

RESOLUTION NO. 74527

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE CALLING AND GIVING NOTICE OF, ON ITS OWN MOTION, THE SUBMISSION TO THE ELECTORS OF THE CITY OF SAN JOSE, AT THE SPECIAL MUNICIPAL ELECTION TO BE HELD ON NOVEMBER 4, 2008, A BALLOT MEASURE TO REDUCE THE TAX RATE AND TO UPDATE THE CITY'S TELECOMMUNICATIONS USERS TAX

WHEREAS, Charter Section 1600 authorizes the City Council to set the date for a Special Municipal Election; and

WHEREAS, the City Council desires to submit to the electors of the City of San José at a Special Municipal Election a ballot measure proposal to add a new Chapter 4.70 to the Municipal Code to reduce the tax rate and to update the City's telecommunications users tax;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

SECTION 1. A Special Municipal Election is hereby called and ordered to be held in the City of San José on November 4, 2008, for the purpose of voting on a ballot measure proposal to add a new Chapter 4.70 to the Municipal Code to reduce the tax rate and to update the City's telecommunications users tax. The actual language of the proposed new Chapter is attached to this Resolution as Exhibit A.

SECTION 2. The proposed ballot measure will be placed on the ballot for the November 4, 2008 election in the following form:

10% RATE REDUCTION AND UPDATE OF TELECOMMUNICATIONS USERS TAX

Shall an ordinance be adopted to reduce the telecommunications users tax rate from 5% to 4.5%; to update the ordinance and apply the tax equally regardless of technology used; in order to support essential City services, such as police, fire, emergency response, street maintenance, parks and libraries; while maintaining current exemptions; subject to existing audits?

YES	
NO	

SECTION 3. The City Council hereby requests the Board of Supervisors of the County of Santa Clara, California to permit the Registrar of Voters of Santa Clara County to render to the City of San José such services as the City Clerk of the City of San José may request relating to the conduct of the above-described Special Municipal Election with respect to the following matters:

Coordination of election precincts, polling places, voting booths, voting systems and election officers; Printing and mailing of voter pamphlets; Preparation of tabulation of result of votes cast.

SECTION 4. The City Council hereby requests that the Registrar of Voters of the County of Santa Clara consolidate the Special Municipal Election called and ordered to be held on November 4, 2008 with any other election that may be held on that date.

SECTION 5. The City Council hereby authorizes the Board of Supervisors of Santa Clara County, California to canvass the returns of the Special Municipal Election.

SECTION 6. The City Council hereby directs the City Clerk to reimburse the County of Santa Clara in full for any of the above-mentioned services which may be performed by the Registrar of Voters, upon presentation of a bill to the City, with funds already appropriated to the City Clerk for election purposes.

SECTION 7. The City Council hereby directs the City Clerk to take all actions necessary in order to facilitate the Special Municipal Election in the time frame specified herein and comply with provisions of the Elections Code of the State of California, City Charter, Ordinances, Resolutions and Policies with regard to the conduct of the Special Municipal Election.

SECTION 8. Pursuant to Section 12111 of the California Elections Code and Section 6061 of the California Government Code, the City Council hereby directs the City Clerk to (a) cause a synopsis of the proposed measure to be published in the San Jose Mercury News, a newspaper of regular circulation within the City of San José; (b) consolidate the Notice of Measure to be Voted with the Notice of Election into a single notice; (c) cause copies of the proposed measure to be printed in convenient pamphlet form and in type of not less than 10-point; (d) cause copies of that pamphlet to be mailed to each of the qualified electors of the City of San José; and (e) do all other things required by law to submit the specified measure to the electors of the City of San José at the Special Municipal Election, including causing the actual text of the proposed new Municipal Code Chapter 4.70 to be made available in the Office of the City Clerk at no cost and posted on the City Clerk's website.

SECTION 9. Pursuant to Sections 9282 and 9285 of the California Elections Code, the City Council hereby approves the submittal of direct arguments for and against the ballot measure, if any, but determines that rebuttal arguments will not be allowed.

SECTION 10. The City Council hereby directs the City Clerk to transmit a copy of any measure qualifying for placement on the ballot to the City Attorney for preparation of an impartial analysis.

ADOPTED this 5th day of August, 2008, by the following vote:

AYES: CAMPOS, CHIRCO, CHU, CONSTANT, CORTESE,
LICCARDO, NGUYEN, OLIVERIO, PYLE, WILLIAMS,
REED.

NOES: NONE.

ABSENT: NONE.

DISQUALIFIED: NONE.

ATTEST:



LEE PRICE, MMC
City Clerk



CHUCK REED
Mayor

EXHIBIT A

TELECOMMUNICATIONS USERS TAX

BE IT ORDAINED BY THE PEOPLE OF THE CITY OF SAN JOSE:

Title 4 of the San José Municipal Code is hereby amended to add a new Chapter, to be numbered, entitled and to read as follows:

CHAPTER 4.70

TELECOMMUNICATIONS USERS TAX

Part 1

Title and Purpose

4.70.010 Ordinance Title

This Chapter shall be known as the "Telecommunications Users Tax" of the City of San José.

4.70.020 Purpose of Tax and Deposit of Revenues in the General Fund

- A. The purpose of the tax imposed under this Chapter 4.70 is solely for the purpose of raising revenue for general municipal purposes and is not intended for regulation.
- B. All taxes, penalties and interest collected under this Chapter 4.70 shall be deposited in the general fund of the City.

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Part 2

Definitions

4.70.200 Definitions

The definitions set forth in this Part shall govern the application and interpretation of this Chapter.

4.70.210 Ancillary Telecommunication Services

"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:

- A. "Conference bridging service" which 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.
- B. "Detailed telecommunications billing service" which means an ancillary service of separately stating information pertaining to individual calls on a Service User's billing statement.
- C. "Directory assistance" which means an ancillary service of providing telephone number information, and/or address information.
- D. "Vertical service" which means an ancillary service that is offered in connection with one or more Telecommunications Services, which offers advanced calling features that allow Service Users to identify callers and to manage multiple calls and call connections, including conference bridging services.

- E. "Voice mail service" which means an ancillary service that enables the Service User to store, send or receive recorded messages.

4.70.220 Billing Address

"Billing Address" means the mailing address of the Service User where the Service Supplier submits invoices or bills for payment by the Service User.

4.70.230 Day

"Day" means a calendar day.

4.70.240 Director

"Director" means the Director of the Finance Department of the City of San José or such other Director designated by the City Manager to administer this Chapter.

4.70.250 Mobile Telecommunications Service

"Mobile Telecommunications Service" has the meaning and usage as set forth in the Mobile Telecommunications Sourcing Act (4 U.S.C. Section 124) and the regulations established therewith.

4.70.260 Month

"Month" means a calendar month.

4.70.270 Paging Service

"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.

4.70.280 Person

"Person" means, without limitation, any natural individual, organization, 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 non-profit), municipal corporation (other than the City), cooperative, receiver, trustee, guardian, or other representative appointed by order of any court.

4.70.290 Place Of Primary Use

"Place of Primary Use" means the street address representative of where the Service User's use of the Telecommunications Service primarily occurs, which must be the residential street address or the primary business street address of the Service User.

4.70.300 Post-Paid Telecommunication Service

"Post-Paid Telecommunication Service" means the Telecommunications Services 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 Telecommunications Services.

4.70.310 Prepaid Telecommunication Service

"Prepaid Telecommunication Service" means the right to access Telecommunications 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.

4.70.320 Private Telecommunication Service

"Private Telecommunication Service" means a Telecommunications Service that entitles the Service User 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 Service User channel termination points (i.e., the location where the Service User either inputs or receives the telecommunications).

4.70.330 Service Address

"Service Address" means any of the following:

- A. 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,
- B. If the location in Subsection A 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.

- C. For Prepaid Telecommunication Service, the Service Address means the location associated with the service number.

4.70.340 Service Supplier

“Service Supplier” means any Person, including the City, that provides Telecommunications Services to a user of such service within the City.

4.70.350 Service User

“Service User” means a Person required to pay a tax imposed on Telecommunications Services under the provisions of this Chapter.

4.70.360 Telecommunications Services

“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.

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 Communications Commission as enhanced or value added, and includes video and/or data services that are functionally integrated with Telecommunications 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; intrastate, interstate, and international

Telecommunications Services; Mobile Telecommunications Service; Prepaid Telecommunication Service; Post-Paid Telecommunication Service; Private Telecommunication Service; Paging Service; 800 Service; and 900 Service.

4.70.370 Telephone Corporation

"Telephone Corporation" has the same meaning as set forth in Sections 216 and 234 of the California Public Utilities Code, as those sections may be amended from time to time.

4.70.380 VoIP (Voice over Internet Protocol)

"VoIP" or "Voice over Internet Protocol" means the digital process of making and receiving real-time voice transmissions over any internet protocol network.

4.70.390 800 Service

"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.

4.70.400 900 Service

"900 Service" means an inbound toll Telecommunications Service purchased by a subscriber that allows the subscriber's Service Users 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 Service User. The service is typically marketed under the name "900" service, and any subsequent numbers designated by the Federal Communications Commission.

Part 3

Exemptions

4.70.450 Constitutional, Statutory, and Other Exemptions

- A. Exemptions. The tax imposed under this Chapter shall not apply where the Director determines that a Service User or a Telecommunications Service is one of the following:
1. The City;
 2. Telephone Corporation;
 3. Any Person when imposition of a tax imposed by this Chapter upon that Person would be in violation of the Constitution of the United States or that of the State;
 4. The United States or any agency or instrumentality thereof;
 5. International, etc., organizations. On any payment received for Telecommunications Services furnished to an international organization as defined in Section 7701(a)(18) of Title 26 of the United States Code, or to the American National Red Cross;
 6. Service personnel in combat zone. On any payment received for any toll telephone service as defined in Section 4252(b) of Title 26 of the United States Code, 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;

7. Common carriers and communications companies. On any amount paid for any toll telephone service as defined in Section 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;
8. Nonprofit Hospitals. On any amount paid by a nonprofit hospital for Telecommunications Services furnished to such organization. For purposes of this Subsection, 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. State and local governments. On any payment received for Telecommunications Services or facilities furnished to the government of any state, or any political subdivision thereof, or the District of Columbia;
10. Nonprofit educational organizations. On any amount paid by a nonprofit educational organization for Telecommunications Services or facilities furnished to such organization. For purposes of this subsection, 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 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 faculty 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;

11. Qualified blood collector organizations. On any amount paid by a qualified blood collector organization as defined in Section 7701(a)(49) of Title 26 of the United States Code for Telecommunications Services or facilities furnished to such organization;
12. Certain coin-operated service. On any payment received from any Person for services paid for by inserting coins in coin-operated telephones available to the public except where 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;
13. Installation charges. 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;
14. News Services. Except with respect to local telephone service as defined in Section 4252(a) of Title 26 of the United States Code, 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; or
15. Any Person otherwise exempted by this Chapter from payment of a tax imposed by this Chapter.

B. Filing Exemption Application. Except those Persons determined to be exempt pursuant to the rules and regulations adopted by the Director, no exemption shall

be granted by the Director unless an application in writing, stating under penalty of perjury the specific grounds for the exemption, is filed with the Director. The application shall be submitted on a form furnished by the Director.

- C. Proof Required. No exemption shall be granted by the Director unless the applicant establishes to the satisfaction of the Director a right thereto by written records demonstrating entitlement.
- D. Determined by the Director. Within a reasonable time following receipt of a properly completed application, the Director shall notify the applicant in writing of the Director's determination on exemption. In the event of approval, the Director shall also give written notice to the applicant's Service Supplier.
- E. Action by Service Supplier(s). If the Director grants an exemption to a Service User, the Service Supplier(s) shall discontinue collecting taxes imposed by this Chapter from the Service User within sixty (60) Days of receipt of the Director's written notice.
- F. Refund. In the event a Service User who has paid the tax is granted an exemption, that Service User may apply for a refund of the tax paid under Section 4.70.700.
- G. Finality. Any decision of the Director made under this Section shall be final.

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Part 4

Imposition and Collection of the Tax

4.70.500 Telecommunications Users Tax

- A. Establishment of Telecommunications Users Tax. There is hereby imposed a tax upon every Person with a Billing Address or Service Address in the City using Telecommunications Services, including intrastate, interstate, or international Telecommunications Services, and which is referred to in this Chapter as the Telecommunications Users Tax or the tax. The maximum tax imposed shall be at the rate of four and one-half percent (4.50%) of the charges made for such services and shall be collected from the Service User by the Service Supplier or its billing agent. There is a rebuttable presumption that Telecommunications Services, which are billed to a Billing Address 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 Telecommunications Services.
- B. Sourcing Rules. Mobile Telecommunications Service shall be sourced in accordance with the sourcing rules set forth in the Mobile Telecommunications Sourcing Act (4 U.S.C. Section 124). The Director may issue and disseminate to Service Suppliers, which are subject to the tax collection requirements of this Chapter, sourcing rules for the taxation of other Telecommunications Services, including but not limited to Post-Paid 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. Authority for Administrative Rulings. The Director may issue and disseminate to Service Suppliers, which are subject to the tax collection requirements of this Chapter, one or more administrative rulings identifying those Telecommunications Services, or charges therefore, that are subject to or not subject to the Telecommunications Users Tax.
- D. Specific Inclusions in Telecommunications Services. As used in this Section, Telecommunications Services shall include, but are not limited to, charges for: connection, reconnection, termination, movement, or change of Telecommunications Services; late payment fees; detailed billing; central office and custom calling features (including but not limited to call waiting, call forwarding, caller identification and three-way calling); voice mail and other messaging services; directory assistance; access and line charges; universal service charges; regulatory, administrative and other cost recovery charges; local number portability charges; and text and instant messaging.
- E. Certain Exclusions From Telecommunications Services. As used in this Section, Telecommunications Services shall not include digital downloads that are not Ancillary Telecommunication Services, such as music, ringtones, games, and similar digital products.
- F. Multi-Jurisdictional Taxation. To prevent actual multi-jurisdictional taxation of Telecommunications Services subject to tax under this Chapter, any Service User, upon proof to the Director that the Service User has previously paid the same tax in another state or local jurisdiction on such Telecommunications 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 Chapter.

G. Collection of Tax by Service Supplier. The tax on Telecommunications Services imposed by this Chapter shall be collected from the Service User by the Service Supplier. The amount of tax collected in one (1) Month shall be remitted by the Service Supplier to the Director, and must be received by the Director on or before the twenty-fifth (25th) Day of the following Month.

H. Quarterly Remittance of Tax by Service Supplier.

1. A Service Supplier may elect to remit the taxes to the Director on a quarterly basis if the annual amount of taxes collected is less than one hundred thousand dollars (\$100,000).
2. A Service Supplier who qualifies under this subsection is not authorized to remit taxes on a quarterly basis until it has first completed the necessary application forms provided by the Director and the Director has approved the Service Supplier's application for quarterly remittance.
3. A Service Supplier authorized to remit taxes on a quarterly basis shall do so on or before the twenty-fifth (25th) Day of the Month following the end of a calendar quarter.

4.70.510 Bundling Taxable Items with Non-Taxable Items

If any nontaxable charges are combined with and not separately stated from taxable service charges on the Service User's bill or invoice of a Service Supplier, the combined charge is subject to tax unless the Service Supplier or Service User 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 or Service User has the burden of proving the proper apportionment of taxable and

nontaxable charges. If the Service Supplier offers a combination of taxable and nontaxable 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 or Service User has the burden of proving the proper valuation of the taxable and nontaxable services.

4.70.520 Substantial Nexus / Minimum Contacts

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 Telecommunications Users Tax imposed under this Chapter 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 Telecommunications 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 the tax, or establishing a duty to collect and remit the 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 Telecommunications Services that are subject to the tax under this Chapter.

4.70.530 Duty to Collect – Procedures

- A. Manner of Collection by Service Suppliers. The duty of Service Suppliers to collect and remit the taxes imposed by the provisions of this Chapter shall be performed as follows:
1. The tax shall be collected by Service Suppliers insofar as practicable at the same time as, and along with, the collection of the charges made in accordance with the regular billing practice of the Service Supplier. Where the amount paid by a Service User to a Service Supplier is less than the full amount of the charge and tax which was accrued for the billing period, a proportionate share of both the charge and the tax shall be deemed to have been paid. In those cases where a Service User has notified the Service Supplier of refusal to pay the tax imposed on said charges, Section 4.70.580 shall apply.
 2. The duty of a Service Supplier to collect the tax from a Service User shall commence with the beginning of the first regular billing period applicable to the Service User where all charges normally included in such regular billing are subject to the provisions of this Chapter. Where a Service User receives more than one billing, one or more being for different periods than another, the duty to collect shall arise separately for each billing period.
- B. Filing Return and Payment. Each Person required by this Chapter to collect the Telecommunications Users Tax and remit payment of the collected taxes to the City shall file a return with the Director, on forms approved by the Director, on or before the due date. The full amount of the tax collected shall be included with the

return and filed with the Director. The Director is authorized to require such additional information as he or she deems necessary to determine if the tax is being levied, collected, and remitted in accordance with this Chapter. Returns are due immediately upon cessation of business for any reason.

4.70.540 Collection Penalties – Service Suppliers

- A. Due Date for Taxes; Delinquencies. Taxes collected from a Service User are delinquent if not received by the Director on or before the due date. Should the due date occur on a weekend or legal holiday, the return must be received by the Director on the first regular working day following the weekend or legal holiday. A direct deposit, including electronic fund transfers and other similar methods of electronically exchanging monies between financial accounts, made by a Service Supplier in satisfaction of its obligations under this subsection shall be considered timely if the transfer is initiated on or before the due date, and the transfer settles into the City's account on the following business day.
- B. Failure to Collect or Remit. If the Person required to collect and/or remit the Telecommunication Users Tax fails to collect the tax (by failing to properly assess the tax on one or more services or charges on the Service User's billing) or fails to remit the tax collected on or before the due date, the Director shall attach a first penalty of ten percent (10%) of the amount of the delinquent remittance in addition to the delinquent remittance, and a second penalty of ten percent (10%) of the amount of the delinquent remittance in addition to the delinquent remittance and the first penalty, if the delinquent remittance is not paid on or before thirty (30) Days following its due date, and shall pay interest on the delinquent remittance and all penalties assessed thereon, at the rate set forth in Chapter 1.17 of Title 1, until paid.
- C. Penalties for Fraud or Gross Negligence in Reporting or Remitting. The Director shall have the power to impose additional penalties upon Persons required to

collect and remit taxes pursuant to the provisions of this Chapter for fraud or gross negligence in reporting or remitting at the rate of twenty-five percent (25%) of the amount of the tax collected and/or required to be remitted, or as recomputed by the Director.

- D. Penalties Dues As Tax. For collection purposes only, every penalty imposed and such interest that is accrued under the provisions of this Section shall become a part of the tax herein required to be paid.
- E. Authority to Modify Due Dates. Notwithstanding the foregoing, the Director may, in his or her discretion, modify the due dates for remittance of the tax imposed by this Chapter.

4.70.550 Actions to Collect

Any tax required to be paid by a Service User under the provisions of this Chapter shall be deemed a debt owed by the Service User to the City. Any such tax collected from a Service User which has not been remitted to the Director shall be deemed a debt owed to the City by the Person required to collect and remit the tax and shall no longer be a debt of the Service User. Any Person owing money to the City under the provisions of this Chapter shall be liable in an action brought in the name of the City for the recovery of such amount, including penalties and interest as provided for in this Chapter, along with any collection costs incurred by the City as a result of the Person's noncompliance with this Chapter, including, but not limited to, reasonable attorneys' fees. Any tax required to be collected by a Service Supplier or owed by a Service User is an unsecured priority excise tax obligation under 11 U.S.C. Section 507(a)(8)(C).

4.70.560 Bankruptcies and Refusals

- A. Service Suppliers who seek to collect charges for service in bankruptcy proceedings shall also include in any such claim the amount of taxes due City for

those services, unless the Director determines that such duty is in conflict with any federal or State law, rule, or regulation or that such action would be administratively impractical.

- B. All Service Suppliers not required to collect taxes in connection with pursuit of claims for service charges in bankruptcy proceedings pursuant to Subsection A above shall notify the Director in writing within forty-five (45) Days after receipt of notice that a Service User has initiated bankruptcy proceedings.
- C. All Service Suppliers who do not seek to collect charges for service in bankruptcy proceedings shall notify the Director in writing within forty-five (45) Days after receipt of notice that a Service User has initiated bankruptcy proceedings.
- D. All Service Suppliers who receive notice of a Service User's refusal to pay shall notify the Director in writing within forty-five (45) Days after receipt of such notice.
- E. All Persons who have notified the Director of a refusal or bankruptcy proceeding under subsections B, C, and D above shall be relieved of the duty to collect and remit any tax owed by the Service User.

4.70.570 Deficiency Determination and Assessment – Tax Application Errors

- A. Tax Deficiency Determinations. The Director shall make a deficiency determination if he or she determines that any Service User or Service Supplier required to pay or collect taxes pursuant to the provisions of this Chapter has failed to pay, collect, and/or remit the proper amount of tax by improperly or failing to apply the tax to one or more taxable services or charges. Nothing herein shall require that the Director institute proceedings under this Section 4.70.570 if, in the opinion of the Director, the cost of collection or enforcement likely outweighs the tax benefit to the City.

- B. Notice of Deficiency. The Director shall mail a notice of such deficiency determination to the Person allegedly owing the tax, which notice shall refer briefly to the amount of the taxes owed, plus interest on the amount of the tax from the date on which the tax should have been received by the City. Within fifteen (15) Days of the date of mailing of such notice, the Person allegedly owing the tax may request in writing to the Director for a hearing on the matter.
- C. Hearing on Deficiency. If the Person allegedly owing the tax fails to request a hearing within the prescribed time period, the amount of the deficiency determination shall become a final assessment, and shall immediately be due and owing to the City. If such Person requests a hearing, the Director shall cause the matter to be set for hearing. Notice of the time and place of the hearing shall be mailed by the Director to such Person at least five (5) Days prior to the hearing, and, if the Director desires said Person to produce specific records at such hearing, such notice may designate the records requested to be produced.
- D. Determination after Hearing. At the time fixed for the hearing, the Director shall hear all relevant testimony and evidence, including that of any other interested parties, why the assessed amount should not be fixed. At the discretion of the Director, the hearing may be continued from time to time for the purpose of allowing the presentation of additional evidence. Within a reasonable time following the conclusion of the hearing, the Director shall issue a final assessment (or non-assessment), thereafter, by confirming, modifying or rejecting the original deficiency determination, and shall mail a copy of such final assessment to the Person owing the tax. The decision of the Director may be appealed pursuant to Section 4.70.710 of this Chapter. Filing an application with the Director and appeal to the City Manager pursuant to Section 4.70.710 of this Chapter is a prerequisite to a suit thereon.
- E. Payment Due. Payment of the final assessment shall be due and payable to the City on or before the fifteenth (15th) Day following the date of mailing of the notice

of final assessment by the Director, unless an appeal is taken as provided in Subsection D above.

- F. Notice of Delinquency. All notices under this Section may be sent by regular mail, postage prepaid.

4.70.580 Administrative Remedy – Non-Paying Service Users

- A. Administrative Remedies for the Obligation to Collect Tax. Whenever the Director determines that a Service User has deliberately withheld the amount of the tax owed by the Service User from the amounts remitted to a Person required to collect the tax, or whenever the Director deems it in the best interest of the City, he or she may relieve such Person of the obligation to collect the taxes due under this Chapter from certain named Service Users for specific billing periods. To the extent the Service User has failed to pay the amount of tax owed for a period of two (2) or more billing periods, the Service Supplier shall be relieved of the obligation to collect taxes due. The Service Supplier shall provide the City with the names and addresses of such Service Users and the amounts of taxes owed under the provisions of this Chapter. Nothing herein shall require that the Director institute proceedings under this Section if, in the opinion of the Director, the cost of collection or enforcement likely outweighs the tax benefit to the City.
- B. Delinquency Penalty. In addition to the tax owed, the Service User shall pay a first penalty of ten percent (10%) of the amount of the delinquent remittance in addition to the delinquent remittance, and a second penalty of ten percent (10%) of the amount of the delinquent remittance in addition to the delinquent remittance and the first penalty, if the delinquent remittance in addition to the first penalty is not paid on or before thirty (30) Days following its due date, and shall pay interest on the delinquent remittance and all penalties assessed thereon at the rate set forth in Chapter 1.17 of Title 1, until paid.

C. Notice to Non-Paying Service User. The Director shall notify the non-paying Service User that the Director has assumed the responsibility to collect the taxes due for the stated periods and demand payment of such taxes, including penalties and interest. The notice shall be served on the Service User by personal delivery or by deposit of the notice in the United States mail, postage prepaid, addressed to the Service User at the address to which billing was made by the Person required to collect the tax; or, should the Service User have a change of address, to his or her last known address.

D. Additional Penalties.

1. If the Service User fails to pay the delinquent tax to the Director on or before the fifteenth (15th) Day from the date of mailing of the Director's notice, the Service User shall pay a first penalty of ten percent (10%) of the amount of the delinquent tax or ten dollars (\$10.00), whichever amount is greater, in addition to the delinquent tax.
2. If the Service User fails to pay the delinquent tax to the Director on or before the forty-fifth (45th) Day from the date of mailing of the Director's notice, the Service User shall pay a second penalty of ten percent (10%) of the amount of the delinquent tax or ten dollars (\$10.00), whichever amount is greater, in addition to the delinquent tax and the first penalty.
3. Any Service User who fails to pay the delinquent tax on or before the time specified in the Director's notice shall pay interest, at the rate set forth in Chapter 1.17 of Title 1, on the delinquent tax and on any penalty or penalties, until paid.

4.70.590 Additional Powers and Duties of the Director

- A. Administrative Regulations Regarding Payment. The Director may adopt administrative rules and regulations consistent with provisions of this Chapter for the purpose of interpreting, clarifying, carrying out and enforcing the payment, collection and remittance of the taxes herein imposed. The administrative rules and regulations shall not impose a new tax, revise an existing tax methodology as stated in this Section, or increase an existing tax, except as allowed by California Government Code Section 53750(h)(2). The Director shall hold a public hearing and allow public comment on any proposed rule or regulation prior to adoption thereof. The Director shall provide not less than ten (10) Days' notice of such public hearing. A copy of such administrative rules and regulations shall be on file in the Director's office. To the extent that the Director determines that the tax imposed under this Chapter shall not be collected in full for any period of time from any particular Service Supplier or Service User, that determination shall be considered an exercise of the Director's discretion to settle disputes and shall not constitute a change in taxing methodology for purposes of Government Code Section 53750 or otherwise. The Director is not authorized to amend the City's methodology for purposes of Government Code Section 53750 and the City does not waive or abrogate its ability to impose the Telecommunications Users Tax in full as a result of promulgating administrative rulings or entering into agreements with Service Suppliers or Service Users. Failure or refusal to comply with any rules and regulations promulgated by the Director shall be deemed a violation of this Chapter.
- B. Administrative Agreements Regarding Billing Procedures. Upon a proper showing of good cause, the Director may enter into administrative agreements, with appropriate conditions, to vary from the strict requirements of this Chapter and thereby: (1) conform to the billing procedures of a particular Service Supplier so long as said agreements result in the collection of the tax in conformance with the general purpose and scope of this Chapter; or (2) to avoid a hardship where the

administrative costs of collection and remittance greatly outweigh the tax benefit to the City. A copy of each such agreement shall be on file in the Director's office.

- C. Compliance Audits. The Director may conduct an audit, to ensure proper compliance with the requirements of this Chapter, of any Person required to collect and/or remit a tax pursuant to this Chapter. The Director shall notify said Person of the initiation of an audit in writing. Upon completion of the audit, the Director may make a deficiency determination pursuant to Section 4.70.570D of this Chapter for all taxes (and applicable penalties and interest) owed and not paid, as evidenced by information provided by such Person to the Director. If said Person is unable or unwilling to provide sufficient records to enable the Director to verify compliance with this Chapter, the Director is authorized to make a reasonable estimate of the deficiency. Said reasonable estimate shall be entitled to a rebuttable presumption of correctness.
- D. Extension of Time. Upon receipt of a written request of a Service Supplier or Service User, and for good cause, the Director may extend the time for filing any statement required pursuant to this Chapter for a period of not to exceed forty-five (45) Days, provided that the time for filing the required statement has not already passed when the request is received. No penalty for delinquent payment shall accrue by reason of such extension. Interest shall accrue during said extension at the rate set forth in Chapter 1.17 of Title 1, until paid.
- E. Waiver of Penalties and Interest. The Director shall waive the first penalty of ten percent (10%) imposed upon a Service Supplier if:
1. The Service Supplier applies to the Director for such a waiver no later than thirty (30) Days from the date the remittance was due to the City; and
 2. The Service Supplier has made timely payments for (a) the five (5) years immediately prior to the date the remittance was due to the City; or (b) the

two (2) years immediately prior to the date the remittance was due to the City if it has supplied, transported, or delivered the service fewer than five (5) years; and

3. The Service Supplier provides evidence satisfactory to the Director that:
 - a. Payment of the delinquent remittance was postmarked or received by the City no more than three (3) Days after its due date; or
 - b. The Service Supplier mistakenly made payment to a party other than the City on or prior to the date that payment was due to the City, and paid the delinquent remittance and accrued interest owed the City prior to applying to the Director for a waiver; or
 - c. Failure to pay timely was due to circumstances beyond the control of the Service Supplier and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, and the Service Supplier paid the delinquent remittance and accrued interest owed the City prior to applying to the Director for a waiver.

- F. The waiver provisions specified in Subsection E shall not apply to interest accrued on the delinquent payments.

4.70.600 Records

- A. Every Service Supplier required to collect and remit to the Director any tax imposed by this Chapter shall keep and preserve for a period of three (3) years from the due date of remittance, all records as may be necessary to determine the amount of any tax such Service Supplier may have collected or been required to remit.

- B. All such records shall be made available for inspection, audit or copying by the City's authorized representatives at any time during regular business hours upon written request by such representatives.
- C. Non-Disclosure Agreements. The Director is authorized to execute a non-disclosure agreement approved as to form by the City Attorney to protect the confidentiality of Service User information pursuant to California Revenue and Tax Code Sections 7284.6 and 7284.7.
- D. Use of Billing Agents. If a Service Supplier uses a billing agent or billing aggregator to bill, collect, and/or remit the tax, the Service Supplier shall: i) provide to the Director the name, address and telephone number of each billing agent and billing aggregator currently authorized by the Service Supplier to bill, collect, and/or remit the tax to the City; and, ii) upon request of the Director, deliver, or effect the delivery of, any information or records in the possession of such billing agent or billing aggregator that, in the opinion of the Director, is necessary to verify the proper application, calculation, collection and/or remittance of such tax to the City.

Part 5

Refunds and Appeals

4.70.700 Refunds

A. Filing Claim.

- 1. Any tax imposed by this Chapter, including any interest or penalty added thereto, may be refunded by the Director as provided in Subsections B and C of this Section whenever such tax has been:
 - a. Overpaid;

- b. Paid more than once; or
 - c. Erroneously or illegally collected or received by the City, including any instance where a Service Supplier, pursuant to an order by the California Public Utilities Commission or a court of competent jurisdiction, refunds to its Service Users taxes paid on refunded charges.
 2. No refund shall be paid by the Director unless a written claim for refund is filed with the Director, and the provisions of Chapter 4.82 are satisfied.
- B. Refund or Credit to Service Supplier. A Service Supplier may obtain a refund of or take as a credit against taxes remitted any amount overpaid, paid more than once, or erroneously, or illegally collected or received by the City by filing a claim in the manner provided in Subsection A. The Director shall not grant a refund or a credit to a Service Supplier unless the Service Supplier has refunded the tax to the Service User or credited the tax to charges subsequently payable by the Service User.
- C. Refund to Service User. A Service User may obtain a refund of any tax, interest or penalty by filing a claim in the manner provided in Subsection A when:
 1. The Service User was required to remit directly to the Director a tax imposed by this Chapter and the Service User establishes to the satisfaction of the Director that the amount was overpaid, paid more than once, or erroneously, or illegally collected; or
 2. The Service User establishes that the amount was overpaid, paid more than once, or erroneously or illegally collected and has paid the tax to the Service Supplier but is unable to obtain a refund or credit from the Service Supplier who collected the tax.

4.70.710 Appeals Procedures

- A. Administrative Appeals. The provisions of this Section apply to a final determination by the Director under Section 4.70.570. Any Person aggrieved by such a decision of the Director, shall be required to comply with the appeals procedure of this Section. Compliance with this Section shall be a prerequisite to a suit thereon. Nothing herein shall permit the filing of a claim or action on behalf of a class or group of taxpayers.
- B. Appeal to City Manager. Any Person aggrieved by a decision of the Director pursuant to Section 4.70.570, may appeal to the City Manager by filing a notice of appeal with the City Clerk within fifteen (15) Days of the date of the mailing of the decision by the Director. The City Manager shall fix a time and place for hearing the appeal, and provide not less than five (5) Days' written notice thereof to such Person.
- C. Appeal Hearing. The City Manager shall hear and determine all questions raised on appeal and may affirm, reverse or modify the decision of the Director. The decision of the City Manager shall be final and any amount found to be owing shall be immediately due and payable. The City Clerk shall mail written notice of the City Manager's decision to the Person who brought the appeal.
- D. Manner of Notice. All notices under this Section may be sent by regular mail, postage prepaid.

Part 6
Miscellaneous

4.70.800 Notice Of Changes To Ordinance

If a tax under this Chapter is added, repealed, increased, reduced, or the tax base is changed, the Director shall follow the notice requirements of California Public Utilities Code Section 799.

4.70.810 Effect of State and Federal Reference/Authorization

Unless specifically provided otherwise, any reference to a State or federal statute in this Chapter shall mean such statute as it may be amended from time to time, provided that such reference to a statute herein shall not include any amendment thereto, or to any change of interpretation thereto by a State or federal agency or court of law with the duty to interpret such law, to the extent that such amendment or change of interpretation would, under California law, require voter approval of such amendment or interpretation, or to the extent that such change would result in a tax decrease. To the extent voter approval would otherwise be required or a tax decrease would result, the prior version of the statute (or interpretation) shall remain applicable; for any application or situation that would not require voter approval or result in a decrease of a tax, provisions of the amended statute (or new interpretation) shall be applicable to the maximum possible extent.

To the extent that the City's authorization to collect or impose any tax imposed under this Chapter is expanded as a result of changes in State or federal law, no amendment or modification of this Chapter shall be required to conform the tax to those changes, and the tax shall be imposed and collected to the full extent of the authorization up to the full amount of the tax imposed under this Chapter.

4.70.820 Subject to Existing Annual Audits

Pursuant to Section 1215 of the City's Charter, as may be amended, the revenues from the tax imposed by this Chapter shall be subject to the annual audit performed by the City's independent auditor of the City's municipal books, records, accounts and fiscal procedures and which is reported in the City's Comprehensive Annual Financial Report.

4.70.830 Interaction with Prior Tax

- A. Satisfaction of Tax Obligation by Service Users. Any Person who pays the tax levied pursuant to Section 4.70.500 of this Chapter with respect to any charge for a Telecommunications Service shall be deemed to have satisfied his or her obligation to pay the tax levied pursuant to Section 4.68.080 of this Code with respect to that charge. Likewise, prior to April 1, 2009, any Person who pays the tax levied pursuant to Section 4.68.080 of this Code with respect to any charge for a service subject to taxation pursuant to this Chapter shall be deemed to have satisfied his or her obligation to pay the tax levied pursuant to Section 4.70.500 of this Chapter with respect to that charge. The intent of this paragraph is to prevent the imposition of multiple taxes upon a single utility charge during the transition period from the prior telephone users tax to the new Telecommunications Users Tax (which transition period ends April 1, 2009) and to permit Service Suppliers, during that transition period, to satisfy their collection obligations by collecting either tax.
- B. Collection of Tax by Service Providers. Service Suppliers shall begin to collect the tax imposed by this Chapter as soon as feasible after the effective date of the Chapter, but in no event later than permitted by Section 799 of the California Public Utilities Code.
- C. Judicial Determinations. In the event that a final court order should determine that the election enacting this Chapter 4.70 is invalid for whatever reason, or that any

tax imposed under this Chapter 4.70 is invalid in whole or in part, then the tax imposed under Section 4.68.080 (unless repealed) shall automatically continue to apply with respect to any service for which the tax levied pursuant to this Chapter has been determined to be invalid. Such automatic continuation shall be effective beginning as of the first date of service (or billing date) for which the tax imposed by this Chapter is not valid. However, in the event of an invalidation, any tax (other than a tax that is ordered refunded by the court or is otherwise refunded by the City) paid by a Person with respect to a service and calculated pursuant to this Chapter shall be deemed to satisfy the tax imposed under Section 4.68.080 on that service, so long as the tax is paid with respect to a service provided no later than six (6) Months subsequent to the date on which the final court order is published.

4.70.840 Remedies Cumulative

All remedies and penalties prescribed by this Chapter or which are available under any other provision of law or equity, including but not limited to the California False Claims Act (Government Code Section 12650 et seq.) and the California Unfair Practices Act (Business and Professions Code Section 17070 et seq.), are cumulative. The use of one or more remedies by the City shall not bar the use of any other remedy for the purpose of enforcing the provisions of this Chapter.

4.70.850 Effective Date

This Chapter shall become effective immediately upon the date that this Ordinance is confirmed and approved by the voters of San José at the Statewide general election of November 2008.

4.70.860 Amendment or Repeal

Chapter 4.70 of Title 4 of the San José Municipal Code may be repealed or amended by the City Council without a vote of the people. However, as required by Chapter XIIIIC of the California Constitution, 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 San José affirm that the following actions shall not constitute an increase of the rate of a tax:

- A. 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;
- B. 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;
- C. The establishment of a class of Person 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); or
- D. The collection of the tax imposed by this Ordinance, even if the City had, for some period of time, failed to collect the tax.