



MT. HOOD CABLE REGULATORY COMMISSION

1120 SW Fifth Ave. #1305 • Portland, OR 97204

Phone: (503) 823-5385 • Fax (503) 823-5370

Email: www.mhcrc.org

Serving Multnomah County and the Cities of Fairview, Gresham, Portland, Troutdale and Wood Village

MHCRC REPORT & RECOMMENDATION **VERIZON CABLE FRANCHISE**

TO: Mayor & City Council, *Cities of Fairview, Gresham, Troutdale & Wood Village*
Chair & Board of Commissioners, *Multnomah County*

FROM: Mt. Hood Cable Regulatory Commission (*MHCRC*)
Norm Thomas, Chair, MHCRC

SUBJ: **MHCRC-Recommended Cable Franchise with Verizon Northwest**

Date: October 8, 2008

I. MHCRC RECOMMENDATION

The Mt. Hood Cable Regulatory Commission recommends that the City Councils of Fairview, Gresham, Troutdale and Wood Village, and the Multnomah County Commission (collectively referred to herein as the “MHCRC Jurisdictions”) consider and approve the Verizon Cable Services Franchise, in substantially the same form as the Franchise (with Exhibits) attached hereto as Attachment A. The attached Franchise has been recommended by a vote of the MHCRC on October 2, 2008, after negotiations with Verizon and consideration of substantial public comment from the community and interested parties in the record of the MHCRC public hearing held September 15, 2008.

II. EXECUTIVE SUMMARY

After a lengthy negotiation process on behalf of the MHCRC Jurisdictions, where mutual agreement was reached between MHCRC and Verizon negotiators on many (though not all) critical franchise provisions, the MHCRC is pleased to forward to the Jurisdictions a recommended cable franchise which, taken as a whole, we believe is in the best interest of all parties, and which specifically:

- Protects fundamental MHCRC Jurisdiction legal authority;
- Is reasonably commensurate with the incumbent Comcast franchise;
- Protects the interests of cable subscribers and the public, and provides adequate and meaningful enforcement tools;
- Protects and provides for key public benefits in the MHCRC Verizon franchise areas, including community media (e.g. MetroEast), cable customer service, and local authority over cable services to the extent provided under applicable law; and which
- Recognizes the reality of a competitive cable services environment, and upon objective consideration, should provide Verizon everything necessary to begin providing FiOS video service in Verizon’s proposed east County service area as soon as practicable.

The MHCRC believes it is also important for the Jurisdictions to recognize that (for the first time in the history of the MHCRC) the Commission is forwarding to the Jurisdictions a recommendation on a franchise agreement that is not fully agreed to, despite substantial compromises offered by the MHCRC to Verizon on the remaining open issues. At the October 2nd MHCRC meeting and vote, Verizon representatives declined to describe Verizon's views or address Verizon's final position on a variety of proposed franchise provisions, including significant proposed MHCRC compromises which addressed all Verizon's concerns presented at the September MHCRC public hearing and during negotiations. In this context, the MHCRC wishes to convey two additional critical understandings to the Jurisdictions:

- The proposed franchise contains substantial and significant compromises on the key remaining open issues, which incorporated and addressed, to the greatest degree possible, Verizon's positions on these issues. The MHCRC strongly believes the franchise, with the compromises proposed, goes as far toward Verizon's positions as possible, short of the MHCRC Jurisdictions giving up critical local authority and effective enforcement tools to ensure compliance with the franchise agreement.
- Regardless of subsequent discussions between Verizon and the Jurisdictions which may occur regarding the MHCRC recommendation on the remaining open issues, the MHCRC strongly recommends that the City Councils and County Commission include all provisions that were fully-negotiated and agreed upon by Verizon and the MHCRC in any final franchise approved by the Jurisdictions.

III. OVERVIEW OF MHCRC ROLE IN GRANT OF CABLE FRANCHISES

The City Councils of Gresham, Fairview, Portland, Troutdale and Wood Village, and Multnomah County ("Jurisdictions") created the Mt. Hood Cable Regulatory Commission ("MHCRC" or "Commission") in 1993 by intergovernmental agreement ("IGA") to carry out cable regulation and administration on their behalf. The MHCRC has carried out this duty diligently over the subsequent fifteen years, and has successfully negotiated and recommended, among other things, the renewal provisions of existing Jurisdiction cable franchises (in 1996 and 1998), the transfer of cable franchises (in 1999 and 2002), and the grant of new, competitive cable franchises to non-incumbent cable operators (in 2000, 2007 and 2008). The MHCRC has carried out its duties in this regard on behalf of the Jurisdictions by successfully concluding negotiations and recommending agreed-on cable franchises with companies large and small, including multiple newly-formed competitive companies wishing to enter the cable television services market (in 2000), a major Regional Bell Operating Company (in 2007), and a small, family-owned telephone company wishing to provide advanced cable television services in rural areas of east Multnomah County (in 2008). Under the IGA, the Jurisdictions have reserved full authority to act on their own behalf in the grant of cable franchise agreements. In this respect, the MHCRC acts in an advisory capacity to the Jurisdictions and each Jurisdiction has agreed in the IGA to take no action on the grant of a cable franchise until the MHCRC has had the opportunity to consider the matter and make a recommendation to the Jurisdictions. Each Jurisdiction has also agreed in the IGA to make a good faith effort to weigh the impact of any decision to grant a cable franchise on the continuity of the Commission. It is pursuant to this authority delegated to the MHCRC under the IGA that the Commission hereby respectfully submits its final recommendation on the Verizon cable franchise to the Verizon Jurisdiction City Councils and the County Commission.

IV. SUMMARY OF MHCRC/VERIZON MUTUALLY-AGREED PROVISIONS

Summary of MHCRC recommendation:

Regardless of subsequent discussions which may occur with Verizon on any of the MHCRC recommendations on the remaining open issues, the MHCRC strongly recommends that the City Councils and County Commission include all provisions of the proposed Franchise (Attachment A) that were fully-negotiated and agreed upon by Verizon and the MHCRC in any final franchise approved by the Jurisdictions.

Discussion: Part I of the attached Comparison Chart summarizes many of the key areas of agreement reached by MHCRC and Verizon negotiators, and approved by the MHCRC on October 2nd. These significant agreed-on provisions include PEG Capital/I-Net support, PEG channel capacity and interconnection, service area and extension requirements, franchise fee definitions and payments, insurance and indemnification, renewal and transfer provisions, and many other sections of the proposed Franchise. The MHCRC's view is that it is critical that all such mutually-agreed provisions be included in any Verizon cable franchise entered into by the MHCRC Jurisdictions.

During the October 2nd MHCRC meeting and vote, Verizon representatives declined to describe Verizon's views or address Verizon's final position on a variety of MHCRC staff-proposed compromise on open issues (summarized in this memorandum in Section V, below, and in the attached Comparison Chart Attachment B, Part II). However, the MHCRC's view is that lack of confirmed agreement on remaining open issues should not obscure the fact that after many months of negotiations, MHCRC and Verizon negotiators successfully confirmed mutually agreeable language in most other areas of the Franchise. Verizon publicly committed, at the MHCRC September 15th public hearing, to such an approach and agreed to include all mutually-agreed provisions in any ultimate franchise. To do otherwise creates a potential risk of wholesale renegotiation of the proposed franchise agreement on a Jurisdiction-by-Jurisdiction basis with unknown and unknowable consequences to the Jurisdictions' individual and collective legal authority and to the allocation of respective franchise public benefits provided in the franchise. In addition, unraveling already agreed upon language may have unintended negative consequences on the current cable franchise renewal process being conducted under federal statutory guidelines with the Jurisdictions' incumbent cable operator Comcast.

V. SUMMARY OF REMAINING OPEN ISSUES & MHCRC COMPROMISE PROPOSALS

As discussed, at the final MHCRC consideration and vote on the recommended Verizon franchise (Attachment A), Verizon representatives for the most part declined to discuss or disclose Verizon's views on final staff-recommended provisions on the open issues, which included significant compromises addressing most, if not all, of Verizon's stated concerns in several key areas. Staff-proposed compromises were at the same time focused on attempting to preserve as far as possible critical local Jurisdiction authority, the need for consistent cable customer service standards for all cable customers regardless of provider, and meaningful enforcement tools to ensure franchise compliance. Ultimately, the MHCRC honored Verizon's repeated request at the meeting for the MHCRC to take final action on a recommended cable franchise. However, in light of Verizon's decision not to disclose to the MHCRC Verizon's final

views on the provisions and compromises proposed, the MHCRC respectfully presents its analysis and recommendation on remaining open issues, as set forth below.

1. Jurisdiction Authority over Cable Customer Service & Consumer Protection Standards

Specific Provisions of MHCRC-Recommended Compromise:

- (1) Jurisdictions agree to forgo application to Verizon of revisions, if any, to cable customer service standards for initial five (5) years of a 10 year franchise;
- (2) Jurisdictions can apply revised standards to Verizon after five years (in Years 6-10) provided that Jurisdictions have considered costs to Verizon and benefits to consumers, and involved Verizon in development of revised standards;
- (3) A transition period of up to six months is provided to enable Verizon to implement any revised standards (in Years 6-10);
- (4) The Franchise makes clear that Verizon is free at any time to separately pursue a minor variance process with respect to any revised standards Verizon judges to be operationally burdensome

Overview of policy basis for MHCRC compromise recommendation:

- (1) Compromise franchise provisions “lock” existing customer service standards for a substantial period of time (5 years), but preserves the Jurisdictions existing legislative authority over cable customer service standards in a manner consistent with Oregon law; this compromise is designed to meet Verizon’s desire for certainty and stability in the newly-competitive cable marketplace, and address Verizon’s expressed concern that the Jurisdictions might act capriciously without regard to Verizon’s business or financial interests; and
- (2) The compromise provisions provide the means for cable customer service and consumer protection standards to **eventually become consistent** for all cable customers in MHCRC areas in the later years of the Verizon franchise (Years 6-10), after providing an initial stable period (Years 1-5) for Verizon to introduce its competitive FiOS cable services.
- (3) Comcast’s franchise explicitly provides for the company’s obligation to adhere to locally legislated customer service standards as recognized in Federal law. The MHCRC’s compromise places Verizon and Comcast on a level playing field in this regard after allowing five years for Verizon to establish its marketplace presence in its East County service area.

Applicable Franchise provision(s): Sections 9.1 and 9.2

Discussion: The proposed MHCRC compromise meets Verizon’s expressed concerns “more than half way” on this issue. The compromise represents a substantial effort by the MHCRC to address Verizon’s expressed desire for “certainty” in regulations for customer service during the start-up period of its competitive cable system in Multnomah County. This compromise provides Verizon more than five years of the “certainty” Verizon has requested in connection with revisions to customer service standards, as well as a stable period to address Verizon’s concern about possible “capricious” action by the Jurisdictions (5+ years counts both the five year “lock” period plus a transition period of up to six months). This enables Verizon to offer FiOS TV under existing Jurisdiction customer service standards, but without fear of possible ‘operational disruption’ due to changes in standards during the initial years of establishing market presence for FiOS TV in East County. Moreover, even should revised cable customer standards (if any) be later applied, the compromise proposal provides Verizon with unprecedented procedural protections ensuring Verizon is given notice and an opportunity to be heard, a cost/benefit test is

imposed regarding any changes in the standards, and due process for Verizon is assured through franchise-specified participation in the MHCRC/Jurisdiction legislative process. In addition, a transition period of up to six months is provided to Verizon to implement changes should any revisions in the standards be adopted by the MHCRC Jurisdictions. Above and beyond this, Verizon is assured in writing of its right to pursue a minor variance process separately at any time if Verizon deems any particular customer service standards revision unduly burdensome. To summarize: The proposed compromise in the MHCRC-recommended cable franchise fairly balances Verizon's expressed core concerns against the critical need to protect the Jurisdictions' authority (recognized by federal law) to establish and adjust cable customer service standards, while providing the means to ensure consistency for all cable customer service standards in MHCRC territory on a Countywide basis. Finally, and not least, it should be noted that in the MHCRC public record of this process, the MHCRC received nearly 30 comments on the customer service standards authority issue, and the substantial majority (20 out of 30, including from AARP and CUB) strongly supported the MHCRC Jurisdictions retaining their authority in this area.

2. Adequate and Meaningful Franchise Enforcement Remedies

Specific Provisions of MHCRC-Recommended Compromise:

- (1) Establishes annual cap on overall fines at the level of \$200,000 in any twelve-month period;
- (2) Deletes remedy of requiring rate reductions, subscriber refunds, and/or reducing the term of the Franchise, as requested by Verizon;
- (3) Accommodates Verizon concerns on process issues in MHCRC franchise violation proceedings;
- (4) Concedes to Verizon position on amount of Security Fund (\$50,000 instead of \$100,000).

Overview of policy basis for MHCRC compromise recommendation:

- (1) Restructures and compromises on Franchise remedies and enforcement procedures to respond to Verizon concerns as much as possible while preserving effective and meaningful overall franchise enforcement structure;
- (2) Concedes issue of overall cap on fines, but sets cap at a level judged to be a reasonably effective deterrent to a company the size of Verizon;
- (3) As part of overall compromise, concedes to Verizon position and eliminates three separate franchise remedies (fee or rate reductions, grant of refunds to subscribers and reduction in term of franchise);
- (4) Comcast's franchise includes "level playing field" language which means that Comcast would, most likely, request the same level of remedies that are included in any Verizon franchise.

Applicable Franchise provision(s): Sections 14.2., 14.7 and 14.9

Discussion: Throughout the negotiations, Verizon had proposed to severely limit the remedies available to the MHCRC in the franchise to address material franchise violations. Most significantly, Verizon desired to limit per-incident and annual levels of financial penalties to levels which were substantially less than those in the incumbent Comcast franchise. The MHCRC's recommendation, after consultation with Jurisdiction elected officials, is that remedies in place must deter in a meaningful way a company the size of Verizon from material franchise violations. The MHCRC's position is that any fine caps (and no commensurate limitations exist in the Comcast franchise), would need to be set at a high enough level to provide such a deterrent. The MHCRC-recommended Franchise includes public benefit obligations that are particular to the East County community (including, e.g. PEG access channels and

facilities; PEG capital funds; franchise fee payments, a specified service area, etc) and represent a significant commitment on Verizon's part. Verizon as a company is a multi-billion dollar company, and therefore any such caps should be set accordingly. MHCRC consultations on this issue (at both the MHCRC and Jurisdictional levels) tended to show a consensus that any such "caps" would not be adequate to deter a company of Verizon's size and scope from violating the franchise unless established at a six-figure level. After consultation with several Jurisdiction elected officials, the MHCRC agreed to concede to Verizon's position and include an overall annual cap (even though no such cap exists for Comcast) but set the cap at \$200,000 annually for material franchise violations. The MHCRC also agreed to "go the last mile" to accommodate Verizon's position and eliminated three franchise remedies contained in the Comcast franchise to which Verizon has objected (fee or rate reductions, grant of refunds to subscribers and reduction in term of franchise), while also accepting a reduced amount for the Franchise Security Fund (\$50,000 instead of the \$100,000 MHCRC staff had otherwise proposed). It should be understood that the MHCRC's recommended compromise leaves only two remaining remedies for material franchise violations: (1) fines; and (2) termination/revocation of the franchise. Thus, if this compromise is approved, the MHCRC and Jurisdictions will be left with only fines and franchise termination as remedies; therefore, setting a reasonable upper limit for potential fines becomes even more critical in assuring franchise compliance.

3. Local Authority for Verizon "cable" vs "telephone" facilities (Title II vs Title VI)

Specific Provisions of MHCRC-Recommended Compromise:

- (1) Recommended Franchise incorporates Verizon-requested distinction (Section 1.7) that "Cable System shall be limited to optical spectrum" etc., and "shall not include tangible network facilities of a common carrier (under) Title II" or "Non-Cable services"; proposed Franchise also accepts (Section 1.34) that Verizon's FTTP Network facilities are "Telecommunications Facilities" to the extent they are used to provide Telecommunications Services.
- (2) Recommended Franchise includes non-waiver provision (Section 3.6.3) designed to make it clear that neither the MHCRC Jurisdictions nor Verizon waives any rights under applicable law (including federal, state and local law) unless otherwise declared in writing in the Franchise agreement.

Overview of policy basis for MHCRC compromise recommendation:

The recommended compromise is designed to settle an overall difference of opinion in a reasonable way that is fair to both the Jurisdictions and Verizon. By accepting Verizon's "lightwave" distinction in the Cable System definition (Section 1.7), despite the difference with federal law, and by accepting Verizon's distinction regarding Telecommunications Facilities (Section 1.34), but ONLY with an adequate non-waiver provision that protects the Jurisdictions' local authority under Charters & Codes and MHCRC/Jurisdiction authority under Title VI, the MHCRC's believes a mutually fair balance of rights and protections is struck.

Applicable Franchise provision(s): Sections 1.7, 1.34 and 3.6.3

Discussion: Verizon's long-held position is that the MHCRC Jurisdictions should adopt a definition of "Cable System" that is different from the definition currently in place under federal law, and different from the definition long used by the Courts and others to make distinctions between regulation of cable services and telecommunications service. Additionally, Verizon's proposed definition of "Telecommunications Facilities" differs in substance from the definition currently embodied in most of the Jurisdictions' ordinances governing Verizon's use of the right of way for telecommunications purposes. The MHCRC's position has been that a cable franchise is not an appropriate venue to rewrite

distinctions in existing sections of federal code or local ordinances, distinctions which tend to undermine local authority over the public rights of way. MHCRC members have indicated their concern that Verizon is trying to achieve via local franchises that which it has been unable to affect at the appropriate federal level. Verizon has held onto its position here even though Verizon has agreed in other franchises (such as the recently-granted New York City franchise) to follow existing federal law in this regard. However, rather than having Verizon potentially walk away from providing FiOS cable service in East County over a definitional issue, the MHCRC's recommended franchise includes a "bottom line" compromise. This compromise substantially accepts Verizon's modified cable system and telecommunications facilities definitions BUT ONLY WITH the inclusion of satisfactory "non-waiver" language protecting Jurisdictional rights and authority under applicable federal, state and local law. The non-waiver provision the MHCRC has recommended to the Jurisdictions has already gone through several proposals and counter-proposals with Verizon. The underlying legal issues, which have been discussed with Jurisdiction legal counsels, are addressed in the Legal Counsel Opinion, Beery Elsner & Hammond (Pam Beery, Special Legal Counsel) dated September 8, 2008 (distributed to the Jurisdictions' legal counsels and posted on the MHCRC website at this link: http://www.mhcr.org/docs/berryelsnerlegalmemoFIN_001.pdf). Verizon has at no time in the process provided a written response to this Legal Counsel Opinion, nor otherwise substantiated or provided citations to any legal authority to the contrary.

4. Telephone response time measurement (per existing customer service standards)

Overview of MHCRC recommendation:

The MHCRC has NOT included Verizon-proposed language that would in essence count all telephone calls answered by Verizon's automated voice unit in the calculation of its "calls transferred" statistic to reports on its performance under the existing Jurisdiction customer service standard regarding telephone response time.

Applicable Franchise provision(s): Jurisdictions' Customer Service Standards (existing telephone standard), Section III.B. (incorporated within proposed Franchise as Exhibit D, Jurisdiction Customer Service Standards)

Summary of issue:

The current standard requires that if a call is transferred (or put on-hold), the transfer or hold time should not exceed 30 seconds, more than 90% of the time. Cable companies report on their adherence to this standard, among other customer service standards, at least quarterly. Verizon has proposed a methodology to calculate its standard which would render the standard meaningless.

Discussion: The issue here has never been the standard itself but the way in which Verizon had proposed to determine its adherence to the standard. The Jurisdictions' current customer service standards include a non-disputed standard specific to telephone calls that are transferred to a live customer service representative within the automated telephone system. There is a separate standard addressing overall "calls answered." Essentially, the "transfer" standard is that if a call is transferred (or put on-hold), the transfer or hold time should not exceed 30 seconds, more than 90% of the time. Verizon's proposal to include all calls received at its calling centers, as opposed to just those calls that are transferred within the automated phone system, in the calculation of "transferred calls standard" **would in essence cause the standard in this area to become meaningless**, inasmuch as 100% of calls to Verizon are initially and immediately answered by automated means. Verizon has argued that they should receive "credit" for the calls answered by

its automated system. The telephone “calls answered” standard clearly includes those automated calls and therefore, Verizon does get credited under that standard. But the “calls transferred” standard is intended to address the amount of time people are on-hold to speak to a customer service representative, and the related method to calculate that standard needs to accurately reflect the company’s performance in this area. The MHCRC believes that acceptance of Verizon’s proposal would eviscerate the Jurisdictions’ current telephone response standard and would significantly impair the ability of the MHCRC to continue applying the standard to other incumbent cable operators, including Comcast.

5. OTHER ISSUES

A. Downgrade Charges

Applicable Franchise provision: Section 9.8.1

Discussion: Verizon has proposed using the phrase “Unless otherwise ALLOWED by law” instead of standard language (in the Comcast franchise) “Unless otherwise PROVIDED by law”. This change waters down the effect of the exception, is inconsistent with the Comcast franchise, and in the MHCRC’s view amounts to unjustifiable overreaching by Verizon.

B. Discriminatory Practices

Applicable Franchise provision: Section 9.9

Discussion: Verizon has proposed limiting the scope of longstanding anti-discrimination language (included in Comcast and all other MHCRC franchises) to “Subscribers” only and not to “Programmers or any other Persons”. The MHCRC–recommended franchise compromises by eliminating the reference to “Programmers” but continues to apply the non-discrimination language not only to cable subscribers, but to potential subscribers and others in the Franchise area as well. The MHCRC believes non-discrimination protections should be generally applicable to all within the context of the cable services franchise agreement, and any change would be inconsistent with current applicable standards in MHCRC areas.

C. Standard of Review in Case of Franchise Revocation

Applicable Franchise provision: Section 14.10.2

Discussion: Verizon’s original franchise template proposed that any Court challenge to franchise revocation be a “de novo” proceeding, that is: the Court would consider all evidence as if no prior Jurisdiction revocation proceeding had occurred, and the Jurisdiction’s previous action and process would receive no recognition or deference. MHCRC staff felt strongly that such an approach represented over-reaching on Verizon’s part at the expense of reasonable consideration of Jurisdiction processes and authority in the unfortunate circumstance of a franchise revocation. The MHCRC–recommended franchise proposes a “substantial evidence” standard of review – a relatively straightforward standard common in Court reviews of municipal actions. At the very least, the language under Section 14 should ensure that any court review should be based on the record of the proceeding conducted by the Jurisdiction.

CONCLUSION

The MHCRC believes the recommended Verizon cable franchise, including the compromises described herein, are reasonable, protective of the public interest, address in a responsible way the particular interests and issues Verizon articulated to the MHCRC, and should be approved by the MHCRC Jurisdictions and accepted by Verizon.

The MHCRC strongly believes the Franchise, with the compromises proposed, goes as far toward Verizon's positions as possible, short of the MHCRC Jurisdictions giving up critical local authority. The MHCRC was established by the Jurisdictions, and has operated for more than fifteen years, charged by the Jurisdictions to responsibly exercise the Jurisdictions' legal and regulatory authority in cable matters. The MHCRC does not believe the Jurisdictions intended to establish the MHCRC with the idea that the MHCRC should, would or could recommend that the Jurisdiction elected bodies give up or seriously erode their own legal and cable regulatory authority under federal and state law, and under the Jurisdictions' own charters. Should such an outcome be the price the Jurisdictions determine is necessary to pay in order to obtain Verizon's FiOS services, the MHCRC respectfully submits that a decision of such magnitude is properly considered and made, not by an appointed body of citizens such as the MHCRC, but rightfully by elected officials with the ultimate responsibility under their charters and the IGA for approving and entering into cable franchise agreements.

Having said this, the MHCRC stands ready to continue its service to the Jurisdictions and to administer and enforce the cable franchise between and among the Jurisdictions and Verizon in the final form agreed to by all parties. Assuming final Jurisdiction action and Verizon acceptance, the MHCRC looks forward to Verizon FiOS video services promptly being made available in Verizon's proposed service area as soon as practicable.

RESPECTFULLY SUBMITTED,

Norm Thomas, Chair
Mt. Hood Cable Regulatory Commission

ATTACHMENTS

Attachment A: MHCRC Recommended Cable Services Franchise Agreement with Verizon, dated October 3, 2008

Attachment B: Comparison Summary Chart divided into three sections:

- Part I: Significant Mutually-Agreed And Negotiated Provisions
- Part II: Summary Of Significant MHCRC Compromises & Verizon Position
- Part III: Other Issues Potentially Unresolved