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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

SOUTHERN MONTANA  
TELEPHONE CO.,

Petitioner,

v.

MONTANA PUBLIC SERVICE  
COMMISSION, DEPARTMENT OF  
PUBLIC SERVICE REGULATION,  
an agency of the State of Montana,

Respondent.

Cause No. ADV-2015-315

**ORDER ON PETITION FOR  
JUDICIAL REVIEW**

On May 5, 2015, Petitioner Southern Montana Telephone Company (Southern) filed a complaint and petition for judicial review of a final agency decision of Respondent Montana Department of Public Service Regulation, Montana Public Service Commission (PSC), denying Southern's motion for a protective order of its employees' compensation information. Dennis R. Lopach

1 represents Southern. Justin W. Kraske represents PSC. The petition is fully  
2 briefed. Upon review of the record and in consideration of the parties'  
3 arguments, the Court affirms the PSC's decision.

#### 4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 Southern is a privately-owned Montana corporation and public utility  
6 that provides telecommunications services to approximately 950 customers in  
7 rural southwestern Montana. Pursuant to Montana Code Annotated § 69-3-203,  
8 Southern must file an annual report with the PSC containing "all the information  
9 that the commission considers necessary for the proper performance of its  
10 duties." The PSC has certified Southern as an eligible telecommunications  
11 carrier (ETC). As an ETC, Southern receives federal subsidies known as  
12 universal service funds (USF). Most Montana ETCs are unregulated telephone  
13 cooperatives, although a few, like Southern, are privately owned companies.  
14 Although all Montana ETCs must submit documents to the PSC on an annual  
15 basis to be certified as an ETC and receive federal funds, the few privately owned  
16 telephone companies are required to submit annual reports. To maintain its status  
17 as an ETC, Southern must also make regular compliance filings with the PSC. In  
18 its reports to the PSC, Southern must disclose the salaries and total compensation  
19 for its executive employees.

20 Historically, the PSC considered employee compensation information  
21 confidential, and at the utility's request, the PSC issued protective orders to  
22 prohibit the public from accessing the information. Recently, the Federal  
23 Communications Commission (FCC) has attempted to work with state regulatory  
24 agencies, including the PSC, to combat waste, fraud, and abuse of the subsidies  
25 distributed under the USF program. The PSC believes full public disclosure of

1 ETC information, including disclosure of certain executive employee  
2 compensation, should be accessible so the general public will be aware how  
3 public utility funds are spent.

4 Pursuant to the requirement set forth in Montana Code Annotated  
5 § 69-3-203, in March 2014 the PSC sent its annual report compliance letter to all  
6 twenty-six Montana ETCs, including Southern. On April 14, 2014, Southern  
7 filed a motion with the PSC seeking a protective order to prevent its employees'  
8 compensation information from being publicly disclosed. In support of its  
9 motion, Southern argued the salary compensation information is a trade secret  
10 protected by the due process clause of the Fourteenth Amendment to the United  
11 States Constitution. Southern also claimed its executive compensation  
12 information must be protected under the right to individual privacy according to  
13 Article II, section 10, of the Montana Constitution.

14 On February 6, 2015, the PSC issued order 7385 denying a protective  
15 order for compensation information of executive or management employees who  
16 receive \$100,000 or more in total compensation. The PSC concluded this  
17 information is not a trade secret and the individual's expectation that executive  
18 compensation information is private does not clearly outweigh the public's right  
19 to know.

#### 20 **STANDARD OF REVIEW**

21 A district court's review of an administrative agency's order is  
22 governed by the Montana Administrative Procedure Act (MAPA). The standard  
23 of review for an agency decision is set forth in Montana Code Annotated § 2-4-  
24 704(2), which provides:

25 ////

1 (2) The court may not substitute its judgment for that of the  
2 agency as to the weight of the evidence on questions of fact. The  
3 court may affirm the decision of the agency or remand the case for  
4 further proceedings. The court may reverse or modify the decision if  
substantial rights of the appellant have been prejudiced because:

5 (a) the administrative findings, inferences, conclusions, or  
6 decisions are:

7 (i) in violation of constitutional or statutory provisions;

8 (ii) in excess of the statutory authority of the agency;

9 (iii) made upon unlawful procedure;

10 (iv) affected by other error of law;

11 (v) clearly erroneous in view of the reliable, probative, and  
12 substantial evidence on the whole record;

13 (vi) arbitrary or capricious or characterized by abuse of  
14 discretion or clearly unwarranted exercise of discretion; or

15 (b) findings of fact, upon issues essential to the decision, were  
16 not made although requested.

17 Montana courts use a three-part test to determine if a finding is clearly  
18 erroneous. *Weitz v. Mont. Dep't of Natural Res. & Conserv.*, 284 Mont. 130,  
19 133, 943 P.2d 990, 992 (1997). First, the court must review the record to see if  
20 the findings are supported by substantial evidence. Second, if the findings are  
21 supported by substantial evidence, the court must determine whether the agency  
22 misapprehended the effect of the evidence. Third, even if substantial evidence  
23 exists and the effect of the evidence has not been misapprehended, a court may  
24 determine a finding is clearly erroneous when, although there is evidence to  
25 support it, a review of the record leaves the court with the definite and firm  
conviction a mistake has been made. *State Personnel Div. v. Child Support  
Investigators*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305 (citing *Weitz*, 284  
Mont. at 133-34, 943 P.2d at 992). Conclusions of law are reviewed to determine  
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1 if the agency's interpretation of the law is correct. *Steer, Inc. v. Dep't of*  
2 *Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

### 3 **DISCUSSION**

#### 4 **Trade Secret**

5 In support of its petition for judicial review, Southern argues the PSC  
6 erred in finding its executive compensation information was not a trade secret.

7 Pursuant to Montana Code Annotated § 30-14-402(4):

8 "Trade secret" means information or computer software,  
9 including a formula, pattern, compilation, program, device, method,  
10 technique, or process, that,

11 (a) derives independent economic value, actual or potential,  
12 from not being generally known to and not being readily ascertainable  
13 by proper means by other persons who can obtain economic value  
14 from its disclosure or use; and

15 (b) is the subject of efforts that are reasonable under the  
16 circumstances to maintain its secrecy.

17 Southern claims its employee salaries and compensation are  
18 information that derive independent economic value from not being generally  
19 known to others who can obtain economic value from its disclosure. In short,  
20 Southern argues its employee compensation information is valuable competitive  
21 information as long as it remains secret. If the information is public, offers of  
22 employment could be calibrated to entice Southern's employees to accept  
23 employment elsewhere.

24 The PSC argues it consistently has refused to protect employee  
25 compensation information on the basis of trade secret. Moreover, it claims  
Southern has failed to make a prima facie case demonstrating the information  
constitutes a property right subject to constitutional due process protection.

1           Although the PSC concluded Southern demonstrated its employee  
2 compensation information satisfies some elements which define a trade secret,  
3 Southern failed to show that public access to the information would jeopardize its  
4 ability to retain employees or would provide competitors with an advantage to  
5 Southern's detriment.

6           The Montana Constitution guarantees the public the "right to examine  
7 documents or to observe the deliberations of all public bodies or agencies of state  
8 government and its subdivisions, except in cases in which the demand of  
9 individual privacy clearly exceeds the merits of public disclosure." Mont. Const.  
10 art II, § 9. This right is not absolute. *Missouliau v. Bd. of Regents*, 207 Mont.  
11 513, 529, 675 P.2d 962, 971 (1984). A corporation's trade secrets are a species  
12 of private property and are protected from public disclosure by the due process  
13 clause of the Fourteenth Amendment to the United States Constitution. *Mt.*  
14 *States Tel. & Tel. Co. v. Dep't of Pub. Serv. Comm'n.*, 194 Mont. 277, 288, 634  
15 P.2d 181, 188 (1981).

16           Documents in the hands of state agencies are presumed to be subject  
17 to public disclosure, unless proven otherwise. *Great Falls Tribune v. Mont. Pub.*  
18 *Serv. Comm'n.*, 2003 MT 359, ¶54, 319 Mont. 38, 82 P.3d 876. "[D]ocuments  
19 filed by corporate entities with public agencies, such as the PSC, are  
20 presumptively available for access by the public under Montana's Constitution."  
21 *Id.*, ¶ 60. The entity filing the information bears the burden to establish a prima  
22 facie case the information is entitled to protection. *Id.* The procedure for  
23 obtaining a protective order is set forth in Montana Administrative Rule  
24 38.2.5007. In its request for a protective order for its employee compensation  
25 information, Southern must prove the following:

- 1 (4) Requests for a protective order must demonstrate the following:  
2 (a) If the claimed basis for protection is individual privacy, that:  
3 (i) the provider has made a reasonable effort to contact the  
4 individual to ascertain whether the individual waives the right to  
5 privacy for the information at issue;  
6 (ii) the individuals with potential privacy interests have actual,  
7 subjective expectations of privacy in the information at issue;  
8 (iii) society recognizes such expectations of privacy as reasonable;  
9 and  
10 (iv) the demand of individual privacy clearly exceeds the merits of  
11 public disclosure.  
12 (b) If the claimed basis for protection is trade secret, that:  
13 (i) prior to requesting a protective order, the provider has  
14 considered that the commission is a public agency and that there is a  
15 constitutional presumption of access to documents and information in  
16 the commission's possession;  
17 (ii) the claimed trade secret material is information;  
18 (iii) the information is secret;  
19 (iv) the secret information is subject to efforts reasonable under the  
20 circumstances to maintain its secrecy;  
21 (v) the secret information is not readily ascertainable by proper  
22 means; and  
23 (vi) the information derives independent economic value from its  
24 secrecy, or that competitive advantage is derived from its secrecy.  
25

Admin. R. Mont. 38.2.5007(4).

When a company like Southern files a request seeking an order of protection, the PSC must review the request and independently determine whether the records constitute property rights which warrant protection under the due process clause. *Great Falls Tribune*, ¶ 57. When evaluating evidence, an agency may utilize its “experience, technical competence, and specialized knowledge.” Mont. Code Ann. § 2-4-612(7). An agency must “either follow its own precedent or provide a reasoned analysis explaining its departure.” *Waste*

1 *Mgmt. Partners v. Mont. Dep't of Pub. Serv. Reg.*, 284 Mont. 245, 257, 944 P.2d  
2 210, 217 (1997). District courts give agency decisions great deference when the  
3 decision involves substantial agency expertise. *Winchell v. Mont. Dep't. of Nat.*  
4 *Res. & Conserv.*, 1999 MT 11, ¶ 11, 293 Mont. 89, 972 P.2d 1132.

5           The PSC did not err by concluding Southern's employee  
6 compensation information is not a trade secret. Information submitted to the PSC  
7 is presumptively open to the public. Southern bears the burden of establishing  
8 the information warrants protection from public disclosure. The PSC properly  
9 relied on its own expertise and precedent in concluding Southern failed to meet  
10 its burden by not demonstrating the information meets the sixth element of a  
11 trade secret, i.e., Southern's employee compensation information derives  
12 independent economic value from its secrecy or that Southern enjoys a  
13 competitive advantage in keeping the information from the public. The PSC  
14 acted within its specialized knowledge, expertise and discretion when concluding  
15 Southern's telecommunications executive compensation information was not  
16 confidential as a trade secret.

### 17 **Right to Individual Privacy**

18           Southern next argues the PSC erred by concluding the public's right  
19 to access its employee compensation information outweighed its employees'  
20 constitutional right of privacy. Southern further claims the PSC engaged in *de*  
21 *facto* rule making without providing sufficient notice and comment procedures as  
22 required under MAPA. The PSC claims it merely analyzed Southern's request  
23 and employed a constitutional balancing test — weighing the demands of the  
24 individual's right to privacy against the public's right to know.

25 //

1           The right of individual privacy is expressly set forth in Montana's  
2 Constitution, which provides, "[t]he right of individual privacy is essential to the  
3 well-being of a free society and shall not be infringed without the showing of a  
4 compelling state interest." Mont. Const. art II, § 10. The PSC concluded  
5 Southern's employees have a right to privacy in their compensation information  
6 but that right does not clearly outweigh the public's right to know. The PSC  
7 employed the constitutional balancing test found in Article II, section 9, of the  
8 Montana Constitution, which states, "[n]o person shall be deprived of the right to  
9 examine documents or to observe the deliberations of all public bodies or  
10 agencies of state government and its subdivisions, except in cases in which the  
11 demand of individual privacy clearly exceeds the merits of public disclosure."

12           As a balancing test, the PSC relied on a three-factor rubric using the  
13 following criteria: (1) whether Southern's employees were managers or  
14 executives; (2) whether the employees receive annual compensation in excess of  
15 \$100,000; and (3) the degree to which Southern's revenues are derived from  
16 federal ETC funds. Southern argues the PSC's balancing test/three-factor rubric  
17 constitutes a rule. The Court disagrees. Under MAPA, a rule is defined as "each  
18 agency regulation, standard, or statement of general applicability that  
19 implements, interprets, or prescribes law or policy or describes the organization,  
20 procedures, or practice requirements of an agency." Mont. Code Ann. § 2-4-  
21 102(11)(a). Before an agency adopts, repeals, or amends a rule, it must follow  
22 rulemaking procedures pursuant to Montana Code Annotated § 2-4-302 and -305.  
23 These procedures protect the public's right to know and right to participate in the  
24 operations of Montana's administrative agencies. *State v. Vainio*, 2001 MT 220,  
25

1 ¶ 26, 306 Mont. 439, 35 P.3d 948. “Unless a rule is adopted in substantial  
2 compliance with these procedures, the rule is not valid.” *Id.*, ¶ 27.

3 In Order 7385, the PSC found it “reasonable to establish a rubric by  
4 which to judge companies’ motions for protective orders of [employee  
5 compensation] information.” (Admin. R., Item 4, Order No. 7385, ¶ 46  
6 (Feb. 6, 2015).) Based upon the three factors (whether the employee is a  
7 manager or executive; whether the manager’s or executive’s annual  
8 compensation exceeds \$100,000; and whether the ETC receives one-fifth or more  
9 of its total Montana revenues from USFs), the PSC concluded, “the demands of  
10 individual privacy do not clearly outweigh the right to public disclosure of the  
11 compensation of Southern executive and management employees at this time.”  
12 (*Id.*, ¶ 51.) Although the PSC must analyze motions for protective orders on a  
13 case-by-case basis (*Great Falls Tribune* ¶ 56), by applying its three-factor test,  
14 the PSC attempted to avoid conflicting outcomes involving ETC utility protective  
15 orders. *See Assoc. Press, Inc. v. Mont. Dep’t of Revenue*, 2000 MT 160, ¶ 27,  
16 300 Mont. 233, 4 P.3d 5. The PSC is not required to initiate rulemaking to  
17 determine which factors to apply when balancing an individual’s right of privacy  
18 versus the public’s right to know. An agency’s factual determination when  
19 conducting a legal analysis prescribed by the Montana Constitution is not a rule  
20 under Montana Code Annotated § 2-4-102(11)(a). State, county, and local  
21 governments in Montana regularly receive public records requests. On average,  
22 the PSC receives forty requests for protective orders from regulated utilities.  
23 When the PSC, like other government agencies, identifies and applies factors  
24 with which to balance competing constitutional mandates involving public  
25 records, it is not establishing a de facto rule.

1           In determining whether to grant Southern's request for a protective  
2 order, the PSC concluded Southern's executive employees appeared to have a  
3 subjective or actual expectation of privacy. (Order 7385, ¶ 32). Next, the PSC  
4 asked whether society is willing to recognize these privacy rights as reasonable.  
5 In its order, the PSC concluded an executive employee for a telecommunications  
6 company receiving substantial federal subsidies does not have an expectation of  
7 privacy society recognizes as reasonable. Regulated utilities by necessity must  
8 weigh competing demands of its resources, e.g. paying employee compensation,  
9 investment infrastructure, and improving customer service. By disclosing  
10 executive salary compensation, the public can determine whether a regulated  
11 utility is properly using the federal subsidies it receives. After all, the universal  
12 service fund is a surcharge which appears on every phone bill for long distance,  
13 local telephone companies and cellular providers. When the money is used to  
14 subsidize a telephone company (like Southern) which operates in a high cost  
15 area, the public has a right to know how the company is using its USF subsidy to  
16 compensate its executive employees. Southern is a very small company.  
17 Although it has less than 1,000 customers, it receives more than \$3,000,000 in  
18 federal subsidies, more than fifty-five percent of its annual revenues. In this  
19 instance, the PSC correctly determined Southern's executive salary information  
20 is public information.

21           Having reviewed the entire record herein, the Court concludes the  
22 PSC clearly articulated a basis for its decisions, which were based on substantial  
23 evidence and were not arbitrary and capricious. The PSC found that  
24 Southern's executive compensation information was not confidential as either a  
25 trade secret or confidential, private information. Its findings were well reasoned

1 and with within the PSC's specialized knowledge, expertise, and discretion as the  
2 agency responsible for issuing protective orders. The public has a constitutional  
3 right to scrutinize Southern's public utility records as the PSC concluded in this  
4 case.

5 Based on the foregoing,

6 **IT IS HEREBY ORDERED** that Southern's petition for judicial  
7 review is DENIED. The PSC's Orders 7385 and 7385c denying Southern's  
8 motion for a protective order is AFFIRMED.

9 DATED this 8<sup>th</sup> day of April 2016.

10  
11   
12 MIKE MENAHAN  
13 District Court Judge

14 pc: Dennis R. Lopach, 4 Carriage Lane, Helena MT 59601  
15 Justin W. Kraske, Montana Public Service Commission, PO Box 202601,  
16 Helena MT 59620-2601

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