwise more heat from combustion would be absorbed into incoming cooler air). For every 40° F. that the air preheater transfers from the exhaust gas to the fresh combustion air, overall thermal efficiency of

the plant increases 1%. (Supp. 55, Vol. 3: 65-66.) Air preheaters can improve overall thermal efficiency by 5-10%. (Id.; Supp. 183, Commissioner's Ex. 2: 19-6.

Dr. Coleman testified that an air preheater is not necessary to make electricity. (Supp. 41-42, 55, Vol. 3: 6-7, 64.) Indeed, some power plants choose to operate without preheaters. Id. Thus, the use and function of air preheaters is aimed at improved thermal efficiency.

### **3. Economizer.**

Before feedwater enters the boiler, it passes through the economizer. The economizer also is located within in the stream of exhaust gas in the convection pass of the boiler. This device transfers heat in the exhaust gas to feedwater within the economizer before the water is boiled in the furnace.

The economizer's name derives from its purpose of improving thermal efficiency or "economizing" fuel consumption. (Supp. 182, Commissioner's Ex. 2: 19-1.) All authorities agree that the function of an economizer is to recover waste heat from flue gas and to use it to preheat feedwater entering the boiler in order to improve thermal efficiency and thereby reduce fuel consumption. (Supp. 57-58, Vol. 3: 73-75; Supp. 112-113, Appellees' Ex. 19; Supp. 125-127, Appellees' Ex. 25; Supp. 128-130, Appellees' Ex. 26; Supp. 134-136, Appellees' Ex. 29; Supp. 182, Commissioner's Ex. 2: 19-1.) The heat recovery function of economizers reduces fuel consumption by 5% to 10% as a general rule. (See Supp. 112-113, Appellees' Ex. 19.)

Appellees' expert, Dr. Coleman, performed an analysis of the amount of heat recovered from exhaust gas by the economizer at Stuart. (See Supp. 110, Appellees' Ex. 9; Supp. 111, Appellees' Ex. 10.) In that analysis, Dr. Coleman showed that without an economizer, the temperature of flue gas exiting the stack would rise from 300° F. to 441° F. (i.e.,

lost heat). This would reduce Stuart's thermal efficiency by 3.5%. (Id.; see Supp. 55-57, Vol. 3: 65, 70-72; Supp. 182, Commissioner's Ex. 2: 19-1.) Here again, Dr. Coleman testified that an economizer is not necessary to make steam or electricity. (Supp. 41-42, 56, Vol. 3: 6-7, 68; Supp. 112-113, Appellees' Ex. 19.) It is used to improve thermal efficiency and reduce fuel consumption. (Id.)

#### **4. Reheater.**

As steam passes from the boiler to the high-pressure turbine through the turbine, it is both cooling and losing pressure as it imparts energy to the turbine blades. The energy remaining in this steam is lower than when it entered the high-pressure turbine. When steam exits the high-pressure turbine, it is piped back to the convection region of the boiler where it passes through a heat exchanger called the "reheater." (Supp. 109, Appellees' Ex. 2; Supp. 58, 66, Vol. 3: 78, 108-109.) The reheater is a heat recovery device that transfers heat in exhaust gas to the steam passing through it. (Id.) In this fashion, the exhaust gas heat is used to "reheat" steam. The temperature of the steam is increased from 565° to 1005° entirely with the heat in the exhaust gas. (Supp. 19, S.T. No. 1: 17.) If the reheater did not recover and impart this heat to the steam, the heat would go out the stack and reduce Plant thermal efficiency. (Supp. 58, Vol. 3: 77.)

#### **D. Equipment function related to waste steam recovery: main vacuum condenser and circulating water system.**

Turning from devices that recover waste heat in exhaust gas, Appellees next describe equipment that recovers waste steam. When steam initially produced in the furnace is no longer capable of pushing the low-pressure turbines (lacking sufficient energy or heat), it exhausts from the turbine unit. This depleted steam is recovered and condensed in the main

vacuum condenser where it is known as “condensate.” (Supp. 25-31, S.T. No. 1: 23-29; Supp. 59, 66, Vol. 3: 79 and 110.)

The main vacuum condenser at Stuart provides thermal efficiency benefits in two ways. First, it takes advantage of the differences between the physical properties of steam and liquid water to create a vacuum and reduce back pressure on the turbine. Second, it recovers warm condensate from depleted steam for use as boiler feedwater. Both benefits are discussed below along with equipment function.

The main vacuum condenser is a confined space into which depleted waste steam pours from the turbine. The depleted steam condenses on water-cooled tubes within that space. The condensate drops into the “hotwell” where it begins its journey back to the boilers. (Supp. 25-31, S.T. No. 1: 23-29.) The water-cooled tubes are the circulating water system . These tubes run inside the main condenser and are kept cool by Ohio River water flowing within the tubes. (Supp. 59, Vol. 3: 80; Supp. 25-31, S.T. No. 1: 23-29.) The water in the tubes of the circulating water system never touches or mixes with the steam condensate. The water in the tubes returns to the Ohio River. The steam condensate is pumped back to the boiler furnace.

The volume of water as a gas (i.e., steam) is about 75,000 times greater than that of liquid water at .7 psia. (Supp. 137-140, Appellees’ Ex. 30.) Thus, as the depleted steam is collapsed in the main condenser its volume is reduced significantly. The tremendous decrease in volume from steam to liquid water creates a vacuum within the confined condenser space. (Id.)

The vacuum<sup>5</sup> in the main condenser is dependent on the temperature of the water-cooled tubes maintained by the circulating water system. (Supp. 59, Vol. 3: 79-81.) 4400 million pounds of steam pour into the condenser every hour. (Supp. 17, S.T. No. 1: 15.) A very

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<sup>5</sup> Dr. Coleman testified that the pressure in the main vacuum condensers at Stuart was about 0.7 psia (as opposed to 14.7 psia ambient pressure). (Supp. 45, 62-63, Vol. 3: 21, 92, 95-96.)

robust cooling system is required to collapse the steam at that same rate to maintain the vacuum (or the main condenser would no longer be a “condenser” but would become a pressure vessel filled with steam). The circulating water system, cooled by Ohio River water, is that cooling system. Supp. 27, S.T. No. 1:25; Supp. 77, 79, Vol. 4: 81, 94 (Dr. Coleman stating, “that the circulating water system is the source of the vacuum in that condenser” and the condenser “will not work” without it.)

The vacuum in the main condenser lowers back pressure on the turbine than otherwise would exist at ambient pressure. This low back pressure allows low temperature/low pressure steam in the last three stages of the turbine to push turbine blades and perform work. Both Mr. Harrell and Dr. Coleman testified that the last three stages of the low pressure turbine exist solely because the main condenser system has been designed to physically recover and use waste steam to create a vacuum. (Supp. 104, Joint Ex. CC: 65; Supp. 65, Vol. 3: 104-105.) The steam in the final three stages of the turbines could perform no work if the vacuum condenser did not reduce turbine back pressure. (Supp. 104, Joint Ex. CC: 65; Supp. 63, 70, Vol. 3: 98 and 152.)

Mr. Harrell, the Stuart plant engineer, Dr. Rahim, the ODOD engineer, and Dr. Coleman, a Ph.D. power plant engineer, all agreed that from their industry experience and as an engineering matter, steam at the Stuart facility was “waste steam” when it exhausted from the low-pressure turbine and entered the main condenser. (Supp. 103, Joint Ex. CC: 64; Supp. 96, 98-99, Joint Ex. AA, 76; 102-103; Supp. 59-60, Vol. 3: 79, 84-85.) They all agreed that steam entering the main condenser was waste steam. It is this steam that is recovered and used to improve thermal efficiency and lower fuel consumption. Dr. Coleman testified that the back

pressure reduction function of the main condenser lowered coal consumption by over 10%.

(Supp. 64, Vol. 3: 100.)

The second use of the recovered steam is for make-up water for the boiler. The condensate collected is 90° F. (Supp. 25-26, S.T. No. 1: 23-24.) Ambient temperature of boiler makeup water averages about 70° F. Thus, the condensed steam is preheated by about 20° F. before entering the boiler furnace which reduces coal consumption. (Supp. 61, Vol. 3: 89.) This 20° F is heat that would otherwise be wasted if the depleted steam were discarded.

Other evidence presented at the BTA further established that the purpose of the main condenser is to improve thermal efficiency of Stuart. (Supp. 60-61, 64, Vol. 3: 84, 89, 100; Supp. 68-69, Vol. 3: 118-119; Supp. 159, Appellees' Ex. 36: 57-10 (the Babcock & Wilcox text "Steam" states that the primary function of the main vacuum condenser is "to provide a low back pressure at the turbine exhaust to maximize plant thermal efficiency \*\*\*"); Supp. 67-68, Vol. 3: 112-115 (discussion of the text Modern Power Plant Engineer's Guide, which states that the condenser is designed "primarily for removing back pressure upon a turbine" for the "object" of obtaining "better economy" and that the primary goal of reducing back pressure is "accomplished" by "cooling exhaust steam and converting it to water.").) Such use of vacuum condensers allows the same amount of electricity to be generated while lowering coal consumption by 10%); (Supp. 68, Vol. 3: 116; Supp. 141-143, Appellees' Ex. 31 (Modern Power Plant Engineering states, "The primary function of the condenser is to produce a vacuum or desired back pressure at the turbine exhaust for the improvement of the power plant heat rate").<sup>6</sup>)

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<sup>6</sup> Appellees note that these industry texts also mention "deaeration" of condensate as a purpose of main condensers. However, at Stuart, the main condenser does not perform the deaeration function. That function is performed by separate equipment not at issue in this case. (See Supp.

#### IV. STANDARD OF REVIEW BEFORE THE COURT

A. **The decision of the BTA was based on sufficient evidence of record to affirm the Commissioner's determination.**

Appellees submitted a great deal of testimonial and documentary evidence. The BTA determined that the evidence before it was sufficient to make its decision and it ruled upon that evidence. The BTA did not simply rely on the Commissioner's presumptive correctness and it did not rule against the Appellant based upon a lack of evidence. Even assuming that Appellant's suggestion in brief is correct that Appellees and the Commissioner had the burden of proof at the BTA, that proposition fails to consider that the BTA determined that the burden was satisfied. It fails to consider that before this Court the BTA has its own presumption of correctness with regard to weighing the evidence.

Throughout his brief Appellant claims that insufficient evidence exists to support the BTA's decision and that the limited evidence that does exist (as selectively parsed from the record by Appellant) supports his appeal. Appellant is wrong. The evidence before the BTA is substantial. See Statement of Facts herein for record cites. The hearing lasted eleven days. There were seven witnesses, more than 100 exhibits and thousands of pages of hearing and deposition transcript. Much of this evidence described equipment function and showed that the equipment at issue was well understood by engineers, engineering and industry treatises, and governmental publications to be waste heat recovery devices. The BTA used nearly ten pages to make its findings of fact complete with references to the record. Appellant conveniently "overlooks" most of this evidence.

Appellant's objection is not with the sufficiency of the evidence; rather, he disagrees with how the Commissioner and the BTA weighed and selected probative evidence.

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45, 69, Vol. 3: 21, 119.) Thus, at Stuart, the main condenser's function is limited to improving thermal efficiency.

Fortunately, the law is clear on this point. The Court will not disturb the BTA's determination of facts as long as there is evidence that reasonably supports the BTA's conclusion. Satullo v. Wilkins (2006), 111 Ohio St.3d 399, 2006-Ohio-5856 at ¶30.

The Court reviews decisions of the BTA on questions of law; it does not simply reweigh evidence. Citizens Financial Corp. v. Porterfield (1971), 25 Ohio St. 2d 53, 266 N.E. 828, paragraph one of syllabus; Hercules Galion Products, Inc. v. Bowers (1960), 171 Ohio St. 176, 168 N.E.2d 104 (The Court is not a super BTA that sits to reweigh evidence); Freshwater v. Belmont Cty. Bd. of Revision (1997), 80 Ohio St.3d 26, at 31, 684 N.E. 2d 304 (The BTA may accept all, part or none of the testimony presented to it by an expert.) In Satullo, at ¶30, the Court recently reviewed this legal proposition and held:

If the record contains reliable and probative support for the BTA's determination, "we will affirm." Am. Natl. Can Co. v. Tracy (1995), 72 Ohio St.3d 150, 152, 648 N.E.2d 483. Even if we "might have weighed the evidence differently from the Board of Tax Appeals if we had been making the original determination," we will not disturb the decision as long as there is evidence that reasonably supports the BTA's conclusion. Jewel Cos., Inc. v. Porterfield (1970), 21 Ohio St.2d 97, 99, 50 O.O.2d 238, 255 N.E.2d 630.

In short, the BTA determines facts which the Court affirms when the record contains support for them. Differently phrased, the question with regard to the sufficiency of evidence at the BTA is whether there is any probative and reliable evidence that reasonably supports the BTA's findings. Appellant's objections in this regard directly contradict this Court's decisions and are inconsistent with the BTA's thorough reference to and critical analysis of the evidence in the record.

Part of this analysis was the BTA's decision to give no weight to the testimony offered by Appellant's expert George Sansoucy. It is within the BTA's discretion to weigh the evidence and determine what is reliable and probative. According to the BTA's analysis, Mr.

Sansoucy's testimony was evidence that it rejected in favor of other more probative or reliable evidence.<sup>7</sup>

## V. JURISDICTIONAL MATTERS

### A. The Court is without jurisdiction to address claimed errors in Appellant's notice of appeal to the Court that were not assigned to the Commissioner in the notice of appeal to the BTA as required by R.C. 5717.02.

On July 10, 2007 Appellees filed a Motion to Dismiss Claims of Error Two, Three, Four and Five of Appellant's Notice of Appeal to the Court (the "Motion"). Appellees contended that those claims were jurisdictionally defective. The Court denied the Motion without prejudice and expressly permitted Appellees to reassert jurisdictional arguments in Brief.

Appellant asserts in Claim of Error Four that the BTA erred in failing "to apply the proper definition of waste heat" and that the record did not support the BTA's conclusions. In responding to the Motion, Appellant correctly observed that the BTA addressed the issue of "waste heat" in its Decision and Order. However, Appellant takes a step too far by concluding from the BTA's action that Appellees must have been notified of this issue in accordance with statutory requirements.

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<sup>7</sup> Mr. Sansoucy's testimony suffered from irregularities which included false claims of technical skills he did not possess, offering deliberately misleading testimony about his education and fabricating explanations to create phantom expertise when he did not know an answer to a technical question or to bolster credibility when he was caught offering untrue testimony. The BTA's Attorney Examiner who presided over the hearing and witnessed Mr. Sansoucy's demeanor grew frustrated and asked Mr. Sansoucy to explain himself about the truthfulness of his testimony on numerous points. (E.g., Supp. 82, Vol. 11: 514 ("so your testimony wasn't true before. Is that true now?"); Supp. 83, Vol. 11: 521 ("do you consider your initial testimony...misleading?"); Supp. 84, Vol. 11: 522 ("so your prior testimony was not true, is that correct?"); Supp. 84, Vol. 11: 523 ("...was your earlier testimony untrue?"); Supp. 85, Vol. 11: 528-529 (Examiner: "Do you see significant inconsistencies with your testimony in these proceedings?" ...Is it your testimony that your testimony has been both consistent, number one, and truthful throughout these proceedings?" Sansoucy: "...it's been consistent...I made a mistake"); Supp. 86, Vol. 11: 549 ("...the question is, are you telling the truth?").)

Appellant misses the point. Whether some constructive notice at some time existed is not the pertinent legal issue. The questions of “when” and “how” Appellees and the BTA were notified of the alleged error form the crux of the jurisdictional issue. Contrary to the requirements of R.C. 5717.02, Appellant’s notice of appeal to the BTA did not specify the definition of waste heat as an error of the Commissioner. Indeed, the term “waste heat” does not appear anywhere in that pleading. There was no reference to R.C. 5709.45(C) which is the statute that contains that term. Thus, Appellant’s notice of appeal to the BTA was devoid of any direct or indirect reference to “waste heat.”

This Court has been absolutely clear when applying R.C. 5717.02 to taxpayer appeals at the BTA. R.C. 5717.02 requires an appellant to claim errors in “definite and specific terms.” Gochneaur v. Kosydar (1976), 46 Ohio St.2d 59, 66; 346 N.E.2d 320; Ladas v. Peck (1954), 162 Ohio St. 159 syllabus, 122 N.E.2d 12; Queen City Valves v. Peck (1954), 161 Ohio St. 579, 120 N.E.2d 310. R.C. 5717.02 is jurisdictional and mandatory and alleged claims of error must notify of the precise determinations at issue. American Restaurant & Lunch Co. v. Glander (1946), 147 Ohio St. 147 at syllabus, 70 N.E.2d 93; Clippard Instrument Laboratory, Inc. v. Lindley (1977), 50 Ohio St.2d 121, 363 N.E.2d 592.

Two years ago, this Court held that the BTA has no jurisdiction to address a claim of error of the Commissioner regarding the proper definition of a statutory term when neither the term, nor the pertinent statutory subsection containing that term, are included in the notice of appeal to the BTA. In Satullo v. Wilkins (2006), 111 Ohio St.3d 399, 2006-Ohio-5856 at ¶22-24, the taxpayer/appellant argued that the BTA erred when it found the taxpayer fit within the definition of “consumer” such that he would be subject to Ohio use tax. The Court held that because neither the statutory term “consumer,” nor the pertinent definitional statutory subsection

which contained the term were cited within the taxpayer's notice of appeal to the BTA, the definitional claim of error was not properly specified. The Court concluded that both the BTA and this Court were without jurisdiction to consider the claim. *Id.* The Court relied upon Cousino Construction Co. v. Wilkins (2006), 108 Ohio St.3d 90, 2006 Ohio 162 at ¶37-41 and Kern v. Tracy (1995), 72 Ohio St.3d 347, 349; 650 N.E.2d 428, for its holding. Again, nowhere in Appellant's notice of appeal to the BTA is there a reference to "waste heat" or R.C. 5709.45(C) (the statutory subsection containing that term). The holding of Satullo, *supra* is on all fours with these facts. Accordingly, Appellant's "waste heat" Claim of Error Four should be dismissed.

Appellees were only constructively "notified" of Appellant's waste heat contentions. However, the "when" and "how" of this notice failed to satisfy statutory requirements and vest the BTA with jurisdiction. Appellees first received written notice of Appellant's "waste heat" contentions via a written report of Appellant's expert, George Sansoucy, delivered after discovery was almost completed and nearly a full year beyond the statutory appeal period. Appellees received that report in January, 2003 and it was there that the waste heat contention was first apparent. (Supp. 165, Appellant's Ex. 1 (Sansoucy report dated January 3, 2003).) The BTA's hearing commenced in February, 2003. Therefore, Appellees were put on notice of Appellant's waste heat claim for the first time just a month prior to hearing, after discovery was nearly completed, and approximately a year after the R.C. 5717.02 appeal period had expired.

This Court should not accept an expert witness' report submitted nearly a year after the appeal period of R.C. 5717.02 has expired as a proxy for a timely filed notice of appeal. See Clippard Instrument Laboratory, Inc., *supra* at 122 (holding that R.C. 5717.02 requires notice

of a claim of error must be provided by the notice of appeal). Both the timing and the method of notice of the claimed “waste heat” error is contrary to law. Satullo directs that Appellant’s failure to reference “waste heat” or R.C. 5709.45(C) in the notice of appeal filed with the BTA fails to vest the BTA and this Court with jurisdiction over that issue. R.C. 5717.02. For these reasons, Appellant’s Claim of Error Four is jurisdictionally defective.

**B. R.C. 5717.04 requires that claimed errors of the BTA must be specified within the notice of appeal to the Court to invoke the Court’s jurisdiction.**

- 1. Appellant raised the issue of “primary purpose” of the certified equipment in its notice of appeal to the BTA; however, he failed to preserve that issue in any claim of error to the Court as required by R.C. 5717.04. Accordingly, that issue briefed by Appellant has not been properly preserved for review by the Court.**

Appellant argues in his brief at Proposition of Law No. Two that the certified equipment is “essential” or “integral” to Appellees’ business and that its “primary purpose” is something other than thermal efficiency improvement. Yet, nowhere in that notice of appeal to the Court is there any claim that the certified equipment is “essential” to an erroneous purpose or any other phrase remotely suggesting that the primary purpose of the equipment is the subject of his appeal. Similarly, there is no reference to R.C. 5709.44(D). That statute contains the “primary purpose” requirement for certification of equipment.<sup>8</sup>

In his notice of appeal to the Court, Appellant asserted Claims of Error Two and Three that generally allege the BTA either failed to utilize the proper standard of review or erred by refusing to reverse the Commissioner because Appellees failed to prove “each and every requirement of the tax exemption statute.” Appellees argued in their Motion that these Claims of Error were so general they provided Appellees and this Court notice of nothing. It was apparent

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<sup>8</sup> The “tax exemption” statute that was referenced by Appellant in Claim of Error Two is R.C. 5709.50. Not surprisingly, that statute grants tax exemption. However, it is void of any reference to “primary purpose,” “essential” utility of property.

that Appellant intended to utilize his broad procedural claims as pretexts to argue any merits issue he later chose. Not surprisingly, Appellant has done precisely that.

The Court should not allow Appellant to avoid specific statutory requirements of R.C. 5717.04 through simple artifice. Appellant's base that the Commissioner failed to utilize a proper procedural standard of review for "each and every" requirement of a statute should not grant him the latitude to address any merits issue he chooses. No authority supports such a transparent end run around the requirements of R.C. 5717.04. Indeed, such appeals by taxpayer are routinely dismissed. E.g., Queen City Valves, syllabus, supra. The same should be true for Appellant. Otherwise, the Court could receive taxpayer appeals that allege general procedural errors as an easy yet uninformative way to preserve every conceivable merit issue.

Appellant's merit argument concerning "primary purpose" was not raised in his notice of appeal to the Court. It is not properly before the Court pursuant to R.C. 5717.04.

- 2. Appellant failed to raise the issue of "waste steam" in his notices of appeal to both the BTA and to the Court. Accordingly, Appellant's argument in brief that the main condenser was erroneously certified is not before the Court. R.C. 5717.02 and R.C. 5717.04.**

The BTA affirmed the Commissioner's decision to certify the main condenser because it recovered and used "waste steam." "Waste heat" and "waste steam" are not the same. One is energy and one is matter. The General Assembly adopted them as separate terms within R.C. 5709.45(C). When the term "waste steam" is given meaning, it is not appropriate to define it as the same thing as the "waste heat."

Satullo, supra requires that Appellant either state the statutory term or at least cite to the proper subsection in his notice of appeal. Appellant did neither. Neither "waste steam" nor the "main condenser" appears in Appellant's notice of appeal to the Court and neither term appears in Appellant's notice of appeal to the BTA. R.C. 5709.45(C) which is the statute that

contains those terms does not appear in either notice of appeal. As such, Appellant failed to comply with the jurisdictional requirements of either R.C. 5717.02 or 5717.04 with regard to the “waste steam” arguments he now raises in brief to the Court. Those arguments are not properly before the Court. Satullo, supra. Accordingly, the Commissioner’s certification of the main condenser as equipment that recovers and uses “waste steam” should be final.

## VI. LEGAL ARGUMENT

- A. **The date restriction of “on or before December 31, 1974” within the proviso language of R.C. 5709.46 refers to the effective date of the certificate issued by the Commissioner for each item of equipment certified. It is not a prerequisite to the Commissioner’s subject matter jurisdiction over thermal efficiency improvement applications.**

In his Proposition of Law No. 1, Appellant asserts that neither the Commissioner nor the BTA had jurisdiction to consider the Applications because two pieces of equipment out of the more than 200 that are part of the Applications were installed prior to December 31, 1974. Appellant is wrong. There are two occasions when the Court will apply a procedural statutory requirement as jurisdictional. The first occurs when the General Assembly makes it clear from the language it employs that it intends such a result. Second, if the statutory language is not clear, the procedural requirement may be jurisdictional provided it runs to the “core of procedural efficiency” by affecting the tribunal’s ability to do its job fairly and efficiently. E.g., Princeton City School Dist. Bd. Of Educ. V. Zaino (2002), 94 Ohio St.3d 66, 2002-Ohio-65. Neither occasion is present in this appeal.

1. **The date restriction of “on or before December 31, 1974,” within the proviso language of R.C. 5709.46, modifies the preceding part of the same sentence. It instructs as to the effective date of the exempt facility certificate. It is not a jurisdictional prerequisite to the Commissioner’s review of certificate applications.**

Appellant’s theory of R.C. 5709.46 is that the Commissioner lacked jurisdiction to review Appellees’ Applications because included in them were two pieces of equipment too

old to benefit from a thermal efficiency improvement facility certificate. Appellant claims the Commissioner and the BTA should have rejected the Applications in their entirety (i.e., all pieces of equipment) on what he incorrectly argues is a jurisdictional point. Appellant bases his claim upon the highlighted phrase in R.C. 5709.46 below:

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,<sup>9</sup> whichever is earlier, provided such application shall not relate to facilities upon which construction was completed on or before December 31, 1974. (emphasis added)

Appellant focuses exclusively on the phrase “shall not” within the date limitation proviso. He concludes that the proviso must be jurisdictional and treats it as an application requirement rather related to the effective date of the certificate as described in the antecedent clause which the proviso modifies.

Appellant cites to authorities pertaining to the mandatory nature of jurisdictional requirements and generally relating to the phrase “shall not.” But these authorities are not apposite to the question of whether the date restriction in R.C. 5709.46 is jurisdictional or procedural. For example, Appellant cites Cleveland Clinic Found. v. Wilkins (2004), 103 Ohio St. 3d 382, 2004-Ohio 5468. That case involved real property tax exemption under R.C. 5713.08. But, R.C. 5713.08 clearly commands that the Commissioner “shall not consider” applications for real property tax exemption unless a certificate is attached from the City Treasurer showing payment of back taxes. The jurisdictional nature of the requirement under that statute was express and clear. R.C. 5713.081 has similar language directing the Commissioner to “not consider” an application that did not meet certain other requirements.

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<sup>9</sup> “Facility” is defined in R.C. 5709.45(C) as “equipment or property.” The facilities date restriction, therefore, applies to installation dates of “equipment” or “property” not to an entire “facility” as that term may otherwise imply. The pertinent statutory scheme uses “building,” “plant” or “site” for that broader reference. R.C. 5709.45(D).

Thus, Appellant's reliance on Cleveland Clinic is misplaced. That case demonstrates that the General Assembly knows how to make clear in statute its intention to preclude review of a tax application.

There is no phrase in R.C. 5709.46 directing the Commissioner "not to consider" Appellees' Applications. The date restriction proviso is not even located within the portion of R.C. 5709.46 that addresses application requirements. Indeed, the context of the statute and the specific language selected by the General Assembly shows an intent contrary to Appellant's position.

Proper application of the date restriction in R.C. 5709.46 requires analysis of the statute in context. This includes an understanding that the date restriction is part of a proviso that modifies a preceding part of the same sentence. That sentence is only one sentence in a lengthy statute that is itself part of a larger body of law. Massillon City School Dist. Bd. Of Educ. v. Massillon (2004), 104 Ohio St.3d 518, 2004-Ohio-6775 9 at ¶37 (stating, "A court must examine a statute in its entirety rather than focus on an isolated phrase to determine legislative intent"); Commerce & Industry Ins. Co. v. Toledo (1989), 45 Ohio St.3d 96, 102, 543 N.E.2d 1188 (holding the same); State v. Wilson (1997), 77 Ohio St.3d 334, 1997-Ohio-35, at ¶3, following MacDonald v. Bernard (1982), 1 Ohio St.3d 85, 89, 438 N.E.2d 410, 413) (stating, "In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body").

R.C. 5709.46 provides procedural guidance on filing applications for exempt facility certificates. However, the sentence within R.C. 5709.46 that contains the date restriction proviso is not within the portion of the statute that pertains to application requirements. Those requirements are placed at the beginning of the statutory section. The date restriction also does

not appear in the portion of the statute that describes the Commissioner's procedure to analyze the applications and to determine whether equipment qualifies. Instead, the sentence with the date restriction appears within the portion of R.C. 5709.46 dedicated to explaining the issuance of a certificate for equipment that by necessity already has been reviewed and found to have met the qualification requirements set forth in the other portions of the statute.

This conclusion is reinforced by R.C. 5709.50(B) which provides a tax exemption "for the period subsequent to the effective date of a certificate." Had the General Assembly intended to impose the date restriction proviso as a threshold prohibition to the Commissioner's consideration of applications, it would have placed that restriction with the application requirements section of the statute. It would not have made the date restriction part of the effective certificate date language for facilities already determined to qualify for certification, and it would not have tied the restriction to the timing of associated tax exemptions in another statute by use of the same language.

This result also follows when the sentence containing the date restriction is read alone. The subject sentence reads:

*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.*

R.C. 1.42 instructs that the date limitation proviso (underscored) modifies the preceding part of the sentence (italicized). Hedges v. Nationwide Mut. Ins. Co. (2006), 109 Ohio St.3d 70, 2006-Ohio-1926 at ¶24 (applying R.C. 1.42 and stating "the rules of grammar are clear that 'referential and qualifying words and phrases where no contrary intention appears, refer solely to the last antecedent'").

The first clause in the sentence provides that in determining the effective date of the certificate for each piece of equipment, the Commissioner must look to the date the application is filed, or to the date of the installation of the equipment, and choose the earlier date. When the date limitation proviso is applied to the preceding portion of the sentence (i.e., the last antecedent), the sentence carries a straightforward meaning: equipment installed or completed prior to 1975 is time barred and can have no effective certification. In this way, the date restriction proviso is targeted. It prohibits taxpayers from receiving a tax benefit for pre-1975 equipment. R.C. 5709.50(B). The date is an attribute of equipment to qualify for certification. It is not a jurisdictional prerequisite.

It is this meaning that gives logical affect to all the words of the subject sentence in context with R.C. 5709.46. Had the General Assembly intended the date restrictions proviso to be a procedural jurisdictional prerequisite, it would have clearly stated that the “Commissioner shall not consider any application containing pre 1975 equipment” or utilized similar wording. It did not and the statute has never been applied that way.

Appellees identified two date restricted assets within the Applications and withdrew them from the Applications at the BTA. (Supp. 34, Vol. 1: 47.) The BTA sensibly reversed the Commissioner’s certification as to those two items. The statute and judicial efficiency required no other action.

**2. The date restriction proviso in R.C. 5709.46 does not run to core of procedural efficiency and therefore is not a jurisdictional requirement.**

The Court will find a procedural statutory requirement to be jurisdictional if it runs to the “core of procedural efficiency.” The Court has followed this analysis for real property tax complaints (Stanjijm Co. v. Mahoning Cty. Bd. Of Revision (1974), 38 Ohio St.2d 233, 313 N.E.2d 14), notices of appeal to the BTA (Renner v. Tuscarawas Cty. Bd. Of Revision

(1991), 59 Ohio St.3d 142, 572 N.E.2d 56), petitions for reassessment to the Commissioner (Akron Standard Division of Eagle-Picher Industries, Inc. (1984), 11 Ohio St.3d 10, 462 N.E.2d 419) and tax exemption applications (Princeton City School Dist. Bd. Of Educ. v. Zaino (2002), 94 Ohio St.3d 66, 2002-Ohio-65). The aforementioned case law makes clear that the “core of procedural efficiency” is implicated when a procedural requirement affects the tribunal’s ability to do its job fairly and efficiently.

Assuming as Appellant suggests that the vintage date of equipment is a procedural rather than a merits issue concerning which equipment qualifies, there are no notice or due process ramifications that flow simply because pre-1975 assets are mistakenly included within an application. In Princeton City School Dist. Bd. Of Educ., supra at 74, the Court found that under circumstances where the Commissioner was able to obtain the information he needed to make his determination, there was no core of procedural efficiency issue. Here, Appellees disclosed vintage dates for each piece of equipment within the Applications. There is no argument that the Commissioner was misled in some fashion or was somehow prevented from doing his job effectively vis a vis vintage dates. As such, there are no “core of procedural efficiency” issues associated with the date restriction proviso in R.C. 5709.46.

The BTA properly construed the date restriction proviso of R.C. 5709.46 as a merits requirement relating to the attributes of the equipment itself. Appellees withdrew the two “old” pieces of equipment from the Applications at the inception of the BTA’s hearing pursuant to stipulation. (Supp. 34, Vol. 1: 47.) Thus, the only date restriction issue was a merits issue and it was addressed by the Appellees via stipulation. Appellant now seeks to have this Court impose a jurisdictional barrier to reviewing the Applications that is not expressed by statute,

contrary to long-standing administrative interpretation and has no bearing on the Commissioner's procedural efficiency. The Court should reject this attempt by Appellant.

**B. A county auditor who appeals to the BTA from a determination by the Commissioner to certify equipment as thermal efficiency improvement facilities bears the burden of presenting evidence to rebut the Commissioner's presumptive correctness.**

The broad issue of this case when it was before the BTA was whether the Commissioner's determination to issue thermal efficiency certificates (the benefit of which is exemption from tax) was lawful. It is well established that any claimed exemption from tax "must be strictly construed." Campus Bus Serv. v. Zaino (2003), 98 Ohio St.3d 463, 2003-Ohio-1915 at ¶ 8. In doubtful cases exemption is denied. Youngstown Metro. Hous. Auth. v. Evatt (1944), 143 Ohio St. 268, 273, 55 N.E.2d 122.

The BTA clearly acknowledged and applied this standard. Board Decision and Order at 5. However, throughout his brief Appellant incorrectly stretches that standard beyond permissible limits. Appellant incorrectly attempts to transform the standard of strict construction of tax exempt statutes into Appellees' burden of proof at the BTA. He also incorrectly attaches that burden of proof to the Commissioner.

Of course, when the taxpayer is the appellant before the BTA, the taxpayer has the burden of proof. See Stds. Testing Laboratories, Inc. v. Zaino, 100 Ohio St.3d 240, 2003-Ohio-5804 at ¶30. This reflects the principle that the Commissioner's findings "are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful." Nusseibeh v. Zaino (2003), 98 Ohio St.3d 292, 2003-Ohio-855, at ¶ 10. The Commissioner's findings are presumptively valid absent a clear showing of the manner and extent of error. Hatchadorian v. Lindley (1986), 21 Ohio St. 66, 488 N.E.2d 145. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St.3d 121, 537 N.E.2d 1302. Thus, it is Appellant

who was tasked at the BTA with showing the manner and extent of the error in the Commissioner's action. The Commissioner's presumption of correctness flows from the general presumption of validity and sound judgment afforded actions of all administrative agencies and public officials. Wheeling Steel Corp. v. Evatt (1943), 143 Ohio St. 71, 523 N.E. 2d 286 at ¶ 7 of syllabus. Yet, Appellant argues in brief—without any authority—that the BTA should have ignored the Commissioner's presumption.<sup>10</sup> The Appellant's position is incorrect and should be rejected.

C. **The BTA correctly interpreted the term “waste heat” used in R.C. 5709.45(C).**

R.C. 5709.50 provides tax exemptions for equipment which has been certified as thermal efficiency improvement facilities. The related definitional statute of R.C. 5709.45 provides the following:

- (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.
- (D) “Thermal efficiency improvement facility” means 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.

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<sup>10</sup> Appellant's burden shifting argument also fails to consider a practical consequence. The Commissioner was a party at the BTA. In fact, the Commissioner and the Appellees were co-appellees at the BTA. When Appellant argues that Appellees had the burden of proof at the BTA, he necessarily argues that the Commissioner had the burden of proof. The consequence of this position is that the Commissioner lost his presumptive correctness which would render his determination meaningless. There is no authority for this conclusion as it relates to thermal efficiency improvement certificate Applications.

These statutes require that for equipment to be certified as thermal efficiency improvement facilities the equipment must: (1) function primarily to recover and use waste heat or waste steam; (2) that was produced (in this case) incidental to electric power generation.

The General Assembly elected not to define “waste heat” by statute. In addressing this question, the BTA relied on several sources. Ultimately, the BTA ruled that “waste heat” encompassed “all heat not utilized initially in the production of electricity.” As will be shown, this concept of “waste heat” is consistent with (1) the technical definition and accepted industry meaning of that term; (2) the meaning of “waste heat” as used by government agencies; and (3) the use of that term by Ohio courts. Appellant’s proposed definition contradicts these accepted meanings, defies science and leads to absurd results.

**1. Industry use of the technical term “waste heat” in connection with boiler systems.**

Words of a statute that have a technical meaning require a technical interpretation to advance the legislative objective in enacting the statute. R.C. 1.42; Hoffman v. Ohio State Medical Bd. (2007), 113 Ohio St.3d 376, 2007-Ohio-2201 at ¶ 26. Technical phrases in a statute are presumed to be used by the General Assembly in a technical sense and generally should be so construed. *Id.* The thermal efficiency certification statutes require the preparation of applications that explain technical equipment function, make sophisticated calculations of energy savings, and include recommendations from an engineering expert. R.C. 5709.46. These statutes address a technical subject. They involve concepts of heat transfer and thermal efficiency. As will be shown, applying a technical meaning to the statutory term “waste heat” in this context makes sense while forcing “common usage” definitions defy logic and would deny certification to all.

The BTA cited the McGraw-Hill Dictionary of Scientific and Technical Terms, Second Ed. (1978), as support for its holding on “waste heat.” McGraw-Hill defines “waste heat” as: “sensible heat in gases not subject to combustion and used for processes downstream in a system.” (Supp. 160-164, Appellees’ Ex. 47.) The McGraw-Hill definition recognizes commonality among all types of waste heat applications in that heated gas must “not be subject to combustion.” Further, it acknowledges that waste heat exists after it is initially used in the production of electricity. Waste heat must be “used for processes downstream.” This definition makes perfect sense in the context of hot exhaust gas at Stuart. The initial and primary use of the heat generated by coal combustion is at the point of combustion through radiant heat transfer to water in the furnace. This radiant heat in the furnace is used to heat water which is used to generate electricity. The product that naturally results from or is incidental to combustion is oxygen depleted hot exhaust gas which rises out of the furnace area. (Supp. 45, Vol. 3: 22.) Because combustion consumes oxygen in the furnace, the exhaust gas is no longer subject to combustion when it exits the furnace. (Id.) Yet, it contains heat that is usable (and in fact is recovered for use at Stuart) by downstream exhaust gas heat exchangers. Both the McGraw-Hill technical definition of “waste heat” and the definition employed by the BTA contemplate that hot exhaust gas can be used downstream and that the heat in the exhaust gas need not actually be discarded at the stack to be waste heat.

Dr. Coleman testified that in his power plant engineering and teaching experience heat in exhaust gas resulting from combustion would be considered “waste heat.” (Supp. 40, Vol. 2: 165.) He testified that waste heat includes “energy which is to be expended to the environment or which would be expended to the environment if proper recovery equipment were not provided.” (Id.) Dr. Coleman testified that the exhaust gas heat exchangers are known in the

industry as the heat recovery system. (Id.) Similarly, the ODOD engineer, Dr. Rahim, testified that if heat was not absorbed into the boiler surfaces in the furnace, but was instead absorbed into waste flue gas, it is “waste heat.” (Supp. 92, Joint Ex. AA: 42.) Dr. Rahim concluded that the heat in exhaust gas was “waste heat” because it could have been exhausted. (Supp. 97-98, Joint Ex. AA: 101-102.) Thus, both Dr. Rahim and Dr. Coleman testified to an industry and engineering understanding of the term “waste heat” in combustion exhaust gas which is aligned with the technical dictionary definition of “waste heat” in McGraw-Hill.

Appellees also introduced a number of industry documents to demonstrate the context in which the term “waste heat” is utilized. Some of these documents were generally introduced for the proposition that there is waste heat in combustion exhaust gas. Some were introduced to show that the items of equipment at issue are the very components used to capture exhaust gas “waste heat.” In either case, they illustrate how the McGraw-Hill definition adopted by the BTA fits within real world engineering applications. (E.g., Supp. 131, Appellees’ Ex. 27 (industry advertising “waste heat recovery systems” “\*\*\*based on utilization of high temperature waste heat from flue gas or exhaust air”); Supp. 51-52, Vol. 3: 50-51; Supp. 133, Appellees’ Ex. 28 (website of Alstom, the company that manufactured the Ljungstrom air preheater at issue in this case, describing function of the air preheater as, “waste heat is absorbed from hot exhaust gas”); Supp. 52, Vol. 3: 51-52; Supp. 134, Appellees’ Ex. 29 (advertising website of Commercial Energy Systems stating, “An economizer is a heat exchanger that captures waste heat from the flue gas and transfers it to boiler feedwater”); Supp. 52, Vol. 3: 54; Supp. 130, Appellees’ Ex. 26 (website of “the Boiler Room” an online community of manufacturers and operators of commercial boilers stating, “Boiler economizers recover wasted energy from the flue gas \*\*\*”); Supp. 55, Vol. 3: 65; Supp. 182-183, Commissioner’s Ex. 2: 19-1 and 19-6 (excerpt from treatise

published by the manufacturer of the boilers in this case stating, “economizers and air heaters perform a key function in providing high overall boiler efficiency” and “\*\*\* the air heater serves as a heat trap to collect and use waste heat from the flue gas stream.”); Supp. 175, Appellant’s Ex. D, p. SGS 2-19, (Stuart training document circa early 1970s stating, “The Ljungstrom air heater absorbs waste heat from flue gas”); Supp. 176, Appellant’s Ex. H (manufacturer brochure for Appellees’ air preheater from early 1970’s stating “The Ljungstrom air preheater absorbs waste heat from flue gas”).)

From the foregoing it is evident that the concept of “waste heat” among engineers and within industry publications is comprised of the following characteristics: (1) waste heat is contained in hot combustion exhaust gases; (2) waste heat can be recovered for use after the exhaust gas has transited from the area where it is subject to combustion and where primary and initial use of generated heat is made; and (3) waste heat can be recovered and used in downstream processes within the system to improve thermal efficiency. This view of “waste heat” serves the purpose of the Ohio statutes to encourage thermally efficient use of energy and heat (i.e., to save fuel). This working definition of “waste heat” also is in harmony with the McGraw-Hill technical definition which partially formed the basis of the BTA’s holding on that point. This objective definition was adopted and applied by the BTA and it can be applied fairly to all.

**2. Government agency use of the term “waste heat” and descriptions of equipment employed to recover it in boiler systems.**

The BTA’s adoption of the industry’s meaning of “waste heat” is further bolstered by how state and federal agencies apply the term. Because R.C. 5709.46 requires the Commissioner to obtain an opinion from the ODOD as to the function and use of equipment, that

agency's advice and recommendations to Ohio business regarding recovery of "waste heat" is particularly instructive.

One of the missions of Ohio Department of Development—as evidenced by its sub-agency, the Office of Energy Efficiency ("OEE")—is to improve energy efficiency of Ohio businesses. Thus, the State of Ohio funds an administrative agency to advance energy efficiency programs. The OEE explains at its website the important state interest in promoting energy efficient business. (Supp. 121, Appellees' Ex. 24.) The OEE's website states in a bold heading "Energy Efficiency Can Make You More Competitive" and encourages Ohio businesses to install thermal efficiency devices by extolling "increased productivity" as a business benefit from improving energy efficiency. (Id.) It is clear that Ohio wants its business residents to be more "competitive" and more "productive" through energy efficiency.

Ohio is not alone in this endeavor. The United States Department of Energy ("DOE") encourages energy efficient business. The DOE relies on its own sub-agency in this endeavor, the Office of Industrial Technology ("OIT"). The OIT sponsors a program known as "Industrial Best Practices" which educates business about technological methods to operate more energy efficiently.

The state's OEE's website plainly describes that it is in partnership with the federal government's effort through OIT and directs Ohio business to review promulgations of the OIT's "Industrial Best Practices" program. (Supp. 118-120, Appellees Ex. 23.) Thus, the OEE encourages Ohio businesses to utilize the technological advice provided by the OIT to improve energy efficiency. (Id.)

Appellees introduced documents published by the OIT that explain engineering methods to reduce energy waste. Those documents also illustrate the understanding that

pertinent government agencies have of the term “waste heat” and the technology and equipment used to recover and use that heat within boiler systems. Appellees’ Ex. 19 is a document from OIT entitled “Use Feedwater Economizers for Waste Heat Recovery.” It explains that boiler efficiency increases 1% for every 40° F. that flue gas temperature is reduced prior to its escape to atmosphere. It also explains that economizers can pay for themselves in as little as two years through energy savings. Appellees’ Ex. 20 is another OIT promulgation and is headed “Preheated Combustion Air.” That document explains that preheating combustion air is “one of the most potent ways to improve efficiency and productivity.” (Id.) Similarly, it states that flue gas is the source of energy and that “recycling” waste heat this way will reduce the amount of purchased fuel needed. (Id.)

OEE and OIT publications make clear that state and federal agencies commonly understand heat contained in flue gas from boiler combustion to be “waste heat.” The ODOD/OEE and the DOE/OIT’s use of the term “waste heat” who expresses an understanding in harmony with the McGraw-Hill definition, the meaning given to that term by industry experts and relied upon by the BTA. These government agency positions support and add consistency to the Commissioner’s certification of Appellees’ equipment as waste heat recovery devices.<sup>11</sup>

**3. Ohio case law treats waste heat and waste heat recovery devices consistent with industry and government agency meaning.**

This Court previously ruled on a tax case involving Stuart and some of the same type of heat recovery devices now at issue. Cincinnati Gas & Electric Co. v. Kosydar (1974), 38 Ohio St. 2d 71, 310 N.E.2d 245 involved application of a sales tax exemption. The Court discussed hot flue gas and heat recovery devices and held at Stuart that:

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<sup>11</sup> In this context, it is no surprise that ODOD’s engineer, Dr. Rahim, recommended equipment for certification that had long been treated by the ODOD/OEE as waste heat recovery equipment.

[t]he 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. (Emphasis added.)

Thus, the Court recognized that exhaust gas at Stuart contained waste heat that could be recovered and put to further use in downstream operations for the purpose of reducing fuel consumption. Similarly, the Court recognized that the purpose of the air preheater, one of the devices at issue in the present appeal, is to reduce fuel consumption by using waste heat in exhaust gas.

This holding adopts the sensible attributes of the term “waste heat” as defined in McGraw-Hill and applied by the BTA. They are the same attributes described by power plant engineers, industry documents and government publications. Other Ohio cases similarly characterize the heat in combustion exhaust gas as “waste heat.” See Chemical Adhesives, Inc. v. American Mfrs. Mutual Ins. Co. (1989), 42 Ohio St. 3d 40, 537 N.E.2d 624 (involving “heat recovery system” designed to “transfer the waste heat from the exhaust system indirectly to the incoming make-up air”); Ohio Steel Tube Co. v. Chief of the Division of Examiners of Steam Engineers (10th Dist. 1982), Case No. 81AP 912, 1982 WL 4099 at \*1 (involving waste heat recovery boiler purchased to save heat being wasted through exhaust gas from plant’s furnace).

A similar holding to that of Cincinnati Gas was reached in Lubrizol Corp. v. Limbach (June 30, 1992), Ohio BTA case Nos. 88 J 907 through 911 and 89 J 617, 1992 WL 159609. (See App. 8.) There, the taxpayer applied for thermal efficiency certificates for exhaust gas heat recovery devices and steam condensate equipment. The taxpayer operated an incinerator which combusted waste chemicals in a furnace. The resulting hot exhaust gas from the incinerator was directed to a series of heat exchangers. The heat in the exhaust gas was used

to make additional steam which, in turn, was used by the taxpayer in its business operation. The taxpayer sought certification for its expenditures to rebuild its exhaust gas heat recovery equipment associated with the incinerator.<sup>12</sup>

The Commissioner denied certification. The Commissioner argued that the equipment was designed part and parcel with the incinerator such that neither would operate without the other. (See App. 18.) From this, the Commissioner concluded that the heat in the exhaust gas produced by combustion within the incinerator was intended to be used in the heat recovery equipment by design (i.e., “planned from the outset”). The Commissioner concluded that the heat which was intentionally produced could never be waste heat because it was not exhausted to the open atmosphere and thereby wasted.

The BTA rejected this argument and ordered certification of the heat recovery equipment (i.e., the exhaust gas heat exchangers). The BTA held that the exhaust gas heat recovered and used downstream to make steam was waste heat. This determination was made even though the steam produced was used to advance the taxpayer’s primary activity of chemical manufacturing and despite the fact the taxpayer’s incinerator system was designed from inception to recover and use the waste heat in the exhaust gas (i.e., use of the heat was known and intended for use in the original design of the incinerator).

Cincinnati Gas and Lubrizol directly contradict Appellant’s position on several meaningful points. First, these cases adopt the sensible attributes embodied in the McGraw-Hill definition of “waste heat” as embraced by the BTA. Second, these cases reject the precise argument now advanced by Appellant that hot flue gas from boiler combustion does not contain

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<sup>12</sup> The exhaust gas heat exchangers in Lubrizol were known collectively as a “waste heat boiler.” Dr. Coleman testified that a “waste heat boiler” is comprised of the same exhaust gas exchanger components that are at issue in this case. (Supp. 53-55, Vol. 3: 58-59; 62-63.)

waste heat. Finally, they hold that the heat in hot combustion exhaust gas (i.e., the natural product of combustion) is waste heat when used downstream to make steam to support a business function.

**4. Appellant’s “waste heat” definition is circular and would deny certification to all applicants.**

Appellant argues that the term “waste” is simply a modifier of the term “heat” that follows it, and that the term “waste” should be given its common dictionary definition to mean “worthless” or “unused.” Even at first blush, Appellant’s argument fails.

In short, if the heat were “worthless,” no business would bother recovering it, yet recovery is a required element of R.C. 5709.45(C). If heat must be “unused” to qualify as waste heat, the act of recovering and using it would disqualify it from constituting “waste heat.” However, “recovery” and “use” are statutory requirements for thermal efficiency certification. “Use” cannot be both a prerequisite to qualification and a definitional disqualification. Appellant advocates a circular definition of waste heat that always prevents certification. Such a definition defies logic and frustrates legislative intent.

Appellant also argues that the definition of “waste heat” is statutorily limited by the amount of heat that can be recovered and used. He asserts that Appellees capture and use too much heat from the exhaust gas for it to qualify as “waste heat.” He claims that Appellees capture 51% of all heat produced at Stuart through the exhaust gas heat recovery devices at issue and that this quantity of heat as waste heat is disqualifying. Appellant is wrong.

Factually, the record is clear that 50%-60% of all heat is transferred into the water within the furnace. (Supp. 43, 71, Vol. 3:12, 157.) Accordingly, the majority of the heat released by combusting coal at Stuart is transferred to the water initially in the furnace section of the boiler (radiant heat transfer) and not in the exhaust gas ductwork (convective heat transfer) as

suggested by Appellant. (Supp. 78, Vol. 4: 82-83.) Appellees recover only 30%-40% of the heat produced through the exhaust gas heat recovery devices. (Id.) The remaining 10% of heat is lost out the stack. (Id.) Thus, Appellant's argument that 51% of all heat produced cannot be "waste heat" is factually misleading because it lumps together heat in exhaust gas that is recovered and used with heat that is neither recovered nor used.

Appellant compounds the factual error by offering the 51% number (which the record shows more accurately to be 30%-40%) to the Court while failing to place it in industry context. The ECAR chart established that other power plants exist that release to the atmosphere most of the waste heat that Stuart recaptures and uses. There are power plants five times less thermally efficient than Stuart.<sup>13</sup> Stuart is the fifth most efficient power plant in the region. If Stuart's equipment fails to qualify, no electric generating plant can. Yet, such a result would contradict Ohio law because "electric generation" is expressly included in R.C. 5709.45(C). Appellant's statement in brief that "the statute was never intended to exempt an electric generating plant from taxation" contradicts the statute and exposes Appellant's erroneous objective.

Appellant's contention that it cannot be waste heat because the amount of heat recovered from exhaust gas and used at Stuart is "essential to economic production" and is not "incidental" is incorrect as a matter of law. Appellant seizes upon the term "incidental" in the statute. Consider, however, that the precise words in the statute are "waste heat or waste steam produced incidental to electric power generation...." R.C. 5709.45(C). The BTA recognized that the phrase "incidental to" has a different meaning than the term "incidental" standing alone.

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<sup>13</sup> Expert testimony and exhibits were offered showing that some electric generating systems currently used in the industry allow 70% of the heat created to escape to atmosphere with combustion exhaust gas. (Supp. 78, Vol. 4: 82-84.)

BTA Decision and Order at 19. Here, the phrase “incidental to” does not modify the term “waste heat” (i.e., how much waste heat?...an incidental amount). Rather, it modifies the word “produced” (i.e., produced how? . . . produced as a natural consequence of). In other words, the issue is not whether it is incidental amounts of waste heat, but whether the “waste heat” is produced incidental to [as a natural consequence of] electric power generation.” Construing the word “incidental” as a modifier of the word “waste” is grammatically incorrect and violates rules of statutory construction. R.C. 1.42; Hedges, supra (applying the last antecedent rule).

The BTA sensibly rejected Appellant’s argument that the statute prohibits certification of equipment if the amount of heat recaptured and used is more than an incidental amount. *Id.* Waste heat – even in significant amounts – may be put to a use for economic production of electricity at Stuart and still qualify as waste heat. Indeed the phrases “economic production” and “thermally efficient production” mean the same thing. It is not coincidental that a component at issue in this case is called an “economizer.” The logical consequence of requiring “recovery” and “use” of waste heat is a direct benefit to “economic production” in that less fuel will be consumed. In the final analysis, the pertinent statutes contain no words of limitation that cap the amount of waste heat that can be recovered and used before it transforms into “integral” heat. As a point of policy, it makes no sense to encourage or incentivize wasteful energy uses over efficient uses.

Appellant’s argument on waste heat also suggests that before heat can be considered “waste heat” it first must be exhausted and lost to the environment unused. In other words, heat first must be wasted by design and practice before it can be characterized as “waste heat.” After the initial design and purposeful waste, even Appellant might agree that new additional equipment that recovers and uses such heat should qualify for thermal efficiency

certification. This theory, however, requires Appellees (and any other certificate applicant) to have knowingly designed and operated (i.e., subjective intent) Stuart in a thermally inefficient manner. If the inefficiency is corrected later, Appellant may concede that the additional equipment could qualify for certification.

Yet, nowhere in the thermal efficiency statutes is there a requirement that thermal efficiency equipment be “additional” or “add-on.” The plain meaning of “designed, constructed or installed” in R.C. 5709.45(D) makes no distinction between waste heat recovery equipment installed as part of the original design or added later. This was the BTA’s conclusion below and previously in Lubrizol. This proposition also is clear from other terms in R.C. 5709.45 and its history. Energy conversion facilities are defined by R.C. 5709.45(A) and (B). R.C. 5709.45(B) limits the reach of the energy conversion certificates to “additional” equipment. Interestingly, the word “additional” was added to R.C. 5709.45(B) by the House Ways and Means Committee. (See App. (statutory history of H.B. 467 as introduced and amended prior to enactment).) Before the amendment, the language of R.C. 5709.45(B) as originally introduced did not contain the word “additional.” In fact it was identical to that of R.C. 5709.45(D) which defines thermal efficiency improvement facility. After the amendment, the definitions were distinct (i.e., “any property and equipment” versus “any additional property and equipment.”).

Appellant seeks the Court to interpret the phrase “any property or equipment” in R.C. 5709.45(D) relating the thermal efficiency devices to mean precisely the same thing as “any additional property or equipment” in R.C. 5709.45(B) relating to energy conversion devices. Such an “interpretation” would make meaningless the General Assembly’s decision to adopt different statutory language by amending the language of one statute with the word “additional,” but not the other. Appellant’s request is contrary to Ohio law. Katz v. Dept. of Liquor Control

(1957), 166 Ohio St. 229 (a valuable tool in reading a statute is proof that with respect to a particular enactment, the bill originally introduced was passed with changed language; the changed language is particularly instructive on legislative purpose); Dungan v. Kline (1910), 81 Ohio St.371, 90 N.E.938 (all words of a statute must be given meaning).

The General Assembly did not insert the word “additional” to R.C. 5709.45(D) when it amended R.C. 5709.45(B). It is most logical to infer from this that the General Assembly intended thermal efficiency improvement facilities to be treated differently than energy conversion facilities with respect to restricting the exemption to “additional equipment.” For these reasons, Appellant’s position that thermal efficiency certification is restricted to equipment added to the original design is contrary to law.

**D. The “primary purpose” requirement of R.C. 5709.46 is determined from analysis of the function of the equipment. It is not a determination of subjective intentions of each taxpayer.**

Appellant argues in Proposition of Law No. Two that the certified equipment is “essential” or “integral” to “economic production” and therefore, the equipment was designed, constructed or installed for a “primary purpose” other than thermal efficiency improvement.<sup>14</sup> In essence, Appellant argues that the very benefits provided by the equipment and required for certification, also disqualify the equipment from certification.

In its Statement of Facts, Appellees recount the testimony of Dr. Coleman, Dr. Rahim, and Mr. Harrell that establishes that the certified equipment is not necessary to make electricity. Its functional benefit is to reduce fuel consumption by recovering and using waste heat that otherwise would escape with combustion exhaust gas, or in the case of the main

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<sup>14</sup> As a threshold matter, Appellees reiterate to the Court that there are no primary purpose claims of error in the notice of appeal to this Court as required by R.C. 5717.04. Thus, this issue has not been preserved for the Court’s review. Nonetheless, Appellees will address the argument herein.

condenser, recovering and using waste steam. There also is an abundance of documentary evidence in the record explaining the functional purpose of this equipment (i.e., how the waste heat is recovered and used). See Statement of Facts herein. Appellees address below Appellant's propositions that the certified equipment in question is "essential for economic production" and that its primary purpose is to generate gain which Appellant incorrectly argues are disqualifying characteristics under R.C. 5709.45 and .46.

**1. Personal property purchased by a business will always be made with the expectation that it will pay for itself. Such an expectation cannot be disqualifying to certification.**

As a threshold matter, personal property tax is levied upon personal property that is "used in business." R.C. 5701.08(A). "Business" is defined as "all enterprises, except agriculture, conducted for gain, profit, or income and extends to personal service occupations." R.C. 5701.08(E). A public utility's personal property must be "used in business" to be subject to personal property tax. See United Telephone Co. of Ohio v. Limbach (1994), 71 Ohio St.3d 369, at syllabus, 643 N.E.2d 1129. Accordingly, it is the use of personal property by a public utility in an enterprise conducted for gain that causes that property to be subject to personal property tax in the first place.

Because use in the enterprise conducted for gain is a required prerequisite for personal property taxation, that "use" and "purpose" should not be disqualifying to exemption under R.C. 5709.46. In that regard, Appellant's argument is absurdly circular (i.e., the same "use" in "business" that makes the property taxable disqualifies it from certification).

Appellant's questionable reasoning becomes more evident when one considers the business decision that underpins a capital purchase, and the tax benefit that ad valorem tax exemption provides. Before a business purchases capital, it determines the dollar value benefit that will flow from its use, and then weighs that benefit against the cost. The cost will consist of

the amount paid to obtain the capital (i.e., the purchase price), but also must include increased overhead expenses like property taxes, operating costs and maintenance costs. If equipment is not subject to property taxation because of an exemption, then the overhead cost of the capital is reduced, but it still is not free. The purchase price and other overhead costs remain. If use of the capital will not recover those costs in a reasonable time, it will not be purchased, tax exempt or not.

Thus, the bare fact that a taxpayer expects equipment to pay for itself cannot be disqualifying under R.C. 5709.46 because that will be true 100% of the time. No business purchases capital just to avail itself of a property tax exemption. Appellant's argument would bar any business from receiving thermal efficiency certification.

2. **R.C. 5709.45 and .46 require recovery and use of waste heat as shown by measurable reductions in fuel usage. Accordingly, expectation of an economic benefit from reduced fuel consumption cannot be a disqualifying purpose under R.C. 5709.46.**

Appellant's arguments facially contradict the statutorily required exempt function of the equipment under R.C. 5709.45 and .46. Appellant cites to pollution control statutes and interpretive case law for the proposition that equipment that benefits the "economic production" of the facility cannot have an exempt "primary purpose." However, pollution control authorities impose distinct qualifying criteria for pollution control certification that do not apply to thermal efficiency certification. Those authorities are not appropriate. For example, pollution control certification statutes, R.C. 6111.31 and R.C. 5709.21, do not contain a requirement that such equipment "recover" or "use" anything. This reflects the simple reality that pollution control equipment does not normally generate any revenue or reduced costs for the business. Such equipment is required by government regulation. Pollution control equipment pays for itself only in the sense that the business cannot legally operate without it. In this context, the Court

has refused to grant pollution control exemption for equipment whose function provided an economic benefit aside from meeting regulatory need.

Thermal efficiency improvement equipment on the other hand is required by statute to benefit the business economically because reduction of fuel usage reduces fuel costs. R.C. 5709.45(C) requires “recovery” and “use” of waste heat. R.C. 5709.46 requires “reductions in fuel or power usage.” Appellant takes issue with the Appellees “use” of waste heat by the equipment in question to reduce fuel consumption because he argues such benefits are “essential to economic production.” According to Appellant the expectation of such an economic benefit is a disqualifying “purpose” under R.C. 5709.46. However, the pollution control authorities cited by Appellant to support that claim require no such “recovery” and “use.” Reduced fuel consumption is an inherent benefit provided by and is a statutory requirement of waste heat recovery equipment.

In determining “primary purpose,” equipment function controls. Timken Co. v. Lindley (1980), 64 Ohio St.2d 224 syllabus, 416 N.E.2d 592. The individual taxpayer’s subjective purpose for an equipment purchase is irrelevant to the analysis.<sup>15</sup> Id. Dr. Rahim testified that he understood the phrase “primary purpose of the equipment” to mean “what does the equipment do?” (Supp. 93-94, Joint Ex. AA: 52, 54.) Thus, the engineer who analyzed the Applications for ODOD equated “primary purpose” with objective equipment function. In the case of thermal efficiency improvement equipment, the certifiable function is “recovery” and

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<sup>15</sup> The Court has held in the past that granting or denying of tax exemptions based upon the subjective intentions of a taxpayer would violate the Equal Protection of Laws and Due Process clauses of the Ohio and U.S. Constitutions. Bd. of Ed. of the Mentor Exempted Village School Dist. v. Bd. of Revision of Lake Cty. (1979), 57 Ohio St.2d 62, at FN 4, 386 N.E.2d 1113 (the Court held that land owned by real estate speculators qualified for current agricultural use valuation based upon actual functional use of the property. The subjective investment intentions of the property owners were irrelevant).

“use” of “waste heat” and attendant “reductions in fuel or power usage or consumption.” R.C. 5709.45(C) and R.C. 5709.46. Appellees’ certified equipment has only one function, and that is to recover and use waste heat in exhaust gas which thereby reduces fuel consumption. These fuel savings were quantified and verified by the ODOD engineer. It follows that the primary purpose of Appellees’ equipment—by design and use—is to recover waste heat for thermal efficiency improvement. Appellant’s arguments to the contrary have no support under Ohio law.

## VII. CROSS APPEAL OF APPELLEES

### A. The BTA erred when it held that the circulating water system that maintains the vacuum in the main condenser is not a thermal efficiency improvement facility.

In its Decision and Order, the BTA reversed the Commissioner’s certification of the circulating water system at Stuart. However, there is no evidence supporting the BTA’s position with respect to the circulating water system. Under the standard of review set forth in part IV, supra, this Court should reverse the BTA’s decision with respect to the circulating water system.

The main condenser and the circulating water system function together to improve thermal efficiency at Stuart by more than 10% because the recovered waste steam is collapsed (condensed) in a confined space to create a vacuum in the main condenser. That vacuum reduces back pressure on the steam turbine that exhausts waste steam into the condenser with a corresponding increase in thermal efficiency. Thus, it is the creation of a vacuum through collapse of waste steam within the main condenser that generates the thermal efficiency benefit. Dr. Coleman testified that waste steam was exhausted from the turbine to a vacuum within the main condenser to “improve the thermal efficiency performance of the turbine.” (Supp. 60, Vol. 3: 84.) Numerous engineering treatises were presented explaining that concept. (E.g., Supp. 159, Appellees’ Ex. 36 at 57-10 (stating that the power plant condenser receives exhaust

steam from the turbine and condenses it by water cooled surfaces or tubes into a liquid for reuse; it functions to reduce back pressure on the turbine to improve thermal efficiency); see e.g., Supp. 116-117, Appellees' Ex. 21; Supp. 137-140, Appellees' Ex. 30; Supp. 141-143, Appellees' Ex. 31.)

The Court held in Timken, supra at 229, that equipment "directly related" to the exempt function should be given certification. The BTA correctly held that the main condenser's function meets the statutory criteria for a thermal efficiency improvement facility because it recovers and uses "waste steam."

The undisputed evidence is that the main condenser will not generate any vacuum without the circulating water system to cool the main condenser such that the waste steam entering it will condense. Dr. Coleman explained the function and purpose of the circulating water system as "the source of the vacuum in that condenser." (Supp. 59, Vol. 3: 79-82; Supp. 75-76, 78, Vol. 4: 26-32, 84; Supp. 77, Vol. 4: 81.) He also stated that the condenser would not work without the circulating water system. (Supp. 78, Vol. 4: 84.) Thus, the BTA's decision to reverse the Commissioner's certification of the circulating water system that provides the main condenser's ability to collapse that waste steam to create a vacuum was based on a mistaken belief that the circulating water system did not directly relate to the function of the main condenser to produce a vacuum. Yet, the main condenser is able to condense nothing without the circulating water system. There will be no vacuum, and no improvement to the plant's thermal efficiency without it.

It appears from the BTA's opinion that it did not consider any evidence with respect to the function of the circulating water system, but instead considered the unrelated demineralizing and condensate makeup systems. The demineralizing and condensate makeup

systems have nothing to do with the circulating water system. (Supp. 75-76, 4: 26-32.)

Appellees did not seek certification for the demineralizing and condensate makeup systems.

A typographical error in the Applications placed those systems in the same sentence (the erroneous text stated that the demineralizing and condensate makeup systems as well as the circulating water system were not part of the Applications). The statement should have mentioned only the demineralizing and water makeup systems. Plant engineer Harrell testified to that intent and clarified the error. (Supp. 101-103, Joint Ex. CC:62-64.) That typographical error also was easily picked out by Dr. Rahim. He noted that the circulating water system assets were clearly marked and included in the Applications, and he accurately included the circulating water system as part of the main vacuum “condensing section” in his recommendation which was adopted by the Director of the ODOD. (See Supp. 6m, S.T. No. 1: 4.) The demineralizing and condensate makeup systems provide additional demineralized water to boiler systems when water is lost due to leakage. The circulating water system has the completely unrelated function of cooling the main condenser so that the waste steam pouring out of the turbine, after being depleted of heat by the generation of electricity, will condense at such a rate that a vacuum is created with corresponding improvement of thermal efficiency.

The BTA therefore based its decision not on the evidence relating to the circulating water system, but on a mistaken belief that the circulating water system and demineralizing and condensate makeup systems were not part of the Application. That contradicts Mr. Harrell’s testimony factually and that of Drs. Coleman and Rahim as to function. The Court should reverse this mistake.

## **VIII. CONCLUSION**

For the reasons set forth above in parts I-VI, the Court should affirm the decision of the BTA with respect to the exhaust gas heat recovery system and the main condenser, and for

the reasons set forth above in parts I-III and VII the Court should reverse the BTA's holding as to the circulating water system.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of Appellee/Cross Appellant Utilities' Brief 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 ~~December 7~~, 2008.

*January*

*Jeffrey A. Miller / omeg*

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

IN THE SUPREME COURT OF OHIO

Carroll E. Newman,  
Adams County Auditor,

Case No. **07-1054**

Appellant

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

v.

William W. Wilkins,  
Tax Commissioner of Ohio

Appellee

v.

Cincinnati Gas & Electric Co.

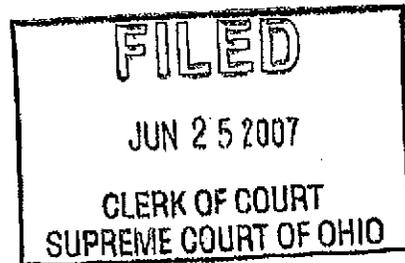
and

Dayton Power and Light Co.

and

Columbus Southern Power  
Co.

Appellees



**NOTICE OF APPEAL OF CINCINNATI GAS & ELECTRIC CO., DAYTON  
POWER AND LIGHT CO., AND COLUMBUS SOUTHERN POWER COMPANY**

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**Counsel for Appellant**  
**Adams County Auditor**

**Notice Of Appeal Of Cincinnati Gas & Electric Co., Dayton Power And Light Co., And Columbus Southern Power Company**

Appellees/cross appellants Cincinnati Gas & Electric Co., Dayton Power And Light Co., and Columbus Southern Power Company (the "Appellees") hereby give notice of their 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 (the "Board"), journalized in case Nos. 2002-P-170,171, and 172 on May 18, 2007. A true copy of the Decision and Order of the Board being appealed is attached hereto and incorporated herein by reference.

The Appellees complain of the following errors in the decision of the Board:

1. The Board erred in failing to affirm the Tax Commissioner's finding that the circulating water system was a thermal efficiency improvement facility as defined in R.C. 5709.45. The circulating water system is required for the main condenser to perform its thermal efficiency improvement function.
2. The Board erred in finding Mr. Sansoucy's testimony admissible under Ohio R. Evid. 702 and in failing to exclude the testimony as patently unreliable, or in failing to exclude Mr. Sansoucy's testimony as a sanction for pervasive provision of false testimony, purposefully failing to disclose evidence contrary to his opinion, admittedly lacking the ability to perform the work and calculations he claimed to have performed in this case, and for engaging in a pervasive pattern of providing inconsistent, contradictory and evasive testimony.
3. The Board erred in failing to support its decision to admit Sansoucy as an expert witness with probative evidence of record and failed to explain what evidence it relied on after the factual grounds it had relied on in its Order Reopening the Record were recanted by Mr. Sansoucy or refuted by overwhelming evidence. For

the right of appeal to be meaningful, it is incumbent upon the Board to support its decision with an explanation of the probative evidence it relied upon such that the Court can perform its review.

4. In admitting the testimony of Sansoucy and finding it credible, the Board's failure to address claims and supporting evidence that he intentionally provided false testimony on material matters violated the Appellees right to Procedural Due Process under the Ohio and United States Constitutions.
5. The Board erred in finding Sansoucy "credible," and erred in failing to set forth in its decision the probative evidence of record that supported a finding that Sansoucy's testimony was "credible" in spite of evidence to the contrary such as:  
(a) the problems with Sansoucy's testimony noted in paragraph 2 above; (b) the express concerns of the Attorney Examiner found throughout the record as to Sansoucy's "pattern" of inconsistent, contradictory, and untruthful testimony; (c) testimony of two PhD professors' from Sansoucy's alma mater (The University of New Hampshire) to the Board that Sansoucy's admittedly inaccurate educational claims, and testimony in defense of those claims (which was recanted by Sansoucy at the reopened hearing), was too unreasonable as an engineering matter to have consisted of good faith mistakes; (d) Sansoucy's repeated demonstrations that he could not understand or explain: (i) how the certified equipment functioned; and (ii) the documents he claimed supported his conclusions; and (e) the recent holding of a New York court that Sansoucy was unqualified and unable to understand the function of equipment comprising a coal fired power plant.

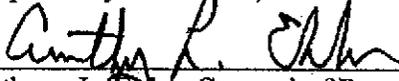
6. The Board erred in refusing to reopen the record to consider a recent finding of fact from a New York court wherein Sansoucy was adjudged unqualified and unable to understand the function of power plant equipment sufficient to provide expert testimony on equipment function.
7. The Board erred in finding that the Tax Commissioner has inherent authority to appeal his own decisions to the Board without complying with the jurisdictional mandates of R.C. 5717.02, or having standing to appeal under R.C. 5709.48 and 49.
8. In finding that the Tax Commissioner could be an appellant of his own decision with new claims of error first raised in brief after discovery was conducted and after the hearing concluded, and without having met the notice and procedural requirements of R.C. 5717.02, the Board erred and violated Procedural Due Process under the Ohio and United States Constitutions.
9. The Board erred in failing to find that implementation of the "replacement part" arguments of the Tax Commissioner would violate the Equal Protection and Due Process clauses of the Ohio and United States Constitutions. Power plants built after December 31, 1974 would be impermissibly benefited with regard to property taxation of replacement parts to the detriment of plants built prior to December 31, 1974. To state it another way, a fixed date distinction that would preclude all replacement equipment purchased after that date from qualifying for exemption because of the date the taxpayer put into service the original plant or facility while allowing newer competing sites to enjoy tax exemption for their replacement parts would violate Equal Protection of Laws and the Due Process Clauses of the Ohio

and United States Constitutions. That is particularly true when as here, the older plant in question is one of the most thermally efficient plants in the country.

10. The Board erred in failing to find that implementation of the "waste heat" arguments of the Adams County Auditor would violate the Equal Protection and Due Process Clauses of the Ohio and United States Constitutions. Restricting the tax exemption to only those taxpayers adding waste heat recovery equipment after beginning operations at a plant or site (in contrast to those taxpayers who design and construct their plant or site with such equipment as part of the original design) rewards faulty planning to the detriment of more efficient planning, and is not a rational basis of disparate taxation of competing entities in the same industry. That is particularly true when as here, the pertinent originally-designed plant is one of the most thermally efficient plants in the country. Similarly, basing tax exemptions purely on the subjective intent of the taxpayer violates Due Process because the subjective intent of the taxpayer cannot be accurately divined.
11. The Board erred in failing to levy sanctions against the Adams County Auditor or Counsel for the Adams County Auditor for bad faith litigation practices. The bad faith conduct consisted of intentional failures to disclose known and admittedly inaccurate testimony of Sansoucy as to education in thermodynamics. This failure occurred after Adams County Auditor successfully argued that Sansoucy had such education and expertise in thermodynamics in his motion to Reopen the Record (and contrary to Appellees' arguments contra) and which the Board expressly relied upon in its Order. In response to the pre-reopened hearing disclosure of expert rebuttal witnesses who would (and did) conclusively refute Sansoucy's educational

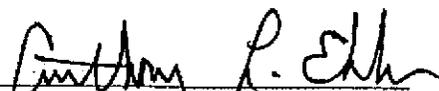
claims, Counsel for Adams County Auditor admittedly had Sansoucy prepare alternative testimony prior to hearing that contradicted Sansoucy's prior testimony as to his education and expertise in thermodynamics, then elicited from Sansoucy at the reopened hearing that he had no education or expertise in thermodynamics. Counsel for Appellant also failed to supplement discovery in accordance with Ohio Civ. R. 26(e) with regard to the new testimony prepared for cross examination that contradicted Sansoucy's prior testimony as to his education. The fact that Sansoucy's prior testimony was false was never disclosed by Appellant even though it was admittedly known prior to the reopened hearing, and only was admitted by Sansoucy under cross examination several days into the reopened proceedings. The Board's failure to address this conduct was an error.

Respectfully Submitted,

  
\_\_\_\_\_  
Anthony L. Ehler, Counsel of Record  
Counsel for Appellees/ 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 this Notice of Appeal was sent by certified mail to counsel for Appellant Tax Commissioner of Ohio, 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 June 25, 2007.

  
\_\_\_\_\_  
Anthony L. Ehler  
Counsel for Appellants  
Cincinnati Gas & Electric Co.  
The Dayton Power and Light Company  
Columbus Southern Power Co.

1992 WL 159609 (Ohio Bd.Tax.App.)

Board of Tax Appeals

State of Ohio

\*1 THE LUBRIZOL CORPORATION, APPELLANT

v.

JOANNE LIMBACH, TAX COMMISSIONER OF OHIO, APPELLEE

CASE NOS. 88-J-907, 88-J-908, 88-J-909, 88-J-910, 88-J-911, 89-J-617

June 30, 1992

(EXEMPTION)

DECISION AND ORDER

APPEARANCES:

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These causes and matters came on to be considered by the Board of Tax Appeals upon six notices of appeal filed herein on October 17, 1988, and July 19, 1989 from corresponding final determinations of the Tax Commissioner dated September 7, 1988, and May 30, 1989 wherein, in each final order, that official denied appellant's applications to certify certain of its property as a thermal efficiency improvement facility.

Case numbers 88-J-907, 88-J-908, and 89-J-617 involve the replacement of appellant's Sarco Disc steam traps with more efficient Ogontz Condensate Temperature Control Valves. Case No. 88-J-909 involves appellant's rebuilding of its Waste Heat Recovery Boiler. Case No. 88-J-910 involves appellant's installation of a waste heat recovery system. Case No. 88-J-911 involves appellant's improvement of its condensate return system, by replacing condensate pot and pumps with a condensate flash tank, and a Sarco steam operated condensate pump, with related insulated piping. Appellant alleges that these components together constitute a thermal efficiency improvement facility. The Tax Commissioner's final determination in each appeal, states, in pertinent part, as follows:

“The Tax Commissioner came on to consider the Application for Thermal Efficiency Improvement Facility Certificate No. 345 filed by The Lubrizol Corporation, Painesville Plant on June 25, 1987, for property located at 155 Freedom Road, Painesville, Lake County, Ohio, Painesville Twp.”

“Upon review of the subject application, the Tax Commissioner finds:

“A ‘thermal efficiency improvement’ is defined in R.C. 5709.45(C):

‘(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.’

“A ‘thermal efficiency improvement facility’ is defined in R.C. 5709.45(D):

‘(D) “Thermal efficiency improvement facility” means 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.’

“In the application \*\*\*, the narrative description provided by the appellant states, in part.<sup>[FN1]</sup>

“This project is one of several to replace Sarco Disc steam traps in transfer line tracer service with Ogontz Condensate Temperature Control Valves. The Sarco traps release flash steam, thereby wasting energy each time the traps cycle.

\*2 “While the replacement of the steam traps does reduce energy consumption and the applicant can therefore be commended for energy conservation, the property which the applicant seeks to be certified does not meet the definition of a thermal efficiency improvement facility pursuant to R.C. 5709.45(C) and (D).

“The applicant’s ‘project’ does not recover and use waste heat or steam as required by the R.C. 5709.45(C) definition for ‘thermal efficiency improvement.’ It is clear from the statutory language that an improvement in thermal efficiency can only be achieved if waste heat or waste steam is recovered and used. The applicant’s ‘project’ merely increases efficiency in the production and use of steam. Such a ‘project’ does not qualify as a thermal efficiency improvement facility.

“Accordingly, pursuant to R.C. 5709.48, the Tax Commissioner hereby denies the issuance of the certificate requested by the applicant.”

In response to the foregoing decision, each of the appellant’s notices of appeal states, in pertinent part, the following:

“Lubrizol takes issue with, and hereby assigns error, the Tax Commissioner's determination that the property described in Lubrizol's June 25, 1987 application for certification as a thermal efficiency improvement facility (assigned number 345) does not qualify for such certification under R.C. 5709.45(C) and (D). It is Lubrizol's contention that the referenced property constitutes property or equipment designed, constructed and installed in a commercial or industrial building or site for the primary purpose of recovering and using waste heat and/or steam produced incidental to electric power generation, industrial process heat generation, lighting, refrigeration or space heating. Accordingly, it is Lubrizol's contention that the referenced property is entitled to be certified as a thermal efficiency improvement facility and that the Tax Commissioner's determination to the contrary is erroneous and unlawful. The Board of Tax Appeals is respectfully requested to so rule.”

The matter was submitted to the Board of Tax Appeals upon the notices of appeal, the “statutory transcripts” (“S.T.”) certified herein by the Tax Commissioner, the evidence adduced at the evidentiary hearing conducted herein which is contained in the hearing record (“R”), exhibits one through six, and the briefs filed by counsel for the parties.

The record establishes that the appellant is a corporation engaged in the business of producing specialty chemicals for a variety of end users. (R. 9) It conducts this business, in part, at its Painesville, Ohio, facility. To properly process the specialty chemicals, they are transported throughout the Painesville plant (generally in a liquid state) via a network of process pipes. (R. 10) The process pipes typically range between 2 1/2 and 5 inches in diameter. (R. 9)

To insure that the chemicals being pumped through the process pipes do not freeze and continue to flow freely through the process, it is necessary for the temperature of said chemicals to be maintained at certain minimal levels. (R. 9) To accomplish this, the appellant runs copper steam tubes,

approximately 3/8 inches, in diameter, along the outer surface of the process pipes and then covers both the process pipes and the steam tubes with insulation. (R. 10)

\*3 At the beginning of the process, the appellant generates the steam in its four natural gas fired boilers and one waste heat recovery boiler. (R. 10) Water is fed into the boilers and heated until steam is created. (R. 11) The steam is then released from the boilers into the network of steam tubes. At the point it is introduced into the steam tubes, the steam is at 360 degrees Fahrenheit. (R. 11).

As the steam is introduced into the steam tube, it fills the available space and warms the processing pipe to which it is attached. Consequently, there is a transfer of thermal energy that, in turn, reduces the temperature of the steam. When the temperature of the steam drops to the boiling temperature of water (212 degrees Fahrenheit), the steam condenses into water condensate.

The condensate that collects in the steam tube must be purged in order to make room for more steam. (R. 12) The appellant initially opted to attach "Sarco" steam traps to its steam tubes. The "Sarco" traps are designed to open (permitting condensate to pass through the trap) when condensate enters the trap from the steam tube. As the temperature of the condensate flowing into the trap increases to 212 degrees Fahrenheit, "flashing" occurs. Flashing creates a low pressure area in the steam trap and causes it to close, preventing live steam from escaping from the steam tube to which it is attached. Because the "Sarco" traps do not close until flashing occurs, a portion of the condensate that passes through the Sarco trap boils away and is lost in the atmosphere. (R. 18)

The appellant maintains that it has decided to capture and recycle the heat embodied in the condensate purged from the steam tubes. (R. 13) To this end it has designed and installed the system which is at issue herein. (R. 13) One of the elements of the system is the "Ogontz" temperature control valve, which prevents the condensate purged from a steam tube from flashing away. It accomplishes this

by monitoring the temperature of the condensate in the steam tube to which it is attached, and permitting only condensate at a temperature of between 180 and 190 degrees Fahrenheit to pass through it. (R. 20, 28; Exhibits 5 and 6) The second component of the system are the condensate return lines, which channel the condensate purged from a steam tube to the condensate pot. (R. 19, 21, 26; Exhibit 2 at 0121-0196) The next component is the condensate pump which pumps the condensate that collects in the condensate pot to the boiler house, where it is fed into one of appellant's boilers. The condensate is converted into steam in the boilers, and recirculated via the steam tubes.

The Ogontz valve, unlike the Sarco trap, is designed to prevent the condensate purged from the steam tube from flashing away. The Ogontz valve is temperature sensitive and only permits condensate at a temperature of between 180 and 190 degrees Fahrenheit to pass through it. (R. 20) The Ogontz valve permits the appellant to capture all of the condensate purged from the steam tubes without losing any to flashing. (R. 24, 25, 28)

\*4 In the next step of the heat recovery system, the released condensate that has been collected from the traps and valves is channelled through condensate return lines to what are called "condensate pots". (R. 26) The water condensate collected in these pots is then pumped (via the pump attached to the condensate pots) from each pot back to the boiler house, where it is fed into one of the appellant's boilers, converted into steam and recirculated in the steam tubes. (R. 29) The condensate fed back into the boilers has a temperature of approximately 200 degrees Fahrenheit. (R. 30, 31)

The appellant is also seeking certification for its "waste heat recovery boilers." The appellant designed and installed the waste heat recovery boiler (as well as its duct work and fans) which captures and draws the hot gasses generated by its waste by-product incinerator through the boiler. (R. 33) As the hot gasses pass through the boiler, the temperature of the water contained therein increases to the point

that it becomes steam. (R. 34) That steam is then channelled through the steam tube system. (R. 34)

The appellant filed its application for certification as a thermal efficiency improvement facility pursuant to R.C. 5709.46 which provides, in part, as follows:

“Application for an energy conversion, solid waste energy conversion, or thermal efficiency improvement certificate shall be filed with the tax commissioner in such manner and in such form as he prescribes by rule.”

The issue presented to this Board is whether the appellant's project improvements qualify as a thermal efficiency improvement. For the reasons set forth more fully below, we find that the Ogontz temperature control valves, condensate return lines, the condensate pot and pump, and the waste heat recovery boiler qualify under the statute as thermal efficiency improvements, and are entitled to be certified as such.

R.C. 5709.45(C) defines thermal efficiency improvement in the following manner:

“(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.”

R.C. 5709.45(D) defines thermal efficiency improvement facility in the following manner:

“(D) ‘Thermal efficiency improvement facility’ means 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 Tax Commissioner contends that appellant's network does not, in fact, recover and use waste steam, but merely recirculates the collected condensate. In other words, the Tax Commissioner maintains that the appellant's system conserves steam through the release and collection of condensate,

rather than recovering and reusing it again.

In *Ford Motor Company v. Limbach* (Oct. 5, 1990), B.T.A. Case No. 88-B-105, unreported, the appellant therein had installed an “energy management system” consisting of a computer, monitor control systems, and related equipment to control and monitor the heating and ventilation of the facility. The Tax Commissioner denied Ford's application for certification as a thermal efficiency improvement facility. On appeal to this Board, we affirmed the decision of the Commissioner, concluding that Ford's system did not fit within the statutory definition. We stated therein that:

\*5 “A thermal efficiency improvement contemplated by the legislature is one which recovers for further use what would be unused, superfluous heat or steam discharged as an incidental product of normal business. In accordance with Revised Code section 5709.46, the use to which specified waste heat or waste steam must be put is the reduction of fuel or power usage or consumption.” *Id.*, at 4.

Upon consideration, we find that the appeal herein is distinguishable from *Ford*. In *Ford*, the taxpayer was merely utilizing its “energy management system” technology to control and conserve energy. *Lubrizol* has installed its system in order to physically collect and reuse waste heat produced incidental to industrial heat generation. The difference between these two cases lies in the nature of their processes.

*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 200 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.

Furthermore, in resolving the issue in Ford, this Board relied on Cleveland Trinidad Paving Co. v. Limbach (1990), 52 Ohio St.3d 101. We stated in Ford:

“As the decision of the Court (in Cleveland Trinidad) is applied to the present matter, the Board finds that a thermal efficiency improvement is one which actually recovers waste heat or steam and actually uses or consumes it as an energy source. Equipment which prevents the waste which would otherwise be consumed is not enough to qualify for the certificate.”

Therefore, we find that with regard to the Ogontz temperature control valves, the condensate lines, the condensate pot and pump and the waste heat recovery boiler, the Tax Commissioner erred in her denial of appellant's application for certification as a thermal efficiency improvement facility. The appellant has established that the subject equipment conserves and reuses energy which would otherwise be unused. It goes beyond simply preventing the waste of heat or steam.

In accordance with the foregoing discussion, we therefore find and determine that the Tax Commissioner improperly assessed the Ogontz temperature control valves, the condensate lines, the condensate pot and pump, and the waste heat recovery boiler. The journal entries are hereby reversed.

It is hereby Ordered that a certified copy of this decision and order be sent to the Tax Commissioner, and to the appellant, by and through their respective counsel.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

Kiehner Johnson

\*6 Chairman

FN1 The narrative description is included in the journal entries which are the subject of Case Nos. 88-J-

907 and 88-J-908.



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ARGUMENT

- I. STEAM TRAPS AND PARTS OF A CONDENSATE RECOVERY SYSTEM WHICH SAVES CONDENSATE PURGED FROM STEAM TUBES AND TRANSPORTS THAT CONDENSATE TO A BOILER WHERE IT IS REUSED AS FEEDWATER TO MAKE STEAM DO NOT QUALIFY FOR TAX EXEMPTION AS A THERMAL EFFICIENCY IMPROVEMENT FACILITY UNDER R.C. 5709.45 (D).
- 

Appellant contends that the Ogontz steam traps, the condensate return lines and the condensate recovery pot and pump qualify as a thermal efficiency improvement facility under R.C. 5709.45 (D). That provision defines such a facility as follows:

(D) "Thermal efficiency improvement facility" means 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.

To qualify, the equipment must be designed, constructed or installed for the primary purpose of thermal efficiency improvement. That term is defined in R.C. 5709.45(C):

(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.

If a certificate is granted, the transfer of tangible personal property for incorporation into the facility is not considered a sale or use of tangible personal property for purposes of the sales or use tax. The certified facility is also exempted from real and personal property taxation and is

not considered as an asset in the calculation of the owner's franchise tax liability. R.C. 5709.50. Exemption under R.C. 5709.50 is permitted only "for that portion of ... such thermal efficiency improvement facility used exclusively for thermal efficiency improvement.

Thus, under the statutory scheme for providing tax exemption for such facilities, to qualify for a certificate and exemption, the property must be used exclusively to recover and use waste heat or waste steam produced incidental to electric power generation, industrial process heat generation, lighting, refrigeration, or space heating.

The analysis of the application of R.C. 5709.45 to the equipment at issue must begin with the recognition that statutes granting exemptions from taxation must be strictly construed and one claiming exemption must affirmatively establish its right to the claimed exemption. Bird & Son, Inc. v. Limbach (1989), 45 Ohio St. 3d 76; OCLC v. Kinney (1984), 11 Ohio St. 3d 198. Thermal efficiency improvement facilities are exempted from property, sales and use, and franchise taxes. R.C. 5709.50. R.C. 5709.45 is therefore subject to these rules of construction.

The Ohio Supreme Court so held in Cleveland Trinidad Paving Co. v. Limbach (1990), 52 Ohio St. 3d 101,102:

According to Marietta Coal Co. v. Lindley (1983), 6 Ohio st. 3d 6, 7, 6 OBR 5, 7, 450 N.E. 2d 1164, 1167, an applicant for a certificate conferring tax exemption must prove that the property in question satisfies each requirement of the exempting statute. Thus, Cleveland

Trinidad must establish that the disputed facility is designed primarily for solid waste energy conversion, is suitable and reasonably adequate for such purpose, and is intended for solid waste energy conversion. Furthermore, under Timken Co. v. Lindley (1980), 64 Ohio St. 2d 224, 227, 18 O.O. 3d 430, 432, 416 N.E. 2d 592, 595, "\*\*\* laws relating to exemption from taxation pro tanto violate the constitutional requirement of tax uniformity, [and] such laws must be construed most strongly against the exemption."

The Court also reaffirmed that the Tax Commissioner's findings are presumptively valid and that the applicant, on appeal to the Board, has the burden to prove that her determination is incorrect. See also Ford Motor Company v. Limbach, BTA Case No. 88-B-105 (October 5, 1990).

The equipment at issue does not recover and use waste heat or waste steam. Rather, the Ogontz steam traps prevent steam from being lost. They are designed to get the heat value of the steam out of the system before it gets into the condensate return system. As Mr. Doolittle testified, they "are designed to permit condensate to be released but no steam." R. 19.

✓ Thus, waste steam is not recovered and used. The steam traps simply prevent the loss of steam from the system. In fact, appellant changed from Sarco steam traps to Ogontz steam traps because the latter were more efficient in preventing the loss of steam from the system. R. 24.

The steam traps do not recover and use waste steam. They keep the energy of the steam in the system by preventing release of the steam. They are designed to assure that the maximum amount of energy is taken out of the steam before the condensate

is released. R. 37-38. The purpose of the steam traps is to avoid losing any steam from the system. R. 36. Thus, the steam traps do not recover and use waste steam, they maximize the utilization of the steam in the system. They do not recover waste steam, they prevent steam from being wasted. There is no waste steam to recover. The Ogontz steam traps are designed to assure that there is none. The material that is captured and reused by the condensate recovery system is water. R. 37-39. There is no steam in the recovered material. R. 39.

In asserting that the Ogontz steam traps qualified as an exempt thermal efficiency improvement facility or parts thereof, appellant fails to recognize the fundamental distinction between the function of recovering and using waste heat or steam and the function of preventing the waste of heat or steam. While the latter function conserves energy by efficiently using heat and steam, that function does not meet the definition of "thermal efficiency improvement" contained in R.C. 5709.45 (C). To qualify under that definition, equipment must actually recover waste heat or waste steam and actually use it as an energy source.

This Board recognized this distinction in Ford Motor Company v. Limbach, supra, at 5. The Board noted the distinction between recovering and using waste heat or steam and simply conserving energy by efficiently using steam or heat. In rejecting the taxpayer's argument, the Board followed the holding of the Ohio Supreme Court in Cleveland Trinidad Paving, supra, that the exemption provisions of R.C. 5709.45 must be

narrowly construed and to qualify equipment must perform the specific function detailed in the exemption provision. Energy conservation is a much broader concept which would encompass a wide range of items. While conservation of energy is obviously a goal to be encouraged, it is not an activity for which the Ohio General Assembly has chosen to grant a tax exemption.

In order to accept appellant's construction, the Board would have to not only ignore the clear language of the statute and the rule of strict construction against exemptions, but also add words to the statute which were not used by the General Assembly in enacting that statute. In enacting R.C. 5709.45, the General Assembly did not include machinery and equipment used to conserve energy or fuel. It would be improper for the courts to insert words to that effect in applying this statute. As the Ohio Supreme Court reaffirmed in Wheeling Steel Corp. v. Porterfield (1970), 24 Ohio St. 2d 24, 28, "[i]n determining the legislative intent of a statute 'it is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.' (Emphasis added.) Columbus-Suburban Coach Lines v. Pub. Util. Comm., 20 Ohio St. 2d 125, at 127." If the General Assembly had intended to grant an exemption for property designed and used for energy conservation, it would have expressly so provided. If the exemption provision is to be broadened to include the vast number of items that could conceivably fall under the general scope of energy conservation, resulting in a concomitant

reduction in tax revenue, it must be done by the General Assembly whose function it is to enact laws granting exemptions from taxation.

In Cleveland Trinidad Paving, the Ohio Supreme Court rejected an argument similar to that raised by appellant in this case. Cleveland Trinidad Paving argued that energy conservation was the same as energy conversion and therefore that because its equipment resulted in a lower use of an energy source it qualified as a "solid waste energy conversion facility" as defined in R.C. 5709.45(G). In rejecting the taxpayer's argument, the Court noted the difference between conversion of solid waste into energy and the use of that energy and the conservation of energy. Similarly, the recovery and use of waste heat or steam is different from the conservation of energy realized from efficiently utilizing the steam in a system.

Nor do the condensate return lines and the condensate pot qualify for exemption as parts of a thermal efficiency improvement facility. To qualify as such a facility, equipment must, inter alia, recover and use waste heat or waste steam. These items do not recover and use waste heat or steam. They recover and use waste water. As noted earlier, the condensate that is recovered is water. It contains no steam. R. 39. The energy in the steam is utilized in the process system before the condensate is released. R. 37. The water that is recovered is not used as an energy source. It is used as boiler feedwater. R. 40. Any heat that remains in the condensate which is purged

from the process system is not nor can it be separated from the water that is used as boiler feedwater. R. 57. There is nothing that is recovered as a separate element that can be used as an energy source or fuel source. Id.

As with the Ogontz steam traps, the condensate recovery lines and condensate pump at best serve an energy conservation function. As Mr. Doolittle testified, recovering the condensate and reusing it as boiler feedwater saves appellant from using energy that would otherwise be necessary to heat city water which is received at a lower temperature than the recovered condensate. R. 34, 40. As discussed in detail above, items which result in the conservation of energy do not qualify as thermal efficiency improvement facilities. See Cleveland Trinidad Paving Co. v. Limbach, supra; Ford Motor Company v. Limbach, supra.

II. HEAT PRODUCED BY APPELLANT'S WASTE INCINERATOR IS NOT WASTE HEAT PRODUCED INCIDENTAL TO INDUSTRIAL PROCESS HEAT GENERATION.

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Appellant claims that its waste heat recovery boiler qualifies as a thermal efficiency improvement facility under R.C. 5709.45 (D). To qualify under this provision, equipment must be designed, constructed or installed for the primary purpose of recovering and using waste heat or steam produced incidental to industrial process heat generation. Only those portions of the facility that are exclusively so used are entitled to the exemptions from taxation. R.C. 5709.50.

As argued in detail under Part I of this brief, the provisions of R.C. 5709.45 must be construed most strongly against the exemption and the one claiming exemption must affirmatively establish its right to the claimed exemption. The entity challenging the Tax Commissioner's findings regarding entitlement to the certificate and exemption must also meet its burden of overcoming the presumptive validity of such findings.

The boiler at issue does not qualify for certification and exemption as a thermal efficiency improvement facility. It does not recover and use waste heat produced incidental to industrial process heat generation. Initially, the operation which produces the heat is not an industrial process. Second, the heat produced is not waste heat produced incidentally.

Rather, it is produced with the intent to use it to fuel the boiler.

To qualify under the definition of "thermal efficiency improvement", waste heat must be produced incidental to industrial process heat generation. The waste incinerator which produces the heat does not constitute an industrial process. Appellant is engaged in the business of manufacturing and processing chemicals. R. 8-9. The waste incinerator does not perform any function in the processing of chemicals by appellant. R. 47. Rather, it is used to dispose of certain waste materials resulting from its manufacturing or processing operations.

The disposal of waste resulting from an industrial process is not part of the industrial process. Appellant is not engaged in the business of disposing of waste. It is in the business of processing chemicals for sale. Acceptance of the broad construction of R.C. 5709.45 (C) advanced by appellant would violate the rule of strict construction against exemption provisions and would require the Board to ignore the restrictive language of the statute. As the Ohio Supreme Court reaffirmed in Columbus Colony Housing, Inc. v. Limbach (1989), 45 Ohio St. 3d 253, 255, it is the duty of the courts to apply the statutory law as it is written.

The General Assembly limited the exemption provided for thermal efficiency improvement facilities to items which recovered and used waste heat produced incidental to industrial

process heat generation. It did not grant the exemption for the recovery and use of heat produced incidental to any and all operations performed by a manufacturer, such as waste disposal. If it had intended such a broad exemption it could easily have so provided. It certainly would not have used the restrictive language it did if that was its intent.

The plain and ordinary meaning of the word "process" when used in the context of a manufacturing operation is the various steps and activities undertaken which result in the particular product being manufactured. The term "process" in the context of a manufacturing operation is defined in Black's Law Dictionary (6th Ed.) as a "means to prepare for market or to convert into a marketable product." Appellant sells chemicals, not waste material. Its industrial process is the manufacture of chemicals. Its disposal of waste is no more an industrial process than is a factory's taking its garbage to a landfill.

This definition of the term "process" is further supported by its acceptance by the Ohio Supreme Court in National Tube Co. v. Glander (1952), 157 Ohio St. 407, 410:

Now, what do the terms, "manufacturing" and "processing," mean? According to well considered definitions they imply essentially a transformation or conversion of material or things into a different state or form from that in which they originally existed - the actual operation incident to changing them into marketable products.

While National Tube was a sales tax case, the statutory definition provided by now R.C. 5739.01 (R) had not been enacted. The Court did not rely on a statutory definition specific to the sales tax exemption. Rather, it looked to the common, ordinary meaning of that term. Absent a specific statutory definition requiring a specialized meaning, the common, ordinary meaning is the proper construction to be given terms used in a statute. R.C. 1.42.

Ohio Supreme Court decisions involving the concept of "process" or "processing" have also applied this well established definition. In Huron Fish Co. v. Glander (1946), 146 Ohio St. 631, 634, the Court adopted the definition of "process" applied by the Arizona Supreme Court in Moore et al., Tax Comm. v. Farmers Mutual Mfg. & Ginning Co., 51 Ariz. 378, 77 P. 2d 209:

"The word 'process' means to subject, especially raw material, to a process of manufacturing, development, preparation for the market, etc., and to convert into marketable form, as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking."

The Court also found that this was essentially the definition of "process" contained in the Oxford English Dictionary. Id. In paragraph two of the syllabus in Huron Fish Co., the Court held as follows:

"Processing" is the refining, development, preparation or converting of material (especially that in a raw state) into marketable form.

This is the same basic definition applied by the Ohio Supreme Court in Miller v. Peck (1952), 158 Ohio St. 17. Recently, in Stoneco, Inc., v. Limbach (1990), 53 Ohio St. 3d 170, 173, the Court followed this concept of "process" noting that a process is the activity of converting raw material into a more valuable commodity for sale. Even though the Court in Stoneco broadened the definition of manufacturing for purposes of the investment tax credit by applying the integrated plant test in lieu of a direct use test, it stood by the basic concept of "manufacturing" and "processing" as the conversion of raw materials into a finished product for sale.

As evidenced by the absence of a single authority cited by appellant to support its contention, no Ohio court has held that the disposal of waste by a manufacturer is a part of an industrial process. Such a construction is not supported by the statutory language or any case authority and should be rejected by this Board.

The second reason that the boiler does not qualify as a thermal efficiency improvement facility is that the heat produced is not waste heat produced incidental to any process. The waste incinerator and the boiler at issue were built together in such a configuration that they had to be used in conjunction with each other. R. 47. The incinerator could not be operated without the boiler. Id. The incinerator and boiler were constructed together for the purpose of providing a source of heat for the boiler. Given these facts, it cannot

seriously be argued that the heat produced by the waste incinerator was waste heat produced incidentally. Such an argument would be rebutted by the common definition of the term "incidental":

1: subordinate, nonessential, or attendant in position or significance: as a: occurring merely by chance or without intention or calculation: occurring as a minor concomitant ...  
b: being likely to ensue as a chance or minor consequence....

Webster's Third New International Dictionary. The production and use of this heat to heat the water in the boiler was planned from the outset. The incinerator and boiler were designed and constructed specifically to effectuate this plan. Such a planned method of producing and using heat is the antithesis of incidental.

CONCLUSION

For the reasons set forth in the foregoing brief, the final determination of the Tax Commissioner should be affirmed.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.  
Attorney General



A handwritten signature in cursive script, appearing to read "Richard C. Farrin", is written over the typed name.

RICHARD C. FARRIN  
Assistant Attorney General

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Appellee is being mailed on this 19th day of December, 1990 to Charles M. Steines, Jones, Day, Reavis & Pogue, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44115, Attorneys for Appellant.

  
RICHARD C. FARRIN  
Assistant Attorney General

H. B. No. 464 —Messrs. Kurfess - Carney - McClaskey - L. Hughes - Maier -  
 Mmes. Karmol - Tansey.  
 To amend section 4905.14 and to enact section 4933.31 of the  
 Revised Code to require natural gas and electric light com-  
 panies, together with the Public Utilities Commission, to  
 plan how to meet the natural gas and electric power de-  
 mands of Ohio, and to prohibit any natural gas distribution  
 subsidiary of a natural gas holding company from curtailing  
 the supply of natural gas to any category of its customers  
 in Ohio to a degree greater than any subsidiary of the  
 company outside Ohio curtails the supply of natural gas to  
 the same categories of its customers.

3—23. H. Introduced.—p. 408.

H. B. No. 465 —Mr. McEwen.

To amend section 4301.17 of the Revised Code to increase  
 and fix by statute the commissions received by agents  
 operating agency liquor stores.

3—23. H. Introduced.—p. 408.

4—6. H. To Committee—Governmental Affairs.—p. 491.

H. B. No. 466 —Mr. McEwen.

To amend section 5739.02 of the Revised Code to exempt  
 sales of residential heating fuel from the sales tax.

3—23. H. Introduced.—p. 408.

4—6. H. To Committee—Ways and Means.—p. 491.

H. B. No. 467 —Messrs. Carney - E. Hughes - McClaskey - Maier - Mmes.  
 Aveni - Tansey.

To enact sections 5709.41 to 5709.48 of the Revised Code to  
 provide tax exemptions for energy conversion facilities.

3—23. H. Introduced.—p. 408.

3—30. H. To Committee—Energy and Environment.—p. 457.

5—24. H. Reported. Substitute bill.—p. 836.

6—26. H. Re-referred—Ways and Means.—p. 887.

7—14. H. Reported. Amended.—p. 1427.

7—20. H. Third consideration.—p. 1473.

7—20. H. Amended.—p. 1473.

7—20. H. Emergency clause agreed to.—p. 1475.

Vote—yeas 80, nays 17.

7—20. H. Passed.—p. 1475.

Vote—yeas 90, nays 7.

7—21. S. Received from House.—p. 836.

7—25. S. To Committee—Ways and Means.—p. 892.

9—27. S. Reported. Amended.—p. 1080.

#### 1978

6—22. S. Third consideration.—p. 1985.

6—22. S. Amended.—p. 1985.

6—22. S. Emergency clause agreed to.—p. 1986.

Vote—yeas 27, nays 3.

6—22. S. Passed.—p. 1986.

Vote—yeas 27, nays 3.

6—22. H. Concurred in Senate amendments.—p. 3055.

6—22. H. Emergency clause agreed to.—p. 3056.

Vote—yeas 83, nays 12.

7—11. To Governor.

7—13. Approved by Governor.

Effective date July 13, 1978.

(Ordered printed by the House)

112th GENERAL ASSEMBLY,  
REGULAR SESSION,  
1977-1978

Sub. H. B. No. 467

MESSRS. CARNEY-E. HUGHES-McCLASKEY-MAIER-  
MMES. AVENI-TANSEY

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## A BILL

To enact sections 5709.45 to 5709.52 of the Revised Code to provide tax exemptions for energy conversion facilities and thermal efficiency improvement facilities, and to declare an emergency.

*Be it enacted by the General Assembly of the State of Ohio:*

2 SECTION 1. That sections 5709.45, 5709.46, 5709.47, 5709.48,  
3 5709.49, 5709.50, 5709.51, and 5709.52 of the Revised Code be  
4 enacted to read as follows:

5 Sec. 5709.45. AS USED IN SECTIONS 5709.45 TO 5709.52  
6 OF THE REVISED CODE:

7 (A) "ENERGY CONVERSION" MEANS THE CONVER-  
8 SION OF FUEL OR POWER USAGE AND CONSUMPTION  
9 FROM NATURAL GAS TO AN ALTERNATE FUEL OR POWER  
10 SOURCE, OR THE CONVERSION OF FUEL OR POWER USAGE  
11 AND CONSUMPTION FROM FUEL OIL TO AN ALTERNATE  
12 FUEL OR POWER SOURCE, OTHER THAN NATURAL GAS.

13 (B) "ENERGY CONVERSION FACILITY" MEANS ANY  
14 PROPERTY OR EQUIPMENT DESIGNED, CONSTRUCTED, OR  
15 INSTALLED IN A COMMERCIAL BUILDING OR SITE OR IN

Appx. 000038

16 AN INDUSTRIAL PLANT OR SITE FOR THE PRIMARY PUR-  
17 POSE OF ENERGY CONVERSION.

18 (C) "THERMAL EFFICIENCY IMPROVEMENT" MEANS  
19 THE RECOVERY AND USE OF WASTE HEAT OR WASTE  
20 STEAM PRODUCED INCIDENTAL TO ELECTRIC POWER  
21 GENERATION, INDUSTRIAL PROCESS HEAT GENERATION,  
22 OR SPACE HEATING.

23 (D) "THERMAL EFFICIENCY IMPROVEMENT FACIL-  
24 ITY" MEANS ANY PROPERTY OR EQUIPMENT DESIGNED,  
25 CONSTRUCTED, OR INSTALLED IN A COMMERCIAL BUILD-  
26 ING OR SITE OR IN AN INDUSTRIAL PLANT OR SITE FOR  
27 THE PRIMARY PURPOSE OF THERMAL EFFICIENCY IM-  
28 PROVEMENT.

29 Sec. 5709.46. APPLICATION FOR AN ENERGY CONVER-  
30 SION OR THERMAL EFFICIENCY IMPROVEMENT CERTIFI-  
31 CATE SHALL BE FILED WITH THE TAX COMMISSIONER  
32 IN SUCH MANNER AND IN SUCH FORM AS MAY BE PRE-  
33 SCRIBED BY RULES ADOPTED BY THE COMMISSIONER  
34 AND SHALL CONTAIN A NARRATIVE DESCRIPTION OF  
35 THE PROPOSED FACILITY, A DESCRIPTIVE LIST OF ALL  
36 EQUIPMENT AND MATERIALS ACQUIRED OR TO BE AC-  
37 QUIRED BY THE APPLICANT FOR THE PURPOSE OF EN-  
38 ERGY CONVERSION OR THERMAL EFFICIENCY IMPROVE-  
39 MENT, AND IN THE CASE OF AN APPLICATION PERTAIN-  
40 ING TO A THERMAL EFFICIENCY IMPROVEMENT FACILITY,  
41 A DESCRIPTIVE STATEMENT IDENTIFYING THE REDUC-  
42 TIONS IN FUEL OR POWER USAGE OR CONSUMPTION THAT  
43 ARE, IN THE OPINION OF THE APPLICANT, LIKELY TO BE  
44 REALIZED THROUGH THE CONSTRUCTION OF THE THER-  
45 MAL EFFICIENCY IMPROVEMENT FACILITY NAMED IN

46 THE APPLICATION. PRIOR TO ISSUING AN ENERGY CON-  
47 VERSION OR THERMAL EFFICIENCY IMPROVEMENT CER-  
48 TIFICATE, THE TAX COMMISSIONER SHALL OBTAIN AN  
49 OPINION REGARDING THE APPLICATION FROM THE DI-  
50 RECTOR OF THE OHIO ENERGY AND RESOURCE DEVELOP-  
51 MENT AGENCY, AND, IN THE CASE OF AN APPLICATION  
52 PERTAINING TO A THERMAL EFFICIENCY IMPROVEMENT  
53 FACILITY, THE DIRECTOR OF ENERGY AND RESOURCE  
54 DEVELOPMENT SHALL, BEFORE RENDERING THE OPIN-  
55 ION, DETERMINE WHETHER OR NOT THE REDUCTIONS  
56 IN FUEL OR POWER USAGE OR CONSUMPTION DESCRIBED  
57 IN THE APPLICATION ARE LIKELY TO BE REALIZED  
58 THROUGH THE CONSTRUCTION OF THE THERMAL EFFI-  
59 CIENCY IMPROVEMENT FACILITY NAMED IN THE APPLI-  
60 CATION AND SHALL SO ADVISE THE TAX COMMISSIONER  
61 WITH THE TRANSMITTAL OF THE OPINION. IF THE COM-  
62 MISSIONER, AFTER OBTAINING THE OPINION OF THE DI-  
63 RECTOR OF THE OHIO ENERGY RESOURCE AND DEVELOP-  
64 MENT AGENCY, FINDS THAT THE PROPOSED FACILITY  
65 WAS DESIGNED PRIMARILY FOR ENERGY CONVERSION  
66 OR THERMAL EFFICIENCY IMPROVEMENT AND IS SUIT-  
67 ABLE AND REASONABLY ADEQUATE FOR SUCH PURPOSE  
68 AND IS INTENDED FOR SUCH PURPOSE, HE SHALL ENTER  
69 A FINDING AND ISSUE A CERTIFICATE TO THAT EFFECT.  
70 SAID CERTIFICATE SHALL PERMIT TAX EXEMPTION PUR-  
71 SUANT TO SECTION 5709.50 OF THE REVISED CODE ONLY  
72 FOR THAT PORTION OF SUCH ENERGY CONVERSION FA-  
73 CILITY OR THERMAL EFFICIENCY IMPROVEMENT FACIL-  
74 ITY OR THAT PART USED EXCLUSIVELY FOR ENERGY  
75 CONVERSION OR THERMAL EFFICIENCY IMPROVEMENT.

76 THE EFFECTIVE DATE OF SAID CERTIFICATE SHALL BE  
77 THE DATE OF THE MAKING OF THE APPLICATION FOR  
78 SUCH CERTIFICATE OR THE DATE OF THE CONSTRUCTION  
79 OF THE FACILITY, WHICHEVER IS EARLIER, PROVIDED  
80 SUCH APPLICATION SHALL NOT RELATE TO FACILITIES  
81 UPON WHICH CONSTRUCTION WAS COMPLETED ON OR  
82 BEFORE DECEMBER 31, 1974.

83 IF APPLICATION IS MADE FOR AN ENERGY CONVER-  
84 SION FACILITY OR THERMAL EFFICIENCY IMPROVEMENT  
85 FACILITY, UPON WHICH CONSTRUCTION WAS COMPLETED  
86 BETWEEN JANUARY 1, 1975, AND THE EFFECTIVE DATE  
87 OF THIS ACT, THE EFFECTIVE DATE OF THE CERTIFICATE  
88 ISSUED ON SUCH FACILITY SHALL BE THE DATE OF THE  
89 MAKING OF THE APPLICATION; HOWEVER, THE ISSUANCE  
90 OF A CERTIFICATE ON SUCH FACILITY SHALL NOT EN-  
91 TITLE ITS HOLDER TO RECOVER ANY TAXES PAYABLE  
92 PRIOR TO THE EFFECTIVE DATE OF THE CERTIFICATE  
93 ON THE FACILITY OR ANY EQUIPMENT OR MATERIALS  
94 INCORPORATED THEREIN.

95 Sec. 5709.47. BEFORE ISSUING ANY CERTIFICATE, THE  
96 TAX COMMISSIONER SHALL GIVE NOTICE IN WRITING BY  
97 MAIL TO THE AUDITOR OF THE COUNTY IN WHICH SUCH  
98 FACILITIES ARE LOCATED, AND SHALL AFFORD TO THE  
99 APPLICANT AND TO THE AUDITOR AN OPPORTUNITY FOR  
100 A HEARING. ON LIKE NOTICE TO THE APPLICANT AND  
101 OPPORTUNITY FOR A HEARING, THE COMMISSIONER  
102 SHALL, ON HIS OWN INITIATIVE OR ON COMPLAINT BY  
103 THE COUNTY AUDITOR OF THE COUNTY IN WHICH ANY  
104 PROPERTY TO WHICH SUCH ENERGY CONVERSION OR  
105 THERMAL EFFICIENCY IMPROVEMENT CERTIFICATE RE-

106 LATES IS LOCATED, REVOKE SUCH ENERGY CONVERSION  
107 OR THERMAL EFFICIENCY IMPROVEMENT CERTIFICATE  
108 WHENEVER ANY OF THE FOLLOWING APPEARS:

109 (A) THE CERTIFICATE WAS OBTAINED BY FRAUD OR  
110 MISREPRESENTATION.

111 (B) THE HOLDER OF THE CERTIFICATE HAS FAILED  
112 SUBSTANTIALLY TO PROCEED WITH THE CONSTRUCTION,  
113 RECONSTRUCTION, INSTALLATION, OR ACQUISITION OF  
114 ENERGY CONVERSION FACILITIES OR THERMAL EFFI-  
115 CIENCY IMPROVEMENT FACILITIES.

116 (C) THE STRUCTURE, SITE, OR EQUIPMENT TO  
117 WHICH THE CERTIFICATE RELATES HAS CEASED TO BE  
118 USED FOR THE PRIMARY PURPOSE OF ENERGY CONVER-  
119 SION OR THERMAL EFFICIENCY IMPROVEMENT AND IS  
120 BEING USED FOR A DIFFERENT PURPOSE.

121 WHERE THE CIRCUMSTANCES SO REQUIRE, THE COM-  
122 MISSIONER, IN LIEU OF REVOKING SUCH CERTIFICATE,  
123 MAY MODIFY THE SAME BY RESTRICTING ITS OPERA-  
124 TIONS.

125 ON THE MAILING OF NOTICE OF THE ACTION OF THE  
126 COMMISSIONER REVOKING OR MODIFYING AN ENERGY  
127 CONVERSION OR THERMAL EFFICIENCY IMPROVEMENT  
128 CERTIFICATE AS PROVIDED IN SECTION 5709.48 OF THE  
129 REVISED CODE, SUCH CERTIFICATE SHALL CEASE TO BE  
130 IN FORCE OR SHALL REMAIN IN FORCE ONLY AS MODI-  
131 FIED AS THE CASE MAY REQUIRE.

132 Sec. 5709.48. AN ENERGY CONVERSION OR THERMAL  
133 EFFICIENCY IMPROVEMENT CERTIFICATE, WHEN ISSUED,  
134 SHALL BE SENT BY CERTIFIED MAIL TO THE APPLICANT  
135 AND NOTICE OF SUCH ISSUANCE IN THE FORM OF CERTI-

136 FIED COPIES THEREOF SHALL BE SENT BY CERTIFIED  
137 MAIL BY THE TAX COMMISSIONER TO THE COUNTY AUDI-  
138 TOR OF THE COUNTY IN WHICH ANY PROPERTY TO WHICH  
139 THE SAME RELATES IS LOCATED AND SHALL BE FILED  
140 OF RECORD IN HIS OFFICE.

141 NOTICE OF THE ORDER OF THE COMMISSIONER DENY-  
142 ING, REVOKING, OR MODIFYING AN ENERGY CONVERSION  
143 OR THERMAL EFFICIENCY IMPROVEMENT CERTIFICATE  
144 IN THE FORM OF CERTIFIED COPIES THEREOF SHALL BE  
145 SENT BY CERTIFIED MAIL TO THE APPLICANT OR THE  
146 HOLDER THEREOF AND TO SUCH COUNTY AUDITOR, AS  
147 THE CASE MAY REQUIRE. THE APPLICANT OR HOLDER  
148 AND SUCH COUNTY AUDITOR IN THE PROPER CASE ARE  
149 DEEMED PARTIES FOR THE PURPOSE OF THE REVIEW  
150 AFFORDED BY SECTION 5709.49 OF THE REVISED CODE.

151 Sec. 5709.49. ANY PARTY AGGRIEVED BY THE ISSU-  
152 ANCE OR REFUSAL TO ISSUE, REVOCATION, OR MODIFICA-  
153 TION OF AN ENERGY CONVERSION OR THERMAL EFFI-  
154 CIENCY IMPROVEMENT CERTIFICATE MAY APPEAL FROM  
155 THE FINDING AND ORDER OF THE TAX COMMISSIONER  
156 TO THE BOARD OF TAX APPEALS IN THE MANNER AND  
157 FORM AND WITHIN THE TIME PROVIDED BY SECTION  
158 5717.02 OF THE REVISED CODE.

159 Sec. 5709.50. (A) WHENEVER AN ENERGY CONVER-  
160 SION OR THERMAL EFFICIENCY IMPROVEMENT CERTIFI-  
161 CATE IS ISSUED ON AN ENERGY CONVERSION FACILITY  
162 OR A THERMAL EFFICIENCY IMPROVEMENT FACILITY,  
163 THE TRANSFER OF TANGIBLE PROPERTY FOR INCORPO-  
164 RATION INTO THE FACILITY, OR PORTION THEREOF, COV-  
165 ERED BY THE CERTIFICATE, WHETHER SUCH TRANSFER

166 TAKES PLACE BEFORE OR AFTER THE ISSUANCE OF THE  
167 CERTIFICATE, SHALL NOT BE CONSIDERED A SALE OF  
168 SUCH TANGIBLE PERSONAL PROPERTY FOR THE PURPOSE  
169 OF THE SALES TAX, OR USE FOR PURPOSE OF THE USE  
170 TAX, IF THE TANGIBLE PERSONAL PROPERTY IS TO BE OR  
171 WAS A MATERIAL OR PART TO BE INCORPORATED INTO  
172 AN ENERGY CONVERSION FACILITY OR A THERMAL EFFI-  
173 CIENCY IMPROVEMENT FACILITY AS DEFINED IN SECTION  
174 5709.45 OF THE REVISED CODE.

175 (B) FOR THE PERIOD SUBSEQUENT TO THE EFFEC-  
176 TIVE DATE OF SAID CERTIFICATE AND CONTINUING SO  
177 LONG AS SAID CERTIFICATE IS IN FORCE, NO FACILITY  
178 OR CERTIFIED PORTION THEREOF SHALL BE CONSID-  
179 ERED:

180 (1) AN IMPROVEMENT ON THE LAND ON WHICH THE  
181 SAME IS LOCATED FOR THE PURPOSE OF REAL PROPERTY  
182 TAXATION;

183 (2) AS USED IN BUSINESS FOR THE PURPOSE OF PER-  
184 SONAL PROPERTY TAXATION;

185 (3) AS AN ASSET OF ANY CORPORATION IN DETER-  
186 MINING THE VALUE OF ITS ISSUED AND OUTSTANDING  
187 SHARES OR THE VALUE OF THE PROPERTY OWNED AND  
188 USED BY IT IN THIS STATE FOR THE PURPOSE OF THE  
189 FRANCHISE TAX.

190 Sec. 5709.51. WHEN AN ENERGY CONVERSION OR  
191 THERMAL EFFICIENCY IMPROVEMENT CERTIFICATE IS  
192 REVOKED BECAUSE IT WAS OBTAINED BY FRAUD OR MIS-  
193 REPRESENTATION, ALL TAXES THAT WOULD HAVE BEEN  
194 PAYABLE IF NO CERTIFICATE HAD BEEN ISSUED SHALL  
195 BE ASSESSED WITH MAXIMUM PENALTIES PRESCRIBED

196 BY LAW APPLICABLE THERETO.

197       Sec. 5709.52. IN THE EVENT OF THE SALE, LEASE, OR  
198 OTHER TRANSFER OF AN ENERGY CONVERSION FACILITY  
199 OR A THERMAL EFFICIENCY IMPROVEMENT FACILITY,  
200 NOT INVOLVING A DIFFERENT LOCATION OR USE, THE  
201 HOLDER OF AN ENERGY CONVERSION OR THERMAL EFFI-  
202 CIENCY IMPROVEMENT CERTIFICATE FOR SUCH FACILITY  
203 MAY TRANSFER THE CERTIFICATE BY WRITTEN INSTRU-  
204 MENT TO THE PERSON WHO, EXCEPT FOR THE TRANSFER  
205 OF THE CERTIFICATE, WOULD BE OBLIGATED TO PAY  
206 TAXES ON SUCH FACILITY. THE TRANSFEREE SHALL BE-  
207 COME THE HOLDER OF THE CERTIFICATE AND SHALL  
208 HAVE ALL RIGHTS TO EXEMPTION FROM TAXES WHICH  
209 WERE GRANTED TO THE FORMER HOLDER OR HOLDERS,  
210 EFFECTIVE AS OF THE DATE OF TRANSFER OF THE FA-  
211 CILITY OR THE DATE OF TRANSFER OF THE CERTIFICATE,  
212 WHICHEVER IS EARLIER. THE TRANSFEREE SHALL GIVE  
213 WRITTEN NOTICE OF THE EFFECTIVE DATE OF THE  
214 TRANSFER, TOGETHER WITH A COPY OF THE INSTRU-  
215 MENT OF TRANSFER, TO THE TAX COMMISSIONER AND  
216 THE COUNTY AUDITOR OF THE COUNTY IN WHICH THE  
217 FACILITY IS LOCATED.

218       SECTION 2. This act is hereby declared to be an emergency  
219 measure necessary for the immediate preservation of the public  
220 peace, health, and safety. The reason for such necessity lies in the  
221 fact that Ohio is suffering from a severe shortage of natural gas  
222 and fuel oil, and immediate action is necessary to convert industrial  
223 and commercial facilities from natural gas and fuel oil energy  
224 sources to sources of alternative fuels. Therefore, this act shall  
225 go into immediate effect.

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112th GENERAL ASSEMBLY,  
REGULAR SESSION,  
1977-1978



**Am. Sub. H. B. No. 467**

MESSRS. CARNEY-E. HUGHES-McCLASKEY-MAIER-MMES.  
AVENI-TANSEY-MESSRS. COLONNA-TABLACK-CORBIN-  
DEERING-HADLEY-NETZLEY

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# A BILL

To enact sections 5709.45 to 5709.52 of the Revised Code to provide tax exemptions for energy conversion facilities, solid waste energy conversion facilities, and thermal efficiency improvement facilities, and to declare an emergency.

*Be it enacted by the General Assembly of the State of Ohio:*

2 SECTION 1. That sections 5709.45, 5709.46, 5709.47, 5709.48,  
3 5709.49, 5709.50, 5709.51, and 5709.52 of the Revised Code be en-  
4 acted to read as follows:

5 Sec. 5709.45. AS USED IN SECTIONS 5709.45 TO 5709.52  
6 OF THE REVISED CODE:

7 (A) "ENERGY CONVERSION" MEANS THE CONVER-  
8 SION OF FUEL OR POWER USAGE AND CONSUMPTION  
9 FROM NATURAL GAS TO AN ALTERNATE FUEL OR POWER  
10 SOURCE, OR THE CONVERSION OF FUEL OR POWER USAGE  
11 AND CONSUMPTION FROM FUEL OIL TO AN ALTERNATE  
12 FUEL OR POWER SOURCE, OTHER THAN NATURAL GAS.

13 (B) "ENERGY CONVERSION FACILITY" MEANS ANY  
14 ADDITIONAL PROPERTY OR EQUIPMENT DESIGNED, CON-

15 STRUCTED, OR INSTALLED IN A COMMERCIAL BUILDING  
16 OR SITE OR IN AN INDUSTRIAL PLANT OR SITE NECES-  
17 SARY FOR THE PRIMARY PURPOSE OF ENERGY CONVER-  
18 SION.

19 (C) "THERMAL EFFICIENCY IMPROVEMENT" MEANS  
20 THE RECOVERY AND USE OF WASTE HEAT OR WASTE  
21 STEAM PRODUCED INCIDENTAL TO ELECTRIC POWER  
22 GENERATION, INDUSTRIAL PROCESS HEAT GENERATION,  
23 LIGHTING OR SPACE HEATING.

24 (D) "THERMAL EFFICIENCY IMPROVEMENT FACIL-  
25 ITY" MEANS ANY PROPERTY OR EQUIPMENT DESIGNED,  
26 CONSTRUCTED, OR INSTALLED IN A COMMERCIAL BUILD-  
27 ING OR SITE OR IN AN INDUSTRIAL PLANT OR SITE FOR  
28 THE PRIMARY PURPOSE OF THERMAL EFFICIENCY IM-  
29 PROVEMENT.

30 (E) "SOLID WASTE" MEANS SUCH UNWANTED RESI-  
31 DUAL SOLID OR SEMI-SOLID MATERIAL AS RESULTS FROM  
32 INDUSTRIAL OPERATIONS, INCLUDING THOSE OF PUBLIC  
33 UTILITY COMPANIES, AND COMMERCIAL, DISTRIBUTION,  
34 RESEARCH, AGRICULTURAL, AND COMMUNITY OPERA-  
35 TIONS, INCLUDING GARBAGE, COMBUSTIBLE, OR NONCOM-  
36 BUSTIBLE, STREET DIRT, AND DEBRIS.

37 (F) "SOLID WASTE ENERGY CONVERSION" MEANS  
38 THE CONVERSION OF SOLID WASTE INTO ENERGY.

39 (G) "SOLID WASTE ENERGY CONVERSION FACILITY"  
40 MEANS ANY PROPERTY OR EQUIPMENT DESIGNED, CON-  
41 STRUCTED, OR INSTALLED IN OR ON A COMMERCIAL  
42 BUILDING OR SITE, AN INDUSTRIAL PLANT OR SITE, OR  
43 AN ELECTRIC LIGHT, GAS, OR NATURAL GAS COMPANY  
44 PLANT OR SITE FOR THE PRIMARY PURPOSE OF SOLID

45 WASTE ENERGY CONVERSION.

46       Sec. 5709.46. APPLICATION FOR AN ENERGY CONVER-  
47 SION, SOLID WASTE ENERGY CONVERSION, OR THERMAL  
48 EFFICIENCY IMPROVEMENT CERTIFICATE SHALL BE  
49 FILED WITH THE TAX COMMISSIONER IN SUCH MANNER  
50 AND IN SUCH FORM AS HE PRESCRIBES BY RULE. THE  
51 APPLICATION SHALL CONTAIN A NARRATIVE DESCRIP-  
52 TION OF THE PROPOSED FACILITY AND A DESCRIPTIVE  
53 LIST OF ALL EQUIPMENT AND MATERIALS ACQUIRED OR  
54 TO BE ACQUIRED BY THE APPLICANT FOR THE PURPOSE  
55 OF ENERGY CONVERSION, SOLID WASTE ENERGY CON-  
56 VERSION, OR THERMAL EFFICIENCY IMPROVEMENT. IN  
57 THE CASE OF A THERMAL EFFICIENCY IMPROVEMENT  
58 FACILITY, THE APPLICATION SHALL INCLUDE A DESCRIP-  
59 TIVE STATEMENT IDENTIFYING THE ESTIMATED REDUC-  
60 TIONS IN FUEL OR POWER USAGE OR CONSUMPTION THAT  
61 ARE LIKELY TO BE REALIZED THROUGH THE CONSTRUC-  
62 TION OF SUCH THERMAL EFFICIENCY IMPROVEMENT FA-  
63 CILITY; IN THE CASE OF A SOLID WASTE ENERGY CON-  
64 VERSION FACILITY, THE APPLICATION SHALL INCLUDE  
65 AN ESTIMATE OF THE FACILITY'S SOLID WASTE CON-  
66 SUMPTION CAPACITY AND ENERGY OUTPUT. PRIOR TO  
67 ISSUING AN ENERGY CONVERSION, SOLID WASTE ENERGY  
68 CONVERSION, OR THERMAL EFFICIENCY IMPROVEMENT  
69 CERTIFICATE, THE TAX COMMISSIONER SHALL OBTAIN  
70 A WRITTEN OPINION REGARDING THE APPLICATION  
71 FROM THE DIRECTOR OF THE OHIO ENERGY AND RE-  
72 SOURCE DEVELOPMENT AGENCY. THE DIRECTOR'S OPIN-  
73 ION SHALL INCLUDE HIS DETERMINATION OF WHETHER  
74 THE ESTIMATED REDUCTIONS IN FUEL OR POWER USAGE

75 OR CONSUMPTION, IN THE CASE OF A THERMAL EFFI-  
76 CIENCY IMPROVEMENT FACILITY, OR THE ESTIMATED  
77 SOLID WASTE CONSUMPTION AND ENERGY PRODUCTION,  
78 IN THE CASE OF A SOLID WASTE ENERGY CONVERSION  
79 FACILITY, ARE LIKELY TO BE REALIZED THROUGH THE  
80 CONSTRUCTION OF THE FACILITY NAMED IN THE APPLI-  
81 CATION. IF THE COMMISSIONER, AFTER OBTAINING THE  
82 OPINION OF THE DIRECTOR OF THE OHIO ENERGY RE-  
83 SOURCE AND DEVELOPMENT AGENCY, FINDS THAT THE  
84 PROPOSED FACILITY WAS DESIGNED PRIMARILY FOR  
85 ENERGY CONVERSION, SOLID WASTE ENERGY CONVER-  
86 SION, OR THERMAL EFFICIENCY IMPROVEMENT, IS SUIT-  
87 ABLE AND REASONABLY ADEQUATE FOR SUCH PURPOSE,  
88 AND IS INTENDED FOR SUCH PURPOSE, HE SHALL ENTER  
89 A FINDING TO THAT EFFECT AND ISSUE A CERTIFICATE.  
90 THE CERTIFICATE SHALL PERMIT TAX EXEMPTION PUR-  
91 SUANT TO SECTION 5709.50 OF THE REVISED CODE ONLY  
92 FOR THAT PORTION OF SUCH ENERGY CONVERSION FA-  
93 CILITY THAT IS NECESSARY FOR THE PRIMARY PURPOSE  
94 OF ENERGY CONVERSION, FOR SUCH SOLID WASTE EN-  
95 ERGY CONVERSION FACILITY USED EXCLUSIVELY FOR  
96 SOLID WASTE ENERGY CONVERSION OR FOR SUCH THER-  
97 MAL EFFICIENCY IMPROVEMENT FACILITY USED EXCLU-  
98 SIVELY FOR THERMAL EFFICIENCY IMPROVEMENT. THE  
99 EFFECTIVE DATE OF THE CERTIFICATE SHALL BE THE  
100 DATE OF THE MAKING OF THE APPLICATION FOR SUCH  
101 CERTIFICATE OR THE DATE OF THE CONSTRUCTION OF  
102 THE FACILITY, WHICHEVER IS EARLIER, PROVIDED SUCH  
103 APPLICATION SHALL NOT RELATE TO FACILITIES UPON  
104 WHICH CONSTRUCTION WAS COMPLETED ON OR BEFORE

105 DECEMBER 31, 1974.

106 IF APPLICATION IS MADE FOR AN ENERGY CONVER-  
107 SION FACILITY, SOLID WASTE ENERGY CONVERSION FA-  
108 CILITY, OR THERMAL EFFICIENCY IMPROVEMENT FACIL-  
109 ITY UPON WHICH CONSTRUCTION WAS COMPLETED BE-  
110 TWEEN JANUARY 1, 1975, AND THE EFFECTIVE DATE OF  
111 THIS ACT, THE EFFECTIVE DATE OF THE CERTIFICATE  
112 ISSUED ON SUCH FACILITY SHALL BE THE DATE OF THE  
113 MAKING OF THE APPLICATION; HOWEVER, THE ISSUANCE  
114 OF A CERTIFICATE ON SUCH FACILITY SHALL NOT EN-  
115 TITLE ITS HOLDER TO RECOVER ANY TAXES PAYABLE  
116 PRIOR TO THE EFFECTIVE DATE OF THE CERTIFICATE  
117 ON THE FACILITY OR ANY EQUIPMENT OR MATERIALS  
118 INCORPORATED THEREIN.

119 Sec. 5709.47. BEFORE ISSUING ANY CERTIFICATE,  
120 THE TAX COMMISSIONER SHALL GIVE NOTICE IN WRITING  
121 BY MAIL TO THE AUDITOR OF THE COUNTY IN WHICH THE  
122 FACILITIES TO WHICH THE CERTIFICATE RELATES ARE  
123 LOCATED AND SHALL AFFORD TO THE APPLICANT AND  
124 TO THE AUDITOR AN OPPORTUNITY FOR A HEARING. ON  
125 LIKE NOTICE TO THE APPLICANT AND OPPORTUNITY FOR  
126 A HEARING, THE COMMISSIONER SHALL, ON HIS OWN IN-  
127 ITIATIVE OR ON COMPLAINT BY THE COUNTY AUDITOR  
128 OF THE COUNTY IN WHICH ANY PROPERTY TO WHICH AN  
129 ENERGY CONVERSION, SOLID WASTE ENERGY CONVER-  
130 SION, OR THERMAL EFFICIENCY IMPROVEMENT CERTIF-  
131 ICATE RELATES IS LOCATED, REVOKE THE CERTIFICATE  
132 WHENEVER ANY OF THE FOLLOWING APPEARS:

133 (A) THE CERTIFICATE WAS OBTAINED BY FRAUD  
134 OR MISREPRESENTATION.

135 (B) THE HOLDER OF THE CERTIFICATE HAS FAILED  
136 SUBSTANTIALLY TO PROCEED WITH THE CONSTRUCTION,  
137 RECONSTRUCTION, INSTALLATION, OR ACQUISITION OF  
138 FACILITIES FOR WHICH THE CERTIFICATE WAS ISSUED.

139 (C) THE STRUCTURE, SITE, OR EQUIPMENT TO  
140 WHICH THE CERTIFICATE RELATES HAS CEASED TO BE  
141 USED FOR THE PRIMARY PURPOSE OF ENERGY CONVER-  
142 SION, SOLID WASTE ENERGY CONVERSION, OR THERMAL  
143 EFFICIENCY IMPROVEMENT AND IS BEING USED FOR A  
144 DIFFERENT PURPOSE.

145 (D) THE STRUCTURE, SITE, OR EQUIPMENT TO  
146 WHICH THE CERTIFICATE RELATES HAS NOT SUBSTAN-  
147 Tially PROVIDED THE ESTIMATED REDUCTIONS IN FUEL  
148 OR POWER USAGE OR CONSUMPTION, IN THE CASE OF A  
149 THERMAL EFFICIENCY IMPROVEMENT FACILITY, OR THE  
150 ESTIMATED SOLID WASTE CONSUMPTION AND ENERGY  
151 PRODUCTION, IN THE CASE OF A SOLID WASTE ENERGY  
152 CONVERSION FACILITY, AS SPECIFIED IN THE OPINION  
153 OF THE DIRECTOR OF THE OHIO ENERGY AND RESOURCE  
154 DEVELOPMENT AGENCY UNDER SECTION 5709.46 OF THE  
155 REVISED CODE.

156 WHERE THE CIRCUMSTANCES SO REQUIRE, THE COM-  
157 MISSIONER, IN LIEU OF REVOKING SUCH CERTIFICATE,  
158 MAY MODIFY THE SAME BY RESTRICTING ITS OPERA-  
159 TIONS.

160 ON THE MAILING OF NOTICE OF THE ACTION OF THE  
161 COMMISSIONER REVOKING OR MODIFYING A CERTIFICATE  
162 AS PROVIDED IN SECTION 5709.48 OF THE REVISED CODE,  
163 THE CERTIFICATE SHALL CEASE TO BE IN FORCE OR  
164 SHALL REMAIN IN FORCE ONLY AS MODIFIED AS THE

165 CASE MAY REQUIRE.

166       Sec. 5709.48. AN ENERGY CONVERSION, SOLID WASTE  
167 ENERGY CONVERSION, OR THERMAL EFFICIENCY IM-  
168 PROVEMENT CERTIFICATE, WHEN ISSUED, SHALL BE  
169 SENT BY CERTIFIED MAIL TO THE APPLICANT AND NO-  
170 TICE OF SUCH ISSUANCE IN THE FORM OF CERTIFIED  
171 COPIES THEREOF SHALL BE SENT BY CERTIFIED MAIL  
172 BY THE TAX COMMISSIONER TO THE COUNTY AUDITOR  
173 OF THE COUNTY IN WHICH ANY PROPERTY TO WHICH  
174 THE CERTIFICATE RELATES IS LOCATED AND SHALL BE  
175 FILED OF RECORD IN HIS OFFICE.

176       NOTICE OF AN ORDER OF THE COMMISSIONER DENY-  
177 ING, REVOKING, OR MODIFYING AN ENERGY CONVERSION,  
178 SOLID WASTE ENERGY CONVERSION, OR THERMAL EF-  
179 FICIENCY IMPROVEMENT CERTIFICATE IN THE FORM OF  
180 CERTIFIED COPIES THEREOF SHALL BE SENT BY CER-  
181 TIFIED MAIL TO THE APPLICANT OR THE HOLDER THERE-  
182 OF AND TO SUCH COUNTY AUDITOR, AS THE CASE MAY  
183 REQUIRE. THE APPLICANT OR HOLDER AND SUCH  
184 COUNTY AUDITOR IN THE PROPER CASE ARE DEEMED  
185 PARTIES FOR THE PURPOSE OF THE REVIEW AFFORDED  
186 BY SECTION 5709.49 OF THE REVISED CODE.

187       Sec. 5709.49. ANY PARTY AGGRIEVED BY THE ISSU-  
188 ANCE OR REFUSAL TO ISSUE, REVOCATION, OR MODIFI-  
189 CATION OF AN ENERGY CONVERSION, SOLID WASTE EN-  
190 ERGY CONVERSION, OR THERMAL EFFICIENCY IMPROVE-  
191 MENT CERTIFICATE MAY APPEAL FROM THE FINDING  
192 AND ORDER OF THE TAX COMMISSIONER TO THE BOARD  
193 OF TAX APPEALS IN THE MANNER AND FORM AND WITH-  
194 IN THE TIME PROVIDED BY SECTION 5717.02 OF THE RE-

195 VISED CODE.

196       Sec. 5709.50. (A) WHENEVER AN ENERGY CONVER-  
197 SION, SOLID WASTE ENERGY CONVERSION, OR THERMAL  
198 EFFICIENCY IMPROVEMENT CERTIFICATE IS ISSUED, THE  
199 TRANSFER OF TANGIBLE PROPERTY FOR INCORPORATION  
200 INTO THE FACILITY, OR PORTION THEREOF, COVERED BY  
201 THE CERTIFICATE, WHETHER SUCH TRANSFER TAKES  
202 PLACE BEFORE OR AFTER THE ISSUANCE OF THE CER-  
203 TIFICATE, SHALL NOT BE CONSIDERED A SALE OF SUCH  
204 TANGIBLE PERSONAL PROPERTY FOR THE PURPOSE OF  
205 THE SALES TAX, OR USE FOR PURPOSE OF THE USE TAX,  
206 IF THE TANGIBLE PERSONAL PROPERTY IS TO BE OR  
207 WAS A MATERIAL OR PART TO BE INCORPORATED INTO  
208 AN ENERGY CONVERSION FACILITY, SOLID WASTE EN-  
209 ERGY CONVERSION FACILITY, OR A THERMAL EFFI-  
210 CIENCY IMPROVEMENT FACILITY, AS APPROPRIATE.

211       (B) FOR THE PERIOD SUBSEQUENT TO THE EFFEC-  
212 TIVE DATE OF A CERTIFICATE AND CONTINUING SO LONG  
213 AS THE CERTIFICATE IS IN FORCE, NO SUCH FACILITY OR  
214 CERTIFIED PORTION THEREOF SHALL BE CONSIDERED:

215       (1) AN IMPROVEMENT ON THE LAND ON WHICH THE  
216 SAME IS LOCATED FOR THE PURPOSE OF REAL PROPERTY  
217 TAXATION;

218       (2) AS USED IN BUSINESS FOR THE PURPOSE OF PER-  
219 SONAL PROPERTY TAXATION;

220       (3) AS AN ASSET OF ANY CORPORATION IN DETER-  
221 MINING THE VALUE OF ITS ISSUED AND OUTSTANDING  
222 SHARES OR THE VALUE OF THE PROPERTY OWNED AND  
223 USED BY IT IN THIS STATE FOR THE PURPOSE OF THE  
224 FRANCHISE TAX.

225 Sec. 5709.51. WHEN AN ENERGY CONVERSION, SOLID  
226 WASTE ENERGY CONVERSION, OR THERMAL EFFICIENCY  
227 IMPROVEMENT CERTIFICATE IS REVOKED BECAUSE IT  
228 WAS OBTAINED BY FRAUD OR MISREPRESENTATION, ALL  
229 TAXES THAT WOULD HAVE BEEN PAYABLE IF NO CER-  
230 TIFICATE IS REVOKED BECAUSE IT WAS OBTAINED BY  
231 FRAUD OR MISREPRESENTATION, ALL TAXES THAT  
232 WOULD HAVE BEEN PAYABLE IF NO CERTIFICATE HAD  
233 BEEN ISSUED SHALL BE ASSESSED WITH MAXIMUM PEN-  
234 ALTIES PRESCRIBED BY LAW APPLICABLE THERETO.

235 Sec. 5709.52. IN THE EVENT OF THE SALE, LEASE, OR  
236 OTHER TRANSFER OF AN ENERGY CONVERSION FACIL-  
237 ITY, SOLID WASTE ENERGY CONVERSION FACILITY, OR  
238 A THERMAL EFFICIENCY IMPROVEMENT FACILITY NOT  
239 INVOLVING A DIFFERENT LOCATION OR USE, THE HOLDER  
240 OF THE CERTIFICATE FOR THE FACILITY MAY TRANSFER  
241 THE CERTIFICATE BY WRITTEN INSTRUMENT TO THE  
242 PERSON WHO, EXCEPT FOR THE TRANSFER OF THE CER-  
243 TIFICATE, WOULD BE OBLIGATED TO PAY TAXES ON SUCH  
244 FACILITY. THE TRANSFEREE SHALL BECOME THE HOLDER  
245 OF THE CERTIFICATE AND SHALL HAVE ALL THE RIGHTS  
246 TO EXEMPTION FROM TAXES THAT WERE GRANTED TO  
247 THE FORMER HOLDER OR HOLDERS, EFFECTIVE AS OF  
248 THE DATE OF TRANSFER OF THE FACILITY OR THE DATE  
249 OF TRANSFER OF THE CERTIFICATE, WHICHEVER IS  
250 EARLIER. THE TRANSFEREE SHALL GIVE WRITTEN NO-  
251 TICE OF THE EFFECTIVE DATE OF THE TRANSFER AND  
252 A COPY OF THE INSTRUMENT OF TRANSFER TO THE TAX  
253 COMMISSIONER AND THE COUNTY AUDITOR OF THE  
254 COUNTY IN WHICH THE FACILITY IS LOCATED.

255 SECTION 2. This act is hereby declared to be an emergency  
256 measure necessary for the immediate preservation of the public  
257 peace, health, and safety. The reason for such necessity lies in  
258 the fact that Ohio is suffering from a severe shortage of natural  
259 gas and fuel oil, and immediate action is necessary to convert  
260 industrial and commercial facilities from natural gas and fuel oil  
261 energy sources to sources of alternative fuels. Therefore, this act  
262 shall go into immediate effect.

*State and Local Archives*

THE OHIO HISTORICAL SOCIETY

Accession:

Testimony, etc. from

Series: 2009

Joint House and Senate

Finance Committee Hearings

Box: 1

on Departmental Budgets

1976

Appx. 000056



# The Ohio Manufacturers' Association



# BULLETIN

100 East Broad Street  
Columbus, Ohio 43215

Telephone  
614-224-5111

NO. 3  
FEBRUARY 4, 1977

## IF YOU HAVE ENERGY PROBLEMS

CALL THE OMA  
614-224-5111

OR STATE ENERGY PROBLEMS CENTER  
614-466-7590

### Energy Crisis

#### MANUFACTURERS COOPERATE DURING ENERGY CRISIS

In forewarning of things to come happened on Friday, January 20, when the Governor notified the OMA President, Thomas R. Ineson, and Energy Coordinator, William J. Costello, to attend a meeting in his office on Saturday morning, January 22.

Following is a chronological report of events which followed during the next 12 days:

#### Tuesday, January 22

9:00 a.m. — Meeting in Governor Rhodes' office of gas officials and representatives of business, industry, and schools with the Governor and legislative leaders.

2:00 p.m. — Meeting of business, industry, and school officials with the Governor and legislative leaders.

#### Wednesday, January 23

9:30 a.m. — Emergency meeting of Ohio Energy and source Development Agency Board to consider emergency contingency plans.

2:00 p.m. — Meeting of electric utility representatives with the Governor and legislative leaders.

6:00 p.m. — Governor Rhodes declared statewide energy emergency and set up a 24-hour Energy Emergency Center (3C). (At request of the Governor, OMA staff members were

asked to man industrial phones at the Center to assist manufacturers with energy problems and to keep him informed of the status of plant closings and unemployment.)

#### Tuesday, January 25

8:00 a.m. — EEC became operational and started assisting in emergency situations.

9:00 a.m. — OMA set up additional clearing house for information and emergency assistance through its office facilities with two staff members operating in addition to the staff members at EEC.

10:00 a.m. — National Weather Service started predicting sub-zero temperatures and blizzard conditions for Friday, Saturday, and Sunday.

3:00 p.m. — Governor was notified by Federal Energy Administration that a "hold" was in effect on all industrial propane — only enough for plant protection and maintenance. Contacted FEA for full text of order and met with Ohio Energy Agency to discuss ramifications.

#### Wednesday, January 26

10:00 a.m. — Standard Oil announced loss of half of its capacity at its Lima refinery adding to shortages of fuel oil.

1:00 p.m. — The Governor requested all industries and others having capability to start burning Ohio coal to alleviate shortages in other fuels.

#### Thursday, January 27

9:00 a.m. — Columbia Gas of Ohio declared peak demand day and ordered all large industrial and commercial customers off

### Also in this Bulletin

- Energy Crisis — Residential Curtailment
- Pollution — Governor Says "Burn Coal"
- Transportation — Plant Receiving Problems
- U. C. — Legislature Suspends Claims Procedure
- Bills Introduced
- What To Write For

the lines except for plant protection gas. Started buying all "self-help" gas from industries. This was followed by similar announcements by Cincinnati Gas & Electric, Dayton Power & Light, West Ohio Gas, and River Gas companies. (East Ohio Gas has been on the "degree day" curtailment since January 17.

6:00 p.m. - After all day consultations with energy officials and all affected parties, the Governor declared a statewide energy crisis. The Energy Emergency Center (EEC) became the Energy Crisis Center (ECC).

#### Friday, January 28

5:00 a.m. - Blizzard conditions hit western Ohio moving eastward. By 10:00 a.m., all portions of the state were affected.

9:00 a.m. - Governor Rhodes requested all commercial establishments in the state, except groceries and drug stores, to close down because of weather and energy shortage by 12:00 noon. The National Guard was put on alert and the Highway Patrol requested people to stay off the roads.

10:00 a.m. - Columbia Gas requested that 68,000 commercial customers close at noon and remain closed for the weekend. Also, all human needs customers turn down thermostats below 65 degrees, specifically hotels and motels.

12:00 noon - Lake Underground Propane Storage (LUPS) announced valves were freezing up, adding to propane shortage for residential use.

2:00 p.m. - The State Highway Patrol reported almost all roads in southwest, northwest and northeast quadrants of the state were impassable adding to problems in delivery of propane and fuel oil.

#### Saturday, January 29

9:30 a.m. - LUPS announced to ECC they were out of a chemical needed to dry the propane as it came out of storage. OMA representative, Bill Costello, working with OERDA representatives and Alcoa personnel in Pittsburgh, found needed 16,000 pounds at Alcoa plant outside of Little Rock, Arkansas. Florida Air National Guard plane was diverted from training mission to pick up chemical and deliver to Cleveland airport. The chemical arrived at LUPS at 11:00 p.m.

#### Sunday, January 30

2:00 p.m. - ECC notified by Fayette County officials they were completely cut off by blowing snow and many residents were out of fuel oil, propane and food.

#### Monday, January 31

7:45 a.m. - Columbia Gas of Ohio directed all industrials and large commercials to stay at plant maintenance levels until 8:00 a.m. on Saturday, February 5, and possibly longer. This was necessary because Columbia's supplier, Columbia Gas Transmission, was directed by the Federal Power Commission to divert 24% of its available gas to other states.

9:00 a.m. - Questions were raised concerning a 10-hour four-day work week and overtime pay. Any manufacturer with a government contract must pay overtime for any hours worked over eight hours under the requirements of the Walsh-Healy Act. This would take congressional action to change. Labor contracts with provisions for overtime for any hours over eight must be renegotiated with the union. State law only calls for overtime for any hours over forty in a week.

#### Tuesday, February 1

9:00 a.m. - The OMA informed Governor Rhodes that over 4,500 manufacturing plants were closed and an estimated 600,000 workers were furloughed.

9:30 a.m. - Some manufacturers started calling in to ask if the Governor had ordered all industry to shut down. **THE GOVERNOR HAS NEVER ORDERED INDUSTRY TO CLOSE DOWN. ON FRIDAY, JANUARY 28, THE GOVERNOR REQUESTED ALL COMMERCIAL, NOT INDUSTRIAL, ESTABLISHMENTS TO CLOSE, EXCEPT GROCERIES AND DRUG STORES, BECAUSE OF WEATHER CONDITIONS.**

#### Wednesday, February 2

9:00 a.m. - The Ohio Petroleum Marketers Association reported the fuel oil and propane situation was still deteriorating with little or no deliveries of fuel oil being made to industrial customers.

11:00 a.m. - Columbia Gas of Ohio and Dayton Power and Light made an announcement that they were extending the curtailments on all industrials and large commercial users, except for plant maintenance and protection, from 8:00 a.m. Saturday, February 5 to 8:00 a.m., Wednesday, February 9. Cincinnati Gas and Electric Company extended its curtailments until Saturday, February 12.

#### Thursday, February 3

8:00 a.m. - The Governor and OERDA were notified by the FEA that the hold on all industrial propane was still in effect and only propane used for plant protection could be delivered to industrial customers whether or not a supplier has surplus product after all Priority I customers are serviced.

**URGENT - AT THE SUGGESTION OF THE OMA STAFF AND COUNSEL, JACOB O. KAMM, CHAIRMAN OF THE BOARD OF TRUSTEES OF THE ASSOCIATION, HAS DIRECTED THAT ALL MANUFACTURERS BE ADVISED TO IMMEDIATELY DEVELOP CONTINGENCY PLANS TO PREPARE FOR THE TOTAL SHUT OFF OF NATURAL GAS TO INDUSTRY FOR 30 TO 45 DAYS. EACH MANUFACTURER MUST ASSESS HIS INDIVIDUAL SITUATION AND PREPARE FOR ALL EVENTUALITIES, INCLUDING THE COMPLETE "MOTH BALLING" OF ALL FACILITIES AND THE RESULTANT ECONOMIC IMPLICATIONS OF SUCH ACTIONS.**

*(Editor's note: OMA representative, Bill Costello, who personally handled over 200 calls on Thursday, Friday and Saturday, January 27 - 29, worked with representatives of the Ohio National Guard, Ohio Energy and Resource Development Agency, Ohio Department of Economic and Community Development, Ohio Petroleum Marketers Association, Ohio Highway Patrol, Ohio L. P. Gas Association, U. S. Corps of Engineers, U. S. Coast Guard, the Federal Energy Administration, and Columbus and Southern Ohio Electric Company in manning the Energy Crisis Center.*

*Costello stated, "Many of these people were on call 24 hours a day and most spent 10 to 12 hours a day at the ECC and took phone calls at home the rest of the time."*

*"I don't suppose most of the citizens of Ohio will ever realize the job these dedicated people performed during the past week. They just weren't a voice on the end of the phone - they became personally involved and some of them spent an hour trying to get fuel to a homeowner who was out. As far as I am concerned, they did an outstanding job and it's a good thing Governor Rhodes had the foresight to set up such an operation before the really bad weather hit."*

*It was the opinion of both Robert Ryan, OERDA Director, and James Duerk, OECD Director, that the manufacturers of Ohio were better prepared than any other segment of Ohio's economy to handle both the weather problems and the energy shortage.*

*Although it was estimated that over 600,000 employees of Ohio manufacturers were affected by either the weather or the energy shortage, it must be remembered that more than 650,000 workers either didn't miss any work or were only marginally affected.)*

**MANUFACTURERS ASK PUCO TO APPROVE RESIDENTIAL CURTAILMENT**

At its meeting on Wednesday, February 2, the Public Utilities Commission of Ohio (PUCO) rejected The Ohio Manufacturers' Association's request for consideration of a special residential curtailment plan.

The reasons given by the Commission for turning down the OMA proposal were:

- (1) under federal policy, residential and other Group 1 customers had to be served, which included plant maintenance and protection gas (the Commission is mistaken as plant maintenance and protection gas is in Group 2 as provided in the guidelines of the Federal Power Commission); and
- (2) the State had to follow the federal policy and that if the OMA wanted to change that policy it had to be done in Washington (this is also an error in that the State is not subject to the federal policy and the Public Utilities Commission of Ohio can do whatever it wants in allocating gas within the State once the state allocations are made by the Federal Power Commission).

The Association will continue to press for the eventual possibility of residential curtailment to assure that the manufacturers of Ohio have available to them at least the minimal amount of gas needed for plant maintenance and plant protection to prevent further damage to machinery and equipment.

**Pollution**

**GOVERNOR SUSPENDS ENVIRONMENTAL RESTRICTIONS DURING ENERGY CRISIS**

On Thursday, January 27, 1977, Governor James A. Rhodes issued an executive order suspending the applicability and enforcement of various Environmental Protection Agency regulations to facilitate the conversion to and use of alternate fuel capabilities, (other than natural gas) specifically, coal and fuel oil for "such purposes as space heating and steam and electric power production."

The action by the Governor suspending the regulations was preceded on the same day by his declaration of a statewide "energy crisis" which empowered him to "issue, amend, or suspend any rule of any state agency or political subdivision if (he) determines that such action is necessary to minimize the adverse impact of the energy crisis on the people of the State."

The specific Ohio EPA regulations suspended (using their earlier better known numerical designations) include:

- AP-3-07 Control of Visible Air Contaminants from Stationary Sources.
- AP-3-11 Restriction on Emission of Particulate Matter from Fuel Burning Equipment.
- AP-3-14 Restriction on Emissions of Sulfur Dioxide from Use of Fuel.
- AP-7-06 Control of Nitrogen Oxide Emissions from (B), (C) (2) and (3) Oil and Coal Burning Equipment.

Although there is nothing in the Executive Order specifying the term of the suspension, the law provides that the suspended regulations shall be reinstated "upon expiration of the energy crisis."

What this means to manufacturers - First, the Executive Order specifically provides that "no person is authorized . . . to cease to operate or fail to operate in a normal fashion any air pollution control device . . . unless and until authorized to do so by the Director of Environmental Protection."

Secondly, the Governor's Executive Order probably does not bind the Federal government in any way. It is arguable that Ohio's federally approved state implementation plan (not including Ohio's existing sulfur dioxide regulations AP-3-14) could be considered to have the force and effect of federal law making the suspended regulations enforceable by the U. S. EPA even during their term of suspension of Ohio law. Additionally, the sulfur dioxide control regulations promulgated by U. S. EPA in August, 1976, are not affected by the Governor's Order.

Thirdly, only those regulations mentioned above, which apply to fuel burning equipment, are suspended. Other regulations, such as those applying to process and fugitive emissions are not suspended.

To date, there has been no formal response by the U. S. EPA to the Governor's action. Informal reactions of individual federal officials, however, are sympathetic to the serious energy problems confronted by Ohio industry and that "prosecutorial discretion" would be used so as not to conflict with the objectives of the Governor during the "energy crisis."

**Transportation**

**RECEIVING DOCKS SHOULD BE MANNED OR OTHER ARRANGEMENTS MADE DURING EMERGENCY**

A traffic snarl of another kind is developing in Ohio which could seriously delay or prevent delivery of essential consumer and industrial goods if some important steps are not taken now.

Ohio Trucking Association Executive Vice President Donald B. Smith said recent commercial and industrial plant closings have created an abnormal backup of truck shipments which could not be delivered.

Smith explained that "in most cases, a truck will make a delivery to more than one plant in a trip. If the shipment nearest the trailer door cannot be unloaded due to a closed facility, then the entire truckload must be returned to the terminal to be rearranged, rerouted and rescheduled." Most individual loads are too large to move aside to reach another load behind," Smith added.

"What we are asking is for each closed facility to have one employee on duty at the dock to insure that deliveries can be completed," Smith said. "The trucking industry is looking for cooperation from shippers to smooth over the transportation of important goods during the crisis."

About 66 percent of Ohio communities depend entirely on trucks for receiving and shipping all goods on a regular timely basis. In order to retain efficient transportation of vital goods throughout the winter, the Ohio Trucking Association has asked for cooperation to prevent a worsening of the traffic snarl.

## Unemployment Compensation

### CLAIMS PROCEDURE SUSPENSION RUSHED THROUGH LEGISLATURE

H. B. 157, Camera (D-Lorain), an emergency bill suspending normal procedural requirements governing unemployment benefit applications, was introduced in the House at 2:00 p.m., Tuesday, February 1, and was cleared by the Senate for signature by the Governor three hours later. The purpose of the measure was to attempt to reduce the undue delay experienced by claimants in receiving their benefit checks during periods of abnormally high unemployment. That delay in 1975, during the height of the recession, was 9-10 weeks. Estimates of the current unemployment stemming from the energy crisis have been as high as 1 to 1½ million.

Normally, when an employee is laid off and applies for J. C. benefits, employers are sent forms requesting information concerning the claimant's length of employment, wages, and reason for separation. The employer is granted 10 days to complete and return the forms before a determination is made as to eligibility for benefits. The current problem is that when the plants close down completely because of the lack of energy, there is no one to receive and complete the forms causing further delays in processing and issuing benefits.

The following are the procedures required by Section 141.28, Ohio Revised Code, which the bill permits the Administrator to suspend:

- (1) Notice must be sent to each employer who is an interested party in the claim requesting information concerning the reason the claimant is unemployed. Each such employer has the right to attend a fact-finding hearing prior to the Bureau's making a determination on the claimant's eligibility.
- (2) The Administrator must request wage information from base period employers which is needed in calculating the amount and duration of a claimant's benefits.
- (3) The claimant and base period employers must be promptly notified when a claim has been established.
- (4) The Administrator must examine initial claims and each continued claim to determine whether any ineligibility provisions of the law are applicable.
- (5) Whenever a base period or subsequent employer of a claimant raises an eligibility question about any continued claim in a prescribed manner, the Administrator must hold a fact-finding hearing on the issue prior to allowing the claim.

The bill specifies that if the suspension of these provisions and adoption of emergency procedures results in a claimant's being overpaid or underpaid by the Bureau, the determination of the claim can be readjusted any time during the claimant's benefit year" (the 52 weeks beginning with the week the

claimant first files for benefits). This provision grants the employer a full year to "appeal" an incorrect determination. Currently, he has only 14 days to appeal such a determination.

If the overpayment results from fraudulent misrepresentation on the part of the claimant, the bill specifies that the Bureau may go to court to recover overpaid benefits and may declare the claimant ineligible for twice the number of fraudulently claimed weeks of benefits during the ensuing two years. If the claimant has been overpaid, the overpayment may be deducted from future benefits to which he is entitled or recovered directly from the claimant within three years. The bill provides that any overpayment shall be charged to the "mutualized account" until it is collected (that is, to all employers jointly) rather than to the individual employer for whom the claimant worked.

## Bills Introduced

- S. B. 41 — *Valiquette*. Prohibits overtime from being worked except on a voluntary basis and revises state labor laws.
- H. B. 127 — *Colonna*. Provides tax incentives to private industry to encourage the recovery of energy from solid waste.
- H. B. 139 — *Branstool*. Allows ERDA to reallocate fuels for production of field crops.
- H. B. 148 — *Fauver*. Creates enforcement powers during energy emergencies and provides incentives for energy-saving home improvements.
- H. B. 150 — *I. Thompson*. Revises maximum hours and working condition law.

## What to Write For

### INFO ON NEW TOXIC SUBSTANCES ACT

The U. S. Environmental Protection Agency has published a ten-page summary of the new federal Toxic Substances Control Act (PL 94-469), which gives EPA extensive regulatory authority over thousands of existing chemical substances and mixtures, as well as over new, potentially toxic or environmentally harmful chemical substances. Manufacturers or users of chemicals interested in learning more about this important new federal law can contact the OMA office for a copy of the EPA summary, together with a copy of EPA's tentative schedule for rulemaking to implement various provisions of the new law. For copies of PL 94-469, members can contact the Office of Public Affairs (A-107), U. S. Environmental Protection Agency, 401 M Street, S.W., Washington, D. C. 20460, or their congressman.

— END —

NEWS RELEASE

FOR IMMEDIATE RELEASE

FEBRUARY 2, 1977

Columbus - State Senator Neal F. Zimmers, Jr. today announced that the Senate Energy and Public Utilities Committee will open an investigation of the gas procurement and management policies of Ohio utility companies, commencing the week of February 7.

Senator Zimmers indicated the purpose of the investigation is to determine the causes and the scope of the present natural gas shortage in Ohio.

"Hopefully, these hearings will bring to light causes for Ohio's current crisis situation, and enable the Senate to develop legislation which could prevent a reoccurrence of the disaster we are now experiencing this winter."

- End Release -

# House bill clears way for utilities to use coal

COLUMBUS (AP) — A House committee began hearings yesterday on a bill encouraging Ohio utilities to use native, high sulfur coal despite federal air pollution restrictions on the product.

The bill's chief sponsor, State Rep. Arthur R. Bowers, D-98, of Steubenville, said the U.S. Environmental Protection Agency has agreed "to look the other way" during the current energy crisis.

He also told the House Utilities, Insurance and Financial Institutions Committee the federal standards could be relaxed, or that future technology might provide the means for Ohio to comply with EPA sulfur dioxide emission standards.

Bowers' bill would prohibit the state's electrical utilities from passing along to their customers the additional costs of coal purchased outside the state because of its low sulfur content.

Bowers' measure was one of three-energy related measures to come before the committee. The others also were held over for further hearings.

They would provide state subsidies to pay 25% of the utility bills of totally handicapped homeowners, along with all Ohioans 65 years old

and older, whether they rent or own their own homes; and establish powers for the state attorney general to enforce energy-related conservation measures ordered by the governor when he declares a statewide energy crisis.

Ohio Department of Education officials told the House Finance Committee yesterday a bare bones survival budget would force some cuts in the administration of all state level school programs.

Martin W. Essex, state superintendent of public instruction, said mere survival for the department would mean a 26% reduction in the required level of services.

The education department originally requested more than \$9.6 million for the two-year period beginning July 1. Gov. James A. Rhodes' budget calls for \$8.4 million for education and the survival level was pegged at \$7.1 million, less than current spending.

The amounts do not include subsidies to local school districts for basic aid and special programs. Those funds will be considered separately by the committee.

Budget hearings will continue today.

## INTERCEPTED LETTERS

MESSRS. LUKENS, CELESTE  
Akron

Dear Gubernatorial Candidates:

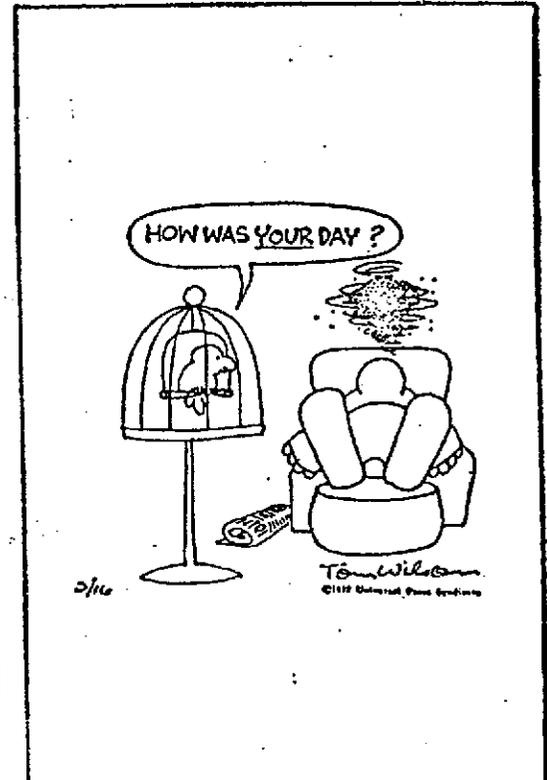
WHO wants to be gubernator any-way?

AKRON Jr.

Beacon Journal 2/15

ZIGGY

By Tom Wilson



## Legislator Gears To Fight Gas Hike

State Rep. Mike Stinziano, D-Columbus, said Monday he expects Columbia Gas of Ohio to attempt to raise homeowners' utility bills to pay for high-cost natural gas used by large industries.

HE WARNED the gas firm that such charges are illegal under a state law enacted last year.

Stinziano said he is prepared to take Columbia to court if necessary to ensure that residential customers are charged only for natural gas that is purchased for home use.

"I WILL NOT stand by and let the gas company charge residential customers twice what they had been paying for natural gas unless there is absolutely no other gas available for home use," Stinziano said.

The legislator claimed unregulated emergency gas that will be purchased for industries will probably cost up to \$3 per 1,000 cubic feet, about double the cost of gas earlier bought for use by homeowners.

STATE OF OHIO  
**Executive Department**

OFFICE OF THE GOVERNOR

*Columbus*

EXECUTIVE ORDER

DECLARING ENERGY EMERGENCY

WHEREAS, Section 122.86, Revised Code, authorizes the Governor to declare an energy emergency when he finds that "the health, safety or welfare of the citizens of this State is threatened by reason of an actual or impending acute shortage in usable energy resources", and

WHEREAS, the supply of usable natural gas available to the State of Ohio has been severely reduced by available natural gas supplies and the extreme cold weather, and

WHEREAS, information has been presented to me by Ohio natural gas utility companies and related or affected persons which indicates that curtailments of natural gas to their users will effect the health, safety and welfare of Ohio citizens who receive and use natural gas,

NOW THEREFORE, I JAMES A. RHODES, Governor of the State of Ohio, pursuant to the authority granted me by Section 122.86, Revised Code, do hereby declare a natural gas energy emergency in the State of Ohio until further notice. I further order that all State offices and buildings shall close off unused spaces, reduce temperatures to 65 degrees during the day and 55 degrees at night, and use alternate fuels where possible.



Attest:

*Ted W. Brown*  
Secretary of State

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 23rd day of January, in the year of our Lord one thousand nine hundred and seventy-seven

*James A. Rhodes*  
GOVERNOR

Filed in the Office of the Secretary of State at Columbus, Ohio

on *January 24, 1977* A.M. *10:55*  
TED W. BROWN  
SECRETARY OF STATE

Per *Patricia A. 700*

STATE OF OHIO  
**Executive Department**

OFFICE OF THE GOVERNOR

*Columbus*

*451-0384  
Manny Daniels  
Call aft. 8:00*

EXECUTIVE ORDER

DECLARING ENERGY EMERGENCY

WHEREAS, Section 122.86, Revised Code, authorizes the Governor to declare an energy emergency when he finds that "the health, safety or welfare of the citizens of this State is threatened by reason of an actual or impending acute shortage in usable energy resources", and

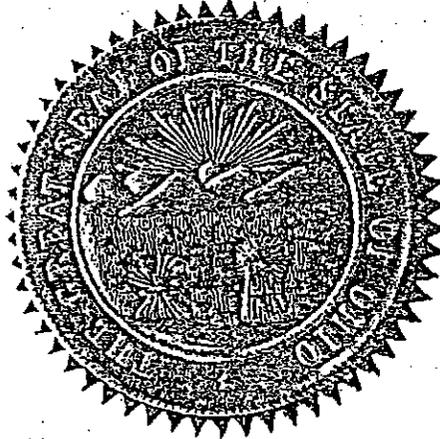
WHEREAS, Section 122.84, Revised Code, gives the Ohio Energy and Resource Development Agency the authority to devise contingency plans to conserve, allocate, use, increase the supply of or to take whatever steps are necessary, in the event of an energy emergency, to assure the fairest and most advantageous use of energy or of any energy source or supply for the benefit of all of the people of the State consistent with orders of the Public Utilities Commission of Ohio with respect to the conservation, allocation, or use of natural gas, and

WHEREAS, the supply of natural gas available to the Dayton Power and Light Company service area has been severely reduced by available natural gas supplies and the extreme cold weather, and

WHEREAS, the Dayton Power and Light Company has filed information with the Public Utilities Commission of Ohio detailing such curtailments of natural gas to its users as will effect the health, safety and welfare of the citizens who receive natural gas from the Dayton Power and Light Company service area,

NOW THEREFORE, I, JAMES A. RHODES, Governor of the State of Ohio, pursuant to the authority granted me by Section 122.86, Revised Code, do hereby declare an energy emergency in the area which receives its natural gas from the Dayton Power and Light Company and do further

order the Ohio-Energy and Resource Development Agency to implement its contingency plan developed pursuant to Section 122.84, Revised Code, which will preserve the continued supplying of natural gas to all residences and to alleviate shortages to all other users in the Dayton Power and Light Company service area.



IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 20th day of January, in the year of our Lord one thousand nine hundred and seventy-seven.

*James A. Rhodes*  
GOVERNOR  
*Thomas J. Moyer*

Attest:

*Ted W. Brown*  
Secretary of State

Thomas J. Moyer  
Authenticating Officer for  
GOVERNOR JAMES A. RHODES  
(Ohio Rev. Code Sec 107.15)

Filed in the Office of the Secretary of State at Columbus, Ohio

on *January 20, 1977* <sup>A.M.</sup> P.M. *4:30*

TED W. BROWN  
SECRETARY OF STATE

Per *Patricia A. Zelle*

From: Office of the Governor

FOR IMMEDIATE RELEASE

January 20, 1977

Governor James A. Rhodes, in the face of continuing and intensifying shortage of gas supplies, today issued an executive order declaring that an emergency is in existence in the service area of Dayton Power and Light Company.

Ohio energy officials, monitoring the situation, also issued an alert for the entire state, which is one stage short of declaration of a statewide emergency.

Governor Rhodes also called on C. Luther Heckman, chairman of the Public Utilities Commission of Ohio (PUCO) and Robert S. Ryan, director of the Energy Resource Development Agency (ERDA) to launch an immediate investigation of the entire gas supply situation, with special emphasis on identifying gas wells within the state that currently are capped and not adding to the resources during the emergency.

Under the Ohio contingency plans, the declaration of an emergency could lead at ERDA's order to school closings and limited operation of retail stores, shopping centers and other commercial installations.

The alert affecting the rest of the state calls for voluntary cooperation by stores and schools in reduction of gas consumption under the possibility of a statewide emergency which would make the mandated limitations effective throughout Ohio.

"There is a possibility of having to go to a statewide emergency if the gas supply to the rest of the state continues to deteriorate," the Governor said.

(more)

Appx. 000067

Curtailments already in effect on industry are being continued, the Governor explained.

"In order that Ohio will have sufficient gas to minimize the hardships in this critical period, we are asking for the complete cooperation of every citizen."

"Conservation efforts now will help preserve as many jobs as possible through this critical situation," the Governor added.

TO: William Chavanne, Clerk of the Senate  
FROM: Nancy Daniels, Administrative Assistant to Senator McCormack  
DATE: January 20, 1977

RE: ENERGY EMERGENCY IN THE DAYTON POWER AND LIGHT SERVICE AREA  
ENERGY ALERT FOR THE REST OF THE STATE OF OHIO

Governor Rhodes has issued an Executive Order declaring an energy emergency in the Dayton Power and Light Company service area and an energy alert for the rest of the state (see attached Executive Order and press release from Governor Rhodes.)

The energy emergency for the Greater Dayton area means that the following requirements, issued by C. Luther Heckman, chairman of the Public Utilities Commission of Ohio, and Robert S. Ryan, director of the Energy Resource Development Area, must be followed in the DP&L service area:

- 1.) ALL SCHOOLS (PRIMARY AND SECONDARY) MUST CLOSE AS SOON AS POSSIBLE FOR THIRTY (30) CALENDAR DAYS.
- 2.) ALL BUSINESSES, INCLUDING DOCTOR'S OFFICES, PRIVATE CLINICS, STORES, MUST LIMIT THEMSELVES TO A FORTY (40) HOUR WEEK.
- 3.) ALL RESIDENTIAL CUSTOMERS ARE BEING REQUESTED TO TURN THEIR THERMOSTATS DOWN TO 65° F.
- 4.) ALL INDUSTRIES ARE ON A 50% CUTBACK ON THEIR ALLOCATION FOR THE ENTIRE WINTER SEASON. IF THE INDUSTRY HAS ALREADY USED UP THEIR ENTIRE ALLOCATION UNDER CURTAILMENT, THERE WILL BE NO NEW GAS FORTHCOMING.

Heckman and Ryan will meet with all those affected at 9a.m. Friday, January 21, 1977, in the Dayton Council Chambers in Dayton City Hall. School officials, businesses, city officials, DP&L representatives, legislators and others have been urged to attend to discuss the energy emergency contingency plan (items #1-4) and the affect on the community. Possible exceptions to the rules, such as pharmacies and doctors' offices, will be discussed.

The rationale for calling the energy emergency under Section 122,86 of the Revised Code is to protect the "health, safety or welfare of the citizens."

The Governor has placed the rest of the state under an energy alert which calls for voluntary compliance with the contingency plan mandated for Dayton. Ryan and Heckman have been meeting with the State School Board and have requested that all school systems presently closed because of the bad weather remain closed.

Heckman indicated that there is a "strong possibility" that the entire state would be placed on an energy emergency as soon as one week or within two or three weeks. He also indicated that if Columbia Gas service area were forced into an energy emergency he would recommend that the Governor declare on for the entire state. Columbia services about 60 counties in Ohio.

While the present situation has been caused by severe supply problems for natural gas, the contingency plan issued for Dayton applies to all forms of energy. Ryan indicated that when one energy source is in severe straits, all forms of energy sources are threatened.

*Summary*  
488-7500  
x710  
TOM HEINE 433-4900  
JOHN MAXWELL 275-5294  
NORM 275-8795  
(419) 874-3111  
1,200,000 papers  
#473,000

In addition to the energy emergency and the energy alert, the Governor has also called for:

- 1.) The PUCO and ERDA to begin an immediate inventory of all capped gas wells in Ohio to make sure that all available natural gas is being used and to ensure full production. These wells are those not owned by public utility companies.
- 2.) Review the Columbia Gas situation especially as it relates to charges made recently that the company is experiencing an inability to provide natural gas.

Heckman and Ryan said they will be meeting with legislative leaders next week to discuss legislative involvement in the present situation, especially as it relates to the school closings.

Heckman and Ryan stressed several times during their joint press conference that Ohio is in its present situation because of the unprecedentedly cold and harsh winter we have experienced this year. They said there was no way we could have controlled such a situation.

# Columbia crosses fingers to get by

By DEAN SCHOTT  
Press Ohio Bureau

COLUMBUS—Columbia Gas of Ohio has not asked the Federal Power Commission for help even though the utility reports it doesn't have enough natural gas for its residential users and other priority customers for the winter.

"It's something that so obviously needs to be done by the company," Assistant Atty. Gen. Samuel Randazzo of the Public Utilities Commission of Ohio said yesterday. "There must be a logical reason why they have not done it."

Columbia spokesman William Chaddock replied that company officials believe the 4.2 billion cubic foot shortage exists only on paper. "Over the long haul, we feel the shortage can be offset by residential conservation," he said. "Therefore, we have not appealed to the FPC for priority gas."

But Randazzo said, "If the company has a paper shortfall, then its officials must be misleading somebody along the way. When you send information to the governor indicating a shortfall, I don't understand how it can be just on paper."

PUCO Chairman C. Luther Heckman said he is worried about Columbia relying on turned-down thermostats alone as getting it through the winter.

Earlier this month, Governor Rhodes asked the state's gas utilities if they need additional supplies for their priority one users — homes, hospitals, nursing centers, small commercial establishments and buildings needing minimum amounts for protection from extreme cold.

Columbia and Dayton Power & Light (DP&L) were the only two who said they did, and the governor asked the FPC for more than 8 billion cubic feet of emergency natural gas.

DP&L followed up the governor's request with its own plea for more natural gas before the FPC. Randazzo said, "Columbia indicated they were going to file a request with the FPC, but they never did."

That inaction, he said, was why the governor has sent follow-up telegrams to the FPC and why the PUCO has sent staff attorneys to Washington to argue for more natural gas.

Robert S. Ryan, director of the Ohio Energy and Resource Development Agency, said he expects the FPC to rule on the governor's request for emergency gas for Ohio this week.

Meanwhile, Chaddock said Columbia has been looking for additional supplies in the Southwest United

States. So far, he said, the utility has not acquired any. "Nothing is locked up, but we are still negotiating," he added.

Marvin E. White, chairman of the Columbia Gas Distribution Cos., said his firm has lost out on some natural gas in the state because industries have offered producers higher prices for the fuel.

"It's simply a case of the producers accepting the most profitable offer," White said.

Columbia has been offering \$1.90 per thousand cubic feet, but he said industries are willing to pay more than \$2 under the self-help program and are paying for the wells, pipelines and other facilities needed to deliver the gas.

"If producers prefer to sell their gas under this program rather than others we have available, that is their choice," White said.

Meanwhile, the PUCO ordered the Columbia to supply information about gas supply by tomorrow so the regulatory commission can comply with a directive of Governor Rhodes.

The PUCO said three gas utilities have complied with a request for the same information, but Columbia, the state's largest gas distributor, has balked at releasing the information because it concerns "projected" data.

Last week, Rhodes ordered PUCO chairman C. Luther Heckman to "immediately" investigate whether the state's major gas distributors would reap "excessive profits" during Ohio's energy crisis.

PUCO asked for information from Columbia Gas of Ohio, the Dayton Power and Light Co., the Cincinnati Gas and Electric Co. and the East Ohio Gas Co.

# Rhodes gas well plan scored

By DEAN SCHOTT  
Ohio Scripps-Howard Bureau

One of Gov. James A. Rhodes' answers to the Ohio natural gas crisis is to drill twice as many wells in the state this year, but government and private officials say the goal is not within reach.

"We can make up much of our shortfall in natural gas supply by drilling more wells and keep both our schools and plants open," Rhodes said Tuesday.

Officials considered the goal laudable, but said the chances of going from 2,000 new wells in 1976 to 4,000 this year is unattainable.

"I HATE TO contradict the governor, but it wouldn't be possible," said Ted DeBrosse, acting chief of the oil and gas division in the Ohio Department of Natural Resources. "We could increase the number of wells, but we can't double them."

A private producer who asked to remain anonymous said, "It would be an impossibility to double the number of wells in a year. There's no way it could happen."

PETER SUSEY, deputy director of the Ohio Energy and Resource Development Agency (ERDA) said, "I think the governor's call is a realistic goal, but I am somewhat careful of the time in which it could be achieved. I think we could get up to 3,000 wells in this year."

Rhodes put Susey in charge of the project to increase the number of wells and to expand the self-help program which allows industries and schools to develop their own supplies of natural gas. The governor told him that any barriers to the program should be removed.

There apparently is one impediment to increasing natural gas production that cannot be removed immediately. It's the lack of drilling rigs and equipment to develop new wells.

DEBROSSE SAID, "The shortage of drilling rigs is not limited to Ohio. The demand for them is very high and we would run into problems trying to get more."

They said every available rig was used in 1976 and production of both natural gas and oil increased. DeBrosse reported that nearly 27,000 wells were operating last year, a jump of 1,772 over 1975.

Natural gas production in Ohio went

from 85 billion cubic feet in 1975 to 88 billion cubic feet in 1976, based on an estimate made by the U.S. Bureau of Mines last month. The state's production accounts for 7 per cent of its total annual need.

THE PROVEN NATURAL gas reserve remaining beneath Ohio ranges from one to 1.3 trillion cubic feet, and the state's producers have been largely successful in getting to the reserves. Nine of every 10 times they sink a well, they find natural gas. That compares with one out of every 10 in the Southwest U.S.

DeBrosse said the success rate in Ohio is misleading. "The risk is low and so is the amount of production," said Kirk Jordan, executive vice president, Ohio Oil and Gas Association. "Ohio ranks about sixth in the nation in the drilling of wells, but stands about 20th in production."

MEANWHILE, Columbia Gas Transmission Corp. announced Tuesday it can restore to its 80 customers in seven states about 10.7 billion cubic feet (BCF) of gas trimmed from supplies earlier this winter. The additional gas was made available through emergency gas purchases under the Emergency Natural Gas Act of 1977 and Federal

Power Commission procedures. It will help meet the requirements of high priority consumers such as homes and hospitals.

The 10.7 BCF of gas offsets a similar amount the corporation reduced as of Jan. 1, 1977. The new gas will return to 632 BCF the amount of gas Columbia Transmission promised its customers last fall for the November-March period.

THE COMPANY said in a two-page statement that despite the restoration of the 10.7 BCF, the gas shortage this winter is far from over.

"Our present estimates show that our customers, based on the overall remaining amount of gas they have coming to them from Columbia in February and March, could be 25 BCF short of meeting their normal high priority requirements," the company said.

The statement said the additional gas will provide its customers with almost half the additional gas they need to meet their first priority needs.

"Our customers must continue their own actions to offset their shortfall and our action today should help them do that more effectively," the company said.

B-2

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TUES., FEB. 15, 1977

## Fight For Ohio Coal Can Hasten Solution

A LABOR-oriented committee has joined others in efforts to make use of Ohio's most plentiful energy resource — coal.

This bodes well although it is not surprising because labor officials are very much aware 7,000 jobs or more hang in the balance if Ohio's high sulfur coal mines are closed.

But a concerted effort will hasten solutions to the serious air pollution problem caused by most Ohio coal.

THE GOVERNOR'S Labor Advisory Committee on Energy recommends a drastic increase in the severance tax on Ohio coal with the revenues used for energy solutions.

Committee suggestion is to increase the tax, now four cents a ton on coal. Other state severance taxes range up to \$1.40. This would garner approximately \$70 million a year in Ohio.

The labor advisory group supported Gov. James A. Rhodes for his suspension of state Environmental Protection Agency restrictions on Ohio coal during the energy crisis.

It also took the practical position of

urging the federal EPA to extend deadlines for industrial compliance with antipollution emission standards.

The committee's study on energy made such other interesting recommendations to support additional research for shale gas as an energy source, restrict businesses and merchants to 40-hour work weeks, tax breaks for conservation measures and the developing of a state energy code.

But the key to the study is labor joining hands with business and other consumers to fight for expanded usage of Ohio coal.

TWO CAUTION signals may be raised by the recommendations for a very sizeable hike in the severance tax, derived from minerals mined in Ohio.

While the Ohio severance tax is the lowest in the nation, a huge increase could nullify the competitive position of Ohio mines because of the pollution problem.

Ohio coal must be kept competitive with western coal and it must be acknowledged the hiked severance tax would be passed along to consumers.

# Ohio put under energy emergency

By George E. Condon Jr.  
Plain Dealer Bureau

COLUMBUS — Gov. James A. Rhodes declared last night a statewide energy emergency. Legislative leaders called for a special session of the General Assembly deal with the worsening shortage of natural gas.

Warning that "if the people of Ohio will not cooperate with this, we're

courting disaster," Rhodes pleaded for voluntary conservation measures by residential gas users, businessmen and schools.

The governor stopped short, however, of embracing a drastic energy contingency plan, informally adopted earlier in the day by the Ohio Energy Resource and Development Agency (ERDA). It would close schools, cur-

tail business hour and impose residential conservation.

Rhodes said he did not want to adopt mandatory controls but to test voluntary measures.

"We will analyze the situation day by day," Rhodes said. "This is the first step."

In addition to recommending resi-

dential conservation — the cornerstone of his policy — Rhodes took these actions with the concurrence of Senate President Pro Tem Oliver Ocasek, D-27, of Northfield, and House Speaker Vernal G. Riffe Jr., D-89, of New Boston.

•Asked the federal Environmental Protection Agency to relax until June 1 emission standards that prevent

industry from burning high-sulfur Ohio coal.

•Put national guardsmen on standby for possible use in "human and logistic emergencies," such as evacuating communities that run out of gas or loading oil from barges stuck in the icy Ohio River.

•Asked President Carter to ap-

## Ohio under energy emergency

### ★ From First Page

prove the special allocation of additional natural gas for Ohio.

•Asked all mayors to declare local emergencies, call on residents to conserve fuel and establish emergency headquarters to handle possible problems.

•Created an Energy Emergency Management Committee, and ordered a crisis office to be opened in the Department of Economic and Community Development.

The key to the emergency plan, however, was the recommendations for fuel conservation.

Rhodes, with Ocasek and Riffe, made these recommendations:

- ✓ Reduce all residential heating to 65 degrees in the day and 55 at night.
- ✓ Close all unused rooms in homes.
- ✓ Supplement home heating by using fireplaces or alternate forms of heating if available.
- ✓ Ask vacationing homeowners to turn their thermostats down to 45 degrees.
- ✓ Keep stores at 68 degrees during the day and 55 at night.

✓ Have retailers look for alternate fuels.

✓ Keep office buildings at 65 degrees during the day and 55 at night.

✓ Close unused rooms in state offices.

✓ Have state officials look for alternate fuels for state offices.

✓ Have all schools reduce temperatures to 65 degrees.

Those voluntary measures contrast sharply with the ERDA contingency plan, which recommended statewide closings of all schools for 30 days; limiting bars, restaurants, supermarkets, shopping malls and offices to 40 hours a week; turning off hot water in rest rooms; not heating swimming pools, and canceling all school athletic events.

That mandatory plan, if approved by ERDA tomorrow, will be presented to the legislature, which is returning tomorrow, a week early.

Riffe and Ocasek said energy committees in each chamber will meet today to discuss energy efforts.

Tomorrow, they said, a resolution supporting the governor's emergency proclamation will be considered. Then the legislature will begin

consideration of more drastic energy conservation plans if the voluntary effort fails.

Ocasek said the legislature will pass no bills without discussion with the governor.

Meanwhile, Rhodes has said he is considering asking for statewide television and radio time to appeal for voluntary conservation.

Now in his 11th year as governor, Rhodes has never before asked for such TV and radio time.

"We believe that if all the people will cooperate, we believe we can save between 10% to 12% of the natural gas that's being used in the homes in Ohio today," Rhodes said.

"We're in a most precarious position in the state of Ohio," he said, "but we have to take one step at a time, and we have to call upon the largest user of natural gas in Ohio first to act, and that happens to be the residents."

He added: "We're asking them to cooperate, and if we can get that, I think it will answer some of the problems."

Discussion earlier in the day at a lengthy ERDA meeting, however,

indicated that much more than voluntary conservation will be needed if Ohio is to survive the winter without a disaster.

State Rep. Thomas J. Carney, D-71, of Youngstown, an ERDA member, noting predictions of colder than-normal weather until April, he said:

"If it stays 30% colder than normal like it has for most of the winter, crisis wouldn't be the word for it. Disaster would be the word for it."

Carney said the gas shortage in Ohio required mandatory controls and said that "the public health may require confiscation of available supplies."

William G. Ferguson, ERDA chairman, recommended that Rhodes declare a crisis rather than an emergency, which is one step below a crisis.

In a crisis, the governor has power to put into effect mandatory conservation plans without legislative approval.

Ferguson said a mandatory plan "will have trouble succeeding unless there's an enormous reception by the public."

...ect Congress- 1  
...am J. Keating, 49; 1  
now publisher of the Cincin- t  
nati Enquirer and a close s  
friend of Rhodes. The latter  
has expressed no interest, at 2  
least publicly. 1

Realistically, now is not the d  
best time to expect Rhodes, ir  
who has a budget battle li

... division, which  
... not properly measuring

AUDITOR decided to question the entire  
parking procedure matter through a legal opinion.

May said his section does not question paying for  
state vehicles, but other problems have developed,  
such as in areas where employees pay a monthly fee  
to park on state-leased property

## Glenn proposes plan for emergency gas

By George P. Rasanen  
Pipin Dealer Bureau

**PLAIN DEALER 1/19**  
WASHINGTON — Sen. John H.  
Glenn, D-O., introduced last night a  
bill to guarantee emergency alloca-  
tion of natural gas supplies to states  
threatened with factory shutdowns  
and school closings because of severe  
weather.

Glenn's bill would give the presi-  
dent power to declare a natural gas

emergency and allocate gas from  
interstate pipelines to crisis areas.

Glenn said the allocation system  
would be "strictly a protection  
against the possibility that some  
states would be paralyzed while  
others suffer comparatively little  
hardship."

His bill would authorize interstate  
pipelines to negotiate presumably  
higher prices than the federally  
regulated \$1.42 per million cubic  
feet.

Under present law, interstate  
prices can be deregulated for 60 days  
to meet emergencies.

Under Glenn's bill, if pipelines  
failed to quickly negotiate a price,  
the Federal Power commission would  
set it.

The Glenn plan would expire May  
31.

A similar bill is expected to be  
introduced in the House. Speedy  
hearings are expected.

1720 - Journal 2/11

# Energy crisis solution lies in coal, governor claims

Gov. James Rhodes told the Ohio Newspaper Association Convention Thursday night the solution to Ohio's energy problem is coal.

"There is no natural gas in abundance for Ohio," Rhodes said. "We have to have a compromise. I am trying to save the state of Ohio. The solution is going to be in coal.

"This is just not the winter of 1977," he said. "It's going to be worse in 1978 and could carry over into 1979 or 1980.

"WE'RE NOT OUT OF IT because it's going to get worse," Rhodes said. "There will be very little natural gas this summer."

Rhodes reiterated that coal, which Ohio has in abundance, seems to be the only answer and a compromise must be made with environmentalists and the U.S. Environmental Protection Agency.

Rhodes also said the state cannot depend on alternate fuels, such as oil.

"THE FUEL OIL WE burn today would have been the gasoline of tomorrow," said Rhodes. "And we're going to have a gas shortage this summer."

Bill Casstevens, Cleveland, director of District 2 of the United Auto Workers union and one of those who received the Governor's Award, echoed Rhodes' fears.

"This gas shortage, real or contrived, is going to plague us for time and time to come," said Casstevens.

The award, the state's highest honor, was presented to 23 persons by Rhodes.

This year is the 28th anniversary of the awards, presented to persons "for excellence of achievement benefiting mankind and promoting the quality of life for all Ohioans."

Nominees must have been born in Ohio or have lived in the state for several years.

The award is a bronze plaque bearing the Great Seal of the State of Ohio.

The recipients are:

• Marion Rombauer Becker, Cincinnati,

posthumous award in recognition of her work as an author, conservationist and patron of the arts.

• The Most. Rev. Joseph L. Bernardin, Cincinnati, Archbishop of the Roman Catholic Diocese of Cincinnati.

• Tina Marie Bischoff, Columbus, long distance swimmer.

• William C. Boehm, Cleveland, choral director.

• Erma Bombeck, Dayton, columnist and author.

• Bill Casstevens, Cleveland, director of Region 2 of the United Auto Workers union.

• William J. DeLancey, Cleveland, president of Republic Steel Corp.

• Phyllis Diller, Lima, comedienne.

• George Forbes, Cleveland, president of Cleveland City Council.

• James Harlow, Cincinnati, executive secretary of the Greater Cincinnati Building Trades Council.

• Eileen Heckart, Columbus, actress.

• Harry Holliday Jr., Middletown, president of Armco Steel Corp.

• John Jakes, Dayton, novelist.

• George H. Kaul, Ashtabula, chairman Premix, Inc.

• Mary Wells Lawrence, Youngstown, chairman, Wells, Rich, Green, Inc., New York.

• Samuel H. Miller, Cleveland, vice chairman, Forest City Enterprises, Inc.

• Earel D. Neikirk, Elyria Chronicle-Telegram.

• Paul Schroeder, Elyria Chronicle-Telegram.

• Dr. Earl S. Sherard Jr., Columbus, pediatrician and professor of pediatrics at Ohio State University.

• Robert H. Snyder, Columbus, Cleveland Plain Dealer.

• Iris Jennings Vail, Cleveland, for community betterment.

• Irvin F. Westheimer, Cincinnati, founder of Big Brothers.

B2

THE CINCINNATI ENQUIRER

Sunday, February 13, 1977

## Rhodes Calls For Split-Up Of Charter-Dem Coalition

Two members of the local Democratic Party steering committee want an end to the coalition between Democrats and the Charter Committee in city politics.

In a letter dated February 9 and addressed to "Dear Fellow Democrat," Jerome F. Luebbers and W. Emerson Rhodes said "the eventual result of maintaining the coalition is to encourage a splintering of the Democratic Party in Hamilton County."

During a telephone interview Saturday, Rhodes said the Charter Committee has the benefits of association with the party for city races, then turns against the party in county races.

Luebbers said it is time for new faces in the Democratic Party and with Charter Committee sponsorship "we only get the same old faces. It's time for Democrats to stand on their own."

The coalition was first formed in 1969, when the Republicans still controlled Cincinnati City Council. In 1971, the coalition won a majority of the nine council seats and has held the majority ever since.

Both Rhodes and Luebbers are Delhi Township Trustees, in addition to being steering committee members.

Prior to the November general election, the Charter Committee endorsed four Democrats and eight Republicans for county office.

In October, Rhodes, particularly irked by the committee's endorsement of county commission incumbent Allen Paul, a Republican, over Democrat Ed Wolterman, first called for an end to the coalition.

Mayor James Luken, a Democrat, said Rhodes' most recent appeal will be just as successful as his October efforts.

"There was no support for it then and there's none now," Luken said.

Luken said the coalition is effective and suggested that Rhodes was just "using the press." He released this over the weekend because he knew it was a slow news day.

Sidney Well, Democratic Party co-chairman, said he was very much against Rhodes' proposal but refused to discuss it until the February 25 steering committee meeting where the call to end the coalition will be on the agenda.

Maggie Quinn, Charter Committee chairwoman, said she believes Rhodes' public efforts are a matter of internal business for the party.

# New blizzards rage; gas crisis can last

By United Press International

New blizzards attacked battered Great Lakes cities Tuesday and a top government official warned the nation's natural gas crisis can last into the summer.

Indiana Gov. Otis R. Bowen asked President Jimmy Carter to put his state on a disaster basis. Buffalo, N.Y., went under a state of emergency with its second blizzard in four days. A state of emergency was declared in North Carolina — the 13th state to do so.

**THE COLD STAYED** on in the nation's eastern half and energy supplies dwindled.

The number of workers idled by energy-saving cutbacks or other weather-connected layoffs in 17 states mounted to at least 2.2 million — possibly as many as 2.5 million.

The toll of weather-attributed deaths since a blizzard boiled up in the midlands Thursday night climbed to at least 69, including 31 in New York

state, 21 in Indiana and eight in Ohio. Many of the victims froze to death in blizzard-trapped cars.

In a freeze which seemed to have no ending, there were these developments:

- Federal Power Commissioner John Holloman warned the worst of the natural gas crisis may be still to come. The nation faces emergency conditions through the spring, he said, and factories may have to stay idle into the summer for want of gas.

- The House passed President Carter's emergency legislation to get natural gas into homes that need it — but at consistently higher prices. The action was without enthusiasm. Many members said it did not go far enough. A similar bill was passed by the Senate Monday.

- The state of California, unafflicted by the freeze, ordered its 20 million residents to turn down thermostats and put on sweaters to help out the rest of the country. The Public Utilities Commission's order said the heat should be turned off entirely in swimming pool heaters. The commission did not say how it intended to enforce the order. A spokesman said Californians should feel morally obliged to comply.

- Even though Mayor Stanley Wakowsky declared a state of emergency in snow-swamped Buffalo and 500 National Guardsmen were out trying to clear the stuff away, many residents were past caring. Mrs. Thomas Gutteridge of suburban Amhurst said. "We're stuck in the house any-

way. There's no moving. We can get out our door but we can't get down the street."

- The Agriculture Department said farmers were battling frozen ponds and pipes to get water to their cattle. "Farmers in many parts of the nation reported hay supplies shrinking fast," the department's weekly crop weather report said.

Layoffs hit Ohio hardest. State officials said between 1.2 million and 1.5 million persons were idled there and predicted the number of temporarily unemployed would "increase dramatically" by the end of this week.

4044

(Special Session)

(Amended House Joint Resolution No. 1)

## JOINT RESOLUTION

Relative to the Governor's January 23, 1977 declaration of a statewide energy emergency for natural gas.

WHEREAS, major distributors of natural gas in Ohio have stated there is a significant shortage of natural gas available to Ohio for the remainder of the winter season of 1976-1977, and

WHEREAS, natural gas is a principal energy source vital to Ohio's educational, commercial, industrial, residential, and social life, and

WHEREAS, Governor James A. Rhodes has declared, pursuant to section 122.86 of the Revised Code, a statewide energy emergency due to a lack of natural gas availability, and

WHEREAS, Speaker Vernal G. Riffe, Jr., and President Pro Tempore Oliver Ocasek have called a Special Session of the Ohio General Assembly to assist the Governor during this natural gas emergency situation, and

WHEREAS, industrial and commercial consumers of natural gas are presently subject to curtailment orders of supplies of natural gas while residential consumers, who consume in excess of 50% of Ohio's natural gas supply, are under no curtailment orders; now therefore be it

*Resolved*, that the General Assembly urges all Ohio individuals and all Ohio businesses who are consumers of natural gas to comply with the Governor's voluntary program to conserve Ohio's available existing natural gas supplies; and be it further

*Resolved*, that the General Assembly urges all retail stores, restaurants, grocery stores, taverns, recreational facilities, theaters, shopping malls and office buildings which do not use natural gas to heat their establishments, to join in this statewide effort to conserve by turning back their thermostats to 60° and by letting the public clearly know what energy sources are being used to heat their establishments; and be it further

AM. H. J.

*Resolved*  
elected office  
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Adopted **JA**

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File No. 1.

Appx. 000077

AM. H. J. R. No. 1

4045

*Resolved*, that the General Assembly, the Governor, and other elected officials work together with the President of the United States to solve this winter's natural gas shortage.

*Vernon W. Riffe*

Speaker of the House of Representatives.

*Richard J. Celeste*

President of the Senate.

Adopted JANUARY 25, 1977.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 26th day of January, A.D. 1977.

TED W. BROWN,  
Secretary of State.

File No. 1.

Appx. 000078

ing in any way by the taxpayer, either by combining, rectifying, or refining, or adding thereto;

(2) "Foreign trade zone" means a general purpose foreign trade zone or a special purpose subzone for which, pursuant to the "Act of June 18, 1934," 48 Stat. 19 U.S.C.A. 81a, as amended, a permit for foreign trade zone status was granted before January 1, 1992, including expansions of and additions to such a zone that are adjacent to the zone as it existed on January 1, 1992, but excluding special purpose subzones for which a permit is granted on or after such date.

(B) Tangible personal property, including such property when used solely for display or demonstration purposes, shall be considered to be in the stream of foreign commerce and shall be exempt from personal property taxation while held in a foreign trade zone.

**HISTORY:** 137 v H 890 (Eff 8-1-78); 140 v H 291 (Eff 7-1-83); 143 v H 96 (Eff 1-1-90); 145 v S 5. Eff 3-16-93.

#### Cross-References to Related Sections

Foreign trade zone corporation, RC § 1743.11.

#### Text Discussion

Tax on corporations. 1 Course Chapter 1

#### Research Aids

Exemption of goods in foreign trade zone:

**O-Jur3d:** Tax § 74

### [ENERGY CONVERSION AND THERMAL EFFICIENCY FACILITIES]

## § 5709.45 Definitions.

As used in sections 5709.45 to 5709.52 of the Revised Code:

(A) "Energy conversion" means either of the following:

(1) The conversion of fuel or power usage and consumption from natural gas to an alternate fuel or power source, other than propane, butane, naphtha, or fuel oil;

(2) The conversion of fuel or power usage and consumption from fuel oil to an alternate fuel or power source, other than natural gas, propane, butane, or naphtha.

(B) "Energy conversion facility" means any additional property or equipment designed, constructed, or installed in a commercial building or site or in an industrial plant or site necessary for the primary purpose of energy conversion.

(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.

(D) "Thermal efficiency improvement facility" means 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.

(E) "Solid waste" means such unwanted residual solid

or semi-solid material as results from industrial operations, including those of public utility companies, and commercial, distribution, research, agricultural, and community operations, including garbage, combustible or noncombustible, street dirt, and debris.

(F) "Solid waste energy conversion" means the conversion of solid waste into energy and the utilization of such energy for some useful purpose.

(G) "Solid waste energy conversion facility" means any property or equipment designed, constructed, or installed in or on a commercial building or site, an industrial plant or site, or an electric light, gas, or natural gas company plant or site for the primary purpose of solid waste energy conversion.

**HISTORY:** 137 v H 467 (Eff 7-13-78); 138 v S 239. Eff 5-29-80.

#### Ohio Administrative Code

Certification of energy conversion, solid waste energy conversion, or thermal efficiency improvement facilities under RC §§ 5709.45 to 5709.52. OAC 5703-1-09.

#### Comparative Legislation

Exemption for energy conversion and thermal efficiency:

FL—Stat Ann § 196.012

IL—ILCS ch 35 § 200/10-5 et seq

IN—Code § 6-1.1-12-26

MI—Comp Laws Ann § 211.7h

NY—Real Prop Tax Law § 487

#### Research Aids

Facilities relating to energy use:

**O-Jur3d:** Tax § 671

#### Law Review

Tax incentives for the construction of conversion and conservation facilities. Note. 4 UDayLRev 477 (1979).

## § 5709.46 Application for energy conversion or thermal efficiency certificate.

Application for an energy conversion, solid waste energy conversion, or 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 a descriptive list of all equipment and materials acquired or to be acquired by the applicant for the purpose of energy conversion, solid waste energy conversion, or 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; in the case of a solid waste energy conversion facility, the application shall include an estimate of the facility's solid waste consumption capacity and energy output. Prior to issuing an energy conversion, solid waste energy conversion, or 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 esti-

mated reductions in fuel or power usage or consumption, in the case of a thermal efficiency improvement facility, or the estimated solid waste consumption and energy production, in the case of a solid waste energy conversion 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 energy conversion, solid waste energy conversion, or 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 5709.50 of the Revised Code only for that portion of such energy conversion facility that is necessary for the primary purpose of energy conversion, for such solid waste energy conversion facility used exclusively for solid waste energy conversion, or for 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.

If application is made for an energy conversion facility, solid waste energy conversion facility, or thermal efficiency improvement facility upon which construction was completed between January 1, 1975, and July 13, 1978, the effective date of the certificate issued on such facility shall be the date of the making of the application; however, the issuance of a certificate on such facility shall not entitle its holder to recover any taxes payable prior to the effective date of the certificate on the facility or any equipment or materials incorporated therein.

**HISTORY:** 137 v H 467 (Eff 7-13-78); 140 v H 100. Eff 2-24-83.

#### Cross-References to Related Sections

Energy conversion, thermal efficiency defined, RC § 5709.45. Hearing on application; grounds for modifying or revoking certificate, RC § 5709.47.

#### Ohio Administrative Code

Certification of energy conversion, solid waste energy conversion, or thermal efficiency improvement facilities under RC §§ 5709.45 to 5709.52. OAC 5703-1-09.

#### Research Aids

Facilities relating to energy use:

**O-Jur3d:** Tax §§ 670, 672

#### CASE NOTES AND OAC

1. (1990) Converting solid waste into a material to conserve an energy source is not converting solid waste into energy for purposes of exemption under RC § 5709.46: *Cleveland Trinidad Paving Co. v. Limbach*, 52 OS3d 101, 556 NE2d 181.

### § 5709.47 Hearing on application; grounds for modifying or revoking certificate.

Before issuing any certificate, the tax commissioner

shall give notice in writing by mail to the auditor of the county in which the facilities to which the certificate relates are located and shall afford to the applicant and to the auditor an opportunity for a hearing. On like notice to the applicant and opportunity for a hearing, the commissioner shall, on his own initiative or on complaint by the county auditor of the county in which any property to which an energy conversion, solid waste energy conversion, or thermal efficiency improvement certificate relates is located, revoke the certificate whenever any of the following appears:

(A) The certificate was obtained by fraud or misrepresentation.

(B) The holder of the certificate has failed substantially to proceed with the construction, reconstruction, installation, or acquisition of facilities for which the certificate was issued.

(C) The structure, site, or equipment to which the certificate relates has ceased to be used for the primary purpose of energy conversion, solid waste energy conversion, or thermal efficiency improvement and is being used for a different purpose.

(D) The structure, site, or equipment to which the certificate relates has not substantially provided the estimated reductions in fuel or power usage or consumption, in the case of a thermal efficiency improvement facility, or the estimated solid waste consumption and energy production, in the case of a solid waste energy conversion facility, as specified in the opinion of the director of development under section 5709.46 of the Revised Code.

Where the circumstances so require, the commissioner, in lieu of revoking such certificate, may modify the same by restricting its operations.

On the mailing of notice of the action of the commissioner revoking or modifying a certificate as provided in section 5709.48 of the Revised Code, the certificate shall cease to be in force or shall remain in force only as modified as the case may require.

**HISTORY:** 137 v H 467 (Eff 7-13-78); 140 v H 100. Eff 2-24-83.

#### Cross-References to Related Sections

Energy conversion, thermal efficiency defined, RC § 5709.45.

#### Research Aids

Facilities relating to energy use:

**O-Jur3d:** Tax §§ 672, 674

### § 5709.48 Certificate and orders sent by certified mail; notice to county auditor.

An energy conversion, solid waste energy conversion, or thermal efficiency improvement certificate, when issued, shall be sent by certified mail to the applicant and notice of such issuance in the form of certified copies thereof shall be sent by certified mail by the tax commissioner to the county auditor of the county in which any property to which the certificate relates is located and shall be filed of record in his office.

Notice of an order of the commissioner denying, revoking, or modifying an energy conversion, solid waste energy conversion, or thermal efficiency improve-

ment certificate in the form of certified copies thereof shall be sent by certified mail to the applicant or the holder thereof and to such county auditor, as the case may require. The applicant or holder and such county auditor in the proper case are deemed parties for the purpose of the review afforded by section 5709.49 of the Revised Code.

**HISTORY:** 137 v H 467. Eff 7-13-78.

#### Cross-References to Related Sections

Energy conversion, thermal efficiency defined, RC § 5709.45.  
Hearing on application; grounds for modifying or revoking certificate, RC § 5709.47.

#### Research Aids

Facilities relating to energy use:

**O-Jur3d:** Tax § 672

### § 5709.49 Appeal to board of tax appeals.

Any party aggrieved by the issuance or refusal to issue, revocation, or modification of an energy conversion, solid waste energy conversion, or thermal efficiency improvement certificate may appeal from the finding and order of the tax commissioner to the board of tax appeals in the manner and form and within the time provided by section 5717.02 of the Revised Code.

**HISTORY:** 137 v H 467. Eff 7-13-78.

#### Cross-References to Related Sections

Applicant or holder and county auditor deemed parties for appeal, RC § 5709.48.  
Energy conversion, thermal efficiency defined, RC § 5709.45.

#### Ohio Administrative Code

Board of tax appeals—

Hearings. OAC 5717-1-15.

Mediation conferences. OAC 5717-1-21.

Notice of appeal. OAC 5717-1-04.

#### Research Aids

Facilities relating to energy use:

**O-Jur3d:** Tax § 672

### § 5709.50 Tax exemptions for facilities and transfers of property.

(A) Whenever an energy conversion, solid waste energy conversion, or thermal efficiency improvement certificate is issued, the transfer of tangible property for incorporation into the facility, or portion thereof, covered by the certificate, whether such transfer takes place before or after the issuance of the certificate, shall not be considered a sale of such tangible personal property for the purpose of the sales tax, or use for purpose of the use tax, if the tangible personal property is to be or was a material or part to be incorporated into an energy conversion facility, solid waste energy conversion facility, or a thermal efficiency improvement facility, as appropriate.

(B) For the period subsequent to the effective date of a certificate and continuing so long as the certificate is in force, no such facility or certified portion thereof shall be considered:

(1) An improvement on the land on which the same is located for the purpose of real property taxation;

(2) As used in business for the purpose of personal property taxation;

(3) As an asset of any corporation in determining the value of its issued and outstanding shares or the value of the property owned and used by it in this state for the purpose of the franchise tax.

**HISTORY:** 137 v H 467. Eff 7-13-78.

#### Cross-References to Related Sections

Application for energy conversion or thermal efficiency certificate, RC § 5709.46.

Energy conversion, thermal efficiency defined, RC § 5709.45.

#### Ohio Administrative Code

Certification of energy conversion, solid waste energy conversion, or thermal efficiency improvement facilities under RC §§ 5709.45 to 5709.52. OAC 5703-1-09.

#### Text Discussion

Deeds. 3 **Course** Chapter 35

Sale of goods. 1 **Course** Chapter 7

Tax on corporations. 1 **Course** Chapter 1

#### Research Aids

Exemptions for conversion facilities and transfers of property:

**O-Jur3d:** Tax §§ 378, 670, 1058

### § 5709.51 Penalty for obtaining certificate by fraud or misrepresentation.

When an energy conversion, solid waste energy conversion, or thermal efficiency improvement certificate is revoked because it was obtained by fraud or misrepresentation, all taxes that would have been payable if no certificate had been issued, shall be assessed with maximum penalties prescribed by law applicable thereto.

**HISTORY:** 137 v H 467. Eff 7-13-78.

#### Cross-References to Related Sections

Energy conversion, thermal efficiency defined, RC § 5709.45.

#### Research Aids

Revocation of conversion certificate:

**O-Jur3d:** Tax §§ 674, 1058

### § 5709.52 Transfer of certificate.

In the event of the sale, lease, or other transfer of an energy conversion facility, solid waste energy conversion facility, or a thermal efficiency improvement facility not involving a different location or use, the holder of the certificate for the facility may transfer the certificate by written instrument to the person who, except for the transfer of the certificate, would be obligated to pay taxes on such facility. The transferee shall become the holder of the certificate and shall have all the rights to exemption from taxes that were granted to the former holder or holders, effective as of the date of transfer of the facility or the date of transfer of the certificate, whichever is earlier. The transferee shall give written notice of the effective date of the transfer and a copy

**5717.02 Appeals from final determination of the tax commissioner; procedure; hearing**

Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

Upon the filing of a notice of appeal, the tax commissioner or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner or director, together with all evidence considered by the commissioner or director in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it their findings for affirmation or rejection. The board may order the appeal to

be heard upon the record and the evidence certified to it by the commissioner or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper.

(2002 S 200, eff. 9-6-02; 2000 S 287, eff. 12-21-00; 2000 H 612, eff. 9-29-00; 1994 S 19, eff. 7-22-94; 1985 H 321, eff. 10-17-85; 1985 S 124; 1983 H 260; 1981 H 351; 1977 H 634; 1976 H 920; 1973 S 174; 1953 H 1; GC 5611)

#### HISTORICAL AND STATUTORY NOTES

**Pre-1953 H 1 Amendments:** 119 v 34; 118 v 344, § 15; 106 v 260, § 54; 103 v 794, § 32

**5717.04 Appeal from decision of board of tax appeals to supreme court**

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of budget and management, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall

be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

(1987 H 231, eff. 10-5-87; 1983 H 260; 1977 H 634; 1973 S 174; 125 v 250; 1953 H 1; GC 5611-2)

#### HISTORICAL AND STATUTORY NOTES

**Pre-1953 H 1 Amendments:** 119 v 34; 118 v 344, § 15; 116 v 104; 107 v 551