

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska	)	Application No. NUSF-69
Public Service Commission, on	)	
its own motion, seeking to	)	
implement policies and	)	
procedures related to providing	)	ORDER GRANTING
Dedicated universal service	)	APPLICATION IN PART
Support for Wireless	)	
Telecommunications Services:	)	
N.E. Colorado Cellular Inc.	)	
d/b/a Viaero Wireless.	)	Entered: February 10, 2009

BY THE COMMISSION:

By Application filed June 27, 2008, N.E. Colorado Cellular Inc. d/b/a Viaero Wireless (Viaero), seeks support from the Nebraska Universal Service Fund (NUSF) dedicated wireless program. Notice of the Application appeared in the Daily Record, Omaha, Nebraska on July 11, 2008. Petitions of Formal Intervention were timely filed by United Telephone Company of the West Inc. d/b/a Embarq Corporation (Embarq) and by several rural carriers, the Rural Independent Companies<sup>1</sup> (RIC).

A hearing on the Application was held on December 16, 2008 in the Commission Hearing Room, Lincoln, Nebraska. All pre-filed testimony was offered and admitted into evidence. The testimony of an unavailable applicant witness, as stipulated by Viaero, the Commission staff, and the intervenors, was admitted into the record.

The Application filed by Viaero was made part of the record as Exhibit No. 13. The Application contained information regarding the proposed cell sites, an estimation of costs to be reimbursed by the dedicated wireless program, a service analysis, and coverage maps which measured signal strength for a GSM network. The Commission staff served discovery requests on Viaero. The responses to discovery were marked as Exhibit No. 12 and entered into the record. The responses included a proposed depreciation schedule for the construction costs, a list of wireless voice and data plans that would be offered in the areas

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<sup>1</sup> The RIC group consists of the following rural independent telephone companies: Arlington Telephone Company, Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco Inc., Consolidated Telecom, Inc., Consolidated Telephone Company, Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, K&M Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telecom Inc., and Three River Telco.

covered by the Application as well as information regarding the status of service in the proposed coverage areas.

In support of the Application, Mr. Nicholas White, General Counsel for Viaero and Thomas Burnett, Viaero's CTO and Vice-President of Technical Operations testified. Mr. White testified generally about Viaero's organizational structure and the service provided by Viaero.

Specifically, Mr. White testified that his opinion was Viaero should be eligible to receive support from the dedicated wireless program. In deciding which rural areas to target with dedicated wireless program support, Viaero selected low-density/high-cost portions of its service area where additional wireless services would satisfy an unmet need. Viaero utilized publicly available mapping data showing where wireless service was unavailable. Viaero also identified several regions where additional wireless infrastructure would be beneficial and prioritized them based on where the benefits of new wireless infrastructure would be the greatest to the population living in and utilizing these regions.

Mr. White testified Viaero will be willing and able to permit other carriers to enter into roaming agreements with Viaero where technically feasible. In addition, Viaero would be willing and able to construct towers, supported by the NUSF Wireless Program, in such a way to accommodate the collocation of additional equipment where technically feasible. Viaero agreed that as a recipient of dedicated wireless program support it should report its use of this support to the Commission during the annual certification process used by eligible telecommunications carriers (ETCs).

Mr. Burnett generally described Viaero's network in Nebraska. He further described the manner in which the construction costs and signal coverage maps were prepared.

Mr. Dan Davis, an employee of Consortia Consulting, testified for RIC. Mr. Davis testified the Commission should prioritize wireless funding and target unserved areas. Mr. Davis also testified in support of Commission oversight in areas such as service quality reporting and consumer protection standards, infrastructure sharing, roaming agreements, financial earnings and expense reporting limits.

Ms. Ann Prockish, Manager of State Regulatory in the Department of Law and External Affairs, testified on behalf of Embarq. Ms. Prockish testified that the Viaero application was incomplete since it did not include financial information

revealing whether its Nebraska rate of return was less than 12 percent. She suggested the Commission adopt financial earnings and expense reporting to make sure that companies receiving dedicated wireless program support had a need for this funding and were not earning an excessive rate of return. Ms. Prockish further stated that Viaero should be required to provide a business case analysis explaining how it has determined the proposed eight cell sites would not be economical to build, without dedicated wireless program support.

Ms. Sue Vanicek, the Director of the Nebraska Telecommunications Infrastructure and Public Safety (NTIPS) Department of the Commission, recommended the Commission adopt some general conditions for the receipt of dedicated wireless program support. Ms. Vanicek recommended the Commission require support recipients agree to enter into roaming agreements at reasonable, market-based rates and permit other wireless carriers to co-locate equipment on NUSF funded infrastructures, where technically feasible. In addition, Ms. Vanicek, recommended the Commission require dedicated wireless program recipients certify that the cell sites be Phase II E-911 capable to enhance public safety. Ms. Vanicek testified that the Commission should target the support to unserved or underserved areas.

Post-Hearing Briefs were solicited by the Commission. Briefs were filed by RIC, Embarq and Viaero.

Viaero argued that its application should be granted without the imposition of mandatory earnings reports and without additional Commission oversight over service contracts. Viaero again supported the conditions proposed by Ms. Vanicek at the hearing including the requirement to enter into roaming agreements upon commercially reasonable terms and conditions, infrastructure sharing including collocating with other wireless carriers, public safety agencies, and internet providers at commercially reasonable terms and conditions. Viaero also agreed to the suggested reporting requirements and that support should be targeted only to rural unserved and underserved areas. Viaero agreed that all tower facilities funded with support from the dedicated wireless program will be ready to provide Phase II Wireless E911 when constructed.

Embarq recommended the Commission deny the Viaero application without prejudice arguing the Petition lacked the requisite information. Embarq argued the Commission must first determine the economic viability of the proposed locations and determine whether Viaero would build the sites without NUSF support. Embarq further argued that prioritization was

imperative and the fund must be used to support the deployment of wireless service where it is otherwise unavailable by any technology.

RIC maintained that the Commission should adopt financial reporting and earnings limitations, consumer protection requirements, infrastructure sharing requirements, 911 requirements, roaming agreement requirements and service quality standards.

#### O P I N I O N      A N D      F I N D I N G S

The Commission allocated \$2.5 million for the 2008 funding year in which the petition was filed. Viaero's Petition sought \$3 million for 8 proposed cell towers. Long Lines Wireless LLC requested approximately \$900,000 of the \$2.5 million allocation for six cell sites. Since the requests for wireless funding exceeded the amount of support available, it was necessary for the Commission to prioritize the support to meet public interest goals the Commission envisions for the dedicated wireless program.

Viaero proposed construction of tower sites in the following communities: Lynch, Verdel, Niobrara, Verdigre, Sparks, Springview, Wilsonville and Beaver City. Based on the Application, the testimony provided by the applicant, staff and intervenors, and based on available funding, the Commission finds the application should be granted in part. Of the proposed locations, the Commission finds it appropriate to allocate support for five of the eight tower sites. Specifically, the Commission supports the grant of dedicated wireless program support to construct towers in the Sparks (Cherry County), Springview (Keya Paha County), Verdigre (Knox County), Niobrara (Knox County) and Lynch (Boyd County) locations requested.

The Commission finds that dedicated wireless program support should be provided only to support tower construction or a cell site that has not yet been constructed. If a wireless carrier has commenced or completed the construction of a tower or cell site prior to requesting funding from the dedicated wireless program, it appears that the carrier anticipated that such tower or cell site would generate sufficient revenue in the absence of funding from the dedicated wireless program.

The Commission also finds that dedicated wireless program support should be targeted to serve high-cost unserved and underserved areas. In order to identify high-cost areas that are

least likely to provide sufficient operating revenues to support tower construction or the placement of a cell site without support, the Commission selected cell sites that serve out-of-town support areas that have less than 4.5 households per square mile. These areas were identified to be the highest-cost areas in which to provide service in the Commission's permanent high-cost support mechanism.<sup>2</sup>

In order to provide benefits to the greatest number of households in high-cost areas, the Commission ranked the towers and cell sites that were found to be eligible for funding from those serving the greatest number of out-of-town households to those serving the least number of out-of-town households. Using this method, the Commission finds that the following towers or cell sites should be funded:

<u>Carrier</u>	<u>Area</u>
Long Lines	Crofton Hubbard Walthill
Viaero	Lynch Niobrara Sparks Springview Verdigre

In addition to the analysis described above, the Commission also compared the tower and cell site locations selected for funding against existing locations in the state. The tower and cell site locations selected for funding were in areas where there are no towers or cell sites or where there is slight overlap with the coverage of other existing towers and cell sites.

Providing funding for the towers and cell sites listed above will exhaust the Commission's allocation of \$2.5 million for dedicated wireless program support for the 2008 calendar year. The proposed towers submitted for funding by Viaero for Beaver City, Verdel, and Wilsonville were eligible under the methodology described above, but were not selected for funding for the 2008 funding year because the funds allocated were not sufficient to fund all eligible requests. Viaero may resubmit

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<sup>2</sup> See Application No. NUSF-26, *In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to establish a Long-Term Funding Mechanism*, Progression Order No. 5 (June 29, 2004) at Appendix A, p. 5.

its request for funding if it still wishes to seek dedicated wireless program support for construction of towers at these locations.

#### Reimbursement Process:

The Commission approves reimbursement up to the estimated construction costs contained in the application for the five approved sites or the actual cost of construction on each site, whichever is lower. The proposed construction costs estimated by Viaero for the five approved sites total Two Million Twenty-Three Thousand and Sixty Three Dollars (\$2,023,063). As recommended by Ms. Vanicek, Viaero must first make the investment and file a request for reimbursement with the NTIPS Department. Viaero does not need to complete the construction process prior to seeking reimbursement; rather, it may work with the NTIPS Department to develop intervals at which reimbursement can be sought. The dedicated wireless program will reimburse Viaero for reasonable expenditures made related to the cell sites approved in this Order. Once the investment is made, Viaero shall file a request for support, provide the NTIPS Department with copies of the invoices and shall certify to the Department that it had made the described investment for the provision, maintenance and upgrading of facilities and services in the described rural areas.

As a dedicated wireless program recipient, the Commission finds Viaero must meet the following conditions:

#### Infrastructure Sharing:

Viaero shall be required to construct tower facilities in a manner that would accommodate collocation of additional equipment of other wireless carriers, public safety agencies, Internet providers and other providers with technologies that qualify. Such collocation will be required where technically feasible and upon commercially reasonable terms and conditions. In its late-filed exhibit denoted as "Exhibit B", Viaero stated that it agrees as a precondition to receiving support from the dedicated wireless program that it would reserve additional space for collocated equipment on terms and conditions that are commercially reasonable. Viaero stated it would be willing to provide the Commission on a periodic basis reports concerning requests for collocation and its response to those requests. While the Commission will not require Viaero to routinely file collocation agreements, if an issue is raised by public safety agency or another wireless provider, the Commission will make a

determination as to whether these ordered conditions are being met.

Roaming Agreements:

Viaero must agree to permit roaming at commercially reasonable rates. We believe this requirement is fundamentally related to the public policy objectives of the dedicated wireless program. The Commission will not require Viaero to routinely file its roaming agreements. Entities denied roaming access at commercially reasonable or market-based rates may file a request with the Commission to make a determination as to whether this requirement is being satisfied.

Phase II Enhanced 911 Capability:

To enhance public safety, the Commission requires that the tower sites funded by this approval must have the equipment and software necessary for Phase II wireless E911 capability. In addition, in a manner consistent with federal regulations, the wireless provider must provide Phase II wireless E911 service after a request has been made by a County or Public Safety Answering Point (PSAP). Viaero must certify to the completion and commitment of these requirements prior to reimbursement from the dedicated wireless program.

Reporting Requirements:

Viaero shall file, on an annual basis, consistent with federally designated eligible telecommunications companies, the information required by the Commission's Telecommunications Rules at title 291 Neb. Admin. Code, chapt. 5, § 009, pertaining to ETCs. Viaero shall also include dedicated wireless program support in the reports required by the Commission's Orders in Dockets NUSF-25/NUSF-66. Viaero shall file its annual report on or before June 1 of each year.

The Commission declines to adopt the suggested financial earnings report requirements. The Commission believes the annual ETC reporting requirements will be sufficient for the purposes of determining that NUSF support is being used for the provision, maintenance and upgrading of facilities and services in Nebraska.

In addition, the Commission expects that construction on these projects will proceed in a prompt business-like fashion. Progress reports shall be filed on an annual basis or more frequently if deemed necessary by the Commission so that the

Commission can plan for the timing of distribution for these funds.

Continuing Nature of Requirements:

The Commission will enforce these requirements for as long as the towers are in use and providing service to customers. The Commission may take any action it deems necessary and appropriate to enforce the requirements and conditions in this Order.

These opinions and findings carry no precedential value other than establishing minimum standards and criteria the Commission applied in this application for dedicated wireless program support. The Commission may modify the minimum requirements and conditions as it relates to future Petitions for support from the dedicated wireless program.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the application of NE Colorado Cellular, Inc. d/b/a Viaero Wireless shall be and it is hereby granted in part to the extent provided herein.

IT IS FURTHER ORDERED that NE Colorado Cellular, Inc. d/b/a Viaero Wireless shall be subject to all terms and conditions adopted in this Order.

MADE AND ENTERED at Lincoln, Nebraska, this 10<sup>th</sup> day of February, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING

Chairman

ATTEST:

Executive Director