

IN THE SUPREME COURT OF OHIO

Carroll E. Newman,
Adams County Auditor,

Appellant

v.

Richard A Levin,
Tax Commissioner of Ohio

and

Cincinnati Gas & Electric Co.

and

Dayton Power and Light Co.

and

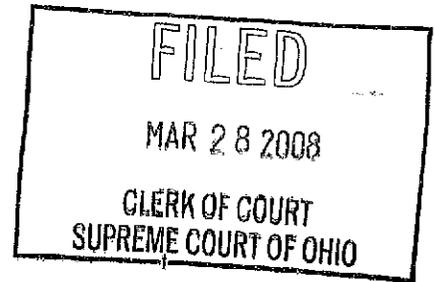
Columbus Southern Power
Co.

Appellees

Case No. 07-1054

On Appeal from Ohio Board of Tax Appeals

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



**APPELLEES/CROSS APPELLANT UTILITIES' MEMORANDUM CONTRA
APPELLANT'S MOTION TO STRIKE FOURTH BRIEF**

Marc Dann (0039425)
Attorney General of Ohio
Lawrence D. Pratt (0021870)
Assistant Attorney General
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-5967
Facsimile: (614) 466-8226

Counsel for Appellee
Tax Commissioner of Ohio

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

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

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

Counsel for Appellant
Adams County Auditor

APPELLEES/CROSS APPELLANT UTILITIES' MEMORANDUM CONTRA APPELLANT'S MOTION TO STRIKE FOURTH BRIEF

Citing Sup. Ct. R. VI(5)(D), Appellant moves the Court to strike seventeen of the twenty pages contained in Appellees' reply brief on its Cross Appeal (the "Fourth Brief"). Appellant contends that the Fourth Brief exceeds the permissible scope of reply. Appellant is mistaken.

The permissible scope of the Fourth Brief includes a reply in areas authorized by the Court in any pre-briefing order. In addition, the Fourth Brief may include a reply to any assertion in Appellant's combined reply brief on Appeal/response brief on Cross Appeal (the "Third Brief") that bears on the issues in the Cross Appeal.¹ The Fourth Brief is within permitted scope.

- A. In a pre-briefing order, the Court authorized Appellees to make jurisdictional arguments in brief. Appellees' inclusion in the Fourth Brief of reply arguments on jurisdictional claims was consistent with the Court's order and did not violate Sup. Ct. R. VI(5)(D).**

There is no dispute that Appellees offered reply arguments on pages one through seven of the Fourth Brief to support jurisdictional claims that Appellees raised in their brief on the merits (the "Second Brief"). These reply arguments addressed Appellant's response presented in the Third Brief.

Appellees' jurisdictional contentions were made part of the briefing in this case by Court order. Newman v. Levin (2007), 116 Ohio St. 3d 1205, 2007-Ohio-5507.

Appellees' compliance with the Court's order followed the standard progression of brief

¹ Appellees have diligently searched the Court's decisions for guidance as to application of Sup. Ct. R. VI(5)(D). It does not appear the Court has cited the rule in any published decisions. Accordingly, Appellees rely on fundamental appellate procedure as to the proper scope of a reply in interpreting the Court's rule.

(the Second Brief), response (the Third Brief) and reply (the Fourth Brief). See, e.g., State v. Hubbard (10th Dist. 2004), 2004 WL 235197, 2004-Ohio-553, ¶ 6 FN 2 (stating, “reply briefs are intended merely to be an opportunity to reply to the brief of the appellee”); Hoskins v. Simones (2nd Dist. 2007), 173 Ohio App.3d 186, 2007 -Ohio- 4084, ¶38 (holding the same). Accordingly, Appellees did not violate Sup. Ct. R. VI(5)(D) and there is no basis to strike these pages of the Fourth Brief.²

B. Arguments made in Appellees’ Fourth Brief are pertinent to the issues raised on cross appeal. Accordingly, they are within permitted scope.

Appellant’s appeal to the Court contests the BTA’s decision to affirm the Commission’s certification of the main condenser, reheater, air heater and economizer. Appellees’ Cross Appeal contests the BTA’s decision to reverse the Commissioner’s certification of the circulating water system. The briefs filed by both parties make clear that certification of equipment as thermal efficiency improvement devices is the salient issue. In his Motion To Strike, Appellant complains that a discussion of law or fact that pertains to the certification of circulating water system (i.e., the Cross Appeal) that also may apply to certification of the other equipment (i.e., the Appeal) cannot be included in the Fourth Brief. Appellant is wrong.

Appellant advanced broad legal theories in his Third Brief as to the meaning of statutory terms such as “waste heat,” “waste steam,” and “primary purpose.” These terms have general application to the equipment at issue in both the Appeal and the Cross Appeal. However, Appellant did not specify in either his notice of appeal or the Third

² Subject matter jurisdiction can be raised at any time and cannot be waived. Appellant’s motion to strike serves no purpose with regard to jurisdictional arguments. The Court does not gain jurisdiction over an appeal via an alleged violation of briefing rules. Therefore, Appellant’s Motion To Strike jurisdictional arguments should be denied.

Brief which theories applied to which equipment. In considering Appellant's theories regarding those terms as they relate to the equipment covered by the Appeal, the Court necessarily will consider whether those terms apply to the circulating water system (i.e., the Cross Appeal) based on the same universal theories. In other words, the Court will be consistent in its application of law to equipment in both the Appeal and the Cross Appeal.

Because Appellant's theories involve the meanings of universally applicable statutory terms, the parties cannot rationally limit them to equipment in either the Appeal, or alternatively, the Cross Appeal. For example, Appellees explained in the Fourth Brief at pp. 16-20 that the "circulating water system" (Cross Appeal) and the "main condenser" (Appeal) work together to perform an exempt function, and that they should be certified together as the "Condensing Section." It is not possible to segregate Appellant's arguments against certification of the main condenser from his arguments against certification of the circulating water system. Similarly, Appellees are not able to discuss why the circulating water system should be certified without discussing the main condenser as well. Indeed, it was Appellant who spent a great deal of the Third Brief discussing Dr. Coleman's treatment of the main condenser and the concept of "waste steam." All of that discussion necessarily pertains to the Cross Appeal.³

³ The statutory term "waste steam" (R.C. 5709.45) is pertinent because the BTA affirmed certification of the main condenser based upon "waste steam" usage. The other certified equipment were certified based upon "waste heat" usage. Yet, Appellant's notice of appeal fails to reference "waste steam" or "main condenser." Accordingly, discussion of the term "waste steam" by Appellant can only be that of a cross appellee responding to Appellees' arguments on cross appeal. R.C. 5717.04. Nonetheless, Appellant has attempted to preclude Appellees' reply by conducting his entire discussion of "waste steam" within portions of the Third Brief that he self-designated as a reply to his Appeal. Appellant's jurisdictional failure to raise "waste steam" as an issue on appeal does not prevent Appellees from replying to arguments that directly affect certification of the circulating water system. Appellant's arguments on "waste steam" (cont. next page)

The broad attacks on the credibility and reliability of Dr. Coleman and Mr. Harrell that Appellant makes, in the Third Brief, pertain, also pertain to the Cross Appeal. The testimony and credibility of these witnesses played a role in the BTA's Decision and Order on all equipment. As such, Appellant asks the Court to ignore the applicability of his new arguments to the Cross Appeal. This is not rational. New arguments made in the Third Brief with universal application invite Appellees' response.

Appellees may use the Fourth Brief to respond or reply to any assertion in the Third Brief that bears upon the Cross Appeal (i.e., certification of the circulating water system). Appellant offered theories about the meaning of "waste heat," "waste steam," and "primary purpose." These terms have undeniable application to the issue on Cross Appeal of whether the circulating water system should be certified. Similarly, new attacks on the credibility and reliability of witnesses who testified about, *inter alia*, the main condenser and the circulating water system also are pertinent to the Cross Appeal. Accordingly, Appellant's Motion To Strike has no merit.

C. The Court needs to be fully informed of facts and legal arguments to help it render a balanced and correct decision. The Third Brief included facts and legal theories not raised in either the First Brief or in the Second Brief. Appellees are permitted to respond.

Assuming arguendo that the Fourth Brief contains some facts and legal arguments not pertinent to the Cross Appeal, Appellant's Motion To Strike should be denied under the "clean hands doctrine." This doctrine "bars relief to those guilty of improper conduct in the matter as to which they seek relief. It is invoked to protect the integrity of the court." 30A C.J.S. Equity § 109. Appellant has unclean hands because the portion of his

are necessarily responses made in the role of cross appellee because he failed to contest that issue in his appeal.

Third Brief designated as a “reply” exceeded the proper scope of a reply to Appellees’ Second Brief. See Sup. Ct. R. VI(5)(C) (stating that the Third Brief shall contain a reply and a response or only a response at the option of the Appellant); E.g., Hubbard, supra.⁴

The impropriety of Appellant’s actions are apparent in several examples.

Appellant filed a thirteen page First Brief. Within that document, Appellant devoted four pages to describing the facts and procedural history. Within those four pages, Appellant devoted a single paragraph to Appellees’ expert Dr. Coleman even though the BTA relied heavily on Dr. Coleman in reaching its Decision and Order. Appellant’s paragraph consisted of a short list of alleged “admissions” that addressed neither the reliability nor the methodology of Dr. Coleman’s expert analysis.

In the Third Brief, Appellant began at page one by instructing Appellees which portions were subject to reply in the Fourth Brief. Not surprisingly, Appellant directed that nearly all of the Third Brief was immune to reply. Appellant then launched a lengthy, detailed, and misleading attack upon Dr. Coleman and his analysis. That discussion should have been contained in the First Brief. Had Appellant followed the normal briefing progression, Appellees could have responded in the Second Brief and Appellant could have replied in the Third Brief.

Unfortunately, Appellant chose not to follow that procedurally proper approach. Appellant filed a meager First Brief and made new substantive attacks on Dr. Coleman’s analysis in the Third Brief. He then instructed that Appellees were not permitted to rebut

⁴ Appellees appreciate that filing a Motion to Strike portions of the Third Brief was available to Appellees as a procedural option to address these matters. However, Appellees believe the better and more efficient course of conduct is to deal with those issues in brief and at oral arguments and to leave the Court to fashion a remedy, if any is needed, through its decision.

his new assertions. This strategy is a transparent attempt to deny Appellees their right to respond.

Further highlighting the non-reply nature of the Third Brief, Appellant attacked exhibits that were not discussed in the First Brief or in the Second Brief. At page four of the Third Brief Appellant states, “[I]n Appellee’s Merit Brief, Appellee points to Appellee’s Exhibit #7 and #8 as if they are probative evidence supporting their case.” Yet, Appellees Exs. 7 and 8 were not discussed in the Second Brief. Neither exhibit was included in any supplement submitted to the Court. Appellant’s express characterization of his new claims as a response to arguments raised in the Second Brief is absolutely false. Appellant concocted it from nothing.

Appellant then goes on to state that Exhibit #7 had nothing to do with waste heat analysis or primary purpose analysis and that Exhibit #8 depicted an “industrial heat boiler” not an electric generating plant. However, as explained in the Fourth Brief at pps. 13-15, there is overwhelming evidence in the record that Appellees’ Exhibit 8 does show an equipment configuration that is in common usage by utilities in the electric generation industry. There is no evidence to the contrary. Appellant’s claim that Appellees’ Exhibit 8 depicted only an “industrial heat boiler” is false. These flagrantly erroneous statements of fact could mislead the Court if not rebutted.

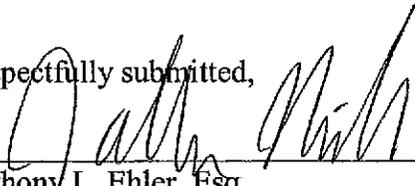
Still more examples exist of Appellant addressing matters in the Third Brief that were not raised by Appellees. At pages two and three of the Third Brief, Appellant claimed that Dr. Coleman’s analysis was based on a hypothetical boiler with a “hole” “punched” in the side that “will kill everyone in the plant.” Appellees discussed no such theory in their Second Brief, nor did Dr. Coleman ever suggest these hypothetical facts.

See Appellees' Fourth Brief at pps. 10-11. Rather, he was directed by counsel for Appellant at the BTA's hearing to address operation of a partially disassembled boiler (i.e., Dr. Coleman's puzzled statement "I do not understand that."). Id. Thus, once again, Appellant delved into new factual matters in the Third Brief that he should have raised in the First Brief. It appears Appellant asserted new matters in this fashion with the aim of precluding rebuttal. Worse, he mischaracterized those new matters which risks misleading the Court.

The Court's rules anticipate arguments and factual claims in brief followed by a response. That has occurred here. There is no prejudice to either side. Appellant offered objectively disprovable and hyperbolic theories in the Third Brief that address matters not raised in any prior brief to the Court. He then attempted to preclude response by "instruction" and now attempts to strike Appellees' response by motion. Appellant's strategy does not inform the Court. It seeks to confuse the Court and to prevent lifting of that confusion. This strategy is inappropriate and should be rejected.

For all of these reasons, the Court should deny Appellant's Motion To Strike Appellees' Fourth Brief.

Respectfully submitted,



Anthony L. Ehler, Esq.

Douglas L. Rogers, Esq.

Jeffrey Allen Miller, Esq.

Vorys, Sater, Seymour and Pease LLP
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 Appellees/Cross Appellant Utilities' Memorandum Contra Appellant's Motion to Strike Fourth Brief Of Appellees was sent by regular U.S. mail to counsel for Appellee Tax Commissioner of Ohio, Marc Dann and Lawrence D. Pratt, 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 28, 2008.



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