



March 10, 2015

(Via e-mail)

The Honorable Mark Hass, Chairman
Senate Committee on Finance and Revenue
Oregon State Capitol
900 Court Street NE, Room 143
Salem, OR 97301

RE: Senate Bill 569 (SB 569)

Dear Chairman Hass:

The Voice on the Net (VON) Coalition¹ writes to express its strong opposition to SB 569. In particular, VON objects to the inclusion of Interconnected Voice over Internet Protocol (VoIP) within the definition of communications service providers subject to tax that may be imposed by municipalities.

SB 569 proposes to enable Oregon municipalities to impose a tax on providers of VoIP services that operate within a municipality for use of the public right of way in such municipalities. The tax would be based on the annual gross revenues from VoIP services earned within the boundaries of the municipality. For the reasons set forth below, VON urges you to reject SB 569 because it would impede technical innovation and economic growth in Oregon, is constitutionally suspect, and may violate the federal Internet Tax Freedom Act ("ITFA").

VoIP is a powerful force for increased competition, a platform for innovation, a key driver of broadband deployment and a vehicle for continued economic growth and consumer benefit. VoIP is the next generation of communications applications that are rapidly being deployed to meet consumer demand. In contrast to traditional, landline telephone service, VoIP is a broadband service that utilizes Internet Protocol (IP) technology — which changes the contents of the communication into digital packets and sends them over the fastest available route over the Internet. By utilizing IP technology, these services provide an integrated suite of capabilities and features for consumers to communicate by voice, data and/or video, and to manage their communications

¹ The Voice on the Net or VON Coalition consists of leading VoIP companies, on the cutting edge of developing and delivering voice innovations over the Internet. The coalition works to advance regulatory policies that enable Americans to take advantage of the full promise and potential of VoIP. The Coalition believes that with the right public policies, Internet based voice advances can make talking more affordable, businesses more productive, jobs more plentiful, the Internet more valuable, and Americans more safe and secure. Since its inception, the VON Coalition has promoted pragmatic policy choices for unleashing VoIP's potential. <http://www.von.org>.



dynamically. These features and capabilities far exceed those of traditional, landline telephone service.

VoIP is driving economic growth and broadband adoption throughout the state, which in turn drive the growth of applications and the devices that enable consumers to use them, which in turn drives the deployment of broadband networks which these apps and devices utilize. This “virtuous cycle” of economic growth and consumer adoption will create good, high-tech jobs in Oregon. Adding an unnecessary tax to VoIP will hurt demand for the service and reduce demand for services that are now enjoyed by hundreds of thousands of Oregon residential and enterprise consumers.

The tax authorized by SB 569 would not only inhibit the growth of this burgeoning technology industry in Oregon, but would also be legally infirm under the Commerce Clause of the U.S. Constitution and the ITFA.

A. The Commerce Clause

Under the four-pronged test articulated by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a state or local tax violates the Commerce Clause of the United States Constitution unless the tax is (1) applied to an activity with a substantial nexus with the taxing jurisdiction, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the taxing jurisdiction.

1. Substantial Nexus

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the United States Supreme Court held that substantial nexus requires the physical presence of the taxpayer within the taxing jurisdiction before a tax may be imposed. If Oregon municipalities are permitted to impose a tax on VoIP providers because of the presence of customers in the jurisdiction, such tax would run afoul of the physical presence standard set forth by *Quill* if the VoIP providers have no physical presence in the jurisdiction. In *Goldberg v. Sweet*, 488 U.S. 252 (1989), a case involving an Illinois tax on telecommunications providers, the United States Supreme Court doubted that a state through which a telephone call’s electronic signals merely passed had a sufficient nexus to tax that call, and also doubted that termination of an interstate telephone call, by itself, provided a substantial enough nexus to tax a call. *Goldberg, supra*, at 263. By subjecting a VoIP provider without a physical presence to a municipal tax solely because its customers are located within the municipality, SB 569 would violate the physical presence set forth in *Quill*.



2. Fair Apportionment

The central purpose behind the apportionment requirement of the *Complete Auto* test is to ensure that each jurisdiction taxes only its fair share of an interstate transaction. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). A fairly apportioned tax must be externally consistent. To be externally consistent, the jurisdiction may only tax that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. *Container Corp.*, *supra*, at 169-170. To satisfy fair apportionment, an interstate telephone call may be taxed only in jurisdictions where the call originates or terminates, and where a customer service address exists. *Goldberg*, *supra*, at 263. By taxing a VoIP provider solely on the basis of the location of its customers without consideration for where calls originate or terminate, SB 569 would not be fairly apportioned. Furthermore, SB 569 would not be externally consistent if it is imposed on the gross revenues of VoIP providers based solely on the presence of its customers in the municipality because it would not reflect the VoIP providers' activities conducted outside the municipality.

3. Discrimination Against Interstate Commerce

A state or local tax that discriminates against interstate commerce violates the Commerce Clause. *Container Corp.*, *supra*, at 170. Even if neutral on its face, a tax will be struck down if it has a discriminatory effect on interstate commerce. *Best & Co. v. Maxwell*, 311 U.S. 454 (1940). SB 569 would have the discriminatory effect of being imposed more heavily on communications service providers operating in interstate commerce (including VoIP providers) than those operating locally because the tax would be imposed irrespective of where a call originates or terminates. By doing so, SB 569 would impose a disproportionate economic burden on an interstate call in violation of the Commerce Clause.

4. Fairly Related to Services Provided by the Taxing Jurisdiction

The *Complete Auto* test also requires the tax be fairly related to the presence and activities of the taxpayer within the jurisdiction. The purpose of this test is to ensure that a jurisdiction's tax burden is not placed upon persons who do not benefit from services provided by the jurisdiction. *Goldberg*, *supra*, at 267. If SB 569 permits municipalities to impose taxes on VoIP providers that conduct no activities and have no presence in those municipalities, the tax would fail this prong of the *Complete Auto* test.

B. The Internet Tax Freedom Act

The municipal taxation of VoIP providers contemplated by SB 569 would be expressly preempted under section 1101(a)(2) of the ITFA, which prohibits state and



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local jurisdictions from imposing “discriminatory taxes on electronic commerce.” Section 1105(2)(A) of the ITFA defines a discriminatory tax to include any tax imposed by a state or local jurisdiction on electronic commerce that is not generally imposed “on transactions involving similar property, goods, services, or information accomplished through other means.” SB 569 would impose a tax on VoIP providers for the provision of voice services over the Internet, whereas certain voice services that are not provided over the internet (e.g., wireless services) would not be subject to the tax, resulting in a discriminatory tax on electronic commerce under the ITFA.

VON respectfully urges you to reject SB 569 and instead support the continued development of VoIP while promoting the virtuous cycle of economic growth and job creation that the broadband ecosystem fosters. Please do not hesitate to contact me if you have any questions.

Sincerely,

The VON Coalition

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cc: Members of the Senate Committee on Finance and Revenue