



**In the  
Missouri Court of Appeals  
Western District**

**IN THE MATTER OF THE  
APPLICATION OF WISPER ISP INC  
FOR DESIGNATION AS AN ELIGIBLE  
TELECOMMUNICATIONS CARRIER;**

**CONEXON, LLC AND GOSEMO, LLC,**

**Appellants,**

**v.**

**MISSOURI PUBLIC SERVICE  
COMMISSION,**

**Respondent**

**WD82727**

**ORDER FILED:**

**MARCH 31, 2020**

**Appeal from Missouri Public Service Commission**

**Before Division One: Thomas N. Chapman, Presiding Judge, Mark D. Pfeiffer, Judge,  
Anthony Rex Gabbert, Judge**

**ORDER**

**Per Curiam:**

Appellants Conexon, LLC and GoSEMO, LLC appeal a decision of the Missouri Public Service Commission granting Intervenor Wisper ISP, Inc.'s application for designation as an Eligible Telecommunications Carrier. Appellants raise two points on appeal claiming the Commission denied Appellants' due process rights by not allowing them to complete discovery, and that the Commission acted unlawfully by granting Wisper's application which they claim relied on incomplete evidence and misrepresentations. We affirm. Rule 84.16(b).



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**MEMORANDUM FILED:**

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**MEMORANDUM<sup>1</sup>**

Appellants Conexon, LLC and GoSEMO, LLC appeal a decision of the Missouri Public Service Commission (“PSC”) granting Intervenor Wisper ISP, Inc.’s (“Wisper”) application for designation as an Eligible Telecommunications Carrier. Appellants raise two points on appeal. They first claim the Commission denied Appellants’ due process rights by not allowing them to

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<sup>1</sup>This informal, unpublished memorandum is provided to the parties to explain the rationale for the order affirming judgment. This memorandum is not a formal opinion and is not uniformly available. It shall not be reported, cited, or used in unrelated cases before this court or any other court. A copy of this memorandum shall be attached to any motion filed for rehearing or for transfer to the Supreme Court.

complete discovery and present evidence at a hearing. They next argue that the Commission acted unlawfully by granting Wisper's application because, they argue, the application relied on incomplete evidence and misrepresentations and did not meet statutory requirements. We affirm.

## **BACKGROUND**

Appellant GoSEMO, LLC is a wholly-owned subsidiary of SEMO Electric Cooperative, a rural electric cooperative. Appellant Conexon, LLC plans, designs, and constructs fiber optic networks in Missouri. Wisper is a broadband internet and voice-over-IP phone provider based in Illinois and authorized to conduct business in Missouri.

The Federal Communications Commission ("FCC") conducts programs intended to accelerate the expansion of broadband services to rural areas and other areas currently lacking necessary broadband infrastructure. As part of this effort, the FCC conducted a reverse auction referred to as the Connect America Fund – Phase II ("CAF-II"). Appellants and Wisper, among others, competed in the auction. In August of 2018, Wisper was announced as the winner of CAF-II funding for certain areas in Missouri. To actually obtain the CAF-II funding, Wisper must meet certain FCC requirements. One requirement is to obtain designation as an Eligible Telecommunications Carrier ("ETC") with the Missouri Public Service Commission within 180 days of winning the auction. In the present case, Wisper had until February 25, 2019 to obtain this designation.

Wisper submitted its ETC application to the PSC on December 21, 2018. On January 18, 2019, Appellants moved to intervene, alleging that Wisper's application was deficient. The PSC granted Appellants' motion to intervene on January 28, 2019. On January 31, 2019, PSC staff filed a recommendation that Wisper's application be approved. Appellants served discovery requests on Wisper on February 7, 2019, and on February 8, 2019 they filed a response to the

staff recommendations re-stating various concerns with Wisper's ETC application and moving for additional time to respond. Also on February 8, 2019 Wisper filed its responses to the staff recommendations and Appellants' motions to intervene and extend time to respond.

On February 11, 2019 the PSC ordered Wisper to remedy a deficiency in its application. Wisper's application lacked an appropriate affidavit verifying its application as required by 20 CSR 4240-2.060(1)(M). At the same time, Appellants moved to shorten the time for Wisper to respond to the discovery requests. Appellants claimed this was intended to expedite proceedings so that Wisper could still receive its ETC status on time. Wisper remedied its application with a verifying affidavit as required by the PSC on February 13, 2019. On February 14, 2019, the PSC issued an order granting Wisper's application - thereby designating it an ETC - and denying Appellants' motions for additional time to respond and to shorten Wisper's deadline to respond to the discovery requests. When the PSC issued this order, the deadline for Wisper to respond to the discovery requests had not yet passed, and no hearing was held at any point during the proceedings. Appellants then timely commenced their appeal. Additional facts will be set forth below as needed.

## **DISCUSSION**

“An order from the PSC is presumed to be valid, and the burden of proof is on the party challenging the order, by clear and satisfactory evidence, to show that the order is either unlawful or unreasonable.” *Kan. City Power & Light Co.'s Request v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d 757, 763 (Mo. App. 2016) (*KCPL*). “An order's lawfulness depends on whether the [PSC's] order and decision was statutorily authorized.” *State ex rel. Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 397 S.W.3d 441, 446-47 (Mo. App. 2012). “When determining whether the order is lawful, we exercise independent judgment and must correct erroneous interpretations of

the law.” *Id.* at 447. “Because the [PSC] is purely a creature of statute, its powers are limited to those conferred by statute either expressly, or by clear implication as necessary to carry out the powers specifically granted.” *Id.*

“In determining whether the [PSC’s] order is reasonable, we consider (1) whether it was support[ed] by substantial and competent evidence on the whole record, (2) whether the decision was arbitrary, capricious, or unreasonable, and (3) whether the [PSC] abused its discretion. *KCPL*, 509 S.W.3d at 764 (citation omitted). “We consider the evidence, along with all reasonable supporting inferences, in the light most favorable to the [PSC’s] order.” *Id.*

For their first point on appeal, Appellants claim the PSC erred in granting Wisper’s ETC application without allowing the parties to complete discovery and without an evidentiary hearing. Appellants claim that once they were allowed to intervene in the matter, they had due process rights which were violated by the PSC. First, they claim they had a right to complete discovery, and that by granting Wisper’s application without allowing discovery to be completed, their rights were violated. Second, they argue the PSC erred in not holding an evidentiary hearing. Both the PSC and Wisper argue that the matter was not a contested case under statute such that a hearing was required, and that Appellants had no property interest at issue in the proceeding. Therefore, they argue, Appellants had no due process rights to conduct discovery or participate in a hearing.

In considering if the PSC erred in not holding a hearing, we also address whether the matter below was a contested or noncontested case. “The answer to whether a matter before the PSC is contested or noncontested depends on the answer to a single question: Is the PSC required by law to hold a hearing?” *Id.* at 783-84. If so, the matter is a contested case. *Id.* The hearing requirement may be “expressly required by statute or ordinance” or “otherwise required by law.”

*State ex rel. Coffman v. PSC*, 121 S.W.3d 534, 540 (Mo. App. 2003). “In the latter context, a hearing will be required under due process principals when the agency decision concerns a protected property interest.” *Id.*

In the present case, Appellants have not identified any statutory authority that requires the PSC to hold a hearing in ETC proceedings, therefore, they must identify a protected property interest for a hearing to be required. “[P]roperty interests and protected rights are created, and their dimensions defined, by existing rules or understanding that stem from an independent source such as state law.” *McIntosh v. LaBundy*, 161 S.W.3d 413, 416 (Mo. App. 2005). In their brief, Appellants suggest that their status as intervenors gave them certain protected rights, adding that in prior cases, the PSC normally holds a hearing when a party objects to an ETC application. However, the regulation cited by Appellants which governs intervenors before the PSC only sets forth the procedures by which one must apply to intervene. It does not actually extend any particular rights to parties subsequently allowed to intervene, nor does it affirmatively require the PSC to hold a hearing. *See* 20 CSR 4240-2.075. Just as the rules governing interventions fail to grant Appellants the right to a hearing, prior PSC decisions granting hearings regarding ETC applications do not bind the PSC to allow a hearing in this case. *See, e.g., State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003) (stating: “an administrative agency is not bound by *stare decisis*”). Thus, none of the authorities relied on by Appellants grant them a protected right to a hearing. And, they have failed to identify a protected interest which they held in the ETC application or the CAF II funding which

was ultimately awarded to Wisper. They therefore lack the protected interest entitling them to due process right[s], and in turn, a hearing.<sup>2</sup>

As to Appellants' claims pertaining to the lack of discovery in the case, as explained above, they do not have a protected interest granting them due process rights, and the matter below is a noncontested case. Appellants have failed to cite a single authority establishing discovery rights for parties in noncontested cases, nor have they cited any authority requiring the PSC to do anything regarding discovery prior to granting an ETC application.

Point I is denied.

For their second point on appeal, Appellants argue that the PSC erred in granting Wisper's ETC application in that the application was not supported by competent and substantial evidence. They first argue that Wisper made numerous misrepresentations, and that the application did not meet statutory requirements. They further argue that the verifying affidavit was insufficient in that it was filed late; it mirrored affidavits filed by Wisper in other states suggesting it was inaccurate and merely copied; it was dated weeks prior to its submission; and the attorney who submitted the affidavit to the PSC was not licensed in Missouri.

As to Wisper's affidavit, nothing states that the initial failure to include a verifying affidavit is an incurable omission immediately and permanently fatal to an ETC application. In

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<sup>2</sup> At oral argument, Appellants suggested that they had a protected interest in a "business expectancy." When considering if a business expectancy exists "[i]t is necessary to determine if the expectancy claimed was reasonable and valid under the circumstances alleged." *Rail Switching Servs. v. Marquis-Missouri Terminal, LLC*, 533 S.W.3d 245, 260 (Mo. App. 2017) (citations omitted). A contract is not necessary, and an expectancy may be formed through "a regular course of prior dealings" or "a probable future business relationship that gives rise to a reasonable expectancy of financial benefit." *Western Blue Print Co. v. Roberts*, 367 S.W.3d 7, 19 (Mo. banc 2012) (citations omitted). However, Appellants completely failed to explain what their business expectancy might be, and it is difficult to conceive of any expectancy which could arise out of these circumstances. Here, Appellants lost the FCC's CAF II auction. Their loss at the auction would seem to extinguish any possible business expectancy they might have.

accordance with 20 CSR 4240-2.060(2), Wisper submitted an affidavit prior to the PSC granting the application.<sup>3</sup> Similarly, we see no reason to draw negative inferences from the affidavit's alleged similarity to affidavits filed by Wisper in other jurisdictions. As the ETC process is largely prescribed by federal law, and Wisper was seeking ETC designation in multiple states, we would expect as much. We are also unpersuaded by Appellants' claims that the affidavit was deficient because it referred to a "petition" for ETC status rather than an "application," and the affidavit was dated weeks prior to its submission. We agree with Wisper's suggestion that these deficiencies are, at most, "*de minimis*." Furthermore, Appellants have not cited any authority supporting their argument that the affidavit was deficient. Their argument thus fails. *See Williston v. Vasterling*, 536 S.W.3d 321, 343 (Mo. App. 2017) (stating: "Failure to cite relevant authority supporting a point or to explain the failure to do so preserves nothing for our review.").

As to Appellants' claim that an attorney not licensed in Missouri improperly signed a pleading, they overstate the facts. An out-of-state attorney did sign his name to the certificate of service attached to Wisper's verifying affidavit, but all of the substantive pleadings filed before the PSC, including the application itself, were executed by counsel licensed in Missouri. Nonetheless, assuming a signature by out-of-state counsel on a certificate of service violated applicable ETC rules, those rules do not state if there should be a penalty if and when a party violates 20 CSR 4240-2.040's requirement pertaining to attorneys practicing before the PSC. We are not inclined to hold that Wisper's application should be denied based on a technical, not

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<sup>3</sup> 20 CSR 4240-2.060(2) states: "If any of the items required under this rule are unavailable at the time the application is filed, they shall be furnished prior to the granting of the authority sought." Elsewhere in 20 CSR 4240-2.060, the requirement that an affidavit be submitted is set forth. Thus, by requesting the missing affidavit and then granting the application *after* the affidavit was furnished, the PSC was in compliance with applicable rules.



substantive, violation of the applicable rules. As our Supreme Court has explained, the “purpose of declaring certain acts by those not authorized to practice law a nullity is to protect the public.” *Hensel v. Am. Air Network*, 189 S.W.3d 582, 584 (Mo. banc 2006) (holding that a pleading prepared and signed by out-of-state counsel should not be struck where in-state counsel ultimately presented said pleading to the trial court). In the present case, where harm to the public is minimal at most, penalizing Wisper by striking its application is grossly disproportionate to any harm.

Appellants also suggest Wisper misled the PSC by not informing the PSC of its ability to seek an extension of the deadline to obtain ETC status, and by misstating the broadband requirements for the CAF II auction. As to the statement concerning its broadband capabilities, in its response to Appellants’ motion to intervene, Wisper amended its application to state that it would meet the higher broadband speeds specified in the CAF II auction. Additionally, Appellants cite no authority for the proposition that Wisper had an affirmative duty to inform the PSC of its ability to apply for an extension. *See Williston, supra*.

Finally, Appellants claim that Wisper cannot meet the requirements for the CAF II auction despite their assertions to the contrary, and that, therefore, the PSC erred in granting the application. In so arguing, they rely almost exclusively on FCC rules in the Code of Federal Regulations. The PSC has responded with the assertion that Wisper did meet the Missouri Code of State Regulations requirements for ETC status by stating that they could or would comply with FCC requirements for CAF II. The PSC claims that it is unable to fully assess Wisper’s broadband capabilities within the limited process the law allows, and that the FCC can and will more thoroughly assess Wisper’s capabilities. In any event, the PSC argues that Wisper was only required to certify that it met requirements, not demonstrate it. In their reply, Appellants

change tack, seeming to suggest that Wisper's application was so plainly misleading that the PSC erred in accepting the statements and certifications contained therein.

We again note that the applicable rules do not require hearings to be held, and merely require statements and certifications, including certifying affidavits from company officers. *See* 20 CSR 4240-31.015 & 4240-31.016. The rules similarly fail to describe any other process by which the PSC could be expected to engage in a detailed analysis of an applicant's technical capabilities. The absence of statutory procedures allowing the PSC to engage in a more thorough analysis of an applicant's capabilities is such that the PSC did not err for failing to do such. As stated above, the PSC is a creature of statute, and it cannot adopt procedures which pry into an applicant's capabilities any more deeply than statutes and associated rules allow. Therefore, the PSC did not act unreasonably or unlawfully in granting Wisper's application. Point II is denied.

#### **CONCLUSION**

The PSC did not act unlawfully or unreasonably in failing to hold a hearing, denying Appellants discovery-related motions, and granting Wisper's ETC application. The judgment is affirmed.