

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

MOTION TO REMOVE  
CONFIDENTIALITY  
DESIGNATIONS FROM  
TESTIMONY OF LEE L.  
SELWYN AND GLENN  
BLACKMON

**INTRODUCTION**

1 Commission Staff files this motion to remove all of the “confidential” and “highly confidential” designations from the testimony of Lee L. Selwyn and Glenn Blackmon, filed on March 18, 2003.<sup>1</sup> Staff maintains that no portions of this testimony discloses information that meets the standards for confidentiality set forth in the protective orders issued in these dockets, nor those set forth in RCW 80.04.095, RCW 42.17.310(q), and WAC 480-09-015.

2 As Staff noted when it filed the testimony of Drs. Selwyn and Blackmon, Staff filed its testimony with the Commission in accordance with the confidentiality designations that Qwest applied to certain portions, but it did so without agreeing that the confidentiality designations were appropriate or consistent with the law. Staff has since conferred with Qwest on multiple occasions in an effort to remove these confidentiality designations, as

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<sup>1</sup> Qwest has agreed to remove the confidentiality designations from all of Dr. Blackmon’s testimony. See page 6 of

Staff believes that none of them are warranted under the terms of the protective orders in this case, or under the governing statutes and rules. To this date, Qwest has agreed only to remove the confidentiality designations (or in some cases, lower the designation from “highly confidential” to “confidential”) from a limited number of testimony references.<sup>2</sup> Staff asks in this motion that all such designations be removed.

### **ARGUMENT**

**1. The protective orders issued in this docket strictly limit the materials that can be designated as confidential and highly confidential.**

**A. Confidential Information**

3 It is a fundamental public policy of this state that the government should, to the greatest extent possible, conduct its business in the open. RCW 42.17.010. The Protective Order issued on September 12, 2002, states that all access, review, use, and disclosure of any material designated by a party to this proceeding as confidential shall be governed by the order and WAC 480-09-015. Protective Order, ¶ 3. WAC 480-09-015, in turn, states that

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attached table. Hence, only the designation of Dr. Selwyn’s testimony remains a contested issue.

<sup>2</sup> Attached to this motion is a table showing the confidentiality designations to date of the testimony of Lee L. Selwyn (LLS-1T) and Glenn Blackmon, PhD. (GB –T-1). The table lists each of the pages on which allegedly confidential or highly confidential information appears, together with a brief description of the item involved in each reference. These listings are consistent with the manner in which the testimony was marked and submitted to the Commission on March 18, 2003. The last column of the exhibit indicates instances in which Qwest has agreed to remove or lower the confidentiality designation of certain items, per e-mail by Lisa Anderl to Greg Trautman of April 9, 2003. As can be seen, several boxes in the last column remain blank. In all of these instances, Qwest has not concurred to change the confidentiality designations. Again, Staff requests that all confidentiality designations be removed.

confidential information is “limited to information filed with the commission or its staff which is protected from inspection or copying under chapter 42.17 RCW or RCW 80.04.095.” Furthermore , the rule provides that “in the event of a challenge, the burden of proving that the statutory definition applies is on the party asserting confidentiality.”

4           RCW 80.04.095 provides confidentiality protection only for records filed with the commission that “contain valuable commercial information, including trade secrets or confidential marketing, cost, or financial information, or customer-specific usage and network configuration and design information,” and only if disclosure of such records will result in “private loss, including an unfair competitive disadvantage.”<sup>3</sup>

5           In addition, the Protective Order states, “The Commission expects Confidential Information to include only numbers, customer names, and planning details,” and further directs that “Parties must scrutinize potentially confidential material, and limit the amount they designate ‘Confidential Information’ to only information that truly might compromise their ability to compete fairly or that otherwise might impose a business risk if disseminated without the protections provided in this Order.” Protective Order at ¶¶ 3, 4.

6           As shown below, none of the references in the testimony of Dr. Selwyn meet these

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<sup>3</sup> RCW 80.04.095 provides that confidentiality can be maintained by the claimant obtaining a superior court order protecting the records as confidential. The statute also permits the Commission to use protective orders “governing disclosure of proprietary or confidential information in contested proceedings.” RCW 42.17.310 (q) provides an exemption from public inspection and copying for “records filed with the utilities and transportation commission or

exacting standards necessary for confidential designation.

**B. Highly Confidential Information**

7 Documents marked as “highly confidential” are subject to severe limitations on dissemination. Parties other than Public Counsel and Staff who seek disclosure of such documents or information must designate one outside counsel and no more than one outside consultant, legal or otherwise, to receive and review these materials. They must further agree that they “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.” Third Supplemental Order, Appendix to Protective Order, at pp. 5-6.

8 For this reason, documents or information may be designated as “highly confidential” only if their dissemination “imposes a significant risk of competitive or other commercial harm to the disclosing party. *Id.* at 5. Moreover, “[p]arties 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

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attorney general under RCW 80.04.095 that a court has determined are confidential under RCW 80.04.095.”

business risk if disseminated without the heightened protections provided in this section.” *Id.*

**2. None of the references in Dr. Selwyn’s testimony meet the rigorous standards required for confidential or highly confidential information.**

9 As noted above, the burden of proving confidentiality rests with Qwest, the party seeking such designation. None of the references in Dr. Selwyn’s testimony meet the necessary standards.

10 First, many of the testimony references do not deal in any way with “numbers, customer names and planning details,” (see Protective Order at ¶ 3), let alone any conceivable valuable commercial or financial information or competitive harm.

**\*\*\*CONFIDENTIAL BEGINS\*\*\*** \*\*\*\*\*

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\*\*\*\*\***CONFIDENTIAL ENDS**\*\*\* These are all references to materials that Qwest has marked as either confidential or highly confidential, but clearly, none of these references meet the standards for confidential, let alone highly confidential, designation.

11 Dr. Selwyn's testimony also contains passages in which **\*\*\*CONFIDENTIAL BEGINS\*\*\*** \*\*\*\*\*

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\*\*\*\*\* **\*\*\*CONFIDENTIAL ENDS\*\*\*** These general references, which do not disclose any trade secrets or confer competitive disadvantage, also do not meet the criteria for confidential designation.

 In other places, Dr. Selwyn makes reference to **\*\*\*CONFIDENTIAL BEGINS\*\*\***

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\*\*\*\*\***CONFIDENTIAL ENDS**\*\*\* None of these numbers reveal information that qualify as confidential or highly confidential under the terms of the protective order or the governing statutes. Nor are the forecasted assumptions the type of “planning details” that qualify for such protection.

**CONCLUSION**

14 In summary, there is no basis for the continued confidential or highly confidential designation of any portions of Dr. Selwyn’s testimony, and Staff therefore requests that such designations be removed.

DATED this 10<sup>th</sup> day of April, 2003.

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