



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

STAFF REPORT AND RECOMMENDATIONS

To: The Mt. Hood Cable Regulatory Commission (“MHCRC”)
Re: Verizon Cable Franchise: Recommendation to MHCRC Jurisdictions
For: MHCRC Special Meeting, October 2, 2008
From: MHCRC Staff (David Olson & Julie S. Omelchuck)
Date: September 30, 2008

STAFF RECOMMENDATION

Staff recommends that the MHCRC take action to approve and forward the attached proposed Cable Franchise Agreement (Exhibit A, dated September 30, 2008) between Verizon Northwest and the Cities of Fairview, Gresham, Troutdale and Wood Village and Multnomah County (“MHCRC Verizon Jurisdictions”) to the elected bodies of the MHCRC Verizon Jurisdictions for final action.

Along with the staff-recommended Franchise Agreement (Exhibit A), this staff report includes a “Comparison Summary Chart” (Exhibit B, updated from the prior version submitted at the MHCRC September 15th Public Hearing) which details the remaining outstanding issues in the Franchise, the Verizon and Staff positions, and staff’s final recommendations. Also included is an attachment setting forth Verizon’s final proposed language on the positions at issue (Exhibit C).

OVERVIEW OF PUBLIC COMMENT

A summary of public comments provided at the MHCRC September 15th Public Hearing has been provided under separate cover. At the public hearing and in the public record of the proceeding (through the closing date of September 22nd), in addition to the participation and comments of Verizon, the MHCRC received substantial comments from a large number of interested organizations and parties, including comment by or on behalf of:

- Five elected officials (including four elected officials who are members of the governing bodies of four out of five MHCRC Verizon Jurisdictions);
- more than a dozen organizations or entities (including stakeholders such as MetroEast Community Media and Mt. Hood Community College, business organizations such as the East Metro Economic Alliance, organized labor including the IBEW and CWA, and significant consumer and public affairs organizations including the Citizens Utility Board of Oregon, AARP, and the Oregon Alliance to Reform Media);
- both of the currently-franchised, incumbent cable operators (Comcast and Cascade Access); and

- nearly 30 individual citizens (not including a form letter with similar content from various Verizon employees, 49 by our count, dated September 25th and distributed to MHCRC members on or around September 29th after the hearing record closed)

UPDATED STATUS OF NEGOTIATIONS

MHCRC staff and Verizon were able to meet and discuss remaining issues twice (supplemented by email exchanges) between the September 15th public hearing and the scheduled MHCRC vote. During this period, we were able to make progress on reaching agreement in connection with several of the secondary issues detailed in the Public Hearing Staff memorandum and at the hearing itself. However, during this period, although a number of substantial compromises were proposed and counter-proposed, we are not able to confirm at this writing final agreement on mutually agreeable compromises in connection with the 3 major issues remaining (federal law definitions, authority over customer service standards, and workable fine caps) along with one other issue (a meaningful telephone consumer protection requirement equivalent to the current MHCRC standard). As a result, the attached staff-recommended Verizon franchise contains staff's "last, best" proposed compromise language on these issues where applicable, which we hope Verizon will consider as a fair approach for all concerned, and which we recommend the MHCRC approve and forward to the MHCRC Verizon Jurisdictions for final action. It is our hope, by means of this process, that Verizon will have sufficient time to consider accepting the provisions included in the proposed Franchise in the best interest of all concerned, and final franchise terms can be arrived at which are protective of MHCRC Jurisdiction's authority, reasonably commensurate with Comcast, and protective of cable subscribers and the public interest, while at the same time providing Verizon everything necessary to begin providing FiOS video service in its proposed east County service area as soon as practicable.

I. STAFF ANALYSIS AND RECOMMENDATION ON REMAINING ISSUES

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

Overview of Staff recommendation:

- (1) Include compromise franchise provisions which 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, by agreeing to "lock" existing customer service standards for a substantial period of time (5 years) but WITHOUT requiring Jurisdictions to waive their existing legislative authority over cable customer service standards in a manner inconsistent with Oregon law; and*
- (2) 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 video services;*

Applicable Franchise provision(s): Section 9.1 and 9.2

Summary of Staff-recommended Compromise:

- (1) Jurisdictions agree to forgo application to Verizon of revisions, if any, to cable customer service standards for initial five 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

Discussion: This compromise represents a substantial effort on the part of staff to meet Verizon “more than half way” on this issue and enable Verizon to launch FiOS video operations in its east County service area as soon as practicable. 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) to enable Verizon to offer FiOS TV under existing MHCRC customer service standards, but without fear of possible ‘operational disruption’ (which Verizon has expressed as a core concern) due to any future changes in the standards. 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. Moreover, 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 fairly balances Verizon’s core concerns against the critical need to protect the Jurisdictions’ authority under 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 29, including from AARP and CUB) strongly supported the MHCRC Jurisdictions retaining their authority in this area.*

2. Adequate enforcement remedies (with compromise fine cap for franchise violations, elimination of other remedies, and reduction in Security Fund as part of overall compromise)

Overview of Staff recommendation:

- (1) *Restructure and compromise 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) *Concede issue of overall cap on fines, but set cap at a level judged to be a reasonably effective deterrent to a company the size of Verizon;*
- (3) *As part of overall compromise, concede to Verizon position and eliminate two separate franchise remedies (grant of refunds to subscribers and reduction in term of franchise) in the interest of reaching overall agreement with Verizon on remedies;*

(4) Concede to Verizon position on amount of Security Fund (\$50,000 instead of \$100,000) as part of overall compromise;

Applicable Franchise provision(s): Section 14.2.2, 14.6, 14.7, 14.9

Summary of Staff-recommended Compromise:

(1) Establish annual cap on overall fines at the level of \$200,000 in any twelve-month period;

(2) Delete remedy of requiring subscriber refunds, and/or reducing the term of the Franchise, as requested by Verizon;

(3) Accommodate Verizon concerns on process issues in MHCRC franchise violation proceedings;

(4) Accept reduced amount for Verizon Security Fund (\$50,000 instead of \$100,000) in exchange for Verizon acceptance of overall enforcement structure and fine cap

Discussion: Verizon has from the beginning of the process wished to cap or limit the remedies in the franchise to per-incident and annual levels which are substantially less than those in the Comcast franchise, and substantially less on an annual and per-incident basis than the fine recently issued by the MHCRC to Comcast in connection with not providing adequate notice to customers in connection with the October 2007 Comcast channel changes. Staff's position throughout has been that any such limitations, if accepted, would need to be set high enough to sufficiently deter Verizon from any franchise violations. In practice, this means that any fine caps, if established at all (and no commensurate limitations exist in the Comcast franchise), would need to be set at a high enough level to deter a company the size of Verizon from materially violating the franchise. The Franchise includes public benefit obligations that are particular to our community (PEG access; PEG capital funds; franchise fee payments, service area, etc) and represent a significant commitment on Verizon's part. Verizon as a company is a multi-billion company, and therefore any such caps should be set accordingly. Informal MHCRC staff consultations on this issue at both the MHCRC and Jurisdictional levels tended to show a consensus that any such "caps", if considered at all, 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 Commission members and Jurisdiction elected officials, MHCRC staff proposes that an overall cap of \$200,000 be established as an annual ceiling. Should Verizon agree to accept the proposed compromise and cap fines at such a level, MHCRC staff is also willing to "go the last mile" and eliminate two franchise remedies to which Verizon has objected (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 all of these concessions and compromises are a "package" and depend on Verizon agreement to a fine cap at the level proposed. It should also be understood that, under staff's compromise proposal (and as Verizon has requested) the ONLY remaining remedies for material franchise violations are fines and termination/revocation of the franchise. Thus, even if the overall proposal is accepted, the MHCRC and Jurisdictions will be left with only fines and termination as remedies, and the level of the potential fines becomes even more critical in assuring franchise compliance.

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

Overview of Staff recommendation:

Accept Verizon's "lightwave" distinction in Cable System definition (Section 1.7), despite difference with federal law, and Verizon's distinction regarding Telecommunications Facilities (Section 1.34) but ONLY with an adequate non-waiver provision that protections MHCRC Verizon Jurisdiction local authority under Charters & Codes; and MHCRC/Jurisdiction authority under Title VI

Applicable Franchise provision(s): Section 1.7, Section 1.34, Section 3.6.3

Summary of Staff-recommended Compromise:

- (1) Proposed Franchise incorporates Verizon 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) Proposed 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.

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. Staff’s position has been that a cable franchise is not an appropriate venue to rewrite distinctions in existing sections of federal code, distinctions which tend to undermine local authority over the public rights of way. MHCRC direction to staff has been to hold firm on this issue, 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, which is all that staff had proposed throughout the negotiations. However, Verizon has remained adamant that the company would not offer service in MHCRC territory without inclusion of the modified definition Verizon proposed in some mutually agreeable form. Rather than see Verizon walk away from providing FiOS video service in East County over a definitional issue, staff has proposed substantial acceptance of Verizon’s modified cable system definition 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 to which Staff can recommend the Jurisdictions agree is set forth as Section 3.6.3 of the proposed Franchise, and has already gone through several proposals and counter-proposals with Verizon. The underlying legal issues, which have been discussed with Jurisdiction legal counsels, is addressed in the Legal Counsel Opinion, Beery Elsner & Hammond (Pam Beery, Special Legal Counsel) dated September 8, 2008, previously distributed to the MHCRC 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 for any contrary Verizon view of this and the customer service authority issue (also addressed in the Opinion).

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

Overview of Staff recommendation:

Staff recommends NOT including Verizon-proposed language that would in essence count all telephone calls to Verizon’s automated voice unit as “calls received” or “calls transferred” within the meaning of the existing MHCRC telephone response time measurement.

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

Summary of Staff-recommended Compromise:

The current MHCRC 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. Verizon’s proposal 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 and Verizon's proposed customer service standards include a non-disputed standard regarding telephone calls that are transferred to a live customer service representative within the automated telephone system. Essentially, the 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. In April 2008, Verizon and MHCRC negotiators reviewed a chart provided by Verizon and agreed that Verizon's standard was essentially the same as the jurisdictions' current customer service requirements. However, in mid-August, Verizon noted a desire to clarify the way Verizon would calculate its reported performance under this standard. Verizon's current 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's position is that Verizon has not configured its national automated phone system to measure only those calls that are transferred to gauge whether those calls are on hold more than 30 seconds, 90 percent of the time. Verizon has not proposed other alternatives to date. Staff 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. Staff believes this also represents an unacceptable amendment to the Jurisdictions' current customer service standards in this area, and cannot fairly be characterized as a "minor variance" which is provided for in the franchise.

PART II. OTHER ISSUES

A. Reduction of access channels and PEG/I-Net amount in the event Jurisdictions grant lesser PEG channel or financial requirements to another cable operator

Applicable Franchise provision: Section 3.10.2

Discussion: This provision would apply if any MHCRC Jurisdiction granted a cable franchise in Verizon's service area with fewer PEG Access channels or a lower percentage of Gross Revenue devoted to PEG/I-Net grants. MHCRC staff has accepted the basic structure of Verizon's counter-proposal but Verizon has not confirmed acceptance of the revised language at this writing.

B. Downgrade Charges

Applicable Franchise provision: Section 9.8.1

Discussion: Verizon has proposed using the phrase "Unless otherwise ALLOWED by law" instead of our 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, amounts to legal overreaching by Verizon, and staff cannot recommend the change.

C. 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". Staff has agreed to eliminate the reference to "Programmers" but asserts that the non-discrimination language needs to continue to apply to not only to cable subscribers, but to potential

subscribers and others in the Franchise area as well. Application of this language has never been a problem or issue in other MHCRC cable franchises, and staff believes this position represents overreaching by Verizon, is inconsistent with applicable standards in MHCRC areas, and cannot be recommended to the Jurisdictions.

D. 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. Staff felt strongly that such an approach represented flagrant over-reaching on Verizon’s part at the expense of reasonable consideration of Jurisdictions processes and authority in the unfortunate circumstance of a franchise revocation, and staff proposed a “substantial evidence” standard of review – a relatively straightforward standard common in Court reviews of municipal actions. Verizon remains opposed to a “substantial evidence” standard of review, and has counter-proposed that the Franchise remain silent on the standard of review. Staff would be willing to further consider and discuss with Jurisdiction legal counsels the possibility of remaining silent on the standard of review, but only as part of an overall agreement on all of the provisions of Section 14 of the Franchise (including fine caps and remedies) *and only if the language providing for further review “based on the record of the proceeding conducted under this Section 14” is retained.* Verizon has made no further response in this area.

CONCLUSION

Although it is not clear at this writing that Verizon will agree with each and every compromise proposed, nevertheless after 17 months of negotiations, MHCRC staff believes the compromises proposed herein are reasonable, protective of the public interest, address the particular interests and issues Verizon has articulated in a responsible way, and should be approved by the MHCRC and forwarded to the MHCRC Jurisdictions for final action. Thereafter, assuming final Jurisdiction action and Verizon acceptance, we look forward to Verizon FiOS video services promptly being made available in Verizon’s proposed service area as soon as practicable.

ATTACHMENTS

- Attachment A: Recommended Verizon/MHCRC cable franchise
- Attachment B: (Updated) Summary Comparison Chart of key Franchise Provisions.
- Attachment C: Verizon final proposed language on issues remaining