

**MOUNT HOOD CABLE REGULATORY COMMISSION**  
**February 23, 2009 Hearing**

**Verizon Northwest Inc.'s Reply Brief**

**I. INTRODUCTION**

Verizon has acted in good faith at all times with respect to the PEG Channels. Verizon informed the negotiation team, the City of Gresham, and MetroEast that the PEG Channels would not be available when it began to offer cable service in Gresham. In fact, Verizon stated on the public record of the Gresham City Council, in front of all interested parties, that the PEG Channels would not be available for approximately 120 days. Verizon has informed its Subscribers of the channels available on its FiOS television service. Verizon is working diligently to complete the myriad steps necessary to be able to launch the PEG Channels as soon as possible. There is no evidence to the contrary.

**A. Verizon Has Complied With The Franchise In Good Faith.**

Staff incorrectly asserts that Verizon did not raise the issue of PEG Channel timing at any time during the negotiation or franchise approval process. To the contrary, Verizon disclosed the PEG Channel timing during both the franchising and approval processes.

On June 15, 2007, MHCRC staff proposed to Verizon a franchise provision that could be interpreted to require the PEG Channels to be active before Verizon began providing service under the franchise. *See* Verizon Exhibit 8, at §6.4.3. Staff's proposed language also would have required the reserved PEG Channels to be activated within 90 days of a request to do so. *See* Verizon Exhibit 8, at §6.1.3.2. Verizon refused to accept either of these provisions and explained to the MHCRC staff that the PEG Channels could not be activated that quickly and would not be available when Verizon began offering cable service. Staff's statement in its Formal Hearing Memorandum that Verizon "did not raise the issue at any point in the MHCRC process"<sup>1</sup> is simply incorrect. Both sides of the negotiation team were aware, as of summer 2007, that the PEG Channels would be activated some time after service was initiated. Neither party proposed language to specify a date certain. Verizon proceeded in good faith based upon its disclosure that the PEG Channels would not be available on "Day One."

During the Gresham City Council meeting on November 18, 2008, Verizon stated on the public record that it would take approximately 120 days to activate the PEG Channels. The Council also understood that Verizon would begin providing cable service promptly following approval of the franchise. Gresham Mayor Shane Bemis even commented during the Council meeting that Verizon was ready to "flip the switch" and begin service. Verizon made the statement that the channels would not be available for 120 days in good faith, on the public

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<sup>1</sup> Formal Hearing Memorandum at 6.

record, and in front of all interested parties. David Olson and Julie Omelchuck of the MHCRC staff were present. Neither indicated that they disagreed or had a different understanding of the requirements under the franchise. Rob Brading of MetroEast was also present and did not question the timing of service or of PEG Channel activation. The statement in the Staff's Formal Hearing Memorandum that "the MHCRC, the City of Gresham, and relevant stakeholders such as MetroEast trusted and assumed, throughout the course of developing and approving the Franchise agreement, that the required PEG channels would be activated and automatically [sic] on the Service Date selected by Verizon"<sup>2</sup> is simply untrue. At the time the Franchise Agreement was approved by the City of Gresham, both parties to the Agreement, as well as MHCRC staff and MetroEast, were aware that service would be available immediately and the PEG Channels would come online approximately 120 days later. Again, Verizon proceeded in good faith based upon this understanding.

**B. Verizon's Cable Service Does Not Violate Federal Law Or The Definitions In The Agreement.**

Staff argues that Verizon's FiOS TV service violates federal law and the definitions in the Agreement because the PEG channels were not available when it initiated service. Staff's position is incorrect. The definition of cable service contained in federal law does not mention, let alone require, PEG Channels as part of "cable service." As provided in the federal Communications Act:

the term 'cable service' means - -

- (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
- (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

47 U.S.C. §522(6). The Franchise Agreement incorporates the federal law definition of cable service. Agreement, section 1.6. Neither definition mentions PEG Channels. Despite the clear definition to the contrary, staff claims that by excluding the PEG Channels, Verizon's FiOS television is not "cable service" under federal law or the Franchise Agreement. Under staff's analysis, Verizon could offer FiOS television without a franchise so long as it did not include PEG Channels in its FiOS TV offering because federal law requires a franchise only if Verizon is offering "cable service." 47 U.S.C. § 541(b)(1). Clearly, Congress did not create such a loophole.

Staff's argument is based upon Section 543 of the Communications Act, entitled "Regulation of Rates," which addresses rate regulation where there is no effective competition. Subsection (b)(7)(A) of that section, entitled "Components of Basic Tier Subject to Rate Regulation," mentions a separate "basic service tier to which subscription is required for access to any other tier of service." 47 U.S.C. §543(b)(7)(A). Under that provision, any PEG Channels

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<sup>2</sup> Formal Hearing Memorandum at 7.

to be provided under the franchise must be included in any basic service tier which is subject to rate regulation. *Id.* (emphasis added). This provision does not address or bear upon when such PEG Channels should be available. Moreover, these provisions do not even apply to Verizon in the first place.

Section 543 of the Communications Act applies only to those cable providers who are not subject to effective competition. *See City of St. Petersburg, Florida v. Bright House Networks, LLC*, No. 8:07-cv-02105-T-24-MSS, 2008 U.S. Dist. LEXIS 100576 (M.D. Fla Dec. 12, 2008). In that case, the court held that the requirement to provide a basic service tier did not apply to Bright House because Bright House was subject to effective competition. *Id.*

The same is true in this case. As a competitive entrant in the Gresham cable market, Verizon is, by definition, subject to effective competition. The FCC has found that when a local exchange carrier offers cable service to an area served by an incumbent, effective competition is presumed. *See, Media Bureau Clarifies Issue Concerning Franchise Authority Certification To Regulate Rates*, FCC Public Notice, January 16, 2009. Because Verizon is subject to effective competition, Section 543 of the Communications Act is not applicable to Verizon. Therefore, the requirements in Section 543 regarding PEG Channels and the basic service tier do not apply to Verizon. Instead, PEG Channel requirements are a function of the local franchise.

The Gresham Franchise Agreement requires a certain number of PEG Channels but does not require them to be provided by a date certain. The Franchise Agreement defines “Basic Service” as any service tier that includes the retransmission of local television broadcast signals as well as the PEG Channels required by this Franchise.” Agreement, section 1.4. This definition clarifies the meaning of the term “Basic Service” as used in the Agreement. The definition is not a substantive requirement and does not address the timing of availability of PEG Channels.

For these reasons, staff’s arguments about federal law and the definitions in the Franchise Agreement requiring PEG Channels when cable service is initiated are wrong.

### **C. The PEG Channels Could Not Be Activated Within 30 Days.**

As described in Verizon’s Opening Brief and the Testimony of Anthony van Lierop, Verizon is diligently working in good faith to activate the PEG Channels as expeditiously as it can under the circumstances. Staff implies that because Verizon agreed to activate the PEG Channels in Washington County only 30 days after initiating service there, it should be able to do the same in Gresham. However, the circumstances are entirely different. In Washington County, Verizon reached agreement on the terms of the franchise long before it completed construction of the video hub office that enables Verizon to provide cable service in Oregon. Consequently, Verizon could not begin to provide cable service in Washington County for many months after it had entered into the franchise agreement. The circumstances in Washington County were such that “30 days after the service date” in that franchise constituted approximately eight months after the effective date of that franchise. Because it had a fully executed franchise in place, Verizon was able to construct the PEG Channel connection concurrently with construction of the video hub office and activate the PEG Channels shortly

after it initiated cable service. This occurred over a period of eight months after the franchise took effect.

In sharp contrast, Verizon was ready to provide cable service in Gresham long before the franchise was executed. As the Commission is aware, it was not clear that the parties would ever reach mutually acceptable franchise terms for Gresham. Verizon was still negotiating language in the Agreement the day before the City of Gresham approved the agreement. Under these circumstances, no reasonable business would begin constructing a connection to obtain PEG Channel signals. When the Gresham agreement was finally approved by the City Council, the video hub office was complete and functioning, the FTTP Network had been constructed in most of the city, and Verizon had already waited over 17 months to begin service in Gresham. Everything was in place to begin offering cable service and Verizon had made clear to all stakeholders that the PEG Channels would follow within a reasonable period of time. In both cases, Verizon acted in good faith under the unique circumstances that were present.

Because the PEG Channels could not be activated within 30 days, the 30-day cure period does not apply. Instead, the alternative extended cure period is applicable. Section 14.5 of the Agreement provides that “if cure is not reasonably possible within thirty (30) days and the Grantee 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 rights under this Section 14.” Even if a violation had occurred, the applicable standard would not be whether the PEG Channels were activated within 30 days as staff argues, but whether Verizon initiated good faith efforts to activate the PEG Channels within that period and continued such efforts in good faith.

**D. Absence Of A Deadline Does Not Mean Immediately.**

Staff argues that if no other deadline is stated in the Agreement, performance is due on the Effective Date or Service Date. If this were the case, the City would similarly be required to perform immediately any obligations without a stated deadline. The City of Gresham took on certain obligations under the Agreement without a stated deadline for performance. For example, Sections 7.7 and 11.1.7 of the Agreement obligate the City to require MetroEast to include Verizon as an additionally named insured in MetroEast’s liability insurance policy. Section 7.2.2 requires that “suitable required space, environmental conditions, and electrical power supply” for Verizon’s equipment be provided at MetroEast. These provisions do not include deadlines. Clearly, the City expected to be allowed a reasonable period of time to complete these tasks. In fact, despite its request, Verizon has not yet been provided with confirmation that it is named as an additionally insured on MetroEast’s liability insurance. The same standard must be applied to the obligations of both Verizon and the City under the Franchise Agreement.

**E. Verizon Was Not Afforded Its Due Process Rights Under The Agreement.**

Staff argues at great length that Verizon was adequately apprised of staff’s belief that failure to provide the PEG Channels when it initiated service constitutes a violation of the Agreement. However, the issue is not whether or when staff tried to clarify its intent that the

letter serve as a Noncompliance Notice, but rather whether Verizon received the due process to which it was entitled under the Agreement.

Section 14.4 of the Agreement guarantees Verizon notice of the “exact nature” of any alleged noncompliance. Section 16.5 of the Agreement provides that all notices required under the franchise must be mailed to Tim McCallion, President of Verizon Northwest Inc. with a copy to Jack H. White, Senior Vice President and General Counsel of Verizon Telecom. Verizon could change its designee for official notices by providing written notice of the change.

At no time did Verizon provide written notice of any change to its designated representatives for purpose of notices under the Agreement. For convenience of both parties, Verizon provided a different point of contact, Raymond Deede, for questions and routine matters related to administration of the Agreement. Both parties understood that Mr. Deede did not replace Messrs. McCallion and White for any official notices under the franchise, as demonstrated by the fact that Ms. Omelchuck’s letter was addressed to Mr. McCallion and copied to Mr. White. Ms. Omelchuck’s letter indicated that it constituted the notice required under Section 7.1.2 of the Agreement regarding the general type of use of the PEG Channels. As an official notice required under the Agreement, it was appropriately addressed to Mr. McCallion and Mr. White. The only communications that constitute an official notice under the Agreement are those sent to Mr. McCallion and copied to Mr. White.

Verizon cannot be expected to guess whether any communication it receives is intended to be an official notice under the Agreement. Nor can it be expected to consider an inadequate official notice to be rectified by a later, unofficial communication. This is particularly true with respect to email communications. By their very nature, email is informal and receives less attention than a letter. It is unreasonable to expect that an informal email to a single recipient will receive the heightened level of attention appropriate for a Noncompliance Notice. That is why the agreement establishes a formal notice process to assure Verizon’s due process rights.

The December 3, 2008 telephone conversation with Ray Deede and follow-up email did not constitute official notice under the Agreement. The comment contained in that email that the November 26, 2008 letter was intended to be a noncompliance notice did not make it one. Similarly, the staff reports for the December 15, 2008 and January 12, 2009 Commission meetings did not constitute official notice under the Agreement. These subsequent communications could not, and did not, satisfy Verizon’s due process rights.

Furthermore, Verizon did not receive the staff reports until after the respective meetings for which they were prepared. Without the benefit of the staff report for the January 12, 2009 meeting prior to the actual meeting, Verizon mistakenly believed that the January meeting was intended to be the informational session planned for December 15, 2008 that was cancelled. The staff report for the January 12, 2009 meeting, which Verizon received on January 13, 2009, was the first notice Verizon received that staff was requesting further enforcement action by the Commission. Because Verizon did not receive the staff report until the day following the January 12, 2009 meeting, it was unprepared to fully respond during the meeting. *See* Verizon Exhibit 5.

Nor can the January meeting itself be considered notice, or cure the defects in notice. The meeting was not in writing; Mr. McCallion and Mr. White were not present; and the alleged violations were not thoroughly discussed as staff asserts. There was no mention of the new allegation that federal law requires the PEG Channels when cable service is initiated. There was no mention of the allegation that Verizon was not providing adequate notice to its customers.<sup>3</sup> The lack of detail in the discussion, combined with the failure to provide Verizon with the staff report, combined with the lack of a clear Noncompliance Notice to Verizon's official notice recipients under the franchise constituted ambush. Furthermore, staff has never attempted to address Verizon's concerns by sending a Noncompliance Notice, identified as such and stating the exact nature of the alleged violations, to Mr. McCallion and Mr. White.

#### **F. Further Commission Action Is Not Appropriate.**

Staff's Formal Hearing Memorandum suggests that the Commission should consider remedies but does not propose or identify any particular remedy for consideration. Consequently, Verizon is deprived of an adequate opportunity to respond, or prepare a response, to any proposed remedies. Therefore, even if the Commission were to find against Verizon which it should not do for the reasons stated herein and in Verizon's Opening Brief, it would be inappropriate for the Commission to consider remedies at the February 23, 2009 hearing.

### **III. CONCLUSION**

The evidence and the arguments contained herein and in Verizon's Opening Brief establish that (1) initiating cable service without the PEG Channels did not violate the Franchise Agreement; (2) Verizon did not receive a Noncompliance Notice consistent with its due process rights; and (3) Verizon is diligently engaged in good faith efforts to activate the PEG Channels as expeditiously as possible. Therefore, Verizon respectfully requests that the MHCRC terminate this proceeding.

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<sup>3</sup> To this day, Verizon does not understand what notice staff believes subscribers should 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 available, necessarily excluding any channel that is not on the list. A current channel listing, tailored to specific geographic areas, is also available on Verizon's website.