



## MT. HOOD CABLE REGULATORY COMMISSION

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

### **STAFF PUBLIC HEARING MEMORANDUM**

**To: The Mt. Hood Cable Regulatory Commission (“MHCRC”)**  
**Re: Verizon Cable Franchise: Public Hearing Draft & Issues Remaining**  
**For: MHCRC Public Hearing, September 15, 2008**  
**From: MHCRC Staff (David Olson & Julie S. Omelchuck)**  
**Date: September 10, 2008**

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#### **OVERVIEW OF PROCESS**

Subsequent to Verizon’s formal request and presentation at the April 2007 MHCRC meeting, MHCRC staff has been engaged for 15 months in negotiations with Verizon to develop a mutually-agreeable competitive cable services franchise to enable Verizon to launch its widely-recognized FiOS cable services in substantial portions of Verizon’s existing telephone service area in east Multnomah County. Under the Intergovernmental Agreement creating the MHCRC, the MHCRC’s role is to develop and make a recommendation on such a franchise for final action by the City Councils of Fairview, Gresham, Troutdale and Wood Village and the Multnomah County Commission (which are the elected bodies with jurisdiction to issue a cable franchise in the relevant portions of Verizon’s service area). The MHCRC from the outset named MHCRC Chair Norm Thomas as the MHCRC’s designated liaison to the process, and also provided for outside counsel (from the law firm Beery & Elsner) to assist with the negotiations. Throughout the process, Chair Thomas --- while not participating directly in the staff/Verizon negotiations --- has been kept informed and engaged by staff throughout the process at a relatively high level of detail. As the designated MHCRC liaison, he has also had the opportunity to meet and discuss issues with Verizon representatives and to keep the MHCRC Jurisdictions and elected officials informed about the negotiations and various issues as they arose.

#### **SUMMARY OF CURRENT STATUS OF NEGOTIATIONS**

Unlike every other cable franchise negotiation in which the MHCRC has engaged for more than a decade (with companies large and small, including cable operators, telephone companies and overbuilders), progress in concluding an agreement with Verizon has been slow and difficult. Staff’s view is that one reason for the slow progress has been the lack of regular availability of Verizon’s negotiating team (including Verizon’s decision to cancel all negotiating meetings between mid-June and August of this year). Although the proposed Verizon cable franchise itself (i.e. the Public Hearing Draft) is at this writing nearly complete in many respects, three fundamental, core issues remain which separate Verizon and MHCRC Staff negotiators. MHCRC Staff has reported to Chair Thomas that it appears unlikely that the negotiators can reach agreement on these issues anytime soon, even though a number of compromises have been proposed by MHCRC staff. In addition to the three major issues in dispute, there are also a number of lesser issues which remain unresolved, but which staff believes are

susceptible to resolution if the negotiations continue in good faith and Verizon allocates sufficient time and resources to the negotiations.

### **ATTACHMENTS TO MHCRC STAFF REPORT**

The major issues which remain, along with the lesser issues, are summarized in the “Comparison Summary Chart” attached to this memorandum. Also attached is a memorandum from MHCRC Special Legal Counsel Pam Beery on the legal issues underlying two of the three major issues. Please note that the “Summary Chart” is divided into three sections:

- Part I summarizes the three major unresolved issues where further progress in the negotiations appears stalled;
- Part II is an overview of other unresolved issues which, in the view of MHCRC staff, are susceptible to resolution by the negotiators, with the possible exception of the telephone “on hold” transfer time customer service standard;
- Part III is a summary of the agreed-on provisions in the Public Hearing Draft franchise, reflecting the fruits of considerable work by the negotiating teams over the past 15 months.

### **STAFF ANALYSIS AND DISCUSSION OF ISSUES**

The discussion (below) is organized to incorporate and reference the “Comparison Chart”, the September 8, 2008, legal memorandum from Beery & Elsner, and the proposed Public Hearing Draft franchise dated September 5, 2008 (all attached to this memo). *The issues are framed as questions which staff believes the MHCRC might consider in its direction to staff.*

### **PART I. THREE SIGNIFICANT UNRESOLVED ISSUES**

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

##### ***Questions for MHCRC to address:***

- a. *Should the MHCRC recommend that the Jurisdictions agree to waive their existing legislative authority in a manner inconsistent with Oregon law, even though Verizon has demanded such a waiver as a condition of entering into a cable franchise?*
- b. *Should cable customer service and consumer protection standards be generally consistent for all cable customers in MHCRC areas, regardless of provider?*

***Applicable Franchise provision(s):*** Section 9.1 and 9.2

***Staff Discussion:*** MHCRC staff and Verizon negotiators have reached general agreement that the existing MHCRC countywide customer service standards will apply to Verizon cable services customers with two exceptions (the presence of a local office and timing of standard installation) related to Verizon-specific issues. The exceptions are handled in the Franchise under the MHCRC’s customary “minor variance” process and, staff believes, uphold the original intent of the current standards. A lesser, but still significant, unresolved issue is Verizon’s refusal to provide data particular to telephone hold times (see Comparison Chart Part II, page 2). However, the major issue dividing the parties here is not the customer service standards themselves (which are the existing MHCRC Countywide standards adopted by the Jurisdictions and apply to all cable service providers in the MHCRC jurisdictions), *it is Verizon’s demand that the MHCRC Jurisdictions give up existing legal authority to enact and enforce cable consumer protection provisions to the extent provided under current federal law.* Federal law

allows local governments to adjust or revise customer service standards if necessary during the life of a franchise, which might be up to 15 years under Verizon's proposal. It is the opinion of MHCRC special legal counsel (an opinion shared, to the best of our knowledge, by MHCRC Jurisdiction legal counsels) that under current Oregon law, no MHCRC Jurisdiction could give up this authority even if their Councils voted to do so. *See* Legal Counsel Opinion, Section III.C., page 9 (attached).

## **2. Adequate enforcement remedies (Verizon proposal to cap fines for franchise violations)**

### ***Questions for MHCRC to address:***

- a. *Should enforcement remedies and procedures (including financial penalties) available to the MHCRC in the case of material franchise violations be generally consistent for all cable franchisees in MHCRC areas?*
- b. *Would a cap on fines at the level proposed by Verizon (initially \$200/incident or \$20,000 per year, most recently \$400 per incident/\$40,000 per year) sufficiently deter a company the size of Verizon (Verizon: \$93 billion/yr revenues, 235,000 employees vs Comcast: \$30 billion/yr revenues, 100,000 employees) from materially violating the Franchise?*

***Applicable Franchise provision(s):*** Section 14.2.2, 14.7

***Staff Discussion:*** Verizon wishes 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 is that any such limitations 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 no such "caps", if considered at all, would be adequate to deter a company of Verizon's size and scope unless established at a six-figure level. Verizon has at no point agreed to consider or agree to any "cap" set at such a level.

## **3. Use of existing federal law definitions for Verizon "cable" vs "telephone" facilities**

### ***Questions for MHCRC to address:***

- a. *Should the MHCRC recommend a cable franchise to the Jurisdictions which defines Verizon's cable system in a manner different than used in applicable federal law, even though Verizon has agreed to use existing federal definitions in other cable franchises (including New York City)?*
- b. *Should the MHCRC recommend that the proposed Franchise include a strong nonwaiver provision, whereby the MHCRC Jurisdictions do not waive application of any of their authority under applicable law unless specifically declared in writing in the Franchise?*

***Applicable Franchise provision(s):*** Section 1.7, 1.35, 3.63

**Staff Discussion:** Verizon’s 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 has been used by the Courts and others to make distinctions between regulation of cable services and telecommunications service. *Staff’s position is 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.* Staff’s position also is that a fundamental issue here is for Verizon to be willing to agree that its cable services will be governed under the franchise agreement as provided for under current federal law. Verizon has agreed in other franchises (such as the recently granted New York City franchise) to follow existing federal law in this regard, and staff thinks it only reasonable to ask that Verizon do so with MHCRC Jurisdictions. However, staff has made a proposal to Verizon, to which Verizon has not responded, which accepted Verizon’s proposed cable system definition but also included language which protected the jurisdictional rights granted in federal law related to cable system regulation. Staff has also proposed numerous other possible compromises in this area, to which Verizon has not responded. The legal background and implications of this issue are extensively addressed in the attached Legal Counsel Opinion, Section III A. and B., pp. 2-8.

## **PART II. OTHER UNRESOLVED ISSUES**

### **1. Measurement of telephone hold time for transferred calls (per customer service standards)**

***Question for MHCRC to address:***

*Should the MHCRC accept Verizon’s method to calculate its adherence to the customer service standard for telephone call transfer and on hold time, which would include all calls answered by Verizon’s automated telephone system as opposed to only those calls transferred, rendering the standard meaningless?*

***Applicable Franchise provision(s):*** Section 9.3

**Staff Discussion:** The issue here is not in the standard itself but the way in which Verizon recently proposed to determine its adherence to the standard. The jurisdictions’ current and Verizon’s proposed customer service standards include a non-disputed standard, and reporting on such 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 and the reporting on that standard met the jurisdictions’ current customer service requirements and therefore, no variance was needed in this area. 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 “transfer time” but has proposed

no other alternatives to date. Staff believes Verizon's proposal does not constitute a "minor variance" but a significant amendment to the jurisdictions' current customer service standards.

## **2. Inclusion of certain enforcement remedies**

### ***Question for MHCRC to address:***

*Should the MHCRC agree to give up two remedies for franchise violations opposed by Verizon, but contained in other comparable MHCRC cable franchises (ability to require subscriber refunds or reduce the term of the franchise as applicable)?*

***Applicable Franchise provision(s):*** Section 14.2.3 and Section 14.2.4

***Staff Discussion:*** Verizon opposes inclusion of both of these remedies in the Franchise, which would leave only fines and franchise revocation as enforcement options under the Franchise. Verizon has not elaborated to any great extent on its reasons for opposing the provisions beyond stressing that such remedies are not included in other Verizon cable franchises. The MHCRC and its predecessors have not relied on either provision as a final remedy in any enforcement proceeding, except it should be mentioned that the issue of possibly requiring subscriber refunds came up in connection with the \$43,999 fine imposed by the MHCRC on Comcast earlier this year (though the MHCRC ultimately accepted Comcast's argument that such a refund was too administratively cumbersome). If these two potential remedies are eliminated, the MHCRC's options to penalize the company for material franchise violations is limited to only fines since franchise revocation is highly unlikely and only for substantial material default of a material franchise provision. Staff believes this greatly reduces the MHCRC's flexibility for graduated enforcement of material franchise violations.

## **3. PEG Programming Information to Subscribers**

### ***Question for MHCRC to address:***

*Should the MHCRC require Verizon to make a good faith effort to include access to PEG channel programming information as Verizon's set-top box technology evolves?*

***Applicable Franchise provision(s):*** Section 7.3.3

***Staff Discussion:*** MHCRC Staff has conceded Verizon control over PEG access channel locations; however, the Franchise requires that PEG programming information will be included, in general, on Verizon's website and printed materials provided to subscribers. Only access channel number assignments will be included in Verizon's on-screen channel lineup guide (Section 7.1.2). As set-top box and other technologies are developed to improve access by subscribers to programming information, this provision requires Verizon to make a good faith effort to include access to PEG channel programming information as it develops enhancements to its set-top technology. Verizon has not confirmed agreement with MHCRC staff-proposed language in this area.

#### **4. Use of “substantial evidence” standard in Court review of Franchise revocation**

***Question for MHCRC to address:***

*If the Verizon Franchise is revoked following the procedures set forth in the Franchise, should a Jurisdiction’s action be upheld in any subsequent Court challenge if it is supported by substantial evidence, based on the record of the proceeding?*

***Applicable Franchise provision:*** Section 14.10.2

***Staff 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 this was grossly over-reaching on Verizon’s part 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. Verizon’s counter-proposal is not acceptable to MHCRC staff or legal counsel, as it creates uncertainty which could undermine possible judicial consideration of prior Jurisdiction action in such a matter.

#### **5. Other Franchise provisions awaiting resolution or final agreement**

***Question for MHCRC to address:***

*Should the MHCRC urge MHCRC Staff and Verizon negotiators to continue to work diligently to conclude agreement on remaining sections of the Franchise where mutually agreeable outcomes remain possible?*

***Applicable Franchise provision(s):*** Section 20 (Reporting), Section 8.4 (Bundled Services), and others

***Staff Discussion:*** There are several sections of the Franchise where proposals have been made and/or language proposed but final confirmation as to agreement on the proposed language has not yet been confirmed by Verizon. Pursuant to direction from Chair Thomas, MHCRC staff negotiators are attempting to confirm agreement on these provisions, or the development of acceptable counter-proposals, with Verizon negotiators on an ongoing basis. It is MHCRC staff’s hope that as many of these provisions can be agreed on as soon as possible and before MHCRC action on a recommended Verizon cable franchise (presently scheduled for a final MHCRC vote on October 2, 2008).

### **PART III. AGREED-ON NEGOTIATED PROVISIONS**

***Question for MHCRC to address:***

*Should the MHCRC advise the City Councils and County Commission to include all mutually-agreed on, fully-negotiated provisions of the proposed Franchise developed by the negotiators to date in any final franchise approved by the Jurisdictions?*

**Staff Discussion:** Lack of agreement on the three major issues discussed and listed in Part I (above) and lack of resolution of the issues referenced in Part II (above) should not obscure the fact that after 15 months of negotiations, MHCRC staff and Verizon negotiators *have reached mutually agreeable language in most other areas of the Franchise*. Staff's view is that it is critical that any and all such negotiated and mutually-agreed provisions be included in any Verizon cable franchise entered into by any of the MHCRC Jurisdictions. This includes major areas of agreement such as PEG Capital/I-Net support, PEG channel capacity and interconnection, Verizon service area and extension requirements, franchise fee definitions and payments, insurance and indemnification, renewal and transfer provisions, and many other sections.

#### **ATTACHMENTS & REFERENCES**

- Comparison Summary Chart, MHCRC Staff Proposed Verizon Franchise, posted on MHCRC website: [http://www.mhcr.org/docs/ops\\_VerizonComparisonChart9.5.08.pdf](http://www.mhcr.org/docs/ops_VerizonComparisonChart9.5.08.pdf)
- Legal Counsel Opinion, Beery Elsner & Hammond (Pam Beery, Special Legal Counsel) dated September 8, 2008
- Public Hearing Draft, Proposed Verizon Cable Franchise, dated September 5, 2008, posted on MHCRC website: <http://www.mhcr.org/docs/ops-VerizonFranchise-Public%20Hearing%20Draft%209-5-08.pdf>