

CELL TAX FAIRNESS ACT OF 2009

HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 1521

JUNE 9, 2009

Serial No. 111-41

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

U.S. GOVERNMENT PRINTING OFFICE

50-140 PDF

WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
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CELL TAX FAIRNESS ACT OF 2009

TUESDAY, JUNE 9, 2009

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

The Subcommittee met, pursuant to notice, at 11:35 a.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Delahunt, Watt, Sherman, Lofgren, Scott, Franks, Smith, Jordan, and Issa.

Staff Present: (Majority) Norberto Salinas, Counsel; Adam Russell, Professional Staff Member; and (Minority) Daniel Flores, Counsel.

Mr. COHEN. This hearing of the Committee on the Judiciary 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. I will now recognize myself for a short statement.

In 2000, the National Governors' Association issued a report concluding that existing State and local telecommunications tax systems were inefficient, complex, and not competitively neutral. However, only some States have reformed their telecommunications tax policies, with many others possibly losing out on economic growth while costing their residents billions of dollars in taxes and fees.

Most State and local tax policies do not reflect today's market for communication services, particularly the wireless industry. For example, some jurisdictions impose both a gross receipts tax and a general sales tax on wireless services. Others impose higher tax rates on wireless services when compared to other services. Still other States arguably discourage investments in telecommunications infrastructure by imposing excessive taxes on the telecommunications industry's capital investments.

These forms of discriminatory taxation affect the pocketbooks of consumers. This has the effect of chilling investment and impacting interstate commerce.

Having been a legislator, I am aware of the need for revenue and also the difficulties sometimes in catching up with technology.

Today we hold a hearing on H.R. 1521, the "Cell Tax Fairness Act of 2009." H.R. 1521 would impose a 5-year moratorium on any new discriminatory tax with respect to mobile services, mobile service providers, or mobile service property. The legislation would pre-

vent increasing taxes imposed solely on wireless subscribers and wireless providers. More importantly, the 5-year moratorium would provide the telecommunications industry and the State and local governments the opportunity to come together and work on reforming the current communications tax structure. Doing so will maintain a steady stream of revenue for State and local governments while ensuring a fair tax burden among communications mediums, including wireless services.

It reminds me of Lyndon Johnson: Let us come together.

This hearing will provide Members of the Subcommittee the opportunity to hear testimony from State and local governments' reliance on taxes and fees on wireless services. Members will also hear testimony about how those taxes and fees impact consumers and wireless providers.

Finally, Members will hear testimony about how important affordable access to wireless services is to the growth of broadband access in this country.

This testimony should help us determine whether Congress should intercede with this legislation. I am cognizant of the current plight that State and local governments are experiencing vis-a-vis revenue. They are all cash strapped and I can sympathize with their concerns. They receive lower revenues but still are expected to provide essential services.

This legislation is not intended to affect current State and local Government revenues. In fact, H.R. 1521 will not prevent taxing authorities to continue to tax wireless services and providers. It merely imposes a short moratorium on certain new discriminatory taxes. We need fair tax policies to encourage capital investment to help consumers.

Accordingly, I look forward to today's testimony.

I now recognize my colleague, the distinguished Ranking Member of the Subcommittee, Mr. Franks, for his opening remarks.

[The bill, H.R. 1521, follows:]

111TH CONGRESS
1ST SESSION

H. R. 1521

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

MARCH 16, 2009

Ms. ZOE LOFGREN of California (for herself, Mr. FRANKS of Arizona, Mr. COHEN, Mr. SMITH of Texas, Mrs. BONO MACK, Mr. SENSENBRENNER, Ms. ESTIHO, Mr. COBLE, Ms. JACKSON-LEE of Texas, Mr. WEXLER, Mr. JORDAN of Ohio, Mr. GUTIERREZ, Mr. ISSA, Mr. GONZALEZ, Mr. CARDOZA, Mr. FORBES, Mr. COSTA, Mr. WITTMAN, Mr. BACA, Mr. RADANOVICH, Mr. GENE GREEN of Texas, and Mr. BERRY) 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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Cell Tax Fairness Act
5 of 2009”.

1 **SEC. 2. MORATORIUM.**

2 (a) IN GENERAL.—No State or local jurisdiction shall
3 impose a new discriminatory tax on or with respect to mo-
4 bile services, mobile service providers, or mobile service
5 property, during the 5-year period beginning on the date
6 of enactment of this Act.

7 (b) DEFINITIONS.—In this Act:

8 (1) MOBILE SERVICE.—The term “mobile serv-
9 ice” means commercial mobile radio service, as such
10 term is defined in section 20.3 of title 47, Code of
11 Federal Regulations, as in effect on the date of en-
12 actment of this Act, or any other service that is pri-
13 marily intended for receipt on, transmission from, or
14 use with a mobile telephone, including but not lim-
15 ited to the receipt of a digital good.

16 (2) MOBILE SERVICE PROPERTY.—The term
17 “mobile service property” means all property used
18 by a mobile service provider in connection with its
19 business of providing mobile services, whether real,
20 personal, tangible, or intangible and includes, but is
21 not limited to goodwill, licenses, customer lists, and
22 other similar intangible property associated with
23 such business.

24 (3) MOBILE SERVICE PROVIDER.—The term
25 “mobile service provider” means any entity that sells

1 or provides mobile services, but only to the extent
2 that such entity sells or provides mobile services.

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

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

9 (i) any mobile service and is not gen-
10 erally imposed, or is generally imposed at
11 a lower rate, on or with respect to, or
12 measured by the charges, receipts or reve-
13 nues from, other services or transactions
14 involving tangible personal property;

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

20 (iii) any mobile service property and is
21 not generally imposed, or is generally im-
22 posed at a lower rate, on or with respect
23 to, or measured by the value of, other
24 property that is devoted to a commercial or
25 industrial use and subject to a property

1 tax levy, except public utility property
2 owned by a public utility subject to rate of
3 return regulation by a State or Federal
4 regulatory authority; and

5 (B) was not generally imposed and actually
6 enforced on mobile services, mobile service pro-
7 viders, or mobile service property prior to the
8 date of enactment of this Act.

9 (5) STATE OR LOCAL JURISDICTION.—The term
10 “State or local jurisdiction” means any of the sev-
11 eral States, the District of Columbia, any territory
12 or possession of the United States, a political sub-
13 division of any State, territory, or possession, or any
14 governmental entity or person acting on behalf of
15 such State, territory, possession, or subdivision and
16 with the authority to assess, impose, levy, or collect
17 taxes or fees.

18 (6) TAX.—

19 (A) IN GENERAL.—The term “tax” means
20 any charge imposed by any governmental entity
21 for the purpose of generating revenues for gov-
22 ernmental purposes, and is not a fee imposed
23 on an individual entity or class of entities for
24 a specific privilege, service, or benefit conferred
25 exclusively on such entity or class of entities.

1 (B) EXCLUSION.—The term “tax” does
2 not include any fee or charge—

3 (i) used to preserve and advance Fed-
4 eral universal service or similar State pro-
5 grams authorized by section 254 of the
6 Communications Act of 1934 (47 U.S.C.
7 254); or

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

11 (c) RULES OF CONSTRUCTION.—

12 (1) DETERMINATION.—For purposes of sub-
13 section (b)(4), all taxes, tax rates, exemptions, de-
14 ductions, credits, incentives, exclusions, and other
15 similar factors shall be taken into account in deter-
16 mining whether a tax is a new discriminatory tax.

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

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

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

6 (i) specific services;

7 (ii) specific industries or business seg-
8 ments; or

9 (iii) specific types of property; and

10 (B) the term “new discriminatory tax”
11 shall not include a new tax or the modification
12 of an existing tax that—

13 (i) replaces one or more taxes that
14 had been imposed on mobile services, mo-
15 bile service providers, or mobile service
16 property; and

17 (ii) is designed so that, based on in-
18 formation available at the time of the en-
19 actment of such new tax or such modifica-
20 tion, the amount of tax revenues generated
21 thereby with respect to such mobile serv-
22 ices, mobile service providers, or mobile
23 service property is reasonably expected to
24 not exceed the amount of tax revenues that
25 would have been generated by the respec-

1 tive replaced tax or taxes with respect to
2 such mobile services, mobile service pro-
3 viders, or mobile service property.

4 **SEC. 3. ENFORCEMENT.**

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

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

○

Mr. FRANKS. Thank you, Mr. Chairman. Mr. Chairman, I would like to start by thanking the Chair for holding this hearing. I really appreciate what you are doing today. Today's hearing is the second in less than a year on this topic.

H.R. 1521, the Cell Tax Fairness Act of 2009, has 112 cosponsors in the 111th Congress. This is a nearly identical amount of support to a similar bill in the 110th Congress. Mr. Chairman, I am honored to be one of those 112 sponsors, as I know you are. And I hope that with your leadership and that of Ms. Lofgren, we can have a markup of this legislation in the near future.

I support the legislation because it is my belief that States and localities unfairly burden cell phone consumers with excess taxes. Nationwide, the average tax on wireless service is 15.19 percent, which is more than double the average sales tax rate for all businesses, which is 7.07 percent. These tax rates are more in keeping with sin taxes; that is, taxes on alcohol and tobacco, than with general business taxes.

It is my understanding that these taxes on the wireless industry are estimated to be over \$15 billion a year. That is an astonishing number, and something that warrants the attention of the Subcommittee.

I know that discrimination, at least in this context, is often in the eyes of the beholder. However, by any definition imposing taxes on a wireless procedure that are more than double what general businesses pay should be considered discriminatory.

I will also continue to oppose discriminatory taxes or excise taxes that are imposed by States that excessively punish individual industries. I strongly believe that consumers should be the ones to pick winners and losers and not government.

And finally, I am heartened to see the two State representatives testifying today because I know that many States are hurting financially. My State is currently trying to close a \$3 billion deficit, and I respect those concerned about this bill's effect on State revenues. However, this legislation merely freezes current tax structures on wireless services for 5 years, and I believe that is a worthwhile purpose and one that will benefit consumers and technological advancements in the long run.

And Mr. Chairman, I would like to welcome one of the panel members especially today. Don Stapley is a member of the Board of Supervisors in my county, and he is a good friend, and I appreciate him being here. He is a little bit disoriented on this legislation today, but that is all right. We understand. That can happen even to people from Arizona. But I am very grateful for him showing up here.

And with the Chairman's permission, I would like to yield the balance of my time to Mr. Jordan for a brief opening. He just wants to go 60 seconds.

Mr. JORDAN. I thank the Ranking Member. And I want to also thank the Chair and Ms. Lofgren for sponsoring this legislation. I have to go to an Ohio delegation meeting here at noon, so I won't be able to stay for much of the testimony.

I just want to say that I appreciate that this bill is being brought forward. I am a cosponsor and, like the Ranking Member indicated, it is good to see some State legislators here who support this legis-

lation as well. I understand that tax fairness is important, particularly in this area. So with that, I would yield back the balance of my time and thank the Ranking Member for yielding.

Mr. COHEN. Thank you. I would now like to recognize the distinguished lady from California, who is a sponsor of this legislation, if she would like to make some remarks. Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman, and I very much appreciate that you have scheduled this hearing today.

I introduced this bill because I believe that wireless services and mobile devices are increasingly essential to affordable broadband access in the United States.

Now, there is no doubt that expanding broadband speed and access should be a national priority. We rank 15th out of 30 members of the OECD in broadband adoption per capita. So we have a lot of catching up to do. Only about half of American households have access to broadband, most to relatively slow service, especially compared to what is widely adopted in other countries like South Korea and Japan.

President Obama has recognized the imperative of building broadband capacity. The FCC is developing a comprehensive plan for national broadband as mandated by the stimulus legislation Congress passed a few months ago. Broadband Internet is a critical infrastructure. Just like highways or ports through the power grid, it is essential to daily life and to future economic growth.

We have come quite a long way with wireless, but this is still an emerging technology, and we have a long way to go. In the first quarter of 2008, 37 percent of U.S. mobile subscribers paid for access to the Internet, and 15 percent used it at least one a month. Now use of the new spectrum from the 700 megahertz auction and the deployment of 4G networks are just beginning. These technologies have tremendous promise, not just faster Internet access, but also lots of new innovative applications.

Anyone who spent even a few minutes looking at applications on the iPhone, my favorite toy, has caught a glimpse of what the future might hold. And we can't let discriminatory tax policies deter innovation.

Now wireless is increasingly important to Internet access for working class and lower income Americans, and that makes a lot of sense. Cell phones have become an essential tool in life for nearly everyone. If you are well off, you can afford multiple Internet connections, such as cable and DSL at home. But if you don't have as much money, you might rely on what you can get on your phone.

Wireless users earning \$20,000 to \$40,000 a year access mobile data applications more than users earning \$100,000 a year. And 39 million wireless subscribers have incomes of less than \$25,000 a year. Wireless is also crucial to extending broadband to underserved rural areas. According to the FCC, at the end of 2007 wireless broadband was the most widely distributed of all Internet connection technologies. Ninety-four percent of all ZIP codes have it.

Despite the importance of wireless services, they face a disproportionate and growing tax burden. The average wireless customer pays 15.2 percent in Federal, State and local taxes and fees as opposed to 7.1 percent for other goods and services. Taxes on cell phone service have gone up four times faster than taxes on other

goods and services between 2003 and 2007. These discriminatory tax rates will discourage both consumer spending and industry investment in more advanced wireless services like faster mobile data.

The 5-year moratorium in this bill will spur investment in the near term. It will also encourage State and local governments to harmonize and modernize their taxes in the longer term. We have a similar moratorium on Internet taxes that has spurred investment and innovation on the Internet.

These taxes are also regressive. This is not only because lower income Americans rely more on their cell phones, the taxes themselves are often highly regressive such as per line flat fees.

I do recognize the concerns of State and local governments and until this year I had actually spent more time on the Board of Supervisors in Santa Clara County than I had in the House of Representatives. I know that times are tough, and I am very sensitive to the concerns of State and local officials. However, this bill would not affect existing taxes. It only has to do with new discriminatory taxes, taxes put in place after enactment. And it would also not prevent States and municipalities from raising taxes on wireless services unless the taxes were discriminatory. So if you have a tax that you are adopting on everything, wireless would not be exempted.

Now, I respect the autonomy of States and localities. But when you have a nationwide need to deploy broadband as we do, we can't allow local tax deployment plans to really interfere with that national goal.

So I am grateful for this hearing, Mr. Chairman, and I look forward to hearing from the witnesses, and I yield back the balance of my time.

Mr. COHEN. Thank you, Ms. Lofgren. I would now like to recognize the Ranking Member of the full Committee, a lion from the State of Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, first of all, thank you for having this hearing today on such an important piece of legislation, and I would also like to thank our colleague on the Judiciary Committee, Ms. Lofgren, for introducing H.R. 1521, the Cell Tax Fairness Act of 2009, of which I am an original cosponsor.

There are now 112 cosponsors of this bill, Republicans and Democrats alike, including many Members of this Committee. That is a strong indication of the popular support that this legislation enjoys.

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, not inhibit their use through higher taxes. The fact that these devices facilitate interstate commerce certainly gives the Congress the authority to constrain the States' taxing authority. However, just because Congress has the authority to do something does not necessarily mean that it should exercise that authority in every case.

The taxing power has traditionally been within the jurisdiction of the States. And given the state of our economy, I sympathize with States' concerns about losing revenue because of congressional intervention. However, I also know that promoting mobile telecommunications is one way to increase American commerce and generate American jobs. This bill is specifically written to prevent discriminatory taxes after the date of enactment. Any taxes already in effect will remain untouched. So States will not lose any revenue as a result of this proposal.

I do look forward to hearing from all of our witnesses to see how we can balance the problem of disproportionate taxation of telecommunications firms and consumers against the needs of States' treasuries. Unfortunately, since I won't be able to stay much longer at this hearing because of a previous commitment, I do have some questions that I will submit for the record, but I want to mention those questions now in hopes that the panelists might address them.

One, are wireless taxes regressive, and do they disproportionately impact lower and middle income consumers? Two, does the bill limit States rights? And three, if Congress passes this legislation, what impact would it have on State and local revenues, on consumers, and on wireless service providers?

Mr. Chairman, thank you and I will yield back.

Mr. COHEN. Thank you, Mr. Smith. If there are no other statements from the Members, I am pleased to introduce our first witness, and we introduce the witnesses before their testimony. I want to thank each witness on the front end for participating. Without objection, your written statement will be placed in the record and we would ask you to limit your remarks to 5 minutes. We have a lighting system that shows green when you are starting and you are somewhere in between the first 4 minutes, and yellow means you have got a minute to go and red means you need to close.

After each witness has presented his or her testimony to the Subcommittee, Members will be permitted to ask questions. They also have a 5-minute limit.

Our first witness is Mr. Robert D. Atkinson. He is the Founder and President of Information Technology and Innovation Foundation, a Washington, D.C.-based technology policy think tank. He is also the author of State New Economy Index series and the book, *The Past and Future of America's Economy: Long Waves That Power Cycles of Growth*.

He has an extensive background in technology policy, has conducted groundbreaking research projects on technology and innovation, is a valued adviser to State and national policy members, and a popular speaker on innovation policy nationally and internationally. Before coming to ITIF, Dr. Atkinson was Vice President of the Progressive Policy Institute and Director of that institute's Technology and New Economic Project.

Previously Dr. Atkinson served as the first Executive Director of the Rhode Island Economic Policy Council, a public-private partnership, including as members the governor, legislative leaders, corporate, and labor leaders. And prior to that he was Project Director of the former Congressional Office of Technology Assessment. He has testified several times before Members of Committees

of Congress, so he knows what to expect. He has appeared at various news outlets, including CNN, FoxNews, MSNBC, NPR, and NBC Nightly news.

Thank you, Dr. Atkinson. I am looking forward to your testimony. I am always amazed at people who have think tanks. It is better than the other tanks, and 'tank' you for being here as you begin your testimony.

**TESTIMONY OF ROBERT D. ATKINSON, Ph.D., PRESIDENT,
INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION**

Mr. ATKINSON. Thank you, Mr. Chairman. We are certainly a think tank, not a do tank. So we think about things. And thank you also, Mr. Franks, for the opportunity to be here today to talk about the impact of discriminatory taxes on wireless telecommunication services and on economic growth.

It is clear from looking at the evidence from a wide array of economists that the U.S. economy has been transformed in the last 15 years by information and communications technologies, including wireless communications. One of the reasons why U.S. productivity growth has been so strong compared to the prior period there is a clear consensus among economists that it is due to the IT revolution. What is also important is that innovation in IT continues to emerge. We see that in Congresswoman Lofgren's example of the iPhone. But that is the tip of the iceberg. We are going to see a whole wide array of new wireless uses. This is not a bill about cell phones alone. This is about a revolution that is occurring in the U.S. economy where wireless devices and wireless services are going to be ubiquitous. And one of them, but certainly not the only one, is going to be wireless broadband.

We are poised to see the deployment of new technologies in the next, really the next 12 months of what is called 4G, where you will get services of up to maybe 60, 70 megabits per second on a wireless device. This now provides the opportunity for what we call a third pipe going into the home and importantly a new opportunity for people who might not have been able to access broadband, particularly rural residents or lower income residents.

When you look at taxation, there are basically three principles of optimal taxation. One, it should induce little change on consumer behavior. Secondly, it is not borne disproportionately by low-income individuals, and, third, it is not placed disproportionately on activities with positive externalities. Unfortunately, discriminatory taxes on cellular telecommunications violate all three principles.

There is an argument that opponents of the bill make that this doesn't affect wireless adoption. It may not affect consumers getting a cell phone. It is clear that most consumers value that and have to have it. But what it does affect is consumers getting ancillary services, buying more minutes, getting broadband on wireless, getting a whole array of other things. And there have been several academic studies that show this quite clearly.

Rappoport, Alleman and Taylor found that for every new dollar of discriminatory tax on wireless services, expenditures by consumers go down by \$1.60. Ingraham and Sidak found slightly lower numbers, \$1.23 to \$1.29 negative elasticity. In other words, consumers spend less.

In thinking about broadband and wireless broadband, Austan Goolsbee when he was at the University of Chicago, Dr. Goolsbee is now at the CEA, he found that actually it is much bigger for broadband, with a \$2.75 negative elasticity. So a \$1 tax on wireless broadband reduces the consumption of that service by \$2.75.

Not only that, but Goolsbee's work has shown that taxes on wireless don't just affect the consumer side. They affect the producer side and will reduce deployment, particularly in slightly high cost areas.

Secondly, these have discriminatory effects on individuals based on income. In one study, Rappoport, Alleman and Taylor found that low-income individuals were as likely to adopt cellular Internet service and wireless Internet services as high-income individuals. So essentially this is not something that just high-income people are getting and we can justify a tax that way which may be legitimate, but that is not what is happening here. Low-income people are big users of this. And importantly, as GAO noted in a recent report, price is a barrier to adopting broadband services. A recent study by the Pew Internet and Society found that 35 percent of dial-up users say the major reasons for not switching to broadband is price.

Thirdly, again really I think the key point here, is that this is a service, a wireless service as well as IT in general, has what economists call large positive externalities; in other words, what a consumer does with this device doesn't just benefit the consumer, it benefits all consumers. It benefits businesses. It benefits government.

And there are several reasons for that. One is a traditional notion of what are called network externalities. In other words, as each individual user is able to use one of these, other people are—it makes it easier and beneficial for other people to use this.

Again a study by Austan Goolsbee and Klenow found that there are these positive externalities, and in neighborhoods where they are controlling for income and all these other factors in neighborhoods where more people are using broadband, it makes it easier for other people to use broadband. And the reason is when some people in a neighborhood use it, other people know about it. They talk about it and so there is this, as I said, positive externality.

How much is that positive externality? Igraham and Sidak found that every dollar of tax on wireless services, national economic welfare falls by \$1.23 to \$1.95. So in other words, adding \$1 reduces overall economic welfare by \$1.23 to \$1.95.

Hausman at MIT found slightly smaller numbers, between 72 cents and \$1.14 loss. So again either number you use those are quite significant.

Finally, the numbers on broadband are even higher. Goolsbee finds that it is anywhere around \$3.55 national welfare loss.

I will just close by saying having worked for a governor before in my past, I understand the issue of States and their rights here. But this is an issue where essentially what States do impacts the country as a whole. State taxes benefit the State. They hurt the entire country, which to me is a reason for Congress to act on this.

Thank you, very much.

[The prepared statement of Mr. Atkinson follows:]

PREPARED STATEMENT OF ROBERT D. ATKINSON

Mr. Chairman, Mr. Franks, and members of the Committee, I appreciate the opportunity to appear before you today to discuss the impact of discriminatory taxes on wireless telecommunications services on economic growth and opportunity.

I am president of the Information Technology and Innovation Foundation. ITIF is a nonpartisan research and educational institute whose mission is to formulate and promote public policies to advance technological innovation and productivity. Recognizing the vital role of technology in ensuring American prosperity, ITIF focuses on innovation, productivity, and digital economy issues. I have studied and written extensively about the issues of information technology and broadband and their effects on economic growth and societal improvement.

IMPORTANCE OF WIRELESS COMMUNICATIONS

In the last 15 years, the U.S. economy has been transformed by information and communications technology (IT), including wireless communications. One result has been a significant increase in U.S. economic productivity, with most economists agreeing that the increase was due to the IT revolution.¹ And as a key component of the IT revolution, wireless technologies have contributed to that growth.

Moreover, innovation in the IT industry is continuing, with changes in the wireless industry being among the most rapid. The development of the Apple iPhone, and the introduction of similar offerings by competing cell phone manufacturers, is but the most recent and visible manifestation of this flourishing of innovation. Increasingly businesses are using wireless technology to become more productive and innovative, with everything from tracking inventory, to monitoring the performance of their business on a real-time basis, to enabling mobile workers to be connected. Consumers are using wireless for an increasingly diverse and novel range of purposes, from health applications like remote monitoring of diabetes to financial applications like mobile banking and peer-to-peer payments.

In addition, more and more parts of the United States have access to advanced 3G wireless services, and the rollout of advanced next generation 4G services, such as Wi-Max and LTE, is proceeding. These next generation services are important not just because they will continue to serve as a platform for robust innovation in mobile services and applications, but also because they offer the promise of enabling the entry of a third broadband "pipe" to the home (to compete with cable modem and DSL/fiber service). This new pipe offers to not only bring additional competition and consumer benefits to all Americans, but also to provide broadband services in some rural areas that now cannot access wired broadband services. In addition, because wireless broadband may provide lower priced broadband in all areas, it has the potential to help lower-income Americans who to date have not previously subscribed to broadband. In short, wireless services promise to be a growing and more important part of the IT ecosystem in the United States.

It is in this environment of innovation and digital transformation that your Committee considers legislation to ban new discriminatory taxes on wireless services. Imposing discriminatory taxes on wireless services is in essence taxing one of the major engines of U.S. innovation and economic growth, and as discussed below has significant impacts on economic growth and economic fairness.

Principles of Optimal Taxation: Many tax economists suggest that there are three principles of optimal taxation of commodities. An efficient commodity tax: 1) induces little change in consumer behavior; 2) is not borne disproportionately by low income individuals and households; and 3) is not placed disproportionately on activities with strong positive externalities. Discriminatory taxes on cellular telecommunications violate all three principles. I will examine each principle.

DISCRIMINATORY TAXES ON WIRELESS SERVICES REDUCE CONSUMER USE

Opponents of federal legislation to ban the introduction of new discriminatory taxes on wireless services argue that the rapid growth in cellular telephone subscriptions suggests that the higher taxes on cellular service have no negative impact. And they point to the rapid growth of cellular telephone service. But the major impact of discriminatory taxes is not on the decision to buy or not buy a cell phone (although for some individuals this may be the case). Rather, it is on the consumption of wireless services, with individuals facing higher taxes purchasing plans with fewer minutes and fewer services. And for a whole host of other services which are not as necessary, as of yet, to daily life, discriminatory taxes reduce not only use but adoption of these services. These include wireless data services and wireless Internet.

Scholarly studies find that the impact of price (of which taxes are a component) on wireless expenditures is quite high. Rappoport, Alleman, and Taylor found that for the average monthly U.S. consumer expenditure on cell phone service (\$52 per month),² every dollar of additional tax reduces expenditures by more than \$1.60.³ Ingraham and Sidak find slightly lower, but still high, elasticities of demand of between \$1.23 and \$1.29 (in other words, increasing taxes on wireless services by \$1 reduces consumption of the services by between \$1.23 to \$1.29).⁴

Because wireless data services, including broadband Internet access, are an even more discretionary purchase for most consumers, the impact of taxes on wireless data and broadband are likely even higher. Indeed, Austin Goolsbee finds the elasticities for broadband to be between 2.15 and 3.50, with an average of 2.75. In other words, increasing taxes on wireless data and Internet services by \$1.00 reduces consumption of these services by an average of \$2.75.⁵

This very high impact of taxes on consumer demand also affects producer decisions on where to deploy services. As the GAO reported, one of the most important factors for companies considering deploying broadband to an area was the expected demand for broadband service.⁶ Since adoption rates drive demand, not only do wireless taxes affect the ability of citizens to afford wireless Internet access, but they could also discourage some companies from deploying 3G and 4G systems. This conclusion is supported by research by Goolsbee who found that “in several medium sized markets, applying a tax on broadband would have reduced the potential producer surplus enough that suppliers would not be able to cover their fixed costs and would choose to delay the diffusion of broadband in those markets.”⁷

DISTRIBUTIONAL IMPACTS OF WIRELESS TAXES

It might be one thing if discriminatory wireless taxes affected mostly demand from higher income consumers. But of all advanced information technology and communications services, wireless is one of the most widely adopted services, with wireless services much more evenly distributed among income groups than fixed broadband. Rappoport, Alleman, and Taylor find that while the highest income Americans (\$100,000 or more in annual income) adopted fixed broadband at 125 percent the rate that the average income American adopted a set of telecommunications and computing products (PCs, Internet, Broadband, Mobile, Internet ready PCS and PCS Internet Subscriber (in 2003), mobile phone adoption was only 40 percent higher while mobile Internet use was just 44 percent higher. In other words, low income households were almost as likely to adopt wireless services as higher income households. Moreover, when examining just adoption of Internet-enabled cellular services (as opposed to all the listed services and products), low-income households (less than \$15,000 per year) adopted the service at about the same rates as high income households.

Because low income households are almost as likely to subscribe to wireless services as higher income households, discriminatory taxes on wireless services are more regressive than many other kinds of taxes. And because of the structure of many of these taxes, the distributional impacts are even worse. When some jurisdictions (like Baltimore, MD for example) impose surcharges on service, the tax is not proportional to use, but is the same on all users, regardless of income or use.

These discriminatory taxes play a role in limiting wireless data and broadband adoption, particularly among low income households. As GAO reported, the “price of broadband service remains a barrier to adoption of broadband service for some consumers” and noted that “households with high incomes were 39 percentage points more likely to adopt broadband than lower-income households.”⁸ Likewise, the Pew Internet and Society project found that just 25 percent of low income Americans with less than \$20,000 annual income subscribe to broadband services, compared to 85 percent of households with over \$100,000 in income.⁹ Moreover, over one-third (35 percent) of dial-up users say that price is the major reason for not switching to broadband.¹⁰ Raising the price of wireless broadband service through discriminatory taxes will slow adoption of broadband, particularly as it’s likely that for many low income households in the future, wireless will be an important means of accessing the benefits of the Internet.

IMPACT OF DISCRIMINATORY WIRELESS TAXES ON ECONOMIC GROWTH

Telecommunications taxes have been high historically because states and localities could tax these with little fear of losing revenue to consumers shifting their expenditures. For example, high retail sales taxes could induce residents to shop in nearby jurisdictions with lower rates. In contrast, taxing services that people consumed in their homes was seen by states as a more reliable way to raise revenue.

This is one major reason why telecommunications services is in most jurisdictions taxed more heavily than other goods or services.

This may once have made sense at a time when the principal telecommunications service consumed by people was “plain old telephone service.” But it certainly makes no sense now when telecommunications services, including wireless, are key drivers of the digital economy. In fact, many jurisdictions, especially the states and the federal government, recognize that it is a driver, and are investing public funds to promote it.

One of the reasons why governments are investing in digital communications technologies, including wireless, is because they exhibit what economists call positive externalities (an externality occurs when the impacts of decisions by producer or consumers spill over to the broader economy.) One of the most important externalities from wireless services is network externalities. Network externalities are the effects on a user of a product or service of others using the same or compatible products or services. Positive network externalities exist if the benefits are an increasing function of the number of other users. In this case a good becomes more valuable to individual consumers as others also purchase that good. The classic example is telephone service, which becomes more valuable to a user if more people are connected. Indeed, telephone network externalities have long been recognized and have been a major rationale behind universal service policies. The same kind of externality exists with wireless telephone service. But externalities from wireless broadband are likely to be even more significant, in part because broadband enables new services to emerge that will benefit broadband users.

There are two kinds of network externalities from broadband, direct and indirect. Direct externalities relate to subscribership. Just as the fax system became more valuable when more people had faxes, broadband becomes more valuable when more people have broadband; the more likely others are to subscribe. This is in part because the decision to purchase broadband is dependent in part on having sufficient knowledge about it. Unlike a service like haircuts or a product like TVs that most people are familiar with and can accurately value, fewer people are familiar with wireless data and Internet services and cannot always value their benefits.

Empirical evidence suggests that this is a factor that affects subscribership. Goolsbee and Klenow found that people are more likely to buy their first computer if they live in areas where a high proportion of households own computers or if a high fraction of their friends and family own computers—even controlling for other factors affecting computer ownership. If ownership rates are 10 percent higher in one city than another in a given year, the gap will be 11 percent the following year, assuming all else stays constant.¹¹ They explain this effect on the basis that the number of experienced and intensive computer users creates a “spillover” effect for non-users. They conclude that the effect is most probably related to the use of e-mail and the Internet—consistent with the view of computers being the hub of an information and communications network. But it is also likely to be related to the fact that people who have friends and neighbors with broadband are more likely to be able to better understand its value. While dial-up connections also enable network externalities for applications like email, only wireless broadband would generate them for mobile applications. Moreover, these externalities are likely to be higher in lower-income neighborhoods where individuals may have less familiarity with these technologies.

Indirect network externalities from broadband relate to its effect on applications and content that requires broadband transport to work effectively. One reason why broadband take-up is not higher is because data-rich applications that could be accessed over broadband have not developed faster. Why develop mobile applications, especially ones that need moderate- to high- speeds, when very few people would be able to access them? This “chicken-or-egg” issue slows deployment of wireless broadband. More data-intensive applications would make mobile broadband more valuable, while more mobile broadband subscribers would make data-intensive applications more commercially viable. Indeed, more mobile broadband would spur the development of a whole host of new applications that are not viable now.

The second major kind of broadband externality relates to the fact that broadband enables consumers to become more efficient, thus in turn driving higher rates of productivity and economic growth. In the old economy producers produced and consumers consumed. Producers invested in new capital equipment to produce goods and services more efficiently and consumers in turn bought these cheaper goods and services. This dichotomy between producers and consumers is blurring in the new digital economy where a whole host of digital tools are enabling consumers to become, in the words of futurist Alvin Toffler, “prosumers” who act at the same time as both consumer and producer.

Whether it's conducting mobile banking, getting real time information on traffic conditions, or engaging in e-government services, mobile Internet is enabling self-service and becoming an important share of the economy, helping to boost productivity and to increase consumer convenience. Indeed, with the service sector now accounting for over 80 percent of employment, prosumerism will simply have to play a much larger role if we are to continue to boost incomes and economic growth. Wireless broadband promises to be a key technology for boosting prosumer productivity.

Wireless Internet is also improving Americans' quality of life. For example, using a wireless data reader that connects to standard telephones, patients can securely transmit the medical data recorded by these medical devices to their health care provider. Their physicians can then review the patients' health information remotely, thereby reducing the number of office visits, a major benefit for patients with chronic diseases or who need frequent care. Similarly, obstetricians can remotely monitor the blood pressure and fetal heart beat of their patients at home, rather than requiring the patients to be admitted to the hospital.¹² Wireless is also helping older Americans minimize the risks associated with solitude. Currently, for example, older adults and individuals with disabilities can use a personal emergency response system so that with the push of a button they can call for medical assistance. Personal emergency response devices typically consist of two components: a wearable wireless transmitter and a telephone unit that connects to an emergency response center. Such devices can particularly help adults who are at risk of a stroke or falling live independently. They can also save money by reducing the length of time for inpatient hospital care or nursing home care.

Economic studies of the impact of taxes on wireless service support this argument that reduced wireless activity will have negative economic impacts. Ingraham and Sidak find that for every \$1 of tax, national economic welfare falls by between \$1.23 and \$1.95, depending on the level of the tax existing in a jurisdiction (if a state with already high taxes on wireless service increases taxes even more, the overall economic welfare loss would be 1.95).¹³ Hausman also finds significant, albeit somewhat smaller, impacts of societal economic welfare. He finds that for every additional dollar raised in taxes on wireless services, the marginal efficiency cost to the economy is between \$0.72 and \$1.14.¹⁴ In other words, when a jurisdiction adds a tax on wireless service, for every dollar it receives, society loses between \$0.72 and \$1.14.

The impact of taxes on wireless broadband is likely to be even higher, given the even-broader network and prosumer externalities. In fact, Goolsbee finds this to be the case, with the overall economic welfare loss from \$1 of taxes on broadband (wireless or wired) being between \$3.46 and \$5.15.¹⁵ In other words, for every dollar raised in taxes, society as a whole loses at least \$3.46.

THE RATIONALE FOR FEDERAL ACTION

Even with these significant negative impacts from discriminatory wireless taxation, some argue that jurisdictions should be free to impose these taxes. If these negative effects were confined to the jurisdiction imposing the taxes, the opponents of legislation would have a stronger, but in my view, still inadequate case. But the costs of discriminatory wireless taxation are not only borne by residents of the jurisdiction, but by all Americans. In particular, while sub-national jurisdictions also benefit from higher levels of wireless adoption, there is an asymmetrical distribution between the costs and benefits of taxes on wireless services. When jurisdictions tax wireless services, they receive all of the financial benefit of the tax, but the net social cost of lower rates of wireless service access extends beyond the jurisdictions' borders to affect residents and businesses across the entire nation.

Second, opponents of this legislation argue that it will hurt state and local fiscal health. But this legislation only prohibits new discriminatory taxes. Moreover, states and localities will benefit as higher levels of productivity generate lower prices for their citizens. In addition, the economic benefits of a healthy national economy will provide state tax administrators opportunities to increase their state tax revenue.

Third, opponents will argue that this simply shifts taxes from one service or product to others. Of course it does. But that's not the point. The point is that the negative effects of taxes on wireless services are higher than on most other services or products. For example, Hausman finds that the effect on welfare of general taxation and income taxation is between 54 to 71 percent less costly to economic efficiency and net economic welfare than taxes on wireless.¹⁶ And taxes on items with negative externalities, such as products like petroleum which emit greenhouse gas emissions, would have positive effects on economic welfare. Opponents also argue that

many types of industries are subject to their own special taxes. But again, the major reason why discriminatory wireless taxes are a bad idea is not because discriminatory taxes themselves are a bad idea. Taxes on tobacco products are rightly justified by the adverse health effects from smoking. Rather, it is discriminatory taxes on products or services with large positive externalities that are problematic.

CONCLUSION

Wireless innovation is likely to continue to bring new consumer functionalities, business and government benefits and overall economic growth. However, the evidence clearly shows that taxes on wireless services, particularly discriminatory taxes, have a clear negative effect on adoption of these services and because of that, negative effects on both U.S. economic growth and economic opportunity for all Americans, and lower income Americans especially.

Notes:

1. Robert D. Atkinson and Andrew S. McKay, "Digital Prosperity: Understanding the Economic Benefits of the Information Technology Revolution," (Washington, DC: The Information Technology and Innovation Foundation, 2007) <www.itif.org/index.php?id=34>.
2. U.S. Bureau of Labor Statistics, "Spending on Cell Phone Services Has Exceeded Spending on Residential Phone Services," 2007, <www.bls.gov/cex/cellphones2007.htm>.
3. Paul Rappoport, James Alleman, and Lester Taylor, "Household Demand for Wireless Telephony: An Empirical Analysis," Presentation to the 31st Annual Telecommunications Policy Research Conference, Sept. 19, 2003, George Mason University, Arlington, Va.
4. Allan T. Ingraham and J. Gregory Sidak, "Do States Tax Wireless Services Inefficiently? Evidence on the Price Elasticity of Demand," *Virginia Tax Review*, Vol. 24: 249–261, 2004.
5. Austan Goolsbee, "The Value of Broadband and the Deadweight Loss of Taxing New Technology," *Contributions to Economic Analysis & Policy*: Vol. 5 : Iss. 1, Article 8. (2006) <www.bepress.com/bejeap/contributions/vol5/iss1/art8>.
6. Ibid.
7. Austan Goolsbee, "The Value of Broadband and the Deadweight Loss of Taxing New Technology," NBER Working Paper 11994 (National Bureau of Economic Research, Feb. 2006): <papers.nber.org/papers/W11994>.
8. Ibid.
9. Pew Internet and American Life Project, Home Broadband Adoption 2008.
10. Ibid.
11. Austan Goolsbee and Peter Klenow, "Evidence on Learning and Network Externalities in the Diffusion of Home Computers," *Journal of Law and Economics*, October 2002, Vol XLV (2, part 1): 317–344.
12. E. Kyriacou, et al., "Multi-Purpose Healthcare Telemedicine Systems with Mobile Communication Link Support," *BioMedical Engineering Online* 2 (2003), <www.biomedical-engineering-online.com/content/2/1/7> (accessed July 24, 2008).
13. Ingraham and Sidak, op. cit.
14. Jerry Hausman, "Efficiency Effects on the U.S. Economy from Wireless Taxation," *National Tax Journal*, vol. LIII, No. 3., Part 2, 733–742.
15. Austan Goolsbee, "The Value of Broadband and the Deadweight Loss of Taxing New Technology," op. cit.
16. Jerry Hausman, op. cit.

Mr. COHEN. Thank you, Dr. Atkinson.

Our next witness is State Representative Mara Candelaria, from the State of Indiana. She has experience in Congress, having worked for U.S. Congressman Peter Visclosky and has worked with the Democratic Party. As a former NCSL executive committee member, I welcome you here and appreciate your work in the Indiana State House of Representatives.

Would you begin your testimony?

**TESTIMONY OF THE HONORABLE MARA CANDELARIA
REARDON, INDIANA HOUSE OF REPRESENTATIVES**

Ms. CANDELARIA REARDON. Thank you, Chairman Cohen and Ranking Member Franks, Members of the Subcommittee. My name is Mara Candelaria Reardon, and I have the honor of representing the 12th House District in Indiana. I serve on the Environmental Affairs, Government and Regulatory Reform and Ways and Means Committee in Indiana's House.

Thank you for the opportunity to appear before you this morning to offer my support for H.R. 1521, the Cell Tax Fairness Act of 2009.

The Cell Tax Fairness Act takes a thoughtful, pro-consumer, pro-broadband approach that will help to ensure affordable wireless services for my constituents and Indiana's nearly 4.7 million wireless subscribers.

Congresswoman Lofgren and Congressman Franks are to be commended for the broad bipartisan support they have garnered with this legislation. As a State legislator and particularly as a member of the Government and Regulatory Reform and Ways and Means Committee, any Federal legislation that places parameters on a State's ability to tax is something that I believe should be done sparingly, judiciously and, most importantly, does absolutely no harm.

I believe that H.R. 1521 meets these criteria.

Our system of Federalism grants State and local policymakers with the ability to determine how States should levy taxes on individuals and businesses that reside within their respective jurisdictions. As a member of Indiana's Ways and Means Committee, I am sensitive to preserving the State's taxing authority to fund government services. But as a legislator tasked with writing Indiana's tax laws, I also believe that another important precept of our Nation's tax structure is that taxes should be levied equitably on our citizens, particularly when multiple jurisdictions have the ability to tax.

In Indiana my constituents pay a 9.55 percent rate in State and local taxes and a relatively modest combined rate of 13.74 percent in State, local, and Federal taxes, fees, and surcharges for their wireless services, as compared to the national average of 15.2 percent. Nevertheless, Indiana's wireless consumers are now effectively taxed twice. They not only pay the State sales tax like consumers of other goods, but also included is the utilities receipts tax. In several States, consumers pay taxes, fees, and surcharges in excess of 18 percent on top of their monthly bills for their service. When tax rates reach those levels, as they do with alcohol and tobacco, the purpose is usually to inhibit use.

Wireless services are no longer a luxury in our society. They have become a necessity. Preserving affordability should be an important public policy goal. H.R. 1521 provides a measured approach by only precluding new discriminatory taxes and fees from being added on an already excessive level of taxation imposed upon wireless consumers.

Importantly, the legislation recognizes the revenue needs of States and localities and does not take away any existing revenue from State or local governments. In fact, H.R. 1521 allows States

and localities to raise wireless taxes if done in conjunction with an increase in taxes on other general goods and services.

My focus here this morning will be to provide some historical context as to how we got here and where we are today and why I believe taking a time out from imposing new additional discriminatory taxes on wireless services is important to American consumers and consistent with principles espoused by the National Conference of State Legislators.

The tax structure imposed on the communications industry today is a holdover from the days when the industry was operated by Ma Bell as a regulated utility. This tax structure was first instituted long before I entered public office and well before the first wireless call was ever made. As some may recall, as regulated utilities telecommunications providers were subject to taxes under statutes applicable to public utilities. The taxes imposed upon included gross receipts, franchise, and other industry-specific taxes that were passed on to consumers in the rates as part of the regulatory rate setting process. The phone company never had to worry about consumers looking for a cheaper alternative because there was no competition in the marketplace. State and local governments could tax telecommunications services at a much higher rate than other goods and services without worrying about constituent backlash because the natural reaction was, it is just the phone company raising my rates again.

Fast forward to today, and the communications marketplace is drastically different than it was 20 years ago. Consumers have a myriad of options to choose from to be their communications provider as well as voice and data plans to meet their individual needs.

However, the legacy tax structure remains in place. Our Federal and State income tax is structured such that if you earn more you pay more in taxes. That is not the case with respect to the payment of wireless taxes.

As I mentioned previously, Indiana has approximately 4.7 million subscribers. Of that 4.7, nearly 14 percent of Indiana's households have cut the cord and are wireless only. As of October, 2008, 4.5 percent of Indiana's wireless subscribers had income levels of less than \$50,000 and 61.7 percent had income levels of less than \$75,000. Regardless of whether someone is making \$25,000 annually or \$125,000 annually, they will pay the same tax rate on their purchases of wireless services. With the national average of 15.2 percent, consumers who are of lower or moderate incomes pay disproportionately more for the same services than those with higher incomes.

Why is this important to bear in mind? Access to wireless services is no longer a luxury for a select few but rather a vital necessity, particularly for those facing economic challenges.

In preparing for this hearing, I took the opportunity to read an April 27 Dear Colleague circulated by Congresswoman Lofgren and Congressman Franks. The Dear Colleague highlighted an March 23 Washington Post article chronicling how low-cost cell phones provide an essential lifeline to the homeless.

When you consider how important wireless services have become to consumers today, taxing those services at an excessive level is counterproductive.

As I mentioned earlier, I am sensitive to the importance of preserving State and local governments' ability to fund government services. Current tax revenues in Indiana are down 8 percent from last year. But as policy makers it is important that we also finance public services not to target one good or service for disparate tax treatment.

I can go on.

Mr. COHEN. I know you can but you also can't.

Ms. CANDELARIA REARDON. Thank you for the opportunity.

[The prepared statement of Ms. Candelaria Reardon follows:]

PREPARED STATEMENT OF THE HONORABLE MARA CANDELARIA REARDON

Chairman Cohen, Ranking Member Franks and members of the Subcommittee, my name is Mara Candelaria Reardon, and I have the honor of representing House District 12 in Northwest Indiana. I serve on the Environmental Affairs, Government and Regulatory Reform and Ways and Means Committees in Indiana's House of Representatives.

Thank you for the opportunity to appear before you this morning to offer my support for H.R. 1521, the "Cell Tax Fairness Act of 2009." The Cell Tax Fairness Act takes a thoughtful, pro-consumer, pro-broadband approach that will help to ensure affordable wireless services for my constituents and Indiana's nearly 4.7 million wireless subscribers.¹ Congresswoman Lofgren and Congressman Franks are to be commended for the broad bi-partisan support they have garnered with this legislation.

As a state legislator and particularly as a member of the Government and Regulatory Reform and Ways and Means Committees, any federal legislation that places parameters on a state's ability to tax is something that I believe should be done sparingly, judiciously and most importantly, does no harm. I believe that H.R. 1521 meets these criteria. Our system of Federalism grants state and local policymakers with the ability to determine how states should levy taxes on individuals and businesses that reside within their respective jurisdictions. As a member of Indiana's Ways and Means Committee, I am sensitive to preserving a state's taxing authority to fund government services.

But as a legislator tasked with writing Indiana's tax laws, I also believe that another important precept of our nation's tax structure is that taxes should be levied equitably on our citizens, particularly when multiple jurisdictions have the ability to tax. In Indiana, my constituents pay a 9.55% rate in state and local taxes, and a relatively modest combined rate of 13.74% in state, local and federal taxes, fees and surcharges for their wireless services as compared to the national average of 15.2%.

Nevertheless, Indiana's wireless consumers are now effectively taxed twice. They not only pay the state sales tax like consumers of other goods, but also included is the Utility Receipts Tax.

In several states, consumers pay taxes, fees and surcharges in excess of 18% on top of their monthly bills for their service. When tax rates reach those levels, as they do with alcohol and tobacco, the purpose is usually to inhibit use. Wireless services are no longer a luxury in our society; they have become a necessity. Preserving affordability should be an important public policy goal.

H.R. 1521 provides a measured approach by only precluding *new discriminatory* taxes and fees from being added on an already excessive level of taxation imposed upon wireless consumers. Importantly, the legislation recognizes the revenue needs of states and localities and *does not* take away any existing revenue from state or local governments. In fact, H.R. 1521 allows states and localities to raise wireless taxes if done in conjunction with an increase of taxes on other general goods and services.

My focus here this morning will be to provide some historical context as to how we got to where we are today and why I believe that taking a "time-out" from imposing new, additional discriminatory taxes on wireless services is important to

¹/FCC's Local Competition Report, September 18, 2008

American consumers and consistent with principles espoused by the National Conference of State Legislatures.

HISTORICAL CONTEXT REGARDING COMMUNICATIONS TAXES

The tax structure imposed upon the communications industry today is a holdover from the days when the industry was operated by Ma Bell as a rate regulated utility. This tax structure was first instituted long before I entered public office and well before the first wireless call was ever made. As some may recall, as regulated utilities, telecommunication 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 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 other goods and services without worrying about constituent backlash because the natural reaction was, "it's just the phone company raising my rates again."

Fast forward to today and the communications marketplace is drastically different than it was 20 years ago. Consumers have a myriad of options to choose from to be their communications provider, as well as voice and data plans to meet their individual needs. However, the legacy tax structure remains in place.

REGRESSIVE NATURE OF WIRELESS TAXES

Our Federal and State income tax system is structured such that if you earn more, you pay more in taxes. That is not the case with respect to the payment of wireless taxes. As I mentioned previously, Indiana has approximately 4.7 million subscribers. Of that 4.7 million, nearly 14 percent of Indiana's households have "cut the cord" and are wireless only.² As of October of 2008, 45.7% of Indiana's wireless subscribers had income levels of less than \$50,000 and 67.1% had income levels less than \$75,000.³ Regardless of whether someone is making \$25,000 annually or \$125,000 annually, they will pay the same tax rate on their purchases of wireless services. With a national average wireless tax rate of 15.2%, consumers who are of lower or moderate income levels pay disproportionately more for the same service than those with higher incomes.

Why is this important to bear in mind? Access to wireless services is no longer a luxury for a select few, but rather a vital necessity, particularly for those facing economic challenges. In preparing for this hearing, I took the opportunity to read an April 27th "Dear Colleague" circulated by Congresswoman Lofgren and Congressman Franks. The

"Dear Colleague" highlighted a March 23rd *Washington Post* article chronicling how low-cost cell phones provide an essential lifeline to the homeless and those who are experiencing economic difficulty. The article clearly brings into focus what many of us take for granted, but for others provides some modicum of much needed normalcy.

"Having a phone isn't a privilege anymore—it's a necessity," said Rommel McBride, who spent about six years on the streets before recently being placed in a city housing program. . . . A cell phone is the only way you can call to keep up your food stamps, your housing application, your job. When you're living in a shelter or on the streets, it's your last line of communications with the world."

When you consider how important wireless services have become to consumers today, taxing these services at such an excessive level is counterproductive. Mr. McBride happens to live here in Washington, D.C., but there are thousands, if not millions of people throughout this country who rely on their cell phones to assist in finding a job; locating a place to live; keeping in touch with loved ones and friends; protecting their personal safety; accessing the Internet as well as a variety of other uses. For many, their wireless phone is their lifeline.

FEDERALISM PERSPECTIVE

As I mentioned earlier in my testimony, as a state legislator, I am very sensitive to the importance of preserving state and local government's ability to tax in order to fund government services. Current tax revenues in Indiana are down 8% from last year. But as policymakers, it's also important, as we finance public services, not

² Centers for Disease Control NCHS March 11, 2009

³ ComScore October 2008

to target one particular good or service for disparate tax treatment as compared to others.

For example, state and local wireless taxes and fees increased from 10.2% to 11% between 2003 and 2007—this resulted in an increase in the rate of taxes on sales of wireless services that was four times the increase in the rate of taxes imposed on sales of other competitive goods and services.

Opponents of H.R. 1521 claim that this legislation drastically departs from long-standing principles of federalism and that it provides favorable tax treatment to the wireless industry. Under our Federalist system, the federal government is authorized to exercise only those powers which are expressly provided by the Constitution, with all other powers reserved to the states as set forth under the 10th Amendment. Thus, the federal government's powers are limited. However, under the Commerce Clause, Congress is expressly granted the power to regulate commerce among the states. Due to the mobile nature of wireless services and the ability to use such services across the country, the provision of wireless services is clearly interstate commerce and well within the power of Congress to "regulate commerce among the states."

Additionally, the 14th Amendment provides that ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws" and further specifies under Section 5 that Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

In my opinion, H.R. 1521 does not dramatically depart from our federalist principles. In the mid 1970s, Congress passed the federal 4-R Act which precluded states from discriminatorily taxing the railroad industry. And more recently in 2007, this Subcommittee played a leading role in the extension of the Internet Tax Freedom Act.

It's my understanding that the primary beneficiary of this legislation is the American wireless consumer, not the wireless industry. In 2007, Indiana subscribers paid over \$326 million in wireless taxes and fees. The carriers remit these taxes to the state, but it is the consumers that pay the overwhelming majority of these taxes, not industry. I appreciate the temptation to try and obfuscate the issue, but if this legislation results in a five to ten dollar savings each month for my constituents, while at the same time, the state of Indiana continues to collect \$326 million or more annually in wireless tax revenues—I consider it a win-win.

Last year, wireless consumers across the country paid nearly \$21 billion in state, local and federal taxes and fees imposed on their wireless services to fund government services. By anyone's measure, that is a lot of money for one subset of consumers to pay for an essential service. H.R. 1521 does nothing to jeopardize that revenue stream. In all likelihood, state and local revenues from wireless services will continue to grow if this legislation is enacted.

H.R. 1521 provides a common sense solution to a growing problem. Clearly, it is a bill that has broad, bipartisan appeal, as evidenced by over 100 cosponsors, which is why I strongly support the passage and enactment of H.R. 1521, the "Cell Tax Fairness Act of 2009."

Thank you again for this opportunity to offer my thoughts. I would be happy to answer any questions that you may have.

Mr. COHEN. Thank you, Representative Reardon. We do need to try to keep to the red light.

Our third witness is Joanne Hovis. Ms. Hovis is President of Columbia Telecommunications Corporation, which is a communications engineering and consulting firm. She is an attorney. She has practiced both in Chicago and in Washington, is an authority on municipal and community broadband topics and on governments' role vis-a-vis. She has represented several impressive clients and knows when 5 minutes are 5 minutes. You are recognized.

TESTIMONY OF JOANNE HOVIS, COLUMBIA TELECOMMUNICATIONS CORPORATION, ON BEHALF OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL LEAGUE OF CITIES

Ms. HOVIS. Thank you, Mr. Chairman. Chairman Cohen, distinguished Members, thank you for the opportunity to speak to you here today. I serve as a member of the Board of Directors of the National Association of Telecommunications Officers and Advisors, and I am very pleased to be here on behalf of NATOA as well as the U.S. Conference of Mayors, the National League of Cities, National Association of Counties, and the Government Finance Officers Association. I do focus on community broadband issues, working for State and local government and nonprofits across the country, and I am a long-time advocate for the need for greater broadband, bigger broadband, more broadband, and more affordable broadband in the United States. And so I commend all of you and agree with much of what Ms. Lofgren said just a few minutes ago that the need for attention to this issue is enormous.

What I would like to talk about here today, though, is whether this particular piece of legislation will really result in deployment of a lot more broadband or affordable broadband.

The issue of tax policy, tax is not my area. That is for elected officials to address because they are answerable to their constituency. I would like to, rather, correct what I believe are some of the misunderstandings surrounding the economics of the wireless industry and the actual barriers to deployment of wireless broadband services to all areas of our country.

First and foremost, the current tax treatment of wireless services by Federal, State, and local authorities has not hindered product innovation, service growth, or industry profitability. This industry, the wireless communications industry, is strong and successful. Growth has been explosive in high-density areas of the country where the carriers have chosen to invest and to deploy networks. In 1995, there were just under 34 million cell phone subscribers in the United States. By 2008, that number 270 million, 87 percent of the Nation's population. That is for wireless voice service. On the wireless broadband, or data side, we are seeing similar growth.

Indeed, it is wireless that represents the greatest growth and opportunity for the communications industry in a variety of ways, and by its own account the wireless industry is very strong. Verizon, the country's largest mobile service provider, posted profits of \$1.65 billion in the first quarter of 2009 on wireless revenue growth of almost 30 percent. Most of the major carriers, as Dr. Atkinson mentioned, are moving very fast to deploy in the areas where they see a return on investment.

4G services, there is explosive movement toward and development toward deployment of next generation broadband wireless services. AT&T is upgrading existing networks like the other carriers and is expanding from 350 to 370 metropolitan areas in this next generation. Given the strength and profitability of this industry, one wonders why the industry is seeking preferential tax treat-

ment, and I would like to address the issue of whether or not they actually are seeking it in order to deploy more wireless broadband networks.

Given that the wireless voice and data industries are both profitable and growing at extraordinary rates in metropolitan areas of the United States, I think we should look at what is happening in the rural areas. Obviously we are not seeing that kind of growth in rural areas, and I should say that America's local governments are as concerned and troubled by this lack as is the Subcommittee. While I commend those who believe our Nation should find new models for expanding deployment in less densely populated areas, it is important to understand that it is the economics of wireless communications that is the reason for the slow or nonexistent deployment. Deployment of communications networks is extremely costly. Communications carriers are private for-profit companies, and they quite rationally allocate their investment resources to areas of the country where they are likely to achieve the highest return on investment, those areas that have relatively dense populations and higher, and thereby greater, potential penetration and higher revenues per mile of construction.

The basic reality of these economics will not be changed by pre-emption of a particular tax or by removal of any single cost of doing business. Carriers will still invest their money where they are likely to get the greatest return on investment, and this is the central broadband issue that we face as a Nation in our rural areas, that that return on investment simply does not exist in the same way in rural areas. That is a national problem, but this is not the solution.

Finally, let me very briefly point out that this legislation is not timely and should await the result of the proceeding currently underway at the Federal Communications Commission that Congresswoman Lofgren mentioned a littler bit earlier. As directed by the Recovery Act, the FCC is currently engaged in an extensive proceeding to develop a national broadband plan, and as part of that plan the FCC released a notice of inquiry that included questions about a wide range of various things that could be hindering broadband deployment in the United States. And the Federal Communications Commission is undertaking a year of extensive analysis, and this Subcommittee should consider waiting to see the expert agency's conclusions before proceeding with this legislation, which is really a piecemeal attempt to deal with this issue.

I know I am out of time. I want to thank you for your attention.
[The prepared statement of Ms. Hovis follows:]

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

H.R. 1521
“Cell Tax Fairness Act of 2009”

June 9, 2009

Chairman Cohen and distinguished members of the House Subcommittee on Commercial and Administrative Law:

My name is Joanne Hovis. I am the President of Columbia Telecommunications Corporation, a national, public interest, communications engineering and business consulting firm. CTC is a 26-year old company that advises state and local governments and non-profits regarding broadband communications, fiber and wireless network design, market analysis, and business planning. Our current clients include the cities of San Francisco, Seattle, Tucson, and Portland, Oregon; the District of Columbia; the Knight Center of Digital Excellence; the William Penn Foundation; the Institute for Next Generation Internet; the University of Illinois; Case Western Reserve University; and many others.

I serve as a member of the Board of Directors of the National Association of Telecommunications Officers and Advisors (NATOA), which represents local governments and promotes community interests in communications matters.

I am also a longtime advocate of the need for greater broadband communications deployment in the United States.

I appreciate the opportunity to appear before you today on behalf of NATOA, as well as the National Association of Counties (NACo), the Government Finance Officers Association (GFOA), the United States Conference of Mayors (USCM), and the National League of Cities (NLC).

I am here to correct some of the misunderstanding surrounding the economics of the wireless industry and the actual barriers to deployment of wireless broadband services to all areas of our country.

First and foremost, the current tax treatment of wireless services by federal, state, and local authorities has not hindered product innovation, service growth, or industry profitability.

The wireless communications industry is a strong and successful industry. Growth has been explosive in the high-density areas of the country where the carriers have chosen to invest and deploy networks. In 1995, there were 33.8 million cell phone subscribers in the United States; by 2008, that figure had jumped to 270.3 million, representing 87 percent of the nation's total population.

Indeed, it is wireless that represents the greatest growth and opportunity for the communications industry in a variety of ways: first, customers are acquiring wireless phones in addition to the landlines they have in their homes; second, a growing number of customers are dropping their landline phones in favor of having just one, wireless phone;¹ and third, wireless data services – that enable mobile email, text messaging, and Internet use – are growing exponentially.²

By its own account, the wireless industry is very strong. Verizon, the country's largest mobile service provider, posted profits of \$1.65 billion in the first quarter of 2009, representing wireless revenue growth of almost 30 percent.³ On June 12, 2008, in written testimony presented to the Federal Communications Commission, Verizon Executive Vice President Thomas Tauke stated: "The wireless marketplace is working well . . . for consumers and the American economy."

AT&T also clearly sees continued strength in its wireless data services. AT&T is not only attempting to double its wireless data network speeds, but also expanding from 350 to 370 metropolitan areas.⁴ Other major wireless carriers, including Verizon Wireless and Clearwire Corp., are also pursuing network technology upgrades in attempts to capture a larger share of the lucrative wireless data market.

Given the strength and profitability of the wireless industry, one wonders why these companies are seeking preferential tax treatment. Some believe that the wireless industry needs preferential tax treatment because such a benefit will help them deploy and provide affordable broadband access for all Americans.

Let me note that, in my experience, most local governments are actively involved in a range of activities designed to spur broadband communications deployment in their communities – for purposes of education, public safety, economic development, and digital literacy. Local government initiatives range from, in a few cases, seeking to build such networks themselves, to – in many more cases – petitioning and negotiating with

¹ A May 2009 survey released by the Centers for Disease Control and Prevention concludes that for the first time the number of households in the U.S. with only a cell phone exceeds the number of households in the U.S. with only a landline phone.

² In a news report after first-quarter earnings were released, an industry analyst pointed out that AT&T's first-quarter wireless-data revenue soared by almost 40 percent, with average revenue per user up two percent, because of increased wireless Web, e-mail, and text messaging use. <http://www.msnbc.msn.com/id/30431872/>, accessed June 8, 2009.

³ Associated Press, <http://www.msnbc.msn.com/id/30431872/>, accessed June 8, 2009.

⁴ "AT&T says to double mobile data speeds by 2011," Reuters, May 27, 2009, <http://www.reuters.com/article/technologyNews/idUSTRE54Q4TS20090527>

private communications companies to deploy networks in their jurisdictions. America's local governments have been at the forefront of advocating for more, better broadband for many years.

As I just discussed, the wireless voice and data industries are both profitable and growing at extraordinary rates in metropolitan areas of the United States. This is unfortunately not the case in many rural areas, and America's local governments are as concerned and troubled by this as is this Subcommittee. While I commend those who believe our nation should find new models for expanding deployment of wireless broadband in less densely-populated areas, it is important to understand the real economic reasons why we have not achieved the level of broadband wireless deployment we would ideally like.

State and local taxes of wireless service are not an obstacle to wireless broadband deployment. On the contrary, it is the broader economics of the wireless communications industry that is the reason for this slower (or nonexistent) deployment in rural areas. Deployment of communications networks is extremely costly; communications carriers are private, for-profit companies and they quite rationally allocate their investment resources to areas of the country where they are likely to achieve the highest return on investment – those areas that have relatively dense populations and thereby greater potential penetration and higher revenues per mile of construction.

This basic reality of the economics of this industry will not be changed by preemption of state or local taxes or, frankly, by removal of any single cost of doing business, such as a tax. Even in an environment of lower tax costs, the wireless carriers will, quite rationally, still invest their resources in the most potentially lucrative areas and will still set their prices at the highest aggregate rates they believe the market will bear. **Relieving them of local tax costs is unlikely to change investment choices and may simply serve to convert into carrier profits those funds that would otherwise have accrued to localities in this critical economic environment.**

Finally, let me point out that this legislation, to the extent it attempts to impact broadband deployment through one mechanism, is not timely and should await the results of a proceeding currently underway at the Federal Communications Commission. As directed by the American Recovery and Reinvestment Act, the FCC is currently engaged in an extensive, year-long proceeding to develop a National Broadband Plan. That Plan will be delivered to the Congress in February 2010. As part of this proceeding, the FCC's Notice of Inquiry indicates that it plans to evaluate contentions that taxes and other expenses may impact broadband deployment – as well as evaluating the many economic, financial and other factors that could be hindering broadband deployment in the United States. Public comments to the FCC were due just yesterday, and thousands of public, private, and non-profit entities throughout the country are participating in the proceeding by filing comments. Given the breadth and scope of the FCC's charge under the Recovery Act – as well as the February deadline by which it will report its findings to the Congress – this Subcommittee would be wise to wait to see the expert agency's conclusions before proceeding with this legislation.

Local governments and their associations have long advocated for a cohesive, nationwide broadband policy that would bring *affordable* broadband services to all Americans. At last, it appears that the nation is on the verge of achieving what has been necessary for so long – a coordinated federal, state, and local effort to ensure that advanced communications services are available to all. The charge to the FCC under the Recovery Act is a significant and impressive means to this goal.

I commend this Subcommittee for its attention to the essential issue of broadband deployment for all Americans, but I ask you to await the outcome of this important proceeding, and to refrain from a piecemeal attempt to stimulate broadband deployment with a tax policy that would shift a greater burden onto the backs of America's cities, towns, and counties.

Last September, a witness testified before this Subcommittee that "excessive new wireless taxes imposed piecemeal by thousands of state and local governments are a deterrent to new broadband network investments." But a more accurate understanding of the economics of wireless broadband deployment demonstrates that this argument is actually smoke and mirrors, and that this argument for preferential tax treatment is more likely to benefit the wireless communications industry than to change investment decisions regarding wireless broadband.

I urge you to speak out against this measure.

Thank you for the opportunity to provide testimony before the Subcommittee today.

Mr. COHEN. Thank you, Ms. Hovis.

Our fourth witness is a State representative from the Sunshine State, Mr. Joseph Gibbons. He was elected in 2006. He has both parts of Broward and Miami Dade Counties. The football stadium may be in there, the baseball stadium. What do they call it now? Pro Player?

Mr. GIBBONS. Yes.

Mr. COHEN. Prior to his election to the House he was on the Broward County Planning Council and has been a city commissioner from the City of Hallandale Beach.

We appreciate your coming before the Committee, and please begin your testimony.

**TESTIMONY OF THE HONORABLE JOSEPH A. GIBBONS,
FLORIDA HOUSE OF REPRESENTATIVES**

Mr. GIBBONS. Thank you, Chairman Cohen, Ranking Member Franks, and Members of the Subcommittee. My name is Joe Gibbons, and I am a member of the Florida House of Representatives representing the 105th District.

One of the committees that I serve on is the Energy and Utilities Policy Committee. It is my commitment to my work on the issues of that committee that brings me here today.

As wireless services continues to evolve and becomes more about services other than voice, it is critical to recognize that consumers in this emerging environment are not the same individuals that could afford the expensive Internet experience. We should not create the same digital divide on broadband as we initially created on access to the Internet.

While Federal legislatures recognize the need to prevent excessive and discriminatory tactics on the Internet by passing the Internet Tax Freedom Act Amendments of 2007 and Federal and State policymakers embrace the desire to accelerate the deployment of broadband services, the fact remains that the current level of State and local taxation on telecommunications services is misguided and directly counter to economic prosperity.

Unless the tax policies of the past are reformed to reflect the highly dynamic nature of the communications industry today, many of my constituents will be priced out of the ability to have affordable access to the most advanced wireless broadband services. The impact of the current level of taxation on wireless consumers is significant for the high level of seniors, African American, and Hispanic consumers, who as a group have shown a high adoption rate and significant use of both wireless and voice data services. My poorest constituents are more likely to have only a cell phone as opposed to having both a landline phone and a cell phone. Taxation should not punish disproportionately those who can least afford it. And in Florida that is the system in place today.

I reach out to Congress today to help steer the course to telecommunications tax reform for all of my constituents, especially those that use their cell phone as a lifeline. In 2000, to simplify the taxes and fees imposed upon communications services at the State level, legislation was passed that replaced 11 different impositions into one consolidated communications services tax. The base was expanded to specifically include wireless, even though several of

the old impositions were for uses of the right-of-way or other public utility impositions. The current taxes imposed upon the entire communications industry, including wireless, appear to be excessive.

One of the recent trends that the industry has highlighted has been to take the existing franchise and utility taxes that are already applicable to landline services and extend them to wireless. State and local officials are targeting wireless because the number of wireline customers are dwindling and they believe that wireless needs to fill that gap.

It is incumbent upon legislators like myself to advance the needed reforms to the current tax structure at home so that this critical technology, a lifeline in the eyes of my constituents, is not taxed at rates in excess of 20 percent of their monthly bill.

This bill does not preclude communication specific fees so long as the funds are solely used for that stated purpose such as funding for e-911 communications systems and universal service. This bill prevents taxes or fees from being imposed on wireless service that is not also imposed on general goods and services. I believe that those taxes should be as broadly and equitably applied as possible so that the cost of government is borne equitably by all constituents receiving the benefit of those services.

As a former city commissioner and a part of the Broward League of Cities, I am intimately aware of the need for revenue to fund critical government programs. Like any State policymaker, I take any Federal intervention into State taxing authority very seriously. However, I believe that H.R. 1521 carefully walks that fine line of when Federal intervention makes sense. This bill does not preclude my ability to tax wireless consumers or the industry in a rational way. It only precludes my State from targeting these consumers for additional excess taxes. I believe that precluding new discriminatory taxes from being enacted strikes the right balance between the different sovereign powers. These services clearly operate within interstate commerce and as such are within Congress' purview to address when they believe there is a social good to do so, and again I repeat, a social good to do so.

Working with the States to address the existing tax burden on communication services has proven to be very challenging. This bill is seeking simply a time-out so that the situation doesn't get worse during the time that the industry is continuing to work with elected officials to fix the existing problem.

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. This bill would benefit wireless consumers by preventing them from being singled out for new taxes.

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. 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. It is simply identifying that State and local governments should not target wireless consumers unfairly to raise additional revenues or their existing tax structure might come up short. I believe precluding new discriminatory taxes

from being enacted strikes the right balance between the different sovereign powers.

Thank you again for this opportunity here today, and I would be happy to answer any questions that Members of the Committee might have.

[The prepared statement of Mr. Gibbons follows:]

PREPARED STATEMENT OF THE HONORABLE JOSEPH A. GIBBONS

Chairman Cohen, Ranking Member Franks and members of the Subcommittee, my name is Joe Gibbons and I am a member of the Florida House of Representatives representing the 105th District which incorporates parts of Broward County including all or parts of Hollywood, Hallandale Beach, Miramar, Pembroke Pines, Pembroke Park and Westpark. My current responsibilities in the state legislature include participation on the Transportation & Economic Development Appropriations Committee, the Energy & Utilities Policy Committee, the Full Appropriations Council on Education & Economic Development and the Joint Legislative Budget Committee. Thank you for the opportunity to testify today on H.R. 1521, the "Cell Tax Fairness Act of 2009."

While federal legislators recognized the need to prevent excessive and discriminatory taxes on the Internet by passing the Internet Tax Freedom Act Amendments Act of 2007 and federal and state policymakers embrace the desire to accelerate the deployment of broadband services the fact remains that the current level of state and local taxation of telecommunications services is misguided and directly counter to economic prosperity and continued deployment of advanced mobile services across the country. Ultimately, unless the tax policies of the past are reformed to reflect the highly dynamic nature of the communications industry today, many of my constituents will be priced out of the ability to have affordable access to the most advanced wireless broadband services. HR. 1521 is a necessary first step to prevent further expansion of new discriminatory taxes on wireless services while simultaneously it is incumbent on legislators like myself to advance the needed reforms to the current tax structure at home so that this critical technology, a lifeline in the eyes of my constituents, is not taxed at rates in excess of 20% of their monthly bill.

MY CONSTITUENTS WOULD BENEFIT FROM REFORM

My district is a diverse, multi-ethnic urban area which is one of the fastest growing areas in the state of Florida. The impact of the current level of taxation on wireless consumers is significant for the high level of seniors, African American and Hispanic consumers who, as a group, have shown a high adoption rate and significant use of both wireless voice and data services:

- For use of non-voice data applications on handhelds, Hispanics and African Americans lead the way relative to caucasian Americans. Half of African Americans and 56% of English-speaking Latinos with cell phones, on a typical day, do at least one of 10 non-voice data applications such as taking pictures, accessing the internet for news, playing music, or texting. By contrast, 38% of caucasians do these kinds of activities on a wireless handheld device on the average day.¹
- Mobile access builds on the cell phone, a device that is easier to use and more affordable than a computer. Adoption patterns have therefore been very different for the device, which is a key platform for "on the go" information access. Cell phone users are more likely to be found in groups that have generally lagged in internet adoption, such as senior citizens, blacks, and Latinos.²

All of the data points above are reflective of the broad demographics that make my district the center of diversity in the state and the impetus for the need of federal, state and local focus on the issue of taxation of wireless consumers. Florida undertook comprehensive measures in 2000, to "simplify" the taxes & fees imposed upon communication services. At the state level, legislation was passed that replaced 11 different impositions into one consolidated communications services tax. The base was expanded, to specifically include wireless, even though several of the

¹Pew Internet & American Life Project, *Seeding the Cloud: What Mobile Access Means for Usage and Online Content*, March 2008.

²Pew Internet & American Life Project, *Seeding the Cloud: What Mobile Access Means for Usage and Online Content*, March 2008

old impositions were for uses of the Right of Way or other public utility impositions. Although simplification was accomplished, the excessive level of taxation remains. The state still has one of the highest rates on communication services in the country at over 20%. Recent efforts to reduce the rate imposed upon all communication services have failed but no time is better than the present to drive attention to this issue and create momentum for reform of the existing level of taxation of these services. What is clear though is that we shouldn't allow the situation to get worse at the same time we are trying to fix the current system and the situation in Florida provides a prime example of that rationale. Once the state and local jurisdictions become dependent upon receiving the revenues from these excess taxes it is very hard to work to take it away, even when policymakers might agree that it is the right policy to pursue. That is the genesis of what H.R. 1521 will help accomplish, stopping the current tax situation from getting worse for wireless consumers.

Furthermore, as a small business owner, I am profoundly aware of the impact of mobile communications on the level of productivity, the increased speed at which to react to customers needs and the cost of tools that enhance and add to the bottom line. State and local tax policy that discourages use and adoption by small businesses also drives away investment in infrastructure. The most effective means to encourage investment in the state relative to investment is to eliminate the high level of discriminatory taxes that retard infrastructure investment and drive up prices. The current tax policy in Florida is counterproductive to the thousands of small entrepreneurs that make up my district, companies that add significantly to the local and state economy.

REGRESSIVE NATURE OF TELECOM TAXATION

The high wireless tax burden on Floridians is a major concern but the burden on those Americans, regardless of ethnic identification, that can least afford telecommunications services is a primary concern. The following statistics from the Center for Disease Control's annual survey illustrates the concern of high taxes on wireless service:

- Adults living in poverty (21.6%) were more likely than higher income adults to be living in households with only wireless telephones.³
- The percentage without health insurance coverage at the time of the interview among wireless-only adults (28.8%) was twice as high as the percentage among adults living in landline households (14.1%).⁴

As a former City Commissioner and Vice-Chair of the Broward League of Cities Diversity Committee, I am intimately aware of the need for revenue to fund critical government programs but there needs to be a fine balance in how revenues are obtained so that one service is not so heavily burdened with taxes that it effectively discourages the use of such services, pricing them out of reach for a segment of the population that arguably relies upon them the most. Clearly that is the case with cell phone taxation and as a result those that can least afford the onerous burden are impacted the most. Ironically and to my point, relative to taxation of their cell phone bill my wealthiest constituents contribute at the same level as my poorest. And according to statistics, my poorest constituents are more likely to have only a cell phone as opposed to having both a land line phone and a cell phone. Taxation should not punish disproportionately those who can least afford it and in Florida that is the system in place today. I reach out to Congress today to help steer the course to telecommunications tax reform for all my constituents especially those that use their cell phone as a lifeline.

POLICY DOUBLE-SPEAK SO TO SPEAK

As wireless service continues to evolve and becomes more about services other than voice, it is critical to recognize that consumers in this emerging environment are not the same individuals that could afford the expensive Internet experience through the desktop computer. As pointed out by the Pew Internet & American Life Project "groups that have in the past trailed in "traditional" internet access are in a better position to shape cyberspace as the internet becomes more accessible using wireless devices." For broadband to become available to the greatest number of American consumers, it's incumbent on policymakers to make wireless services affordable through reasonable tax policy, thus lowering a significant cost barrier.

³ CDC, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2007

⁴ CDC, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2007

- In 2005, the percentage of African Americans with broadband service in the home was 14%; the percentage of all African Americans was 30 percent. In 2007, the percentage of African Americans increased to 40%, nearly tripling in number; the percentage of all Americans was 47%.⁵

Broadband is critical to my community and communities across the State of Florida and the nation. The federal government has taken bold steps in recent months to stimulate the deployment of broadband services to all Americans. However on the flip side, policymakers are still seeking to tax wireless services to the point where the services are simply unaffordable. Taxation of products at rates close to the 20% level like those imposed upon alcohol and tobacco makes sense to most from a policy perspective because the intent is to discourage the use of such product(s) through the high level of taxes imposed. Conversely, taxation of wireless services, services that lawmakers want to ensure all constituents have affordable access to, at a 20% rate, makes absolutely no policy or economic sense. These high levels of taxation will stifle demand for such services, which in turn will also slow investment in critical broadband infrastructure so many policymakers continue to seek. We need to fix the existing problem as it is counterintuitive to many of our existing public policy goals of expanding the reach and affordability of broadband services.

STATE SOVEREIGNTY

Like any state policymaker, I take any federal intervention into state taxing authority very seriously. However, I believe that H.R. 1521 carefully walks that fine line of when federal intervention makes sense. This bill does not preclude my ability to tax wireless consumers or the industry in a rational way. It only precludes my state from targeting these consumers for additional excess taxes. As we have already heard, Florida is already asking these consumers to bear more than their fair share of the state and local tax burden and we shouldn't allow that to get any worse. Certainly not for a service that is critical to the overall health and productivity of our Nation's economy.

I strongly support H.R. 1521, the "Cell Tax Fairness Act" and its pro-consumer, pro-broadband intent. I welcome any questions you may have.

Mr. COHEN. Thank you, Representative Gibbons. I appreciate it.

Our final witness is Don Stapley. Mr. Stapley is the Chair of the Maricopa County Arizona Board of Supervisors, which is Phoenix, which is where the University of Tennessee won the national championship a few years ago. He has risen through the ranks of NACo to become President, became President in Jackson County, Kansas City, Missouri. I am a former NACo member and attended a national conference of NACo in Jackson County myself many years ago.

Welcome to the Committee, and we appreciate your testimony.

TESTIMONY OF THE HONORABLE DON STAPLEY, MARICOPA COUNTY BOARD OF SUPERVISORS, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES, THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL LEAGUE OF CITIES

Mr. STAPLEY. Chairman Cohen, thank you, and distinguished Members of the House Subcommittee on Commercial and Administrative Law. I will skip my introduction to save time for the complete presentation, but I do appreciate the opportunity to appear before you today on behalf of NACo as well as the Government Finance Officers Committee—Association, I am sorry, the United States Conference of Mayors, and the National League of Cities. If there is one thing all of our organizations have in common, it is our

⁵Pew Internet & American Life Project, June 2007

longstanding opposition to efforts by Congress to preempt State and local taxing authority. This is especially true when it comes to telecommunications taxes. How to levy taxes fairly, how to ensure there is no discrimination among companies that provide different forms of the same service, and how to protect local government revenues are all appropriate debates, but these debates belong at the State and local level, and this is why our associations are united in our opposition to this bill.

Local governments exercise their taxing authority to the extent provided by State law. As a result, local taxing authority and practices differs from State to State and oftentimes taxing policy differs from county to county and city to city within States. But this is good, because this means that every local government taxing authority tailors its tax policy by taking into account the sources of revenue available and the needs and wants of its residents.

I was first elected to the Board of Supervisors in Maricopa County, Arizona in 1994. More than two-thirds of the population of Arizona lives in my county, which is also home to the State capital of Phoenix. Three weeks ago, the board adopted a tentative fiscal budget for years 2009 and 2010 of \$2.1 billion. This represents a 5.4 percent decrease from the current year's budget. The board adopted a strategic plan to exercise sound financial management and build the county's fiscal strength. To this end we cut jobs, programs, and some services and delayed capital projects which resulted in a savings of in excess of \$122 million.

Much of the county's revenue comes from property taxes, sales taxes, vehicle license taxes, and jail taxes. We choose to continue minimizing the property tax burden that we impose upon our citizens. Because of the rapid growth that has taken place within the county, the board has lowered or maintained the overall property tax rate for the past 15 years.

In today's difficult economic times where State aid to local governments has decreased dramatically, local taxing autonomy is crucial in helping to ensure that the needs of local citizens, our mutual constituents, are met. The ability to make taxing and other fiscal policy decisions at the local level and without Federal intervention has enabled Maricopa County to provide the quality services that our constituents have come to expect.

Some argue that the proposed 5-year ban set forth in this bill doesn't hurt State and local governments because they can still continue to collect the taxes they currently impose. But this misses the point.

What this legislation does is preempt State and local taxing authority and represents a Federal intrusion into historically protected State and local tax classifications. Enactment of this bill would lead other industries to seek similar special Federal protection from State and local taxes.

It is important to remember that State and local governments, unlike the Federal Government, must balance their budgets. In this tough financial climate, this isn't an easy task. Hard choices like those made in my county must be made. Essential services may be cut. Public employees may be laid off. Infrastructure repairs and construction may be put on hold. And yes, taxes may even have to be raised. But what is important to emphasize is that

when balancing the budget, all options must be on the table. What this bill does is take away one of those important options, to tax the wireless industry at the expense of other taxpayers and businesses.

This bill fails to recognize the plain fact that not all jurisdictions depend on identical revenue sources. Some have income tax. Others don't. Some tax food. Others don't. As a result some jurisdictions may necessarily have to tax wireless services at a higher level than others. Enactment of this bill would force those jurisdictions to rely even more heavily on other types of taxes, thereby shifting the tax burden to those in the community less able to tolerate it.

However, whether a particular State or local government has imposed too high a tax burden on the wireless industry is an issue that should be addressed at the appropriate State or local government level. The Federal Government should not step in and impose a uniform, nationwide taxing scheme that provides preferential tax treatment to a single industry, the wireless industry in this case, while preempting State and local taxing authority.

Those who support this legislation must ask themselves whether the preemption of State and local authority is warranted. I urge that in this case, where legislation seeks to protect an industry that continues to experience explosive growth and profits at the expense of other taxpayers, it is most definitely not. I urge you to speak out against this measure.

Thank you for your time, Mr. Chairman, and the opportunity to be before you today, and I am happy to answer any questions.

[The prepared statement of Mr. Stapley follows.]

PREPARED STATEMENT OF THE HONORABLE DON STAPLEY

**Statement of Don Stapley
Board of Supervisors
Maricopa County, Arizona**

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

**H.R. 1521
“Cell Tax Fairness Act of 2009”**

June 9, 2009

Chairman Cohen and distinguished members of the House Subcommittee on Commercial and Administrative Law:

My name is Don Stapley. I am on the Board of Supervisors of Maricopa County, Arizona and President of the National Association of Counties (NACo).¹ I chair NACo's Strategic Plan Advisory Committee and I am a former chair of NACo's Large Urban County Caucus. I am also the Executive Committee Liaison to NACo's Information Technology Committee.

I appreciate the opportunity to appear before you today on behalf of NACo, the Government Finance Officers Association (GFOA), the United States Conference of Mayors (USCM), and National League of Cities (NLC).

If there is one thing all of our organizations have in common, it is our long-standing opposition to efforts by Congress to preempt state and local taxing authority. This is especially true when it comes to telecommunications taxes. How to levy taxes fairly, how to ensure there is no discrimination among companies that provide different forms of the same service, and how to protect local government revenues, are all appropriate debates. But these debates belong at the state and local levels. And this is why our associations are united in our opposition to this bill.

¹ The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,066 counties. NACo advances issues with a unified voice before the federal government, improves the public's understanding of county government, assists counties in finding and sharing innovative solutions through education and research, and provides value-added services to save counties and taxpayers money. For more information about NACo, visit www.naco.org.

Local governments exercise their taxing authority to the extent provided by state law. As a result, local taxing authority and practices differ from state to state. And often times, taxing policy differs from county to county and city to city within the state. But this is good. Because this means that every local government taxing authority tailors its tax policy by taking into account the sources of revenue available and the needs and wants of its residents.

I was first elected to the Board of Supervisors of Maricopa County, Arizona in 1993. More than half the population of Arizona lives in Maricopa County, which is home to the state capital, Phoenix. Three weeks ago, the Board adopted a tentative fiscal year 2009-10 budget of \$2.1 billion. This represents a 5.4% decrease from this year's budget. The Board adopted a strategic plan to exercise sound financial management and build the County's fiscal strength. To this end, we cut jobs, programs, and services and delayed capital projects, which resulted in a savings of \$122 million. Much of the County's revenue comes from property taxes, sales tax, vehicle license taxes, and jail taxes. We choose to continue minimizing the property tax burden that we impose upon our citizens. Because of the rapid growth that has taken place within the county, the Board has lowered or maintained the overall property tax rate for the past 15 years.

Maricopa County has achieved and maintained financial stability by developing and implementing a series of budget, tax and other financial policies to guide our fiscal management and budgetary decisions. These policies address a number of issues, including budget development, tax reduction, budgetary control, reserves, and managing for results. These policies incorporate "best practices" in the field of state and local government budgeting and financial management, and are aligned with Maricopa County's Managing for Results System.

In today's difficult economic times, where state aid to local governments has decreased dramatically, local taxing autonomy is crucial in helping to ensure that the needs of local citizens, our mutual constituents, are met. The ability to make taxing and other fiscal policy decisions at the local level, and without federal interference, has enabled Maricopa County to provide the quality services that our constituents have come to expect.

Some argue that the proposed 5-year ban set forth in this bill doesn't hurt state and local governments because they can still continue to collect the taxes they currently impose. But this misses the point. What this legislation does is preempt state and local taxing authority and represents a federal intrusion into historically-protected state and local tax classifications. Enactment of this bill would lead other industries to seek similar special federal protection from state and local taxes. This slippery slope necessarily leads to an erosion of our system of federalism and a direct threat to the fiscal health of state and local governments.

It is important to remember that state and local governments, unlike the federal government, must balance their budgets. In this tough financial climate, this isn't an easy task. Hard choices – like those made by my County - must be made. Essential services

may be cut. Public employees may be laid off. Infrastructure repairs and construction may be put on hold. And yes, taxes may occasionally have to be raised. But what is important to emphasize is that when balancing the budget, all options must be on the table. What this bill does is takes away one of these options –to tax the wireless industry- at the expense of other taxpayers and businesses.

This bill fails to recognize the plain fact that not all jurisdictions depend on identical revenue sources. Some have an income tax – others don't. Some tax food – others don't. As a result, some jurisdictions may necessarily have to tax wireless services at a higher level than others. Enactment of this bill would force those jurisdictions to rely even more heavily on other types of taxes, thereby shifting the tax burden to those in the community less able to tolerate it.

The wireless industry argues misleadingly that this bill is necessary because taxes on wireless providers are higher than those imposed on other industries. Our organizations have published a report disputing these claims and I have attached a copy of the report to this statement.

However, whether a particular state or local government has imposed too high a tax burden on the wireless industry is an issue that should be addressed by the appropriate state or local government. The federal government should not step in and impose a uniform, nationwide taxing scheme that provides preferential tax treatment to a single industry – the wireless industry - while preempting state and local taxing authority.

Preemption of state and local authority presents a serious matter, as any such preemption undermines the 10th Amendment to the United States Constitution. Those who support such legislation must ask themselves whether the preemption of state and local authority is ever warranted. I would urge that in this case, where the legislation seeks to protect an industry that continues to experience explosive growth² and profits at the expense of other taxpayers – it is most definitely not.

I urge you to speak out against this measure.

Thank you for allowing me the opportunity to appear before you today.

² In 1995, there were 33.8 million cell phone subscribers in the United States. In 2008, the number of cell phone subscribers had jumped to 270.3 million, representing 87% of the United States' population.



**LOCAL GOVERNMENT PERSPECTIVE
ON TELECOMMUNICATIONS TAXES**

A Response to Industry's 2004 COST Study

Summer 2006

Sponsored by:

National Association of Counties
National League of Cities
United States Conference of Mayors
Government Finance Officers Association
National Association of Telecommunications Officers and Advisors



1.0 Introduction

The telecommunications industry is conducting a multipronged effort to reduce the level of taxes it pays to local governments. Large sums of money are being poured into national and local advertising in a highly targeted media and lobbying campaign. In addition, the telecommunications industry is litigating against local governments to contest taxes and fees. The industry is also lobbying the federal and state governments to obtain favorable legislation to accomplish the same result.

As with any business, telecommunications companies need to pay their fair share of taxes.

As with any business, telecommunications companies need to pay their fair share of taxes. Recognizing the convergence among different types of telecommunications services, local governments generally favor the imposition of taxes on a nondiscriminatory basis, regardless of the technologies used, on competing communications service providers that offer functionally equivalent services. They also favor reforms that will create a level playing field for competition among existing and new service providers. Further, they favor simplifying the administration of state and local taxes on communications services to encourage continued investments and innovations.

In this context, it is critical that industry viewpoints be carefully scrutinized. The industry commissioned a study, published in March 2005 by the Telecommunications Tax Task Force of the Council on State Taxation (COST), titled *2004 State Study and Report on Telecommunications Taxation* (the COST Study).¹

As it states, the COST Study is intended to persuade policymakers to lower the tax burdens on the telecommunications industry:

The state and local tax laws continue to impose high levels of industry-specific taxation on telecommunications services. While some states have begun the process of reforming the state and local tax structure, much more is needed to reduce the high levels of telecommunications taxation...²

The COST Study summarizes its most important finding as follows:

The 2004 State Study shows that the average effective rate of state and local transaction taxes is 14.71%, compared to only 6.12% for general businesses nationwide.³

¹ The following companies participated in the study: ALLTEL Corporation, AT&T Corporation, BellSouth Corporation, Cingular Wireless LLC, Level 3 Communications, Nextel Communications, Qwest Communications, SBC Communications, Sprint Corporation, Telephone and Data Systems, Inc., T-Mobile USA, Verizon Communications, and Verizon Wireless.

² *2004 State Study and Report on Telecommunications Taxation*, Council on State Taxation, 2005, p. 7.

³ *Ibid.*, pp. 3-4.

The COST Study contains serious methodological flaws that make it an inappropriate basis for policy decisions.

This White Paper presents a preliminary response from local governments to the 2004 COST Study and that core finding. The COST Study contains serious methodological flaws that make it an inappropriate basis for policy decisions, especially the industry's proposals to make widespread changes to local tax structures. The COST Study presents a selective summary of state and local fees and taxes that omits important analytic issues. Moreover, it neglects to highlight parts of the tax system that favor telecommunications companies compared to other businesses.

2.0 Local Government Response to 2004 COST Study: A Summary

The following problems were identified by the local government organizations that examined the 2004 COST Study:

- ❖ **"Transaction Taxes:"** The COST Study's analysis of "transaction taxes" is flawed because it mixes *taxes*, which apply to a broad range of businesses, with *user fees*, which are the charges that local governments levy for use of public rights-of-way by private users such as telecommunications companies. The COST Study fails to define "transaction taxes" consistently for telecommunications companies and other businesses.
- ❖ **Income Taxes:** The COST Study fails to disclose that telecommunications companies pay significantly lower corporate income taxes than other businesses.
- ❖ **Property Taxes:** The COST Study's analysis of property taxes shows, by its own numbers, that there is no discrimination against telecommunications companies in real property taxes and little disparity, if any, in other property taxes.
- ❖ **Overall Impact on Local Governments:** Because of the flaws of the COST Study with respect to (1) user fees and other fees and (2) income taxes, its estimates of relative tax burdens are incorrect. However, even if taken at face value, the COST Study's data show a tremendous impact on the ability of local governments to provide needed services to their constituents due to lost revenue if the telecommunications industry's recommendations were followed.
- ❖ **The Effects of Changing Technology:** Currently, technological convergence is creating new forms of competition among different types of telecommunications as voice, data, and video are offered over a much broader range of media, including traditional land lines, wireless, cable, satellite, and voice-over-Internet-protocol (VoIP) services. Each of these services is subject to a different set of state and local taxes. In addition, the federal government is showing a disturbing pattern of intervention in state and local revenue policy that has the potential to exacerbate rather than reduce these tax differentials. In this context, negotiations among state and local government groups and telecommunications companies represent the best way to reduce administrative burdens and promote equitable taxation.

The sections that follow consider each of these points in turn.

3.0 "Transaction Taxes"

As stated above, the COST Study's analysis of "transaction taxes" mixes *taxes*, which apply to a broad range of businesses, with *user fees*, which are the charges that local governments levy for use of public rights-of-way by private users such as telecommunications companies. The COST Study raises significant methodological issues when it fails to define "transaction taxes" consistently for telecommunications companies and other businesses. The result of this shortcoming is that the numbers produced by the COST Study indicate much heavier relative burdens on telecommunications companies, compared to other business companies, than are actually the case.⁴

The COST Study as a whole is based on a fallacious argument

Before discussing these individual issues, however, it should be noted that the COST Study as a whole is based on a fallacious argument. The COST Study argues that tax burdens should be applied consistently across different companies. Of course, this is not really true. The Supreme Court has repeatedly upheld the power of state legislatures to classify taxpayers according to local needs and conditions. In the 1983 case of *Regan v. Taxation With Representation*, the court reiterated that "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."⁵ Indeed, many types of businesses are subject to their own special taxes, including not only the so-called "sin taxes" of tobacco and alcohol but also travel, hotel, entertainment, petroleum distribution, transportation, and non-telecom public utilities.⁶ Therefore, claiming that the tax burden for the telecommunications industry should be comparable with other businesses is not a valid argument. Nevertheless, this White Paper considers the COST Study's other claims.

3.1 Significant Portions of So-Called "Taxes" Are User Fees

The COST Study creates an artificial construct that it calls "transaction taxes."⁷ It applies this term to the tax burden on telecommunications companies compared to the tax burden on other businesses.

The COST Study defines "transaction taxes" inconsistently.

The COST Study undercuts its own call for consistency by defining "transaction taxes" differently for telecommunications companies and for other businesses. The COST Study defines "transaction taxes" on telecommunications companies as the total of "any state and local taxes applied to the cost of service or the

⁴ This methodological shortcoming also means that the COST Study includes user fees in its calculations for telecommunications companies to produce a higher total number of transaction taxes compared to the calculation for other businesses, where the definition of "transaction tax" does not include user fees.

⁵ 461 U.S. 540, 547 (1983). The court went on to quote with approval the following language from *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940):

The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.... [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.

⁶ Tillman L. Lay, "Some Thoughts on Our System of Federalism in a World of Convergence," *Law Review of Michigan State University-Detroit College of Law*, Spring 2000, pp. 223-237, at p. 231-2.

⁷ 2004 *State Study and Report on Telecommunications Taxation*, Council on State Taxation, 2005, pp. 3-4.

provision of the line to the consumer.” By contrast, the COST Study defines transaction taxes on general businesses much more narrowly, as merely “the traditional sales tax imposed on sales of tangible personal property and comparable transaction taxes.”⁸

Thus, “transaction taxes” for telecommunications include not only sales taxes but also user fees that states and localities may impose on companies in return for their use of public rights-of-way. Other businesses—in general—do not use the public rights-of-way to nearly the extent that telecommunications companies do.

3.2 User Fees

For telecommunications companies, user fees are required when a company uses streets or overhead wires or other parts of public rights-of-way in its business. These user fees include payments for use of public rights-of-way that sometimes, but not always, may be denominated as “taxes.” User fees may be assessed as franchise fees, permit fees, infrastructure maintenance fees, or gross receipts taxes, for example, depending on the jurisdiction. Other businesses that use public rights-of-way, such as gas and electric companies, also pay user fees.

In addition to charging for use of public rights-of-way, federal law permits states and localities to impose 911 emergency system surcharges or universal service fees. Both of these are used to help build and maintain the public telecommunications network. They directly benefit the users of telecommunications services. This is similar, for example, to the use of gasoline taxes to help build and maintain the network of roads and other infrastructure that are needed to serve automobile traffic.

In preparing this White Paper, officials from a number of local and state governments and local government associations contributed their insights to help identify which charges were improperly categorized in the COST Study as taxes instead of user fees.

As can be expected from the different revenue policies adopted across the country, the results vary from state to state and locality to locality. New York State published a study in 2001 that shows the gap between sales taxes and other transaction revenues that can be considered user fees rather than taxes. That study concluded as follows:

Computations from governmental sources indicated that the total amount of local telecommunications taxes and fees was slightly over \$1 billion [in 1998]. Nearly two-thirds of these revenues came from two sources—the sales tax and the real property tax.⁹

Setting aside the \$306.5 million in property taxes from the \$1.039 billion in local fees and taxes that year, this means that New York State’s local governments collected some \$732 million from telecommunications companies that year, of

⁸ *Ibid.*, p. 4.

⁹ New York State Department of Taxation and Finance and New York State Office of Real Property Services, *Local Telecommunications Taxes and Fees in New York State*, report to Governor George E. Pataki and the New York State Legislature, January 2001, p. 3.

which the state attributes only \$350 million, or 47 percent, to sales taxes.¹⁰ The remainder of the revenues collected can be attributed to user fees rather than the kind of tax revenues paid by other businesses.

In another example, data from the State of Florida indicate a significant but somewhat lower percentage of user fees. In 2000, the Florida legislature passed the Communications Services Tax Simplification Law.¹¹ The legislation created a new tax structure for communications services, combining seven different state and local taxes or fees and replacing the revenues with a two-tiered tax composed of a state tax and a local option tax on communications services. According to one estimate, somewhat less than 25 percent of the new Communications Services Tax represents user-fee revenues while the remainder represents tax revenues.¹²

User fees reflect the special burdens that telecom companies impose on the public and local governments.

Thus, in two major jurisdictions that have reviewed this question, it has been found that a substantial fraction of local government revenues comes from user fees rather than taxes on telecommunications companies. User fees, especially for the public rights-of-way, reflect the special burdens that telecommunications companies impose on the public and local governments. Telecommunications companies also derive special benefits from the use of the public rights-of-way.

3.3 Impact on Constituents

Telecommunications companies burden the public in ways that general business does not. For example:

- ❖ Telecommunications companies frequently cut open sections of street pavements either to install new services or to access existing infrastructure. Even though the companies fill in the cuts, the pavement within and beside the cuts often fails prematurely. For example, a City of Cincinnati study found that "street pavements with cuts exhibit a 33% loss in their remaining service life."¹³
- ❖ Installation of telecommunications infrastructure, such as cables, causes lane closures and significant delays to the traveling public.
- ❖ Closing of street lanes due to installation of telecommunications infrastructure costs both public and private revenues (e.g., parking meter revenues, disruption of private commercial businesses).
- ❖ Installation of telecommunications infrastructure has led to serious accidents and damage to water mains, power lines, gas lines, phone lines, steam lines, and sewers.¹⁴

¹⁰ See Table 1, *ibid.*, p. 4. The distribution of a small amount of listed taxes and fees collected by New York City is not clear from this table.

¹¹ Codified at Chapter 202, Florida Statutes.

¹² Interview with Christian Weiss, Chief Economist, Office of Tax Research, Department of Revenue, State of Florida, October 2005.

¹³ Arudi Rajagopal, "A Rational Permit Fee Structure for the Street Right-of-Way Permit Program," *Public Works Management and Policy*, vol. 8, no. 3, January 2004, pp. 203-215, at p. 210.

¹⁴ See, e.g., TeleCommUnity, "The Case for Rights-of-Way Management: A Collection of Illustrative Incidents Arising from Street Cuts," available at <http://www.TeleCommUnityAlliance.org>.

Occupation of public rights-of-way by infrastructure of a telecommunications company denies use of that space, and potentially space above and below it, for other uses. For example, the need for access to underground cables and other infrastructure limits the location of light rail lines, transit-related infrastructure such as stations and shelters, foundations for overpasses, streetlight foundations, etc.

In other words, it is entirely appropriate for local governments to charge user fees for use of the public rights-of-way. The portion of "transaction taxes" attributable to user fees should be deducted from the COST Study numbers to make the comparison consistent between telecommunications companies and other businesses that do not impose the same burdens on the public.

3.4 *User Fees and Taxes Are Enacted for Different, Legitimate Purposes*

The point is well settled that taxes and fees are quite different sources of revenue. In a case involving a gross receipts tax that the City of St. Louis imposed on telegraph companies, the Supreme Court decided over a hundred years ago that it is legitimate for a locality to impose such user fees:¹⁵

All that we desire or need to notice is the fact that this use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not.¹⁶

The court had little difficulty with the fact that the rental fee had been denominated as a gross receipts "tax." It clearly distinguished the difference between taxes and fees on analytical grounds, something that the 2004 COST Study fails to do:

"A tax is a demand of sovereignty, a toll is a demand of proprietorship." [citations omitted] If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes.¹⁷

It should be added that the distinction between taxes and user fees remains a feature of current law. For example, *TCG Detroit v. City of Dearborn*, 206 F 3d 618 (6th Cir, 2000) upheld a franchise fee imposed by the City of Dearborn on a telecommunications company as "fair and reasonable" under the terms of the Federal Telecommunications Act of 1996.¹⁸

¹⁵ *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893)

¹⁶ 148 U.S. at 99

¹⁷ 148 U.S. at 97

¹⁸ The 1996 Act, as codified at 47 U.S.C. Section 253, provides in pertinent part that:
(a) In general: No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Following the established legal distinction, the U.S. Government Accountability Office (formerly the General Accounting Office) has rendered an opinion that distinguishes the immunity of the U.S. government from local taxes under the Supremacy Clause of the U.S. Constitution and rights-of-way charges that the U.S. government is obligated to pay when they are imposed by the District of Columbia government.¹⁹

3.5 User Fees Are Not Limited to Cost

The question then becomes whether it is somehow improper for localities to impose user fees that are higher than the locality's own costs for use of public rights-of-way. Here too the answer is well settled: The owner of property, whether a private owner or a governmental one, may charge market rates for the use of its property.

Similar to the state and local governments that are the focus of the 2004 COST Study, the federal government also has spoken clearly in this regard. The U.S. Office of Management and Budget (OMB) issued Circular No. A-25 in 1998, establishing federal policy regarding fees assessed for government services and for sale or use of government goods or resources. That circular prescribes:

Except [for exceptions as a courtesy to foreign governments or as may be approved by OMB], *user charges will be based on market prices...* when the Government, not acting in its capacity as sovereign, is leasing or selling goods or resources, or is providing a service (e.g., leasing space in federally owned buildings). Under these business-type conditions, *user charges need not be limited to the recovery of full cost and may yield net revenues.*²⁰ (emphasis added)

In summary, the 2004 COST Study fails to add to the policy debate because it inappropriately mixes user fees and state and local taxes when calculating the "transaction tax" burden on telecommunications companies and other users of public property for private gain. User fees, especially when collected on the basis of market prices, are a substantial part of the revenues that local governments collect from telecommunications companies. These user fees, as the U.S. Supreme Court observed long ago, are as legitimate as tax revenues; similar to tax payments, telecommunications companies may either pass these costs of doing business on to their customers or deduct them from their income taxes.

(b) State regulatory authority: Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority: Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

¹⁹ U.S. General Accounting Office, "911 Emergency Surcharge and Right-of-Way Charge," B-288161, April 8, 2002.

²⁰ U.S. Office of Management and Budget, "User Charges," OMB Circular A-25, July 8, 1993.

4.0 Income Taxes

The COST Study fails to disclose that telecommunications companies pay significantly lower corporate income taxes than other businesses.

Telecommunications companies on average pay substantially lower corporate income taxes than other companies.

The 2004 COST Study concedes in the section on methodology and assumptions that it "does not include income taxes."²¹ This glaring omission undermines the usefulness of the COST Study, since it fails to provide an accurate picture of state and local taxation of telecommunications companies. Importantly, it omits a significant benefit that telecommunications companies receive under current tax policy. Telecommunications companies on average pay substantially lower corporate income taxes than other companies.

Many telecommunications companies own substantial infrastructure. They claim income tax deductions on the basis of those assets. Because of income tax treatment that permits the telecommunications companies to claim depreciation and investment tax credits on their property, some major telecommunications companies pay far less income taxes, as a percent of income, on average than do other businesses. The 2004 COST Study, which seeks to compare telecommunications tax burdens with those of other businesses, omits this important aspect of state and local taxation.

A look at the public reports of Verizon Communications, a major company with both land-line and wireless lines of business, shows the corporate income tax benefits received by this participant in the 2004 COST Study.

In 2004, Verizon reported that its state and local tax burdens amounted to an effective rate of only 2.9%.

Verizon's 2004 Form 10-K filed with the Securities and Exchange Commission reports the company's tax burdens.²² In 2004, the company reported that its state and local tax burdens amounted to an effective rate of only 2.9 percent. The company reported a total income tax expense of \$2.851 billion for 2004.²³ Moreover, the lion's share of this—\$1.850 billion—was deferred. Deferred taxes are much less costly than taxes one must pay immediately.²⁴

Verizon reported that much of its state and local income tax burden is deferred. In 2004, the company owed \$335 million in state and local taxes; however, \$123 million was deferred. These are tax revenues for current services, which will not be received by state and local governments for many years to come.

5.0 Property Taxes

The COST Study analysis of property taxes shows, by its own numbers, that there is no discrimination against telecommunications companies in real property taxes and little disparity, if any, in other property taxes.

²¹ 2004 State Study and Report on Telecommunications Taxation, Council on State Taxation, 2005, p. 19.

²² 2004 Form 10-K for Verizon Communications, Inc., Note 17, "Income Taxes," pp. 192-193 (Internet version), March 2005

²³ The company's income statement, also found in the Form 10-K, shows that Verizon's net income that year was \$7.8 billion.

²⁴ If a company can defer paying taxes, it can invest the money and obtain investment income for years before the money must actually be paid to the tax authorities. As a result, government is deprived of this money during the intervening years. Other taxpayers such as general businesses generally must pay their full taxes promptly and therefore lose the benefit of deferral.

The COST Study shows that telecommunications companies pay roughly the same percentage of property taxes as do other businesses.

The 2004 COST Study itself shows that telecommunications companies on average pay roughly the same percentage of property taxes as do other businesses. The COST Study finds that telecommunications companies pay an effective tax rate on real property (i.e., land and buildings) of 2.26 percent, compared to an effective tax rate for other businesses of 2.19 percent.²⁵ In other words, there is virtually no difference in real property tax burdens.

The effective tax rate for telecommunications companies on tangible property (e.g., furniture, fixtures, equipment) is 1.85 percent, compared to an effective tax rate for other businesses of 1.70 percent.²⁶ Again this difference, if statistically significant, is small. Taken together, the effective tax rates for real and tangible property are essentially the same between telecommunications companies and other businesses.

The COST Study does show that about one-third of the states, mostly in the Midwest and West, impose taxes on intangible property (e.g., patents, copyrights, licenses, trademarks) at somewhat higher effective rates for telecommunications companies. However, the study also shows that tax rates for intangible property are on average across the country much lower than the other property tax rates on real and tangible property.²⁷

In addition, there is the problem of tax avoidance behavior by telecommunications companies that allows them to reduce their property tax burdens even further. As *The Boston Globe* reported,

In total, telecoms have cut their city tax bills by over \$14 million since 2003, through moves such as transferring legal title to equipment to paper companies based in Bermuda and Delaware that get more favorable tax treatment....Verizon Wireless, for example, shifted legal ownership of assets to a Bermuda-based corporation to get more favorable tax treatment and cut its Boston tax bill by 99 percent, to \$9,307 this year from over \$3 million two years ago, according to city figures.²⁸

The different tax treatment of telecommunications companies and other utility companies also creates significant inequities:

In the case of thousands of roadside poles jointly owned by Verizon and the local electric utility, the utility pays tax on its half-interest in the pole, but Verizon doesn't. In many cases wireless companies don't pay tax on computerized switches, but they do on backup electrical generators sitting just feet away from the switches.²⁹

Boston's Mayor Thomas M. Menino is backing a bill in the Massachusetts legislature to tax telecommunications equipment the same as the property of electric utilities and other industrial companies. This bill would raise \$140 million in revenues statewide.³⁰

²⁵ 2004 *State Study and Report on Telecommunications Taxation*, Council on State Taxation, 2005, p. 12.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Peter J. Howe, "Telecoms Slash Their Property Tax Burden," *The Boston Globe*, June 10, 2005.

²⁹ *Ibid.*

³⁰ *Ibid.*

6.0 Overall Impact on Local Governments

Because of the flaws of the COST Study with respect to (1) user fees and other fees and (2) income taxes, its estimates of relative tax burdens are incorrect. However, even if taken at face value, the COST Study's data show a tremendous impact on the ability of local governments to provide needed services to their constituents due to lost revenue if the telecommunications industry's recommendations were followed.

In addition to the 2004 COST Study, the Telecommunications State and Local Tax Coalition (an industry group) prepared a study in 2001. The 2001 study quantified the amount of state and local revenues that the telecommunications industry seeks to eliminate:

An estimated 39 percent of all telecom taxes, \$7.0 billion, are excess taxes that exceed taxes generally imposed on other businesses and their customers...³¹ (emphasis in original)

In other words, as of the year 2001, the telecommunications industry was suggesting that their taxes to state and local governments should be reduced by \$7 billion. If we accept the flawed study and its outcomes, as well as project the 39 percent reduction to the telecommunications industry's current state and local taxes, around \$20 billion annually, that number has now grown to around \$8 billion.

To offset the loss of \$8 billion, governments would be faced with difficult choices. They could (1) increase rates on all other taxpayers, (2) cut services, or (3) undertake a combination of both. In today's environment of resistance to increased taxation, budget cuts are the more likely scenario. There are already fiscal pressures on cities. For example, nearly one-half of all city finance officers in 2005 increased fees and charges for services to offset revenue shortfalls.³²

The magnitude of these cuts is seen in the potential impact on four of the largest and most essential categories of local government employees: police officers, firefighters, elementary school teachers, and high school teachers. Figure 1 shows the median salaries and the number of each that would correspond to the financial impact of the type proposed by COST.

It would be foolhardy to enact federal laws based upon the flawed and incomplete information in the COST Study.

In other words, if governments lost \$8 billion in revenue, they would need to shift tax burdens from telecommunications companies to other taxpayers or else cut budgets by an amount equal to the combined salaries of more than 150,000 teachers, police, and firefighters. It would be foolhardy to enact federal laws with the kind of impact that the telecommunications industry seeks, especially if based upon the flawed and incomplete information provided in the COST Study.

³¹ *Telecommunications Taxes: 50-State Estimates of Excess State and Local Tax Burden*, prepared by Ernst & Young LLP for the Communications State and Local Tax Coalition, November 2001, p. 1.

³² Michael A. Pagano, Christopher W. Hoene, *City Fiscal Conditions in 2005*, National League of Cities, January 2006.

Figure 1: Potential Impacts of an \$8 Billion Reduction in Telecommunications Taxes

	Elementary School Teachers ^a	Secondary School Teachers ^a	Police Officers ^b	Firefighters ^c
Median salary	\$45,658	\$46,119	\$34,738	\$32,162
Median salary plus benefits^d	\$59,584	\$60,185	\$46,896	\$40,524
No. corresponding to a \$0.25 billion revenue reduction	4,196 teachers	4,154 teachers	5,331 police officers	6,169 firefighters
No. corresponding to a \$1 billion revenue reduction	19,850 teachers, police officers, and firefighters			
No. corresponding to an \$8 billion revenue reduction	158,800 teachers, police officers, and firefighters			

a. Source: *Mini-Digest of Education Statistics 2003*, National Center for Education Statistics, U.S. Department of Education, October 2004, Table 16, p. 20.

b. Source: *2004 Municipal Yearbook*, International City/County Managers Association (ICMA), 2004, Table 3/5. The median is for the entrance salary for police officers.

c. Source: *2004 Municipal Yearbook*, ICMA, 2004, Table 3/6. The median is for the entrance salary for firefighters.

d. Figures for police and fire benefits, as a percentage of salary, are calculated from ICMA's *Police and Fire Personnel, Salaries, and Expenditures, 2005*; figures for teacher benefits are projected to be the average, as a percent of salary, of the police and fire benefits.

7.0 The Effects of Changing Technology

Technological convergence is creating new forms of competition among different types of telecommunications as voice, data, and video are offered over a much broader range of media, including traditional land lines, wireless, cable, satellite, and VoIP services. Each of these services is subject to a different set of state and local taxes. In addition, the federal government is showing a disturbing pattern of intervention in state and local revenue policy that has the potential to exacerbate rather than reduce these tax differentials. In this context, negotiations among state and local government groups and telecommunications companies represent the best way to reduce administrative burdens and promote equitable taxation.

7.1 Shifting Technologies

This analysis would be incomplete without recognition of the larger context of the COST Study. There is no question that telecommunications companies are under serious pressure from competing technological applications that are rendering old business models increasingly vulnerable. As *The Wall Street Journal* reported, "more Americans now have cellular phones than traditional phones in their homes. Cable companies are selling phone service, while phone companies

plan to offer video in coming years. And high-speed connections make it possible to use computer software to make calls over the Internet.³³

Consider, for example, voice communications. In the interviews conducted for this White Paper, a number of respondents commented on the rapid reduction in access lines in their jurisdictions. This trend is borne out by the statistics. For example, the Federal Communications Commission reports that from year-end 2000 to year-end 2004 the number of mobile wireless telephone subscribers increased by almost 80 percent, from 101 million to 181 million subscribers.³⁴ Many of these subscribers formerly were land-line customers. The result, perceptible to local and state governments, has been a reduction in revenues that previously had been received by land-line companies and ultimately by the governments that tax those companies.

These trends are accelerating with new technologies, and especially the Internet, forcing further changes in business models. *The Economist* magazine published two reports that essentially conclude that, "There is no longer any question of whether VOIP ("voice over Internet protocol," i.e., telephone services provided via Internet) will wipe out traditional telephony, but a question of how quickly it will do so."³⁵

The result of this pressure is being felt not only by telecommunications companies but also by state and local governments that are trying to adjust their tax base to take account of the migration of telecommunication services from traditional forms. State and local governments have begun to levy taxes on cell phones in addition to sales taxes, leading to industry complaints that wireless telephone services are subject to special taxes.³⁶

7.2 Shifting Tax Burdens

On the other side, telecommunications companies are able to use the new technologies and other techniques to try to avoid their traditional tax burdens. In Massachusetts, for example, telecommunications companies, including several that participated in the 2004 COST Study, have engaged in special corporate transactions that permit them to avoid paying their usual share of property taxes. *The Boston Globe* reported:

Making aggressive use of fine print in Massachusetts tax law, telecommunications companies have managed to get \$1.3 billion in property off local tax rolls in the last two years, including \$438 million worth in Boston alone.³⁷

³³ Anne Marie Squeo, "Phone Companies Push Telecom Overhaul; Industry Wants Revamp of 1996 Act to Level Playing Field, but Cable Firms Are Cautious," *The Wall Street Journal*, January 18, 2005, p. A4.

³⁴ Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2004*, July 2005, Table 13 ("Mobile Wireless Telephone Subscribers").

³⁵ "How the Internet killed the phone business," *The Economist*, September 15, 2005, p. 11. See also, "The meaning of free speech," *ibid.*, pp. 69-71).

³⁶ Ken Belson, "The Cellphone Becomes a Taxpayer," *The New York Times*, May 14, 2005.

³⁷ Peter J. Howe, "Telecoms Slash Their Property Tax Burden," *The Boston Globe*, June 10, 2005.

Of course, to the extent that telecommunications companies shed their tax burdens, other businesses and consumers must pick up the slack if local governments try to avoid draconian cuts in services:

The tax-minimizing moves by companies, including Verizon Communications Inc. and its wireless affiliate, MCI Inc., Sprint Corp., and AT&T Corp., mean Boston businesses are paying 2 percent higher property tax bills, and the average single-family homeowner is paying \$185 more each year, city Assessor Ronald Rakow said yesterday.³⁸

The impact on local and state revenues of tax avoidance behavior by these companies is exacerbated by an increasing pattern of federal intervention to preempt state and local tax systems. The most recent example is the so-called Internet Tax Nondiscrimination Act,³⁹ which expanded an earlier federal moratorium on state and local taxation of Internet access and other taxes on electronic commerce.

Selectively omitting certain services within the telecommunications sector from taxation does nothing to improve the quality or consistency of our tax policies nationwide. Technology will cause enough disruption; artificial discrimination, through yet further expansion of the Internet Tax Nondiscrimination Act,⁴⁰ will add to that problem.

8.0 Conclusion

Both the federal and local governments are considering how to levy taxes fairly, without discriminating among companies that provide different forms of the same service. These debates are appropriate, and local government has been a willing partner in attempting to consider potential reforms that would continue to ensure continued growth of technology use and development. However, these goals cannot be achieved if the telecommunications industry continues to produce and circulate among members of Congress findings such as those set forth in 2004 COST Study, which contains serious methodological flaws and omits essential analytic information, and to focus more on obtaining inappropriate advantages than on creating rational tax policy.

First, the study fails to reduce the calculated "transaction taxes" by the substantial amount that is attributable to the user fees. Second, it fails to reduce the calculated "transaction taxes" by the amount used to fund the 911 emergency system and universal service. These help the public telecommunications network (and the profits of telecommunications companies). None of these are separated out from the study's comparisons with the tax burdens borne by general businesses. Moreover, the COST Study fails to include a comparison of corporate income tax burdens, where other businesses pay more on average than telecommunications companies. Policymakers would be foolhardy to undertake major policy shifts of the type urged by COST on the basis of the weak COST Study.

³⁸ Ibid.

³⁹ Public Law 108-435, enacted December 3, 2004.

⁴⁰ See, e.g., S. 849 and H.R. 1684, both introduced April 19, 2005, in the U.S. Senate and House of Representatives, respectively.

From the Sponsoring Organizations

We wish to express our thanks to Washington, D.C., attorney Thomas H. Stanton, who teaches at the Center for the Study of American Government at Johns Hopkins University, for his assistance in helping to prepare this report. The National Association of Counties presented Mr. Stanton with its Distinguished Service Award for his past work in strengthening the intergovernmental partnership.

Mr. COHEN. Thank you, Mr. Chairman. Let me start with questions. I am going to recognize myself for 5 minutes.

Representative Reardon, you mentioned in your remarks that the national average wireless tax rate is now 15.2 percent and that consumers who are at low and moderate income levels pay a disproportionately flat rate for the same services as those of higher incomes. I would like each of the representatives and the county commissioner to discuss the idea of regressive taxes such as this and its effect on people.

Representative Reardon.

Ms. CANDELARIA REARDON. Well, the regressive nature of the tax is based on the economic—if you look at the income of the average wireless customer by the Pew Hispanic study here, where 84 percent of Hispanics now have wireless service that wouldn't potentially be able to afford the services that we were talking about, the access to the wireless that Dr. Atkinson mentioned, the services that they could get if they are paying 10 or \$15 in taxes. Those are services that they are unable to access for e-mail and other lifelines that they have to the community. And there was that article in—this is a lifeline for a lot of homeless people trying to access services for job opportunities and housing and food stamps.

Mr. COHEN. Do you think wireless communications is kind of a necessity?

Ms. CALENDARIA REARDON. I think it is becoming a necessity. These people that are living in homeless shelters, it is their only line of communication when checking on their housing situation and job opportunities. It is a way for them to stay connected to the world when they are living in a shelter, and they miss phone calls for job opportunities because they are using a pay phone or they don't get messages in a timely fashion. I think it is becoming more and more a necessity in today's society for everybody.

Mr. COHEN. Representative Gibbons, do you have some thoughts to contribute on this subject?

Mr. GIBBONS. Yes, thank you, Mr. Chair.

I think that it hinders access, actually. You know, it is not just about voice any longer. It is about all these other services that are part of what I consider economic development and cost cutting. You can access all kinds of medical records and all kinds of medical services online now. If you don't have access to that, then you cannot take advantage of the fact that there are savings involved in having that kind of access.

What we are trying to say is, as we deploy it—see, when Internet services were first provided, there was a digital divide created. There were people who could afford desktop computers and people who couldn't afford desktop computers. Those who could afford desktop computers had instant access, and it opened up a whole new world to them.

Well, the same thing is going to happen with broadband now. All I am saying is let's not leave anybody behind. Let's make sure that everyone has equal access to the opening up of this whole new world, because, again, we don't want two societies. And when we don't have the opportunity to be exposed to things—because, you know, an opportunity is not an opportunity unless you have had the exposure to see it as such. So if I block your exposure, I block

your opportunities. And so, through the regressive nature of this, it blocks opportunities and it blocks exposure, and it keeps people living in certain conditions.

Mr. COHEN. Thank you, sir.

Mr. Commissioner Stapley?

Mr. STAPLEY. Yes. You know, I think your question was, has this tax become regressive in some jurisdictions. And the answer to that is, if it has, I don't know; it certainly hasn't in my State and in my county. We don't tax cell phones in my county. We don't have the authority to. They may be taxed at the State level.

But I can assure you, if it becomes a regressive tax, it is a lot easier to get rid of those politicians at the local level, by their local constituents, than it is to turn Congress over because they placed a ban on these taxes through a moratorium, a 5-year moratorium.

So, in my opinion, it is a preemption question, not a question of regression.

Mr. COHEN. Let me ask you this. So you believe that the Congress should not take a position and leave it up to all the locals and the States to have maybe different taxes levels, even though—this is, you know, different than fixed communications, the wireless folks can be moving from State to State, making calls from everywhere, and it is kind of a national form of communications.

Do you not see a distinction of that in the old, traditional, Alexander Graham Bell—

Mr. STAPLEY. No, I get your point, Mr. Chairman, and I understand it. But I do believe that government works best that is closest to the people. And, in my opinion, taxes on cell phones should be the same.

You know, one of my colleagues next to me pulled out a new phone the other day, and he said, "I threw away that extensive one, and I just got this one, and I am only paying \$45 a month for unlimited service anywhere in the United States. It is a new program, it is great." It allows—I mean, it fosters competition.

But when you take a whole industry and you treat it differently than other industries, I think you run the risk of—

Mr. COHEN. But isn't it different when I can hold this phone, and it has a Memphis area code, and dial from Washington to Phoenix and talk on Phoenix ESPN Radio with, you know, whoever? And maybe it is different than if I was picking up a phone that was attached to the wall and, you know, kind of pull it around and put it to my ear and not get too far and call Phoenix from Memphis. Isn't that a little different?

Mr. STAPLEY. It is different. But let me give you an example of why this preemption issue is the issue we are talking about and is more important than any of the other issues. And that would be the example of the Federal Government placing a tax on telephones, the kind that you are talking about—Alexander Graham Bell, fixed-on-the-wall line—to fund World War I, I believe, if I am not mistaken. That tax is still there. It has never been taken off.

The express purpose of that tax, I think it was 11 percent, was to fund World War I. And Congress has never gone back and removed it.

Mr. COHEN. Does that maybe speak to why we shouldn't have a moratorium, because it is difficult to repeal a tax once you have

passed one, and you should do it right the first time rather than have just a hodgepodge?

Mr. STAPLEY. I agree with you, except I think it is much more difficult at the Federal level than at the State and local level.

Mr. COHEN. Thank you, sir. Thank you.

I am up. Abiding by the 5-minute rule, I now recognize the new Ranking Member, the Ranking Member once-removed, Mr. Issa of California.

Mr. ISSA. Thank you, Mr. Chairman. And, by the way, you have a missed call on your phone, I noticed. That is the problem with being here on the dais.

Boy, there is so much and, as you say, Chairman, so little time.

Mr. COHEN. It was Speaker Pelosi. She was really calling for you.

Mr. ISSA. Oh, okay. As soon as I am done here, I promise.

Well, you know, Mr. Stapley said we must ask, we who cosponsor this bill, and so I guess I will.

Dr. Atkinson, just a couple of quick questions. First of all, don't we inherently use less of what we tax? And can you think of any reason we would want to limit communication, either digital or voice? Is there any public interest in limiting that? Is it a bad thing in some way other than, well, driving down the road not on your earpiece?

Mr. ATKINSON. Economists talk about elasticities of demand, so, in other words, what is the relationship of demand to the price. And there are different elasticities for different things. The elasticity, for example, of milk is quite low, or food. But the elasticity for cellular or wireless communications services is quite high.

Mr. ISSA. Okay, so, going through that logic, again, Mr. Stapley was kind of, you know, sort of saying, "Stay out of our business. We need to do what we need to do." Well, let's go through this for a second.

Wireline received access to public, State, city, county access to roads. They got right-of-ways. Were there any substantial right-of-ways granted by local municipalities? Isn't it true that wireless, they pay for every single booth and every single building that they put their cells on? They paid very dearly for their bandwidth when they went to auction.

What is it that a city or a State gave to a wireline carrier? What asset did it give, loan, or provide?

Mr. ATKINSON. To a wireline?

Mr. ISSA. To a wireless, I am sorry, to a wireless, a wireless.

Mr. ATKINSON. Wireless. I am not aware of any on wireless.

Mr. ISSA. So, unlike wireline, they gave nothing. Unlike wireline, instead of being given, they had to pay. So where is the interest by a city or a county or a State in some harm or some offset for which they have a special right to tax greater than the ordinary tax?

Which, if I understand my Constitution, we specifically have a prohibition on targeting taxes. You know, it is designed to keep from targeting one rich landowner out of business, but, in fact, you target an industry, it is somewhat the same.

Is there anything that is so evil in wireless communication as to receive a special burden?

Mr. ATKINSON. No. It is to the exact opposite. I mean, it would be one thing if States or localities want to impose taxes that hurt their own economy or that hurt their own poor or low-income citizens. The Federal Government doesn't have a job to protect them from bad decisions.

The problem with this case, though, is that those decisions impact the rest of us. And they impact the rest of us by devaluing the value of the overall network. And that is what the—

Mr. ISSA. And going to that, isn't the commerce clause probably the most cited reason for the Federal Government feeling that, in fact, the common good of all the citizens of the various States and the District are required to be protected by we in Washington? And if, in fact, you were to have a local municipality that made it burdensome to do business there, that it could degrade the ability of the rest of the country to do business with, let's say, Arizona?

Mr. ATKINSON. Absolutely correct.

Mr. ISSA. So we do have a public interest. We do, in fact, understand that what we tax more we consume less of. We do understand there is nothing inherently wrong in that.

Additionally, are there any offsets in the existing tax? For example, E911, although it is a wonderful service, and it is paid for out of the taxes on the system, in fact it is not a problem created by the system, but, in fact, an excess benefit created. I just want to make sure we understood that.

I guess, Mr. Stapley, I have been referencing you because you were so vehemently opposed to our preemption. I will ask you one question and then let you answer sort of all of them.

If, in fact, the good people of Arizona heard you today, or of Phoenix, and said, "Okay, fine, if that is the way he feels about it, we will all simply go get phones in another area code, and we are simply not going to pay your tax if we feel that it is one penny higher than the lowest tax in the Nation," do you believe you would have any authority to do anything over your constituents choosing to pick a lower tax area under national law?

And, if so, what we are proposing here, isn't it, in fact, for your own good that we want to essentially say, since they have the ability to go shop elsewhere, we are simply keeping you from taking advantage of your constituents simply because they want an area code that is convenient?

Mr. STAPLEY. I think the best answer I can give you is that those debates should be not here in Washington, D.C. Those debates need to take place in the States and in the counties and in the cities.

Mr. ISSA. Well, I appreciate that, but I am a San Diegan, so I am sort of a suburb of Arizona all summer. And the "zoneys" all appreciate that.

Mr. STAPLEY. Yes, right, exactly.

Mr. ISSA. We take advantage of you in San Diego in a huge way. You can't vote. And what do we tax at a disproportionate rate? Hotel/motel, all the—

Mr. STAPLEY. You are telling me.

Mr. ISSA. Exactly. We have huge taxes. And do you know why we do that in San Diego? Because there is no constituency against it.

Mr. STAPLEY. Correct.

Mr. ISSA. Isn't, in a sense, when you say, "Hold us accountable, we are the ones closest, we are going to have the election," isn't it true that basically there is nobody that has ever been voted out of office for putting a tax on something that is pretty invisible to the consumer, such as a hotel or, in this case, even local ups and adds to a telephone bill?

And, by the way, you have my personal apology that we haven't yet paid for World War I and that we are still taxing it. Because I do think it is inherently wrong to be continuing to have these artificial taxes.

Mr. STAPLEY. Well, I understand your point and do not disagree, but I do believe that the debates need to take place locally. And if there is a national problem, we can work together to solve that problem.

But I don't think, by preempting State and local governments from assessing these taxes—because, again, for the very reason that I said in my testimony, every county, every city has different revenues, has different needs, and constituencies have different—

Mr. ISSA. Right. But just one question: Do you understand—because you didn't seem to in your statement—that it is only discriminatory taxation that we are objecting to? If you want to tax, if you want to have a 17 percent sales tax on everything, this bill would not preempt you in any way, shape, or form from including wireless and wireline or anything else.

Mr. STAPLEY. I do understand that, but I also understand that that is the basic premise upon which most politicians are unelected. So that is not the issue.

Mr. ISSA. So what you are saying is, if you had a 17 percent sales tax, your people would be unelected, but if you have a tax on this particular subset, it may not show so much?

Mr. STAPLEY. No. I think the point is, I don't think that the tax on this subset should be done at the Federal level or should be prohibited at the Federal level. It needs to be dealt with at the local level.

Mr. ISSA. But you know we prohibit you from having a poll tax. Do you think that is reasonable?

Mr. STAPLEY. I do.

Mr. ISSA. Okay. So you do look at some arbitrary or some punitive or some discriminatory taxes that we prohibited as reasonable; you just don't like this particular preemption?

Mr. STAPLEY. That is correct.

Mr. ISSA. Thank you.

Thank, Mr. Chairman.

Mr. COHEN. Thank you, sir.

I am going to, in the policy of Chairman Conyers, going to recognize Mr. Watt next and then Mr. Delahunt and then Mr. Sherman.

Mr. Watt, you are recognized, having been here for the longest period of time today.

All right then, I would yield and recognize the Vice Chairman, Mr. Delahunt.

Mr. DELAHUNT. Well, thank you, Mr. Chairman.

And I am also the vice chair of the States' Rights Caucus. The gentleman to my right, Mr. Watt, has been chairing that particular caucus since I arrived here in Congress some 13 years ago. He is, I am sure, well-known throughout the country for his advocacy for States' rights. And it is good to see that there is a Member in this branch that still believes in the viability of the 10th amendment.

But I have been asked to submit for the record a statement of the Federation of Tax Administrators on cell phone taxation. And I would like to submit it for the record, Mr. Chairman.

Mr. COHEN. Without objection, so done.

[The information referred to follows:]

PREPARED STATEMENT OF THE FEDERATION OF TAX ADMINISTRATORS, SUBMITTED BY
THE HONORABLE WILLIAM D. DELAHUNT, A REPRESENTATIVE IN CONGRESS FROM
THE STATE OF MASSACHUSETTS

**Statement
Of
The Federation of Tax Administrators
On
Cell Phone Taxation
Before the
Subcommittee on Commercial and Administrative Law
Of the
Committee on the Judiciary
June 9, 2009**

The Federation of Tax Administrators (FTA) is an association of the tax administration agencies in all of the 50 states, the District of Columbia and New York City. We are pleased to have the opportunity to present our views on legislation that would, in our opinion, unreasonably circumscribe the authority of the states to enforce their tax laws as to wireless communications providers.

FTA opposes the Cell Tax Fairness Act of 2009 (H.R. 1521) as a completely unwarranted intrusion into state sovereignty and the ability of the states to determine their own fiscal destiny. The bill would:

- Result in significant litigation,
- Result in preferential tax treatment of cell phone service providers,
- Increase taxes on individuals and non-cell phone businesses to make up for the reduced taxes paid by cell phone service providers, and
- Violate the fundamental principles of Federalism by restricting state and local government authority to develop tax structures that reflect the needs of their communities.

Background

The operative part of H.R. 1521 provides that “No State or political subdivision thereof shall impose a new discriminatory tax on or with respect to mobile services, mobile service providers, or mobile services property, during the 5-year period beginning on the date of enactment of this Act.” The impact of the bill is created by the definitions.

“Mobile service” is defined as commercial mobile radio service “or any other service that is primarily intended for receipt on or use with a mobile telephone.” This would obviously include wireless phone service, but also things like Internet access and presumably, television services, games, music, news services that are intended for receipt on cell phones, etc.

“Mobile service provider” is defined as “any entity that markets, sells, or provides mobile services.”

“Mobile services property” is “all property used by a mobile service provider in connection with its business of providing mobile services, whether real, personal tangible or intangible and includes but is not limited to goodwill, licenses, customer lists and other similar intangible property associated with such business. Coupled with the definition of mobile services, this is overly broad.

The most problematic definition defines the term “new discriminatory tax.” The “new” part is that the tax “was not generally imposed and actually enforced prior to the date of enactment of this Act.” The tax is one imposed by a state or political subdivision that “is imposed on or with respect to –

- (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 charges, receipts or revenues form, 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;
- (III) Any mobile service property and is not generally imposed, or is generally imposed at a lower rate, on or with respect to other commercial or industrial property that is devoted to a commercial or industrial use and subject to a property tax levy;”

The bill contains a rule of construction that says all taxes, 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.”

Finally, the bill purports to limit its application by saying a new tax is not a new discriminatory tax if it replaces a tax previously imposed on mobile services, providers or property and the amount of tax revenues generated is reasonably expected to not exceed the amount of tax revenues that would have been generated by the respective tax or taxes.

Comments

The overall effect of the bill is to say that any new tax (or change in current taxes) that affects mobile services or mobile service providers cannot increase revenues and will have to treat the services and providers the same as general businesses under the sales, income and property taxes. The practical consequence of the legislation will be to grant mobile services and providers a “most favored nation” status in that they could not be treated any worse than the most favored industry after accounting for exemptions, deductions, etc. In other words, mobile services and providers will have to be provided a benefit equal to any preference granted to any other industry.

While there may be a simplistic, intuitive appeal to the title of the amendment, the wholly unwarranted effect of its passage will be to stop any efforts to reform and simplify state

and local taxes on telecommunications and related communications services dead in their tracks and to deprive the units of government closest to the issue from taking thoughtful action. That is to say, the amendment will not allow state and local efforts (such as undertaken in recent years in Florida, Illinois Utah and Virginia) to look across the totality of state and local taxes and fees applied to all types of communications services and to roll them into a single tax levied at a single, non-discriminatory rate across all types of communications providers (e.g., telecommunications companies, cable companies, wireless providers, and satellite providers.)

Reform efforts such as those in the states mentioned above greatly benefit the telecommunications industry as a whole and have been championed by significant parts of the industry. They avoid discrimination among providers of similar services and greatly simplify the administration of state and local telecommunications taxes for providers. The amendment effectively blocks such reforms because they involve the creation of a special tax that is a composite of several existing taxes and fees and applies it only to affected communications providers (not to all businesses.) Sometimes the combined rate is higher than the general retail sales tax since it is an amalgamation of several taxes and fees and may be a substitute for some other taxes imposed on general businesses. The proposed amendment would prohibit such a reform even though the reform could accomplish in significant measure the goals that the telecommunications industry has pursued for a number of years.

In addition to frustrating any comprehensive telecommunications tax reform, the amendment will likely frustrate state efforts to rationalize their tax systems in ways that many would say make sense. For example, efforts to include certain services that are designed for cell phones (e.g., ring tones, music, games, news feeds) will be challenged as being discriminatory if the rate applied to cellular services is higher than the general business rate even though similar services sold in another environment may be taxed at a higher rate.

The “rule of construction” raises an issue of whether it would prevent a state from enacting an exemption for other taxpayers that is not then applied to mobile communications services and providers. For example, if a state were to enact a sales tax exemption for manufacturing machinery and equipment, would a mobile service provider be able to claim that their equipment should also be exempt even though it may not meet the definition of manufacturing equipment used by the state.

In short, the effect of the legislation would be to freeze in place the current state and local telecommunications regime because it will block attempts to rationalize those taxes across providers of similar services. Since the tax cannot exceed the lowest tax rate, the legislation will effectively prevent efforts to reduce or eliminate discrimination among providers of similar services and efforts to otherwise simplify the administration of those taxes. In other words, it will perpetuate and freeze in place what nearly everyone in the U.S., Congress, the communications industry and the state and local tax community recognizes is a complex and overly burdensome tax structure. The effect would be to

completely frustrate the ability of those closest to the situation to enact meaningful changes to the laws they administer and conform to the will and needs of their electorate.

Truth in Advertising

There is some need for truth in advertising on the part of the supporters of the amendment. They make much of the current differential between the tax rate applied to mobile services and that applied to general services. They also make much of the fact that the bill carves out E-911 services or Universal Service Fund contributions. What they fail to say is that a significant part of the current differential is attributable to E-911 and USF charges. That is, there are not a large number of states with taxes applied only to cell phones. Rather, the differential is due to 911 and USF – two services state legislatures and Congress have chosen to fund through assessments against users of all forms of telecommunications services. [See attached article [Appendix A] for a listing of the taxes and fees applied to cellular services and note the preponderance of the charges for 911 and USF.]

Significant Litigation

H.R. 1521 contains many undefined terms and phrases that are not clear. Similar legislation in other areas has led to extensive litigation to define terms. The vague language of these types of preemption proposals and the lack of an administrative agency that can issue interpretative rulings leaves only the courts to determine what terms actually mean. This is, at best, a cumbersome process that will inevitably result in different definitions in different jurisdictions. It will be virtually impossible to develop a uniform set of rules to ever be developed because of the nature of trial court and appellate litigation.

Preserving Federalism

The fundamental concept of Federalism vests states and local governments with the responsibility of providing services and raising funds needed to be able to pay for the services. Freezing in place the current levels of tax for video services and providers and not allowing new taxes to apply, even if they are broadly based undercuts the authority of state and local governments and creates a privileged class of taxpayer. We urge Congress to refrain from taking any steps in this direction. Taxpayers in general will have to shoulder the burdens that are created when special privileges are conferred on designated parties.

Mr. DELAHUNT. You know, this is a debate that plays itself out in a variety of different ways, you know, preferential treatment, the interstate commerce clause. I have been very much involved in the issue of fairness as applied to the collection of the sales tax, you know, from out-of-State vendors.

But let me just put a—if we continue here in Congress to limit the sources of revenue—and I am not even sure I am on this particular bill—but where are States and local governments and other subsets of States, where are you going to get your revenue?

Mr. Stapley, do you have any ideas? Are you going to have a—are we are going to have to increase the property tax? Are we going to have to—which is clearly a regressive tax. It is a regressive tax. Or are we going to have to increase the sales tax rates and maybe increase it on such items as food?

I mean, I think there are legitimate arguments on both sides of this issue.

But let's presume that in Arizona, or in California, for that matter, local governments are doing a good job, they are making some real tough decisions, and that the budgets that they formulate we could all agree on. Where are they going to get their revenue?

In Massachusetts, because of the difficulty in collecting State sales tax from out-of-State vendors, we have a shortfall of some \$400 million to \$500 million. That is a pretty good plug. In California, Mr. Issa, I understand it amounts to billions of dollars in terms of shortfall.

Mr. ISSA. \$42 billion but rising.

Mr. DELAHUNT. No, no, I am talking about just the shortfall because of the inability of the collection of sales tax.

Mr. ISSA. Oh, yes.

Mr. DELAHUNT. You know, we can't continue to avoid discussion of this issue, which is: How do State and local governments, which deliver the real necessary services that people demand, how are we going to fund them? Any ideas? Be creative.

Mr. Gibbons?

Mr. GIBBONS. Thank you.

I can tell you what they are doing. They are increasing fees—water fees, fire fees, sewage fees. Because in Florida we limited the local government's ability to raise property taxes to a certain percentage of CPI. So what they did was, because we had falling property values, they started increasing fees.

Mr. DELAHUNT. OK, we can increase fees.

Mr. GIBBONS. That is what is happening.

Mr. DELAHUNT. Okay.

Ms. Hovis?

Ms. HOVIS. Congressman, I am not a tax expert. I speak to the broadband issues. I don't know—

Mr. DELAHUNT. Well, tell me, where would you get the money to fund teachers?

Ms. HOVIS. I would say only that the—I can't imagine how localities could exist if they don't have control over taxing decisions at the local level.

And while I respect the tax issues here, I deeply respect those concerns, I think that if this piece of legislation is about impacting broadband investment, it will have only effects at the far margins.

It will not solve the problem it purports to solve, even if it does have some kind of a basis in tax policy. There is not a broadband policy here.

Mr. DELAHUNT. Thank you.

Ms. Reardon, how do we fund the cops?

Ms. CANDELARIA REARDON. Well, I think that this industry last year paid \$21 billion in State, local, and Federal income taxes and fees. In Indiana alone, \$326 million was paid by these taxes and fees.

At some point we have to look at—

Mr. DELAHUNT. Well, what new revenue sources at the local level would you suggest?

Ms. CANDELARIA REARDON. Well, I think that, you know—first of all, I don't think that taxing the citizens any further, without looking at efficiencies in government—

Mr. DELAHUNT. No, I am not giving you the hypothesis that we have done all the efficiency, that the local people are doing a good job, we are at a barebones budget, and we don't have enough money. How do you fund it?

Ms. CANDELARIA REARDON. I can't speak to that—

Mr. DELAHUNT. OK, thank you.

Ms. CANDELARIA REARDON [continuing]. That land. I mean, we don't live there, in Indiana. We have lots of—

Mr. DELAHUNT. I understand—

Ms. CANDELARIA REARDON [continuing]. Reforms, and I think—

Mr. DELAHUNT [continuing]. But I am using a national argument here.

Ms. CANDELARIA REARDON. Well, then you look at fees, you look at property taxes. I think those are the things that—

Mr. DELAHUNT. Property taxes, fees. Okay, thank you.

Dr. Atkinson?

Mr. ATKINSON. I would not tax a critical engine of economic growth and innovation. For example, I wouldn't—

Mr. DELAHUNT. Okay. Where would you tax?

Mr. ATKINSON. What I would—

Mr. DELAHUNT. I am not asking where you wouldn't. Where would you tax?

Mr. ATKINSON. Right, I understand that, but I needed to say that first. What I would tax, I would tax things that basically have less distorted impact. And most of the studies show—

Mr. DELAHUNT. You know, "distorted" is a great word. Where would you tax?

Mr. ATKINSON. I am going to say it in just about 1 second.

Mr. DELAHUNT. He is going to rule me out in another second.

Mr. ATKINSON. As I said, I would therefore tax property, income, and sales. Income first, property—

Mr. DELAHUNT. Thank you. Property, income, and sales.

Mr. Stapley, you are my last shot.

Mr. STAPLEY. Well, first of all, let me just say that, as representing the associations—the National Association of Counties, the League of Cities, the Conference of Mayors—we are not closed to telecom tax reform. We are interested in engaging and have engaged in that debate. We just are opposed to this what I consider to be a piecemeal approach.

To answer your question specifically—

Mr. DELAHUNT. Answer my question. Where would you tax? Let's say this bill goes and we will never be able to tax wireless ever again. What are you going to do?

Mr. STAPLEY. We are going to continue to tax at the same three-legged stool that we have in the past, that we just talked about. And we are going to have to learn to live within our means. That is the answer to your question.

Mr. DELAHUNT. I am even giving you the premise you are going to live in your means. You have the barebones budget out in Maricopa County. I mean, you know, you are paying teachers \$7,000 a year, okay, and you are really crunching them down. How are you going to pay for it?

I yield back. I thank the indulgence of the Chair.

Mr. COHEN. Thank you.

Mr. Watt, distinguished Member, head of the States' Rights Caucus, and Mr. Congeniality.

Mr. WATT. Thank you, Mr. Chairman.

Let me first applaud the testimony of Ms. Hovis, who didn't deal with the tax issue here but dealt with whether this is really going to have any impact on the provision of phone or broadband service. I definitely agree with you.

And we need to figure out a way to extend broadband deployment into rural areas. Taxes is not driving that one way or another. In my urban community, I don't have any problem at all finding a network to do this. Whether they tax it or don't tax it is not driving that. But when I retreat on the weekends up the mountains of North Carolina, no service of any kind there. And whether this gets taxed or doesn't get taxed is not going to solve that problem one way or another.

I am not an advocate of discriminatory taxes, even though I am cast as the States' rights advocate here. I have the same questions that Mr. Delahunt has asked about that. But I don't know that I think that is the issue either.

My question is, how you define "discriminatory" here. And I just need a little more information, because I think the definition of "discriminatory" that is in this bill is way, way too broad.

The taxation of mobile service property is one thing. I think we should not be discriminating between fixed people and mobile people. But the service, I am not sure how the taxation is being done. Maybe Ms. Candelaria Reardon and Mr. Stapley can help me with this.

Is there a discrimination now between a fixed land line tax on service, phone service, broadband service, and mobile service? Because that is really the comparison that I think we ought to be trying to make here if we are trying to eliminate discriminatory taxation. It is not between all other people who are not in the business of providing telecommunications services.

Is that going on now?

Ms. CANDELARIA REARDON. I believe it varies from State to State. In Indiana, for example, we pay the local, State, and Federal taxes, fees, surcharges. However, on top of that, we also pay a utility receipts tax.

Mr. WATT. On land lines and mobile lines?

Ms. CANDELARIA REARDON. Yes.

Mr. WATT. Or on just mobile lines?

Ms. CANDELARIA REARDON. On both.

Mr. WATT. Okay. So how is that discriminatory?

Ms. CANDELARIA REARDON. Well, because there—

Mr. WATT. Yet it would be under this bill. If it gets charged to land line carriers and it gets charged to mobile carriers, how is that discriminatory? That is what I am trying to figure out. Yet it would be under this bill.

Ms. CANDELARIA REARDON. Right. And we touched on that, I think Congressman Issa touched on that earlier, about the right-of-way fees that are charged for cellular use as opposed to land lines.

Mr. WATT. I am not looking at the source of what the State or the local community has provided historically. All of that stuff has kind of gone out. The land lines are owned by private industry now. They are not owned by the State anymore. They are not run by the State anymore.

So if we are going to make a comparison, it seems to me we ought to be making a comparison between how we treat land-line phone and broadband service versus how we treat mobile phone and broadband service. And if those two things are being taxed the same way, that is how—I mean, that is my definition of “discriminatory.”

I am perhaps asking the wrong person this. Maybe I should be asking Ms. Lofgren this when we get to a markup; it is her bill. But it seems to me that the definition of “discriminatory” in this bill is way broader than I am comfortable with.

Ms. LOFGREN. Would the gentleman yield?

Mr. WATT. Let me go to Mr. Stapley, and then maybe I can get Ms. Lofgren to explain this.

Mr. STAPLEY. Yes, I would just offer a brief opinion. And that is, irrespective of the bill, it could be considered discriminatory either way, whether the bill is in place or not. I mean, there is a difference. A good example—

Mr. WATT. My question is, are local communities taxing land telecommunication in a different way than they are taxing mobile telecommunication? And that seems to me to be the underlying question that I am asking.

Ms. LOFGREN. If I may?

Mr. WATT. Yes, I will yield to the gentlewoman. My time has long expired.

Ms. LOFGREN. The answer to that is “yes” because the Congress has passed an Internet tax moratorium. And we did so because we want to nurture the development of the Internet.

Mr. WATT. I wasn’t all that happy about that either.

Ms. LOFGREN. But the answer to the question is, if you have a DSL line, you can engage in discriminatory taxes on the DSL land because that is broadband that we want to nurture. You can do so on your 3G line, which is another reason why the bill was introduced.

I thank the gentleman for yielding.

Mr. WATT. Okay. Well, maybe I just don’t have enough education and understanding about how taxes are being imposed. But it

seems to me that the definition of discriminatory in this bill goes well beyond differences in treatment of telecommunications companies and says you can't discriminate between mobile telecommunication companies and any company. And that I am troubled by.

But I will get, when we get closer to the markup—maybe we should have a hearing about that rather than whether it is a good idea to discriminate. It is never a good idea to discriminate, but it is always difficult to define “discrimination” and what is really discriminatory.

So I am through, but Mr. Gibbons wants to respond to my question.

Mr. GIBBONS. Thank you for the question.

To me, it is discriminatory when, in Florida, we tax all other goods and services at 6 percent but we tax these services at 20 percent.

Mr. WATT. No, it is discriminatory if you tax land services, telecommunications services one way and mobile telecommunications services another way. It is discriminatory if you tax their property, the property of a non-telecommunications company one way and the property of a mobile company another way. That is discriminatory.

But if you, the service that is being provided here, the telecommunications service, if you are treating land providers and mobile providers the same way, that doesn't seem to me to be discriminatory.

And that is what I am asking the question about. And I don't know the answer to that. Maybe—

Mr. ATKINSON. Could I respond to that quickly?

Mr. WATT. If you know the answer to that question.

Mr. ATKINSON. I was going to answer that question.

Mr. WATT. Okay. All right.

Mr. ATKINSON. I think there are two kinds of discrimination that we are talking about. There is inter-industry and intra-industry.

And what you are talking about is a discrimination within voice. And, clearly, the ideal would be no discrimination, but we do have difference rates right now. For example, as Congresswoman Lofgren alluded to, if I get on a user voice service, VOIP, voice-over Internet, on broadband, the broadband tax moratorium makes that a little bit—makes it less taxed than wireless. So that is discrimination.

The point, I think, that is more important, though, is that it is not so much intra-industry, it is inter-industry, the fact that this overall set of services—

Mr. WATT. See, I don't even want to go there. I mean, that is not the discrimination that I think we ought to be dealing with in this bill. That is just my own opinion. Maybe I am just out to lunch.

I yield back, Mr. Chairman. I have taken much more time.

Mr. COHEN. Thank you for yielding back the remainder of your time.

Mr. WATT. I did not yield back any time. I just yielded back.

Mr. COHEN. I will yield to the gentlelady of California, Mr. Sherman having joined the competition for congeniality.

Ms. LOFGREN. Thank you very much.

And thank you, Mr. Sherman, for allowing me to ask my brief questions. At this time, I have to Chair a Committee hearing over in the Capitol in 7 minutes, so I will be brief.

Dr. Atkinson, there has been some suggestion the taxation has no real impact, meaningful impact, on how this technology will be deployed. And I am wondering if you have a comment on that, number one.

And, number two, you are a technology observer. And I am wondering if you have a view—you know, right now we have 3G. We are about to get a 4G rollout. In the next several years, unimpeded, what do you foresee will be developed in the wireless arena that is really at stake here, the related questions?

Mr. ATKINSON. Well, the first question is on impact. And I think it is important to understand that the impact here is what economists would call “at the margin.” So if you have a tax or don’t have a tax, it is not going to affect wireless deployment in the middle of nowhere, doesn’t matter what the tax is. And it won’t affect wireless deployment in Silicon Valley.

Where it will affect deployment, though, are places at the margin, where the costs are slightly higher than what you can make a return on. And that is clearly what Austin Goolsbee showed in his study. And the same thing happens on adoption.

And I think it is important to recognize, on adoption, not everybody has a cell phone who uses wireless service as a traditional user. For example, we recently bought a cell phone for my father-in-law, who passed away recently, but before he passed away he had Alzheimer’s. And he would walk around, and he didn’t know where he was sometimes. And his wife, my mother-in-law, did not know how to get hold of him. And we got him a cell phone from Verizon and we had, you know, with everybody’s permission, a tracking thing you can put on it so that she could go on the Internet and find out exactly where he was. And this was very, very useful to us and it allowed him to sort of have mobility and be out in the community longer than would have otherwise.

Well, that was a discretionary purchase. Now, we were fine with making it, but there are lots of other people where having an 18 percent tax on that might keep them from doing it. So I do think that there is clearly economic evidence that this is discretionary.

In terms of where we are going, I think we are really only at, if you will, Internet, sort of, wireless 1.0. Wireless 2.0 is going to be an amazing series of things where we will be able to do medical data transfer, we will have 4G wireless, be able to have broadband to the home, a fourth pipe, a third pipe. There will be a whole array of new innovative services that the iPhone is really just only touching on.

So I think that is the context we have to think about that. Do we really want, as a Nation, to be taxing this whole array of new services? I would argue it makes sense to have a 5-year moratorium on doing that.

Ms. LOFGREN. Now, can you give us an international perspective on wireless development? Where is the United States relative to other countries? And where might we be relative to other countries in, say, 5 or 10 or 15 years from now?

Mr. ATKINSON. Well, in some areas we are ahead. We seem to be ahead, for example, on mobile services, wireless voice services. But in other areas we are behind.

So, for example, the ability to use your cell phone—I was just reading today in the new iPhone announcement, you can use your cell phone to go get into your Zipcar. So if you get a Zipcar, you download the code, just wave your cell phone and it opens the door of the Zipcar—kind of a cool device. But we are so far behind on those.

You take a country like Japan or Korea where you can use your cell phone to download movie tickets, walk into the movie theater, wave your cell phone, get into the theater. In Japan, the ability to have traffic information on your cell phone, you can look on your cell phone and know in real time what the road conditions are like.

Those are the areas that we are farther behind on. And I think, unless we try to innovate more, we are going to continue to be behind there.

Ms. LOFGREN. I would just note, before I yield back—I won't take additional time. Thank you, again, Mr. Chairman, for this hearing.

I do think, although not everyone agreed, that when we, the House and Senate, acted and the President signed the bill to do a moratorium on Internet access, it was really a mistake: This should have been included, and it was not.

And I think, you know, that was a pretty broad consensus. Not every person agreed. But the country is now in a position where we are saying we are going to nurture Internet development. And, without including wireless, we are going to fall short.

And, in fact, I think that wireless is going to leapfrog some of what we have already done, and that is just a personal opinion, not only in the United States but certainly in the developing world. If you take a look at parts of Africa, I mean, they are just going to leapfrog with the wireless technology that is being developed, provided that we take the right steps to nurture innovation both through our research efforts as well as our tax policy.

So I thank you, all of the witnesses. And I apologize for running off to Chair my other Committee.

Thank you very much, Mr. Chair.

Mr. COHEN. You are welcome, and thank you.

And now Mr. Sherman is recognized for 5 minutes.

Mr. SHERMAN. Thank you, Mr. Chairman.

I should explain my uncharacteristic politeness in letting Ms. Lofgren go first. It is actually a clever tactic so that she would be outside the room before she heard me in any way criticize her bill. I don't want anybody to think that congeniality is something they should expect from me except in extraordinary circumstances, no, not at all.

Mr. Chairman, I would hope that we in the Federal Government would make sure that our Federal tax laws were entirely devoid of unfairnesses and unreasonable distinctions before we then go tell the States how to make sure that their laws are fair.

In my State, we tax scotch more than we tax beer. I have always thought that was unfair. And I don't know why we aren't dealing with that issue or hundreds of other issues where we could say that we have some unfairness at the State level.

The argument is that this is somehow preventing the deployment of a national network. Well, since 2000, subscribership in wireless has grown by 158 percent; revenue has grown 124 percent. And if I have to ask people in my State, "What are the big problems?" insufficient access to wireless communication is not one of them. The fact that summer school has been cancelled in Los Angeles for insufficient revenue, that is likely to be on the list.

Now, Mr. Atkinson urges that we tax property, income, or sales. But in my State we can't do that without a two-thirds vote, and we are not going to get one.

Ms. Reardon, are you an advocate for taxing property, income, and sales to replace the missing revenue?

Ms. CANDELARIA REARDON. Well, this bill does not actually impact revenue. The revenue that is already there will remain there. It is a moratorium on increasing sales taxes. It wouldn't inhibit the revenue already collected.

Mr. SHERMAN. Well, my State has a \$42 billion deficit. We are looking for new sources of revenue. Clearly, we are going to need some more revenue. Would you say we should get it from property, income, or sales taxes?

Ms. CANDELARIA REARDON. Yes.

Mr. SHERMAN. Okay. Have you advocated increases in any of those taxes in your own State?

Ms. CANDELARIA REARDON. We have a surplus in our State, currently.

Mr. SHERMAN. Congratulations. Could you share some of that? Yes, exactly, in the spirit of foreign aid. California is sometimes regarded as foreign.

I would hope, Mr. Chairman, that since we are having hearings today that would undercut State revenue, that we would also have hearings on a bill, maybe Delahunt's bill, to reverse the Quill case and allow the proper collection of sales taxes that are already a matter of law. And, I mean, if we are able to pass such a bill, I think States could afford to see the passage of Ms. Lofgren's bill.

I yield to the gentleman from Massachusetts.

Mr. DELAHUNT. I thank the gentleman.

And let me just say, because sales tax revenue, clearly, for most States is a significant part of their revenue source—and I, in the past, have suggested that the stakeholders come together. I would advocate, to nurture various industries and moratoriums, et cetera, that potential support if, in fact, we can resolve exactly the problem as described by my colleague from California.

But I can't support anything that will continue to erode the revenue base of State and local sources. I am finished doing that. Because until we address the major problem confronting States in terms of revenue sources, which is the sales tax, then everything else that comes in front of this Committee, I say, has to be deferred.

And I thank the gentleman.

Mr. SHERMAN. Just to explain the issue for those in the room that haven't followed it, a large number of States impose a sales tax. Every State that imposes a sales tax also imposes a use tax, so that if you are able to buy something through a catalog or a

phone or Internet and escape the sales tax because it is shipped to you, then you are supposed to pay taxes on that as a use tax.

The problem is that retailers outside your jurisdiction fail to collect the use tax or report the use tax liability. And so, as a practical matter, billions and billions of dollars of sales/use tax revenue is never collected.

If we were able—and perhaps some of the people at this table could become advocates for a bill—to require retailers around the country to report when they ship something into Massachusetts or California or, better yet, to collect the sales and use tax and remit it to State tax authorities, if you want to put Zoe Lofgren's bill on that bill, I will vote for final passage, and you will have at least two votes that you might otherwise not get.

With that, I yield back.

Mr. COHEN. I thank the gentleman from California.

And Mr. Jordan does not seek to ask any questions. And, with that, I believe we have concluded our questions.

I want to thank each of the witnesses for their testimony and appearing before us.

And I hope that if there are questions submitted to you, which there may be, by Members, that you will respond to them. You will have 5 legislative days to respond to those questions which might be submitted by Members of the Committee.

Without objection, the record will remain open for those 5 days for the submission of any additional materials from Members.

And I thank everyone for their time and patience.

This hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 1:20 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSE TO POST-HEARING QUESTIONS FROM ROBERT D. ATKINSON, PH.D.,
PRESIDENT, INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1521, the "Cell Tax Fairness Act of 2009"
June 29, 2009

Robert D. Atkinson, Ph.D., Information Technology and Innovation Foundation

Questions from the Honorable Steve Cohen, Chairman

Chairman Cohen, thank your for questions. My answers are below.

1. **In your written statement, you discuss in detail the positive externalities associated with wireless services. You state that tobacco products have negative externalities and it is justifiable to tax them. What items other than wireless have positive externalities, and thus should not be taxed or taxed at a very low rate?**

Academic research has shown that there are a number of activities with strong positive externalities. For example, broadband telecommunications and the Internet have positive externalities, which is one reason why some nations like Japan and Korea have subsidized it. This is the rationale behind efforts like the Internet Tax Moratorium and some legislation in Congress to provide tax incentives for deploying broadband. There appear to be strong externalities from information technology investments generally. For example, Loren Hitt's work at University of Pennsylvania suggests that firms only capture about half the total benefits from the IT investments, with the other half spilling over as positive externalities. All of this suggests

2. **The FCC is delivering to Congress by February 2010 a National Broadband Plan, which will include an evaluation on whether taxes impact broadband deployment. If the FCC concludes that taxes have a minimal or no impact on broadband deployment, is H.R. 1521 moot? If the FCC concludes that taxes have a major impact, would you suggest legislation that goes further than H.R. 1521's 5-year moratorium? Should Congress wait until the report is released before acting on H.R. 1521?**

I don't believe that H.R. 1521 would be moot if the FCC were to find, which I don't believe they will, that taxes have a minimal impact on broadband (both deployment and adoption). (The evidence, including by Austin Goolsbee, who is now in the Obama Administration White House, suggests that it does.) The reason is that the evidence with regard to the impact of taxes on

wireless adoption is quite strong and while this is related to broadband, it's not the only use for wireless.

If the FCC concludes that taxes have a major impact, I would favor legislation that goes farther, and in particular, legislation that not only prevents new discriminatory taxes from being enacted, but bans all discriminatory taxes on wireless, broadband, and Internet access, including existing discriminatory taxes.

I do not believe that Congress should wait before acting on H.R. 1521. Between then and now states and localities may enact further discriminatory taxes, which would harm the nation. Moreover, passing H.R. 1521, will provide an important benchmark upon which further action that the FCC might recommend can rest.

- 2. In her written statement, Ms. Hovis suggests that decreasing taxes on wireless services will not necessarily lead to quicker broadband deployment in underserved areas (such as small towns and rural areas) because the providers will seek to invest their resources in the most potentially lucrative areas. Is she correct about providers still servicing the more lucrative markets than rural areas?**

I do not believe that Ms. Hovis is correct. Companies will invest in areas where their revenues exceed their costs and for phased investments in infrastructure they will normally invest in areas that provide the greatest return first, the next greatest return second, etc. Because discriminatory taxes on wireless reduce demand for wireless services, they make small towns and rural areas less attractive to serve, meaning that they either will not be served or will be served later than they would otherwise.

- 4. In her written statement, Ms. Hovis cites statistics showing that in 1995 there were nearly 33 million cell phone subscribers in the U.S. By 2008, there were over 270 million cell phone subscribers. Coupled with wireless industry revenue up exponentially year over year, where is the evidence that the state and local tax and fee burden on the wireless industry has had a negative impact on wireless industry growth? How can the wireless industry suggest that the overall burden is onerous?**

It is important to distinguish between the variety of different wireless services. There is "plain old cell phone service." There are also a host of other services, including data plans for cell phones, wireless broadband, cell phones used as GPS devices, wireless e-books (e.g., the Kindle). To the extent that plain old cell phone service has been close to a necessity for a large share of the American population, it is right to say that the effect of discriminatory taxes on this service are not as high as on other wireless services that are more discretionary in nature. It is here that the big impact on discriminatory taxes is felt in terms of slower adoption and deployment. And it is important to note that America is in the midst of a wireless revolution ("wireless 2.0") as big as the first wireless revolution brought us affordable cell phones.

Discriminatory taxes are holding back wireless 2.0, with large negative economic impacts on the nation.

5. At a hearing on identical legislation during the last Congress, one witness contended that “when stripped of USF and E-911 fees and other user-specific fees, the wireless 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.

According to a report by Scott Mackey published in “State Tax Notes” (February 18, 2008), the average general sales/use tax rate was 7.07 percent, while the tax on wireless at only the state and local level was 11.00 percent. Moreover, the rate is considerably higher in some states. Finally, between 2003 and 2007, taxes fees on wireless service increased four times faster than taxes on other goods and services.

6. Other than state and local governments lowering taxes or keeping taxes low on wireless services, what else can state and local governments do to encourage broadband development which would also not affect their current revenues?

One of the most important steps state and local governments can do to encourage broadband development is to reduce the barriers to broadband facilities providers in deploying new or expanded networks. For example, many localities erect regulatory barriers to the construction of new cell towers, leaving citizens complaining about spotty cell service. Likewise, many communities erect regulatory barriers (and charge high fees) to providers seeking to install broadband cabling and equipment. States and local governments can also engage in demand aggregation programs such as Berkshire Connect in Massachusetts to pool demand to encourage areas to be served by broadband providers. Finally, they can work with the private sector and civic sectors to develop efforts to expand digital inclusion and help expand digital literacy.



RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE MARA CANDELARIA
REARDON, INDIANA HOUSE OF REPRESENTATIVES

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1521, the "Cell Tax Fairness Act of 2009"
June 29, 2009

The Honorable Mara Candelaria Reardon, Indiana House of Representatives

Questions from the Honorable Steve Cohen, Chairman

1. In his written statement, Mr. Stapley contends that the bill fails to recognize that not all jurisdictions depend on identical revenue sources. Some have no income taxes while some tax food. So some jurisdictions may need to tax wireless services at a higher rate than other services. Please respond.

It is certainly correct that there is significant diversity among local jurisdictions across the country in terms of the mix of revenue sources that they rely on to provide public services. State laws and constitutions impose varying restrictions on local revenues sources. Many states in the Northeast do not permit local option income, sales or other consumption taxes, while some Midwestern and Western states give their cities "home rule" authority to levy any tax not prohibited by state law or constitution.

I take issue, however, with Mr. Stapley's contention that a local jurisdiction needs to tax wireless at a higher rate. Local jurisdictions, even those in states without extensive home rule authority, have many revenue and spending options available to balance their budgets. They can raise broad-based property or sales taxes, cut expenditures, or increase fees for services. Many have chosen instead to impose discriminatory taxes on wireless service to avoid political accountability.

Some local jurisdictions have chosen to tax wireless service at excessive rates simply because of their historical ability to tax "telephone service" – a power that historically is tied to their ability to impose right-of-way fees on telephone providers in exchange for the use of public property to place poles, wires, and other equipment. There is no legal, business, or political justification for imposing those taxes on wireless service when wireless providers do not use public property to place equipment.

Moreover, there are important economic reasons why excessive and discriminatory taxes on wireless should be curtailed. As Mr. Atkinson pointed out in his testimony, excessive and discriminatory taxes on wireless service affect more than just the immediate jurisdiction imposing the tax. The social costs of imposing such taxes impact the local, state and national economy as these taxes reduce investment in communications networks and place a drag on national economic growth.

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

Passage of this legislation would have no impact on the revenues of state and local governments because the bill “grandfathers” all existing discriminatory state and local taxes that are now currently imposed and actually enforced. The legislation would, however, stop jurisdictions from imposing new discriminatory taxes on wireless service.

Consumers would benefit in two ways. First, they would be protected from excessive new taxes being added to their wireless bills. This would provide certainty to businesses and consumers, who would know that when they sign up for wireless service, they would know exactly how much they are paying over the life of their contracts.

Second, the moratorium on new taxes on wireless providers and wireless property would create a more stable and predictable business climate for wireless providers – a climate conducive to investment in wireless networks. Wireless providers spend tens of billions of dollars each year to upgrade their networks to run faster and operate better. Network quality and speed continues to improve each year thanks to these investments. Knowing that state and local jurisdictions will not be able to come in after the investments are made and impose new taxes on network equipment will create a stable investment climate that encourages more network investment. Consumers, in turn, will benefit from better and faster networks.

As we mentioned in the preceding paragraph, wireless providers will benefit from a stable investment climate that will encourage additional investment in wireless networks.

3. What do you hope to accomplish with Congress passing H.R. 1521 and imposing a five-year moratorium? Will this moratorium simply lead to a permanent moratorium? Or a ban on all taxation of wireless services?

As a state legislator and particularly as a Member of the Ways and Means Committee in the Indiana House of Representatives, I am sensitive to preserving a state’s taxing authority to fund government services. As I stated in my testimony, I also believe that another important precept of our nation’s tax structure is that taxes should be levied equitably on our citizens, particularly when multiple jurisdictions have the ability to tax. H.R. 1521 takes a measured approach by only precluding new discriminatory taxes and fees from being added on an already excessive level of taxation imposed upon wireless consumers.

My hope is that when H.R. 1521 is enacted, it will serve as a catalyst for both state and local government and industry stakeholders to negotiate in good faith to derive a wireless tax regime that satisfies the revenue needs of states and localities, but does so in a manner that taxes wireless services commensurate with other competitive goods and services.

I do not believe that it's the intent of Rep. Zoe Lofgren, the sponsor of H.R. 1521, to create a permanent moratorium. It is my understanding that a previous version of this legislation called for a three-year moratorium; however, Rep. Lofgren chose to extend the moratorium period by two years to provide a sufficient time frame to develop a harmonized wireless tax regime.

Regarding your question on banning all taxation of wireless services, I do not believe H.R. 1521 would result in that scenario, nor would I support a total ban of taxing wireless services.

4. In your written statement, you indicate that you are very sensitive to federalism principles. Why do you support this legislation, fully knowing that it possibly could lead to further federal intervention, similar to Congress continuing a moratorium on Internet access taxes?

I believe H.R. 1521 does not dramatically depart from our federalism principles because it recognizes the inherently interstate nature of mobile wireless services. Under the Commerce Clause, Congress is expressly granted the power to regulate commerce among the states. It's my understanding that in 2007, Congress overwhelmingly passed a seven-year extension of the moratorium on Internet access taxes. Clearly, there is widespread bi-partisan support for setting parameters on states' and localities' ability to tax the Internet. Considering the tremendous growth of the Internet over the past ten to twelve years, and its growing importance to our domestic and international economy, I believe that the House Judiciary Committee has had incredible foresight in crafting an Internet Tax policy that has yielded extraordinary economic benefits.

5. State and local governments have already worked with the industry to reform some telecommunications taxes (such as sourcing) and have admitted that their communications tax structures need revising. In your view, has the industry put forth enough effort to work with the state and local governments to reform telecommunications taxes before coming to Congress?

It is my understanding that the communications industry has been advancing the need for significant reform to the taxes imposed upon the industry and its consumers since the late 1990's, culminating with a presentation before the Advisory Commission on Electronic (ACEC) regarding why such reforms were critical as the industry moved forward. After the ACEC, the industry worked directly with the coalition of the national state and local government groups (including the National Governor's Association, National Conference of State Legislators, American Legislative Exchange Council, National League of Cities and the US Conference of Mayors in addition to others) to continue the discussions and develop materials to help advance the need for reform of the communications tax structure in the states. That process led to the adoption of resolutions by these organizations recognizing the importance and the need for comprehensive changes to the communications tax structure.

Additionally, the industry has pursued specific reform measures as well as advanced studies of the communications tax structure in various states to help move this process forward. Since I am only aware of specific activities related to Indiana, I

have asked the industry to help provide specific examples of the reform efforts which have been attached as an appendix to these questions.

Unfortunately, while there have been a few efforts to simplify the taxes imposed upon communication services in various states, the only state that has been able to enact meaningful reform of the existing communications tax structure is Virginia. While many policymakers might see the need to pursue such changes, the process takes a lot of time to sort through the specifics and with continued fiscal pressures on state budgets other priorities always seem to surface pushing communications tax reform to the back burner.

The other problem that has consumed a lot of the industry's time and effort has been continuing to battle new proposals to expand or enact discriminatory taxes on the industry and its consumers. Again, those specific examples are highlighted in the attached appendix. With the enactment of H.R. 1521, precluding the enactment of new discriminatory taxes, should help free up the resources of the industry to continue their pursuit of the reforms they are seeking to the existing tax structure with the states. In my opinion, the industry has continued to remain dedicated to pursuing the needed reforms.

6. Many industries have come to this Subcommittee to ask Congress to grant them special protections from state and local taxes. We have heard from the hotel industry, the car rental industry, the satellite television industry, Internet access providers, and big businesses among several others. As a state representative, please tell us why we should grant the wireless industry its wishes and not others?

The hospitality industry, the satellite industry and Internet access providers are all very important sectors of our economy; however, I would not characterize them as a "lifeline." Access to wireless services is no longer a luxury for a select few, but rather a vital necessity, particularly for those that are facing economic challenges. I believe preserving affordability is an important public policy goal.

According to Comscore, nearly 63% of wireless consumers have an income of \$75,000 or less, 17% have an income of \$25,000 or less. It is not the wireless industry that will pay the overwhelming majority of these taxes, it is middle and lower income families and individuals who will pay these taxes. Consider the fact that in 2003, revenues to state and local governments from wireless users was \$8.937 billion, in 2008 that amount had grown to \$16.2 billion. Under H.R. 1521, states and localities will continue to collect billions of dollars in revenues from wireless consumers.



RESPONSE TO POST-HEARING QUESTIONS FROM JOANNE HOVIS, COLUMBIA TELECOMMUNICATIONS CORPORATION, ON BEHALF OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE GOVERNMENT FINANCE OFFICERS ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL LEAGUE OF CITIES

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1521, the "Cell Tax Fairness Act of 2009"
June 29, 2009

Joanne Hovis, Columbia Telecommunications Corporation

Questions from the Honorable Steve Cohen, Chairman

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

Currently states and localities are facing difficulties meeting a variety of their obligations, their liabilities are increasing, they are laying off essential personnel, and cutting vital public services, including police and fire. The requirements set forth in the legislation (e.g., the definition of nondiscriminatory) would make it very difficult for many jurisdictions to have tax classifications, thereby limiting a potential revenue stream for states and localities at a time when they can least afford it.

2. 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?

While the legislation does not ban all *current* taxes on wireless services, it is important to remember 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 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.

It is also important to note that in some states the legislation *would effectively* create a ban on all wireless services taxes because of the difficulties involved in raising other taxes, for example, property and sales taxes, as was discussed by Rep. Sherman (D-CA) at the hearing. This is another example as to why these decisions are best made at the state and local level. If legislators in a particular state feel that it is appropriate to apply the same tax increases across the board and they are able to so in accordance with state law, it is their prerogative. However, in some states this is not a viable option and application of this law would curtail an essential

revenue stream for states and localities. Once again, this suggests that federal preemption is inappropriate and unwarranted.

- 3. In his written statement, Rep. Gibbons suggests that it will be difficult for state and local governments to reform and reduce excessive rates of taxes on communication services because they become reliant on the revenue. Thus, federal intervention through this legislation is necessary. Will passage of this bill lead to effective reform?**

First, let me begin by stating that it is our position that federal preemption is rarely necessary and we question why a state legislator would think it appropriate. If Rep. Gibbons has any concerns about the use of this revenue, he and his colleagues have the authority to deal with it in their state legislature. The state of Indiana is free to tax any industry as it so chooses. However, Congressional preemption of the taxing authority of other state and local governments will most definitely not lead to effective reform. It will simply tie the hands of elected officials in those states and have detrimental impacts on our mutual constituents. State and local innovation leads to effective reform.

State and local governments have been working in an effort to reform the existing telecommunications tax structure on a nationwide basis. Currently, the national local government organizations have been engaged in ongoing discussions with Congressional offices, industry, and others to arrive at a mutually agreeable resolution of the issues surrounding today's telecommunications taxing scheme. Local governments have concluded that any meaningful reform measures must be both technology and revenue neutral and must not be done on a piecemeal basis – especially if doing so results in the preferential tax treatment of one specific service at the expense of others.

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

- 4. Rep. Gibbons and Rep. Reardon stated in their written statements that they take very seriously any federal intervention. Yet, they believe that H.R. 1521 is necessary because the bill would prevent states from raising additional excess taxes on wireless consumers. How would you respond to their contention?**

I would suggest that Reps. Gibbons and Reardon address the issue in their home states of Florida and Indiana, respectively.

- 5. According to Rep. Candelaria Reardon, “with a national average wireless tax rate of 15.2%, consumers who are of lower or moderate income levels pay disproportionately more for the same service than those with higher incomes.” Please respond.**

As an initial matter, I would like to emphasize that we question the reliability of the industry's continued claim that it is taxed excessively compared to other general goods and services. I would like to call the Subcommittee's attention to a report that was submitted as part

of the Honorable Don Stapley's written statement in this proceeding that concludes the industry's methodology is flawed in that it combines federal, 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 – in calculating the industry's average tax rate.

One result of this bill would be to shift the tax burden from wireless services to traditional landline phone service. Typically, older and/or less well-to-do residents continue to rely more heavily on plain old telephone services to communicate. As a result, this bill would result in higher taxes on this consumer population while businesses, as well as typically younger and/or more well-to-do residents who tend to rely on wireless and Internet access for most of their communications needs, would be shielded from any tax increases.

Furthermore, forcing state and local governments to move toward a single transaction tax rate would make those transaction-based tax systems *more*, not less, regressive. Most local governments and some state governments are restricted by state law or state constitutions to rely on transaction tax systems rather than income tax systems. Their ability to create different tax classifications among transaction taxes is typically the only means available for local and state governments to soften the inherent regressive nature of their transaction-based tax systems.

Taxing utility services at a higher rate than general sales taxes is a classic example. Unlike 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. This results in a lessening of the regressive effects of a transaction-based tax system.

On the other hand, requiring utility-type services to be taxed at the same rate as all other consumer goods and services, which this bill would essentially require, 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.

In addition, imposing higher taxes on utility services, including telecommunications, also serves another 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 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 the contrary, some local governments 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. But 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.

6. Excessive new wireless taxes imposed by thousands of state and local governments arguably may be 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 I stated in my written and oral testimony before this Subcommittee, there is no evidence supporting the notion that state and local wireless taxes have slowed or deterred wireless or wireless broadband deployment or subscribership. In 2008, there were 270.3 million cell phone subscribers in the United States, representing 87 percent of the nation's total population. In an April 1, 2009 address, Ivan Seidenberg, chairman of the board and chief executive officer of Verizon, spoke of the growth of the wireless industry in America "as we keep going past 90 percent penetration and more. But even that's too limiting a view of the future; if we think in terms of the complex web of wireless connectivity that next-generation technology will bring about, then the opportunity to explode *past* the 100 ceiling to 300 percent, 400 percent, or 500 percent is not only *possible* . . . it's *probable*."

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. 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. Furthermore, there is no established nexus between tax rates charged to consumers and a business' decision relative to capital investment. As was stated at the hearing, broadband investment is related to population density and return on that investment. Taxes charged to consumers are not a variable.

Local governments share Congressional concerns about the pace of broadband access and deployment in our country. However, the wireless industry's attempt to portray state and local government taxes as the scapegoat for our nation's world standing in broadband access is misplaced. No one has been more vocal in the support of increased availability of affordable broadband than state and local governments. Local government elected officials recognize the economic importance of broadband access and want all their constituents to have affordable broadband access. But state and local elected officials also must balance their budgets; 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.

RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE JOSEPH A. GIBBONS,
FLORIDA HOUSE OF REPRESENTATIVES

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1521, the "Cell Tax Fairness Act of 2009"
June 29, 2009

The Honorable Joseph A. Gibbons, Florida House of Representatives

Questions from the Honorable Steve Cohen, Chairman

In your written statement, you indicate that recent efforts to reduce the tax rate on communications services have failed. Please explain those efforts and why they failed.

Response: The current rate of federal, state and local taxes and fees imposed upon wireless consumers in Florida is approximately 20.42%, nearly three times the level of the average state/local sales tax rate of 7%. Ever since the communications taxes were simplified in Florida into one state and one local tax rate in 2001, the industry has advanced that the rate is too high when compared to the rate imposed upon general retail purchases. Legislation was introduced in 2006 that would have gradually lowered the state rate over a 3-year period to place the state rate on par with the state rate for the general retail sales tax. That bill died. In 2007, efforts were undertaken by the industry to obtain a one-time reduction of 1% from the rate of the state tax on communication services. However, as the legislation worked its way through the budget process the size of the reduction was whittled down repeatedly until ultimately there was no reduction in the final budget that passed.

That is why I believe H.R. 1521 strikes the right balance of trying to stop these excess impositions before they start. Once state and local governments are dependent upon revenues generated from excessively high taxes on wireless service, it is virtually impossible to try to eliminate them. There always seems to be another program that the state can find to justify spending the revenue generated from these taxes.

What do you hope to accomplish with Congress passing H.R. 5793 and imposing a five-year moratorium? Will this moratorium simply lead to a permanent moratorium? Or a ban on all taxation of wireless services?

Response: Passage of H.R. 1521 would preclude only new discriminatory taxes from being imposed upon wireless services and property helping to stop the existing tax situation from getting worse during the 5-year period. This will allow time to educate policymakers on why reform of the existing communications taxes is critical to achieving their overall policy goals of having ubiquitous and affordable access to broadband services. As this measure doesn't preclude generally applied taxes from being imposed or increased on wireless services, even during the 5-year moratorium, it is hard to see this bill ever leading to a ban of ALL taxes on wireless services or that it would become a measure that needs to be enacted permanently. Hopefully, state and local policymakers will come to understand the importance of avoiding imposing targeted taxes on wireless services and work to reform the existing tax structure for all

communication services and tax them like any other competitive goods and services. This would eliminate the need for any future moratorium.

Many industries have come to this Subcommittee to ask Congress to grant them special protections from state and local taxes. We have heard from the hotel industry, the car rental industry, the satellite television industry, Internet access providers, and big businesses among several others. As a state representative, please tell us why we should grant the wireless industry its wishes and not others?

Response: I believe that H.R. 1521 is different for a few reasons. First, we need to keep in mind that this is not a measure seeking to provide a tax break for the industry. This measure is about stopping unfair taxes from being imposed upon wireless consumers.

Second, this bill does not impact any existing taxes. It is only asking that Congress preclude allowing any new discriminatory tax impositions from being imposed upon wireless services or property using the taxes imposed upon other goods and services as the measurement standard. Several of these other measures would impact existing taxes.

Third, H.R. 1521 is not asking for a ban on all taxes like other measures have advanced. It still allows wireless services to be taxed, it is just asking that they be taxed fairly.

Most importantly, these services and the underlying capital investment in the infrastructure needed to provide such services are critical to our national economy. Wireless services are a key element to providing affordable access to broadband services that had previously been out of reach for many. Allowing state and/or local governments to impose new excessive taxes on such services are counter to the policy goals of ensuring affordable access for all Americans and as such we should not be imposing ne unfair taxes on these services.

In your written statement, you suggest that state and local jurisdictions have become dependent upon the revenues from excess taxes on wireless services, and that it is very hard to eliminate those excessive taxes, even when policymakers might agree that it is the right policy to pursue. What do you suggest state and local jurisdictions do to fill that revenue void if they had to roll back tax rates?

Response: Reform of the communications taxes in each state will require their own tailored solution to identify the replacement source. However, sound tax policies principles suggest that taxes imposed upon the broadest base at the lowest rate will help drive equity in taxation. To the extent that state and local governments need to identify replacement sources of revenue to replace existing discriminatory taxes, it should be done through broad based generally applied taxes. I know as an elected official that raising taxes is never an easy task. But if a state truly needs the revenue it should raise it through broadly applied taxes and not on industry specific taxes imposed upon communication services. We are only hurting those that we continually profess we are trying to help.

In your written statement, you take very seriously any federal intervention. Yet, you believe that H.R. 1521 is necessary because the bill would prevent states, including yours,

from raising additional excess taxes on wireless consumers. Mr. Stapley and Ms. Hovis would contend that the bill is not necessary because state and local elected officials can decrease taxes on their own, or barring that, constituents can vote in a new state legislature or local commission who will decrease taxes. Please respond.

Response: There is some truth to what Mr. Stapley and Ms. Hovis have stated and the key to holding policymakers accountable for these decisions comes down to educating the consumers on the current burden they are paying every month in wireless taxes and fees. The wireless industry has been working very hard over the past few years to help educate their consumers about their current tax burden. Consumer education has been critical and was likely the key factor in defeating several recent attempts to add new discriminatory taxes on wireless services.

However, I think it is unreasonable to suggest that constituents can easily vote a policymaker out of office if they are not working on fixing this problem. Unfairly adding to the existing burden of wireless taxes and fees would be one of the many issues that a policymaker would be dealing with over the course of their election cycle. Additionally, the term of office for any elected position varies so significantly it could be several years after passing a new targeted tax that the policymaker will even be up for re-election. This is not something that can be easily accomplished and not truly a viable recourse for consumers. Of note, the federal excise tax was imposed in 1898 as a temporary tax to fund the Spanish-American War. The temporary tax was repealed well over 100 years later becoming a symbol of how difficult it is to remove telecommunications taxes once in place.

In your written statement, you indicate that Florida simplified the taxes and fees imposed on communication services. Please explain what was simplified and how effective the process was.

Response: Numerous state and local taxes and fees were imposed upon communication services. Tax reform was advanced that consolidated these numerous impositions into one state tax and one local tax to make communications bills easier for Florida customers to read and to help ease the administrative burden companies faced in filing all of these different taxes and fees with hundreds of different local jurisdictions. The simplification measure consolidated all of the state impositions into one statewide communications services tax and consolidated all of the local impositions into one local communication services tax. The rate of the local communications services tax varies by jurisdiction. The average rate for both the state and local communication services tax significantly exceeds the average combined state/local retail sales tax rate.

Even though this effort was not seeking to reduce the high level of taxes on communications services and was only seeking to consolidate these various taxes into one imposition, it took several years for the communications services tax simplification legislation to pass. One of the biggest impediments was getting the localities to relinquish some of their control over the various impositions and trust that the state would distribute the taxes back to the localities on a timely basis to ensure they were getting the money they were entitled to.

Overall, administration of the simplified communications services tax has made the tax portion of customer bills easier to read and has reduced the administrative compliance burden for carriers. However, Florida customers still pay nearly three times more in taxes for the purchase of communications services than they pay for the purchase of other taxable goods and services.

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

Response: As I read and understand this question, H.R. 1521 would have no impact on any existing state and/or local revenues. It would also not have any impact on any proposal to increase general taxes that wireless consumers and businesses would be subject to.

What this measure would do is prevent a state and/or local jurisdiction from trying to address their revenue needs by imposing a new tax solely on wireless services or wireless property.

I think the legislation benefits consumers by ensuring that state and/or local governments do not unfairly increase the taxes and fees on their wireless services and requires them to raise the revenue they need through broad based taxes.

I think it is good for wireless service providers to help ensure their consumers are not unfairly targeted for excess taxes and that their property is not targeted for unfair taxes that would increase their cost to deploy wireless infrastructure, specifically when policymakers continue to ask the industry to invest more in the infrastructure necessary to continue to expand the reach of broadband services.

Most importantly, I believe this is good for our economy by ensuring affordable access to advanced wireless services and continued investment in the infrastructure needed to ensure ubiquitous access to broadband services.

At a hearing on identical legislation during the last Congress, one witness contended that “when stripped of USF and E-911 fees and other user-specific fees, the wireless 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.

Response: The best way for me to respond is by using my own state as an example. The impositions currently imposed upon wireless services in Florida includes:

State communications services tax – 9.17%
 Local communications services tax – 6.06% (Average)
 State E911 fee – 1.00% (\$.50/mo)

Total state & local rate – 16.23%

When you add in the Federal universal service fee, Florida consumers are paying in excess of 20%.

For other general goods and services the following taxes apply:

State sales tax – 6%
Local sales tax – 1% (Average)

Total state & local tax - 7%

Even when you remove the Federal USF and the state E911 fee, the rate on wireless services is 15.23% compared to the rate imposed upon other goods and services of 7%. That is a rate that is more than double. Using simple math I do not see where the basis is for contending that the numbers don't support that wireless consumers are bearing a higher burden than consumers of other goods and services. While that may be true in other states, that is certainly not the case in Florida where wireless consumers are paying more than double the taxes imposed upon other general goods and services.



RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE DON STAPLEY,
MARICOPA COUNTY BOARD OF SUPERVISORS

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1521, the "Cell Tax Fairness Act of 2009"
June 29, 2009

The Honorable Don Stapley, Maricopa County

Questions from the Honorable Steve Cohen, Chairman

- 1. H.R. 1521 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?**

While the legislation does not ban all current taxes on wireless services, it is important to remember 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 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.

It is also important to note that in some states the legislation would effectively create a ban on all wireless services taxes because of the difficulties involved in raising other taxes, for example, property and sales taxes, as was discussed by Rep. Sherman (D-CA) at the hearing. This is another example as to why these decisions are best made at the state and local level. If legislators in a particular state feel that it is appropriate to apply the same tax increases across the board and they are able to do so in accordance with state law, it is their prerogative. However, in some states this is not a viable option and application of this law would curtail an essential revenue stream for states and localities. Once again, this suggests that federal preemption is inappropriate and unwarranted.

- 2. Excessive new wireless taxes imposed by thousands of state and local governments arguably may be 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 Joanne Hovis stated in her written and oral testimony before this Subcommittee, there is no evidence supporting the notion that state and local wireless taxes have slowed or deterred wireless or wireless broadband deployment or subscribership. In 2008, there were 270.3 million cell phone subscribers in the United States, representing 87 percent of the nation's total population. In an April 1, 2009 address, Ivan Seidenberg, chairman of the board and chief executive officer of Verizon, spoke of the growth of the wireless industry in America "as we keep going past 90 percent penetration and more. But even that's too limiting a view of the future; if we think in terms of the complex web of wireless connectivity that next-generation technology will bring about, then the opportunity to explode past the 100 ceiling to 300 percent, 400 percent, or 500 percent is not only possible . . . it's probable."

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. 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. Furthermore, there is no established nexus between tax rates charged to consumers and a business' decision relative to capital investment. As was stated at the hearing, broadband investment is related to population density and return on that investment. Taxes charged to consumers are not a variable.

Local governments share Congressional concerns about the pace of broadband access and deployment in our country. However, the wireless industry's attempt to portray state and local government taxes as the scapegoat for our nation's world standing in broadband access is misplaced. No one has been more vocal in the support of increased availability of affordable broadband than state and local governments. Local government elected officials recognize the economic importance of broadband access and want all their constituents to have affordable broadband access. But state and local elected officials also must balance their budgets; 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.

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

Currently states and localities are facing difficulties meeting a variety of their obligations, their liabilities are increasing; they are laying off essential personnel, and cutting vital public services, including police and fire. The requirements set forth in the legislation (e.g., the definition of nondiscriminatory) would make it very difficult for many jurisdictions to have tax classifications, thereby limiting a potential revenue stream for states and localities at a time when they can least afford it.

4. In his written statement, Rep. Gibbons suggests that it will be difficult for state and local governments to reform and reduce excessive rates of taxes on communication services because they become reliant on the revenue. Thus, federal intervention through this legislation is necessary. Will passage of this bill lead to effective reform?

First, let me begin by stating that it is our position that federal preemption is rarely necessary and we question why a state legislator would think it appropriate. If Rep. Gibbons has any concerns about the use of this revenue, he and his colleagues have the authority to deal with it in their state legislature. The state of Indiana is free to tax any industry as it so chooses. However, Congressional preemption of the taxing authority of other state and local governments will most definitely not lead to effective reform. It will simply tie the hands of elected officials in those states and have detrimental impacts on our mutual constituents. State and local innovation leads to effective reform.

State and local governments have been working in an effort to reform the existing telecommunications tax structure on a nationwide basis. Currently, the national local government organizations have been engaged in ongoing discussions with Congressional offices, industry, and others to arrive at a mutually agreeable resolution of the issues surrounding today's telecommunications taxing scheme. Local governments have concluded that any meaningful reform measures must be both technology and revenue neutral and must not be done on a piecemeal basis - especially if doing so results in the preferential tax treatment of one specific service at the expense of others.

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

- 5. Rep. Gibbons and Rep. Reardon stated in their written statements that they take very seriously any federal intervention. Yet, they believe that H.R. 1521 is necessary because the bill would prevent states from raising additional excess taxes on wireless consumers. How would you respond to their contention?**

I would suggest that Reps. Gibbons and Reardon address the issue in their home states of Florida and Indiana, respectively.

- 6. During questioning by Rep. Issa, you were asked about what local governments would do if their constituents decided to obtain cell phone plans in other jurisdictions. Would the Mobile Telecommunications Sourcing Act cover such situations?**

In the event local officials see that their current wireless tax system results in consumers taking steps to obtain cell phone services from neighboring jurisdictions, it may be incumbent on those officials to re-examine their wireless tax policy and take appropriate action. However, this underscores the position that I repeatedly took during the hearing on this bill – taxing decisions best belong at the local level. And those decisions should not be limited by Congress granting preferential tax treatment to wireless services at the expense of others.

Further, the Mobile Telecommunications Sourcing Act requires that taxes are imposed based on the billing address of the consumer. Studies have shown that any local tax savings consumers may see after jumping through the hoops to establish a different billing address are small.

7. During the hearing, Rep. Watt asked three of the five witnesses several questions about defining what is “discriminatory” for purposes of H.R. 1521 and for other Federal legislation affecting state and local taxation. You were not part of this discussion during the hearing. Please provide your response now.

Our associations have policy positions that like services should be treated alike and that any federal efforts to alter existing telecommunications tax systems must be revenue neutral. This proposed legislation, however, fails to do both. This bill would give preferential tax treatment to wireless services, at the expense of landline and VOIP services. Furthermore, by barring any tax increases on wireless services, this bill would tie the hands of local government officials to craft tax policy tailored to the specific needs of their constituents.

