

IN THE SUPREME COURT OF OHIO

Carroll E. Newman	:	Case No. 07-1054
	:	
Adams County Auditor	:	
	:	
Appellant,	:	
	:	
vs.	:	On Appeal from the Ohio Board of Tax Appeals
	:	
William W. Wilkins	:	
[Richard A. Levin]	:	
Tax Commissioner	:	Ohio Board of Tax Appeals Case Numbers
State of Ohio	:	2002-P-170, 171 and 172
	:	
and	:	
	:	
Cincinnati Gas & Electric Company	:	FOURTH BRIEF OF APPELLEES/CROSS
	:	APPELLANTS CINCINNATI GAS &
and	:	ELECTRIC COMPANY,
	:	DAYTON POWER & LIGHT COMPANY
Dayton Power & Light Company	:	AND COLUMBUS SOUTHERN POWER
	:	COMPANY
and	:	
	:	
Columbus Southern Power Company	:	
	:	
Appellees.	:	

FOURTH BRIEF OF APPELLEES/CROSS APPELLANTS

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I. INTRODUCTION

Appellant's brief styled Combined Brief of Appellant/Cross Appellee is the Third Brief filed with the Court in this matter. The advocacy in that Third Brief is reasonably described as "attack and ignore." Appellant shows a propensity to ignore the context of the evidence he attacks; he ignores facts in the record when convenient; he ignores Ohio statutes and case law when they contradict his conclusions; he ignores the BTA's discretion in assigning weight to evidence. It is Appellant's disregard and failure to discuss these matters that could mislead the Court and compels Appellees to respond.

All of Appellees' responses address either jurisdictional issues¹ or questions of law and fact that relate to Appellees' Cross Appeal. For example, whether Appellant properly preserved in his notices of appeal to the BTA and the Court legal issues involving "primary purpose," "waste heat," and "waste steam" will affect the Court's consideration of the Cross Appeal (*i.e.*, whether the circulating water system should be certified). Appellees also respond to Appellant's criticism of the credibility and reliability of documentary and testimonial evidence adduced at trial because this evidence supports Appellees' position on Cross Appeal.

II. JURISDICTIONAL MATTERS

As recently as a few months ago, this Court thoroughly explained the law relating to notices of appeal and jurisdiction in tax cases before the BTA and the Court. Lovell et al. v. Wilkins (2007), 116 Ohio St. 3d 200, 2007-Ohio-6054, ¶ 35. There, the Court held that:

For more than 50 years, this court's decisions interpreting the specificity requirement of R.C. 5717.02 have made clear that a notice of appeal filed with the BTA must explicitly and precisely recite the errors contained in the Tax Commissioner's final

¹ Advancing jurisdictional claims in Brief was authorized by the Court in a prior ruling on a motion filed in this case. Newman v. Levin (2007), 116 Ohio St.3d 1205, 2007- Ohio-5507, ¶ 5.

determination.” *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, 840 N.E.2d 1065, ¶ 41. We have also explained that any alleged errors not specified in the notice of appeal are not reviewable by the BTA or by this court. See, e.g., *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, ¶ 44 (“This court can consider claims of error only when they were properly raised before the BTA”); *Cleveland Elec. Illum. Co. v. Lindley* (1982), 69 Ohio St.2d 71, 75, 23 O.O.3d 118, 430 N.E.2d 939 (“Under R.C. 5717.02, a notice of appeal does not confer jurisdiction upon the Board of Tax Appeals to resolve an issue, unless that issue is clearly specified in the notice of appeal”); *Lenart v. Lindley* (1980), 61 Ohio St.2d 110, 114, 15 O.O.3d 152, 399 N.E.2d 1222 (“R.C. 5717.02 is a jurisdictional enactment and * * * adherence to the conditions and procedure set forth in the statute is essential”); *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, 583, 53 O.O. 430, 120 N.E.2d 310, quoting Black’s Law Dictionary (4th Ed.1951) (R.C. 5717.02 requires the appellant to “specify” any alleged errors, and “specify” means “to mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize; or **673 to distinguish by words one thing from another’ ”).

The Court’s pronouncement is clear and comprehensive. It has application to all of Appellees’ jurisdictional claims.

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.**

The crux of Appellant’s defense of his notice of appeal to the BTA is that the notice was sufficiently non-specific such that it now can be interpreted as encompassing “waste heat” arguments made in brief. Appellant implies that his choice to use overly broad and general language in his pleading is the solution to potential jurisdictional problems. Appellant is wrong. R.C. 5717.02 and this Court’s decisions make clear that a lack of specificity in pleadings is the jurisdictional problem, not the solution.

Whether Appellant’s notice of appeal was sufficiently broad or non-specific that it later could be interpreted as encompassing virtually any argument under applicable statutes is not the

proper question required by R.C. 5717.02. Indeed, in Queen City Valves, Inc. v. Peck (1954), 161 Ohio St. 579, 120 N.E.2d 310, syllabus, the Court held that a notice of appeal to the BTA that does not enumerate in specific and definite terms the precise errors complained of but uses language so broad and general that it might be employed in nearly every case is not sufficient.

The question properly stated is whether an “objective and reasonable reader” would be “put on notice” from Appellant’s pleading that Appellant intended to argue that the Commissioner failed to apply the proper definition of “waste heat.” See Cousino Construction Co. v. Wilkins (2006), 108 Ohio St.3d 90, 2006-Ohio-162, ¶ 41 (applying an “objective and reasonable reader” standard with regard to interpreting notices of appeal); Castle Aviation, Inc. v. Wilkins (2006), 109 Ohio St.3d 290, 2006 -Ohio- 2420, ¶ 39 (stating that the purpose of the notice of appeal to the BTA is to put a party on notice of alleged errors). To wit: did Appellant’s notice of appeal to the BTA “mention specifically,” “state in explicit terms” or “particularize” his “waste heat” claim of error? The Court need only review Appellant’s notice of appeal to answer that question “no.”

Appellant offered “summaries” of the assignments of error made to the BTA that he deemed pertinent to his defense. Rather than risk any potential mischaracterization, Appellees quote the actual errors assigned.

2. The machinery, equipment and property were not designed, constructed and installed for the primary purpose of thermal efficiency improvement, but were in fact necessary for the operation of the power plant regardless of the thermal efficiency aspects, if any, of the machinery, equipment and property. In effect, the thermal efficiency was incidental and not primary.
5. The Tax Commissioner failed to apply the exemption most strongly against the applicant, in violation of law.
8. The findings of the engineers used by the Tax Commissioner were in error.

Neither the term “waste heat”² nor its statutory citation (i.e., R.C. 5709.45(C)) appear anywhere in these paragraphs. Satullo v. Wilkins (2006), 111 Ohio St.3d 399, 2006-Ohio-58576, ¶22-24 (holding that R.C. 5717.02 requires a notice of appeal to specify either the language of the statute or the statutory citation that is to be the subject of the legal dispute); Cousino, supra, ¶37-38. No “reasonable reader” of these assignments of error would be “put on notice” of Appellant’s intention to dispute the Commissioner’s definition of “waste heat” because there is no mention of “waste heat.” Silent notice is an oxymoron. R.C. 5717.02 cannot be stretched to allow Appellant to simply select in brief any one of a number of unmentioned elements within an uncited statute. This would provide no notice at all.

Appellant’s reference to “thermal efficiency” in assignment of error no. 2 falls short as well. This entire dispute before the Court involves thermal efficiency as a general matter. Thermal efficiency is the ultimate legal issue. Reference to that general term specifies nothing because it relates to everything. It covers all potential legal or factual issues in all thermal efficiency certificate disputes. For this reason, it fails the required standards of R.C. 5717.02. Queen City Valves, supra.

Appellant also claims that his reference in assignment of error no. 8 to the “findings of the engineers” somehow specifies “waste heat” as the particular issue he intended to raise. But the engineer offered specific findings on a multitude of issues all of which generally relate to thermal efficiency. Accordingly, Appellant’s claim covers all issues and specifies nothing. Such

² Appellant curiously emphasizes assignment of error no. 4 to the Court apparently because it employs the term “waste heat.” See Section II.B.1 infra for a full recitation of that assignment of error no. 4 to the Court. Rather than support Appellant, however, assignment of error no. 4 illustrates how the issue of “waste heat” should have been raised at the BTA. Appellant’s explicit and particular use of the term “waste heat” in assignment of error no. 4 to the Court highlights Appellant’s complete failure to raise “waste heat” as an issue at the BTA. Appellant cannot rehabilitate that failed claim in his pleading to the Court.

an assignment of error requires the reader to guess which potential issue out of many possible is the actual subject of the appeal to the BTA. As such, the language used by Appellant does not satisfy the specificity requirements of R.C. 5717.02. Queen City Valves, supra.

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.**

To be sure, Appellant raised the issue of "primary purpose" in his notice of appeal to the BTA. However, he failed to preserve that issue in the assignments of error made to the Court as required by R.C. 5717.04. It follows that "primary purpose" is not an issue properly before the Court for review. Castle Aviation, Inc., supra; Lawson Milk Co. v. Bowers (1961), 171 Ohio St. 418, 171 N.E.2d 495.

Appellant defends his notice of appeal to the Court by attempting to exploit the fact that his assignments of error are nonspecific. Appellant referred to three assignments of error in his notice of appeal to the Court in defense of his position. Unfortunately, Appellant offered only a "summary" of those assigned errors making it difficult to distinguish between the notice of appeal language and Appellant's argument. Rather than quarrel, Appellees simply quote the assigned errors below for the Court's ease of review.

2. It was an error and abuse of discretion for the Board of Tax Appeals to approve a tax exemption application when the taxpayer failed to prove that the property to be exempted satisfied each and every requirement of the exemption statute.
3. It was an error and abuse of discretion for the Board of Tax Appeals to fail to apply a strict scrutiny test and view the evidence most strongly against the exemption.

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

From these paragraphs, it is evident that Appellant's notice of appeal does not contain the phrase "primary purpose." They also do not contain a citation to R.C. 5709.45(D) which imposes the "primary purpose" requirement. The language used at the Court stands in sharp contrast to assignment of error no. 2 at the BTA which clearly specifies "primary purpose." Instead, in assignment of error no. 2 to the Court, Appellant generally attempts to invoke "each and every" statutory requirement as his own specified issue. This type of all-inclusive general pleading is jurisdictionally defective under Ohio law.

Moreover, the "tax exemption" statute referred to by Appellant in his assignment of error no. 2 to the Court logically refers to R.C. 5709.50. Despite Appellant's attempt to direct the Court's attention to R.C. 5709.45 in his "summary" of that assigned error, it is R.C. 5709.50 and R.C. 5709.50 alone that provides a tax exemption for certified equipment. R.C. 5709.50 is void of any reference to "primary purpose" or "essentiality" of property.

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

The issue of "waste steam" is important because the BTA affirmed the Commissioner's certification of the condenser in reliance on its finding that the condenser functioned to recover and use "waste steam" thereby reducing fuel consumption. Appellant argues against the BTA's "waste steam" holding in brief. Yet, neither the word "waste steam" nor its statutory citation, R.C. 5709.45(C), appear in Appellant's notices of appeal to either the BTA or to the Court. Apparently, Appellant believes that his assignment of error no. 4 to the Court regarding "waste heat" somehow retroactively vested the BTA, and now vests the Court with jurisdiction over

Appellant's "waste steam" position he argues in brief. See FN 2, supra. Appellant's word substitution contradicts Ohio law regarding the specificity of pleadings. Lovell, supra, ¶35.

Appellant's failure to mention "waste steam" illustrates other deficiencies. Even assuming the all-inclusive general language chosen by Appellant covers the separate legal issues of "waste steam" and "waste heat," Appellant makes no effort to tie those legal issues to equipment in Appellees' certificate applications. Making this tie is important because the various pieces of equipment have different and varying functions. The BTA affirmed certification of the equipment under differing waste heat or waste steam legal theories. Appellees are left to guess which legal issue is raised relative to which pieces or groupings of equipment. Appellant again tries to justify specific claims made in brief by citing to language in his pleading that is so general and broad as to cover all issues arising in any thermal efficiency improvement case.

Appellees appreciate that the Court is not disposed to being hypertechnical in denying jurisdiction in these types of matters. However, the express statutory mandates of R.C. 5717.02 and R.C. 5717.04 require certain minimal conditions of notice and specificity to confer jurisdiction. Those minimum specificity requirements are not met here.

III. REBUTTAL OF APPELLANT'S CHARACTERIZATION OF FACTS

Appellant devotes half of his Third Brief to instructing the Court regarding his version of "real" facts. Appellant also takes aim at the credibility of Appellees' witnesses by carefully selected snippets of testimony and ignoring context. Appellees address Appellant's factual claims to the extent they bear upon or relate to the Cross Appeal (i.e., whether the circulating water system should have been certified as part of the vacuum condenser which was certified). The credibility and reliability of Appellees' witnesses are manifestly related to the Cross Appeal as their testimony was offered, in part, to support Appellees' Cross Appeal.

A. Appellant's attacks on the reliability of Dr. Coleman's findings and testimony fails to consider that the findings and conclusions of the Ohio Department of Development engineer, Dr. Rahim, were in accord with those of Dr. Coleman.

Appellant makes several claims regarding the analysis of Appellees' expert witness Dr. Coleman. Appellant contends that Dr. Coleman's analysis was unreliable and that without this testimony the BTA's decision was against the manifest weight of the evidence and an abuse of discretion. The Court has stated that "[I]f 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. Similarly, the Court has stated, "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, 255 N.E.2d 630.

As a threshold matter, Appellees observe that the testimony and written findings of the Ohio Department of Development's engineer, Dr. Rahim, also support the conclusion of the BTA. Dr. Rahim's written "waste heat" and "waste steam" findings and calculations were expressly adopted by the Director of the Department of Development and were provided to the Tax Commissioner in the Director's written recommendation. (Supp. 2: 5-6, S.T. 3-4). The Commissioner relied on that recommendation when he certified the subject equipment. Thus, Dr. Rahim's findings of fact and conclusions as to "waste heat" and "waste steam" are implicitly part of the BTA's decision. In addition to his written findings, Dr. Rahim's deposition was admitted into evidence at the BTA's hearing. (See Joint Ex. AA). Dr. Rahim's deposition made quite clear that he evaluated the primary purpose of the equipment with regard to "waste heat." (Joint Ex. AA: 104 (stating that the "primary purpose" of each component at issue was to recover and use "waste heat")). Thus, there is reliable and probative evidence supporting the BTA's decision in addition to that of Dr. Coleman.

B. Appellant's factual claims regarding the analysis and conclusions of Dr. Coleman are misleading. They are not supported by the record.

Dr. Coleman was retained by Appellees to describe the function of the Stuart plant as a whole, and the function of the certified equipment therein. (Vol. 1: 121-122). He also was tasked with describing the functional benefit that the certified equipment provided. *Id.* Dr. Coleman testified that he toured Stuart and that he reviewed technical manuals and the heat balance to familiarize himself with Stuart and its operations. (Vol. 2: 118-119).

As part of his deeper analysis, Dr. Coleman studied how Stuart functions with the benefit of the certified equipment and how it would function without such equipment. Dr. Coleman analyzed fuel consumption and heat recovery under both scenarios. For example, Appellees Exs. 9 and 10 [Supp. 2: 110-111] provides flow charts prepared by Dr. Coleman showing temperature (of flue gas) and BTUs of heat recovered by the economizer and air preheater of Stuart as designed (Ex. 9) and also without the economizer. (Supp. 2: 56-57, Vol. 3: 70-72). This sort of comparison of Stuart to non-Stuart designs was intended to be helpful to the BTA for its use in forming conclusions about equipment function relative to fuel consumption and heat recovery.

Appellees Ex. 7 is a chart prepared by Dr. Coleman showing his calculation of capital and operating costs for plant designs with (1) no condenser; (2) an atmospheric condenser (*i.e.*, a condenser that does not operate at a vacuum but that recovers pure water); and (3) a vacuum condenser operating at precisely the same parameters as Stuart's. Dr. Coleman explained this exhibit in detail. (Supp. 2: 61-65, Vol. 3: 89-103). He concluded from this analysis that the primary function and benefit of the main condenser at Stuart was to improve thermal efficiency and that these thermal efficiency benefits far outweighed the capital cost savings of installing a less thermally efficient condenser. *Id.* This conclusion flowed from Dr. Coleman's analysis and

comparison of capital costs (i.e., the higher capital cost of a vacuum condenser compared to an ambient pressure condenser), and operating cost savings (i.e., the thermal efficiency achieved at Stuart by the vacuum).

In sum, Dr. Coleman's analysis of these matters was thoughtful and scientific. He formed expert opinions regarding the function of and benefit derived from the certified equipment (Vol. 2: 121-122) and his testimony was accorded proper weight by the BTA. Yet, at pages 2-3 of his Third Brief, Appellant complains that Dr. Coleman confined his analysis to "hypothetical" plants and not to the "real" facts at Stuart. Dr. Coleman did no such thing. The purpose of Dr. Coleman's effort was to analyze and compare Stuart as designed with a "hypothetical" plant operating without the type of certified equipment at Stuart. This approach logically allowed for a focused study of the certified equipment. The BTA agreed and rejected Appellant's attempt to disparage his analysis.

Appellant takes additional pot shots at Dr. Coleman. In one, Appellant claims that Dr. Coleman's analysis of Stuart was based on a presumption that without the certified equipment a large hole in the Stuart boiler would exist and that hot flue gas would be released directly inside the Stuart buildings. In the second, Appellant tries to paint Dr. Coleman's testimony as requiring Stuart to retrofit its turbines with \$240 million in modifications.

Appellant suggests that these fact patterns formed the foundation of Dr. Coleman's analysis. This claim is not only incorrect, it is bizarre. Dr. Coleman's comparison of the Stuart design to a design lacking the certified equipment did not involve or require hypothetical disassembly and modification of Stuart. Nowhere in the record is there evidence that either Dr. Coleman's analysis or his conclusions were based on these "presumptive" facts. In reality, it was counsel for Appellant who, on cross-examination, directed Dr. Coleman to address these

facts as part of Appellant's own absurd hypotheticals. (Supp. 2: 72, Vol. 3: 160 (Appellant's counsel directing Dr. Coleman to "punch a hole somewhere in the system" and Dr. Coleman responding, "I don't understand that.")). Appellant's attempt to attribute these absurd assumptions³ to Dr. Coleman is a further attempt at misdirection.

C. Appellant's claims regarding waste steam are not supported by the record.

At page three of his Third Brief, Appellant argues that Mr. Harrell, the Stuart plant engineer, rejected the idea that steam in the last three stages of the turbine was "waste steam." Appellant implies that this information is somehow key to undermining the BTA's Decision and Order. This makes no sense. Appellees did not claim any portion of the turbine to be a "waste steam" recovery device. No portion of the turbine was included in the certificate applications. Whether or not Mr. Harrell believed steam inside the turbine was "waste steam" is not relevant and the BTA made no finding in that regard.

The BTA did hold that depleted steam, once exhausted from the turbine, was "waste steam." Mr. Harrell quite clearly testified that he considered steam to be "waste steam" after it exited the 18th (final) stage of the turbine (i.e., the moment it exits the turbine and enters the main condenser). (Supp. 2: 103; Joint Ex. CC: 64). Mr. Harrell testified, as did Dr. Coleman and Dr. Rahim, that "waste steam" at Stuart is steam no longer capable of performing work to generate electricity. This occurs after the steam leaves the turbine and enters the main condenser. Appellant's attempt to focus the Court's attention on steam within the turbine is not germane.

³ Dr. Coleman's education and work experience in the power plant industry are unassailable. See Brief of Appellees/Cross Appellants at fn. 3. It strains credibility to assert that Dr. Coleman's engineering analysis was based on a fact pattern that assumed Stuart would operate with a hole in its boilers and vent hot exhaust gas inside buildings (i.e., a plant without exhaust ductwork leading to a chimney) or that such analysis would have any bearing on ascertaining the design benefit provided by the certified equipment.

Appellant also states that the reuse of waste steam at Stuart saves \$37,000 in daily water processing costs. As a threshold matter, Appellees note that it is not possible to “recover and use” waste steam without recovering and using the matter (i.e., water) that comprises the steam. If properly pled, the question Appellant poses would be whether the benefit from avoiding water processing is the “primary purpose” of the condenser. As shown below, the answer to that question is “no.” However, even if the answer were “yes,” it must be assumed that the General Assembly understood that recovering “steam” entails recovering “water.” Despite the economic benefit of saving pure water, Dr. Coleman testified with reference to Appellees’ Ex. 7 that the thermal efficiency economic benefit of recovering and using waste steam in the condenser far exceeded the economic benefit of avoiding additional water processing costs.

Appellant’s primary disagreement appears to be with the requirements of the certification statutes and not the BTA’s reasoning. Appellant wages a battle against the inherent benefit of fuel savings achieved by equipment that “recovers and uses” waste heat or waste steam. Simply stated, Appellant does not believe a taxpayer should receive a tax benefit when there is an inherent business benefit to recovering and using waste heat or waste steam. However, this is precisely what the statutes call for in the area of thermal efficiency. It is not possible to “recover and use” waste heat or waste steam without an economic benefit. “Recovery and use” of waste heat or waste steam are activities that always will generate fuel savings. Indeed, energy savings are required by the statute and must be measured and included in applications for certification eligibility.⁴ R.C. 5709.46. Appellant demonizes the resource recovery and use that forms the

⁴ It is possible that Appellant is confused by the “incidental benefit” test imposed in air pollution control certification matters. R.C. 5709.20(B); see White Rubber Co. v. Lindley (1981), 65 Ohio St.2d 94, 418 N.E.2d 1347. There, equipment that provides more than an incidental benefit to the owner’s manufacturing operations—as compared to air pollution control—cannot be certified. However, no such test exists in the area of thermal efficiency certificates. Indeed, such

substance of the equipment's exempt function. This is contrary to the express intention of the General Assembly.

D. Appellant's factual claims as to the non-existence of "waste heat" in the electric industry.

At pages five through ten of his Third Brief, Appellant claims that "waste heat" is not a term used within the electric utility industry. Appellant insists that the term "waste heat" is a foreign concept. He contends that it does not appear in reference material cited by Appellees and he claims that evidence submitted on this point dealt only with "industrial boilers" not utility boilers. These claims are untenable.

The term "waste heat" is in "common usage" in the electric utility industry. (Supp 2: 40, Vol. 2: 164-166; Supp. 2: 54-55, Vol. 3: 62-63). It also is used interchangeably with the term "heat recovery." (Supp. 2: 47-48, Vol. 3: 32, 35-36). Indeed, "heat recovery steam generator" is a term used interchangeably with "waste heat recovery boiler." See Appellees' Ex. 46: 31-5. In that regard, heat recovery steam generators (known in the industry as "HRSGs") are heat exchangers attached to exhaust gas streams of various systems where combustion takes place. Id.; see Appellees' Ex. 46. In the electric industry, the certified convection pass equipment is known as the "heat recovery system." (Supp. 2: 49-50, Vol. 3: 40-44; Supp. 2: 127, Appellees' Ex. 25 (characterizing economizers and air preheaters as "heat recovery" equipment)).

As the name implies, waste heat recovery boilers/HRSGs are used to recover waste heat from combustion exhaust gas produced in the electric utility industry to produce steam. (Supp. 2: 53-54, Vol. 3: 57-59; Appellees' Ex. 8; see Appellees' Ex. 46, p. 31-3; Supp. 2: 48, Vol. 3:

a test would directly contradict the thermal efficiency requirements that the recovered waste heat be "used" and that such "use" reduce energy or fuel consumption. R.C. 5709.45 and .46.

35-36). Appellees Ex. 8 shows a waste heat recovery boiler/HRSG utilized to recover and use exhaust gas heat to make steam.

Appellant claims that Appellees Ex. 8 depicts only an “industrial boiler” that is not utilized in the electric utility industry. However, this claim directly contradicts Appellant’s own expert report (Appellant’s Ex. 1, App. D at D-2 and D-3) which clearly acknowledged this technology as used in the electric utility industry and references the arrangement shown in Appellees Ex. 8 (i.e., Sansoucy’s combined cycle description at page D-3 of his report). Similarly, Dr. Coleman explained at length that this “combined cycle” arrangement (i.e., gas turbine and waste heat recovery boiler/HRSG) is used extensively in the electric utility industry to generate electricity for sale to the public. (Supp.2: 47-49, 53-54, Vol. 3: 32-39, 58-59; Supp. 2: 78-80, Vol. 4: 19-20, 82-83, 97-99). Appellant’s claim in brief that Appellees’ Ex. 8 does not depict a waste heat recovery boiler/HRSG used in the electric utility industry, but rather shows only an “industrial boiler” flatly contradicts the record.

Dr. Coleman provided further insight as to “waste heat” in the combustion exhaust gas at Stuart. He testified that the heat exchanger components that comprise a waste heat recovery boiler/HRSG are identical in function and use to the heat exchangers used in the exhaust gas stream at Stuart. (Supp. 2: 47-49, 54-55, Vol. 3: 58-59, 62-63 (stating there is no difference “whatsoever” between the function of waste heat boilers and the convection pass heat exchangers at Stuart)). Indeed, not only do the components have the same function, they have the same names (i.e., superheater, reheater, and economizer). (Appellees’ Ex. 46, p. 31-1, 2, 3; Appellees’ Ex. 8. Supp. 2: 54-55, Vol. 3: 62-63). Dr. Coleman explained that the convection pass equipment in an electric utility boiler was the same as in a “waste heat boiler.” (Vol. 2: 166

(stating that “portions of it” [the Stuart boiler] are a “waste heat boiler”); see Supp. 2: 54-55, Vol. 3: 62-63).

Appellant also questioned Dr. Coleman about electric utility usage of the type of equipment certified herein as compared to uses by other industries. Coleman responded by explaining in his view the word “utility” is merely denominative of an ownership structure. (Supp. 1: 76, Vol. 4: 20). He sensibly observed that electric power generation at a public utility is an “industrial” undertaking. Id. He testified that there was no difference “whatsoever” in the function of the certified equipment as between a utility and other industrial uses (i.e., what Appellant denominates “industrial boilers”). (Vol. 4: 76).

Appellant’s attempt to segregate the electric utility industry from other industries with regard to boilers and thermal efficiency technology also ignores that many industrial consumers of power are large-scale producers and sellers of electricity. The steel, cement, petroleum, chemical, and paper industries are all well-known producers of electric power on a megawatt scale. See, e.g., R.C. 4928.01(A)(25) (defining “distributed generation” applications), (31) (defining “net metering” where customer-generator sells excess electricity that it generates to electric service provider) and (33) (defining “self generators” that produce power for their own use and that “may provide any such excess electricity to retail electric service providers.”). It is self evident that some of Appellant’s “industrial boiler” users are producing electricity on a large scale and selling the excess to the public. R.C. 4928.01. Thus, contrary to the unsupported insinuations of Appellant, there is no line separating electric utilities from other industrial users of boilers. All boilers used in all industries are “industrial boilers.”

Laid bare, Appellant’s position is that thermal efficiency improvement equipment utilized by electric generating public utilities never qualifies for certification simply because the

equipment is owned by public utilities. Appellant conveniently overlooks that R.C. 5709.45(C) expressly provides that certification applies to “electric generation.”

IV. LEGAL ARGUMENT

- A. The circulating water system is required for, and directly related to, the performance of the condenser’s thermal efficiency improvement function. The BTA’s decision to reverse the Commissioner’s certification of the circulating water system was in error.**

Appellees’ certificate applications included the circulating water system as part of the equipment within the “Condensing Section.” (Supp. 2: 25-26, S.T. 23-24 (application narratives)). Appellees described the main condenser and the circulating water system together as the “Condensing Section” in the application narratives. (Supp. 2: 25-27, S.T. 23-25). The condenser recovers waste steam exhausting from the main turbine and rapidly condenses it in a confined space to create a vacuum. (Supp. 2: 137-140, Appellees Ex. 30). This vacuum reduces backpressure on the turbine. *Id.* This allows steam at low temperature and low pressure to perform work in the turbine that the steam otherwise could not perform. *Id.* This increases electric generation output while using the same amount of fuel. *Id.* The fuel savings associated with the lower turbine backpressure are scientifically dependent upon two things: (1) provision of a confined space (the condenser) where the rapidly condensing steam can form a vacuum; and (2) a system to cool the waste steam (*i.e.*, the circulating water system) such that it will condense rapidly.

Dr. Rahim analyzed Appellees applications and combined the condenser with the circulating water system when preparing his engineering recommendation. These items were addressed within the “Condensing Section” of his recommendation. (Supp. 2: 6, S.T. 4). Dr. Rahim stated at his deposition that he was “convinced” that Appellees applications were accurate as to the descriptions of equipment function and also as to heat savings calculations. (Joint Ex.

AA: 120-122). Thus, in the “Condensing Section” description in his written findings, Dr. Rahim included the circulating water system. (Supp. 2: 6, S.T. 4). He recommended that both the circulating water system and the condenser qualified for certification. Id.

The BTA stated that the basis of its decision to deny certification was that Appellees failed to provide heat savings calculations for the circulating water system as required by R.C. 5709.46. Decision and Order of the BTA at 29. However, the heat savings calculations were provided by Appellees for the “Condensing Section” as a whole (i.e., the condenser and the circulating water system working together) as verified by Dr. Rahim in his written findings. (See Supp. 2: 25, S.T. 23 (application description of heat savings from “Condensing Section”); Supp. 2: 6, S.T. 4 (verification of fuel savings for the Condensing Section by Dr. Rahim)). There was no separate calculation of the heat savings for the circulating water system in the application because it was merely a subcomponent of the “Condensing Section” for which the necessary calculations already were provided. The BTA’s reason for denying certification is based on an oversight. The required heat savings calculations were provided.⁵

The decision of the BTA reversing certification of the circulating water system also mistakenly focused on the boiler water make-up and water demineralizing systems. See Decision and Order of the BTA at 28-29. However, these systems are not part of Appellees’ applications. They are completely unrelated to the circulating water system. (Supp. 2: 58-59, Vol. 3: 78-81; Supp. 2: 75-76, Vol. 4: 26-33). Dr. Coleman explained that the boiler water make-up system which supplies boiler water to the condensate system (to make up for any steam system loss) is located close to the circulating water system on Appellees Ex. 37 (system

⁵ The BTA reached this conclusion *sua sponte*. It was never addressed by either party in brief or otherwise. Appellees believe that the BTA’s good faith review of the record without guidance or comment from either party gave rise to this mistake of fact.

diagram) but was not part of it. He explained further that the boiler make-up water system was shown in blue and the circulating water system was shown in green on that exhibit. He noted that the “blue” and “green” never come in contact with one another and he cautioned not to confuse the circulating water system with the separate boiler water make up and demineralizing systems. (Supp. 2: 59, Vol. 3: 80); (See also Supp 2: 75: Vol. 4: 29 (Attorney Examiner noting Appellant’s “confusion” of the condensate system [supplied very pure water by the demineralized and boiler make-up water systems] with the unrelated circulating water system and attempting to clarify the difference between the systems)).

There is no evidence that the boiler water make-up and demineralizing systems are necessary components for the condenser to function. However, the circulating water system is a necessary component for condenser function. (Supp 2: 59, Vol. 3: 79-82). In this way, the BTA’s holding that the condenser should be certified because it “recovers and uses” “waste steam” is important. The “use” to which the waste steam is put is that it is condensed in a confined space. The associated change in its physical properties from steam to water (i.e., drastic decrease in volume) is exploited to allow the turbine to utilize low-pressure steam still within it. (Supp. 2: 25-26, S.T. 23-24). This “use” of the “waste steam” recovered by the condenser (i.e., condensation in a confined space to reduce backpressure on the main turbine) could not occur without cooling by the circulating water system. Thus, the statutorily required fuel savings as calculated by Dr. Rahim for the “Condensing Section” are dependent upon the circulating water system to provide the necessary cooling to condense the steam.

For these reasons, the BTA’s decision to affirm only half of the Condensing Section (i.e., the condenser) makes no sense. The entire Condensing Section is required to effect the fuel savings benefit. The entire Condensing Section, including the circulating water system should

be certified. Timken v. Lindley (1980), 64 Ohio St.2d 224, 229, 416 N.E. 2d 592 (holding that all equipment directly related to an exempt function should be certified).

Lastly, Appellant resorts to several techniques to support his claim that the “primary purpose” of the certified equipment is something other than thermal efficiency. With all of these techniques, Appellant ignores objective equipment function and the benefit provided by that discrete function. He instead interprets “primary purpose” in an absurd fashion that would deny exemption in all cases. For example, Appellant identifies the macroscopic “primary purpose” of the entire Stuart plant to produce electricity and make money and then claims the “primary purpose” of the discrete certified equipment is the same (i.e., to produce electricity and make money). He also uses an integrated plant analysis to argue that if any of the certified equipment were removed while Stuart was operating a “big hole” would be created and there would be a catastrophe caused by the release of hot gas and steam. He then concludes that the primary purpose of the certified equipment must be to prevent catastrophe.

Appellant’s analysis is wrong and this Court has rejected it previously in favor of analysis of objective equipment function. In Timken, supra, the Court instructed that the “primary purpose” of equipment is ascertained from its function. The BTA expressly followed the mandate of Timken in this case. R.C. 5709.46 requires thermal efficiency equipment to reduce fuel usage. Thus, the “primary purpose” inquiry is whether the function of the certified equipment (e.g., the Condensing Section equipment) functions to save fuel by recovering and using waste steam. This is why fuel savings calculations are statutorily required. This is why “waste steam” is required to be used. Appellant’s focus on absurdities in order to avoid addressing objective equipment function is patently unreasonable and adds nothing useful to the discussion.

The function and the functional benefit of the circulating water system is clear from Dr. Rahim's engineering findings and Dr. Coleman's testimony discussed above. The circulating water system is not only "directly related" but is "directly necessary" for the exempt function fuel savings of the Condensing Section to occur. Similarly, but for the condenser, there would be no circulating water system. The calculation of these fuel savings were included in the applications for certification. Based on the foregoing, the BTA's decision to reverse the Commissioner as to certification of the circulating water system is erroneous and unlawful.

Respectfully submitted,

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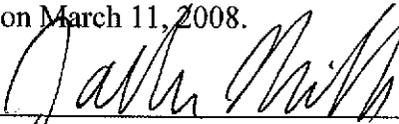
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CERTIFICATE OF SERVICE

I certify that a copy of Fourth Brief of Appellees/Cross Appellants Cincinnati Gas & Electric Company, Dayton Power & Light Company and Columbus Southern Power Company was sent by regular U.S. mail to counsel for Appellant Tax Commissioner of Ohio, Marc Dann and Lawrence Pratt, Esq., 30 E. Broad St., 25th Floor, Columbus, Ohio 43215, and Counsel for Appellant Adams County Auditor, David C. DiMuzio, David C. DiMuzio, Inc., 1900 Kroger Building, 1014 Vine St., Cincinnati, Ohio 45202 on March 11, 2008.



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