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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

LEVEL 3 COMMUNICATIONS, LLC,
Plaintiff-Appellant,

v.

DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent.

Oregon Tax Court Regular Division
TC 5236 (Control); 5269; 5291

SC S067283

APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Judgment of the
Oregon Tax Court, Regular Division
dated November 20, 2019
Honorable Robert T. Manicke, Judge

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I. INTRODUCTION

> "[T]he power to tax involves the power to destroy . . . the power to destroy may defeat and render useless the power to create . . ."

McCulloch v. Maryland, 17 US 316, 431 (1819).

This case requires the Court to decide whether the Oregon Legislature meant what it said when it taxed the value of "property" a company owns on a particular assessment date that is "used or held" for the purpose of engaging in certain industries. The Tax Court held that the statutory scheme permitted taxation of the entire enterprise value of the company itself in the hands of its shareholders. But surely the legislature understood the significance of the language it used to implement the state's power to tax property.

We therefore posit that the plain meaning of the statutory text—read in context—must prevail over the opaque interpretation that the Tax Court derived from an incomplete reconstruction of legal history. Citizens rely on a straightforward reading of statutes to manage their affairs, structure their business, and conform their conduct, and that straightforward approach accords with the time-tested legacy of this Court's statutory interpretation decisions.

Had the legislature intended to tax the value of an entire business enterprise, as opposed to its property on the valuation date, why does the statutory scheme consistently and repeatedly distinguish between a company's property and the company itself? Wouldn't the legislature simply have said property taxation embraces the value of the entire business enterprise instead of listing specific examples of property to be taxed? Neither the Tax Court nor the Department of Revenue cogently answered those questions here. They erroneously concluded that Level 3 Communications could be taxed based on the value of the entire company to its shareholders.

Accordingly, this Court should hold that property tax appraisal methodologies that derive a company's enterprise value—instead of the value of the company's *property*—must be adjusted, modified, or disregarded under Oregon's central assessment regime. To be valid, an appraisal must deliberately aim for the statutory target: the value of a company's existing property on the valuation date that is used or held in connection with one of the industries subject to central assessment. Because the Tax Court refused to require the Department's appraisal to meet that statutory target, this Court should reverse and remand this case.

II. STATEMENT OF THE CASE

A. Nature of the Proceeding and Relief Sought

This appeal arises from a decision of the Oregon Tax Court. Defendant-Respondent Oregon Department of Revenue (the "Department") centrally assessed property owned and used by Plaintiff-Appellant Level 3 Communications, LLC ("Level 3") for the 2014-15, 2015-16, and 2016-17 tax years under ORS 308.505 and ORS 308.515.

B. Nature of the Judgment Sought to Be Reviewed

The Oregon Tax Court entered a Judgment on November 20, 2019, determining the real market value of Level 3's property subject to central assessment for the 2014-15, 2015-16, and 2016-17 tax years to be $127,575,000 as of January 1, 2014, $184,815,000 as of January 1, 2015, and $224,055,000 as of January 1, 2016 (ER-295).

C. Statutory Basis of Appellate Jurisdiction

The Court has jurisdiction over this matter pursuant to ORS 305.445.

D. Timeliness of Appeal

The Judgment was entered on the trial court's register on November 20, 2019. (ER-303). Level 3 filed its Notices of Appeal on December 17, 2019. Level 3 timely filed this appeal pursuant to ORS 19.255(1).

E. Question Presented on Appeal

Does Oregon's central assessment regime, which taxes the value of a company's property on January 1 of each year that is used or held in connection with certain industries, permit assessment of value of the company itself from the standpoint of its shareholders?

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F. Summary of Argument

For its property to be subject to central assessment, a company must own the property on the January 1 assessment date and must actually use that property to conduct business in certain enumerated industries, including railroads, utilities, and communication companies like Level 3. The Tax Court erred in ruling as a matter of law that the appraisals proffered by the Department need not aim for this statutory target, but could include the value of future property reflected in the expectations of the company's shareholders.

Under the ordinary meaning of the statutory text, read in context, Oregon's central assessment regime taxes the value of a company's *property* but not the value of the company itself—the business enterprise value—from the standpoint of its shareholders. The statutory text and context repeatedly distinguish between a company's property and the company itself. An appraisal that values the entire business enterprise sweeps too broadly: it captures additional stock value held by a company's shareholders, which is distinct from the value of property used or held by the company. It is a fundamental principle of Oregon law that a corporation is distinct from its shareholders. In addition, the statutory definition of "property" specifically excludes shares of stock and similar intangibles that merely represent claims on other property.

Furthermore, at the time the 1909 legislature first enacted the key central assessment provisions, other Oregon statutes already taxed the value held by shareholders of certain corporations and also taxed the privilege of corporate existence. When the legislature taxed shareholder value and corporate existence, it did so expressly—using language that is absent from the central assessment regime.

The Tax Court misconstrued the phrase "franchises and special franchises" in the statutes to permit assessment of the shareholders' privilege to conduct business as a corporation. When viewed in context, "franchise" must be construed narrowly to refer to certain privileges state and local governments historically granted to railroads and utilities—the very industries subject to central assessment. These controversial arrangements were at the epicenter of public debate in Oregon that emerged during the era of urbanization that marked the beginning of the twentieth century. Indeed, this Court's early decisions and historical sources leading up to the 1909 enactment of central assessment overwhelmingly characterized "franchises" as legal privileges—not available to citizens generally—that a government traditionally conferred upon railroads, utilities, and similar companies to operate for the public benefit but for private profit. These franchises did not include the privilege to conduct business as a corporation—a privilege available to all citizens by statute since Oregon statehood.

In reaching the opposite conclusion, the Tax Court departed from the text and context of the central assessment regime. It relied on the historical development of state taxation in cases from Illinois, Ohio, and Kentucky. That incomplete history fails to link Oregon's 1909 central assessment provisions to the tax statutes of those states. Instead, the Tax Court's historical examples involved differently-worded state statutes that bear little resemblance to Oregon's central assessment regime.

Consistent with the statutory text and context, this Court has observed on two occasions that central assessment taxes the value of a company's property rather than the value of the business itself. *See Delta Air Lines, Inc. v. Dept. of Revenue*, 328 Or 596, 616, 984 P2d 836 (1999) and *Comcast Corp. v. Dept. of Rev.*, 356 Or 282, 284, 337 P3d 768 (2014). Those observations echo the Court's early case law and are difficult to reconcile with the Tax Court's view that central assessment taxes the enterprise value of a company.

The Tax Court, however, contended that certain language in this Court's recent decision in *DISH Network Corp. v. Dept. of Rev.*, 364 Or 254, 292 (2019), supersedes this Court's statements in *Delta* and *Comcast* that the value of the property does not equal the value of the business. Nothing in *DISH*, however, suggests this Court intended to repudiate its earlier statements and reinterpret the central assessment statutes.

In sum, the Tax Court disregarded this Court's statutory construction methodology when it ruled that the value of Level 3's property was equal to the value of the company to its shareholders. This led the lower court to accept a distorted appraisal of Level 3 *as a company*, despite uncontroverted evidence that the company's high-tech networking equipment rapidly becomes obsolete and declines in value precipitously upon installation. The Department's appraiser assumed that Level 3's property would actually grow its revenue-producing capacity because he assumed the company itself would grow, acquire new equipment, and expand its network in the future—i.e., obtain new property that did not exist on each valuation date. That appraisal approach cannot be reconciled with the text and context of the central assessment statutes, which values a company's existing property on January 1. Because the Tax Court erred in its interpretation and application of those statutes, this Court should reverse and remand this case.

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G. Summary of Facts and Proceedings Below

1. Who is Level 3?

Level 3 (and its corporate parent) is a telecommunications company and internet service provider headquartered in Broomfield, Colorado.[1] Opinion,[2] p. 2 (ER-227); Tr. 99-101. Level 3 owns and operates an optical fiber network worldwide, but primarily in North America, Latin America, and Europe. Opinion, p. 2 (ER-227); Tr. 111-13; Ex. 14. Optical fiber allows transmission of data using light waves, which has many advantages over electrical wires. Tr. 104-06. This network enables vast quantities of electronic information to be conveyed across the internet at high speeds and over great distances. Tr. 116-18; Ex. 14. Fundamentally, Level 3 is in the business of transporting electronic data. Opinion, p. 2 (ER-227); Tr. 106, 116-17 130, 169, 426, 1598. The company's ability to compete and generate revenue depends on the volume of data it can transmit. Tr. 201-03. Level 3 is not a household name because the company is essentially a wholesaler. Opinion, p. 3 (ER-228); Tr. 182. Its customers are businesses rather than consumers, and its customer base is dominated by a few large companies, government entities, and other telecommunications carriers. Opinion, p. 3 (ER-228); Tr. 99-100,171-72, 184.

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[1] Although stated in present-tense, these are the facts established at trial as of the applicable assessment dates.

[2] Refers to the Tax Court's opinion below (ER-226-294).

It operates in a competitive environment that includes many players, including large companies like AT&T and Verizon who, unlike Level 3, have diversified lines of business that include retail consumers. Tr. 145-46, 185, 703.

The backbone of Level 3's network consists of fiber-optic cables strung across continents and under oceans. Tr. 109-10. Each cable consists of multiple pipes called "conduits" that house the optical fiber. Tr. 107. When Level 3 originally installed much of its network in the 1990s, each cable included 12 conduits with the expectation that all of these would eventually be utilized for future growth. Tr. 107, 136-37. However, innovations in the technology used in optical communication equipment have allowed Level 3 to grow its network and increase data transmission volume without expanding its fiber network. Tr. 117, 138. Instead, higher capacity can be delivered more efficiently by updating the signaling equipment at the fiber end points. Tr. 117, 130, 154-55. Thus, as a result of changing technology, Level 3 uses only two of the original 12 conduits—a fraction of the available fiber in its network. Tr. 136-37. This technological and competitive environment affects the value of Level 3's network for property tax purposes.

2. The Value of Level 3's Property

The constant advances in data transmission technology render Level 3's network equipment obsolete shortly after installation because newer equipment can transmit a greater volume of data at a lower cost per unit. Tr. 129-131, 157. This phenomenon is called cost compression. Tr. 229, 1605. Because of competition, however, any cost savings spurred by technological change must be passed on to Level 3's sophisticated customers in the form of lower prices on a per unit basis. Tr. 147, 197-98; Ex. 19. This phenomenon is called price compression. Tr. 197-201, 1605.

To take advantage of cost compression and grow its revenues in the face of price compression, Level 3 must continually increase the volume of network capacity it sells to its customers. Tr. 201-03. Obsolete equipment, however, cannot generate growth in revenues in this environment. Tr. 217-18. To increase revenue in the future, Level 3 must expand its network—either by procuring up-to-date equipment or by acquiring other telecommunication companies and integrating their networks. Tr. 156, 201, Ex. 36. Level 3's modest revenue growth over the years is attributable to purchased growth, largely from its acquisition of other companies. Tr. 1429-31; Ex. 23. Level 3's analysts cannot forecast future growth in revenues without significant expansion of the company's network capacity. Opinion, pp. 8-9 (ER-233-34); Tr. 214-16, Ex. 36.

The Tax Court found Level 3's witnesses and documentary evidence on these factual issues to be "highly persuasive." Opinion, p. 9 (ER-234). The

Tax Court concluded the evidence was "comprehensive, and largely unrefuted" that Level 3's "equipment in place on any assessment date was not capable of generating [future] growth in revenue because it quickly became obsolete, even as customer demand for capacity constantly increased." Opinion, p. 43 (ER-268). Hence, the Tax Court found "as a fact, that the only way Taxpayer could satisfy customers' increasing demand and increase Taxpayer's own revenue was by constantly acquiring new equipment by direct purchase or by acquiring or merging with other companies that had the needed equipment." *Id*.

3. The Competing Appraisals at Trial

As detailed below, Oregon's central assessment regime taxes the market value of property a company uses or holds in connection with one of the industries subject to central assessment on January 1 of each tax year. ORS 308.540. The scheme generally requires valuation of a company's property inside and outside the state as a "unit" and then apportions that value to the company's activities in the state. ORS 308.550(1). Thus, the Tax Court had to determine the real market value of Level 3's property used in its communications business on each of the assessment dates. Opinion, pp. 1, 4 (ER-226, 229).

The parties proffered competing appraisals of Level 3's property. The most significant difference between the appraisals resulted from their disparate legal viewpoints of what the central assessment statutes require to be valued as property on each valuation date—i.e., the parties disagreed on the statutory target that an appraisal was required to meet. Opinion, pp. 5, 8-9 (ER-230, 233-34).

Level 3 targeted its appraisals to the value of Level's existing property used by the company on each assessment date, in reliance on the ordinary meaning of "property" in the central assessments statutes (*viz*. ORS 308.505(9) (2013)). Opinion, pp. 5, 43-44, 56-57 (ER-230, 268-69, 281-82); Ex. 1, p. 4 (ER-4). In doing so, Level 3 relied on consistent statements by this Court in *Delta Air Lines, Inc. v. Dept. of Revenue*, 328 Or 596, 616, 984 P2d 836 (1999) ("the department's task was to determine the value of Delta's assets, **not the value of Delta as a firm**.") (emphasis added); *Comcast Corp. v. Dept. of Revenue*, 356 Or 282, 294, 337 P3d 768 (2014) ("**only the property** used in the business . . . is assessed (and thus taxed). The **value of the business . . . itself is not subject to central assessment**.") (emphasis added). Opinion, pp. 38-42 (ER-263-67); Ex. 1, p. 4 (ER-4).

Accordingly, Level 3's valuation expert, Dr. Hal Heaton, based his unitary valuation model on Level 3's existing property in use on each assessment date, rather than the value of Level 3 as a company to its shareholders. Ex. 1, pp. 4, 20-23 (ER-4, 20-23); Tr. 1598, 1601-02. Under his model, the company's network in place on each valuation date would continue to suffer from obsolescence and its ability to generate future revenue would decline. Opinion, p. 43 (ER-268); Ex. 1, pp. 20-23 (ER-20-23); Tr. 1415, 1598, 1600-02.

By contrast, the Department's appraiser, Brent Eyre, based his valuation on the business enterprise of Level 3 as a company. He assumed that Level 3's property would increase its revenue-generating capacity at a rate of three percent,[3] because he predicted the industry and Level 3 as a company would grow its revenues at that rate. Opinion, p. 8 (ER-233); Ex. A, pp. 26-27 (ER-90-91); Tr. 704-05, 1351-52 (ER-204-05), Ex. 35, pp. 8-9 (ER-155-56). Mr. Eyre predicated his valuation on the assumption that Level 3 as a company would expand its network in the future, through acquisition of other companies or by purchasing new equipment. Tr. 737, 740. Thus, the Department's appraisal included the value of property that was not in existence on January 1 for each of the valuation dates. Tr. 741-43, 745-46.

Although their underlying legal assumptions differed, both appraisals considered all three valuation approaches to central assessment: the cost approach, the market approach, and income approach. *See* OAR 150-308-069 (2) (authorizing use one or more of these approaches). The cost approach is

[3] This was for the 2014-15 tax year. Mr. Eyre used growth rates of 2.9 percent and 2.6 percent for the subsequent tax years. Ex. B, p. 28; Ex. C, p. 29.

based on the theory of substitution and considers the cost to purchase the same property as of the assessment date; the market approach considers comparative value of the property reflected in the market as of the assessment date; and the income approach considers the present value of the income the taxable property is expected to generate over time. Opinion, pp. 6, 49, 56 (ER-231, 274, 281).

Level 3's valuation expert, Dr. Heaton considered the cost approach based on Level 3's historical costs less depreciation recorded in the company's balance sheets. Opinion, p. 49 (ER-274); Ex. 1, pp. 19-20 (ER-19-20).[4] He determined that this approach did not accurately account for the obsolescence of Level 3's existing property occasioned by rapid technological change and resulting in price compression and cost compression. Ex. 1, pp. 19-20 (ER-19-20). He concluded that the cost approach could provide only a high benchmark for the possible value of Level 3's property on the assessment date. Opinion, p. 49 (ER-274).

Dr. Heaton then considered the market approach. Ex. 1, p. 20 (ER-20). For publicly traded companies, this is often performed using the value of the company's stock and outstanding debt to determine what a similar company could be purchased for. Opinion, p. 56 (ER-281). Dr. Heaton determined the

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[4] Only the parties' appraisal reports for the 2014-15 tax year are included in the excerpt of record: Ex. 1 (ER-1); Ex. A (ER-65). The appraisal reports for the 2015-16 and 2016-17 tax years are similar. *See* Exs. 2-3; Exs. B-C.

stock and debt method was unreliable because many factors other than the value of the company's property influence the value of its stock. Opinion, pp. 56-57 (ER-281-82); Ex. 1, pp. 15, 20 (ER-15, 20). Among other things, the market price of a company's securities includes the speculative value of future property not yet in existence on each valuation date. Tr. 419-23 (ER-60-64).

Dr. Heaton relied entirely on the income approach. Ex. 1, pp. 25-26 (ER-25-26). Specifically, he used the discounted cash-flow method, which considers present value of an anticipated revenue stream generated by the property in use on each assessment date. Opinion, p. 6 (ER-231); Ex. 1, p. 26. His method accounted for cost compression and price compression and the related fact that obsolete networking property in place on the valuation date would decline in its ability to generate revenues in the future. Ex. 1, p. 23 (ER-23); Tr. 425. Any anticipated future growth in revenues by the company (which would be reflected in stock prices) would have to come from equipment upgrades and network expansion—by acquiring new property not present on each of the given valuation dates. Opinion, p. 43 (ER-268); Ex. 1, p. 23 (ER-23); Tr. 425, 429. Thus, Dr. Heaton's income approach valued the company's operating property in place on each valuation date, not the value of Level 3 as a company to its shareholders.

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By contrast, the Department's appraiser, Brent Eyre admitted that he performed a business valuation of Level 3. Opinion, p. 8 (ER-233); Ex. A, pp. 7-8 (ER-71-72); Tr. 704-05, 1351-52 (ER-204-05).[5] In his cost approach, Mr. Eyre included the business enterprise value by adding the value of "accounting goodwill" to his historical cost less depreciation calculation as shown on the balance sheets of the company as a whole. Tr. 714-15, 1378-79. Under Generally Accepted Accounting Principles, goodwill is not independently valued as an identifiable asset, but is an accounting residual number that follows from a corporate acquisition. Tr. 1352-1354 (ER-205-207). Level 3 acquired several companies over the years, accumulating goodwill as a residual figure on its balance sheet that is not attributable to either tangible or intangible property. Tr. 1382-85; Ex. 49.

In his market approach, Mr. Eyre estimated the value of Level 3's stock and debt securities, which include intangible investment attributes unrelated to the market value of Level 3's property. Opinion, pp. 56-57 (ER-281-82); Ex. A, p. 45 (ER-109); Ex. 48 (ER-225); Tr. 1356. Mr. Eyre made no adjustments

[5] Mr. Eyre's report states "The ultimate goal of a unit appraisal is to value and assess property. However, the unit methods used to achieve this ultimate goal are most akin to a 'Business Appraisal' as that term is referred to in the USPAP. Thus, the USPAP standards that most properly apply to this report are Standards 9 and 10." Ex. A, pp. 7-8 (ER-71-72). Mr. Reilly explained, an appraiser is required to invoke those standard in business valuation. Tr.1351-52 (ER-204-05); Ex. 35, p. 12 (ER-159). USPAP refers to the Uniform Standards of Professional Appraisal Practice. OAR 161-002-0000(39).

to address the intangible investment attributes of publicly traded securities—such as liquidity, diversification, limited liability, or expectation of growth from future assets—which add value to a company's securities, but have little to do with the company's taxable property in place on the January 1 valuation dates. Tr. 1340-42, 1355-1368; Ex. 35, pp. 8-11, 31 (ER-155-58, 178).

Similarly, Mr. Eyre's income approach did not address the unique factors affecting Level 3 within the competitive telecommunication industry, particularly the impacts of cost compression, price compression, and obsolescence. Ex. A, pp. 25-42 (ER-89-106). Relying on a publication that predicted three percent growth for the overall telecom industry, Mr. Eyre assumed that Level 3 as a company and the income-producing capacity of Level 3's property would grow at that same rate. Opinion, pp. 8-9 (ER-233-34); Ex. A, pp. 29-30 (ER-93-94); Ex. 35, pp. 20-22 (ER-167-69).

In response to Mr. Eyre's appraisal, Level 3 presented evidence that the value of a company from the standpoint of its shareholders does not accurately reflect the value of its existing property on a particular assessment date. Level 3's rebuttal expert, Robert Reilly, identified a dozen attributes of stock ownership, which provide value to shareholders but have little to do with the value of a company's property.[6] Tr. 1340-42, 1355-1368 (ER-208-221); Ex. 35, pp. 8-12, 31 (ER-155-59,178); Ex. 48 (ER-225). Both Mr. Reilly and Dr. Heaton agreed that, among other things, the share price of a publicly-traded company reflects the shareholders' belief or "bet" on the company's future prospects for growth. Tr. 420-21 (ER-61-62), 1340-41. A company's share price also includes value inherent in the fact that shareholders have limited liability, that shareholders mitigate investment risk through diversification, and that shareholders have a ready market available to liquidate their shares. Ex. 35, pp. 10-11 (ER-157-58); Ex. 48 (ER-225); Tr. 1362-63, 1366-67 (ER-215-16, 299-220). The property used or held by a company does not share these valuable attributes, particularly where the company has invested extensive capital resources in a single communications network that requires constant technological upgrade. Opinion, pp. 8-9, 43 (ER-233-34, 268); Tr. 1362, 1364, 1367 (ER-215, 217, 220); Ex. 35, pp. 10-12 (ER-157-159).

4. The Tax Court's Opinion

The Tax Court recognized that resolution of the parties' valuation dispute depended on the legal issue of whether the central assessment statutes require valuation of only the property of a company rather than the enterprise value of

[6]Attributes reflected in Level 3's stock included future tangible property, future intangible property, the present value of growth opportunities, and potential mergers and acquisitions. Opinion, p. 10 (ER-235); Ex. 48 (ER-225).

the company itself. Opinion, pp. 5, 9, 42-44, 47, 56, 60 (ER-230, 267-69, 272, 281, 285). The court summarized Level 3's position as "based on the premise that Taxpayer as a centrally assessed company is something distinct from the property it owns, holds or uses" and that "the Department may not include in its determination of value any items that are attributes of Taxpayer as a company." Opinion, p. 5 (ER-230). The Tax Court acknowledged that the

> "Taxpayer's premise is logical" and explained that "[t]he **ordinary meaning** of 'property' is 'something that is or may be owned or possessed,' which implies that the person owning or possessing the property can be identified separately and may have its own attributes or characteristics that make its value different from that of the property it holds."

Id. (emphasis added). The Tax Court further acknowledged the attributes of stock ownership identified by Mr. Reilly and stated that, "[f]or purposes of its legal analysis, the court. . . initially assumes that the Attributes are, in fact, attributes of the stock or other ownership interests in the company." Opinion, p. 10 (ER-235).

The Tax Court nevertheless concluded that Oregon's central assessment regime permits valuation of the entire company from the standpoint of its shareholders. *Id.* at 42-43 (ER-267-68). After determining that the statutory text and context of the central assessment scheme were inconclusive, the Tax Court focused on the legal history of central assessment in nineteenth century cases arising from Illinois, Ohio, and Kentucky that preceded enactment of

Oregon's 1909 central assessment statutes. *Id.* at 20-26 (ER-245-251). The Tax Court opined that those early cases constituted a "public record" available to the Oregon legislature, which tacitly accepted property appraisals based on business enterprise valuation. *Id*. at 26 (ER-251). The court's preliminary conclusion was not altered by its examination of selected legal developments in Oregon. *Id.* at 27-33 (ER-252-58).

The Tax Court also focused on the phrase "franchises and special franchise" in the definition of property and concluded that the legislature intended the value property to include the value of the corporate enterprise to the shareholders. *Id.* at 16-20, 35-36 (ER-241-45, 260-61). The Tax Court then considered this Court's decisions in *Delta* and *Comcast* but concluded that the statements in those cases were not precedential and were superseded by this Court's recent decision in *DISH Network Corp. v. Dept. of Revenue*, 364 Or 254, 434 P3d 379 (2019) and its discussion of the unit valuation method. Opinion, pp. 38-42 (ER-263-267). Based on its survey of authorities, the Tax Court saw "no indication . . . that the legislature has imposed any legal requirement to distinguish between the value of the company to its shareholders and the value of all of the company's tangible and intangible property." *Id.* at 42-43 (ER-267-68).

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The Tax Court then applied its legal ruling to each of the three appraisal approaches used by the parties' experts. With regard to the income approach, the court determined it was acceptable to ignore the obsolescence inherent in the company's property and the undisputed impacts of price and cost compression. *Id.* at 43 (ER-268). The court assumed that the company's property in use on each valuation date would decline in its capacity to generate future revenue. *Id.* at 43, 46-47 (ER-268, 271-72). The lower court nevertheless accepted the Department's appraisal and Mr. Eyre's formulation of the income approach. *Id*. at 49 (ER-274). For similar reasons, the Tax Court also accepted Mr. Eyre's stock and debt method of the market approach. *Id.* at 56-57 (ER-281-82). The Tax Court rejected Mr. Eyre's use of the cost approach, noting that even the Department's own rebuttal expert rejected that approach. *Id.* at 55-56 (ER-280-81).

III. ASSIGNMENT OF ERROR

The Tax Court erred when it concluded that the value of "property" that is "used or held" by a company on the assessment date as defined in the central assessment statutes includes not only the value of the company's tangible and intangible property in use on the assessment date, but also the value of the company itself from the standpoint of its shareholders.

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A. Standard of Review

This is a legal issue that this Court reviews for errors of law. ORS 305.445; *Seneca Sustainable Energy, LLC v. Dept. of Revenue*, 363 Or 782, 804, 429 P3d 360 (2018).

B. Preservation of Error

This issue was raised repeatedly during trial and in post-trial briefs and discussed extensively in the Tax Court's opinion. Opinion, p.5 (ER-240).

C. Argument

1. The statutory text and context show that the legislature intended to tax a company's *property* on the assessment date—not the value of the company to its shareholders.

This Court must decide whether the value of a company's "property" subject to central assessment on each assessment date includes the value of the company itself held by its shareholders. The Tax Court's ruling on this legal issue pervaded nearly every aspect of the Tax Court's evaluation of the parties' competing appraisals. Opinion, pp. 5, 9, 42-44, 46-47, 56-57, 60 (ER-230, 267-69, 271-72, 281-82, 285). This presents a question of statutory construction for this Court to resolve through its time-honored statutory construction methodology.

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a. Oregon's Statutory Construction Roadmap

This Court's most cited decisions form the roadmap for determining legislative intent when interpreting statutes: *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042, 1050 (2009) and *Portland Gen. Elec. Co. v. Bureau of Labor & Indus*., 317 Or 606, 610–11, 859 P2d 1143, 1146 (1993) ("*PGE*"). The roadmap begins with examination of the text and context of the statute. *Gaines*, 346 Or at 171 (holding that first step of statutory construction methodology "remains an examination of text and context."). The first level of analysis requires examination of the statutory text itself, because "[t]he formal requirements of lawmaking produce the best source from which to discern the legislature's intent." *Id.* at 171; *see* Or Const, Art IV, § 25 (requiring legislative majority to enact laws). When considering the text, "words of common usage typically should be given their plain, natural, and ordinary meaning." *PGE*, 317 Or at 611. The Court is directed "not to insert what has been omitted, or to omit what has been inserted * * *." ORS 174.010; *PGE*, 317 Or at 611. Where a statute defines a particular term, the Court uses that definition; but the Court generally interprets words in the statute according to their plain and ordinary meaning, unless the context requires otherwise. *Comcast Corp. v. Dept. of Revenue*, 356 Or 282, 295-96, 337 P3d 768 (2014). As a result, the Court sometimes relies on dictionary definitions to help ascertain the meaning of terms the legislature may have considered. *Id.* at 296-97.

However, the Court does not interpret statutory text in a vacuum. Under the first level of analysis, it considers the text of the statute in context. *Gaines*, 346 Or at 171; *PGE*, 317 Or at 611. Context includes "other provisions of the same statute and other related statutes." *PGE*, 317 Or at 611. When considering context, the Court "utilizes rules of construction that bear directly on the interpretation of the statutory provision in context." *Id.* Where a statute in question forms part of an overall legislative scheme, other statutes within the same scheme form an important part of the context as do prior amendments to that scheme. *State v. February*, 361 Or 544, 550, 396 P3d 894, 900 (2017) (observing that "context includes the structure of the statute as a whole."); *State v. Werdell*, 340 Or 590, 596, 136 P3d 17 (2006) (reading term in statute *in pari materia* with other provisions). The legislature is also deemed to be aware of this Court's case law at the time of enactment. *Wetherell v. Douglas County*, 342 Or 666, 678, 160 P3d 614 (2007) (noting that context includes "the preexisting common law."). In addition, this Court has ruled that "[w]hen a prior decision implicates the interpretative questions before [it], 'the court may consider itself bound to follow a prior construction as a matter of *stare* *decisis*.'" *Habitat for Humanity of the Mid-Willamette Valley*, 360 Or 257, 261-262, 381 P3d 809, 811 (2016).

A party may also proffer legislative history, which the Court will consult "after examining text and context," and the Court determines what "evaluative weight" if any to give to that legislative history. *Gaines*, 346 Or at 172. "A party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it." *Id*. "If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id*.

Here, the text and context lies primarily within Oregon's central assessments statutes, which are codified in ORS 308.505 to 308.665 (2013).[7] These statutes provide a comprehensive regime for taxing the property a company uses in connection with certain specified industries. *Southern Pacific Transp. Co. v. Dept. of Revenue,* 295 Or 47, 52, 664 P2d 401 (1983) (central

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[7] Unless noted, all property tax citations refer to the 2013 version of the ORS, which applies to the January 1, 2014 and January 1, 2015 tax assessments at issue. Prior to that, the central assessment statutes were last amended in 2009. *See* Or Laws 2009, ch 128. The 2015 legislature amended portions of those statutes, but the amendments do not affect the legal issues in this case for purposes of the January 1, 2016 assessment. *See* Or Laws 2015, ch 23. However, some applicable provisions or subsections (*viz*., ORS 308.505(9)) were renumbered in later versions of the statutes. The Tax Court's opinion also cites to the 2013 version of these statutes. Opinion, p. 2, n. 2 (ER-227).

assessment statutes operate as "a complete and comprehensive scheme of taxation."); *Comcast*, 356 Or at 292–93 (central assessment apply to companies that sell or perform certain "commodities, businesses, and services" provided by statute).

When read together, these statutes establish three basic requirements for property to be subject to central assessment: (i) the property must be owned (or leased, occupied, etc.) by a company on the assessment date; (ii) the property must have situs in the State of Oregon; and (iii) the property must actually be used or held by the company in conducting business in one of the designated industries subject to central assessment. In formulating those requisites, the central assessment provisions repeatedly distinguish between a *company* on the one hand and the *property* it uses or holds on the other.

Hence, the plain and ordinary meaning of the text, within the context of the statutory framework of the central assessment scheme, demonstrates that the legislature intended to assess and tax the value of the *property* used or held by a company on the assessment date, but not the enterprise value of the *company* itself held by its shareholders. Shareholder value includes the valuable attributes of stock ownership in addition to the value of a company's property. Opinion, pp. 10, 43-44 (ER-235, 268-69); Tr. 1340-42, 1355-1368 (ER-208-221); Ex. 48 (ER-225). Nothing in the sparse legislative history of central assessment overcomes the "seemingly plain and unambiguous text" of the relevant statutes. *Gaines*, 346 Or at 172.

b. Under the statutory definition, "property" must be used or held by a company, not its shareholders.

To conduct the text and context analysis, we begin with the definition of "property" used in central assessment. *Comcast*, 356 Or at 295 ("When the legislature provides a definition of a statutory term, we of course use that definition. Otherwise, we ordinarily look to the plain meaning of a statute's text as a key first step in determining what particular terms mean."). Read in isolation, the definition is somewhat circular; it literally defines "property" in terms of "property:"

> "(9) 'Property':
> "(a) Means all **property** of any kind, whether real, personal, tangible or intangible, that **is used or held by a company as owner**, occupant, lessee or otherwise, for the performance or maintenance of a business or service or for the sale of a commodity, as described in ORS 308.515;
> "(b) Includes, but is not limited to, the lands and buildings, rights of way, roadbed, water powers, vehicles, cars, rolling stock, tracks, office furniture, telephone and transmission lines, poles, wires, conduits, switchboards, machinery, appliances, appurtenances, docks, watercraft irrespective of the place of registry or enrollment, merchandise, inventories, tools, equipment, machinery, franchises and special franchises, work in progress and all other goods or chattels; and
> "(c) **Does not include items of intangible property that represent**:
> "(A) **Claims on other property**, including money at interest, **bonds**, notes, claims, demands or any other evidence of indebtedness, secured or unsecured; or

> "(B) **Any shares of stock in corporations**, joint stock companies or associations."

ORS 308.505(9) (emphasis added).

Despite its circularity, this definition is not entirely unhelpful because subsection (a) provides that the property must be something "used or held" by a company as owner—not something used or held by the shareholders of the company. Indeed, it is a fundamental premise of corporate law that a company is distinct from its shareholders. *State ex rel. Willamette Nat. Lumber Co. v. Circuit Court for Multnomah Cty.*, 187 Or 591, 603, 211 P2d 994, 999 (1949) ("[a] corporation is a legal entity, separate and distinct from * * * its stockholders * * *."); *Sneed v. Santiam River Timber Co.*, 122 Or 652, 655, 260 P 237, 238 (1927) ("It is of course well established that a corporation is an entity separate, independent, and apart from the associates who compose its stockholders."); *see also* ORS 60.151 (shareholders not liable for corporate debts). It is also fundamental that a company is distinct from its *property*. *See* ORS 60.077(2)(d) (empowering corporations to own property).

The statutory definition is also consistent with the ordinary usage of "property." This Court often considers dictionary definitions to illuminate the plain meaning of statutory terms. *Comcast*, 356 Or at 296-97. In ordinary parlance, "property" involves a person's possession or control of something protected by a legal right:

> “**2 a :** something that is or may be owned or possessed **:** WEALTH, GOODS; *specif* **:** a piece of real estate . . . **b :** the exclusive right to possess, enjoy, and dispose of a thing **:** a valuable right or interest primarily a source or element of wealth **:** OWNERSHIP . . . **c :** something to which a person has a legal title **:** an estate in tangible assets (as lands, goods, money) or intangible rights (as copyrights, patents) in which or to which a person has a right protected by law . . .”

PROPERTY, *Webster’s Third New Int’l Dictionary*, p. 1818 (unabridged ed. 2002).[8]

Similarly, the *Black’s Law Dictionary* definition describes property as a bundle of rights that someone possesses or controls:

> “**1.** Collectively, the rights in a valued resource such as land, chattel, or an intangible. • It is common to describe property as a ‘bundle of rights.’ These rights include the right to possess and use, the right to exclude, and the right to transfer. — Also termed bundle of rights. **2.** Any external thing over which the rights of possession, use, and enjoyment are exercised <the airport is city property>.”

PROPERTY, *Black's Law Dictionary* (10th ed. 2014).

Significant portions of the statutory definition of “property” in ORS 308.505(9) date back to the original 1909 enactment of the central assessment regime. *See* Or Laws 1909, ch 218, § 5; *see also* Lord’s Oregon Laws, title XXVIII, ch VI, § 3618 (1910) (App-8-9). The definition of “property” from an early version of *Webster’s* comports with how that word is understood today.

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[8] This is the dictionary Oregon appellate courts most frequently consult. *See Kohring v. Ballard*, 355 Or 297, 304, n. 2, 325 P3d 717 (2014).

See PROPERTY, *Webster's New Int'l Dictionary of the English Language*, p. 1718 (reference history ed. 1910).[9]

Both the Tax Court and the Department contended that the definition of property is expansive because it encompasses "all property of any kind." *See* ORS 308.505(9)(a); Opinion, pp. 34-35 (ER-259-60). Because of this purported breadth, they argued, it must embrace the value of the company itself from the standpoint of its shareholders. This argument is misguided for two overarching reasons.

First, when the statute circularly defines "property" to mean "any kind" of "property" it amounts to little more than a tautology—as if the legislature is saying, "by all property, we really mean *all* property." Property is property. The supposed breadth of that statement does not suddenly convert categories of things which are not property into property. As noted, Level 3 presented evidence that certain investment attributes inherent in the value of its stock held

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[9] The definition in this early *Webster's* states in relevant part: "**4.** The exclusive right to possess, enjoy, and dispose of, a thing ; ownership ; in a broad sense, any valuable right or interest considered primarily as a source or element of wealth; also, the relation or relative status of one owning a thing. In a narrower sense *property* implies exclusive ownership (**general property**) of things, as where a man owns a piece of land or a horse; in the broader sense *property* includes, in the modern legal systems, practically all valuable rights (i.e., those that collectively make up a person's *estate* or *assets*), except, generally, those involved in public or family relations, these also being treated as property in the earlier legal systems. . ." *Webster's New Int'l Dictionary of the English Language*, p. 1718 (1910).

by shareholders lack the basic characteristics of property—and certainly not property used or held by the company. Opinion, pp. 10, 43-44 (ER-225, 268-69); Tr. 1340-42, 1355-1368 (ER-208-221); Ex. 48 (ER-225). If something is not someone's property, it does not become that person's property simply as a result of the modifier "all."

Second, the circular definition of property is narrowed in myriad ways by the statutory context found in the central assessment scheme as detailed below. The property subject to assessment is restricted to property a company owns (leases, occupies, etc.) on each assessment date that the company actually uses or holds in the performance of its business within the industries made subject to central assessment. The purportedly broad definition of property is also narrowed by the nonexclusive list of specific examples of things that can constitute property in ORS 308.505(9)(b) (App-1). And the definition is further delimited by the exclusion of securities that represent claims on property in subsection (9)(c) of the definition in ORS 308.505 (App-2).

c. The context confirms that taxable property must be used or held by a company on the assessment date in connection with specified industries.

Key provisions of the central assessment regime provide context that narrows the definition of "property" to property actually used or held by a company on the assessment date. A helpful starting point for this text and context analysis is ORS 308.540. This provision requires assessment of the value of a company's property as it exists on a particular snapshot in time:

> "For each year, the Department of Revenue shall prepare an assessment roll, in which shall be assessed, ***as of*** **January 1 at 1:00 a.m. of the year**, **the assessed value of the property of persons and companies subject to taxation** under ORS 308.505 to 308.665. * * *"

ORS 308.540 (emphasis added). Two other statutes define the category of companies whose property is subject to central assessment. Central assessment applies to a company (or other entity) under ORS 308.505(8) (App-1) if the company is engaged in certain types of business, in providing certain services, or in selling certain commodities, which are enumerated in ORS 308.515(1) (App-2-3).[10] The latter statute provides for annual assessment of a company's property "that has a situs in this state" and that "is used or held" by a company "in performing or maintaining" their business in certain enumerated industries. ORS 308.515(1).

The enumerated industries include railroads,[11] utilities, or other businesses with networks that extend outside of Oregon—such as

[10] To avoid extensive quotations within the body of the brief, the text of relevant statutory provisions is set out in the Appendix.

[11] The Ninth Circuit held recently that railroads are no longer subject to taxation of intangible property under Oregon's central assessment scheme by operation of the federal Railroad Revitalization and Regulatory Reform Act of 1976. *BNSF Ry. Co. v. Oregon Dept. of Revenue*, 965 F3d 681, 693 (9th Cir 2020).

communications companies like Level 3. *Id.*; *see also DISH*, 364 Or at 257 (describing industrial categories subject to central assessment). Importantly, ORS 308.515(1) reiterates the "used or held" phraseology from the definition of property in ORS 308.505(9) (quoted above) and confirms that, to be subject to central assessment, the property must actually be used by the company in one of the enumerated industries.

Other provisions reinforce these principles. "Property having situs in the state," is defined to mean property that is "owned, leased, used, operated or occupied by" a company and that is situated or used wholly or partly within the state. ORS 308.505(10) (App-2). Another statute describes precisely *whose* property will be assessed: it is a company whose property is "owned, leased, rented, chartered or otherwise held for or used" in connection with one of the industries subject to central assessment. ORS 308.517(1) (App-3).[12] A different statute, ORS 308.510, clarifies the distinction between real and personal property for central assessment purposes, but again uses the phrase "owned and used by a company" to refer to such property. ORS 308.510(1)

[12] The exception in subsection (2) of ORS 308.517 provide specifics for assessment of a lease or similar arrangement between two companies subject to central assessment. The Department may assess either company. ORS 308.517(2) (App-3). Subsection (3) of that statute exempts from central assessment certain real estate belonging to company that meets certain criteria. ORS 308.517(3) (App-3-4). It is difficult to understand how these exceptions could be accounted for in a valuation of a company's entire business enterprise.

(App-2). A statute entitled "Mode of valuing property" outlines the types of information the Department may consider in "arriving at the amount and character and assessed value of the **property belonging to a company**." ORS 308.545 (emphasis added) (App-5-6).

Yet another key provision permits the Department to employ the "unit" method of valuing a company's property for central assessment purposes. ORS 308.555 (App-6-7). It provides that the Department "may value the entire **property,** both within and without the State of Oregon, as a unit." *Id.* (emphasis added). It requires the Department to "make deductions of the **property of the company** situated outside the state, and not connected directly with the business thereof . . . to the end that the fair proportion of the **property of the company** in this state may be ascertained." ORS 308.555 (emphasis added). A related statute establishes how the Department apportions the value of the unit of property subject to taxation in Oregon, according to that portion of its property "in Oregon, **controlled or used by the company**, as owner, lessee, or otherwise . . ." ORS 308.550 (emphasis added) (App-6). All these provisions reinforce the notion that the *company's* property will be appraised as a unit, rather than the company itself or the shareholder's property.

Additional context for what constitutes property subject to central assessment is found in the list of examples in the definition statute, ORS

308.505(9)(b) (App-1). This Court has consistently held that a list of examples forms important context in interpreting the exemplified statutory term. *Gordon v. Rosenblum*, 361 Or 352, 365, 393 P3d 1122 (2017) (nonexclusive statutory examples "provide context for our understanding of that term"). Here, each example represents an item of tangible or intangible property that a company might own and use to engage in one of the industries subject to central assessment under ORS 308.515(1) (App-2-3). None of these suggest an item of property that is used or held by the company's shareholders.[13]

This contextual reading of the central assessment statutes is further bolstered by ORS 308.505(9)(c) (App-2). Paragraph (c) expressly excludes from that definition intangible property that represents "[c]laims on other property." *Id.* It expressly excludes securities such as corporate stocks and bonds from the definition of property. Even if the value of stock in a company could somehow be considered property owned and used by the company itself—as opposed to the property of its shareholders—this exclusion removes "shares of stock in corporations" from consideration. ORS 308.505(9)(c)(B). While taxable property cannot include the value of stock or items that represent

[13] The Tax Court seized on the words "franchises and special franchises" in this list to suggest that the property could include the value of the corporate enterprise itself. As we discuss below, this reading imposes a level of generality upon that language that is inconsistent with the rest of the examples.

claims on other property, that is precisely what the Department and its expert argued at trial—that the value of a company's securities represent claims on its assets and therefore equates to the value of its property. Tr. 1111, 1191. The Tax Court apparently accepted that premise without regard to these statutory requirements.[14]

d. Other tax statutes in 1909 expressly taxed the shareholder value of corporations using different language.

Related statutes in effect at the time the legislature enacted central assessment provide further context showing that the legislature did not intend to tax shareholder value or corporate enterprise value as *property* of a company. *See PGE*, 317 Or at 611; *Gaines*, 346 Or at 177, n. 16 ("Ordinarily, only statutes enacted simultaneously with or before a statute at issue are pertinent context for interpreting that statute.").

In 1909, an existing statute expressly imposed a tax on the value of shares of stock of a corporation engaged in banking. *Compare* Lord's Oregon Laws, title XXVIII, ch IV, §§ 3568-3569, 3575 (banking stock taxation) (App-

[14] The Tax Court concluded that this provision had no substantive effect. Opinion, p. 37 (ER-262). The court proffered legislative history to suggest this language merely codified the Department's existing practice. *Id.* By doing so, the Tax Court ignored this Court's principle that "in considering legislative history, we will not lightly disregard our understanding of the statute based on the common and natural meaning of its text and context." *Gaines*, 346 Or at 178.

7-8) with ch VI, §§ 3618-19 (central assessment provisions) (App-8-9).[15] In fact, these bank stock taxation provisions were proposed alongside the 1909 central assessment statutes (including the definition of property) in the same package of draft legislation contained in the 1906 Report that the Tax Court cited.[16] *See* 1906 Report, pp. 110-13,118-19. Had the legislature intended to tax the shareholder value of corporations subject to central assessment as they taxed the shareholder value of banking corporations, they presumably would have used the same express language.

Similarly, the right of a corporation to be a corporation was separately taxed at the time of the 1909 enactment. Lord's Oregon Laws, title XLIV, ch I, § 6684 (App-12-13). Beginning in 1907, corporations were required to pay a graduated annual license fee based on the value of the corporation's "capital stock." *Id.*; *see also* Or Laws 1907, ch 237, p. 421. Among other things, the law provides, "No articles of incorporation shall be filed by the secretary of state, nor shall any corporation hereafter formed have or exercise any corporate

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[15] Lord's Oregon Laws, title XXVIII, ch IV, § 3568 (1910) provides in part: "Shares of stock of national banks shall be assessed to the individual shareholders at the place where the bank is located. . . ." (App-7).

[16] Report of the Board of Commissioners Appointed Under the Provisions of Chapter 90, Laws of 1905, for the Purpose of Examining and Reporting on Matters of Assessment and Taxation, etc. (June 30, 1905), available at https://archive.org/details/reportboardcomm00mulkgoog/page/n5 ("1906 Report"). *See also* Or Laws 1905, ch. 90.

right, franchise, or power, or carry on business in this state, until such organization tax and annual license fee shall have been paid." Lord's Oregon Laws, title XLIV, ch I, § 6684. Hence, a corporation's privilege to exist was expressly taxed based on the "capital stock" under this provision. It would have made little sense for the legislature two years later to have surreptitiously included such taxation within central assessment. These related statutes provide additional context for interpreting the meaning of property in central assessment.

In sum, the plain meaning of the definition of "property," read in context with the other central assessment statutes described above, shows that "property" must be something that (i) is owned by the company (or occupied, leased, etc.) on the assessment date; (ii) has situs in the state; and (iii) is "used or held by a company" in performing, maintaining, or selling the types of business, service, or commodities that are subject to central taxation under ORS 308.515. Stated differently, the statutory text and context confirm a company's property in Oregon is subject to central assessment only to the extent the company actually owns the property on January 1 and uses the property to conduct business in one of the enumerated industries subject to central assessment.

From this text in context, it follows that an appraisal used to assess the value of the company itself—as held by its shareholders—would sweep too broadly. That appraisal would embrace certain valuable attributes of stock ownership—value held by the shareholders but not "used or held" by the company in the enumerated industries. As shown by the evidence in this case, the value of a company held by its shareholders includes investment value inherent in stock ownership, such as expectations for revenue growth, limited liability, and portfolio diversification. Ex. 1, pp. 15, 20 (ER-15, 20); Ex. 48 (ER-225); Tr. 419-23, 1355-1370 (ER-60-64, 208-223). Stock value includes the value of property that the company and its shareholders hope it will acquire in the future—not just the property used or held by the company on the statutory assessment date. *Id*. The Tax Court assumed these attributes existed but determined they were irrelevant because it held that central assessment permits valuation of the entire corporate enterprise. Opinion, pp. 10, 46-47 (ER-235, 271-72). Because the text and context alone demonstrate that the Tax Court erred in deciding this legal issue, this case should be reversed and remanded.

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2. The phrase "franchises and special franchises" does not confer authority to tax the shareholder value of a company.

The Tax Court concluded that the phrase "franchises and special franchises," listed among the examples of "property," allowed for valuation of the entire corporate enterprise held by its shareholders. According to the Tax Court, this phrase "blurred the line between a centrally assessed company and the property it uses . . ." Opinion, p. 43 (ER-268). Relying on a secondary entry for the definition of "franchise" in the 1910 *Black's Law Dictionary*, the Tax Court identified a dichotomy in the usage of that word.[17]

Under this dichotomy, "franchise" can mean (i) a "general franchise" which refers to the charter of a corporation—its right to exist (also called a franchise "to be") or (ii) a "special franchise" consisting of rights conferred by a government to a private entity to operate in the public sphere (also called a franchise "to do"). Opinion, pp. 17, 35 (ER-242, 260). The Tax Court concluded that the legislature meant to include taxation of the franchise "to be" because this phrase codified a purported historical practice of assessing a

[17] Relevant portions of the *Black's Law Dictionary* entries for "franchise" from 1891 and 1910 are in the Appendix (App-13-14). The cited source of that dichotomy in the 1910 *Black's* is a 1909 New York decision: *Lord v. Equitable Life Assur. Soc'y of U. S.*, 194 NY 212, 213, 87 NE 443 (1909) (App-14). That case is unlikely to have influenced the 1909 legislature because it post-dates the "franchises and special franchises" phrase in the report that proposed the legislation. 1906 Report, p. 119.

company's right to exist as part of its property. *Id.* at 17, 43 (ER-242, 268). From that premise, the court disregarded the contextual limitations on the meaning of "property" and concluded that central assessment taxes the value of the entire corporate enterprise in the hands of its shareholders. *Id.* at 35-36, 43 (ER-260-61, 268).

Although it is tempting to equate the *Black's* dichotomy with the phrase "franchises and special franchises" in ORS 308.505(9)(b), the text and context of the central assessment regime demand a narrower reading of that phrase for two main reasons. First, the statutory context shows that the franchise phrase appears in a list of examples of tangible and intangible property commonly associated with railroads and utilities. The legislature had no reason to create a list of examples of property if the entire list were swallowed by "franchises" as a catchall that embraced the entire value of a company itself. Moreover, related provisions of the central assessment scheme that mention franchises become superfluous under the Tax Court's interpretation.

Second, in the decades leading to the 1909 initial enactment of these statutes, the terms "franchise" or "special franchise" were used interchangeably in Oregon jurisprudence to refer to a specific type of legal privilege, a franchise "to do," conferred on businesses of the type subject to central assessment. These terms overwhelmingly referred to a privilege conferred by the state or a municipality to operate a railroad, utility, or similar business in exchange for consideration paid to the government grantor—a privilege that was unavailable to all citizens. At that time, "franchise" did not typically apply to the privilege of corporate existence, which was available to all citizens by statute as required under the Oregon Constitution.

a. The text and context supports a narrow interpretation of "franchise."

Recall that the franchise phrase appears in a specific list of examples as part of the definition of "property." ORS 308.505(9)(b) (App-1). The examples generally pertain to railroads, utilities, and similar businesses subject to central assessment, e.g. ". . . rolling stock, tracks, office furniture, telephone and transmission lines, poles, wires, conduits, switchboards, machinery . . ." *Id.*

As noted, this Court has repeatedly held that a list of examples provides context for determining how broadly to construe the meaning of surrounding terms. *Gordon*, 361 Or at 365; *Goodwin v. Kingsmen Plastering, Inc.*, 359 Or 694, 701, 375 P3d 463 (2016). The Court has alternatively referred to this as the principle of *ejusdem generes* ("of the same type or class") or *noscitur a sociis* ("it is known by its associates"), both of which focus on similarity of characteristics among items in a list.[18] *See Gordon*, 361 Or at 365; *Schmidt v. Mt. Angel Abbey*, 347 Or 389, 403, 223 P3d 399 (2009) ("we have considered

[18] Both Latin translations are from *Black's Law Dictionary* (11th ed. 2019).

the context provided by specific examples when those examples fall after the general term, as well as when they are placed before. . .”).

Where a list of examples illustrates a legal standard or category, this Court applies the doctrine of *ejusdem generis* and assumes that the standard or category embraces items with similar characteristics. *Schmidt*, 347 Or at 405 (under *ejusdem generis*, “the court seeks to find, if it can, a common characteristic among the listed examples. . .”); *Bellikka v. Green*, 306 Or 630, 636, 762 P2d 997 (1988). But even where the doctrine does not strictly apply, the Court has said that surrounding examples “provide context for our understanding” of the term in question. *Gordon*, 361 Or at 365.

Here, the Tax Court’s view that “franchises and special franchises” broadly captures the value of an entire business enterprise would ignore these interpretive principles and render the remainder of the examples largely superfluous. *See DISH*, 364 Or at 278 (courts “should avoid interpreting statutory enactments in a way that makes parts of them superfluous . . .”). Business enterprise value not only includes the value of the company’s property, but also includes the forward-looking investment value held by its shareholders. Ex. 1, pp. 15, 20 (ER-15, 20); Ex. 48 (ER-225); Tr. 419-23, 1355-1370 (ER-60-64, 208-223). In light of the specificity of the other examples, it would be incongruous for the legislature to have included one example that is substantially broader in scope and effectively swallows all the others. But even if the franchise phrase were viewed as a sort of catchall, as the Tax Court implied, the doctrine of *ejusdem generis* would operate to limit the scope and generality of that catchall. *See Schmidt*, 347 Or at 405; *Bellikka*, 306 Or at 636. This context limits the scope of "franchises" to items closely associated with the industries subject to central assessment, i.e., the franchise to operate in the public sphere or the franchise "to do."

Other central assessment statutes provide additional context. ORS 308.505(8) provides that a person or company engaged in one of the industries enumerated in ORS 308.515(1) is subject to central assessment "**whether or not the activity is pursuant to any franchise** and whether or not the person or other entity or combination of entities **possesses characteristics of limited or unlimited liability**." ORS 308.505(8 (emphasis added) (App-1).

The first bolded phrase reveals that the legislature expected some, but not all persons engaged in the industries subject to central taxation to be operating under franchises. The subsequent bolded phrase then implies the legislature also expected some, but not all persons engaged in those industries to be entities operating with limited liability—in the corporate form. *See Amfac Foods, Inc. v. Int'l Sys. & Controls Corp.*, 294 Or 94, 100, 654 P2d 1092 (1982) (discussing policy behind limited liability for corporate shareholders). If conducting activity pursuant to "any franchise" automatically included the concept of conducting business as a corporation, as the Tax Court theorized, the second phase of the statute regarding limited liability would be superfluous. *C.f. Goodwin*, 359 Or at 702 (employing similar reasoning where statute assumed a distinction between injury to "property" and an injury to "any interest in property"). Instead, this provision draws a distinction between franchise privileges and corporate privileges.

Another central assessment statute provides additional context for the franchise phrase. The "mode of valuing property" statute states that, to determine "the amount and character and assessed value of the **property belonging to a company**," the Department "may inspect the property, and may take into consideration the statements filed" under the central assessment statutes, along with "the reports, statements or returns of the company filed [with any state agency or county], the earning power of the company, the **franchises and special franchises owned or used** by the company, and such other evidence of any kind that is obtainable bearing thereon." ORS 308.545 (emphasis added) (App-5-6). Once more, the references to property "belonging to a company" and to franchises "owned or used" by the company correspond to how the other key provisions (discussed above) characterize property subject to central assessment—distinguishing between a company itself and its property. This usage of "franchise" is consistent only with the franchise "to do," which involves government-conferred privileges owned or used by the company—not its shareholders—to conduct a business subject to central assessment. Based on this context, a franchise right is a valuable property right of the company that does not include value of the company itself.

b. In 1901, the most prevalent use of "franchise" referred to privileges granted to railroads and utilities in contract-like arrangements.

As we have seen, central assessment applies only to a company's property "used or held" in connection with certain enumerated industries, which include railroads, utilities, and similar businesses with networks. Businesses in those industries share a common feature: they historically operated under one or more franchises "to do." For example, a city might grant a franchise to enable an electric utility to string wires along public streets or a franchise to allow a street car railroad to run tracks across on city roads. *See, e.g., Sweetland v. Grants Pass New Water, Light & Power Co*., 46 Or 85, 86, 79 P 337 (1905) (city granted electric, gas and water utility franchise); *Dunne v. Portland St. Ry. Co.*, 40 Or 295, 296, 65 P 1052, 1053 (1901) (franchise to operate street railway in the city).

This sense of "franchise" overwhelmingly dominates Oregon law and historical authorities in the decades immediately preceding enactment of the

1909 central assessment statute that first contained the franchise phrase. *See Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995) (noting that, with regard to statutory construction, "[t]he proper inquiry focuses on what the legislature intended at the time of enactment and discounts later events.").

This Court recently examined the history of franchises in connection with another statute involving taxation of railroads and utilities, ORS 221.450. *Northwest Natural Gas Co. v. City of Gresham*, 359 Or 309, 327, 374 P3d 829, 840 (2016). Based on that history, this Court construed "franchise" narrowly to refer to the privilege to operate in public granted to railroads and utilities, which had to be accepted in a contract-like arrangement—a franchise "to do." *Id.* at 330 ("Historically, it was a common practice for a municipality to enact an ordinance granting a franchise to a specific utility, which . . . became a contract when accepted by the utility.").

At issue in *Northwest Natural* was whether the City of Gresham exceeded its statutory authority under ORS 221.450 when it enacted a privilege tax on gas, water, and electricity. *Id.* at 312. The decision turned on whether the utilities were operating "without a franchise" under a provision of the statute enacted in 1931. *Id*. at 321. The Court of Appeals concluded that "franchise" had a broad meaning, encompassing any privilege granted by ordinance to a utility. *Id.* at 323. This Court disagreed, holding that "franchise" had a narrow and precise legal meaning. *Id.*

Both this Court's methodology in *Northwest Natural* and its conclusion instruct the interpretation of "franchise" here. The Court first examined legal authorities from the early twentieth century to determine that "franchise" had an established legal meaning:

> " '**[F]ranchises are special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right.**' *Elliott v. City of Eugene et al.,* 135 Or 108, 113, 294 P. 358 (1930). *See also* John Bouvier, 2 *Bouvier's Law Dictionary and Concise Encyclopedia* 1299 (3d ed. 1914) (defining franchise as '**[a] special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right**'); *Black's Law Dictionary* 515 (1889) (using same definition and adding, '[i]n this country, it is a privilege of a public nature, which cannot be exercised without a legislative grant')." (citation omitted).[19]
>
> "However, the 1914 Bouvier text also indicated that there were differences between English common law and American law, and that American 'franchises *spring from contracts* between the sovereign power and private citizens, made upon **a valuable consideration, for purposes of public benefit as well as of individual advantage**.' 2 *Bouvier's Law Dictionary* at 1299. . ."

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[19] In this portion of the quote, this Court was quoting favorably from the Court of Appeals' opinion, *Northwest Natural Gas Co. v. City of Gresham*, 264 Or App 34, 44, 330 P3d 65, 71 (2014).

Northwest Natural, 359 Or at 327-28 (emphasis added, some citations omitted). This Court also quoted favorably from another legal dictionary, defining franchise as:

> "A species of incorporeal hereditament springing from a contract between the state and a private citizen or citizens, made upon valuable consideration, for purposes of public benefit as well as individual advantage."

Northwest Natural, 359 Or at 328 (quoting James A. Ballentine, *Law Dictionary with Pronunciations* 525 (1930)). Significantly, that 1930 definition mirrors the definition used by this Court in the year preceding the 1909 central assessment enactment:

> "A franchise is (1) an incorporeal hereditament; and (2) a privilege or authority vested in certain persons by grant of the state to exercise powers or to do and perform acts which, without such grant, they could not do or perform. A franchise consists in the incorporeal right."

State v. Portland Gen. Elec. Co., 52 Or 502, 526, 95 P 722 (1908) (emphasis added). *Portland Gen. Elec.* used this definition of "franchise" to describe the exclusive privilege and contractual duty of a company to operate the locks at Willamette Falls and to charge tolls for passage. *Id.* at 521.[20] The main entry in

[20] In an early case, this Court observed, "a franchise was, by the common law, said to be a branch of the king's prerogative in the hands of the subject, but that in America it was understood to be a particular privilege conferred by grant from the government, and vested in individuals." *Hackett v. Wilson*, 12 Or 25, 38, 6 P 652 (1885) (citations omitted).

Black's Law Dictionary and the definition in other legal reference books from the turn of the last century define "franchise" in similar terms:

> "**A special privilege conferred by government upon an individual or corporation, and which does not belong to the citizens of the country generally, of common right**. It is essential to the character of a franchise that it **should be a grant from the sovereign authority**, and in this country no franchise can be held which is not derived from a law of the state. In England, a franchise is defined to be a royal privilege in the hands of a subject. In this country, it is **a privilege of a public nature**, which cannot be exercised without a legislative grant."

Black, Henry C., *A Law Dictionary* at 519 (2d ed.1910) (emphasis added) (App-14).[21]

> "In **American law**, franchise means: (1) A particular privilege conferred upon individuals by grant from the government. Franchises are usually held by corporations created for the purpose of enjoying them, **such as railroad, steamboat, ferry and telegraph companies**."

Rapalje, Stewart; Lawrence, Robert L., 1 *A Dictionary of American and English Law* at 543 (1888) (emphasis added, citations omitted) (App-14-15).

Two characteristics of a "franchise" emerge from *Northwest Natural* and these early sources. First, a franchise is a privilege conferred on a private business to operate for the public benefit in exchange for consideration paid in a contract-like arrangement with the granting governmental authority. Second, a

[21] This primary definition remained essentially unchanged from the first edition of *Black's Law Dictionary*. *See* Black, Henry C., *A Law Dictionary* at 515 (1891) (App-13). The Tax Court relied on a sub-entry instead of the main entry in the 1910 second edition of *Blacks.* Opinion, p. 17 (ER-242).

franchise is a privilege that does not belong to citizens generally; it belongs to the private business who negotiated the franchise. *See Northwest Natural*, 359 Or at 327-28, 335. Those characteristics are inherent in the franchises traditionally granted to railroads, utilities, and similar businesses, but are absent from the more generalized privilege of a corporation to do business as a corporation.

Indeed, the privilege to conduct business as a corporation has been available to all citizens since Oregon statehood and is not a franchise in the same sense. As originally enacted, the Oregon Constitution[22] required private corporations to be formed through general laws and banned the territorial legislature's earlier practice of specially chartering corporations individually. *Straw v. Harris*, 54 Or 424, 430, 103 P 777 (1909). A 1906 amendment made that prohibition even more explicit with regard to private corporations. Or Const Art XI, § 2 (Amended) (1906);[23] *State ex rel. Eckles v. Woolley*, 302 Or 37, 42, 726 P2d 918 (1986) (discussing history of provision). Presumably, the

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[22] Article XI, section 2 of the Oregon Constitution originally provided in part: "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes; . . ." Or Const, Art XI, § 2 (Original).

[23] As amended in 1906, Article XI, section 2 of the Oregon Constitution provided in part: "Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. . . " Or Const, Art XI, § 2 (Amended).

1909 legislature understood that the right to form a corporation was available by general statute to any member of the public—hardly a "franchise" in the sense commonly used at the time.

Returning to *Northwest Natural*, this Court concluded that a narrower meaning of "franchise," was "the more prevalent use of the term," in the early twentieth century. 359 Or at 328. To reach that conclusion, this Court considered the word's usage from its own decisions leading up to the 1931 enactment of ORS 221.450. *Northwest Natural*, 359 Or at 330. Under the *Gaines* analysis, existing Oregon law at the time of enactment forms part of a statute's context. *Montara Owners Ass'n v. La Noue Development, LLC*, 357 Or 333, 341, 353 P3d 563 (2015) ("context for interpreting a statute's text includes the preexisting common law, and we presume that the legislature was aware of that existing law.").

Following the methodology of *Northwest Natural*, one can similarly identify the most prevalent usage of "franchise" by examining Oregon decisions in the decades preceding the 1909 enactment of central assessment. Throughout that era, this Court repeatedly used the word "franchise" to refer to privileges of a contractual nature that the state or a locality conferred on railroads, utilities, and similar businesses. Such cases may be loosely categorized as follows:

- **Pre-1909 cases referring to the franchise to operate a railroad, ferry, or wharf:**

  Hackett v. Wilson, 12 Or 25, 32, 6 P 652 (1885) (ferry);
  Budd v. Multnomah St. Ry. Co., 15 Or 404, 404, 15 P 654 (1887) (street railroad);
  Ryberg v. Portland Cable Ry. Co., 22 Or 224, 225, 29 P 614, 614 (1892) (street railroad);
  Blagen v. Thompson, 23 Or 239, 241, 31 P 647(1892) (street railroad)
  Parkhurst v. City of Salem, 23 Or 471, 473, 32 P 304 (1893) (street railroad);
  McCornack v. Salem Consol. St. Ry. Co., 34 Or 543, 549, 56 P 518 (1899) (street railroad);
  Shannon v. City of Portland, 38 Or 382, 387, 62 P 50, 51 (1900) (street railroad);
  Dunne v. Portland St. Ry. Co., 40 Or 295, 296, 65 P 1052, 1053 (1901) (street railroad);
  Mead v. City of Portland, 45 Or 1, 9, 76 P 347, 349 (1904), *aff'd*, 200 US 148 (1906) (river wharf);
  Wolf v. City & Suburban R. Co., 45 Or 446, 457, 78 P 668, 670 (1904) (street railroad);
  Wolfard v. Fisher, 48 Or 479, 481, 84 P 850 (1906), *aff'd*, 48 Or 479, 87 P 530 (1906) (street railroad).

- **Pre-1909 cases referring to the franchise to operate a utility:**

  Haugen v. Albina Light & Water Co., 21 Or 411, 412, 28 P 244 (1891) (water utility);
  Savage v. City of Salem, 23 Or 381, 381-83, 31 P 832 (1893) (water tanks for street-sprinkling);
  Umatilla Irr. Co. v. Umatilla Imp. Co., 22 Or 366, 387, 30 P 30 (1892) (irrigation and water system);
  Mackin v. Portland Gas Co., 38 Or 120, 121, 61 P 134, 134 (1900) (gas utility);
  City of Salem v. Anson, 40 Or 339, 344, 67 P 190, 192 (1902) (electric utility);
  Sweetland v. Grants Pass New Water, Light & Power Co., 46 Or 85, 86, 79 P 337 (1905) (water, gas, and electric utilities);

> *Coquille Mill & Mercantile Co. v. Johnson*, 52 Or 547, 554, 98 P 132, 134 (1908) (boom on waterway).

These early cases reflect the pervasive use of "franchise" to describe privileges conferred on railroads, utilities, and similar businesses to conduct business in the public sphere, which include the contractual component and characteristics described in *Northwest Natural*, 359 Or at 327-28. *See*, *e.g., Savage*, 23 Or at 383-84 (discussing utility and railroad franchises granted "for the purpose of serving the public, for private gain . . .").

Other historical authorities, including one cited by the Tax Court, confirm that railroad and utility franchises were a recurrent subject of political discourse in Oregon in the late 1800s and early 1900s. *See* E. Kimbark MacColl, *The Shaping of a City: Business and Politics in Portland, Oregon 1885-1915* (1976) ("*The Shaping of a City*") (cited by Tax Court, Opinion p. 18, n.14 (ER-243)). This history of turn-of-the-century Portland is chock-full of intrigue and public controversy surrounding the railroad and utility franchises being handed out by the state and by municipal governments—often in exchange for consideration publicly criticized as inadequate. *See, e.g., The Shaping of a City* at 124-25, 137-140, 328-344. In the chapters covering the years from 1890 to 1907, there are roughly two dozen references to railroad and utility franchises as a source of great fortune and perhaps overly cozy relationships between politicians and industry leaders. *Id.* at 111-347. A 1906 political cartoon from *The Morning Oregonian* epitomizes the public discourse over franchises of the time:

The Morning Oregonian (April 19, 1906), p. 9 (downloaded as public domain from http://oregonnews.uoregon.edu/). Also, reprinted in *The Shaping of a City* at 336, and reprinted in E. Kimbark MacColl & Harry H. Stein, *Merchants, Money & Power: the Portland Establishment 1843-1913* (1988) ("*Merchants, Money & Power*") at 426.

Another Oregon history book, *Merchants, Money & Power*, refers to the franchises of the sort granted to railroad and utilities more than two dozen times as major subject of public controversy in the chapters covering Portland business and politics from 1902 to 1909. *Merchants, Money & Power* at 357-420. These historical discussions of the role of franchises in public policy are entirely consistent with the predominate use of that term from this Court's decisions from the same era.

An additional historical source merits consideration. The Tax Court correctly pointed out that much of the tax legislation proposed in the 1906 Report became law. Opinion, p. 31 (ER-256). With regard to "franchises," that report reflects the same public discourse of the times. It contains extensive discussion of the need to impose property taxation on the franchises granted to railroads and utilities to operate in the public arena—based on the theory that such franchises represent valuable property that had to be considered along with other property:

> "The franchise is inseparable from the property of the corporation in the street, whether this property consists of poles, pipes or tracks above the ground, under the ground, or on the ground. **The right to lay a railroad track and operate a railroad in a public street can not be separated or dissociated from the railroad itself. This is equally true of the right to lay water and gas mains and the like**. The franchise is a necessary and inevitable element of value, and is a proper subject of consideration in determining the taxable value of the real property of the corporation enjoying it."

1906 Report, p. 22 (emphasis added); *See also* 1906 Report pp. 16-17 (discussing franchises "of corporations and individuals holding property devoted to railway, street railway, gas, electric light, telegraph and telephone purposes."). By contrast, the report contains only a single mention of the concept of a corporation's "franchise to be a corporation," and that fleeting reference lies within a lengthy quote from a *different* report: a 1904 report of the New York State Board of Tax Commissioners describing tax trends outside of Oregon. 1906 Report, p. 42.

In the decades leading up to the 1909 central assessment statute, this Court's decisions and other Oregon historical context overwhelmingly used "franchise" to refer to legal privileges granted to railroads, utilities, and similar business to operate in the public sphere: the franchise "to do." The notion that "franchise" corresponds to the privilege of shareholders to conduct business in the corporate form does not appear with prominence in Oregon legal history from this period. Applying that concept here would contravene the plain meaning of the text and context of the central assessment regime.

3. The Tax Court digressed from this Court's text and context methodology.

The Tax Court digressed from this Court's statutory construction methodology when it concluded the legislature intended to tax the value of a corporation from the standpoint of its shareholders. Instead of examining the text of the statute in the context of Oregon jurisprudence leading up to the 1909 enactment, the court below focused on the legal development of taxation from three other states: Illinois, Ohio, and Kentucky. According to the Tax Court, decisions from those states constituted a "robust public record" available to the 1909 Oregon legislature—which purportedly countenanced assessment of a company's enterprise value. *See* Opinion, p. 26 (ER-251). The lower court then considered an unrepresentative sample of legal developments in Oregon that appeared to confirm the court's preliminary hypotheses. *See* Opinion, pp. 27-35 (ER-252-260). Both aspects of the Tax Court approach fail to comport with this Court's approach to statutory construction.

a. The history of central taxation from other states does not constitute context or legislative history.

The decisions from Illinois, Ohio, and Kentucky all had the distinction of having reached the United States Supreme Court on the federal questions of whether new state tax regimes infringed on interstate commerce, due process, or other constitutional rights. Because of that apparent notoriety, the Tax Court assumed the Oregon legislature would have been familiar with them (as a "robust public record") and with the idea that property taxation extends to the value of the corporations held by its shareholders. Opinion, pp. 26, 35 (ER-251, 260).

Although those decisions heralded the emergence of new state taxation schemes in the latter half of the nineteenth century, it does not follow that Oregon modeled its 1909 central assessment statutes based on those decisions. And the fact that the tax structures of certain states were held to be permissible under the United States Constitution says nothing about whether Oregon intended to adopt a similar regime. Had the Oregon legislature relied on those decisions, it would have adopted language similar to that found in those states' tax statutes, but that is not the case.

Early decisions from other jurisdictions—based on differently-worded statutes—are also not part of Oregon's common law that constitutes "context" under Oregon's statutory construction methodology. *See Montara Owners*, 357 Or at 341 (presuming legislature's familiarity with existing Oregon common law as context for interpreting statute); *cf. Southern Pacific*, 295 Or at 60 (observing that "the assessment decisions of other states do not help us interpret our own statute. . .").

The Tax Court relied on an 1875 United States Supreme Court decision, *Taylor v. Secor* (also known as the *State Railroad Tax Cases*), which upheld the constitutionality of an Illinois statute that imposed a separate tax on "the capital stock of all companies." *Taylor v. Secor*, 92 US 575, 603 (1875); *see* Opinion, pp. 21-22 (ER-246-47). Under the statute and implementing rules, the taxable value of "capital stock" was defined to be the value of a company's shares of stock plus the value of its bonded debt, minus the value of the company's tangible property. *Taylor*, 92 US at 604. The Court found the Illinois taxation scheme to be within constitutional boundaries of a state's power to tax and held that the lower federal court exceeded its authority by enjoining enforcement of the tax. *Id.* at 603.

Here, however, the Tax Court viewed *Taylor* too broadly, contending that the case supports the proposition that the value of a company's stocks and bonds is a proxy for the value of a company's *property*. Opinion, p. 22 (ER-247). The Illinois tax provision at issue did not speak in terms of the value of a company's property, but directly assessed its "capital stock" as measured by the amount of its paid-in capital.[24] The Illinois Supreme Court later observed that the tax was "not a property tax." *People ex rel. Roberts & Schaefer Co. v. Emmerson*, 305 Ill 348, 137 NE 202, 203 (1922). Oregon's central assessment regime (from 1909 until today) remains devoid of language directly assessing the value of "capital stock" as found in the Illinois law—which applied to all corporations, not merely to railroads and utilities.[25]

The Tax Court similarly relied on two related United States Supreme Court cases upholding the constitutionality of an Ohio statute (called the

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[24] The Court noted,"The words 'capital stock,' as here used, do not mean the shares of the stock, but the aggregate capital of the company. This is obvious from the proviso to the fourth paragraph of sect. 3 of the revenue law." *Taylor*, 92 US at 602-03.

[25] Both historically and currently, the phrase "capital stock" appears in only one place in Oregon's central assessment scheme, the provision listing numerous metrics that a company must provide in annual reports. ORS 308.525 (4); Lord's Oregon Laws, title XXVII, ch VI, § 3620 (App-9-10). As discussed below, none of those metrics are conclusive under ORS 308.545.

"Nichols Law") that assessed the intangible property of "express" companies operating among several states: *Adams Exp. Co. v. Ohio State Auditor,* 166 US 185, 218 (1897); *Sanford v. Poe*, 165 US 194, 226 (1897); *see* Opinion, pp. 22-24 (ER-247-49). Those cases arose from an Ohio Supreme Court decision (quoted by the Tax Court) that interpreted and upheld the Nichols Law under the state's constitution. *State ex rel. Poe v. Jones*, 51 Ohio St 492, 37 NE 945 (1894).

The Nichols Law directed Ohio's taxation board to assess the value of a company's property and to be "guided by . . . the value of the entire capital stock of the company, and such other evidence and rules as would enable the board to arrive at the true value in money of the entire property[.]" *Poe*, 37 NE at 950. The Ohio court rejected the contention that the law unfairly taxed express companies by "adding to the intrinsic value of tangible property." *Id.* In upholding the validity of the tax, the court noted that the state's taxation authority was "**not** required to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of its entire capital stock." *Poe*, 37 NE at 950 (emphasis added).

The case fails to establish equivalence between a company's property and the value of the company to its shareholders—even under Ohio law. Had the Oregon legislature intended to focus its valuation of property on "capital stock" in the same manner, that phrase would have a prominent role in Oregon's central assessment regime. Instead, as noted above, the Oregon legislature expressly provided for a different tax on capital stock in earlier legislation. *See* Lord's Oregon Laws, title XLIV, ch I, § 6684 (App-12-13); Or Laws 1907, ch 237, p. 421.

The Tax Court also discussed at length the Kentucky decision of *Henderson Bridge Co. v. Kentucky*, 99 Ky 623, 31 SW 486 (1895), *aff'd sub nom*., 166 US 150 (1897). The plaintiff company was chartered by the state of Kentucky to build and operate a railroad toll bridge across the Ohio River into Indiana. *Henderson Bridge,* 31 SW at 487, 491. The company challenged Kentucky's tax on its property, claiming it unconstitutionally taxed interstate commerce. *Id.* at 487-88. Both the Kentucky Court of Appeals and the U.S. Supreme Court rejected that challenge without much discussion. *Henderson Bridge,* 166 US at 154–55; 32 SW at 488. The Kentucky court also considered whether the property tax was correctly ascertained under the meaning of "capital stock" in the state statute. *Henderson Bridge*, 32 SW at 489-91. Based on provisions in Kentucky's constitution and language in the state's property tax regime, the court determined that "capital stock" included all of the property. *Id*. at 490-91. Having concluded that capital stock included the entire property of the company, the court accepted with minimal discussion the state's property valuation based on the value of the paid-in capital plus the bonds used to finance the bridge project—essentially to derive the purchase price of the bridge. *Id.* at 491.

Henderson Bridge certainly accepts a property valuation based on capital stock of a single-asset company, but the case really concerned the determination of the calculation method under Kentucky's property tax statute. As with Illinois and Ohio, there is no indication that Oregon's central assessment statute is modeled after Kentucky's with the latter's emphasis on "capital stock."

In short, the decisions from Illinois, Ohio, and Kentucky involve differently worded and differently structured tax statutes that do not form part of the context or legislative history of Oregon's central assessment statute. The fact that courts of other states reached particular conclusions under different statutory frameworks does not imply the Oregon legislature intended the same result when it enacted its own central assessment regime.

b. The Oregon developments cited by the Tax Court fail to support its conclusion.

To confirm its hypothesis based on the law of other states, the Tax Court selectively considered legal developments in Oregon relating to the 1909 central assessment statutes, but declined to consider the broader spectrum of Oregon jurisprudence described above. The Tax Court focused on three areas: early Oregon property tax case law, enactment of the 1907 property tax statute, and the 1906 Report. These developments fail to support the Tax Court's premise that taxation of a corporation's value from the standpoint of its shareholders was already ingrained in Oregon jurisprudence by 1909.

The Tax Court first relied on a decision based on early Oregon property tax law for the unremarkable proposition that when assessing the value of railroad property, an assessor may consider the value of stocks and bonds—along with a host of other business-related metrics. Opinion, pp. 27-28 (ER-252-53); *Oregon & California Railroad Co. v. Jackson County* ("*O&C Railroad*"), 38 Or 589, 608, 64 P 307, 313 (1901), *modified on reh'g*, 38 Or 589, 65 P 369 (1901). In *O&C Railroad*, the Court also said that the assessor could consider "the cost of construction, the cost of replacement, its connections with roads and advantages in a commercial way for commanding the carrying trade, its rental value, [and] its net earnings . . ." *O&C Railroad*, 38 Or at 608. In stating that "stocks and bonds may furnish an element by which to determine the worth of such property[,]" the Court also warned that "conditions which may unite to influence the market must be borne in mind, as they may be unnatural, and out of the usual course . . ." *Id.* That warning is remarkably similar to the argument Level 3 made in the trial below: because many external market factors affect stock value, that data point fails to produce a reliable indicator of a company's property on a given assessment date—

particularly where rapid technological change renders a company's existing property obsolete. *See* Opinion, pp. 8-10, 43 (ER-233-35, 268). In any event, *O&C Railroad* was decided based on a dissimilar property tax law, well before enactment of the 1909 statute. 38 Or at 604 (citing 1893 session laws).

Nevertheless, the Tax Court contended that early Oregon decisions had always countenanced valuation of all franchises as property, including the franchise "to be." Opinion, p. 32 (ER-257). According to the court, this earlier taxation was analogous to taxing the intangible attributes of stock ownership. Opinion, p. 29 (ER-264). To support this premise, the Tax Court relied on *State v. Pacific States Tel. & Tel. Co*., 53 Or 162, 99 P 427 (1909). Opinion, pp. 32-33 (ER-257-58). However, *Pacific States* did not discuss a corporation's franchise "to be" in the context of property taxation, and as explained below, this Court later rejected the suggestion in *Pacific States* that Oregon property tax historically assessed the value of franchises of any sort.

In *Pacific States*, the Court upheld a statewide gross receipts tax on a telephone utility against a claim of double taxation. 53 Or at 162, 166. The use of "franchise" in that case did not refer to the franchise "to be." Instead, this Court explained how the legislature may separately tax different financial elements of a company without fear of double taxation. *Id*. at 165-66. The Court distinguished a tax on the value of a "franchise" from a tax on "capital stock" or on "shares of stock in the hands of individual holders." *Id.* at 165. It observed that the tax in question "is a business or excise tax on the **right to be** or exercise the powers of a corporation, and **is in no sense a tax on property**; nor is it a tax on **the business or franchise which the corporation**, when organized, may exercise." *Id.* at 164-65 (emphasis added). At that point, the opinion had used "franchise" exclusively to refer to the telephone company's franchise "to do"—and the Tax Court agreed that franchise in the above-quoted passage referred to the franchise "to do." Opinion, p. 32 (ER-257). Yet the Tax Court interpreted the phrase "franchise of a corporation" two sentences later to refer to the franchise "to be," Opinion, p. 32 (ER-257); *see Pacific States*, 53 Or at 166.

A more consistent reading of the *Pacific States* opinion reveals that "franchise of a corporation" refers merely to a franchise "to do" that happens to belong to a corporation. 53 Or at 165-66. Nevertheless, the Tax Court read *Pacific States* as approving a then-existing practice by local assessors to tax the value of a corporation's franchise "to be," even before passage of property tax reforms in 1907 and 1909. Opinion, p. 32 (ER-257).

The Tax Court's premise based on *Pacific States* cannot be reconciled with this Court's subsequent pronouncements. Seven years later, this Court singled out *Pacific States* as improperly suggesting that preexisting property tax law enabled taxation of franchises (of any sort) and further warned of the confusing usage of the term "franchise" in connection with corporations. *City of Portland v. Portland Railway, Light & Power Co*., 80 Or 271, 302, 156 P 1058 (1916). Although unknowable to the 1909 legislature, *Portland Railway* contains one of the few early Oregon discussions about the meaning of "franchise."

In *Portland Railway*, an electrical utility, which operated under five municipal franchises, challenged the Portland's ability to enforce a gross receipts tax. 80 Or at 277. This Court held that gross receipts tax exceeded the city's existing charter. *Id.* at 306-07. Before reaching that conclusion, the Court considered the utility's argument that the tax constituted improper double taxation because the company had already paid property taxes under the central assessment scheme. *Id.* at 281-83 (citing Or Const, Art I, § 32 and Art IX, § 1). In rejecting that argument, the Court categorized the types of taxation that may validly be imposed on corporations and their franchises without violating the prohibition against double-taxation:

> "It must therefore be conceded to be authoritatively established that taxes, charges, and fees may be simultaneously exacted of a corporation, so as to compel it to pay: (1) An **ad valorem or property tax** on all property owned by it, **including franchises when they are considered as property**; (2) a license or privilege tax on business; and (3) a fee to the state for **its franchise or right to do business as a corporation**."

Id. at 300-01 (emphasis added).

These categories differentiate between a property tax assessed on franchises "considered as property"—such as the those granted to the electrical utility (*id*. at 277)—and a privilege tax that may be assessed by the state on the "franchise or right" to be a corporation. *Id.* at 300-301. The clear implication is that the property tax—including franchises to operate—does not tax the right to do business as a corporation.

The *Portland Railway* Court also warned of the confusion resulting from the multiple uses of "franchise" in connection with corporations:

> "The term 'franchise' is not always used with discrimination. The granting of a privilege to maintain poles and wires in the street for the distribution of electricity is a special franchise, or a franchise 'to do,' and may be owned by an individual or corporation. When associated with corporations, the word 'franchise' has various significations. The franchise 'to be' may refer to the grant of corporate life, or it may relate to the privilege of continuing to exist as a corporation. The franchise 'to do' may refer to the right to do business generally as a corporation, or it may signify the corporate power to transact the particular business and do the things specifically enumerated in the articles of incorporation."

Id. at 303-04.

This caution highlights the importance of statutory and historical context when construing the word "franchise." It is noteworthy that when referring to the types of franchises "to do" granted to railroads and utilities, the *Portland Railway* opinion uses the terms "franchise" and "special franchise" interchangeably. *See, e.g, id.* at 277, 294-95. The 1916 opinion does not employ the same "general franchise" versus "special franchise" terminology that the Tax Court emphasized from the 1910 *Black's* sub-entry. Nothing in the opinion suggests the 1909 legislature intended to assess the value of the entire corporation from the standpoint of its shareholders. Finally, *Portland Railway* undermines any suggestion in *Pacific States* that Oregon's early property tax law implicitly allowed assessment of franchises of any sort. *Portland Railway*, 80 Or at 302.[26] *Portland Railway* shows that the Tax Court should not have read *Pacific States* to continence property taxation on the franchise "to be."

A second Oregon development the Tax Court highlighted was enactment of the 1907 local assessment property tax act, which mentions "franchises." Opinion, pp. 32-33 (ER-257-58). This fails to support the view that the term encompasses taxation of the entire corporate enterprise from the standpoint of its shareholders. The 1907 property tax act defined "land, real estate, and real property" to include all buildings and structures along with "all rights and privileges thereto belonging or in any wise appertaining; and all **franchises and privileges** granted by or pursuant to any law of this state, or municipal ordinance or resolution, owned or used by any person or corporation, ***other***

[26] The court stated, "Notwithstanding the language employed in *State v. Pacific States Tel. & Tel. Co.*, 53 Or. 162, 99 Pac. 427, the tax provided for by the state law was not necessarily laid on franchises." *Portland Railway*, 80 Or at 302.

than the right to be a corporation; . . ." Lord's Oregon Laws, title XXVIII, ch III, § 3552 (1910) (emphases added) (App-7). The Tax Court suggested that "franchises" above would have taxed a company's franchise "to be" but for the qualifier in italics. Opinion, pp. 32-33 (ER-257-58). But the court ignored the word "privileges" in the phrase "all franchises and privileges." One cannot assume that "franchises" would have included the right to be a corporation when the more general word, "privilege," easily embraced that right. Also, as discussed, "franchises" had a legal meaning in 1907 that was more specific than the general term, "privileges." The fact that the 1907 act excluded the right to be a corporation from the phrase "all franchises and privileges" says little about the reference to franchises in the 1909 act. Moreover, this 1907 provision suggests that the legislature understood the word "franchise" alone, without the "special" modifier, can refer to a franchise "to do"—precisely the type of franchises granted to railroads and utilities that dominated public discourse around 1907.

A third Oregon development that the Tax Court relied upon was the 1906 Report commissioned by the 1905 legislature. The Tax Court correctly pointed out that much of the legislation proposed in that report became law, including the 1907 property tax and the 1909 central assessment language. But even the Tax Court observed that the report questioned the validity of valuing property based on the value of corporate securities. Opinion, pp. 29-30, n. 25 (ER-254-55). In the report's appendix on valuation methods applicable to railroad property, the report states that "the aim of the investigation being to ascertain the commercial valuation of that portion of the assets of rail way corporations employed in the business of transportation" (1906 Report, p. 192) and the report goes on to specifically reject the "Stock and Bond" method of valuation. 1906 Report, p. 193.

As explained above, the report contained other proposed legislation that expressly taxed the value of corporate stock held by shareholders—but only in connection with the banking industry. 1906 Report, pp. 110-13. The drafters of the report and the proposed legislation did not employ that same language with regard to the central taxation of property. 1906 Report, pp. 118-19. Presumably, they understood the difference between taxing the value of a corporation's property and taxing the value of the company itself held by its shareholders. And as discussed, the 1906 Report is consistent with the notion that the references to "franchise" in the proposed property tax legislation exclusively referred to the franchises "to do,"—the controversial privileges conferred on railroads and utilities that the report specifically addressed. 1906 Report, pp. 16-17, 22. Assuming the 1906 Report constitutes legislative history, nothing in that report accomplishes the "difficult task" necessary to "overcome seemingly plain and unambiguous text with legislative history." *Gaines*, 346 Or at 172.

None of the Oregon developments called out by the Tax Court establish that the Oregon legislature intended for central assessment to tax the value of the entire business enterprise from the standpoint of its shareholders. Instead, these authorities support the proposition that the central assessment regime assesses the value of a company's property—but not the value of the company itself.

c. The reporting requirements do not expand the scope of assessment beyond property.

ORS 308.545 authorizes the Department to consider a wide range of financial information from statements a company files with the state "[f]or the purpose of arriving at the amount and character and assessed value of the property belonging to a company" but the provision holds that "no report, statement or return shall be conclusive." ORS 308.545 (App-5-6). The Tax Court read the reference to the "earning power of the company" in ORS 308.545 to suggest that property owned and used by a company must include the value of the company itself owned by its shareholders. Opinion, pp. 17-18 (ER-242-43). The Tax Court also relied on the fact that another statute, ORS 308.525(5), requires a company to file statements to disclose the value of the company's stock on the assessment date. Opinion, p. 17 (ER-242). But the lower court did not consider the larger context of this reporting statute, which requires a company to disclose at least a dozen different financial metrics, including the historical cost of all of its real and personal property, the value of all of its bonds or other obligations, the gross receipts and net earnings from all sources, and any other information the Department requires. ORS 308.525(4)-(16) (App-4-5).

These two statutes have remained remarkably unchanged since the original 1909 enactment of central assessment. *Compare* ORS 308.525 and 308.545 *with* Lord's Oregon Laws, title XXVIII, ch VI, § 3620 and § 3622 (App-9-11). Yet no one would seriously argue that these provisions have ever permitted the Department to tax the earnings or income of a company when the statutory text speaks solely in terms of property used by a company. The mere fact that the Department may collect and consider a wide variety of financial metrics about a company does not imply that the legislature intended to tax each of those financial metrics. *See Portland Railway*, 80 Or at 294.

A more consistent reading of these statutes is that, while the Department may consider a wide array of financial data about a company, it may do so only to the extent that information assists in determining the "amount and character and assessed value of the property belonging to a company" and such information is "not conclusive." ORS 305.545. The Tax Court ignored this important context by contending these statutes authorized taxation of the company itself rather than its property.

4. This Court has consistently stated that the ad valorem taxation applies to the property, not to the business enterprise.

This Court's more recent decisions are consistent with the interpretive framework supplied by the statutory text and context; it has observed that the central assessment scheme assesses a company's property, not the company itself. The most notable example is *Delta Air Lines, Inc. v. Dept. of Revenue*, 328 Or 596, 616, 984 P2d 836 (1999). In *Delta*, both this Court and the Tax Court rejected appraisal approaches that focused on the value of the company to its shareholders rather than the company's unit of operating property. *Id.*; *Delta Air Lines, Inc. v. Dept. of Revenue*, 13 Or Tax 372, 382 (1995). The airline and the Department offered competing appraisals of the taxpayer's operating property to the Tax Court. The main difference between the appraisals resulted from the value of leased aircraft, which comprised nearly half of Delta's fleet. *Delta*, 13 Or Tax at 374-75. Among other things, Delta argued that the value of the leases were already included under in the stock and debt method, because the company's leased property increased shareholder value. *Id.* at 381. In rejecting Delta's argument, the Tax Court said, "Undoubtedly this is true, but it is also irrelevant. **The objective of the tax appraisal is to value the operating**

property, not the value of the firm or shareholder value." *Id.* at 382 (emphasis added). The Tax Court further rejected a valuation model that assumed the existence of new property acquired in the future, stating "[t]he law does not allow the state to tax nonexisting assets or future acquisitions." *Id.* at 383.

This Court affirmed the Tax Court's decision on this very point. The Court highlighted the central assessment statutory requirements of ORS 308.515 and 308.540, noting that "the department's task in this case was to value Delta's taxable property, as a unit, as of the assessment date at issue." *Delta*, 328 Or at 616. It agreed with the Tax Court in rejecting the use of the same valuation model, "**because the department's task was to determine the value of Delta's assets, not the value of Delta as a firm**." *Id.* (emphasis added). Both this Court and the Tax Court in *Delta* based these observations on what the central assessment statutes required: valuation of the property, not valuation of the company. In other words, the valuation dispute turned on which of the competing appraisals more closely hit this statutory target.

With respect to Level 3, however, the Tax Court refused to accept that target. Specifically, the Tax Court rejected *Delta* here because the case was decided during the period in which this Court reviewed Tax Court decisions *de novo*. Opinion, p. 39 (ER-264). While that criticism might be justified when relying on factual findings, the *Delta* court's discussion of what the statutes require was a legal determination.[27]

The Tax Court further distinguished *Delta* because the case involved an outdated version of the *Western States Association of Tax Administrators Appraisal Handbook: Unit Valuation of Centrally Assessed Properties* ("*WSATA Handbook*") in use at the time. Opinion, pp. 40-41 (ER-265-66). According to the Tax Court, a newer version of the *WSATA Handbook* undermines *Delta* because the handbook now permits the Department to use appraisal methods the Court rejected. *Id.* at 41 (ER-266). The *WSATA Handbook*, however, was not the source for this Court's statement in *Delta* regarding the need to value the company's property rather than the company itself. While the Court discussed the handbook, the statements about valuing the property instead of the company were based on the statutory goal of the assessment—to arrive at the value of Delta's property as distinguished from the value of Delta as a company. *Delta*, 328 Or at 616. Indeed, the Tax Court's

[27] The Tax Court cited a *de novo* case for the "apparent conclusion that Oregon law allows the Department to consider future additions to the asset base in estimating future cash flows." Opinion, p. 46 (ER-271) (citing *Union Pacific Railroad Co. v. Dept. of Rev.*, 315 Or 11, 22, 843 P2d 864 (1992). The Tax Court acknowledged that *Union Pacific* had limited precedential value because statutory construction issues were not raised in that case, and this Court "ultimately accepted the taxpayer's 'no-growth' argument as a factual matter." Opinion, p. 46 (ER-271).

opinion in *Delta* made essentially the same statement without mentioning the *WSATA Handbook*. *Delta*, 13 Or Tax at 382.

Moreover, a revision to the *WSATA Handbook* does not alter the meaning of Oregon statutes. Although approved as "the official guide" for use by a Department rule,[28] the *WSATA Handbook* is not specifically tailored to Oregon statutory law. In fact, the current 2009 handbook includes appraisal techniques and adjustments (such as deducting the value of intangible property) that if implemented would clearly contravene Oregon's central assessment statutes. *WSATA Handbook*, pp. I-6, VI-1-6. The handbook is better understood as a set of valuation guidelines that the Department may use, but only to the extent they are otherwise consistent with Oregon law.[29] Accordingly, the 2009 revision of the handbook did not undermine *Delta's* statement about what the statutes require as a valuation target. The Tax Court erred in disregarding *Delta*.

In addition to *Delta*, this Court also highlighted the difference between property valuation and business valuation in *Comcast*, 356 Or at 293-94. At

[28] OAR 150-308-0690 provides: "The 2009 Western States Association of Tax Administrators Appraisal Handbook: Unit Valuation of Centrally Assessed Properties is adopted as the official valuation guide for property assessed by the Oregon Department of Revenue under ORS 308.505 to 308.665 for ad valorem tax purposes."

[29] The *Oregon Bulletin* explanation for OAR 150-308-0690 (formerly OAR 150-308.655) states, "The handbook is the official appraisal **guideline** for centrally assessed property under ORS 308.505 to 308.665 for ad valorem taxes." 49 *Oregon Bulletin* No. 9 at 99 (2010) (emphasis added).

issue was whether a cable television and internet provider used or held its property in connection with "communication," which is one of the industries made subject to central assessment under ORS 308.515(1) (App-2-3).

The Court provided an overview of central assessment and quoted the statute that enumerates the industries subject to central assessment, ORS 308.515(1). One of the listed business types in that statute is "communication." ORS 308.515(1)(h). After quoting that portion of the statute, this Court then distinguished the business from the property:

> "The statute goes on to list the particular services, businesses, and commodities that are subject to central assessment. It bears emphasizing, however, that **only the property used in the business**, service, or commodity is assessed (and thus taxed). **The value of the business, service, or commodity itself is not subject to central assessment**."

Comcast, 356 Or at 293-94 (emphasis added). In short, this Court went out of its way to distinguish the value of property as separate from the value of the business itself. It ultimately determined that Comcast was subject to central assessment because it was in the business of "data transmission services" which is expressly included in the definition of "communication" under ORS 308.505(3).

Here, Level 3 agrees that, like Comcast, it is in the business of communication and is subject to central assessment. However, Justice Linder's statement in *Comcast* echoes *Delta* in emphasizing the need to value the *property* rather than the company or business itself. But the Tax Court discounted the statement as an irrelevant comment. Opinion, pp. 41-42 (ER-266-67). The Tax Court's assertion is difficult to reconcile with structure of the statutory scheme outlined above. This Court's observations in *Comcast* and *Delta* are entirely consistent with that scheme. And this Court adheres to its prior statutory construction as a matter of *stare decisis*. *Habitat for Humanity*, 360 Or at 261-62.

5. This Court's decision in *DISH* does not alter the plain meaning of the text in context.

In rejecting the precedential value of this Court's statements in *Comcast* and *Delta*, the Tax Court and the Department relied on a particular passage in *DISH,* which was decided after the trial in this case and after the parties had already submitted extensive post-trial briefs on these issues. Opinion, p. 42 (ER-267); *DISH*, 364 Or at 292 (decided January 25, 2019); TC Docket Case No. 5236 (ER-302). *DISH* held that when the department changes the mode of assessment of a company's property from local assessment to central assessment, the resultant valuation increase does not offend the property valuation limitations of Measure 50 (Or Const, Art XI, § 11) and its implementing statutes. *DISH*, 364 Or at 256-57. Instead, the change-of-mode increase fits within exceptions for "new" property. *Id.* at 257. This Court concluded that a change to the unit valuation used in central assessment includes value of "new" property because it captures system-wide and intangible property not previously assessed. *Id.* at 258, 293

However, nothing in the holding or reasoning of *DISH* undermines Level 3's position here. Level 3 does not dispute application of central assessment, or the system-wide or unit approach to the valuation of the company's *property* in use on the assessment date. Indeed, both this Court and the Department in *DISH* described the central assessment statutes in the same terms as we have described them above.

Citing ORS 308.515(1), this Court explained that under central assessment, "a company is assessed for the property it uses (or holds for future use) in its business[.]" *DISH*, 364 Or at 258. The Court noted that under ORS 308.555, centrally assessed property is subject to unit valuation, "whereby the value of a business's property 'both within and without the state' is determined 'as a unit'," and central assessment served the purpose of allowing taxation of companies "that use property over a large area to operate a single network or system." *DISH*, 364 Or at 258 (citing *Comcast*, 356 Or at 289-93). The Court pointed out that only central assessment may also take "intangible personal property" into account. *DISH*, 364 Or at 258. (citing ORS 307.030(2); ORS 308.510(1)).

The Department agreed wholeheartedly with those characterizations. As quoted favorably in *DISH*, the Department described application of the unit rule as a valuation of business *property* as a whole:

> "The real market value of taxpayer's **property** in Oregon is the Oregon-allocated share of the **business property as a whole,** which takes into account the headquarters and all other transmission infrastructure taxpayers have created to deliver communication services here."

DISH, 364 Or at 289-90 (emphasis added) (quoting Appellant Department of Revenue's Reply Brief at 12 (SC S065019)). The Department made no suggestion in *DISH* that central assessment taxes the value of the company itself. It was sufficient for purposes of the new property exception in Measure 50, that unit valuation captures intangible values of a company's system-wide network of property. *Id.* at 258, 292-93.

Nevertheless, the Tax Court and the Department below focused on a passage in *DISH* that was not germane to the holding. After determining that an exception to Measure 50 applied to the switch from local to central assessment, the *DISH* Court further noted that the unit approach in central assessment is qualitatively different from local assessment—because it captures the value of intangible property existing in a company's network:

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> "Here in Oregon, where there is no bar on taxing the intangible property of the centrally-assessed companies whose property may be subjected to unitary valuation, ORS 307.030(2), there is no reason to adhere to that artificial focus on tangible property. We can acknowledge that unit valuation as permitted by ORS 308.555 is not at bottom just a different way of valuing a company's tangible property. **Unit valuation actually values the company as a going concern: It considers a company's market value as a whole and does not, either in practice or in theory, purport to assess the various component parts that go into that whole**. *See generally* Gary C. Cornia, David J. Crapo, and Lawrence C. Walters, *The Unit Approach to the Taxation of Railroad and Public Utility Property*, Lincoln Inst. of Land Pol. Conference Paper 130-33 (May 2013) * * *; James C. Bonbright, 1 *The Valuation of Property: A Treatise on the Appraisal of Property for Different Legal Purposes* 511-13 (1937) (unit valuation is designed to capture worth of a business as going concern, not its physical plants)."

DISH Network, 364 Or at 292 (emphasis added).

Both the Department and the Tax Court seized upon the bolded language above to claim that central assessment values the company, even though that reading is at odds with other statements in the opinion focused on taxing *property*—including the Department's own statement. Moreover, that interpretation of this Court's statement would amount to overruling *sub silentio* inconsistent statements in *Delta* and *Comcast* and would appear to contravene the statutes themselves. It seems unlikely this Court intended anything so consequential.

Instead, the statement in *DISH* must be understood in the context in which it was made. That statement was not interpreting Oregon's statutory regime but was describing, in a general sense, explanations of unitary assessment by certain commentators on that subject. Nether of the two statutes cited immediately before the bolded statement above discuss valuation of the company itself from the standpoint of its shareholders. Instead, ORS 308.555 provides in explicit terms that the Department may assess the entire *property* of a company as a unit—but only to the extent the property is actually used directly in connection with one of industries subject to central assessment.[30] The other statute cited in the above quote, ORS 307.030(2), holds that intangible property may be assessed only by means of central assessment rather than by local assessment.[31] Thus, the sentence in question (quoted in bold above) is not construing or interpreting the cited statutes, it is summarizing a small sample of appraisal literature on unit valuation.

In particular, the "see generally" citation signal reveals that this Court was referring to background information and speaking broadly about the cited

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[30] Similarly, OAR 150-308-069 (2) provides: "ORS 308.555 authorizes the department to value all property of a centrally assessed company as a unit. Unit valuation means valuing an integrated group of assets functioning as an economic unit as 'one thing,' without reference to the market value of any individual assets. To determine a company's unit value, the department considers one or more of the cost, income and stock and debt approaches to value, reconciling the approaches to arrive at 'unit value' also referred to as the 'correlated system value.'"

[31] ORS 307.030 (2) (2019) provides: "Except as provided in ORS 308.505 to 308.674 [central assessment statutes], intangible personal property is not subject to assessment and taxation."

appraisal literature. That literature discusses in general terms valuation techniques that have evolved in unitary assessment. *See* Gary C. Cornia, David J. Crapo, and Lawrence C. Walters, *The Unit Approach to the Taxation of Railroad and Public Utility Property*, Lincoln Inst. of Land Pol. Conference Paper 139-144 (May 2013)[32] ("*Unit Approach Paper*"); *see also* James C. Bonbright, 1 *The Valuation of Property: A Treatise on the Appraisal of Property for Different Legal Purposes* at 522-531 (1937) ("*Valuation of Property*"). Both sources describe how valuation techniques have evolved over time based on availability of financial data from centrally assessed companies. *Id.* And while some techniques certainly consider company-wide metrics from securities markets, the existence of such techniques does not alter what Oregon law requires as a valuation target.

For example, the Lincoln Institute article notes that the sales (or market) comparison approach to property appraisal generally attempts to examine other sales of comparable property, but sales of large networks rarely occur. *Unit Approach Paper* at 143. As an alternative, the stock and debt method was developed to consider the value of a company's bonds and equity from securities market data as an indicator of system-wide property value. *Id.* Yet the article notes that "[t]his method is now used infrequently," and highlights

[32] Available at https://www.lincolninst.edu/sites/default/files/pubfiles/unit-approach-to-taxation-of-railroad-public-utility_0.pdf (accessed June 3, 2020).

shortcomings of valuation based on a company's stock. *Id.* at 144. It observes that "market transactions for entire firms or individual stocks require the appraiser to make adjustments for intangible and nontaxable components embedded in observed prices." *Id.* at 144. The article says nothing about the specifics of Oregon statutory law, but it recognizes the limitations of considering stock value in the unit valuation of property—those limitations involve the same attributes of stock value Level 3 established at trial.

Similarly, the 1937 Bonbright treatise that this Court cited in *DISH* fails to support the Tax Court's interpretation of Oregon Law. Bonbright defines what the author means by the unit rule in valuation:

> "A unit-rule appraisal may be defined as any appraisal of a part of an organic whole which assumes that the sum of the values of the parts is equal to the value of the whole, and which derives the value of any one part by allocating to it a given share of the unitary value."

2 *Valuation of Property* at 658. This definition suggests appraisal of an entire system of property with allocation to a component part, but does not necessitate valuation of a company from the standpoint of its shareholders. To be sure, one can read portions of the treatise to equate the so-called unit rule with a valuation of a business enterprise—with proper adjustments:

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> "Under this [unit] rule, in its more thoroughgoing form, the entire enterprise is first valued as a unit, some 'fair share' of this value (perhaps after the deduction of certain asset values deemed inappropriate for allocation) being attributed to the particular state or district that is imposing the tax."

2 *Valuation of Property* at 633. But the author includes a caveat to suggest that the unit rule can involve valuation of any *system* of property functioning together—not necessarily an entire business enterprise:

> "The term 'unit rule' is often used in its broadest sense, to denote any assessment, measured by capital value (or by annual income) under which the value of (or income from) property located within a specific geographical area is taken to be equal to a certain share of the value of (or income from) a larger aggregate of property, of which the former property is an integral part. **When used in this broad sense, the unit rule does not necessarily require a valuation of an entire business enterprise**."

2 *Valuation of Property* at 633-34, n.1 (emphasis added).

Moreover, the actual discussion this Court cited in Bonbright is not limited to property taxation. It covers appraisal methods used in connection with several early 20th century corporate taxation schemes that predate modern corporate income tax —including taxes based on "capital stock," and "corporate excess." 1 *Valuation of Property* at 512. Bonbright's discussion further warns of inconsistencies among the laws of different states and the resulting effects on valuation approaches:

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> "This chaotic nature of the state corporation and public-utility taxes has inevitably resulted in a chaos of legal decisions and dicta as to the proper methods of valuation. **Generalizations as to the legal rules of valuation are dangerous, since they must ignore the innumerable differences in taxing statutes, administrative procedures, and prior judicial decisions,** that form the background of the rule of valuation accepted in any one case."

1 *Valuation of Property* at 512 (emphasis added).

Contrary to the position taken by the Tax Court and the Department, this Court's citation to these background sources in *DISH* does not imply this Court had concluded that central assessment taxed the company itself.

However, the Tax Court and the Department focused on another non-legal phrase contained in the *DISH* quotation above: "going concern." As used in *DISH* and in this case, that phrase has potential to generate significant semantic confusion. That phrase is not found in the central assessment statutes, but derives its usage from appraisal literature.[33]

As Mr. Reilly explained in unchallenged testimony, when valuing property on a "going concern basis" or a "going concern premise of value" the appraiser determines the market value of the property in use by the company to generate income. Tr. 1295-1303 (ER-139-47); Ex. 35, p. 11 (ER-158), Ex. 52.

[33] In local assessment of industrial property, a Department rule describes "going concern" in this way: "The going concern concept recognizes that the value of an assembled and operational group of assets usually exceeds the value of an identical group of assets that are separate or not operational." OAR 150-308-0260.

This contrasts, for example, with valuing property on a liquidation basis or liquidation premise of value, which considers the value of the assets if separately sold off, as in a fire sale. Tr. 1298-1300 (ER-142-144). Everyone agrees the property should be valued on a going concern basis, not on a liquidation basis for scrap. But the semantical confusion results because the phrase "going concern" is also used in business valuation. Tr. 1295-96 (ER-139-140). When an appraiser values a *business* "as a going concern" or values "a going concern" it can refer to the value of the entire business enterprise, not to the value of its property. Tr. 1295-97 (ER-139-141). Consistent with Mr. Reilly's testimony, the *WSATA Handbook* recognizes this potential for confusion and makes clear that "going concern" for unit valuation purposes does not equate to enterprise valuation.[34] The Tax Court quoted that statement from the *WSATA Handbook* when attempting to distinguish *Delta*. Opinion, p. 41 (ER-266).

In short, this Court's statement in *DISH* was not intended as a statement about statutory construction, but a generalized statement about unit valuation techniques found in a small sample of appraisal literature—literature which

[34] The *WSATA Handbook* notes: "Going concern as used here is not synonymous with enterprise value. Enterprise value is a broader term which encompasses the value of a corporate entity including all of it tangible and intangible assets; it is a valuation of the present owner's total business in contrast to the exchange valuation of operating assets as a going concern." *WSATA Handbook*, p. III-6, n. 36.

itself made generalizations about the topic without regard to the requirements of any particular state's law. The Court's statement might have been more nuanced had it spoken in terms of valuing a company's entire system or network of property, which would have been consistent with how the Department's rules characterize unit valuation. *See* OAR 150-308-069 (2) (defining "unit value" to be interchangeable with "correlated system value"). But that level of specificity was unnecessary for the Court to decide the issue at hand in *DISH*. The case does not alter the straightforward reading of the statutes requiring assessment of property rather than assessment of a company—and the Tax Court misconstrued *DISH* in concluding otherwise.

6. Level 3's expert valued the company's property in use on the assessment date, not the company itself. But the Tax Court rejected it for precisely that reason.

As we have shown, Oregon's central assessment statutes tax the value of Level 3's property in existence on the valuation date that is used or held by the company in the communications business subject to central assessment—not the value of Level 3 itself held by its shareholders. This forms the statutory target that an appraisal of centrally assessed property must aim for. The Tax Court disagreed, and its ruling on this legal issue directly affected how it evaluated the competing appraisals in this case.

Uncontroverted evidence, which the Tax Court found to be credible, showed that because of rapid technological change and ever-increasing demand for greater digital bandwidth, the income-generating capacity and value of Level 3's existing network equipment declines precipitously after installation. Opinion, pp. 8-9, 43 (ER-233-34, 268). As a company, Level 3's only prospect for future revenue growth depends on its ability to expand its digital network through procurement of new property or acquisition of other companies with their own fiber optic networks—property not used or held by the company on each assessment date. Opinion, p. 43 (ER-268). The Tax Court found this to be an uncontroverted fact. *Id.*

The appraisals proffered by Level 3 were predicated on these facts, while the Department's appraisal was based on Level 3's future prospects for growth as a company. Opinion, pp. 43, 46-47 (ER-268, 271-72); Tr. 428-29. Nevertheless, because the Tax Court determined that the central assessment statute permitted the Department to assess the value of Level 3 as a company rather just Level 3's property, the court rejected Level 3's appraisals and accepted the Department's appraisals with regard to two of the three valuation methodologies. Opinion, pp. 43, 46-47, 56-57 (ER-268, 271-72, 281-82).

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a. The Income Approach

Dr. Heaton relied entirely on the income approach in his valuation model to capture the value of Level 3's property operating in place on each valuation date. Ex. 1, pp. 15, 21-26 (ER-15, 21-26). This required him to accept the facts established about the company's network and equipment. Ex. 1, pp. 22-23 (ER-22-23). Because he was assessing the value of Level 3's network rather than the company itself, he did not assume a positive growth in the income-generating capacity of the obsolete property in place on each valuation date. Opinion, p. 43 (ER-268); Ex. 1, pp. 22-23 (ER-22-23); Tr. 1599-1601. When his analysis considered stock market data, Dr. Heaton made mathematical adjustments for the fact that an investor in the company's stock could sell the stock in the liquid stock market—while the company itself having invested in its network could not easily sell the network for cash in the same way. Ex. 1, pp. 20, 46-47, 52-54 (ER-20, 46-47, 52-54); Tr. 478-59, 492-95.

By contrast, the Department's appraiser, Mr. Eyre, assumed equivalence between the future income-generating ability of Level 3 as a company, and the future income-generating capacity of its property in place on the assessment date. Opinion, pp. 8-9 (ER-233-34); Ex. A, pp. 29-30 (ER-93-94). Mr. Eyre applied the income approach in a manner that disregarded the technological environment in which Level 3 operated and the undisputed effects of cost compression and price compression on its networking property.

Based on industry-wide data, Mr. Eyre assumed that Level 3 as a company would grow as the industry grew by increasing its revenues by three percent annually—essentially assuming that Level 3 would obtain new networking equipment in the future or acquire other companies along with their networks. Opinion, pp. 8-9 (ER-233-34); Ex. A, pp.29-30 (ER-93-94). By valuing the long-term prospects of the company, Mr. Eyre appraised property of the company that did not exist on each of the valuation dates. Also, Mr. Eyre relied on stock price data in his analysis without adjustment for the fact that stock prices include factors that have little to do with the value of a company's property—such as liquidity, diversification, limited liability, or expectation of growth from future assets. Tr. 1340-42, 1355-1368 (ER-208-221); Ex. 35, pp. 8-11, 31 (ER-155-58, 178).

Because the Tax Court rejected the notion that Oregon law requires a focus on the value of property as opposed to the company, it rejected Dr. Heaton's valuation and the premise that the property in place on a particular assessment date would not grow in its income-generating capacity. Opinion, pp. 43-47 (ER-268-71).

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b. The Market Comparison Approach

Dr. Heaton concluded that the market comparison approach to valuation using the stock and debt method could not be effectively adjusted to capture only the value of Level 3's property as opposed to the value of Level 3 as a company. Ex. 1, p. 20 (ER-20). Many factors other than the value of a company's property influence the value of its stock. Ex. 1, pp. 15, 20 (ER-15, 20). Among other things, the market price of a company's securities includes the speculative value of future property not yet in existence on the each valuation date. Ex. 1, p. 20 (ER-20); Tr. 419-23 (ER-60-64). While the Tax Court agreed with those underlying facts, it nevertheless accepted Mr. Eyre's use of the stock and debt method because it held the central assessment statutes permitted valuation of the entire company rather than just the company's property. Opinion, pp. 56-57 (ER-281-82).

c. The Cost Approach

Dr. Heaton also considered but accorded no weight to the cost approach. He determined that the historical cost less depreciation method would at most give a high benchmark for the value of Level 3's property. Ex. 1, pp. 16-20 (ER-16-20). Again, this method could not account for the functional and economic obsolescence of Level 3's networking property. *Id*. Mr. Eyre's formulation of this approach included substantial value attributable to accounting goodwill—which Level 3 argued below does not reflect the value of property but accounting methods following a business combination. Opinion, pp. 49-50 (ER-274-75); Tr. 714-15, 1378-79. Even the Department's own rebuttal expert, Dr. Bernardo, rejected the cost approach as valid for a company like Level 3. Opinion, pp. 55-56 (ER-280-81). The Tax Court agreed with Level 3 that the cost approach was unreliable as applied here and rejected it. Opinion, pp. 55-56 (ER-280-81).

The Tax Court's decision to accept the appraisals of Mr. Eyre and to reject those of Dr. Heaton stemmed directly from the court's conclusion that central assessment permits taxation of the value of the company itself from the standpoint of its shareholders, rather than just the company's property. Opinion, pp. 46-47, 56-57 (ER-271-72, 281-82). Because that legal conclusion cannot be supported by the text and context of the central assessment statutes, the Tax Court's decision must be reversed and remanded.

IV. CONCLUSION

Oregon's central assessment regime taxes the value of property that a company uses or holds on each assessment date in connection with the industries subject to central assessment. The unambiguous text of these statutes, considered in context, establishes that the value of the company's property does not include the enterprise value of the company itself held by its shareholders. Both taxpayers and the Department must target their appraisal approaches to comply with the plain meaning of these statutes. Valuation methodologies that include enterprise or shareholder value must be appropriately adjusted or modified to conform to Oregon law, particularly when a company's existing property rapidly declines in value. Because the Tax Court held that central assessment permitted taxation of the value of the Level 3 itself from the standpoint of its shareholders, its decision should be reversed and remanded.

DATED this 31st day of August, 2020.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

The court granted a motion to exceed the length limit for this brief. The order granting that motion was dated July 21, 2020 and permits a brief of up to 24,000 words. I certify that (1) this brief complies with that order and (2) the word count of this brief is 22,323.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

Dated: August 31, 2020.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 31, 2020, I filed the foregoing **APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD** with the Appellate Court Administrator by using the eFiling system.

I certify that service of a copy of this brief will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate court' eFiling system at the participants' email addresses as recorded this date in the appellate eFiling system:

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