To: Executive Committee
From: Roxanne Bland, MTC Counsel
Date: November 29, 2012
Subject: H.R. 1002, Wireless Tax Fairness Act of 2011

H.R. 1002, S. 543, the Wireless Tax Fairness Act, was introduced by Zoe Lofgren (D-CA) and has 236 cosponsors. WTFA imposes a 5-year moratorium for any “new discriminatory tax” “on or with respect to” mobile service, mobile service providers and mobile service property by state and local jurisdictions, unless the tax is imposed and enforced before the Act’s enactment. The purpose of the moratorium is to “freeze” existing telecommunications tax regimes in place to give state and local governments and industry the opportunity to make meaningful reforms. The bill is patterned after 49 U.S.C. 11501 (the 4R Act), and the drafters have analogized it as such. H.R. 1002 passed the House on November 1, 2011, and is now pending in the Senate Finance Committee. The bill:

- Imposes a 5-year moratorium on “new discriminatory taxes” on mobile services, mobile service providers and mobile property.
- “mobile services” is defined extremely broadly to include not just what we think of as cell service providers, but also “any other service that is primarily intended for receipt on, transmission from, or use with a mobile telephone or other mobile device, including but not limited to the receipt of a digital good.
- “new discriminatory tax” is also defined extremely broadly to include any income, sales, gross receipts or property tax that is imposed on “mobile services” and is not generally imposed or is imposed at a lower rate on any “other services or transactions involving tangible personal property.” Would a cell tax be “discriminatory” under this definition if there are exemptions from an otherwise generally applicable tax for any other service or type of transaction? Indeed, the bill provides that “all taxes, tax rates, exemptions, deductions, credits, incentives, exclusions, and other similar factors shall be taken into account in determining whether a tax is a new discriminatory tax.”
- Contains “grandfather clause” under which all taxes currently imposed and enforced on mobile service, service providers and property are preserved during the 5-year moratorium. Any rate change, extension, sunset or redefinition could void the grandfather clause.
- Constrains state and local taxing authority, interferes with decision-making and administration, and confers an unfair advantage on one industry.
• States and local jurisdictions that do not currently tax mobile services, service providers and property are forced to design their regimes based on these new restrictions instead of on their own needs.
AN ACT

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

1 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE.

This Act may be cited as the “Wireless Tax Fairness Act of 2011”.

SEC. 2. FINDINGS.

Congress finds the following:

(1) It is appropriate to exercise congressional enforcement authority under section 5 of the 14th Amendment to the Constitution of the United States and Congress’ plenary power under article I, section 8, clause 3 of the Constitution of the United States (commonly known as the “commerce clause”) in order to ensure that States and political subdivisions thereof do not discriminate against providers and consumers of mobile services by imposing new selective and excessive taxes and other burdens on such providers and consumers.

(2) In light of the history and pattern of discriminatory taxation faced by providers and consumers of mobile services, the prohibitions against and remedies to correct discriminatory State and local taxation in section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (49 U.S.C. 11501) provide an appropriate analogy for congressional action, and similar Federal legislative measures are warranted that will prohibit imposing new discriminatory taxes on providers and con-
sumers of mobile services and that will assure an ef-
fective, uniform remedy.

SEC. 3. MORATORIUM.

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

(b) DEFINITIONS.—In this Act:

(1) MOBILE SERVICE.—The term “mobile serv-

ice” means commercial mobile radio service, as such
term is defined in section 20.3 of title 47, Code of
Federal Regulations, as in effect on the date of en-
actment of this Act, or any other service that is pri-
marily intended for receipt on, transmission from, or
use with a mobile telephone or other mobile device,
including but not limited to the receipt of a digital
good.

(2) MOBILE SERVICE PROPERTY.—The term
“mobile service property” means all property used
by a mobile service provider in connection with its
business of providing mobile services, whether real,
personal, tangible, or intangible (including goodwill,
licenses, customer lists, and other similar intangible
property associated with such business).
(3) Mobile service provider.—The term "mobile service provider" means any entity that sells or provides mobile services, but only to the extent that such entity sells or provides mobile services.

(4) New discriminatory tax.—The term "new discriminatory tax" means a tax imposed by a State or local jurisdiction that is imposed on or with respect to, or is measured by, the charges, receipts, or revenues from or value of—

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

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

   (C) a mobile service property and is not generally imposed, or is generally imposed at a lower rate, on or with respect to, or measured by the value of, other property that is devoted to a commercial or industrial use and subject to
a property tax levy, except public utility prop-
erty owned by a public utility subject to rate of
return regulation by a State or Federal regu-
latory authority;

unless such tax was imposed and actually enforced
on mobile services, mobile service providers, or mo-
bile service property prior to the date of enactment
of this Act.

(5) STATE OR LOCAL JURISDICTION.—The term
“State or local jurisdiction” means any of the sev-
eral States, the District of Columbia, any territory
or possession of the United States, a political sub-
division of any State, territory, or possession, or any
governmental entity or person acting on behalf of
such State, territory, possession, or subdivision that
has the authority to assess, impose, levy, or collect
taxes or fees.

(6) TAX.—

(A) IN GENERAL.—The term “tax” means
a charge imposed by a governmental entity for
the purpose of generating revenues for govern-
mental purposes, and excludes a fee imposed on
a particular entity or class of entities for a spe-
cific privilege, service, or benefit conferred ex-
cursively on such entity or class of entities.
(B) EXCLUSION.—The term “tax” does not include any fee or charge—

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

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

(c) RULES OF CONSTRUCTION.—

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

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

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

(i) specific services;

(ii) specific industries or business segments; or

(iii) specific types of property; and

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

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

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

(ii) is a local jurisdiction tax that may
not be imposed without voter approval,
provides for at least 90 days’ prior notice
to mobile service providers, and is required
by law to be collected from mobile service
customers.

SEC. 4. ENFORCEMENT.

Notwithstanding any provision of section 1341 of title
28, United States Code, or the constitution or laws of any
State, the district courts of the United States shall have
jurisdiction, without regard to amount in controversy or
citizenship of the parties, to grant such mandatory or pro-
hibitive injunctive relief, interim equitable relief, and de-
claratory judgments as may be necessary to prevent, re-
strain, or terminate any acts in violation of this Act.

(1) JURISDICTION.—Such jurisdiction shall not
be exclusive of the jurisdiction which any Federal or
State court may have in the absence of this section.

(2) BURDEN OF PROOF.—The burden of proof
in any proceeding brought under this Act shall be
upon the party seeking relief and shall be by a pre-
ponderance of the evidence on all issues of fact.
(3) RELIEF.—In granting relief against a tax which is discriminatory or excessive under this Act with respect to tax rate or amount only, the court shall prevent, restrain, or terminate the imposition, levy, or collection of not more than the discriminatory or excessive portion of the tax as determined by the court.

SEC. 5. GAO STUDY.

(a) STUDY.—The Comptroller General of the United States shall conduct a study, throughout the 5-year period beginning on the date of the enactment of this Act, to determine—

(1) how, and the extent to which, taxes imposed by local and State jurisdictions on mobile services, mobile service providers, or mobile property, impact the costs consumers pay for mobile services; and

(2) the extent to which the moratorium on discriminatory mobile services taxes established in this Act has any impact on the costs consumers pay for mobile services.

(b) REPORT.—Not later than 6 years after the date of the enactment of this Act, the Comptroller General shall submit, to the Committee on the Judiciary of the House of Representatives and Committee on the Judiciary of the Senate, a report containing the results of the study re-
quired subsection (a) and shall include in such report rec-
ommendations for any changes to laws and regulations re-
lating to such results.

Passed the House of Representatives November 1,
2011.

Attest:

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