

111 FERC ¶ 61,307  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

City of Westerville, Ohio

Docket No. EL05-81-000

v.

Columbus Southern Power Company  
and  
American Electric Power Service Corporation

ORDER DENYING COMPLAINT

(Issued May 31, 2005)

1. In this order, the Commission denies a complaint filed by the City of Westerville, Ohio (Westerville) against the Columbus Southern Power Company (Columbus Southern) and the American Electric Power Service Corporation (AEPSC). In its complaint, Westerville argues that it has been charged unjust, unreasonable, unduly discriminatory, and unlawful rates from May 1, 2001 to December 31, 2003 under Columbus Southern's Fuel Cost Adjustment (FCA) and other provisions of its March 12, 1982 Agreement with respondents, as supplemented, and a corresponding rate schedule originally designated as Rate Schedule No. 32 (the Agreement).

**Background**

2. Westerville is a municipally owned, non-profit electric distribution utility, which provides electric service to approximately 15,000 customers in and around the suburbs of Columbus, Ohio. Westerville is interconnected with, and located within, the control area of Columbus Southern. Westerville serves only retail customers.

3. Columbus Southern, a public utility, is a wholly owned operating subsidiary of the American Electric Power System.<sup>1</sup>

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<sup>1</sup> Section 201(e) of the Federal Power Act, 16 U.S.C. § 824(e) (2000).

4. On March 12, 1982, Westerville and Columbus Southern entered into a Settlement Agreement in Docket No. ER82-282-000. The Settlement Agreement contained a Rate Schedule for Municipal Wholesale Service under which Westerville took wholesale bundled electric service from Columbus Southern. Underlying the rates was Columbus Southern's historical cost of service analysis for the twelve month period ending December 31, 1980 and its projected cost of service for the twelve month test period ending December 31, 1982, along with a FCA. The FCA, applicable to Municipal Sales for Resale, including those of Westerville, provided:

The charge per kWh for all energy billed each month shall be increased or decreased when the Company's fuel cost per kWh, based on the most recent month for which such cost has been determined is above or below \$0.012946. The adjustment factor shall be equal to the difference in (a) the Company's fuel cost per kWh, to the nearest 1/1,000 mill, and (b) \$0.012946 per kWh, modified to allow for losses associated with wholesale sales for resale at the applicable service voltage and to allow for the recovery of the Ohio Gross Receipts Tax.<sup>2</sup>

5. Effective December 31, 2003, Westerville and Columbus Southern terminated the Agreement.<sup>3</sup> The notice of termination of service was accepted by delegated authority.<sup>4</sup>

### **Complaint**

6. On March 28, 2005, Westerville filed with the Commission a complaint against Columbus Southern. Westerville contends that Columbus Southern charged Westerville a 4.75 percent Ohio Public Utility Excise Tax (Ohio Gross Receipts Tax (Ohio GRT)),<sup>5</sup> after Columbus Southern was exempted from the tax by statute after April 30, 2001. Westerville contends that it was charged for the Ohio GRT during the period from May 1, 2001 (the effective date of the exemption of Columbus Southern and other electric companies from the Ohio GRT) to December 31, 2003 (when it ceased taking service from Columbus Southern). Westerville requests that the Commission order Columbus to

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<sup>2</sup> The Agreement was amended in ways not relevant here by Supplemental Agreements dated March 12, 1982, May 1, 1983, and June 1, 1986.

<sup>3</sup> On October 31, 2003, Columbus Southern submitted a notice of cancellation of service of what now was designated FERC Electric Tariff, Fifth Revised Volume No. 1, Service Agreement No. 3.

<sup>4</sup> See Delegated Letter Order in Docket Nos. ER04-150-000 and ER04-150-001, issued on December 24, 2003.

<sup>5</sup> The Ohio GRT is found at sections 5727.31 to 5727.62 of the Ohio Revised Code. Section 5727.30 of the Ohio Revised Code exempts electric companies (including Columbus Southern) from the Ohio GRT after April 30, 2001.

refund, with interest, all amounts charged by Columbus Southern for the Ohio GRT, during this period.

7. Westerville calculates the charges associated with the Ohio GRT from which Columbus Southern was exempted to total \$1,615,354. Of that amount, Westerville states that \$636,723 is associated with fuel charges that should have been adjusted through the FCA. The \$636,723 is made up of the Ohio GRT in the base fuel of \$714,364, and a negative \$77,641 in the FCA over the period of May 1, 2001, through December 31, 2003.

8. Westerville also contends that Columbus Southern discriminated against it by charging Westerville the Ohio GRT and not charging other customers the Ohio GRT. Specifically, Westerville contends that other municipal customers, including the City of Jackson, Ohio, and the City of Bryan, Ohio (City of Bryan), were not charged the Ohio GRT during the same time period that Westerville was being charged the tax. Westerville states that if these systems are similarly situated as Westerville, Columbus Southern's inconsistent treatment should be constituted as unlawful undue discrimination under the Federal Power Act.

9. Westerville requests that the Commission order Columbus Southern to refund, with interest, all amounts unlawfully charged to Westerville for the "phantom" Ohio GRT under the FCA and Agreement since May 1, 2001. Alternatively, Westerville requests that the Commission institute an investigation and set the matter for hearing. Westerville states that if a hearing is ordered, it is willing to have such hearing held in abeyance, pending attempts at settlement before a Commission settlement judge. However, Westerville requests that it be allowed to undertake discovery during the period held in abeyance, so as to be able to document and calculate more precisely any unlawful charges. Westerville believes this approach should enable the parties to reach a just and reasonable settlement.

### **Notice**

10. Notice of the complaint was published in the *Federal Register*, 70 Fed. Reg. 17,079 (2005), with comments, interventions, and protests due on or before April 18, 2005. Columbus Southern filed an answer and motion to dismiss the complaint. On May 3, 2005, Westerville filed an answer to Columbus Southern's answer.

### **Columbus Southern's Answer**

11. Columbus Southern requests that the Commission dismiss Westerville's complaint. Columbus Southern presents four defenses in its response. First, Columbus Southern states that Westerville has not demonstrated a claim upon which relief can be granted, *i.e.*, Columbus Southern states that Westerville is incorrect in naming the

AEPSC as a respondent in this case. Columbus Southern explains that AEPSC and Westerville do not have a contractual relationship. According to Columbus Southern, AEPSC has not issued billings to Westerville. Therefore, Columbus Southern argues that AEPSC should be removed as a respondent to this complaint.

12. Second, Columbus Southern asserts that Westerville's complaint is premised on incorrect and omitted facts, and misinterpretations of the FCA provisions of the Service Agreement.<sup>6</sup> Third, Columbus Southern denies that the base cost of fuel used in the calculation of the FCA includes a gross-up for the Ohio GRT. Instead, Columbus Southern explains that the base amount only includes fuel costs and does not include any Ohio GRT.<sup>7</sup> Rather, according to Columbus Southern, all of the Ohio GRT associated with the base period fuel costs were reflected in non-fuel base rates. Columbus Southern explains that the Ohio GRT expense was not different from any other test year expenses that Columbus Southern collected from Westerville through its non-fuel base rates.

13. With respect to amounts collected through its FCA, Columbus Southern states that it is only the difference between the base period fuel costs and the current period fuel costs that is subject to modification for the Ohio GRT.<sup>8</sup> Thus, Columbus Southern denies the allegation that any Ohio GRT associated with revenues it collected from Westerville for customer charges, or kW demand charges, kWh energy charges, or base period fuel charges have ever been collected through the FCA. Columbus Southern notes that, based on Westerville's own calculations, from May 2001 through January 2004, Columbus Southern actually credited Westerville with a net amount of \$77,641 for the Ohio GRT due to the predominantly negative fuel adjustment clause revenue that flowed through its FCA during the period from May 2001 through January 2004.<sup>9</sup> Columbus Southern states that one could reasonably argue that it could have stopped adjusting the difference between current and base period fuel costs for the Ohio GRT when Columbus Southern became exempt from the tax, because there was no longer any Ohio GRT occasioned by

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<sup>6</sup> Columbus Southern lists 14 answers to factual allegations in Appendix.

<sup>7</sup> Columbus Southern relies on the Affidavit of David M. Roush and Statement BI, page 3 of 16 contained in Exhibit A to its Answer as evidence that no Ohio GRT was included in the base cost of fuel.

<sup>8</sup> In support of this statement, Columbus Southern provides copies of Statement BI, Fuel cost adjustment factors, for Period I and for Period II, and Statement AY, Income and Revenue Tax Rate Data, for Period II, that were included in Docket No. ER02-282.

<sup>9</sup> Columbus Southern references page 6 of 13 of Exhibit 7 to Westerville's complaint.

that difference, and if it had made such a decision, it would have resulted in increased billings to Westerville of nearly \$80,000.<sup>10</sup>

14. Columbus Southern further asserts that it would be inappropriate to refund, through the FCA, revenues collected through non-fuel base rates, to reflect a decrease in or elimination of one cost component (i.e., the Ohio GRT) without recognizing increases in that cost, or other costs, or totally new costs, that were never reflected in Columbus Southern's non-fuel base rates throughout the term of the Agreement.

15. Fourth, Columbus Southern explains that, with respect to the City of Bryan, the agreements between the cities and the American Electric Power-East (AEP) operating companies are vastly different from the arrangements Columbus Southern had with Westerville. The contract with the City of Bryan was entered into in 1998 under the AEP Companies' Wholesale Market Tariff and does not contain a fuel adjustment clause. Instead, the agreement contains a provision that spells out a specific treatment for the Ohio GRT. Columbus Southern believes these differences make it clear that Westerville and the City of Bryan are not similarly situated and Columbus Southern did not engage in unlawful undue discrimination. Columbus Southern further points out that the City of Jackson, Ohio, took the same service as Westerville and was charged the same negative GRT through the FCA until it ceased taking service in March 2001.

## **Discussion**

### **Procedural Matters**

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.214 (2004), the notice of intervention and timely, unopposed motion to intervene serve to make Columbus Southern a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a)(2) (2004), prohibits an answer to an answer, unless otherwise ordered by the decisional authority. We are not persuaded to accept Westerville's answer and will, therefore, reject it.

### **Commission Determination**

17. We will deny Westerville's complaint. Westerville has not shown that Columbus Southern has inappropriately collected any amounts of Ohio GRT. Thus, Westerville is not entitled to any refunds.

18. The Commission cannot, contrary to Westerville's assertion, adjust base rates retroactively to reflect changes in the cost level of one particular cost item once the rates

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<sup>10</sup> See Columbus Southern's Answer at Appendix 1, P9.

have been accepted and made no longer subject to refund.<sup>11</sup> Here, Columbus Southern's base rates (including its base fuel cost) were unconditionally accepted by the Commission in Docket No. ER82-282, to be effective October 1, 1982.<sup>12</sup> Any change to those rates must consider all of the cost components and can only be made on a prospective basis. Therefore, the relief sought by Westerville with respect to the base rates cannot be provided.<sup>13</sup>

19. On the other hand, the Commission agrees with Westerville that, if inappropriate amounts are included in the FCA, they should be refunded. This is because Columbus Southern's FCA is a formula rate that is subject to adjustment and refund if billed amounts include costs that are not properly includable in the FCA formula. Here, we conclude, based on Columbus Southern's statements and exhibits, that inappropriate amounts were included in the FCA billings for the period in question, *i.e.*, differences between current and base period fuel costs were multiplied by an Ohio GRT factor and included in the FCA billings to Westerville after Columbus Southern became exempt from the Ohio GRT. However, because the calculations produced a net negative Ohio GRT adjustment to the FCA billings (*i.e.*, operated to the benefit of Westerville by decreasing its FCA billings) during the period in question, Columbus Southern did not over-collect from Westerville and therefore refunds are not appropriate. Moreover, consistent with Columbus Southern's position, we will not require it to recalculate

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<sup>11</sup> See, e.g. *Carolina Power & Light Co. v. FERC* at 860 F.2d 1097 (D.C. Cir. 1988). See also *Delmarva Power & Light Co.*, Opinion No. 262, 38 FERC ¶ 61,098 at 61,259 (1987), *reh'g denied*, Opinion No. 262-A, 43 FERC ¶ 61,520 (1988), *aff'd mem.* No. 88-1557 (D.C. Cir. 1989); *Southwestern Public Service Co.*, 63 FERC ¶ 61,295 at 63,093, n 12 (1993). In *Carolina Power & Light Co. v. FERC*, the court stated:

While the rationale behind this policy has never been clearly set forth by the FERC, the Commission's refusal to make a "spot adjustment" to established rates on the basis of discrete changes in *one component* of a utility's costs appears rooted in two notions. First, the Commission appears to believe that wholesale rates should ordinarily be adjusted only upon a comprehensive review of cost-of-service data. Implicit in this view is the assumption that overstated estimates of a utility's expenses are almost always accompanied by offsetting underestimates. Second, the Commission has not been blind to possible unfairness inherent in entertaining spot adjustments in the customers' favor.

<sup>12</sup> See unpublished Commission Letter Order in Docket No. ER82-282, dated March 25, 1982.

<sup>13</sup> Even if the base cost of fuel had been accepted subject to refund, the attachments to the affidavit of Columbus Southern's witness provide cost of service statements that conclusively show that Columbus Southern's base fuel costs do not include the Ohio GRT, and therefore no refunds of base fuel costs would be appropriate.

Westerville's billings to collect the additional amounts that resulted from the exclusion of the "negative" Ohio GRT adjustment.

20. We also reject Westerville's assertion that Columbus Southern engaged in undue discrimination in the application of its tariff. Columbus Southern charged the City of Jackson the same rates as those charged to Westerville and fully justified the difference in treatment of the City of Bryan, which was not similarly situated with Westerville and, indeed, did not even have a fuel adjustment clause. Accordingly, the Commission will deny Westerville's complaint.

The Commission orders:

Westerville's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.