MOUNT HOOD CABLE REGULATORY COMMISSION
February 23, 2009 Hearing

Verizon Northwest Inc.'s Opening Brief

I. INTRODUCTION

Verizon Northwest Inc. ("Verizon") has taken extraordinary measures to activate the public, educational, and governmental channels ("PEG Channels") that originate at MetroEast Community Media ("MetroEast"). Verizon has prioritized the activation of the PEG Channels to be provided pursuant to the Cable Franchise Agreement Between the City of Gresham, Oregon and Verizon Northwest Inc. dated November 18, 2008 (the "Franchise Agreement" or "Agreement"). Verizon expedited the internal planning, design, and engineering processes and approvals to shorten the overall process by more than eight weeks. Verizon also completed connection of the MetroEast facility to the Fiber-To-the-Premise Network ("FTTP Network") ahead of schedule. As a result of these extraordinary efforts, Verizon anticipates that it will be ready to launch the PEG Channels in advance of the April 8, 2009 target date.

Moreover, Verizon had no obligation to take these extraordinary measures. Under the Franchise Agreement, Verizon is entitled to a reasonable period of time to activate the PEG Channels. Given the steps required, a reasonable period of time to launch the PEG Channels is six months. Verizon has been offering cable service in Gresham for less than three months. Therefore, Verizon cannot be in violation of the Franchise Agreement for failing to launch the PEG Channels within a reasonable period of time.

If Verizon were in violation of the Franchise Agreement, Verizon is entitled to a Notice of Noncompliance and an opportunity to cure. Verizon never received a Notice of Noncompliance under the Franchise Agreement.

Verizon respectfully requests that the Mount Hood Cable Regulatory Commission ("MHCRC") terminate this proceeding because no violation of the Franchise Agreement has occurred. Verizon further requests that the MHCRC terminate this proceeding because proper procedures under the Agreement have not been followed. In the alternative, Verizon respectfully requests that the Commission determine that Verizon has undertaken and continues good faith efforts to remedy the alleged noncompliance. Arguments supporting each of these requests is set forth below.

II. ANALYSIS

A. Verizon Has Not Violated The Franchise Agreement.

MHCRC staff asserts that Verizon has violated the Franchise Agreement because the PEG Channels were not active on the date that Verizon began providing competitive cable service to multiple subscribers in the City of Gresham (the "Service Date"). To have active PEG

Channels on the Service Date, Verizon would have needed to construct a connection from its video serving office ("VSO") to MetroEast before the Agreement was final or delay offering competitive cable service until such connection was constructed and the PEG Channels were active. The Franchise Agreement imposes neither requirement and would be unenforceable if it did.

1. Verizon is not required to delay providing competitive cable service until the PEG Channels are active.

Delay in providing competitive cable services is against public policy which favors competition. Competition reduces rates and speeds deployment of advanced broadband services to consumers. Federal Communications Commission, In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, Released March 5, 2007 (hereinafter "FCC Order") at ¶ 50, 52. Federal law provides that a franchising authority may not unreasonably refuse to grant a competitive franchise. 46 U.S.C. § 541(a)(1). The Federal Communications Commission has found that delay can constitute unreasonable refusal of a franchise. FCC Order at ¶ 67. The FCC further found that delays allow the incumbent cable operator the opportunity to launch targeted marketing campaigns that undermine a competitor's prospects for success. FCC Order at ¶ 24.

For these same reasons, a delay in market entry to allow for activation of PEG Channels would contravene public policy. When the City of Gresham granted a franchise to Verizon, the franchising process had already consumed more than nineteen months. By contrast, the FCC requires a decision on a franchise application in 90 days. FCC Order at ¶ 71. This delay of entry increases the cost of broadband deployment, deprives consumers of choice and the favorable impact of competition on rates, and allows the incumbent to lock customers into contracts while operating as a monopoly. *See* FCC Order at ¶ 52. As the FCC found, a requirement that Verizon delay entry into the market as a competitive cable provider would constitute an unreasonable denial of a franchise in violation of federal law.

2. Verizon is allowed a reasonable time in which to activate the PEG Channels.

The City of Gresham did not require a delay in offering competitive cable service. To the contrary, the City granted Verizon a franchise that requires Verizon to provide PEG Channels within a reasonable period of time. Section 7.1.1 of the Franchise Agreement provides:

> Subject to Section 3.10.2, Grantee shall provide eight (8) PEG Access Channels as part of Basic Service which shall be fully accessible to all Subscribers within the Service Area. Grantee shall provide one additional Access Channel as part of Basic Service, to be used by the City or its designee(s) for the distribution of PEG Access Channel programming information to Subscribers.

Section 7.1.1 is silent as to the date that the PEG Channels should be activated. When no time frame is provided by the language of the contract, a reasonable time period is implied. See

Stricklin v. Flavel, 180 Or.App. 360, 43 P.3d 1116 (2002) (holding that in the absence of a specific time for performance, performance was due within a reasonable time); *Farmers Insurance Exchange v. Crutchfield*, 200 Or.App. 146, 113 P.3d 972 (2005) (in transaction where no time for delivery is specified, performance must occur within a reasonable time); and *Earls v. Corning*, 207 Or.App. 706, 143 P.3d 243 (2006) (when agreement for sale of real property did not include a closing date, a reasonable time is implied).

What constitutes a reasonable time period depends upon the facts and circumstances of the case. *Earls*, at 715. In this case, the time necessary to complete the various steps and processes required to activate the PEG Channels must be considered. The Franchise Agreement provides some guidance. Under the Agreement, Verizon has reserved additional PEG Channels for activation during the term of the franchise. *See* Agreement, Section 7.1.3. The Agreement explicitly provides 120 days to activate such a channel when the programming source is MetroEast. Agreement, Section 7.1.3.3. This time frame assumes a connection exists to MetroEast because such connection is required under the Agreement. However, if the new channel will be sourced from another location, no timeframe is specified. Therefore, when a connection to the programming source is in place, the Agreement provides 120 days to activate a channel that has been reserved. When no connection exists, as is the case with the eight PEG Channels sourced from MetroEast, more time is required.

The addition of new PEG Channels to the cable system requires a complex series of design, engineering, construction, and testing processes. First, a design for connecting the programming source to the cable system must be developed. Once a design configuration has been established, exact specifications must be engineered. The engineering is double-checked for accuracy and quality control. When final engineering is complete, the necessary materials and equipment are ordered. Construction begins when all materials are available. After the fiber has been installed to the origination site, equipment can begin to be installed and connected to the new fiber. All new connections and equipment must be tested to ensure quality transmissions. Appropriate adjustments are made during the testing process. Finally, when all testing is complete, the new channel signals can be added to the cable system. Barring unusual circumstances, these steps can often be completed in a period of approximately 180 days, or six months.

Many steps in this process are outside the control of the cable provider. For example, coordination with the provider of PEG programming signals is necessary to ensure adequate space, power, access, and environmental conditions are provided. In addition, inclement weather may cause delays in construction or third party vendors may not be able to deliver necessary equipment in a timely manner. Based upon the number and complexity of steps required to activate PEG Channels and the potential for delays that are outside of Verizon's control, activation of PEG Channels may take more than 180 days.

In this case, Verizon has established an accelerated timeline of approximately 120 days for activation of the PEG Channels. The schedule was accelerated at the request of MHCRC staff. Verizon's proposed schedule is more than reasonable given the circumstances, which are explained in more detail below and in the Testimony of Anthony van Lierop.

3. The Franchise Agreement contemplates that the PEG Channels would not be active immediately.

By requiring actions prior to launch of the PEG Channels, the Franchise Agreement implicitly acknowledges that PEG Channels would not be immediately available. Section 7.1.2 of the Franchise Agreement requires that the City provide basic information regarding the PEG Channels to Verizon within ten days of execution of the Franchise Agreement. Section 7.2.2 makes Verizon's obligation to provide the PEG Channels contingent upon the City providing suitable conditions. One of these conditions is adequate electrical supply. MetroEast had to increase the number of electrical outlets available for Verizon's equipment, which takes time. The City is also required to provide certain liability protections to Verizon for use of the PEG Channels. All of these actions take time on the part of the City, or its designee, and must be completed prior to activation of the PEG Channels. Clearly, a reasonable period of time for both parties to complete these steps was intended in the Franchise Agreement.

Since Verizon began offering competitive cable service across the country, Verizon has routinely begun to offer cable services as soon as possible after a franchise is granted and added the PEG Channels within a reasonable period of time. There is nothing in the Gresham Franchise Agreement to indicate that the parties intended a different standard to apply in this case.

In summary, the Franchise Agreement does not require that the PEG Channels be active prior to the Service Date. The Agreement is silent as to the date such channels will be active. When a specific deadline is not provided, Oregon law requires that performance occur within a reasonable time. That the parties intended to provide for a reasonable period of time for PEG Channel activation is further supported by the fact that successful activation requires cooperation from, and action on the part of, MHCRC and/or MetroEast. A reasonable time for activation of the PEG Channels is 180 days. 180 days have not passed since Verizon initiated its competitive cable service in Gresham. Therefore, Verizon cannot be in violation of the Franchise Agreement for failing to provide the PEG Channels.

B. MHCRC Failed To Provide Adequate Notice Of The Alleged Noncompliance To Verizon.

The Franchise Agreement provides that, in the event the MHCRC believes Verizon has violated the Agreement, the Commission will notify Verizon "in writing of the exact nature of the alleged noncompliance (for purposes of this Section 14, the "Noncompliance Notice") at least thirty (30) days prior to exercising any of the City's rights under this Franchise." *See* Section 14.4. Verizon has not received the required Noncompliance Notice.

The letter sent by Julie Omelchuck to Tim McCallion dated November 26, 2008 was not a Noncompliance Notice as required by the Franchise Agreement. Ms. Omelchuck's letter did not state that it was a Noncompliance Notice. Nor did it indicate that it was sent pursuant to Section 14.4 of the Franchise Agreement. Instead, Ms. Omelchuck's letter indicated that it was to "provide notice under Section 7.1.2" which is the franchise provision requiring information regarding channel content be provided within ten days of the effective date.

The Franchise Agreement requires that the "exact nature" of the alleged violation be identified. Ms. Omelchuck's letter indicated that it did not appear that Verizon had implemented a connection at MetroEast to obtain PEG Channel programming and that Verizon had not communicated with MetroEast about a technical plan or timeline to implement such a connection. Without identifying which of these items is referenced, the letter states that "this is of grave concern" and "implicates a potential franchise violation". The letter did not identify the exact nature of any alleged violation.

The Franchise Agreement guarantees Verizon an opportunity to cure. Specifically, Section 14.5 provides that no further action shall be taken if Verizon cures within 30 days. If cure is not reasonably possible within 30 days, and Verizon initiates good faith efforts to cure within 30 days and continues such efforts, no further action shall be taken. But there is no mention of Verizon's cure rights in Ms. Omelchuck's letter. Instead of referencing these cure rights, Ms. Omelchuck requests that "Verizon address the channel connection without further delay." Verizon had no way of knowing that Ms. Omelchuck intended her letter to begin the 30-day cure period or trigger an explanation of Verizon's good faith efforts to cure within a longer period of time.

The question is not whether Verizon was aware of the MHCRC's concerns, but rather whether Verizon had notice that a violation of the Franchise Agreement was alleged and that the cure provisions had been triggered. Ms. Omelchuck's letter dated November 26, 2008 did not provide the requisite notice. Any oral conversations could not fulfill the notice requirement because the Agreement required that the notice be in writing. The requirement for written notice is to avoid exactly the confusion that has occurred in this case.

The Franchise Agreement provides that the Commission's right to conduct a formal hearing can occur only after Verizon has received a Noncompliance Notice and been afforded its opportunity to cure. Because Verizon did not receive a Noncompliance Notice as required in the Franchise Agreement, the cure provision was not triggered. Consequently, the prerequisites to a formal hearing have not been met. Without a proper Noncompliance Notice, the Commission cannot take further enforcement action.

C. Verizon Has Initiated Good Faith Efforts To Cure And Such Efforts Continue In Good Faith.

The Franchise Agreement guarantees Verizon an opportunity to cure in the event of an alleged violation.[1] There are two types of cure recognized in the Agreement. First, is a cure that occurs within 30 days of the Noncompliance Notice. Agreement, Section 14.5. The second comes into play when a cure is not reasonably possible within thirty days. In that case, if

[1] In arguing that it has satisfied the cure provision of the Franchise Agreement, Verizon does not waive its argument that no violation has occurred or that no Noncompliance Notice was provided.

Verizon "initiates good faith efforts reasonably satisfactory to the Commission to cure within thirty (30) days and the efforts continue in good faith, the Commission *shall not exercise* the City's [enforcement] rights." *Id.*

Given the complexities of design, engineering, construction, installation, and testing that are required to activate the PEG Channels, it is not reasonably possible to activate new PEG Channels within 30 days. As explained above, a reasonable period is 180 days. Therefore, the second type of cure is at issue here.

Verizon began offering cable service pursuant to the Franchise Agreement on November 25, 2008 (the "Service Date"). *See* Verizon Exhibit No. 2. Verizon initiated good faith efforts to activate the PEG Channels immediately following the Service Date.

Because Verizon obtains the CAN Channel from a source other than MetroEast, Verizon began distributing that channel to its Gresham subscribers on December 10, 2008.[2] With respect to the remaining eight channels, Ms. Omelchuck's letter dated November 26, 2008 informed Verizon of the general nature of programming to be carried on the PEG Channels and indicated the desired channel number assignments for the PEG Channels. Verizon Exhibit No. 3. Two business days following receipt of this information, Verizon requested that internal staff assign the PEG Channel numbers as requested in the notice. Tentative channel number assignments were made one week later.

Verizon conducted a site survey at MetroEast on December 9, 2008. Based upon the site survey results, Verizon determined that it would deploy "IP PEG" technology using the existing FTTP Network to connect the MetroEast facility to the Verizon network for the purpose of obtaining the PEG Channel signals. The same day as the site survey, Verizon's PEG design team finalized the deployment plan and submitted it for internal approval. The very next day, Verizon approved the plan and associated budget and the plan was released for final engineering by the outside plant group ("OSP") and the central office engineering and installation group ("COEI").

Based upon the decision to deploy IP PEG technology, Verizon developed an accelerated schedule for activation of the PEG Channels by April 8, 2009. *See* Verizon Exhibit No. 6.

Despite severe and highly unusual weather conditions, the OSP engineering was completed by January 9, 2009. At that time, Verizon issued construction work orders which allowed materials to be ordered and staging for construction to begin. The engineering team identified the need for a seven-foot rack to house the required equipment within the MetroEast facility. The rack and other required equipment to be installed at MetroEast was ordered on

[2] The facts set forth herein demonstrating Verizon's good faith efforts to cure are based upon the Testimony of Anthony van Lierop, filed herewith, and the testimony of Joshua N. Dillon to be presented at the hearing.

January 16, 2009. On that same date, the preliminary PEG Channel assignments received final approval.

On January 22, 2009, Verizon scheduled the "make ready" work at the MetroEast facility. Verizon also met with MetroEast at its facility on January 26, 2009. On January 27, 2009, MetroEast contacted an electrical contractor to install the necessary wiring and outlets for Verizon's equipment. During this time period, OSP began installing fiber between the MetroEast facility and Verizon's central office. Fiber installation was completed on January 29, 2009. The specialized rack was delivered to and installed at MetroEast on February 10, 2009, well ahead of the scheduled date (March 11, 2009). Verizon has installed two multi-dwelling unit ("MDU") optical network terminals ("ONTs") on the rack and is in the process of connecting them to the FTTP Network. Once a path is established from MetroEast to Verizon's central office/video service office ("VSO"), the COEI team will configure the optical line terminal ("OLT") that is housed at the VSO. A continuity test to ensure the integrity of video signals between MetroEast and Verizon's video hub office ("VHO") will complete the network creation phase of the process.

The provisioning phase requires installation of eight video encoders at MetroEast, one for each PEG Channel. Once these encoders are installed, Verizon will begin testing the signals from MetroEast and grooming the channels. Launch will occur when testing is complete.

This evidence demonstrates that Verizon initiated good faith efforts to activate the PEG Channels within thirty days of the Service Date and that such efforts continue to this day. The evidence also demonstrates that Verizon has expedited the PEG deployment process as much as possible. Verizon's initial timeline established a 120-day schedule instead of the standard 180-day schedule.

Verizon shortened the standard times for internal design decisions and approvals by prioritizing the MHCRC PEG Channels ahead of other channels that were already in the pipeline. This allowed the pre-planning phase to be completed in two weeks, instead of the standard 60 days. In addition, the engineering was prioritized and completed ahead of schedule, allowing construction to begin early. At the time of this writing, Verizon is ahead of this schedule and anticipates that the PEG Channels may be ready for launch before the April 8, 2009 target date.

There is no evidence that Verizon did not fully engage in good faith to activate the PEG Channels as quickly as it could. These efforts began just two business days after the Service Date and are continuing. As a result of Verizon's good faith efforts, an early launch date is anticipated. The Commission cannot reasonably find that these efforts are not satisfactory. Verizon has satisfied the cure provision such that "the Commission *shall not* exercise the City's rights under [] Section 14" of the Franchise Agreement.

III. CONCLUSION

Verizon has acted in good faith throughout the short life of the Franchise Agreement. Verizon promptly notified the MHCRC staff of the Service Date. Verizon has repeatedly met with staff by phone and in person to discuss staff's concerns about the PEG Channels, while at the same time prioritizing the activation process and working diligently to expedite the launch of the PEG Channels. Verizon provided staff with a written timeline that identifies benchmarks in the activation process and has diligently kept staff apprised of its progress with respect to the timeline and benchmarks. Verizon has offered to provide additional notice to subscribers of the availability of the PEG Channels beyond that required in the Agreement.

For the reasons set forth herein and to be presented at the hearing, Verizon respectfully requests that the Commission terminate this proceeding because no violation of the Franchise Agreement has occurred. In the alternative, Verizon respectfully requests that the MHCRC terminate this proceeding because no Noncompliance Notice was provided to Verizon and because Verizon has undertaken and continues good faith efforts to activate the PEG Channels as soon as possible.