

# SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

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## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application    ) Application No. C-5140  
of Leonard and Diana Rainforth,    )  
Doniphan, Nebraska, seeking        )  
authority to receive advanced        ) GRANTED  
telecommunications capability        )  
service from the Doniphan            )  
Exchange of Hamilton Telephone       )  
Company.                                ) Entered: December 8, 2020

### BY THE COMMISSION:

By Application filed June 15, 2020, Leonard and Diana Rainforth of Doniphan, Nebraska, sought authority to receive advanced telecommunications service from the Doniphan exchange of the Hamilton Telephone Company ("Hamilton"), in lieu of telephone service from the Hansen exchange of Windstream Nebraska, Inc. ("Windstream"). Notice of the Application appeared in The Daily Record, Omaha, Nebraska, on June 25, 2020.

### E V I D E N C E

On August 20, 2020, Windstream sent notice via e-mail stating that it did not consent to the boundary change. Pursuant to Neb. Rev. Stat. § 86-135, the Commission held a hearing on October 8, 2020 at the Doniphan Event Center, 103 W Pine Street, Doniphan, Nebraska 68832. The application, publication, and hearing notice were made part of the record by the Commission. Applicants were not represented by counsel. Mary Jacobson appeared on behalf of Windstream and called Cris Wright to testify on Windstream's behalf. Pat Shaw testified on behalf of Hamilton but was not represented by counsel. Shana Knutson appeared on behalf of the Commission staff.

Commission exhibits numbered 1 - 6 were offered and accepted. These exhibits included Exhibit 1, consisting of Mr. and Mrs. Rainforth's application, and Exhibit 4 consisting of a Google map image showing the relationship between the Rainforth's address and the two Windstream fixed wireless facilities in the area. Additionally, Late-filed Exhibits 5-6 consisting of photos of the Rainforth's internet speeds and monthly bill were offered and accepted.

Mr. Rainforth testified in support of the application. Mr. and Mrs. Rainforth sought a boundary change for their property located at 7387 West Rosedale Road, Doniphan, Nebraska. Mr. Rainforth

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testified generally about his needs for broadband service and the nature of the service he was receiving.<sup>1</sup>

Mr. Rainforth stated that approximately one year ago he received information from Windstream indicating their system would produce up to 100 Mbps.<sup>2</sup> He was aware, due to his location, he was not going to get that level of speed but stated that receiving anywhere from 10 to 20 Mbps consistently would allow his household to run as needed.<sup>3</sup> Mr. Rainforth stated when the technicians installed it, they told him he should have almost double the download than the upload, but he was unsure if that was a fact.<sup>4</sup> He testified that from October 2019 through January 2020, they had no issues to speak of and no real complaints, but the speed has slowly worsened.<sup>5</sup>

Mr. Rainforth testified he is retired but working part-time.<sup>6</sup> Mrs. Rainforth works at Central Community College, and in the past year, she began to work from home as needed.<sup>7</sup> He also stated that last spring his grandchildren would do some schooling at his residence at well.<sup>8</sup> At that time, there were infrequent outages.<sup>9</sup> When he did have an outage, he stated he contacted Windstream and a representative would talk him through resolving the issue. They were able to help him restore his connection.<sup>10</sup> He understood with the system Windstream installed, that he would have an outage from time to time or that service would slow down.<sup>11</sup>

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<sup>1</sup> See Testimony of Leonard Rainforth, Hearing Transcript (TR) 8-32, 44-45 and 48-49.

<sup>2</sup> TR 9:16-19.

<sup>3</sup> TR 9:19-23.

<sup>4</sup> See TR 18:4-8.

<sup>5</sup> TR 14:11-15.

<sup>6</sup> TR 9:24-25.

<sup>7</sup> See TR 9:24-10:3.

<sup>8</sup> TR 10:4-9.

<sup>9</sup> See TR 10:10-13.

<sup>10</sup> TR 10:10-19.

<sup>11</sup> See *id.*

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In May of 2020, Mrs. Rainforth began working from home.<sup>12</sup> When she began her workday, she received speeds of up to 25-30 Mbps. But as the day progressed the speed would marginally decrease.<sup>13</sup> Mr. Rainforth testified there were times mid-week when Mrs. Rainforth began to work from home and within the hour she would need to go into work at the college for the day because of outages or slow Internet speeds.<sup>14</sup>

The Rainforths had several outages and interruptions in June.<sup>15</sup> Mr. Rainforth testified that he called Windstream's tech line on approximately three separate occasions. These calls lasted from two to two and a half hours.<sup>16</sup> In addition, at that time Mr. Rainforth, who was a member of the Regional Planning Commission for Hall County, was unable to attend his meeting via Zoom due to lack of service or poor connectivity.<sup>17</sup>

Mr. Rainforth testified that after these calls, service technicians visited his home and determined the antenna needed to be moved higher. The antenna was moved to one spot for a couple days, at which point the technicians called and stated it needed to be moved again.<sup>18</sup> The antenna was located at the peak of the home but the Rainforths were asked if they would allow the arm of the antenna to be moved around the corner and about three feet off the side of the home in hopes of retaining a stronger signal in that location.<sup>19</sup>

After moving the antenna, Mr. Rainforth testified the Internet speeds increased to 50-60 Mbps in the mornings. However, starting five o'clock and onwards, there would either be an outage, or the speed would drop down to 1-2 Mbps.<sup>20</sup> The Rainforths also use the

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<sup>12</sup> TR 10:20-21.

<sup>13</sup> See TR 10:21-11:7.

<sup>14</sup> *Id.*

<sup>15</sup> TR 11:8-14.

<sup>16</sup> *Id.*

<sup>17</sup> See TR 11:15-23.

<sup>18</sup> See TR 11:25-12:7.

<sup>19</sup> TR 12:8-16.

<sup>20</sup> See TR 12:17-21.

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Internet service to stream from multiple devices which drops the speed down to approximately 2 Mbps when streaming.<sup>21</sup>

Beginning in August 2020, Mr. Rainforth stated he would use the Windstream website to check the Internet speeds and took photos (Exhibit 5) of the speed first thing in the morning and again when it slowed.<sup>22</sup> Depending on how long the Internet was down, it would come back on for maybe 3-4 hours at a time, then slow and go back down. Mr. Rainforth testified there were evenings when they lacked service altogether.<sup>23</sup> When this happened, he would contact the service line, and the technician would advise him to unplug the router, wait a minute, plug it back in, and was told that should take care of it. It would come back up, but the service was never consistent.<sup>24</sup>

Mr. Rainforth testified that their home is located 5.5 miles from one tower and the other tower is 4.5 miles to the west.<sup>25</sup> Since the home is in between the two tower locations, he believes trees and terrain can cause problems.<sup>26</sup> At one point, he cut down two 25-year-old trees in the front yard in hopes of getting the service they had expected. He stated this did work for a time, but it has not been consistent.<sup>27</sup>

Upon questioning, Mr. Rainforth testified that they have not had a landline telephone service since switching to Windstream.<sup>28</sup> He stated that the billing is confusing when asked what they currently pay for their monthly internet service due to a promotion of \$36/month at the start, and then an e-mailed bill showing \$94/month, but the next month there are discounts.<sup>29</sup> When asked how far their residence is from Hamilton service, he responded saying they have fiber optic buried directly in front of their home, and

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<sup>21</sup> See TR 12:22-13:3.

<sup>22</sup> See TR 13:3-12.

<sup>23</sup> TR 13:17-18.

<sup>24</sup> See TR 13:12-25.

<sup>25</sup> TR 15:4-8.

<sup>26</sup> *Id.*

<sup>27</sup> TR 15:10-17.

<sup>28</sup> TR 21:2-8.

<sup>29</sup> TR 22:13-23.

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only 60-70 feet of fiber would need to be run to get to the house.<sup>30</sup> Further questioning led to Mr. Rainforth testifying that they do not pay for a specific speed tier, just for whatever service is available.<sup>31</sup>

Since the application for boundary change, the Rainforths have not changed their service package or upgraded their internet, nor have they been offered better service from Windstream.<sup>32</sup> Service technicians have not been to the residence other than the two times in July for the moving of the antenna.<sup>33</sup> Mr. Rainforth testified that in a seven day span, four nights a week there will be an outage of some sort to an evening where there is no Internet whatsoever. As of the date of the hearing, he stated the service they were receiving from Windstream was marginal at best due to the inconsistent service.<sup>34</sup>

Ms. Cris Wright, the local manager for Windstream, testified in opposition to the application. Ms. Wright testified that the fixed wireless service was installed from the Hansen site in May 2019, with the Rainforth's service being installed in September 2019.<sup>35</sup> The Rainforth's bill consisted of \$47.50/month for the internet plan, a \$5.99/month modem charge, approximately \$2/month in taxes, and a one year \$8/month credit which recently fell off the bill.<sup>36</sup> Upon moving the antenna, the technician had 70 Mbps from the antenna with approximately 50 Mbps effective throughout the home.<sup>37</sup> Ms. Wright testified that one week prior to the hearing he remotely logged in and performed a speed test from the Rainforth's modem. At that time, the service was running at 50 Mbps, and it showed in the last seven days in the evenings, it was around 10 Mbps.<sup>38</sup>

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<sup>30</sup> See TR 23:2-13.

<sup>31</sup> See TR 24:24-25:2.

<sup>32</sup> TR 29:19-30:11.

<sup>33</sup> TR 30:12-31:6.

<sup>34</sup> See TR 31:7-32:4.

<sup>35</sup> See Testimony of Cris Wright, TR 33:24-45:15.

<sup>36</sup> See TR 34:5-10.

<sup>37</sup> TR 34:11-17.

<sup>38</sup> TR 34:18-22.

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Upon questioning, Ms. Wright testified that at a maximum, 21 customers/modems can be on a particular quadrant without having any kind of speed issue, but she was unable to state how many were working off the same quadrant as the Rainforths.<sup>39</sup> Ms. Wright stated that the difference in speed activities Mr. Rainforth testified to versus the speed activity Ms. Wright saw when he tested the speed could be because Mr. Rainforth is probably testing from a Wi-Fi device instead of testing directly hardwired into the modem.<sup>40</sup>

Ms. Wright testified that when she tested the Internet speed the week prior, it was approximately ten o'clock in the morning, and she was unaware that there were any sort of issues throughout the day.<sup>41</sup> She testified that he had not done any testing in the evening or over the weekends when traffic would presumably be higher. Ms. Wright stated she was unaware that there were any issues, nor had they had complaints.<sup>42</sup>

Upon further questioning by the Commissioners, Ms. Wright testified that a technician only gets dispatched if there is work required out in the field.<sup>43</sup> Some of the calls that go into the call center are resolved over the phone, in which case Ms. Wright would not know about those calls.<sup>44</sup> Ms. Wright further testified that at this time, Windstream has no plans to deploy fiber to the premises in the Doniphan Exchange.<sup>45</sup>

Mr. Pat Shaw, General Manager for Hamilton Telecommunications, testified on behalf of Hamilton. Hamilton's fastest speed tier is 1 Gbps download by 250 Mbps upload.<sup>46</sup> The cost of that service is approximately \$89.95, which is the cost when bundled.<sup>47</sup> Hamilton's

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<sup>39</sup> See TR 35:22-36:6.

<sup>40</sup> TR 36:21-24.

<sup>41</sup> TR 39:5-14.

<sup>42</sup> TR 40:9-16.

<sup>43</sup> TR 40:15-16.

<sup>44</sup> See TR 40:17-41:20.

<sup>45</sup> TR 42:12-17.

<sup>46</sup> See Testimony of Pat Shaw, TR 46:5-48:13.

<sup>47</sup> TR 46:18-21.

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second tier would be 250 Mbps download by 50 Mbps upload.<sup>48</sup> Hamilton's third tier is 50 Mbps download by 25 Mbps upload.<sup>49</sup> Mr. Shaw further testified that the Rainforth's house is located right behind one of Hamilton's vaults and that service could be up and running within 60 days.<sup>50</sup>

In response to questions from Commissioners, Mr. Shaw stated Applicants would have no problems with streaming if Hamilton were to use the 50 Mbps download by 25 Mbps upload.<sup>51</sup> Upon questioning from staff, Mr. Shaw testified that Hamilton consented to the application.<sup>52</sup> Hamilton would be able to provide service to the Applicants within 60 days or as soon as the boundary change was made.<sup>53</sup>

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

Changes of a local exchange territory are governed by *Neb. Rev. Stat.* §§ 86-135 to 86-138. Section 86-135 states only upon non-consent of all telephone carriers involved shall the Commission hold a public hearing in the application. With a protest by Windstream opposing the proposed boundary change, the Commission held a public hearing on October 8, 2020, in Doniphan, Nebraska.<sup>54</sup>

Hamilton and Windstream are local exchange carriers holding certificates of public convenience and necessity to provide local exchange service in their respective territories. Mr. Rainforth seeks service to his house, which is located within the boundary of Windstream's Hansen Exchange, and has requested a boundary change so that he may receive advanced telecommunications service from the Doniphan Exchange of Hamilton.

Windstream does not consent to the boundary change in question. Hamilton does consent to the boundary change and is willing to pay

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<sup>48</sup> TR 46:13-15.

<sup>49</sup> TR 46:14-15.

<sup>50</sup> TR 46:9-11 and 46:22-24.

<sup>51</sup> TR 47:9-19.

<sup>52</sup> See TR 46:11-13.

<sup>53</sup> TR 46:22-24.

<sup>54</sup> Notice of the hearing was mailed to the interested parties on or around August 31, 2020.

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related costs.

The Commission finds that, based upon the evidence presented that the Applicants were not at the time of the Application receiving advanced telecommunications capability service at their home despite making good faith attempts to obtain advanced telecommunications capability service from Windstream.

The main question at issue is whether Applicants were receiving advanced telecommunications capability service from the telecommunications company which furnishes telecommunications service in the local exchange area in which the applicant resides pursuant to Neb. Rev. Stat. § 86-136(1)(Supp. 2019).<sup>55</sup> Neb. Rev. Stat. § 86-103.01 defines advanced telecommunications capability service as high-speed, broadband telecommunications capability provided by a local exchange carrier that enables users to originate and receive high-quality voice, data, graphics, and video communications using any technology. In considering this application, we weigh the testimony offered by Mr. Rainforth and offered by Windstream. Because the statute is written in terms of what is "received" by the Applicant, we find it relevant to assess this capability from the end user's perspective rather than the raw potential of what the telecommunications company says can be delivered in ideal conditions. We believe this is meant to be a specific factual determination which can vary from case to case.

In this particular case, Applicants appeared to have gone through considerable lengths to obtain advanced telecommunications capability service from Windstream. They removed trees from their property which posed possible line of sight issues to the towers. They permitted the technicians to move the antenna to a more elevated location on their home. They also worked with technicians in attempts to resolve the issues. However, according to the testimony offered by Mr. Rainforth, slower speeds and service issues persisted. Exhibit 5 offered by Mr. Rainforth and received into evidence demonstrated that there were a number of occasions in the afternoon and evening hours where slow network connections prevented them from using their service. Windstream did not dispute Mr. Rainforth's evidence that there were difficulties with his service which resulted in slow broadband speeds and connection issues. Rather, Ms. Wright, Windstream's witness, testified to performing a speed test of her own, which demonstrated a throughput of 50 Mbps. However, she testified the test was conducted in the morning not

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<sup>55</sup> In 2019, the Legislature modified § 86-136 (1) which previously required the Commission to determine whether an Applicant would receive advanced telecommunications capability service within a reasonable period of time.



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during evening or weekend hours. Data supporting her testimony and the speed of the service generally provided to the Applicants was not filed. Ms. Wright indicated she did not have an answer to the concern that four out of seven nights Mr. Rainforth generally does not have good or any broadband service.

We note that advanced telecommunications capability service provided to consumers does not have to be perfect. Service interruptions can occur on occasion due to various factors that may or may not be in the control of a carrier. However, when the level of service is so inconsistent that it becomes unreliable, it can render access to that service effectively unavailable. Here, we consider that to be the case. Accordingly, based on the testimony provided, we are persuaded that the Applicants were not receiving advanced telecommunications capability service from Windstream.

The Commission further finds that the revision of the exchange service area is economically sound and will not impair the capabilities of the telecommunications companies affected by the change to serve their subscribers.

The Commission further finds that although the Applicant is willing to pay construction and other costs related to this boundary change, Hamilton has stated its willingness to pay such costs, and this requirement is therefore waived under Neb. Rev. Stat. § 86-136(3).

Being fully advised in the premises, the Commission hereby finds that the requirements of Neb. Rev. Stat. § 86-136 have been met and the Applicant's request should be granted, and the exchange boundaries should be modified to allow the Applicants to receive advanced telecommunications capability service from the Doniphan Exchange of Hamilton Telephone Company.

### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the application should be, and it is hereby, granted.

IT IS FURTHER ORDERED that the revised exchange boundaries detailed in Attachment "A" to this Order be, and are hereby made, the official boundaries of the Doniphan Exchange of Hamilton Telephone company and the Hansen Exchange of Windstream Nebraska, Inc.

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ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 8th day of December, 2020.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

  
Chair

ATTEST:

  
Executive Director