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CELL TAX FAIRNESS ACT OF 2008

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 5793

SEPTEMBER 18, 2008

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CONTENTS

SEPTEMBER 18, 2008

Page

THE BILL

H.R. 5793, the "Cell Tax Fairness Act of 2008" 3

OPENING STATEMENTS

The Honorable Linda T. Sánchez, a Representative in Congress from the State of California, and Chairwoman, Subcommittee on Commercial and Administrative Law 1
The Honorable Chris Cannon, a Representative in Congress from the State of Utah, and Ranking Member, Subcommittee on Commercial and Administrative Law 10
The Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Subcommittee on Commercial and Administrative Law 11

WITNESSES

Ms. Gail W. Mahoney, Commissioner, Jackson County, Michigan, Jackson, MI, on behalf of the National Association of Counties
Oral Testimony 19
Prepared Statement 22
The Honorable James F. Clayborne, Jr., Illinois State Senator, Belleville, IL
Oral Testimony 25
Prepared Statement 27
Scott R. Mackey, Esquire, Kimbell Sherman Ellis, Montpelier, VT
Oral Testimony 31
Prepared Statement 33
Tillman L. Lay, Esquire, Spiegel & McDiarmid, LLP, Washington, DC, on behalf of the U.S. Conference of Mayors, the National League of Cities, the Government Finance Officers Association, the National Association of Telecommunications Officers and Administrators
Oral Testimony 41
Prepared Statement 43

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Letters of Support from the National Black Chamber of Commerce, the Chamber of Commerce of the United States of America, and the National Association of Neighborhoods (NAN) 13
Prepared Statement of the Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary 59
Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Chairman, Committee on the Judiciary, and Member, Subcommittee on Commercial and Administrative Law 60

Page

APPENDIX

Material Submitted for the Hearing Record

Answers to Post-Hearing Questions from Gail W. Mahoney, Commissioner, Jackson County, Michigan, Jackson, MI, on behalf of the National Association of Counties 64
Answers to Post-Hearing Questions from the Honorable James Clayborne, Illinois State Senator, Belleville, IL 66
Answers to Post-Hearing Questions from Scott Mackey, Esquire, Kimbell Sherman Ellis, Montpelier, VT 67
Answers to Post-Hearing Questions from Tillman L. Lay, Esquire, Spiegel & McDiarmid, LLP, Washington, DC, on behalf of the U.S. Conference of Mayors, the National League of Cities, the Government Finance Officers Association, the National Association of Telecommunications Officers and Administrators 72

CELL TAX FAIRNESS ACT OF 2008

THURSDAY, SEPTEMBER 18, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 1:08 p.m., in room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Lofgren, Watt, Cannon, Jordan, and Keller.

Staff present: Michone Johnson, Majority Chief Counsel; Norberto Salinas, Majority Counsel; Adam Russell, Professional Staff Member; and Stewart Jeffries, Minority Counsel.

Ms. SÁNCHEZ. The Subcommittee on Commercial and Administrative Law will now come to order. Without objection, the Chair will be authorized to declare a recess of the hearing. And I will now recognize myself for a short statement.

In a world where text messaging, Internet capability, digital music and instant voice communication at the push of a button are commonplace, wireless services are becoming more prevalent than ever. In fact, over the last decade, the number of cell-phone subscribers has quadrupled to over 250 million.

Not only have wireless phones become required for many businesses, but they have also become ingrained in daily life. Cellular phones provide a platform for friends to instantaneously chat, for businesses to pitch proposals, and for those who are in distress due to natural disasters, to make emergency contact. Couple these benefits with cell phones' ease of use and competitive pricing, and it is no wonder that the public has quickly come to rely on them.

But as the popularity of cell phones has grown, the wireless industry maintains that local and State tax rates on wireless services have steadily increased. The wireless industry has raised pointed concerns that local and State governments have disproportionately raised these tax rates and fees, when compared to other services and goods.

State and local governments generally dispute those charges. They suggest that they are simply restructuring their tax bases, in light of the trend away from landline communication. Further, they contend that the tax burden should not necessarily be applied evenly across different industries.

Many types of industries are subject to their own special taxes, including not only tobacco and alcohol, but also travel, hotels, entertainment, transportation and public utilities.

Today's legislative hearing will provide us with the opportunity to hear testimony on the taxes and fees imposed on wireless services and providers. The testimony will also assist us in determining whether the tax-and-fee burden is truly unfair, and not justifiable.

Additionally, we will examine H.R. 5793, the "Cell Tax Fairness Act of 2008," which seeks to impose a 5-year moratorium on new, discriminatorily imposed taxes and fees on wireless services and providers.

As we hear today's testimony, we must remember to balance the competing interests concerning the issues addressed by this legislation. As consumers, we want to pay lower taxes and fees on our wireless services, but as legislators, we understand that State and local governments need revenue to provide the services we need and expect from them. Accordingly, I am very much looking forward to hearing today's testimony.

[The bill, H.R. 5793, follows:]

110TH CONGRESS
2D SESSION

H. R. 5793

To restrict any State or local jurisdiction from imposing a new discriminatory tax on cell phone services, providers, or property.

IN THE HOUSE OF REPRESENTATIVES

APRIL 15, 2008

Ms. ZOE LOFGREN of California (for herself, Mr. CANNON, Mr. COHEN, Mr. CHABOT, Mr. MEEKS of New York, and Mr. SENSENBRENNER) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To restrict any State or local jurisdiction from imposing a new discriminatory tax on cell phone services, providers, or property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Cell Tax Fairness Act of 2008".

SEC. 2. MORATORIUM.

(a) IN GENERAL.—No State or local jurisdiction shall impose a new discriminatory tax on or with respect to mobile services, mobile service providers, or mobile service

1 property, during the 5-year period beginning on the date
2 of enactment of this Act.
3 (b) DEFINITIONS.—In this Act:
4 (1) MOBILE SERVICE.—The term ''mobile serv-
5 ice'' means commercial mobile radio service, as such
6 term is defined in section 20.3 of title 47, Code of
7 Federal Regulations, as in effect on the date of en-
8 actment of this Act, or any other service that is pri-
9 marily intended for receipt on, transmission from, or
10 use with a mobile telephone, including but not lim-
11 ited to the receipt of a digital good.
12 (2) MOBILE SERVICE PROPERTY.—The term
13 ''mobile service property'' means all property used
14 by a mobile service provider in connection with its
15 business of providing mobile services, whether real,
16 personal, tangible, or intangible and includes, but is
17 not limited to goodwill, licenses, customer lists, and
18 other similar intangible property associated with
19 such business.
20 (3) MOBILE SERVICE PROVIDER.—The term
21 ''mobile service provider'' means any entity that sells
22 or provides mobile services, but only to the extent
23 that such entity sells or provides mobile services.

(4) NEW DISCRIMINATORY TAX.—The term "new discriminatory tax" means any tax imposed by a State or local jurisdiction that—

(A) is imposed on or with respect to, or is measured by the charges, receipts, or revenues from or value of—

(i) any mobile service and is not generally imposed, or is generally imposed at a lower rate, on or with respect to, or measured by the charges, receipts or revenues from, other services or transactions involving tangible personal property;

(ii) any mobile service provider and is not generally imposed, or is generally imposed at a lower rate, on other persons that are engaged in businesses other than the provision of mobile services; or

(iii) any mobile service property and is not generally imposed, or is generally imposed at a lower rate, on or with respect to, or measured by the value of, other property that is devoted to a commercial or industrial use and subject to a property tax levy, except public utility property owned by a public utility subject to rate of

return regulation by a State or Federal regulatory authority; and

(B) was not generally imposed and actually enforced on mobile services, mobile service providers, or mobile service property prior to the date of enactment of this Act.

(5) STATE OR LOCAL JURISDICTION.—The term "State or local jurisdiction" means any of the several States, the District of Columbia, any territory or possession of the United States, a political subdivision of any State, territory, or possession, or any governmental entity or person acting on behalf of such State, territory, possession, or subdivision and with the authority to assess, impose, levy, or collect taxes or fees.

(6) TAX.—

(A) IN GENERAL.—The term "tax" means any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed on an individual entity or class of entities for a specific privilege, service, or benefit conferred exclusively on such entity or class of entities.

(B) EXCLUSION.—The term "tax" does not include any fee or charge—

(i) used to preserve and advance Federal universal service or similar State programs authorized by section 254 of the Communications Act of 1934 (47 U.S.C. 254); or

(ii) specifically dedicated by a State or local jurisdiction for the support of E–911 communications systems.

(c) RULES OF CONSTRUCTION.—

(1) DETERMINATION.—For purposes of subsection (b)(4), all taxes, tax rates, exemptions, deductions, credits, incentives, exclusions, and other similar factors shall be taken into account in determining whether a tax is a new discriminatory tax.

(2) APPLICATION OF PRINCIPLES.—Except as otherwise provided in this Act, in determining whether a tax on mobile service property is a new discriminatory tax for purposes of subsection (b)(4)(A)(iii), principles similar to those set forth in section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. 11501) shall apply.

(3) EXCLUSIONS.—Notwithstanding any other provision of this Act—

(A) the term "generally imposed" as used in subsection (b)(4) shall not apply to any tax imposed only on—

(i) specific services;

(ii) specific industries or business segments; or

(iii) specific types of property; and

(B) the term "new discriminatory tax" shall not include a new tax or the modification of an existing tax that—

(i) replaces one or more taxes that had been imposed on mobile services, mobile service providers, or mobile service property; and

(ii) is designed so that, based on information available at the time of the enactment of such new tax or such modification, the amount of tax revenues generated thereby with respect to such mobile services, mobile service providers, or mobile service property is reasonably expected to not exceed the amount of tax revenues that would have been generated by the respective replaced tax or taxes with respect to

1 such mobile services, mobile service pro-
2 viders, or mobile service property.

3 **SEC. 3. ENFORCEMENT.**

4 (a) BURDEN OF PROOF.—The burden of proof in any
5 proceeding brought under this Act shall be upon the party
6 seeking relief and shall be by a preponderance of the evi-
7 dence on all issues of fact.

8 (b) RELIEF.—In granting relief against a tax which
9 is discriminatory or excessive under this Act with respect
10 to tax rate or amount only, the court shall prevent, re-
11 strain, or terminate the imposition, levy, or collection of
12 no more than the discriminatory or excessive portion of
13 the tax as determined by the court.

○

Ms. SÁNCHEZ. At this time, I will now recognize my colleague, Mr. Cannon, the Ranking Member of this Subcommittee, and the lead Republican co-sponsor of the legislation, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair. It is a pleasure to be here today.

And I would like to thank the witnesses for joining us at this hearing.

The Chair may recall that, at the markup of the State Video Tax Fairness Act in July, I requested that we hold one final hearing on H.R. 5793, the "Cell Tax Fairness Act of 2008," which was introduced by the gentlelady from California, Ms. Lofgren, who is with us, here, today.

At the time that I asked for the hearing, the bill had 75 co-sponsors, including 12 Members of the Judiciary Committee. Today, there are 130 co-sponsors, including 15 Members of the Judiciary Committee. And, hopefully, when this bill comes up for markup in the 111th Congress, we will have a majority of the House as co-sponsors.

As you know, I am one of the 130 co-sponsors, and I support this legislation because it is my belief that States and localities unfairly burden phone consumers with excess taxes. In my home, for instance, when my home phone rings, nobody answers it, because all my kids know that if the call was for them, it would be on their cell phone. And I know the same darn thing.

So I occasionally answer the phone. And what do I end up doing? Talking to people that want to talk to my wife, who hasn't quite—well, actually, she does know how to text—but she is not quite at the same level as the rest of the family, technologically. She does have a cell phone.

In fact, maybe what I ought to do is start answering by saying, "Yes, my wife's cell-phone number is—do you have a pen? Would you like me to text it to you?" Because, other than that—I mean, if I call home, it—it can ring 30 times before we get the—in fact, we took off the answering machine because nobody would ever listen to the messages.

So the world has changed. And nationwide, the average tax rate on wireless services is now 14.14 percent, which is more than double the average sales-tax rate for all businesses, which is about 7.04 percent. These tax rates are more in keeping with what we call "sin taxes," that is, taxes on alcohol and tobacco, than with a general business taxes.

And, you know, "sin taxes," we sometimes say, "are taxes on the stupid." But this is just a plain tax on poor people—let us say the most regressive tax—among the most regressive taxes that we could possibly have, and suggests to the mind that when we have the Federal telephone tax of 3 percent to fund the Spanish-American War, which never went away. And, at that time, it was, "Let us tax those rich people who have telephones."

It is not rich people anymore. Everybody has telephones. And what we really hope is that we empower people who don't have as much money today, in the—because we want them to have more money with new ideas and new technology, and a robust economy tomorrow, as opposed to saying, "We are just going to tax every-

body and take money from them." This is not like a "sin tax" in that most profound sense.

It is my understanding that these taxes on the wireless industry are estimated to be nearly $5 billion a year. That is an astounding number, and something that warrants the attention of the Subcommittee.

In my time on the Subcommittee, I have seen many hearings—and, in fact, I have Chaired many hearings—on the subject of discriminatory State taxes. I know that discrimination, at least in this context, is often in the eye of the beholder. However, to my mind, imposing taxes on the wireless providers that are more than double to the general business taxes are, by definition, discriminatory.

In that regard, I am actually relieved to see that one of our witnesses here today, County Commissioner Mahoney, acknowledges that State and local taxation schemes have not kept pace with changing technology. It is refreshing that we can have at least a point of agreement in some cases. And similarly, it is refreshing that State Senator Clayborne has taken the position that a State's revenue is not sacrosanct, and that it is possible to tax a class of business too much.

I know that many States are hurting financially. We just read today my State's calling a special session to deal with a $200 million budget shortfall. And I respect those concerns, and the fact that this bill is going to further reduce tax revenues. However, I think this legislation has many features that will ensure that it does not diminish the State's revenues; rather, it will merely require that States tax business uniformly, going forward. I think that it is worthwhile—a worthwhile purpose that—one that will benefit consumers in the long run.

And, again, I would like to thank the Chair for exceeding to my request for a hearing on this issue, and yield back what time remains.

Ms. SÁNCHEZ. The gentleman yields back. And I thank him for his statement.

I would now like to recognize my colleague, Ms. Zoe Lofgren, the distinguished Chairwoman of the Immigration Subcommittee, for her opening remarks on H.R. 5793, which she introduced.

Ms. LOFGREN. Thank you, Chairwoman Sánchez. And, just as Mr. Cannon has requested this hearing, I also requested that you have this hearing. And I am very appreciative that you have carved out time to do this. I know that the schedule is unbelievably tough. And I really wanted to thank you and credit you for taking the time to do this.

I decided to introduce the Cell Tax Fairness Act because I see that wireless services and mobile devices are going to play an essential and, actually, a growing role in affordable broadband access in this country. And the FCC has estimated that in 2007, last year, 68 percent of all broadband subscriptions were wireless subscriptions, which is an astonishing percentage.

And given that the United States is slipping in broadband penetration—the last I looked, we were 16th in broadband penetration—it is important that we visit this issue.

The access to broadband is going to be accelerated with the spectrum—the 700-megahertz auction. And so it is timely to take a look at what impediments we have put into place for broadband access.

I think it is important to note that the tax burden is particularly significant for those who use wireless phones. Thirty-nine million Americans have—wireless subscribers—have incomes of less than $25,000 a year. And so if you take a look at the need to penetrate broadband broadly through America, the growing opportunity that the spectrum sale is going to give us, and the fact that we are slipping, and still way behind, especially among low-income Americans—this discriminatory tax system that we have identified here, on cell phones—we shouldn't even call them cell phones, because they are data devices now—is very important.

Some have suggested that this is really a bill for the telecommunications industry. And, as a matter of fact, I have been on the opposite side of so many issues when it comes to that industry, from net neutrality to spectrum policy, open access and the like—this isn't about the cell-phone industry. It is about the American people, who need to have access to broadband. And taxes do have an impact, and impact behavior.

Now, I want to say just a word about local government, because this is the last year I can say this. I served longer on the Board of Supervisors of Santa Clara County than I have yet to serve in the United States House of Representatives. And I do know that the times are tough in local government. And revenue is necessary for the essential services that counties and cities do.

I am very sensitive to that. And I also know that local governments are, you know, at the bottom of the feeding chain, really, when it comes to local-government services. It all rolls to you. And it is very tough to meet the obligations that are so important.

I know that it is almost impossible to avoid taxing something that you can tax, when you are facing the needs that you have, which is why a Federal law is something we need to take a look at.

Now, it is important to note that this bill, if enacted into law, would not prevent—it wouldn't take any taxes away that are currently in place. And it wouldn't prevent additional taxation, provided that it was the same rate as other goods and services. Because, if a local government needs to have a half-cent sales tax, then it should apply broadly to whatever is taxable in the State. In California, you don't tax food. Other States do.

But for discriminatory taxes, there would be a time out, a break. And I think that, as States and local governments struggle with telecommunications-taxation policy, and we have tried to do that with the Internet-tax moratorium and the like, this time-out is highly necessary. Because if we don't do a time-out, at the rate of taxation increase on cell taxes, we are going to have a huge—an even bigger problem than we have today.

So I want to thank, again the Chairwoman.

I want to thank Mr. Cannon and his staff for all their hard work in making sure that the 130 co-sponsors are bipartisan. This is not a partisan issue.

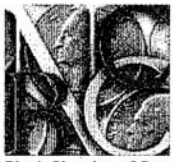
And I would ask unanimous consent to place in the record, letters of support from the U.S. Chamber of Commerce, the National

Association of Neighborhoods and the Black Chamber of Commerce, who have all asked that we support this bill.

Ms. SÁNCHEZ. Without objection, so ordered.

[The information referred to follows:]

LETTERS OF SUPPORT FROM THE NATIONAL BLACK CHAMBER OF COMMERCE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE NATIONAL ASSOCIATION OF NEIGHBORHOODS (NAN)



National Black Chamber of Commerce

July 31, 2008

Congresswoman Carolyn Cheeks Kilpatrick (MI-13)
Chairwoman, Congressional Black Caucus
2264 Rayburn House Office Building
Washington, D.C. 20515-0542

Dear Chairwoman Kilpatrick:

The diverse membership of the National Black Chamber of Commerce (NBCC) represents African American communities, businesses and families around the country. Today, all Americans increasingly rely on our wireless service every day to do business, to stay connected with family and friends, and even to get help in emergencies. It is especially important to members of the African American community in the United States to safeguard the productivity, choices, low prices and efficiencies we get every day from wireless.

The good news on the wireless tax front is this – consumers now have two fighting chances to freeze spiraling unfair state and local wireless taxes, for five years! On the House side, under the bipartisan leadership of Rep. Zoe Lofgren (CA-16) and Rep. Chris Cannon (UT-3), these Members are leading the charge with H.R. 5793, the "Cell Tax Fairness Act of 2008." Additionally, there is now a Senate companion bill from Sen. Ron Wyden (D-OR) and Sen. Olympia Snowe (R-ME), or S. 3249, the "Mobile Wireless Tax Fairness Act." We thank them all for their bipartisan efforts on this important consumer matter, and we urge all of the Members of the CBC to follow this important leadership. Please support and co-sponsor H.R. 5793 and S. 3249 today.

The proof that wireless is working for African American consumers is in the numbers:

- It is estimated that there are currently more than 260 million wireless subscribers in the country. Approximately 29 million of these users are African Americans, about 4 million of African American users are under the age of 24, and about 2.6 million are students.
- According to a recent survey reported by the Pew Internet and American Life Project, African American and young adults clearly lead the way. 71 percent of African Americans currently use cell phones.
- About 7 out of 10 African American wireless users are satisfied with their wireless service, according to an M:Metrics survey, and 81% were satisfied in a recent MyWireless.org® national bipartisan poll.
- Additionally, 68% percent of African Americans have ever sent or received a text message and 57% have taken a picture wirelessly, compared to 53% and 56% of white Americans, respectively.
- Lastly, 57% of African Americans said they send or receive email wirelessly, 54% have used a handheld wireless device to access the Internet on the go, and about 45% of the African American population changes their ringtone each month.
- Most wireless carriers now offer prepaid service requiring no contract and no early termination fees.

- Many wireless carriers now provide service area maps in stores or online.
- Wireless providers have successfully taken additional security steps in recent months to safeguard their customers' privacy.

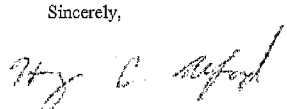
The numbers are becoming increasingly important to our African American-owned and operated businesses, which now use wireless as a basic tool to connect employees during the business day, to service their customers and to grow their businesses. The biggest threat to the advantage wireless provides? Simply put, excessive taxes and regulations on wireless by state and local governments that cost African American businesses and consumers money. In the United States, consumers are already paying an average of 15.1 percent each month in taxes, fees and surcharges on wireless services. This is more than double the average taxes consumers pay on other goods and services, which averages about 7 percent. In a few cases, it is even higher than tax rates on so-called "sin products" like tobacco and alcohol.

Seventeen states – including the District of Columbia – now levy monthly taxes on wireless in excess of 15 percent, and a handful of these states now impose taxes above 20 percent! Additionally, in the last four years, the tax rate on wireless has increased four times faster than the rate on other goods and services. That makes the annual burden on wireless consumers approximately $21 billion dollars. Worse, wireless taxes are often burdensome and regressive, and hit minority communities and others on fixed budgets hardest. The mobile phone in today's fast-paced society has truly become a lifeline for all users. While the policymakers' proposed tax increases are often will-intentioned to help communities, in reality these tax hikes ultimately have a harmful impact on our most economically-disadvantaged citizens.

As a Member of Congress, you still have a golden opportunity at the Federal level to protect millions of African American wireless consumers, families and businesses across America, by providing for this 5-year "break" from all new discriminatory state and local wireless taxes. This bill will not ultimately fix the overall uneven tax burden that exists on the backs of our consumers today, but it is a great start in these uncertain economic times to address the issue and provide much-needed pocketbook relief to so many wireless African Americans. Lastly, it will not take away any current revenue from state and local governments, often needed for crucial local programs.

The National Black Chamber of Commerce strongly endorses the pro-consumer, bipartisan "Cell Tax Fairness Act of 2008," H.R. 5793, as well as S. 3249, the "Mobile Wireless Tax Freedom Act." Thank you for your consideration, and for your important work in the U.S. Congress on behalf of millions of African Americans.

Sincerely,



Harry C. Alford
President and CEO
National Black Chamber of Commerce

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CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

September 17, 2008

The Honorable Zoe Lofgren
United States House of Representatives
Washington, DC 20515

Dear Representative Lofgren:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, strongly supports H.R. 5793, the "Cell Tax Fairness Act of 2008."

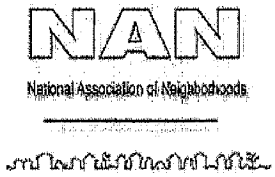
As more and more Americans become wireless users, it is imperative that Congress prevent new discriminatory state and local taxes from being levied on consumers. By providing for a five-year moratorium on such taxes, this legislation will ensure that U.S. wireless consumers do not incur unfair costs related to their cell phone usage.

The Chamber applauds your leadership in introducing this important legislation. The Chamber looks forward to working with you on this issue.

Sincerely,

R. Bruce Josten

Cc: Members of the Committee on the Judiciary



July 31, 2008

Congresswoman Carolyn Cheeks Kilpatrick (MI-13)
Chairwoman, Congressional Black Caucus
2264 Rayburn House Office Building
Washington, D.C. 20515-0542

Dear Chairwoman Kilpatrick:

The National Association of Neighborhoods (NAN) strongly endorses the pro-consumer and bipartisan Lofgren-Cannon "Cell Tax Fairness Act of 2008" (H.R. 5793), as well as, the Wyden-Snowe "Mobile Wireless Tax Fairness Act of 2008" (S. 3249). The mobile phone in today's fast-paced society has become a vital economic, social and emergency "lifeline" for all users.

The membership of the NAN primarily represents African American neighborhoods, businesses and families around the country. Many African Americans increasingly rely on wireless service every day to do business, to stay connected with family and friends and to get help in emergencies. Therefore, it is especially important to members of the African American community in the United States to safeguard affordability, the productivity and service choices we get every day from wireless.

While the price of wireless handsets and services are going down, consumers are paying an average of 15.1 percent each month in taxes, fees and surcharges on wireless services. This is more than double the average tax consumers pay on other goods and services. In a few cases, it is even higher than tax rates on so-called "sin products" like tobacco and alcohol.

Seventeen states and the District of Columbia, now levy monthly taxes on wireless in excess of 15 percent. A handful of these states now impose taxes above 20 percent. Additionally, in the last four years, the tax rate on wireless has increased four times faster than the rate on other goods and services. Wireless taxes are often unfair and regressive, and hit minority communities and others on fixed income hardest.

The bipartisan "Cell Tax Fairness Act of 2008" (H.R. 5793), and the "Mobile Wireless Tax Fairness Act of 2008" (S. 3249), is legislation that will provide a reasonable 5-year break for consumers from all new state and local government taxes and fees. This will go a long way in helping consumers maintain the wireless communication services that they rely on. We urge you to support this legislation.

Thank you for the attention you have given to this important consumer and small business issue, and we look forward to working with you.

Sincerely,

National Association of Neighborhoods

NAN
1300 Pennsylvania Avenue, NW
Suite 700
Washington, D.C. 20004
www.nanworld.org

Ms. LOFGREN. And with that, I will yield back, Madam Chairwoman—again, thanks for this hearing.

Ms. SÁNCHEZ. I thank the gentlelady for her statement.

Without objection, other Members' opening statements will be included in the record.

I am now pleased to introduce the witnesses on our panel for today's hearing. Our first witness is Gail Mahoney. Commissioner Mahoney serves as the county commissioner for Jackson County, MI. She is also the deputy director for South Central Michigan Works.

Commissioner Mahoney has served as both chair and vice chair of the Human Services Committee, and as chair of the Personnel and Finance Committee. Commissioner Mahoney is currently a member of that committee.

Commissioner Mahoney has also been a member of the National Association of Counties, Finance, and Intergovernmental Steering Committee, since 1996. She serves on numerous boards and commissions, including the Jackson County Fair Board, the Armory Arts Alliance, Mid-South Substance Abuse Commission, which she chairs, Region Two Planning Commission, Passages Center for Women's Health of Foote Hospital, and the National Association of Black County Officials.

Welcome, Ms. Mahoney, to our panel.

Our second witness is James—is it Clayburn or Clyborne?

Mr. CLAYBORNE. Clayborne.

Ms. SÁNCHEZ. Clayborne. State Senator Clayborne represents the 57th district of Illinois. Elected in 1995, he sits on several committees, including the Senate Committee on the Whole, Executive Appointments, Insurance and Pensions and Investments Committees. State Senator Clayborne chairs the Environment and Energy Committee, as well.

Prior to his election to the State senate, Senator Clayborne was a partner at Hinshaw & Culbertson in Belleville, Illinois, and served as a St. Clair County assistant State's attorney.

Welcome to you.

Our third witness is Scott Makay—or, I am sorry—Mackey. Pardon me. I just made you Irish. [Laughter.]

Mr. Mackey is a partner at Kimbell Sherman Ellis, KSE, and assists clients in designing and implementing successful strategies in State capitals. Mr. Mackey joined KSE in 2000, and became a partner in 2005.

Prior to joining KSE, Mr. Mackey was the National Conference of State Legislature's chief economist. There, he spent 10 years working with legislative leaders on critical State issues like the taxation of electronic commerce and telecommunications-tax reform. Prior to joining NCSL, Mr. Mackey was legislative assistant to U.S. Senator James Jeffords, where he handled environmental issues and dairy policy.

Our final witness is Tillman Lay. Mr. Lay is a partner in the Washington, D.C. law firm of Spiegel & McDiarmid—did I pronounce that correctly?

He has substantial experience in litigation and counseling on telecommunications, cable television, anti-trust and constitutional-

law matters, before administrative agencies, Federal courts and Congress.

For several years, Mr. Lay has represented and advised the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the National Association of Telecommunications Officers and Advisors, and other local government organizations and individual municipalities, on communications-tax-law matters.

He has represented municipal organizations in connection with, among other communications-tax-law-related matters, the Telecommunications Act of 1996, the Internet Tax Freedom Act and its extensions, the Mobile Telecommunications Sourcing Act of 2000, and previous bills in Congress to reform State and local telecommunications taxes.

I thank you all for your willingness to participate in today's hearing. Without objection, your written statements will be placed into the record in their entirety. And we are going to ask that you limit your oral testimony to 5 minutes.

You will note that we have a lighting system. And when we remember to employ it, you will be given a green light at the beginning of your time. You will get a yellow light when you have a minute remaining in your time, and then, of course, when your time expires, you will see the red light.

If you are caught mid-sentence or mid-thought, we will, of course, allow you to finish that sentence or thought before we move on to the next witness. So with that, I—and after each witness has presented their testimony, we will have a round of questioning from the Members here, subject to the 5-minute limit.

So, with that, I am going to go ahead and invite Commissioner Mahoney to please give us her oral testimony.

TESTIMONY OF GAIL W. MAHONEY, COMMISSIONER, JACKSON COUNTY, MICHIGAN, JACKSON, MI, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

Ms. MAHONEY. Thank you Chairwoman Sánchez, and the distinguished Members of the House Subcommittee on Commercial and Administrative Law.

My name is Gail Wallace Mahoney, and I am a county commissioner from Jackson County, Michigan, currently completing my seventh term. I am also a member of the Board of Directors for the Michigan Association of Counties, and also the National Association of Counties, NACo. I am currently serving as the chair of the Finance and Intergovernmental Affairs Steering Committee.

I appreciate the opportunity to be before you today on behalf of NACo, also the National League of Cities, the United States Confronted of Mayors, the National Association and Telecommunication Officers and Advisors, and the Government Finance Officers Association.

We are witnessing an explosion in the telecommunications technology. Every day, we see new products being introduced to the marketplace; new, better, faster services being marketed to America's public.

In a recent report from the FCC, it was stated that there were 33.8 million cell-phone subscribers in 1995. Simply 12 short years

later, we have seen a 700 percent increase, up to 255.4 million subscribers. Along with that explosion, we have also seen an explosion in the companies' profits.

Even to the casual observer, it is clear that the current tax statement of cell-phone services by the Federal, State and local authorities has not hindered the product innovation and services for financial growth. But that is not to say that the improvements to the telecommunication-tax schemes can not be made.

Local governments have called for comprehensive reform that would ensure revenue's neutrality, and ensure that functionally equivalent services that make use of different technologies are treated in a similar manner. But the telecommunications-tax reform should not be a disguise for Federal preemption of State and local governments' taxing authority, nor does comprehensive reform mean that a piecemeal approach would give preferential treatment to any services, or a means of its delivery. That is what H.R. 5793 will do.

Unlike the Federal Government, which has a projected deficit of about $407 billion—really, we believe it is about $700 million—most States and local government are required to balance their budgets. This job has become more and more increasingly difficult across the country, and in many jurisdictions.

It is reported by the Center on Budget Policy Priorities that at least 29 States face a combined budget shortfall of $48 billion for fiscal year 2009. California, alone, nearly has about half that amount. It is expected that more States will join that list in revenue forecasts updated, probably after the election.

If the combined house collapse and ever-increasing number of home foreclosures—throwing in a little bit of unemployment, a stagnant growth in economy, a pinch of high fuel costs and a dash of investment—bankruptcies from investment firms—you have a recipe for economic mess, currently confronting State and local governments.

To make up revenue shortfalls, many local governments find themselves in a position of spending reserves, cutting services such as fire, police, teachers, and also increasing taxes. Jackson County's unemployment rate is higher than the national average. We are reaching nearly an 8 percent increase in unemployment. In addition, the county has been particularly hit hard by mortgage foreclosures and, also, mortgage fraud.

Because of this situation, along with the downturn of the national economy, we will have to make some significant reductions in county expenses. We are looking at a possible $1.5 million shortfall in 2009. As a county commissioner, completing my 14th year, it is my job to make these very difficult decisions. This is going to affect our coworkers, people that I love and people that, you know, worked for the county for over the past 14 years, that I have become acquainted with.

These people are facing a possible 83 people we are going to have to cut from our budget. That is why it is so important that the officials actually do everything that they can to try and provide an opportunity to have every revenue opportunity that we can. We cannot afford to have anything taken off the table.

Faced with these looming economic problems, the last thing Congress needs to do is to enact legislation that would preempt the taxing authority of State and local governments, especially such preemptions that will result in the preferential treatment of any one technology over another.

The true aim of this legislation is Federal preemption that reduces the level of taxes that cell-phone industry pays the State and local governments, and an increase to everyone else's taxes. The consumers which have switched their services from local landlines, now, to a cell phone—these revenues are eroding the city and county's income.

This may force localities to rely even more heavily on property and income taxes. Congress must not take actions that will make an already-difficult job even harder.

Thank you for the opportunity to provide this testimony today on behalf of NACo. And I would ask that my full written statement be made part of the record. And I look forward to answering any questions. Thank you.

[The prepared statement of Ms. Mahoney follows:]

PREPARED STATEMENT OF THE HONORABLE GAIL W. MAHONEY

Statement of Gail W. Mahoney, Commissioner
Jackson County, Michigan
Chair, NACo Finance and Intergovernmental Affairs Committee

Before the
Subcommittee on Commercial and Administrative Law
U.S. House of Representatives

H.R. 5793
"Cell Tax Fairness Act of 2008"

September 18, 2008

Chair Sanchez and distinguished members of the House Subcommittee on Commercial and Administrative Law:

My name is Gail W. Mahoney. I am a county commissioner from Jackson County, Michigan and a member of the Board of Directors of both the Michigan Association of Counties and the National Association of Counties (NACo). I have served for more than a decade and am currently the chair of NACo's Finance and Intergovernmental Affairs Committee.

I appreciate the opportunity to appear before you today on behalf of the National Association of Counties, the National League of Cities, the United States Conference of Mayors, the National Association of Telecommunications Officers and Advisors, and the Government Finance Officers Association.

We are witnessing an explosion in telecommunications technology. Everyday, we see new products being introduced to the marketplace and new, better and faster services being marketed to America's consumers. Just look at the changes we have seen in the mobile telephone arena. Just a few years ago, we had shoe-size phones with hit and miss service coverage. Today, we have palm-sized phones that can provide nationwide voice, video, and broadband services. Consumers can't wait to see what new wireless gadgets and services are going to hit the market next.

And this consumer excitement has resulted in the unprecedented growth of the wireless phone market. In the Twelfth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, released by the Federal Communications Commission on February 4, 2008, it was stated that there were 33.8 million cell phone subscribers at the end of 1995. Twelve years later, there were 255.4 million subscribers – an increase of over 700%! It is estimated that 83 percent of U.S. consumers have a cell phone – a number that is expected to reach 89 percent by the end of this decade.

And along with this explosive growth, there was a corresponding growth in company profits. In the second quarter of 2008, Verizon reported signing up 1.5 million new subscribers and saw its profits rise to $1.88 billion, up from $1.68 billion during the same quarter in 2007.

Even to the casual observer, it is clear that the current tax treatment of cell phone services by Federal, State, and local authorities has not hindered product innovation and service and financial growth. But that is not to say that improvements to the telecommunications tax scheme cannot be made.

Telecommunications tax policy has not kept pace with the industry's growth and our current tax system is outdated. Local governments have called for comprehensive reform that would ensure revenue neutrality and ensure that functionally equivalent services that make use of different technologies are treated in a similar manner.

Telecommunications tax "reform" should not be a disguise for federal preemption of state and local governments' taxing authority. Nor does comprehensive reform mean a piecemeal approach that would give preferential treatment to any one service or means of delivery. This approach is what the cell phone industry seeks and what legislation such as H.R. 5793 would accomplish.

Unlike the federal government - with its projected budget deficit of $407 billion, most state and local governments are required to balance their budgets. This job has become increasingly difficult for many jurisdictions across the country. In a report issued by the Center on Budget and Policy Priorities, at least 29 states face a combined budget shortfall of $48 billion for fiscal year 2009. California alone represents nearly half that amount. And it is expected that more states will join that list as revenue forecasts are updated.

If you combine the housing collapse and the ever-increasing number of home foreclosures, throw in growing unemployment and stagnant economic growth, add a pinch of high fuel costs and a dash of investment firm bankruptcies, you have the recipe for the economic mess currently confronting state and local governments. To make up revenue shortfalls, many local governments find themselves in the position of spending reserve funds, cutting services, such as fire, police, and teachers, and/or raising taxes.

Faced with these looming economic problems, the last thing Congress should do at this time is enact legislation that would preempt the taxing authority of state and local governments, especially when such preemption would result in the preferential treatment of one technology over another.

The true aim of this legislation is a federal preemption that reduces the level of taxes that the cell phone industry pays to state and local governments and an ***increase*** *to everyone else's taxes*. As consumers switch from older services to new, for example, from land lines to cell, local revenues will continue to erode if cities are not able to continue to tax mobile communication services in a fair and equitable manner. This may force many

localities to rely even more heavily on property and income taxes. In this difficult economy, with foreclosures on the rise and the tax base eroding, the greater likelihood will be that State and local governments will have to cut the services they provide to their residents – police, fire, and education, among others. Congress must not take any actions that will make an already difficult job harder.

Thank you for the opportunity to provide testimony on behalf of the National Association of Counties. I would ask that my full written statement be made part of the record. I look forward to answering any questions.

Ms. SÁNCHEZ. Thank you, Ms. Mahoney.

At this time, I would invite Mr. Clayborne to give his testimony.

STATEMENT OF THE HONORABLE JAMES F. CLAYBORNE, JR., ILLINOIS STATE SENATOR, BELLEVILLE, IL

Mr. CLAYBORNE. Thank you, Chairman Sánchez, Ranking Member Cannon, and Members of the Subcommittee.

My name is James Clayborne. I am the assistant majority leader in the Illinois State Senate. I am also a member of the National Conference of State Legislator's Communication, Financial Services and Interstate Commerce Committee, which recently reaffirmed its Communications Policy Statement, calling for fair and equitable taxation of communication services.

Thank you for the opportunity to appear before you today to testify regarding the importance of H.R. 5793, the "Cell Tax Fairness of 2008." To my constituents and the more than 9.5 million wireless consumers in Illinois, Congresswoman Lofgren and Congressman Cannon, are to be commended for the broad bipartisan support they have garnered for this bill.

As you might imagine, as a State senator—a State legislator—my Federal bill limiting a State's ability to tax is something I take quite seriously. Our system of federalism provides State and local policymakers with the authority to decide how the State should impose taxes on individuals, businesses that reside within their jurisdiction.

The State's authority to impose that revenue—raise revenue to fund government services is a concept that I strongly support. However, I believe that another fundamental tenent of our Nation's tax system is that taxes should be levied fairly on citizens, particular in situations where multiple levels of government may have the authority to tax.

One only needs to look at his or her own wireless bill to see that there is nothing fair about the countless number of taxes and fees that wireless customers pay today. H.R. 5793 is a carefully crafted piece of legislation that calls for a temporary 5-year time-out on any new discriminatory tax or fee from being added on top of existing levels of taxes imposed upon wireless services.

H.R. 5793 is entirely prospective, meaning that any tax or fee that is currently being collected by States and localities will continue to be collected. I believe that the prospective nature of this legislation is extremely important because it recognizes the revenue needs of States and municipalities.

Last year, the wireless consumers paid nearly $21 billion to State, local and Federal Government. None of the $21 billion would be rescinded under this legislation.

My focus here today would be to discuss how we got to where we are today, and why I believe that taking a time-out from additional discriminatory taxes imposed upon wireless consumers is important to my constituents, and consistent with the principles adopted by the NCSL.

The average rate of Federal, State and local taxes and fees on wireless is 15.2 percent, compared to the average rate imposed on goods, services—which is just over 7 percent—this means the tax

rate on wireless services are more than double the rate on other goods and services.

Looking at my home state of Illinois, it is ranked the ninth-highest in the country, with an average rate of close to 17 percent. A tax rate of 17 percent upon service that I believe is critical to many of my constituents is a financial burden. But imagine adding an additional tax on wireless consumers.

Last year, Cook County, Illinois, which encompasses most of the city of Chicago, sought to impose a $4-per-line-per-month tax on communication services. There was no specific purpose given to justify the tax aimed solely at communication services. Rather, the revenue was going to be used to plug a hole in the county's general-fund budget.

Had the proposed Cook County tax been added, the rate of taxes and of fees on wireless services, if purchased by the citizens of Chicago, would have increased to an average of 24 percent.

When the people of Cook County learned of the proposed tax increases, 3,300 consumers took time to contact their county officials to voice their opposition. The actions of these consumers in Cook County demonstrate just how unpopular these targeted wireless taxes are with consumers.

As we all know, wireless services are no longer considered a luxury. For millions of Americans, these services are crucial to their everyday lives, and yet they are taxed at levels that are double or even triple the rates imposed on other goods and services. Imposing regressive consumption taxes on consumers of an essential service such as wireless disproportionately impacts low and middle-income consumers, with—unfortunately, can put this critical service out of financial reach for some of my constituents, who need it the most.

Had the proposed tax by Cook County go into effect, the Chicago residents will be paying an additional $12 on a $50 bill. Taxing on wireless services at that rate is more than double the rate imposed upon goods and services—artificially increases the cost of services, and which hurts the economic gains that could be achieved by having a more rational tax policy.

Over the past 8 years, NCSL has made communications-tax reform a major priority for States to consider. The committee, as well as separate tax force, has spent considerable time educating state-policy makers on the need to simplify and modernize the taxes imposed upon communications services. Even though the communications-tax reform has been a major topic of NCSL, little progress in achieving such reforms has been made.

I believe this Subcommittee is uniquely situated to address the disparate tax treatment of an inherently interstate service. As someone who comes from a State that imposes a 17 percent tax on wireless services, I know that once these taxes are in place, it is very difficult to reduce them. Preventing the imposition of new, additional discriminatory taxes on consumers, while we try to fix the existing system, will be both an economic benefit to consumers, and will also help those who cannot afford a computer enjoy the benefits of wireless broadband.

Last year, it was estimated that wireless consumers in my State paid almost $1 billion in State, local and Federal taxes——

Ms. SÁNCHEZ. Yes.

Mr. CLAYBORNE [continuing]. And fees imposed upon their wireless services. By anyone's measure, be it from State or Federal perspective, that is a lot of money, from the one subset of consumers, to pay on an essential service.

That is why I strongly support the passage and enactment of H.R. 5793, the "Cell Tax Fairness Act of 2008."

Thank you again for this opportunity to speak to you today. I would be happy to answer any questions you may——

[The prepared statement of Mr. Clayborne follows:]

PREPARED STATEMENT OF THE HONORABLE JAMES F. CLAYBORNE, JR.

Chairwoman Sánchez, Representative Cannon, and members of the Subcommittee, my name is James Clayborne, and I am the Assistant Majority Leader of the Illinois State Senate. I am also a member of the National Conference of State Legislator's (NCSL) Communications, Financial Services & Interstate Commerce Committee which recently reaffirmed its communications policy statement calling for fair and equitable taxation of communications services.

Thank you for the opportunity to appear before you today to testify regarding the importance of H.R. 5793, the "Cell Tax Fairness Act of 2008" to my constituents and the more than 9.5 million [1] wireless consumers in Illinois. Representatives Lofgren and Cannon are to be commended for the broad bi-partisan support they have garnered for this bill.

As you might imagine, as a state legislator, any federal bill limiting a state's ability to tax is something that I take very seriously. Our system of Federalism provides state and local policymakers with the authority to decide how states should impose taxes on individuals and businesses that reside within their jurisdictions. The states' authority to impose taxes that raise revenues to fund government services is a concept that I strongly support.

However, I believe that another fundamental tenet of our nation's tax system is that taxes should be levied fairly on our citizens, particularly in situations where multiple levels of government may have authority to tax. One only needs to look as far as his or her own wireless bill to see that there is nothing fair about the countless number of taxes and fees imposed upon wireless services today.

The purpose of H.R. 5793, precluding *new discriminatory* taxes from being added on top of the existing excessive level of taxes imposed upon wireless services, is an idea that is hard to disagree with. While convergence, competition and the dynamic changes that have taken place within the communications industry makes it critical for state policymakers to simplify and reform the current state and local taxes imposed upon all communication services and property, that goal is going to take some time to accomplish. It makes sense that state and local governments should not be enacting new discriminatory impositions when policymakers and the industry are continuing to work towards eliminating the ones that currently exist. Specifically for services that consumers rely upon for their communication, information and public safety needs

My focus here today will be to talk about how we got to where we are today and why I believe that taking a "time-out" from having new, additional discriminatory taxes imposed on wireless services is important to my constituents and consistent with the principles adopted by NCSL at its annual meeting.

HIGHLIGHTING THE PROBLEM

The tax structure imposed upon the communications industry today is a carryover from the days when the industry was operated by Ma Bell as a rate regulated utility. This tax structure was created well before the first wireless call was ever made. As regulated utilities, providers were subject to taxes under statutes applicable to "public utilities." The taxes imposed included gross receipts, franchise and other industry-specific taxes that were then passed on to consumers in the rates as part of the regulatory rate setting process. The phone company never had to worry about the consumer looking for a cheaper alternative because there was no competition in the marketplace. State and local governments could tax telecommunication services at much higher rates than any other goods and services without worrying about an

[1] FCC, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Service: Twelfth Report,* FCC 08–028 (Feb. 4, 2008).

outcry from unsuspecting constituents, because "it was just the phone company raising rates again."

Since the introduction of wireless services in the late 1980's and the passage of the Federal Telecommunications Act of 1996, the marketplace for communication services has changed substantially. Communications services are no longer provided by only a single provider, the "rate-regulated" utility. Consumers now have many options to choose from for their communications services as a number of extremely competitive industries bring innovation and change to consumers at a rapid pace.

The wireless industry alone provides communication services to over 260 million consumers. That is a staggering number of consumers enjoying the benefits of wireless mobility when you consider that only fifteen years ago there were just 13 million wireless consumers. The days of wireless services being considered a luxury that only the wealthy can afford are over. Today these services are critical to my constituents and, as with many other wireless consumers across the country, are considered a necessity. Likewise, wireless broadband services may be the only access that many consumers have to the internet. For better or worse, we can all be "connected" 24/7 if we choose to do so.

Unfortunately, the tax structure hasn't kept pace with all the exciting innovation and technological changes taking place in the industry. The January 2008 issue of Governing magazine stated "And yet, state tax structures, developed at a time when computers—"thinking machines"—were the stuff of science fiction, and the American economy flourished with the automobile industry, have failed to evolve. To take one example, there is the outmoded way in which telecommunications companies are taxed. A reliable, high-quality and affordable telecommunications system is essential to the economic competitiveness of states—to say nothing of the nation. And yet, these systems are subject to very high taxation rates in a number of states—by a tax approach set when the industry, dominated by one telephone company, was highly regulated."[2]

Instead of undertaking the difficult task of reforming the tax structure for the industry in total, the wireless industry and its consumers have seen many of these antiquated "utility" taxes from the last century simply extended to wireless services under the guise of "leveling the playing field." I support this bill because I don't believe that making the situation worse before we tackle the difficult task of making it better for my constituents is the right answer.

The study published by Mr. Mackey earlier this year indicated that the national average rate of federal, state and local taxes and fees on wireless services is 15.19% compared to the average rate imposed upon other goods and services of 7.07%.[3] That means the rate of tax on wireless services is more than double the rate on other goods and services! When I look at my home state of Illinois, it is ranked the 9th highest in the country with an average tax rate of close to 17%. It appears that we have some work to do to in my state to try to lower the rate imposed on wireless services to the rate imposed upon other goods and services, which averages about 8–9%.

A tax rate of 17% imposed upon services that I believe are critical to many of my constituents is burdensome, but imagine adding an additional tax on wireless services to that rate. I was very surprised to learn that a County in my state actually attempted to do just that last year. Cook County, Illinois, which encompasses most of the City of Chicago, was seeking to impose a $4 "per line, per month" tax on communication services. There was no specific purpose given to justify the imposition of this tax solely on communication consumers—rather, the revenue was going to be used to plug a hole in the County's general fund.

Had the proposed Cook County tax been enacted, the rate of taxes/fees on wireless services purchased by citizens in the City of Chicago would have increased to, on average, a rate of 24%. Now, if consumers in Cook County had the opportunity to approve this new tax, then I might not question the fairness of it. However, the county council was deciding for wireless consumers—the county was not going to put this proposal to a vote of the people. After the wireless industry educated its consumers about this new proposed "phone tax," over 3,300 consumers took the time to contact their county officials to speak out against this tax. The actions of these consumers in Cook County demonstrate just how unpopular these targeted wireless taxes are with consumers.

When you consider how important wireless services have become to consumers today, taxing these services at such an excessive level is counterintuitive to me. Rates frequently approach the level of so-called "sin" taxes. Policymakers typically

[2] Katherine Barrett & Richard Greene, *Growth & Taxes,* Governing Magazine (January 2008).

[3] Scott Mackey, *Excessive Taxes & Fees on Wireless: Recent Trends,* State Tax Notes (Feb. 18, 2008).

impose sin taxes when they want to discourage consumption of certain products, such as alcohol and tobacco. It is hard to understand why a service that many of my constituents consider a safety lifeline is taxed at nearly 20% per month. A rate meant to discourage usage, not encourage it.

I believe we all can acknowledge that communication services, and wireless services in particular, are a vital component of this country's economic growth and stability. Mr. Mackey cites several facts in his testimony on the productivity benefits that the wireless industry provides to the overall economy. It is hard to believe that any reasonable policymaker would continue to think that imposing new discriminatory taxes on wireless services is appropriate.

PROTECTING WIRELESS CONSUMERS FROM EXCESSIVE TAXES IS IMPORTANT TO MY CONSTITUENTS

As has been mentioned before, wireless services are no longer considered a luxury. For many Americans, these services are crucial to their everyday lives and yet they are taxed at levels that are double or even triple the rates of tax imposed on other goods and services. Imposing regressive consumption taxes on consumers purchases of wireless services disproportionately impacts low and middle income consumers which can put this critical service out of reach for some of my constituents that need it the most.

According to the Pew Internet & American Life Project, when respondents were asked how hard it would be to give up a specific communication service, cell phones received the top ranking over the Internet and television.[4] The Pew study also found that 84 percent of English-speaking Hispanics, 71 percent of African-Americans and 74 percent of non-Hispanic white Americans have cell phones.[5]

As was stated before, wireless devices are being used to do far more than just make phone calls. Wireless technology also provides people with the ability to remain connected to friends, family and, in this new information age, to be able to access the Internet. Recent studies have shown that minorities constitute a growing proportion of total demand for wireless, particularly the newest data services, like broadband.

On a typical day, 77 percent of all Americans with cell phones have sent or received text messages, taken a picture, played a game, sent or received e-mail, accessed the Internet, recorded a video, played music, sent or received an instant message, used a map, or watched a video on their cell phone.[6] Breaking down the details, the highest percentage of use is from minorities: 90 percent of English-speaking Hispanics and 77 percent of African-Americans have done at least one of these activities compared to 73 percent of non-Hispanic white Americans.[7]

Adoption of new technologies, in particular the use of wireless phones and wireless broadband, has driven and improved productivity, economic growth, and household income in the United States. Recent studies have demonstrated that policies supporting affordable wireless services that allow for increasing wireless use should lead to income and productivity gains by all Americans, particularly low income wireless users.

Whether it is a small business owner tracking orders "on the go," an employee answering e-mails on a wireless device outside of the office, or a family physician using a handheld device to input patient information and prescriptions, wireless has delivered enhanced efficiencies and greater convenience. Taxing wireless services at a rate that is more than double the rate imposed upon other goods and services is artificially increasing the cost of these services which in turn hurts the economic gains that could be achieved by having a more rational tax policy.

CONCEPT IS CONSISTENT WITH NCSL TELECOMMUNICATIONS TAX REFORM PRINCIPLES

Over the past eight years, NCSL has made communications tax reform a major priority for states to consider. The Committee as well as a separate task force has spent considerable time educating state policymakers on the need to simplify and modernize the taxes imposed upon communications services as well as the benefits in doing so.

The most recent set of principles for communications tax reform that have been unanimously endorsed by the NCSL are set forth below:

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[4] John Horrigan, *Mobile Access to Data and Information,* Pew Internet & American Life Project (March 2008).

[5] *Id.*

[6] *Id.*

[7] *Id.*

TAXATION OF COMMUNICATIONS SERVICES

Transaction taxes and fees imposed on communications services should be simplified and modernized to minimize confusion, remove distortion and eliminate discrimination regarding the taxability of telecommunications services. The National Conference of State Legislatures encourages elected policymakers at all levels of government to work together to simplify, reform and modernize communications taxes based upon the following principles:

Tax Efficiency: taxes and fees imposed on communications services should be substantially simplified and modernized to minimize confusion and ease the burden of administration on taxpayers and governments.

Competitive Neutrality: transaction taxes and fees imposed on communications services should be applied uniformly and in a competitively neutral manner upon all providers of communications and similar services, without regard to the historic classification or regulatory treatment of the entity.

Tax Equity: Under a uniform, competitively neutral system, industry-specific communications taxes are no longer justified, except for fees needed for communications services such as 911 and universal service.

State Sovereignty: Other than the prohibition of taxes on Internet access, NCSL will continue to oppose any federal action or oversight role which preempts the sovereign and Constitutional right of the states to determine their own tax policies in all areas, including communications services.[8]

Except for the very last provision addressing state sovereignty, the concepts in H.R. 5793 are very consistent with this policy statement. Under a uniform and competitively neutral system, industry specific taxes are no longer justified. Unfortunately, without proceeding with the reforms needed to the current tax structure, the system will remain confusing and inequitable. Extending industry specific "utility" taxes to wireless services is not the right answer. The concepts in H.R. 5793 are intended to guard against having the taxation of communications services become more onerous before the reforms set forth in the NCSL policy statement can be implemented.

Even though communications tax reform has been a major topic at NCSL, little progress in achieving such reforms has been made. One area where we have seen moderate success has been in the simplification of some of the existing taxes by reducing the number of returns communications providers are required to file. Illinois was one of those states, where several local impositions were consolidated into one tax that is filed with the state, significantly reducing the number of returns required to be filed that was required when returns were filed with the local governments.

While the simplification effort was helpful, the state still has not engaged in serious discussions with stakeholders about formulating a plan to reduce the high rate of taxes imposed upon communication consumers. Given the budget deficits that many states will be facing, I believe it will be difficult to quickly accomplish the reform that is required to reduce the existing excessive rates of taxes on communication services any time soon.

Having said that, it is an issue that we must continue to focus on. In the interim, we should ensure that no new discriminatory taxes will be imposed on wireless services. As a state that currently imposes an onerous tax burden on communication services, I can honestly state that once these taxes are in place they are very hard to eliminate. Preventing the imposition of new burdensome taxes on consumers while we try to fix the existing system makes a lot of sense.

Last year, it was estimated that wireless consumers in the state of Illinois paid almost $1 billion in state, local and federal taxes and fees imposed upon their wireless services. By anyone's measure, be it from a state or federal perspective, that is a lot of money for one subset of consumers to pay on an essential service. That is why I strongly support the passage and enactment of H.R. 5793, the "Cell Tax Fairness Act of 2008."

Thank you again for this opportunity to speak to you today. I would be happy to answer any questions that you might have at the appropriate time.

Ms. SÁNCHEZ. Thank you, Mr. Clayborne.

We have just received notice that we have votes pending across the street. But I think we do have time to have Mr. Mackey give

[8] Unanimously passed the NCSL Communications, Financial Services and Interstate Commerce Committee Business Meeting, November 28, 2007—Passed on voice vote during the full NCSL Business Meeting November 30, 2007—Passed on voice vote during NCSL Annual Business Meeting, July 25, 2008.

his oral testimony, assuming that you can squeeze it in between the 5- and 6-minute mark.

STATEMENT OF SCOTT R. MACKEY, ESQUIRE, KIMBELL SHERMAN ELLIS, MONTPELIER, VT

Mr. MACKEY. Thank you very much, Chairwoman, and Members of the Committee.

I will stay within my time. I just want to reiterate two important points that Ms. Lofgren made during her opening remarks.

First of all, this bill would not preempt any existing taxes. So there would be no fiscal impact from this bill on any State or local government that is currently, today, imposing taxes—even discriminatory taxes—on wireless consumers.

And it would allow new taxes, provided that those new taxes were not singling out wireless consumers, but were part of a broad-based tax increase to meet revenue needs for local government. So this bill only affects new discriminatory taxes—the ones that, as we have heard, are burdening consumers.

I am going to just skip over some of the things I said in my prepared remarks, and just focus on a couple of things that some of the folks claim that this bill would do, because I think, in some of the testimony, some of the local governments are claiming that we have not made the case that there is excessive or discriminatory taxes on wireless consumers.

And as a side note, I would say, if there are no discriminatory taxes imposed today, then governments have nothing to worry about from this bill, because it only affects discriminatory taxes.

In terms of whether there is a problem, NCSL, the Governor's Association, Governing Magazine—many, many people have said that there is, indeed, a problem. So I don't think we can just say that this something—that the wireless industry has somehow cooked the numbers to show that there is a problem.

There is a problem. And, you know, I would not tell a consumer in Baltimore City, that has, you know, a typical $50 plan with two lines, that is paying $11.50 in taxes a month versus if they walked into the hardware store and bought something for $50—they would pay $2.50. Or, in Chicago, where a same—similarly situated consumer—would pay $12 a month on their wireless bill, and only pay $5 if they bought something from the store. So, clearly there is a problem here.

But there is not a problem in every State. It is limited to certain States that have really targeted wireless consumers.

As has been mentioned, these are regressive taxes. There are many, many lower and moderate-income people that have plans and—that, in particular—the trend toward a per-line charge, instead of a percentage of your bill—is very, very burdensome on lower-income people, who have multiple lines on the same plan—family share plans and the like.

Consumers are really spending a lot, and, really, this bill, as has been suggested, is about the consumer. The notion that the local governments are willing to talk about reform, and that this bill would actually discourage reform—I worked on this issue for the last 10 years of my career, and the facts would really suggest otherwise. When the industry and others have sat down with local

governments to talk about reform, we have not been able to make any progress.

We are facing new taxes right now from local governments in California, Oregon, Missouri, Maryland and New York. And one of the reasons why we haven't had consensus on reform is, because, to a lot of local governments, reform means, "Let us make wireless consumers pay all the taxes that are legacy from the regulated era that are now being levied on the landline phones." And reform means, "Let us bring everybody up to the highest level of taxation."

And we think reform means, "Let us bring everybody down to a level that is being imposed broadly on all goods and services that are subject to the tax, and not single out specific services for those types of discriminatory taxes."

And then, finally, the issue of, "Why wireless? Why should the Congress look at wireless as an industry that deserves—the consumers deserve protection from new discriminatory taxes?" Well, clearly, the wireless industry is federally licensed and regulated. Congress and the FCC have set the rules and granted the licenses that dictate how and where wireless providers are able to sell their service.

So Congress is already heavily involved in this industry. And it is a fundamentally interstate industry. I mean, this is an industry where folks with wireless phones start a call in one jurisdiction, can cross a boundary—and that, in fact, is why Congress decided it had to get involved and actually make the rules for allocating which jurisdictions were able to tax. And that is the Mobile Telecom Sourcing Act that Congress passed 5 or 6 years ago.

So, clearly, this is an interstate service, and the Federal role is already well established.

And then, finally, more and more economic studies have showed that wireless industry has a disproportionate share in our economic growth. And if we are going to do the kind of things that Representative Lofgren said, instead of—in terms of setting the stage for new technologies, new ways that American businesses and—are going to be more productive—then we can't have taxes that discourage investment and force consumers to have to choose not to adopt and purchase certain services because the tax burden is too high, and they can't afford to choose them.

So, in summary, thank you, again, for the opportunity to testify. I look forward to questions. This bill is really about protecting the consumer. And it needs to be passed. And I hope you will move to a markup as soon as possible.

Thank you.

[The prepared statement of Mr. Mackey follows:]

PREPARED STATEMENT OF SCOTT R. MACKEY

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Written Testimony
of
Scott R. Mackey
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Hearing on HR5793, the "Cell Tax Fairness Act of 2008"

House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

September 18, 2008

Chairwoman Sanchez, Ranking Member Cannon, and members of the Subcommittee, thank you for this opportunity to testify on an issue of real importance to millions of wireless consumers, small and large businesses, wireless providers, and the US economy.

My name is Scott Mackey and I am an economist and partner at Kimbell Sherman Ellis LLP. Over the past eight years, I have worked with major wireless telecommunications providers to reduce or eliminate excessive and discriminatory taxes on wireless services at the state and local level. It has been a frustrating experience to say the least, because while state and local government officials recognize that this is a major problem, with a few notable exceptions, there has been no progress in reducing the tax burden on communications users.

So I am happy to appear today to support H.R. 5793. Representative Lofgren and her primary co-sponsor, Representative Cannon, and the over 100 other members co-sponsoring this legislation are to be commended for supporting this pro-consumer, pro-growth legislation.

Two years ago this Subcommittee held a hearing on the general topic of state and local taxation of interstate telecommunications services. At the time, I testified that despite a seven-year effort by the industry to work with state and local governments to address excessive taxes on communications services, very little progress had been made. Today, I am sorry to report that since that time, things have gotten worse.

Over the past few years, while states themselves have generally refrained from imposing new taxes on wireless service, local governments in California, Maryland, Missouri, New York and Oregon have imposed or are currently attempting to impose ***new discriminatory*** taxes on wireless service. And wireless users have every reason to be concerned about the possibility of

new targeted taxes in other states and localities as well.

H.R. 5793 simply calls for a "time out" from the imposition of **new** discriminatory taxes on wireless service and property. A discriminatory wireless tax is a tax that is imposed on wireless service at a higher rate than on other goods and services subject to generally applicable taxes. Although the bill would not address existing discriminatory taxes on wireless providers and their customers, the bill would at least stop the situation from going from bad to worse. This legislation would protect millions of wireless consumers – and thousands of small and large businesses that use wireless service every day to improve profitability and productivity – from new discriminatory taxes for five years.

Today I will focus on three important reasons why Congress should pass the "Cell Tax Fairness Act of 2008" before adjournment later this fall:

- First, tax burdens on wireless providers and consumers continue to grow. States and localities are not only failing to reform their existing discriminatory tax systems, but in some instances they are making the situation worse. Without this legislation, states and localities will continue to single out wireless service for new discriminatory taxes.

- Second, at a time when state and local economic development experts are touting expanded broadband deployment as critical to economic development in their communities, excessive new wireless taxes imposed piecemeal by thousands of state and local governments are a deterrent to new broadband network investments. The need to avoid new taxes on wireless investment is particularly important at this time because of the recent auction of wireless spectrum – now is the time to encourage investment in wireless networks that will bring wireless broadband service to many more Americans across the country.

- Finally, at a time when many low and middle-income families are struggling to make ends meet, H.R. 5793 would protect wireless users from burdensome new taxes. Wireless taxes are among the most regressive forms of taxation used by state and local government to fund public services – especially at the high rates imposed on consumers – so this legislation would particularly benefit low and middle income families by protecting them from regressive new wireless taxes.

1) H.R. 5793 Highlights the Failure of State and Local Governments to Eliminate Existing Discriminatory Wireless Taxes

The first comprehensive attempt to catalog the tax burden on communication services, providers and their customers was published in September 1999 by the Committee on State Taxation (COST). This landmark study found that consumers of telecommunications services paid effective state/local tax rates that were more than twice those imposed on taxable goods sold by general business (13.74% vs. 6%). Including federal taxes, the tax burden was nearly three times higher than general business. In addition, due to the sheer number of different state and local taxes imposed in many jurisdictions, the typical communications service provider was

required to file seven to eight times as many tax returns compared to those filed by typical businesses (63,879 vs. 8,951 annually).

I published a follow-up study in *State Tax Notes* in February 2008 using the COST study methodology to examine in more detail the tax burden on wireless customers. Its findings were consistent with the COST study – that wireless customers faced tax burdens that were, on average, two to three times higher than general business. I recently updated the study to reflect tax burdens as of July 1, 2008, which is summarized in Table 1 on page 4.

During the last five years, many states and localities have added to the existing tax burdens imposed on wireless services. Pennsylvania added a 5% gross receipts tax on wireless service beginning in 2004. This tax was added despite the fact that wireless service is already subject to the 6% state sales tax (7% in the two largest cities in the state). South Dakota added a 4% gross receipts tax on wireless service, again subjecting customers to a "double tax" by imposing both the sales taxes and gross receipts tax. Kentucky imposed a new 1.3% gross receipts tax on communications services, although the legislation eliminated other discriminatory taxes.

Baltimore City imposed an additional $3.50 per month "line charge" on phone bills in 2004, while Montgomery County Maryland added a $2.00 monthly charge. In 2007, Missouri cities successfully used the courts to impose large new "business license taxes" on wireless services at rates as high as 10%, even though business license taxes on other types of businesses are typically well below 1%.

In 2008, many California cities have been rewriting their Utility User Tax (UUT) ordinances to expand the base of wireless services covered by their taxes, and a handful of cities are also trying to impose new "911 taxes" on wireless bills – taxes that they readily acknowledge will not be used solely to fund the 911 emergency communications systems but will also be used for general public safety needs, pensions, and other general government purposes. Many of the rates imposed are excessive – up to 11% under the UUT ordinances and as much as $3.49 per month for a 911 tax in Santa Clara County. Clearly these taxes target wireless consumers for the funding of government services that should be borne by all constituents, not just wireless consumers. Prince Georges County, Maryland is trying to increase its local wireless tax from an already excessive 8% to 11% (in addition to 5% sales tax and 911/USF fees), and several Oregon cities are in the process of rewriting their local ordinances to expand the base of their telecommunications privilege taxes to wireless services imposed for use of the public rights of way, even though wireless providers do not use the public rights-of-way.

Wireless providers and consumers have attempted to address the existing discriminatory tax burden on wireless services in the states. For almost ten years, the wireless industry has engaged in a dialogue with representatives of state and local government organizations – and state legislatures – actively trying to address the problem.

The Advisory Commission on Electronic Commerce was formed by Congress in 1998 as part of the original Internet Tax Freedom Act to examine issues surrounding the taxation on Internet access, electronic commerce, and communications. The Commission held hearings on these issues throughout 1998 and 1999. In 1999, the communications industry testified before

Taxes and Fees on Wireless Service, July 2008
Compared to General Sales Tax Rate

Disparity Rank	State	State-Local Wireless Rate	Sales Tax State-Local Rate	Wireless Over/(Under) General Rate
1	Nebraska	18.35%	6.50%	11.85%
2	Washington	18.24%	8.55%	9.69%
3	Florida	16.23%	7.25%	8.98%
4	New Hampshire	7.84%	0.00%	7.84%
5	New York	15.95%	8.19%	7.76%
6	Rhode Island	14.53%	7.00%	7.53%
7	Pennsylvania	13.51%	6.50%	7.01%
8	Mississippi	13.73%	7.23%	6.50%
9	Texas	14.27%	8.25%	6.02%
10	Montana	5.96%	0.00%	5.96%
11	South Dakota	11.92%	5.96%	5.96%
12	DC	11.53%	5.75%	5.78%
13	Maryland	11.52%	6.00%	5.52%
14	Delaware	5.46%	0.00%	5.46%
15	Utah	11.97%	6.58%	5.29%
16	Illinois	14.24%	6.00%	5.24%
17	North Dakota	10.59%	6.00%	4.59%
18	Kentucky	10.37%	6.00%	4.37%
19	Kansas	11.31%	7.38%	3.93%
20	Alaska	6.40%	2.50%	3.90%
21	Arizona	9.95%	6.20%	3.75%
22	Hawaii	7.71%	4.00%	3.71%
23	New Mexico	10.75%	7.43%	3.32%
24	Colorado	10.66%	7.56%	3.10%
25	Indiana	8.89%	6.00%	2.89%
26	California	10.97%	8.10%	2.87%
27	Wyoming	7.79%	5.50%	2.29%
28	Tennessee	11.51%	9.25%	2.26%
29	South Carolina	9.48%	7.25%	2.23%
30	Mississippi	9.01%	7.00%	2.01%
31	Arkansas	10.26%	8.38%	1.88%
32	Maine	6.85%	5.00%	1.85%
33	New Jersey	8.81%	7.00%	1.81%
34	Oregon	1.51%	0.00%	1.51%
35	North Carolina	8.34%	6.75%	1.59%
36	Virginia	6.51%	5.00%	1.51%
37	Minnesota	8.50%	7.08%	1.42%
38	Iowa	7.37%	6.00%	1.37%
39	Vermont	7.75%	6.50%	1.25%
40	Oklahoma	9.64%	8.45%	1.19%
41	Michigan	7.03%	6.00%	1.03%
42	Connecticut	6.92%	6.00%	0.93%
43	Georgia	8.28%	7.50%	0.78%
44	Ohio	7.88%	7.13%	0.75%
45	Massachusetts	5.60%	5.00%	0.60%
46	Alabama	7.41%	7.25%	0.16%
47	West Virginia	6.03%	6.00%	0.03%
48	Wisconsin	5.55%	5.55%	0.00%
49	Louisiana	6.17%	9.00%	-2.83%
50	Idaho	2.13%	6.00%	-3.87%
51	Nevada	2.01%	7.56%	-5.55%
	US Simple Average	**9.44%**	6.20%	3.24%
	US Weighted Average	**10.86%**	6.20%	4.66%

For flat monthly taxes and fees, average monthly consumer bill is estimated at $49.94 per month per CTIA.

Source: Committee on State Taxation, 50-State Study and Report on Telecommunications Taxation, May 2005 Update
Updated August 2008 by Scott Mackey, Kimball Sherman Ellis LLP using state statutes and regulations

the Commission on the impact of excessive and discriminatory taxation of communication services, the communications infrastructure needed to build out networks, and the daunting compliance burden placed upon providers asking the commission to prod states toward substantial reform in these areas.

In response to the presentation of the data contained in the COST report, one member of the Commission suggested that the Commission should recommend that Congress pass legislation outlawing discriminatory taxation of communications services by state and local governments, similar to what was done for the railroad industry under the Federal 4-R Act. While the industry supported the concept, it did not pursue this approach because state and local organizations had expressed a desire to work with the industry to pursue the reforms needed to address the excessive level of taxation imposed upon communication consumers. The industry was sensitive to the states desire to work together and chose to focus their efforts on working with state and local governments on the needed reform in the states, rather than seek federal intervention.

As a result of the Commission members' failure to reach a 2/3 majority consensus, the Commission ultimately did not forward any recommendations to Congress. However, the communications industry used the Commission's work as a springboard to reach out to key government organizations such as the National Conference of State Legislatures (NCSL) and the National Governors' Association (NGA) – as well as the local organizations – to promote the reforms needed to reduce the level of taxes imposed upon its consumers. As a result of the ongoing dialogue, both the NGA and the NCSL issued policy positions, approved by their respective memberships, calling for states to eliminate excessive and discriminatory taxes on the communications industry and its consumers.

Particularly relevant to today's discussion are two of the policy principles adopted by the NCSL membership in 2000 and reaffirmed in 2007:

- **Tax Equity**: *Under a uniform, competitively neutral system, industry-specific telecommunications taxes are no longer justified.*

- **Tax Fairness**: *With the blurring of distinctions between various services and technologies, state and local governments must strive to set tax burdens on telecommunications services, property and providers that are no greater than those tax burdens imposed on other competitive services and the general business community.*

In 2005, recognizing that efforts to reduce state and local taxes on users of communications services were going nowhere, the National Governors' Association invited the industry and state and local organizations to participate in a new series of negotiations to formulate a plan to address the problem. After months of negotiations, it became clear that some of the major local government organizations were unwilling to agree to any reforms that would eliminate the authority of localities to impose excessive taxes on communications customers. The opposition of local governments to comprehensive state-level reform efforts is one of the main reasons we believe that it is critical to pass HR 5793.

The communications industry also worked with individual state legislatures in key states to address the issue. Unfortunately, most of these efforts were unsuccessful. Since 2005, reform bills that would have reduced the level of tax on wireless services were considered but failed to pass in Florida, Illinois, Oregon, Pennsylvania and South Dakota. In California, the wireless industry reached out directly to the cities to seek a comprehensive state-level solution to the problem presented by the impending elimination of the Federal excise tax, but the cities decided they did not want to work with the industry and moved ahead unilaterally seeking to expand their utility tax base to new services.

There are two notable exceptions to this lack of success in reducing excessive wireless taxes: Texas and Virginia. In 2006, the Virginia General Assembly passed legislation replacing a myriad of local taxes and fees with a single, state-collected tax imposed at the same rate as is imposed on general business. This reform eliminated local taxes that were as high as 28% on customers in certain cities with a new tax, imposed at the state level, of 5% on all types of communications services. Under this new law, which took effect in 2007, consumers of all communications services – wireless, wireline, and cable – will no longer pay excessive tax rates on these services. This legislation could serve as a model for action in other states. Members of the industry have reached out to local governments organizations to work with them on efforts in the states that would follow the Virginia model of simplifying the confusing array of taxes on consumers through the implementation of a state-level tax – this legislation is designed to encourage such efforts.

In Texas, the legislature repealed a 1.25% special tax on wireless and other telecommunications services effective this month. The tax was initially imposed to fund communications infrastructure projects for schools and libraries, but once that project was complete the revenue went to the general fund. This repeal moves Texas closer to a tax system that does not discriminate against wireless consumers.

2) H.R. 5793 Would Stop Taxes that Impede Investment in Wireless Networks

The wireless industry plays a critical role in the US economy because of its beneficial impact on the productivity of businesses. A 2008 study by *Ovum and Indepen* found that in 2005, the productivity value of all mobile wireless services was worth $185 billion to the US economy. That same study found that new productivity enhancements from wireless broadband will contribute an additional $860 billion to US GDP over the next decade. These productivity benefits of wireless broadband networks highlight the urgency of enacting this legislation which would prevent new discriminatory taxes from being imposed on wireless infrastructure investment.

Productivity is simply a measure of output per worker, and strong productivity growth generates important economic benefits. It boosts incomes, living standards, capital formation, and overall economic growth. In the late 1990s, the rapid productivity growth due to the emergence of the Internet and electronic commerce was widely credited with fueling the robust economic expansion of recent years.

Just as the initial development of the Internet was the driver of productivity in the late 1990s, broad deployment of wireless broadband will drive innovation and productivity in the very near future. Tax and regulatory policies that promote investment in wireless broadband networks and applications will generate important economic benefits. Conversely, policies that increase the cost of investment or otherwise slow investment in communications infrastructure will delay important economic benefits

Consumers benefit greatly from additional investment in communications networks because competition among providers reduces prices. Numerous recent studies have found that broadband penetration in the United States is well behind many of our global competitors. Additional investment in broadband networks by wireless companies in the U.S. will bring high speed networks to businesses and consumers that lack a single provider today, as well as bring competition and lower prices to businesses and consumers served by multiple broadband providers.

State and local governments recognize the importance of advanced communications networks because they are subsidizing these networks through tax incentives, indirect investment, and even direct investment in municipal broadband networks. Yet at the same time they are imposing excessive consumer taxes that hinder the buildout of these networks.

Discriminatory state and local taxes on wireless providers and consumers impede wireless broadband deployment in two ways. First, excessive taxes on consumers reduce the quantity of wireless service purchased. Economists have found that each $1.00 in additional taxes on wireless service will reduce consumer purchases by about $1.20. By reducing consumer purchases, wireless providers have less revenue to reinvest in network enhancements. While wireless companies currently invest about $25 billion annually in their networks, excessive and discriminatory taxes on wireless services will hinder additional deployment.

Second, discriminatory taxes on wireless property and infrastructure purchases increase the cost of investment. Sales taxes on equipment purchases drive up the initial costs of such investments, while discriminatory property taxes on providers increase the ongoing costs of deploying new network equipment. The imposition of excessive taxes on network equipment seems to work directly against the stated goal of most policymakers to encourage investment in more broadband networks to reach more of their citizens.

While HR5793 would not address existing discrimination, it would keep the situation from getting worse and create a stable investment climate for new wireless network investments at a time when wireless providers will be making new networks investments for recently auctioned spectrum.

3) H.R. 5793 Would Stop New Taxes Which Disproportionately Burden the Poor

There is no dispute that state and local taxes on wireless consumers are highly regressive. Simply stated, lower income consumers (for example, the working poor and seniors on fixed incomes) pay a much higher proportion of their incomes in wireless taxes than do higher income consumers. When many of these special industry taxes were first imposed on wireline phone

service 50 or even 100 years ago, telephone service was considered a luxury only affordable by the rich. Today, as evidenced by the fact that over 260 million Americans have wireless devices, wireless services are considered by many to be a necessity.

While most consumption taxes are regressive by nature, it is unfortunate when regressive taxes are imposed at excessive levels on a service that many citizens believe is a necessity. Many states, for example, exempt food from sales and use taxes to mitigate the overall regressivity of the sales tax. Unfortunately, in the case of communications services, consumers in many states face layer upon layer of regressive taxes.

A disturbing trend is making this problem worse. In the last few years, some jurisdictions have imposed flat "per line" taxes, such as Baltimore's new $3.50 per month tax. These taxes take an already regressive tax and make it much worse. In the case of Baltimore, $3.50 per month on a $25 monthly calling plan is a 14% tax rate on that plan but only 3.5% on a $100 monthly calling plan. When the state sales tax of 5% is added on, the consumer on a $25 monthly plan in Baltimore is paying an effective tax rate of 19%! And if that consumer has a family plan with multiple lines, the $3.50 applies to each line. Several wireless providers allow consumers to add an additional line for as little as $9.99 per month. The tax rate on that additional line is a staggering 35%!

Reducing consumer taxes to the same rate charged on other goods and services would not completely eliminate the regressive nature of taxes on communication services, but it would make such taxes much less burdensome to consumers on low and fixed income households.

Chairwoman Sanchez and members of the Subcommittee, thank you again for holding this hearing and allowing me to testify in support of this bill. I hope both the Subcommittee and the full Committee will mark-up this legislation soon, so that wireless consumers can be protected from new discriminatory taxes. From the information that has been presented today, you can see that wireless consumers are already paying more than their fair share in state and local taxes. We hope that during this "time-out" state and local governments will work with the industry on meaningful reform, building on the success efforts in Virginia and Texas, which truly simplifies the taxation of wireless services and reduces the level of regressive taxes on working families.

Ms. SÁNCHEZ. Thank you for your testimony, Mr. Mackey.

At this time, we will recess to walk across the street to vote. And we will resume the hearing as soon as the last vote is finished.

[Recess.]

Ms. SÁNCHEZ. The Subcommittee will now come to order. And we thank the witnesses for their patience while we were across the street voting.

We are going to try to finish the hearing—have a thorough hearing, but finish it within the hour, if possible, because we are expecting another round of votes.

So I am going to just jump in very quickly, and ask Mr. Lay to give his oral testimony.

STATEMENT OF TILLMAN L. LAY, ESQUIRE, SPIEGEL & McDIARMID, LLP, WASHINGTON, DC, ON BEHALF OF THE U.S. CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADMINISTRATORS

Mr. LAY. Thank you. Good afternoon, Chairwoman Sánchez, and Members of the Subcommittee.

I am Tillman Lay, of the D.C. law firm of Spiegel & McDiarmid, and I am testifying on behalf of the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, and the Government Finance Officers Association.

We oppose H.R. 5793. Its proposed moratorium on State and local wireless taxes represents an unwarranted Federal intrusion into the long-recognized authority of State and local governments to establish tax classifications. And it would open the door to other industry sectors asking for similar preemption of State and local tax-classification authority.

The Supreme Court has long recognized that State and local governments have broad discretion in the field of taxation, where they possess the greatest freedom of classification. H.R. 5793 departs radically from this longstanding principle of federalism.

It would single out one subpart of the telecommunications-industry sector, wireless services, for preferential, preemptive protection from State and local tax classifications. That would set a precedent that would endanger State and local tax authority and tax-classification authority in at least two ways.

First, it would move us further away from State and local government efforts at telecommunications-tax reform. The bill would require that State and local governments treat wireless services more preferentially than their landline-telecommunications-service competitors. Narrowing the permissible tax base for telecommunications to landline service would put upward pressure on State and local landline-telecommunications-service taxes, and, likely, on State and local public-utility taxes as well.

Second, the bill would set a dangerous standard for Federal intervention into State and local-government tax classifications. If taxing any industry sector or service at a rate different from the general business-sales-use tax rates constitutes a discriminatory

tax, then there would be no limit at all to Federal preemption of all State and local tax classifications.

And you can expect other industries that are subject to different, and, often, higher, State and local tax classifications, such as the utility, petroleum distribution, entertainment, transportation and other industries, to ask Congress for similar preemptive relief from State and local tax classifications.

Moreover, the legislation is a solution in search of a problem. Supposedly excessive State and local wireless fees and taxes notwithstanding, the wireless industry has enjoyed remarkable growth in terms of subscribership, revenues, and investment—over the past 7 years.

According to the FCC, wireless-industry subscribership has grown 158 percent since 2000, and wireless-industry revenue has grown 124 percent over that same time period.

The wireless industry's claim of excessive taxes and fees are based upon an apples-and-oranges mix of Federal, State and local fees and taxes, many of which would not be affected by H.R. 5793 at all.

CTIA has claimed that about 15 percent of each customer's monthly bill already goes to taxes and fees. But this 15 percent figure includes Federal taxes and Federal Universal Service Fund charges. The 15 percent figure also includes State Universal Service Fund and State and local 911 fees—two more categories of fees that the bill exempts from its reach. And the 15 percent figure also includes State and local general sales-and-use taxes, which, of course, would also not be subject to the bill's moratorium.

By singling out State and local wireless taxes for preemption, industry is seeking to shift all of the blame and all of the fiscal burden to local governments and their general funds, not for the taxes they have imposed, but for the various user fees imposed by the Federal and State and local governments that the bill would not preempt.

Eight years ago, local government organizations and the wireless industry worked together to develop and support the enactment of the Mobile Telecommunications Sourcing Act. The MTSA assures political accountability. A State or wireless tax will end up being paid by the constituents of the State or local government that imposes the tax.

No elected official enjoys imposing or increasing any tax. And that is just as true of State and local elected officials, as it is Members of Congress. There is one difference, however. State and local governments must balance their budgets. And political accountability ensures that if State or local government constituents who pay a wireless tax feel that that tax is excessive, there is a very effective cure. It is called the ballot box.

H.R. 5793 violates all principles of political accountability. It would enable the Federal Government to place a preemptive ceiling on State and local taxing authority, while leaving to State and local elected officials the difficult task of deciding what other taxes to raise or what services to cut to compensate for action that the Federal Government, not they, took.

We, therefore, ask that the Subcommittee vote against approving H.R. 5793. Thank you for your time. And I would be happy to answer any questions you may have.

[The prepared statement of Mr. Lay follows:]

PREPARED STATEMENT OF TILLMAN L. LAY

Testimony Of

Tillman L. Lay

On Behalf of

The U.S. Conference of Mayors,
The National League of Cities,
The National Association of Counties
The National Association of Telecommunications
Officers and Advisors,
and
The Government Finance Officers Association

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

On
"Cell Tax Fairness Act of 2008"
(H.R. 5793)

September 18, 2008

2141 Rayburn House Office Building
Washington, D.C.

Good afternoon, Chairwoman Sanchez and Members of the Subcommittee. I am Tillman Lay, partner in the Washington, D.C., law firm of Spiegel & McDiarmid LLP, and I am here to testify on behalf of the U.S. Conference of Mayors ("USCM"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the National Association of Telecommunications Officers and Advisors ("NATOA"), and the Government Finance Officers Association ("GFOA") concerning H.R. 5793. I have represented these organizations and several individual municipalities on telecommunications and telecommunications tax matters for a number of years.

Thank you for the opportunity to testify on behalf of these organizations, which represent our nation's local governments, their telecommunications staff and advisors, and their finance officers. We oppose H.R. 5793. Its proposed moratorium on state and local wireless taxes would represent an unwarranted federal intrusion into the long-recognized authority of state and local governments to make tax classifications and open the door to unprecedented federal control and oversight of state and local tax authority.

Moreover, the legislation is a solution in search of a problem: Industry presents no data indicating that state and local wireless taxes have had any adverse effect on wireless service subscribership, revenue or investment. To the contrary, wireless industry subscribership, revenue and investment have soared during the same period that it suffered from the supposedly onerous state and local tax burden about which it complains. In addition, when stripped of universal service fund ("USF") and E-911 fees and other user-specific fees, industry's own data concerning the supposed burden of state and local taxes on the wireless industry fail to show any appreciable or widespread higher tax burden on wireless than on other business sectors. In fact,

wireless service enjoys a lower state and local tax burden than some other industry sectors, such as public utilities.

Local governments are more than willing to discuss reform of telecommunications taxes with industry.[1] Given the increasing convergence of telecommunications-related services, revising service definitions and simplifying taxes is a goal state and local governments share with industry. But by compelling favorable treatment of the wireless industry versus the many other sectors of the telecommunications industry, this bill would not further state and local telecommunications tax reform; it would instead create a new obstacle to such reform.

Local governments oppose any federal preemption of state and local governments' taxing authority, and any federally-compelled special tax favoritism of one industry. Yet that is what the wireless industry seeks in this bill.

The wireless industry's plea for federally mandated tax favoritism will open the door to other industries asking Congress for similar special exemptions or protections from state and local tax authority. That poses a dire threat not merely to state and local tax revenues, but to the entire existence of independent state and local taxation authority in our system of federalism.

Congressional policymakers who are basing their decision on wireless industry tax studies are being misled by the wireless industry's flawed data and unsound policy analysis. By requiring that "discriminatory taxes" on a specific business sector must be measured against, and not exceed, the taxes imposed by state and local governments on "general" businesses, H.R. 5793 would, if enacted, open the door to unchecked federal oversight, and rewriting of, all state and local tax laws and classifications. And since most state and local governments, unlike the federal government, must balance their budgets, such a federalization of state and local tax

[1] As an example, just eight years ago USCM, NLC, NACo, NATOA and GFOA worked with the wireless industry to enact the Mobile Telecommunications Sourcing Act of 2000, 4 U.S.C. §§ 116-126 (2000) ("MTSA"). I discuss MTSA in Part 3 below.

classifications would not even lower total taxes paid by state and local taxpayers; it would just redistribute the tax burden among those taxpayers.

1. H.R. 5793 Represents An Unprecedented, and Dangerous, Intrusion on State and Local Tax Authority That Would Threaten Our System of Federalism.

The Supreme Court has long recognized that state and local governments have broad discretion in the field of taxation, where they possess "the greatest freedom in classification."[2] The reason should be obvious: "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments,"[3] and our system of federalism therefore requires "scrupulous regard for the rightful independence of state governments" in matters of tax classification.[4]

H.R. 5793 departs radically from these longstanding principles of federalism. It would single out not just one sector of industry, but one subpart of the telecommunications industry sector – wireless services – for preferential federal preemptive protection from state and local tax classifications. That would set a precedent that would endanger state and local taxing authority in at least two very disturbing ways.

First, it would move us further away from state and local government efforts at telecommunications tax reform. The bill would essentially require that state and local governments treat wireless services more preferentially than their landline telecommunications service competitors. Narrowing the permissible tax base for telecommunications to landline telecommunications would put upward pressure on state and local landline telecommunications service taxes (and likely on public utility taxes as well). It does not take a prophet to figure out

[2] *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940).
[3] *Dows v. City of Chicago*, 78 U.S. (11 Wall) 108, 110 (1871) (quoted in *DirecTV, Inc. v. Tolson*, 513 F.3d 119, 123 (4th Cir. 2008)).
[4] *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 108 (1981) (quoted in *Tolson*, 513 F.3d at 123).

the next shoe to drop: The landline telecommunications industry will then demand from Congress similar preferential, preemptive protection from state and local taxes.

Second, and more generally, the bill would set an unprecedented, and dangerous, new standard for federal intervention into state and local government tax classifications. Under the bill, "discrimination" is defined as any tax imposed on a particular industry (in this case, the wireless industry) that "is not generally imposed, or is generally imposed at a lower rate," than that imposed generally on all businesses. If the standard for federal intervention into supposedly "discriminatory" state and local taxation becomes that every industry sector and every service has to be taxed at the same rate, then there would be no limit at all to federal intervention in state and local tax classifications. And you can expect other industries that are subject to different, and often higher state and local tax classifications – such as the utilities industries, the petroleum distribution industry, the entertainment industry, and others – to ask Congress for similar preemptive relief from state and local taxes.[5] Indeed, such a standard for "discriminatory" state and local taxes would mean, contrary to long-established precedent, that the federal government has the power to preempt *all* state and local tax classifications and to impose a federally-mandated state and local tax code of only a single tax rate for all businesses.

[5] The wireless industry's claim that its state and local tax burden is inappropriate given its non-monopoly status rests on the mistaken assumption that the telecommunications industry's historical monopoly status is the only rational tax policy justification for taxing different industry sectors at different rates. There are a variety of tax policy justifications for having different business tax classifications. To use but one example, telecommunications and utility services have different demand characteristics than many other consumer goods; demand for telecommunications and utility services tends to be less elastic, and less volatile in economic downturns, therefore providing a more stable, predictable tax base than taxes on most consumer goods. Telecommunications and utility services taxes also have different tax distribution effects than general sales taxes. Businesses tend to consume relatively larger amounts of telecommunications and utility services than residential consumers, meaning that the burden of telecommunications and utility taxes falls relatively more on businesses and less on residential consumers. If utility taxes and general sales taxes were equalized, the result would be a shift of the relative tax burden away from business taxpayers to residential taxpayers. *See* Tillman Lay, "Some Thoughts on Our System of Federalism in a World of Convergence," 2000 L. Rev. M.S.U.-D.C.L. 223, 233-34.

That would mean the end of state and local tax classification authority. The power of the federal government to preempt state and local taxes is ultimately the power to destroy state and local governments – a power that cannot be reconciled with our basic system of federalism.

2. There Is No Factual Basis for the Wireless Industry's Claims of Excessive State and Local Tax Burdens.

The remarkable and unprecedented intrusion into state and local tax classification H.R. 5793 would represent far outweighs any plausible benefit the bill would offer. In fact, when the arguments and data underlying the wireless industry's claims about state and local wireless taxes are assessed objectively, the bill is nothing more than a very drastic solution in search of an illusory problem. It is also nothing more than a self-interested plea by a single industry for its own special federal protection from state and local tax classifications.

a. There Is No Evidence That State or Local Taxes Have Had Any Adverse Effect on Wireless Industry Subscribership, Revenue or Investment.

The only plausible justification for such a dramatic federal intrusion into state and local tax classifications would be if it could be shown that state and local wireless taxes were having a uniquely harmful effect on the growth and health of the wireless industry. But there is no evidence of that at all.

To the contrary, allegedly excessive state and local wireless fees and taxes notwithstanding, the wireless industry has enjoyed remarkable growth, in terms of subscribers and revenues, over the past seven years. According to the FCC, wireless industry subscribership has grown 158% since 2000, and wireless industry revenue has grown 124% over that same period:

MOBILE WIRELESS TELEPHONE SUBSCRIBERS
and
TELECOMMUNICATIONS INDUSTRY WIRELESS SERVICE REVENUES

Year	No. of Mobile Wireless Telephone Subscribers[6] (in millions)	% Increase From Prior Year	Total Telecommunications Industry Wireless Service Revenues (in millions)	% Increase From Prior Year
2000	99.0	n/a	$ 62.0	n/a
2001	128.5	30 %	$ 74.7	20 %
2002	141.8	10 %	$ 81.5	9 %
2003	160.6	13 %	$ 89.7	10 %
2004	184.7	15 %	$ 98.6	10 %
2005	213.0	15 %	$ 107.1	9 %
2006	241.8	14 %	$ 115.3	8 %
2007[7]	255.4	6 %	$ 138.9	20 %
Total Cumulative 7-Yr Increase	156.4	158 %	$ 76.9	124 %

What these figures reveal is that, regardless whether one subjectively believes that a particular individual state or local tax or fee on the wireless industry is "too high," "too low," or "just about right," there is no evidence that collectively, those taxes and fees have had any measurable or even discernable impact at all on wireless industry growth. Nor have supposedly onerous wireless taxes stalled wireless industry investment; wireless providers "have been

[6] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Twelfth Report, 23 FCC Rcd 2241 (2008) ("*Twelfth Report*"). This report is available on the FCC's web site at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-28A1.pdf, and also at http://wireless.fcc.gov/index.htm?job=cmrs_reports#d36e145, which provides links to all the previous Annual Competition Reports beginning with the first report in 1995. *See also* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *Trends in Telephone Service* (August 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf.

[7] The FCC has not yet published year-end data for 2007. The *Twelfth Report*, although adopted on January 28, 2008, and released on February 4, 2008, is retrospective and focuses on the marketplace for Commercial Mobile Radio Services as of the end of calendar year 2006. The total number of wireless subscribers and total industry wireless service revenues shown here for 2007 are those reported by CTIA-The Wireless Association® in its *Semi-Annual Wireless Industry Survey for Year End 2007* (2008), *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2007_Graphics.pdf.

spending about $20 billion per year over the past five years on network upgrades and service expansions."[8]

That wireless industry growth and investment seems little affected by state and local taxes is not a surprising conclusion. Wireless service growth in recent years has been characterized by large-scale, "macro" demand curve-shifting characteristics – decreasing cellphone unit size, increased convenience, and increasing number of services provided over cellphones – that would overwhelm any marginal effects of taxes on the industry's cost curve.

b. The Wireless Industry's Tax and Fee Data Shows Nothing Onerous or Excessive about the State and Local Wireless Taxes It Seeks to Preempt.

The wireless industry's claims of supposedly excessive taxes and fees are based upon an apples-and-oranges mix of federal, state and local fees and taxes, many of which would not be affected or limited by H.R. 5793 at all. CTIA, for instance, has claimed that "about 15 percent of each customer's monthly bill already [goes] to taxes and fees."[9] But this 15% figure includes federal taxes and federal USF charges.[10] The 15% figure also includes state USF fees and state or local E-911 fees, two categories of fees that H.R. 5793 exempts from its reach.[11] And the 15% figure also includes state and local general sales taxes, which of course would not be subject to the bill's moratorium.[12] Furthermore, the 15% figure also includes some state fees

[8] Scott Mackey, "Excessive Taxes and Fees on Wireless Service: Recent Trends," 47 *State Tax Notes*, 519, 521 (Feb. 18, 2008) ("*2008 Wireless Service Trends*").
[9] "CTIA – The Wireless Association® Calls for Passage of Cell Tax Fairness Legislation" (Apr. 15, 2008) *available at* http://www.ctia.org/media/press/body.cfm/prid/1752.
[10] *2008 Wireless Service Trends* at 519.
[11] *See id* at 519 & 523-531.
[12] *See id* at 523-531.

imposed generally on telecommunications service providers, such as telecommunications relay service for the deaf fees and state public utility commission fees.[13]

When these various federal and state fees and taxes are stripped away, what the wireless industry's own data show is that the level of true state and local taxes imposed on wireless service (that is, general revenue-raising state and local taxes) is not that significant at all.[14] And of the true state and local wireless taxes that remain, most are either telecommunications or utility taxes that apply not only to wireless services, but to landline services (and sometimes utility services and/or cable and satellite services) as well. Preempting the further application of such taxes to wireless service would simply create a new form of tax "discrimination" between wireless and landline telecommunications services and between wireless and other communications services generally. By federally mandating such discrimination, H.R. 5793 would frustrate the ability of state and local governments to reform telecommunications taxes by broadening the tax base. And it also will inevitably lead to new pleas by yet other sectors of industry – the landline telecommunications service sector, and possibly video service providers and utilities as well – for the same preemptive, federally-favored tax treatment. That, in turn, could only lead to further erosion of state and local tax bases for already cash-strapped state and local governments that must balance their budgets.

Thus, the wireless industry's claims about supposedly excessive state and local wireless taxes are based in large part on federal and state fees that H.R. 5793 would *not* preempt in any way. The perverse effect is obvious: By seeking to preempt state and local wireless taxes, industry seeks to blame local governments, and their general fund budgets, *not* for the taxes they

[13] *See id.* Indeed, if these latter categories of wireless or telecommunications-specific user fees were included in H.R. 5793's classification of "discriminatory taxes," the bill would give the wireless industry a tax *break* relative to other "general businesses."
[14] *See 2008 Wireless Service Trends* at 525-531.

have imposed, but for various user fees imposed by the federal and state governments that the bill saves from preemption.

The wireless industry presents no reliable aggregate data concerning the amount and number of the state and local taxes to which the bill actually would apply, pointing instead to an average "total tax and fee burden" on wireless, a substantial portion of which is composed of fees to which the bill would not apply at all. That is not evidence of excessive taxation of wireless services by local or state governments. It is instead evidence of a skewed and misleading manipulation of data to lead policymakers astray.

3. The Mobile Telecommunications Sourcing Act Ensures That State and Local Elected Officials Are No Less Sensitive and Responsive To Constituents Concerns About Wireless Taxes Than Congress.

Eight years ago, USCM, NLC, NACo, NATOA and GFOA and the wireless industry worked together to develop and support enactment of MTSA. Among other things, MTSA provides a simplified and uniform method for the imposition of state and local taxes on wireless service. It ensures that only a single state and a single local jurisdiction may tax wireless service: The state and locality where the wireless customer's "place of primary use" (either the customer's home or business address) is located. MTSA thus eliminates the possibility of double or inconsistent taxation of wireless by multiple jurisdictions.

MTSA also did something else: By permitting taxation only at a customer's place of primary use, it also ensures that a customer knows precisely what jurisdiction is responsible for a state or local wireless tax and thus what elected state or local officials to hold responsible if the wireless customer does not like the tax. Put a little differently, MTSA assures political accountability: A state or local wireless tax will end up being paid by the constituents of the state or local government that imposed the tax.

No more can be asked of a tax in our system of federalism. No elected official enjoys imposing, or increasing, any tax, and that is just as true of state and local elected officials as it is of members of Congress. There is one difference, however: State and local governments usually must balance their budgets. And political accountability ensures that if state or local government constituents who pay a wireless tax feel that the tax is excessive, there is a very effective cure: the election process.[15]

The federal preemption approach in H.R. 5793, in contrast, violates all principles of political accountability. It would enable the federal government to place a preemptive ceiling on state and local taxing authority, while leaving to state and local elected officials the difficult task of deciding what other taxes to raise, or services to cut, to compensate for the federal limitation. For political accountability to exist, the same governmental body that cuts or limits taxes must also be responsible for raising other taxes or cutting government services to pay for the tax cut. That principle of political accountability is a foundation on which the federal government's longstanding historical respect for state and local government tax classifications rests. And it is that foundation which H.R. 5793 would upset.

We therefore ask that the Subcommittee vote against approving H.R. 5793.

Thank you for your time, and I would be happy to answer any questions you may have.

[15] Indeed, a wireless industry spokesperson has elsewhere conceded as much. *See 2008 Wireless Service Trends* at 521, 523 & 524 ("the state-local [tax and fee] burden on wireless fell slightly between July 2006 and July 2007," "for the first time since 2003, no states imposed a new [industry-specific] tax or increased the rate of an existing [wireless-specific] tax," and "if state lawmakers and local officials target wireless consumers for new taxes and fees, they can expect more resistance [from their constituents] than in the past").

Ms. SÁNCHEZ. Thank you, Mr. Lay. We appreciate your testimony.

We will now begin the round of questioning. And I will recognize myself first, for 5 minutes of questions.

I am going to start with Ms. Mahoney.

If Congress were to pass this legislation, what impact would it have on State and local revenues?

Ms. MAHONEY. One of the issues is, for me, and for Michigan—if the Federal Government decides to limit this tax, the way we collect our current fees or try and balance our budget—for instance, you know, for me, if we were to have what Illinois has, at 17 percent, I think this would be a really good idea. But we don't.

And, if, for our constituents and the people within our State—to keep fire departments going, to keep police stations going—and we are able to say to our constituents, "We need this tax for that reason—you know, to increase 1 percent versus laying off police officers." I think that we should be able to do that.

And those are the kinds of things that I think—imposing it from a Federal level preempts us from being able to do that.

Ms. SÁNCHEZ. Thank you, Ms. Mahoney.

Mr. Clayborne, what do you hope to accomplish with the passage of H.R. 5793, and the 5-year moratorium? Because I am interested in knowing if this 5-year moratorium will actually just sort of lead the movement toward a permanent moratorium, or a ban on all taxation of wireless services.

Mr. CLAYBORNE. I think what, essentially, happens is that you force the State, local and county governments to come together to begin to address this issue.

Obviously, if we continue to—if this bill does not pass, then if every county in the State decides to raise it by 2 percent—there are 102 counties in the State of Illinois. That tax will continue to go up. And it is obviously a burden on the poor.

So we believe that the moratorium——

Ms. SÁNCHEZ. Do you see it, primarily, as a leverage to try to get people to sit down and talk about some real reform?

Mr. CLAYBORNE. That is correct.

Ms. SÁNCHEZ. Okay.

I am just interested in knowing from you, Mr. Clayborne—as the Chairman of the Subcommittee, I have had various industries come to me to say, "We are being discriminated against in terms of taxes." And just some of the industries that have come to ask for relief are the hotel industry, the car-rental industry, the satellite-television industry, Internet-access providers and big businesses, among several others.

So I am interested in knowing your perspective. You know, why the carve-out for wireless, and not all the other industries that are coming to ask for the same kind of relief? Because the cumulative effect, I believe, if we were to say, "Yes," to everybody, would be what Ms. Mahoney has mentioned; that, budgets for fire departments and police departments would be particularly hard-hit, especially at a time when, I believe, most States are facing huge economic problems.

Mr. CLAYBORNE. I think it is—the distinction between the other entities that you discussed is the fact that most of those are actually luxury. This has become essential.

As Ms. Lofgren had stated—Congresswoman Lofgren stated—"At my house, no one answers the house phone, because if you are intending to call my sons, then you either text them or you call them on their cell phone." So it has become essential item in our daily use.

I have two sons in college. I don't even know the number to the dorm room, because they won't answer it. This has become such an essential part of communicating, between texts, emails, as well as the actual phone itself. So that is the difference.

Ms. SÁNCHEZ. That is the distinction? Okay.

Mr. Lay, in his written statement, State Senator Clayborne suggests that it would be difficult for State and local governments to reform and reduce excessive rates of taxes on communication services. And that is sort of the justification why Federal legislation is necessary.

Do you think that passage of this 5-year moratorium would lead to effective reform?

Mr. LAY. No, I don't.

The difficulty is this: As I recall in his answer—and maybe you are confusing his with Mr. Mackey's—the view of telecommunications-tax reform that industry has, as the only acceptable reform, is that industry be taxed just—just be subject to a generally applicable sales-and-use tax, no differential tax rate. And that is the difficulty.

I don't think the moratorium would result in that. In fact, for fiscal reasons, it would probably force local governments to raise taxes on landline telephone, which is a shrinking tax base, because that is all they would have left. They can't increase or extend the telephone tax to wireless service anymore.

Ms. SÁNCHEZ. Okay. Thanks.

Mr. LAY. They would put us further away.

Ms. SÁNCHEZ. Thank you, Mr. Lay.

My time has expired, so I will recognize the Ranking Member, Mr. Cannon, for 5 minutes of questions.

Mr. CANNON. Thank you, Madam Chair.

And, you know, I was just sitting here, thinking. I had said earlier in my opening statement that these are regressive taxes. I think that is particularly difficult because I actually think that you are not smarter because you are rich. And if we want to tap into the genius of people who are not yet rich, you have to give them access to systems.

And my understanding is that there are some jurisdictions that are taxing cell phones like $1.50—in some case, even more than that—per line. So in the case of my family, I have a family plan. Actually, we have a big family, so we have two family plans. And each additional person we put on that family plan costs about $5 for the plan.

And I see Mr. Mackey is nodding his head. Apparently, that is common. And, you know, if you add $1.50 tax on that line, that is like a 30 percent tax for that phone.

And, now, I bought my 10-year-old, now, a phone when she was 8, because I figure that is one of the best ways to protect her. You know, she can dial, or we can locate—if she keeps the phone with her and she gets lost, we can locate her with, perhaps, the phone GPS system.

So there are a lot of reasons to have a phone, but if you start putting a 30 percent tax on it, at some point, you actually really affect people's ability to buy that, especially when you are in a—when your incomes are more marginal.

I am in—you know, late in my career, as opposed to a young family that has two or three kids, and that tax could be more significant.

Does that bother you, Mr. Lay, that we could be taxing at those kinds of rates on services that are profoundly important to the development of society?

Mr. LAY. Well, I would first say that the fee you are talking about—and this is based upon Mr. Mackey's table—to say that it is common is not accurate—that a tax of that level is not common.

Mr. CANNON. No, I don't think I said it is common. I just said that that is one of the fees, and that, you know——

Mr. LAY. And, well, there is—I mean, I suspect—I guess my reaction to that is, one, that would not happen unless the voters who pay that tax allowed elected officials to do that. There is an effective check on that.

The other question that I——

Mr. CANNON. Let us go to that point, because, you know, my family has been through a number of plans over time, as almost everybody has, because it has been a pretty volatile market.

So we ended up, at one point in time, where we had two very different plans. And within those plans, the bills went to different addresses. So my wife's phone went to my home address and my phone, which was the same phone, went to my business address.

And the bill was significantly different on my wife's phone—higher. And the reason for that was because the local city taxed it at a much higher rate.

And so it seemed to me that the only way to solve that was to move the address for the billing for her phone into my business, which, by the way, saves a lot of inconvenience anyway, because sometimes she doesn't get around to paying the bills, and my office does.

But I guess my point there is that people actually don't—they are not going to change their elected officials over that kind of a thing. And, frankly, if—they may not even know about it or know what their bill is, compared to other people. Normally, they just take the bill and write out a check for the bottom line.

Now, that doesn't mean it doesn't have an economic effect. But to say that voting is the way to change your phone bill seems to me to be a pretty tenuous relationship.

Mr. LAY. Only if you say that it is tenuous, not just—if that is a statement that, basically, you can't count on the democratic process to protect against excessive taxes as—do people want to tax themselves? I would suggest that is a question of the basic form of democratic government. I mean, that is what we have.

Mr. CANNON. Okay.

Well, then, let me ask it this way: If you think that local voters should protect themselves by who they elect—I agree with that—is there a role for the Federal Government in eliminating the discriminatory taxes, especially in a case like cell phones, where you have this national market?

I mean——

Mr. LAY. I think there is a national market for lots of goods and services—petroleum distribution, electric, gasoline. All are subject to taxes that, under this definition of discrimination, would be called discrimination.

I would say——

Mr. CANNON. And we are working on several of those that you have just mentioned, of course.

Mr. LAY. Yes.

And, I guess, where I would have a problem is the notion that the Federal Government has the power, in our constitutional system, to, basically, rewrite and mandate all the State and local tax codes in this country.

You have to remember that State and local governments, unlike the Federal Government, rely primarily on transaction taxes. The Federal Government relies more on income taxes. And on the issue of regressivity, I would suggest to you that, although all transaction taxes are somewhat regressive, utility and telecommunications taxes are actually a bit less regressive than general sales taxes, because their burden falls relatively more on businesses relative to residences.

So if you shift it——

Mr. CANNON. I see that my time has expired.

But let me just point out, in response to that last point, that that is generally true. But the nature of telecommunications is different from the nature of electricity and other kinds of services like that, in that communication is the foundation for progress for people. That is individual progress I am talking about. And, therefore, the regressivity, I believe, that is reflected in these kinds of taxes on cell-phone devices, or what Ms. Lofgren calls "computational devices," is profoundly important.

And with that, Madam Chair, I yield back.

Ms. SÁNCHEZ. The gentleman yields back.

At this time, I would like to recognize Zoe Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Madam Chair.

And I went and, over the break, I had my staff get a copy of the innovation agenda that was rolled out by Speaker Pelosi, Congresswoman Anna Eshoo and myself, in September of 2005, actually. And on the front cover, there is a quote from John F. Kennedy.

And it goes like this: "The vows of this Nation can only be fulfilled if we are first. And, therefore, we intend to be first. Our leadership in science and in industry, our hopes for peace and security, our obligations to ourselves, as well as others, all require us to make this effort."

And in the innovation agenda, we outlined, really, five things that we needed to do. And number three was "Affordable Broadband Access for all Americans." That was right behind "Basic Research" and an "Educated Workforce."

And the reason why is that this is not just another good and service. Broadband is an enabler of everything else. As we said in the innovation agenda, the deployment of high-speed, always-on broadband, Internet and mobile communications is going to fuel the development of millions of new jobs in the U.S.

And just as railroads and highways did in the past, broadband and mobile communications are going to dramatically increase productivity, efficiency of our economy. And so this is an adopted policy of House Democrats. And it is our guiding principle of how we are going to sort through issues in the Nation's interest.

This isn't just something that is of interest to cities or counties. This is a nationwide policy issue, which is why we are here today.

Now, I just wanted to note—and then I will get into a quick question—the telecommunications companies aren't paying these taxes. I mean, they are here advocating, I think, because they are concerned that, at some level, when you get too high, usage will drop off. I am not saying they are a disinterested party. But they are not paying these taxes. It is individuals.

And, actually, the reason why I got interested in this is that, especially for low-income people, this is going to be the way to the Internet superhighway. And if we prevent low-income Americans from having that access to broadband, then our ability to meet the innovation-agenda goals is going to be impaired.

Now, it has been suggested that this is an unprecedented step to take this. I don't think that is correct. We did do the Internet-tax moratorium for exactly the same reason that this bill has been introduced. It is the same issue, which is broadband, and the enabler of innovation pursuant to our innovation agenda.

But I am wondering, Mr. Mackey, do you have other examples where Congress, because of a national policy issue, took a similar type of action?

Mr. MACKEY. Thank you. And I agree 100 percent with the premise that you just laid out.

Yes, there have been other examples where Congress has decided that there is a compelling national interest—back in the 1970's, when the railroad industry was in a lot of trouble. And what was going on is a lot of localities were sort of disproportionately taxing the property of railroads because they just had a sliver or ribbon of land that went through their community.

Congress decided it was in the national interest to have a national framework where local governments would be permitted to tax railroad property, and tax railroads, but not in a way that discriminates. So there is somewhat of a parallel to this.

There is also other instances, I think, with the airline and Interstate Motor Carrier Regulation, where Congress has stepped in and proscribed or prohibited local governments from taxing those things.

But, clearly, you know, we don't ask you to take this step lightly. And we have tried to work with localities, as I have said earlier——

Ms. LOFGREN. Right.

Mr. MACKEY [continuing]. For the past decade. But it is our feeling, for the reasons you stated, Representative Lofgren, that there is a compelling national interest that, if we set up a framework

where States and local governments can tax telecom—we can do so fairly, in a nondiscriminatory manner—we are going to grow the jobs. We are going to, actually, we think, create more tax revenue because of the applications that are going to run and the jobs that are going to be created——

Ms. LOFGREN. I am about to run out of time. And I do think the rationale—for example, hotel taxes—I mean, we did high hotel taxes when I was in local government, because it is always easier to tax somebody else's constituents.

But, you know, actually, people don't really look at the hotel tax. It is not the same kind of enabler of growth. It is not a fundamental building block of a high-tech innovation, educated society. It is not an enabler of other things in the same way that this is.

I had other questions, but I have run out of time, Madam Chairwoman. I don't want to abuse the process. So I yield back.

Ms. SÁNCHEZ. The gentlelady yields back.

Yes?

Mr. CANNON. Madam Chair, I would like to ask unanimous consent to have included in the record the opening statement by the Ranking Member of the full Committee, Mr. Lamar Smith.

Ms. SÁNCHEZ. Without objection, so ordered.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Madame Chair, I would like to thank you for bringing attention during this Congress to a variety of discriminatory taxes.

This is the latest in a series of hearings that have covered the Internet tax moratorium, the Mobile Workforce State Tax Simplification Act, the Business Activity Tax Simplification Act, and the State Video Tax Fairness Act.

I would also like to thank Ranking Member Cannon for his leadership on this and so many other issues before the Commercial and Administrative Law Subcommittee. He has been instrumental in getting many bills passed during his tenure on the Committee and his insight, knowledge, and commitment will be missed next year.

As for the "Cell Tax Fairness Act of 2008", through my involvement with the Internet tax moratorium and other matters it has become clear to me that telecommunications firms and consumers, and, in particular, wireless services, are taxed higher at the state level than many other businesses.

In our increasingly mobile economy, we should encourage the deployment of cell phone and wireless devices and not inhibit them through higher taxes. The fact that these devices travel through interstate commerce and facilitate interstate commerce certainly gives Congress the authority to constrain the states' taxing authority.

However, just because Congress has the authority to do something does *not* mean that it should necessarily exercise that authority in every case. I am well aware that the power to tax power has traditionally been within the purview of the states. And given our shaky economy, I can certainly sympathize with states' concerns about losing revenue because of Congressional intervention.

So, I look forward to hearing from all our witnesses to see if there is a way that we can weigh the disproportionate taxation of telecommunications companies and consumers against the needs of states' treasuries.

Ms. SÁNCHEZ. And I would also ask that the opening statement from the Chairman of the full Committee, Mr. Conyers, be entered into the record, as well——

Mr. CANNON. Thank you.

Ms. SÁNCHEZ [continuing]. And without objection, so ordered.

[The prepared statement of Chairman Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

As Members of Congress, we must carefully balance competing interests. We must ensure that the States do not burden interstate commerce through their taxing authority, while also ensuring that the authority of States to tax activity within their borders is maintained.

Today, we consider H.R. 5793, the "Cell Tax Fairness Act of 2008," which seeks to impose a five-year moratorium on any new discriminatory taxes and fees on mobile services, mobile service providers, and mobile service property.

According to reports, taxes and fees account for about 15% of a consumer's wireless services monthly bill. That burden seems higher than the burden imposed on other services and products. That burden could affect the free flow of commerce, stifle innovation, and be considered a regressive impact.

However, we are in the midst of a dire economic environment, where State and local revenues are declining fast, especially in my home state of Michigan. According to estimates, state and local governments rely on revenue from telecommunications for about $20 billion per year. Thus, we need to look carefully at any legislation, including this one, that could further impact State and local revenues and a state or local government's ability to provide its residents essential services.

I look forward to today's hearing, and hope it will achieve three critical objectives.

First, it should serve as a venue where we examine the taxes and fees imposed on wireless services and providers.

Second, this hearing should allow us to focus on H.R. 5793, which responds to concerns voiced by the wireless industry regarding what it perceives as a discriminatory burden imposed on them by State and local taxing authorities.

Third, this hearing should serve to begin a dialogue on State and local taxation of communications. And I urge each state and locality to revisit, simplify, and modernize its communications tax structure in light of technological advances.

I thank Chairwoman Sánchez for holding this important hearing, and I very much look forward to hearing today from the witnesses.

Mr. CANNON. And may I also apologize. We were laughing up here. And that is sometimes a little coarse. I just wanted to let people know that I was reading to staff the very kind remarks that Mr. Smith had made about me, which were kind enough to be laughed at.

Thank you, folks. We appreciate the seriousness of this panel, and our guests here. And I want to make it clear that we were laughing about something other than the subject matter here. Thank you.

Ms. SÁNCHEZ. Okay; duly noted, for the record.

At this time, I would recognize the gentleman from Florida, Mr. Keller, for 5 minutes of questions.

Mr. KELLER. Thank you, Madam Chairwoman.

Senator Clayborne, let me start with you. How long have you been in the Illinois State Senate?

Mr. CLAYBORNE. About 13½ years.

Mr. KELLER. Thirteen years—so you served with Senator Obama?

Mr. CLAYBORNE. That is correct.

Mr. KELLER. As you can tell from our questioning, it is a pretty bipartisan issue, at least, on the House side. Over on the Senate side, Senator McCain has introduced the cell-phone tax moratorium, S. 166, which he successfully got through the Commerce Committee.

Have you had a chance to talk with your colleague, U.S. Senator, Barack Obama, to see if you can persuade him along the same lines as Senator McCain, on this issue?

Mr. CLAYBORNE. No. No, I have not talked to Senator Obama about this issue.

Mr. KELLER. Do you have any sense of optimism that you can win him over?

No?

Ms. Mahoney, do you know where he is on this? You got him?

Ms. MAHONEY. I would say that you will not be able to convince the senator on this issue.

Mr. KELLER. All right. Okay—could have a vote present on this one here.

Let me turn to you, Mr. Mackey.

Now, I have noticed that my home state of Florida has about the third highest cell-phone taxes. And Virginia is sort of the middle of the pack—I think, around number 36. Yet, Florida sort of failed to pass their reform legislation to address this issue, while Virginia was quite successful.

What do you attribute the two dynamics of that to?

Mr. MACKEY. Well, I mean, I think Florida is—because you don't have an income tax, it makes it that much more difficult to try to replace the kind of money that is on the table.

I think, because Florida localities had, historically, been granted a large amount of tax autonomy, there was a—they were taxing at extraordinarily high rates. And so there was a lot of money that needed to be replaced. And, politically, they couldn't come up with—they got halfway to reform.

They made it so telecom companies don't have to file hundreds or thousands of returns for local jurisdiction, and they centralized. But, unfortunately—and this is the problem we face everywhere—they were unable to get the rate down to where there is not a significant disparity.

Mr. KELLER. All right. Well, let me ask you: You seem to think that these taxes have been a pretty good target for localities to increase. Why do you think they are choosing to increase the cell-phone taxes by a significant amount?

Mr. MACKEY. Well, I think some of it is a historical relic to the old days of regulation. I mean, the localities, because telecom companies had to use their rights of way, they had the ability to tax them and impose fees on them. And, then, when wireless came along to compete, and wireless didn't have that same situation, they had already had a well-established right, if you will, to tax communications companies.

And their argument was, "Reform equals 'Let us make wireless pay what we have historically made the wire-line guys pay'."

Mr. KELLER. Now, Mr. Lay—and I am just paraphrasing—sort of says, "Well, look. If you are city councilman comes up with some huge tax increase that you don't like on the cell phone, you have a remedy. Just vote him out." Why is that not a sufficient remedy under your view?

Mr. MACKEY. Well, in my opinion—and some of it gets back to what Mr. Cannon said. I think, a lot of times, you know, people are busy. And, you know, these bills come in. And, frequently, people don't focus on how much tax is being imposed on the bill.

In some respects, you know, it is a hidden tax. It is on the bill, but who is—people don't always go through their bills. So I think

one of the reasons is that it is a tax that can be raised without people paying a lot of attention to it.

Mr. KELLER. Ms. Mahoney, you are a local elected official. Would you have concerns if—you know, as someone sitting for election—if you had a big tax-increase vote on a cell-phone issue?

Ms. MAHONEY. I would be very concerned. And one of the things that, you know, I have said, is that I think it is so important if—I mean, if we are going to level the playing field——

Mr. KELLER. Right.

Ms. MAHONEY [continuing]. You know, let us level it.

But, I mean, my fear is we start preempting these things, you know, and pulling people out and separating them individually—who is going to be before you next?

Mr. KELLER. Right.

Ms. MAHONEY. At the local level, for us to not have the ability to say to our constituents—and we have to show them how the money is going to be used—how we are going to use it.

And so if I come to them and say, "Oh, we are just raising it because we are going to give the employees a raise," that is totally different than saying, "I am not going to be able to keep the fire department going. I am not going to be able to, you know, keep our 911 system going. I am not going to be able to do these things."

That is totally different. But that is the constituents that we speak to. And I think that is how you become elected—when you address the individual needs of the consumer.

Mr. KELLER. All right. Well, thank you.

I am sorry, Mr. Lay, I didn't get a chance to get to you. But my time is expired. And I am sure my other colleagues will follow up with that.

And I yield back to the balance of my time.

Ms. SÁNCHEZ. The gentleman yields back.

I really want to thank all of the witnesses for their testimony today, and, again, for being so patient through the interruption.

Without objection, Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses and ask that you answer as promptly as you can, so that we can make them a part of the record.

Without objection, the record will remain open for 5 legislative days, for the submission of any other additional material.

Again, thanks to everybody for participating in this hearing. And this hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 3:30 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

ANSWERS TO POST-HEARING QUESTIONS FROM GAIL W. MAHONEY, COMMISSIONER, JACKSON COUNTY, MICHIGAN, JACKSON, MI, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES

January 21, 2009

The Honorable Linda T. Sanchez
Chair, Subcommittee on Commercial
and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: September 18, 2008, Hearing on H.R. 5793
"Cell Tax Fairness Act of 2008"

Dear Chairwoman Sanchez:

On behalf of the National Association of Counties (NACo), I write in response to your letter of October 9, 2008.

1. You indicate in your written statement that the current economic problems state and local governments face along with passage of this legislation would "result in the preferential treatment of one technology over another." Please explain.

The proposed legislation would specifically prohibit so-called "discriminatory" taxes on wireless services. However, the legislation would permit "discriminatory" tax treatment of landline phones and VOIP technology. The tax discrimination that this legislation would create is enhanced by the fact that landline telephone access – and tax base – is shrinking.

NACo has called for the simplification of telecommunications taxes, but has consistently argued that any reform treat all similar services in a like manner, regardless of the technology used. Landline and wireless telecommunications are clearly similar, competing services. This legislation would result in expanding the tax rate differential between wireless and landline services and move us farther away from the goal of telecommunications tax reform.

2. Proponents of this legislation argue that it simply imposes a moratorium on new discriminatory taxes and fees, and therefore does not ban all taxes or even new taxes on wireless services. Please respond.

It is correct that the legislation does not ban all *current* taxes on wireless services. However, this fails to recognize the fact that some jurisdictions impose relatively low wireless services taxes compared to other jurisdictions. This legislation would prohibit those jurisdictions from raising rates on wireless services as more residents shift away from landline services.

Furthermore, while the legislation would ostensibly permit a jurisdiction to impose a new tax on wireless services, such a tax must be imposed on *all* other services, goods, or businesses. This requirement intrudes into historically-protected state and local tax classifications. This would

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result in other industries seeking similar special federal tax protection from state and local taxes. This legislation would essentially prohibit state and local governments from making any tax classifications at all – regardless of how reasonable such a classification may be – with respect to wireless services.

3. In your written testimony, you state that "telecommunications tax policy has not kept pace with the industry's growth and our current tax system is outdated." What efforts have state and local governments made to update their tax structures regarding telecommunications? Will passage of this legislation spur states and locals to reform quicker?

State and local governments have been working in an effort to reform the existing telecommunications tax structure on a nationwide basis. Currently, NACo is engaged in ongoing discussions with Congressional offices, the National Governors Association, the United States Conference of Mayors, the National League of Cities, and others to arrive at a mutually agreeable resolution to the problems surrounding today's telecommunications taxing scheme. Local governments have concluded that any meaningful reform measures must be both technology and revenue neutral.

4. If there is anything to which you would like to respond or clarify from the hearing, please do so.

State and local government budgets are under enormous strain. Counties are faced with declining property tax bases, sales tax revenues are down, demand on public services is up, credit markets are frozen, and so on. Now is not the time for Congress to give preferential tax treatment – at the expense of local governments – to the wireless industry.

Please accept my sincere appreciation for the opportunity to testify at the September 18th hearing. And thank you for allowing me to submit these responses to your follow-up questions, which were delayed due to personal illness. Please feel free to contact me if you have further questions or concerns.

Yours truly,

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ANSWERS TO POST-HEARING QUESTIONS FROM THE HONORABLE JAMES CLAYBORNE, ILLINOIS STATE SENATOR, BELLEVILLE, IL

Q. 1 – If Congress passes this legislation, what impact would it have on state and local revenues?

A. 1 – This legislation would not have any current impact on state and local revenues. All existing taxes and fees imposed upon wireless services would continue to be imposed and collected under this legislation. Additionally, H.R. 5793 would not preclude state and local government from increasing or imposing new taxes on wireless services if they are generally imposed upon other goods and services.

The legislation is narrowly focused to only preclude state and local governments from enacting NEW discriminatory taxes imposed upon wireless services when they are not also broadly imposed upon other goods and services.

Q. 2 – As a state senator, you would seemingly be wary of federal intervention into state and local government's authorities to tax whom and how much. Why do you support this legislation fully knowing that it could possibly lead to further federal intervention?

A. 2 – As a state senator, I am very wary of federal intervention, specifically when it involves tax matters. However, when one takes a step back and sees how important broadband services are to our economy and the role that wireless technology has, and will continue to play, in delivering those services to consumers, I think the federal, state and local governments all have a role in working together to ensure that we don't burden this technology with an onerous tax structure.

I would like to say that the principles endorsed and promoted by NCSL are enough and that each state will act on its own accord to start addressing the existing tax structure imposed upon all communication services. Unfortunately, we have not seen a lot of progress in that direction and it certainly seems reasonable to me that we should not allow the situation to continue to worsen at a time when we continue to push for these much needed reforms. I do not think it is unreasonable for Congress to say do not tax these services unfairly.

Q. 3 – If there is anything to which you would like to respond or clarify from the hearing, please do so.

At a time when most policymakers are continuing to look for ways to provide affordable access to broadband services for their constituents, this legislation seems to strike the right balance in our system of federalism. It is not creating an unfunded mandate by ordering states to eliminate existing tax revenues imposed upon such services. Nor is it forcing states to implement programs to provide access to such services without providing the money for states to pay for such programs. It is simply identifying that state and local governments should not target wireless consumers unfairly to raise additional revenues when their existing tax structure might come up short. That seems to be a very reasonable ask in today's economy.

ANSWERS TO POST-HEARING QUESTIONS FROM SCOTT MACKEY, ESQUIRE, KIMBELL SHERMAN ELLIS, MONTPELIER, VT

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Answers to Written Questions
From Chairwoman Sanchez

September 18, 2008 Hearing
on the
Cell Phone Tax Fairness Act of 2008

Submitted by
Scott Mackey
Partner, Kimbell Sherman Ellis LLP
Montpelier, VT

Q1. According to the FCC, wireless industry subscribership has grown 158% and wireless industry revenue 124% since 2000. Indeed, in Mr. Lay's written statement, he indicates that there is no evidence that the state and local tax and fee burden on the wireless industry has had any measurable impact at all on wireless industry growth. If this is correct, than how can the wireless industry suggest that the overall burden is onerous?

A: It is important to remember that consumers are the ones bearing the brunt of these taxes. The industry has never argued that discriminatory taxes would stop people from using cell phones, as consumer surveys show that cell phones are just too important in people's lives for them to give them up completely. We have argued that the imposition of new discriminatory taxes causes consumers to use fewer minutes, use fewer new services, and can drive subscribers to use cheaper plans.

The reason that subscribership has grown so dramatically is due to the tremendous reduction in prices for wireless service. In the last eight years, the per-minute price of wireless service has declined from $.25 to $.05. As the price dropped, tens of millions of new consumers found that they could afford service for the first time or they could afford additional new services like text messaging or digital downloads. In particular, the emergence of attractively-priced family share plans – where additional lines can be added for $10 per month – has led to a dramatic increase in households with multiple phones.

Offsetting the tremendous price reductions enjoyed by consumers has been the growth of new taxes on wireless service. My studies have show that taxes on wireless service have increased faster than taxes on other goods and services sold at retail. Economists who have studied the relationship between the price of wireless service and the quantity

demanded by consumers have found that the "elasticity of demand" for wireless service is about -1.2%.[1] This means that every 1% increase in the price of service generated by new taxes on wireless service decreases purchases by 1.2%, since consumers make purchasing decision based on the "bottom line" price of the service that includes taxes and fees.

Given the relationship between price and quantity purchased, wireless taxes have clearly prevented consumers in some states from enjoying the full benefits of reductions in prices for wireless service. So the appropriate question is really, "What would the growth have been but for the discriminatory taxes on wireless consumers?" And more importantly in the context of H.R. 5793, "Should Congress prevent new discriminatory taxes that disproportionately burden the poor and reduce utilization of new and emerging wireless services?" I would argue that the answer to that question is yes.

Q2: If Congress passes this legislation, what impact would it have on state and local revenues? On consumers? On wireless service providers?

A: H.R. 5793 is prospective in its application, so it would not have any impact on existing state and local tax revenues. Any existing discriminatory taxes and fees that are currently in place would not be pre-empted by this bill. The bill would prevent states and localities from imposing new discriminatory taxes on wireless consumers or providers. However, the bill would not prevent states or localities from increasing sales taxes, property taxes, or other broad-based taxes that apply to wireless consumers and providers in addition to other taxable goods and services.

The bill would benefit wireless consumers by preventing them from being singled out for new taxes. New studies have found that a disproportionate number of "wireless only" households are low-income households, with as many as half of all "wireless only" households earning less than $40,000 per year. As wireless taxes are particularly regressive due to the emergence of flat per-line impositions, this legislation will disproportionately benefit low- and moderate-income Americans.

This legislation will also create a stable climate for investment in advanced generation wireless networks by preventing new discriminatory state and local taxes on wireless property and equipment. A stable investment climate will encourage new investment in these networks, which in turn will benefit businesses with higher wireless speeds that allow the deployment of new, productivity-enhancing technologies. Consumers will benefit as wireless broadband networks are deployed more broadly, giving consumers additional broadband choices that will put downward pressure on prices through enhanced competition.

[1] J. Gregory Sidak and Allan Ingraham, "Do States Tax Wireless Service Efficiently? Evidence on the Price Elasticity of Demand." Washington, DC: American Enterprise Institute, April 2003.

Q3: In Mr. Lay's written statement, he contends that "when stripped of USF and E911 fees and other user-specific fees, industry's own data concerning the supposed burden of state and local taxes on the wireless industry fail to show any appreciable higher tax burden on wireless than on other business sectors. In fact, wireless enjoys a lower burden than other industry sectors." Please respond.

A: The data Mr. Lay refers to in his written statement is from a study that I conducted and authored on this topic. It measures federal, state, and local taxes and fees on customer bills and does not measure property taxes, business income taxes, and other taxes imposed on companies that do not appear on customer bills. The study includes the federal Universal Service Fund as well as 911 fees and a few other telephone type fees.

Mr. Lay is wrong to assert that removing these fees and the federal USF charge results in a tax burden no higher than general business sectors. In fact, after eliminating these fees and charges from the calculation, 16 states impose discriminatory tax burdens on wireless consumers.

The chart below lists these states and compares the effective tax rates on wireless consumers as compared to the general retail tax rate:

STATE	WIRELESS RATE[2]	GENERAL RETAIL RATE
Nebraska	12.9%	7.0%
Washington	15.0%	8.7%
Florida	15.2%	7.0%
New York	12.9%	8.2%
Missouri	15.7%	7.2%
Rhode Island	12.0%	7.0%
Pennsylvania	11.5%	6.5%
Illinois	13.25%	9.0%
California	8.75%	8.1%
Utah	10.3%	6.7%
South Dakota	10.0%	6.0%
DC	10.0%	5.8%
North Dakota	8.5%	6.0%
Maryland	9.5%	6.0%
Kentucky	8.8%	6.0%
Indiana	7.4%	6.0%

In terms of Mr. Lay's assertion that "…wireless enjoys a lower burden than other industry sectors", there are only three states where wireless consumers enjoy lower rates than the general retail rate. These states are Nevada, Idaho, and Louisiana. Nothing in H.R. 5793 would preclude these states from expanding their general sales and use tax base to include wireless service should they choose to do so.

[2] Excluding federal USF, state and local 911 fees, and other special purpose fees excluded in H.R. 5793.

Q4: During the hearing, Mr. Lay criticized CTIA's assertion that "about 15% of each customer's monthly bill goes to taxes and fees" by showing that H.R. 5793 excludes federal taxes and fees and some state and local fees, even though the 15% CTIA offers includes some of those federal, state, and local taxes and fees. Please respond.

A: As I mentioned in my answer to Question 2 above, Mr. Lay's assertion that there is no state and local discrimination against wireless consumers is wrong. Excluding the federal USF, 911, and other fees excluded by the legislation still leaves 16 states with discriminatory consumer taxes. Examples include: Nebraska (wireless-12.9% vs. general retail - 7%), Washington (wireless – 15.0% vs. general retail – 8.7%), Florida (wireless – 15.2% vs. general retail – 7%), and others listed on the chart above.

Q5: If there is anything to which you would like to respond or clarify from the hearing, please do so.

A: I understand the fundamental argument that states (and their local governments if granted authority by the state legislature) should have the authority to raise revenues from their citizens as they see fit. However, Congress has in some instances limited state taxing powers when such taxes discriminate against or unreasonably burden interstate commerce by hampering economic growth of commercial activity that is fundamentally interstate in nature.

For example, recognizing that wireless communications services and networks are fundamentally interstate in nature, Congress passed the Mobile Telecommunications Sourcing Act (PL 106-272) in 2001 to impose national uniform rules for "sourcing" wireless calls, which may cross numerous taxing jurisdictions and therefore demanded a uniform, national approach for state and local tax purposes.

Congress also acted in 1976 to end discriminatory state and local taxation of railroads because states and localities were applying property taxes that disproportionately burdened railroad property. In adopting the Railroad Revitalization and Regulatory Reform Act of 1976, commonly known as the "4-R Act," Congress recognized that rail networks were fundamentally interstate in nature and that the accumulated impact of discriminatory taxation in multiple jurisdictions could have a damaging impact on the entire US economy.

Similarly, recognizing the interstate nature of air transportation, Congress has also acted in 1982 as part of the Airport and Airway Improvement Act to limit the ability of states and localities to tax airline tickets and air transportation services and, much like the 4-R Act, to prohibit discriminatory state and local property taxes on air carrier transportation property. And prior to that, as part of the Motor Carriers Act of 1980, Congress enacted provisions similar to those of the 4-R Act to prohibit discriminatory state and local property taxes on motor carrier transportation property. Again, in these instances,

Congress weighed the tradeoffs between state sovereignty and the national economy and found that all citizens would benefit from limited pre-emption of state taxing authority.

Like rail networks, wireless networks are privately owned and operated infrastructure that are fundamental to the economic competitiveness of the United States. Imposition of discriminatory taxes on this important national economic asset may hinder the further development of that infrastructure and make America less productive and competitive in the global marketplace. It is well documented that wireless services and networks are dramatically improving the competitiveness and productivity of American businesses and contributing greatly to the health and safety of American consumers. H.R. 5793 would only target new discriminatory taxes that burden individuals and businesses that use wireless services and wireless providers that invest in the wireless networks that help make America more productive and competitive.

ANSWERS TO POST-HEARING QUESTIONS FROM TILLMAN L. LAY, ESQUIRE, SPIEGEL & MCDIARMID, LLP, WASHINGTON, DC, ON BEHALF OF THE U.S. CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADMINISTRATORS

SPIEGEL & MCDIARMID LLP

GEORGE SPIEGEL (1919-1997)
ROBERT C. McDIARMID
ROBERT A. JABLON
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October 24, 2008

Via Email to (Adam.Russell@mail.house.gov)

The Honorable Linda T. Sánchez
Chair, Subcommittee on Commercial
and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: September 18, 2008, Hearing on H.R. 5793, the "Cell Tax Fairness Act of 2008"

Dear Chairwoman Sánchez:

On behalf of the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the National Association of Telecommunications Officers and Advisors and the Government Finance Officers Association, I write in response to your letter to me of October 9, 2008.

Attached is a copy of the portion of the September 18 hearing transcript encompassing my testimony with my proposed corrections to errors in transcription marked by hand. I respectfully request that these errors in transcription be corrected in the record.

The balance of this letter responds to the additional questions directed to me in your letter of October 9.

1. **H.R. 5793 simply imposes a five-year moratorium on new discriminatory taxes on wireless services. State and local governments will still be able to tax wireless services and providers as long as they are not discriminatorily applied. Why should Congress not impose such a simple moratorium when it is not banning all taxes on wireless services?**

A federal moratorium giving one industry special protection from state and local tax classifications poses problems at two fundamental levels.

The general problem is that H.R. 5793 represents a federal intrusion into historically-protected state and local tax classifications. Such an intrusion would inevitably lead to other industries seeking similar special federal protection from state and local taxes. (After all, lots of industries can claim that they are important to the nation's economy.) And that, in turn, would lead to the federalization of state and local tax classifications, the undermining of our entire system of federalism, and a direct threat to the fiscal health of state and local governments.

The more specific problem stems from H.R. 5793's definitions of "new discriminatory tax" and "generally imposed," coupled with the question's apparent assumption that all state and localities already tax wireless services and landline telecommunications services at the same rate. Under § 2(b)(4) of H.R. 5793, any wireless tax is a "new discriminatory tax," and thus prohibited, if it is "not generally imposed, or is generally imposed at a lower rate," on "other services" or "tangible personal property," or on "other persons that are engaged in businesses other than the provision of mobile services." This definition, when coupled with § 2(c)(3)(A)'s definition of "generally imposed," means that state and local governments would be prohibited from making *any* tax classification at all, no matter how reasonable, with respect to wireless services. Instead, wireless providers and services would be exempt from any state or local taxation unless they are taxed at a rate equal to the tax rate that is imposed on *all* other services, goods or businesses (assuming there is such a single general tax rate in a given locality, which is not always true). Indeed, read literally, H.R. 5793's "new discriminatory tax" definition would arguably exempt wireless services even from many state and local general sales and use taxes because many such taxes exempt food and other items and thus might not meet H.R. 5793's tests of applying to all "other" goods, services or businesses and of being "generally imposed."

H.R. 5793's "new discriminatory tax" definition would actually lead to *increased* tax discrimination in the sense that term is normally understood. "Tax discrimination" usually means taxing like, and competing, services differently. Landline and wireless telecommunications are clearly "like," and competing, services. Yet for those states and localities that subject landline telecommunications, and often all utility services, to higher tax rates than the general sales tax rate, H.R. 5793 would actually *compel* discriminatorily preferential tax treatment of wireless services vis-à-vis landline telecommunications services and other utility services.

Moreover, the tax discrimination between wireless and landline services that H.R. 5793 would create would be exacerbated by the current trend of declining landline telephone access lines. The landline telecommunications service tax base is shrinking, and because H.R. 5793 would bar states and localities from broadening that tax base to include "like" wireless services, there would be upward pressure on state and local landline telecommunications and utility tax rates to offset tax revenue losses stemming from the shrinking tax base. The resulting expanding tax rate differential between wireless and landline services would put us further away from the goal of telecommunications tax reform: To tax telecommunications services at uniform rates.

Finally, please forgive state and local governments if they are more than a bit skeptical of the notion that, if enacted, H.R. 5793 would result only in a five-year moratorium. The history of the Internet Tax Freedom Act ("ITFA") shows that once Congress imposes a supposedly temporary moratorium on certain types of state and local taxes, the moratorium tends to become all-but-permanent due to Congress' apparent fear of being accused of "raising taxes" if it allows the moratorium to expire. As you may recall, in 1998 the ITFA was originally justified as a temporary measure due to the supposedly embryonic nature of Internet services. The Internet can in no sense still be considered embryonic. Furthermore, there is no evidence that the ITFA has promoted Internet growth: Internet availability and subscribership are just as robust in states with grandfathered pre-ITFA Internet taxes as they are in states with no pre-ITFA grandfathered taxes. Yet the ITFA persists, extended again last year until 2014. So let there be no misunderstanding about what is at stake in H.R. 5793: The risk of an all-but-permanent, federally-compelled state and local discrimination between wireless and landline telecommunications services.

2. In his written statement, Mr. Mackey contends that "excessive new wireless taxes imposed by thousands of state and local governments are a deterrent to new broadband network investments." When the United States is falling behind other developed countries in broadband access, we need to do all that we can to improve this country's broadband reach. Why should Congress not pass this legislation to ensure that there are no excessive discriminatory taxes imposed on wireless services and providers which may slow broadband growth?

As an initial matter, as noted in my testimony, Mr. Mackey's claim about supposedly "excessive" state and local wireless taxes is not supported by his own factual evidence. To pump up his figures for supposedly "excessive" state and local wireless tax rates, he includes a series of federal, as well as state and local, fees and taxes – such as federal excise taxes, federal universal service fund ("USF") charges, state USF charges, state and local E-911 fees and even generally applicable state and local taxes – that H.R. 5793 exempts from its reach. When these fees and charges are removed from Mr. Mackey's calculations, the true state and local tax rates for wireless that his evidence shows are far lower than he claims.

Second, there is no evidence remotely supporting the notion that state and local wireless taxes have slowed or deterred wireless, or wireless broadband, deployment or subscribership. In fact, the evidence is directly to the contrary. As set forth in my testimony, wireless subscribership has grown by leaps and bounds over the last decade, supposedly "excessive" state and local wireless taxes notwithstanding.

Likewise, there is no evidence that wireless service, or wireless broadband, deployment or subscribership is lower in states or localities with higher wireless tax rates than it is in states and localities with lower wireless tax rates. Mr. Mackey's own data indicate that among the states with the highest weighted average wireless service tax rates are Washington, Florida, New

York, Texas, Missouri, Pennsylvania, Illinois and California.[1] I doubt anyone would seriously suggest that those states are the laggards among the states in wireless subscribership or deployment. Nor is there any evidence suggesting that wireless tax rates in the U.S. exceed wireless tax rates in all of the other countries that have greater broadband deployment and subscribership than the U.S.

Local governments share the Subcommittee's concerns about the pace of broadband access and deployment in the U.S. We resent, however, the wireless industry's attempt to portray state and local government taxes as the scapegoat for our nation's disappointing world standing in broadband access. State and local elected officials, every bit as much as members of Congress, recognize the economic importance of broadband access and very much want their constituents to have affordable broadband access. But state and local elected officials also must balance their budgets and therefore recognize that, without adequate tax revenues to pay for police, fire, schools, health care, roads and streets, and other critical local economic infrastructure, broadband access would be nothing more than an economic engine with no chassis.

I would like to add a final note on this topic to correct an apparent misunderstanding about wireless taxes and wireless broadband Internet access that occurred at the September 18 hearing. Rep. Lofgren suggested that wireless taxes might slow or deter wireless broadband Internet access deployment and subscribership. For reasons noted above, the evidence does not support that hypothesis. But there is another misperception underlying that claim. The ITFA applies to all Internet access services, whether landline or wireless. Thus, while for reasons noted above and elsewhere, local governments do not support the ITFA, the Internet tax moratorium nevertheless applies to wireless Internet access services. Therefore, to the extent that one believes that the ITFA promotes broadband Internet access deployment and subscribership (which we do not), wireless broadband Internet access providers already enjoy the federal tax preemption benefit of the ITFA. In contrast, H.R. 5793, when coupled with the ITFA, would give wireless service providers a unique, and discriminatorily preferential, federal tax preemption benefit that landline broadband Internet access service providers lack: double-preemption from not only state and local Internet access taxes but also telecommunications taxes as well.

3. At the hearing, during one of your responses to a question posed by Mr. Cannon, you delved into the issue of regressive taxes. You were unable to finish your discussion on that issue, so please expound on your response.

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[1] Scott Mackey, "Excessive Taxes and Fees on Wireless Service: Recent Trends," 47 *State Tax Notes*, 519, 522 at Table 2 (Feb. 18, 2008). *See also* Written Testimony of Scott R. Mackey, Hearing on H.R. 5793, the "Cell Tax Fairness Act of 2008," at 4 (Sept. 18, 2008).

My basic point was that, contrary to the claims of some of H.R. 5793's proponents, forcing state and local governments to move toward a single transaction tax rate, as H.R. 5793 tends to do, would make those governments' transaction-based tax systems *more*, not less, regressive. Because most local governments and some state governments are restricted by state law or state constitution to relying on more regressive transaction tax systems rather than more progressive income tax systems, their ability to create different tax classifications among transaction taxes (in other words, having different transaction tax rates for different categories of goods and services) is typically the only means available for local and state governments to soften the inherent regressitivity of their transaction-based tax systems.

Taxing utility services at a higher rate than general sales taxes is a classic example. Unlike the case with many other consumer goods and services, businesses consume proportionately more utility services than do residential taxpayers. As a result, imposing a higher utility tax than a general sales tax tends to shift the overall local tax burden more to business taxpayers and away from residential taxpayers, thereby lessening somewhat the regressivity of a transaction-based tax system. On the other hand, requiring that utility-type services be taxed at the same rate as all other consumer goods and services, as H.R. 5793 would do with respect to wireless services, has the opposite effect: It would shift the overall local tax burden away from business taxpayers and toward residential taxpayers, making a transaction-based tax system more regressive.[2]

Telecommunications services generally are often subject to utility tax rates, or at least to higher tax rates than general sales taxes, because much like other utility services, businesses typically are proportionately larger consumers of telecommunications services than residential households. Whether that is also true of wireless services may not be as clear, but there is no compelling reason to believe it is not. It is certainly not irrational or unreasonable for a state or local government to classify wireless services for tax purposes based on an assumption that wireless services share this attribute with landline services, especially when such a classification also would eliminate any tax discrimination between landline and wireless services that compete with one another.

Mr. Cannon also suggested that telecommunications services are different from other utility services, such as electricity, in that telecommunications services "are profoundly important to the development of society" and are "the foundation for progress for people." I respectfully take issue with that distinction between telecommunications and other utility services. It is true that telecommunications services are vitally important, but that is no less true of other utility services. Indeed, absent electric service, the classic utility service, there would be

[2] I note that, for somewhat different reasons, the ITFA likely has regressive tax effects as well. Typically older and/or less well-to-do residents continue to rely more heavily on plain old telephone services to communicate and thus must continue to pay local telecommunications taxes, while businesses, as well as typically younger and/or more well-to-do residents, tend to rely on Internet access for most of their communications needs and are thus largely shielded by the ITFA from local telecommunications taxes.

no telecommunications or broadband services at all. Yet the fact remains that essential utility services, including electric services, are typically taxed at a higher rate than the general sales tax. (Indeed, non-telecommunications utility services on average are also taxed at a significantly higher rate by state and local governments than telecommunications services.)

4. If there is anything to which you would like to respond or clarify from the hearing, please do so.

In addition to lessening the inherent regressivity of a transaction-based tax system, imposing higher taxes on utility services, including telecommunications, also serves another perfectly rational and important tax policy interest: relative stability in anticipated tax revenue. Demand for utility services, including telecommunications services, tends to be less elastic than demand for many other consumer goods and services, especially during economic downturns. Thus, utility taxes provide a more stable and predictable tax base for local government tax revenue budgeting and planning. That is an important tax classification policy goal in any circumstance, but especially so in this economic environment. The current economic downturn has placed an enormous strain on state and local government budgets, which are caught in a vise of declining property tax bases, sales tax revenue declines, the tight municipal bond market, and higher interest rates, on the one hand, and increased demand for the essential services they provide, on the other.

I do not mean my answers to suggest that imposing a higher tax rate on utility services, or wireless or other telecommunications services, is the only rational tax policy for state and local governments to follow. To the contrary, while some local governments follow that tax policy, others do not impose any tax at all on wireless or other telecommunications services, or impose the same tax on telecommunications services as on many other goods and services. That is precisely what our system of federalism envisions with respect to state and local tax classification policy: Each state and locality tailors its tax classification system to best meet the needs and preferences of its residents, and retains the flexibility to revise or change its tax classifications and/or rates in response to changing revenue needs and economic conditions.

What I do mean to suggest is that there are perfectly sound and reasonable tax policy justifications to tax telecommunications services, including wireless services, at something other than the general sales tax rate, and that there has been no rational or factually supported justification offered for federal intrusion into such state and local tax classifications.

It bears emphasizing that the intrusion into state and local tax classifications that H.R. 5793 represents would have significant adverse consequences not only for local governments and their residents, but for the nation as a whole. Given that there is no correlation, much less any causation, between local wireless tax rates and wireless and broadband subscription or deployment, the most likely result of a wireless tax moratorium would *not* be to spur wireless growth further, but rather to transfer money out of already-strapped state and local government budgets and into the pockets of the wireless industry. And the moratorium also would mean that residents would see either an increase in the other local taxes they must pay to offset the

resulting tax revenue loss, or a decrease in funding for police, fire, schools, local infrastructure and other essential services that local governments provide to their residents and to the nation as a whole. This is certainly not the time for Congress to be considering ways to tie the fiscal hands of state and local governments.

* * * * *

Please accept my thanks for the opportunity to testify at the September 18 hearing, and to respond to your additional follow-up questions. Should you or any other Subcommittee member or member of the Subcommittee staff wish to ask further questions or seek further information, please feel free to contact me.

Very truly yours,

/s/
Tillman L. Lay

On behalf of the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the National Association of Telecommunications Officers and Advisors and the Government Finance Officers Association

Attachment

cc: Ron Thaniel
Larry Jones
Carolyn Coleman
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