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**BEFORE THE ARIZONA CORPORATION COMMISSION**

2008 JUL -3 P 4: 45

**MIKE GLEASON**  
Chairman

**WILLIAM MUNDELL**  
Commissioner

**JEFF HATCH-MILLER**  
Commissioner

**KRISTIN MAYES**  
Commissioner

**GARY PIERCE**  
Commissioner

Arizona Corporation Commissioner  
AZ CORP COMMISSION  
DOCKET CONTROL

**DOCKETED**

JUL -3 2008

DOCKETED BY *MW*

**IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION AND APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS**

**DOCKET NO. T-01051B-07-0693**  
**DOCKET NO. T-03608A-07-0693**

**RESPONSE OF ARIZONA DIALTONE, INC. TO QWEST CORPORATION'S NOTICE OF SUPPLEMENTAL AUTHORITY**

On June 26, 2008, Qwest Corporation ("Qwest") filed its Notice of Supplemental Authority (the "Notice") wherein it claimed that Arizona Dialtone, Inc. ("AZDT") is improperly asking this Commission to permit continued access to Qwest's unbundled network element platform ("UNE-P") at TELRIC pricing, which Qwest contends is barred by the decision of the Eighth Circuit Court of Appeals in Southwestern Bell Telephone v. Missouri Public Service Commission ("Southwestern Bell"), which Qwest attaches to its Notice. Qwest relies on Southwestern Bell to argue that AZDT is asking this Commission to set rates for § 271 elements, and therefore, "is improperly asking this Commission to assert authority it does not have." (Notice, p.2, Ins.11-14).

Qwest's argument relies on a false premise - that in resolving the backbilling issues presented by Qwest's Petition for Arbitration, this Commission would be setting rates for § 271

1 elements. That premise is false because this proceeding is an arbitration of the terms of a TRRO  
2 amendment to the parties' Interconnection Agreement, as expressly authorized by § 252(b) of the  
3 Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(b), not a rate-setting proceeding.  
4 The issue in this Qwest-initiated arbitration is whether Qwest should be allowed to backbill AZDT  
5 additional amounts beyond the UNE-P pricing Qwest charged for the transition year between  
6 March 11, 2005 and March 10, 2006 and the post-transition year period from March 11, 2006  
7 through the date of execution of a TRRO amendment. As such, the Southwestern Bell case is  
8 inapplicable here because AZDT is not seeking access to unbundled switching services pursuant to  
9 § 271 of the Act, but rather, is opposing Qwest's attempt to back bill AZDT additional amounts  
10 for local circuit switching services which Qwest at all times billed at UNE-P pricing and for which  
11 AZDT paid at that pricing.

12 In addition, as this Commission is aware, the parties have arbitrated the identical back  
13 billing issues before the Colorado Public Utility Commission ("CPUC"). AZDT has filed with  
14 this Commission the written decision of the CPUC in which it: (1) approved TRRO amendment  
15 language authorizing Qwest to back bill AZDT for the "plus \$1" rate for the transition year  
16 between March 11, 2005 and March 10, 2006; and (2) approved TRRO amendment language  
17 authorizing Qwest to back bill AZDT for the period from March 11, 2006 to July 19, 2007, but  
18 only at the "plus \$1" transition rate, rather than the significantly higher resale rate Qwest had  
19 sought to charge. In response to the CPUC's decision, Qwest filed an Application for Rehearing,  
20 Reargument, or Reconsideration (the "Application for RRR") in which it argued that by limiting  
21 Qwest's ability to back bill for the period from March 11, 2006 to July 19, 2007 to the difference  
22 between the UNE-P rate AZDT already has paid and the "plus \$1" transition rate (rather than  
23 Qwest's resale rate), the CPUC had engaged in improper rate-setting of a § 271 element beyond  
24 its legal authority.

25 The CPUC summarized Qwest's argument as follows:  
26

1 Qwest next argues that this Commission does not have authority to  
2 review or otherwise set rates for § 271 elements, such as here.  
3 According to Qwest's line of reasoning, our Decision setting the  
4 UNE-P plus \$1 back billing charge for the TRRO post-transition  
5 period from March 10, 2006 to July 19, 2007 violates the Telecom  
6 Act because it presumes that the Commission has authority to review  
7 and set rates for the switching that Qwest provides pursuant to § 271.

8 (See CPUC Order Denying Application for RRR, attached hereto as Exhibit A, at ¶13). The  
9 CPUC flatly rejected Qwest's argument, stating that it was not setting rates at all, but rather,  
10 merely was arbitrating the very back billing issues Qwest had raised in its Petition for Arbitration.  
11 More specifically, the CPUC stated:

12 [I]n this matter, Qwest, obviously assuming this Commission had  
13 jurisdiction in this back-billing matter, sought arbitration of just that  
14 issue (whether it could back bill AZDT for charges for services from  
15 March 10, 2005 to the date of our decision) pursuant to § 252(b).  
16 We accepted the matter under our authority pursuant to § 252(b) to  
17 arbitrate any open issue between an ILEC and a CLEC in ICA  
18 negotiations. We did not intend to set any rate for services provided  
19 by Qwest under § 271. Our resolution of the issues brought to us by  
20 Qwest related merely to the back-billing Qwest sought and the  
21 appropriate amount given the evidence on record. Decision No.  
22 C08-0414 resolves that matter. Qwest now seems to argue that had  
23 we granted it the total amount of back billing it sought (specifically  
24 for the period March 10, 2006 through July 19, 2007) that would not  
25 implicate § 271; however, because we provided an amount of back  
26 billing less than what it sought, that somehow violates the prohibition  
against a state commission setting wholesale rates under § 271. We  
fail to see the logic in that argument. Qwest recognized we had  
authority to settle this matter pursuant to § 252 by petitioning this  
Commission for arbitration of the back billing issue, and our  
decision was grounded wholly within our authority under § 252 of  
the Telecom Act. Therefore, we deny Qwest's RRR on this issue.  
We note that had Qwest's position truly been that this Commission  
had no authority regarding its back billing issue with AZDT, its  
recourse would have been to seek relief with the FCC. However, it  
chose to address its issues here, pursuant to § 252(b) of the Telecom  
Act. We therefore assume Qwest agrees the matter was rightly  
before this Commission.

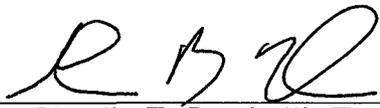
(See Exhibit A, at ¶18).

In other words, the CPUC unequivocally rejected the very same argument that Qwest  
attempts to make in its Notice, namely, that AZDT's position in this arbitration amounts to a  
request that this Commission set rates for § 271 network elements which the Commission has no

1 legal authority to do. That false argument has no more weight here than it did in Colorado. Like  
2 the CPUC, this Commission should summarily reject Qwest's "rate-setting" argument and the  
3 supplemental authority which supposedly supports it, and proceed to issue a decision based on the  
4 record evidence adduced in this matter.

5 **RESPECTFULLY SUBMITTED** this 3<sup>rd</sup> day of July, 2008.

6 **CHEIFETZ IANNITELLI MARCOLINI, P.C.**

7  
8 By 

Claudio E. Iannitelli, Esq.

Glenn B. Hotchkiss, Esq.

Matthew A. Klopp, Esq.

Attorneys for Arizona Dialtone, Inc.

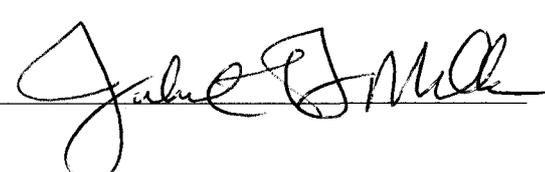
9  
10  
11 ORIGINAL and 13 copies of the foregoing  
12 hand-delivered this 3<sup>rd</sup> day of July, 2008, to:

13 Docket Control  
14 ARIZONA CORPORATION COMMISSION  
15 1200 West Washington Street  
16 Phoenix, AZ 85007

17 COPY of the foregoing mailed  
18 this 3<sup>rd</sup> day of July, 2008, to:

19 Norman G. Curtright, Esq.  
20 Qwest Corporation  
21 20 East Thomas Road, 16<sup>th</sup> Floor  
22 Phoenix, AZ 85012

23 Maureen A. Scott, Esq.  
24 Legal Division  
25 ARIZONA CORPORATION COMMISSION  
26 1200 West Washington  
Phoenix, AZ 85007

By: 

N:\CLIENTS\Arizona Dialtone\Qwest 1183-13\Pleadings\Arizona\AZDT Resp to Qwest's NOSA 07 03 08 car.doc

*Exhibit*      **A**

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JUN 12 2008

CHEIFETZ JANNITELLI  
MARCOLINI, P.C.

Decision No. C08-0585

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF ARIZONA**

DOCKET NO. 07B-514T

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IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION  
WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE  
COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS  
ACT OF 1996.

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**ORDER DENYING APPLICATION FOR REHEARING,  
REARGUMENT, OR RECONSIDERATION**

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Mailed Date: June 9, 2008

Adopted Date: June 4, 2008

**I. BY THE COMMISSION**

**A. Statement**

1. This matter comes before the Commission for consideration of an Application for Rehearing, Reargument, or Reconsideration (RRR) to Commission Decision No. C08-0414 filed by Qwest Corporation (Qwest) on May 8, 2008. Qwest requests RRR regarding that portion of the Commission decision that provided that Qwest was entitled to receive the Unbundled Network Element Platform (UNE-P) rate plus \$1 for the post Triennial Review Remand Order (TRRO) transition period of March 10, 2006 through July 19, 2007. Qwest also seeks RRR regarding the Commission's evidentiary findings that Qwest (nor Arizona Dialtone, Inc. (AZDT)) acted completely in good faith in negotiations.

2. Now, being fully advised in the matter, we deny Qwest's RRR consistent with the discussion below.

**B. Analysis and Findings**

3. In Decision No. C08-0414, we found that based on the evidence in the record, neither Qwest nor AZDT followed the directives of the Federal Communication Commission's (FCC) TRRO which established new rules applicable to Incumbent Local Exchange Carriers' (ILECs) unbundling obligations regarding mass market local circuit switching, high-capacity loops, and dedicated interoffice transport. ILECs no longer had an obligation to provide Competitive Local Exchange Carriers (CLECs) with unbundled access to mass market local circuit switching, including in those instances where mass market local circuit switching is a component of UNE-P. As part of the conversion to the new rules, the FCC adopted a transition period requiring CLECs to submit orders to convert their UNE-P customers to alternative arrangements within 12 months of the effective date of the TRRO, which was March 10, 2006 (referred to as, the transition period).<sup>1</sup>

4. In Decision No. C08-0414, we found that neither Qwest nor AZDT followed the directives of the TRRO and neither party negotiated in good faith as required by § 251(c)(1) of the Telecommunications Act of 1996 (Telecom Act). After a thorough review of the evidence, we found that Qwest made no effort to terminate the interconnection agreement (ICA) between it and AZDT, continued to provide unbundled UNE-P services to AZDT, continued to bill AZDT for such services at the unbundled rate called for by the ICA, and continued to accept AZDT's payments at the UNE-P rate. In addition, from the effective date of the TRRO until May 25, 2007, Qwest continued to accept new orders from AZDT for local circuit switching.

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<sup>1</sup> See, TRRO, ¶¶ 199, 226, and 227.

5. We also found that the record revealed that during the course of the parties' negotiations concerning the TRRO amendment, Qwest took the position that the transition rate called for by the TRRO during the transition period was non-negotiable and, therefore, it offered AZDT no other rate. Additionally, the only options Qwest offered AZDT for local circuit switching after expiration of the transition period were to purchase such services at Qwest's resale rate, or to enter into a new commercial agreement for the Qwest Platform Plus product (QPP).

6. However, we also found that AZDT took the position, and advised Qwest, that it was financially unable to pay the transition rate, the resale rate for local switching, or the rate requested by Qwest for QPP. We also found that in direct conflict with the TRRO, AZDT continued to submit orders for UNE-P products during the transition and post-transition period and converted none of its affected local circuit switching Unbundled Network Elements (UNEs) to alternative facilities or arrangements. We further found that AZDT was not without responsibility in this matter, as it clearly dragged its feet in negotiating new terms and neither party negotiated in complete good faith as required by the TRRO.

7. Qwest now argues that the portion of Decision No. C08-0414 setting the UNE-P plus \$1 rate from March 10, 2006 to July 19, 2007 violates the Telecom Act because §§ 251 and 271 impose different unbundling obligations and different pricing schemes for network elements, and because the Commission does not have authority to review or otherwise set rates for § 271 elements. Instead, Qwest seeks an order that provides for back billing of Qwest's month-to-month Public Access Line (PAL) and Plain Old Telephone Service (POTS) resale rate for the TRRO transition period from March 10, 2006 to present.

8. With regard to its first argument, Qwest maintains that while the FCC's TRRO provides that CLECs are not impaired without access to – and cannot lease as UNEs at Total Element Long Run Incremental Cost (TELRIC) rates – multiple network elements, including local switching, the “competitive checklist” in § 271 nonetheless requires companies such as Qwest to provide access to certain network elements, including local switching, as a condition to being permitted to provide interstate toll service in their designated incumbent geographic regions. According to Qwest, this obligation applies even if the FCC has determined that there is no longer a duty to provide these elements as UNEs under § 251.

9. Qwest goes on to argue that there are differences between UNEs provided under § 251 and network elements that a Bell Operating Company (BOC), like Qwest provides under § 271, the most significant of which is that a BOC is not required to provide § 271 elements at the TELRIC rates that apply to § 251 UNEs. Rather, Qwest maintains that prices for these elements are governed by the “just, reasonable, and nondiscriminatory” rate standard of §§ 201 and 202 of the Telecom Act. According to Qwest, under this standard, BOCs may charge a market-based rate. Qwest concludes that it is only obligated to provide local switching to AZDT pursuant to § 271, and that rate must be based upon a market rate. As such, its QPP and month-to-month resale of PAL/POTS offerings are consistent with the FCC's removal of unbundled switching from § 251, and the FCC's findings that market-based rates apply to switching and other network elements that have been removed from § 251, but that BOCs continue to provide under § 271.

10. We appreciate Qwest's analysis of the terms of the TRRO and the distinctions between its § 251 and § 271 responsibilities. However, we are not persuaded by the arguments

Qwest raises regarding this issue that our Decision is unlawful. We note that the record provides that while Qwest indicated to AZDT that it would discontinue UNE-P services to AZDT, Qwest nonetheless continued to provide that service after the end of the TRRO transition period at the rate called for in the ICA between the parties for such services. As a result, Qwest allowed the 135/160 day arbitration petition window afforded by § 252(b)(1) of the Telecom Act to close without initiating an arbitration action.<sup>2</sup> Further, the TRRO set a default rate BOCs were to charge CLECs in the event they were unable to negotiate a new charge during the transition period – the UNE-P rate plus \$1. However, Qwest continued to charge AZDT at the ICA UNE-P rate. Because the parties could not agree on terms, we approved Qwest's proposal for back billing during the transition period of March 11 through 10, 2006 at the UNE-P plus \$1 default charge provided by the FCC. As for the post-transition period, we found back billing AZDT at the UNE-P plus \$1 charge was appropriate for the period March 10, 2006 through July 19, 2007, since Qwest (nor AZDT for that matter) did nothing to advance negotiations during that period.<sup>3</sup>

11. We then determined that the appropriate charge for the remaining time period, July 20, 2007 through the present, was the difference between the UNE rate and the month-to-month resale service rate from the date of the *Qwest Corporation v. Arizona Corporation Commission*, 496 F.Supp. 2d 1069 (D. Ariz. 2007) decision, since AZDT should have realized the ramifications of that decision and entered into a negotiated ICA amendment rather than forcing this matter to arbitration.

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<sup>2</sup> See, Decision No. C08-0414 at ¶ 24.

<sup>3</sup> While not expressly stated in the Decision, by implication, approving back-billing for Qwest, we found no violation of the doctrine against retroactive ratemaking or that these were untariffed charges.

12. We are still persuaded that our Decision was reasonable and equitable based on the actions of both parties as detailed in the record in this matter. Qwest, although it now argues that it had the right to bill AZDT at an amount that was merely "just reasonable and non-discriminatory" nonetheless continued to bill AZDT at the amount in the ICA between the parties, even after the transition period provided by the TRRO had expired. It would appear that Qwest now requests that this Commission fix what it failed to do. We decline to do so.

13. Qwest next argues that this Commission does not have authority to review or otherwise set rates for § 271 elements, such as here. According to Qwest's line of reasoning, our Decision setting the UNE-P plus \$1 back billing charge for the TRRO post-transition period from March 10, 2006 to July 19, 2007 violates the Telecom Act because it presumes that the Commission has authority to review and set rates for the switching that Qwest provides pursuant to § 271.

14. Qwest makes the case that the only role of state commissions under § 271 is to consult with the FCC concerning a BOC's compliance with that section, and that the arbitration authority granted to state commissions under § 252 only permits state commissions to impose requirements concerning the duties created by § 251, not § 271. Qwest points out that the FCC alone has the authority to enforce the requirements of § 271, and state commissions are preempted from interfering with those requirements.

15. Qwest concludes that the portion of Decision No. C08-0414 that allows Qwest to back bill AZDT at the UNE-P plus \$1 charge from March 10, 2006 to July 19, 2007 therefore violates the Telecom Act because it impermissibly sets rates for unbundled switching that the TRRO ruled Qwest is no longer obligated to provide under § 251 of the Act, even if Qwest must

still provide switching under § 271 of the Telecom Act. Qwest therefore argues that it is entitled to back-bill the month-to-month resale rate for the entire TRRO post-transition period beginning on March 10, 2006 to the present, and it requests that we approve the TRRO amendment language that it has submitted in this matter.

16. This matter was commenced on December 19, 2007, when Qwest filed a petition for arbitration with the Commission pursuant to our Rule 4 *Code of Colorado Regulations* (CCR) 723-2-2560 and § 252(b) of the Telecom Act. Qwest's petition requested that this Commission arbitrate one unresolved issue in connection with a proposed amendment to the ICA between Qwest and AZDT. As part of its petition, Qwest sought authorization from this Commission to: (a) back bill AZDT for the difference between the transition rate and the UNE-P rates paid by AZDT during the transition period; and (b) the difference between the UNE-P rates paid by AZDT during the post-transition period and Qwest's month-to-month local exchange resale service alternatives for UNE-P PAL and UNE-P POTS.<sup>4</sup> Most significantly, Qwest noted on the record that back billing clauses substantially similar to those it proposed here, have been a part of TRRO amendments signed by numerous other CLECs and approved by this Commission.<sup>5</sup>

17. Section 252(b) of the Telecom Act provides state commissions with the authority to arbitrate any open issue between an ILEC and a CLEC. We are aware that various federal court decisions, and indeed our own decisions, have indicated that state commissions do not have authority over rates for wholesale services provided under § 271 of the Telecom Act.

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<sup>4</sup> See, Decision No. C08-0414 at ¶ 33.

<sup>5</sup> *Id.* at ¶ 34.

18. However, in this matter, Qwest, obviously assuming this Commission had jurisdiction in this back-billing matter, sought arbitration of just that issue (whether it could back bill AZDT for charges for services from March 10, 2005 to the date of our decision) pursuant to § 252(b). We accepted the matter under our authority pursuant to § 252(b) to arbitrate any open issue between an ILEC and a CLEC in ICA negotiations. We did not intend to set any rate for services provided by Qwest under § 271. Our resolution of the issues brought to us by Qwest related merely to the back-billing Qwest sought and the appropriate amount given the evidence on record. Decision No. C08-0414 resolves that matter. Qwest now seems to argue that had we granted it the total amount of back billing it sought (specifically for the period March 10, 2006 through July 19, 2007) that would not implicate § 271; however, because we provided an amount of back billing less than what it sought, that somehow violates the prohibition against a state commission setting wholesale rates under § 271. We fail to see the logic in that argument. Qwest recognized we had authority to settle this matter pursuant to § 252 by petitioning this Commission for arbitration of the back billing issue, and our decision was grounded wholly within our authority under § 252 of the Telecom Act. Therefore, we deny Qwest's RRR on this issue. We note that had Qwest's position truly been that this Commission had no authority regarding its back billing issue with AZDT, its recourse would have been to seek relief with the FCC. However, it chose to address its issue here, pursuant to § 252(b) of the Telecom Act. We therefore assume Qwest agrees the matter was rightly before this Commission.

19. Qwest also argues that the evidence shows that it negotiated in good faith during the period of time in question. Qwest further argues that by failing to make an effort to terminate the ICA even though no resolution was reached during the TRRO transition period showed its good faith by giving AZDT the benefit of the doubt. Further, Qwest argues that continuing to

provide UNE-P services to AZDT also showed its good faith because its reading of the TRRO was that the TRRO was required to be implemented through modifications to the ICA between itself and CLECs under the ICA's change of law provisions. As a result, Qwest argues that it was required to honor the ICA. Qwest argues that all of its other actions during the period at issue demonstrate it acted in good faith and followed the law.

20. While Qwest makes the claim that it could not unilaterally terminate the contract without having to then negotiate a replacement ICA under the terms of the TRRO,<sup>6</sup> Qwest nonetheless later indicates in its RRR application that it indeed could have terminated the ICA but chose not to in order to demonstrate its good faith in the negotiations with AZDT.<sup>7</sup>

21. We are comfortable with our evidentiary findings in this matter. We based our decision regarding the appropriate amounts of back billing owed Qwest based on the full record. The grant to Qwest of back billing amounts was based on the evidence which showed that neither Qwest nor AZDT acted in good faith as that term applies under the Telecom Act. Nothing in Qwest's arguments on RRR persuade us to alter or amend our findings of fact and our decision based on those findings. Therefore, we deny Qwest's RRR regarding our evidentiary findings.

22. The Application for RRR filed by Qwest is denied in its entirety consistent with the discussion above.

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<sup>6</sup> See, Qwest Application for RRR at pp. 13-14.

<sup>7</sup> See, *Id.* at pp. 20-22.

23. On May 15, 2008, AZDT filed a Response to Qwest's Application for RRR. Subsequently, Qwest filed a Motion to Strike AZDT's response pleading on May 19, 2008. On May 28, 2008, AZDT filed a response to Qwest's Motion to Strike.

24. Commission Rule 4 CCR 723-1-1308(a) provides that responses may not be filed to a request for RRR. We see no reason here to waive that rule and therefore grant Qwest's Motion to Strike AZDT's response to Qwest's RRR application.

## **II. ORDER**

### **A. The Commission Orders That:**

1. The application of Qwest Corporation for Rehearing, Reargument or Reconsideration of Commission Decision No. C08-0414, filed on May 8, 2008, is denied in its entirety consistent with the discussion above.

2. The Motion to Strike Arizona Dialtone, Inc.'s Response to Qwest's Application for Rehearing, Reargument, or Reconsideration is granted.

3. Commission Decision No. C08-0414 is upheld in its entirety.

4. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONER'S WEEKLY MEETING  
June 4, 2008.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

RON BINZ

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JAMES K. TARPEY

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MATT BAKER

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Commissioners