

DATE: NOVEMBER 2, 2015

TO: THE HONORABLE SUSAN ACKERMAN, CHAIR, OREGON PUBLIC UTILITY
COMMISSION
THE HONORABLE JOHN SAVAGE, COMMISSIONER, OPUC
THE HONORABLE STEPHEN BLOOM, COMMISSIONER, OPUC

FROM: GIL RIDDELL, POLICY DIRECTOR, ASSOCIATION OF OREGON COUNTIES

SUBJECT: DOCKET NO. AR 592 [NOV. 3, 2015]: PROPOSED TEMPORARY RULES TO
IMPLEMENT SB 611 AS AMENDED BY HB 2485 (2015).

ATTACHMENT(S): FCC WEBPAGE, "TYPES OF BROADBAND CONNECTIONS"
LEGISLATIVE COUNSEL OPINION DATED OCTOBER 27, 2015

REQUESTED ACTION: For the several reasons stated below, AOC respectfully urges the Public Utility Commission to substitute for the definition of "broadband service" in the proposed temporary rule the following: "Broadband service" means the provision of data transmission technology that provides two-way data transmission to and from the Internet and is faster than traditional dial-up.

DISCUSSION:

The Public Utility Commission staff would have the Commission define "broadband service" as limited to "the provision of data transmission technology that provides two-way data transmission to and from the Internet with a download speed equal to or greater than 10 megabits per second (Mbps)."

To adopt this definition, the Commission would be forced to ignore legislative history, legislative intent, the opinion of the Legislative Counsel Dexter Johnson, the appropriate role of an administrative agency with respect to legislation, and the assumption of stakeholders during the legislative process.

The following discussion will be based on the PUC staff materials the Commission has at hand.

The staff is correct that the Acts (Enrolled Senate Bill 611 and Enrolled House Bill 2485) provide a sizeable property tax exemption for "qualified projects" of communication services with, among other requirements, the capacity to provide at least approximately one gigabit per second symmetrical service to a majority of the residential customers of the company's broadband service. One gigabit per second is the only speed specified in the Acts, and the only speed with which the Commission should concern itself. It is a justly high target for telecommunication providers to reach to gain the sizeable exemption from property taxes. Along with the data center portion of the Acts, the exemptions would conservatively equate in FY 2016-17 to an estimated \$4.3 million loss of resources for local general services, such as public safety and health, and \$3.5 million of local funds for the state school system. The estimate grows for each biennium. [Note: The estimate was provided on March 19, 2015, by Kyle Easton, Economist of the Legislative Revenue Office, for SB 611B, with the general understanding of what "broadband service" means under the bill. The estimate is conservative, because he notes that the "revenue impact includes losses in revenue for local governments derived from the exemptions ... for existing companies in Oregon. The revenue impact does not include estimates for potential companies

that could receive [the] exemption under the qualified project investment exemption” (emphasis added)].

The staff is also correct that stakeholder consensus was not reached on the definition of “broadband services”, although it is worth noting that the staff conferred with counties once and, as we understand it, with industry representatives several times.

The staff statement at page 2 is correct in one respect: “A definition of broadband service is necessary to the Commission’s determination that the applicant’s project is a qualified project.” What is incorrect is that the Commission is to provide the definition. The Legislature has already done so.

The Federal Communications Commission, at its web page titled “Types of Broadband Connections” (Attachment I), states that the term “*commonly refers to high-speed Internet access that is always on and faster than the traditional dial-up access.* Broadband includes several high-speed transmission technologies such as: Digital Subscriber Line (DSL); Cable Modem; Fiber; Wireless; Satellite; Broadband over Powerlines (BPL).” (Emphasis added). The FCC describes broadband in **modes or types, without reference to speed.** In describing the features of each mode, the FCC gives examples of speeds among other features. But the key point is that broadband is generally understood as **faster than the traditional dial-up access.** That is the **only qualification.** Indeed, that is what the Association of Oregon Counties believed, and on which based our acceptance of SB 611/HB 2485. AOC does not recall any instance during legislative deliberations where a minimum speed was stated as a definition of broadband. As the Legislative Counsel Dexter Johnson states at page two of his opinion (Attachment 2), the **ordinary meaning of “broadband” is defined by Merriam-Webster in mode, not by minimum speed.** He also notes at page two that **the term appears 36 times in Oregon statute, none modified by a specified minimum speed to communication services.** Note as well that the PUC staff discussion at pages two and three quote definitions by Newton, Merriam-Webster, and the federal Telecommunications Act, none of which state a minimum speed of service.

If the Legislature wished to change the ordinary understanding of “broadband service”, it would have done so by explicit definition.

The PUC staff then declares at page three, “[N]one of the above definitions are exact for purposes of determining whether a project is a qualified project... [I]t is necessary to further define what high speed means in the context of broadband services.” To what purpose does that serve? The procedure laid out by the Legislature is simple and direct. The PUC will receive the application; determine if the goal of one gigabit per second symmetrical service is properly certified as the applicant’s capacity to provide to a majority of its residential customers; receive and verify the number of the applicant’s residential customers of the applicant’s broadband services (i.e., any mode of service above traditional dial-up access); ensure that the other requirements of a “qualified project” are met; then decide yes or no on the question of “qualified project”. That’s the sum of it.

PUC staff’s reference to the FCC Universal Service Fund and its benchmarking rule is utterly irrelevant. That program is for a completely different purpose. The USF receives assessments from providers to in turn provide support for build out of Internet service to certain categories of users, such as schools and libraries (the “E-Rate”) and rural health care. The bench-marking rule is intended to moderate expenses of very high cost rate-of-return carriers (as a kind of cap or limit to reimbursable capital and operating costs of those carriers) compared to their similarly situated peers. The FCC may demand a minimum

speed of service for providers building out to receive reimbursement of costs, which is perfectly appropriate in exchange for payment of subsidies ultimately charged to the public. *It is the same as the Legislature requiring companies to have the capacity to provide one gigabit per second symmetrical service to a majority of their residential broadband customers before they can receive property tax expenditures (in effect, public payments) amounting to tens of millions of dollars of the public resources for schools, safety, and health care.*

Why is this decision before the Commission so critical? The definition of “broadband services” in the temporary rule may enable certain companies to qualify that were not intended to by the legislation. And the inappropriate property tax exemption could continue indefinitely. The Commission staff would have the Commission step out of bounds and into the shoes of the Legislature. There is no role for an administrative agency to define a term in conflict with how that term was used and intended in the statute (see Attachment 2, page 3).

Is this all about lost public revenues? Not at all for county governments. County Commissioners and Judges know full well the need for economic development. Local governments have added to incentives already provided by the state to attract and retain community spirited businesses. Counties have been willing to accept the loss of current public revenues for their vital public services for the longer-term goal of healthy, sustainable communities. But AOC was working with estimates of lost revenue before us during the 2015 legislative session. The potential extra-legislative action by these proposed temporary rules may significantly change revenue costs. It would be prudent to know the answer to that question.

The PUC staff’s statement of need for a temporary rule is revealing. They state that a delay would seriously prejudice the “public interest”. But a delay would amount to merely a year for the program to have a full set of permanent rules after public input, consultation with the other implementing state agency (Department of Revenue), and productive reflection. Moreover, “public interest” is far broader than immediate and potentially inappropriate legal and financial advantages to telecommunication companies. The public interest includes that of the general public, likely few of whom will see a benefit from this proposed rule. The public interest includes their need for vital local services such as adequate resources for education, public safety, health care, and government actions that carefully fulfill its responsibilities.

AOC respectfully urges the Commission to fulfill your role of carrying forward the legislative intent and clear language of these two Acts by substituting for the definition of “broadband service” in the proposed temporary rule the following: “Broadband service” means the provision of data transmission technology that provides two-way data transmission to and from the Internet and is faster than traditional dial-up.

Types of Broadband Connections

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The term broadband commonly refers to high-speed Internet access that is always on and faster than the traditional dial-up access. Broadband includes several high-speed transmission technologies such as:

- Digital Subscriber Line (DSL)
- Cable Modem
- Fiber
- Wireless
- Satellite
- Broadband over Powerlines (BPL)

The broadband technology you choose will depend on a number of factors. These may include whether you are located in an urban or rural area, how broadband Internet access is packaged with other services (such as voice telephone and home entertainment), price, and availability.

Digital Subscriber Line (DSL)

DSL is a wireline transmission technology that transmits data faster over traditional copper telephone lines already installed to homes and businesses. DSL-based broadband provides transmission speeds ranging from several hundred Kbps to millions of bits per second (Mbps). The availability and speed of your DSL service may depend on the distance from your home or business to the closest telephone company facility.

The following are types of DSL transmission technologies:

- **Asymmetrical Digital Subscriber Line (ADSL)** – Used primarily by residential customers, such as Internet surfers, who receive a lot of data but do not send much. ADSL typically provides faster speed in the downstream direction than the upstream direction. ADSL allows faster downstream data transmission over the same line used to provide voice service, without disrupting regular telephone calls on that line.
- **Symmetrical Digital Subscriber Line (SDSL)** – Used typically by businesses for services such as video conferencing, which need significant bandwidth both upstream and downstream.

Faster forms of DSL typically available to businesses include:

- High data rate Digital Subscriber Line (HDSL); and
- Very High data rate Digital Subscriber Line (VDSL).

Cable Modem

Cable modem service enables cable operators to provide broadband using the same coaxial cables that deliver pictures and sound to your TV set.

Most cable modems are external devices that have two connections: one to the cable wall outlet, the other to a computer. They provide transmission speeds of 1.5 Mbps or more.

Subscribers can access their cable modem service by simply turning on their computers, without dialing-up an ISP. You can still watch cable TV while using it. Transmission speeds vary depending on the type of cable modem, cable network, and traffic load. Speeds are comparable to DSL.

Fiber

- Fiber optic technology converts electrical signals carrying data to light and sends the light through transparent glass fibers about the diameter of a human hair. Fiber transmits data at speeds far exceeding current DSL or cable modem speeds, typically by tens or even hundreds of Mbps.

- The actual speed you experience will vary depending on a variety of factors, such as how close to your computer the service provider brings the fiber and how the service provider configures the service, including the amount of bandwidth used. The same fiber providing your broadband can also simultaneously deliver voice (VoIP) and video services, including video-on-demand.
- Telecommunications providers sometimes offer fiber broadband in limited areas and have announced plans to expand their fiber networks and offer bundled voice, Internet access, and video services.
- Variations of the technology run the fiber all the way to the customer's home or business, to the curb outside, or to a location somewhere between the provider's facilities and the customer.

Wireless

- Wireless broadband connects a home or business to the Internet using a radio link between the customer's location and the service provider's facility. Wireless broadband can be mobile or fixed.
- Wireless technologies using longer-range directional equipment provide broadband service in remote or sparsely populated areas where DSL or cable modem service would be costly to provide. Speeds are generally comparable to DSL and cable modem. An external antenna is usually required.
- Wireless broadband Internet access services offered over fixed networks allow consumers to access the Internet from a fixed point while stationary and often require a direct line-of-sight between the wireless transmitter and receiver. These services have been offered using both licensed spectrum and unlicensed devices. For example, thousands of small Wireless Internet Services Providers (WISPs) provide such wireless broadband at speeds of around one Mbps using unlicensed devices, often in rural areas not served by cable or wireline broadband networks.
- Wireless Local Area Networks (WLANs) provide wireless broadband access over shorter distances and are often used to extend the reach of a "last-mile" wireline or fixed wireless broadband connection within a home, building, or campus environment. Wi-Fi networks use unlicensed devices and can be designed for private access within a home or business, or be used for public Internet access at "hot spots" such as restaurants, coffee shops, hotels, airports, convention centers, and city parks.
- Mobile wireless broadband services are also becoming available from mobile telephone service providers and others. These services are generally appropriate for highly-mobile customers and require a special PC card with a built in antenna that plugs into a user's laptop computer. Generally, they provide lower speeds, in the range of several hundred Kbps.

Satellite

Just as satellites orbiting the earth provide necessary links for telephone and television service, they can also provide links for broadband. Satellite broadband is another form of wireless broadband, and is also useful for serving remote or sparsely populated areas.

Downstream and upstream speeds for satellite broadband depend on several factors, including the provider and service package purchased, the consumer's line of sight to the orbiting satellite, and the weather. Typically a consumer can expect to receive (download) at a speed of about 500 Kbps and send (upload) at a speed of about 80 Kbps. These speeds may be slower than DSL and cable modem, but they are about 10 times faster than the download speed with dial-up Internet access. Service can be disrupted in extreme weather conditions.

Broadband over Powerline (BPL)

BPL is the delivery of broadband over the existing low- and medium-voltage electric power distribution network. BPL speeds are comparable to DSL and cable modem speeds. BPL can be provided to homes using existing electrical connections and outlets. BPL is an emerging technology that is available in very limited areas. It has significant potential because power lines are installed virtually everywhere, alleviating the need to build new broadband facilities for every customer.

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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

October 27, 2015

Representative Phil Barnhart
900 Court Street NE H279
Salem OR 97301

Re: Meaning of term "broadband" in 2015 legislation

Dear Representative Barnhart:

You asked whether use of the term "broadband" in a draft administrative rule being considered by the Public Utility Commission is inconsistent with that same term, as used in enrolled Senate Bill 611 (2015),¹ as further amended by enrolled House Bill 2485 (2015).² We conclude that the answer is yes, and further conclude that the rule would likely be found invalid if challenged in court. In explaining our reasoning for this conclusion, we summarize the 2015 legislation in question below and explain the standards courts employ in interpreting statutory provisions. We also discuss the degrees of deference that courts give to state agencies that interpret statutory provisions through administrative rules and then apply those standards to the draft rule.

2015 Legislation

SB 611 established new property tax exemptions for the property of certain companies subject to central assessment under ORS 308.505 to 308.665, including a property tax exemption for "qualified projects" under section 5 of SB 611. A project is qualified under section 5 if, in part, the "project requires capital investment in [specified infrastructure] that enables the company [undertaking the project] to offer communication services, including a capacity of at least one gigabit per second symmetrical service, to a majority of the residential customers of the company's broadband services". Section 5 of SB 611 was subsequently amended in section 7 of HB 2485 to slightly modify the requirements for a qualified project. As modified, a project is qualified if new capital investment enables the company to "offer communication services, including *the capacity to provide, at least, approximately* one gigabit per second symmetrical service, to a majority of the residential customers of the company's broadband services." (Italics indicate new language inserted by HB 2485.) In other words, the qualified project exemption established in SB 611 and HB 2485 requires a company to offer communication services of at least approximately one gigabit per second service to a majority of the company's residential broadband service customers, in order for the property associated with the project to be exempt from taxation. The term "broadband services" is not used in any other location in either bill and is not defined in either bill.

¹ Chapter 23, Oregon Laws 2015.

² Chapter 31, Oregon Laws 2015.

Statutory interpretation

When a term is used in a statute but the term is not defined in the statute, the task is to ascertain legislative intent by applying rules of statutory construction established by the Oregon Supreme Court. Under those rules, courts employ three levels of analysis to discern legislative intent. At the first level of analysis, courts will consider the text and context of the law in question and, in the absence of a statutory definition or contextual evidence that a unique meaning is intended, will give words their plain and ordinary meaning.³ The second level of analysis involves considering any proffered legislative history of a provision. However, a court will only give legislative history the evaluative weight that the court considers helpful in discerning legislative intent.⁴ Finally, if legislative intent remains unclear after examining the text and context of a provision, a court will employ general maxims of statutory construction to resolve the ambiguity.⁵

The plain and ordinary meaning of the term “broadband” is “operating at, responsive to, or comprising a wide band of frequencies” or “of, relating to, or being a high-speed communications network and especially one in which a frequency range is divided into multiple independent channels for simultaneous transmission of signals (such as voice, data, or video)”.⁶ The definition does not require a minimum speed for service to be considered broadband. When a statute employs technical or scientific terms, a court may substitute an authoritative description from a relevant professional source for the plain meaning of the term.⁷ The Federal Communications Commission has described “broadband” as “commonly refer[ing] to high-speed Internet access that is always on and faster than the traditional dial-up access.”⁸ Finally, as noted above, the first level of analysis consists of both the text and the context of that statute. Contextual evidence includes related statutory provisions in existence before the provision being construed.⁹ The term “broadband” appears 36 times in the 2013 edition of the ORS. Assuming for the sake of argument that all of these references are to some degree related to the provisions in SB 611/HB 2485, none of these 36 references modify “broadband” by affixing a specified minimum speed to communication services.

We are unable to conclusively review the legislative history of SB 611/HB2485 within the time available before this opinion must be delivered to you. A cursory examination of the materials available on OLIS did not shed any light on whether the legislature intended to apply any particular minimum speed to Internet service for that service to be considered broadband service.

Resort to the third level of statutory construction analysis — application of general maxims of statutory construction — is appropriate only when ambiguity remains concerning the meaning of the term in question. It is certainly arguable that no ambiguity exists concerning whether the term broadband requires a specified minimum speed as no use of the term in the ORS so provides, the plain meaning of the word does not suggest that a minimum speed is a requirement and authoritative technical sources do not suggest that a minimum speed is a requirement. One general maxim courts employ is to assume that the legislature intends words to be used consistently.¹⁰ Applying that maxim resolves any ambiguity in favor of a reading of the term “broadband” as not requiring a threshold minimum speed.

³ *PGE v. BOLI*, 317 Or. 606, 610-611 (1993).

⁴ *State v. Gaines*, 346 Or. 160, 170-172 (2009).

⁵ *Id.*

⁶ *Merriam-Webster Unabridged Online Dictionary*

⁷ *Tharp v. Psychiatric Sec. Review Bd.*, 338 Or. 413, 423 (2005).

⁸ <https://www.fcc.gov/encyclopedia/types-broadband-connections> (last visited on 10/27/2015).

⁹ *Stull v. Hoke*, 326 Or. 79-80 (1997).

¹⁰ *State v. Holloway*, 138 Or. App. 260 (1995).

Proposed administrative rule

Draft OAR 860-200-0050¹¹ provides definitions for administrative rules that apply to a company seeking a qualified project determination and property tax exemption under section 5 of SB 611, as amended by HB 2543.¹² The rule defines "broadband service" as "the provision of data transmission technology that provides two-way data transmission to and from the Internet with a download speed equal to or greater than 10 megabits per second (Mbps) and an upload speed equal to or greater than 3 Mbps." Thus, the definition in the rule establishes a minimum speed of transmission that must be satisfied before a communication service is considered a broadband service.

Standards of review of administrative rules

A state agency interprets and implements a statute through adoption of administrative rules and orders. The Oregon Supreme Court has identified three classes of statutory terms that determine the court's standard of review to apply when courts review the rule or order:

(1) Terms of precise meaning, whether of common or technical parlance, for which an agency's authority to interpret is limited to applying the term to specific facts and the court's standard for review is to set aside the agency's interpretation if the agency's interpretation conflicts with the statutory use of the term;¹³

(2) Inexact terms, which require agency interpretation and judicial review for consistency with legislative policy;¹⁴ and

(3) Terms of delegation, which require legislative policy determination by the agency and judicial review of whether the policy is within the intent and scope of the delegation.¹⁵

Examples of terms of precise meaning include "male", "Class II farmland" and "rodent".¹⁶ By contrast, examples of inexact terms include "available", "operator of a facility" and "earning capacity".¹⁷ We conclude that "broadband services" as used in the draft rule is more likely a term of precise meaning and therefore is likely invalid because it conflicts with the statutory use of the term. The conflict is grounded in the rule's requiring a minimum transmission speed, whereas the plain and ordinary meaning of the term broadband as used in the statute does not require a minimum transmission speed.

Please advise if we can be of further assistance.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the

¹¹ Working copy draft of 10/20/2015

¹² Draft OAR 860-200-0005 (10/20/2015).

¹³ *Employment Division v. Ring*, 104 Or. App. 713, 718 (1990); see also *Springfield Education Ass'n v. Springfield School District*, 290 Or. 217, 224 (1980)

¹⁴ *Springfield*, at 223.

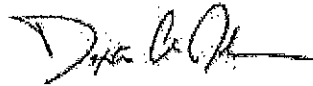
¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Jeld-Wen, Inc. v. Environmental Quality Comm'n*, 162 Or. App. 100, 104 (1999); *Vickers/Nelson & Assocs. v. Env'tl. Quality Comm'n*, 209 Or. App. 179, 185 (2006); *England v. Thunderbird*, 315 Or. 633, 638 (1993).

development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dexter A. Johnson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Dexter A. Johnson
Legislative Counsel