

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of)	
)	DOCKET NO. UT-021120
QWEST CORPORATION)	
)	THIRD SUPPLEMENTAL ORDER:
Regarding the Sale and Transfer of)	AMENDING PROTECTIVE
Qwest Dex to Dex Holdings, LLC, a non-)	ORDER
affiliate)	
.....)	

MEMORANDUM

1 **PROCEEDINGS:** Qwest Corporation (“Qwest”) filed its “Application Regarding Transfer and Sale of Directory Business and Notice of Possible Affiliated Interest Transaction on September 3, 2002. The Commission entered a Protective Order on September 12, 2002, and amended its Protective Order on October 4, 2002. The Commission conducted its first Prehearing Conference on October 8, 2002.

2 **PARTIES:** Lisa A. Anderl, Senior Attorney, U S WEST, Inc. Seattle, Washington, represents Qwest Corporation. Brooks Harlow, Miller Nash LLP, Seattle, Washington, represents Dex Holdings, LLC. Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington represents XO Washington, Inc. Arthur A. Butler and Lisa Rackner, Ater Wynne LLP, Seattle, Washington and Portland, Oregon, represent WeBTEC, f/k/a TRACER. Stephen S. Melnikoff, Department of the Army, Judge Advocate General, represents the Department of Defense and Federal Executive Agencies. Ronald Roseman, attorney, Seattle, Washington, represents the AARP. Simon ffitich and Robert Cromwell, Assistant Attorneys General, Seattle, Washington, represents the Public Counsel Section, Office of Attorney General (“Public Counsel”). Greg Trautman, Assistant Attorney General, Olympia, Washington, represents the Commission’s regulatory staff (“Commission Staff” or “Staff”).

3 **PETITIONS FOR REVIEW OF PROTECTIVE ORDER AMENDMENT:** On October 4, 2002, the Commission amended the Protective Order in this proceeding to provide that parties could designate certain documents as “highly confidential.” The purpose of this amendment is to promote the free exchange of information among the parties while preserving their rights to challenge the designation of any document as “highly confidential.”

- 4 The form of amendment is one the Commission has successfully used in the past to minimize discovery disputes in connection with the production of documents considered commercially sensitive by one or more parties in a proceeding that concerns a pending transaction. Indeed, it appears the amendment is working as intended in this proceeding. Qwest and its counterpart in the pending transaction, Dex Holdings, now have furnished documents previously withheld under Qwest's assertion of the need for the higher level of protection provided by the amendment.
- 5 Dex Holdings asserts that the documents provided under the "highly confidential" classification "are of limited relevance to the Commission's review, yet extremely sensitive from the Buyer's perspective and potentially commercially valuable to the Buyer's competitors." Dex Holdings states that "[t]hese documents contain highly-sensitive and commercially valuable information relating to financial terms of anticipated debt and equity offerings of the Buyer and SGN LLC (the "Company"), trade secrets relating to potential product names, and commercially sensitive directory publishing information."
- 6 Public Counsel is unaffected by the terms of the amendment, yet asserts that it was substantially prejudiced by early entry of the amended order.¹ Public Counsel filed a Petition for Review of Amended Protective Order on October 11, 2002. Public Counsel argues that, considering state law and policy that favors openness in public proceedings, "a request for higher levels of confidentiality must be measured even more strictly" than a request for "confidential" treatment of a document as provided under the original Protective Order. This argument is misplaced for two reasons.
- 7 First, the tension between the need for openness in public proceedings and open public records, and the need to promote full disclosure of relevant documents in formal adjudications that concern pending commercial transactions and include highly sensitive and commercially valuable information is recognized in the public records act, in our principal governing statutes, and in our procedural rules. *RCW 80.04.095; RCW 42.17.310(1)(q); WAC 480-09-015*. The Protective Order entered in this proceeding, and the subject amendment, are entirely consistent with the letter and the intent of these statutes and rules. While this Commission and the Legislature recognize the importance of openness in public proceedings, and in public records, the Commission and the Legislature also recognize the legitimate need to protect certain types of information that are required in the course of regulating certain business activities. Commercially sensitive information concerning pending transactions that are under review by the Commission is a type of information that often gives rise to the tension between confidential disclosure in the pending proceeding and public disclosure under the public records act. Contrary to Public Counsel's argument, the Commission does "regularly and routinely" resolve this

¹ Public Counsel and Staff treat "confidential" and "highly confidential" documents identically under the Protective Order. Public Counsel has no objection to the original Protective Order.

tension in favor of promoting the free and full exchange of confidential information in adjudications via the use of protective orders identical to the Protective Order, as amended, entered in this proceeding.

8 Second, the amendment does not change the public availability of documents that are produced under the Protective Order. Whether a document is designated as “confidential” under the provisions of the original Protective Order, or as “highly confidential” under the terms of the amendment, the document is exempt from public disclosure unless its designation is successfully challenged by a party or by the Commission on its own motion, as provided in the Protective Order.² The only difference between the two classifications is that a smaller number of party representatives are entitled to review “highly confidential” documents than is the case for “confidential” documents. This ensures tighter document control for “highly confidential” documents and reduces the risk of inadvertent disclosure of commercially sensitive information, but allows all parties to have access to potentially relevant information. At the threshold, each party may designate one outside counsel and one outside consultant to review any such document and, considering its content and degree of relevance, determine whether to challenge its designation as “highly confidential.” This is an appropriate balance of interests.

9 While we find Public Counsel’s arguments of principle unpersuasive in the present context, Public Counsel also speaks up for other parties in the proceeding whom it perceives may suffer “practical problems” under the terms of the amendment. Public Counsel’s concern focuses on WeBTEC, which speaks ably enough for itself in its Petition for Review of First Supplemental Order, filed on October 14, 2002.

10 WeBTEC argues that it faces the practical difficulty that “because of certain schedule considerations, WeBTEC has determined that two attorneys, Art Butler and Lisa Rackner, will be representing WeBTEC in this docket” and that both need access to all documents to adequately represent their client’s interests. WeBTEC also argues that the amendment to the Protective Order should apply only to competitors. WeBTEC asserts that “it makes no sense for Qwest to request additional protections for its information that is received by AARP, WeBTEC, or any other consumer or consumer group that is granted party status in this case.” We presume, but do not know, that WeBTEC regards itself as a “consumer group.”

11 In light of WeBTEC’s argument, we will grant its Petition for Review and further amend our Protective Order to permit one additional outside attorney to be eligible to receive and review “highly confidential” documents on a showing that there is a

² We note that the provisions in the Protective Order, as amended, that establish processes for challenging the designation of a document as “confidential” or “highly confidential” track the processes established under RCW 80.04.015 concerning public requests for documents that are asserted to include “valuable commercial information.”

specific need to permit such expanded disclosure. We find that WeBTEC has made such a showing.

- 12 WeBTEC argues that as a non-competitor, it should not be barred from having more than one attorney view the highly confidential documents. Our ruling does not turn on whether a party is a competitor. Sensitive competitive information can be of great interest to more than just competitors. Others in the marketplace may also find such confidential information highly valuable, for a number of reasons. It is prudent for the Commission to limit the dissemination of such information to a limited number of individuals and to know whom those individuals represent. For that reason, while we are allowing WeBTEC to add one more attorney, we require WeBTEC to provide us a list of its members.

ORDER

- 13 The Commission Orders That:

1. The Protective Order previously entered in this proceeding on September 12, 2002, and amended on October 4, 2002, is further amended as set forth in the Appendix to this Order.
2. WeBTEC is required to file with the Commission and serve on all parties by November 15, 2002, a complete list of its members.

DATED at Olympia, Washington, and effective this ____ day of November 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE: Any petition for review of the provisions of this order must be filed within ten (10) days after the date of mailing of this statement, pursuant to WAC 480-09-760.

APPENDIX
Amendment to Protective Order

Highly Confidential Information. This proceeding may involve production and consideration of documents or information the dissemination of which imposes a significant risk of competitive or other commercial harm to the disclosing party. Parties may designate documents or information they consider to be of that nature as “Highly Confidential” and such documents or information will be disclosed only in accordance with the provisions of this Section.

Parties must scrutinize carefully responsive documents and information and limit the amount they designate as Highly Confidential information to only information that truly might impose a serious business risk if disseminated without the heightened protections provided in this Section. The first page and individual pages of a document determined in good faith to include Highly Confidential information must be marked by a stamp that reads: “Highly Confidential Per Protective Order in WUTC Docket No. UT-021120.” Placing a “Highly Confidential” stamp on the first page of a document indicates only that one or more pages contains Highly Confidential information and will not serve to protect the entire contents of a multipage document. Each page that contains Highly Confidential information must be marked separately to indicate where Highly Confidential information is redacted. The unredacted versions of each page containing Highly Confidential information, and provided under seal, also must be marked with the “Highly Confidential . . .” stamp and should be submitted on paper distinct in color from non-confidential information and “Confidential Information” as described in this Protective Order.

Parties other than Public Counsel and Staff who seek disclosure of Highly Confidential documents or information must designate one outside counsel and no more than one outside consultant, legal or otherwise, to receive and review unredacted materials marked “Highly Confidential.” Parties other than Public Counsel and Staff who make a specific showing of special need may designate one additional outside counsel to receive “Highly Confidential” documents and information. In addition to executing the appropriate Agreement required by this Protective Order for “Confidential Information” each person designated as outside counsel or consultant for review of “Highly Confidential” documents or information must execute an affidavit, under oath, certifying that:

- a. They do not now, and will not for a period of five years, involve themselves in competitive decision making by any company or business organization that competes, or potentially competes, with the

company or business organization from whom they seek disclosure of Highly Confidential information.

b. They have read and understand, and agree to be bound by, the terms of the Protective Order in this proceeding and by this Amendment to the Protective Order.

Any party may object in writing to the designation of any individual counsel or consultant as a person who may review Highly Confidential documents or information. Any such objection must demonstrate good cause, supported by affidavit, to exclude the challenged counsel or consultant from the review of Highly Confidential documents or information. Written response to any objection must be filed within three days after service of the objection.

Designated outside counsel and consultants will maintain the Highly Confidential documents and information and any notes reflecting their contents in a secure location to which only the designated persons have access. No additional copies will be made. Any testimony or exhibits prepared that reflect Highly Confidential information must be maintained in the secure location until removed to the hearing room for production under seal and under circumstances that will ensure continued protection from disclosure to persons not entitled to review Highly Confidential documents or information. Counsel will provide prior notice (at least one business day) of any intention to introduce such material at hearing, or refer to such materials in cross-examination of a witness. Appropriate procedures for including such documents or information will be determined by the Commission or by the presiding Administrative Law Judge following consultation with the parties.

The designation of any document or information as “Highly Confidential” may be challenged by motion of any party and the classification of the document or information as “Highly Confidential” will be considered in chambers by the Commission or by the Presiding Administrative Law Judge. The Commission may challenge any “Highly Confidential” designation on its own motion. If the Commission determines that information is not entitled to protection under this Order, the information continues to be protected under this Order for ten days thereafter to enable the producing party to seek judicial review of the determination, including a stay of the decision’s effect pending further review.

At the conclusion of this proceeding, and the exhaustion of any rights to appeal, designated outside counsel must return all Highly Confidential documents and information provided during the course of the proceeding, and must certify in writing that all notes taken and any records made regarding

Highly Confidential documents and information have been destroyed by shredding or incineration.

Highly Confidential documents and information will be provided to Staff and Public Counsel under the same terms and conditions of this Protective Order as govern the treatment of "Confidential Information" provided to Staff and Public Counsel and as otherwise provided by the terms of the Protective Order other than this section.