



## MT. HOOD CABLE REGULATORY COMMISSION

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

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

Email: [www.mhcr.org](http://www.mhcr.org)

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### MT. HOOD CABLE REGULATORY COMMISSION

MetroEast Community Media, Studio A

March 16, 2009 Meeting Minutes -- **APPROVED**

### SUMMARY MINUTES

MINUTES AS APPROVED AT THE APRIL 20, 2009 MHCRC MEETING.

Call to Order: 6:30pm

1. Roll Call.

Commissioners present: Norman Thomas (Chair), Rich Goheen, Sue Dicile, Tim Clark, John Kilian, Andrea Cano.

Commissioners absent: Alan Alexander and 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: Thomas disclosed meeting with Rob Brading regarding MetroEast Community Media strategic directions.

4. Public Comment: none.

5. February 23, 2009 Meeting Minutes

**MOTION:** Cano moved to approve the February 23, 2009 meeting minutes. Goheen seconded.

**DISCUSSION:** none.

**VOTE:** 6-0 passed.

6. Order 2009-01: Findings of Fact, Conclusions of Law and Assessment of Remedies in connection with failure of Verizon Northwest to interconnect and include MetroEast Community Media PEG Channels with Basic Cable Service as required by City of Gresham franchise.

Dicile said she listened to the recording of the February 23rd Formal Hearing on the Verizon franchise violation and reviewed the written materials admitted into the hearing record. Dicile said that based upon her review of the record she planned to participate in the Commission's discussions and any voting on this matter.

#### **Staff Presentation**

Olson said staff followed Chair Thomas's established timeline for circulation of a draft Order and remedy recommendation. Olson said the proposed Order contained in the meeting packet was impacted significantly by the fact that Verizon notified the MHCRC and MetroEast that the PEG channels were activated on March 4. Olson said staff independently verified the activation. Olson said the proposed Order has been revised from the original staff draft of March 2, 2009 to also take into account comments received from Verizon on March 9, 2009.

Olson said staff considered a range of penalties up to \$45,000 when preparing its original recommendation. Olson said staff considered in its penalty recommendation the magnitude of the violation, the anticipated eventual activation of the channels and the damage done to the community. Olson said staff had initially recommended a \$22,500 penalty with specific instructions as to whom the penalty should be paid and how the money was to be used. Olson said that in light of the actual activation of the channels, staff substantially reduced the penalty in the proposed Order and that in light of Verizon's comments on the original staff recommendation, staff eliminated any directives as to how the penalty is to be spent other than it will be paid to the City of Gresham.

Olson said staff acknowledges Verizon's efforts to expedite the activation of the channels following the February 23 hearing. However, Olson said staff also believes that a material franchise violation finding means damage has been done because a material provision in the contract has been breached. Olson said a material franchise violation leads directly to remedy options as outlined in the franchise.

Olson said the City of Gresham will have the opportunity to review the final Order through the discretionary review process included in the MHCRC's Intergovernmental Agreement.

Olson said staff is recommending the Commission consider a \$15,000 penalty. Olson said staff's recommendation took into account the actual activation of the channels on March 4, Verizon's comments submitted on March 9 and the Commission's past history of assessing penalties as a result of material franchise violations. Olson said the Commission fined Comcast \$43,000 last year for failing to provide subscribers 30-days notice of a service change. Olson said Verizon failed to provide the PEG channels to subscribers for three months. Olson said staff struggled with and attempted to reach a commensurate recommendation while taking into account the status of Verizon as a new and competitive provider.

Kilian asked if Verizon counted up the days it took to activate the channels, how long it actually took. Olson said Verizon, following the February 23 hearing, found ways to expedite the process. Olson said Kilian's question would be best answered by Verizon.

### **Verizon Presentation**

Ramona Monroe, Verizon legal counsel, said Verizon appreciates the reduction in the penalty recommendation contained in the proposed order. However, Verizon does not concede that a violation has occurred and rejects any recommendation to assess a financial penalty. Monroe said Verizon respectfully disagrees with the Commission's

determination that a violation has occurred. Monroe said Verizon reserves all rights to appeal or challenge the Commission's determination.

Monroe said staff argues that Verizon has not explained why the PEG channels were not constructed during the negotiations at the same time the FTTP network was being constructed. Monroe said the FTTP network is an upgrade to Verizon's telecommunications network and does not depend upon a cable franchise because it is not a cable system. Monroe said the PEG connection serves no other purpose except to obtain PEG programming. Monroe said Verizon would not invest upfront in the connection without a contract for cable services in place. Monroe said Verizon was unable to reach acceptable terms in 18 months of negotiations with staff. Monroe said it was only through direct negotiations with the City of Gresham that agreeable terms were reached. Monroe said it is unreasonable to expect Verizon to pursue a PEG connection during the months of negotiations.

Monroe said staff argues a fine is a necessary deterrent to future PEG related violations. Monroe said that in choosing a remedy, one factor to consider is whether or not the same type of violation will occur in the future. Monroe said the channels have been activated therefore Verizon cannot again fail to activate them in the future. Monroe said that because the violation is not subject to repetition, no deterrent under the franchise is necessary or appropriate. Monroe said staff also identifies three potential future violations to justify the penalty. Monroe said the potential future violations are speculative. Monroe said staff suggests Verizon might modify its technology necessitating new PEG equipment. Monroe said Verizon just constructed a state of the art system and is unlikely to change the technology any time soon. Monroe said staff also identifies the PEG grant requirement in the franchise as an area that could be violated in the future. Monroe said Verizon has already paid the grant amount and there is little potential to violate this provision in the future. Monroe said staff also argues the PEG fee provision might be violated in future. Monroe said Verizon simply collects and remits the PEG fee. Monroe said Verizon has already paid the first quarterly installment of the PEG fee.

Monroe said it was a long and arduous process to put this franchise agreement in place. Monroe said that after 17 months there were many issues still not agreed upon. Monroe said the City of Gresham approved the agreement on November 18. Monroe said that just days after activation of service, Verizon learned that staff had a different expectation on when the PEG interconnect was to be completed. Monroe said Verizon worked to activate the PEG channels as quickly as it could. Monroe said Verizon achieved activation on March 4.

Josh Dillon, Verizon Regional Manager, responsible for overseeing all franchising in the western region. Dillon said he has testified that he has negotiated a lot franchise agreements and his team implements a lot of franchise agreements. Dillon said he has never had to get into this level of detail under any other agreement. Dillon said Commission Alexander suggested at one point that Verizon and staff had a "failure to communicate." Dillon agrees with this statement. Dillon said he believes everyone at the Commission's February 23 meeting agreed that the PEG channels needed to be activated. Following the February 23 meeting, Dillon said he contacted his team and directed them

to do whatever it takes to get the channels activated. Dillon said Verizon was successful in activating the channels a full month ahead of its anticipated schedule. Dillon said Verizon is hoping to put closure to this issue and in turn start fresh with staff and the Commission. Dillon said he believes everyone is in agreement that cable competition in the area is a positive circumstance and that there is a huge consumer appetite for Verizon's superior products. Dillon said he believes Verizon and staff started off on the wrong foot and continued to head down the wrong path. Dillon said Verizon wants to start developing a working relationship with staff.

Kilian said the City of Gresham signed a contract with Verizon on November 18. Kilian asked Dillon why Verizon did not initiate steps to activate the PEG channels on November 19 with the same urgency Dillon instructed his team with following the February 23 meeting. Kilian said that had Verizon initiated that level of effort two months earlier, then the Commission and Verizon wouldn't be here dealing with this issue tonight. Kilian said he understands Verizon's delay to implement an interconnect plan until an agreement had been reached. Kilian said had Verizon initiated urgent activation of the channels starting on November 19, then the PEG channels would have been up and running by the January 1 and Verizon could have claimed resolution of any potential violation within the cure period.

Monroe said the agreement provides that MHCRC needs to notify Verizon within 10 days of notice of service activation where the PEG channels need to be located on the channel lineup. Monroe said Verizon did take steps to implement activation immediately following receipt of staff's letter. Monroe said Verizon started the process back in December. Monroe said activation took from early December to March 4 to complete. Monroe referred Commissioners to the Hearing Record and Verizon's construction timeline. Monroe said Verizon believes this is an extremely accelerated timeline. Dillon said his team has activated PEG channels all over the country. Dillon said the PEG activation here has been a smooth install with no hiccups and it still took nearly 120 days to complete. Monroe said that early on in the process a lot of work takes place internally at Verizon and not at MetroEast.

Cano said she has reviewed the Commission's meeting minutes regarding this issue. Cano said she does not believe this situation has come about by a failure to communicate but rather an unwillingness to communicate on the part of Verizon. Cano said Verizon argues this is not a regulation that applies because they are not a cable company and the FTTP system is regulated under telecommunications law. Cano said yet Verizon contradicted this argument by arguing that the services it delivers over the FTTP network is indeed cable service but without the PEG channels. Cano said the agreement defines cable service as including the PEG channels. Cano said Verizon was given notice of a potential violation and an opportunity to cure. Cano said Verizon did not respond to the opportunity to cure in a manner that addressed the issue at hand. Cano said she supports a penalty and that the penalty proposed by staff may not be enough to effectively sanction the company. Cano said she believes Verizon owes the City of Gresham and MetroEast for damages incurred.

Monroe said Verizon doesn't deny that it is providing cable services to subscribers. Monroe said staff suggested the service Verizon is providing may not be considered cable

service because the PEG channels had not yet been included. Monroe said she believes there was a misunderstanding between staff and Verizon about what the agreement required in terms of activation of the PEG channels. Monroe said Verizon was not aware that staff expected the PEG channels to be up and running at the time of service roll out until it received the letter dated November 26 from staff. Monroe said Verizon stated at the City of Gresham Council meeting that the PEG channels would take time to activate. Monroe said no one, at that time, told Verizon they expected anything different. Monroe said Verizon did not know that it was expected to delay offering service until the PEG channels were available.

Cano said it's the MHCRC's expectation that when a cable system is activated in the area it will carry the PEG channels.

Monroe said Verizon has activated over 700 PEG channels across the country and that has not been the expectation in Verizon's experience with other franchising authorities.

Goheen asked Monroe to clarify her earlier statement regarding the need for a franchise agreement and how that relates to the carriage of PEG channels.

Monroe said Verizon understands it needs a franchise to provide cable services. Monroe said the FTTP network is a telecommunications facility that did not require the cable franchise to be in place in order to complete an upgrade to the system. Monroe said Verizon needed the franchise to begin providing cable service and PEG services over the FTTP network; not to construct it.

Dicile said the Commission has noted the differences in negotiating agreements with cable companies that have always been cable companies verses companies that are telecommunications companies first and foremost and cable companies as a new entrant into the market. Dicile said there are shared expectations that arise out of historically working with cable companies that the Commission cannot expect when working with telecommunications companies. Dicile said she also believes the franchise language regarding cable service being defined by carriage of the local broadcast and PEG channels was expressly clear and could not and should not have been construed differently. So in that regard, Dicile said she thought it was clear that Verizon had indeed violated the franchise. Dicile said the Commission, in the past, has given ample opportunities to the providers to remedy potential violations. Dicile recalled the numerous notices and warnings that the Commission issued to both AT&T and later Comcast on customer service issues prior to issuing penalties. Dicile said it's been the Commission's goal historically to find a remedy to the violation and to delay issuing penalties unless there was no other recourse. Dicile proposed the Commission consider finding Verizon in violation of the franchise but not levying a financial penalty.

**MOTION:** Dicile moved to adopt Order 2009-01 including findings of fact and conclusion of law finding Verizon in violation of the franchise in connection with failure of Verizon Northwest to interconnect and include MetroEast Community Media PEG Channels with Basic Cable Service as required by the City of Gresham franchise; however eliminate the provisions in the Order for a financial penalty. Clark seconded.

**DISCUSSION:**

Walters said the proposed motion appears to address sections 4.1, 4.2, and 4.3 of the draft Order regarding the financial penalty. Walters said the motion suggests substituting

language in Section 4.1 such as, “ the Commission now orders that it has made a determination that Verizon has materially violated the franchise as identified above,” and to strike Sections 4.2, 4.3 and 4.4.

Dicile said Section 3.14 and 3.15 would also need language revisions or stricken.

Goheen said he was reluctant to eliminate the language in Sections 4.1 and 4.2. Goheen said Section 4.1 should read, “Verizon Northwest shall not be assessed any penalty for material violation of the franchise.” Goheen said Section 4.2 should remain however state Verizon is not being assessed a penalty for the violation.

Walters said Section 4.1 and 4.2 would be redundant. Walters said only Section 4.1 would be necessary.

Cano asked if the Order should include the Commission’s reasons for choosing to forgo a fine.

Kilian suggested Section 4.1 addresses the violation.

Dicile the Commission has established a precedent in how it has conducted fact finding and resolution of violation issues. Dicile said Verizon has activated the channels. Dicile said the violation finding alone documents Verizon’s breach of the agreement. Dicile said should Verizon violate the contract again, then the Commission has precedent to follow the path that leads to financial penalties.

Kilian agreed.

Cano asked if Verizon considered issuing an apology letter to customers. Thomas said he believes Verizon is informing customers of activation of the channels via an on-screen scroll message.

Goheen said the Order should state clearly that a material franchise violation has occurred.

**VOTE:** 6-0 passed.

(Walters was instructed to edit the Order based on the motion and present a revised Order for Commission consideration later in the meeting.)

#### 7. I-Net Fund 2008 Year End Report

Omelchuck said that under the franchises, Comcast dedicates one percent of its gross revenues to fund Institutional Network Capital requirements and extensions (referred to as the “I-Net capital fund”). Omelchuck said the fund is subject to ongoing oversight by staff and approval by the Commission. Omelchuck, referring to the year-end report included in the meeting packet, said staff incorrectly suggested Mike Katz, MHCRC financial consultant, had reviewed this report. Omelchuck said staff was able to review and verify the expenditures in the report independent of outside financial review this year. Omelchuck said Comcast received about \$750,000 in revenue as a result of I-Net services. Omelchuck said staff, Alan Alexander, Comcast and ComNet are in discussions regarding an upgrade plan for stakeholder sites.

**MOTION:** Cano moved to approve the I-Net Fund 2008 Year End Report. Dicile seconded.

**DISCUSSION:** none.

**VOTE:** 6-0 passed.

8. MHCRC Letter to Portland Mayor Re: Proposed Cuts to PCM Budget

Henry gave an overview of budget hearings with the City of Portland. Henry said staff had a work session with the City of Portland Council last week and was informed that the Mayor is moving forward with a five percent (5%) budget reduction to PCM's and the MHCRC's funding.

Henry said in past years, that the Commission has advocated on behalf of PCM through letters to the Portland City Council. Henry said the purpose of the letters has been to outline the importance to the community of PCM services and to ask Council to hold harmless those services from funding reductions.

Henry said staff recommends that the Commission authorize Chair Thomas to sign a letter on behalf of the Commission to the Portland City Council advocating for PCM in the FY09-10 budget process.

In response to a question from Goheen regarding the City of Portland's funding of PCM, Henry said the City of Portland has entered into a contract with PCM that includes a formula for determining funding. Henry said the contract allows the City to consider reductions to PCM similar to other bureaus that are funded from the City's General Fund. Henry said that under normal circumstances the City pays PCM about \$900,000 annually under the contract.

In response to a question from Goheen, Omelchuck said the City of Portland collects about \$5 million in cable franchise fees annually.

Dicile said that in 2003, PCM was subject to a fairly arbitrary budget cut of about \$200,000. Dicile said any additional cuts become egregious because PCM took such a hard hit in 2003. Dicile said she supports a letter from the MHCRC to hold PCM harmless.

Thomas assessed Commissioner consensus and determined consensus is in favor of sending a letter to the Portland City Council.

Henry said the Finance Committee met to discuss both the current year budget reduction and the FY09-10 budget. Henry said that in order to meet current year budget reductions from the City of Portland funding, staff is containing spending so that Portland's reduction will be deducted from its year-end credit at the end of FY08-09. This will not affect the East County Jurisdiction credit.

## 9. Staff Activity Reports and Updates

- Verizon Franchise Update: Omelchuck said Verizon's first quarterly PEG and franchise fee payments were paid late. Omelchuck said staff is working with Verizon to set up an automatic bank transfer to prevent future delays. Omelchuck said staff has noted the franchise language regarding interest on late payments for Verizon and is waiting to hear how Verizon proposes to handle payment of late fees.
- Comcast Rate Increase: Olson said Comcast implemented rate increase effective April 1. Olson said the 1996 Cable Act deregulated the industry. However over the past 13 years, subscribers have seen a 150% increase in rates. Olson said Verizon's rates are commensurate with Comcast's. Olson said areas that have had the benefit of a competitive market have not experienced rate reductions. Olson said subscribers are not benefiting in the rate department with competition. Kilian said he was disappointed with Comcast's decision to raise its rates.
- Comcast 1<sup>st</sup> Quarter 2009 Telephone Answering Statistics: Omelchuck reported that Comcast is not likely to meet its telephone answering requirement for 1<sup>st</sup> quarter 2009. Omelchuck said Comcast is currently reporting meeting the standard only 72% of the time. Omelchuck said Comcast must meet the standard 90% of the time to remain in compliance. Omelchuck said staff plans to issue a potential franchise violation letter by the end of the month. Omelchuck said initial communication from Comcast suggests Comcast's own digital transition is the reason for the increased call volume.
- FCC/Legislative Developments: Henry said there are four bills that staff is participating in, testifying on or monitoring closely at the State legislative level. Henry said House Bill 2405 is championed by Verizon and supports deregulating VoIP delivered services. Henry said Verizon is preparing amendments to address some of the concerns raised by local authorities such as consumer protection concerns. Henry said the Chair of the House Committee plans to schedule a work session in the next six weeks and staff plans to participate. Henry said the other bills include House Joint Resolution 6, which expresses policy of the State to develop and improve broadband availability throughout the state. Henry said staff is preparing comments that are due Thursday. Henry said there is a third bill on facilities relocation in the right-of-way. Although not the direct purview of the Commission, staff is monitoring it closely as it shifts some of the cost of relocation to tax payers. Henry said the Governors office is establishing a broadband committee designed to oversee broadband strategy development throughout the state.
- MHCRC Budget: FY08-09 & FY09-10: see item 8 above.
- Competitive Grant Review Process and Timeline: Omelchuck the deadline for grant applications is tomorrow. Omelchuck said staff is on target to deliver review panel comments and preliminary materials to the Commission for its consideration prior to the May MHCRC meeting.

- Other: Olson said the City of Portland has asked Henry to coordinate a grant proposal for federal stimulus broadband funds that would benefit the Metro area.

10. Committee Reports

- Finance Committee: Thomas said the Committee is schedule to meet next Tuesday.
- Community Needs: Dicile said the Committee is scheduled to meet on April 3.
- Grant Evaluation Committee: none.
- I-Net Liaison: none.
- PCM Liaison: Dicile said PCM appears to be clearing up some issues that resulted from the implementation of user fees. Dicile said despite producer unhappiness with the user fees, producers are gearing up to advocate for PCM in the upcoming budget cycle. Dicile said PCM, like many others, has fallen victim to its investment income declining. Dicile said as a result PCM has had to reduce the number of hours it is open to the public.
- MetroEast Liaison: none.

11. New Business

Thomas noted the upcoming meeting schedule.

12. Franchisee Activity Report

Cascade Access: none.

Comcast: Inouye said Comcast has begun its digital migration of channels 31 through 71 in the Portland metro area. Inouye said Expanded Basic subscribers will need a DCT for their primary TV set and a DTA for any secondary outlets to continue receiving programming. Inouye said subscribers making the transition will see the added benefit of access to 20 additional channels, Comcast's Video-on-Demand platform and digital music channels. Inouye said Comcast is providing one DCT and two DTAs free of charge. Inouye said digital customers that already have a DCT will receive two DTAs for free.

Kilian asked what kind of assistance is being provided to subscribers who are confused about the transition and which boxes they need. Inouye said customers can access information about the transition and the equipment online, at a Comcast store or by calling Comcast. Inouye said Comcast updated its automated calling system (IVR) mid-February to include an option to speak with a customer service representative (CSR) specifically about Comcast's digital transition.

Inouye said Comcast saw a spike in call volume when it began the migration in the Salem area several months ago. Since then, Inouye said Comcast has hired more staff and restructured the IVR to help handle the increase.

Clark said he called in to order his DCT and was impressed with the service.

Inouye said the boxes are shipped to subscribers free of charge.

Clark asked if Comcast has heard of some TVs not working with the DCT. Clark said he had one TV that worked fine with the cable plugged directly in but would not work when the DCT was attached. Inouye said he had not heard specifically of this issue but could assist Clark after the meeting.

Verizon: Dillon said Verizon plans to respond to staff regarding the interest payment this week. Dillon said Deede will attend the MHCRC's next meeting. Dillon said Verizon is running some promotions and bundling opportunities.

13. PEG Provider Activity Report

Portland Community Media: Andre Stewart, PCM Finance and Human Resources Director, said PCM's proposed budget to the City of Portland is due tomorrow. Stewart said PCM has recently instituted an activity fee and has collected in excess of \$12,000 in the last 60 days. Stewart said PCM is hosting its annual producer and volunteer appreciation event on Friday April 3<sup>rd</sup>.

Dicile asked if the matter of the potentially missing payment from the City of Portland has been cleared up. Stewart said PCM is looking at documentation on an old hard drive and hopes to have a resolution by the end of April.

MetroEast Community Media: Brading said MetroEast has also scheduled a volunteer recognition event on April 17 at MHCC. Brading reported upcoming events include: National Federation of Community Broadcasters conference, a conference for community radio folks in early April and the Alliance for Community Media conference in Portland in July.

Dicile asked Brading what MetroEast is doing to assist with planning of the Alliance conference. Brading said MetroEast is helping to find venues for the Hometown Video awards, providing speakers, and providing equipment and tours of MetroEast and PCM.

**Agenda Item 6 Continued**

Walters reviewed edits to Order 2009-01:

- Paragraph 3.14 has been deleted.
- Paragraph 3.15 renumbered to 3.14 and the phrase, "the need for a substantive financial remedy, as provided for in the Verizon Gresham Franchise, in order to deter violations of PEG access and other material obligations of the Verizon Gresham Franchise in the future," deleted.
- Paragraph 4.1 has been modified to read, "Verizon Northwest is not assessed any penalty for material franchise violations of the Verizon Gresham Franchise..."
- Paragraph 4.2 has been deleted.
- Paragraph 4.3 has been deleted.
- Paragraph 4.4 has been deleted and the remaining paragraphs renumbered.

Verizon had no comments.

**MOTION**: Dicile moved to approve Order 2009-01 as revised. Kilian seconded.

**VOTE**: 6-0 passed.

14. Public comment: none.

Adjourn: 8:19pm

Respectfully submitted,

Rebecca Gibbons  
Program Specialist