

IN THE SUPREME COURT OF OHIO

CARROLL E. NEWMAN

Case No. 07-1054

Appellant,

v.

On Appeal From Ohio
Board of Tax Appeals
Nos. 07-1054

WILLIAM W. WILKENS,
Tax Commissioner of Ohio

Appellees

APPELLANT/CROSS APPELLEE ADAMS COUNTY AUDITOR'S
MOTION TO STRIKE FOURTH BRIEF

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

ANTHONY L. ELHER (00393304)
Vorys, Sater, Seymour & Pease LLP
52 E. Gray Street
P.O. Box 1008
Columbus, Ohio 43216
(614) 464-8282
Fax No. (614) 719-4702

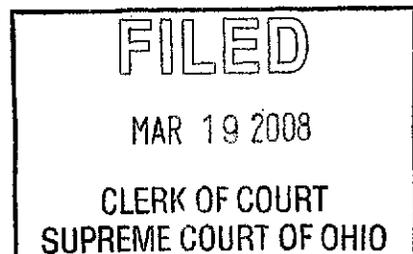
ATTORNEY FOR APPELLANT
ADAMS COUNTY AUDITOR

MARC DANN
Attorney General of Ohio
LAWRENCE PRATT (0021870)
Assistant Attorney General
Chief Taxation Section
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215-3428
(614) 466-5967
Fax: (614) 466-8226

ATTORNEY FOR APPELLEE
ELECTRIC COMPANIES
CINCINNATI GAS &
ELECTRIC COMPANY
THE DAYTON POWER &
LIGHT COMPANY; &
COLUMBUS SOUTHERN
POWER COMPANY

JULIE EZELL, ESQ
Cinergy Services, Inc.
1000 E. Main Street
Plainfield, Ind. 46168-1782
Cincinnati Gas & Electric Co.

ATTORNEY FOR APPELLEE
OHIO TAX COMMISSIONER

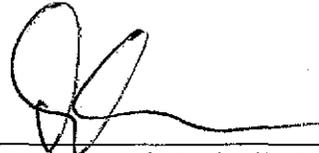


MOTION TO STRIKE

Appellant/Cross Appellee Adams County Auditor hereby moves the Court to strike those portions of Appellee's Fourth Brief which do not relate to the Cross Appeal. (Only item IV on page 16 of the brief, through the first two lines of page 19 of the Brief relate directly to the Cross Appeal.) The remaining portions of the Brief attempt to respond to issues in the main appeal, and attempt to improperly respond to Appellant's Reply Brief.

A Memorandum in Support of this motion is attached.

Respectfully Submitted,



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

MEMORANDUM IN SUPPORT

Supreme Court Rule 6 (5) (D) allows the Fourth Brief “only as a reply brief in the cross-appeal.” It does not permit the cross appellant to respond to the Reply Brief of the Appellant in the main appeal, but strictly limits the Fourth Brief to reply to points raised by the Cross Appellee to the cross appeal itself.

In the instant case, the Cross-Appellee was careful to specifically note those portions of the Third Brief that were in reply to the cross appeal. (See Page 1 of the Combined Brief, which identifies Sections V and IV as relating to the cross appeal.) The rest of the combined Brief was dedicated to the main appeal.

The cross appeal of the cross appellant is limited to the “circulating water system” of the plant, which merely takes in river water at one end and discharges the same, untreated water at the other end. The water in the system never touches or mixes with any of the steam or water used in the boiler or the equipment at issue in this appeal. In short, it has absolutely nothing to do with the types of steam and water in the boiler, except that the circulating water helps cool the steam in the condenser. (No tax exemption exists for cooling the steam, only for capturing waste heat or steam.)

Those portions of the Combined Brief dedicated to the cross appeal totaled one and a half pages, and were limited to the description of how the circulating water system deals with river water and not the water used to drive turbines, and how it is used to cool the water, rather than use its heat, and therefore does not relate to any exempt purpose. The Fourth Brief totaled 20 pages and dealt at length with responding to the issues and arguments at stake in the main appeal, including jurisdictional issues relating only to the main appeal. In essence,

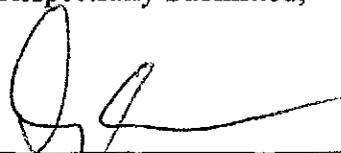
it attempted to get the last word in on the issues raised by Appellant in the main appeal. Clearly, such an effort violates Supreme Court Rule 6(5) (D) and should be stricken.

(Cross appellant hints in the Fourth Brief that it somehow has the power to unilaterally decide what facts and arguments Cross-Appellee is using to oppose the cross-appeal. Obviously, Cross-Appellee can decide on its own to limit its facts and arguments to those in sections V and IV of the Third Brief, which is what it did. Only those few items are subject to reply.) It is not appropriate to use the Fourth Brief as an opportunity to respond to the many points made in Appellant's Reply Brief.

CONCLUSION

Those portions of the Fourth Brief that relate to the main appeal and do not relate to the cross-appeal should be stricken. Pages 1 through 15 should be stricken as well as pages 19 and 20.

Respectfully Submitted,



David C. DiMuzio (0034428)

David C. DiMuzio, Inc.

1900 Kroger Building

1014 Vine Street

Cincinnati, Ohio 45202

(513) 621-2888

Fax No. (513) 345-4449

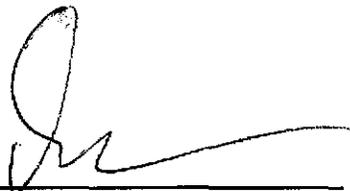
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike has been served by ordinary U.S. Mail this 17 day of March 2008 upon:

ANTHONY L. ELHER (00393304)
Vorys, Sater, Seymour & Pease LLP
52 E. Gray Street
P.O. Box 1008
Columbus, Ohio 43216
(614) 464-8282
Fax (614) 464-8282

JULIE EZELL, ESQ
Cinergy Services, Inc
1000 E. Main Street
Plainfield, Ind. 46168-1782
Cincinnati Gas & Electric Co

MARC DANN
Attorney General of Ohio
LAWRENCE PRATT (0021870)
Assistant Attorney General
Chief Taxation Section
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215-3428
(614) 466-5967
Fax: (614) 466-8226



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