

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

NTS Services, Inc.)
-vs-)
Gallatin River Communications, L.L.C.)
d/b/a CenturyLink)
) Docket No. 10-0637
Formal Complaint and Request for)
Declaratory Ruling pursuant to Sections)
13-515 and 10-108 of the Illinois Public)
Utilities Act.)

**REPLY TO BRIEFS ON EXCEPTIONS OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

The Staff of the Illinois Commerce Commission ("the Staff"), by and through its counsel, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits its Reply to Briefs on Exceptions in the above-captioned matter.

NTS Services, Inc. (hereafter "NTS") objects, in its Brief on Exceptions, to the assessment of costs against it. *See, generally, NTS Brief on Exceptions*. NTS asserts that in light of having withdrawn its complaint prior to hearing or investigation, ostensibly for the purpose of conserving Commission resources, it should not be charged with costs. *Id.*, ¶4. NTS further contends that assessment of costs would be premature, and that there is no indication of the amount of costs or how they would be computed. *Id.*, ¶5. NTS further argues that it should be entitled to notice and a hearing prior to being charged with costs. *Id.*, ¶6. Finally, NTS avers that, somewhat plaintively, that:

It would appear that costs should be apportioned only after the Commission has conducted an investigation, conducted proceedings, and made a determination as to the relative merits of the respective arguments of Complainant and Respondent.

Id.

NTS is wrong in all respects. First, Section 13-515 of the Public Utilities Act - which NTS elected of its own volition to invoke – provides in relevant part that:

The Commission shall assess the parties under this subsection for all of the Commission's costs of investigation and conduct of the proceedings brought under this Section including, but not limited to, the prorated salaries of staff, attorneys, hearing examiners, and support personnel ... directly attributable to the complaint brought pursuant to this Section, ... dividing the costs according to the resolution of the complaint brought under this Section.

220 ILCS 5/13-515(g) (emphasis added)

NTS was absolutely aware of this provision, having sought, in its prayer for relief, an order directing Century Link to pay both NTS's and the Commissions costs. Complaint at 18; Prayer for Relief, §§(G)-(H). Accordingly, it cannot now be legitimately aggrieved by the application of this selfsame statutory provision. Moreover, the assessment of costs is mandatory – the Commission “shall assess” them. Accordingly, there is no basis for a waiver of such costs in this case.

Second, NTS's assertion that its putatively voluntary withdrawal of its Complaint somehow militates against the assessment of costs rings hollow. While the Staff does not claim insight into NTS's motives, it is worthy of note that NTS “voluntarily” withdrew its Complaint two weeks after it filed the Complaint

four days after Staff and Century Link filed Motions to Dismiss identifying fatal shortcomings in the Complaint. Accordingly, the argument that NTS withdrew its Complaint out of concern for Commission resources, rather than because it recognized that the Complaint would be dismissed on Staff's and Century Link's Motions, does not quite pass muster. The best way to conserve Commission resources would have been to file a Complaint that did not, on its face, fail to comply with the statute.

Third, the manner in which costs are computed is clearly set forth in the statute; they are computed using: "the prorated salaries of staff, attorneys, hearing examiners, and support personnel[.]" 220 ILCS 5/13-515(g). Since, as noted above, NTS invoked Section 13-515(g) in its Complaint, it cannot claim ignorance of its terms now. To the extent that the Commission's costs are unknown, that is a risk that NTS took in invoking section 13-515.

Fourth, the statute does not afford the non-prevailing party a right to notice and a hearing prior to being assessed the Commission's costs. As noted, Section 13-515(g) provides that such costs "shall" be assessed, without more.

Fifth, while it may "appear [to NTS] that costs should be apportioned only after the Commission has conducted an investigation [and] proceedings, and made a determination as to the relative merits[.]" this position is, again, in no way apparent on the face of the statute.

This outcome is entirely consistent with civil practice in Illinois. Section 2-1009 of the Illinois Code of Civil Procedure provides, in relevant part, that:

[A] plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's

attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause.

735 ILCS 5/2-1009(a) (emphasis added)

While the Code of Civil Procedure is not specifically applicable to Commission proceedings, it is clear as a general matter that Illinois law does not support the proposition that costs may only be imposed after a hearing and a finding on the merits. In any case, the ALJ's Proposed Order here amounts to a finding on the merits – specifically, a finding that, but for NTS's withdrawal of its Complaint, the Complaint would have been dismissed. See Proposed Order at 2 (“Given the circumstances of this case, the Commission finds that NTS must be assessed Commission costs related to this Complaint”).

At a very basic level, NTS is being charged with costs because it failed to observe clear, unambiguous requirements imposed by a statute under which it sought relief. Imposing costs under such circumstances is entirely reasonable.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that the Proposed Order be adopted.

Respectfully submitted,

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