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Court of Appeals
Division I
State of Washington

No. 75423-8-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

CITY OF SEATTLE,

Appellant,

v.

T-MOBILE WEST CORP.,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Under the Washington Constitution, a city has no inherent taxing authority and may levy a tax only when the Washington Legislature has expressly authorized it to do so. *Carkonen v. Williams*, 76 Wn.2d 617, 627, 458 P.2d 280 (1969). The City of Seattle (“City” or “Seattle”) concedes this point, as it must. Opening Brief of Appellant (“Opening Brief”), pp. 13-14. The Superior Court properly concluded that the Washington statutes on which the City purports to rely “do not authorize the City to tax the international roaming revenue at issue.” (CP 181 (Findings, Conclusion and Order), ¶ 6.) That conclusion resolves the issue here, and the Court was right.

RCW 35.21.714 authorizes the City to tax “the telephone business,” but that same statute expressly limits the City’s taxing authority to that portion of the telephone business that reflects revenue from “intrastate toll telephone services.” *See* discussion, below. The City argues for a narrow construction of this quoted phrase, claiming that the intrastate limit on its authority to tax applies only to revenues from *long distance landline calls* and not to other types of telecommunications services. Opening Brief, pp. 27, 34. But Washington courts have applied the intrastate limit in this statute to invalidate taxes on *a wide variety of telecommunications services*. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358-59, 166 P.3d 667 (2007); *Vonage v. Seattle*, 152 Wn. App. 12, 24, 216 P.3d 1029 (2009).

The City virtually ignores this authority; the Opening Brief does not discuss these dispositive cases until page 31. The City then attempts in vain to distinguish *Qwest* and *Vonage* on the ground that the cases did not involve mobile telecommunications, but that is irrelevant. Both cases held that Washington cities are authorized to levy a tax only on revenues from the *intrastate* aspects of the *telephone business*. As discussed below, there is no dispute that “the telephone business” includes the mobile telecommunications services at issue here. Thus, RCW 35.21.714 limits the City’s authority to tax mobile telecommunications to revenues realized from the intrastate component of that business, which obviously does not include revenue from the *international* telephone calls at issue.

The City’s Opening Brief attempts to construct a circular argument for authority based on outdated state statutes, on a *federal* statute (the Mobile Telecommunications Sourcing Act (“MTSA”)), and on a 2002 amendment to the “Proviso” in RCW 35.21.714 (which did not change the “intrastate” limits in the body of that statute). But the City cannot point to any statute enacted by the Washington Legislature that expressly authorizes it to tax the international telecommunications at issue here. Without express authorization from the State Legislature, the City cannot levy its utility tax on these revenues. *Carkonen*, 76 Wn.2d at 627. The remaining issues raised by the City are discussed in more detail below. But those issues are all moot because the City cannot establish that the Washington Legislature has expressly granted it authority to tax the international telecommunications revenues at issue.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

The City’s statement of the issues conflates several different issues, including issues the Court does not need to reach. Because only the Washington Legislature can create taxing authority in the City, the threshold issue for this Court should be whether the Washington Legislature has expressly authorized the City to tax the international revenues in question. If such authority were present (which it is not), the next issue would be whether the Seattle Municipal Code covers revenues from international telecommunications or whether, as the Hearing Examiner found, the Municipal Code applies only to revenues from “intrastate or interstate” telecommunications.¹ The City’s discussion of the MTSA is a red herring. As discussed below, Federal laws enacted pursuant to the Commerce Clause (including the MTSA) may place *limits* on the taxing authority of state and local governments, but federal law *does not and cannot create new taxing authority* that does not exist under state law.

III. RESPONDENT’S STATEMENT OF THE CASE

For the most part, T-Mobile agrees with the City’s Statement of the Case insofar as it relates to the nature of the telephone services and revenues at issue, the audit process that was followed by the City, the City’s tax assessments, the timeliness of T-Mobile’s appeal to the Office of the Hearing Examiner and the subsequent path of this litigation.

¹ The Superior Court did not need to decide this issue and it did not do so. (CP 181, ¶ 6.)

Opening Brief, pp. 3-8. Indeed, the parties have stipulated to the material facts that control this appeal. Opening Brief, p. 4, note 1.

At pages 7-8 of the Opening Brief, however, the City abandons its recitation of the facts and begins its argument regarding the Hearing Examiner's decision and the rulings of the Superior Court. Those arguments are not appropriate for a Statement of the Case (RAP 10.3(a)(5)) and T-Mobile does not agree with the City's characterization of the earlier decisions or its claim that the decisions were in error. The bases for the Superior Court's Findings, Conclusions and Order and the Hearing Examiner's Findings and Decision are clear from the written decisions, themselves. (CP 179-182; 6-16.)

IV. ARGUMENT

A. **The City May Not Impose any Tax Without Express Authorization from the Washington State Legislature**

The City concedes that, under the Washington Constitution, cities and other municipal bodies have no inherent authority to levy taxes. Opening Brief, pp. 13-14. That point of law is not debatable. *Lakewood v. Pierce Cty.*, 106 Wn. App. 63, 75, 23 P.3d 1 (2001); *Carkonen*, 76 Wn.2d at 627; Wash. Const. art. VII, § 9, art. XI, § 12. The Constitution permits the State Legislature to delegate taxing authority to a city, but only by express authorization in a statute. *Carkonen*, 76 Wn.2d at 627. Of course, when the Legislature does delegate taxing authority to a city, the delegation "is attended by such conditions and limitations as that body may prescribe." *State ex rel. Sch. Dist. v. Clark County*, 177 Wash. 314, 31 P.2d

897 (1934); *Great Northern R. Co. v. Stevens County*, 108 Wash. 238, 183 P. 65 (1919).

In asserting the right to tax revenues from international telecommunications, the City ignores the language in the applicable statute that limits its authority. By its clear terms, RCW 35.21.714 authorizes the City *only* to tax telephone revenues from *intrastate* telephone communications. *See* discussion, below. The City apparently recognizes this problem because it initially argues that a different statute applies. This argument is misplaced.

B. The Superior Court Properly Focused on RCW 35.21.714, Which Limits The City’s Authority To Tax The Telephone Business

The City argues at some length that its tax on the telephone business is authorized by RCW 35.22.280(32), rather than RCW 35.21.714. But, as discussed below, this argument ignores that the Legislature, in the latter statute, specifically limited the City’s authority to tax the telephone business.

RCW 35.22.280(32) is a general grant of authority to Washington cities to “grant licenses.” As the City points out, this statute (or its predecessor) was enacted at least 80 years ago. Indeed, the City relies heavily on *Pacific Telephone and Telegraph Co. v. City of Seattle*, 172 Wash. 649, 21 P.2d 721 (1933), an 83-year-old decision interpreting the statute that preceded RCW 35.22.280. Opening Brief, pp. 14-15. However, the City cannot avoid the fact that its taxing authority, if any, was expressly limited by a more recent statute.

RCW 35.21.714 was enacted by the Washington Legislature in 1981; in 1983 the Legislature clarified the intrastate taxing limits in the statute. *See* discussion below. The earliest tax year included in the assessments at issue here is 2006; by that date, it is clear that the City’s authority (if any) must be determined by reference to RCW 35.21.714, which is both more recent than RCW 35.22.280(32) and more specific in its application to taxes on the telephone business.

As noted above, RCW 35.22.280(32) generally refers to authority “[t]o grant licenses for any lawful purpose.” RCW 35.21.714, on the other hand, applies specifically to any “license fee or tax upon the business activity of engaging in the telephone business.”² The Washington Supreme Court has declared that it is a “canon of statutory construction” that when two statutes cover the same ground, the “the latest enacted provision prevails when it is more specific than its predecessor.” *State v. J.P.*, 149 Wn.2d 444, 452, 69 P.3d 318 (2003); *see also Muije v. Dep’t. of Soc. & Health Servs.*, 97 Wn.2d 451, 453, 645 P.2d 1086 (1982); *State ex rel. Graham v. San Juan County*, 102 Wn.2d 311, 320, 686 P.2d 1073 (1984); *Citizens for Clean Air, et al. v. Spokane*, 114 Wn.2d 20, 37, 785 P.2d 447 (1990). The Superior Court properly looked to RCW 35.21.714, which establishes certain limits on the City’s taxing authority. Indeed, elsewhere in its brief, the City acknowledges this point. Opening Brief, p.

² The Seattle Municipal Code provision on which the Utility Tax is based is SMC 5.48.050, which pertains to taxes on the “telephone business”; the quoted term is also used in RCW 35.21.714.

9 (“The state legislature has authorized the City to impose the tax since at least 1932 and *subsequently imposed limits on that authority.*” (emphasis added). *See also id.*, p. 27.

Not surprisingly, the Opening Brief does not cite a single case since 1983 in which a Washington city successfully relied on RCW 35.22.280(32) as authority for a tax on the telephone business. Since RCW 35.21.714 was enacted, RCW 35.22.280(32) has not even been *mentioned* in the decisions relating to taxing authority, even though a number of cases challenging the authority of Washington cities to tax the telephone business have been decided in that time frame. For example, the City of Seattle apparently did not even raise RCW 35.22.280(32) in 2006 – 09 when Vonage challenged the interstate application of the same utility tax at issue here to its VOIP communications. In that case, Division One of the Court of Appeals concluded instead that “RCW 35.21.714(1) grants cities the authority to impose telephone utility taxes[.]” *Vonage*, 152 Wn. App at 20.

The City attempts to rely on *dicta* from the Hearing Examiner’s conclusions to the effect that these statutes are “easily reconciled” because RCW 35.22.280(32) is broader in scope and RCW 35.21.714 does not cover the entire subject matter of the earlier statute. (CP 13-14); Opening Brief, pp. 27-28. But the Superior Court properly rejected this argument, because it is simply not possible to reconcile the statutes *in this context*. The City’s claim of unlimited authority to tax the telephone business, as the City would interpret RCW 35.22.280(32), cannot be reconciled with

the intrastate limitation on taxing authority set out in RCW 35.21.714. The Court could not apply the former statute here without ignoring (or rewriting) the latter. Importantly, as noted above (see page 6) the Washington Supreme Court has directed that a more specific and recent statute (such as RCW 35.21.714) should be given precedence over an older and more general statute. *State v. J.P.*, 149 Wn.2d at 452.

C. RCW 35.21.714 Limits The City’s Authority To Tax The Telephone Business To A Tax On Revenues From Intrastate Telecommunications.

The first sentence of RCW 35.21.714 authorizes the City to levy a tax on the “telephone business,” but only on that portion of the telephone business that reflects revenue from “intrastate toll telephone services”:

Any city which imposes a license fee or tax upon the business activity of engaging in the telephone business which is measured by gross receipts or gross income may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from *intrastate* toll telephone services subject to the fee or tax.

RCW 35.21.714 (emphasis added).³ This language is clear – the City may levy a telephone business tax on intrastate revenues only – and it has been so interpreted by the Supreme Court.

It is undisputed that under state law, the City may tax Qwest’s charges for and its provision of access to intrastate services. *See* RCW 35A.82.060(1) (‘Any code city . . . may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from *intrastate*

³ The limitation to tax only intrastate telephone communications is reinforced by the language of the proviso to this section, which provides that “the city shall not impose the fee or tax on that portion of network telephone service which represents [...] access to, or charges for, interstate services.” *Id.*

toll telephone services . . .'). And in their initial briefs, both Qwest and the City agreed the City could *not* tax Qwest on charges for *interstate* services. See RCW 35A.82.060(1) (precluding cities from taxing charges 'for access to, or charges for, interstate services').⁴

Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 358-59 (2007) (emphasis in original).

Division One of the Court of Appeals relied on *Qwest* in concluding that RCW 35.21.714 (the same statute at issue here) authorized Seattle to levy taxes only on the intrastate component of Vonage's VoIP services:

Under RCW 35.21.714, cities have the option of taxing the intrastate component of such services. . . . However, the City may not tax the interstate component of Vonage's VoIP service We hold the superior court properly concluded that Vonage is subject to the City's telephone utility tax but the assessment must be based on the intrastate component of Vonage's service.

Vonage, 152 Wn. App. at 24 (internal citations omitted).

1. The City attempts to distinguish *Qwest* and *Vonage* with a tortured interpretation of RCW 35.21.714.

In *Qwest*, the Washington Supreme Court set out specific guidelines for interpreting the meaning of a statute:

A court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent. . . . Review begins with the plain meaning of the statute. . . . If a statute is ambiguous, we may look to the legislative history and the circumstances surrounding the statute's enactment to discern legislative intent. . . . Ambiguities in taxing statutes

⁴ *Qwest* involved RCW 35A.82.060(1), which is identical to RCW 35.21.714 (the statute applicable here), except that the former statute applies to code cities such as Bellevue.

are construed ‘most strongly against the government and in favor of the taxpayer.’

161 Wn.2d at 363 – 64 (internal citations omitted).

The City’s Opening Brief ignores the plain meaning of RCW 35.21.714, as well as the controlling authority discussed above. The City’s primary argument, repeated several times in the brief, is that when the Legislature used the phrase “intrastate toll telephone services” to limit the City’s taxing authority it intended only to expressly authorize a tax on “intrastate long distance service,” without limiting the City’s authority to tax other forms of telecommunications. Opening Brief, p. 34; *see also id.*, p. 2 (Assignment of Error #2). But the Washington appellate courts have consistently rejected similar calls for a narrow interpretation of the terms used in this statute; to the contrary, the intrastate limit on taxing authority has been applied to all forms of telecommunications.

The Court in *Qwest* looked at the same language at issue here and held that it authorizes a city to levy a tax generally on the “telephone business,” but only on that portion of the telephone business that reflects revenue from intrastate telecommunications. Contrary to Seattle’s arguments, *Qwest* was not a case in which “Bellevue attempted to tax interstate landline services.” Opening Brief, p. 31. To the contrary, *Qwest* involved an attempt to impose the tax on, among other services, certain “private line, frame relay, and ATM services provided by Qwest.” 161 Wn.2d at 359-60.

As discussed above, Division One of the Court of Appeals reached the same conclusion in *Vonage*, where the Court applied this same language to limit Seattle’s authority to tax VoIP telecommunications services,⁵ without any discussion of the issue that Seattle now raises. As such, *Qwest* and *Vonage* stand for the proposition that this statute limits a city’s authority to tax the telephone business, *broadly defined*, to a tax on the intrastate component of that business. Neither decision involved “interstate long distance landline calls,” and neither decision limited the scope of the statute as the City now argues. *Cf.* Opening Brief, p. 27.

The City’s next argument is that a broad interpretation of the phrase “intrastate toll telephone services” would make the Proviso to RCW 35.21.714 superfluous because none of the activities listed in the Proviso could be considered “intrastate.” Opening Brief, pp. 34-35. But *Qwest* also refutes that argument. As the facts in *Qwest* illustrate, in the modern telephone business it is often unclear whether a particular service is properly characterized as intrastate or interstate, particularly where services occur within a state but are used as part of a provider’s interstate network. *Qwest*, 161 Wn.2d at 360-61 (“[C]ertain ‘types of dedicated communication connections such as private line transport, frame relay, and ATM products’ may be used by customers to ‘access a local network, an interstate network or for mixed use.’”). As the Supreme Court

⁵ “VoIP technology enables consumers to conduct voice communications (calls) via a high-speed (broadband) Internet connection. Vonage’s service also includes voice mail, call waiting, call forwarding, and caller identification to allow its customers to control how their calls are sent, received, and stored.” 152 Wn. App. at 15.

recognized in *Qwest*, it is not always clear how to characterize services that serve both intrastate and interstate telecommunications. The clause in the Proviso to RCW 35.21.714 providing that “the city shall not impose the fee or tax on that portion of the network telephone service which represents charges [...] for access to, or charges for, interstate services” is intended to make it clear that revenues from services that are part of the interstate telecommunication network are not within the City’s taxing authority even when the services arguably occur entirely within Washington state. The Superior Court properly concluded that the Proviso to RCW 35.21.714 involves further limitations to the intrastate taxing authority granted by the first clause of the statute; in other words, the Proviso modifies but does not negate that limitation. (CP 180, ¶ 4); *see also Qwest*, 161 Wn.2d at 367-68.

Finally, the City ignores *Western Telepage v. City of Tacoma*, 140 Wn.2d 599, 998 P.2d 884 (2000), in which the Supreme Court held that when the Legislature enacted RCW 35.21.714, it intended to adopt taxing rules that apply generally to a broad spectrum of telecommunications services. In 1981 (at the same time that RCW 35.21.714 was enacted) the Legislature amended a number of key statutory definitions to capture *all types of emerging telecommunications technologies* so as to eliminate taxing distinctions among them:

Recognizing the impending revolution in telecommunications services and wishing to ‘level the playing field’ between regulated telephone businesses and emerging, nonregulated telecommunications companies,

the Legislature broadened the definition of companies susceptible to the state public utilities tax by amending former RCW 82.16.010.

140 Wn.2d at 602-03 (internal citation omitted). RCW 82.16.010 defines several key terms that are expressly incorporated by RCW 35.21.714(3) and were adopted by the parties in their pre-hearing Stipulation. *See* discussion in the following section. Seattle’s argument for a narrow interpretation of the phrase “intrastate toll telephone services” ignores that the Legislature chose to define those terms broadly.⁶

2. In arguing for a narrow interpretation of “intrastate toll telephone services,” the City ignores the Parties’ Stipulation of Facts, which incorporates terms defined by the Legislature in related statutes.

The City also ignores that the application of the statutory phrase “intrastate toll telephone services” in this case is controlled by the Parties’ Stipulation of Facts (CP 261-65). For purposes of RCW 35.21.714, “telephone service” means “competitive telephone service *or network telephone service*, or both, as defined in (b)(i) and (ii) of this subsection.” RCW 82.16.010(6)(b)(iv) (emphasis added).⁷ The parties have stipulated

⁶ The City’s argument that the taxing limit in RCW 35.21.714 applies to interstate calls but does not “apply to international calls” is confusing. Opening Brief, p. 41. RCW 35.21.714 authorizes the City to tax only revenue from intrastate telecommunications. As the Supreme Court held in *Qwest*, this excludes interstate telecommunications, but it also clearly excludes the international calls at issue here. *Id.* *See also*, Opening Brief, p. 41.

⁷ “Network telephone service,” in turn, means “the providing by any person of access to a telephone network, telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system.” RCW 82.16.010(6) (b)(ii) (emphasis added).

that, “T-Mobile [...] provides ‘network telephone services’” (as defined in RCW 82.16.010(6)(b)(ii)).” (CP 262, ¶ 2.)⁸ So the City cannot now dispute that the wireless communications offered by T-Mobile, including the international telecommunications at issue, fall within the definition of “telephone services,” as the term is used in RCW 35.21.714.

The parties likewise agree that the term “toll” refers to telephone services that incur a fee. Opening Brief, p. 34, n.5. Thus, the phrase “intrastate toll telephone services” in RCW 35.21.714 refers generally to intrastate telecommunications that generate fees; this phrase was not intended to apply solely to landline long distance calls, as the City argues. *Cf.* Opening Brief at p. 27. And because the City has stipulated that T-Mobile provides “network telephone services,” which includes all forms of telephone services regardless of the transmission system, it cannot now deny that the wireless calls provided by T-Mobile are a form of “toll telephone services,” as that term is used in the statute.⁹ But of course they are not *intrastate* toll telephone services, and the City is not authorized to tax them.

⁸ The Hearing Examiner adopted the stipulations in her Findings of Fact, which were not challenged by the City. (CP 221-22.)

⁹ In fact, contrary to its current argument for a narrow interpretation of this language, Seattle — like the Washington Legislature — has adopted a broad definition of the terms “telephone business” and “telecommunications services” that expressly includes cellular or mobile telephone service. SMC 5.30.060(c). In *Vonage*, the Supreme Court recognized that these provisions in the Seattle Municipal Code are broadly defined to include various types of telecommunications: “[Seattle’s] telephone utility tax is a tax on the privilege of engaging in telephone business in Seattle. SMC 5.48.050.A. The City of Seattle defines ‘telephone business’ broadly to include more than traditional telephone service[.]” 152 Wn. App. at 24.

The City's argument for a narrow interpretation of RCW 35.21.714 ignores the plain meaning of the statute, particularly in light of the carefully-defined terms used by the Legislature and adopted by the parties in their Stipulation of Facts, which shows that the intrastate limits on taxing authority were intended to apply broadly to all types of telecommunications so as to "level the playing field" among emerging technologies. *Western Telepage*, 140 Wn.2d at 602-03. There is simply no support in the statute or the Stipulation of Facts for the narrow construction of "toll telephone services" proposed by Seattle. And, as noted in the previous section of this brief, the narrow construction proposed by the City is also contradicted by appellate decisions that broadly interpret the same language.

3. The City also ignores the rule that ambiguities in taxing statutes must be construed 'most strongly against the government and in favor of the taxpayer.'

In *Qwest*, the Supreme Court reiterated the long-standing rule of construction that ambiguities in tax statutes are to be construed "most strongly" against the government and in favor of the taxpayer. 161 Wn.2d at 363 – 64. As discussed above, T-Mobile respectfully submits that this statute plainly and unambiguously limits the City's authority to tax telecommunications to those revenues that arise from intrastate telephone services, as the Supreme Court held in *Qwest*. But even if there were an ambiguity, it would have to be construed in favor of the taxpayer, T-Mobile.

The City argues for a different rule of statutory construction, but that rule is inapplicable here. The City argues that RCW 35.21.714 should be narrowly construed because it *exempted* interstate and international telecommunications from a tax that previously applied. Opening Brief, pp. 33-34. This argument ignores history. RCW 35.22.280(32) has never been held to authorize a tax on interstate telecommunications, let alone international telecommunications. *Pacific Telephone* certainly did not reach the issues raised in this case; the city ordinance at issue in that case applied only to “income from [the telephone] business in the city,” not from interstate or international activities. 172 Wash. at 651, 657.¹⁰

An “exemption” in a taxing statute presupposes that the Legislature has delegated broad taxing authority from which a taxpayer seeks to be exempt. *Group Health Coop. v. Wash. St. Comm’n*, 72 Wn.2d 422, 429, 433 P.2d 201 (1967). But in this instance, the Legislative grant of authority itself is limited to the right to tax “intrastate toll telephone services.”¹¹ The City must accept that delegation of authority “attended by such conditions

¹⁰ In 1933, and for many years thereafter, the Washington Supreme Court held that a city’s authority to levy a license fee did not even reach the taxpayer’s *intrastate* business that occurred outside the city limits, let alone its revenues from international business activities. *Id.*; *Lone Star Cement Corp. v. Seattle*, 71 Wn.2d 564, 572, 429 P.2d 909 (1967) (“[T]he city has no power either to authorize, license, or tax activities beyond its territorial limits.”). In recent times, to be sure, state courts have permitted cities to levy taxes on some business activities that occur beyond the city limits. But the Washington Legislature has continued to limit the authority of Washington cities to tax the telephone business to the intrastate component of that business.

¹¹ “Any city which imposes a license fee or tax upon the business activity of engaging in the telephone business which is measured by gross receipts or gross income may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from intrastate toll telephone services subject to the fee or tax.” RCW 35.21.714.

and limitations as [the Legislature] may prescribe.” *State ex rel. Sch. Dist. v. Clark County*, 177 Wash. 314, 31 P.2d 897 (1934). The intrastate limitation is not an exemption; if there were any ambiguity in the statute, it must be construed in favor of the taxpayer. “Ambiguities in taxing statutes are construed ‘most strongly against the government and in favor of the taxpayer.’” *Qwest*, 161 Wn.2d at 363 – 64.

D. The Federal Mobile Telecommunications Sourcing Act (“MTSA”) Provides No Authority For The City To Tax International Telecommunications

1. The MTSA does not grant any taxing authority to the City.

Seattle repeatedly asserts that the Federal MTSA (4 USC §§ 116-126) “authorizes” the City to levy a tax on these international telecommunications. *See, e.g.*, Opening Brief, p. 20 (“In the present case, the MTSA authorizes the City to tax T-Mobile’s roaming charges for international incollect communications.”) This assertion, which is the main premise of the City’s Opening Brief, is wrong as a matter of law. The federal government did not, and in fact it *cannot*, grant taxing authority to a Washington City, nor can it amend a state statute.

The City’s arguments ignore the relationship between the state and federal governments and the limited role that the latter plays with regard to state and local taxes. Washington’s Constitution provides that cities and other municipal bodies in the state have no inherent authority to levy taxes, but must derive express taxing authority from the *State Legislature*. *See* Section III.A., *supra.*; Wash. Const. art. VII, § 9, art. XI, § 12.

Thus, the federal government has no power to create or expand taxing authority for any Washington city, even it were inclined to do so. The federal government can, however, *limit* the ability of States and local governments to tax interstate commerce under some circumstances, by application of the Commerce Clause in the U.S. Constitution, Art. I, § 8, cl. 3. Seattle acknowledges this point in its discussion of *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989). Opening Brief, pp. 17-19.

The limited effect of the MTSA is consistent with the limited role of the federal government in state and local tax matters. To that end, the U.S. Congress made it clear that the MTSA does *not* authorize any state or locality to levy a tax:

Sections 116 through 126 of this title [4 USCS §§ 116-126] *do not* [...] provide authority to a taxing jurisdiction to impose a tax, charge, or fee that the laws of such jurisdiction do not authorize such jurisdiction to impose.

4 USC § 118(1) (emphasis added). To the contrary, the power to tax wireless telecommunications services must derive from the powers granted *under the laws of the taxing jurisdiction* which, in the case of Seattle, means that the Washington State Legislature must expressly grant that authority.

The MTSA *permits* taxing jurisdictions to levy taxes on wireless services based on the location of a wireless customer's place of primary use ("PPU"), but *only if* the tax is authorized by state and local laws. As the Superior Court properly held, any change to the taxing authority of the

City must come from the Washington Legislature, not Congress. (CP 180,

¶ 3.) The City’s own authority confirms this point:

Because the MTSA forbids the states from taxing wireless services except as provided under the Act, states have a strong incentive to amend their statutes to provide for taxation of wireless services in conformity with the Act. Unless and until the states take such affirmative action, they will lose tax revenue, because the MTSA itself does not impose the tax; it simply ‘authorizes’ the states to impose the tax in conformity with its provisions.

Opening Brief, p. 19 (quoting from 2 J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 18.07[3] (3d ed. 2002) (footnotes omitted) (CP 409). And as the Superior Court also properly held, the Washington Legislature has not chosen to grant expanded taxing authority to Washington cities. (CP 180, ¶¶ 3,4.)

The Legislative History of the MTSA further confirms that Congress did not intend for the MTSA to expand taxing authority for states or municipalities. In 2000, during consideration of the Bill that became the MTSA, the Congressional Budget Office (“CBO”) reported to Congress that the MTSA would be “revenue neutral” in effect, although it might result in a reallocation of tax revenues among taxing jurisdictions:

Because the current system of taxing mobile telecommunications services is very complex, it is unclear what effect this change may have on revenues from such taxes. Based on information from groups representing the affected state and local governments, however, CBO estimates that the bill would, in total, be approximately revenue neutral across the country, although the distribution of revenues among jurisdictions would likely change.

Congressional Budget Office Cost Estimate, S. 1755 (May 9, 2000) (copy attached as Appendix 1). “Revenue neutral” meant that the MTSA might result in a reallocation of tax revenues among state and local governments but it would not materially increase the total tax burden on the industry by exposing new revenues to state and local taxes.¹² Obviously, a revenue-neutral amendment would not greatly expand the scope of a tax. *See* discussion below at pp. 28-30.

Finally, as noted by the CBO, a number of groups within the industry and the affected state and local governments testified before Congress that the MTSA would not change the taxing authority of any jurisdiction. *See, e.g., Wireless Telecommunications Sourcing and Privacy Act: Hearing on H.R. 3489 Before the Subcommittee on Commercial and Administrative Law of the House Comm. on the Judiciary, 106th Cong. 64-915 (May 4, 2000) (copy attached as Appendix 2) (statements of Tom Wheeler, President and CEO of CTIA (the bill would not “change state or local authority to tax wireless telecommunications” (at p. 19)), Ray Scheppach, Executive Director of the National Governors’ Association (the MTSA does not “seek to determine or change whether a state or local jurisdiction does or does not tax wireless services” (at p. 23)), Joseph E. Brooks on behalf of the*

¹² The meaning of “revenue-neutral,” as applied to a change in tax laws is clear. *See, e.g., uslegal.com*: “The term Revenue Neutral implies changes in the tax laws that result in no change in the amount of revenue coming into the government's coffers. In other words, a tax proposal is revenue neutral if it neither increases nor decreases tax revenues when compared to existing law.”

National League of Cities (“The measure does not change the ability of states and localities to tax telecommunications services.” (at p. 24)).

2. The MTSA limits the authority of states and cities to tax certain revenues.

While the MTSA does not grant new taxing powers to state or local governments, it does *limit* the power of local governments to tax certain revenues. It prohibits any state or local taxing jurisdiction from imposing a tax on wireless telecommunications *unless* the telecommunications are billed to a customer with a PPU within the taxing jurisdiction. 4 USC § 118 (The MTSA does “modify, impair [and] supersede” the taxing authority of some jurisdictions, where expressly provided in the Act.).

The parties appear to agree that Congress enacted the MTSA in 2002 to simplify the taxation of wireless telecommunications services by creating a uniform method of sourcing (or “situsing”) wireless calls to a single location for taxing purposes. But the City’s discussion of the purpose of the statute is incomplete. Opening Brief, pp. 16-19. The primary goal of the MTSA was to eliminate double-taxation of wireless revenues.

Prior to the MTSA, wireless revenue from a single phone call was potentially subject to taxes in multiple jurisdictions, including the jurisdiction where the call originated and the jurisdiction where it terminated, as well as the jurisdiction where the customer resided. The tax analysis was made more complex by the fact that different states and

municipalities had different taxation rules, and was further exacerbated by increased prevalence of “bucket” pricing (i.e., customers pay a monthly recurring charge covering a fixed (or unlimited) number of minutes of calls). Under the patchwork system in place at the time, wireless carriers faced substantial administration costs and their customers could be subject to double or even triple taxation on wireless calls. *See, e.g., Wireless Telecommunications Sourcing and Privacy Act: Hearing on H.R. 3489 Before the Subcommittee on Commercial and Administrative Law of the House Comm. on the Judiciary, 106th Cong. 64-915 (May 4, 2000)* (Appendix 2) (statements of Hon. Charles W. Pickering, Jr. (R-Miss.) (pp. 10-13) and Joseph E. Brooks, on behalf of the National League of Cities (pp. 23-27)).

The MTSA addressed these challenges by adopting a nationwide standard for sourcing wireless telecommunications services that was intended to simplify the rules for taxation of these services and eliminate the problem of double-taxation. Under the MTSA, domestic wireless calls are “sourced” (or “sitused”) to a customer’s PPU, which is the customer’s primary residential or business address. But, again, the new sourcing rules did not *expand* the power of a local jurisdiction to tax wireless calls; rather, they *limited* that power. Under the MTSA, any “taxing jurisdiction” other than the jurisdiction containing the customer’s PPU is *prohibited* from taxing revenues from that customer’s wireless services.¹³

¹³ The MTSA applies only to taxing jurisdictions that are *within* the United States. 4 U.S.C. § 124(12). So the MTSA does not preclude *foreign* jurisdictions in which

3. The City’s arguments about the effects of the MTSA are misplaced.

The City asserts that T-Mobile’s argument “disregard[s] the MTSA’s requirements for sourcing mobile telecommunications charges.” Opening Brief, p. 25. But that is incorrect. This interpretation gives full effect to the MTSA sourcing rules, which *preclude* state or local taxing jurisdictions from imposing a tax on wireless telecommunications unless the telecommunications are billed to a PPU within the taxing jurisdiction. *See* discussion, *supra*. But this is fundamentally different from creating *new* taxing authority in state and local taxing jurisdictions, as Seattle tries to argue. That, the MTSA does not do.

Seattle makes the same argument in another guise when it claims that “the MTSA fundamentally changed the taxation of mobile telecommunications” by state and local governments so that “[f]or tax purposes, cellular calls are no longer interstate or intrastate.” Opening Brief, p. 24. But the City’s authority to levy taxes on the telephone business is governed by RCW 35.21.714, which limits that authority to taxes on “intrastate toll telephone services.” As discussed above, the federal government has no power to rewrite Washington’s statutory law and Congress did not attempt to do so here. *See* 4 USC § 118(1). Contrary to the City’s argument, there is nothing in the MTSA that “amends” state laws such as RCW 35.21.714 so that all wireless calls are

international incollect communications originate from taxing revenues from those communications. This means that the basic premise of the MTSA – elimination of double-taxation – does not apply where such calls are concerned.

treated as “intrastate” calls. And as discussed below, the Washington State Legislature has never eliminated the distinction between intrastate and interstate wireless calls; when the Legislature amended RCW 35.21.714 in 2002 it chose to not amend those portions of the statute, including specifically the provision that limits the City’s taxing authority to revenues from the intrastate component of the telephone business.

E. The 2002 Amendment To RCW 35.21.714 Did Not Expand The City’s Taxing Authority To Include International Mobile Telecommunications

The City relies heavily on the last clause in the Proviso to RCW 35.21.714, but this reliance is also misplaced. In 2002, the Legislature amended the Proviso in response to federal passage of the MTSA: “PROVIDED, That the city shall not impose the fee or tax [authorized by RCW 35.21.714] on . . . *charges for mobile telecommunications services provided to customers whose place of primary use is not within the city*” (language added in 2002 italicized). The City argues that this language expanded its taxing authority as to mobile telecommunications services, so that it now has authority to tax interstate and international mobile telephone communications placed by customers whose place of primary use (i.e., residence) is in Seattle. See Opening Brief, pp. 28-31. But this is not a valid interpretation of the effect of the amendment.

Once again, the City ignores the well-established rules for interpreting the meaning of a tax statute. See discussion, *supra*, p. 10. When these rules are applied to the 2002 amendment to RCW 35.21.714,

it is clear that the Legislature did not intend the amendment to expand the City's authority to tax mobile telecommunications, as the City contends.

1. Review begins with the plain meaning of the statute.

As the Supreme Court has held, review begins with the plain meaning of the statute and RCW 35.21.714 plainly means that the City has authority to tax only the *intrastate* component of the telephone business. *Qwest*, 161 Wn.2d 358-59; *Vonage*, 52 Wn. App. at 24. This limitation appears in the opening sentence of the body of the statute. The Legislature did not amend this language in 2002.

Other language in the Proviso to RCW 35.21.714, enacted prior to 2002, reinforces the conclusion that the City's taxing authority extends only to intrastate telephone revenues, i.e., "the city shall not impose the fee or tax on that portion of network telephone service which represents [...] access to, or charges for, interstate services." RCW 35.21.714. Once again, the Legislature chose not to amend this language in 2002.

Contrary to the City's argument, the last clause of the Proviso did not rewrite the entire statute, nor did it expand the City's authority to tax mobile telecommunications by making every wireless call an intrastate toll telephone call. Opening Brief, p. 24. As the Superior Court concluded, it is simply not possible to interpret the 2002 amendments as the City argues. (CP 180, ¶ 4.)

In the first place, it is significant that the Legislature placed the 2002 amendment into the Proviso, rather than the body of RCW

35.21.714. It is settled law that provisos in statutes operate as limitations upon or exceptions to the general terms of the statute to which they are appended. As such, provisos generally should be strictly construed “with any doubt to be resolved in favor of the general provisions, rather than the exceptions[.]” *Garvey v. St. Elizabeth’s Hospital*, 103 Wn.2d 756, 759, 697 P.2d 248 (1985).

[I]t is a rule of construction that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words, as well as within the reason, thereof.

Sackman v. Thomas, 24 Wash. 660, 673, 64 P. 819 (1901). Here, the general provisions of the statute clearly limit the City to taxing the intrastate component of the telephone business; if the Legislature had intended to dramatically expand the City’s authority, it would not have done so in a proviso, but would have amended the general provisions of the statute.

Moreover, the language of the 2002 amendment to the Proviso expresses the Legislative intent to further limit the City’s authority rather than to grant it substantial additional taxing authority. Once again, the 2002 amendment resulted in the following language: “PROVIDED, That the city shall not impose the fee or tax . . . for mobile telecommunications services provided to customers whose place of primary use is not within the city.” The City asks the Court to read this limiting clause as an

affirmative grant of additional taxing authority, i.e., that, “The city *may* impose the tax on mobile telecommunication services provided to customers whose primary place of use *is* within the city.” But that is not a reasonable construction of the actual language in the amendment, which is negative in tone and in effect.

Finally, the City argues that this prohibition on taxing mobile telecommunications for non-Seattle residents is an “implicit” acknowledgment that the City can tax all mobile telecommunications revenue from Seattle residents. Opening Brief, p. 30. But this argument ignores that the Washington Constitution allows the State to delegate taxing authority to a city only by *express authorization* in a statute. *Carkonen*, 76 Wn.2d at 627. If the Legislature had intended to grant significant new taxing authority to the cities in the 2002 Amendment (which it clearly did not), it would have done so by an express grant of expanded authority, not by way of negative implication in a proviso to the statute.

The plain meaning of RCW 35.21.714, both before and after the 2002 amendment, is that a Washington city may *only* tax the *intrastate* revenues of a mobile telecommunications provider. *Qwest*, 161 Wn.2d at 363-64. And the plain meaning of the last clause of the proviso is that the City may only tax those intrastate revenues of a mobile telecommunications provider to the extent that they arise from “services to customers whose primary place of residence is within the city.” (In other words, the City may no longer tax intrastate revenues arising from a

mobile phone call made within Seattle by, say, a resident of Bellevue.) Because the meaning of this statute is plain, there is no need to consider the legislative intent by delving into the legislative history of the 2002 amendment. *Id.* But even if the Court were to do so in this case, the legislative history of the amendment strongly undermines the City’s argument.

2. The Legislative History of the 2002 amendment confirms that the Legislature did not intend to expand the City’s taxing authority.

The Legislature adopted the 2002 amendments to RCW 35.21.714 in SB 6539. (CP 315-31.) The Legislative findings in Section 1 of SB 6539 show that the Washington Legislature, like Congress before them, did not intend to expand the types of revenue that would be subject to local taxation. Instead, the Legislature repeatedly described the implementing bill as “revenue-neutral,” among the states *and within the state*:

The legislature finds that the United States congress has enacted the mobile telecommunications sourcing act for the purpose of establishing uniform nationwide sourcing rules for state and local taxation of mobile telecommunications services. The legislature desires to adopt implementing legislation governing taxation by the state and by affected local taxing jurisdictions within the state. *The legislature recognizes that the federal act is intended to provide a clarification of sourcing rules that is revenue-neutral among the states, and that the clarifications required by the federal act are likely in fact to be revenue-neutral at the state level.* The legislature also desires to take advantage of a provision of the federal act that allows a state with a generally applicable business and occupation tax, such as

this state, to make certain of the uniform sourcing rules elective for such tax.

(CP 316-17) (2001 Wa. SB 6539 (emphasis added)). The Legislature’s intent is even more clear from the “Local Government Fiscal Note” that was prepared with respect to SB 6539.¹⁴ (CP 340-41.) That Fiscal Note, based on information from the Department of Revenue, the Association of Washington Cities and the Washington State Association of Counties, describes the “revenue impacts” of the legislation as follows:

The act is intended to be revenue-neutral. However, there may be a redistribution of existing tax revenue due to the requirements of taxing a cellular call where the caller lives, not where the call is made. The amount nor location of the redistribution, if any, compared to the existing taxation system is unknown, since the location and destination of a cellular caller’s future calls cannot be known with certainty.

(CP 341) (Local Gov’t Fiscal Note to SB 6539, 57th Leg., Reg Sess. (Wash. 2002) (prepared by Dept. of Community, Trade and Econ. Develop.)).

Even if the plain language of the amendment were not clear, this clear expression of intent by the Legislature would be fatal to the City’s argument. The City argues that the Legislature intended, by means of SB 6539, to expand the taxing authority of Washington cities by authorizing them to tax not only intrastate revenues but also interstate and

¹⁴ A number of Washington appellate courts have approved the use of Fiscal Notes such as this to interpret legislative intent. *Baker v. Tri-Mountain Res.*, 94 Wn. App. 849, 853-54, 973 P.2 1078 (1998); *Qwest*, 161 Wn.2d at 367-68. In fact, the Supreme Court in *Qwest* relied on the local government fiscal note from an amendment to this very statute in support of its conclusion that the statute covers only intrastate telephone revenues.

international revenues from mobile telecommunications. As the Assessments at issue here make clear, this supposed change in authority would have *greatly* expanded the revenue from the cities' taxes on the telephone business.¹⁵ In fact, the Legislature repeatedly expressed a different intent, i.e., to adopt a "revenue-neutral" statute that might reallocate "existing tax revenue" from intrastate calls among cities, but would not generate new tax revenues within the state.

Nor does the City cite any real support for its argument that the intent of SB 6539 was to eliminate the distinctions among intrastate, interstate and international calls for purposes of RCW 35.21.714. To the contrary, the Washington Senate's Final Bill Report on SB 6539 (the 2002 amendments) indicates that the primary purpose of the MTSA, and the corresponding state law amendments to wireless sourcing rules, was to eliminate the problem of double-taxation. ("However, the different sourcing methods can give rise to multiple claims on the same revenue.") *See* Opening Brief, pp. 36-37 (quoting from CP 333). This double-taxation problem, as far as Washington cities were concerned, applied only to intrastate telecommunications. So the Legislature dealt with the problem of double taxation on intrastate revenues in the same way that

¹⁵ If the City's interpretation were adopted, the revenue impact of the amendments would be very substantial. Indeed, over the 5.5 years of taxes at issue herein, the increased tax revenue from the international incollect telecommunications at issue is almost \$500,000. (CP 230 (Findings and Decision), p. 10.) This amount itself is substantial, but it reflects only the supposed increase in taxes for a single city and a single wireless carrier. The revenue impact across the state and across the industry could hardly have been considered "revenue neutral."

Congress did in the MTSA, by adopting sourcing rules that mean that only one city can tax such intrastate revenues. As a result of the amendments, then, the City may only tax *intrastate* revenues of a mobile telecommunications provider to the extent that they arise from “services to customers whose primary place of residence is within the city.” RCW 35.21.714. As with the MTSA, itself, the effect of the 2002 amendments to RCW 35.21.714 is to limit the taxing power of the City, not to expand it.

Thus, both the plain meaning of the statute and the legislative history confirm that the 2002 amendments to RCW 35.21.714 were not intended to expand the City’s taxing authority to include the revenue from international communications. Finally, even if this taxing statute were found to be ambiguous on this issue, any such ambiguity must be “construed most strongly against the government and in favor of the taxpayer.” *Qwest*, 161 Wn.2d at 363 – 64.

F. The Hearing Examiner Correctly Held That SMC 5.48.050.A Does Not Apply To International Telecommunications

The Hearing Examiner carefully analyzed Seattle’s Municipal Code and concluded that SMC 5.48.050.A, by its own terms, does not apply to revenues from international telephone calls, such as the revenues at issue here.¹⁶ (CP 229-30.) The Superior Court did not reach this issue because it was unnecessary to its decision. (CP 181, ¶ 6.)

¹⁶ This portion of the Hearing Examiners’ Findings and Decision is the basis for the Hearing Examiner’s Decision and is therefore not *dicta*.

SMC 5.48.050.A provides that, “The total gross income [subject to the tax] shall also include all charges by the provider of cellular or cellular mobile telephone services provided to its customers *in any taxing jurisdiction (intrastate or interstate)*, which are billed to a ‘place of primary use’ located in Seattle [...]” (emphasis added). As the Hearing Examiner concluded, the Code does not apply to international telecommunications because “interstate” does not mean “international.” *Id.* The City does not dispute the latter point. Opening Brief, p. 40.

Moreover, the term “taxing jurisdiction” is limited to U.S. jurisdictions:

The term ‘taxing jurisdiction’ means any of the several States, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee.

4 USC § 124(12). The parties have stipulated that the international incollect communications that are the subject of this dispute are provided to T-Mobile’s customers in foreign jurisdictions, rather than in a “taxing jurisdiction,” as that term is used in SMC 5.48.050.A. (CP 263, ¶ 4.) As the Hearing Examiner concluded, the plain meaning of this section is that revenues from intrastate and interstate telecommunications are purportedly covered by SMC 5.48.050.A , but revenues from international telecommunications are not. (CP 229-30.)

Seattle argues that a different provision of the Code, SMC 5.48.260, is inconsistent with the Hearing Examiner's conclusion because it provides that the "total gross income from telephone business in the City for purposes of SMC 5.48.050.A [includes] all gross income from cellular telephone service (including roaming charges incurred by Seattle customers outside this state) [...]" But as the Hearing Examiner points out, SMC 5.48.260 is not inconsistent with her interpretation of the latter provision. "[W]hen the two sections are read together, they are entirely consistent." (CP 229, ¶ 10.) SMC 5.48.050.A provides that taxable income includes interstate and intrastate mobile telephone calls provided in a U.S. taxing jurisdiction. SMC 5.48.260 confirms that this includes revenue from "interstate" telecommunications, but it "does not change the meaning of the word 'interstate' in SMC 5.48.[050.A]¹⁷ to 'international.'" (CP 229.) If this Court needs to reach the issue, the Court should reach the same conclusion as the Hearing Examiner, that "the Director lacks authority under the Code to levy a utility tax based on revenue received by T-Mobile from its Seattle-resident customers for international incollect communications." *Id.*

V. CONCLUSION

The City may levy a tax only when the *Washington Legislature* has expressly authorized it to do so. As the Washington Supreme Court (and this Court) previously ruled, the Washington Legislature has delegated to

¹⁷ The Hearing Examiner on several occasions mistakenly referred to SMC 5.48.050 as 5.48.080. *Id.*

cities such as Seattle the authority to levy taxes only on revenue from *intrastate* telephone communications. RCW 35.21.714; *Qwest*, 161 Wn.2d 358-59; *Vonage*, 52 Wn. App. at 24. The intrastate limitation in this taxing statute applies to all aspects of the “telephone business,” including mobile telecommunications. *Id.* Neither the federal Mobile Telecommunications Sourcing Act nor the 2002 amendment to RCW 35.21.714 were intended to expand the taxing authority of the City. To the contrary, both were intended to be “revenue neutral.” For all the reasons set out herein, the Judgment of the Superior Court should be affirmed.

DATED this 4th day of October, 2016.

s/ Michael E. Kipling

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date she caused to be served a copy of the foregoing *Brief of Respondent* via the method indicated below on the following:

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Counsel for Appellant City of Seattle

DATED this 4th day of October, 2016.

s/ Carol A. Cannon

Carol A. Cannon
Legal Assistant

APPENDIX 1



CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

May 9, 2000

S. 1755

Mobile Telecommunications Sourcing Act

As ordered reported by the Senate Committee on Commerce, Science, and Transportation
on April 13, 2000

SUMMARY

Two years after enactment, S. 1755 would prohibit state and local governments from taxing mobile telecommunications calls unless a customer's place of primary telephone use is within the taxing jurisdiction of the state or local government. The bill would encourage states to provide mobile telephone companies with a database that shows which addresses fall within which taxing jurisdictions. Mobile telephone companies would be held harmless for any mistakes in taxes collected because of errors in the database, or from errors they might make before a state provides such a database.

Certain charges imposed on telecommunications services either by states or the federal government under the Telecommunications Act of 1996 to support universal service are recorded in the federal budget. (Universal Service is a program intended to promote the availability of telecommunications services at affordable rates.) Because S. 1755 could affect direct spending and receipts, pay-as-you-go procedures would apply, but CBO estimates that any such effects would be negligible.

S. 1755 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), because it would preempt state and local government laws by prohibiting jurisdictions from taxing mobile telecommunication services unless the jurisdictions contain a customer's place of primary use. While data are limited, CBO estimates the mandate would not impose significant net costs on state or local governments and would not exceed the threshold established in UMRA (\$55 million in 2000, adjusted annually for inflation). The legislation does not contain any new private-sector mandates as defined by UMRA.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Under the Universal Service Fund established by the Telecommunications Act of 1996, the Federal Communications Commission (FCC) seeks to provide universal access to telecommunications services through various charges to some telephone companies and payments to others. The 1996 act also permits states to establish additional collections and payments to preserve and advance universal service, so long as these mechanisms are not inconsistent with federal law.

The Universal Service Fund records these transactions on the federal budget as governmental receipts and direct spending. To the extent that states choose to use charges on mobile telecommunications service to support universal service, S. 1755 could result in reduced revenues collected and lower direct spending. But based on information from the FCC and the Universal Service Administrative Company, CBO estimates that any change in revenues and direct spending as a result of enacting this legislation would be negligible.

The costs of this legislation fall within budget function 370 (commerce and housing credit).

PAY-AS-YOU-GO CONSIDERATIONS

The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending and receipts. As noted above, S. 1755 could affect direct spending and receipts, but CBO estimates that any such effects would be negligible.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

S. 1755 would preempt state and local government laws by prohibiting jurisdictions from taxing mobile telecommunications services unless the jurisdictions contain a customer's place of primary use. Such a preemption would be a mandate as defined in UMRA. This change could initially benefit some taxing jurisdictions and harm others depending on the number of customers with places of primary use within each jurisdiction. The bill would not require or prohibit state and local governments from taxing telecommunications services or affect the rate at which such services could be taxed. It would, however, require a uniform basis for determining which jurisdictions may tax mobile telecommunications services.

Because the current system of taxing mobile telecommunications services is very complex, it is unclear what effect this change may have on revenues from such taxes. Based on information from groups representing the affected state and local governments, however,

CBO estimates that the bill would, in total, be approximately revenue neutral across the country, although the distribution of revenues among jurisdictions would likely change.

ESTIMATED IMPACT ON THE PRIVATE SECTOR

This bill contains no new private-sector mandates as defined by UMRA.

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ESTIMATE APPROVED BY:

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APPENDIX 2

WIRELESS TELECOMMUNICATIONS SOURCING AND PRIVACY ACT

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

SECOND SESSION

ON

H.R. 3489

MAY 4, 2000

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WIRELESS TELECOMMUNICATIONS SOURCING AND PRIVACY ACT

THURSDAY, MAY 4, 2000

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

The subcommittee met, pursuant to call, at 1 p.m., in room 2237, Rayburn House Office Building, Hon. George W. Gekas [chairman of the subcommittee] presiding.

Present: Representatives George W. Gekas and Jerrold Nadler.

Staff present: Diana Schacht, full committee chief counsel; Ray Smietanka, subcommittee chief counsel; David Lachmann, minority professional staff member; Michelle Utt, full committee administrative assistant

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. GEKAS. The hour of 1 p.m. having arrived, the Subcommittee on Commercial and Administrative Law of the Judiciary Committee will come to order.

The rules of the House, and therefore the rules of the committee, require that two members be present for a full-fledged, bona fide hearing to take place. Because I lapsed into a custom many years ago to start every committee meeting on time, I have done so. Now I will sing songs for 6 or 7 minutes until another member should appear.

In the meantime, the gentleman from New York has solved my dilemma. We acknowledge the presence of a second member, the gentleman from New York, the ranking member, Mr. Nadler, and we are in a position now to formalize the opening of the meeting.

With that in mind, let us give a brief overview of the rationale that brings us to the witness table and to the committee table. There is an ongoing controversy—not so much a controversy as a problem with respect to the emerging, still emerging telecommunications service throughout our country. We have seen tremendous developments including a figure that astounds me: there were 4 million wireless telephone units in our country in 1990, and there are now perhaps 80 million units being utilized across the Nation. Ergo, where do the taxing authorities come in?

Everyone knows that telephone service or telecommunications service is not exempt from taxing authorities, generally speaking, and, therefore, if there is to be a taxation program, how will it be implemented? That has been bandied about. Happily we can report, and the testimony at this hearing will probably endorse what I am

(1)

about to say, that industry and taxing authorities have been negotiating for quite some period of time and have reached some conclusions about what they want and ask that the Congress adopt.

That is a good way to do congressional business. Rather than put us in the position of being experts in everything, which we think we are, and in some cases, I am, we would rather adopt the solution that the populous finds in accordance with their wishes and which is comfortable to sustain. That has happily happened in this case.

We are not yet ready for mark up or finalization of the process, but this meeting will crystallize all the issues and catapult us into staff and other action that will bring about fast resolution of this problem.

[The bill H.R. 3489 follows:]

106TH CONGRESS
1ST SESSION

H. R. 3489

To amend the Communications Act of 1934 to regulate interstate commerce in the use of mobile telephones and to strengthen and clarify prohibitions on electronic eavesdropping, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 18, 1999

Mr. PICKERING (for himself, Mr. MARKEY, Mrs. WILSON, Mr. LARGENT, and Mr. TAUZIN) introduced the following bill; which was referred to the Committee on Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Communications Act of 1934 to regulate interstate commerce in the use of mobile telephones and to strengthen and clarify prohibitions on electronic eavesdropping, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Wireless Telecommunications Sourcing and Privacy Act".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) The provision of mobile telecommunications services is a matter of interstate commerce within the jurisdiction of the United States Congress under Article I, Section 8 of the United States Constitution. Certain aspects of mobile telecommunications technologies and services do not respect, and operate independently of, State and local jurisdictional boundaries.

(2) The mobility afforded to millions of American consumers by mobile telecommunications services helps to fuel the American economy, facilitate the development of the information superhighway and provide important safety benefits.

(3) Users of mobile telecommunications services can originate a call in one State or local jurisdiction and travel through other States or local jurisdictions during the course of the call. These circumstances make it more difficult to track the separate segments of a particular call with all of the States and local jurisdictions involved with the call. In addition, expanded home calling areas, bundled service offerings and other marketing advances make it increasingly difficult to assign each transaction to a specific taxing jurisdiction.

(4) State and local taxes imposed on mobile telecommunications services that are not consistently based can subject consumers, businesses and others engaged in interstate commerce to multiple, confusing and burdensome State and local taxes and result in higher costs to consumers and the industry.

(5) State and local taxes that are not consistently based can result in some telecommunications revenues inadvertently escaping State and local taxation altogether, thereby violating standards of tax fairness, creating inequities among competitors in the telecommunications market and depriving State and local governments of needed tax revenues.

(6) Because State and local tax laws and regulations of many jurisdictions were established before the proliferation of mobile telecommunications services, the application of these laws to the provision of mobile telecommunications services may produce conflicting or unintended tax results.

(7) State and local governments provide essential public services, including services that Congress encourages State and local governments to undertake in partnership with the Federal government for the achievement of important national policy goals.

(8) State and local governments provide services that support the flow of interstate commerce, including services that support the use and development of mobile telecommunications services.

(9) State governments as sovereign entities in our Federal system may require that interstate commerce conducted within their borders pay its fair share of tax to support the governmental services provided by those governments.

(10) Local governments as autonomous subdivisions of a State government may require that interstate commerce conducted within their borders pay its fair share of tax to support the governmental services provided by those governments.

(11) To balance the needs of interstate commerce and the mobile telecommunications industry with the legitimate role of State and local governments in our system of federalism, Congress needs to establish a uniform and coherent national policy regarding the taxation of mobile telecommunications services through the exercise of its constitutional authority to regulate interstate commerce.

(12) Congress also recognizes that the solution established by this legislation is a necessarily practical one and must provide for a system of State and local taxation of mobile telecommunications services that in the absence of this solution would not otherwise occur. To this extent, Congress exercises its power to provide a reasonable solution to otherwise insoluble problems of multi-jurisdictional commerce.

SEC. 3. AMENDMENT OF COMMUNICATIONS ACT OF 1934 TO PROVIDE RULES FOR DETERMINING STATE AND LOCAL GOVERNMENT TREATMENT OF CHARGES RELATED TO MOBILE TELECOMMUNICATIONS SERVICES.

(a) **IN GENERAL.**—The Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by adding at the end thereof the following:

“TITLE VIII—STATE AND LOCAL TREATMENT OF CHARGES FOR MOBILE TELECOMMUNICATIONS SERVICES

“SEC. 801. APPLICATION OF TITLE.

“(a) **IN GENERAL.**—This title applies to any tax, charge, or fee levied by a taxing jurisdiction as a fixed charge for each customer or measured by gross amounts charged to customers for mobile telecommunications services, regardless of whether such tax, charge, or fee is imposed on the vendor or customer of the service and regardless of the terminology used to describe the tax, charge, or fee.

“(b) **GENERAL EXCEPTIONS.**—This title does not apply to—

“(1) any tax, charge, or fee levied upon or measured by the net income, capital stock, net worth, or property value of the provider of mobile telecommunications service;

“(2) any tax, charge, or fee that is applied to an equitably apportioned gross amount that is not determined on a transactional basis;

“(3) any tax, charge, or fee that represents compensation for a mobile telecommunications service provider's use of public rights of way or other public property, provided that such tax, charge, or fee is not levied by the taxing juris-

diction as a fixed charge for each customer or measured by gross amounts charged to customers for mobile telecommunication services; or

"(4) any fee related to obligations under section 254 of this Act."

"(c) SPECIFIC EXCEPTIONS.—This title—

"(1) does not apply to the determination of the taxing situs of prepaid telephone calling services;

"(2) does not affect the taxability of either the initial sale of mobile telecommunications services or subsequent resale, whether as sales of the service alone or as a part of a bundled product, where the Internet Tax Freedom Act would preclude a taxing jurisdiction from subjecting the charges of the sale of these mobile telecommunications services to a tax, charge, or fee but this section provides no evidence of the intent of Congress with respect to the applicability of the Internet Tax Freedom Act to such charges; and

"(3) does not apply to the determination of the taxing situs of air-ground radiotelephone service as defined in section 22.99 of the Commission's regulations (47 C.F.R. 22.99).

"SEC. 802. SOURCING RULES.

"(a) IN GENERAL.—Notwithstanding the law of any State or political subdivision thereof to the contrary, mobile telecommunications services provided in a taxing jurisdiction to a customer, the charges for which are billed by or for the customer's home service provider, shall be deemed to be provided by the customer's home service provider.

"(b) JURISDICTION.—All charges for mobile telecommunications services that are deemed to be provided by the customer's home service provider under this title are authorized to be subjected to tax, charge, or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use, regardless of where the mobile telecommunication services originate, terminate or pass through, and no other taxing jurisdiction may impose taxes, charges, or fees on charges for such mobile telecommunications services.

"SEC. 803. LIMITATIONS.

"This title does not—

"(1) provide authority to a taxing jurisdiction to impose a tax, charge, or fee that the laws of the jurisdiction do not authorize the jurisdiction to impose; or

"(2) modify, impair, supersede, or authorize the modification, impairment, or supersession of, the law of any taxing jurisdiction pertaining to taxation except as expressly provided in this title.

"SEC. 804. ELECTRONIC DATABASES FOR NATIONWIDE STANDARD NUMERIC JURISDICTIONAL CODES.

"(a) ELECTRONIC DATABASE.—A State may provide an electronic database to a home service provider or, if a State does not provide such an electronic database to home service providers, then the designated database provider may provide an electronic database to a home service provider. The electronic database, whether provided by the State or the designated database provider, shall be provided in a format approved by the American National Standards Institute's Accredited Standards Committee X12, that, allowing for de minimis deviations, designates for each street address in the State, including to the extent practicable, any multiple postal street addresses applicable to one street location, the appropriate taxing jurisdictions, and the appropriate code for each taxing jurisdiction, for each level of taxing jurisdiction, identified by one nationwide standard numeric code. The electronic database shall also provide the appropriate code for each street address with respect to political subdivisions which are not taxing jurisdictions when reasonably needed to determine the proper taxing jurisdiction. The nationwide standard numeric codes shall contain the same number of numeric digits with each digit or combination of digits referring to the same level of taxing jurisdiction throughout the United States using a format similar to FIPS 55-3 or other appropriate standard approved by the Federation of Tax Administrators and the Multistate Tax Commission, or their successors. Each address shall be provided in standard postal format.

"(b) NOTICE; UPDATES.—A State or designated database provider that provides or maintains an electronic database described in subsection (a) shall provide notice of the availability of the then current electronic database, and any subsequent revisions thereof, by publication in the manner normally employed for the publication of informational tax, charge, or fee notices to taxpayers in that State.

"(c) USER HELD HARMLESS.—A home service provider using the data contained in the electronic database described in subsection (a) shall be held harmless from any tax, charge, or fee liability that otherwise would be due solely as a result of

any error or omission in the electronic database provided by a State or designated database provider. The home service provider shall reflect changes made to the electronic database during a calendar quarter no later than 30 days after the end of that calendar quarter for each State that issues notice of the availability of an electronic database reflecting such changes under subsection (b).

"SEC. 805. PROCEDURE WHERE NO ELECTRONIC DATABASE PROVIDED.

"(a) IN GENERAL.—If neither a State nor designated database provider provides an electronic database under section 804, a home service provider shall be held harmless from any tax, charge, or fee liability in that State that otherwise would be due solely as a result of an assignment of a street address to an incorrect taxing jurisdiction if, subject to section 806, the home service provider employs an enhanced zip code to assign each street address to a specific taxing jurisdiction for each level of taxing jurisdiction and exercises due diligence at each level of taxing jurisdiction to ensure that each such street address is assigned to the correct taxing jurisdiction. Where an enhanced zip code overlaps boundaries of taxing jurisdictions of the same level, the home service provider must designate one specific jurisdiction within such enhanced zip code for use in taxing the activity for that enhanced zip code for each level of taxing jurisdiction. Any enhanced zip code assignment changed in accordance with section 806 is deemed to be in compliance with this section. For purposes of this section, there is a rebuttable presumption that a home service provider has exercised due diligence if such home service provider demonstrates that it has—

"(1) expended reasonable resources to implement and maintain an appropriately detailed electronic database of street address assignments to taxing jurisdictions;

"(2) implemented and maintained reasonable internal controls to promptly correct misassignments of street addresses to taxing jurisdictions; and

"(3) used all reasonably obtainable and usable data pertaining to municipal annexations, incorporations, reorganizations and any other changes in jurisdictional boundaries that materially affect the accuracy of the electronic database.

"(b) TERMINATION OF SAFE HARBOR.—Subsection (a) applies to a home service provider that is in compliance with the requirements of subsection (a), with respect to a State for which an electronic database is not provided under section 804 until the later of—

"(1) 18 months after the nationwide standard numeric code described in section 804(a) has been approved by the Federation of Tax Administrators and the Multistate Tax Commission; or

"(2) 6 months after that State or a designated database provider in that State provides the electronic database as prescribed in section 804(a).

"SEC. 806. CORRECTION OF ERRONEOUS DATA FOR PLACE OF PRIMARY USE.

"(a) IN GENERAL.—A taxing jurisdiction, or a State on behalf of any taxing jurisdiction or taxing jurisdictions within such State, may—

"(1) determine that the address used for purposes of determining the taxing jurisdictions to which taxes, charges, or fees for mobile telecommunications services are remitted does not meet the definition of place of primary use in section 809(3) and give binding notice to the home service provider to change the place of primary use on a prospective basis from the date of notice of determination if—

"(A) where the taxing jurisdiction making such determination is not a State, such taxing jurisdiction obtains the consent of all affected taxing jurisdictions within the State before giving such notice of determination; and

"(B) the customer is given an opportunity, prior to such notice of determination, to demonstrate in accordance with applicable State or local tax, charge, or fee administrative procedures that the address is the customer's place of primary use;

"(2) determine that the assignment of a taxing jurisdiction by a home service provider under section 805 does not reflect the correct taxing jurisdiction and give binding notice to the home service provider to change the assignment on a prospective basis from the date of notice of determination if—

"(A) where the taxing jurisdiction making such determination is not a State, such taxing jurisdiction obtains the consent of all affected taxing jurisdictions within the State before giving such notice of determination; and

"(B) the home service provider is given an opportunity to demonstrate in accordance with applicable State or local tax, charge, or fee administrative procedures that the assignment reflects the correct taxing jurisdiction.

"SEC. 807. DUTY OF HOME SERVICE PROVIDER REGARDING PLACE OF PRIMARY USE.

"(a) **PLACE OF PRIMARY USE.**—A home service provider is responsible for obtaining and maintaining the customer's place of primary use (as defined in section 809). Subject to section 806, and if the home service provider's reliance on information provided by its customer is in good faith, a home service provider—

"(1) may rely on the applicable residential or business street address supplied by the home service provider's customer; and

"(2) is not liable for any additional taxes, charges, or fees based on a different determination of the place of primary use for taxes, charges or fees that are customarily passed on to the customer as a separate itemized charge.

"(b) **ADDRESS UNDER EXISTING AGREEMENTS.**—Except as provided in section 806, a home service provider may treat the address used by the home service provider for tax purposes for any customer under a service contract or agreement in effect 2 years after the date of enactment of the Wireless Telecommunications Sourcing and Privacy Act as that customer's place of primary use for the remaining term of such service contract or agreement, excluding any extension or renewal of such service contract or agreement, for purposes of determining the taxing jurisdictions to which taxes, charges, or fees on charges for mobile telecommunications services are remitted.

"SEC. 808. SCOPE; SPECIAL RULES.

"(a) **TITLE DOES NOT SUPERSEDE CUSTOMER'S LIABILITY TO TAXING JURISDICTION.**—Nothing in this title modifies, impairs, supersedes, or authorizes the modification, impairment, or supersession of, any law allowing a taxing jurisdiction to collect a tax, charge, or fee from a customer that has failed to provide its place of primary use.

"(b) **ADDITIONAL TAXABLE CHARGES.**—If a taxing jurisdiction does not otherwise subject charges for mobile telecommunications services to taxation and if these charges are aggregated with and not separately stated from charges that are subject to taxation, then the charges for otherwise non-taxable mobile telecommunications services may be subject to taxation unless the home service provider can reasonably identify charges not subject to such tax, charge, or fee from its books and records that are kept in the regular course of business.

"(c) **NON-TAXABLE CHARGES.**—If a taxing jurisdiction does not subject charges for mobile telecommunications services to taxation, a customer may not rely upon the nontaxability of charges for mobile telecommunications services unless the customer's home service provider separately states the charges for non-taxable mobile telecommunications services from taxable charges or the home service provider elects, after receiving a written request from the customer in the form required by the provider, to provide verifiable data based upon the home service provider's books and records that are kept in the regular course of business that reasonably identifies the nontaxable charges.

"(d) **REFERENCES TO REGULATIONS.**—Any reference in this title to the Commission's regulations is a reference to those regulations as they were in effect on June 1, 1999.

"SEC. 809. DEFINITIONS.

"In this title:

"(1) **CHARGES FOR MOBILE TELECOMMUNICATIONS SERVICES.**—The term 'charges for mobile telecommunications services' means any charge for, or associated with, the provision of commercial mobile radio service, as defined in section 20.3 of the Commission's regulations (47 C.F.R. 20.3), or any charge for, or associated with, a service provided as an adjunct to a commercial mobile radio service, that is billed to the customer by or for the customer's home service provider regardless of whether individual transmissions originate or terminate within the licensed service area of the home service provider.

"(2) **TAXING JURISDICTION.**—The term 'taxing jurisdiction' means any of the several States, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee.

"(3) **PLACE OF PRIMARY USE.**—The term 'place of primary use' means the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which must be either—

"(A) the residential street address or the primary business street address of the customer; and

"(B) within the licensed service area of the home service provider.

"(4) LICENSED SERVICE AREA.—The term 'licensed service area' means the geographic area in which the home service provider is authorized by law or contract to provide commercial mobile radio service to the customer.

"(5) HOME SERVICE PROVIDER.—The term 'home service provider' means the facilities-based carrier or reseller with which the customer contracts for the provision of mobile telecommunications services.

"(6) CUSTOMER.—

"(A) IN GENERAL.—The term 'customer' means—

"(i) the person or entity that contracts with the home service provider for mobile telecommunications services; or

"(ii) where the end user of mobile telecommunications services is not the contracting party, the end user of the mobile telecommunications service, but this clause applies only for the purpose of determining the place of primary use.

"(B) The term 'customer' does not include—

"(i) a reseller of mobile telecommunications service; or

"(ii) a serving carrier under an arrangement to serve the customer outside the home service provider's licensed service area.

"(7) DESIGNATED DATABASE PROVIDER.—The term "designated database provider" means a corporation, association, or other entity representing all the political subdivisions of a State that is—

"(A) responsible for providing the electronic database prescribed in section 804(a) if the State has not provided such electronic database; and

"(B) sanctioned by municipal and county associations or leagues of the State whose responsibility it would otherwise be to provide the electronic database prescribed by this title.

"(8) PREPAID TELEPHONE CALLING SERVICES.—The term 'prepaid telephone calling service' means the right to purchase exclusively telecommunications services that must be paid for in advance, that enables the origination of calls using an access number, authorization code, or both, whether manually or electronically dialed, if the remaining amount of units of service that have been prepaid is known by the provider of the prepaid service on a continuous basis.

"(9) RESELLER.—The term 'reseller'—

"(A) means a provider who purchases telecommunications services from another telecommunications service provider and then resells, uses as a component part of, or integrates the purchased services into a mobile telecommunications service; but

"(B) does not include a serving carrier with which a home service provider arranges for the services to its customers outside the home service provider's licensed service area.

"(10) SERVING CARRIER.—The term 'serving carrier' means a facilities-based carrier providing mobile telecommunications service to a customer outside a home service provider's or reseller's licensed service area.

"(11) MOBILE TELECOMMUNICATIONS SERVICE.—The term 'mobile telecommunications service' means commercial mobile radio service, as defined in section 20.3 of the Commission's regulations (47 C.F.R. 20.3).

"(12) ENHANCED ZIP CODE.—The term 'enhanced zip code' means a United States postal zip code of 9 or more digits.

"SEC. 810. COMMISSION NOT TO HAVE JURISDICTION OF TITLE.

"Notwithstanding any other provision of this Act, the Commission shall have no jurisdiction over the interpretation, implementation, or enforcement of this title.

"SEC. 811. NONSEVERABILITY.

"If a court of competent jurisdiction enters a final judgment on the merits that is no longer subject to appeal, which substantially limits or impairs the essential elements of this title based on Federal statutory or Federal Constitutional grounds, or which determines that this title violates the United States Constitution, then the provisions of this title are null and void and of no effect.

"SEC. 812. NO INFERENCE.

"(a) INTERNET TAX FREEDOM ACT.—Nothing in this title may be construed as bearing on Congressional intent in enacting the Internet Tax Freedom Act or as affecting that Act in any way.

"(b) TELECOMMUNICATIONS ACT OF 1996.—Nothing in this title shall limit or otherwise affect the implementation of the Telecommunications Act of 1996 or the amendments made by that Act."

(b) **EFFECTIVE DATE.**—The amendment made by subsection (a) applies to customer bills issued after the first day of the first month beginning more than 2 years after the date of enactment of this Act.

SEC. 4. GAO DETERMINATION OF FCC REGULATORY FEES.

Within 180 days after the date of the enactment of this Act, the Comptroller General of the United States shall conduct a review of the annual regulatory fees collected by the Federal Communications Commission pursuant to section 9 of the Communications Act of 1934 (47 U.S.C. 159) to determine whether such fees have been accurately assessed since their inception and shall submit a report to the Congress regarding such review and determination.

SEC. 5. COMMERCE IN ELECTRONIC EAVESDROPPING DEVICES.

(a) **PROHIBITION ON MODIFICATION.**—Section 302(b) of the Communications Act of 1934 (47 U.S.C. 302a(b)) is amended by inserting before the period at the end thereof the following: “, or modify any such device, equipment, or system in any manner that causes such device, equipment, or system to fail to comply with such regulations”.

(b) **PROHIBITION ON COMMERCE IN SCANNING RECEIVERS.**—Section 302(d) of such Act (47 U.S.C. 302a(d)) is amended to read as follows:

“(d) **EQUIPMENT AUTHORIZATION REGULATIONS.**—

“(1) **PRIVACY PROTECTIONS REQUIRED.**—The Commission shall prescribe regulations, and review and revise such regulations as necessary in response to subsequent changes in technology or behavior, denying equipment authorization (under part 15 of title 47, Code of Federal Regulations, or any other part of that title) for any scanning receiver that is capable of—

“(A) receiving transmissions in the frequencies that are allocated to the domestic cellular radio telecommunications service or the personal communications service;

“(B) readily being altered to receive transmissions in such frequencies;

“(C) being equipped with decoders that—

“(i) convert digital domestic cellular radio telecommunications service, personal communications service, or protected specialized mobile radio service transmissions to analog voice audio; or

“(ii) convert protected paging service transmissions to alphanumeric text; or

“(D) being equipped with devices that otherwise decode encrypted radio transmissions for the purposes of unauthorized interception.

“(2) **PRIVACY PROTECTIONS FOR SHARED FREQUENCIES.**—The Commission shall, with respect to scanning receivers capable of receiving transmissions in frequencies that are used by commercial mobile services and that are shared by public safety users, examine methods, and may prescribe such regulations as may be necessary, to enhance the privacy of users of such frequencies.

“(3) **TAMPERING PREVENTION.**—In prescribing regulations pursuant to paragraph (1), the Commission shall consider defining ‘capable of readily being altered’ to require scanning receivers to be manufactured in a manner that effectively precludes alteration of equipment features and functions as necessary to prevent commerce in devices that may be used unlawfully to intercept or divulge radio communication.

“(4) **WARNING LABELS.**—In prescribing regulations under paragraph (1), the Commission shall consider requiring labels on scanning receivers warning of the prohibitions in Federal law on intentionally intercepting or divulging radio communications.

“(5) **DEFINITIONS.**—As used in this subsection, the term ‘protected’ means secured by an electronic method that is not published or disclosed except to authorized users, as further defined by Commission regulation.”

(c) **IMPLEMENTING REGULATIONS.**—Within 90 days after the date of enactment of this Act, the Federal Communications Commission shall prescribe amendments to its regulations for the purposes of implementing the amendments made by this section.

SEC. 6. UNAUTHORIZED INTERCEPTION OR PUBLICATION OF COMMUNICATIONS.

Section 705 of the Communications Act of 1934 (47 U.S.C. 605) is amended—

(1) in the heading of such section, by inserting “interception or” after “unauthorized”;

(2) in the first sentence of subsection (a), by striking “Except as authorized by chapter 119, title 18, United States Code, no person” and inserting “No person”;

(3) in the second sentence of subsection (a)—

(A) by inserting “intentionally” before “intercept”; and

- (B) by striking "communication and divulge" and inserting "communication, and no person having intercepted such a communication shall intentionally divulge";
- (4) in the fourth sentence of subsection (a)—
- (A) by inserting "(A)" after "intercepted, shall"; and
- (B) by striking "thereof or" and inserting "thereof; or (B)";
- (5) by striking the last sentence of subsection (a) and inserting the following: "Nothing in this subsection prohibits an interception or disclosure of a communication as authorized by chapter 119 of title 18, United States Code.";
- (6) in subsection (e)(1)—
- (A) by striking "fined not more than \$2,000 or"; and
- (B) by inserting "or fined under title 18, United States Code," after "6 months,";
- (7) in subsection (e)(3), by striking "any violation" and inserting "any receipt, interception, divulgence, publication, or utilization of any communication in violation";
- (8) in subsection (e)(4), by striking "any other activity prohibited by subsection (a)" and inserting "any receipt, interception, divulgence, publication, or utilization of any communication in violation of subsection (a)"; and
- (9) by adding at the end of subsection (e) the following new paragraph:
- "(7) Notwithstanding any other investigative or enforcement activities of any other Federal agency, the Commission shall investigate alleged violations of this section and may proceed to initiate action under section 503 of this Act to impose forfeiture penalties with respect to such violation upon conclusion of the Commission's investigation."



[The prepared statement of Mr. Gekas follows:]

PREPARED STATEMENT OF HON. GEORGE W. GEKAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The Subcommittee will today hear testimony on legislation introduced by my colleague from Mississippi, Mr. Pickering, which attempts to provide a workable solution to the vexing question of how taxes are assessed on wireless communications.

Over the past ten years there has been a literal explosion with respect to the development and use of mobile communication devices, to the point that now more than 80 million Americans are subscribers to some form of wireless telephonic service. This from a mere four million in 1990. But with the expanded wireless communication there has come confusion in how it should be taxed. Should wireless communications be taxed where they are initiated, where they are received, where they pass through, or in some other way.

Representatives of both taxing authorities and communications providers have negotiated for several years in order to establish a workable framework for collecting taxes on mobile communications and today we will hear them describe the solution that they arrived at and which is encapsulated in H.R. 3489. We will hear also from the sponsor of the legislation, the gentleman from Mississippi.

I think that the public is always well served when representatives from both sides of a serious problem can come together to explore and propose its ultimate solution. The Congress is not all-knowing and when those with actual experience can solve a problem that jointly confronts them, we should certainly take notice . . . as we will today.

Mr. GEKAS. Does the gentleman from New York have an opening statement?

Mr. NADLER. Yes. Thank you, Mr. Chairman.

Before we go to the House floor to vote, I will make an opening statement.

Let me say I applaud Congressmen Pickering, Markey, Ms. Wilson, Largent and Tauzin, the industry and all the affected local governments for coming to an agreement on this. Obviously this presents a question of how to allow State and local governments to

tax a segment of industry that is exploding and burgeoning, tax it rationally without subjecting it to multiple, conflicting and irrational taxation. I congratulate everyone involved for coming up with a simple and rational solution which I think will have universal support.

I should mention that we had a full committee mark up this morning on a somewhat similar problem dealing with the Internet, a different kind of nonwireless, at this point, communication. I wish we were as rational in that field as we are being in this field and we could deal with that problem as we are dealing with this one but I won't ask for testimony on that subject.

I think we have come up with a very good bill. I congratulate everyone involved and I hope we can speedily enact it into law with a minimum of inertia and a minimum of any other problems. I congratulate the sponsors and I thank the chairman.

Mr. GEKAS. We thank the gentleman.

I think it would be wise for us to proceed with the testimony of our colleague from Mississippi and then we will recess to answer the call from the floor for the members to report for a vote, after which we will immediately return, I trust, to complete the hearing.

Right now, we will hear from Charles "Chip" Pickering, the Congressman from Mississippi who formerly served as legislative assistant to former member of the House, Trent Lott, now majority leader of the Senate. Mr. Pickering is the chief sponsor of the legislation which we have presented thus far. We ask him to give an opening statement.

STATEMENT OF HON. CHARLES W. PICKERING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI

Mr. PICKERING. Thank you, Mr. Chairman, and thank you for having this hearing today.

It is one of those rare occurrences in Washington where we come with good news that we have reached agreement with the industries and taxing authorities that will help this exciting and dynamic sector of our economy and resolve how to simplify and collect these taxes in a way that makes the most common sense.

It is a good bill with broad bipartisan support. I look forward to working with the Judiciary Committee as we move forward.

Let me talk a little about where the industry is and what this bill does. I will try to summarize, as we have a vote pending on the floor.

This legislation will improve wireless telecommunications services for customers, so it is good for consumers. It will simplify their monthly bills, it will improve their privacy and will reduce the possibility of double or even triple taxation.

Mr. Chairman, as you mentioned, the great growth in the number of users, we now have 84 million Americans using wireless telecommunication products and services and more and more of them are using their wireless telephones as their sole means of making telephone calls.

Just a few years ago, wireless phones were a novelty item for a privileged few. Today, they are an accessory and for many a necessity. This legislation is specifically targeted to address several key issues that affect wireless telecommunications.

The inclusion of the various provisions in a single bill is a natural way to partner wireless telecommunications issues and will ease member consideration of these important concepts.

At its core, this bill offers a new framework to simplify how State and local jurisdictions administer existing taxes on wireless calls. Under this legislation, all the customers State and local wireless taxes would be assigned to one address, the customer's place of primary use which may be the customer's home or business address. This addresses a practical problem that can arise in the administration of various State and local taxes, different jurisdictions may follow different methodologies, making the determination of the correct taxation very difficult.

Depending on the methodology, a call could be taxed in a city where the customer is located, in the town where that wireless antenna is located or even in the city where the wireless switch is located. The bottom line is it creates confusion. It is costly and it is a problem we can fix with this legislation.

Let me be clear that this legislation is about how the wireless industry administers State and local taxes. It does not reduce or change the industry's or consumer's tax obligations.

Furthermore, the committee should know that extensive discussions and negotiations took place over the last few years with State and local government organizations, including the National Governors' Association, the National League of Cities, the Multistate Tax Commission, the Federation of Tax Administrators and others. They worked closely with the Cellular Telecommunications Industry Association and together they have developed a new methodology for dealing with this complex problem. That new methodology is embodied in this legislation.

The second provision of the bill I introduced includes the language of a bill introduced and led through the Congress by my colleague, Ms. Wilson. Her bill, H.R. 514 improves the privacy protections afforded to users of wireless communication devices and it overwhelmingly passed the House last year but has not been taken up by the Senate.

Finally, the bill requires the GAO to examine the FCC's implementation of provisions of current law which require the telecommunications industry to pay fees to recoup cost of regulatory functions. There has been concern that these fees have not and are not being properly assessed.

I do not take a formal position but I do think it is very important to get a thorough examination of the issue and the GAO study will provide such a review and independent assessment.

In closing, I would like to again thank the committee for having this hearing and to the witnesses for appearing after my testimony and I look forward to any questions and the ability to work with you as we go forward in this process.

[The prepared statement of Mr. Pickering follows:]

PREPARED STATEMENT OF HON. CHARLES W. PICKERING, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MISSISSIPPI

Mr Chairman, thank you for having this hearing today on HR 3489—The Wireless Telecommunications Sourcing and Privacy Act.

I believe the provisions in this legislation take us a long way to improving wireless telecommunications services for consumers simplifying their monthly bills, improving their privacy, and reducing the possibility of double or even triple taxation.

Today, over 84 million Americans are wireless users and more and more of them are using their wireless telephones as their sole means of making telephone calls. Just a few years ago wireless phones were a novelty item for a privileged few today, they are an accessory and for many, a necessity.

This legislation is specifically targeted to address several key issues that affect wireless telecommunications. The inclusion of these provisions in a single bill is a natural partnering of wireless telecommunications issues and will ease member consideration of these important concepts.

At its core, this bill offers a new framework to simplify how state and local jurisdictions administer existing taxes on wireless calls. Under this legislation, all of a customer's state and local wireless taxes would be assigned to one address, the customer's place of primary use which must either be the customer's home or business address.

There are some very real practical problems that can arise in the administration of the various state and local taxes. Different jurisdictions may follow different methodologies making the determination of the correct taxation very difficult. Depending on the methodology, a call could be taxed in the city where the customer is located, in the town where the wireless antenna is located, or, even in the city where the wireless switch is located. The bottom line . . . it's confusing, it's costly and it's a problem that we can fix with this legislation.

Let me be clear, this legislation is about how the wireless industry administers state and local taxes—it *does not* reduce or change the industry's or consumers' tax obligations.

Furthermore, I would like the committee to know that extensive discussions and negotiations have taken place over the last few years among several state and local government organizations including the National Governor's Association, the National League of Cities, the Multistate Tax Commission, the Federation of Tax Administrators and others along with the Cellular Telecommunications Industry Association. Together, they have developed a new methodology for dealing with a complex problem and that new methodology is embodied in this legislation.

The second provision of this bill includes the language of a bill introduced and led through the Congress by my colleague, Mrs. Wilson. Her bill, HR 514, improves the privacy protections afforded to users of wireless communications devices and it overwhelmingly passed the House last year but has not been taken up by the senate.

Finally, the bill requires the GAO to examine the FCC's implementation of provisions of current law which require the telecommunications industry to pay fees to recoup costs of regulatory functions. There has been concern that these fees have not and are not being properly assessed. While I have not taken a position on this matter, I do think it is important to get a thorough examination of the issue the GAO study will provide such a review.

In closing, I would like to again thank the committee for having this hearing and to the witnesses for appearing today to testify on my legislation. Thank you.

Mr. GEKAS. The only question we have is do we have enough time to get to the floor to vote and I think we do.

We will recess this hearing pending the time it takes for the members to repair to the House floor to cast their votes. We expect to be back here by 1:30 p.m.

We stand in recess.

[Recess.]

Mr. GEKAS. The hour of 1:30 p.m. having arrived, the committee will come to order.

Maybe we will order lunch until Mr. Nadler returns or some reasonable facsimile thereof.

We will recess until the second member appears.

[Recess.]

Mr. GEKAS. If the second panel will take their places, we can conserve some time.

We acknowledge the presence and attendance of two members of the committee in the person of the ranking member and the Chair.

We can proceed with the testimony of our second panel which consists of four individuals who have arrived at agreed procedures for dispatch of this piece of legislation.

Thomas Wheeler is president and CEO of the Cellular Telecommunications Industry Association. For some 20 years he has worked at the forefront of telecommunications policy and technology. Mr. Wheeler founded or helped to start multiple companies offering new cable, wireless and video communications services both domestically and internationally. Mr. Wheeler was president of the National Cable Television Association between 1979 and 1984 and is the author of "Leadership Lessons from the Civil War, Winning Strategies for Today's Managers."

Mr. Wheeler is a graduate of Ohio State University and resides in Washington, DC with his family.

Our next witness will be Raymond C. Scheppach, executive director of the National Governors' Association. He has previously worked for about 7 years at the Congressional Budget Office ending his time with CBO as its deputy director. Mr. Scheppach has authored and co-authored four books on economics and has written numerous professional articles.

He holds a bachelor's degree in business administration from the University of Maine and his master and Ph.d degrees in economics from the University of Connecticut.

Joseph E. Brooks is a council member with the City of Richmond, Virginia, and currently serves on the board of directors of the National League of Cities. Mr. Brooks serves as a liaison to the National League of Cities' Finance Administration and Intergovernmental Relations Steering Committee and previously served as a member of the Executive Committee of the Virginia Municipal League. Until his retirement, Mr. Brooks managed a commercial printing firm in Richmond, Virginia.

Our final witness on this panel is Harley Duncan and he appears before us as the executive director of the Federation of Tax Administrators. Previously he served as secretary of the Kansas Department of Revenue, before that as assistant director of the Kansas Division of the Budget. He has held positions with the South Dakota State Government, the Advisory Commission of Intergovernmental Relations and the National Governors' Association.

Mr. Duncan holds a bachelor's degree in political science from South Dakota State University and a master of public affairs degree from the Lyndon B. Johnson School of Public Affairs at the University of Texas.

Mr. Duncan is the author or co-author of several articles and papers on State and local taxation, public financial management and public budgeting.

We thank you all for your participation. We will take the customary step of offering each of your written statements to become part of the record. Without objection, so ordered. We will ask you to synopsize your statements to about 5 minutes more or less.

We will begin with Mr. Wheeler.

**STATEMENT OF THOMAS E. WHEELER, PRESIDENT AND CEO,
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

Mr. WHEELER. Thank you very much, Mr. Chairman.

The others here on the panel representing the State and local governments are steeped in the intricacies of the tax law so I will leave to them those issues and try and address practical implications of what we are talking about today, particularly the implications on consumers.

To give you an idea of how fast the wireless industry is growing, we have heard several numbers this morning but as recently as a few weeks ago, the latest numbers indicate that today there are about 91 million wireless subscribers. We are adding one new subscriber every 2 seconds, 24 hours a day, 365 days a year. It is those subscribers who are going to be affected by the problem that exists today and it is on behalf of those subscribers that we can solve these problems.

This legislation is the result of a 3-year effort by these organizations. As both the chairman and Mr. Nadler have indicated at the outset, we are proud to put you in a unique position or strange position of coming forward and saying, we think we have worked out something that works in the interest of the governments, the industry and consumers.

It does not result in any change in any jurisdiction's power or ability to determine whether to tax wireless services. This bill establishes a common sense plan for the administration of that power in a mobile society. The reality is that our taxing structure is rooted in a sedentary society, yet we are living in a time of increased mobility and mobility of communications.

The home phone, you knew where it was, it was plugged into the wall. It was not hard to figure out what the taxing jurisdiction is, but the air waves do not recognize taxing jurisdictions, let alone people when they take the phone and start wondering around.

Over the years, the States and localities have tried to deal with this in the best way possible but they dealt with it in different ways. There are four principal ways. They say we will tax it where the call originates, the cell site; we will tax it where the switch is; where the call gets switched; we will tax the billing address; we will tax the phone number address. The problem is that creates all kinds of inconsistencies in this mobile environment.

Let me show you an example and this is not an usual situation. The call gets made physically in the jurisdiction of town A and it is picked up by an antenna which is in the jurisdiction of town B and hauled to a switch which is in the jurisdiction of town C. Who collects the taxes?

Let me show you another real life example that shows what happens if you try and drive between Baltimore and Philadelphia. It is a 2-hour drive, about 104 miles. There are 12 different State and local jurisdictions along the way. You are constantly placing calls, who collects the tax? Do localities sort it out, do the carriers sort it out and what about the consumer at the end of the month who finds that his or her tax line on the bill is determined by where they went that month, who collected and how it all got sorted out?

Let me tee up the example and show the common sense solution that we all have worked out. Let us assume a peripatetic business person living in Kansas City who hops a plane to fly to Denver drives from the airport to some appointments, makes some calls along the way, gets back to the airport, flies to Seattle, drives from

the airport, makes some calls on the way to and from the airport, gets the plane in Seattle, comes back to Kansas City, three cities, 39 calls, 26 jurisdictions that could tax those calls. Look at the burden to sort out that for the local governments, for the carriers and look at the confusion for the consumer.

Look at what this bill does. Let us take that same example, Kansas City, Denver, Seattle, back to Kansas City, same number of calls being made, 39 calls, one place of primary use. Since Kansas City is the place of primary use for this particular consumer, it is Kansas City that collects all of the taxes associated with that consumer's use of the phone.

The air waves cannot be trained to respect political boundaries and Americans are mobile people. Either we develop a series of complex procedures and infrastructures to sort out all this and we run up the cost to government, the taxpayers, the cost of service to consumers and confuse consumers or we enact a common sense solution for the mobile age that eliminates the headaches, eliminates the confusion and saves the consumer a bundle twice, both in their taxpayer role and consumer role.

How do you do this? We have agreed amongst us on a concept called the place of primary use. That is for simplification purposes and the bill gets very specific on this so I emphasize that I am painting with a broad brush here. It is basically where is it that bill ends up getting sent.

Then you have to determine which taxing authority that fits into. As you know, annexations are taking place all the time and boundaries are changing and taxes are coming in, so the bill provides for the establishment of a database. The database can be established by State and local governments to reflect I have this address as my place of primary use and here is the State, city, school district, water district, whatever the case, stack of taxes that apply to that specific address so that there can be no confusion.

The bill also provides that if the State and local government do not develop a database, the carrier can establish that kind of database as well.

The bill also provides that there is a 2-year window for all of us to continue the kind of good faith effort that brought us to this point and implement this.

Clearly this is a challenge that rose to a significant level on the part of the members of all of these organizations, significant enough to cause us all to invest about 3 years of effort into the exercise and to come up with this solution which we present to you today.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Wheeler follows:]

PREPARED STATEMENT OF THOMAS E. WHEELER, PRESIDENT AND CEO, CELLULAR
TELECOMMUNICATIONS INDUSTRY ASSOCIATION

SUMMARY

Uniform Sourcing Provisions of H.R. 3489

- Mobile nature of wireless telecommunications complicates state & local taxation of wireless consumers. There are several, often conflicting, methodologies for making these determinations. Current system is confusing to consumers, as wireless state & local tax bills can change on a monthly basis.

- Three-years of work by the wireless industry and state & local governments have produced a practical solution to the problem.
- This solution is embodied in uniform sourcing provisions of H.R. 3489.
- There are two key elements of the provision:
 - Place of primary use, assigning all state and local telecommunications taxes on a consumer to one location, a customer's home or primary business address.
 - State databases identifying state and local tax jurisdictions for all addresses within a state.
- CTIA supports this provision.

Wireless Privacy Provisions of H.R. 3489

- The bill includes the language of Representative Heather Wilson's Wireless Privacy Enhancement Act (H.R. 514), which passed the House on February 25, 1999 by a vote of 403-3.
- These provisions encourage the growth and development of wireless services by deterring eavesdropping and affording wireless subscribers even greater privacy protection than under current law.
- CTIA supports this provision.

GAO Study of Regulatory Fees Provision of H.R. 3489

- This provision directs the GAO to conduct a full review of how the FCC has been assessing annual regulatory fees.
- The FCC has never developed a methodology to accurately determine the number of wireless subscribers, and a GAO study could foster the development of an appropriate methodology.
- CTIA supports this provision.

STATEMENT

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before you today to present the wireless industry's views on legislation that would create a uniform method of sourcing wireless revenues for state and local tax purposes. I am Tom Wheeler, President and CEO of the Cellular Telecommunications Industry Association (CTIA), representing all categories of commercial wireless telecommunications carriers, including cellular and personal communications services (PCS).¹

The wireless industry is founded on innovation, competition and safety. With Congressional support, these principles have unleashed a telecommunications revolution in the past decade. More than 80 million Americans were wireless subscribers in 1999, an astounding leap from just 4 million in 1990. Wireless competition has accelerated to the point that 238 million Americans can today choose from among 3 or more wireless providers. And, more than 165 million Americans live in areas where they can choose from among five or more wireless providers. Throughout this growth, prices for wireless service have fallen dramatically because of increased competition—the average per minute rate has dropped by roughly 50 percent since 1990 in markets throughout America. Indeed, these enhanced services, available to millions of Americans, testify to the power and correctness of the policy judgments made by the members of this Committee in the Omnibus Budget Reconciliation Act of 1993 and the 1996 Telecommunications Act. But, with this revolutionary growth of wireless telecommunications, it is not surprising that from time to time it becomes apparent that laws or regulations that worked for more traditional telecommunications services simply do not translate well to wireless communications.

I am here today to discuss with this Committee the work on one such area—the assignment of wireless services to their proper taxing jurisdiction. My testimony will also address the other items included in H.R.3489—the Wireless Telecommunications Sourcing & Privacy Act.

¹ CTIA is the international organization which represents all elements of the Commercial Mobile Radio Service (CMRS) industry, including cellular, personal communication services, wireless data. CTIA has over 750 total members including domestic and international carriers, resellers and manufacturers of wireless telecommunications equipment. CTIA's members provide services in all 734 cellular markets in the United States and personal communications services in all 50 major trading areas, which together cover 95% of the U.S. population.

Uniform Sourcing Provisions—Description of the Problem

It is the mobile nature of wireless telecommunications that makes the assignment of wireless services and revenues for tax purposes so complicated. Chart 1 illustrates some of the practical problems. If I make a phone call from my back yard, located in Town A, and that call is picked up at the closest cell site, in Town B, and routed to the nearest switch in Town C—*where should the call be taxed?* States and localities have adopted a variety of methodologies to answer that question, including: siting the taxes to the location of the originating cell site, the originating switch, or the billing address of the customer, which may or may not be a home address. All of these methodologies are legitimate and were adopted in good faith by state and local officials, but all have their shortfalls. For example, both the originating cell site and the originating switch in my illustration are outside the taxing jurisdiction from which I am making the call. To complicate matters further, Towns A, B, and C may all be using different methodologies, and that could result in multiple claims on the same revenue for taxation. These are just some of the issues that the tax departments of wireless carriers must deal with daily at the local level.

Chart 2 offers some real-life illustrations of what the current system means to consumers. Suppose a businessman is driving from Baltimore, MD, to Philadelphia, PA, making phone calls throughout the two-hour drive. During the course of this trip, the consumer will have passed through 12 state and local tax jurisdictions, each with their own telecommunications tax rates and rules. Even if there were not competing methodologies complicating the picture, the administrative difficulty for the wireless carrier of correctly determining tax rates and rules for 12 different jurisdictions, passed through in just a few hours, is tremendous. Likewise, the administrative difficulties for the 12 taxing jurisdictions in monitoring compliance with their laws are severe.

The administrative burdens of the current system are even more striking when viewed at the national level (Chart 3). Let's use as an example, a businesswoman living in Kansas. In one day of business travel, she makes 3 wireless calls on the drive to the airport; flies to Denver where she makes 16 calls during her cab rides from the airport to her meeting and back; then flies on to Seattle where she picks up a car to drive to Tacoma. In the roundtrip between the Seattle Airport and the Tacoma meeting site, our businesswoman makes another 19 wireless calls, before catching the dinner flight back to Kansas City. The poor woman makes her final call of the day on the drive home from the airport to tell her family shall be there soon. During this one harried business day, 39 wireless calls have been made, which requires her wireless carrier to keep track of the tax rates and rules in 26 different state and local taxing jurisdictions.

But as difficult as all this is for industry to complete and for state and local governments to monitor—think what the consumer faces. From month to month, depending on where the consumer travels, the consumer's state and local tax bill will change. This rightly leaves customers scratching their heads. If enacted, this uniform sourcing legislation will go a long way towards solving this problem for consumers.

Let me also add that all these problems face even greater challenges in the near future, challenges posed by home calling areas that are growing and the latest ways consumers are buying wireless service. Larger home service areas may encompass more and more state and local taxing jurisdictions. And the new "bucket of minutes" billing plans fundamentally complicate proper tax determination—particularly of roaming—as the allocation of minutes to calls and revenues becomes unclear. In short, Mr. Chairman, the current system doesn't work for consumers, industry or state and local governments—and these problems will only get worse in the months and years ahead.

Uniform Sourcing Provisions of H.R. 3489, the Wireless Telecommunications Sourcing & Privacy Act

A new method of sourcing wireless revenues for state and local tax purposes is needed to provide carriers, taxing jurisdictions and consumers with an environment of certainty and consistency in the application of tax law; and to do so in a way which does not change the ability of states and localities to tax these revenues. After more than three years of discussions, CTIA and representatives from the National Governors' Association, the National League of Cities, the Federation of Tax Administrators, the Multistate Tax Commission, the National Conference of State Legislatures, and other state and local leaders have worked to develop a nationwide, uniform method of sourcing and taxing wireless revenues.

It is important to stress that this legislation does not change the ability of states and localities to tax wireless revenues—it leaves the determination of the tax rate and base to the state and local taxing authorities. In other words, this proposal does

not address, change or affect *whether* a jurisdiction may tax, it only prescribes *how* it may tax.

Which Taxes Are Covered by Uniform Sourcing Provisions?

It is important to distinguish which taxes would be sourced to a "*place of primary use*." To state it most simply, uniform sourcing applies only to "transaction taxes"—or those paid by the consumer, typically itemized on a customer's bill, and collected by wireless companies. The Wireless Telecommunications Sourcing & Privacy Act has no impact on federal taxes or fees, such as the Federal Excise Tax or the Federal Universal Service Fee. These federal taxes and fees are not included in the scope of this legislation because they apply throughout the nation—unlike state and local taxes which apply only in their particular geographic area.

I would emphasize that this legislation addresses the taxes paid by the consumer. Our industry is acting as the administrator of these taxes, imposed on consumers by literally thousands of state and local jurisdictions. So, I would again like to compliment the state and local officials who have worked so hard to develop this proposal to simplify the administrative duties of our industry. I believe the legislation will also make it easier for the state and local officials who monitor our industry to make sure we do the job right. But, great credit is due these state and local officials for working so closely with us on this important issue.

How the Uniform Sourcing Legislation Works

Place of Primary Use (PPU)

There are two major components to the uniform sourcing legislation—the "*place of primary use*" and state by state databases identifying state and local taxing jurisdictions. Let me start with "*the place of primary use*." This legislation defines that for the purposes of state and local taxation, the consumer's purchase of taxable wireless telecommunications services, including charges while roaming anywhere in the United States, have taken place from a single address—a "*place of primary use*." Then, only the taxing jurisdictions in which that address is located may tax the charges. I would note that there is often more than one taxing jurisdiction for any particular address, given the multiple layers of state and local governance (such as, the school district, city, county, and state.)

The "*place of primary use*" is defined as the street address most representative of where the customer's use of mobile telecommunications services primarily occurs. It must be either the residential street address or the primary business street address of the customer. That address also must be within the licensed service area of their home service provider. Customers will be asked to provide their "*place of primary use*" when they sign up for service or renew their contracts.

For the convenience of the consumer, after the effective date of the legislation (two years after passage to allow for necessary changes in state laws and regulations) the legislation allows carriers to treat the address they have been using for tax purposes as the "*place of primary use*" for the remaining term of any existing service contract. After that, when the service contract is extended, renewed, or changed, the customer provides their "*place of primary use*."

Customers may also change their "*place of primary use*" designation if they find that their use of the wireless phone changes. And, similar to any other tax situation in which the party being taxed (in this case, the consumer) specifies an address for tax purposes—should there be any dispute over whether the customer has designated the appropriate address as the "*place of primary use*," the legislation provides state and local governments the authority to review its accuracy, and change it if necessary.

To illustrate how the "*place of primary use*" works let's go back to our harried businesswoman from Kansas City. Because this was her business wireless phone, the street address of her company is her "*place of primary use*." Under this legislation, the 39 wireless calls she made in one day of business travel, would, for tax purposes, be deemed to have all taken place from her Kansas City address. So, only the three taxing jurisdictions—city, county and state—in which her business address is located would have the authority to tax the 39 calls.

State by State Databases of Taxing Jurisdictions

Today, even after wireless carriers have identified which address is going to be used for tax purposes, it is often difficult to determine the appropriate taxing jurisdictions for that address. Annexations of unincorporated areas and shifting local boundaries are a frequent cause of this difficulty. And, as a result, the second major piece of this legislation is the provision of state-level databases which assign each address within that state to the appropriate taxing jurisdictions. So, that all carriers can use the database, and so the same code does not refer to more than one taxing

jurisdiction, the legislation provides for a nationwide standard numeric format for codes. The format must be approved by the Federation of Tax Administrators and the Multistate Tax Commission, organizations representing the state and local officials who administer taxes.

A state or the local jurisdictions within the state *may*, but are not required to, develop these electronic databases. If a carrier utilizes the state database, and if there is an error due to a mistake in the database (e.g., the database indicated our businesswoman's address was in Overland Park, Kansas, when, in fact, the address is in Kansas City, Kansas), the database is corrected and the carrier utilizes the corrected database. What this legislation avoids is the costly and difficult process of going back, figuring out the amount of taxes paid to the wrong jurisdiction, then figuring out where they should have been paid. Instead, this legislation applies some practical common sense.

Only if a state chooses not to provide a database, a carrier may develop a database that assigns taxing jurisdictions based on a zip code of nine or more digits. The carrier is required to exercise due diligence in creating this database. The legislation specifies that the carrier must expend a reasonable amount of resources to create and maintain the database, use all reasonably attainable data, and apply internal controls to promptly correct mis-assignments. If such standards are met, the same processes that apply if a state-created database contains an error, apply to the carrier-created database.

I emphasize that state and local governments maintain authority over both the "place of primary use" and the database. Any taxing jurisdiction may request the carrier to make prospective changes to a customer's "place of primary use" if it feels the one provided by the customer doesn't meet the required definition. The affected taxing jurisdictions simply get together, determine the correct place of primary use, then notify the carrier. Likewise, if taxing jurisdictions determine that an address has been mis-assigned to the wrong taxing jurisdiction, the taxing jurisdictions simply notify carriers of the error, and it is our responsibility to make the correction.

For this proposal to work, it will ultimately require the implementation of the uniform sourcing rules by all states, in order to eliminate the problems that would result if only some states "uniformly sourced" the wireless calls made by their residents in other states. It is for this reason—the need for a standard and nationwide approach—that government groups and industry began to look for a solution to the problems of taxing wireless calls. Only federal legislation can accomplish this, but because this legislation recognizes that individual state and local tax laws and regulations might need to be changed to conform to the federal law, the effective date of this legislation is not until two years after enactment.

Uniform Sourcing Provisions—Summary & Concluding Points

In conclusion, the uniform sourcing provisions of H.R. 3489 would not impose any new taxes or change state or local authority to tax wireless telecommunications; nor would it mandate any expenditure of state or local funding or in any way reduce the tax obligations of the wireless industry. Instead, it would ensure that wireless telecommunications services are taxed in a fair and efficient manner, one that benefits all concerned—consumers, state and local governments, and industry.

Wireless Privacy Enhancement Provisions of H.R. 3489

I would also like to discuss briefly the two other elements of H.R. 3489. One such element is the incorporation of the text of H.R. 514, the Wireless Privacy Enhancement Act, legislation lead by Congresswoman Wilson which passed the full House, most recently by a vote of 403-3 on February 25th, 1999. This component of the legislation will further encourage the growth and development of wireless services by deterring eavesdropping and affording subscribers even more privacy protection than they have under current law.

Since the early days of wireless communications, Congress has tried to protect the privacy rights of wireless communications. The original Communications Act of 1934 made it illegal to intercept and divulge the contents of any radio communications without authorization. Over the years, Congress strengthened the laws governing wireless privacy when it became apparent that existing protection was insufficient. For example, in 1986 the Electronic Communications Privacy Act (herein, "ECPA ") made it a crime to intentionally intercept wireless conversations or to disclose the contents of those conversations. ECPA also made it a crime to manufacture, sell, or possess a device that the person knows is primarily useful for intercepting wireless communications. In 1992, Congress amended the Communications Act to prohibit the manufacture and importation of cellular frequency radio scanners.

Unfortunately, despite Congress's efforts to protect wireless privacy, electronic eavesdroppers have found loopholes in the law. For example, one case was lost after

prosecutors were unable to prove that the eavesdroppers had "intended" to intercept wireless conversations and another because the eavesdropper had not "disclosed" the contents of a conversation. Other cases were lost because the ability of the scanners to also scan non-cellular frequencies or perform other permissible functions made it difficult to prove that the device was "primarily useful" for scanning cellular frequencies. Moreover, because current law only covers scanners used to eavesdrop on "cellular frequencies," it does not clearly prohibit equipment that can intercept signals from newer PCS phones.

Emboldened by these loopholes in current law, hackers have developed a "gray market" for modified and modifiable wireless scanners. Some of these outlaws even advertise in magazines and on Internet web sites that their scanners have cellular frequency blocking components that can be easily overcome with minor alterations. The information and equipment necessary to make these modifications are also widely advertised, sometimes with blatant offers to unblock the cellular frequencies after the equipment is purchased.

The Wireless Privacy Enhancement provisions attack these problems from several fronts. *First*, they expand the definition of the frequencies that may not be scanned to include digital PCS frequencies as well as cellular. I am pleased to say that this provision reflects a compromise between CTIA and the amateur radio community and it ensures that citizens are not prevented from listening to non-commercial radio frequencies like those in the emergency or public safety bands.

Second, they clarify that it is just as illegal to *modify* scanners for the purpose of eavesdropping as it is to manufacture or import them. It also directs the FCC to modify its rules to reflect this change. This provision will help reduce the growing "gray market" in modified and readily modifiable cellular and PCS scanners and digital decoders.

Third, they clarify that the Communications Act prohibits the interception *or* the divulgence of wireless communications, either one standing alone is prohibited.

Fourth, they increase the penalties under the Communications Act to make them consistent with the penalties for violating the Electronic Communications Privacy Act. Under the new penalty provisions, violators will be subject to a fine of \$2,000, six months in jail, or both for a willful violation, and these penalties increase for repeat violations.

Finally, they require the FCC to investigate and take action regarding wireless privacy violations under the Communications Act, regardless of any other investigative or enforcement action by any other federal agency. This provision will help ensure that these newly strengthened privacy protections are fully enforced in the future.

The millions of Americans who use wireless communications deserve to have their privacy protected.

GAO Study of FCC Regulatory Fees Provision of H.R. 3489

I would also like to briefly summarize the provisions contained in Section 4 of the bill—which directs the GAO to conduct a full review of how the Federal Communications Commission has been assessing annual regulatory fees. CTIA believes that such a study is long-overdue. For more than a year, CTIA has been concerned with fundamental problems with the way the FCC is assessing annual regulatory fees.

Most glaring is that for the wireless industry, the FCC bases fee assessments on the number of wireless subscribers. Sounds reasonable, but here's the flaw—the FCC has never figured out a methodology to give itself an accurate way to determine the number of wireless subscribers. Let me illustrate the problem in just one year—FY1999. The FCC estimated the number of wireless subscribers at 55 million, exactly the same number it estimated for FY1998 (even though the FCC acknowledged the growth in wireless subscribers.) A little long division led the FCC to send wireless carriers a bill for about 32 cents per subscriber for FY1999. But, when our industry calculates the bill, we have to use the actual number of subscribers—which was not 55 million, but 69 million. Multiply the 32 cents by 69 million users, and that alone means that the FCC has collected about \$5 million more than they should have. And, this is but one of many flaws in the FCC's assessment methodology that leads to overpayment—and in our competitive wireless industry, that means additional costs of wireless consumers.

It is my hope that working together, FCC and CTIA can figure out better way for the FCC to follow the specific Congressional direction on fee assessment. But, I strongly believe that "sunshine is the best disinfectant"—and CTIA supports the call for a GAO study of the FCC's regulatory fee assessment.

Conclusion

I am honored to represent the wireless industry today and to pass along to you the wireless industry's enthusiastic endorsement of the Wireless Telecommunications Sourcing & Privacy Act. The telecommunications industry is truly reshaping our world—which brings new challenges and opportunities every day. I am proud of the cooperative effort among state and local governments and industry on this proposal. And, I again thank the Subcommittee for holding this hearing today, and we hope that you are able to turn this legislation into law before the Congress adjourns in the Fall.

Mr. GEKAS. We thank the gentleman and turn to Mr. Scheppach.

STATEMENT OF DR. RAYMOND SCHEPPACH, EXECUTIVE DIRECTOR, NATIONAL GOVERNORS' ASSOCIATION

Mr. SCHEPPACH. Thank you for inviting me to testify on H.R. 3489, the "Wireless Telecommunications Sourcing and Privacy Act."

First, let me say the Nation's Governors strongly support this legislation. It is essentially a win for citizens, it is a win for the industry and it is a win for State and local government.

Second, we would like to say that the approach that was used to come together on this legislation was very productive from our standpoint. We are hopeful this approach can serve as a model for similar issues in the future. By working together government and industry can develop solutions that end up working much better than those determined unilaterally.

Mr. Nadler made a comment earlier about another piece of legislation. We would probably argue if the Congress essentially told the industry, State and local government to come back with a solution on the Internet, we probably could have done the same thing and had a much better bill than the one that was marked up previously, but this is not the point of this testimony.

Let me say the bottom line of this legislation is that it essentially does what needs to be done in the way it needs to be done. It establishes uniformity across State and local jurisdictions in the way that they determine which jurisdictions have the authority to tax the particular call. This provides simplicity and consistency that the industry needs. It also preserves the ability of State and local governments to make fundamental decisions about how to raise revenues they need to provide essential services ranging from educating children to building roads to providing police and fire.

Essentially, the legislation is cost effective for consumers, for industry and for State and local government and it protects State sovereignty which we think is a very critical component of our intergovernmental system.

Thank you, Mr. Chairman. I would be happy to answer any questions.

[The prepared statement of Mr. Scheppach follows:]

PREPARED STATEMENT OF DR. RAYMOND SCHEPPACH, EXECUTIVE DIRECTOR,
NATIONAL GOVERNORS' ASSOCIATION

SUMMARY

The National Governors' Association would like to express its support for H.R. 3489, the Wireless Telecommunications Sourcing and Privacy Act, and to thank Chairman Gekas and Mr. Nadler for holding hearings on this issue. The bill reflects the cooperative efforts of different levels of federal, state, and local governments and the wireless telecommunications industry during the past two years to resolve difficult tax questions in a manner that is mutually acceptable to all of the involved

parties. NGA is hopeful that this process can serve as a model for similar issues in the future, with government and industry working together to develop solutions that work better for everybody than solutions that are developed unilaterally.

The Wireless Telecommunications Sourcing and Privacy Act will modernize state and local taxation of wireless telecommunications. Many state and local telecommunications tax systems were created before the existence and widespread use of wireless phones, and this legislation makes the necessary changes to reflect the realities of a 21st century industry that challenges our traditional concepts of both telecommunications services and political boundaries.

One particularly important aspect of this bill is that it simplifies how states and localities tax wireless services rather than attempting to determine or change whether they do or do not tax wireless services or at what rate they choose to do so. State and local governments will retain the authority they have today to make future changes, within this streamlined framework, as their governors and legislatures decide. We look forward to working with Congress and the wireless industry to achieve passage of this legislation.

STATEMENT

Chairman Gekas, Mr. Nadler, and other members of the committee, thank you for inviting me to testify on H.R. 3489, the Wireless Telecommunications Sourcing and Privacy Act. I am Ray Scheppach, executive director of the National Governors' Association, and I am testifying today on behalf of the association.

Thank you for holding this hearing on the Wireless Telecommunications Sourcing Act. The National Governors' Association is very excited about this legislation, particularly about the process that led to its creation and introduction at the end of last year. The wireless industry approached NGA and other state and local organizations slightly more than two years ago to bring an issue to our attention.

The issue was state and local taxation of wireless phone services. The wireless industry had originally approached Congress to solve their problems, but since the issue was by its very nature a state and local issue, you asked them to come to us first to see if we could work out a mutually acceptable solution. And that is exactly what we have done during the past two years. The solution that we reached is reflected in the legislation that we are discussing today.

We are hopeful that this approach can serve as a model for similar issues in the future. By working collaboratively, government and industry can develop solutions that end up working better for everybody than solutions that are developed unilaterally. This applies not just to collaboration between one level of government—such as state government—and industry, but also to collaboration between the different levels of federal, state, and local government. Part of what makes this legislation so exciting from our perspective is this unique cooperative approach between all affected parties.

You are going to hear about a lot of the details of this legislation from the other witnesses today, so I would like to address the legislation from a slightly broader perspective. Many state and local telecommunications taxes and tax systems were created before the advent of wireless phones. The result of this is that we have tax systems in place that really are not appropriate for mobile telecommunications and consequently create a lot of administrative headaches and even financial liability for the companies in this industry. Fundamentally, we have a 20th century tax system that applies to a 21st century industry.

Let me just give you a few examples of what I mean. Some state and local tax jurisdictions require phone companies to tax telecommunications services where they occur. This is easy to do when I pick up a landline phone in my office or my home and make a call. It becomes a little more complicated when I pick up my cell phone and make a call.

Should the service be taxed by the jurisdiction where I am physically located at the time I am making the call? How does the phone company figure out where I am? What if I am driving between my home in Virginia and my office in the District of Columbia? What if the cellular tower that is transmitting the call happens to be located in a different tax jurisdiction than the one in which I am physically standing?

As you can clearly see, the issue becomes very complicated very quickly. And this list of questions applies only to one scenario of how a state or local tax jurisdiction requires the tax to be applied. The list may grow exponentially when you consider that different jurisdictions have different rules for determining how calls should be taxed. Some places tax telecommunications services based on where the call physically takes place, other places apply taxes based on a customer's billing address, and others still determine taxes using the originating cell site, tower, or switch. It

is simply unreasonable and incredibly burdensome to expect the phone companies to be able to figure out all these variables and then collect and remit taxes on behalf of all the appropriate jurisdictions.

These issues alone are sufficient to require a solution, but the problems go further than just figuring out the location of a call for tax purposes. The marketplace for cellular telecommunications services is evolving in ways that the existing tax system is not designed for and cannot accommodate. Just as the task of figuring out exactly where a call takes place for tax purposes has become increasingly complex in the wireless era, so has the task of figuring out exactly how much a call costs. Wireless services are often sold in buckets or bundles of minutes, so it is very difficult for the phone companies to assign a specific cost to each phone call or each minute of service for that matter. When you add this complicating wrinkle to the already difficult chore of figuring out which combination of state and local jurisdictions have the authority to tax a call, it becomes readily apparent why it is so important to overhaul the state and local tax system for wireless telecommunications services.

I touched on this point earlier, but I would like to emphasize again how remarkable and significant it is that different levels of government have worked so successfully with industry to reach a mutually acceptable solution. Rather than seeking to avoid existing tax collection responsibilities, industry approached state and local governments to help them develop a uniform and sensible approach to fulfilling these responsibilities on behalf of state and local governments. The Wireless Telecommunications Sourcing and Privacy Act does not seek to expand or reduce any company's tax collection responsibilities, nor does it seek to determine or change whether a state or local jurisdiction does or does not tax wireless services or at what rate they choose to do so.

The act creates a uniform method for determining where wireless services are deemed to occur for purposes of taxation. In those states where wireless services are taxed today, they will continue to be taxed under this bill. For those states that have chosen not to tax wireless services, they will continue not to be taxed. Furthermore, state and local governments will retain the authority that they have today to make future changes as their governors and legislatures decide regarding the taxability of these services and what rates apply to them.

The bottom line is that this mobile telecommunications sourcing legislation does what it needs to do in the way that it needs to be done. It establishes uniformity across state and local jurisdictions in the way that they determine which jurisdictions have the authority to tax a particular call. This provides the simplicity and consistency that industry needs. But the Wireless Telecommunications Sourcing and Privacy Act also preserves the ability of state and local governments to make fundamental decisions about how to raise the revenues they need to provide essential public services ranging from educating children to building roads to providing police and fire safety. We appreciate the hard work of industry to address these issues in a fair and mutually beneficial manner and think that these efforts and the interests of industry, state and local governments, and consumers are well reflected in the Wireless Telecommunications Sourcing and Privacy Act.

Thank you again for inviting me to testify today on behalf of the National Governors' Association. We look forward to continue working with you, your colleagues in the Senate, and the other groups represented here today to achieve passage of this important legislation. I would welcome any questions you might have.

Mr. GEKAS. We thank the gentleman and we turn to Mr. Brooks.

STATEMENT OF JOSEPH E. BROOKS, COUNCIL MEMBER, CITY OF RICHMOND, ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

Mr. BROOKS. Thank you.

The National League of Cities is pleased to have this opportunity to share our views on the "Wireless Telecommunications Sourcing and Privacy Act."

I am Joe Brooks from the Richmond City Council. I serve as a member of the Board of Directors of the National League of Cities.

The National League of Cities represents 135,000 mayors and local elected officials from cities, towns and villages across our country. They range in population from the very largest cities like Los Angeles and New York, to the various smallest. NLC is the Na-

tion's oldest national association representing municipal interests in Washington.

On behalf of the National League of Cities, I would like to express my gratitude to the sponsor of the act, Representative Charles Pickering. His leadership on this issue clearly shows his confidence in the ability of State and local officials and governments to resolve complex telecommunications issues without Federal preemption of traditional policy.

The mobility afforded to millions of American consumers by mobile telecommunications services has helped to transform the American economy, facilitate the development of the information superhighway and provide important public safety benefits.

As we enter the 21st Century, however, the telecommunications industry and State and local governments have been wrestling with numerous taxation issues. This measure is positive proof that we can forward solutions that address the critical needs of cities and foster the growth of the telecommunications industry.

This cooperative effort is how we believe other issues involving the telecommunications industry can be resolved. This stands in contrast to the procedures of the Advisory Commission on Electronic Commerce.

NLC welcomes the opportunity to develop a partnership with you, Mr. Chairman, and members of the subcommittee to address this particular bill or any other Federal efforts relating to meaningful telecommunications tax simplification that respects the fiscal needs and autonomy of local governments.

I would like to voice the National League of Cities' strong support for this bill. This legislation is the culmination of 3 years of cooperative effort between the wireless industry, the National League of Cities, the National Governors' Association, the Federation of Tax Administrators, and the Multistate Tax Commission.

Working with industry and our State partners, we have developed a measure that we believe provides a straightforward solution to a very complicated problem. From the National League of Cities' perspective, the legislation benefits consumers, State and local governments and the wireless industry.

The application of local taxes on wireless services represents a unique and difficult problem for local governments and for the wireless service providers. There has been considerable debate among industry and State and local governments as to which jurisdiction should have the right. This has been covered in the presentations made to you by the other two members of the panel.

The measure does not change the ability of States and localities to tax telecommunications services. It is generally revenue neutral among local governments, equitable among carriers and taxing jurisdictions and easy to administer.

For local government the measure addresses several important issues, the nexus, collection and remittance of existing taxes due and simplification and uniformity. I will skip some of this because it has already been covered by the others.

I will point out that the measure does not mandate any expenditure of State and local funding. In addition to preserving State and local government revenues, the act lowers the cost of taxes that are owed. I cannot stress enough that the current system is an ac-

counting nightmare and a drain on local governments. Overall, the existing system is administratively burdensome for local governments and costly for consumers.

State and local taxes that are not consistently based can result in some telecommunications revenues inadvertently escaping local taxation altogether, thereby depriving local governments of needed funds to deliver police, fire and emergency services.

The measure puts local governments and service providers on a level playing field, sparing them the arduous task and expense of determining the taxability of every individual cellular call, including calls across taxing jurisdictions multiple times and the same call. The measure establishes a uniform standard for sourcing telecommunications for all State and local governments that tax these activities.

The measure's public and private partnership shows that State and local governments and the wireless industry can work together to produce beneficial results for all stakeholders.

Mr. Chairman and members of the subcommittee, I greatly appreciate your leadership on this issue and look forward to working with you as this crucial piece of legislation moves forward to final passage.

I will be happy to answer any questions you may have at the appropriate time.

[The prepared statement of Mr. Brooks follows:]

PREPARED STATEMENT OF JOSEPH E. BROOKS, COUNCIL MEMBER, CITY OF RICHMOND,
ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

SUMMARY

This testimony states the National League of Cities' (NLC) strong support for the Wireless Telecommunications Sourcing and Privacy Act (H.R. 3489).

NLC supports the Wireless Telecommunications Sourcing and Privacy Act as meaningful telecommunications tax simplification that respects the fiscal needs and autonomy of local governments. The National League of Cities is the oldest national association representing municipal interests in Washington, DC; and its membership includes more than 135,000 local elected officials from cities and towns across the nation.

The current application of local taxes on wireless services presents unique and difficult problems for local governments, the wireless service providers, and consumers. There has been considerable debate among industry and state and local governments as to which jurisdictions should have the right to tax wireless calls. Is it the town, county or state from where the call originated? Is it where the call terminated or where some element of the wireless provider's transmission facility is located?

The Wireless Telecommunications Sourcing and Privacy Act answers this question and others like it in a way that upholds and adheres to traditional notions of state and local sovereignty with respect to taxation. The measure does not change the ability of states and localities to tax telecommunications services. It is generally revenue-neutral among local governments, equitable among carriers and taxing jurisdictions, and considerably easier to administer. For local government, the measure addresses several important issues—nexus, collection and remittance of existing taxes due, and of course, simplification and uniformity.

Overall, this legislation benefits consumers, state and local governments, and the wireless industry.

STATEMENT

Mr. Chairman and Members of the Subcommittee, the National League of Cities (NLC) is pleased to have this opportunity to share our views on the Wireless Telecommunications Sourcing and Privacy Act. My name is Joseph E. Brooks, and I am a City Council Member from Richmond, Virginia. I also currently serve on the National League of Cities' Board of Directors.

The National League of Cities represents 135,000 mayors and local elected officials from cities and towns across the country that range in population from our nation's largest cities of Los Angeles and New York to its smallest towns. NLC is the nation's oldest national association representing municipal interest. Washington. At this time, I ask that my written testimony be submitted for the record.

On behalf of the National League of Cities, I would like to express my gratitude to the sponsor of the Wireless Telecommunications Sourcing and Privacy Act (H.R. 3489), Representative Charles Pickering. His leadership on this issue clearly shows his confidence in the ability of state and local governments to resolve complex telecommunications issues without federal preemption of traditional municipal authority.

The mobility afforded to millions of American consumers by mobile telecommunications services has helped transform the American economy, facilitate the development of the information superhighway, and provide important public safety benefits. As we enter the 21st Century, however, the telecommunications industry and state and local governments have been wrestling with numerous taxation issues. This measure is positive proof that we can forge solutions that address the critical needs of cities and foster the growth of the telecommunications industry. NLC welcomes the opportunity to develop a partnership with you, Mr. Chairman, and the members of the Subcommittee, to address the Wireless Telecommunications Sourcing and Privacy Act and other federal efforts relating to meaningful telecommunications tax simplification that respects the fiscal needs and autonomy of local governments.

Today, I want to voice the National League of Cities' strong support for the Wireless Telecommunications Sourcing and Privacy Act. This legislation is the culmination of a three-year cooperative effort between the wireless industry, the National League of Cities, the National Governors' Association, the Federation of Tax Administrators, and the Multi-State Tax Commission. Working with industry and our state partners, we have developed a measure that we believe provides a straightforward solution to a very complicated problem. From the National League of Cities' perspective, this legislation benefits consumers, state and local governments and the wireless industry.

The application of local taxes on wireless services presents unique and difficult problems for local governments and for the wireless service providers. There has been considerable debate among industry and state and local governments as to which jurisdictions should have the right to tax wireless calls. Is it the town, county or state from where the call originated? Is it where the call terminated or where some element of the wireless provider's transmission facility is located?

The Wireless Telecommunications Sourcing and Privacy Act answers this question and others like it in a way that upholds and adheres to traditional notions of state and local sovereignty with respect to taxation. The measure does not change the ability of states and localities to tax telecommunications services. It is generally revenue-neutral among local governments, equitable among carriers and taxing jurisdictions, and considerably easier to administer. For local government, the measure addresses several important issues—nexus, collection and remittance of existing taxes due, and of course, simplification and uniformity.

The measure bolsters the ability of state and local governments to collect those taxes they choose to impose on wireless providers while simplifying the wireless providers' job of determining which taxes apply to them. The measure removes any doubt as to a local taxing jurisdiction's ability to impose an existing tax on cellular services by expressly recognizing the authority of the taxing jurisdictions indicated by the customer's place of primary use, and preventing the exercise of additional authority by any other local taxing jurisdictions. The measure does not mandate any expenditure of state or local funding.

In addition to preserving state and local government revenues, the Wireless Telecommunications Sourcing and Privacy Act lowers the cost of collecting taxes that are owed. I cannot stress enough, that the current system is an accounting nightmare and a drain on local governments. Overall, the existing system is administratively burdensome for local governments and costly for consumers. State and local taxes that are not consistently based can result in some telecommunications revenues inadvertently escaping local taxation altogether, thereby depriving local governments of needed tax revenues to pay for the vital services they provide such as police, fire, and emergency medical services. The Wireless Telecommunications Sourcing and Privacy Act would relieve local taxing authorities of burdensome audits and oversight responsibilities without losing the authority to tax wireless calls. The measure puts local governments and service providers on a level playing field by sparing them the arduous task and expense of determining the taxability of every individual cellular call included in a bill, including calls that cross taxing jurisdictions multiple times during the same call. The measure establishes a uniform

standard for sourcing cellular telecommunications for all state and local governments that tax these activities.

The measure's new method of sourcing wireless revenues for local tax purposes is needed to avoid the potential for double or no taxation; and to provide carriers, taxing jurisdictions and consumers with an environment of certainty and consistency in the application of tax law. For local governments, uniformity that respects local autonomy is important, because it simplifies compliance for our cities and avoids multiple taxation. This measure provides much needed relief for state and local governments.

The measure's public-private partnership shows that state and local governments and the wireless industry can work together to produce beneficial results for all stakeholders.

Mr. Chairman and Members of the Subcommittee, I greatly appreciate your leadership on this issue, and look forward to working with you as this crucial piece of legislation moves forward toward final passage. I would be happy to answer any questions that the Subcommittee may have at the appropriate time.

Thank you.

Mr. GEKAS. We thank the gentleman and we turn to the final witness, Mr. Duncan.

**STATEMENT OF HARLEY DUNCAN, EXECUTIVE DIRECTOR,
FEDERATION OF TAX ADMINISTRATORS**

Mr. DUNCAN. Thank you.

I am pleased to be here today to offer the support of the Federation of Tax Administrators for the "Wireless Telecommunications Sourcing and Privacy Act."

This legislation represents a common sense approach to resolving a difficult issue, that of imposing transaction taxes on mobile telecommunications services. The bill before you might easily be considered a model for public policymaking in the 21st Century. State and local tax laws have not kept abreast of the changes in technology in mobile telecommunications or the business practices and consumer acceptance of such services.

Those tax laws today effectively require identifying the location of each mobile phone call. This requirement is burdensome and increasingly unnecessary from a business standpoint. As consumer acceptance of cellular phones has increased, our society and businesses have become more mobile and business practices have changed to offer bulk rate pricing for mobile telecommunications services regardless of where used.

Instead of seeking Federal restrictions on State taxing authority, however, the cellular telecommunications industry, to its credit in my estimation, approached State and local governments in an attempt to develop a cooperative and mutually beneficial resolution of the issues. The result is the legislative proposal before you today that has the support of both the industry as well as State and local governments.

The bill before you meets the essential requirements of all parties to this issue. From our perspective, most importantly, it preserves the ability of States to determine the types of taxes on cellular services that they desire to impose. At the same time, from the perspective of the industry, this measure simplifies compliance for the cellular providers as well as consumers and provides assurances to those providers that good faith efforts to comply with the bill will protect them from audit assessments on the back end.

It is for these reasons that the legislation before you should be approved. It is simply a common sense approach to a difficult issue.

The central issue is the sourcing of cellular services or assigning such services to the appropriate taxing jurisdiction for purposes of transaction taxes. As I mentioned, those taxes today require you to identify the location of the call and the service and that is what is increasingly difficult.

The bill addresses this sourcing problem by sourcing all wireless calls and services to the place of primary use which will essentially be the customer's residence or business address. Only the taxing jurisdictions within that place of primary use would be authorized to impose a tax on the services and they would be authorized to impose a tax on all the services consumed by that user under the contract consummated at the place of primary use.

There are two significant changes from current practices. The first is we will not be looking to an individual call to source the transaction, but rather the transaction will be considered all the services that are offered for a fee, and all will be taxable at one source under a rough justice concept that they are presumed to be used at that place of primary use.

The second important element of the bill is the assigning of this place of primary use to a taxing jurisdiction. That is determining what is the appropriate tax rate for each customer. There are two methods spelled out in the bill for you, as Mr. Wheeler noted. One might be a database of addresses and tax rates that is provided by the State or local governments or the second is the efforts by the cellular provider to develop that same database of matching addresses to tax rates.

I think the important element of this is in both cases, whether a provider uses the service the database provided by the State or local government or they make good faith efforts on their own behalf to do this, they will be held harmless or provided a safe harbor from audits and an incorrect assignment that may be discovered on audit. In other words, you make an effort to get it right, you exercise due diligence, States and local governments are not going to come back on you on audit and find that you were in error. If you were in error, it is simply corrected going forward.

There is a nonseverability clause that says if any part of the act is found unconstitutional or substantially impaired, which we don't think will come into play, the whole act would fail. That is an important element to prevent litigation that would try to disrupt one part of the act and leave another part in tact. The nonseverability is important.

The second is there are two amendments that have been discussed with staff to clarify that the term "transaction tax" does not include two types of taxes and two unique taxes in a couple of States that were really not intended to come into play. These were approved in the Senate version, and we would recommend them to you.

Again, this is a practical solution to a very difficult issue and we commend it to you. I would be glad to answer any questions.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Duncan follows:]

PREPARED STATEMENT OF HARLEY DUNCAN, EXECUTIVE DIRECTOR, FEDERATION OF
TAX ADMINISTRATORS

SUMMARY

Introduction. The Federation is an association representing the principal tax administration agencies in each state as well as the District of Columbia and New York City. FTA supports those provisions of H.R. 3489 relating to the sourcing of mobile telecommunications services for state transactional tax purposes.

The proposal before you is the result of extensive discussions and negotiations between state and local governments and the cellular telecommunications industry. It enjoys the support of both sides, and as such, it is to be recommended to you fully.

Purpose of the Bill. The central issue dealt with by the proposal before you is "sourcing" cellular telecommunications services, i.e., assigning such services to the appropriate taxing jurisdiction for transaction tax (primarily sales and use tax) purposes. A transactional tax for these purposes is a tax that necessarily requires a determination of where the services are sold and purchased in order to apply the taxes applicable to that location. It can be difficult to determine the precise location of the sale and purchase of wireless services. Consequently, it can also be difficult to determine the precise taxes that are applicable to the provision of wireless services.

Main Features of the Bill

Sourcing provision. The bill addresses this sourcing problem by sourcing all wireless calls to the "place of primary use" (PPU), which will essentially be the customer's residence or business address. Only the state and/or sub-state taxing jurisdictions encompassing the PPU could tax the calls. (Section 802(b))

Hold harmless. The bill provides a mechanism for assigning PPUs to taxing jurisdictions. It further provides, in Sections 804(c) and 805(a), that a wireless carrier would be held harmless against errors that might occur in such assignments if one of the two designated methods is used.

Nexus and collection. Section 802(b) of the bill provides that charges for mobile telecommunications services are "authorized to be subjected to tax" by the taxing jurisdictions encompassing a customer's PPU, regardless of where the cellular calls originate, terminate or pass through. This section resolves any residual doubt as to a particular taxing jurisdiction's ability to impose an existing tax on cellular services.

Non-severability Clause. The Act provides that if subsequent litigation determines that the Act violates federal law or the Constitution or that federal law or the Constitution substantially impairs the Act, the entire Act falls. This nonseverability is a critical feature of the Act, because the States are giving up an existing state tax system with one set of jurisdictional understandings in favor of a different taxing system with a different jurisdictional understanding.

STATEMENT

Introduction

My name is Harley Duncan. I am Executive Director of the Federation of Tax Administrators (FTA). The Federation is an association representing the principal tax administration agencies in each state as well as the District of Columbia and New York City. I am here today to discuss those provisions of H.R. 3489 relating to the sourcing of mobile telecommunications services for state transactional tax purposes. FTA supports those provisions.

The proposal before you is the result of extensive discussions and negotiations between state and local governments and the cellular telecommunications industry. It enjoys the support of both sides, and as such, it is to be recommended to you fully.

The bill before might easily be considered a model for public policymaking in the 21 st Century. State and local tax laws applied to mobile telecommunications have not kept pace with changes in technology, business practices or consumer acceptance of the service. Instead of seeking federal restrictions on state taxing authority, however, the cellular telecommunications industry approached state and local governments in an attempt to develop a cooperative, mutually beneficial resolution of the issues. The result is a mutually agreed to legislative proposal that preserves state authority to determine the types of taxes on cellular services that it desires to impose. At the same time, the measure simplifies compliance for cellular providers and consumers and provides assurances to cellular providers that good faith efforts to comply will protect them from audit assessments. It is for these reasons that the legislation before you should be approved. It is a common sense approach to an otherwise difficult problem.

Purpose of the Bill

The central issue dealt with by the proposal before you is "sourcing" cellular telecommunications services, i.e., assigning such services to the appropriate taxing jurisdiction for transaction tax (primarily sales and use tax) purposes. States and localities impose transactional taxes, like sales and use taxes, on the provision of mobile telecommunications services. A transactional tax for these purposes is a tax that necessarily requires a determination of where the services are sold and purchased in order to apply the taxes applicable to that location. It can be difficult to determine the precise location of the sale and purchase of wireless services. Consequently, it can also be difficult to determine the precise taxes that are applicable to the provision of wireless services.

Difficulty in determining the precise location can arise from the mobile character of the services. Thus, for example, a wireless call can come from and go to any location and the location can even change during the course of the call. Further, wireless companies offer billing plans that significantly reduce at the retail level the business need to identify the precise location of the retail sale and purchase. One example of this trend is a nationwide subscription plan that permits wireless calling without roaming charges or long-distance charges from any location, provided a certain specified number of minutes of use per month is not exceeded.

It can also be difficult to determine all the taxes that are applicable to the precise location where a wireless call is sold and purchased. This difficulty can arise from having to match correctly each identified location to the boundaries of the various local taxing jurisdictions in a State that permits local taxation of wireless telecommunications.

Given these and other practical difficulties, the wireless industry sought development of taxing systems that lessened the burden of having to determine the location of the sale and purchase of *each* wireless call and the taxes applicable to *each* call. This effort captured the attention of state and local tax administrators who desire to have existing tax systems better match current business practices and reality. Representatives of the wireless industry and state and local tax administrators jointly developed the proposed *Wireless Telecommunications Sourcing and Privacy Act*.

Main Features of the Bill

The bill is intended to address, for transactional tax purposes only, the problem of determining the situs of a cellular telephone call, which has proven to be difficult under normal standards of sourcing transactions. For example, if a caller who resides in California happens to be in (maybe driving through) Virginia and makes a call to someone else in Virginia or another state, the question would be what state or states have jurisdiction to impose a transactional tax on that call. The problem becomes more difficult when the fact that a call can occur while the caller and/or receiver are moving in and out of taxing jurisdictions is considered.

Sourcing provision. The bill addresses this sourcing problem by sourcing all wireless calls to the "place of primary use" (PPU), which will essentially be the customer's residence or business address. Only the state and/or sub-state taxing jurisdictions encompassing the PPU could tax the calls. (Section 802(b))

The sourcing provisions of this bill would present two significant changes from current practices. First, the transaction being taxed is no longer the making of an individual call, but rather, the cumulative service of providing the calls, for one fee. That is, instead of viewing a billing for wireless phone service as a series of transactions, each a single call which may or may not be taxable, the phone bill would now represent one transaction, the sale of services provided by the vendor. (It would be the responsibility of the vendor to separately state any exempt calls, though the only type of exempt call addressed in the bill is an interstate call; some states do not tax interstate toll calls.) Second, rather than sourcing an individual call or transaction to its "point of use" as we might today, all calls are sourced to the PPU and, as a rough justice concept, that is presumed to be the point of use for all services.

Specifically, the bill in its current form provides that "All charges for mobile telecommunications services . . . are authorized to be subjected to tax, charge or fee by the taxing jurisdictions whose territorial limits encompass the customer's place of primary use," and that no other taxing jurisdictions may tax those charges. (§ 802(b)) "Place of primary use" is defined as "the street address representative of where the customer's use of the mobile telecommunications services primarily occurs, which must be either . . . the residential street address or the primary business address of the customer." (§ 809(3)) This definition was designed to deter the use of a fraudulent or misleading address set up only to evade tax, by employing an address that the customer would presumably have established for reasons other

than taxation of cellular calls. The bill provides that the PPU must be within the licensed service area of the home service provider.

The bill defines "customer" as "the person or entity that contracts with the home service provider" for the cellular service. (§ 809(6)(A)(i)) As it is the intention of the bill to assign service to the area in which that service actually, and primarily, occurs, the bill addresses the situation of multistate use of several phones under one contract by providing that, "where the end user of mobile telecommunications services is not the contracting party," the customer shall be "the end user of the mobile telecommunications service." (§ 809(6)(A)(ii))

Hold harmless. Essentially, the bill provides a mechanism for assigning PPUs to taxing jurisdictions. It further provides, in Sections 804(c) and 805(a), that a wireless carrier would be held harmless against errors that might occur in such assignments if one of the two designated methods is used.

Under the first scenario, at Section 804, a state would furnish vendors with a database (e.g., Geographic Information System) matching addresses with taxing jurisdictions, and vendors would be held harmless for any errors resulting from their use of that database. The bill contains standards that must be met by that database provided by a state, essentially to enable the databases provided by states to be conformed to the vendors' billing systems. There would be no hold harmless for vendors that do not use the state-supplied database, after a period allowed for converting to the database (§ 805(b)).

Under the second scenario, at Section 805, if a state does not furnish vendors with a database, vendors would be held harmless if they employ a zip code of at least nine digits (an "enhanced zip code"), and exercise "due diligence" in assigning addresses to taxing jurisdictions. "Due diligence" is defined to require vendors to expend resources, maintain internal controls, and employ all obtainable data pertaining to changes such as municipal annexations. It is thought that states for whom sourcing of wireless calls has a material effect on revenues will be motivated to provide the database discussed in Section 804, while states for whom such sourcing is not important will be content to allow vendors to employ the enhanced zip code, the accuracy of which has been characterized within a range of 80-99-plus percent.

Nexus and collection. Section 802(b) of the bill provides that charges for mobile telecommunications services are "authorized to be subjected to tax" by the taxing jurisdictions encompassing a customer's PPU, regardless of where the cellular calls originate, terminate or pass through. This section resolves any residual doubt as to a particular taxing jurisdiction's ability to impose an existing tax on cellular services, by expressly recognizing the authority of the taxing jurisdictions indicated by the customer's PPU, and preventing the exercise of additional authority by any other taxing jurisdictions. With the recognition of this jurisdiction, the cellular provider is also charged with the responsibility of paying and collecting the existing taxes to the taxing jurisdictions in which the customer's PPU is located.

Non-severability Clause. The Act provides that if subsequent litigation determines that the Act violates federal law or the Constitution or that federal law or the Constitution substantially impairs the Act, the entire Act falls. This non-severability is a critical feature of the Act, because the States are giving up an existing state tax system with one set of jurisdictional understandings in favor of a different taxing system with a different jurisdictional understanding. Without that clause, the legislation could create an incentive for litigation that would, unfortunately, seek to convert this legislation from being of mutual benefit to states, localities and the industry to legislation that would, in fact, preempt state taxing authority and undermine state sovereignty. If the new system is lost, the States want an unrestricted ability to return to the *status quo ante*.

Amendments. We have discussed with your staff and others, two desired amendments to H.R. 3489. These have been incorporated into the Senate counterpart to this bill. S. 1755 has been amended in two ways, both in Section 801(b), regarding the taxes to which the bill does not apply. First, the original Section 801(b)(4) was moved to 801(b)(5) without change, and was replaced with an exclusion for "any generally applicable State-imposed business and occupation tax—(A) that is applied to gross receipts or gross proceeds; (B) that is the legal liability of the carrier; and (C) under which the carrier may elect to use the sourcing rules under this title" (to remove the State of Washington's Business and Occupation Tax). Second, the original Section 801(b)(2), which excluded from the coverage of the bill "any tax, charge, or fee that is applied to an equitably apportioned gross amount that is not determined on a transactional basis," was amended by striking the word "gross" (to remove the Michigan Single Business Tax).

Constitutional Considerations

The constitutional provisions relevant to the subject matter of this bill are the Due Process Clause and Commerce Clause of the federal constitution. In brief, it appears that Congress has adequate authority under the Commerce Clause to address this matter, as the siting of cellular telephone calls that are transmitted from one state to another would be considered a matter of interstate commerce (as the finding in Section 2(1) indicates), and, as to intrastate calls, even activity that appears to take place entirely within one state can be considered interstate commerce, as indicated recently by the U.S. Supreme Court's striking down a local real estate tax as a violation of the Commerce Clause in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 117 S.Ct. 1590 (1997).

As to the Due Process Clause, which requires that there be at least a minimum connection between the state and the taxpayer or activity it is seeking to tax, a concern could be raised because the taxing jurisdictions indicated by the PPU need not be where any given call is either originated or terminated, and, in *Goldberg v. Sweet*, 488 U.S. 252 (1989), the Supreme Court authorized taxation by the state of origination or the state of termination, provided that the state was also where the service or billing address was located. As indicated above, however, the bill does not contemplate that taxes are being imposed on individual calls, but rather, it is intended that the bill be viewed as allowing the taxation of the sale of a service that would be deemed to occur at the PPU, and only those taxing jurisdictions encompassing the PPU would be authorized to tax the sale of that service. With the PPU essentially being based on the home or workplace of the customer purchasing the service, the purchase of the service in the taxing jurisdictions authorized by the bill to tax the service (at the PPU) would most likely supply the requisite connection with the taxing jurisdictions to satisfy any Due Process Clause concerns.

Section-by-Section Discussion

Findings; placement. While the findings in Section 2 of the bill generally spell out the problems to be addressed by the bill, the placement of the bill, as indicated by Section 3, in the Communications Act of 1934 is potentially problematic, to the extent that it might invite enforcement of the bill's provisions by the Federal Communications Commission. To address that concern, Section 810 of the bill provides that the FCC "shall have no jurisdiction over the interpretation, implementation, or enforcement of this title."

Section 801. Application of title. Generally, the bill applies to "any tax, charge or fee levied by a taxing jurisdiction as a fixed charge for each customer or measured by gross amounts charged to customers," regardless of whether the charge is imposed upon the vendor or the customer, and regardless of how the charge is named or described. As the bill is intended to apply to transactional taxes, taxes measured by net income, capital stock, net worth or property value are excluded, as are taxes "applied to an equitably apportioned gross amount that is not determined on a transactional basis."

Section 801(c) provides that the siting of prepaid calling card services and air-to-ground radiotelephone services is not covered by the bill, and that the taxability of sales or resales of cellular services where the Internet Tax Freedom Act would preclude the taxation of charges for cellular services is not affected by the bill.

Section 802. Sourcing rules. As described more fully above, this section provides that cellular services may be taxed by "the taxing jurisdictions whose territorial limits encompass the customer's place of primary use," regardless of where the calls originate, terminate or pass through, and that no other taxing jurisdictions may tax that service. Thus, if a customer, whose PPU is in Pittsburgh, Pa., initiates a call to California while driving in Virginia, and during the call also drives through Washington, DC and into Maryland, that call, along with all the other cellular calls included within the customer's bill from his cellular provider, could be taxed only by the taxing jurisdictions representing that customer's PPU in Pittsburgh.

Section 803. Limitations. The bill is not intended to expand the authority of states to tax, or to preempt the states' authority to tax, except as expressly provided in the bill. As this section provides that this bill does not authorize a taxing jurisdiction to impose a tax that the laws of the jurisdiction do not authorize the jurisdiction to impose, it is anticipated that states will have to adjust their laws accordingly, e.g., if a state's laws do not permit the taxation of calls that neither originate nor terminate within the state.

Section 804. Electronic databases for nationwide standard numeric jurisdictional codes. As discussed above, this section provides that states (or a designated entity acting on behalf of local taxing jurisdictions) may provide vendors with an electronic database that designates, for every street address in the state, the appropriate taxing jurisdictions encompassing that address, and that vendors will be held harmless

for errors in assigning taxing jurisdictions resulting from the use of such a database provided by a state. The section also delineates the technological standards that a state-provided database must meet, and provides requirements to be met by states and vendors when there are changes to the database.

Section 805. Procedure where no electronic database provided. If a state does not provide the electronic database described in Section 804, a vendor could still be held harmless for errors resulting from the misassignment of taxing jurisdictions if the vendor employs an "enhanced zip code," i.e., a zip code of nine or more digits, to assign street addresses to taxing jurisdictions, and does so with due diligence. The bill contains a rebuttable presumption that a vendor has exercised due diligence in its use of enhanced zip codes if the vendor can demonstrate that it (1) expended reasonable resources to maintain a database of assignments to taxing jurisdictions, (2) maintained reasonable internal controls to correct misassignments, and (3) used all reasonably obtainable data pertaining to municipal annexations and other changes in boundaries that affect the accuracy of the database.

Section 805(b) provides that, if a vendor has been entitled to be held harmless for its use of enhanced zip codes under Section 805(a), and a state then provides an electronic database under Section 804, that vendor will continue to be held harmless while diligently using the enhanced zip codes, until the later of eighteen months after a nationwide numeric code has been approved as required under the bill, or six months after the state has provided the database.

Section 806. Correction of erroneous data for place of primary use. This section addresses situations in which taxing jurisdictions discover errors in designations of PPUs or assignments of taxing jurisdictions. If a taxing jurisdiction determines that an address provided as the PPU does not meet the statutory definition of that term, the jurisdiction may give binding notice to the vendor to correct that PPU on a prospective basis, provided that the customer in question is given an opportunity to demonstrate that the supplied address is actually the correct PPU, and that, when it is a local taxing jurisdiction that makes the determination of an incorrect PPU, that jurisdiction must obtain the consent of all other affected taxing jurisdictions. Also, when a taxing jurisdiction determines that the assignment of a taxing jurisdiction by a vendor using enhanced zip codes is incorrect, the jurisdiction can give binding notice to the vendor to make the change on a prospective basis, under the same provisos regarding consent of other local jurisdictions and giving the vendor an opportunity to show that its original assignment was actually correct.

Section 807. Duty of home service provider regarding place of primary use. Subsection (a) provides that a vendor is responsible for obtaining and maintaining its customers' PPUs, and that, if a vendor's reliance on information provided by a customer regarding the customer's PPU is in good faith, the vendor would not be liable for any additional taxes based on a different determination of the customer's PPU, for taxes "that are customarily passed on to the customer as a separate itemized charge."

Subsection (b) includes a grandfathering provision, which allows a vendor to treat an address it has been using for a customer, under a contract in effect two years after the date of the enactment of this act, as that customer's PPU for the remaining term of the contract, excluding extensions or renewals.

Section 808. Scope; special rules. This section contains a few special rules, the more important of which include the following: (a) That nothing in the bill prevents taxing jurisdictions from collecting a tax from a customer that has failed to provide the correct PPU; and (b) that, if a jurisdiction does not tax cellular service, but the cellular service is bundled with other taxable services, the cellular service "may be" subjected to tax, unless the vendor can identify the nontaxable services from its books and records.

Section 809. Definitions. While most of the relevant terms employed in the bill have been described above, a few additional points should be made.

Place of primary use. The PPU will be a street address, either a residential street address or a business street address, whichever is "representative" of where the customer's use primarily occurs. This language reflects that many, if not most, cell phones are used in transit from one place to another, perhaps from home to work, so that the PPU should represent the primary use, as between the customer's residence and primary business address. As noted above, Section 807(a) allows a vendor to rely on the PPU provided by the customer, if the vendor does so in good faith.

Resellers. The bill is not intended to source cellular services provided to entities that resell those services. The definition of "customer" excludes resellers, and "reseller" is defined in the bill essentially as a provider who purchases telecommunications services from another telecommunications service provider and then resells those services.

Satellites. While calls from planes are not covered by the bill (§801(c)(3)), calls employing satellites would be, as the federal regulatory definition of "commercial mobile radio service," referred to in the Section 809(1) definition of that term, includes calls employing both satellites alone and satellites in conjunction with earth stations. Industry representatives have indicated their agreement with this conclusion in writing.

Section 810. Commission not to have jurisdiction of title. As noted above, this section provides that the FCC "shall have no jurisdiction over the interpretation, implementation, or enforcement of this title."

Section 811. Nonseverability. This section provides essentially that, if a court enters a final, non-appealable judgment on the merits, that "substantially limits or impairs the essential elements of this title" on federal statutory or constitutional grounds, the whole act would become null and void. Thus, if the sourcing provision of the bill is determined to be unconstitutional, the hold-harmless provisions would not remain in effect.

Section 812. No inference. This section provides that the bill does not affect the Internet Tax Freedom Act or the Telecommunications Act of 1996.

Section 4. Effective date. The bill would apply to customers' bills issued after the first day of the first month beginning more than two years after the date of enactment. This provision was intended to give states time to develop the electronic databases, if they choose to do so.

Mr. GEKAS. Thank you.

First, the assurance that the Chair is empowered to transmit to the members who have negotiated so successfully that we are of a mind through communications we received from staff that the final version of this bill could be introduced as early as today for final resolution by this committee and the full committee perhaps next week. So it is moving with due deliberate speed.

That was intended to cover the fact that the amendments you are talking about will be considered when we are wrapping this up if they are not already incorporated in the draft of the new bill.

In the definition in the current bill for place of primary use, which is totally understandable, nevertheless it does not—and I guess it is purposefully drafted that way—allude to the place of billing at all and somewhere along the line in your negotiations and in your original statement, Mr. Wheeler, you excluded the billing site, but they can coincide. If they are different, then you go back to where the use is lodged. Is that correct?

Mr. WHEELER. Yes, Mr. Chairman. I was purposely trying to waffle on that issue because of the point you just made. Is it business use, is it residential use, is it the home, is it the office? That is something we have left purposely vague in order to be able to work it out as the process goes forward.

Mr. GEKAS. I am sure in a court case an evidentiary piece of information designating where the billing occurred can be used to determine where the primary use is but I think you have clarified it in the definition. I am wondering if we don't mention billing at all does that mean it is inherent in the question of what is primary use or is it totally irrelevant?

Mr. WHEELER. It is relevant but not necessarily inherent. Look at 809 for a second as you have been doing. It says it must be either the residential street address or the primary business street address. It must be within the licensed service area. So it has to be one of two addresses. That may not be the billing address. I may have my bill sent to my office which is in another taxing jurisdiction but I am here.

Mr. GEKAS. The Counsel wishes to pose a question which I will allow her to do.

The COUNSEL. You just raised a question in my mind. What if neither the residential street address or the business street address happen to be within the licensed service area? Could that ever occur?

Mr. WHEELER. I would have a hard time imagining that kind of a situation. The entire United States is licensed.

The COUNSEL. By that service provider?

Mr. WHEELER. By a service provider, and whoever is providing service in that area is going to have facilities in that area, so I think it is pretty safe to say it is hard to conceive.

Mr. NADLER. Would the chairman yield?

Mr. GEKAS. I would yield.

Mr. NADLER. I want to pursue that point because I wonder if something was overlooked. It has to be either the residential street address or the primary street address of the customer which has to be with in the licensed service area?

Mr. WHEELER. Yes, sir.

Mr. NADLER. Assume somebody has a number of business addresses, his primary business address is not within the licensed service area and he generally uses it because he goes from address one to address two to home, so the place of primary usage is at a secondary business address or in his home, so you could get a situation where the place of primary usage is not within the licensed service area.

Mr. WHEELER. What you are trying to avoid is tax jurisdiction shopping, if you will. As I said in my direct remarks, there is a 2-year window where we all worked together in the kind of good faith that has brought us to this point to try and resolve details.

For instance, it is entirely conceivable that when you walk in to sign up for wireless service and fill out the form, they will say to you, Mr. Nadler, I need you to designate a place of primary usage. Is it your address or another address or whatever but there will be a way of capturing that information.

Mr. GEKAS. The only way a dispute can arise is if two taxing authorities claim that a particular address is the location of primary use, correct? We all understand this and it seems clear to everyone that two taxing authorities can take a different stance as to where primary use originates and there we would have a dispute. Then we would have to refer back to this and a court would have to decide on that basis. It is a good way to do business, I think.

I have no further questions. The gentleman from New York is allotted a full 5 minutes.

Mr. NADLER. Which I will not take.

I was just struck by your counsel's questions and I had to follow up.

I think you have done a very good job, collectively, at drafting this bill on the question before us which is how to split up taxing jurisdiction geographically without causing all sorts of problems.

Why is section 4 in the bill, which directs GAO to determine whether the FCC's regulatory fees have been accurately assessed in the last 70 years or so. It seems to have nothing to do with the rest of this bill. I have no idea whether that is a good idea or not but why is it in this bill?

Secondly, there is a provision concerning privacy in this bill. Again, I haven't studied that and it may be a great idea. I think I voted for it in the House last year but why is that in this bill?

Mr. WHEELER. The previous witness is the best answer for that question. It was put in by the Commerce folks when it was in the Commerce Committee. Neither of those provisions are in the Senate bill.

Mr. NADLER. Which brings up the related question of why the Commerce Committee was dealing with this bill in the first place and why this was drafted as an amendment to the Communications Act when it is clearly an interstate tax matter, but we will deal with those questions later.

Thank you.

Mr. GEKAS. We thank the witnesses.

I remember once when I was in the State Senate that we had a bitter dispute which is ongoing in Pennsylvania, I believe, on tort reform on product liability reform and so forth which, when I was chairman of the State Senate Judiciary Committee there, I took the parties literally into a room, the trial lawyers, the Chamber of Commerce and AFL-CIO and two others and put them in a room and asked them to come out with a solution to a particular legislative problem.

The result was a substantially workable piece of legislation on products liability reform and that was my first example now replicated by your effort of how the parties themselves could craft a piece of legislation for the good of all. So I want to commend you on this excellent effort.

— We may subpoena you some day to appear before a group that will be seeking model ways of approaching legislative solutions.

With that, we thank the gentlemen and the committee stands adjourned.

[Whereupon, at 2:05 p.m., the subcommittee was adjourned.]

