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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
**QWEST’S ANSWER TO STAFF’S MOTION
TO REMOVE CONFIDENTIALITY
DESIGNATIONS FROM TESTIMONY OF
LEE L. SELWYN**

I. INTRODUCTION

Qwest hereby files its answer to Staff’s Motion to Remove Confidentiality Designations from the testimony of Lee L. Selwyn. Qwest has summarized its position on the issues raised in Staff’s motion in the attached table. It is the same table that Staff attached to its motion, but Qwest has filled in the column on the right hand side with its designation as to whether the material is confidential or not.

Qwest wishes to emphasize that some of the information in Staff’s testimony was not actually designated by Qwest as confidential in the first instance, but was so designated by Staff because it was information that characterized or otherwise discussed a confidential document, without necessarily disclosing confidential information. Qwest has therefore clarified that those narrative sections of Staff’s testimony are not confidential.

Qwest further clarifies that another portion of the information constitutes narrative discussion of documents Staff thought were confidential, when those documents had never actually

1 been designated by Qwest as confidential. The information was designated as confidential by Staff
2 because Staff did not review the documents that Qwest provided when it first filed its application.
3 Staff's witness saw this information only when he reviewed the information provided in a data room
4 in response to Public Counsel's data request #01-006, and erroneously believed that Qwest had
5 designated the information as confidential. Qwest clarified these erroneous designations in its
6 initial response to Staff's request for redesignation of confidential information.

7 Finally, Qwest clarifies that in its view, none of the information in Dr. Selwyn's testimony is
8 highly confidential. Thus, all designations as to confidential information are simply the standard
9 confidentiality designation, not highly confidential.

10 That said, there are a number of instances where Staff's motion seeks to disclose
11 confidential information where Qwest continues to assert that the documents or excerpted portions
12 are confidential. Those will be discussed in detail below. All page and line references correspond
13 to the attached table and the testimony of Lee Selwyn.

14 **II. THE STANDARD FOR CONFIDENTIALITY**

15 There are three governing provisions with regard to confidentiality in this proceeding. First,
16 the Commission has entered a Protective Order in this case, identifying generally what types of
17 information may be protected. Second, the Commission has adopted a rule allowing documents to
18 be designated as confidential, WAC 480-09-015. Finally, the legislature has recognized that certain
19 documents produced to the Commission should not be publicly disclosed, and enacted RCW
20 80.04.095 to afford parties protection for confidential documents, including documents containing
21 valuable commercial information.

22 The Protective Order states, at paragraph 3, that the Commission "expects Confidential
23 Information to include only numbers, customer names, and planning details." As will be clear from
24 the discussion below, a great deal of the challenged information consists of confidential numbers
25 that are integral to the sale transaction and should not be publicly disclosed.

26 WAC 480-09-015 also governs this proceeding, and contains provisions that mirror those in

1 the Protective Order and RCW 80.04.095.

2 RCW 80.04.095 provides as follows:

3 **Protection of records containing commercial information.**

4 Records, subject to chapter 42.17 RCW, filed with the commission or the attorney
5 general from any person which contain valuable commercial information, including
6 trade secrets or confidential marketing, cost, or financial information, or customer-
7 specific usage and network configuration and design information, shall not be subject
8 to inspection or copying under chapter 42.17 RCW: (1) Until notice to the person or
9 persons directly affected has been given; and (2) if, within ten
10 days of the notice, the person has obtained a superior court order protecting the
11 records as confidential. The court shall determine that the records are confidential
12 and not subject to inspection and copying if disclosure would result in private loss,
13 including an unfair competitive disadvantage. When providing information to the
14 commission or the attorney general, a person shall designate which records or
15 portions of records contain valuable commercial information. Nothing in this section
16 shall prevent the use of protective orders by the commission governing disclosure of
17 proprietary or confidential information in contested proceedings.

18 The procedure for challenging the confidentiality of a document is set forth in the Protective
19 Order – the burden is on the party asserting confidentiality, and the Commission or the ALJ must
20 review the documents *in camera* to rule on the confidentiality.

21 **III. ARGUMENT**

22 It is clear such an *in camera* review must result in a conclusion that both the underlying
23 documents and the excerpts in the testimony are properly designated as confidential. All of the
24 documents contain either confidential financial information, strategic planning information,
25 competitively sensitive information about the directory publishing business, or commercially
26 valuable information with regard to the sale transaction. Both the Buyer and Qwest are placed at a
potential competitive disadvantage by the public disclosure of their financial and other business
information when such disclosure is not otherwise required by law.

27 **A. The Lehman Brothers' and Merrill Lynch Presentations**

28 Staff asserts that Dr. Selwyn's references to financial data included in work product
29 prepared for Qwest by Lehman Brothers and Merrill Lynch, Qwest's financial advisors, is not
30 properly considered confidential and should be disclosed. In particular, Dr. Selwyn's testimony

1 includes numerous references to the valuation work of Lehman Brothers and Merrill Lynch included
2 in their presentations to Qwest's Board.

3 It is critical to understand that the work product prepared by Lehman Brothers and Merrill
4 Lynch in conjunction with the Dex sale has always been treated as confidential by Qwest, and has
5 not been publicly disclosed. In fact, the terms of Qwest's engagement letters with these two firms
6 provides that their work product is additionally considered confidential by the firms themselves.
7 This is so because their work product contains comprehensive collections of relevant commercial
8 data relating to the directory publishing industry, analyses of market trends, evaluative material and
9 conclusions and opinions that are commercially valuable to these firms. Their presentations also
10 reveal their distinct, and proprietary valuation methodologies. Disclosure of this information in the
11 public domain would result in private loss to these firms. Their work product should be available
12 only to those who have compensated these firms for their efforts, analyses and opinions.

13 Further, the Lehman and Merrill work product is confidential, and extremely sensitive, from
14 a Qwest perspective. It provides extremely detailed analyses of the Qwest Dex directory
15 publishing business, expected future performance of that business and valuation of that business. It
16 also provides explicit detail regarding the bid positions of the parties competing to purchase Dex.
17 This data is valuable commercial information from the Qwest perspective, particularly if the second
18 phase of the Dex sale does not close, for whatever reason. In the event that the sale does not close,
19 release of this data could significantly harm Qwest's ability to re-offer these operations for sale,
20 should it determine to do so. Potential purchasers would have a virtual roadmap to Qwest's
21 valuation of the directory business, as well as detailed information relating to bids submitted by
22 potential purchasers in the prior sale effort. Disclosure of this sensitive information could possibly
23 lead to a lower sales price in the event that Qwest does re-market the operations. Quite clearly, no
24 business offering itself for sale would want this kind of detailed valuation material in the public
25 domain, available to potential purchasers.

26 Staff's primary advocacy in this docket, of course, is that the Commission should not

1 approve the transaction, and the deal should not close. There certainly remains a possibility,
2 therefore, that the deal will not close, for this or some other reason, making public disclosure of this
3 very sensitive valuation and bid information completely inappropriate. In fact, disclosure of this
4 data before this transaction is completed could itself somehow impact the transaction, as this data is
5 not available to the general public, including the equity and bond markets.

6 The data relating to forecasts of future performance—which in turn directly drives the
7 valuations upon which Mr. Selwyn relies—is also confidential and competitively sensitive.
8 Release of this data, directly, or indirectly, through release of the valuation methodologies and
9 summaries could provide competing directory publishers an unfair competitive advantage.
10 Understanding that these valuations are a function of EBITDA, and being provided these valuations,
11 competitors could make reasonable estimates concerning Dex’s operating margins, and thereby gain
12 an unfair competitive advantage. Release of this economic forecast data could also influence the
13 equity and bond markets, and could create disclosure issues for Qwest, to Qwest’s detriment and
14 potential commercial harm.

15 **1. Specific References to the Board Presentations**

16 There are a number of references to specific financial data or other numbers in Staff’s
17 testimony. For example, pages 27 through 31 of Dr. Selwyn’s testimony disclose in detail ranges of
18 valuation estimates, the dollar value of variances from either the mid-point or the high end of
19 valuation estimates, and other sensitive information that is specific to this as-yet-unconsummated
20 transaction. Page 34, Table 2 contains similarly confidential information which has not been
21 appropriately designated by Staff as confidential. Pages 36 through 39 also contain proprietary
22 information from the Lehman Brothers’ and Merrill presentations.

23 **B. Other Information**

24 **1. Specific Financial and Numerical Data**

25 Dr. Selwyn’s testimony contains a great deal of other financial information, including a
26 significant number of instances where he calls out specific dollar amounts or percentage figures.

1 Qwest considers all of this information to be confidential, and appropriately designated under the
2 terms of the Protective Order. As noted above, RCW 80.04.095 contains specific provision for the
3 protection of financial data, and the Protective Order at paragraph 3 contains specific provision for
4 protection of “numbers.” Obviously, not every number will be a confidential number, but where
5 those numbers are in fact commercially valuable business information, they are clearly protected
6 from disclosure under the Protective Order and Washington law. The following specific page and
7 line references are examples of such information.

8 **Page 29, footnote 37 and page 30, lines 1-12 and footnote 39.** The information contained
9 in this portion of the testimony discloses confidential EBITDA and growth numbers. The actual and
10 estimated EBITDA and the assumed and/or projected growth rates are competitively sensitive
11 information. This information is not otherwise available in the public domain and would provide
12 competitors in the advertising industry valuable insight into the yellow pages publishing and
13 advertising business that they would not otherwise have. Thus, the information meets the test
14 contained in RCW 80.04.095 as being valuable commercial information.

15 **Page 95, lines 15-16 and 19.** This testimony contains confidential business information
16 with regard to the projected revenues from specific lines of business, i.e., the direct marketing and
17 database lines of business. Other companies compete with Dex in these areas, and data concerning
18 either projections of or actual revenues realized from these businesses would provide competitors
19 with valuable insight into the opportunities in these areas. Such information would not otherwise be
20 available to them, and Qwest therefore believes that this is valuable commercial information that is
21 competitively sensitive and is protected under RCW 80.04.095.

22 **2. Competitively Sensitive Data**

23 **Page 50 line 13 – page 51 line 16.** The information contained in this part of the testimony
24 discloses strategic information from two documents that are competitively sensitive. Dr. Selwyn’s
25 own description of these documents provides ample support for their confidentiality. As he states at
26 page 50, lines 4-6, “[t]hese two documents provide an in-depth evaluation of the state of the

1 directory publishing industry at that time [August 2001], Dex’s strengths and weaknesses, and Dex’s
2 future prospects.” Thus, it is clear that the information contained in those documents would provide
3 valuable information to competitors with regard to Dex’s prospects, as well as areas where Dex
4 might be vulnerable to competition. As such, the information contained in this section of the
5 testimony is competitively sensitive and commercially valuable.

6 **Page 93 line 12 – page 94 line 2.** The information contained in this part of the testimony is
7 confidential information from a study commissioned by Qwest Dex to obtain information about
8 advertisers who have chosen to leave Qwest. This information would obviously give competitors
9 an edge over Qwest in that it would reveal information about Qwest’s business that would
10 potentially enable them to compete more effectively for advertising dollars. This information is
11 only available because of a study Qwest undertook at its own expense in furtherance of improving
12 its position in the market. This information would not otherwise be available to competitors and is
13 therefore both commercially valuable and competitively sensitive and should be protected pursuant
14 to RCW 80.04.095.

15 **3. Calculations from Confidential Information**

16 There is an additional subset of information challenged by Staff. In general, this information
17 includes Qwest’s (e.g., pages 8-9, 42, 72, lines 11-12) and Staff’s (e.g., pages 46, 53-54, 110)
18 calculation of the gain on the sale, as well as Staff’s calculation of a Washington earnings-based
19 allocator (pages 53, 54, 108). Some of this information is Staff witness Selwyn’s calculation, based
20 on confidential Qwest data. Qwest asserts confidentiality with regard to all of this information as
21 well.

22 Qwest’s calculation of the gain on the sale is confidential for the same reason that the
23 Lehman and Merrill presentations are confidential – this is business information specific to a
24 transaction that has not yet closed and is therefore sensitive until such time as it may legitimately be
25 called historic data. There are a number of reasons why Qwest asserts confidentiality with regard
26 to this information. First, information concerning the gain on the sale is sensitive because it reveals

1 information that has not been made publicly available regarding material components of QCI's
2 balance sheet after the sale. Information concerning jurisdictional allocation of the gain reveals
3 commercially sensitive information about Dex's business in Washington. Finally, Qwest's
4 calculation of the gain excludes certain lines of business, for reasons set forth in Ms. Jensen's
5 testimony. Thus, information concerning allocation of the gain among LCI, NewVentures, Secondary
6 and Non-Qwest listings in Primary Directories provides commercially sensitive information about
7 the revenues generated by different lines of business.

8 As to Staff's conclusions, because they are calculations using undisputedly confidential
9 Qwest data, they are also confidential. For example, Staff's calculation of the gain on the sale for
10 Washington is accomplished through the calculation of an NPV for the non-confidential imputation
11 number (\$103.4 million). Release of the end result of that calculation, along with Dr. Selwyn's
12 discussion of the calculation, would provide the reader with insight into the underlying growth
13 assumptions, which are confidential as discussed above.

14 IV. CONCLUSION

15 For the reasons set forth herein, the Presiding Officer should affirm the confidentiality of the
16 testimony as set forth in the attached table.

17 RESPECTFULLY SUBMITTED this 23rd day of April, 2003.

18 QWEST CORPORATION

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