

OHIO BOARD OF TAX APPEALS

Columbia Gas of Ohio,)	CASE NOS. 97-K-545,
)	97-K-546, 97-K-547
Appellant,)	
)	(PUBLIC UTILITY
vs.)	PROPERTY TAX)
)	
Roger W. Tracy, Tax)	ORDER
Commissioner of Ohio,)	
)	(Overruling Motion
Appellee.)	to Reconsider)

APPEARANCES:

For the Appellant	-	Amy L. Koncelik Columbia Gas of Ohio 200 Civic Center Drive Columbus, Ohio 43215
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: Richard C. Farrin Assistant Attorney General State Office Tower-16th Floor 30 East Broad Street Columbus, Ohio 43266-0410

Entered March 5, 1999

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This matter is now considered by the Board of Tax Appeals following receipt of a "Supplemental Memorandum in Support of Motion to Exclude Testimony," filed on behalf of the Tax Commissioner, and appellant's response thereto. On February 1, 1999, the Tax Commissioner filed a motion seeking to exclude the testimony of certain witnesses, i.e., James Frost and Larry Martin, employees of appellant, claimed not to have been timely identified by appellant in response to discovery. At the February 2, 1999 evidentiary hearing convened in this matter, appellant's counsel was admonished for not having supplemented prior discovery responses in a more timely fashion. Nevertheless,

based upon appellant's representation that Frost and Martin would testify as "fact" witnesses regarding matters of which they had personal knowledge, and relying upon Cleveland Hts./Univ. Hts. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (1995), 72 Ohio St.3d 189, wherein a distinction was drawn between "fact" and "expert" witnesses,¹ the presiding attorney examiner overruled the Tax Commissioner's motion to exclude. However, in order to permit counsel an adequate opportunity to prepare for the testimony of these witnesses, he was granted leave to delay cross-examination until a later date.

Thereafter, during the course of the February 2, 1999 hearing, the Tax Commissioner's counsel renewed his motion to exclude, citing the Supreme Court's decision in Landskroner v. Pub. Util. Comm. (1983), 5 Ohio St.3d 96. Since counsel elected to delay his cross-examination of Frost and Martin, the parties were accorded an opportunity to file written memoranda addressing the application of Landskroner to the facts of the present situation. Upon consideration of the oral and written arguments made by counsel, as well as the testimony elicited during direct examination of the witnesses who are the subject of the motion to exclude, it is determined that no reason exists for reconsidering the attorney examiner's ruling.

In Landskroner, the court held that a witness is not considered a "lay" witness merely because he or she testifies from his or her personal knowledge. Rather, the determination of whether a person is a "lay" or "expert" witness depends upon the matters upon which the individual is to testify:

¹ In Cleveland Hts./Univ. Hts., the court affirmed this Board's decision to admit the testimony of a witness whose identity was not disclosed until hearing. The court held that neither Civ. R. 26 nor former Ohio Adm. Code 5717-1-10 required a party to disclose the identity of a "fact" witness in advance of hearing.

“A ‘lay witness’ is defined as a ‘[p]erson called to give testimony who does not possess any expertise in the matters about which he testifies. ***’ *** In contrast, this court has defined an ‘expert witness’ as one who testifies concerning ‘*** matters of scientific, mechanical, professional or other like nature, requiring special study, experience or observation not within the common knowledge of laymen ***.’ *** Similar language is used in Evid. R. 702 describing expert testimony, and Evid. R. 703, governing the bases for expert opinion provides that ‘[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.’ (Emphasis added.) Thus, the fact that an expert testifies from personal knowledge does not remove him from the classification of expert witness.” Id. at 97. (Citations omitted.)²

In the instant matter, appellant’s witnesses, while having knowledge of and experience in the public utility industry, did not offer opinions based upon their knowledge and/or experiences. Instead, they simply testified regarding facts within their personal knowledge. As such, their testimony is not subject to exclusion under either Civ. R. 26 or Ohio Adm. Code 5717-1-11.

Based upon the foregoing, the Tax Commissioner’s request to reconsider is hereby overruled. The parties are ordered, within seven days of the issuance of this Order, to submit an agreed upon date for an additional hearing in this matter. Said hearing shall proceed within thirty days of the issuance of this Order. The purpose of said hearing will be to conclude the examination of Frost and Martin and to permit the Tax Commissioner to present evidence in rebuttal to

² In Landskroner, the court affirmed a decision of the Public Utility Commission of Ohio to preclude an individual from offering “any conclusions as an expert because he had not been identified prior to trial ***.” Id. at 97. Nevertheless, that individual was permitted to testify about facts he knew.

the testimony of these individuals. In the event counsel are unable to reach an agreement upon such a date, this Board will proceed to select a date for hearing and the parties should expect said hearing to proceed as scheduled.