

Service Date: September 21, 2017

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Petition of Commnet) REGULATORY DIVISION
Wireless, LLC for Designation as an Eligible)
Telecommunications Carrier) DOCKET NO. D2017.6.50
) ORDER NO. 7566

ORDER GRANTING PROTECTIVE ORDER IN PART, DENYING IN PART

PROCEDURAL HISTORY

1. On June 06, 2017, Commnet Wireless LLC (“Commnet”), submitted a petition to the Department of Public Service Regulation (“Commission”), requesting designation as an Eligible Telecommunications Carrier (“ETC”) to offer Lifeline service in Big Horn County.
2. On August 10, 2017, the Commission issued data requests to Commnet, including Data Requests PSC-003 through PSC-005, which sought various financial and coverage information from Commnet.
3. On September 1, 2017, the Commission received Commnet’s data responses, in addition to a *Motion for Protective Order* (“Motion”). The Motion requests a protective order pursuant to Mont. Admin. R. 38.2.5014 (2017) to protect asserted trade secrets from being publicly disclosed in response to PSC-003 through PSC-005. Mot. at 2. Specifically, the Motion seeks protection of financial information including balance sheets, income statements, cost and revenue analyses, and capital expenditures associated with Commnet’s operation and network buildout (“Financial Information”), and coverage and performance data for Rosebud County underlying Attachment A in Commnet’s FCC Form 690 (“Coverage Information”). *Id.* at 6-7.
4. The Commission noticed the Motion in its weekly agenda for the week commencing September 12, 2017. The Commission did not receive any public Comment regarding the motion, and on September 18, 2017, granted Commnet’s Motion.

DISCUSSION, FINDINGS, CONCLUSIONS

5. The Montana Constitution requires that Commission records and proceedings are publicly available. Mont. Const. Art. II, §§ 8–9. However the Commission may protect sensitive information, “when necessary to preserve trade secrets . . . or other information that must be protected under law.” Mont. Code Ann. § 69–3–105(2) (2015).

6. The Montana Supreme Court has articulated standards for evaluating Commission protective orders:

[A] non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements. The claimant's showing must be more than conclusory. It must be specific enough for the PSC, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the public utility's claims to the right of confidentiality.

Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, ¶ 56, 319 Mont. 38, 89 P.3d 876.

7. The Commission has codified these authorities with a regulatory procedure that balances the public right-to-know, with the protection of sensitive information. See Mont. Admin. R. 38.2.5001–5030. This process includes both procedural and substantive requirements.

8. Procedurally, a motion for a protective order must include:

- (a) an identification of the person, including contact information (phone number and e-mail address) to whom communications from commission staff, parties, and interested persons may be made;
- (b) a complete and specific nonconfidential identification, description, and explanation of the information, item by item or by category of items which are alike, of all information for which protection is requested, suitable for meaningful use in testimony, arguments, public discussion, orders, and the public record;
- (c) a complete and specific factual basis, supported by affidavit of a qualified person, that supports the claim of confidential information; and
- (d) a complete and specific legal analysis, explaining why the information is confidential information.

Mont. Admin. R. 38.2.5007(3)(a)–(d).

9. Substantively, a motion for a protective order must establish—by thorough legal and factual examination—that the information sought to be protected is either a trade secret or

otherwise legally protectable. Mont. Admin. R. 38.2.5007(2). Establishing a *prima facie* showing of trade secret confidentiality includes the following:

- (a) prior to requesting a protective order, the provider has considered that the commission is a public agency and that there is a constitutional presumption of access to documents and information in the commission's possession;
- (b) the claimed trade secret material is information;
- (c) the information is secret;
- (d) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy;
- (e) the secret information is not readily ascertainable by proper means; and
- (f) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.

Mont. Admin. R. 38.2.5007(4)(b)(i)–(vi).

10. The Commission finds that Commnet has met the procedural burden as required by Mont. Admin. R. 38.2.5007(3). Commnet has provided: appropriate contact information (Mot. at 2); a sufficient description of the information sought to be protected (*Id.* at 2-3); a qualified affidavit that supports the confidentiality of the information (*Affidavit of Rohan Ranaraja* (September 1, 2017)); and a sufficient complete legal analysis as to why the information should be protected. (Mot. at 3-10).

11. The Commission also finds that Commnet has established most of the substantive *prima facie* showing of trade secret confidentiality as required by Mont. Admin. R. 38.2.5007(4)(b). The Motion states: Commnet has “considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission’s possession” (Mot. at 2); that the material for which protection is sought is information (*Id.* at 4; *see also* Mont. Admin. R. 38.2.5001(3) (defining information)); all of the information in question contains secret information (Mot. at 4; Aff. at ¶¶ 8-9); the information is not readily ascertainable by proper means and is subject to reasonable efforts to maintain its secrecy. Mot. at 5-6; Aff. at ¶¶ 8-9.

12. The final factor at issue in the trade secret analysis is whether the information that Commnet is seeking to protect derives independent economic value or a competitive advantage from its secrecy.

13. Commnet states that the Financial and Coverage Information derive independent economic value from its secrecy, based on the content of the information, and that the Commission has protected similar information in the past. Commnet states the Financial

Information has independent economic value for three reasons. First, disclosure of the information could be used by Commnet's competitors to undermine its competitive bidding process with the Federal Communications Commission's E-Rate, Tribal Mobility, and Lifeline Funding programs, as well as undermine Commnet's ability to negotiate effectively with other businesses, including negotiating favorable roaming rates with various national carriers. Mot. at 7-8; Aff. ¶¶ 11-14. Second, the information is specific enough to provide tangible business advantage to Commnet's competitors, warranting protection. Mot. at 9; Aff. ¶ 16. Finally, the information includes private investment information that is unrelated to the public funding allocated for ETC purposes. Mot. at 9-10; Aff. ¶ 18. Regarding the Coverage Information, Commnet states it has independent economic value because it is specific, "drive-tested" information for Rosebud County that provides specific areas of coverage, which could be utilized by Commnet's competitors. Mot. at 9; Aff. ¶ 17. Further, Commnet states the Commission should protect both the Financial and Coverage Information because the Commission has protected similar information in the past. Mot. at 6, 7; Aff. ¶ 10.

14. The Commission has previously found that carriers seeking ETC certification for FCC High Cost support must publicly disclose related financial information, as the information by definition lacks independent economic value because areas receiving High Cost support require a federal subsidy to become a going business concern. Dkt. D2013.11.80, Order No. 7319a (May 30, 2014) (with concurring statement by Commissioner Kavulla). Commnet's Motion presents the question whether this same rationale applies to financial information associated with ETC certification to receive FCC Lifeline funds, and establishes a similar absence of economic value.

15. The Commission finds that the Financial Information requested of Commnet in PSC-003(a),(b),(d), and (e) lacks independent economic value, as the information relates to areas which require a federal subsidy to become a going business concern. ETCs generate Lifeline customers through active solicitation, enrollment, and subsequent self-certification that customers qualify for either non-tribal or tribal Lifeline funds. The FCC provides Lifeline funds, generated from a tax on non-exempt carriers, to ETCs for every qualified customer. ETCs then credit each qualified Lifeline customer's monthly bill with the FCC funding. These credits are substantial – \$9.25 for non-tribal customers to \$34.25 per month for tribal customers – as one of the purposes of the federal subsidy is to subsidize those who wouldn't have access to

telecommunication services. 47 CFR § 54.403 (2017); 47 USC § 254(b) (2017). By definition, this is a marketplace that lacks competition, as the consumers of these services – low income customers – wouldn't participate in the market without a credit on their monthly bill. If it were economic for an unsubsidized competitor to overbuild Commnet's network on the Northern Cheyenne reservation, it is reasonable to assume a provider would have already built a network on the reservation, and the FCC would have not deemed the area eligible for Auction 902 Tribal Mobility Fund subsidies. However, this is not the case. Accordingly, Commnet's responses to PSC-003(a),(b),(d), and (e), shall not be protected as confidential information.

16. The Commission also finds that the Financial Information requested of Commnet in PSC-004(b), including capital expenditure amounts for Rosebud County, does not derive independent economic value from its secrecy. Looking at the initial Auction 902 Tribal Mobility Fund bidding detail, Commnet was the only bidder for Rosebud County.¹ By definition, the capital expenditures for Rosebud County lacks independent economic value as this marketplace is not competitive. This fact is reinforced by the reasonable assumption that future FCC High Cost auctions for Rosebud County would favor Commnet as a bidder, due to the already awarded and invested FCC funds first in infrastructure (Tribal Mobility Funds), and potentially supplemented by Commnet's increased provision of services in the area from additional Lifeline funds (contingent upon successful enrollment of Lifeline customers). Further, Commnet was put on notice that Tribal Mobility Fund revenues received for Rosebud County not only lacked independent economic value, but also they must be invested in Rosebud County, and that this information would not be protected in the future. Dkt. D2013.11.80, Order 7319, ¶ 40 (Dec. 03, 2013); *see also* Order No. 7319a (May 30, 2014) (with concurring statement by Commissioner Kavulla). Commnet's response to PSC-004(b) shall not be protected as confidential information.

17. However the Commission finds that the Financial Information requested of Commnet in PSC-004(d), including capital expenditure information for Big Horn County, derives independent economic value from its secrecy. Commnet utilized private capital to build its infrastructure in Big Horn County. App. at 3. Commnet is not currently serving Big Horn County with FCC High Cost nor Lifeline services. *Id.* A competitor carrier could utilize the disclosure of the capital expenditures Commnet has made in Big Horn County to undermine a

¹ Available at: <https://goo.gl/P8AoBX> (Last retrieved: Sept. 13, 2017).

subsequent bid for FCC High Cost or Lifeline services. Accordingly, Commnet's response to PSC-004(d) shall be protected as confidential information.

18. The Commission also finds that the Coverage Information requested in Commnet in PSC-005(e) derives independent economic value from its secrecy. Commnet states the Coverage Information is "drive-tested", containing particularly detailed information of coverage and performance data for specific census blocks within Rosebud County. This information could provide diligent broadband competitors with necessary information to target future capital expenditures or marketing efforts towards certain census blocks that may be business opportunities without a federal subsidy. Commnet's response to PSC-005(e) shall be protected as confidential information.

19. The Commission also disagrees that disclosure of this Financial Information would sufficiently impact Commnet's subsequent bids for FCC funding to warrant protection. As stated above, the FCC High Cost bidding process has historically lacked competition, undermining the argument that the information possesses independent economic value. *Supra* at ¶ 16. Additionally, disclosure will not impact Commnet's E-Rate bidding applications nor negotiations with other businesses such as AT&T and Verizon, as requiring disclosure of this information places Commnet on a more equal playing field with other carriers that benefit from federal subsidies to provide services to high-cost areas, which are required to disclose their financials with the Commission for High Cost ETC certification and re-certification purposes.. To the contrary, to grant protection of Commnet's Auction 902 expenditures and Financial Information for Lifeline ETC certification and re-certification purposes would create an opportunity for Commnet to engage in regulatory arbitrage: Commnet would have access to the financial information of all ETCs that receive High Cost support in Montana, while no ETCs would have access to Commnet's financial information.

20. Finally, the Commission disagrees with Commnet that the Commission has protected similar information in the past. Commnet states that *Order No. 7557* protected similar financial information as Commnet now requests to be protected. Mot. at 6. However this Order did not involve ETC certification, nor telecommunication services, and does not bind the Commission's decision regarding Commnet's motion. *The Application for Natural Gas License for DNE Sales, LLC*, Dkt. N2017.3.20, Order No. 7557 (July 12, 2017) (granting protection of DNE's financial information in a competitive natural gas wholesale marketplace). Commnet also

lists various ETC protective orders as persuasive authority for the Commission to protect Commnet's information. However these orders are similarly non-binding regarding Commnet's Motion, as they did not concern protection of information regarding FCC Auction 902 expenditures or Lifeline services. *See* Dkt D2008.9.111, Order No. 6969a (Feb. 10, 2009), and Order 6969c (May 19, 2009); Dkt. D2003.1.14, Order No. 6492c (Oct. 31, 2005).

21. The Commission finds—based on the procedural and substantive discussion of the Motion—that Commnet's Motion regarding its responses to PSC-004(d) and -005(e) satisfy the Commission's protective order requirements. However, the Commission finds that Commnet's Motion regarding its responses to PSC-003(a),(b),(d),(e), and PSC-004(b) do not satisfy the Commission's protective order requirements.

ORDER

IT IS ORDERED:

22. Commnet's Motion is GRANTED regarding Commnet's responses to PSC-004(d) and PSC-005(e) in Dkt. D2017.6.50.

23. Commnet's Motion is DENIED regarding Commnet's responses to PSC-003(a),(b),(d), and (e), and PSC-004(b) in Dkt. D2017.6.50.

24. Information submitted in accordance with this Order will be treated as "confidential information" pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana.

25. Commnet must produce the information consistent with this Order by September 29, 2017.

DONE AND DATED this 21st day of September, 2017.

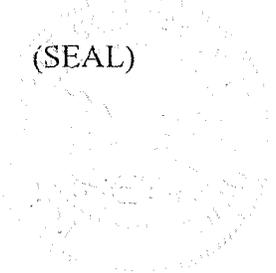


Zachary T. Rogala
Examiner

ATTEST:


Rhonda J. Simmons
Commission Secretary

(SEAL)



Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

Mont. Admin. R. 38.2.5012

Docket No. D2017.6.50, Order No.7566

Order Action Date: September 21, 2017

I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed Mont. Admin. R. 38.2.5001–38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and Mont. Admin. R. 38.2.5001–38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

Typed or Printed Name

Signature

Date of Signature

Business Address:

Employer

Party Represented