



Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

SUITE 2300
1300 SW FIFTH AVENUE
PORTLAND, OR 97201-5630

TEL (503) 241-2300
FAX (503) 778-5299
www.dwt.com

October 17, 2006

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Public Utility Commission of Oregon
550 Capitol Street N.E., Suite 215
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Re: UM 1251 – Joint CLECs’ Reply Brief

Dear Filing Clerk:

Enclosed for filing in the above-named docket is the original Joint CLECs’ Reply Brief along with five copies. Please contact our office with any questions or problems.

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in black ink, appearing to read 'Leslie A. Thompson', written over the printed name.

Leslie A. Thompson
Assistant to Sarah K. Wallace

Enclosures

cc: UM 1251 Service List

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1251

In the Matter of

COVAD COMMUNICATIONS COMPANY,
ESCHELON TELECOM OF OREGON, INC.,
INTEGRA TELECOM OF OREGON, INC.,
MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC., and XO COMMUNICATIONS
SERVICES, INC.

Request for Commission Approval of Non-
Impairment Wire Center List.

JOINT CLECs' REPLY BRIEF

Covad Communications Company, Eschelon Telecom of Oregon, Inc., Integra Telecom of Oregon, Inc., McLeodUSA Telecommunications Services, Inc., and XO Communications Services, Inc. (collectively "Joint CLECs") submit this Reply Brief.

ARGUMENT

In their Opening Brief, the Joint CLECs addressed many of the arguments that Qwest Corporation ("Qwest") makes in support of its positions on the disputed issues in this proceeding. The Joint CLECs will endeavor not to be repetitive, but Qwest raises a few points in its Opening Brief that merit additional discussion, including (1) Qwest's manipulation of its ARMIS 43-08 data; (2) the proper vintage of that data; (3) appropriate procedures for future wire center designations; (4) Qwest's proposal to unilaterally reject CLEC orders; and (5) Qwest's proposed imposition of a \$50 charge to convert affected UNEs to Qwest private line or special access services.

A. Qwest's Line Count Data Fails to Support Qwest's Classification of the Medford, Bend, Portland Alpine, and Salem Main Wire Centers

1. The FCC Did Not Authorize Qwest to Increase Its Business Line Count to Include Spare Capacity on Digital Circuits.

Qwest prominently quotes from paragraph 105 of the Federal Communications Commission's ("FCC's") *Triennial Review Remand Order* ("TRRO")¹ "that 'business line counts are an objective set of data that incumbent LECs have already created for other regulatory purposes,' and that 'by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information.'"² Qwest then radically departs from this "simplified ability to obtain the necessary information" to "adjust" its ARMIS 43-08 data to include unused capacity on high capacity circuits that is not part of its ARMIS report.³ Apparently, simplicity and reliance on data already created for other purposes is only desirable if it benefits Qwest.

Qwest's primary justification for altering its ARMIS 43-08 business line counts is Qwest's interpretation of the FCC's definition of "business lines" in FCC Rule 51.5, which the Joint CLECs discussed in their Opening Brief and will not repeat here.⁴ Qwest also

¹ *In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, CC Docket No. 01-338, WC Docket No. 04-313, 20 FCC Rcd 2533 (2004).

² *In the Matter of Covad Communications Company, Eschelon Telecom of Oregon, Inc., Integra Telecom of Oregon, Inc., McLeodUSA Telecommunications Services, Inc., and XO Communications Services, Inc. Request for Commission Approval of Non-Impairment Wire Center List*, OPUC Docket No. UM 1251, Qwest's Opening Post-Hearing Brief at 13 (September 21, 2006) (emphasis added by Qwest) ("Qwest Opening Brief").

³ See e.g., Utah Tr. at 48-50 (Qwest Teitzel). The parties have agreed to rely on the transcript from the parallel proceedings before the Utah Public Service Commission in lieu of a hearing in this docket and have submitted a copy of the transcript for inclusion in the record.

⁴ *In the Matter of Covad Communications Company, Eschelon Telecom of Oregon, Inc., Integra*

contends, however, that “the FCC use of ARMIS data implicitly includes some adjustment to the data, especially in the use of the data at the wire center level since it is reported at the state level.”⁵ Qwest thus would have the Commission believe that because the ARMIS data must be adjusted to be wire-center specific, rather than statewide as reported to the FCC, other adjustments to that data are appropriate.

Making ARMIS data more granular by breaking the statewide number of business lines down by wire center is a far cry from using Qwest’s non-ARMIS records to inflate the number of business lines that Qwest reports to the FCC. In one case, Qwest is assigning business lines reported to the FCC on a statewide basis to individual wire centers. Qwest’s proposal, however, is to use its own proprietary data on the number and utilization of high capacity circuits in its network to create new data not included in its ARMIS report to the FCC. Such a proposal is fundamentally inconsistent with the FCC’s stated goals in paragraph 105 of the TRRO of simplicity and “reliance on objective set of data that incumbent LECs have already created for other regulatory purposes.” The Commission should reject Qwest’s proposed adjustment.

2. If Qwest is Authorized to Adjust its ARMIS 43-08 Lines, the Commission Should Make Additional Adjustments to Qwest’s Business Line Counts.

As discussed in the Joint CLEC Opening Brief, if the Commission permits Qwest to adjust its ARMIS 43-08 business line count, the Commission should also require Qwest to

Telecom of Oregon, Inc., McLeodUSA Telecommunications Services, Inc., and XO Communications Services, Inc. Request for Commission Approval of Non-Impairment Wire Center List, OPUC Docket No. UM 1251, Joint CLEC Opening Brief at 4-7 (September 21, 2006) (“Joint CLEC Opening Brief”).

⁵ Qwest Opening Brief at 16.

make other adjustments, including updating its data.⁶ ARMIS data for calendar year 2004 is the publicly available data for Qwest's business line counts that is closest to March 11, 2005, the effective date of the TRRO, and is therefore the data that should be used for Qwest's initial wire center classifications.

Qwest contends that "the vast majority of state commissions" agree with Qwest that the use of 2003 ARMIS data is appropriate.⁷ This statement is simply false. The "vast majority of state commissions" have not even addressed this issue, much less agreed with Qwest. Two of the four commissions that have made a determination on that issue have agreed with the Joint CLECs that 2004 ARMIS data should be used.⁸

The Washington Utilities and Transportation Commission recently rejected the Administrative Law Judge's initial conclusion that the use of 2003 ARMIS data was appropriate and concluded that reliance on the most recent data available is critically important when making any wire center designations because of the impact of those designations on the development of local exchange competition:

Because these designations are permanent and materially affect the development of competition in Washington, we determine that our designation decision should be based on the most

⁶ Joint CLEC Opening Brief at 7-10.

⁷ Qwest Opening Brief at 2.

⁸ *In re Investigation Concerning the Status of Competition and Impact of the TRRO*, WUTC Docket NO. UT-053025, Order 04, Order Adopting Interpretive Statement; Granting Joint CLECs' Petition For Review; Granting in Part and Denying in Part Qwest's Petition for Review, ¶ 21 (Oct. 5, 2006) (use of 2004 data is appropriate); *In the Matter, on the Commission's Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters by SBC Michigan and Verizon (Challenge)*, Michigan PSC Docket No. U-14447, Order at 5 (September 20, 2005) (use of 2004 data appropriate); *In the Matter of the Investigation Into Qwest Wire Center Data*, Utah PSC Docket No. 06-049-40, Report and Order at (September 11, 2006) (use of 2003 data is appropriate); *Post-Interconnection Dispute Resolution Proceeding Regarding Wire Center UNE Declassification*, TX PUC Docket No. 31303, Order Approving Methodology to Determine AT&T Texas Wire Centers which are Non-Impaired at 29 (April 7, 2006) (use of 2003 data is appropriate).

recent data available. In this instance, by applying the FCC's criteria to the most recent date, we ensure that our decision are based on the best information available reflecting the most recent state of competitive between competitive and incumbent carriers at the wire center level. For the same reasons, we shall require the use of the most recent data at the time we resolve future disputes over wire center designations.⁹

Although the Arizona and Colorado commissions have not yet ruled on this issue, staffs in both states agree with the Washington commission that Qwest should be required to use more recent ARMIS data.¹⁰ This Commission should reach the same conclusion.

B. The Commission Should Adopt Reasonable Procedures for Evaluation and Implementation of Future Wire Center Classifications.

The parties generally agree that Commission review of future wire center classifications should be handled on an expedited basis. The Joint CLECs have made proposals to allow for just such fast-track review, but Qwest objects to some of the very procedures that would be required for interested parties to have the information necessary to evaluate new wire center designations within the 30 days these parties recommend. Qwest also refuses without adequate justification to provide notice to affected CLECs that a wire center is approaching FCC non-impairment thresholds. The Commission should adopt the Joint CLECs' proposals on these issues.

⁹ *In re Investigation Concerning the Status of Competition and Impact of the TRRO*, WUTC Docket NO. UT-053025, Order 04, Order Adopting Interpretive Statement; Granting Joint CLECs' Petition For Review; Granting in Part and Denying in Part Qwest's Petition for Review, ¶ 21 (Oct. 5, 2006) (footnote omitted).

¹⁰ *In re the Application of [Joint CLECs] and Qwest Request for Commission Process to Address Key UNE Issues Arising from TRRO*, Arizona Corp. Comm'n Docket Nos. T-03632A-06-0091, *et al.*, Responsive Testimony of Armando Fimbres at 5 (Sept. 22, 2006) ("Arizona Staff Testimony"); *In re Joint CLECs' Request Regarding the Status of Impairment in Qwest's Wire Centers*, Colorado PUC Docket No. 06M-080T, Answer Testimony and Exhibits of Lynn M.V. Notarianni at 16-17 (July 24, 2006) ("Colorado Staff Testimony").

Notice of Wire Center Approaching Non-Impairment Threshold

The Joint CLECs propose that Qwest be required to notify the Commission and interested parties when a wire center is close to meeting a non-impairment threshold.¹¹ More specifically, Qwest should provide notice when the number of business lines served in a particular wire center is within 5,000 lines of meeting the business line counts specified in the TRRO or the number of fiber-based collocators is within one fiber-based collocator of meeting a particular FCC threshold. In addition to Qwest's "gaming" and "administrative burden" arguments that the Joint CLECs previously addressed in their Opening Brief, Qwest contends that these thresholds "are not meaningful, especially since 5,000 lines or one fiber collocator does not mean that a change in the impairment classification for that wire center is imminent."¹² Qwest is incorrect.

The Joint CLECs previously explained that Qwest should notify CLECs when a wire center is approaching one or more of the FCC's impairment thresholds because "impairment status of a wire center is vitally important in informing CLEC investment decisions."¹³ Qwest claims that because ARMIS data is updated only once per year and line counts may decline over the following year, notice based on the prior year's data "could actually cause CLECs to take costly action to prepare for a wire center non-impairment reclassification that will not occur."¹⁴ The Joint CLECs appreciate Qwest's purported concern, but CLECs – like any other business – would rather make strategic and investment predictions and decisions based on more information, not less. The possibility that such notice may be a "false alarm"

¹¹ Joint CLECs/1, Denney/34.

¹² Qwest Opening Brief at 27.

¹³ Joint CLECs/1, Denney/34.

does not mean the CLECs should receive no notice whatsoever. The CLECs – not Qwest – should determine whether the proximity of the business line or fiber-based collocator counts in a particular wire center signals the need to develop alternatives to high capacity UNEs in that wire center. To the extent, moreover, that advance notification (in conjunction with other market analysis and business data) encourages CLECs to construct their own facilities – even though the wire center does not eventually meet an FCC impairment threshold and UNEs continue to be available – that notification fosters the development of more facilities-based competition, which even Qwest allegedly believes is in the best interests of Oregon consumers. The Commission should require Qwest to provide such notice.

Filing for Future Wire Center Classification

The Joint CLECs recommend that Qwest be required to include all of its supporting documentation with its initial filing for Commission approval of a new wire center classification as a means of facilitating a 30-day review process.¹⁵ Qwest states that it “intends to provide the same kind of supporting data that it used to support its initial list of non-impaired wire centers.”¹⁶ That data simply is not sufficient to enable CLECs to conduct their review of Qwest’s proposed classification and to undertake their own independent investigation within 30 days. CLECs need the type of data that they requested in discovery in this case, including Qwest’s supplemental responses to that discovery.¹⁷ If Qwest does not provide that information as part of its initial filing, CLECs will need to obtain it through discovery in the new proceeding, which necessarily will result in a delay in interested parties’

¹⁴ Qwest Opening Brief at 27.

¹⁵ Joint CLECs/1, Denney/34-41.

¹⁶ Qwest Opening Brief at 11.

ability to respond to Qwest's filing. If Qwest, like the Joint CLECs, wants an expedited proceeding that contemplates any objection to Qwest's future wire center classifications within 30 days of Qwest's initial filing, Qwest needs to provide the same information it provided in this proceeding – including responses to the wire center-specific discovery propounded by the Joint CLECs – as part of that initial filing.

Qwest nevertheless raises the concern that while CLECs are entitled to “sufficient information,” that should not include the level of detail it provided with respect to some fiber-based collocations “without the prior consent of the carriers whose data is being disclosed.”¹⁸ The Joint CLECs explained in their Opening Brief, however, that this is why the five day notice of any initial filing the Joint CLECs propose is necessary – to inform affected CLECs that their confidential data will be used in the proceeding and enable them to have time to lodge any objection before Qwest discloses that data. The data that Qwest eventually provided in response to the Joint CLECs' data requests was critical to the Joint CLECs' ability to review and confirm the accuracy of Qwest's fiber-based collocater determinations and the resulting wire center classifications. Until Qwest provides that data, neither Qwest nor the Commission should expect interested parties to be able to fully evaluate any filing for a new wire center classification.

D. The Commission Should Not Permit Qwest to Unilaterally Reject Orders for UNEs in Non-Impaired Wire Centers.

“Qwest agrees that it would not ‘block’ orders absent a final designation of non-impairment” but disagrees with the Joint CLEC proposal to develop order processing modifications to ensure that Qwest does not block orders that CLECs are entitled to have

¹⁷ See Joint CLECs/13.

processed.¹⁹ Qwest’s arguments against the Joint CLEC proposal fail to support Qwest’s position.

Qwest “disagrees with the Joint CLECs’ argument about Qwest being required to immediately process orders from a CLEC who ‘self-certifies’ that it is entitled to obtain the requested UNE.”²⁰ Qwest’s disagreement is with the FCC, not the Joint CLECs. Paragraph 234 of the TRRO requires Qwest to provision a UNE under just such circumstances:

Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, **the incumbent LEC must immediately process the request.** To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, **the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE** before a state commission or other appropriate authority. (Emphasis added and footnote omitted.)²¹

The Utah Public Service Commission agreed with the Joint CLECs and concluded that Qwest is required to comply with the FCC process.²²

Nor do the Joint CLECs advocate “separate proceedings before this Commission between Qwest and each CLEC that wishes to place a UNE order in a particular wire center that Qwest believes is non-impaired,”²³ despite the FCC’s clear establishment of just such a

¹⁸ Qwest Opening Brief at 26, n.36.

¹⁹ *Id.* at 11.

²⁰ *Id.*, n.13.

²¹ TRRO ¶ 234.

²² *In the Matter of the Investigation Into Qwest Wire Center Data*, Utah PSC Docket No. 06-049-40, Report and Order at 37-38 (September 11, 2006) (“[W]e conclude the process set forth by the FCC in paragraph 234 of the *TRRO* remains applicable to CLEC requests for UNEs and order Qwest and CLECs to follow that process in the procurement of UNEs in the future.”)

²³ Qwest Opening Brief at n.13.

process. The Joint CLECs propose to work with Qwest to develop an order process that renders individualized Commission procedure unnecessary in wire centers that the Commission has agreed meet the FCC criteria for non-impairment. The Joint CLECs, however, are not willing to permit Qwest to unilaterally implement order processing adjustments in the wake of wire center reclassifications at the risk of having Qwest erroneously reject legitimate orders.

The Joint CLECs recognize that if a CLEC mistakenly submits an order for a UNE that is no longer available in such a wire center, the CLEC would be responsible for paying Qwest the difference between the UNE charges and the applicable tariff charges that should have applied retroactively to the date of the order. The Joint CLECs thus do not seek to have their cake and eat it too, as Qwest contends. Qwest remains economically whole under the Joint CLECs' proposal. The emphasis, however, should be on ensuring that the circuit is timely provisioned so that the CLEC can provide prompt service to its customers. The Joint CLECs' proposal does just that and should be adopted.

E. The Commission Either Should Not Authorize Qwest to Impose a Charge for Converting UNEs to Tariffed Services or Should Not Authorize a Charge in Excess of a Reasonable Charge for Conversions of Tariffed Services to UNEs.

Qwest inappropriately proposes to impose a \$50 Design Change Charge on each UNE that it converts to a special access circuit after a wire center has been properly classified as non-impaired with respect to that particular UNE. Qwest maintains that it incurs costs to undertake such conversions for a CLEC's benefit and if Qwest "were not allowed to charge the CLEC for such activities, the cost burden would be unfairly shifted to Qwest and its end-

user customers, thereby disadvantaging Qwest in a market the FCC has determined to be competitive.”²⁴ Such contentions are unsupportable.

CLECs do not benefit from Qwest undertaking what amounts to nothing more than a billing record change in conjunction with Qwest doubling or tripling the rate Qwest charges the CLEC for providing a particular circuit. Once the conversion takes place, moreover, the CLEC becomes one of Qwest’s customers that pays retail rates and thus is already bearing the burden of whatever costs Qwest incurs to undertake this activity for its own benefit. Nor did the FCC determine that *any* market is “competitive” – only that CLECs are not “impaired” without access to high capacity UNEs in wire centers that serve a certain number of business lines and/or have a specified number of fiber-based collocators. Qwest cannot argue with a straight face that these areas are “competitive” or that Qwest is suffering any “disadvantage” whatsoever if a CLEC agrees to pay recurring rates that are two or three times higher for a circuit as a special access service than the CLEC paid for the very same circuit as a UNE.

Qwest also fails to justify the need for any cost-generating activity. Qwest claims that the circuit identifier (“circuit ID”) must be changed because FCC rules “require that telephone carriers accurately maintain records that track inventories of circuits, and that unique circuit ID is maintained as a means of measuring the different service performance requirements applying to UNEs and private line services.”²⁵ Qwest, however, never explains why the existing circuit ID could not be used for these purposes. Indeed, at one time Qwest

²⁴ *Id.* at 32, n.35.

²⁵ *Id.* at 33 (footnote and citation omitted).

did just that with respect to the combination of transport and loops known as enhanced extended links (“EELs”).²⁶

Even if it were necessary for Qwest to undertake some cost-generating activity in connection with conversions of UNEs to private line circuits, Qwest failed to demonstrate that such activities are comprised of the same activities included in Qwest’s Design Change Charge. Other than standard order processing activities – which are common to any Qwest nonrecurring charge – a *billing* system change for an *existing* circuit bears no similarity to the change in *design* of a *new* circuit.

Staffs at other state commissions have agreed with the Joint CLECs that no (or only a nominal) charge is appropriate. Colorado Commission staff, for example, cites multiple reasons why no charge (or a nominal charge of \$1) should be imposed:

First, the CLEC is not directly the cost causer. The FCC mandated that in ‘non-impaired’ wired centers, a CLEC may not retain the UNE circuit. Second, it is not clear, as described above, that the CLEC currently has alternative facilities that can be obtained from other providers to which the customer can be converted. This second basis is further supported because the cost of building facilities, particularly in the 90-day window Qwest proposed to require transitions existing circuits, likely makes the option not viable. Third, the cost will not be passed along to the Qwest end-user. Qwest will more than recover its costs in the margin of the recurring charge for the ongoing private line service which is considerably higher than the current UNE circuit rate.²⁷

²⁶ Joint CLECs/1, Denney/53-54.

²⁷ Colorado Staff Testimony at 33-36.

Arizona commission staff similarly proposes that Qwest be required to waive any nonrecurring charge for converting TRRO-affected UNEs to private line circuits for many of the same reasons.²⁸

Finally, Qwest claims that the Commission lacks jurisdiction to establish a nonrecurring charge for an interstate tariffed service.²⁹ That is true but irrelevant. Qwest obviously does not believe that a charge to convert a UNE to a private line is within the FCC's exclusive jurisdiction or Qwest would not have asked this Commission to authorize Qwest to impose that charge in this proceeding. Indeed, no such charge appears in Qwest's federal tariff. On its face, therefore, Qwest's tariff does not authorize Qwest to impose *any* charge for these conversions, and neither should the Commission. Even if the Commission were to decide that some charge for this activity is appropriate, however, the Commission has jurisdiction to establish that charge as among the rates for UNEs over which the Commission unquestionably has jurisdiction.³⁰

CONCLUSION

For the foregoing reasons and the reasons discussed in the Joint CLECs' Opening Brief, the Commission should not approve Qwest's classification of the Medford, Bend, and Portland Alpine wire centers but should classify them as Tier 3 wire centers, should classify the Salem State (Main) wire center as Tier 2 if the Commission finds that any adjustments to

²⁸ Arizona Staff Testimony at 16-20.

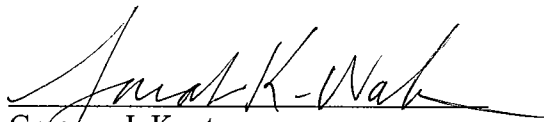
²⁹ Qwest Opening Brief at 34, n.41.

³⁰ 47 U.S.C. § 252(d)(1).

the ARMIS and UNE line count data is appropriate, and should adopt the Joint CLECs' proposals on the other disputed issues.

Dated this 17th day of October, 2006.

DAVIS WRIGHT TREMAINE LLP

By: 
Gregory J. Kopta
Sarah K. Wallace

CERTIFICATE OF SERVICE

UM 1251

I hereby certify that on October 17, 2006, a copy of the Joint CLEC's Reply Brief in the above referenced docket was sent via U.S. Mail, to the following:

OPUC
Attn: Filing Center
550 Capitol St. NE #215
Salem, OR 97308-2148
PUC.FilingCenter@state.or.us
Original Sent Overnight Delivery

John M. Devaney
Perkins Coie LLP
607 Fourteenth St. NW, Suite 800
Washington, D.C. 20005-2011
jdevaney@perkinscoi.com

Karen L. Clauson
Eschelon Telecom Inc.
730 2nd Avenue S – Ste. 900
Minneapolis, MN 55402-2489
klclauson@eschelon.com

Kevin L. Saville
Frontier Communications of America, Inc.
2378 Wilshire Blvd.
Mound, MN 55364
ksaville@czn.com

Douglas K. Denney
Eschelon Telecom Inc.
730 2nd Avenue S – Ste. 900
Minneapolis, MN 55402-2489
dkdenney@eschelon.com

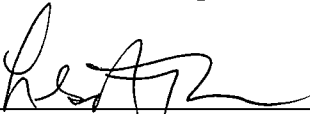
Jay Nusbaum, Government Affairs Attorney
Integra Telecom
1201 NE Lloyd Blvd., Ste. 500
Portland, OR 97232
jaynusbaum@integratelecom.com

Rex Knowles
XO Communications Services, Inc.
111 E. Broadway, Ste. 1000
Salt Lake City, UT 84111
Rex.knowles@xo.com

William A. Haas
McLeodUSA Telecommunications Services, Inc.
One Martha's Way
Hiawatha, IA 52233-2402
whaas@mcleodusa.com

Gregory Diamond
Covad Communications
7901 E. Lowry Blvd.
Denver, CO 80230
gdiamond@covad.com

Alex M. Duarte
Qwest Corporation
421 SW Oak St., Suite 810
Portland, OR 97204
alex.duarte@qwest.com



Leslie A. Thompson