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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of QWEST CORPORATION
Regarding the Sale and Transfer of Qwest Dex to Dex Holdings, LLC, a non-affiliate

Docket No. UT-021120
ANSWER TO PETITIONS OF PUBLIC COUNSEL AND WeBTEC FOR REVIEW OF FIRST SUPPLEMENTAL ORDER

I. PROCEDURAL BACKGROUND

On September 27, 2002, Qwest Corporation (“Qwest”) filed the majority of the transaction documents at issue in this proceeding as public documents or as “confidential” documents pursuant to the protective order issued in this docket on September 12, 2002 (the “Protective Order”). On September 27, 2002, Qwest also filed a motion with the Commission seeking amendment of the Protective Order to provide for additional “highly confidential” protection for the few remaining transaction documents that contain extremely sensitive and commercially valuable information. On October 4, 2002, the Commission issued its First Supplemental Order amending the Protective Order to provide for extra protection for documents designated as “highly confidential.”

At the prehearing conference in this docket on October 8, 2002, Public Counsel and WeBTEC raised certain concerns about the First Supplemental Order. The administrative law judge noted that the First Supplemental Order was “meant to promote the exchange of information among the parties, not to inhibit it ...”. Tr. at 50. Further, the judge asked the

1 parties “to work together to try to work these things out among themselves...”. Id. at 49. The
2 judge asked the parties to “wait and see” whether the highly confidential documents could be
3 used as needed under the Protective Order. See Tr. at 47-48.

4 On October 11, just three days after the prehearing conference and without
5 attempting to negotiate with other parties, Public Counsel filed its petition.¹ On October 14, also
6 without any negotiation with other parties, WeBTEC filed its petition. In order to allow an
7 opportunity for the parties to try to resolve their differences, Dex Holdings, LLC (“Dex”) asked
8 that the response date to both petitions be set for October 24, 2002. However, the discussion
9 among the parties did not resolve the concerns of all of the parties to the discussions.
10 Accordingly, Dex files this answer to the petitions.

11 **II. DISCUSSION**

12 **A. ALL PARTIES AND THE DISCOVERY PROCESS IN THIS CASE WILL** 13 **BENEFIT FROM THE FIRST SUPPLEMENTAL ORDER.**

14 Dex is *currently* the only party that has requested highly confidential treatment of
15 documents or information. Dex was and is very concerned about potential disclosure of certain
16 of the transaction documents. It is important to remember, however, that other parties, including
17 Qwest and the intervenors, could potentially be requested to provide highly confidential
18 information before this docket is over. Moreover, even though the “highly confidential”
19 designations to date have related to general (but high level) concerns about commercially
20 valuable information, there is no reason to believe that information of potential benefit to
21 competitors of Qwest and Dex will not be produced later in this docket. Finally, as discussed
22 more fully below and contrary to the arguments of Public Counsel and WeBTEC, it is not just
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25 ¹ While Public Counsel faced an October 14 deadline to file its petition under WAC 480-09-760,
26 that did not preclude any attempt to work things out with other parties during the intervening six
days.

1 the interests of Qwest's and Dex's competitors which are implicated by the highly confidential
2 information in this docket.²

3 Having a familiar framework³ in place now will permit highly confidential
4 information to be timely disclosed and protect legitimate proprietary interests of any party that
5 are now or may be implicated. As the ALJ noted, the First Supplemental Order will promote the
6 free flow of information in this docket.

7 **B. THE FIRST SUPPLEMENTAL ORDER ALREADY ACCOMMODATES THE**
8 **ONLY EXTANT SUBSTANTIVE CONCERN OF WEBTEC.**

9 WeBTEC asserts that limiting access to highly confidential documents to one
10 attorney will impair its participation in the case. WeBTEC apparently overlooks the provisions
11 of the First Supplemental Order that permit it to “designate one outside counsel and no more than
12 one outside consultant, *legal or otherwise*” to receive highly confidential information. *Id.*, ¶ 4
13 (emphasis added). Thus, WeBTEC can designate Mr. Butler as outside counsel and Ms. Rackner
14 as legal consultant. They can both have access to highly confidential information under the
15 existing provisions of the First Supplemental Order. There is no need to modify the order as
16 WeBTEC requests.

17 WeBTEC also speculates it may decide some day to retain a second outside
18 expert. Such speculation does not justify a modification of the First Supplemental Order at this
19 time. Every party could claim they “might” need more experts, more attorneys, less restrictive
20 handling provisions, and the like. If a protective order can be watered down based on such
21 speculation, then no protective order could ever be sustained. Such arguments should be saved
22 for another day. As the ALJ noted at the prehearing conference, “I think we will continue to be
23 flexible and open-minded to meet the needs of the case....” *Tr.* at 47.

24 ² For example, Boeing, a WeBTEC member, participates in the capital markets and could find
25 the highly confidential information discussed below to be of commercial value.

26 ³ “Highly Confidential” protective orders similar in form to the First Supplemental Order have
been entered in a number of Commission dockets, including UT-991358, UT-000883, UE-
001952, UT-003022, and TO-011472.

1 **C. PUBLIC COUNSEL HAS NO STANDING TO OBJECT TO THE FIRST**
2 **SUPPLEMENTAL ORDER.**

3 Public Counsel's petition is unusual in that Public Counsel alleges no provision of
4 the order has any direct adverse impact on Public Counsel. Indeed, Public Counsel's substantive
5 concern appears to be that of WeBTEC's. If so, then the foregoing discussion with regard to
6 WeBTEC should resolve Public Counsel's petition. Moreover, it is questionable whether Public
7 Counsel has standing to raise hypothetical concerns of other parties.

8 In an apparent attempt to create standing, Public Counsel argues the "public's"
9 right to open proceedings. But this argument is a red herring, since Public Counsel has raised no
10 objection to the "standard" Protective Order in this case. Even if the Commission were to vacate
11 the First Supplemental Order the "highly confidential" documents would continue to be kept
12 from the public as "confidential" documents.⁴ The issue at hand has nothing to do with public
13 access. Rather, it has to do with how carefully fewer than a dozen people must handle a small
14 fraction of the documents that will be produced in this case and whether or not that small handful
15 of people might be expanded to include perhaps a dozen more people.

16 **D. ENTRY OF THE FIRST SUPPLEMENTAL ORDER WAS PROCEDURALLY**
17 **CORRECT.**

18 Public Counsel, while apparently not harmed itself, expresses concern about the
19 process for entry of the First Supplemental Order. Public Counsel's objection ignores the fact
20 that the Administrative Procedure Act ("APA") gives the Commission authority to enter
21 protective orders *sua sponte*. See RCW § 34.05.446. Indeed, the Commission did so in issuing
22 the Protective Order. It follows, then that the Commission had authority to amend its Protective
23 Order to permit Qwest to promptly file the remainder of the transaction documents. The
24 Commission could have issued the First Supplemental Order merely on receipt of a cover letter

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26 ⁴ Such withholding from the public is not absolute, however. The public will still have a right to
request specific confidential documents under the procedures of WAC 480-09-015.

1 from Qwest indicating that highly confidential documents had to be withheld from the
2 September 27 filing until the Protective Order was amended.

3 That Qwest filed a motion cannot eliminate the Commission’s power to act
4 proactively on its own motion under RCW § 34.05.446. The Commission acted within its
5 authority in amending its Protective Order without waiting for responses by other parties to
6 Qwest’s motion.

7 **E. RETAINING THE FIRST SUPPLEMENTAL ORDER PUTS NO BURDEN ON**
8 **PUBLIC COUNSEL, WHILE VACATING THE FIRST SUPPLEMENTAL**
9 **ORDER WOULD BE HIGHLY PREJUDICIAL TO DEX.**

10 The Commission’s *sua sponte* action to amend the Protective Order did not
11 prejudice Public Counsel. As the judge stressed at the prehearing conference, “there is nothing
12 in the amendment to the protective order that affects the rights of Public Counsel with respect to
13 the handling of documents.”⁵ Tr. at 37. Moreover, unlike the protective order in Docket UT-
14 000883, the First Supplemental Order does not preclude Public Counsel or intervenors from
15 having access to the highly confidential information. Cf. Second Supplement Order, ¶ 12,
16 Docket UT-000883. Each party in this docket can have at least one attorney and one expert
17 receive and review highly confidential information.

18 In contrast to the lack of demonstrable harm to Public Counsel, granting the
19 request to vacate would severely and unfairly prejudice Dex. *After* Public Counsel filed its
20 petition to vacate Public Counsel and its expert, Michael Brosch, received highly confidential
21 documents in reliance on the First Supplemental Order. Mr. Brosch has already reviewed the
22 documents and Public Counsel may have as well. Dex permitted Qwest to provide those
23 documents to Public Counsel and expert in reliance on the provisions of the First Supplemental
24 Order. Public Counsel and its expert received the documents under the terms of the First

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26 ⁵ Moreover, the judge made it clear that the parties had other avenues to address any practical
problems that may arise as the case unfolds: See, e.g., Tr. at 47.

1 Supplemental Order. Having already received the documents, Public Counsel should not now be
2 permitted to challenge the very existence of the order.

3 **F. IN ADDITION TO BEING PROCEDURALLY CORRECT, ENTRY OF THE**
4 **FIRST SUPPLEMENTAL ORDER WAS SUBSTANTIVELY APPROPRIATE.**

5 The Commission routinely provides protective orders and “highly confidential”
6 protective orders to ensure that proceedings are not delayed because parties withhold information
7 out of concern that the risk of disclosure may outweigh tangential relevance to the proceedings.⁶
8 The threshold for entry of such protective orders is intentionally set low to promote such free
9 flow of information. As the judge noted repeatedly at the prehearing conference, the goal is to
10 facilitate the discovery process. The remedy for any abuses of a protective order is not to vacate
11 the order. Rather, the remedy is to move to reclassify documents that a party believes are not
12 deserving of the claimed level of protection. Protective Order, ¶ 16. Moreover, the Commission
13 reserved the right to review confidential designations on its own initiative. *Id.*, ¶ 17. With these
14 remedies the amended Protective Order adequately balances three important and well-recognized
15 but competing goals: protection of commercially sensitive and valuable information, free and
16 timely flow of information in the discovery process, and public policy favoring open
17 government.

18 Qwest’s motion met the relatively low threshold for the mere entry of a protective
19 order. Nevertheless, Dex provides below additional information regarding the need for highly
20 confidential protection of the documents already filed under that designation in this docket.

21 1. The documents filed to date require highly-confidential treatment.

22 The documents for which Qwest sought highly confidential protection are of
23 limited relevance to the Commission's review, yet extremely sensitive from the Buyer’s
24 perspective and potentially commercially valuable to the Buyer’s competitors. These documents
25 contain highly-sensitive and commercially valuable information relating to financial terms of

26 ⁶ See note 2, *supra*.

1 anticipated debt and equity offerings of the Buyer and SGN LLC (the “Company”), trade secrets
2 relating to potential product names, and commercially sensitive directory publishing information.

- 3 2. Documents Relating to the Buyer’s Financing [Debt Financing Commitment
4 Letter (Exhibit N to the Dexter and Rodney Purchase Agreements), Equity
5 Financing Commitment Letters (Exhibit O to the Dexter and Rodney Purchase
6 Agreements) and the Equity Term Sheet (Exhibit R to the Rodney Purchase
7 Agreement), Term Sheet for Seller Financing (Section 1.2BS of Sellers’
8 Disclosure Schedule to the Rodney Purchase Agreement) and the PIK Preferred
9 Stock Term Sheet (Exhibit V to the Rodney Purchase Agreement)]

10 These documents contain information relating to the Buyer’s financing of the
11 Dexter and Rodney transactions that would be of great value to those competing for limited
12 funds available in today’s relatively narrow debt and equity capital markets. Under current
13 market conditions, there is a limited pool of equity capital and a number of similar competing
14 investment opportunities for directory businesses, including deals relating to the acquisitions of
15 the directory businesses of Sprint and Bell Canada. Public disclosure of the details of the
16 financial terms of these offerings could impair the ability of the issuers to raise equity or debt on
17 the most commercially favorable terms by making the Buyer’s and the Company’s offerings of
18 securities less competitive with these similar offerings. If they had knowledge of the expected
19 financial terms of the Buyer’s and the Company’s offerings, other directory publishing
20 businesses seeking financing could enhance the attractiveness of their offerings by changing the
21 terms, marketing strategy and timing of competing investment opportunities. Moreover,
22 disclosure of material details relating to the issuance of additional debt or equity securities prior
23 to the offering and marketing of such securities and the issuer or equity sponsors having an
24 opportunity to organize presentations and road shows to institutional and other investors could
25 impair the ability of the issuer or equity sponsor, as the case may be, to decide when to enter the
26 capital markets, so as to optimize the amount of debt or equity securities to be sold to generate
the best price and the highest level of demand.

While public disclosure of this information would be highly damaging to the
Buyer, the information has limited relevance to the Commission's review. The Exhibits

1 identified above include documents and information that relate solely to the Buyer's ongoing and
2 future efforts to provide for additional sources of financing for the acquisition of the Qwest Dex
3 business. They have no bearing on the Commission's evaluation of the nature and structure or
4 terms and conditions of the acquisition, the Buyer's commitment to consummate the
5 Transactions by paying the negotiated purchase price, the impact of the Dex sales on Qwest, or
6 the operation of the Dex business going forward. Such information is already fully detailed in
7 other documents that Qwest has provided.

8 3. Documents Containing Trade Secrets [Sections 3.14 and 3.20 of the Seller's
9 Disclosure Schedule to the Dexter and Rodney Purchase Agreements]

10 Two additional documents contained in the Seller's Disclosure Schedules to the
11 Dexter and Rodney purchase agreements contain highly-confidential information disclosing
12 trade secrets that would be commercially valuable to competitors.

13 Section 3.14 of Seller's Disclosure Schedule to the Dexter and Rodney Purchase
14 Agreements contains information relating to potential product names that have not yet been
15 registered as trademarks. Until Dex obtains trademark protection for these product names,
16 disclosure may provide impetus for competitors to use similar names, impair Dex's ability to use
17 these names if competitors register the same or similar trademarks, or reduce the economic value
18 attached to these names by using them in the marketplace.

19 Section 3.20 of Seller's Disclosure Schedule to the Dexter and Rodney Purchase
20 Agreements contains tables with information setting forth key directories, the financial
21 importance to Rodney and Dexter of certain key directories, and information related to
22 publishing schedules and publishing dates. This information would have great strategic and
23 commercial value to competitors, which could use it to target their launch of competing
24 directories to new, lucrative markets or to determine the markets in which advertising dollars
25 will have the greatest impact.

1 In contrast, the probative value of this information to the Commission in
2 evaluating the Dex sale is low. The information for which Qwest has designated for highly
3 confidential treatment has no bearing on the nature and structure or terms and conditions of the
4 acquisition, Buyer's commitment to consummate the Transactions, the impact on Qwest of the
5 Dex sale, or the operation of the Dex business going forward.

6 **III. CONCLUSION**

7 The petitions of Public Counsel and WeBTEC should be denied. If the
8 Commission finds merit in permitting both Mr. Butler and Ms. Rackner to be able to see the
9 highly confidential materials Dex would not object to a limited amendment to the amended
10 Protective Order to permit that, subject to the conditions set forth in the discussion above.
11 Alternatively, if the Commission preferred, the parties could handle that accommodation by
12 stipulation.

13 DATED this 24th day of October, 2002.

14 MILLER NASH LLP

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16 _____
17 Brooks E. Harlow
18 WSB No. 11843

19 Attorneys for Intervenor
20 Dex Holdings, LLC
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