

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Protecting Against National Security Threats to the
Communications Supply Chain Through FCC
Programs
WC Docket No. 18-89

ORDER DENYING REQUEST FOR RECONSIDERATION

Adopted: January 18, 2024

Released: January 18, 2024

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. NE Colorado Cellular Inc. dba Viaero Wireless (Viaero) asks the Wireline Competition Bureau (Bureau) to reconsider the Bureau’s denial of reimbursement claims filed by Viaero under the Secure and Trusted Communications Networks Reimbursement Program (Reimbursement Program) for certain equipment that Viaero purchased to replace equipment manufactured by Huawei Technologies Company (Huawei).1 For the reasons set forth below, we maintain that the expenses at issue are not reimbursable under the Reimbursement Program and that denying reimbursement for the expenses is appropriate to prevent waste, fraud, or abuse.

II. BACKGROUND

2. As directed by the Secure and Trusted Communications Networks Act of 2019, as amended (Secure Networks Act), the Commission established the Reimbursement Program to reimburse providers of advanced communications services with ten million or fewer customers for costs reasonably incurred in the removal, replacement, and disposal of covered communications equipment or services from their networks that pose a national security risk, i.e., communications equipment or services produced or provided by Huawei or ZTE Corporation (ZTE) that were obtained by providers on or before June 30, 2020.2 The Reimbursement Program was later funded by a \$1.9 billion congressional

1 Letter from David A. LaFuria, counsel for NE Colorado, Inc., to Trent Harkrader, Chief, Wireline Competition Bureau (Nov. 2, 2023) (Viaero Letter). While the Viaero Letter Request refers to seeking reconsideration of a decision to deny reimbursement by the Fund Administrator for the Replacement Program, the Bureau itself makes the final decision on reimbursement requests. Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs, WC Docket No. 18-89, Second Report and Order, 35 FCC Rcd 14284, 14336, para. 121 (2020) (2020 Supply Chain Order).

2 Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, § 4(a)-(c), 134 Stat. 158 (2020) (codified as amended at 47 U.S.C. §§ 1601-1609) (for purposes of the Secure and Trusted Communications Networks Act, defining “advanced communications services,” by reference to 47 U.S.C. § 1302(d)(1), as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology”). The Commission adopted rules implementing the Secure Networks Act on December 10, 2020. 2020 Supply Chain Order, 35 FCC Rcd 14284. On July 13, 2021, the Commission amended its rules, consistent with amendments to the Secure Networks Act included in the Consolidated Appropriations Act, 2021. Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs, WC Docket No. 18-89, Third Report and Order, 36 FCC Rcd 11958, 11959, para. 2 (2021) (2021 Supply Chain Order). The Commission later clarified that, for purposes of the Reimbursement

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appropriation,³ which is less than the \$5.6 billion in collective funds requested by applicants.⁴ Because demand exceeded available funding, the Secure Networks Act required the Bureau to implement a prioritization scheme where funding was allocated first to approved applicants with 2,000,000 or fewer customers (Priority 1 applicants).⁵ Demand from Priority 1 applicants alone exceeded the amount appropriated, and these applicants consequently received a partial, pro-rated funding allocation of approximately 39.5% of their reasonable and supported estimated costs for removing, replacing, and disposing of covered communications equipment and services.⁶

3. The Secure Networks Act requires Reimbursement Program funds to be used “solely for the purposes of permanently removing . . . , replacing . . . , [and] disposing of [] covered communications equipment or services”⁷ In implementing this language, the Commission recognized that several recipients might have begun the process of removing covered equipment and services from their networks prior to the creation of the Reimbursement Program, and therefore allows recovery of such costs (provided they were incurred after April 17, 2018).⁸ However, regardless of whether the costs were incurred before or after creation of the Reimbursement Program, the Commission adopted a “costs reasonably incurred” standard for determining whether costs associated with the removal, replacement, and disposal of covered communications equipment and services are eligible for reimbursement.⁹

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Program, covered communications equipment or services is limited to the communications equipment or services produced or provided by Huawei Technologies Company (Huawei) or ZTE Corporation (ZTE) that were obtained by providers on or before June 30, 2020. *See* 47 CFR § 1.50004(a)(1)-(2); *2021 Supply Chain Order*, 36 FCC Rcd at 11980, para. 50; *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs – Huawei Designation*, PS Docket No. 19-351, Order, 35 FCC Rcd 6604 (PSHSB 2020) (*Huawei Designation Order*); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs – ZTE Designation*, PS Docket No. 19-352, Order, 35 FCC Rcd 6633 (PSHSB 2020) (*ZTE Designation Order*).

³ 47 U.S.C. § 1603(k) (“In carrying out [the Reimbursement Program], the Commission may not expend more than \$1,900,000,000.”).

⁴ *See Wireline Competition Bureau Announces the Grant of Applications for the Secure and Trusted Communications Networks Reimbursement Program*, WC Docket No. 18-89, Public Notice, DA 22-774, at 1-2 (WCB July 18, 2022) (*SCRIP Granted Applications Public Notice*) (explaining that “[e]ach applicant was required to include in its application estimates for the costs that it will reasonably incur for the permanent removal, replacement, and disposal of covered communications equipment and services” and identifying that, across all filed applications, applicants sought a total of “approximately \$5.6 billion in gross program support”).

⁵ *See* 47 U.S.C. § 1603(d)(5)(C); *see also* 47 CFR § 1.50004(f)(1) (requiring the Bureau to “issue full funding allocations for all eligible providers in the Priority 1 prioritization category before issuing funding allocations in any subsequent prioritization categories”); *SCRIP Granted Applications Public Notice* at 2-3.

⁶ *See* 47 CFR § 1.50004(f)(1) (“If there is insufficient funding to fully fund all requests in a particular prioritization category, then the Wireline Competition Bureau will pro-rate the available funding among all eligible providers in that prioritization category.”); *see also SCRIP Granted Applications Public Notice* at 2-3 (noting that Priority 1 applicants received a pro-rated 39.5% share of their reasonable and supported estimated costs for carrying out their removal, replacement, and disposal).

⁷ 47 U.S.C. § 1603(c)(1)(A)-(C).

⁸ *2020 Supply Chain Order*, 35 FCC Rcd at 14340, paras. 130-33; *Wireline Competition Bureau Finalizes Application Filings, Procedures, Cost Catalog, and Replacement List for the Secure and Trusted Communications Networks Reimbursement Program*, WC Docket No. 18-89, Public Notice, DA 21-947, 36 FCC Rcd 12190, 12206, para. 47 (WCB Aug. 3, 2021).

⁹ The Commission adopted the “costs reasonably incurred” standard to align with the rules of the Broadcast Incentive Auction, stating that it saw “no reason to deviate”⁹ from the Broadcast Incentive Auction standard, which required reimbursement of “costs that are reasonable to provide facilities comparable to those . . . reasonably replaced.” *2020 Supply Chain Order*, 35 FCC Rcd at 14334-36, paras. 120-21, citing *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29

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Recognizing that application of this reasonableness standard would need to occur on a case-by-case basis, the Commission delegated to the Bureau “authority . . . to make reimbursement determinations”¹⁰

4. Prior to passage of the Secure Networks Act and establishment of the Reimbursement Program, Viaero purchased and installed new equipment at several hubs in its network to replace equipment manufactured by Huawei.¹¹ Viaero obtained equipment for several of these hubs from {[]}¹² Viaero intended this equipment to be a permanent replacement for the Huawei equipment.¹³ In July 2021, Viaero selected {[]} as its “primary equipment vendor” to {[]} In January 2023, however, Viaero discovered that its {[]}¹⁵ Viaero asserts that the only remedy for this compatibility issue was to replace the {[]} equipment, and that it therefore purchased equipment from another manufacturer, {[]} to replace the {[]} equipment.¹⁶

5. Viaero then sought reimbursement under the Reimbursement Program for both the original equipment and the equipment that replaced it.¹⁷ The Bureau authorized reimbursing Viaero for the second set of equipment, but not for the first set, which it deemed to be duplicative.

III. DISCUSSION

6. Viaero asks the Bureau reconsider its decision to deny reimbursement claims for the cost of first set of equipment that was later replaced by the second set¹⁸ Viaero argues that (1) reimbursing it for the the first set of equipment as well as the second set of equipment will not increase the overall amount of Reimbursement Program funding made available to Viaero; (2) nothing in the Commission’s orders or rules expressly prohibits the expenditure of funds for interim equipment; and (3) at the time of purchase it intended the first set of equipment to be a permanent replacement for the Huawei equipment, had a good-faith, reasonable belief that the first set of equipment would work with whatever network vendor Viero eventually chose, and obtained the best possible pricing.

7. We deny Viaero’s request to reconsider our denial of reimbursement claims associated with the costs for the {[]} equipment. We find the costs were not reasonably incurred to remove, replace, and dispose of covered Huawei equipment.¹⁹ Viaero initially bought the {[]} equipment to replace Huawei equipment,²⁰ but when Viaero later chose {[]} as its primary

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FCC Rcd 6567, 6821, para. 623 (2014) (*Incentive Auction Order*); see also 31 U.S.C. § 1301(a) (“Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”).

¹⁰ *2020 Supply Chain Order*, 35 FCC Rcd at 14336, para. 121.

¹¹ Viaero Letter at 1.

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ As noted above, Viaero’s Letter asks the Commission to reconsider the Fund Administrator’s decision to deny reimbursement, but it is actually the Bureau that authorizes or denies reimbursement requests, *2020 Supply Chain Order*, 35 FCC Rcd 14284, 14336, para. 121, and we therefore treat Viaero’s Letter as a request for the Bureau to reconsider its own decision under 47 CFR § 1.106(a)(1).

¹⁹ 47 CFR § 1.50004(a).

²⁰ Viaero Letter at 1-2.

network vendor it did not confirm that the {{ }} equipment would be compatible with the {{ }} equipment, which was why it had to buy the {{ }} equipment as a replacement.²¹ The Bureau granted Viaero's reimbursement claim for the {{ }} equipment as being reasonably incurred to replace Huawei equipment. However, we cannot conclude that the costs for the {{ }} equipment were also reasonably incurred, because they are duplicative of the costs for the {{ }} equipment. This duplication of costs was the result of Viaero choosing {{ }} as its primary network vendor, and was avoidable if Viaero had planned differently to ensure compatibility of equipment. Accordingly, on the facts here, we cannot say the costs for the {{ }} equipment were reasonably incurred.

8. In addition, the Bureau has a statutory obligation to prevent waste, fraud, and abuse in the Reimbursement Program,²² and denying reimbursement for the {{ }} equipment is necessary to prevent waste. Viaero asserts that its purchase of {{ }} equipment was reasonable because at the time of purchase, it had a good-faith, reasonable belief that the {{ }} equipment would be compatible with the equipment of whatever primary network vendor Viaero ultimately chose.²³ Regardless of that belief, however, Viaero did not confirm that the {{ }} equipment would be compatible with the {{ }} equipment. Further, even if that failure was inadvertent, the fact remains that Viaero was reimbursed for the {{ }} equipment it used to replace the {{ }} equipment. The Bureau concludes that reimbursing Viaero for duplicative sets of equipment to replace a single set of Huawei equipment would waste Reimbursement Program resources that could be used for other purposes, such as replacing other Huawei equipment in Viaero's network.²⁴ This is an independent basis for denying reimbursement.

9. Viaero raises a number of other arguments in its request for reconsideration, which we now address. First, Viaero argues that reimbursement of the {{ }} equipment would not increase its overall funding allocation from the Reimbursement Program. But even if reimbursing Viaero for both sets of equipment would not increase the overall amount of reimbursement funding allocated to Viaero, that has no bearing on the how we apply the "costs reasonably incurred" standard to specific costs. As discussed above, the costs for the {{ }} equipment were not reasonably incurred because they were duplicative and that duplication was avoidable, and because allowing double reimbursement would improperly waste Reimbursement Program resources. Moreover, the amount allocated to a recipient of the Reimbursement Program is the maximum amount it can be reimbursed for costs reasonably incurred. It is not an amount that recipients are guaranteed or entitled to recover, and recipients cannot recover for costs that do not meet the "costs reasonably incurred" standard (e.g., costs ineligible for reimbursement). Reimbursing Viaero for costs not reasonably incurred would undermine the Reimbursement Program's integrity and fail to protect the Program from waste, fraud, and abuse.

10. Second, we reject Viaero's argument that nothing in the Commission's orders or rules expressly prohibits the expenditure of funds for interim equipment. While the orders and rules do not expressly contemplate whether interim equipment may be found reasonable and thus reimbursable, the *2021 Supply Chain Order* did expound on the "costs reasonably incurred" standard with regard to technology upgrades. In that Order, the Commission directed the Bureau, with the assistance of the Fund Administrator, to first consider whether the cost is typically incurred when transitioning from covered communications equipment and services to a replacement.²⁵ Upgrade costs incurred beyond the cost of

²¹ *Id.*

²² 47 U.S.C. § 1603(e)(1).

²³ Viaero Letter at 3.

²⁴ See *2020 Supply Chain Order* 35 FCC Rcd at 14335, para. 120 (one purpose of the reasonableness standard is to "ensure that excessive, unreasonable costs do not jeopardize the available funding needed by all participating providers").

²⁵ *2021 Supply Chain Order*, 36 FCC Rcd at 11994, para. 89.

comparable replacement are borne by the provider.²⁶ In this context, Viaero argues that the costs for the {{ }} equipment constitutes interim equipment and should be reimbursable. However, the {{ }} equipment was not equipment necessary to transition from covered equipment to a replacement, but rather was supposed to serve as the replacement until it was deemed incompatible with other replacement equipment that Viaero purchased. Viaero has already received reimbursement for the reasonably incurred costs of its replacement equipment.

11. Moreover, the Bureau’s Frequently Asked Questions (FAQs) regarding the Reimbursement Program address the use of temporary/interim facilities and this FAQ supports our interpretation of the “costs reasonably incurred” standard above. In response to the question “Are temporary/interim facilities reimbursable?” the FAQs state that “if a provider requires interim facilities to meet its removal, replacement, or disposal term, or avoid prolonged down-time during the transition, then interim facilities may be reimbursable. Circumstances will be considered on a case-by-case basis”²⁷ Viaero asserts that {{

}}²⁸ Viaero then contends that while the {{ }} equipment was originally intended to be permanent equipment, it became “interim” equipment when it had to be replaced due to incompatibility, and therefore should be reimbursable under the approach described in the FAQ.²⁹ We disagree. The FAQ merely states that requests for reimbursement of interim facilities may be granted and will be considered on a case-by-case basis.³⁰ The FAQ does not state that temporary or interim facilities will always be deemed reimbursable. In addition, it is not clear that the {{ }} equipment would qualify as “interim” facilities. Although “interim” facilities are not defined, the FAQ refers to “temporary/interim equipment” used to help a recipient meet its removal, replacement, and disposal term deadline, or to avoid prolonged downtime during the transition to new equipment.³¹ In other words, it contemplates equipment that was always intended to be temporary and was installed only to help meet the term deadline or prevent outages.³² That is not the situation here. To the contrary, Viaero asserts that the {{ }} equipment was purchased with the intent of being permanent replacement equipment, and it was replaced only because it was incompatible with the equipment of the primary vendor that Viaero later chose for its network.³³ In other words, the {{ }} equipment was not intended to be interim equipment, and became duplicative equipment as a result of Viaero’s choice of {{ }} as its primary network vendor. and failure to determine in advance whether the {{ }} equipment would be compatible with the primary vendor’s equipment.

12. Third, Viaero argues that it had a good-faith, reasonable belief that the {{ }} equipment would be a permanent replacement for the Huawei multiplexing equipment and did not learn until much later that the {{ }} equipment was not compatible with the primary network vendor’s

²⁶ *Id.*

²⁷ Secure and Trusted Communications Networks Reimbursement Program: Frequently Asked Questions, <https://docs.fcc.gov/public/attachments/DA-23-991A2.pdf>, last visited Jan. 16, 2024 (Reimbursement Program FAQs).

²⁸ Viaero Letter at 2-3.

²⁹ *Id.*

³⁰ Reimbursement Program FAQs (stating, in response to question “Are temporary/interim facilities reimbursable?” that “Circumstances will be considered on a case-by-case basis.”)

³¹ *Id.* (response to question “Are temporary/interim facilities reimbursable?”).

³² See *Incentive Auction Order*, 29 FCC Rcd at 6823-24, para. 627 (stating that interim facilities may be used for temporary operations for a station or to meet a construction deadline or to avoid prolonged periods off the air while repacking changes are made).

³³ Viaero Letter at 2-3.

equipment.³⁴ But even if Viaero acted in good faith, that does not change the fact that it exercised its business judgment to purchase two sets of equipment, one of which ultimately proved to be incompatible, to replace one set of Huawei equipment, and now seeks full reimbursement for both replacement sets. As discussed above, while Viaero describes this as an unforeseen circumstance, the question remains whether Viaero or the Reimbursement Program should bear the cost of the duplicative equipment. We find that it would be unreasonable for the Reimbursement Program to bear the cost of both sets of equipment, and doing so could amount to waste of Reimbursement Program resources.

13. For these reasons, we deny Viaero's request to reconsider our decision to deny reimbursement for the {[]} equipment at issue.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, pursuant to section 4(i)-(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i)-(j), section 4(c)(1)(a) of the Secure and Trusted Communications Networks Act, as amended, 47 U.S.C. § 1603(c)(1)(A), and sections 0.204, 0.291, 1.106, and 1.50004(a) of the Commission's rules, 47 CFR §§ 0.204, 0.291, 1.106, 1.50004(a), the request for reconsideration filed by NE Colorado, Inc. dba Viaero Wireless is DENIED.

15. IT IS FURTHER ORDERED that, pursuant to the authority delegated in section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Trent B. Harkrader
Chief
Wireline Competition Bureau

³⁴ *Id.* at 3.