

Before the  
Mt. Hood Cable Regulatory Commission (MHCRC)  
1120 SW Fifth Ave Room 1304  
Portland, OR 97204

**FORMAL HEARING MEMORANDUM**

**To: Mt. Hood Cable Regulatory Commission**  
**Re: Potential Verizon Franchise Violation –**  
**Failure to provide MetroEast PEG Channels in Gresham**  
**For: MHCRC Formal Hearing, February 23, 2009**  
**Prepared by: David C. Olson, MHCRC Director**  
**Date: February 17, 2009**

---

**STAFF SUMMARY AND RECOMMENDATION**

MHCRC staff has concluded that substantial, uncontroverted evidence exists to support a determination by the MHCRC that Verizon has failed to interconnect, activate and include the Public, Educational and Governmental (“PEG”) cable access channels of MetroEast Community Media (“MetroEast”) when Verizon began offering cable services to subscribers in its Gresham service area on November 25, 2008 (“Gresham Service Date”). Such failure by Verizon violates the material, unambiguous terms of Verizon’s cable franchise with the City of Gresham. Such failure has also materially damaged MetroEast (including its users, viewers, and community stakeholders), existing and potential Verizon subscribers, and the City of Gresham’s interest, as well as the public interest, in ensuring that material franchise obligations are performed. Verizon has been duly notified (in writing and otherwise) both initially and on multiple subsequent occasions of the exact nature (with citations) of the franchise violations at issue in this proceeding, and the immediate need for prompt and effective curative action by Verizon. Despite such notice, Verizon has failed at this writing to activate the required PEG channels on (or after) the Gresham Service Date. Verizon’s failure in this regard remains uncured and continuous as of the date of this memorandum. Therefore, MHCRC staff recommends the MHCRC formally determine that a material franchise violation has occurred. MHCRC staff further recommends that the MHCRC direct staff to develop suitable findings of fact and conclusions of law, including the assessment of appropriate remedies based on applicable franchise criteria, for final action by the MHCRC at the next available MHCRC meeting date.

**AUTHORITY & RULES OF PROCEDURE**

1. Authority. The Mt. Hood Cable Regulatory Commission (“MHCRC”) was created by intergovernmental agreement (“IGA”) to carry out cable regulation and administration on behalf of Multnomah County and the cities of Portland, Gresham, Troutdale, Fairview, and Wood Village (“Jurisdictions”). Among other things, the MHCRC oversees compliance with cable franchise agreements, subject to discretionary review by the Jurisdictions as provided under §4.A. of the IGA. The MHCRC’s authority over this matter, on behalf of the City of Gresham, is recognized in Exhibit B of the Verizon Gresham Franchise.
2. Applicable Franchise Agreement. The subject franchise in this matter is the Cable Franchise

Agreement between the City of Gresham, Oregon and Verizon Northwest, Inc. dated November 18, 2008 (“Verizon Gresham Franchise”). This proceeding does not address, and is not intended to address or include any rights or remedies pertaining to similar subjects which may arise under the separate cable franchise agreements or addendums entered into by Verizon and any other MHCRC Jurisdiction. On behalf of the Jurisdictions, the MHCRC does not waive any applicable rights or remedies of the MHCRC or the Jurisdictions in that regard.

3. Formal Hearing. In accordance with MHCRC Rules of Procedure (“RoP”) §6, the MHCRC has given notice of a Formal Hearing under RoP §6.6 to be held February 23, 2009 in order to consider evidence of potential violation by Verizon of the specific requirements of the Verizon Gresham Franchise as detailed herein.

### **APPLICABLE FRANCHISE REQUIREMENTS**

4. Applicable franchise requirements (all citations are to Verizon Gresham Franchise).

1.4 *Basic Service:* Any service tier that includes the retransmission of local television broadcast signals as well as the PEG Channels required by this Franchise.

7.1 *PEG Access Channels:*

7.1.1 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.

7.2.2 The City or its designee(s) shall cause to be provided suitable signals for the PEG Access Channels to Grantee at MetroEast Community Media, 829 NE Eighth Street, Gresham, Oregon 97030-5643 (the “PEG Access Headend”). The Access Channel signal for each PEG Access Channel shall be provided as composite video on a coaxial cable and two balanced audio +4dBm on two shielded audio cables to the Grantee’s encoding device at the PEG Access Headend. Grantee shall provide, install, and maintain in good working order the equipment necessary for transmitting the PEG Access Channel signal from the PEG Access Headend, or other signal source locations designated under Subsection 7.1.3.3, for distribution to Subscribers. Grantee’s obligation with respect to such upstream transmission equipment and facilities shall be subject to the availability, without charge to Grantee, of: (a) suitable required space, environmental conditions, and electrical power supply; (b) access to and pathway within the facility housing the PEG Access Headend; and (c) such cooperation of the City and any designee(s) as is reasonably necessary for Grantee to fulfill such obligations. The City represents and warrants that to the best of their knowledge, no incumbent cable operator consent is necessary for the Grantee to transmit PEG signals, including but not limited to, any consent related to the facilities of any incumbent cable operator used to transmit PEG content to an origination or other point from auxiliary locations. If the PEG Access Headend relocates or if the City designates a different signal source location for an Access Channel, the City or its designee(s) shall fund all direct costs to construct a connection from the new site or location to the nearest point on the FTTP Network.

*Note:* other provisions of the Verizon Gresham Franchise are cited where applicable throughout this Memorandum, or set forth in full where relevant.

### **MHCRC STAFF FINDINGS OF FACT**

5. Verizon Gresham Service Date and Verizon provision of “cable service”. Pursuant to the Verizon Gresham Franchise, §1.32, the MHCRC received notice from Verizon that the Service Date selected for Gresham by Verizon was November 25, 2008. The Service Date under the franchise means the date Verizon chose to initially provide purported “cable service” to multiple subscribers in the franchise area.

6. “Cable Service” under applicable law and Verizon Gresham Franchise must include PEG channels. Under Title VI of the Communications Act, all levels or “tiers” of “cable service” offered by a cable operator to subscribers are required by law to include “a separately available basic service tier to which subscription is required for access to any other tier of service.” This “Basic” tier, defined as Basic Service under §1.4 of the Verizon Gresham Franchise, must “at a minimum” include “Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers”.<sup>1</sup>

7. MetroEast PEG Channels not activated or provided to subscribers by Verizon on Gresham Service Date. Although MHCRC staff notified Verizon pursuant to applicable franchise provisions (*see* Exhibit 1) of the MHCRC’s placement request for the MetroEast PEG cable access channels required to be provided to subscribers by Verizon under applicable franchise provisions set forth in ¶4, above, there is no dispute among the parties as to the fact that on the Gresham Service Date, a date within Verizon’s control and wholly selected by Verizon, Verizon had not interconnected with Metro East as required under §7.2.2 of the Verizon Gresham Franchise, and did not provide the PEG channels required under §7.1.1 of the Verizon Gresham franchise. There is also no dispute that Verizon has not done so at this writing.

8. Appropriate notice recipients for Verizon. There is no dispute among the parties that Verizon has, without limitation, at all pertinent times in this proceeding, and in addition to the specific notice recipients specified under the Verizon Gresham Franchise (§16.5), identified Mr. Raymond Deede, Franchise Service Manager, Verizon Pacific NW Region (Everett, WA), as Verizon’s appropriate and designated recipient of notices and/or regulatory correspondence on Verizon’s behalf, and as Verizon’s designee to be responsible for receipt of and/or response to MHCRC regulatory matters, inquiries or issues arising under or in connection with the Verizon Gresham Franchise.

9. Notice & cure requirements of Verizon Gresham Franchise. The Verizon Gresham Franchise provides as follows concerning the nature and timing of the notice required to be provided to Verizon in the case of a potential Franchise violation, and Verizon’s right to cure or respond:

§14.4 *Notice of Violation:* If at any time, the Commission believes that Grantee has not complied with the terms of the Franchise, the Commission on behalf of the City shall notify Grantee 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

---

1 *See* Title VI of the Communications Act, 47 U.S.C. §543(b)(7)(A)(ii), binding and applicable to Verizon under §3.5 of the Verizon Gresham Cable Franchise.

exercising any of the City's rights under this Franchise.

§14.5 *Grantee's Right to Cure or Respond*: If Grantee removes or otherwise cures the asserted violation within thirty (30) days from receipt of the Noncompliance Notice, or 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. Upon cure of any noncompliance, the Commission shall provide written confirmation that such cure has been effected.

10. MHCRC Noncompliance Notifications to Verizon of potential Franchise Violations and Opportunity to Cure. MHCRC staff provided Noncompliance Notices to Verizon of a potential Franchise Violation" (with citations) in connection with this matter, stressing the need for prompt and immediate curative action by Verizon, or good faith efforts in that regard, as follows:

- a. *Notice letter to Verizon dated November 26, 2008. See MHCRC Staff-Exhibit 1*. The opening paragraph of the letter (MHCRC Staff-Exhibit 1) refers to "notice to Verizon on certain requirements under the recently approved cable services franchise with the City of Gresham, Oregon" and "raises a potential franchise issue related to inclusion of the local access channels in the cable services being offered in the franchise area. The MHCRC letter (Exhibit A) not only cites the applicable franchise provisions (7.1.1 and 7.2.2) but sets forth in full the language of Gresham Franchise §7.1.1 (requiring eight MetroEast PEG channels to be provided to Verizon Gresham subscribers), while at the same time summarizing the interconnection requirement of §7.2.2. The letter states that this matter is "of grave concern" and "implicates a potential franchise violation." The letter requests "that Verizon address the access channel connection without further delay." The letter concludes by expressing the hope "that Verizon can remedy the channel connect immediately."
- b. *Follow-up email to Verizon (December 3, 2008) confirming Noncompliance Notice and specifying deadline for Cure or good faith efforts toward cure. See MHCRC Staff-Exhibit 2*. Subsequently, MHCRC Cable Program Manager Julie Omelchuck on December 3<sup>rd</sup> documented in writing via an email addressed to Verizon's Raymond Deede a contemporaneous phone conversation between Ms. Omelchuck and Mr. Deede regarding the non-compliance issues arising from Verizon's failure to activate the Gresham PEG channels and the regulatory process going forward. Ms. Omelchuck's email to Mr. Deede explicitly confirmed in writing that (1) the November 26 letter (MHCRC Staff Exhibit 1) was indeed a "noncompliance notice"; and (2) January 2, 2009 was the deadline by which Verizon was required to cure, or initiate good faith efforts satisfactory to the Commission to cure, the specified noncompliance. The January 2<sup>nd</sup> date was established, per Verizon Gresham Franchise §14.5, as within 30 days of Verizon's receipt of the original Noncompliance Notice (which USPS had confirmed was received by Verizon on December 3, 2008).
- c. *In-person meeting with Verizon (December 11, 2008)* On December 11, 2008 MHCRC staff met in person with Raymond Deede to discuss the subject of the potential franchise violations and Verizon's plans or efforts directed at cure. The meeting was attended by Julie Omelchuck and David Olson of MHCRC staff (Mr. Olson attended only the first portion of the meeting in order to detail the specific regulatory requirements at issue). The meeting was also attended by Rob Brading, Executive Director of MetroEast

Community Media and MetroEast's engineer. MHCRC Staff at that time reviewed in detail with Mr. Deede the Verizon Gresham franchise provisions that were implicated by Verizon's failure to activate the PEG channels. Mr. Deede responded by describing a proposed process and timeline for activating MetroEast PEG channels which he estimated as being potentially complete on or around April 2009. Mr. Deede characterized the process and timeline he described as the usual and customary PEG channel interconnection and activation process for Verizon in most of its cable franchise areas.

- d. *Staff Report on Verizon franchise violations prepared for MHCRC December 15 meeting, distributed to Verizon. See MHCRC Staff - Exhibit 3.* In advance of the scheduled MHCRC December 15<sup>th</sup> meeting, MHCRC Staff duly prepared a staff report on the potential Verizon franchise violations, summarizing the status of the matter. The Staff Report was included in the MHCRC pre-meeting packet and listed as "INFORMATION ONLY" because Verizon was still within the "cure period" specified by the Verizon Gresham Franchise (*see ¶d, above*) and the MHCRC was obliged under the Verizon Gresham Franchise to proceed no further in the exercise of further process or remedies until this initial "cure period" had concluded on January 2, 2009. This Staff Report (MHCRC Staff - Exhibit 3) was distributed to Verizon and other interested parties, along with the rest of the agenda items and enclosures for the MHCRC meeting scheduled for December 15, 2008.<sup>2</sup> The December Staff Report once again confirmed that the November 26<sup>th</sup> MHCRC letter (Exhibit 1) was a Noncompliance Notice and Opportunity to Cure.
- e. *Staff Report on Verizon franchise violations prepared for MHCRC January 12 meeting, distributed to Verizon. See MHCRC Staff - Exhibit 4.* This further staff report was prepared for the MHCRC January 12<sup>th</sup> meeting, which took place subsequent to the January 2, 2009 expiration of the cure period. As the cure period had now expired, this staff report set forth the "exact nature of the alleged noncompliance," as required by §14.4 of the Verizon Gresham Franchise, and recommended the MHCRC schedule a formal hearing on potential Verizon franchise violations. In addition to recapitulating the relevant Verizon Gresham Franchise provisions implicated, and the underlying facts giving rise to the violations, the report also included MHCRC staff's analysis and conclusion that Verizon had failed to cure the violations or initiate good faith efforts in that regard, as required by the franchise.
- f. *MHCRC discussion at MHCRC meeting of January 12, 2009.* At the January 12, 2009 MHCRC meeting, the potential Verizon franchise violations were again thoroughly discussed by MHCRC staff and MHCRC members, with Verizon representatives in attendance and participating. The MHCRC subsequently gave direction to move the matter forward to the formal hearing scheduled February 23, 2009.
- g. *Notice of Formal Hearing, distributed to Verizon on January 22, 2009. See Exhibit 5.* The Formal Hearing notice includes a detailed Issue Statement as well as a complete breakout of all Verizon Gresham Franchise provisions at issue in this proceeding, which

---

<sup>2</sup> MHCRC Staff Reports prepared for regular MHCRC meeting are customarily prepared in the form of "Cover Sheets" for individual agenda items. These staff reports ("Cover Sheets") typically contain relevant background information, franchise citations, and staff recommendations for further action, if necessary.

are replicated in full. The Formal Hearing Notice was emailed to Raymond Deede and other Verizon recipients on January 22, 2009, more than 30 days before the February 23, 2009 scheduled date of the MHCRC Formal Hearing.

### **MHCRC STAFF REGULATORY ANALYSIS**

#### **11. Regulatory analysis of Verizon franchise violation.**

The potential franchise violations at issue in this case are straightforward and relatively free from the need to delve deeply into regulatory nuance and prior MHCRC precedent and interpretive history.<sup>3</sup> The franchise requirements at issue here are set forth clearly both in federal law (see ¶ 6, above) and in the Verizon Gresham Franchise. The command of both applicable federal law and the franchise that all PEG channels required by the franchise must be included as part of Basic service is clear, unqualified, and unambiguous. In the case of the Verizon Gresham Franchise, the franchise provisions are clear that the interconnection between Verizon and MetroEast must be accomplished, and the eight MetroEast PEG channels must be included on Verizon's cable services effective with the Verizon Service date (chosen by Verizon) of November 25, 2008. The facts are equally clear, and there is no material dispute between the parties, that Verizon failed to accomplish this by the Gresham Service Date, and has not accomplished it at this writing. Indeed, whatever service Verizon may at this writing be providing under the "FiOS TV" trade name in Gresham, it can in no way fairly be characterized as "cable service" under applicable federal law and the clear language of the Verizon Gresham Franchise. The issue is thrown into even sharper relief when it is realized that Verizon has entered into cable franchises with other Jurisdictions (including multiple Jurisdictions in Washington County which are technically linked to the Verizon Gresham system) where the relevant cable franchise agreement specifically provided for a "bridge" period of 30 days before the required PEG channels were to be activated and provided.<sup>4</sup> Thus, if Verizon wished to propose a delay or "bridge" period prior to activation of the required MetroEast PEG channels in the Verizon Gresham Franchise, then Verizon quite clearly knew what language or provisions to propose in the course of nearly 17 months of negotiations with MHCRC staff, and/or through the course of the MHCRC process and public hearing, and/or through the final franchise agreement approved by the Gresham City Council. But Verizon made no such proposal, suggested no such language, and did not raise the issue at any point in the MHCRC process. Nor, after the MHCRC process concluded, did Verizon propose any specific language in this regard to the City of Gresham, even though Verizon otherwise sought and was successful in negotiating with Gresham other provisions different from the those recommended by the MHCRC. Verizon now unaccountably argues that because the Verizon Gresham Franchise (in §7.1.1 and otherwise) is silent on the date when PEG channels will be activated, this means that a "reasonable period of time" must be imputed so as to allow Verizon to complete the necessary work to connect and offer the local PEG channels. However, nothing in the Verizon Gresham Franchise or the history of these negotiations supports such an argument. Indeed, Verizon's argument that the

---

<sup>3</sup> Other recent MHCRC formal franchise compliance inquiries and subsequent orders assessing remedies have relied to some degree on prior MHCRC interpretive precedent, e.g. MHCRC Order No. 2008-01; MHCRC Order No. 2002-01; and MHCRC Order No. 2001-01.

<sup>4</sup> See Cable Franchise Agreement between Verizon Northwest and Washington County (and 10 other Jurisdictions), effective May 25, 2007, Section 6.1.2.

franchise is “replete with examples”<sup>5</sup> that when the parties intended to provide a deadline, they included it in the agreement, underscores the fallacy of Verizon’s reasoning. In fact, Verizon’s argument turns logic on its head: the reality is that, under the Verizon Gresham Franchise, when the parties intended to set a separate deadline, or to provide a time frame for a commitment different from the Effective Date or Service Date of the franchise, then such a time frame, notice period, date, or separate matter of timing issue was specifically called out, provided for, and set forth clearly and unambiguously in the franchise agreement.<sup>6</sup> The fact that no separate provision was included in the Verizon Gresham Franchise for a different, deferred, delayed or otherwise elongated time frame or “transition” period for activation of the PEG channels underlines the main point here, and the unambiguous factual and legal surrounding of this material franchise violation: 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 on the Service Date selected by Verizon, as the Verizon Gresham Franchise clearly required. The Franchise became effective on November 18, 2008. Verizon then announced a Service Date of November 25, 2008 without having completed, and having barely initiated, the interconnection and activation of the PEG channels as required by the Verizon Gresham Franchise.<sup>7</sup> In conclusion, it was Verizon, not the City of Gresham, and not the MHCRC, that selected a Service Date to launch purported “cable services” that did not include the required MetroEast PEG Channels and Interconnection, which are material requirements of federal law and the Verizon Gresham Franchise. The series of MHCRC Noncompliance Notices documented in this memorandum followed as a consequence. *In conclusion, this is not a difficult or ambiguous franchise compliance determination.* Verizon’s violation of the material provisions of the Verizon Gresham Franchise, as cited, is clear and inarguable.

#### 12. Damage to MetroEast Community Media, its stakeholders, and the City of Gresham.

Over and above the clear and unambiguous material franchise violation by Verizon, there has been demonstrable damage to the interests of MetroEast Community Media as a consequence of Verizon’s franchise violations, including Verizon’s failure to activate, connect and include MetroEast PEG channels to date. Assuming the absence of effective curative action by Verizon continues through the scheduled date of the MHCRC formal hearing (February 23, 2009), *nearly three months* will already have elapsed since the Gresham Service Date selected and announced by Verizon. As the MHCRC is aware, MetroEast is a non-profit community television organization whose professional staff and hundreds of volunteers produce and cablecast Public Access, Educational, and Governmental (PEG) local cable programming. In 1984, the organization was founded as Multnomah Cable Access by a group of concerned citizens who understood that cable television had potential to provide more than entertainment. More than 20 years later, MetroEast’s nationally recognized and award-winning<sup>8</sup> role in its east Multnomah

---

<sup>5</sup> Letter, Raymond Deede to Julie Omelchuck, December 23, 2008.

<sup>6</sup> See, e.g. Verizon Gresham Franchise §4.1.1, §4.1.1.2, §4.1.1.3, §5.2.3, §6.5, §7.1.2, §7.1.3.3, §7.3.1, §7.3.3, §8.2, §8.3, §10.1, §10.4.3, §10.6, §11.1.6, §12.4, §14.7.2, §14.9, §14.10, and §14.11.

<sup>7</sup> Representatives of MetroEast Community Media informed MHCRC staff at the meeting of December 11, 2008 (referenced in ¶ 10 c. of this memorandum), which occurred after the date of the initial MHCRC Noncompliance Notice, that MetroEast had not been contacted by Verizon to discuss and arrange interconnection matters for more than a year.

<sup>8</sup> National recognition has often been awarded to MetroEast Community Media, including the 2003 Overall

County service area (the largest portion of which is within the City of Gresham) continues with its mission to invigorate civic engagement, inspire diverse voices and strengthen community life in Gresham and throughout east Multnomah County. As Gresham and other MHCRC East Multnomah County Jurisdictions are fully aware, MetroEast plays a critical role in providing essential community information and programming available in no other media. In its formal role as East County's premier service provider of community cable programming, MetroEast programs eight cable channels, and offers video production workshops and training, providing individuals, community groups and non-profit organizations in east Multnomah County a way to discuss community issues through video. Verizon's failure to include MetroEast PEG Channels from the Service Date as the franchise requires has damaged the interests not only of MetroEast, but of the City of Gresham and Verizon's own cable subscribers, who are simply not receiving the cable services required by law or the services they are entitled to under the Cable Franchise entered into between the City of Gresham and Verizon. As a result of Verizon's material franchise violations in this respect, not only is there damage to the public interest in franchise commitments that haven't been met, but subscribers to Verizon's "FiOS" service in Gresham at this writing still cannot obtain access to local cable programming of critical interest and importance to Gresham and throughout east County, such as local government meetings which include not only the Gresham City Council, but several other local jurisdictions with significant authority over substantial aspects of the lives of residents of East Multnomah County, including school districts and local agencies such as Public Utility Districts. Verizon's FiOS subscribers in Gresham, without any prior notice from Verizon, have not at this writing even been made formally aware by Verizon, at initial signup or otherwise, that they cannot receive any of MetroEast's channels and programming, including Gresham City Council and Planning Commission meetings, Multnomah County Commissioners meetings, and other government programming including coverage of the Oregon State Legislature and local school districts who are making decisions now in difficult economic times about matters that affect citizens in Gresham and throughout the area. One of the critical values of MetroEast Community Media is a commitment to collaborating with local governments, educational institutions, non-profit organizations and individuals to bring collective resources together to produce and cablecast programming content in keeping with Gresham and East County community aspirations. None of this is possible without regular access to cable subscribers---access Verizon has foreclosed by prematurely launching "cable" service in Gresham without the required MetroEast PEG channels. In answer to the question: What have Verizon FiOS subscribers missed in terms of content from MetroEast Community Media since Verizon's self-selected Service Date of November 25, 2008? Here are a few examples:

- No access to any of the live, gavel-to-gavel local government meetings (including the Gresham City Council) including ongoing access to the public discussions of elected officials currently engaged in critical discussions of budgets and service cuts affecting all citizens in a gravely recessionary economy;
- No access to MetroEast's unique, one-time-only programming as a partner in the Oregon 150 Sesquicentennial Project (celebrating Oregon's 150<sup>th</sup> birthday on February 14, 2009);

---

Excellence Award and numerous Hometown Video Awards from the Alliance for Community Media. MetroEast Community Media has also received awards and recognition from other significant entities, including from the National Association of Telecommunications Officers and Advisors, Cable Ace, and Government Star.

this project included community members and leaders, from Gresham and elsewhere, taping their own, unique “Oregon Stories” which were taped and aired on MetroEast channels in January and February 2009;

- Live coverage of Gresham Mayor Shane Bemis’s second “State of the City” speech, delivered to a packed Gresham City Council chamber on February 11, 2009; and
- Coverage of the 2009 session of the Oregon Legislature, which is considering deep cuts in social services, law enforcement, corrections, and support for public schools --- all critical matters for the City of Gresham and its residents.

In conclusion, the damage to the interests of MetroEast Community Media, its stakeholders, and the City of Gresham as a result of Verizon’s franchise violations is substantial, continuous, and remains uncured at this writing.

13. Regulatory analysis of sufficiency of notice provided to Verizon under the Verizon Gresham Franchise. As the succession of detailed notices set forth in ¶10 (above), and documented in the attachments to this Memorandum amply demonstrate, the notice provided to Verizon by MHCRC staff and the MHCRC is consistent with the requirements of the Verizon Gresham Franchise (set forth in ¶9, above). To summarize:

- Initial Noncompliance Notice (November 26, 2008) (MHCRC Staff Exhibit 1). The Initial Noncompliance Notice documents that Verizon had failed to implement specific Verizon Gresham Franchise requirements related to the PEG interconnection. The Franchise Requirements are set forth in detail. Moreover, the notice expresses specific concern that Verizon had not communicated with MetroEast to establish a technical plan or timeline to implement the required connection. The letter declares this matter “*of grave concern*” and states that “*this implicates a potential franchise violation.*” The letter requests “*that Verizon address the access channel connection without further delay.*” The letter concludes by expressing the hope “*that Verizon can remedy the channel connect immediately.*” (emphasis supplied)
- Follow-up Email (December 3, 2008) (MHCRC Staff Exhibit 2) Ms. Omelchuck’s email explicitly confirmed, and documented in writing, what had already been confirmed verbally with Mr. Deede, including the fact that (1) the November 26 letter (Exhibit 1) was indeed a “noncompliance notice”; and (2) within 30 days of Verizon’s receipt of the Noncompliance Notice, and in accordance with the Verizon Gresham Franchise §14.5, Verizon was required to cure, or initiate in good faith efforts satisfactory to the Commission to cure the specified noncompliance.
- In-person meeting with Verizon December 11<sup>th</sup> 2008. In response to these noncompliance notices and urgent messages regarding the need for immediate action and/or immediate good faith efforts toward cure of the violations, MHCRC Staff and MetroEast met with Verizon’s Mr. Deede on December 11, 2008. See summary, above, ¶10.c. After setting forth the potential franchise violations in detail, Mr. Deede responded by describing a proposed process and timeline for activating MetroEast PEG channels which he estimated as being potentially complete on or around April 2009. Mr. Deede characterized the process, and timeline he described, as the usual and customary PEG channel interconnection and activation process utilized by Verizon in most of its cable franchise areas. Based on Mr. Deede’s description and characterization at this meeting, MHCRC Staff’s preliminary analysis was that the process and timeline described by Mr. Deede appeared to be merely normative to Verizon, showed no

evidence of having been initiated, escalated or expedited by Verizon in response to the previous MHCRC Noncompliance Notice; and did not appear to demonstrate any particular sense of urgency nor any particularized degree of responsiveness by Verizon to the MHCRC Noncompliance notice and the stated deadline of January 2, 2009 (already provided to Mr. Deede) as the date by which Verizon would be required to cure the potential violations or initiate good faith efforts satisfactory to the MHCRC to do so. Ultimately, MHCRC staff's preliminary conclusion was that Verizon's response, as articulated by Mr. Deede, could not be credited by a reasonable person with the degree of good faith any such person would pronounce as "reasonably satisfactory" in order to effect a "cure within 30 days" of the specified noncompliance, as contemplated by the Verizon Gresham Franchise §14.5. Indeed, the estimated PEG channel activation timeline of April, 2009 proffered by Mr. Deede would tend to support the opposite conclusion, that is, as of the date of this particular contact with Verizon (December 11, 2008), Verizon's response to the Noncompliance Notice and the urgency of the situation stated in writing and verbally by MHCRC staff appeared:

- not in good faith,
  - unreasonable,
  - unsatisfactory in light of the notices and deadlines already communicated to Verizon, and
  - self-evidently NOT designed to cure the potential franchise violation within the 30 day "cure window" of January 2, 2009 – a deadline already provided in writing to Verizon by MHCRC staff (*MHCRC Staff Exhibit 2*); in fact, Verizon's estimate (April 9, 2009) regarding completion of the MetroEast PEG interconnect would occur more than four months after the Verizon Gresham Service Date selected by Verizon, four months after the initial MHCRC Noncompliance Notice, and by comparison was three months longer than the deadline for Verizon's activation of PEG Channels in Verizon's Washington County franchise.<sup>9</sup>
- Staff Report on Verizon franchise violations prepared for MHCRC December 15 meeting (*MHCRC Staff Exhibit 3*). This Staff Report, distributed to and received by Verizon, also contained a detailed description of the franchise provisions implicated in the potential Verizon franchise violation. It is worth quoting the relevant portion of the Staff Report verbatim:
- *On November 26, 2008 staff issued a Notice of Potential Franchise Violation and Opportunity to Cure letter to Verizon regarding inclusion of the local access channels in the cable services being offered in the franchise area. The Notice and Opportunity to Cure letter (attached) references requirements under Section 7.1.1 of the Gresham franchise and provides Verizon with 30-days from receipt of the notice to cure or initiate good faith efforts satisfactory to the Commission to cure the noncompliance. Verizon received staff's letter on December 3, 2008 and, therefore, has until January 2, 2009 to cure or initiate good faith efforts to cure the noncompliance. Although the MHCRC December meeting itself was cancelled due to inclement weather, there is no dispute that the Staff Report (MHCRC Staff Exhibit 3), along with the rest of the pre-meeting MHCRC*

---

<sup>9</sup> See footnote 4, *infra*.

agenda-related items was provided to and received by Verizon.

- Staff Report on Verizon franchise violations prepared for MHCRC January 12 meeting (MHCRC Staff Exhibit 4). In addition to setting forth the “exact nature of the alleged noncompliance,” as required by §14.4 of the Verizon Gresham Franchise, this Staff Report recommended the MHCRC schedule a formal hearing on potential Verizon franchise violations, as the cure/good faith efforts period had now expired (as of January 2, 2009). The report included MHCRC staff’s detailed analysis and conclusion that Verizon had failed to cure the violations or to initiate good faith efforts in that regard, as required by the franchise.
- MHCRC discussion at MHCRC meeting of January 12, 2009. As discussed in ¶10 f, above, at the January 12, 2009 MHCRC meeting, the potential Verizon franchise violations were again thoroughly discussed by MHCRC staff and MHCRC members, with Verizon representatives in attendance and participating. The MHCRC subsequently gave direction to move the matter forward to the formal hearing scheduled February 23, 2009.<sup>10</sup>
- Notice of Formal Hearing, distributed to Verizon on January 22, 2009. (MHCRC Staff Exhibit 5) As indicated above (¶10 g), this Formal Hearing notice once again includes a detailed Issue Statement as well as a complete breakout of all Verizon Gresham Franchise provisions at issue in this proceeding, which are replicated in full. The Formal Hearing Notice was emailed to Raymond Deede and other Verizon recipients on January 22, 2009, more than 30 days before the February 23, 2009 scheduled date of the MHCRC Formal Hearing.<sup>11</sup>

14. MHCRC staff conclusion following analysis of notice provided to Verizon. Based on the factual evidence and analysis set forth in this Formal Hearing Memorandum, MHCRC staff believes substantial evidence exists to support a determination by the MHCRC that, the timing and adequacy of the notice provided to Verizon were sufficient under applicable franchise provisions, and Verizon appears to have violated applicable requirements of the Verizon Gresham Franchise, specifically §1.4, §7.1.1, and §7.2.2 (set forth in full in ¶4 hereof), the terms of which are material franchise provisions.

#### **APPLICATION OF REMEDIES FOR FRANCHISE VIOLATIONS**

15. Commission acting on behalf of City of Gresham. In making a determination as to whether a franchise violation has occurred, and in separately determining the appropriate franchise remedy, the MHCRC is acting on behalf of the City of Gresham, as provided in the Mt. Hood Cable Regulatory Commission Intergovernmental Agreement, set forth as Exhibit B to the

---

<sup>10</sup> The record of the MHCRC January 12<sup>th</sup> meeting indicates that Verizon representatives complained that inadequate notice had been given to Verizon by MHCRC staff, both with respect to the original Noncompliance Notice of the potential franchise violations, and the Opportunity to Cure or initiate good faith efforts satisfactory to the Commission toward that end. However, MHCRC staff would observe that even if Verizon’s arguments were credible at this point (and MHCRC staff does not agree Verizon’s arguments on this point are credible) the January 12<sup>th</sup> discussion by Verizon with the MHCRC, and the documentation provided to Verizon at that time, on the public record, furnished ample and sufficient evidence of the requisite Noncompliance Notice and Opportunity to Cure as required under the Verizon Gresham Franchise, all of it occurring more than 30 days prior to the MHCRC scheduled formal hearing of February 23, 2009.

<sup>11</sup> See Footnote 10, above, regarding MHCRC staff’s response to Verizon’s reiterated procedural objections, which MHCRC staff believes are not credible and are without merit, as the record of this proceeding amply demonstrates..

Verizon Gresham Cable Franchise.

16. Application of Remedies for franchise violations. In considering the application of remedies following a finding of a material franchise violation, the Verizon Gresham Cable Franchise, §14.2, requires consideration of, among other things, (1) the nature and extent of the violation(s) (2) whether Verizon (the franchisee) has a history of similar violations, (3) the remedy that can be expected to deter such violation(s) in the future; (4) the damage suffered by the public and the cost of remedying the violation(s); (5) the persons burdened by the violation(s); and any other matters the MHCRC deems appropriate.

15. Potential range of remedies for MHCRC consideration. Giving due consideration to the criteria for the assessment of remedies for franchise violations, including, e.g. the nature and extent of the violation, the recent history of similar violations, the potential remedies that can be expected to deter such violations in the future, and the damage suffered by subscribers, MHCRC staff submits as evidence, as an initial matter, the Findings of Fact and Regulatory Analysis set forth in this Formal Hearing Memorandum. MHCRC staff will separately analyze and will be prepared in subsequent pre-Hearing filings or else at the February 23, 2009 MHCRC Formal Hearing on this matter to recommend specific remedies, or a suitable range of remedies for MHCRC consideration, should the MHCRC formally determine find that Verizon has violated the franchise in one or more of the manners set forth herein.

### **CONCLUSIONS & RECOMMENDATIONS**

16. Conclusions and recommendations. MHCRC Staff believes Verizon's failure to activate and include MetroEast PEG channels as part of Basic Service when Verizon elected to begin offering purported "cable service" to its subscribers in its Gresham service area on November 25, 2008 ("Gresham Service Date") violates the material terms of Verizon's cable franchise with the City of Gresham. Among other factors, staff believes the nature and scope of this particular violation and Verizon's failure to take prompt and adequate steps to cure the violation, violations which remain uncured at this writing, creates the necessary context for appropriate regulatory action by the MHCRC. Staff also submits that the MHCRC should act within the scope of its lawful regulatory responsibility on behalf of the City of Gresham, MetroEast Community Media and its users, viewers and stakeholders; Verizon cable subscribers in Gresham, and the public interest in ensuring orderly enforcement of and compliance with cable franchise agreements, and direct staff to prepare an appropriate Order containing findings of fact and conclusions of law as appropriate, together with appropriate remedies, as determined by the MHCRC, for the material franchise violations at issue in this proceeding.

**MHCRC STAFF PRELIMINARY EXHIBIT LIST**

Formal Hearing on Potential Verizon Franchise Violations –  
Failure to provide MetroEast PEG Channels in Gresham

<b>Exhibit #</b>	<b>Description</b>
<b>1</b>	Initial Noncompliance Notice: MHCRC letter to Verizon Northwest President Tim McCallion dated November 26, 2008 (emailed to multiple Verizon recipients November 26, 2008)
<b>2</b>	Email(s) from Cable Program Manager Julie Omelchuck to Verizon Franchise Service Manager Raymond Deede following up prior telephone conversations and discussing noncompliance notice (December 3, 2008)
<b>3</b>	Staff Report on potential Verizon franchise violations prepared for MHCRC meeting scheduled December 15, 2008 and distributed to Verizon.
<b>4</b>	Staff Report on Verizon franchise violations prepared for MHCRC meeting scheduled January 12, 2009 and distributed to Verizon
<b>5</b>	Notice of Formal Hearing, distributed to Verizon on January 22, 2009

**MHCRC STAFF – PRELIMINARY WITNESS LIST**

Formal Hearing on Potential Verizon Franchise Violations –  
Failure to provide MetroEast PEG Channels in Gresham

<b>Witness</b>	<b>Title</b>	<b>Summary of Testimony to be Proffered</b>
Rob Brading	Executive Director, Multnomah Community Television	History of Verizon contacts with MetroEast re interconnection; role and value of MetroEast PEG channels and programming in Gresham; damages to MetroEast from Verizon’s failure to include MetroEast PEG Channels
Julie S. Omelchuck	Cable Program Director, Mt. Hood Cable Regulatory Commission	History of Noncompliance & Opportunity to Cure Notices issued to Verizon; importance of PEG Channels