Proposed Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services

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Draft – For Discussion Purposes Only

Special rules: Telecommunications and ancillary service providers. The following special rules are established with respect to the apportionment of income from the sale of telecommunications and ancillary services by a person that is taxable both in this state and in one or more other states.

(1) In general A person providing telecommunications or ancillary services whose business activity is taxable both within and without this state shall allocate and apportion its net income as provided in [Article IV of the Multistate Tax Compact or state equivalent] and regulations issued thereunder, exclusive of [Art.IV.2. of the Multistate Tax Compact or state equivalent], except as modified by this special rule.

(2) Definitions.

(i) "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.

Comment [s1]: SS&UT Agreement p. 98

(ii) "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 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.

Comment [s2]: SS&UT Agreement p. 98

(iii) "Air-to-Ground Radiotelephone service" means a radio service, as that term is defined in 47 CFR 22.99, in which common carriers are authorized to offer and provide radio telecommunications service for hire to subscribers in aircraft.

Comment [s3]: SS&UT Agreement p. 28

(iv) "Ancillary service" means services that are associated with or incidental to the provision of telecommunications services, including but not limited to the following subcategories: detailed telecommunications billing, directory assistance, vertical service, conference bridging service and voice mail services.

Comment [s4]: SS&UT Agreement p. 96; conference bridging service was added to the list of included services because the SS&UT definition for conference bridging service identifies it as an ancillary service.

The term “ancillary service” is defined as a broad range of services and is broader than the sum of the subcategories.

Comment [s5]: See SS&UT Agreement p. 96 and p. 100.

(v) “Bundled transaction” means the retail sale of two or more products where (1) the products are otherwise distinct and identifiable, and (2) the products are sold for one non-itemized price. For purposes of this special regulation, a “bundled transaction” does not include the sale of any products in which the “sales price” varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction. A transaction that otherwise meets the definition of a “bundled transaction” is not a “bundled transaction” if it is: (1) the “retail sale” of two products where the first product is essential to the use of the second product, and the first product is provided exclusively in connection with the second, and the true object of the transaction is the second; (2) the “retail sale” of more than one product, but the products are sourced the same under this special rule; or (3) the “retail sale” of more than one product, but the sum of the “purchase price” or “sales price” of products which are sourced differently under this special rule is de minimis.

Comment [s6]: Based on the concepts in SS&UT Agreement pp. 79 and 80. Revisions to this definition are under consideration.

(vi) "Call-by-call Basis" means any method of charging for telecommunications services where the price is measured by individual calls.

Comment [s7]: SS&UT Agreement p. 28

(vii) “Coin-operated telephone service” means a “telecommunications service” paid for by inserting money into a telephone accepting direct deposits of money to operate.

Comment [s8]: SS&UT Agreement p. 99

(viii) “Communications Channel” means a physical or virtual path of communications over which signals are transmitted between or among customer channel termination points.

Comment [s9]: SS&UT Agreement p. 28

(ix) “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.

Comment [s10]: SS&UT Agreement p. 96

(x) "Customer" means the person or entity that contracts with the seller of telecommunications services. If the end user of telecommunications services is not the contracting party, the end user of the telecommunications service is the customer of the telecommunication service. "Customer" does not include a reseller of telecommunications service or for mobile telecommunications service of a serving carrier under an agreement to serve the customer outside the home service provider's licensed service area.

Comment [s11]: SS&UT Agreement p. 28

(xi) "Customer Channel Termination Point" means the location where the customer either inputs or receives the communications.

Comment [s12]: SS&UT Agreement p. 28

(xii) “Detailed telecommunications billing service” means an ancillary service of separately stating information pertaining to individual calls on a customer’s billing statement.

Comment [s13]: SS&UT Agreement p. 96

(xiii) “Directory assistance” means an ancillary service of providing telephone number information, and/or address information.

Comment [s14]: SS&UT Agreement p. 96

(xiv) "End user" means the person who utilizes the telecommunication service. In the case of an entity, “end user” means the individual who utilizes the service on behalf of the entity.

Comment [s15]: SS&UT Agreement p. 28

(xv) “Fixed wireless service” means a telecommunications service that provides radio communication between fixed points.

Comment [s16]: SS&UT Agreement p. 98

(xvi) "Home service provider" means the same as that term is defined in Section 124(5) of Public Law 106-252 (Mobile Telecommunications Sourcing Act).

Comment [s17]: SS&UT Agreement p. 28

(xvii) “International” means a “telecommunications service” that originates or terminates in the United States and terminates or originates outside the United States, respectively. United States includes the District of Columbia or a U.S. territory or possession.

Comment [s18]: SS&UT Agreement p. 99

(xviii) “Interstate” means a “telecommunications service” that originates in one United States state, or a United States territory or possession, and terminates in a different United States state or a United States territory or possession.

Comment [s19]: SS&UT Agreement p. 100

(xix) “Intrastate” means a “telecommunications service” that originates in one United States state or a United States territory or possession, and terminates in the same United States state or a United States territory or possession.

Comment [s20]: SS&UT Agreement p. 100

(xx) "Mobile telecommunications service" means the same as that term is defined in Section 124(7) of Public Law 106-252 (Mobile Telecommunications Sourcing Act).

Comment [s21]: SS&UT Agreement p. 28

(xxi) “Mobile wireless service” means a telecommunications service that is transmitted, conveyed or routed regardless of the technology used, whereby the origination and/or termination points of the transmission, conveyance or routing are not fixed, including, by way of example only, telecommunications services that are provided by a commercial mobile radio service provider.

Comment [s22]: SS&UT Agreement p. 98

(xxii) “Network access service” means the provision by a local exchange telecommunication service provider of the use of its local exchange network by an inter-exchange telecommunication service provider to originate or terminate the inter-exchange telecommunication service provider’s traffic carried to or from a distant exchange.

Comment [s23]: This definition is not included in the SS&UT Agreement.

(xxiii) “Outerjurisdictional property” means tangible personal property, such as orbiting satellites, undersea transmission cables and the like, that are owned or rented by the taxpayer and used in a telecommunications or similar service business, but that are not physically located in any particular state.

(xxiv) “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.

Comment [s24]: SS&UT Agreement p. 98

(xxv) “Pay telephone service” means a telecommunications service provided through any pay telephone.

Comment [s25]: SS&UT Agreement p. 100

(xxvi) "Place of primary use" means the street address representative of where the customer's use of the telecommunications service primarily occurs, which shall be the residential street address or the primary business street address of the customer. In the case of mobile telecommunications services, "place of primary use" shall be within the licensed service area of the home service provider.

Comment [s26]: SS&UT Agreement p. 28

(xxvii) "Post-paid calling service" means the telecommunications service obtained by making a payment on a call-by-call 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 telephone number which is not associated with the origination or termination of the telecommunications service. A post-paid calling service includes a telecommunications service, except a prepaid wireless calling service, that would be a prepaid calling service except it is not exclusively a telecommunication service.

Comment [s27]: SS&UT Agreement p. 29

(xxviii) “Prepaid calling service” means the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls 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.

Comment [s28]: SS&UT Agreement p. 29 and 99

(xxix) “Prepaid wireless calling service” means the sale of a telecommunications service that provides the right to utilize mobile wireless service as well as other non-telecommunications services including the download of digital products delivered electronically, content and ancillary services, which must be paid for in advance that is sold in predetermined units of dollars of which the number declines with use in a known amount.

Comment [s29]: SS&UT Agreement p. 29 and 99

(xxx) “Private communications service” means a telecommunications service that entitles the customer to exclusive or priority use of a communications 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.

Comment [s30]: SS&UT Agreement p. 29 and 99

(xxxi) "Product" means tangible personal property, digital good or service.

(xxxii) "Service address" means:

A. The location of the customer's telecommunications equipment, to which the customer's call is charged, and from which the call originates or terminates, regardless of where the call is billed or paid.

B. If the location in subsection (A) is not known, service address means the origination point of the signal of the telecommunications services first identified by either the seller's telecommunications system or in information received by the seller from its service provider, where the system used to transport such signals is not that of the seller.

C. If the location in subsection (A) and subsection (B) are not known, the service address means the location of the customer's place of primary use.

(xxxiii) "Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. The term "telecommunications service" 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 service is referred to as voice over Internet protocol services or is classified by the Federal Communications Commission as enhanced or value added.

A. The term "telecommunication service" is defined as a broad range of services. The term includes, but is broader than the sum of, the following subcategories: 800 service, 900 service, ~~wireline service,~~ fixed wireless service, mobile wireless service, paging service, prepaid calling service, prepaid wireless calling service, private communication service, value-added non-voice data service, coin-operated telephone service, international telecommunications service, interstate telecommunications service, intrastate telecommunications service, network access service and pay telephone service.

B. The term "telecommunications service" does not include:

1. Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser where such purchaser's primary purpose for the underlying transaction is the processed data or information;

Comment [s31]: Utah Proposed Amendment to add this defintion to SS&UT Agreement

Comment [s32]: SS&UT Agreement p. 29-30

Comment [s33]: SS&UT Agreement p. 97 -98

Comment [s34]: See SS&UT Agreement p. 100.

Comment [s35]: 800 service, 900 service, fixed wireless service, mobile wireless service, paging service, prepaid calling service, prepaid wireless calling service, private communication service, value added non voice data services are listed as types of "telecommunications services" under the SS&UT Agreement p. 98-99. Wireline service was added by the drafter to correspond with the inclusion of wireless services.

Comment [s36]: This draft adds network access service to the SS&UT Agreement definition. Network access service are not in the SS&UT Agreement

Comment [s37]: coin-operated, international, interstate, intrastate, and pay telephone services are listed as "Modifiers of Sales Tax Basee/Exemption Terms" under the SS&UT Agreement p. 99-100. Residential service is also listed, but was not included because corresponding services, such as commercial service, were not listed and there is no definition to draw on for the services that were not listed.

2. Installation or maintenance of wiring or equipment on a customer's premises;

3. Tangible personal property;

4. Advertising, including but not limited to directory advertising.

5. Billing and collection services provided to third parties;

6. Internet access service;

7. Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance and routing of such services by the programming service provider. Radio and television audio and video programming services shall include but not be limited to cable service as defined in 47 USC 522(6) and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 CFR 20.3;

8. "Ancillary services"; or

9. Digital products "delivered electronically", including but not limited to software, music, video, reading materials or ring tones.

C. Examples of Included and Excluded Services.

Example 1. An entity provides dedicated network service to an entity which will resell that service as intrastate telecommunications service. Both entities are providing a telecommunications service.

Example 2. An entity provides an interstate telecommunications service to an internet service provider which will use that service in the provision of internet access service. The entity providing interstate telecommunications service is providing a telecommunications service. The entity providing internet access service is not providing a telecommunications service.

Example 3. An entity primarily engaged in the provision of cable television provides an interstate telecommunications service. The entity is engaged in the provision of telecommunications service.

(xxxiv) "Value-added non-voice data service" means a service that otherwise meets the definition of "telecommunications services" in which computer processing applications are used to act on the form, content, code, or protocol of

the information or data primarily for a purpose other than transmission, conveyance or routing.

Comment [s38]: SS&UT Agreement p. 99

(xxxv) "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.

Comment [s39]: SS&UT Agreement p. 96

(xxxvi) "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.

Comment [s40]: SS&UT Agreement p. 97

~~**(xxxvii)** "Wireline service" means a telecommunications service that is provided, in whole or in part, through any type of tangible conductor, including, but not limited to coaxial cable, copper wire, and fiber optic cable.~~

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Comment [s41]: This term is not defined in the SS&UT Agreement.

(3) Apportionment and Allocation

(i) Property Factor: Outerjurisdictional property that is used by a taxpayer in providing a telecommunications or ancillary service shall be excluded from the numerator and from the denominator of the property factor.

(ii) Sales Factor: Sales of telecommunications and ancillary services in this state.

Comment [s42]: SS&UT Agreement p. 24 -25. However, neither sourcing of Network Access nor sourcing of bundled transactions is covered in the SS&UT. Portions of the provision on bundled transactions (such as the definition and the description of the use of books and records) are based on SS&UT Agreement.

A. Gross receipts from the sale of telecommunications services, other than those defined in subsections C. through G., which are sold on a call-by-call basis are in this state when (a) the call originates and terminates in this state or (b) the call either originates or terminates and the service address is also located in this state.

B. Gross receipts from the sale of telecommunications services, other than those defined in subsections C. through G., which are sold on other than a call-by-call basis, are in this state when the customer's place of primary use is in this state.

C. Gross receipts from the sale of mobile telecommunications services, other than air-to-ground radiotelephone service and prepaid calling service, are in this state when the customer's place of primary use is in this state pursuant to the Mobile Telecommunications Sourcing Act.

D. Gross receipts from the sale of post-paid calling service are in this state when the origination point of the telecommunications signal is first identified in this state by either (1) the seller's telecommunications system, or (2) information received by the seller from its service provider, where the system used to transport such signals is not that of the seller.

E. Gross receipts from the sale of ancillary service, prepaid calling service or prepaid wireless calling service are in this state:

1. when the product is received by the purchaser at a business location of the seller in this state;

2. if the product is not received by the purchaser at a business location of the seller, when the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), known to the seller, is in this state;

3. if subsections E.1. and E.2. do not apply, when the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business is in this state, provided use of this address does not constitute bad faith;

4. if subsections E.1, E.2 and E.3 do not apply, when the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of the purchaser's payment instrument, if no other address is available, is in this state, provided use of this address does not constitute bad faith; and

5. if none of the previous rules of subsections E.1., E.2., E.3. or E.4. apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, when the location determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided (disregarding for these purposes any location that merely provided the digital transfer of the product sold), is in this state. Provided however, in the case of gross receipts from the provision of prepaid wireless calling service, the rule provided in this subsection E.5. shall include as an option the location associated with the mobile telephone number.

For the purposes of this subsection E., the terms "receive" and "receipt" mean: taking possession of tangible personal property, making first use of services, or taking possession or making first use of digital goods, whichever comes first. The terms "receive" and "receipt" do not include possession by a shipping company on behalf of the purchaser.

F. Gross receipts from the sale of a private communication service are in this state:

1. if such service is for a separate charge related to a customer channel termination point, when the customer channel termination point is located in this state;

2. if under such service all customer termination points are located entirely within one state, when the customer channel termination points are located in this state;

3. if such service is for segments of a channel between two customer channel termination points located in different states and such segments of channel are separately charged, when the customer channel termination points are in this state, provide however that only fifty percent of such gross receipts are in this state; and

4. if such service is for segments of a channel located in more than one state and such segments are not separately billed, when the customer channel termination points are in this state, provided however that only a percentage of such gross receipts, determined by dividing the number of customer channel termination points in the state by the total number of customer channel termination points, are in this state.

G. A portion of the total gross receipts from sales of telecommunication services to other telecommunication service providers for resale is in this state in an amount determined by multiplying such total gross receipts by a fraction, the numerator of which is "total carrier's carrier service revenues" for this state and the denominator of which is the sum of "total carrier's carrier service revenues" for all states in which the taxpayer is doing business, as reported by the Federal Communications Commission [in its report titled Telecommunications Revenues by State, Table 15.6, or successor reports which include such information,] for the most recent year available as of the due date of the return, determined without regard to extensions.

H. Gross receipts attributable to the sale of a telecommunication or ancillary service sold as part of a bundled transaction are in this state when such gross receipts would be this state in accordance with the provisions of sections ii.A. through G.

1. The amount of gross receipts attributable to the sale of a telecommunication or ancillary service which is sold as part of a bundled transaction shall be equal to the price charged by the

taxpayer for such service when sold separately, adjusted by an amount equal to the quotient of a) the difference between 1) the price charged by the taxpayer for the bundled transaction, and 2) the sum of the prices charged by the taxpayer for each of the included products when sold separately, and b) the number of products included in the bundled transaction;

2. If the amount of such gross receipts is not determinable under subsection ~~I~~H.1., then ~~they~~ it may be determined by reasonable and verifiable standards from taxpayer's books and records that are kept in the regular course of business for purposes including, but not limited to, non-tax purposes.

I. Gross receipts from the sale of telecommunication services which are not taxable in the State to which they would be apportioned pursuant to sections ii.A through G., shall be excluded from the denominator of the sales factor.