

Before the
Mt. Hood Cable Regulatory Commission (MHCRC)
1120 SW Fifth Ave Room 1304
Portland, OR 97204

MHCRC STAFF REPLY MEMORANDUM

To: Mt. Hood Cable Regulatory Commission
Re: Staff Reply Memorandum to Verizon Opening Brief
Potential Verizon Franchise Violation –
Failure to provide MetroEast PEG Channels in Gresham
For: MHCRC Formal Hearing, February 23, 2009
Prepared by: David C. Olson, MHCRC Director
Date: February 20, 2009

MHCRC Staff respectfully submits this Reply Memorandum in response to Verizon’s Opening Brief. This memorandum includes staff’s response and concluding comments, together with additional exhibits and a final witness list. We look forward to fully discussing and responding at the Formal Hearing to the various issues raised in this proceeding, and submitting additional recommendations regarding appropriate remedies if the MHCRC determines, after the conclusion of the Formal Hearing, that one or more material franchise violations have occurred. MHCRC Staff also wishes to express, at this time, appreciation to the representatives of Verizon and MetroEast Community Media for fully and respectfully engaging in this important proceeding and helping to develop a substantial record of the various issues and arguments to assist the MHCRC in making a final determination and taking appropriate action, based on the record.

MHCRC STAFF SUMMARY RESPONSE

1. Nothing in Verizon’s Opening Brief contains facts or arguments that rebut the clear and unambiguous evidence of material franchise violations in this case. To reiterate:
 - a) There is no factual dispute that Verizon has failed to interconnect and provide MetroEast Community Media’s PEG channels on its “Fios TV” system in Gresham on the Franchise Service date unilaterally selected by Verizon (November 25, 2008).¹ Verizon’s failure materially violates both the specific terms of the Verizon Gresham Franchise as well as applicable federal law.²
 - b) There can be no dispute that the “Fios TV” services presently being provided by Verizon in Gresham are not “cable services” including “Basic Services” as required by the Verizon Gresham Franchise and applicable law.³ Verizon

1 Verizon’s Service Date notification to the City of Gresham, c/o the MHCRC, is attached as Exhibit 7 hereto.

2 Verizon Gresham Franchise §7.1.1 and §7.2.2, fully set forth in MHCRC Staff’s initial Formal Hearing Memorandum dated February 17, 2009.

3 47 U.S.C. §543(b)(7)(A)(ii), binding and applicable to Verizon under §3.5 of the Verizon Gresham Cable Franchise.

continues as of the date of the Formal Hearing (and beyond that date, by Verizon's own account) to violate its cable franchise with Gresham in that respect.

- c) MetroEast Community Media and the City of Gresham have been damaged beginning on the Service Date, and continue to be damaged, due to Verizon's deliberate non-carriage and failure to meet its specific franchise commitments to carry the MetroEast PEG channels on the Service Date (including Gresham City Council meetings and other critical government and community programming) as the franchise requires.
- d) Verizon, by its own account, is either unable to or incapable of activating and including the required MetroEast PEG Channels before the April 8, 2009 "target date" unilaterally selected by Verizon, a date nearly 4 ½ months beyond the Gresham Service Date selected by Verizon.
- e) The April 8, 2009 "target date" unilaterally selected by Verizon is itself not ultimately a committed target date at all, subject as it is to further delay and complicating factors, according to the written testimony of Verizon's own supervisor charged with overseeing the process.⁴
- f) By comparison, Verizon activated the PEG Channels in its adjacent Washington County cable system within 30 days of Verizon's selected Service Date, as negotiated and provided for specifically in the Verizon Washington County Franchise⁵; Verizon requested no such "bridge period" at any point in the Gresham franchise negotiations, at either the MHCRC or City of Gresham levels.
- g) Verizon's failure to take any meaningful action to design and engineer the interconnection with MetroEast despite 19 prior months of negotiations, (first with the MHCRC, then with the City of Gresham) objectively underlines Verizon's evident lack both of adequate planning and good faith. This is particularly underscored by Verizon's failure to make any substantive contact with MetroEast Community Media to address technical interconnection requirements between December 20, 2007 and December 9, 2008⁶, the latter action occurring only AFTER Verizon unilaterally selected its Service Date and AFTER Verizon received notice of a potential Franchise Violation from the MHCRC. This apparent lack of technical pre-planning by Verizon, accompanied by the dilatory and leisurely interconnection scenario documented in Verizon's own testimony and attachments belie Verizon's unsupported claims of subsequent "good faith". Such claims by Verizon, which rely on self-selected timelines and processes exclusively designed and controlled by Verizon, and devoid of any independent or objective evidence of reasonableness beyond Verizon's self-

4 Testimony of Anthony van Lierop on Behalf of Verizon Northwest Inc. ("van Lierop Testimony") attached to Verizon's Opening Brief in this proceeding, received February 17, 2009. See van Lierop Testimony, ¶3, ¶4, ¶22.

5 Cable Franchise Agreement between Verizon Northwest and Washington County (and 10 other Jurisdictions), effective May 25, 2007, Section 6.1.2. The Effective Date, Service Date, and PEG Interconnection date of the Verizon/Washington County are documented in Exhibit 6 attached hereto.

6 See van Lierop Testimony, ¶5 and ¶7.

interested assertions, are collectively “too little, and too late”, to adequately demonstrate any degree of good faith or reasonableness by Verizon in this matter.

- h) The 4 ½ month “target” period self-selected and urged by Verizon to interconnect the MetroEast PEG Channels AFTER being notified of a potential franchise violation, is itself inherently unreasonable, not in good faith, and cannot by any reasonable criterion be deemed to substantiate a “good faith effort” by Verizon which the Commission could under any circumstance find “reasonably satisfactory” in connection with the evident violations of clearly-stated Gresham franchise requirements.

ANALYSIS OF SPECIFIC ISSUES RAISED IN VERIZON OPENING BRIEF

2. Gresham Franchise is specific, not “silent” on required date of Interconnection. The Verizon Gresham Franchise is not “silent” on the date PEG Channels must be provided in Gresham, as Verizon claims. To the contrary, the Verizon Gresham Franchise is absolutely clear that the MetroEast PEG Channels must be provided on the Service Date, subject only to addressing PEG channel positions under the process set forth in the franchise (a process Verizon itself unilaterally pre-empted in Gresham by selecting a Service Date before the PEG Channel position request could be made⁷). The Oregon case cited by Verizon imputing reasonable timelines when contract provisions are otherwise silent might be relevant if there was any doubt on this point, but no such doubt exists and the Franchise is not “silent” by any means. Under the Franchise, Verizon agrees to provide cable services (including Basic service, which includes the PEG channels) on the Service Date selected by Verizon. There is no ambiguity on this point, and thus no basis in the Franchise or applicable law for any alternate or later timing of the type Verizon now wishes to “read in” to suit its own convenience under the specious and self-interested theory that such later timing is “implied”.
3. Interconnecting MetroEast channels 4 ½ months after the Service Date is inherently unreasonable. Verizon’s claim that designing and implementing the MetroEast PEG interconnection more than 4 and ½ months after the Service Date chosen by Verizon represents “good faith” and “extraordinary measures” is a claim that is inherently unreasonable. Verizon seeks to justify this extraordinarily lengthy timeline, a timeline never at any point raised by Verizon in 19 months of prior negotiations, by putting forth the “straw man” argument that an even more unreasonable timeline of six (6) months is a “more typical” and normative Verizon schedule⁸. However, MHCRC staff urges the MHCRC not to be lulled into imputing any degree of reasonableness to Verizon’s *post hoc* rationalizations.
4. Damage to MetroEast and the City of Gresham due to Verizon’s deliberate noncarriage is substantial and continuing. The inherently unreasonable 4 ½ month post-hoc interconnection scenario offered by Verizon as evidence of “good faith” is damaging enough, while the six-month scenario Verizon seeks to postulate as a “normative” milepost for comparative purposes, is itself patently outrageous. Acceptance of any such

⁷ See discussion, *infra*, ¶7 of this Reply Memorandum.

⁸ See van Lierop Testimony, ¶3.

a scenario would imply that the City of Gresham and MetroEast would agree that it is reasonable for the City of Gresham's government and community programming, along with all the rest of MetroEast's programming content, to be unavailable on Verizon's system in Gresham for nearly half a year after Verizon launched purported "cable services". Both non-carriage scenarios result in further substantial damage to the nationally-recognized, award-winning nonprofit entity which the City of Gresham has chosen and relies on for its primary community media, and which continues to enjoy dedicated, ongoing support from the City and citizens of Gresham. Moreover, it should be stressed that the City of Gresham's programming, like all other content cablecast by MetroEast Community Media, is distinct from the offerings of broadcasters and satellite services in that it ***relies entirely on cable systems for carriage, and such carriage forms the "sine qua non" or essential basis of MetroEast's core mission, including programming, training, outreach and operations.*** Unlike broadcasters and satellite services, MetroEast has no other viable alternate means to reach the cable subscribers of Gresham other than carriage on the cable systems operating in Gresham. Thus, Verizon's actions and inactions resulting in non-carriage not only violate the Gresham Franchise, but cause critical damage to the fundamental core mission of and pre-condition for the successful continuing operations of MetroEast Community Media and, in this way, damage not only MetroEast's interests, but the interests of the City of Gresham and all other stakeholders, including (not least) Verizon's own customers in Gresham who are denied access to MetroEast programming.

5. Verizon could have proposed and negotiated alternate PEG language but chose not to do so. Verizon was at liberty throughout 19 previous months of franchise negotiations (including two separate levels of negotiations and regulatory approvals) to propose alternate activation times, methods or dates for the PEG channels. Verizon has included such language in other franchises (including in its adjacent Washington County franchise, which provided for a 30 day PEG activation date, measured from the Service Date) but did not do so in connection with the Gresham franchise, or even raise the issue. In the absence of such proposals by Verizon, the Verizon Gresham Franchise provides that PEG channels be provided on the Service Date, along with all other Verizon cable services. All non-Verizon observers and participants in the process, including stakeholders in the City of Gresham, the MHCRC itself and MetroEast Community Media reasonably proceeded under that assumption, an assumption in accordance both with the specific language of the Gresham franchise as well as applicable federal law.
6. Verizon's self-proclaimed "extraordinary measures" are simply re-titled efforts which are collectively too little and too late. Verizon's self-designated "extraordinary measures" are simply existing, normative efforts which Verizon has used this proceeding to re-characterize with urgent-sounding language AFTER being notified of the potential franchise violations at issue here. As mentioned, all of these measures are collectively too little and too late, coming as they do after the franchise violation process has already begun. Moreover, these "extraordinary" efforts appear targeted to accomplish nothing more than the mere possibility (nothing more) of meeting an unacceptable and facially unreasonable April 2009 interconnection "target date" ---- the justification for which has not been substantiated by any entity other than Verizon itself. The April 2009 date remains precisely the same un-expedited "target date" Verizon initially provided to

MHCRC staff (verbally) in early December, describing it at the time as normative and routine for Verizon. In its opening brief, however, Verizon now attempts to repackage the same timeline and re-label it as evidence that Verizon has “prioritized” the interconnection process. However, this is little more than old wine in new bottles. All of these purported “good faith efforts”, and self-described “extraordinary measures” by Verizon continue to be belied, among other things, by the following undisputed facts:

- a) All of the activities Verizon describes as “expedited” activities are occurring “after the fact” of the violation itself instead of being accomplished in any measure beforehand, as the Gresham Franchise contemplates and as Verizon’s other construction activities to activate FiOS would imply.
 - b) As an example, by Verizon’s own account, *more than a year elapsed between Verizon’s initial site survey at MetroEast (December 2007) and any evidence of subsequent Verizon action (December 2008) to activate the MetroEast channels*; Verizon in the meantime was obviously not similarly handicapped in constructing the rest of its Gresham FiOS TV system during this period; and
 - c) Verizon self-selected a Gresham Service Date (a date wholly within Verizon’s control) which could not technically accommodate the MetroEast channels, underlining the fact that Verizon made little evident attempt to complete the required interconnection in order to include these channels in its initial service offering.
7. Verizon itself pre-empted the Gresham PEG channel position request process, so Verizon cannot now validly use this argument to justify delay in activating the PEG Channels. Verizon’s brief argues (Section 3) that the Gresham Franchise contemplated that the PEG channels were not planned to be activated immediately, because, among other things, the MHCRC was required to notify Verizon of the requested channel positions and thus Verizon was required to “wait” to complete the MetroEast PEG interconnection until the “PEG Channel position request” had been received (a request which was required to be submitted within 10 days of the November 18, 2008 Effective Date of the Verizon Gresham Franchise). Verizon has no valid basis for arguing this claim because Verizon itself “jumped the gun” and unilaterally pre-empted this process, along with the associated franchise provision, by selecting a Service Date less than 10 days from the Effective Date of the Gresham Franchise, thus foreclosing any orderly channel numbering request by the MHCRC on behalf of Gresham. Moreover, Verizon’s technical arguments (e.g. that an “adequate electrical supply” needed to be made available by Metro East and that this “takes time”) are belied by Verizon’s inaction during the one year period prior to Verizon’s selected Service Date, during which time the MetroEast facility and its staff were entirely available to accomplish this work. In the meantime, Verizon was clearly designing and constructing the non-PEG remainder of its FiOS system in order to launch FiOS TV on the Service Date it selected, so there is basis for any claim by Verizon that engineering or construction resources in Gresham were somehow unavailable. Thus, at all relevant times it has been action by Verizon (not any action by the MHCRC or inaction by MetroEast) which has been inconsistent BOTH with the substance of the PEG franchise commitments (that the channels be activated on the Service date) AND the process set forth in the franchise for the orderly request for designation of PEG channel assignments in Gresham.

8. Verizon's lack of good faith is shown by Verizon subsequently offering service in other MHCRC Jurisdictions without MetroEast PEG channels. Subsequent to the MHCRC notice to Verizon and the MHCRC's direction to schedule a formal hearing on potential franchise violations, Verizon has separately notified Troutdale (Exhibit 8), Fairview (Exhibit 9), and Wood Village (Exhibit 10) of Verizon's launch of "FiOS TV services" WITHOUT the PEG Channels. These deliberate subsequent choices by Verizon to activate "FiOS TV" in other MHCRC Jurisdictions WITHOUT the required PEG Channels, even while this material franchise violation process is underway and not yet concluded in connection with Verizon's commitments to the City of Gresham, underlines once more the lack of good faith evident in Verizon's conduct. It is plainly evident that, despite claims of "good faith" and "extraordinary measures" in Verizon's opening brief, Verizon continues to act unilaterally, unreasonably and in bad faith by launching service in other MHCRC Jurisdictions without the required MetroEast PEG channels, and before the MHCRC regulatory process is concluded.

CONCLUSIONS & RECOMMENDATIONS

9. Conclusions and recommendations. MHCRC Staff believes Verizon's failure to activate and include MetroEast PEG channels as part of Basic Service when Verizon elected to begin offering purported "cable service" to its subscribers in its Gresham service area on November 25, 2008 ("Gresham Service Date") violates the material terms of Verizon's cable franchise with the City of Gresham. Among other factors, staff believes the nature and scope of this particular violation and Verizon's failure to take prompt and adequate steps to cure the violation, violations which remain uncured at this writing and which Verizon itself projects will remain uncured until at least April 2009, creates the necessary context for appropriate regulatory action by the MHCRC. Appropriate regulatory action also must include appropriate remedies addressed to the damages Verizon's franchise violations and non-carriage have caused to MetroEast Community Media and to the City of Gresham. Staff submits once again that the MHCRC should act within the scope of its lawful regulatory responsibility on behalf of the City of Gresham, MetroEast Community Media and its users, viewers and stakeholders, Verizon cable subscribers in Gresham, and the public interest in ensuring orderly enforcement of and compliance with cable franchise agreements, and direct staff to prepare an appropriate Order containing findings of fact and conclusions of law regarding these franchise violations, together with appropriate remedies addressed to the damage Verizon has caused to MetroEast Community Media and the City of Gresham.

MHCRC STAFF ADDITIONAL EXHIBIT LIST

These Exhibits are in addition to the Exhibits attached to MHCRC Staff's Formal Hearing Memorandum dated February 17, 2009

Exhibit #	Description
6	Email from Fred Christ of MACC, February 18, 2009 confirming Verizon-Washington County Effective Date, Service Date, and Activation Date for PEG Channels in Washington County/MACC/Verizon service area.
7	Letter from Raymond Deede to Julie Omelchuck dated November 25, 2008 providing notice of Gresham franchise area service date of November 25, 2008.
8	Letter from Raymond Deede to Julie Omelchuck dated February 6, 2009 providing notice of Troutdale franchise area service date of February 5, 2009.
9	Letter from Raymond Deede to Julie Omelchuck dated February 6, 2009 providing notice of Fairview franchise area service date of February 5, 2009
10	Letter from Raymond Deede to Julie Omelchuck dated February 6, 2009 providing notice of Wood Village franchise area service date of February 6, 2009

MHCRC STAFF – ADDITIONAL WITNESS LIST

These Witnesses are in addition to the Witnesses designated in MHCRC Staff's Formal Hearing Memorandum dated February 17, 2009

Witness	Title	Summary of Testimony to be Proffered
Ramona Monroe or Larry Manion	Franchise Negotiators for Verizon Northwest, Inc.	Application by Verizon of FCC Competitive Cable Franchise Rule (CFR §76.41) to prior MHCRC-Verizon cable franchise negotiations