

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE COMMISSION, ) Rule and Regulation No. 172  
ON ITS OWN MOTION, SEEKING TO )  
AMEND TITLE 291, CHAPTER 5, TELE- )  
COMMUNICATIONS RULES AND )  
REGULATIONS, TO ADD RULES )  
REGARDING CUSTOMER BILLING )  
PRACTICES )



COMMENTS  
OF  
N.E. COLORADO CELLULAR, INC.  
d/b/a VIAERO WIRELESS

N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless (“Viaero”), by counsel and pursuant to the Order Opening Docket and Seeking Comments, dated May 19, 2009 (“Opening Order”), in the above-referenced Docket provides the following Comments.

**I. INTRODUCTION**

Viaero is a “telecommunications carrier” as defined in 47 U.S.C. § 153(44) and 47 C.F.R. § 51.5, and for the purposes of Part 54 of the FCC’s Rules (47 C.F.R. § 54.1, et seq.), Viaero is considered a common carrier. Viaero holds authorizations from the FCC to provide Personal Communications Services (“PCS”) in nearly all of Nebraska, excluding Omaha and Lincoln. Viaero is a commercial mobile radio service (“CMRS”) provider pursuant to the definition of “mobile service” provider in 47 U.S.C. § 153(27). Viaero provides interstate telecommunications services as defined in 47 U.S.C. § 254(d) and 47 C.F.R. § 54.5. Viaero was designated an Eligible Telecommunications Carrier (“ETC”) by Commission Order entered on October 18, 2005 in Application C-3324.

The detailed description of Viaero contained above has special significance in this Docket, because Nebraska law has specifically limited the authority of this Commission to regulate CMRS carriers like Viaero. Even in the absence of the restrictions established by the

Nebraska legislature, state jurisdiction to regulate Viaero's rates is specifically preempted. 47 U.S.C. § 332(c)(3). There are exceptions to this general preemption, Viaero freely admits. However, Viaero has concerns that the proposed changes to the Commission's rules in this Docket, at least as they pertain to Viaero, would be contrary to Nebraska law, preempted by federal law, and in any event are unnecessary. Viaero respectfully requests that the Commission consider more limited changes to the rules, focusing on local exchange carriers and more conservatively tailoring any changes to avoid unnecessary costs to carriers, as those costs will inevitably be passed on to Nebraska consumers.

## **II. THE PROPOSED RULES, IF APPLIED TO CMRS CARRIERS, WOULD VIOLATE N.R.S. § 86-124**

For the purposes of its comments, Viaero assumes that the rules proposed in this docket would apply generally to all ETCs participating in the state's Universal Service Fund.<sup>1</sup> Viaero does not believe that the changes proposed in this Docket can be legally justified on the basis of ETC status.

Neb. Rev. Stat. § 86-124 prohibits the regulation of "mobile radio services" and "wireless telecommunications service." This prohibition is as broad as it is clear, and provides for no exceptions.

The Commission has been granted certain powers and duties related to the Nebraska Universal Service Fund (the "Fund"):

The commission shall determine the standards and procedures reasonably necessary, adopt and promulgate rules and regulations as reasonably required, and enter into such contracts with other agencies or private organizations or entities as

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<sup>1</sup> It is not completely clear from the Opening Order whether the Commission intends the proposed rule changes to apply to Viaero as a wireless ETC. Commission Rule 009.02A8 requires all ETCs to "satisfy applicable consumer protection and service quality standards." How the Commission views the interplay between the statutory prohibition of wireless regulation and its authority to administer the NUSF is critical in determining how, if at all, these new rules would apply to Viaero or other wireless ETCs.

may be reasonably necessary to efficiently develop, implement, and operate the fund.

N.R.S. § 86-235.

The Commission's power to regulate the Fund can be read quite broadly. However, the power to regulate, expressed in general terms, cannot supersede a specific statutory directive against regulation. In all respects, the Commission's administration of the Fund must be reasonable (a qualification used repeatedly in the text of the statute), and adopting rules and regulations that conflict with existing statutes cannot be considered reasonable.

### **III. CERTAIN ASPECTS OF THE PROPOSED RULES RAISE PREEMPTION QUESTIONS, AT LEAST AS TO CMRS CARRIERS LIKE VIAERO**

Viaero recognizes the broad authority of this Commission, delegated by the legislature, to regulate the rates, terms, conditions, practices and "exercise general control" over local exchange carriers. Neb. Rev. Stat. § 75-109. Viaero also acknowledges that the State of Nebraska<sup>2</sup> retains authority to regulate the "terms and conditions" of CMRS, even after the adoption of 47 U.S.C. § 332(c)(3). The significance and meaning of the phrase "terms and conditions" has been evaluated by the Eighth Circuit in a nearly identical context. In evaluating a Minnesota statute regulating CMRS carriers' billing procedures, the Eighth Circuit established the following principle:

Any measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to serve as a "consumer protection measure," but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A). To avoid subsuming the regulation of rates within the governance of "terms and conditions," the meaning of "consumer protection" in this context must exclude regulatory measures, such as Article 5, that directly impact the rates charged by providers.

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<sup>2</sup> As discussed in Section II above, the legislature has explicitly prohibited the Commission from regulating wireless telecommunications service. Therefore, the authority retained by the state to regulate terms and conditions of CMRS pursuant to 47 U.S.C. § 332(c)(3) remains vested with the legislature.

*Cellco Partnership v. Hatch*, 431 F.3d 1077, 1082 (8th Cir. 2005).

Any rule change that would "directly impact" rates would necessarily be preempted. The most clear example of how the Commission's proposed changes would directly impact rates is contained in the proposed Rule 002.17C, which requires pro-rated refunds of monthly service charges in the event a customer or carrier terminates service. Viaero, like nearly every CMRS carrier, charges on a monthly basis for its services, and enters into long-term contracts with subscribers in order to provide more affordable activation fees and handsets. Proposed Rule 002.17C would directly impact customer rates by lowering the rates of those subscribers cancelling mid-month, and effectively raising the rates of subscribers that do not cancel, limiting the ability of Viaero to offer discounts and other services. The impact on rates is evident.

#### IV. CONCLUSION

Viaero respectfully requests the Commission to issue a progression order clarifying that Rule 002.17, in its current form or as it may be amended in this proceeding, does not apply to CMRS carriers, including wireless ETCs. This would allow Viaero to withdraw from this proceeding in a timely manner and allow the Commission to conduct its rulemaking without unnecessary parties.

**NE COLORADO CELLULAR, INC.,  
d/b/a VIAERO WIRELESS**

By



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of June, 2009, an original, eight copies and an electronic copy of the Comments of N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless, on Order Opening Docket and Seeking Comment in Rule and Regulation No. 172 were delivered to:

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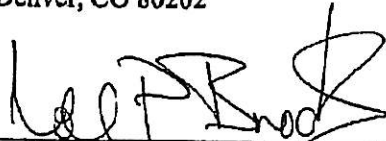
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