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**In Support of HB 4066
House Committee on Revenue
February 8, 2012**

1. Why Yahoo! is not a communication company

Most real property is assessed by the county in which the property is located.

Some businesses present unique challenges for valuing property because the businesses are made up of properties linked across many Oregon counties. Valuing the individual parts of a linked business may undervalue the business and underestimate the business's need for government services. Professor Bonbright, the leading scholar on the issue, explained:

[U]nique combinations of land and structures used by railroads, other public utilities, and large manufacturing companies * * * that are physically and functionally integrated over wide areas * * * [may] have no value, over and above their salvage value, except as integral parts of the very enterprise by which they are now exploited. In effect, they are worth no more and no less than the business is worth * * *.

Bonbright, *The Valuation of Property – A Treatise on the Appraisal of Property for Different Legal Purposes* 511 (1965). As a Kansas court put it more than a century ago:

A railroad is an entire thing and should be assessed (valued) as a whole. It would be almost as easy and as reasonable to divide a house or a locomotive into portions, and assess each portion separately, as to divide a railroad into portions and assess each portion of it separately.

To properly value the kind of businesses that are “integrated over wide areas,” the Legislative Assembly adopted “central assessment,” which requires the Department of Revenue to value the linked properties of certain kinds of companies as whole businesses, then allocate the value among Oregon’s 36 counties. The kinds of business that the Legislative Assembly has designated as appropriate for central assessment are transportation companies (such as railroads), ORS 308.515 (1)(a)–(g), energy companies (such as electric utilities), ORS 308.515 (1)(i)–(k), and communication companies (such as landline or wireless telephone companies), ORS 308.515 (1)(h).

For many years, the Legislative Assembly considered only two kinds of companies to be communication companies: telephone companies and telegraph companies. In 1971, after the invention of wireless telephones using microwave transmitters, the Legislative Assembly broadened the definition of communication companies to include “data transmission services by whatever means provided.”

The 1990s saw the rapid growth of the Internet, with use at work and at home commonplace. The Department of Revenue did not attempt to tax companies that provide access to the Internet or information over the Internet. Nevertheless, to ensure that there would be no taxation of Internet access, in 2001, the Legislative Assembly passed the Internet Tax Freedom Act, ORS 305.822 (2), which provides:

This state, and the municipal corporations and political subdivisions of this state, may not impose, assess, collect or attempt to collect a tax on Internet access or the use of Internet access if the tax was not in effect on October 6, 2001.

In 2009, the Department of Revenue, with no change in the law or businesses’ practices, started subjecting Internet information companies like Yahoo! to central assessment as if they

were involved in communications like a telephone company. Companies like Yahoo! that had paid taxes in only a single county where the company had a sales office suddenly had their tax bills double or triple.

The new and higher tax bills go not only to companies that provide access to the Internet through the companies' cables, towers, and wires. The new and higher bills go to companies like Yahoo! that do not have any cables, towers, or wires in Oregon.

The Department treats Yahoo! as a communication company for one or both of two reasons. One reason may be because Yahoo! pays a communication company that is subject to central assessment to provide customers with free access to Yahoo!'s web sites—just like a retail company pays for a telephone company to provide a toll-free telephone number for customers to talk to the retail company. Under this application of the law, a “communication company” includes both the communication company and its commercial customers.

The other reason the Department may treat Yahoo! as a communication company is that Yahoo! provides email addresses to customers who want them: [your name]@yahoo.com. However, providing an email account is not providing data transmission services. If it were, then a stationer who provides a customer with paper and envelope would be treated as the Postal Service.

The Legislative Assembly did not intend for a “communication company” to include a business like Yahoo! that is not “integrated over wide areas” and only provides an email account or arranges for a communication company to provide the Internet equivalent of a toll-free telephone number.

The Department has resolved the issue beginning with the tax year that starts in July 2012 by adopting a rule that says that, going forward, the Department will not treat Internet information companies like Yahoo! as communication providers.

2. Why a statutory change is better than a rule change

The Legislative Assembly's changing a statute is much better for a business than an agency's changing a rule. How we got to where we are today shows why a rule change provides insufficient certainty for business to invest in Oregon.

The dispute started in 2009 when the Department adopted a rule that made companies like Yahoo! subject to central assessment. Companies that had never paid taxes in Oregon and owned no property in Oregon started receiving tax bills.

In 2010, the Court of Appeals invalidated the Department's rule because the Department had failed to follow this body's instruction to consider the effect of a rule on small businesses. The Court of Appeals pointed out that the Department had simply "fail[ed] to * * * engage[] in the type of informed rulemaking contemplated by the legislature[.]"

Rather than conduct the "informed rulemaking" that the Legislative Assembly requires, the Department decided the Department did not need the rule to tax Internet information companies as communication providers. The Department continued to send the new and higher tax bills.

Last week, thanks to the good auspices of the Governor and his staff, the Department reversed itself and adopted a rule that frees companies like Yahoo! from central assessment—at least beginning this coming tax year.

To ensure that the Department cannot change its mind again and expand the definition of communication company to include an Internet information company like Yahoo!, the Legislative Assembly should, in 2013, make crystal clear that communication company does not include a company that simply provides email accounts and the Internet equivalent of a toll-free telephone number.

There is still more certainty to be achieved. Although the Department is addressing the problem beginning this coming tax year, the Department is continuing to demand increased payments from Yahoo! and others for the past couple of tax years. When we return in 2013, I expect that we will still be litigating in the Tax Court or the Supreme Court over whether which view of the law is correct: the Department's view now or the Department's view for the past couple of years.