

SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

| | | |
|--------------------------------|---|----------------------------|
| In the Matter of the |) | Application No. C-5576 |
| Application of Viaero Fiber |) | |
| Networks, LLC, Fort Morgan, |) | |
| Colorado, seeking authority to |) | ORDER GRANTING APPLICATION |
| provide competitive local |) | |
| exchange telecommunications |) | |
| services within the State of |) | |
| Nebraska. |) | Entered: November 6, 2024 |

BY THE COMMISSION:

On April 11, 2024, Viaero Fiber Networks, LLC ("Applicant" or "Viaero Fiber") of Fort Morgan, Colorado, filed an application with the Nebraska Public Service Commission ("Commission") seeking authority to operate as a competitive local exchange carrier of telecommunication services within the State of Nebraska. Notice of the application was published in The Daily Record, Omaha, Nebraska, on April 16, 2024. No protests were filed.

B A C K G R O U N D

Applicant is a Limited Liability Company organized under the laws of the State of Colorado with its principal business located at 1224 West Platte Ave. Fort Morgan, CO 80701. Applicant has been authorized by the Nebraska Secretary of State to operate in Nebraska. Applicant is a wholly-owned subsidiary of Viaero Wireless Technologies, Incorporated ("Viaero Wireless").

Applicant seeks a certificate of public convenience and necessity to provide competitive local exchange telecommunications services and advanced communications services as a common carrier throughout the state of Nebraska, primarily through fiber-based infrastructure. Applicant states in its application that it will provide broadband services to residential and business customers as well as IP enabled Voice over Internet Protocol service. Applicant intends to participate in the Affordable Connectivity Program, the Nebraska Telephone Assistance Program ("NTAP"), and the Lifeline Program; whereby Applicant would offer its discounted service to qualifying customers.

Applicant also states that it will adhere to all applicable state laws and all Commission policies, rules, and orders. Furthermore, Applicant or an officer, director, or shareholder having 5% or more of Applicant's voting securities has not been

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involved in a formal complaint or other investigatory or enforcement proceeding within the past two years. Applicant also states that a grant of its application will promote and serve the public interest by increasing customer choice in greater Nebraska at affordable rates.

Finally, the Commission wishes to emphasize that this order does not, in any way, diminish the Commission's findings in Consolidated Docket No. C-5493/PI-245 and C-5520/PI-246 regarding the use of prohibited equipment in Nebraska. On February 22, 2023, Governor Jim Pillen signed executive order No. 23-05¹ which prohibits the State from awarding any grant funding designated for broadband deployment in Nebraska to any provider using or deploying communications equipment and services developed by organizations on the FCC's Covered List.² The Nebraska Legislature subsequently codified Neb. Rev. Stat. §§ 86-125 (4)(c) and 86-324 2(d) to require the Commission to ensure all communications providers in Nebraska are not using or deploying any communications equipment or service, and required the Commission to withhold support distributed from the NUSF to any such telecommunications company.³ In response, the Commission opened Docket Nos. C-5493/PI-245 and C-5520/PI-246,⁴ in which, we required all local exchange carriers, interexchange carriers, eligible telecommunications carriers, and communications providers certificated or registered in Nebraska to provide to the Commission an attestation as to whether they are using or deploying prohibited equipment. Entities who file an attestation in the affirmative or who fail to file an attestation at all are ineligible from receiving NUSF and/or State funding

¹ Exec. Order No. 23-05 (February 22, 2023).

² The current Covered List is maintained by the FCC at <https://www.fcc.gov/supplychain/coveredlist>. Detailed information regarding the creation and maintenance of this list can be found at 47 C.F.R. § 1.50000 et seq.

³ Neb. Rev. Stat. § 86-324 (2)(d).

⁴ See *In the Matter of the Nebraska Public Service Commission, on its own motion, to require certificated local exchange carriers, interexchange carriers, and eligible telecommunications carriers in Nebraska to attest as to whether they are using or deploying communications equipment prohibited by the Federal Communications Commission*, Docket No. C-5493/PI-245, Order Consolidating Dockets and Publishing Updated List of Entities Using or Deploying Prohibited Equipment (November 7, 2023).

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designated for broadband deployment.⁵ Once approved to operate as a Competitive Local Exchange Carrier ("CLEC"), Applicant would also be subject to the above requirements.

E V I D E N C E

On August 9, 2024, a hearing officer order was entered scheduling this matter for hearing on September 25, 2024. Notice of this hearing was published in *The Daily Record* on September 3, 2024. A hearing was then held on September 25, 2024. Mr. Jonathan Smith, staff attorney for the Commission, appeared on behalf of Commission Staff. Ms. Joselyn Luedtke, attorney with Zulkoski Weber, appeared on behalf of Viaero Fiber.

The hearing began with the testimony of Carrie Gans, Assistant Telecommunications Director of the Telecommunications and NUSF (Nebraska Universal Service Fund) Department of the Commission. Ms. Gans began her testimony by giving an overview of the CLEC application process. She then went into specific detail regarding its financial requirements.⁶ Next, she provided a brief assessment of Viaero Fiber's CLEC application. Ms. Gans first confirmed that Viaero Fiber met the standards of technical and managerial competence necessary to provide local exchange services in the State of Nebraska.⁷ Next, regarding Viaero Fiber's financial qualifications, Ms. Gans confirmed it met the capitalization requirement as defined in Commission Rule 002.50(C)(10)(a). However, Viaero Fiber failed to pass the positive working capital test as defined in Commission Rule 002.50(C)(10)(b) as its current liabilities exceeded its current assets.⁸ Ms. Gans then answered several questions related to Viaero Fiber's application before ending her testimony.⁹

Following Ms. Gans testimony, Viaero Fiber called Mr. Mike Felicissimo, Treasurer of Viaero Fiber and CFO of Viaero Wireless. Mr. Felicissimo began his testimony by addressing Viaero Fiber's

⁵ See *Prohibited Equipment List*, NEBRASKA PUBLIC SERVICE COMMISSION (last updated Oct. 17, 2024), <https://psc.nebraska.gov/telecommunications/c-5493c-5520-prohibited-equipment>.

⁶ Hrg. Transcript 8:10-10:21.

⁷ *Id.* at 8:23-9:2.

⁸ *Id.* at 11:1-10.

⁹ *Id.* at 12:15-19:12.

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financial deficiency under the Commission's rules and regulations. Mr. Felicissimo referred the Commission to the interim consolidated financial statements of Viaero Wireless, as of June 30, 2024, marked as exhibit 7, stating that it reflected meeting the positive working capital test that it had initially failed.¹⁰

Mr. Felicissimo went on to explain that this change was due to a subsequent modification in Viaero Wireless' accounting practice, with approval from the company's auditors, Clifton Larsen Allen, LLP, CLA. He stated that NE Colorado Cellular Inc. ("NEC"), a subsidiary of Viaero Wireless and sister company to Viaero Fiber, incurred expenses associated with the Federal Communications Commission's ("FCC") rip and replace program and recorded payables to vendors for those goods and services immediately. After which, expenses were submitted to the FCC for reimbursement. With its prior accounting practice, Viaero Wireless waited to record reimbursement receivables back from the FCC until the reimbursement requests were granted, which took additional time due to the lengthy FCC approval process. Viaero Wireless recorded the receivables from the FCC for the anticipated reimbursement as a long-term rather than a current item. Mr. Felicissimo stated this practice resulted in reflecting higher payables than receivables and negative working capital. With the modification in its accounting practice, Viaero Wireless now records the reimbursement receivable at the same time as the payable and reclassified a portion of the long-term deferred grant receivable as current. As such, the resulting accounting change in Viaero Wireless' financial statements now reflects positive working capital.¹¹ Mr. Felicissimo then stated that this result demonstrates Viaero Wireless' financial strength, which would in turn allow Viaero Fiber to successfully provide CLEC services in Nebraska.¹²

Upon questioning, Mr. Felicissimo outlined the corporate structure of the Viaero entities and described the specific role each entity played in supporting its network.¹³ During the discussion regarding Viaero Fiber, the Commission requested Applicant file a late-filed exhibit showing the following: working

¹⁰ *Id.* at 23:9-25:7.

¹¹ *Id.* at 25:16-27:4.

¹² *Id.* at 28:20-24.

¹³ *Id.* at 30:13-32:7.

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capital, cash on-hand, debt, liabilities, and assets of Viaero Fiber.¹⁴ In response to another question, Mr. Fellicissimo reiterated that both Viaero Fiber and NEC are wholly-owned subsidiaries of Viaero Wireless, which means all of their financial obligations are fully guaranteed by the parent, Viaero Wireless.¹⁵

Following Mr. Fellicissimo's testimony, Viaero Fiber called Mr. Ron Christensen, President of Viaero Fiber, to testify before the Commission. Mr. Christensen clarified the details of the various grant projects of Viaero Wireless and confirmed the speeds that Viaero Fiber would offer to customers if its CLEC application was approved.¹⁶ Following Mr. Christensen's testimony, Mr. Fellicissimo offered a closing statement, after which, the hearing was adjourned.

During the hearing, the following exhibits were offered and accepted into the record: Exhibit 1: Notice of Application, 4/16/24; Exhibit 2: Order Scheduling Hearing, 8/09/24; Exhibit 3: Order Issuing Protective Order, 8/26/24; Exhibit 4: Notice of Hearing, 9/03/24; Exhibit 5: Application for CLEC Authority; Exhibit 6: Financial Statements and Supplementary; Exhibit 7: Consolidated Financial Statements; Exhibit 8: Letter from CLA; and Exhibit 9: Service Area map.¹⁷ After the hearing, the following late-filed exhibit was offered and accepted into the record: Exhibit 10: Viaero Fiber Networks Balance Sheet - CONFIDENTIAL.

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

The Commission considers this application for authority in light of the following criteria and standards established in the Commission's telecommunications rules:

- (a) Whether the Applicant has provided the information required by the Commission;
- (b) Whether the Applicant has provided a performance bond, if required;
- (c) Whether the Applicant possesses adequate financial resources to provide the proposed service;

¹⁴ *Id.* at 34:4-35:21.

¹⁵ *Id.* at 38:15-22.

¹⁶ *Id.* at 46:9-50:22.

¹⁷ *Id.* at page 3.

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- (d) Whether the Applicant possesses adequate technical competence and resources to provide the proposed service;
- (e) Whether the Applicant possesses the adequate managerial competence to provide the proposed service; and
- (f) Whether granting the Applicant a certificate preserves and advances universal service, protects the public safety and welfare, ensures the continued quality of telecommunications services and safeguards the rights of consumers, pursuant to Section 253(b) of the Act.

These opinions and findings carry no precedential value other than establishing minimum standards and criteria to apply when considering applications to provide local exchange services. All telecommunications carriers seeking such a certificate must demonstrate that they meet, at a minimum, the standards and criteria set forth herein.

This order does not terminate, waive or in any manner diminish the exemptions and protections created by the Act for rural carriers, as defined by the Act. This order does not address the issue of rural local exchange carrier exemption under the Act. Rural exemptions may be terminated, suspended, or modified only as provided in section 251(f) of the Act.

Before the Applicant is allowed to provide local exchange service to its users, it must either:

1. Through negotiation or arbitration, reach an interconnection/resale agreement with the pertinent incumbent local exchange carrier and receive Commission approval of the interconnection/resale agreement; or
2. In the event a certified local exchange carrier provides a wholesale tariff, purchase rates from that tariff, file its own tariff and receive Commission approval of its tariff.

Prior to providing service in any area in the State of Nebraska, Applicant must file tariffs in accordance with the provisions of Section 002.21 of the Neb. Admin. R. & Regs. Title 291, Ch. 5. Upon the offering of local exchange services in the State of Nebraska, Applicant would be subject to the same laws, rules and regulations, both federal and state (including any laws, rules or regulations regarding universal service, restrictions on

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joint marketing and quality of service), applicable to any other exchange company except those obligations imposed on ILECs pursuant to Section 251(c) of the Act.

During the Commission's initial review of Viaero Fiber's application, the Commission determined that Applicant did not meet a minimum financial requirement found under 291 Neb. Admin. Code § 5-002.50(C)(10)(b). The Commission finds it necessary to address Applicant's failure to meet this requirement and whether, under certain circumstances, an application for authority should be approved if it does not meet this minimum requirement.

The evidence presented at the hearing confirmed the Commission's initial finding that Applicant failed to submit financial statements evidencing positive working capital. Nonetheless, in making the determination of whether Applicant should be granted CLEC authority, the Commission must consider the unique circumstances related to this specific docket. The Commission finds the following to be true: (1) Applicant is a wholly-owned subsidiary of Viaero Wireless. (2) NEC is a wholly-owned subsidiary of Viaero Wireless. (3) As permitted under past Commission practice, Applicant submitted the financial statements of its parent company, Viaero Wireless, for consideration. (4) Due to NEC's involvement in the FCC's rip and replace program, Viaero Wireless' consolidated financial statements reflected negative working capital.

During the hearing, Viaero Fiber submitted updated compiled consolidated financial statements, marked as Exhibit 7. Reflected in this exhibit, Viaero Wireless modified its accounting practice related to the recording of incurred expenses and receivables associated to NEC's involvement in the FCC's rip and replace program. As such, Exhibit 7 reflected a positive working capital.

The Commission understands that Viaero Fiber's working capital determination is inextricably tied to NEC's involvement in the FCC's rip and replace program, and that, but for NEC's involvement, Viaero Wireless' financial statements would have shown a positive working capital, thereby passing our financial tests. The Commission does not make a determination of the validity of Viaero Wireless' new accounting practice; however, it does find the principle of Viaero Fiber's argument to be persuasive as the financial issue associated with Viaero Fiber's application is primarily related to the timing of federal reimbursements and not

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Viaero Fiber's managerial, technical, or financial competence. No party in this proceeding refuted the Applicant's competence. The Commission finds that if it were to approve Viaero Fiber's CLEC application for authority, the potential risk to Nebraskans is minimal.

Based upon the information provided by Applicant, the Commission finds that approval of Viaero Fiber's application is appropriate in this specific circumstance. Applicant has demonstrated that it meets the standards of technical and managerial competence and all other criteria necessary to provide local exchange services in the State of Nebraska.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Application C-5576 be, and is hereby, granted.

IT IS FURTHER ORDERED that Applicant is obligated to abide by the same laws, rules and regulations, both federal and state (including any laws, rules or regulations regarding universal service, restrictions on joint marketing and quality of service), applicable to any other local exchange carriers, except obligations imposed on incumbent local exchange carriers pursuant to Section 251(c) of the Act.

IT IS FURTHER ORDERED that, to the extent Applicant provides access line service as referenced in the Telecommunications Relay System Act, Neb. Rev. Stat. §§ 86-301 through 86-315(Relay Act) and defined in Neb. Admin. R. & Regs. Title 291, Ch. 5 § 001.01B, the Applicant shall collect from its subscribers a surcharge (Relay Surcharge) pursuant to the relay act and the Commission's annual orders establishing the amount of the surcharge, and shall remit to the Commission the proceeds from the relay surcharge as provided by the Relay Act.

IT IS FURTHER ORDERED that the Applicant comply with all necessary statutes and Commission Rules and Regulations as they pertain to the Nebraska Universal Service Fund.

IT IS FURTHER ORDERED that the Applicant comply with Section 251(f)(1)(B) of the Telecommunications Act of 1996 and that the Applicant submit any bona fide request(s) for interconnection,

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services or network elements from a rural telephone company to the Commission for its approval.

IT IS FURTHER ORDERED that Applicant shall file, in accordance with the applicable statutes, on or before April 30 of each year, an annual report with the Commission in accordance with Commission regulations and requirements.

IT IS FURTHER ORDERED that within 30 days from the entry of this order that the Applicant file a tariff and pay appropriate filing fees with the Commission as required by state statutes and the Commission's regulations.

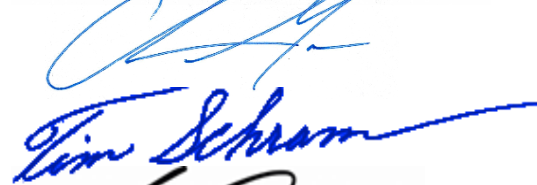
IT IS FURTHER ORDERED that this order be, and is hereby, made the Commission's official certificate of Public Convenience and Necessity to the Applicant to provide local exchange telecommunications services in the State of Nebraska.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 6th day of November, 2024.

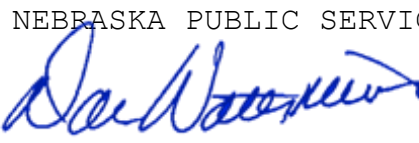
NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Eric M. Hamler

Tim Schram

Kevin Stocker


Chair

ATTEST:


Thomas W. Golden
Executive Director