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Written Testimony
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Hearing on HR5793, the “Cell Tax Fairness Act of 2008”

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Subcommittee on Commercial and Administrative Law

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

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

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

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

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

new targeted taxes in other states and localities as well.

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

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

- First, tax burdens on wireless providers and consumers continue to grow. States and localities are not only failing to reform their existing discriminatory tax systems, but in some instances they are making the situation worse. Without this legislation, states and localities will continue to single out wireless service for new discriminatory taxes.
- Second, at a time when state and local economic development experts are touting expanded broadband deployment as critical to economic development in their communities, excessive new wireless taxes imposed piecemeal by thousands of state and local governments are a deterrent to new broadband network investments. The need to avoid new taxes on wireless investment is particularly important at this time because of the recent auction of wireless spectrum – now is the time to encourage investment in wireless networks that will bring wireless broadband service to many more Americans across the country.
- Finally, at a time when many low and middle-income families are struggling to make ends meet, H.R. 5793 would protect wireless users from burdensome new taxes. Wireless taxes are among the most regressive forms of taxation used by state and local government to fund public services – especially at the high rates imposed on consumers – so this legislation would particularly benefit low and middle income families by protecting them from regressive new wireless taxes.

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

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

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

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

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

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

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

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

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

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

Disparity Rank	State	State-Local Wireless Rate	Sales Tax State-Local Rate	Wireless Over/(under) General Rate
1	Nebraska	18.35%	6.50%	11.85%
2	Washington	18.24%	8.65%	9.59%
3	Florida	16.23%	7.25%	8.98%
4	New Hampshire	7.84%	0.00%	7.84%
5	New York	15.95%	8.19%	7.76%
6	Rhode Island	14.53%	7.00%	7.53%
7	Pennsylvania	13.51%	6.50%	7.01%
8	Missouri	13.73%	7.23%	6.50%
9	Texas	14.27%	8.25%	6.02%
10	Montana	5.96%	0.00%	5.96%
11	South Dakota	11.92%	5.96%	5.96%
12	DC	11.53%	5.75%	5.78%
13	Maryland	11.52%	6.00%	5.52%
14	Delaware	5.46%	0.00%	5.46%
15	Utah	11.97%	6.68%	5.29%
16	Illinois	14.24%	9.00%	5.24%
17	North Dakota	10.59%	6.00%	4.59%
18	Kentucky	10.37%	6.00%	4.37%
19	Kansas	11.31%	7.38%	3.93%
20	Alaska	6.40%	2.50%	3.90%
21	Arizona	9.95%	6.20%	3.75%
22	Hawaii	7.71%	4.00%	3.71%
23	New Mexico	10.75%	7.43%	3.32%
24	Colorado	10.66%	7.56%	3.10%
25	Indiana	8.89%	6.00%	2.89%
26	California	10.97%	8.10%	2.87%
27	Wyoming	7.79%	5.50%	2.29%
28	Tennessee	11.51%	9.25%	2.26%
29	South Carolina	9.48%	7.25%	2.23%
30	Mississippi	9.01%	7.00%	2.01%
31	Arkansas	10.26%	8.38%	1.88%
32	Maine	6.85%	5.00%	1.85%
33	New Jersey	8.81%	7.00%	1.81%
34	Oregon	1.61%	0.00%	1.61%
35	North Carolina	8.34%	6.75%	1.59%
36	Virginia	6.51%	5.00%	1.51%
37	Minnesota	8.50%	7.08%	1.42%
38	Iowa	7.37%	6.00%	1.37%
39	Vermont	7.75%	6.50%	1.25%
40	Oklahoma	9.64%	8.45%	1.19%
41	Michigan	7.03%	6.00%	1.03%
42	Connecticut	6.92%	6.00%	0.92%
43	Georgia	8.28%	7.50%	0.78%
44	Ohio	7.88%	7.13%	0.75%
45	Massachusetts	5.60%	5.00%	0.60%
46	Alabama	7.41%	7.25%	0.16%
47	West Virginia	6.03%	6.00%	0.03%
48	Wisconsin	5.55%	5.55%	0.00%
49	Louisiana	6.17%	9.00%	-2.83%
50	Idaho	2.13%	6.00%	-3.87%
51	Nevada	2.01%	7.56%	-5.55%
	US Simple Average	9.44%	6.20%	3.24%
	US Weighted Average	10.86%	6.20%	4.66%
For flat monthly taxes and fees, average monthly consumer bill is estimated at \$49.94 per month per CTIA.				
Source: Committee on State Taxation, 50-State Study and Report on Telecommunications Taxation, May 2005 Update Updated August 2008 by Scott Mackey, Kimbell Sherman Ellis LLP using state statutes and regulations.				

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

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

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

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

- **Tax Equity:** *Under a uniform, competitively neutral system, industry-specific telecommunications taxes are no longer justified.*
- **Tax Fairness:** *With the blurring of distinctions between various services and technologies, state and local governments must strive to set tax burdens on telecommunications services, property and providers that are no greater than those tax burdens imposed on other competitive services and the general business community.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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