FILED

APR 12 2019

Missouri Public Service Commission

Missouri Public Service Commission
3:21 pm CT

Missouri Public Service Commission

Judge or Division:	Appellate Number:	
Appellant: Conexon, LLC and GoSEMO, LLC vs.	Missouri Public Service Commission File Number: CA-2019-0196	
Respondent: Missouri Public Service Commission		(Date File Stamp)

Notice of Appeal

Notice is given that Conexon, LLC and GoSEMO, LLC appeals to the Missouri Court of Appeals ☑ Western ☐ Eastern ☐ Southern District.

4/12/2019
Date Notice of Appeal Filed
(to be filled in by Secretary of Commission)

Megan E. Ray by SS.
Signature of Attorney or Appellant

The notice of appeal shall include the appellant's application for rehearing, a copy of the reconciliation required by subsection 4 of section 386.420, a concise statement of the issues being appealed, a full and complete list of the parties to the commission proceeding, and any other information specified by the rules of the court. The appellant(s) must file the original and (2) two copies and pay the docket fee required by court rule to the Secretary of the Commission within the time specified by law. **Please make checks or money orders payable to the Missouri Court of Appeals.** At the same time, Appellant must serve a copy of the Notice of Appeal on attorneys of record of all parties other than appellant(s), and on all parties not represented by an attorney. The commission shall forward the notice of appeal to the appropriate appellate court.

CASE INFORMATION

Appellant Name / Bar Number:		Respondent's Attorney / Bar Number:	
Megan E. Ray 62037		Missouri Public Service Commission	
Address: 3816 South Greystone Ct., Suite B Springfield, MO 65804		Address: 200 Madison Street, Suite 800 PO Box 360 Jefferson City, MO 65102	
Telephone: 417-864-6401	Fax: 417-864-4967	Telephone: 573-751-3234	Fax:

Date of Commission Decision:	Date of Application for Rehearing Filed:	Date Application for Rehearing Ruled On:
2/14/19	2/22/19	3/13/19

DIRECTIONS TO COMMISSION

A copy of the notice of appeal and the docket fee shall be forwarded to the clerk of the appellate court. Unless otherwise ordered by the court of appeals, the commission shall, within thirty days of the filing of the notice of appeal, certify its record in the case to the court of appeals.

Certificate of Service

I certify that on 4/12/19 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.

(See Attachments)

Megan E. Ray
Appellant or Attorney for Appellant

Certificate of Service

The undersigned certifies that a true and correct copy of the forgoing document was served by electronic mail or U.S. Mail, postage prepaid, this April 12, 2019 upon all counsel of record and the following:

Missouri Public Service Commission
Staff Counsel Department
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounselservice@psc.mo.gov

Office of the Public Counsel
Marc Poston
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Missouri Public Service Commission
Whitney Payne
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
whitney.payne@psc.mo.gov

Wisper ISP Inc.
Douglas C Gruenke
1002 East Wesley Drive, Ste. 100
O'Fallon, IL 62269
dcg@bglattorneys.com

/s/ Megan E. Ray
Megan E. Ray

Full and Complete List of Parties

In accordance with RSMo. 386.510, the following contains a full and complete list of the parties to the Commission proceeding:

Appellants/Complainants:

Conexon, LLC
Megan E Ray
3816 S Greystone Ct., Suite B
Springfield, MO 65804
mray@lawofficemo.com

GoSEMO, LLC
Megan E Ray
3816 S Greystone Ct., Suite B
Springfield, MO 65804
mray@lawofficemo.com

Respondent:

Missouri Public Service Commission
Staff Counsel Department
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounselservice@psc.mo.gov

Additional Parties to Commission Hearing

Office of the Public Counsel
Marc Poston
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Missouri Public Service Commission
Whitney Payne
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
whitney.payne@psc.mo.gov

Callabyte Technology, LLC
Megan E Ray
3816 S Greystone Ct., Suite B
Springfield, MO 65804
mray@lawofficemo.com

Wisper ISP Inc.
Douglas C Gruenke
1002 East Wesley Drive, Ste. 100
O'Fallon, IL 62269
dcg@bglattorneys.com

Concise Statement of Issues

In accordance with RSMo. 386.510, the following contains a concise statement of the issues being appealed:

Conexon, LLC and GoSEMO, LLC appeal the Missouri Public Service Commission's Order Granting Designation as an Eligible Telecommunications Carrier ("ETC") to Wisper ISP Inc. The Order was premature in that discovery by Intervenors was not permitted, depriving Intervenors of their due process rights. Additionally, Wisper's ETC Application contained material misrepresentations which were not corrected by the date of the Order and Wisper's ETC Application failed to comply with all the ETC requirements. Furthermore, Wisper's ETC application was incomplete. Finally, Wisper's ETC application failed to comply with Commission Rule 4 CSR 2.060(1)(M) and 4 CSR 240-31.016(2)(A).

No reconciliation pursuant to subsection 4 of Section 386.420 RSMo. is required in the instant matter, as the Commission's Order has not resulted in the establishment of new rates.

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Application of Wisper ISP Inc. for Designation as an Eligible Telecommunications Carrier	)))	Case No. CA-2019-0196

JOINT APPLICATION FOR REHEARING AND MOTION FOR RECONSIDERATION

COMES NOW Conexon, LLC and GoSEMO, LLC (hereinafter, collectively "Intervenors"), by and through undersigned counsel, and pursuant to RSMo. § 386.500 and 4 CSR 240-2.160, hereby files this Joint Application for Rehearing and Motion for Reconsideration regarding the Commission's Order Granting Designation as an Eligible Telecommunications Carrier ("ETC") to Wisper ISP Inc. ("Order") and various procedural orders contained therein.

The Order was granted on February 14, 2019. The stated effective date of the Order is February 24, 2019. This Joint Application for Rehearing and Motion for Reconsideration is timely filed both within ten (10) days of the date of the Order and before the effective date of the Order pursuant to RSMo. § 386.500 and 4 CSR 240-2.160.

Intervenors allege the Order was unlawful, unjust and unreasonable for the following reasons:

ARGUMENT

I. The Order was premature in that adequate time for discovery by Intervenors was not permitted, depriving Intervenors of their due process rights.

Intervenors timely filed their Joint Application to Intervene on January 18, 2019 which was subsequently granted by the Commission on January 29, 2019, with the Commission ruling that the Joint Application to Intervene satisfied the requirements of 4 CSR 240-2.075.

On January 31, 2019, just two days after Intervenors' Joint Application to Intervene was

granted, Staff Counsel filed its Recommendation that the PSC approve Wisper's ETC Application.

On February 7, 2019, only nine (9) days after being granted intervention, Intervenors sent their initial Data Requests to Wisper. Intervenors also filed a Joint Motion to Shorten Time regarding said Data Requests on February 11, 2019 in an effort to preserve Wisper's ability to be designated as an ETC by February 25, 2019, affording Wisper adequate time to respond to Intervenors' Data Requests while still providing Intervenors with an expedited period to conduct discovery. Wisper stated in its Opposition to the Intervenors' Joint Motion to Shorten time that it intended to object to Intervenors' Data Requests. The Commission denied Intervenors' Joint Motion to Shorten Time in its Order. As of this date, Wisper has not responded to, or objected to, a single Data Request issued by Intervenors. Intervenors' Joint Motion to Shorten Time should not have been denied because the low burden of showing good cause was met by Intervenors.

On February 14, 2019, approximately two weeks after Intervenors' Joint Application to Intervene was granted and only seven (7) days after Intervenors' Data Requests were sent to Wisper, the Commission granted Wisper's ETC Application.

The Commission's Order states, *inter alia*, that "[t]he Intervenors have not filed a motion to compel or otherwise attempted to compel responses to data requests" as explanation of the denial of the Joint Motion to Shorten Time. Of course, Wisper had 20 days to respond to Intervenors' Data Requests pursuant to 4 CSR 240-2.090(2)(C), which gave Wisper until February 27, 2019. As a result, a Motion to Compel would not have been an appropriate or a timely filing for Intervenors to make on February 14, 2019, the date of said Order.

The Intervenors have not been afforded due process in this proceeding. Every filing by

the Intervenors was timely and Intervenors even attempted to honor Wisper's request for ETC designation by February 25, 2019. The Intervenors' legal rights have been completely disregarded by this premature Order.

In previous ETC cases, the Commission has stated in corresponding Orders that a hearing is required when an Intervenor requests a hearing or when a party objects to an ETC application. One such example is found in the Blue Jay Wireless, LLC case. In its Order Granting ETC Designation to Blue Jay Wireless, the Commission stated as follows:

> "This matter is within the Commission's jurisdiction.[1] Because no party objects to the company's application, no evidentiary hearing is required.[2] Rights to a hearing are therefore waived.[3]"[4]

It is clear the Commission's position in that case, and in many others,[5] was that if a party had objected to Blue Jay's application, an evidentiary hearing would have been required. Intervenors were not even permitted to conduct reasonable discovery in this case, let alone afforded an opportunity for an evidentiary hearing. Intervenors were made proper parties to this case when the Commission granted Intervenor's Application for Intervention. Intervenor's Application raised concerns with Wisper's ETC application and clearly opposed granting ETC status to Wisper. Thus, an evidentiary hearing should have been held after a reasonable discovery period. Several past ETC cases decided by the Commission did involve hearings and some even

---

[1] 47 U.S.C. §(e)(2).
[2] State ex rel. Deffenderfer., Inc. v. Public Service Com'n, 776 S.W.2d 494 (Mo. App. 1989).
[3] Section 536.060, RSMo 2000.
[4] *See* Order Granting Application for Designation as an ETC to Blue Bird Wireless, LLC, Issued May 15, 2013, File No. TA-2013-0272.
[5] *See* Order Granting Application for Designation as an ETC to Budget PrePay, Inc., Issued April 24, 2013, File No. CO-2012-0043; *See also* Order Granting Application for Designation as an ETC to Cricket Communications, Inc., Issued March 10, 2010, File No. TA-2010-0229; *See also* Order Granting Application for Designation as an ETC to Easy Telephone Service Company, Issued November 22, 2011, File No. TA-2011-0164; *See also* Order Granting Application for Designation as an ETC to i-wireless, LLC, Issued November 9, 2011, File No. TA-2011-0377; *See also* Order Granting Application for Designation as an ETC to Chariton Valley Telecom Corporation, Issued May 1, 2013, File No. TA-2012-0128; *See also* Order Granting Application for Designation as an ETC to Sage Telecom Communications, Issued November 13, 2013, File No. TA-2014-0008.

involved multiple hearings.[6]

Intervenors respectfully request the Commission Reconsider its denial of Intervenors' Motion to Shorten Time and Rehear its Order Granting ETC Designation to Wisper ISP Inc. and afford Intervenors due process by allowing Intervenors an adequate time to conduct discovery and to hold an evidentiary hearing in this case.

II. Wisper's ETC Application contained material misrepresentations which were not corrected by the date of the Order.

Wisper made material misrepresentations in its ETC Application. For example, on page 14 of Wisper's ETC Application, Wisper states that "[f]or its Missouri Census Blocks, Wisper committed to offer 25 Mbps download and 3 Mbps upload." However, Wisper actually committed to 100 Mbps (download)/20 Mbps (upload) broadband performance obligations that must be made available to at least 95% of the locations in its CAF-II winning areas using a network capable of delivering 100/20 Mbps speeds to at least 70% of its CAF-II winning locations at peak hours.[7] This is a material misrepresentation of the very core of Wisper's ETC Application for which a correction should have been required prior to the Commission's grant of ETC designation.

Further, Wisper stated in its ETC Application that it must have its ETC designation on or before February 25, 2019 in order to be eligible to receive the CAF Phase II Auction funds.[8]

---

[6] *See* Report and Order, Issued May 3, 2007, Case No. TO-2005-0384.

[7] *See* Connect America Fund Phase II Auction Schedule for July 24, 2018; Notice and Filing Requirements and Other Procedures for Auction 903, FCC Rcd 1428, 1514-15 (2018) ("...a network that fully supports the delivery of consumer voice and broadband service that meets the requisite performance requirements to at least 95 percent of the required number of locations in each state by the end of the six year build-out period and for the duration of the 10-year support term, assuming a 70 percent subscription rate by the final service milestone.").

[8] *See* ETC Application at p. 2.

Wisper did not disclose to the Commission that it can in fact file a Petition for Waiver with the FCC to obtain additional time to obtain ETC designation status, a procedural option contemplated by the FCC and that will be exercised by other CAF-II winning bidders.[9]

Wisper filed its ETC application nearly three (3) months after the September 27, 2018 date by which the FCC would presume that the CAF-II ETC Application "acted in good faith".[10] Intervenors' rights should not be trampled upon simply because Wisper elected to file its ETC Application nearly three months after the date specified by the FCC. This is a material misrepresentation for which a correction should have been required prior to the Commission's grant of ETC designation.

III. Wisper's ETC Application failed to comply with all ETC requirements.

[9] *See In the Matter of Connect America Fund*, 31 FCC Rcd. 5949, 6002-03, Report and Order and Further Notice of Proposed Rulemaking (2016) ("...[W]e will require winning bidders for the Phase II competitive bidding process to submit proof of their ETC designation as part of the long-form application process. Such proof must be submitted within 180 days of the public notice announcing them as winning bidders. Failure to obtain ETC status and submit the required documentation by the deadline is an event of default... In the event the bidder is unable to obtain the necessary ETC designations within 180 days, we find that it would be appropriate to waive the 180-day timeframe if the bidder is able to demonstrate that it has engaged in good faith efforts to obtain an ETC designation, but the proceeding is not yet complete. A waiver of the 180-day deadline would be appropriate if, for example, an entity has an ETC application pending with a state and the state's next scheduled meeting at which it would consider the ETC application will occur after the 180-day window... [W]hen considering waivers of the 180-day timeframe for obtaining ETC designation, we will presume that an entity will have acted in good faith if the entity files its ETC application within 30 days of the release of the public notice announcing that it is a winning bidder."); *see also* Connect America Fund Phase II Auction (Auction 903) Closes: Winning Bidders Announced; FCC Form 683 Due October 15, 2018, Public Notice, DA 18-887 (2018) at ¶¶ 34-35 ("CAF-II Auction Closing Public Notice.").

[10] *See* Connect America Fund et al., Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 6002-03, paras. 152-153 (2016) (Phase II Auction Order and/or FNPRM). ("...In the event [a CAF-II] bidder is unable to obtain the necessary ETC designations within 180 days, we find that it would be appropriate to waive the 180-day timeframe if the bidder is able to demonstrate that it has engaged in good faith efforts to obtain an ETC designation, but the proceeding is not yet complete. A waiver of the 180-day deadline would be appropriate if, for example, an entity has an ETC application pending with a state and the state's next scheduled meeting at which it would consider the ETC application will occur after the 180-day window... We expect that winning bidders will have an incentive to file their ETC applications expeditiously so that they can meet the requirements to begin receiving support as soon as possible. Instead, based on what we observed in the rural broadband experiments, when considering waivers of the 180-day timeframe for obtaining ETC designation, we will presume that an entity will have acted in good faith if the entity files its ETC application within 30 days of the release of the public notice announcing that it is a winning bidder.")

The provision of E911 services is a requirement of all ETCs.[11] Wisper admitted in its ETC Application that in the event of a failure of the IP connection or the local AC power, its VoIP service, including the E911 feature, will not function.[12] Through Data Requests, Intervenors sought further information regarding concerns about Wisper's ability to provide customer access to critical E911 services in certain situations. Wisper has not responded to Intervenors' Data Requests as of this date. Intervenors raised this issue with the Commission in their Joint Motion to Shorten Time which was denied within the Commission's Order Granting ETC Designation to Wisper ISP Inc. Thus, Intervenors respectfully request the Commission Reconsider denial of Intervenors' Joint Motion to Shorten Time.

On the face of Wisper's ETC Application, this critical requirement regarding the provision of E911 service was not met. Wisper should have been required to provide an explanation of how it intended to meet this requirement prior to the Order being issued. Thus, Intervenors respectfully request the Commission Rehear its Order Granting ETC Designation to Wisper ISP Inc.

IV. **Wisper's ETC Application was incomplete.**

Wisper never filed with the Commission Exhibit D to its ETC Application, which was an integral part of its Application. Intervenors also never received a copy of Exhibit D, despite requesting it through Data Requests. Wisper has not responded to any of Intervenors' Data

---

[11] *See e.g.*, 47 C.F.R. § 54.101(a)(1) ("Eligible voice telephony services must provide ... emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; and 47 C.F.R. § 202(a)(2) ("In order to be designated an eligible telecommunications carrier, any common carrier in its application must... demonstrate its ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.").

[12] *See* Wisper's ETC Application, pg. 16.

Requests as of this date. Intervenors raised this issue with the Commission in their Joint Motion to Shorten Time which was denied within the Commission's Order Granting ETC Designation to Wisper ISP Inc. Thus, Intervenors respectfully request the Commission Reconsider denial of Intervenors' Joint Motion to Shorten Time.

Wisper's ETC Application should not have been granted until said Application was complete. Thus, Intervenors respectfully request the Commission Rehear its Order Granting ETC Designation to Wisper ISP Inc.

V. Wisper's ETC Application failed to comply with Commission Rule 4 CSR 2.060(1)(M) and 4 CSR 240-31.016(2)(A).

Wisper failed to file an Affidavit verifying its ETC Application contemporaneously with its Application on December 21, 2018 as required by 4 CSR 2.060(1)(M) and 4 CSR 240-31.016(2)(A). The Commission issued an Order on February 11, 2019 requiring Wisper to file an Affidavit by February 12, 2019. Wisper failed to file the Affidavit by that date and on February 13, 2019, the Commission issued an Order Directing Immediate Response which provided Wisper with a third opportunity to file its required Affidavit. The Affidavit filed by Wisper's President on February 13, 2019 was filed under penalty of perjury.

Wisper's Affidavit in support of its ETC application clearly should have been rejected by the Commission. Among other things, it was dated November 17, 2018 which was more than a month before Wisper filed its ETC Application with the Commission on December 21, 2018. Also, in the Affidavit, it states "Wisper has also filed with the state to receive authorization to provide competitive local and intrastate interexchange services."[13] Wisper never filed an

[13] *See* Verification, Exhibit I to Wisper's ETC Application, at paragraph 3.

application for authorization to provide competitive local and intrastate exchange services in the state of Missouri.

Wisper's President either willfully told the Commission an untruth in his Affidavit or this Affidavit was hastily borrowed from another document and haphazardly filed in response to the Commission's February 13, 2019 Order Directing Immediate Response. The Commission issued its Order Granting ETC Designation to Wisper less than twenty-four hours after this perfunctory Affidavit was filed.

Furthermore, the Affidavit was filed with the Commission by Kristopher E. Twomey, a Washington, DC attorney who is not even licensed to practice law in the State of Missouri, in clear violation of 4 CSR 240-2.040(3). Wisper's Affidavit should have been rejected by the Commission for the numerous deficiencies stated above. Wisper's ETC Application should not have been granted until an accurate Affidavit was filed by a licensed attorney. Thus, Intervenors respectfully request the Commission Rehear its Order Granting ETC Designation to Wisper ISP Inc.

CONCLUSION

The Commission's February 14, 2019 Order Granting ETC Designation to Wisper ISP Inc. was unlawful, unjust and unreasonable because said Order: (1) was premature in that it deprived Intervenors of an adequate time for discovery and deprived Intervenors of their due process rights; (2) granted an ETC Application that contained material misrepresentations which were not corrected; (3) granted an ETC Application that failed to comply with all ETC requirements; (4) granted an ETC Application that was incomplete; and (5) granted an ETC Application that did not have an affidavit accurately verifying the Application.

WHEREFORE, for the reasons set forth above, Intervenors respectfully request the Commission grant Intervenors' Joint Application for Rehearing and Motion for Reconsideration.

Respectfully submitted,

/s/ Megan E. Ray

Megan E. Ray, *Mo. Bar #62037*
Andereck, Evans, Lewis, Figg & Battagler, L.L.C
3816 S. Greystone Ct., Ste. B
Springfield, MO 65804
(417) 864-6401 (telephone)
(417) 864-4967 (fax)
Email: mray@lawofficemo.com

ATTORNEY FOR INTERVENORS

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing document was served by electronic mail or U.S. Mail, postage prepaid, this 22nd day of February, 2019 upon all counsel of record and the following:

Office of the Public Counsel
Hampton Williams
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, Missouri 65102
opcservice@ded.mo.gov

Missouri Public Service Commission
Staff Counsel Department
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, Missouri 65102
staffcounselservice@psc.mo.gov

/s/ Megan E. Ray

Megan E. Ray