

**ORDINANCE NO. 4127**

**AN ORDINANCE OF THE CITY OF POMONA AMENDING CHAPTER 50, ARTICLE V OF THE POMONA CITY CODE REGARDING A TELECOMMUNICATION UTILITY USERS' TAX**

**THE PEOPLE OF THE CITY OF POMONA, CALIFORNIA DO ORDAIN AS FOLLOWS:**

**SECTION 1.** That Chapter 50, Article V, Sections 50-201, 50-202 and 50-203 of the City of Pomona is hereby amended to read as follows:

**Sec. 50-201. Definitions.**

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) "Ancillary telecommunication services" means services that are associated with or incidental to the provision, use or enjoyment of telecommunications services, including but not limited to the following services:

(1) "Conference bridging service" means an ancillary service that links two or more participants of an audio or video conference call and may include the provision of a telephone number. Conference bridging service does not include the telecommunications services used to reach the conference bridge.

(2) "Detailed telecommunications billing service" means an ancillary service of separately stating information pertaining to individual calls on a customer's billing statement.

(3) "Directory assistance" means an ancillary service of providing telephone number information, and/or address information.

(4) "Vertical service" means an ancillary service that is offered in connection with one or more telecommunications services, which offers advanced calling features that allow customers to identify callers and to manage multiple calls and call connections, including conference bridging services.

(5) "Voice mail service" means an ancillary service that enables the customer to store, send or receive recorded messages. Voice mail service does not include any vertical services that the customer may be required to have in order to utilize the voice mail service.

(b) "Ancillary video services" means services that are associated with or incidental to the provision or delivery of video services, including but not limited to electronic program guide services, recording services, search functions, or other interactive services or communications that are associated with or incidental to the provision, use or enjoyment of video services.

(c) "Billing Address" means the mailing address of the service user where the service supplier submits invoices or bills for payment by the customer.

(d) "City" means the City of Pomona.

- (e) "City Manager" means the City Manager or his or her authorized representative.
- (f) "Internet Access" means the service of providing the initial access to the internet and the data services it provides, whether by dial-up, broadband, cable, model, or other technology, but does not mean telephone communications services using internet technology (such as voice of internet protocol services) provided to one who otherwise has internet access.
- (g) "Mobile Telecommunications Service" has the same meaning and usage as set forth in the Mobile Telecommunications Sourcing Act (4 U.S.C. Section 124) and the regulations thereunder.
- (h) "Paging service" means a "telecommunications service" that provides transmission of coded radio signals for the purpose of activating specific pagers; such transmissions may include messages and/or sounds.
- (i) "Person" means, without limitation, any natural individual, firm, trust, common law trust, estate, partnership of any kind, association, syndicate, club, joint stock company, joint venture, limited liability company, corporation (including foreign, domestic, and nonprofit), municipal district or municipal corporation (other than the City) cooperative, receiver, trustee, guardian, or other representative appointed by order of any court.
- (j) "Place of Primary Use" means the street address representative of where the customer's use of the telecommunications service primarily occurs, which must be the residential street address or the primary business street address of the customer.
- (k) "Post-paid telecommunication service" means the telecommunication service obtained by making a payment on a telecommunication-by-telecommunication basis either through the use of a credit card or payment mechanism such as a bank card, travel card, credit card, or debit card, or by charge made to a service number which is not associated with the origination or termination of the telecommunication service.
- (l) "Prepaid telecommunication service" means the right to access telecommunication services, which must be paid for in advance and which enables the origination of telecommunications using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.
- (m) "Private telecommunication service" means a telecommunication service that entitles the customer to exclusive or priority use of a telecommunications channel or group of channels between or among termination points, regardless of the manner in which such channel or channels are connected, and includes switching capacity, extension lines, stations, and any other associated services that are provided in connection with the use of such channel or channels. A telecommunications channel is a physical or virtual path of telecommunications over which signals are transmitted between or among customer channel termination points (i.e., the location where the customer either inputs or receives the telecommunications).

- (n) "Service Address" means either:
- (1) The location of the service user's telecommunication equipment from which the telecommunication originates or terminates, regardless of where the telecommunication is billed or paid; or,
  - (2) If the location in subsection (1) of this definition is unknown (e.g., mobile telecommunications service or VoIP service), the service address means the location of the service user's place of primary use.
  - (3) For prepaid telecommunication service, "service address" means the location associated with the service number or, if not known, the point of sale of the services.
- (o) "Service Supplier" means any entity or person, including the City, that provides telecommunication service to a user of such service within the City. The term includes any entity or person required to collect, or self-collect tax under this Article and to remit such tax imposed by this Chapter, including the billing agent of such an entity or person in the case of electric, gas, water or telecommunication service suppliers.
- (p) "Service User" means a person required to pay a tax imposed under the provisions of this Chapter.
- (q) "State" means the State of California.
- (r) "Streamlined Sales and Use Tax Agreement" means the multi-state agreement commonly known and referred to as the Streamlined Sales and Use Tax Agreement, as it is amended from time to time.
- (s) "City Treasurer" means the City Treasurer of the City or his or her designee.
- (t) "Telecommunications services" means the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points, whatever the technology used, whether such transmission, conveyance, or routing occurs by wire, cable, fiber-optic, light wave, laser, microwave, radio wave, (including but not limited to, cellular service, commercial mobile service, personal communications service (PCS), specialized mobile radio (SMR), and other types of personal wireless service (see 47 USCA section 332(c)(7) (C)(i)) regardless of radio spectrum used), switching facilities, satellite or any other technology now existing or developed after the adoption of this ordinance, and includes without limitation, fiber optic, coaxial cable, and wireless. The term "telecommunications services" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such services are referred to as voice over internet protocol (VoIP) services or are classified by the Federal Telecommunications Commission as enhanced or value added, and includes video and/or data services that is functionally integrated with "telecommunication services". "Telecommunications services" include, but are not limited to the following services, regardless of the manner or basis on which such services are calculated or billed: ancillary telecommunication services; ancillary video services; intrastate, interstate, and international telecommunication services; central office and custom calling features (including but not limited to call waiting, call forwarding, caller identification and three-way calling), local number portability, text messaging, instant messaging, mobile telecommunications

service; connection, reconnection, termination, movement, or change of telecommunication services; late payment fees; access and line charges; universal service charges; regulatory, administrative and other cost recovery charges; local number portability charges; prepaid telecommunication service (to the extent that it is practicable for the service supplier to collect the correct tax imposed under this Chapter from the service supplier), including but not limited to prepaid calling cards; post-paid telecommunication service; private telecommunication service; paging service; 800 service (or any other toll-free numbers designated by the Federal Telecommunications Commission); 900 service (or any other similar numbers designated by the Federal Telecommunications Commission for services whereby subscribers who call in to prerecorded or live service); or value-added non-voice data service. For purposes of this section, “private telecommunication service” means any dedicated telephone communications service that entitle a user to exclusive or private use of communications channels. Nothing in the definition of Telecommunications Services is intended to include charges for Internet Access within the scope of taxable charges for telecommunications services under this Article.

(u) “VoIP (voice over internet protocol)” means the digital process of making and receiving real-time voice transmissions over any Internet Protocol network.

(v) “800 service” means a “telecommunications service” that allows a caller to dial a toll free number without incurring a charge for the call. The service is typically marketed under the name “800”, “855”, “866”, “877”, and “888” toll-free calling, and any subsequent numbers designated by the Federal Communications Commission.

(w) “900 service” means an inbound toll “telecommunications service” purchased by a subscriber that allows the subscriber’s customers to call in to the subscriber’s prerecorded announcement or live service. “900 service” does not include the charge for: collection services provided by the seller of the “telecommunications services” to the subscriber, or service or product sold by the subscriber to the subscriber’s customer. The service is typically marketed under the name “900” service, and any subsequent numbers designated by the Federal Communications Commission.

(x) *Small business* means 50 or less employees.

#### **Sec. 50-202. Constitutional exemptions.**

(a) Nothing in this article shall be construed as imposing a tax upon any person when imposition of such tax upon that person would be in violation of the Constitution of the United States or that of the state.

(b) Any service user that is exempt from the tax imposed by this Chapter pursuant to subsection (a) of this section shall file an application with the City Treasurer for an exemption; provided, however, this requirement shall not apply to a service user that is a state or federal agency or subdivision with a commonly recognized name for such service. Said application shall be made upon a form approved by the City Treasurer and shall state those facts, declared under penalty of perjury, which qualify the applicant for an exemption, and shall include the names of all telecommunication and video service suppliers serving that service user. If

deemed exempt by the City Treasurer, such service user shall give the City Treasurer timely written notice of any change in telecommunication service suppliers so that the City Treasurer can properly notify the new telecommunication service supplier of the service user's tax exempt status. A service user that fails to comply with this section shall not be entitled to a refund of telecommunication users' taxes collected and remitted to the City Treasurer from such service user as a result of such noncompliance. The decision of the City Treasurer may be appealed by filing an application with the City Treasurer and appeal to the City Manager as a prerequisite to a suit thereon.

(c) The City Council may, by resolution, establish one or more classes of persons or one or more classes of utility service otherwise subject to payment of a tax imposed by this Chapter and provide that such classes of persons or service shall be exempt, in whole or in part from such tax for a specified period of time.

#### **Sec. 50-203. Telecommunication Utility Users' Tax.**

(a) There is hereby imposed a tax upon every person in the City using telecommunication services, including services for intrastate, interstate, or international calls billed to a customer with a Service Address within the City's tax jurisdiction ("Telecommunication Utility Users' Tax") to the extent permitted by federal and state law. Interstate calls shall be deemed to include calls to all districts, territories and possessions of the United States, including the District of Columbia. The term "charges," as used in this section, includes charges made for (i) telephone service; (ii) minimum charges for service, including customer charges, demand charges, standby charges, and annual and monthly charges, and (iii) the value of any other services, credits, property of every kind or nature, or other consideration provided by the service user in exchange for the telecommunication services provided. Telecommunication Utility Users' Tax is intended to, and does, apply to all charges within the City's tax jurisdiction, such as charges billed to a telephone account having a situs in the City as permitted by the Mobile Telecommunications Sourcing Act of 2000, 4 U.S.C section 116, *et seq.* The tax imposed by this section shall be as follows:

- (1) Residential users: nine percent, effective January 1, 1997.
- (2) Commercial/industrial users: nine percent, effective January 1, 1997.

There is a rebuttable presumption that telecommunication services, which are billed to a billing or service address in the City, are used, in whole or in part, within the City's boundaries, and such services are subject to taxation under this Chapter. If the billing address of the service user is different from the service address, the service address of the service user shall be used for purposes of imposing the tax. As used in this Section, the term "charges" shall include the value of any other services, credits, property of every kind or nature, or other consideration provided by the service user in exchange for the telecommunication services.

(b) The City Treasurer may issue and disseminate to telecommunication service suppliers, which are subject to the tax collection requirements of this Chapter,

sourcing rules for the taxation of other telecommunication services, including but not limited to postpaid telecommunication services, prepaid telecommunication services, and private telecommunication services, provided that such rules are based upon custom and common practice that further administrative efficiency and minimize multi-jurisdictional taxation.

(c) To prevent actual multi-jurisdictional taxation of telecommunication services subject to tax under this section, any service user, upon proof to the City Treasurer that the service user has previously paid the same tax in another state or local jurisdiction on such telecommunication services, shall be allowed a credit against the tax imposed to the extent of the amount of such tax legally imposed in such other state or local jurisdiction; provided, however, the amount of credit shall not exceed the tax owed to the City under this section.

(d) Exemptions.

(1) As used in this section, the term "charges" shall not include charges for services paid for by inserting coins in coin-operated telephones, except that where such coin-operated telephone service is furnished for a guaranteed amount, the amounts paid under such guarantee plus any fixed monthly or other periodic charge shall be included in the base for computing the amount of tax due.

(2) No tax shall be imposed under this section, except with respect to local telephone service, on any payment received from any person for services used in the collection of news for the public press, or a news ticker service furnishing a general news service similar to that of the public press, or radio broadcasting, or in the dissemination of news through the public press, or a news ticker service furnishing a general news service similar to that of the public press, or by means of radio broadcasting, if the charge for such service is billed in writing to such person.

(3) No tax shall be imposed under this section on any payment received for services furnished to an international organization designated under the International Organizations Immunities Act, and defined in 22 U.S.C section 288, or to the American National Red Cross.

(4) No tax shall be imposed under this section on any payment received for any toll telephone service which originates within a combat zone, as defined in Section 112 of Title 26 of the United States Code, from a member of the Armed Forces of the United States performing service in such combat zone, as determined under Section 112 of Title 26 of the United States Code.

(5) Only one payment of tax under this section shall be required with respect to the tax on any service, notwithstanding the lines or stations of one or more persons are used in furnishing such service.

(6) No tax shall be imposed under this section on the amount paid for any toll telephone service described in Sec. 4252(b)(2) of Title 26 of the United States Code to the extent that the amount so paid is for use by a common carrier, telephone or telegraph company, or radio broadcasting station or network in the conduct of its business as such.

(7) No tax shall be imposed under this section on so much of any amount paid for the installation of any instrument, wire, pole, switchboard, apparatus, or equipment as is properly attributable to such installation.

(8) No tax shall be imposed under this section on any amount paid by a nonprofit hospital for services furnished to such organization. For purposes of this exemption, the term "nonprofit hospital" means a hospital referred to in Section 170(b)(1)(A)(iii) of Title 26 of the United States Code which is exempt from federal income tax under Section 501(a) of Title 26 of the United States Code.

(9) No tax shall be imposed under this section upon any payment received for services or facilities furnished to the government of any State, or any political subdivision thereof, or the District of Columbia.

(10) No tax shall be imposed under this section on any amount paid by a nonprofit educational organization for services or facilities furnished to such organization. For purposes of this exemption, the term "nonprofit educational organization" means an educational organization described in Section 170(b)(1)(A)(ii) of Title 26 of the United States Code which is exempt from federal income tax under Section 501(a) of Title 26 of the United States Code. The term also includes a school operated as an activity of an organization described in Section 501(c)(3) of Title 26 of the United States Code which is exempt from federal income tax under Section 501(a) of Title 26 of the United States Code, if such school normally maintains a regular facility and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

(e) The tax imposed in this section shall be collected from the service user by the person providing the telecommunication services. The amount of tax collected in the month must be received by the City Treasurer on or before the 20th day of the following month. The duty to collect the tax based on a measure including charges for interstate and international telecommunication services shall commence with the first regular billing period of each service user ending on or after the effective date of the ordinance from which this section is derived.

The City Treasurer may consider state-wide interpretative rules and guidelines as a factor in determining the intent of voters adopting this section. To the extent that the City Treasurer determines that the tax imposed under this section shall not be collected in full for any period of time, and such administrative ruling falls within the City Treasurer's discretion to settle disputes, the City Treasurer's exercise of prosecutorial forbearance under this Chapter does not constitute a change in taxing methodology for purposes of Government Code section 53750(h), and the City does not waive or abrogate its ability to impose the Telecommunication Utility Users' Tax in full as a result of issuing such administrative rulings and may suspend such rulings and recommence collection of the tax without additional voter approval.

(f) To prevent actual multiple taxation of any service that is subject to tax under Subsection (a) of this section and which consists of a call that originates or terminates outside of the City, any service user, upon proof that such service user has paid a tax in another taxing jurisdiction of the United States on such call, shall

be allowed a credit against the tax imposed in Subsection (a) of this section to the extent of the amount of such tax properly due and paid in such other taxing jurisdiction of the United States. However, no credit may be allowed for any tax paid to another taxing jurisdiction on any call to the extent that such call may not, under the Constitution and statutes of the United States, be made the subject of taxation by such other taxing jurisdiction of the United States. For purposes of imposing a tax or establishing a duty to collect and remit a tax under this Chapter, “substantial nexus” and “minimum contacts” shall be construed broadly in favor of the imposition, collection and/or remittance of the Telecommunication Utility Users’ Tax to the fullest extent permitted by state and federal law, and as it may change from time to time by judicial interpretation or by statutory enactment. Any telecommunication service (including VoIP) used by a person with a service address in the City, which service is capable of terminating a call to another person on the general telephone network, shall be subject to a rebuttable presumption that “substantial nexus/minimum contacts” exists for purposes of imposing a tax, or establishing a duty to collect and remit a tax, under this Chapter. A service supplier shall be deemed to have sufficient activity in the City for tax collection and remittance purposes if its activities include, but are not limited to, any of the following: maintains or has within the City, directly or through an agent or subsidiary, a place of business of any nature; solicits business in the City by employees, independent contractors, resellers, agents or other representatives; solicits business in the City on a continuous, regular, seasonal or systematic basis by means of advertising that is broadcast or relayed from a transmitter with the City or distributed from a location with the City; or advertises in newspapers or other periodicals printed and published within the City or through materials distributed in the City by means other than the United States mail; or if there are activities performed in the City on behalf of the service supplier that are significantly associated with the service supplier’s ability to establish and maintain a market in the City for the provision of telecommunication services that are subject to the Telecommunications Utility Users’ Tax.

(g) If any nontaxable charges are combined with and not separately stated from taxable service charges on the customer bill or invoice of a service supplier, the combined charge is subject to tax unless the service supplier identifies, by reasonable and verifiable standards, the portions of the combined charge that are nontaxable and taxable through the service supplier’s books and records kept in the regular course of business, and in accordance with generally accepted accounting principles, and not created and maintained for tax purposes. The service supplier has the burden of proving the proper apportionment of taxable and non-taxable charges. If the service supplier offers a combination of taxable and non-taxable services, and the charges are separately stated, then for taxation purposes, the values assigned the taxable and nontaxable services shall be based on its books and records kept in the regular course of business and in accordance with generally accepted accounting principles, and not created and maintained for tax purposes. The service supplier has the burden of proving the proper valuation of the taxable and non-taxable services.



**SECTION 2. Effective Date.** This Chapter shall become effective immediately upon the date that this Ordinance is confirmed and approved by the voters of Pomona at the Special Municipal Election held on November 3, 2009.

**SECTION 3. Amendment or Repeal.** Chapter 50 of Article V of the Pomona City Code may be repealed or amended by the City Council without a vote of the people. However, as required by Chapter XIII C of the California Constitution and Section 1015 of the City Charter, voter approval is required for any amendment provision that would increase the rate of any tax levied pursuant to this Ordinance. The People of the City of Pomona affirm that the following actions shall not constitute an increase in the rate of a tax:

- (1) The restoration of the rate of the tax to a rate that is no higher than that set by this Ordinance, if the City Council has acted to reduce the rate of the tax;
- (2) An action that interprets or clarifies the methodology of the tax, or any definition applicable to the tax, so long as interpretation or clarification (even if contrary to some prior interpretation or clarification) is not inconsistent with the language of this Ordinance;
- (3) The establishment of a class of persons that is exempt or excepted from the tax or the discontinuation of any such exemption or exception (other than the discontinuation of an exemption or exception specifically set forth in this Ordinance); and
- (4) The collection of the tax imposed by this Ordinance, even if the City had, for some period of time, failed to collect the tax.

**SECTION 4. Severability.** If any section, subsection, sentence, clause, phrase, or portion of this Ordinance is for any reason held to be invalid or unenforceable by a court of competent jurisdiction, the remaining portions of this Ordinance shall nonetheless remain in full force and effect. The people hereby declares that they would have adopted each section, subsection, sentence, clause, phrase, or portion of this Ordinance, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or portions of this Ordinance be declared invalid or unenforceable.

**SECTION 5. Execution.** The Mayor is hereby authorized to attest to the adoption of this Ordinance by the voters of the City by signing where indicated below.

**SECTION 6. Majority Approval.** This Ordinance shall be effective only if approved by a majority of the voters voting thereon and shall go into effect ten (10) days after the vote is declared by the City Council.

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I hereby certify that the foregoing Ordinance was PASSED, APPROVED and ADOPTED by the people of the City of Pomona voting on the 3<sup>rd</sup> day of November, 2009.

**ATTEST:**

**CITY OF POMONA:**

\_\_\_\_\_  
Marie Michel Macias, City Clerk

\_\_\_\_\_  
Elliott Rothman, Mayor

**APPROVED AS TO FORM:**

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Arnold M. Alvarez-Glasman, City Attorney