



MT. HOOD CABLE REGULATORY COMMISSION

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MT. HOOD CABLE REGULATORY COMMISSION

MetroEast Community Media, Studio A

February 23, 2009 Meeting and Formal Hearing Minutes -- **APPROVED**

SUMMARY MINUTES

MINUTES AS APPROVED AT THE MARCH 16, 2009 MHCRC MEETING.

Call to Order: 6:30 pm

1. Roll Call.

Commissioners present: Norman Thomas (Chair), Rich Goheen, Tim Clark, Andrea Cano, Alan Alexander and John Kilian.

Commissioners absent: Sue Dicile, Bill June.

Staff: David C. Olson, Director; Mary Beth Henry, Deputy Director; Julie Omelchuck, Program Manager; Ben Walters, Legal Counsel; Rebecca Gibbons, Program Specialist.

2. Agenda Review: none.

3. Disclosures: Cano disclosed meeting with Multnomah County Commissioner Diane McKeel and her staff, Sam Peterson. Alexander disclosed meeting with Commissioners Dicile and Thomas, Omelchuck and PCM Executive Director and PCM Board Chair to discuss roles and responsibilities.

4. Public Comment: none.

5. Welcome Portland City Commissioner Amanda Fritz

Thomas welcomed City of Portland Commissioner Amanda Fritz. Thomas said Commissioner Fritz is the newly appointed Commissioner-in-Charge of the Office of Cable Communications and Franchise Management, the office with which the Commission contracts for staffing services.

Fritz thanked Commissioners for serving on the MHCRC. Fritz said she is advocating for the MHCRC in the City of Portland budget process and hopes her office will be a resource for the MHCRC. Fritz said she has been a community organizer for the past 17 years and looks forward to advocating on behalf of Portland Community Media. Fritz said her county-wide focus is reflected in her involvement in the Bureau of Emergency Communications and the Metro Policy Advisory Committee.

6. January 12, 2009 Meeting Minutes

Cano noted typographical errors on page 12 of the meeting minutes: first paragraph “KCME” should be “KZME” and second paragraph “Bard” should be “Board”.

MOTION: Kilian moved to approve the January 12, 2009 Meeting Minutes as amended.

Goheen seconded.

DISCUSSION: none.

VOTE: 6-0 passed

7. Formal Hearing on Potential Franchise Violation

Thomas said the purpose of the Formal Hearing is to determine whether or not to find Verizon in violation of its Franchise related to Verizon’s PEG Access obligations under the Gresham Franchise Agreement. Thomas said that at the January meeting, the Commission scheduled this Hearing in order to hear evidence from the Parties, in this case MHCRC staff and Verizon, about staff’s assertion that Verizon failed to provide the required PEG Access Channels as part of its Basic Service tier when it began offering cable services to subscribers in its Gresham service area on November 25, 2008. Thomas said staff believes that this failure to carry the PEG Access Channels is a demonstrable franchise violation.

Thomas said he convened a pre-hearing conference on February 3 with the Parties to establish a process by which to conduct the hearing. Thomas said notes from the pre-hearing conference were distributed to the parties, and no objections were received. Thomas said the conference notes were included in tonight’s meeting packet and will be included in the record of this hearing.

Thomas said the Parties, at the pre-hearing conference, indicated a willingness to participate in discussions on a potential settlement and that if a potential settlement had been reached staff was to indicate this prior to the hearing. Thomas said he assumed a settlement had not been reached. Omelchuck confirmed this assumption.

Thomas reviewed the agenda for the hearing.

Thomas called for additional written exhibits that were not available for distribution prior to the Hearing as evidence from the Parties.

- Olson presented Exhibits 11 through 16 as evidence and stated that these documents were being submitted as rebuttal to new arguments raised by Verizon’s Reply Brief. Thomas called for any objections and hearing none accepted Exhibits 11 through 16 into the Formal Hearing Record.

Thomas asked if either Party had any objections to the evidence submitted prior to this hearing.

- Olson requested sentence 4, page 6 of the Verizon Reply Brief, dated February 20, 2009 - “There was no mention of the allegation that Verizon was not providing adequate notice to its subscribers” – and the subsequent footnote 3 – “To this day, Verizon does not understand what notice staff believes subscribers would be receiving that they are not receiving. While Verizon does not provide subscribers with a list of every possible channel that is not available on FiOS TV, it does provide a list of the channels that are

- Monroe said the statement was not offered as an argument or defense on another violation; it was offered in rebuttal to staff's allegation that at the January meeting the issues were thoroughly reviewed and discussed. Monroe said the issue of notice to subscribers was not discussion by the Commission at the January meeting. Monroe said the statement is not critical to Verizon's case so should the Commission choose to disregard the statement Verizon has no objection.
- Thomas said that at the pre-hearing conference he struck from the scope of the hearing any discussion of a separate violation concerning notice to subscribers.
- Walters said Verizon asserts the statement is in response to staff's characterization of the January meeting. Walters said Commissioners who were present at the January meeting are positioned to weigh Verizon's arguments. Walters confirmed that Thomas had, at the pre-hearing conference, decided to limit the scope of the hearing and the discussion to staff's assertion specific to carriage of the PEG access channels and struck from the scope and any discussion of notice to subscribers.
- Thomas struck the above referenced sections from the Hearing Record.
- Walters said Thomas's ruling instructs Commissioners to disregard the statement in Verizon's Reply Brief.

Thomas accepted all other written evidence into the Formal Hearing Record.

OPENING STATEMENTS

MHCRC Staff

Olson, MHCRC Director, said the plethora of paper going back and forth on this issue belies the fact that this is a simple and straightforward case. Olson said the Gresham franchise agreement identifies two dates as significant in triggering requirements going forward: the Effective Date, Tuesday, November 18, the date the Gresham City Council approved the franchise, and the Service Date, November 25, a date selected at Verizon's discretion. Olson said cable service under the franchise includes Basic Service and the PEG access channels. Olson said the franchise states Verizon is to notify the MHCRC of a date by which it plans to begin offering cable service to subscribers. Olson said staff received notice of Verizon's Service Date the day after it launched service, November 26. Olson said that in instances when Verizon has needed more time to launch service with the PEG access channels, it has sought a bridge provision in its franchise agreement. As example, Olson said the Washington County franchise administered by MACC has bridge provisions specific to this issue. Olson said the Washington County franchise bridge provision gave Verizon 30 days from the Service Date to light up the PEG access channels. Olson said Verizon did indeed begin offering the PEG channels in Washington County within 30-days after its Service Date (MHCRC Staff Exhibit 6). Olson said the Gresham franchise agreement does not include a bridge provision. Olson said that if Verizon needed more time to light up the PEG channels it certainly had experience negotiating bridge language to this effect. Olson said Verizon never raised the need for a bridge provision during franchise negotiations. Olson said the franchise requirements are straight forward and well understood by

both staff and MetroEast; cable service is not cables service unless it includes the PEG access channels. Olson said Verizon has launched something it calls FiOS TV but it's not cable service as defined by the franchise.

Olson said staff, in fulfilling the MHCRC's obligations under the franchise, immediately upon receiving notice of a Service Date from Verizon, notified Verizon of the channel locations and the need for expedited action in light of a potential franchise violation to get the PEG access channels up and running. Olson said the staff notice and the subsequent chain of documents that followed all highlighted for Verizon the specific franchise sections at the core of this issue: Section 7.1 carriage language, Section 7.2 the interconnect with MetroEast and the definition of Basic Service.

Olson said Verizon's failure to carry the PEG access channels as of its Service Date causes damage to the City of Gresham, MetroEast Community Media and subscribers. Olson said the largest fiscal contribution line item in Gresham's cable budget is in support of the PEG access channels under cable regulation. Olson said the community channels are at the core of what cable service is; a recognized fact under federal law and local franchises. Olson said the PEG channels make government transparent, give the public access to their elected officials and facilitate public participation. Olson said the MHCRC is structured to defend and protect this public resource. Olson said the PEG channels are essential and the definition of cable service requires them. Olson said Verizon made a deal after 17 months of negotiations with MHCRC staff and further negotiations with City of Gresham staff, in which Verizon was successful in winning several of its positions. Olson said Verizon negotiators, at any time during those 19 months, could have raised bridge language; but they didn't. Olson said Verizon then selected a Service Date, seven days after the Effective Date, to launch a service that lacked the essential elements. Olson said the MHCRC is tasked with defending local voices and local views.

Olson said local voices and local views are more important to the City of Gresham and the Cities in East County than Portland because Olson said east county residents are and have been hostage to a Portland centric media market. Olson said this is also a time when mass media is increasingly concentrated with less and less local content. Olson said the PEG channels are essential for the Gresham City Council's government messaging and community information, particularly in these tough economic times. Olson said one way to know the channels are essential is to look at the definition of cable service in the franchise.

Olson said that in 17 months of negotiations Verizon had plenty of time to figure out where the electrical outlets were at MetroEast.

Olson said Section 1.4 defines Basic Service, the minimum level of service, as including the PEG access channels. Olson said Section 7.1.1 states Verizon shall provide Basic Service including the eight PEG access channels on the Service Date. Olson said Section 7.2.2 states Verizon shall interconnect with MetroEast Community Media. Olson said Verizon didn't meet any of these requirements when it launched service in Gresham and, as of today, still hadn't met the requirements. Olson said that 120 days will soon lapse and Gresham subscribers still will not have the PEG channels. Olson said Verizon dropped the ball and has not acted in good faith to remedy the situation. Olson said Verizon has many legal arguments including that 180 days is

its standard national timeframe and is what's reasonable for a national company. Olson said Verizon never asked the City of Gresham if six months is a reasonable amount of time to get the channels up and running. Olson said Verizon is arguing what is reasonable for them, not what is reasonable for this community.

Olson said that, in terms of process, staff immediately sent a letter to Verizon's designated notice recipients citing specific franchise language (MHCRC Staff Exhibit 1). Olson said staff then emphasized with Verizon's designated contact the importance of this issue in a telephone conversation that was then followed up with an email (MHCRC Staff Exhibit 2). Olson said Verizon, at the January MHCRC meeting, claimed surprise regarding the violation. Olson said on November 26, notice was given. Olson said that, after reading Verizon's argument on this issue, staff has no idea how to provide notice to Verizon. Olson said one Verizon argument is that the official franchise contacts, one in California and one in New Jersey need to be here in person in order for staff to have adequately given notice. Olson said all of Verizon's arguments regarding process fade in light of the fact that this Commission, by establishing this formal hearing, has already concluded that adequate notice was given. Olson said notice was given on November 26, 2008; numerous subsequent communications thereafter reiterated the noncompliance and the franchise sections; and, the MHCRC January meeting resulted in a determination that notice had indeed been given when the Commission voted to set a formal hearing date.

Olson said Section 16.6 of the Gresham franchise states that the franchise agreement constitutes the entire agreement between the City of Gresham and Verizon and that the agreement supersedes all prior or contemporaneous agreements whether written or oral. Olson said the agreement states that service shall include the PEG access channels. Olson said Verizon's 120 day implementation timeline is not in the agreement.

Olson said Verizon is suggesting that it be allowed to read into the agreement things that just aren't there. Olson said an example of this is Verizon's Oregonian Ads, which have been running for most of a year. Olson said the ad encourages folks to "ask about our FiOS TV availability in Portland" (MHCRC Staff Exhibit 13). Olson said Verizon does not offer service in Portland. Olson said Verizon does not have a franchise agreement with the City of Portland.

Olson said Verizon's arguments regarding process and notice of non-compliance is a distraction from the real issue at hand.

Olson said the MHCRC is tasked with, and has done an excellent job to-date of, protecting and defending the public interest and access to the community channels. Olson said the community media elements are a critical piece of the franchise agreement.

Verizon

Ramona Monroe, attorney with Stoel Rives representing Verizon, said she was a negotiator on the Gresham/Verizon franchise and that her testimony will be incorporated into the opening statement to avoid repetition. Monroe said she would be available during witness testimony to answer any questions.

Monroe said the Gresham franchise does not state that the PEG channels need to be available on the service date. Monroe said no combination of provisions or definitions in the agreement include such a requirement. Monroe said no combination of federal law provisions impose such a requirement. Monroe said the reason a provision is not in the agreement is because Verizon would never have agreed to it. Monroe said Verizon since April 2007 has maintained that it cannot activate the channels on the service date. Monroe, referring to Verizon Exhibit 8, said the staff draft franchise dated June 15, 2007 under Section 6.4.3 included language that purported to require a PEG connection on the effective date of the agreement. Monroe said Verizon refused this language because it could not meet that requirement. Monroe said no such requirement is in the final franchise agreement. Monroe said that in the June 2007 draft franchise there is language regarding reserve channels, or additional PEG channels beyond the initial eight PEG channels, that are held for future activation when certain criteria are met. Monroe said the agreement provides an activation timeline for the reserve channels. Monroe said that in the June 2007 staff draft franchise, staff proposed a 90-day timeline for activating the reserve channels. Monroe said Verizon did not accept staff's proposal because Verizon could not guarantee PEG channel activation within that timeframe. Monroe said the final franchise agreement with the City of Gresham includes a 120-day timeline for the reserve channels. Monroe said that staff and Verizon met to discuss the June 2007 staff draft franchise and Verizon said it could not meet a 90-day timeline and explained why it could not.

Monroe said this was never a significant issue during the negotiations. Monroe said neither side discussed a date certain for activation. Monroe said Verizon representatives stated on the public record at the Gresham City Council meeting at which the Council was considering the franchise agreement that the PEG channels would not be available for 120-days. Monroe said that at that meeting Verizon and the Gresham City Council understood that service would begin immediately. Monroe said Gresham Mayor Shane Bemis stated on the public record that Verizon was ready to flip the switch and begin service. Monroe said Verizon's representatives stated that the PEG channels would not be available for 120-days. Monroe said everyone present at the meeting, which included David Olson, Julie Omelchuck, Rob Brading and the full Gresham City Council and City staff that had participated in negotiations, was aware that cable service would roll out without the channels being activated. Monroe said no one at that hearing objected and no one asked Verizon to activate the channels sooner.

Monroe said staff argues that the franchise agreement clearly requires the PEG channels by the Service Date. Monroe said Verizon believes it's not clear or we wouldn't be here. Monroe said staff relies on Section 543 of the Federal Communications Act. Monroe said Section 543 deals with rate regulation. Monroe said local government has the authority to regulate cable rates only when there is no effective competition in the marketplace. Monroe said that by definition Verizon brings effective competition to the marketplace. Monroe said earlier this year the Federal Communications Commission (FCC) issued a public notice to that effect. Monroe said that because Verizon is subject to effective competition Section 543 simply does not apply. Monroe said that even if it did apply Section 543 requires that the PEG channels be placed on the Basic Service tier. Monroe said it does not address the timing of when those channels are to be made available.

Monroe said staff also argues that the definition of Basic Service in the agreement requires the PEG channels. Monroe said the definition provides meaning to the term Basic Service as used in the agreement. Monroe said the definition does not include any substantive requirements and it doesn't indicate when the PEG channels need to be made available. Monroe said the agreement does not require that Basic Service be available on the Service Date. Monroe said there is no date provided. Monroe said the agreement does not impose a specific deadline for the PEG channels and therefore Verizon has not violated its agreement with the City of Gresham.

Monroe said that, under Oregon State Law, when a contract doesn't specify a date certain, then the party is to perform within a reasonable period of time. Monroe said what constitutes a reasonable period of time is determined by the circumstances. Monroe said it is not reasonable to activate the PEG channels on day one.

Monroe said staff argues that Verizon should have delayed providing service until the PEG channels were available. Monroe said this would be against public policy. Monroe said one of purposes of Title VI of the Federal Communications Act, the section dealing with cable service, is to promote competition in cable communications. Monroe said the FCC's recent order stated that enhanced cable competition is a federal goal. Monroe said that in order to promote these public policies, federal law prohibits exclusive franchises and prohibits a franchising authority from unreasonably refusing to award a franchise. The FCC order also recognized that a delay can constitute an unreasonable award of a franchise. Monroe said the FCC also recognized that a delay allows incumbent provider to undermine the competitor's chances for success. Monroe said any forced delay in initiating cable service in order to activate the PEG channels would thwart the FCC's public policy. Monroe said requiring such a delay would constitute unreasonable refusal under a competitive franchise.

Monroe said Verizon did not receive the due process notice that is required before an enforcement proceeding of this type. Monroe said the agreement requires notice stating the exact nature of the alleged violation. Monroe said the agreement requires that Verizon be given either 30-days cure period or a longer period with good faith efforts to cure. Monroe said she is now prepared to answer the question about what would constitute sufficient notice. Monroe said the notice should state clearly that it is being issued pursuant to Section 14.4. Monroe said the notice should be identified as a noncompliance notice, a defined term in the agreement. Monroe said the notice should indicate that it triggers one of two available cure periods. Monroe said the notice should clearly state that it intends to start the cure period and it should clearly state what steps Verizon should take to avoid further enforcement. Monroe said the staff letter dated November 26 did none of these things. Monroe said Verizon was aware that staff had concerns about a potential franchise violation but that knowledge is not the same as the due process rights that were guaranteed to Verizon under the franchise. Monroe said that even with adequate notice, Verizon couldn't activate the PEG channels within 30-days. Monroe said certain steps are required to activate the PEG channels. Monroe said Verizon's written testimony addresses the steps needed: a design must be developed to connect the origination site to Verizon's video serving office, then engineers need to determine how the signal will travel from the origination site to the VSO, then the actual pathway needs to be constructed, the fiber has to be installed, equipment needs to be ordered, installed and tested, the channel signal needs to be tested, and any kinks in the system need to be worked out. Monroe said no steps can be skipped or

eliminated. Monroe said these steps require a significant investment of Verizon's time and money. Monroe said it is unreasonable for Verizon to undertake this level of investment before a franchise agreement is fully approved. Monroe said it became clear at the end of the 17 months of negotiations that the parties were not likely to come to an agreement on the terms of a franchise until the last minute. Monroe said she was still negotiating terms with City of Gresham's legal counsel on the day of and during Council consideration of the agreement. Monroe said the PEG channel interconnect with MetroEast could not be constructed until after the agreement was approved.

Monroe, referring to her earlier comments regarding the 120-day timeline to activate the reserve PEG channels, said the timeline applies only when a connection already exists. Monroe said if that connection didn't exist, then a longer period is to be discussed among the parties. Monroe said the connection in this case didn't exist. Monroe said Verizon has worked diligently to expedite the process so that it can activate the PEG channels. Monroe said staff compares this to the Washington County agreement. Monroe said the situation there was completely different. Monroe said the FTTP network was not capable of providing cable services at the time the Washington County agreement was executed. Monroe said video hub office, a critical element to providing cable services, was not in place. Monroe said the anticipated completion of that hub office was still several months away. Monroe said Verizon went ahead and constructed the PEG channel connection concurrently with the construction of the video hub office. Monroe said the situation in Gresham is entirely different. Monroe said the video hub office is fully operational and the FTTP network is mostly constructed therefore Verizon was ready to flip the switch when the agreement was approved. Monroe said there simply was no lead time to build the PEG channel connection. Monroe said any intentional delay to providing cable service after the agreement was in place would have been against public policy and not good business practice.

Monroe said Verizon initiated efforts to make the connection and activate the channels in good faith promptly after the agreement was signed. Monroe said just two days after the information about the PEG channels was received from staff Verizon initiated its internal process. Monroe said Verizon expedited the design and engineering phases even though they had to occur over the holidays and during severe weather. Monroe said construction has been completed ahead of schedule. Monroe said Verizon anticipates that the system will be fully capable of transmitting the PEG signal by mid- to late-March. Monroe said Verizon has diligently pursued good faith efforts to activate the PEG channels as quickly as it can.

Monroe said Verizon asks that the Commission make a determination that no violation of the franchise has occurred. Monroe said in the alternative, Verizon asks that the Commission determine that the notice was inadequate to protect Verizon's due process rights and that Verizon has initiated and pursued good faith efforts to activate the PEG channels.

WITNESSES

MHCRC Staff Witnesses

Olson called Julie Omelchuck, MHCRC staff cable program manger. Omelchuck said she is a lead staff person on public policy, negotiations and implementation of the public benefits under the franchise agreements.

Olson asked Omelchuck if the Effective Date of the Verizon/Gresham franchise is November 18 and the Service Date is November 25.

- Omelchuck said correct.

Olson asked if the notice from Verizon about a November 25 Service Date in Gresham was a surprise.

- Omelchuck said yes. Omelchuck said she received a phone call from Ray Deede on November 26 and Ray told her that Verizon began offering service the day before and that they were sending the MHCRC a notice about the service date. Omelchuck said she was surprised and the first thing she said to Ray was that she thought the PEG channels were not included in the service.

Olson said that Omelchuck, in her capacity as program manager, sent a letter to Verizon (MHCRC Staff Exhibit 1) dated November 26 to Tim McCallion. Referring to this letter, Olson asked if the letter was addressed to more than one subject and if so why.

- Omelchuck said she had already been in the process of drafting a letter regarding channel assignments for the PEG channels. Omelchuck said the franchise requires staff to notify Verizon within 10-days of the Service Date of the requested channel positions. Omelchuck said because of the timing of the service launch without the PEG channels, it ended up being a dual-purpose letter. Omelchuck said the opening paragraph of the letter noted the dual purpose.

Olson asked if the letter specifically mentions the sections of the Gresham franchise that were at issue.

- Omelchuck said yes.

Olson asked if the letter was sent to the official notice recipients: Mr. McCallion and Mr. White.

- Omelchuck said yes and staff received postal confirmation of receipt.

Olson asked why staff tracked receipt.

- Omelchuck said staff tracked receipt because there is a 30-day cure period under the franchise that begins following receipt of the notice.

Olson said the cure period was set based on date of receipt.

- Omelchuck said correct.

Olson asked Omelchuck to summarize the subsequent contacts with Verizon in December concerning this potential franchise violation and the cure period.

- Omelchuck said she had several conversations with Ray Deede. Omelchuck said staff was directed by Verizon to use Deede as the point of contact on all franchise matters. Omelchuck said she had phone calls with Deede on December 3, December 8 and December 11. Omelchuck said she emailed Deede (MHCRC Staff Exhibit 2) had an in-person meeting with Deede on December 11, sent a staff memo for the December 15 MHCRC meeting and had a discussion about the memo. Omelchuck said staff then received a reply letter from Verizon on December 23.

Olson asked if Omelchuck communicated to Verizon that the cure period extended to January 2.

- Omelchuck said correct.

Olson said the Commission held a meeting on January 12 and a staff report (MHCRC Staff Exhibit 4) was distributed prior to the meeting. Olson asked if the staff report detailed the exact Gresham franchise requirements at issue.

- Omelchuck said yes.

Olson asked if the staff report includes mention of the Basic Service issue.

- Omelchuck said yes.

Olson said Verizon's Reply Brief characterizes the January 12 meeting as an ambush. Olson asked if Omelchuck would agree with this characterization.

- Omelchuck said no. Omelchuck said she had had several conversations with Deede specifically about the process, the cure period, the cure letter, etc. Omelchuck said the first time staff had heard that Verizon was confused about the process and the noncompliance issue was at the January 12 meeting.

Olson said Verizon's Reply Brief also states that the official notice recipients under the Gresham franchise, Mr. McCallion and Mr. White were not present at the meeting. Olson asked if the Gresham franchise requires these gentlemen to be physically present in order for Verizon to receive official notice under the franchise.

- Omelchuck said they do not need to be physically present.

Olson said formal notice of the hearing was sent to Verizon on January 22 (MHCRC Staff Exhibit 5). Olson asked if the formal hearing notice detailed the exact franchise provisions at issue in the upcoming proceeding was the formal hearing notice sent to Mr. McCallion and Mr. White in addition to Mr. Deede, and was the notice sent 30-days or more prior to this hearing.

- Omelchuck said yes to all three questions. Omelchuck said transmittal of the notice was documented in an email (MHCRC Staff Exhibit 11).

Olson said he summarized the various notices in a letter to Verizon (MHCRC Staff Exhibit 14). Olson asked if this letter, in addition to Mr. Deede, was sent to Mr. McCallion and Mr. White.

- Omelchuck said yes.

Olson asked if his letter was sent 30-days prior to this hearing.

- Omelchuck said transmittal was documented in an email (MHCRC Staff Exhibit 12).

Olson asked Omelchuck, in her capacity as program manager, in the event the Commission determines material franchise violations have occurred and remedies should be assessed, if she is satisfied all the forms of notice to Verizon required by the Gresham franchise in connection with this process have been satisfied.

- Omelchuck said yes.

Verizon had no questions for Omelchuck.

Thomas awarded five additional minutes for staff to call forward Rob Brading.

Olson called Rob Brading. Brading said he is the CEO at MetroEast Community Media responsible for day-to-day operations and long term planning, etc.

Olson asked how long Brading has occupied his position.

- Brading said going on 17 years.

Olson asked if MetroEast has been recognized over the years for its programming.

- Brading said MetroEast has been recognized on several occasions. Brading said MetroEast is celebrating its 25th Anniversary this year. Brading said MetroEast has been recognized by the Alliance for Community Media as an elite organization for several years. Brading said individual awards have been received from the National Association of Telecommunications Officers and Advisors (NATOA) and the Alliance for Community Media. Brading said individual producers have received production awards

from highly competitive contest such as the Cable Ace Awards in which they are competing with commercial stations as well.

Olson asked if MetroEast's recognition could be characterized as national.

- Brading said yes.

Olson asked how Brading would characterize the City of Gresham's relationship to MetroEast.

- Brading said MetroEast has an excellent relationship with the City of Gresham. Brading said MetroEast regularly cablecast all the council meetings, planning meetings and special events. Brading said MetroEast also works with a number of local non-profit groups and individual members of the public.

Olson asked how viewers access MetroEast programming.

- Brading said through the Comcast cable system at this point.

Olson asked if there are other ways to access MetroEast programming.

- Brading said no.

Olson asked if there are alternatives to accessing MetroEast programming other than the cable system such as satellite.

- Brading said no. Brading said MetroEast does not have access to the airwaves to transmit its programming in any other fashion.

Olson asked when was Brading first contacted by Verizon to make arrangements for an interconnect with Verizon's system.

- Brading said he was first contacted by Verizon in December 2007 and someone from Verizon came out to scout the territory. Brading said he did not hear from Verizon again until December 2008.

Olson asked Brading if he attended the November 18 Gresham City Council meeting and, if so, would he characterize the issues surrounding MetroEast's connection and programming needs as a subject of significance during the Council discussion.

- Brading said he attended the November 18 Council meeting. Brading said the Gresham Council recessed the meeting to assure satisfactory handling of MetroEast issues that were raised during the Council discussion.

Olson asked if at any time in the Gresham/Verizon franchising process, Verizon notified MetroEast or discussed with MetroEast that there would be a substantial delay, or any delay, in including MetroEast's channels on the Verizon cable system.

- Brading said no.

Olson asked Brading, in his professional judgment, if the non-carriage has resulted in damage to either or both MetroEast or the City of Gresham.

- Brading said MetroEast's mission is to serve the community. Brading said that when MetroEast programming is not available then MetroEast is not delivering on its mission. Brading said that in the past few months there has been a big emphasis on volunteering in East County. Brading said Mayor Bemis called for volunteers in his State of the City speech which MetroEast covered. Brading said Verizon subscribers did not see this speech. Brading said the Golden Note awards that recognize volunteers in the community aired and Verizon subscribers did not see it.

Verizon had no questions for Brading.

Walters said 8.5 minutes was used to question Omelchuck and 5 minutes was used to question Brading. Thomas awarded a total of 13.5 minutes to Verizon for presenting its witnesses.

Verizon Witnesses

Monroe called Josh Dillon, Verizon Western Region Manager for franchising, acquisitions and implementation. Dillon said he oversees all the negotiations and implementation of agreements in California, Oregon and Washington.

Monroe asked Dillon to describe his background in franchising.

- Dillon said he began working on the franchising project in October 2004, about the same time Verizon began its franchising efforts around the country. Dillon said he has been around since Verizon first got into cable business. Dillon said he has worked as a negotiator, has personally negotiated 87 agreements and has sat in as senior negotiator on about 20 other agreements. Dillon said last year, he oversaw over 20 agreements in Washington and Oregon. Dillon said he has been involved in close to 130 agreements. Dillon said his team also has responsibilities to implement and maintain all the agreements in California, Washington and Oregon - about 123 franchises to-date.

Monroe asked Dillon his experience with timing of PEG channel activation.

- Dillon said he has a lot. Dillon said it's always discussed in every negotiation. Dillon said not all communities have PEG channels. Dillon said most Pacific NW communities do have PEG channels. Dillon said he works closely with the PEG team during negotiations. Dillon said he usually identifies the local origination point and sends out engineer to assess and develop a game plan that is then used during the negotiations.

Monroe asked Dillon if he was familiar with the Washington County agreement and, if so, could he describe the PEG activation process.

- Dillon said he is familiar. Dillon said it was a very different situation and different timing. Dillon said each market that Verizon provides service has a video hub office that enables the signals go across Verizon's FTTP network. Dillon said the video hub office in Washington County serves the entire Portland market and took 12 months to construct. Dillon said the Washington County hub office was constructed concurrent with the negotiations of the Washington County agreement. Dillon said once the Washington County agreement had been completed, the video hub office construction still had a few months left. Dillon said the video hub office construction allowed time for the PEG team to be plugged into the process. Dillon said the hub office was not operational until December 2007.

Monroe asked if the time to construct the PEG activation in Washington County was more than 30-days.

- Dillon said yes.

Monroe said Dillon has been involved in over 130 franchise negotiations. Monroe asked if any of the agreements Dillon negotiated require the provision of PEG channels on the Service Date.

- Dillon said no.

Monroe said Dillon oversees the implementation of over 120 franchise agreements. Monroe asked Dillon if any of those agreements require PEG channels on the Service Date.

- Dillon said no.

Monroe said Dillon is responsible for franchises throughout Oregon and Washington. Monroe asked Dillon what is his involved in the implementation of the Gresham agreement.

- Dillon said he was personally involved. Dillon said he was personally in contact with the technical team that oversees all the PEG implementation to accelerate the process.

Monroe asked if Verizon has received confirmation that it has been named as an additional insured on MetroEast's insurance policy.

- Dillon said he knows Deede had requested this information, but to the best of his knowledge, Verizon has not yet received the information.

Monroe asked if the agreement requires Verizon to be named as an additional insured on the MetroEast insurance policy.

- Dillon said it does.

Monroe asked Dillon to state the current status of the PEG channel activation for the City of Gresham.

- Dillon referred to Verizon Exhibit 6. Dillon said there is a benchmark date of March 11. Dillon said Verizon is ahead of schedule. Dillon said Verizon has almost completed the March 11 benchmarks as of February 23. Dillon said the OMTs have been installed and currently the control office engineer folks are configuring the equipment at the central office and should be complete this week. Dillon said that once that's completed the address then has to be validated, which confirms the address is live. Dillon said Verizon is about a week and a half ahead of schedule. Dillon said the next step is to install encoders at MetroEast.

Monroe asked Dillon how subscribers or potential subscribers find out about which channels are available on Verizon's system.

- Dillon said there are a couple different avenues. Dillon said subscribers can go to Verizon's website. Dillon said the website offers a tool that allows subscribers to enter their zip code to see the channel lineup offered. Dillon said the second avenue is when an installation occurs Verizon provides a welcome kit that includes a channel line up. Dillon said lastly, Verizon has a very robust on screen, interactive TV guide.

Monroe confirmed that the pre-filed written testimony of Anthony van Lierop is also in the record and part of the proceeding tonight.

Olson cross-examined Dillon.

Olson asked Dillon if Verizon needed to construct a video hub facility in order to serve Gresham.

- Dillon said no because east county is part of the current, existing office that is operational.

Olson, referring to the written testimony submitted by Mr. van Lierop, the senior staff consultant responsible for PEG channel activation nationwide, asked Dillon to read the last sentence of numbered paragraph 4.

- Dillon read, "Verizon hopes to launch the PEG channels before its target date of April 8, 2009, but cannot commit to do so at this time due to factors beyond its control."

Olson cross-examined Monroe.

Olson, referring to Monroe's testimony regarding the federal public policy and the FCC video franchising rule and also referring to MHCRC Staff Exhibit 16, which details the MHCRC Local Rule and franchising process under the FCC rule, asked Monroe when Verizon triggered the formal franchising process.

- Monroe said Verizon did not trigger the shot clock. Monroe said Verizon did not trigger 47 CFR Section 76.41 of the FCC rule.

COMMISSIONER CLARIFYING QUESTIONS

Alexander asked what actually occurred at the Gresham Council meeting on November 18. Alexander said Verizon could have had a stronger case had it submitted evidence, meeting minutes for example, in support of its argument that Verizon informed the Gresham Council that it would take 120-days to implement the PEG channels. Monroe said a video of the meeting is available. Omelchuck said minutes are available on the City of Gresham website. Monroe said she has reviewed the video and asserts that the Verizon representative stated that the PEG channels would not be available for 120-days and the Mayor states that Verizon is ready to flip the switch and begin providing service. Olson said staff has no objection to reviewing the video but said this case rests on the franchise and the requirement. Olson said statements made in those settings do not apply if they aren't included in the franchise.

Alexander asked if Section 14.4 language appears in any of the documentation sent to Verizon. Olson, referring to MHCRC Staff Exhibit 2, said the second sentence of the opening paragraph refers to noncompliance. Olson said it parallels exactly with the franchise sections and provides any clarification if any questions did exist, regarding the November 26 staff letter.

Kilian said he is puzzled by how Verizon could have a lengthy discussion with staff about the difference between 90- and 120-days when it came to additional reserve channels but seems to believe a timeline of 120-days or more for the initial channels should be implicit. Monroe said staff proposed 90-days and Verizon did not believe it could meet that timeline. Monroe said Verizon refused staff's proposal and insisted the timeline needed to be longer. Monroe said Verizon believed the parties understood that, based on prior conversations, that the initial PEG channels would also take a considerable amount of time and that was implicit in the agreement and that no specific timeframe was necessary since staff didn't ask for one.

Kilian, referring to Section 7.2.2, asked how much work was necessary on the part of MetroEast to implement the interconnect. Kilian asked if a suitable environment existed. Olson said he's not an engineer but staff's position is that every one of the items identified in Section 7.2.2 was available immediately in December 2007 or could be available in a matter of moments thereafter. Olson said there was no impediment to interconnect by MetroEast to his knowledge. Brading said there was nothing on the list MetroEast was unable to comply with. Monroe said Section 7.2.2 is language that Verizon proposed because it knows that without these things it will not be able to construct the system. Monroe said one of the things this section calls for is cooperation. Monroe said cooperation could not have previously existed; rather it's a going forward working relationship.

Goheen asked if Verizon wasn't in violation of the franchise when it launched service without the PEG channels then when exactly would Verizon potentially fall into noncompliance. Goheen asked if, in Verizon's mind, it would have been in noncompliance if a year had lapsed before the PEG channels were activated. Monroe said state law imposes performance within a reasonable period of time. Monroe said Verizon has worked hard to activate the PEG channels. Monroe said that when Verizon entered the agreement Verizon thought it was mutually understood that cable service would be offered and the PEG channels would be offered within a reasonable period of time.

Cano asked when Verizon notified the Gresham City Council of the activation of the PEG channels. Monroe said at the November 18 City Council meeting Verizon representatives

disclosed the 120-day timeline. Monroe said Verizon is committed to providing the channels under the franchise. Monroe said Verizon had committed to honor all the agreements reached during the staff negotiations and the section regarding PEG provisions was a section believed to have been agreed upon.

Kilian said Verizon has stressed the importance of having agreements in writing. Kilian asked if Verizon, at any time, put in writing that Verizon was running into trouble and would not have the PEG channels up and running by the Service Date. Monroe said Verizon has not run into trouble activating the channels therefore saw no reason to put anything in writing. Monroe said Verizon believes its implementation timeline is consistent with the franchise requirement. Kilian asked if there were any technical requirements with regard to an interconnect plan with MetroEast that Verizon should have put in writing. Monroe said that in Verizon's mind there was never a delay that warranted a written notice.

Thomas, referring to Section 7.1.3.3, asked if Verizon is treating initial and additional PEG channel activation timeline in the same manner. Monroe said Verizon reads Section 7.1.3.3 to apply only to the reserve channels. Monroe said the timeframe just happens to correspond to timeframe Verizon predicted it would be a reasonable time to activate the initial channels.

Thomas asked Dillon if Verizon has allocated channel numbers to the PEG channels. Dillon said yes. Thomas asked if the channels are included in the programming guide. Dillon said that once the PEG channels are activated the welcome kit received upon installation will have the channels listed and the TV guide menu will be updated.

Thomas asked Dillon when Verizon requested a copy of the MetroEast Insurance Policy (Section 7.7). Dillon said he was copied last week on an email from Deede to Omelchuck. Monroe said the request was for confirmation that it had been done.

Walters asked Monroe what is the requirement in Section 7.7 for indemnification. Monroe said it's a claim for injury, damage, loss, liability, cost or expense arising from Video Programming or other transmission placed on the PEG access channels provided by Grantee under this franchise. Walters asked if Verizon is providing those channels. Monroe said no; that Verizon had asked for confirmation because it expected to launch the PEG channels in the very near future. Walters said the liability insurance is related to the provision of the channels. Monroe said yes it is.

Thomas said he attended the Gresham City Council meeting on November 18 and he recalled Verizon talking about a 120-day timeline for activation of the PEG channels on the interactive TV guide menu. Thomas asked Brading if he recalls discussing with Verizon a 120-day timeline for activation of the channels. Brading said the discussion focused solely on inclusion of the PEG channels in the guide. Thomas asked Brading if he thought the activation of the channels would be delayed. Brading said no.

Thomas asked Brading to clarify MetroEast's readiness to work with Verizon on an interconnect. Brading said since December 2008 MetroEast has had several visits from Verizon and some of those visits have led to MetroEast needing to do something (i.e. MetroEast needed to move one

of its existing racks to make room for Verizon's and needed to provide an additional electrical outlet). Brading said all work requested was completed within a day of the request.

Thomas asked Brading when MetroEast was first contacted by Verizon regarding the interconnect following the effective date of the franchise. Brading said he believes Verizon came out to do another site visit on December 8, 2008 and then he had a meeting with staff and Verizon on December 11, 2008.

Thomas asked Dillon if Verizon engages in engineering before a contract is signed. Dillon said there is some preplanning that takes place during the negotiations. Dillon said a site survey is conducted but the actual engineering and construction of the site usually takes place after an agreement is in place.

Monroe clarified for the record that in one of her briefs it was stated that some of the notices from staff had not been addressed to Mr. McCallion or Mr. White. Monroe said staff has presented some exhibits tonight that indicate they were provided a copy. Monroe said she was not aware of that fact and had not intended to mislead the Commission.

PUBLIC COMMENT

Jeff Bissonnette, representing the Citizen's Utility Board (CUB), said CUB representing residential utility rate payers. Bissonnette said several months ago the MHCRC held a hearing on the terms of a potential franchise agreement with Verizon. Bissonnette said it's disappointing and disturbing that the company does not seem to be living up to the stated commitments to the community. Bissonnette said MetroEast has had at least 5 other cable providers and each of them have carried the PEG channels on the first day of service. Bissonnette said PEG channels may not be important to Verizon but they are important to our community. Bissonnette said it is important that Verizon understand that PEG channels are part of the package. Bissonnette said a key part of the PEG channels is the government; an open government is important particularly in times when transparency and accountability are needed. Bissonnette said residents access City Council, School Boards and other public bodies through the PEG channels. Bissonnette said Verizon has a small number of subscribers currently on its system but subscribers are already forming their viewing habits and being aware of their choices. Bissonnette said that even now Verizon is promoting a bill down in Salem, House Bill 2405 proposing to deregulate any Voice-over-Internet services. Bissonnette said if Verizon cannot be trusted to honor its basic video service agreements how it can be trusted in a deregulated environment. Bissonnette said Verizon has some catchy slogans; the most memorable, "Can you hear me now." Bissonnette said this slogan seems ironic when the Verizon parent company is tuning out the needs of the community and turning a deaf ear on the voices that are carried on the PEG channels. Bissonnette said CUB, on behalf of rate payers, asks the Commission to hold Verizon accountable to the terms of the franchise.

Doug Sweet, station manager of KMHD public broadcasting in Gresham, said he has been involved with public broadcasting for about 28 years. Sweet said public broadcasting is seen as a second class citizen in terms of getting publicity in newspaper, etc. Sweet said Verizon takes

this attitude toward the local PEG channels. Sweet said Verizon gets the commercial channels up and running fine but the PEG channels have second class citizens.

Dan McCreath, Gresham, said he has been a Comcast subscriber for years but has recently considered switching to Verizon FiOS. McCreath said his family engaged in a discussion over switching to FiOS and soon discovered they if they switched they would not have immediate access to the PEG channels. McCreath said both his wife and daughter are producers who utilities the services provided by MetroEast. McCreath said his family was scandalized that Verizon was not offering this service. McCreath said the MHCRC holds a terrific track record for standing up for MetroEast and the public interests. McCreath encouraged the MHCRC to hold Verizon accountable as habits form early.

Hearing no other comments, Thomas closed the public comment section of the hearing.

CLOSING STATEMENTS

MHCRC Staff

Olson said everything Verizon stated about the FCC video franchising order, the 90-day shot clock, the federal public policy and competitive franchising does not apply. Olson said Verizon never triggered that process. Olson said the MHCRC litigated against the FCC order. Olson said the MHCRC lost the case so the Commission advised the Jurisdictions to establish a local rule. Olson said the pronouncements from the former FCC from a year ago have no application here tonight.

Olson said staff agrees that the Washington County situation was completely different. Olson said a video hub office needed to be constructed. Olson said Verizon needed several months lead time to get the hub office up and running before launching service. Olson said the video hub office constructed under the Washington County agreement serves East County. Olson said Verizon does not need to construct another hub office. Olson said that once the hub office was constructed Verizon was able to light up the PEG channels within 30-days. Olson said there's a list of steps necessary for activation of the PEG channels, but every element of Section 7.2.2 was ready to go either instantly or within hours in December 2007. Olson said the reason the work wasn't done is because Verizon didn't do it. Olson said Verizon didn't show up at MetroEast until a year later and nearly ten days after a potential violation notice was issued. Olson said Verizon knew how to propose bridge language. Olson said Verizon has proposed bridge language in its other agreements around the county. Olson said Verizon argues there is a 120-day timeline for activation of the initial PEG channels. Olson said its not there. Olson said the timeline is not in the franchise. Olson said the 120-day timeline applies to the additional reserve channels. Olson said the initial channels are subject to the same service date as all other programming Verizon planned to offer in its service. Olson said that even though it's not applicable because it's not in the franchise, 120-days from the Effective Date of the franchise is March 11. Olson said the channels aren't going to be there as Verizon has not committed to a date and proposes April 8.

Olson said Verizon is arguing that the definition of Basic Service in the Gresham franchise doesn't mean anything. Olson said Verizon argues Basic Service including the PEG channels is

just a definition but doesn't mean anything. Olson said Verizon is attempting to boot strap the 120-days timeline that applies to the reserve channels to the initial channels.

Olson said Verizon argues that everything staff communicates with Verizon has to be in writing with dates and using the magic words in order to hold Verizon accountable. Olson said that when it comes to carrying MetroEast's channels however, the City of Gresham's channels by which government, schools and community events are communicated to East County, Verizon argues that the activation timeline doesn't need to be in writing. Olson said Verizon elects to read it in to the franchise.

Olson said the PEG channels are the essential component to cable service. Olson said Verizon has given the Commission several different dates for activation of the channels; another date was offered tonight – late-March. Olson said the late-March date is not committed. Olson said the April 8 date is not committed. Olson said Verizon's Reply Brief suggests none of the written commitments regarding PEG channels mean anything. Olson said Commissioner Goheen hit it on the head when he said that according to Verizon' read of the franchise there isn't any requirement to activate the PEG channels. Olson said according to Verizon's read there is not a point in time at which the Commission could initiate a compliance hearing because there is not a timeline by which Verizon needs to activate the channels. Olson said that if Verizon was the incumbent cable provided and it began offering cable service without the PEG channels, he would be recommending that the Commission recommend revoking the franchise. Olson said staff recommends the Commission hold Verizon accountable to the franchise.

Verizon

Monroe said Verizon has not insisted that absolutely every communication be in writing. Monroe said Verizon has requested the cooperation of staff and encouraged frequent communication. Monroe said the enforcement notice itself is a due process notice, a little different nature than the typical franchise communication. Monroe said to appear at a meeting without knowledge that action against Verizon is proposed is not due process.

Monroe said a franchise is a contract and a basic tenant of contract law is that a contract must be interpreted and construed consistent with the intent of the parties to that contract. Monroe said the evidence shows there was no mutual intent to establish the service date as date for PEG activation. Monroe said that in the absence of a date, Oregon law provides one. Monroe said the law says that performance of the contractual obligation must be performed within a reasonable period of time. Monroe said what constitutes a reasonable period of time depends upon the circumstances. Monroe said the evidence in this case demonstrates from the technical experts that a significant period of time is necessary to complete all of the steps to activate the PEG channels. Monroe said the evidence also shows that Verizon has expedited this process. Monroe said 120-days is an after the fact estimate of the time it will take. Monroe said Verizon typically counts those days from the Service date not the Effective Date.

Monroe said staff asserts that there is no commitment from Verizon to a date certain. Monroe said Verizon has laid out a very specific timeframe with benchmarks that get us to April 8. Monroe said Verizon very much hopes to have it done before that and it appears that will be the case. Monroe said there is no specific commitment because to do so would require an

amendment to the franchise. Monroe said she doesn't think anyone relishes the notion of reopening and attempting to negotiate an amendment.

Monroe said Verizon has never, and is not now, refused to provide the PEG channels. Monroe said Verizon absolutely intends to do so and is expediting the process because Verizon understands and respects the importance and the significance of the PEG channels to the community.

MHCRC Staff

Olson said MetroEast channels are not on the system. Olson said no matter how that's rationalized, the fact of the matter is the channels aren't being offered and Verizon is purporting to offer cable service without the PEG channels. As a result of this, Olson said damage has been done and continues to be done. Olson said the only means MetroEast, a national award winner organization, has to carry the City of Gresham's messages does not exist. Olson said staff has provided evidence and testimony documenting damage not only to MetroEast but the City of Gresham and its residents. Olson said staff recommends the Commission hold this new entrant accountable to the franchise agreement.

COMMISSIONER CLARIFYING QUESTIONS

Cano asked how many current subscribers Verizon serves in Gresham. Monroe said she does not have an exact number and the number changes daily. Monroe said it's a matter of hundreds.

Kilian said Monroe has indicated that Verizon representatives at the Gresham City Council meeting stated that it would take 120-days to provide the PEG channels. Kilian asked Monroe if this statement had been put in writing. Monroe said no, it is not.

Hearing no other clarifying questions Chair Thomas closed the presentation of evidence portion of the Hearing at 9:01pm.

COMMISSIONER DISCUSSION & ACTION

Thomas advised the Commission that from here forward, the Commission may seek clarification about exhibits, evidence or testimony already submitted on the record or ask informational questions about procedures and process. Thomas said no new evidence, testimony or information may be introduced during the Commission's discussion and action.

Thomas said the Commission is now at the point in its process where it will discuss the evidence heard tonight and come to a determination. Thomas said he would like to structure the Commission's discussion time on two separate determinations.

1. Thomas said the first order of business is for the Commission to determine whether or not it believes a violation has occurred.
2. Thomas said that if the Commission determines a violation has occurred then the second order of business is to discuss remedy options and provide direction to staff.

Alexander, quoting from a movie said, “What we have here is a failure to communicate.” Alexander said it’s been an interesting process working with Verizon for the past two years. Alexander said Verizon’s corporate culture is different and emanates feelings of mistrust. Alexander said he is not surprised that the MHCRC is having some of these problems. Alexander said he believes Verizon received adequate notice of a noncompliance issue.

Kilian said he thinks MHCRC Staff Exhibit 13, the Oregonian ad, speaks to Verizon’s corporate culture. Kilian said it appears the 120-day timeline only applies to the activation of additional PEG channels. Kilian said Verizon, in its argument, puts a lot of credence on written communication however Verizon seems to have failed to have put in writing that it needed 120-days to provide the PEG channels. Kilian said it appears Verizon follows the franchise language only when it suits Verizon. Kilian said Verizon was given an opportunity to cure the non-compliance. Kilian said he thinks Verizon has failed to meet the terms of the agreement. Kilian said he thinks carriage of the PEG channels is a key ingredient that has been overlooked by Verizon.

Goheen said he believes the MHCRC would be doing a disservice to subscribers if the Commission does anything less than find Verizon in violation of the franchise. Goheen said he has dealt with companies on good faith efforts in the past and he does not believe Verizon has acted in good faith. Goheen said he believes Verizon has violated the franchise.

Clark said he understands things are in motion to get the PEG channels activated; however, he believes that if the Commission does not take this situation seriously, then the Commission is opening the door to future violations.

Cano said she believes that Verizon received notice of noncompliance. Cano said there appears to be some movement to correct the violation however, damage to the community is real. Cano said that given the post election environment and the severe economic downturn, the fact that Gresham subscribers do not have access to the community access channels is disturbing.

Thomas said the first order of business, has a violation occurred, has a few subparts. Thomas asked the following questions:

1. Did Verizon receive notice of non-compliance in accordance with the Franchise?
2. Does the franchise allow for a “reasonable period of time,” as Verizon has argued, to activate the PEG access channels – OR – does the franchise require Verizon to include the PEG channels in the Basic Service tier when it begins offering service to subscribers?
3. Good faith – has Verizon made reasonable attempts to provide PEG access channels, in the view of the Commission?

Walters said these are three predicate questions as laid out by the parties’ arguments that the Commission should consider prior to making a determination.

Kilian asked if the Commission should be considering the good faith effort as of the Service Date or as of now. Walters said Verizon has made the argument that it has provided good faith attempts to address the franchise violation. Kilian said the question says ‘has’ not ‘did’. Walters

said Verizon's argument is framed around the franchise provision that it has 30-days to either cure or initiate good faith efforts.

Clark said Verizon has argued that its representative stated a 120-day timeline to the City of Gresham Council. Clark asked Walters where this argument fits from a legal perspective. Walters said this statement is in dispute. Walters said Verizon claims that its representative stated a 120-day timeline with regard to PEG channel activation. Walters said there was counter evidence offered by Rob Brading stating that was not a statement he heard at that meeting. Alexander said it's all hearsay because the Commission does not have the video or minutes of the meeting.

Goheen said the language is not in the contract.

Thomas said the Commission has to enforce the franchise as it's written.

Walters said it may have been the intent of one of the parties going into the contract but it's not reflected in the contract language then it cannot be read into the agreement. Walters said intent cannot override the language in the contract.

Alexander said he doesn't see language in the franchise that specifically states the PEG channels need to be activated by the service date. But, Alexander said he is absolutely certain that staff did alert Verizon of a potential franchise violation. Alexander said the good faith effort question is subjective. Alexander said it looks like Verizon is doing something.

Cano said that even though there has been a declaration by Verizon of forward movement there is a great sense of ambiguity in terms of real and definitive timelines.

Walters suggested taking each of the questions sequentially.

MOTION: Clark moved that the Commission determines that Verizon received notice of non-compliance in accordance with the Franchise. Cano seconded.

VOTE: 6-0 passed.

MOTION: Goheen moved that a franchise violation has occurred with regarding to offering the PEG access channels.

FRIENDLY AMENDMENT: Cano moved that the Commission determines that the franchise requires Verizon to include the PEG access channels in the Basic Service tier when it began offering service to subscribers. Goheen accepted the amendment to the motion. Kilian seconded.

In response to a question from Clark regarding offering of Basic Service, Walters said Section 7.1.1 states that subject to Section 3.10.2, the provision that allows for subsequent modifications, the Grantee shall provide eight PEG access channels as part of the Basic Service which shall be fully accessible to all subscribers within the service area.

DISCUSSION: Kilian said that in his experience the word 'shall' is a mandate.

VOTE: 5-0 passed. Alexander abstained.

Thomas recessed the meeting for 10 minutes at 9:30pm.

Thomas reconvened the meeting at 9:40pm.

Walters advised the Commission to consider the third question posed by Chair Thomas in light of the franchise language in Section 14.4. Walters said Chair Thomas has asked Commissioners to consider whether Verizon has initiated good faith efforts reasonably satisfactory to the Commission to cure within 30-days of the notice and do the efforts continue in good faith.

Omelchuck clarified that Walters is referring to Section 14.5 and request legal counsel read the section for clarity.

Walters read Section 14.5: "If Grantee removes or otherwise cure the asserted violation within 30-days from receipt of the Noncompliance Notice, or it cure is not reasonably possible within 30-days and the Grantee initiates good faith efforts reasonably satisfactory to the Commission to cure within 30-days and the efforts continue in good faith, the Commission shall not exercise the City's rights.

Thomas asked Walters to restate the question. Walters said has Verizon initiated good faith efforts reasonably satisfactory to the Commission to cure the violation within 30-days of the receipt of the notice and do effects continue in good faith.

Alexander said the Commission is to determine whether or not Verizon initiated good faith efforts.

Cano said it's not just whether or not good faith efforts exist but whether Verizon initiated good faith efforts to cure within the 30-days from receipt of the notice and if not cure then initiate good faith efforts that continued beyond the cure period.

Walters said the question can be broken down into subparts. Walters asked, has Verizon acted in good faith and regardless of their good faith and are those efforts reasonably satisfactory to the Commission.

Kilian said the overarching term is 'cure.'

Alexander said the Commission has determined that a violation has occurred. Alexander said the violation is that Verizon failed to carry the PEG channels. Alexander said the Commission now needs to whether or not Verizon has acted in good faith to cure the violation either during the 30-day cure period or now.

Kilian said he thinks it two different things. Kilian said did Verizon attempt to work on a cure 30-days after the notice. Kilian said if Verizon is making good faith efforts now would these efforts mitigate the Commission imposing a penalty.

MOTION: Kilian moved that Verizon did not act in good faith following 30-days notice.

Cano said the motion should include 'the Commission finds' and a determination on the lack of a cure.

FRIENDLY AMENDMENT: Kilian moved that the Commission finds that Verizon did not initiated good faith efforts following 30-days notice to cure the violation in accordance with Section 14.5. Clark seconded.

VOTE: 6-0 passed.

Thomas said he would like to have a discussion with the Commission about potential remedies. Thomas said the purpose of this discussion is to give staff direction on remedies or the range of remedies to consider in a draft Order. Thomas said that in thinking about what is an appropriate remedy under the franchise, Commissioners should keep in mind the remedy options under the franchise. Thomas referred Commissioners to the staff memo on remedy options included in the meeting packet.

Thomas reminded Commissioners that the franchise provides the option to forego a remedy and allowing the violation determination to stand on its own; impose remedies, alone or in combination, that could include ordering the Grantee to correct or cure the violation within a reasonable time frame as the Commission shall determine; impose reasonable penalties as set forth in Section 14.7, subject to the City's right of review; pursue any other legal or equitable remedy available under the franchise or applicable law; or in the case of substantial default of a material provision of the franchise, recommend to the City that it seek to revoke the franchise in accordance with Section 14.10.

Olson said staff has prepared a memorandum with specific recommendations on remedies in the eventuality that the Commission reached this point.

Monroe said Verizon objects because Verizon had not seen anything on remedies prior to tonight.

Olson said the Commission is not assessing remedies tonight. Olson said remedies will be written into an Order containing finds of fact for Commission consideration at its next meeting. Olson said Verizon will have plenty of time to address the Commission's determination on remedies at the next Commission meeting. Olson said staff is following the exact same process the Commission has taken on past violation proceedings.

Omelchuck said staff did not think it appropriate to discuss remedies prior to the Commission making a determination on a violation.

Thomas said the purpose of discussion potential remedies options is to give Commissioners the opportunity to give staff direction. Thomas said the Commission would not be acting to impose a remedy tonight.

Monroe said the pre-hearing conference established a schedule for the submittal of all materials that were going to be discussed on this matter prior to tonight so that both sides would be informed of the other side's position. Monroe said staff is proposing to submit something for Commission consideration and discussion that Verizon has never seen before and has no opportunity to respond. Monroe said the fact that Verizon would be given an opportunity in 30

days to comment says nothing to the fact that the Commission will have had staff's position in hand for those 30 days.

Thomas asked the Commission to consider directing staff on remedies based on the memo provided by staff in the meeting packet. Thomas opened the floor to discussing the types of remedies the Commission could impose.

Gibbons said the Commission does not need to discuss remedies here tonight. Gibbons said the Commission could simply direct staff to draft an Order containing recommended remedies for Commission consideration at its next meeting.

Olson said the staff memo and recommendation on remedies is the precise process the Commission has followed in previous violation proceedings. Olson said staff has specific recommendations that staff withheld on the basis of the Commission's past procedures. Olson said that if no violation was found then there would have been no reason to discuss remedies; if a violation is found then staff has come prepared to assist the Commission in discussing potential remedies.

Thomas asked if staff had copies of its recommendation. Olson said staff came prepared to provide a copy of the staff report to the Commission tonight. Olson asked the Commission to give staff's recommendation due consideration. Olson said staff has no objection to giving Verizon adequate time and opportunity to review and respond to staff's recommendation.

Monroe said she believes it would be most appropriate for the parties to exchange positions on penalties. Monroe suggested staff withhold distributing its position until Verizon is prepared to distribute its position. Monroe said there have been some communication issues in the past and for staff to bring forward something that Verizon has not had an opportunity to comment on is unfair to Verizon.

Thomas said staff needs direction from the Commission on what to include in the way of penalties in the draft Order.

MOTION: Alexander moved to direct staff to prepare a preliminary order and submit its recommendation tonight with a timeframe for Verizon's response by close of business Friday and that staff be given an opportunity to reply one week later – close of business Friday.

Cano asked why the Commission would consider sending the proposed remedies to Verizon for weigh in.

Kilian agreed with Cano. Kilian said the remedy decision is a decision the Commission must make on behalf of the Jurisdictions.

Alexander withdrew the motion.

Omelchuck said staff acted in good faith and apologized to the Commission and Verizon if the process by which staff was prepared to assist the Commission in discussing potential remedies

appeared misleading. Omelchuck said that in discussions with the Commission's legal counsel it was determined that this was the way to bring forward a discussion about remedies. Omelchuck said staff's report and recommendation was not meant to confuse the Commission or hide the ball from Verizon.

Omelchuck said the Commission could direct staff to prepare a draft Order containing findings of fact and conclusions of law and including remedies for Commission consideration at its next meeting. Omelchuck said Thomas, at the pre-hearing conference, agreed to set a timeline for distribution of a draft Order. Omelchuck suggested a timeline be set for staff to distribute a draft Order, which would include proposed remedies that would give Verizon enough time to provide a response in advance of the meeting or to prepare a presentation for the meeting.

Thomas directed staff to distribute a draft Order containing remedies to the MHCRC and Verizon by close-of-business on Monday, March 2. Thomas said Verizon will have until close-of-business Monday, March 9 to provide a response for inclusion in the packet.

Monroe confirmed that Verizon understood that staff was to distribute a draft Order containing findings of fact and conclusions of law and proposed remedies on March 2 and Verizon would have until March 9 to respond.

Kilian said Verizon's response should clearly state what they have done and what they plan to do.

8. MHCRC Evaluation of Staff Services

Thomas thanked Commissioners for their efforts to provide detailed comments on staff services. Thomas said Commissioners' evaluations of staff services were compiled and included in the meeting packet. Thomas said he met with Olson to discuss the evaluation outcomes. Thomas said the evaluation was positive and expressed the high quality of staff support provided to the Commission and the positive relationship between staff and the Commission.

MOTION: Alexander moved to approve the MHCRC evaluation of staff services. Cano seconded.

DISCUSSION: none.

VOTE: 6-0 passed

9. Authorize 2009 I-Net Funds for New I-Net Connections

Omelchuck said that for the past several years the Commission has allocated a certain amount from the I-Net Capital Fund to construct new I-Net connections. Omelchuck said the Commission authorized staff to review and approve new I-Net site builds under an established approval and funding process with Comcast. Omelchuck said staff recommends that the Commission approve up to \$200,000 for disbursement of 2009 I-Net Capital Funds to fund new I-Net connections.

In response to a question from Goheen regarding expenditure of funds in support of an I-Net connection at the County Wapato Jail, Omelchuck said the County has not yet met the requirements established by the Commission therefore staff has not released the funds.

Omelchuck said the Commission approved up to \$310,000 of 2008 I-Net funds for a connection at the Wapato Jail if the County provided documentation of the County's budgetary support for opening the jail. Omelchuck said that should the County provide this documentation in future, staff would come back to the Commission for reconsideration of funding.

MOTION: Alexander moved to approve up to \$200,000 for disbursement of 2009 I-Net Capital Funds to fund new I-Net connections. Goheen seconded.

DISCUSSION: none.

VOTE: 6-0 passed.

10. Staff Activity Reports

- Verizon Franchise Update: Omelchuck said Verizon provided notice of service being launched in Wood Village, Fairview & Troutdale on February 6, 2009. Omelchuck said Verizon's first quarterly customer service standard report was included in the meeting packet. Omelchuck said Verizon failed to meet the benchmark for service installations. Omelchuck said Verizon notified staff of the missed benchmark and followed up with information, i.e. inclement weather issues and a short period of time for taking the measurement, as explanation. Omelchuck thanked Verizon for initiating discussions on the missed benchmark and said staff fully expects Verizon to meet the benchmark in future.
- Comcast Digital Service Transition: Omelchuck said Comcast is transitioning its analog delivered expanded basic service to a digital delivered service. Omelchuck said this transition is not related to the federally mandated DTV transition. Omelchuck said schools and government agencies in Multnomah County are provided with free expanded basic service under the franchise and will be impacted by this transition. Omelchuck said staff is collaborating with Comcast to help ensure that these organizations continue to receive service. Omelchuck said Comcast has been very cooperative and has given plenty of notice. Omelchuck said this is an example of a cooperative relationship between stakeholders and Comcast.
- FCC/Legislative Developments: Henry said Verizon has introduced House Bill 2405 at the state legislature to pre-empt all local and state regulation (including consumer protection) for all IP-enabled services in Oregon. Henry said staff is working hard against the bill and plans to participate in the hearing on March 4.
- FY08-09 Mid-Year Budget Reductions: Henry said the City of Portland has asked for mid-year reductions for all programs that use general fund dollars. Henry said the Finance Committee is scheduled to meet on Wednesday to discuss.
- FY09-10 Budget Process: Henry said the City of Portland has asked for up to 5% reductions in the upcoming budget proposals. Henry said the Finance Committee has met once already to develop proposals and will continue to meet over the next few months. Omelchuck encouraged Commissioners not on the Finance Committee to participate in future budget discussion given the complexity of issues at hand.
- Other: Omelchuck, referring to the hand-written thank you note included in the meeting packet, highlighted the work of the Multnomah County Youth Commission and KBOO Radio, a past grantee.

11. Committee Reports

- Finance: Thomas said the Committee is scheduled to meet on Wednesday.
- Community Needs: none.
- Grant Evaluation: none.
- I-Net liaison: Alexander said staff, in cooperation with Comcast and ComNet, is looking at upgrading the edge devices at the user sites. Omelchuck said the I-Net fund is available to scale the network. ComNet has identified that the edge devices previously deployed are reaching end-of-life and are not supported by the manufacturer. Omelchuck said staff is meeting with Comcast, ComNet, Alexander and Brian Nordlund of Sparling to discuss options.
- PCM liaison: none.
- MetroEast liaison: none.

12. New Business

Thomas thanked Alexander for rearranging his schedule to make the meeting tonight.

Thomas said he would like to schedule a future MHCRC meeting to take a mid-year review of the MHCRC's goals.

13. Franchisee Report

Verizon: none.

Comcast: Inouye thanked staff for including the letter from Gresham Barlow School in the meeting packet. Inouye said Comcast assisted many schools in the area with television hook ups so that students and teachers would have access on Inauguration Day. Inouye reiterated that the Comcast digital migration scheduled for the Portland Metro area sometime this spring is due to Comcast recapturing analog bandwidth and separate from FCC DTV transition. Inouye said the migration will affect channels 32 to 71. Inouye said Limited Basic service will still be transmitted in analog. Inouye said approximately 10% of subscribers will be impacted. Inouye said Comcast is providing those impacted with one free DCT and two free DTA adapters. In response to a question from Thomas regarding the additional adapters, Inouye said each additional adapter after the first there is \$1.99 per box per month. Inouye said Comcast is hosting a job fair on Saturday and is looking to hire up to 30 employees for its call center.

Cascade Access: none.

14. PEG Provider Report

Sylvia McDaniel, PCM, thanked Comcast for keeping to the schedule to transfer channel 29 to PCM to program. McDaniel said PCM submitted its mid-year activity report and highlighted that PCM produced 1,084 shows in the last six months. McDaniel said she is reshaping the organization to open doors to other types of funding. McDaniel said the phrase "Smart Access" is being used to market PCM services and to solicit new partnerships.

Rob Brading, MetroEast, said MetroEast has been involved with the Oregon Sasquatch Centennial events.

15. Public Comment: none.

Adjourn: 10:50pm

Respectfully submitted,

Rebecca Gibbons
Program Specialist