

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In the Matter of the Application of	)	
	)	DOCKET NO. UT-021120
QWEST CORPORATION	)	
	)	SIXTH SUPPLEMENTAL
Regarding the Sale and Transfer of	)	ORDER: DENYING STAFF
Qwest Dex to Dex Holdings, LLC, a	)	MOTION TO REMOVE
non-affiliate	)	CONFIDENTIALITY
.....	)	DESIGNATIONS
	)	

**SUMMARY**

- 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 established a procedural schedule in its Second Supplemental Order, which was entered following a prehearing conference. All scheduled prefiled testimony dates have passed. On April 10, 2003, Staff filed a motion challenging Qwest and Dex Holding’s assertions concerning the need to treat certain information as confidential. Following additional process, including *in camera* review, the matter is ready for decision.
  
- 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, represent the Public Counsel Section, Office of the Attorney General (“Public Counsel”). Greg Trautman, Assistant Attorney

General, Olympia, Washington, represents the Commission's regulatory staff ("Commission Staff" or "Staff").

3 **MOTION TO REMOVE CONFIDENTIALITY DESIGNATIONS:** On April 10, 2003, Commission Staff filed its Motion To Remove Confidentiality Designations from Testimony of Lee L. Selwyn and Glenn Blackmon. On April 17, 2003, Public Counsel filed a "Response" to Staff's Motion stating its concurrence "in the legal and policy analysis set forth in the Commission Staff's Motion. Qwest answered on April 23, 2003. Dex Holdings Answered on April 24, 2003. The Commission considered the matter *in camera* and conducted a prehearing conference on May 5, 2003, to hear additional argument and clarifying statements from counsel.

4 **COMMISSION:** Our process has had a winnowing effect. Staff's Motion originally involved 97 points in Dr. Selwyn's testimony and 3 points in Dr. Blackmon's testimony. Following Qwest and Dex Holding's Answers, 57 points remained in dispute in Dr. Selwyn's testimony and none in Dr. Blackmon's testimony. Following discussion at a prehearing conference, 54 points remained in dispute. As to these 54 points, we deny Staff's Motion.

### MEMORANDUM

5 Staff designated portions of Dr. Selwyn and Dr. Blackmon's testimonies as "confidential" or "highly confidential" when filed on March 18, 2003. The basis for these designations is that Qwest and/or Dex Holdings, who provided the information during discovery, designated the source material on which the witnesses rely into one of these two categories.

6 Staff's motion asks the Commission to rule that all "confidential" and "highly confidential" designations in the March 18, 2003, testimony of staff witnesses Dr. Lee L. Selwyn and Dr. Glenn Blackmon can be removed. Staff claims that no information in this testimony meets the standards for confidentiality established in state statute, Commission regulation, or the Protective Order.<sup>1</sup> Specifically,

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<sup>1</sup> See RCW 80.04.095; RCW 42.17.310(q); WAC 480-90-015. The Commission entered its Protective Order in this proceeding on September 12, 2002, and amended it on October 4, 2002, and November 12, 2002.

Staff claims “many of the testimony references do not deal in any way with ... any conceivable valuable commercial or financial information or competitive harm.” Staff proposes to treat Dr. Selwyn’s entire testimony as non-confidential.<sup>2</sup> Staff also asks that three items in Dr. Blackmon’s testimony be reclassified from confidential to non-confidential, which would render that entire submission non-confidential.

- 7 Qwest responds that misunderstandings and erroneous presumptions on Staff’s part resulted in some information being designated confidential or highly confidential when it need not be. Qwest states that none of Dr. Selwyn’s testimony need be considered highly confidential. However, Qwest argues that certain portions of Dr. Selwyn’s testimony should continue to be treated as confidential. Qwest specifically identifies the Dex valuation work of Lehman Brothers and Merrill Lynch as extremely sensitive, especially if the sale is not completed, as Staff recommends. Qwest also identifies as confidential various financial data provided by Qwest and/or Dex Holdings and directly included in Dr. Selwyn’s testimony or relied on by him in a transparent fashion in his analyses.
- 8 Qwest’s answer states that 22 items in Dr. Selwyn’s testimony that Staff designated as confidential should be reclassified to non-confidential, 18 items reclassified from highly confidential to non-confidential, and 13 items reclassified from highly confidential to confidential. Following Qwest’s approach, 57 items in Dr. Selwyn’s testimony would remain confidential and no items would be highly confidential. Qwest also states that the three items Staff identified in Dr. Blackmon’s testimony as confidential should be reclassified to non-confidential, which removes any question as to the status of his entire testimony as non-confidential.
- 9 Dex Holdings takes no position on most of the disputed information. Dex Holdings argues for continued confidential treatment of nine items it asserts

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<sup>2</sup> Staff designated sixty-six items in Dr. Selwyn’s testimony as “confidential” and thirty-one items were designated as “highly confidential.”

have “commercial and financial value to Dex’s future operations.” These items also are included in the material that Qwest also identifies as confidential.

- 10 The presiding Administrative Law Judge informally offered Staff an opportunity to reply to Qwest and Dex’s proposed treatment of Dr. Selwyn’s testimony, as reflected in their respective answers. The suggestion for a reply was predicated on the idea that this might narrow, or even eliminate, any dispute over what material was and was not properly designated as confidential. Staff indicated that it was prepared to file a reply but did not believe it would narrow the dispute.
- 11 The Commission considered the disputed material *in camera* and set the matter for a prehearing conference to obtain clarification with respect to certain of the confidentiality claims and to hear further argument. During the prehearing conference, Qwest agreed in response to questions from the Bench that several additional items should be reclassified from confidential to non-confidential status.
- 12 Qwest and Dex Holdings, however, both argued for the continued confidential treatment of other items. The companies point specifically to information in Dr. Selwyn’s testimony drawn from confidential and highly confidential studies and analyses performed by or on behalf of Qwest and/or Dex Holdings that might have current or future value to competitors, that might affect the as-yet incomplete transaction, or that might affect a future transaction if principals fail to consummate the current one for one reason or another. Some of the asserted confidential material in Dr. Selwyn’s testimony characterizes or includes direct quotes from underlying documents the confidential status of which Staff does not dispute. Other asserted confidential material involves Dr. Selwyn’s analyses of data and Dr. Selwyn’s conclusions, but the analyses and conclusions are reported in a way that would permit other analysts to “back-out” or otherwise infer the underlying information provided by Qwest and/or Dex Holdings under the Protective Order.

- 13 Staff does not dispute the confidential or highly confidential status of the underlying documents from which Dr. Selwyn draws his testimony, but insists that Dr. Selwyn's statements about, analyses of, and even quotations from the underlying material should not be treated as confidential. Staff, supported by Public Counsel, argues that "[i]t is a fundamental public policy of this state that the government should, to the greatest extent possible, conduct its business in the open." *Staff Motion at 2 (citing RCW 42.17.010)*.
- 14 The Commission agrees that public policy and law in Washington favor the open conduct of the government's business. This policy and the laws that implement it, however, recognize that certain businesses that are regulated by the state may be required to disclose information to government bodies that should be protected from full public disclosure because the information is commercially sensitive. Thus, while we are governed by chapter 42.17 RCW, Washington's open records act, we also are governed by RCW 80.04.095, which provides:

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

- 15 Entry of a protective order, as provided for in the statute quoted above, expedites the free exchange and use of sensitive information in some contested cases. The

protective order used in this way is a tool that promotes economy and efficiency in administrative adjudication. Over time, the Commission has developed what is commonly referred to a standard form of protective order. The standard form protective order may be modified in some cases to afford various degrees of protection to documents and information deemed by one party or another to be entitled to confidential treatment. The standard form order in all instances, however, allows for challenges to any designation of material as confidential. When such a challenge is presented, the burden to show that the material is entitled to confidential treatment is on the party asserting confidentiality. The Commission considers the material, and the party's arguments with respect to it, *in camera*. If the Commission determines that some portion of the material should not be treated confidentially, the party asserting confidentiality is given notice and has ten days to seek relief from the Superior Court.

- 16 Thus, we strike a balance that promotes open, public proceedings, but respects the legitimate interests of private enterprise in protecting commercially sensitive information from public view. We guard against sustaining overbroad assertions of the need for confidential treatment of information, but also do not simply accede to overbroad assertions that there is no need to treat any of a regulated company's information as being entitled to confidential treatment.
- 17 We have completed our *in camera* review of the remaining material put in issue by Staff's Motion and have carefully considered the parties' arguments. We find that the points in Dr. Selwyn's testimony identified in Appendix A to this Order are properly designated as confidential under the Protective Order. Most of these points relate financial data, including specific numbers provided by Qwest or Dex Holdings under the Protective Order, or show the results of Dr. Selwyn's calculations that rely on this commercially sensitive data. The points that do not include direct or indirect expression of specific financial data involve characterizations of, and quotations from, confidential financial and business studies commissioned by Qwest in connection with the pending transaction. These studies were provided under the Protective Order. The information will continue to be commercially sensitive at least so long as the transaction remains

pending. Inasmuch as the entries in Appendix A include all the points that remain in dispute, we conclude that Staff's Motion should be denied.

**ORDER**

- 18 The Commission Orders That Staff's Motion To Remove Confidentiality Designations is denied with respect to the portions of Dr. Selwyn's testimony set forth in Appendix A to this Order.

DATED at Olympia, Washington, and effective this 13<sup>th</sup> day of May 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

**APPENDIX A**

Page	Line	Item	Determination
8	21	States dollar amount of witness' calculation of net present value (NPV) of directory imputation based on earnings growth projections developed by Qwest's financial advisors.	Confidential
9	1	States dollar amount of final "payment" recommended by Qwest witness.	Confidential
9	4	States dollar amount Qwest witness recommends as compensation to customers.	Confidential
9	6	States dollar amount difference between witness' calculation of NPV of directory imputation and Qwest proposed amount.	Confidential
9	16	States dollar amount difference between witness' calculation of NPV of directory imputation and Qwest proposed amount.	Confidential
17	3	Specific percentage comparison of sale price to midpoint of range of BEV estimates.	Confidential
27	1-7	Summarizes range of valuation estimates in various Lehman Brothers studies.	Confidential
27	fn. 33	Explains relationship of LCI assets to sale price.	Confidential
28	Table 1	Summary data from a specific Lehman Brothers study.	Confidential
28	5-14	Reports conclusions of specific Lehman Brothers study.	Confidential
29	1-4	States factors from conclusion of specific Lehman Brothers study.	Confidential
29	10-17	Compares specific Lehman Brothers study to other valuation studies conducted by Lehman Brothers.	Confidential
29	fn. 37	Compares financial assumptions regarding Dex in two Lehman Brothers studies.	Confidential
30	1-12	Compares financial assumptions regarding Dex in Lehman Brothers studies.	Confidential
30	16	States dollar amounts of Lehman Brothers' valuation range for Dex.	Confidential
30	17	States dollar amount of mid-point of Lehman Brothers' valuation range for Dex.	Confidential
30	18	States dollar amount difference between mid-point of Lehman Brothers' valuation range for Dex and sale price.	Confidential
30	fn. 39	States growth rate assumptions used in a Lehman Brothers study.	Confidential
31	10-11	States dollar amount of mid-point of Merrill Lynch results and compares it to sale price.	Confidential
31	13	States dollar and percentage difference between mid-point of Merrill Lynch results and sale price.	Confidential
34	Table 2	Summary data for various investment banker valuations of Dex.	Confidential
35	7-9	Reports witness' calculation of BEV using specific cash flow projections of Dex management.	Confidential

Page	Line	Item	Determination
35-36	19-20, 1-6	States a reservation in two financial adviser fairness opinions.	Confidential
36-38	10-22, 1-33, 1-8	Further explains a reservation in the Lehman Brothers fairness opinion.	Confidential
38	10-12	Yes/no question about whether a fairness opinion's conclusion is conditioned on a specific consideration.	Confidential
38	14-21	States and discusses a reservation in the Merrill Lynch fairness opinion.	Confidential
39	9-11	States range of dollar amount difference between witness' overall conclusion on sale price relative to economic value.	Confidential
42	4	States dollar amount Qwest witness recommends as compensation to customers.	Confidential
42	8	States dollar amount Qwest witness recommends as compensation to customers.	Confidential
42	10	States dollar amount of final "payment" recommended by Qwest witness.	Confidential
42	fn. 56	States dollar amount of final "payment" recommended by Qwest witness.	Confidential
45	21	States dollar amount Qwest witness recommends as compensation to customers.	Confidential
46	1	States dollar amount of witness' calculation of net present value (NPV) of directory imputation.	Confidential
46	6	States dollar amount difference between witness' calculation of NPV of directory imputation and Qwest proposed amount.	Confidential
50-51	13-20, 1-2	States highlighted conclusions of Lehman Brothers studies.	Confidential
51	4-7	States recommended actions in Lehman Brothers report.	Confidential
51	7-12	States dollar amount of additional value from recommended actions in Lehman Brothers report.	Confidential
51	14-16	States summary characterization of Lehman Brothers report.	Confidential
53	2	States dollar amount of witness' calculation of net present value (NPV) of directory imputation.	Confidential
53	10	States dollar amount of witness' assessment of minimum fair market BEV of Dex.	Confidential
53	13	States percentage value for earnings-based allocator.	Confidential
53	15	States dollar amount of witness' calculation of net present value (NPV) of directory imputation.	Confidential
53	17	States dollar amount of witness' assessment of minimum fair market BEV of Dex.	Confidential
54	Table 3	States dollar amounts of alternative calculations of witness' assessment of minimum fair market BEV of Dex.	Confidential
54	14	States witness' assessment of minimum fair market BEV of Dex.	Confidential
72	11-12	States dollar amounts of book value of Dex tangible assets and Washington portion.	Confidential

Page	Line	Item	Determination
93-94	12-17, 1-2	Describes and quotes from Advertising Defector Tracking Study.	Confidential
95	15-16	States dollar amount of value of direct marketing in Lehman Brothers report.	Confidential
95	19	States dollar amount of Qwest revenues from database business.	Confidential
101	2-4	Characterizes a funding arrangement of Qwest Dex Holdings and Qwest Capital Funding.	Confidential
104	15-17	Compares statements in the affiliated interest report and the Descriptive Memorandum.	Confidential
104	18-21	Quotes a general statement in the Descriptive Memorandum.	Confidential
108	4	States the specific percentage amount of the earnings-based allocator recommended by the witness.	Confidential
110	1	States the dollar amount range of the witness' estimate of the imputed fair market value of the directory business.	Confidential