STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

NTS Service Corp.	)	
	)	
-vs-	)	
	)	Docket No. 12-0116
Gallatin River Communications LLC d/b/a CenturyLink	)	
	)	
Formal Complaint and Request for Declaratory Ruling Pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act.	)	

STAFF MOTION TO STRIKE CERTAIN PORTIONS OF THE NTS SERVICE CORP COMPLAINT AND REQUEST FOR DECLARATORY RULING

NOW COMES, the Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, in response to NTS Service Corp.'s Request for Declaratory Ruling and Formal Complaint ("Complaint"), files this Motion to Strike Portions of the Complaint pursuant to Section 200.190 of the Rules of Practice before the Illinois Commerce Commission, 83 Ill. Adm. Code 200.190, and states as follows:

I. BACKGROUND

On February 15, 2012, NTS Service Corp.'s ("NTS") filed its Formal Complaint and Request for Declaratory Ruling ("Complaint") in this proceeding, bringing its claims against Gallatin River Communications LLC d/b/a CenturyLink ("CenturyLink") pursuant to Sections 13-515, 9-250, 10-101 and 10-108 and the parties' Interconnection Agreement ("ICA") entered into pursuant to Sections 251 and 252 of the Federal Communications Act (47 USC §§ 251 and 252). During a pre-hearing conference held on March 6, 2012, the Administrative Law Judge set a motion schedule for all parties.

On March 7, 2012, CenturyLink filed a Motion For a More Sufficient Complaint And Bill of Particulars ("CenturyLink Motion").

II. INTRODUCTION

Staff supports the CenturyLink Motion seeking clarification. Staff also requests that references to Part 200.220 Declaratory Rulings be struck because the requested declaratory ruling is beyond the scope of Section 200.220 and, thus, the authority of the Commission to provide. Staff understands that in most states complaints are often coupled with requests for declaratory rulings. In Illinois, however, an administrative agency has a specifically limited authority to issue declaratory rulings.

The language that Staff requests be struck is very limited. It only appears in three places. Nonetheless, staff will provide a full legal argument due to the potential for confusion if the declaratory language is not struck. Specifically, Staff moves to strike the following language indicated by the strike through:

1. in the caption – "Formal Complaint ~~and Request for Declaratory Ruling"~~
2. On page 1 – "[P]ursuant to Sections 200.170 ~~and 200.220~~ of the Illinois Administrative Code[]"
3. On page 19, under the Prayer for Relief, - " []Commission grant its Complaint ~~and Request for Declaratory Ruling~~, and enter judgment []."

III. Argument

As noted above, Staff's requested relief is extremely limited. Nonetheless, Staff will provide a full legal argument due to the lack of Commission authority and to the potential for procedural confusion if the limited declaratory language is not struck.

A. The Illinois Legislature Limits Agencies' Declaratory Ruling Authority

The Illinois Supreme court "has consistently held that, inasmuch as an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created." *City of Chicago v. Fair Employment Practices Com.* (1976), 65 Ill. 2d 108, 113; *Chicago Division of the Horsemen's Benevolent & Protective Ass'n v. Illinois Racing Board, Ill.* 407, 410. (1972), 53 Ill. 2d 16; *Pearce Hospital Foundation v. Illinois Public Aid Com.* (1958), 15 Ill. 2d 301, 307; *Hesseltine v. State Athletic Com.* (1955), 6 Ill. 2d 129, 131-32; *People ex rel. Polen v. Hoehler* (1950), 405 Ill. 322, 326-28; *People ex rel. Hurley v. Graber* (1950), 405 Ill. 331, 340-44, 346-48.)" *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 551 (1977). Unlike a court, the Commission has no general or common law powers and it must find statutory authority for the powers it exercises. *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 201, 243 (1990).

Declaratory rulings are created entirely by statute. They were unknown at common law. *Wills v. O'Grady*, 86 Ill. App. 3d 775 (1st Dist. 1980)("Declaratory judgments were unknown at common law and were created by statute.").

As noted above, as an administrative state agency the Commission's authority is limited by its enabling statute, the PUA, and also by the Illinois Administrative Procedure Act ("APA"). In fact, administrative agencies, such as the Commission, are prohibited from issuing declaratory rulings, unless the agency has adopted a rule providing for declaratory rulings under Section 5-150 of the APA. *Harrisonville v Illinois Commerce Comm'n*, 176 Ill. App. 3d 389, 393 (5th Dist. 1988)("Barring the adoption of such a rule in

compliance with appropriate rulemaking procedures, the Commission has no authority to render declaratory rulings.”).

Section 5-150 of the Illinois APA, provides in relevant part that:

> Each agency may in its discretion provide by rule for the filing and prompt disposition of petitions or requests for declaratory rulings *as to the applicability to the person presenting the petition or request of any statutory provision enforced by the agency or of any rule of the agency*.
> 5 ILCS 100/5-150(a)(emphasis added).

The Commission has dutifully followed this directive from the General Assembly and promulgated a rule for the filing of petitions for declaratory ruling consistent with the APA directive. 83 Ill. Adm. Code 200.220. Section 200.220 of the Commission’s rules provides, in relevant part, that:

> (a) When requested by the affected person, the Commission may in its sole discretion issue a declaratory ruling with respect to:
>
> > (1) the *applicability* of any statutory provision enforced by the Commission or of any Commission rule *to the person(s) requesting* a declaratory ruling: and
> >
> > (2) whether the person’s compliance with a federal rule will be accepted as compliance with a similar Commission rule.
>
> 83 Ill. Adm. Code 200.220(a)(emphasis added).

Accordingly, the Commission has limited authority to issue declaratory rulings. The Commission is not a county circuit court that has a much broader grant of authority to issue declaratory rulings. In fact, the Illinois Code of Civil Procedure specifically authorizes circuit court judges to issue the declarations NTS seeks here. See 735 ILCS 5/2-701(a). The Commission, however, is limited to the authority expressly granted it by the Illinois Legislature.

B. Part 200.220 Has Unique Standards

It is also important to keep in mind that Part 200.220 has different standards than a stand-alone Section 13-515 Complaint would have. Notably, there is no appeal from Commission declaratory rulings. Part 200.220(i). This fact alone should require that the declaratory ruling language be struck. For example, the potential for confusion and problems that a hybrid order, couched in declaratory ruling language but also seeking findings of fact and conclusions, like the NTS Complaint, is likely to cause is illustrated in *Research Tech. Corp. v. Commonwealth Edison*, 343 Ill. App. 3d 37 (1st Dist. 2003)("*Research Tech*"). In the *Research Tech* case, the Commission had contended on appeal that its Order was a Part 200.220 declaratory ruling and, thus, could not be appealed. The court in *Research Tech* disagreed and found that "the Commission improperly conducted a declaratory ruling proceeding" on the ComEd Petition for Declaratory Ruling because the "affected" person was really Research Tech. *Research Tech,* 343 Ill. App. 3d 37, 44.

The NTS Complaint cites to Part 220.220 and requests declaratory rulings that would determine both NTS rights and CenturyLink rights. In *Research Tech*, ComEd cited to Part 200.220 and requested declarations that would determine both the rights of ComEd and Research Tech. *Research Tech,* 343 Ill. App. 3d at 44. The *Research Tech* court concluded that the Commission conducted an improper declaratory ruling because it went beyond the scope of its authority under Part 200.220. Likewise, NTS does *not* seek a declaration determining whether or not federal or state law enforced by the Commission is *applicable to it*. Rather, NTS seeks a declaration of rights and responsibilities between it and CenturyLink.

Of course, a finding that CenturyLink would be in violation of the PUA and relevant federal law would intrinsically mean that these statutes and ICA are applicable to it. However, any argument that a declaration of rights and responsibilities is really akin to a determination of applicability, and thus fall within the scope of Section 200.220, should be treated with skepticism as the *Research Tech* court explained:

> Just about everything the Commission does involves, in one way or the other, applicability of provisions of the Public Utility Act. Taking that observation a step further, one could argue for a declaratory ruling each time the Commission makes a decision concerning the Public Utilities Act. The argument goes too far. The exception swallows the rule.

The Commission, like the *Research Tech* court, should reject any such similar arguments as they would gut the clear limitations both in Section 200.220 rule and in Section 5-150 of the APA, rendering them meaningless.

IV. CONCLUSION

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that the declaratory ruling language and reference to Part 200.220 should be struck from the NTS Complaint, consistent with the arguments set forth herein.

Respectfully submitted,

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