Statement of Kristina Rasmussen

Director of Government Affairs, National Taxpayers Union

Submitted to the Subcommittee on Commercial and Administrative Law, United States House of Representatives

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I. Introduction

Chairwoman Sanchez and Members of the Committee, my name is Kristina Rasmussen. I am Director of Government Affairs for the National Taxpayers Union (NTU), a grassroots organization of taxpayers with 362,000 members nationwide. I encourage you to find out more about NTU on our website: www.ntu.org.

I offer this testimony in support of H.R. 3679, the State Video Tax Fairness Act. This bill would address the issue of discriminatory video services tax policy by prohibiting inequitable state taxes that are dependent on the mode of programming delivery.

NTU approaches this bill not from the corporate or government perspective, but that of the taxpayer and the consumer. We look for indications of neutrality, simplicity, and transparency when we review proposals to change tax policy, and we believe all three goals are furthered by this bill. In deciding to support H.R. 3679, we were particularly mindful of tax/fee distinctions and issues of federalism, as evidenced by the following testimony. NTU believes that passage of H.R. 3679 would help ensure that consumers – not the states – pick marketplace winners and losers.

II. Telecom Taxation Versus Other Products and Services

Telecommunication services of all varieties have been targets for disproportionate and punitive taxes since the Spanish-American War. These taxes have slowed much of the progress and productivity that could have emerged to enrich our society sooner.

Indeed, a recent survey completed by researchers at the Heartland Institute found that taxes and fees on telecommunication services (e.g., TV and telephone) were typically more than twice as high as those on other retail goods. The average difference was a rate of 13.4 percent for telecommunication, versus 6.61 percent for other products. The same study noted that taxes and fees on communication services directly cost taxpayers more than $37 billion annually, not to mention the yearly "deadweight loss" to the economy of more than $11 billion.

There is a clear need to reduce overall telecommunication tax burdens, promote consumer choice, and provide a neutral playing field among similar products. As such, NTU regularly supports efforts to cut or eliminate telecommunication taxes and fees. We have also advocated in favor of statewide franchising reforms that allow the entry of new competitors into the video, voice, and data delivery markets. At the federal level, we have endorsed efforts to prevent discriminatory taxation of Internet and wireless services (specifically, the Permanent Internet Tax Freedom Act of 2007 and the Cell Phone Tax Moratorium Act), and we support the application of this principle to video services.

III. State Taxation Among Video Services

"Playing favorites" is an accusation often leveled at authority figures like bosses and teachers, but TV fans never expected discriminatory treatment to come from a state's Tax Code. Currently, six states (Ohio, Florida, Kentucky, North Carolina, Tennessee, and Utah) levy state video service taxes on satellite TV that are higher than those levied on cable TV or other similar consumer products.

In the case of Ohio, lawmakers approved a special 5.5 percent tax on TV viewers getting their signal from a satellite service. Cable users, on the other hand, are completely exempt from the tax. So a viewer and his neighbor could be enjoying the *same* TV program, but one would be paying more in taxes if he uses a satellite dish while the other viewer uses cable. And the resulting bill isn't insignificant – satellite consumers in Ohio paid $26.2 million in extra taxes in 2005. In Florida, satellite TV is taxed by the state at a higher rate than cable (13.17 percent versus 9.17 percent).

In the state of Kentucky, recent statewide reforms levied a combined 5.4 percent tax on both satellite and cable, and then sent revenues back to localities proportionate to the franchise fees they had been receiving from cable prior to the reform. North Carolina employs a similar set-up. We are concerned that satellite consumers are now being squeezed by new taxes to pay funds toward fee totals they would never have had to pay. We believe this system violates Congress's intent in the Telecommunications Act of 1996 to keep local franchise fees off satellite service.

In Utah, both cable and satellite pay a 6.25 percent tax, but cable can apply half of any franchise fees paid toward this burden, thereby lowering the operative tax rate. In Tennessee, both cable and satellite consumers pay a sales tax of 8.25 percent, but the first $15 of monthly cable service charges are exempted from this tax (charges above $27.50 are taxed at a 7 percent state rate). For price-sensitive taxpayers, these differences can determine which service they ultimately purchase.

Imagine paying a higher tax rate if you received your salary via direct deposit instead of a check. Or paying taxes on chocolate ice cream but not vanilla. The same thing goes with TV service: Consumers shouldn't have to pay higher taxes just because they use satellite instead of cable, or vice versa.

IV. Tax Parity and Franchise Fees: A Difficult Reconciliation

The need for H.R. 3679 rests largely on how the various government-imposed burdens of the video services industry are measured – which, in turn, could help determine what types of taxes are discriminatory in nature. The answer is, admittedly, not a simple one. Yet, this very question is reason to embrace rather than shun enactment of H.R. 3679.

Opponents of the legislation contend that the "franchise fees" local governments often extract from cable companies are not sufficiently accounted for when comparing state-level tax policies toward cable and satellite television products. Defining a franchise fee as a "cost of doing business" as opposed to an outright tax has much to do with reconciling differences at the state level. While this fee remains a mandatory burden that customers, employees, and shareholders ultimately bear, NTU believes that the recovery of an actual and legitimate expense of a given government service, especially those for which an entity voluntarily avails itself, can meet the definition of a user cost rather than a tax.

We recognize that a franchise fee is a form of extraction by the government, and we have supported and will continue to support efforts to reduce this cost. NTU has a long record of opposing fees and efforts to increase them, especially when they bear little relation or have no connection to the services they are supposed to support. For example, NTU recently opposed attempts to prolong the existence of a special Virginia vehicle registration fee that had been created to fund the now-concluded Jamestown 2007 celebration. The extension of this fee beyond the life of the event it was created to fund would be a clear example of a fee bearing no relation to the promised service.

However, there are distinct benefits received in exchange for cable franchise fees, such as "rights of way" for laying cable necessary for delivering a product. As an aside, we note the strange logic between tying a company's right-of-way cost to an unrelated measurement such as gross revenues. Presumably the cost of "renting" space to run cable is fixed to local property values, so why should the cost be a set portion of their earnings? Regardless, if cable companies believe they are being overcharged by localities for this benefit, we strongly believe they should be working to convince state and local governments to reduce their fees.

There is, however, another important consideration in the debate over H.R. 3679. Unlike many user charges, which entities simply figure as a baseline necessity in order to do business, franchise fees actually deliver a reverse benefit to the payer: historically, in the case of cable TV, the exclusive right to provide service within a given jurisdiction. Surely the value of these franchises is considerable to their holders. Despite various government pricing and service-provision regulations, a franchise fee confers protection from competitors using the same mode

of transmission and, in the case of competition from other modes of transmission, serves as a way to muddy the fiscal waters and argue for higher taxation.

In truth, comparing the tax burdens of video providers depends upon many variables. Cable companies contend that the franchise fees they pay constitute a dollar-for-dollar tax burden that their competitors don't face, but the situation is not cut and dry. Some states provide a credit for franchise fees paid in order to offset other taxes. Meanwhile, for many years, satellite providers have had to competitively bid for the use of federally owned spectrum over which they can transmit their signals. One could argue that this "right of way" through space is somewhat analogous to the terrestrial rights of way cable companies are paying for under franchise agreements. For their part, however, satellite providers do not seem to be operating under the premise that cable companies should pay an equivalent of spectrum auction costs in order to "level the playing field."

Certainly, satellite companies also pay a "cost of business" in preparing, launching, and maintaining their satellites as a precondition of getting their products into homes and businesses. This cost is reflected in the price of their product as opposed to a separate line-item charge on a cable bill. We don't begrudge the right of cable companies to pass along their business costs to consumers. NTU recognizes that visibility and transparency of government costs are good things for the consumer and the tax reform movement as a whole. However, satellite consumers shouldn't be forced to pay an additional tax for the appearance of parity, especially when satellite's delivery costs are already accounted for in its price.

Insomuch as franchise fees are used solely as revenue spigots for local governments instead of a payment rendered in exchange for certain tangible benefits, we support efforts by the cable industry to change existing law to reflect this actuality.

Until then, NTU must work toward parity for taxpayers among truly comparable costs. NTU believes that H.R. 3679 provides a logical starting place – the state level – for reconciling some of these tax burdens to ensure that no one is put at a competitive disadvantage.

V. Federalism and Competition Issues

From NTU's viewpoint, the color of law should always take on a hue that reflects low taxes and free markets, which is a major reason why we support H.R. 3679. However, we are not unmindful of federalism considerations surrounding this measure. During NTU's nearly 40-year history, we have often observed the benefits of tax competition in America's vibrant "laboratory of the states." This phenomenon has, among other things, kept taxpayers in nine states free from a homegrown income tax, and, in five states, unburdened by a general sales tax.

Some elected officials have raised an objection to H.R. 3679 on the grounds that the legislation would further curtail the ability of states and localities to craft tax policy that can be tailored to the specific conditions and outcomes they seek. This concern is not completely devoid of merit, but it does not approach the urgency of protecting residents of all 50 states from predatory taxes at the non-federal level.

Surely, state and local officials would concede that their current taxation powers are far from unlimited, and are often proscribed by other levels of government. California, Oregon, and Washington, for example, limit the rate of tax and/or the annual growth of assessments allowable under city and county property tax systems. Other states, such as Colorado, Michigan, Missouri (and again, California), specifically compel localities to seek the approval of voters prior to levying some or all types of new taxes. Further limitations are established through regulatory decisions, one of the more notable being the California Franchise Board's ruling earlier in this decade that the Los Angeles County Assessor could not claim *situs* for property tax purposes on satellites in permanent earth orbit simply because they were once manufactured in the county.

There are more direct analogies to the legislation before us today. For all of its regulatory drawbacks and lack of clarity in some areas, the federal Cable Communications Act has for nearly 25 years capped the level of franchise fees that local governments can charge at 5 percent. This provision, incidentally, had strong support from the cable industry, which at the time made many of the same arguments on behalf of a federal limit that we are making today.

Established law has long recognized – sometimes to the detriment but mostly for the good of taxpayers – that telecommunications services can often defy state boundaries as well as the jurisdiction of taxing authorities. Subsequent FCC rulings and legislative acts in the 1970s and 1980s lifted the restrictions on cable operators that traditional broadcasters sought to impose so as to avoid competition.

The federal Internet Tax Freedom Act, which became law in 1998 and has been renewed under various names since, has shielded online consumers from discriminatory tax burdens on Internet access. Current legislation in Congress, H.R. 436, would provide for a three-year moratorium on new mobile telephone service taxes whose rates exceed those on comparable non-mobile products. Both approaches have strong support from NTU.

But why should federal intervention be the solution to taxpayer protection issues such as these? Don't citizens have other options, including the electoral process, to effect change? In several senses they do. In addition to participating in elections, citizens can – in some states – initiate binding statewide legislation through the petition process.

As a practical matter, however, states and localities can sometimes be oblivious, and often contemptuous, toward the plight of consumers and businesses facing unfair taxation. The City of Corvallis, Oregon provides but one example of where elected leaders resorted to a noxious tax scheme to make wireless phone services far less affordable. Voters demolished this proposal when it was referred to them in 2006, but this laudable outcome entailed extraordinary efforts on the part of local residents (including our own members) to beat back the tax hike. Until citizen activists can establish comprehensive tax limitation and reduction measures in their communities, it is perfectly reasonable for Congress to set some sensible boundaries under federal law and the Constitution's Commerce Clause.

What about cases in which tax collusion, dressed up as tax competition, poses a direct threat to the well-being of taxpayers and consumers across the nation? For example, many officials are seeking Congress's blessing for a "Streamlined Sales and Use Tax Agreement"

(SSUTA) that would establish a common regime for the application of sales taxes across state borders.

Yet, the SSUTA battle is not being fought over the small share of retail sales that are not subject to direct purchase taxes; the ultimate objective is to dramatically increase sales tax rates and their reach through interstate collusion, and put a padlock on the "laboratory of the states." Such an action may not be on the immediate horizon for taxes on cable and satellite television service, but legislation that would increase discrimination between these modes of video is being introduced throughout the nation. Moreover, federal jurisprudence in this area is not as well established as it has been on the question of state taxation of remote sales. These factors argue in favor of an "insurance policy," in the form of H.R. 3679, to prevent harm to taxpayers in the future.

VI. Fairness, Complexity, and Transparency

The fight over what does and does not constitute a tax, an offset, and so forth, reflects the complexity found in our tax laws. Many of the taxpayers who make up our membership believe that the entire Tax Code is desperately in need of an overhaul that promotes simplicity and transparency. Although H.R. 3679 is aimed at one narrow area of our tax laws, NTU supports it because it provides for a crisp prohibition against discrimination and sets up strong "base rules" for future reform efforts.

Much of the debate over tax discrimination in the video services community has improperly focused on a form of "fairness" that only fills government's coffers further – that is, making sure providers of similar services suffer the misery of equally harsh taxes. Policymakers would do well to remember that the "fairest" fee or tax rate – for providers and taxpayers alike – is zero.

Failing the most far-sighted tax policy of a zero rate (which happens to be simple *and* transparent), at the very least, state and local governments should not discriminate among products or services by disadvantaging one with heavier taxes. Yet, as I just mentioned, inflicting the same measure of pain on all entities is no solution to the question of "fairness." Rather, taxes should be eased across the board. This is why NTU has championed reforms that would lower the tax burdens on *all* participants in the video services market.

While we recognize that states could abuse H.R. 3679 and raise taxes on cable instead of lowering them on satellite systems, we understand the bill's intent as one that would keep any additional taxes on television service at bay.

VII. Conclusion

Thank you, Chairwoman Sanchez, for allowing me to submit this testimony. Many issues of interest to taxpayers are found within the debate over state tax treatment of video services. While we see merit on both sides of the discussion, we ultimately feel that satellite consumers should not be forced to pay additional taxes that demand "parity" – or more – with fees imposed for unrelated benefits.

If the House and Senate were to consider the State Video Tax Fairness Act today, we would classify a vote in favor of H.R. 3679's original language as the "pro-taxpayer" position in our annual Rating of Congress.

And again, on behalf of our 362,000 members, NTU is pleased to offer our thoughts to the Subcommittee as you move forward with this important measure.