



October 2009

Report on the Taxation of the Telecommunications Industry in New York State

Contents

Introduction	1
Endnotes	3
Description of Telecommunication Services	5
Voice Services	5
Wired Voice Communication	5
<i>Traditional Landline</i>	5
<i>Voice-over-Internet Protocol (VoIP)</i>	6
<i>Other Internet-based Voice Communication Services</i>	7
Wireless Communications Services	8
<i>Wireless VoIP</i>	9
Data Communication Services	10
Video and Audio Entertainment Services	10
Television	10
<i>Broadcast Television</i>	10
<i>Cable Television</i>	11
<i>Satellite Television</i>	12
Other Video Service	13
<i>Internet Video Service</i>	13
Audio Communication Service	14
Internet Access Service	15
Digital Products	15
Telecommunication Services for Business Customers	15
Endnotes	17

Description of Regulatory Environment	19
Description of Taxes and Fees	21
Sales and Compensating Use Tax	22
Sourcing Mobile Telecommunications	23
Local Sales and Compensating Use Tax	23
Sales Tax Treatment of Digital Products	24
Sales and Use Tax Exemptions for the Telecommunications Industry	26
Other Related Sales and Use Tax Exemptions	26
Excise Tax on Telecommunication Services	28
Bundling of Communication Services	29
Treatment of the Internet	30
Treatment of Prepaid Calling Cards and Prepaid Calling Service	32
Public Safety Communications Surcharge	33
Local Wireless (E911) Surcharge	33
Wireline Enhanced 911 (E911) Surcharges	33
Local Gross Receipts Taxes	34
New York City Utility Taxes	34
New York State Franchise Taxes	35
Corporation Franchise Tax	35
Corporation & Utility Tax	36
Transportation and Transmission Corporations and Associations (Section 183)	36

Additional Franchise Tax (Section 184)	37
New York City Business Taxes (NYC Administrative Code)	37
General Corporation Tax (GCT)	37
Unincorporated Business Tax (UBT)	38
Local Franchise Fees – Telephone and Cable TV	39
Utility Assessments	40
Targeted Accessibility Fund	41
The Real Property Tax	41
Taxable Status of Various Types of Telecommunications Property	41
Cable Television Property	43
Television and Radio Towers	43
Cellular Telephone Towers and Related Equipment	44
Endnotes	45
Matrix of Taxes by Type of Service	49
Endnotes	54
Tables	
Table 1: Revenues from the Communications Industry	21
Table 2: Combined State and Local Sales Tax Rates on Telephone Service, By Community, as of September 1, 2009	25
Table 3: Taxable Status of Various Services Offered by the Telecommunication Industry by New York State Tax Type	52
Table 4: Status of Real Property Tax on Various Telecommunication Providers	53

Introduction

The pace of change in the telecommunications industry over the past decade has been breathtaking. The ability to communicate with friends, family, business partners and clients has increased dramatically with the advent of new technologies. These new technologies allow for the provision of telecommunication services using a variety of means and for telecommunication providers to offer services they were previously unable to provide such as video games, portable music, movies and more. New York's taxation of the industry however, has not kept up with these dynamic advances.

New York's many layers of government — state, county, city, town and village — impose a variety of taxes on telecommunications services and providers. While the state last reformed its telecommunications taxes in the mid 1990's (not including conforming to federal changes), many local governments still impose telecommunications taxes that reference laws from the 1950's. The patchwork of different taxes imposed by multiple jurisdictions leads to consumer confusion about exactly what taxes are appearing on their monthly bills.

This report attempts to clarify for policy makers the current state of affairs of telecommunications taxation in New York. The State Legislature and the Governor recognized this need by mandating this study in the 2009-10 State Budget:

“The department of taxation and finance, in consultation with the department of public service, is hereby authorized and directed to conduct a study of assessments, fees, and tax rates, and associated policies of the state of New York, relating to the telecommunications industry including but not limited to the cable, satellite and wireless industries of the state. The results of the study shall be set forth in a written report made to the governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly on or before October 1, 2009.”¹

Once decision makers understand the current landscape of telecommunication taxation, it would then be desirable to begin discussions about modernizing the system of taxation that is more reflective of new technologies. Other states, like Virginia, Florida and North Carolina, have already completed their own review and statutory modernization. New York should be at the forefront by developing a telecommunications tax structure reflective of the 21st century.

While this report was mainly written by the Department of Taxation and Finance, significant contributions to the report were provided by the Department of Public Service, The Office of Real Property Services, and the New York City Department of Finance.

Endnotes

1. Chapter 59 of the Laws of 2009, Part NN.

Description of Communications Services

In the decade since the Department of Taxation and Finance (“Tax Department”) last released a report on the industry, vast changes in the scope and nature of telecommunication services have occurred. To provide a framework for a discussion of the taxability of telecommunications services, we must first provide the reader with a description of the industry’s players and the nature of the products and services they provide. The section that follows will describe the current state of telecommunication products and services. We begin with a discussion of voice and data communication services, followed by video and audio entertainment services, digital products, and finally Internet access services.

Voice Services

Traditional landline telephone service has been synonymous with voice communication in the United States for much of the industry’s history. However, over the past decade the voice communications industry has experienced significant changes. Wireless technology and the development of the Internet have challenged the dominance of traditional landline telephone service. Not only has traditional landline service been overtaken by the growing popularity of wireless service, but the wired industry itself no longer provides just one service (telephone or video) but has morphed into providing packages of local and long-distance telephone service, Internet access and video services. Additionally, Voice over Internet Protocol services have emerged and are being provided by new entrants as well as the traditional landline service providers (telephone and video).

Wired Voice Communication

Traditional Landline

Traditional landline service involves a direct line (landline) between every customer’s telephone equipment and the Public Switched Telephone Network (PSTN). The network and the technology have improved but the basic process of placing a telephone call over a landline phone has remained largely unchanged: calls are transmitted through wires that run along telephone lines throughout the country. The participants of the

call are provided exclusive use of a direct line connection that offers reliable and clear communication for the duration of the call. Additionally, the lines traditionally drawn between local telephone service providers and long-distance telephone service providers have begun to fade primarily due to a changing regulatory environment.

*Voice-over-Internet
Protocol (VoIP)*

Telephone service using Voice over Internet Protocol (VoIP) technology has become increasingly popular in recent years and is directly competing with traditional landline services. VoIP transmits phone calls by converting the sound of a caller's voice into digital signals that can be transmitted via the Internet or over a carrier's own privately-managed network or the PSTN. One of the reasons for the growing popularity of Internet protocol (IP)-based calling services is the greater availability of broadband Internet service and the number of features than can be offered over an IP-based platform.

Vonage, first available in 2002, was an early pioneer in VoIP service. It represents an example of a company that provides voice communication services using the Internet to transmit customers' calls. Customers need to independently obtain a broadband Internet connection and buy a phone adaptor or other equipment that converts analog voice signals to IP format. The voice to IP equipment connects directly to the user's Internet equipment and can be used with any traditional phone. To the user, an Internet-based VoIP service functions just as a traditional line.

The most popular VoIP service providers today include cable television companies like Time Warner Cable and Cablevision. These companies represent examples of companies that provide VoIP using the company's own network, in addition to the PSTN, to transmit customers' calls. These companies typically offer bundled package deals on cable television, Internet access, and IP-based phone service for one price. The traditional PSTN network providers also incorporate VoIP technology increasingly throughout the telecommunications network.

*Other Internet-based Voice
Communication Services*

The increase in broadband Internet penetration along with VoIP technology has made a number of new and unique voice communication services possible. Many of them are free to use and are not easy to categorize other than that they are transmitted over the Internet. They include instant messaging, voice chat, and video chat services.

Instant messaging has been a popular communication tool since America On-Line (AOL) first introduced their instant messaging client in 1998. What began as a simple text messaging system has evolved (thanks to broadband penetration and more powerful and feature-rich computers) into voice and video chat devices that are often free to the end user while providing quality voice communication comparable to traditional services.

One of the most prevalent voice chat services is Skype. Skype can be categorized as an application-based VoIP technology.¹ It allows users to make telephone calls to other Skype subscribers or to landline and wireless phone numbers. This type of product is often called a softphone. Softphones turn the user's computer into a phone and do not rely on any other dedicated hardware. Users with a broadband connection simply need to download the software and attach a microphone for voice and a webcam (increasingly standard on most new computers) for video chat. Calls to other Skype users utilize peer-to-peer technology and are completely free. Calls can be made to non-Skype users via the PSTN for a per-minute fee.

More traditional instant messaging services that originated as text only are beginning to offer VoIP voice and video chat services. For example, Google Talk, Yahoo IM, and MSN Messenger all offer free video chat with anyone who has the same chat-provider. There are a countless number of these services with examples ranging from peer-to-peer video conferencing for business professionals to peer-to-peer voice chat systems utilized by computer game players to communicate while playing. Some of these peer-to-peer systems also enable users to place and receive telephone calls from the PSTN and, in that regard, are becoming more closely related to a traditional telephone service.

Increasingly, these VoIP services have no need to be tied to a particular location. With built-in wireless capability found in most laptops, or with an easy-to-install wireless card, many

computers are truly mobile and can access the Internet anywhere there is a Wi-Fi hotspot or a plug-in port for an Ethernet cable. This anywhere-access means that many of the VoIP services discussed above may be mobile in nature.

As progressively more powerful technology is made available in portable Wi-Fi devices, accessing some of these VoIP services does not even require a computer. Skype, for example, is available on portable devices ranging from smart phones with broadband access to handheld gaming devices like the Sony PSP.²

Wireless
Communications
Services

Wireless phone service is the fastest growing segment of the voice communication service industry.³ In December 2000, there were just 110 million wireless subscribers and 104,000 cell sites (towers) across the United States. By December 2008, there were more than 270 million wireless subscribers and the number of cell sites had reached 242,000.⁴

Further illustrating the growing prominence of wireless phone service is the increasing number of wireless-only households. According to the National Center for Health Statistics, by the end of 2008 one in five households (20.2 percent) had no landline phone at all.⁵ Moreover, there was a significant shift in this figure in just the last half of 2008. Estimates released in mid-2008 by NCHS reported that only 17.5 percent of households had no landline. The data suggests that in just six months, the number of wireless-only households jumped nearly three percentage points – from 17.5 percent to 20.2 percent. One possible explanation is that the poor economy forced more households to lower household expenses, and an increasing number of households came to view their landline as expendable.

Wireless communication relies on a system of cell towers interconnected with a wireline network to transmit calls. Cell phones are sophisticated radios and use radio waves to transfer calls. Within a geographic area, referred to as the Cellular Geographic Service Area, cell phone providers are each given a range of radio frequencies to use. The towers themselves may be owned by one provider, but are more often jointly owned by wireless providers in the area.⁶ Within each cell area the Mobile Telephone Switching Office handles this switching process and is also responsible for switching a cellular call to the PSTN when a wireless user places a call to a traditional line.

Wireless communication service plans fall into two categories: monthly calling plans and prepaid calling plans. Monthly calling plans are generally contractual and are based on a fixed monthly charge for an allotment of minutes, with additional charges for extras like Internet access, data transmission capability, and text messaging. Prepaid plans can be based on per-minute or per-day charges, with an additional charge for certain other features. A few prepaid plans even offer monthly plans that mirror traditional monthly calling plans, but without a contract.

The largest wireless service providers like AT&T, T-Mobile, and Verizon Wireless offer both monthly calling plans and prepaid plans. However, some providers specialize in prepaid service plans. TracFone is the largest prepaid provider in the United States. Also popular is Boost Mobile, which targets younger users by including low cost Internet access and other downloadable products (e.g., ringtones) not typically found with other prepaid plans.

Wireless VoIP

Wireless VoIP (VoWIP, or Wi-Fi Telephony) facilitates the transmission of phone calls over a Wi-Fi network. The technology is similar to standard VoIP service but can be utilized from a Wi-Fi hotspot rather than through a direct cable link to the broadband network. The Wi-Fi hotspot effectively mimics the towers that facilitate a cellular phone call. The technology routes calls from the Wi-Fi phone to a WLAN⁷ or Wi-Fi access point, which then routes the call to the appropriate destination within the private network or out onto the Internet or the PSTN.

Wireless VoIP is increasingly popular among business users. A business can set up a Wi-Fi network at their location and then provide each employee with a Wi-Fi phone. While in range of the office Wi-Fi network or other Wi-Fi hotspot, employees have the advantages of wireless telephone service.

Wireless VoIP phones are not as practical for most non-business users because the network availability is not as broad as with typical wireless phones. Though Wi-Fi hotspots act like cell towers, they do not offer the coverage provided by cell towers. Users could initiate a call from any of the growing number of Wi-Fi hotspots, but they would lose the call as soon as they are out of range of the hotspot.⁸ The range of a hotspot may be no more than 100 feet from the establishment offering

the connection. As a result Wi-Fi phones are not as mobile as regular cellular phones.

Some wireless devices allow calls to transmit either through a cellular tower or a wireless network, depending on which one is providing the user with a stronger signal when the call is placed. Some wireless providers have introduced this new technology into consumer service offerings.⁹

Data Communication Services

Data services can take on many forms ranging from the transmission of photographs, fax services and text messages to the transmission of electronic documents from one business to another, financial data, purchase orders, and other information. Many of the services discussed above can be utilized to transmit data over telecommunication networks. Faxes are sent over wired communication devices often utilizing traditional landline service.¹⁰ Unlimited data plans are available through most cellular providers which make sending photos and text messages an easy and relatively affordable form of communication. Data communication is also highly important for the business community. Many businesses have their own secured networks that protect large amounts of sensitive data sent back and forth over the network.

Video and Audio Entertainment Services

Television

Since its inception, broadcast television has changed the way society entertains and informs itself. The technology has changed, most notably with the recent switch away from analog broadcasts to digital broadcasts, but television remains a vital form of communication. Yet, just as with telecommunication service, television is experiencing changes in how it is accessed and a growth in competition by non-traditional sources — primarily the Internet.

Broadcast Television

Broadcast television refers to transmission of video and audio signals over the airwaves from a ground-based transmitter. The transmissions by local broadcast stations are free to anyone with an antenna that can receive the radio frequency and convert the signal.

Analog transmission had been the standard delivery method since the inception of television. On June 12, 2009, more than a decade after Congress approved the measure, television stations stopped broadcasting analog signals and switched to digital signals.¹¹

Cable Television

Cable television was initially conceived as a way to provide broadcast television to remote locations where distance or adverse geography prevented signals from reaching households. In these remote regions, “community antennas” were erected and coaxial cables were run from the towers to users’ homes, generally over telephone or power utility poles.

With the realization that cable systems were able to receive signals from hundreds of miles away, the cable television industry as we currently know it was born. By the mid-1970’s, satellite distribution of programming to cable networks led to a boom in new programming services like HBO and TBS. In the late 1990s the cable industry upgraded their networks by replacing coaxial cables with fiber optic cables.¹² The cost of these improvements led to consolidation in the cable market — as many companies could not financially cover the cost of the upgrades. At the same time, these broadband networks paved the way for cable companies to expand their product offerings to include Internet access and telephone service. Upgraded networks, combined with the development of digital broadcasts, made services like movies-on-demand and digital video recording (DVR) possible.

By far, the largest U.S. provider of cable service is Comcast, which services more than 24 million customers nationally. Time Warner Cable is the next largest provider of cable service with 13 million customers.¹³ Recently, telecommunication companies AT&T and Verizon have entered the cable television market with U-verse and FiOS TV respectively. Some of the smaller independent telephone companies located in upstate New York have also entered this market. Combined, these services reach 3.5 million subscribers as of early 2009.¹⁴

Pricing is typically a tiered system where customers pay based on the channels and services to which they subscribe. Subscriptions can range from basic cable to premium cable to premium movie channels, with additional charges for optional features like high definition programming or DVR functionality. Other charges billed to the customer may

include a monthly fee for customer premises equipment like the cable box and remote, and a one-time fee when service is activated.

Satellite Television

In the early 1990s, as a response to calls for more competition in the cable television market, Congress allowed satellite broadcast signals, which had been exclusively available to cable operators, to be distributed by other emerging technologies. One of those emerging technologies was Direct Broadcast Satellite (DBS) service. At present, DBS service counts as subscribers approximately one-fifth of New York's video programming market.

The transmission of DBS is similar to cable service because both are based on receiving satellite signals. The difference is that the satellite transmission is beamed directly to the customer's home, which is equipped with a small satellite dish, rather than transmitted to a central receiving area and then distributed through cables to subscribers.

The first DBS service was made available by DirecTV in 1994. The service attracted 1.3 million subscribers in less than one year. Dish Network soon arose as the main competitor to DirecTV. Together, the two DBS providers currently count more than 31 million subscribers. Respectively, they are the second and third largest provider of television service in the United States.

Programming and services vary only slightly between direct satellite television and cable television. The business models of the two, however, are significantly different. The primary difference between cable and satellite is that cable providers typically must maintain satellite equipment, as well as the established network of cables, and operate customer service facilities in the community. Because they do not need to maintain a system of cables to connect to their customers' premises, DBS providers avoid the need to secure rights-of-way and easements on real property and the associated costs.

Other Video Service

Internet Video Service

As with most of the technology discussed so far, the Internet has vastly altered the landscape of the television industry. Expanded adoption of broadband service has greatly increased the options for downloading and streaming entire television programs through the user's computer. The popular website Hulu is an example of a site that provides a large variety of streaming television programming. Currently, the service is free to end users and is supported by uninterrupted advertisements that air during the programs. A number of broadcasters have also responded to the demand for online television programming by offering free anytime-viewing of full programs streamed directly from the broadcasters' websites.

Moreover, it is not just television programming that is instantly available over the Internet. Netflix currently offers a product that enables subscribers to stream a limited selection of movies instantly over a computer.¹⁵ Current-generation video game systems developed by Microsoft and Sony Entertainment also have online download services where, for a price, episodes of television programs, movies and more can be downloaded and watched through consoles connected to the Internet.

And it is not just pre-recorded programming and movies that are available online. An increasing number of live sporting events are being streamed over the Internet. Major League Baseball, for example, provides a subscription based service that allows customers to live-stream out-of-market games to their computer.

One advantage traditional television service has had over Internet programming is the benefit of watching from the comfort of a living room on a television screen rather than at a computer desk in front of a smaller computer monitor. With today's technology, even that advantage is being erased. Computer software applications like Boxee are allowing users to connect their computers directly to their television using a simple cable and access content from their computer through their television. All programs downloaded to the user's computer and all programs streaming from sources such as Hulu, Major League Baseball, Netflix, CBS or CNN can be viewed from the comfort of the user's living room. Even more directly, most new televisions have a computer hook-up, allowing users to directly connect their computer to the

television. Additionally, computer monitor manufacturers are offering larger, high-definition screens compatible with television broadcasts.

Beyond the availability on computers, many of the Internet video options discussed above are available on wireless mobile devices. Mobile devices can range from handheld video game systems to sophisticated smart phones. These devices can access the Internet, opening up all of the viewing options that entails.

Audio Communication Service

Audio communication or radio is typically free to users with the equipment necessary to receive signals from transmitters operated by radio stations. With over-the-air radio, listeners have to be within range of radio tower in order to pick up the signal. The Internet has changed that. Radio stations can stream their programming over the web and listeners from all over the world could potentially listen to their programming. Streaming services remain free, at present. Stations benefit from providing the radio stream for free because advertising rates are based on the number of listeners – and streaming listeners count toward that total.

Recently, satellite radio began offering a subscription service that mirrors the business model of cable television. Initially there were two providers of satellite radio: Sirius and XM radio. In early 2008, Sirius purchased XM and Sirius/XM is now the sole provider of satellite radio. Subscribers are charged a monthly fee and need to purchase special equipment to receive the satellite signal. The service is provided largely commercial-free and, because it is provided by satellite, can be received at locations other than a fixed location, such as an automobile.

Though Sirius/XM radio is the first commercial offering of satellite radio to the general public, other satellite radio services are available to business customers. Muzak is a satellite radio company that has become synonymous with “elevator” music. Their service requires a fixed-location receiver and is provided to retail stores, restaurants, and other businesses to provide non-intrusive background music to their establishments.

Internet Access Service

Internet access service is the service that allows users to connect to the Internet, usually provided by an Internet service provider (ISP). Early ISP's, such as AOL and Netscape, allowed access to the Internet through dial-up connections over traditional telephone lines. Currently, most ISPs allow access through a broadband connection such as digital subscriber line or a cable line. Modem service is still available and is widely used in some areas of the country where broadband networks have yet to develop. The faster speeds of broadband enables customers to access digital products and entertainment options not available to dial-up customers.

Digital Products

A wide variety of products that had previously only been available in tangible form are now offered as digital products by telecommunication providers, cable companies, Internet service providers and others. Some examples of digital products include audio works, video works, audio-visual works, graphic works, games, information and entertainment services, and storage of digital products. Digitally-transmitted text and images are available instead of the traditional ink-on-paper printed books, newspapers, magazines and professional journals. Sales of digitally downloaded music files are rapidly surpassing the sales of music stored on physical media. Single track downloads crossed the one billion mark for the first time in 2008, totaling 1.1 billion, up 27 percent from 2007. Digital album sales totaled 66 million, an increase of 32 percent.¹⁶ Video entertainment, regardless of whether its first release was to movie theaters, broadcast television, or an Internet web site, is available for download on demand.

Telecommunication Services for Business Customers

For large business telecommunication customers, data connections are a major part of their telecommunications budget. Most large business customers have equipment at their location that converts their office voice communications into digital data before it is transmitted to their telephone company. This voice data as well as other general data is sent out and received through a high capacity packet-switched network facility.¹⁷

Data network communication is defined by network protocols. A network protocol is a formal set of rules, conventions and data structure that governs how routers, servers and computers exchange information over a network. In other words, network protocol is a standard procedure and format that two data communication devices must understand, accept and use to be

able to talk to each other.

In the area of data transmission by telecommunications carriers, these network protocols all involve packet-switched network technology. The difference between the various packet-switched network technologies is the size of the packet, the size and information in the packet header and footer, and whether or not the data is checked for accurate transmission.

Many business customers are moving to newer telecom data network protocols that provide greater speed and flexibility such as Asynchronous Transfer Mode (ATM) and Internet Protocol.

Major telecommunications carriers are changing their medium and long distance data networks into a network configuration that allows them to accept customer data traffic in any data packet format (e.g. Frame Relay, ATM, SONET) and to deliver the customer's data to another customer location in any data packet format.

Endnotes

1. Application based VoIP means VoIP services where the provider does not own the facilities over which the service is provided. Skype does not own its own network and instead relies on existing networks, and is therefore considered an application based technology.
2. Recently a Skype application was released for Apple's iPhone and in just two days it had surpassed one million downloads. See "1 million and counting download Skype for iPhone": <http://www.betanews.com/>
3. For example, collections data from the New York State wireless communication surcharge, indicate that in the four years from the 2003-04 State fiscal year to the 2007-08 fiscal year, the number of wireless devices in New York increased by nearly 35 percent.
4. Source: *CTIA the Wireless Association*.
5. National Center for Health Statistics: *National Health Interview Study 2008*, December 2008.
6. When a user places a wireless call, it is transmitted through the cell tower that is emitting the strongest radio signal. As the user moves around the area, the signal relative to the user may become weaker as the user moves away from the tower. Meanwhile, the signal from the tower the user is moving towards becomes stronger. As that happens, the call will jump (called cell switching) from one tower to another. The switch is unnoticeable to the user and ensures that the signal of the call remains strong regardless of the users changing location during the call.
7. Wireless Local Area Network (WLAN) provides the benefit of a local network without all the cables. However, WLAN may be slower than a wired LAN.
8. Even this limitation is likely to be eliminated with new technology. Just this year, Verizon Wireless and Sprint released mobile Wi-Fi devices called Mi-Fi. These portable hotspots are not much larger than a credit card and can go anywhere. Data plans can be purchased through the provider for either a monthly or daily fee.
9. T-Mobile is one of the first providers of this technology with their "T-mobile @home" service.
10. A number of services allow users to transmit a fax completely through the use of email. The sender emails the service provider the message, who then transmits the message to the intended party's fax machine. Or the service provider received traditional fax messages and transmits them to the customer by email.
11. Most customers were unaffected by the switch because newer televisions have been required to include a built-in digital converter and most cable companies continued to

carry the programming in the old analog format. People who had older televisions and had no desire to subscribe to cable service had the option of purchasing a digital-to-analog converter. The converters are relatively inexpensive and consumers were allowed to apply for a federal voucher that could be used to offset the cost of the converter.

12. Between September 1, 2000 and August 31, 2003, New York aided this process by enacting a sales tax exemption for machinery and equipment or apparatus used directly and predominately to upgrade cable television systems for digital cable services.
13. *Source:* National Cable & Telecommunications Association , Top 25 MSOs : <http://www.ncta.com> .
14. *Source:* Company Reports and MediaBiz Competitive Intelligence Estimates.
15. Netflix “watch instantly” streaming can also be accessed by Microsoft’s video game system, the Xbox 360.
16. Nielsen Sound Scan and The International Federation of the Phonographic Industry (IFPI).
17. This customer premises connecting facility may be a copper wire, a coaxial cable or a fiber optic cable.

Description of Regulatory Environment

Regulation of telecommunications dates back more than a century to when there was a single natural monopoly providing telephone service to most of the country, the Bell Telephone Company and its affiliated companies, such as New York Telephone Company. Service to areas not covered by the Bell System were handled by independent companies. As discussed, the nature of telecommunications has changed significantly since that time, and only certain aspects of the industry remain under regulatory supervision. At the federal level, the regulatory function is performed by the Federal Communication Commission (FCC) for interstate services, while in New York State, the responsibility is within the purview of the Department of Public Service, which is more commonly referred to as the Public Service Commission (PSC) for intrastate services.

The current regulation of telecommunication services is now primarily a reflection of the platform used to provide the service — the traditional landline circuit-switched network, the Voice over Internet Protocol (VoIP) network, or the wireless (cellular) network. Despite offering very similar and substitutable services, these platforms continue to be subject to differing regulatory obligations and requirements. These are the primary delivery service options for telecommunications, and each is subject to varying layers of regulation: Landline, or “Traditional” Circuit-Switched Telephone Service – This service is currently regulated by both the FCC and the PSC. The FCC regulates the interstate aspects of telecommunication service, while New York regulates the intrastate aspects.

Wireless Telephone Service (sometimes referred to as “cellular” service) - Rates and entry are regulated by the FCC, although no rate regulation is exerted. State regulation is limited to terms and conditions of service. Under an amendment to the Public Service Law (PSL) in 1997, the provisions of the PSL applicable to cellular telephone services are suspended unless the PSC makes a determination, after notice and hearing, that suspension of the application of the PSL shall cease to the extent found necessary to protect the public interest.

Voice over Internet Protocol (VoIP) – There are generally two types of VoIP services – fixed VoIP and nomadic VoIP, with differing regulatory obligations. Nomadic or “application-based” VoIP providers do not own the facilities over which the service is provided. Vonage is an example of a “nomadic” VoIP provider. For purpose of its regulatory jurisdiction, the FCC has classified nomadic VoIP as an interstate service, and this classification has preempted state “economic” (i.e., rate and entry) regulation. Fixed VoIP providers offer service over their own facilities. Time Warner’s Digital Phone and Cablevision’s Optimum Voice are examples of fixed VoIP services. The FCC has not yet preempted the state regulation of fixed VoIP service. The PSC does not currently regulate nomadic or fixed VoIP services in New York.

Cable Television is regulated by local municipalities pursuant to procedural and substantive regulations set by the State and subject to federal and State law. The local franchising authority (LFA) -- the city, town or village-- may regulate basic service tier rates for cable companies, pursuant to FCC regulations and absent an FCC finding of effective competition. In New York, most municipalities elect to have the PSC administer the federal rate regulation process.

Satellite Television is regulated by the FCC, although rates are not. There is no State involvement.

Description of Taxes and Fees

The communications industry and its subscribers are subject to a myriad of state and local taxes and fees. Combined, the taxes discussed below generate approximately \$2.6 billion in State and local revenue. Table 1 below presents revenue collection by tax.

Fiscal Year Revenues From the Communications Industry (In Millions) *

	State Revenue	Local Revenue
Corporate Tax**	\$580.0	\$214.0
Local Gross Receipts Tax ***	-	\$20.0
Sales Tax	\$500.0	\$500.0
State Public Safety Communications Surcharge	\$175.0	-
Local Communications Surcharges	-	\$20.0
Public Service Law 18-a and 217 Assessments	\$12.0	-
Real Property Tax	-	\$375.0
Local Franchise Fees ****	-	\$230.0
Total Revenue	\$1,267.0	\$1,359.0

* The estimates are for the last available fiscal year collections for the various tax types, generally a jurisdiction's fiscal year ending in 2008, fiscal year end dates differ among jurisdictions and reporting lags differ among revenue sources.

** This includes collections from both Corporate Franchise Taxes and Excise Taxes (186-a, 186-e); in addition to the Article 9, Sections 183 and 184 franchise taxes specific to telecommunications (and certain transportation corporations) franchise taxes due from cable and satellite providers (NAICS 51521 and 51741) are included; "Local Revenue" for this row includes the NYC Utilities Tax and MTA Surcharges on the State business taxes.

*** Because the taxes are imposed on both energy and communications providers to customers in the municipalities, and only the gross amount of collections are reported to the Office of the State Comptroller, the methodology used in the 2001 study of *Local Telecommunications Taxes and Fees in New York State* was applied to revenues reported for calendar year 2007.

**** Incomplete data.

Sales and Compensating Use Tax

In general, the New York State sales and compensating use tax (Tax Law, Article 28) applies to every sale, other than for resale, of tangible personal property (TPP) and certain enumerated services. The sales tax also applies to telephone and telegraph service of whatever nature, except for interstate and international telephone service. The law contains a separate imposition on mobile telecommunication service sold for a fixed periodic charge.¹ The tax is applicable to every sale, except for resale of:

“...telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service and except any telecommunications service the receipts from which are subject to tax under paragraph two of this subdivision...”²

“The receipts from every sale of mobile telecommunications service provided by a home service provider, other than sales for resale, that are voice services, or any other services that are taxable... , sold for a fixed periodic charge (not separately stated), whether or not sold with other services”³

The term “telephony and telegraphy” includes the use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals. Sales tax regulation section 527.2(d)(2)⁴ explicitly includes dispatch services (often used for taxis), paging, facsimile transmissions, and message switching services.

The term “telephony and telegraphy” does not include cable television service or music service.⁵ Charges for tangible personal property supplied to customers with cable services (e.g. remote control units and converter boxes) represent charges for property that is incidental to the provision of cable television service and are also exempt. However, any charges to a customer to install or repair cable television equipment are subject to tax.

The sales tax is imposed on the purchasers of the taxable telecommunications services, but is collected from the purchasers and remitted to the Tax Department by the telecommunications providers.

The State also imposes sales tax at the rate of 0.375 percent in the Metropolitan Commuter Transportation District (MCTD), which

consists of seven downstate counties and the five boroughs of New York City. Receipts from this tax are earmarked for the Mass Transportation Operating Assistance Fund which supports public transportation in the MCTD.

*Sourcing Mobile
Telecommunications*

When cellular phones were first introduced, sourcing calls proved to be rather difficult due to the inherent mobility of the devices. Service providers employed multiple sourcing methods including: sourcing the receipts to the telephone exchange of the customer, to the location of the nearest cell tower, or to the billing address of the customer. In 2000, Congress passed the Mobile Telecommunications Sourcing Act (MTSA)⁶ requiring that all cellular telephone calls be sourced to the customers “place of primary use” (PPU), which is essentially their residential or business street address. The new sourcing rules took effect on August 1, 2002.

In 2002, the Tax Law was amended to conform to the MTSA. The statute provided that receipts from any charges for mobile telecommunications services billed by a home service provider should be sourced to the taxing jurisdiction where the mobile telecommunications customer’s place of primary use is located, regardless of where the mobile telecommunications service originates, terminates or passes through.⁷ Accordingly, the mobile telecommunications customer’s place of primary use controls both the tax incidence and the tax rate for purposes of State and local sales taxes.⁸

*Local Sales and
Compensating Use Tax*

Under Article 29 of the Tax Law, cities and counties are authorized to impose sales tax on the same property and services subject to the State tax. Article 29 also allows a city or county which does not impose the broad-based general sales tax to impose tax on one or more of four segments of the broad-based sales tax. These are:

- utility services, including intrastate telephone and telegraph services, and pre-paid telephone calling services;
- “restaurant” food and drink;
- hotel room occupancy; and,
- certain amusement charges.

Currently, all counties and most cities that impose a sales tax impose the broad-based sales tax. Four cities (Lockport, Newburgh, Niagara Falls, and Port Jervis) impose the segmented sales tax on telephone and other utility services.

Finally, school districts that are coterminous with, or wholly or partly located within, a city of less than 125,000 inhabitants may impose sales tax on utility services – including intrastate telephone and telegraph services – at a rate of up to 3 percent. Currently, 21 city school districts impose these taxes.

Sales Tax Treatment of Digital Products

In New York, digital products are not subject to sales tax. Twenty-one states tax digital goods in some form.⁹

In New York, the Tax Department has issued several sales tax Advisory Opinions addressing the non-taxable status of digitally downloaded files. In *The Stock Market Photo Agency, Inc.*,¹⁰ it was concluded that receipts from the electronic transfer of digital photographic images over the Internet represented receipts from the sale of an intangible and were not subject to sales tax.

In *Universal Music Group*,¹¹ it was found that the sale of digitized music recordings over the Internet constituted the sale of intangible property and was not subject to sales tax. Additionally, the sale of digitized music recordings delivered electronically over the Internet did not constitute the provision of a taxable information service or an entertainment service.

And in *Apple Computer, Inc.*,¹² it was concluded that charges for the electronic transfer of digital music via the Internet, downloaded for use on the customers' computers or similar devices, were not subject to tax regardless of whether customers made payment by credit card or by using Apple's alphanumeric code previously purchased and transferred to the customer on a physical medium, by e-mail, or otherwise.

Combined Sales Tax Rates

Table 2 below provides a breakdown of the combined State, County, City, School District, and MCTD sales tax rates as of September 1, 2009.

Table 2: Combined State and Local Sales Tax Rates on Telephone Service, by Community, as of September 1, 2009					
The following shows the combined State, County, City, School District, and MCTD sales tax rates for each taxing jurisdiction:					
County	Rate	County	Rate	County	Rate
Albany outside of...	8.00%	Jefferson outside of...	7.75%	Queens (1)	8.875%
Albany City S.D.	11.00%	Watertown City S.D.	10.75%	Rensselaer	8.00%
Cohoes City S.D.	11.00%	Kings (1)	8.875%	Richmond (1)	8.875%
Watervliet City S.D.	11.00%	Lewis	7.75%	Rockland (1)	8.375%
Allegany	8.50%	Livingston	8.00%	St. Lawrence outside of...	7.00%
Bronx (1)	8.875%	Madison outside of...	8.00%	City of Ogdensburg	7.00%
Broome	8.00%	City of Oneida	8.00%	Ogdensburg City S.D.	10.00%
Cattaraugus outside of...	8.00%	Monroe	8.00%	Saratoga	7.00%
City of Olean	8.00%	Montgomery outside of...	8.00%	Schenectady outside of...	8.00%
City of Salamanca	8.00%	City of Johnstown S.D.	11.00%	Schenectady City S.D.	11.00%
Cayuga outside of...	8.00%	Nassau (1) outside of...	8.625%	Schoharie	8.00%
City of Auburn	8.00%	Glen Cove City S.D.	11.625%	Schuyler	8.00%
Chautauqua	7.75%	Long Beach City S.D.	11.625%	Seneca	8.00%
Chemung	8.00%	New York (1)	8.875%	Steuben outside of...	8.00%
Chenango outside of...	8.00%	Niagara outside of...	8.00%	City of Corning	8.00%
City of Norwich	8.00%	City of Lockport	8.00%	City of Hornell except in...	8.00%
Clinton	8.00%	Niagara Falls City S.D.	11.00%	Hornell City S.D.	10.50%
Columbia outside of...	8.00%	Oneida outside of...	8.75%	Suffolk (1)	8.625%
Hudson City S.D.	11.00%	City of Rome	8.75%	Sullivan	8.00%
Cortland	8.00%	City of Sherril	8.75%	Tioga	8.00%
Delaware	8.00%	City of Utica except in...	8.75%	Tompkins outside of...	8.00%
Dutchess (1)	8.125%	Utica City S.D.	8.75%	City of Ithaca	8.00%
Erie outside of...	8.75%	Onondaga	8.00%	Ulster	8.00%
Lackawanna City S.D.	11.75%	Ontario outside of... (2)	7.50%	Warren outside of...	7.00%
Essex	7.75%	City of Canandaigua	7.50%	City of Glens Falls	7.00%
Franklin	8.00%	City of Geneva	7.50%	Washington	7.00%
Fulton outside of...	8.00%	Orange (1) outside of...	8.125%	Wayne	8.00%
City of Gloversville, except in	8.00%	City of Newburg	8.125%	Westchester (1) outside of...	7.375%
Gloversville City S.D.	11.00%	City of Port Jervis	8.125%	City of Mount Vernon	8.375%
City of Johnstown, except in	8.00%	Middletown City S.D.	11.125%	City of New Rochelle Except in ...	8.375%
Johnstown City S.D.	11.00%	Newburgh S.D. (2)	11.125%	New Rochelle City S.D.	11.375%
Genesee outside of...	8.00%	Orleans	8.00%	City of Whiteplains except in...	8.125%
Batavia City S.D.	11.00%	Oswego outside of...	8.00%	Whiteplains City S.D.	11.125%
Greene	8.00%	City of Fulton	8.00%	City of Yonkers	8.375%
Hamilton	7.00%	City of Oswego	8.00%	Peekskill S.D. (2)	10.375%
Herkimer	8.25%	Otsego outside of...	8.00%	Wyoming	8.00%
		Putnam (1) outside of...	8.375%	Yates	8.00%

1) Rates in these jurisdictions include 3/8% imposed for the benefit of the Metropolitan Commuter Transportation District

2) Rates are effective as of September 1, 2009

Sales and Use Tax Exemptions for the Communications Industry

The Tax Law also provides a number of sales tax exemptions, including exemptions on purchases made by providers of telecommunication services.¹³ One such exemption is related to the treatment of telecommunication equipment. Specifically, the Tax Law exempts purchases of network equipment, customer-premises equipment, optical fiber, wire, cable, wireless equipment, and other tangible property (including prewritten computer software), when used directly and predominantly in the receiving, initiating, amplifying, processing, transmitting, switching or monitoring of switching of telecommunications or Internet access services for sale.¹⁴

Also exempt from State and local sales and use tax are the parts, tools, and supplies used directly and predominantly in or on the equipment described above. The charges for installing, repairing, maintaining, or servicing exempt equipment, or exempt parts, tools, and supplies described above are also exempt.

Taxable purchases made by telecommunications companies include, by way of example, furniture, office supplies, motor vehicles, tangible personal property used in sales, tangible personal property used in administration, and other property not used directly and predominantly in qualifying exempt uses, and utility services.

The sales tax exemption for telecommunications equipment is not unlike the sales tax exemptions provided to other capital intensive industries such as manufacturing and processing.

Other Related Sales and Use Tax Exemptions

- **Structures, Towers, and Improvements to Real Property** - The sales and use taxes do not apply to the service of installing tangible personal property which, when installed, constitutes a capital improvement to real property, property or land. A capital improvement is an addition or alteration to real property which: substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or to the article itself; and, is intended to become a permanent installation. If an installation, such as a structure or tower, qualifies as a capital improvement to real property, then the charge for labor to perform the capital improvement construction is not subject to sales tax. Tax must be paid,

however, on the materials used in the construction. The tax on the materials is paid by the person who purchases those materials – either the contractor or the property owner, as the case may be.

- Interstate or International Telephone Service – Charges for international and interstate telephone and telegraph services are excluded from tax.¹⁵
- Internet Access Service¹⁶ – The sales tax expressly exempts Internet access service. Incidental services such as navigation software, email, and news headlines when offered in conjunction with Internet access are considered part of the exempt service.¹⁷
- Cable Television Service – Cable television service is not subject to tax.¹⁸
- Newspapers and Periodicals – Electronically delivered newspapers and periodicals are exempt from tax, if the content (other than advertising) is the same as the paper edition.¹⁹
- Telephone Service Used in the Collection and Dissemination of News – Charges for telephone and telegraph service used by newspapers, radio broadcasters, and television broadcasters in the collection or dissemination of news are exempt if the charges are toll charges or charges for mileage.²⁰
- Certain Coin-Operated Telephone Charges – Coin-operated telephone charges of 25 cents or less are exempt.²¹
- Internet Data Centers – Machinery, equipment, and certain other tangible personal property sold to a person operating an Internet data center, which is for use in such a center located in this State and is required for and directly related to the provision of Internet web site hosting and other web site services at such a data center are exempt.²²
- Radio and Television Broadcasting – Exempt from tax are purchases by radio and television broadcasters of machinery, equipment, parts, tools, and supplies used in the production and transmission of live or recorded programs. Installing, maintaining, servicing, or repairing the exempt items is also exempt. Moreover, certain services rendered to a regular or system broadcaster in connection with its broadcasting business are exempt from sales tax. These services include producing, fabricating, processing, printing, and imprinting tangible personal property as well as the services of editing, dubbing, and mixing. A broadcaster includes FCC licensed radio and television stations, radio and television networks, and cable television networks. For

the purposes of these exemptions, a broadcaster does not include cable system operators and direct broadcast satellite system operators. However, to the extent such operators produce live or recorded programs (such as public access or local sports programs), the exemption for producing programs applies.²³

Excise Tax on Telecommunication Services

Tax Law Section 186-e imposes a tax of 2.5 percent on gross receipts from the sale of telecommunication services. Telecommunication services are defined in the statute to include services provided by wires, cables, satellites, fiber-optics, lasers, microwaves, radio-waves or similar media. This tax is also applied to services that are ancillary to the provision of the telephone service such as directory information, call waiting, call forwarding, and caller identification. Charges for any service or equipment provided with telecommunication services are also taxable.²⁴

Receipts from telecommunication services are allocated to New York using the method sanctioned by the U.S. Supreme Court in *Goldberg v. Sweet*.²⁵ Under *Goldberg*, the entire receipt from an interstate telecommunication service is allocated to New York if the call originates or terminates in New York, and is charged to a New York service address. Since a New York intrastate telecommunication service both originates and terminates in New York, it is taxable in New York. Mobile telecommunications are sourced under the rules previously discussed concerning the federal Mobile Telecommunications Sourcing Act (MTSA) using PPU. Special apportionment rules apply to sales of certain private communications services.

An exclusion from tax exists for sales for resale of all telecommunication services sold to providers of these services for resale as such. Exclusion from tax also applies to cable television service, air safety and navigation telecommunications, and Internet access.

For telecommunication services that occur within the Metropolitan Commuter Transportation District (MCTD), a surcharge equal to 17 percent of the former 3.5 percent State rate (.00595) is imposed on receipts from those services.²⁶ Gross receipts from wireline telecommunication services are subject to this surcharge if the service originates and terminates within the MCTD. Mobile telecommunication services are

subject to this surcharge if the customer's PPU is within the MCTD. Surcharge collections are earmarked for the Mass Transportation Operating Assistance Fund which supports public transportation in the MCTD.

Unlike the sales tax, the excise tax is imposed on the telecommunications provider, but it may be passed through to the consumers of the service and appear on their monthly bill.

Bundling of Communication Services

The convergence of various communications and entertainment providers has given rise to the bundling of telecommunication services with various products, particularly Internet access, multi-channel cable and satellite television programming and other digital products (e.g., music, on-demand movies). Generally, "bundling" is the combination of two or more distinct products or services for a single charge. When taxable and non-taxable property or services are sold together for a single charge, the otherwise non-taxable property or services may become subject to tax. For example, cable television service is not subject to either sales tax or the telecommunications excise tax. Digital products are also not subject to those taxes. However, these products may become subject to tax when sold with telecommunication services for a single charge. The rationale for treating the entire charge for bundled products as taxable is to prevent the seller from attributing a disproportionate share of the charge to the non-taxable items, thereby avoiding tax and giving the seller an unfair competitive advantage over others.

For sales tax purposes, when non-taxable property or services (other than Internet access) are bundled with taxable telecommunication services and sold to the customer for a single charge, the entire receipt will be subject to sales tax, unless the amount charged for the non-taxable property and/or services is separately stated on the invoice provided to the customer, and reasonable in relation to the overall charge.²⁷ For purposes of the telecommunications excise tax, the term "telecommunication services" includes "any equipment and services provided therewith."²⁸ Thus, revenues derived from equipment and other services provided with telecommunication services are considered gross receipts subject to tax under section 186-e.

Non-taxable property or services sold with mobile telecommunications for a single charge are similarly subject to

both sales and excise taxes. However, if a home service provider uses an “objective, reasonable and verifiable standard” for identifying each of the components of the charge for mobile telecommunications service, then the home service provider may separately account for and quantify the amount of each component charge.²⁹ If the home service provider separately sells the non-taxable property or service, the charge must be based on the price for which that property or service is separately sold. If the home service provider does not separately sell the non-taxable property or service, the charge must be based on “the prevailing retail price of comparable property or service sold separately by other home service providers.” In any event, the charge must be “reasonable and proportionate” to the total charge to the customer.

If telecommunication services are bundled with Internet access for a single charge, the entire charge will be subject to both sales and excise taxes “unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business.”³⁰ In order to be reasonably identified, such charges must be objective and verifiable, and reasonable in relation to the total charge.³¹

Treatment of the Internet

In January 1997, the Tax Department announced that, effective February 1, 1997, Internet access service would not be subject to State and local sales taxes or the telecommunications excise tax.³² That policy was subsequently codified in statutory exemptions for Internet access from the sales and excise taxes.³³ For purposes of the exemption, “Internet access service” was defined as “the service of providing connection to the Internet” by means of accepted Internet protocols, and included software and services provided in conjunction with and incidental to the Internet access services (e.g., navigation software, e-mail, news headlines, etc.).

On October 1, 1998, the federal Internet Tax Freedom Act³⁴ (ITFA) was enacted, establishing the original moratorium on state and local taxes on Internet access. ITFA defined Internet access as the service of connecting customers to the Internet, plus certain incidental services when provided with the Internet connection (e.g., e-mail), but specifically excluded telecommunications from this definition. Taxes on Internet access imposed by state and local governments were

grandfathered if they were generally imposed and actually enforced prior to the date of ITFA's enactment. The ITFA moratorium had no immediate impact on New York's sales or excise taxes, because Internet access service was already exempt under State law.

ITFA also prohibits "multiple or discriminatory taxes on electronic commerce." A multiple tax is one that is imposed on the same transaction by multiple jurisdictions, without credit for taxes paid in other jurisdictions. Sales or use taxes imposed both by a state and its political subdivisions are not multiple taxes for purposes of the Act. A discriminatory tax is a tax on electronic commerce that is not generally imposed on similar property or services provided by other means, or is imposed on electronic commerce at a higher rate than on similar property or services provided by other means.

The Act also provides that "[i]f charges for Internet access are aggregated with and not separately stated from charges for telecommunications or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business."³⁵ In order to be reasonably identified, the charges must be objective and verifiable, and reasonable in relation to the total charge.³⁶

In 2003, ITFA was amended by the Internet Tax Nondiscrimination Act³⁷ (ITNA). ITNA extended the Internet access moratorium until November 1, 2007, and amended the definition of Internet access to include "telecommunications purchased, used or sold by a provider of Internet access to provide Internet access." Although New York did not tax the service of connecting customers to the Internet, it taxed the underlying telecommunications purchased, used or sold to an Internet Service Provider (ISP) to provide Internet access. ITNA had two- and four-year grandfather provisions with slightly different conditions. The Tax Department ultimately concluded that the two-year grandfather provision, which expired on November 1, 2005, applied to New York's taxes on the telecommunications component.³⁸

The Internet Tax Freedom Act Amendments Act³⁹ (ITFAAA) was enacted on October 31, 2007. ITFAAA extended the moratorium until November 1, 2014, and clarified the

application of the ITNA grandfather provisions. ITFAAA further expanded the definition of Internet access service to include certain services (e.g., e-mail, instant messaging, video clips, personal electronic storage capacity) whether or not provided independently or packaged with Internet access service.

Treatment of Prepaid Calling Cards and Prepaid Calling Service

New York State Law has defined “prepaid telephone calling service” differently from other types of telephone service. The distinction between prepaid calling cards and prepaid wireless service is also an important one - and one that has sales and excise tax implications. Prepaid calling cards are not tied to a particular phone or calling plan. Cards can be purchased from retail outlets, activated, and then utilized from just about any telephone. Because it was impossible for the telecommunications provider to know the jurisdiction in which the related telecommunication service would eventually be used, many states, including New York, created a statutory definition of “prepaid telephone calling service” and elected to tax the transaction at time of sale by the retailer and source the sale of the prepaid telephone calling service to the place where the calling card was delivered to the customer. When the federal Mobile Telecommunications Sourcing Act was enacted, it expressly stated that the Act’s sourcing provisions were inapplicable to “prepaid telephone calling services.” leaving states free to determine how to source this service.

While prepaid wireless service may also be sold by retail outlets, and has some of the same sourcing issues as prepaid calling cards, it does not fit the State or federal statutory definitions of a “prepaid telephone calling service.”⁴⁰ Prepaid wireless service is offered by a telecommunications provider and is tied to a particular phone or account with that provider. Thus, it is subject to both sales and excise taxes. This distinction leads to the difference in the Tax Law section that imposes the tax. Sales tax is imposed on prepaid calling cards under section 1105(b)(1)(D), but is imposed on prepaid wireless under section 1105(b)(2). In addition, although a prepaid telephone calling service is not subject to the consumer utility tax,⁴¹ a prepaid wireless service is subject to the consumer utility tax. Revenues recognized at the time prepaid calling services are utilized are subject to the section 186-e gross receipts tax and the applicable MCTD surcharge. Finally, prepaid wireless service is not subject to the Public Safety Communications Surcharge. That Surcharge requires that it be

“reflected and made payable on bills rendered” to customers. Prepaid wireless providers generally do not bill customers for their services.

Public Safety
Communications
Surcharge

Tax Law section 186-f imposes a surcharge on wireless communication services. The surcharge equals \$1.20 per wireless device per month if the customers PPU is in New York.⁴² Cellular telephone service providers collect the surcharge on bills rendered to their customers. Service providers remit the surcharge to the Tax Department on a quarterly basis. Surcharge funds are deposited in the State general fund and the New York State wireless telephone emergency service account of the miscellaneous special revenue fund created pursuant to State Finance Law §97-qq and are distributed for a variety of public safety communications purposes. Service providers may retain 1.66 percent of the total surcharge collected as an administrative fee, if the provider timely files its return and remits the surcharge collected.

Local Wireless (E911)
Surcharge

In addition to the statewide wireless surcharge of \$1.20 per month, New York City and most counties are authorized to impose a surcharge not exceeding 30 cents per device per month on wireless communication services provided to a customer whose place of primary use is in the locality. Currently, 47 counties impose the surcharge.⁴³ All surcharge monies are collected by the carriers and remitted directly to the localities imposing the surcharge. The funds are required to be used to pay for costs associated with the design, construction, operation, maintenance, and administration of public safety communications networks serving such locality. Service providers are allowed to keep 2 percent of the monies collected to cover administrative costs.

Wireline Enhanced 911
(E911) Surcharges

The enhanced emergency telephone system surcharge, authorizes municipalities outside New York City to impose a surcharge of up to 35 cents per local exchange service access line⁴⁴ per month.⁴⁵ In New York City, this surcharge is authorized to be imposed at a rate not to exceed \$1.00 per line per month. The surcharge may not be imposed on more than 75 access lines per customer per location. As with the local wireless surcharge, the State Tax Department does not administer any of the local wireline surcharges. All revenues are collected by the providers and remitted directly to the municipalities imposing the surcharge. Providers may retain

2 percent of the total surcharge collected as an administrative fee. This surcharge is required to be used to pay for the costs associated with obtaining and maintaining the telecommunications equipment and services necessary to provide an enhanced 911 (E911) emergency telephone system.

Local Gross Receipts Taxes

Cities (other than New York City, which is described in the next section of the report) and villages may impose selective gross receipts taxes on the sales of utility services that originate and terminate within their jurisdictions. Cities and villages are authorized to impose a tax of 1 percent on the gross income of utilities, including telecommunication service providers, operating in their jurisdiction.⁴⁶ The authorization to impose tax is based on the State tax imposed by Tax Law section 186-a, as it existed on January 1, 1959, and applies only to receipts derived from transactions within the territorial limits of the city or village. As of 2007, 60 cities, other than New York City, and some 365 of 553 eligible villages impose this tax. These local utility taxes are administered by the chief fiscal officer of each municipality.

New York City Utility Taxes

Telecommunication companies subject to the supervision of the New York State Public Service Commission are subject to a tax of 2.35 percent on their gross income. Gross income means receipts from sales made or services rendered in the City of New York, and certain other income. This tax is generally imposed only on transactions taking place within the territorial limits of the City (intra-city telecommunications). However, if 80 percent or more of a provider's gross income comes from mobile telecommunications services, then the company is considered a utility regardless of whether they are under PSC supervision.

Companies not subject to PSC supervision, but that sell or furnish telecommunications services, are "vendors of utility services." These companies are subject to the Utility Tax of 2.35 percent on their "gross operating income" from selling telecommunications services.

For mobile telecommunication providers, their gross income or gross operating income subject to tax includes 84 percent of charges for the provision of mobile telecommunication services when the mobile telecommunications customer's PPU is within New York City.⁴⁷

New York State Franchise Taxes

Corporation Franchise Tax

Most corporations pay tax under Article 9-A of the Tax Law for the privilege of exercising their corporate franchise in New York. Article 9-A applies to general business corporations not taxed under another article of the Tax Law.

Corporations compute their tax under four bases, and pay tax on the base yielding the highest liability. Taxpayers may subtract net operating losses and tax credits. An additional tax is imposed on the corporation's subsidiary capital allocated to New York, at a rate of 0.09 percent.

- The entire net income base equals federal taxable income modified for income and deduction items that New York treats differently. For example, New York's tax base excludes subsidiary income items and does not allow deductions directly and indirectly attributable to subsidiary capital. The tax rate on allocated ENI varies. Most taxpayers are subject to a rate of 7.1 percent. Small business taxpayers with an ENI base of \$290,000 or less are subject to a rate of 6.5 percent, which rises in stages to 7.1 percent as ENI increases to \$390,000. Qualified New York manufacturers and qualified emerging technology companies (QETCs) are subject to a 6.5 percent rate. OR
- The capital base imposes a tax of 0.15 percent on business and investment capital allocated to New York after deduction for short- and long-term liabilities (the maximum tax on this alternative equals \$350,000 for manufacturers and \$10 million for all others). OR
- The minimum taxable income base, which disallows most credits, imposes a 1.5 percent tax on the alternative minimum taxable base. OR
- A fixed dollar minimum tax, based on the taxpayer's New York receipts as follows:

NY Receipts	C Corporations	S Corporations
Less than \$100,000	\$25	\$25
\$100,000 - \$250,000	\$75	\$50
\$250,000 - \$500,000	\$175	\$175
\$500,000 - \$1,000,000	\$500	\$300
\$1,000,000 - \$5,000,000	\$1,500	\$1,000
\$5,000,000 - \$25,000,000	\$3,500	\$3,000
\$25,000,000 - Over	\$5,000	\$4,500

General business corporations that file as S corporations for federal tax purposes may also elect S status for New York State franchise tax purposes. This election requires the shareholders to report their proportionate share of S corporation income, gain, or loss on their personal income tax returns. Businesses that are eligible S corporations for federal tax purposes, but do not make the election to be a New York S corporation, are deemed to be New York S corporations if investment income for the current taxable year is more than half of federal gross income for the year. S corporations are subject only to the fixed dollar minimum tax, which is imposed at the entity level, but at different amounts than for C corporations.

The Metropolitan Transportation Authority (MTA) surcharge applies, at a rate of 17 percent, to business taxes otherwise due (except the petroleum business tax), and allocable to the 12-county Metropolitan Commuter Transportation District. This region includes the City of New York, Long Island and the mid-to-lower Hudson River Valley. The MTA surcharge remains in effect through tax years ending before December 31, 2013.

Corporation & Utility Tax

Companies principally engaged in telecommunications pay their franchise tax under sections of Article 9 of the Tax Law.

Transportation and Transmission Corporations and Associations (Section 183)

This tax is imposed on corporations, joint stock companies, or associations principally engaged in transportation, telephone, or other transmission businesses. The tax equals the highest of the following calculations:

- 1.5 mills on each dollar of net value of issued capital stock; OR
- if the share of dividends paid on capital stock is 6 percent or more, 0.375 mills per dollar of par value for each one percent of dividends paid; OR
- a minimum tax of \$75.

The MTA surcharge is separately imposed in Tax Law Section 183-a.

Additional Franchise Tax
(Section 184)

This tax is imposed on corporations, joint stock companies, or associations principally engaged in transportation, local telephone business, or other transmission businesses. Principally engaged means that over 50 percent of the taxpayers' gross receipts are derived from the particular activity or activities. It applies a rate of 0.375 percent on gross earnings from all sources in the State. In the case of local telephone businesses, receipts from sales for ultimate consumption from: 1) inter-LATA, interstate, or international telecommunications services, and 2) 30 percent of intra-LATA toll telecommunications services, including inter-region regional calling plan services, are excluded from the tax.⁴⁸The MTA surcharge is separately imposed in Tax Law Section 184-a.

New York City
Business Taxes (NYC
Administrative Code)

New York City imposes some of the same taxes on businesses that the State imposes. Unlike the State, it also has an unincorporated business tax. The New York City Department of Finance administers the City's business taxes.

General Corporation Tax
(GCT)

The General Corporation Tax (GCT) is imposed on domestic and foreign corporations that are engaged in business activities, employ capital, own or lease property, or maintain an office in New York City. Like the State corporate franchise tax, the GCT starts with federal corporate income and applies to most incorporated businesses except banks and regulated utilities, which are taxed under separate taxes. However, unlike federal and State law, New York City does not allow for the S corporation election. The GCT is computed by four different methods and is imposed at whichever method produces the largest amount of tax.

- Entire net income base = 8.85 percent of "net income allocated to New York City"; OR
- Total Capital base = .15 percent of business and investment capital allocated to New York City (for cooperative housing corporations that rate is .04 percent), not to exceed \$1 million; OR
- Alternative tax base = 8.85 percent of 18.75 percent (15 percent for tax years beginning after 2009) of net income plus the amount of salaries or other compensation paid to any person, including an officer, who at any time during the taxable year owned more than five percent of the taxpayer's issued capital stock, minus \$40,000; OR
- Fixed dollar minimum tax, based on New York City receipts, ranging from \$25 to \$5,000.

Small businesses are subject only to the entire net income or fixed dollar minimum tax bases.

Starting in the 2009 tax year, New York City will begin phasing in a single receipts factor allocation formula, to be completed in the 2018 tax year. In 2009, the receipts factor is weighted at 40 percent while the other two factors are weighted at 30 percent each. Manufacturers will retain their current double-weighted sales factor until the 2011 tax year, when the phase-in schedule weights the receipts factor at 53 percent. Starting in that year, manufacturing corporations will use the same allocation formula as all other industries.

In addition to the tax calculated under the highest of the four methods, a tax on subsidiary capital is also payable. The subsidiary tax is at the rate of .075 percent of subsidiary capital allocated to New York City.

Corporations that are subject to the New York City Utility Tax as “vendors of utility services” are also subject to the GCT under a formula that is designed to eliminate duplicative taxation.

In addition to the tax calculated under the highest of the four methods, a tax on subsidiary capital is also payable. The subsidiary tax is at the rate of .075 percent of subsidiary capital allocated to New York City.

The State and City differ in the tests for determining whether a provider of telecommunications services are subject to the GCT. Corporations that are subject to the New York City Utility Tax as “vendors of utility services” are also subject to the GCT under a formula that is designed to eliminate duplicative taxation.

Unincorporated Business Tax (UBT)

The Unincorporated Businesses Tax (UBT) is imposed on unincorporated businesses, such as sole proprietorships and partnerships. The UBT is generally based on the firm’s federal net income, subject to various modifications and allocations, at the rate of 4 percent, after allowance of a \$5,000 exemption. Compensation paid to a proprietor or partner for services or the use of capital in excess of \$10,000 per partner or proprietor is not deductible, and the total deduction cannot exceed 20 percent of the firm’s net income.

Unincorporated businesses allocate income to New York City by using a three-factor formula allocation method based on property, payroll and receipts, unless that method does not fairly and equitably reflect the taxpayer's income. However, starting in the 2009 tax year (2011 for manufacturers), New York City will begin phasing in a single receipts factor allocation formula, to be completed in the 2018 tax year. In 2009, the receipts factor is weighted at 40 percent while the other two factors are weighted at 30 percent each.

A credit eliminates the tax for businesses with taxable incomes of \$100,000 or less, and reduces the tax for businesses with taxable incomes of less than \$150,000.

Unincorporated businesses that are subject to the New York City Utility Tax as "vendors of utility services" are also subject to the UBT under a formula that is designed to eliminate duplicative taxation.

Local Franchise Fees – Telephone and Cable TV

Franchise fees are governed by Section 622 of the Federal Cable Act. Under Section 622, municipalities are entitled to a maximum of 5 percent of gross revenues derived from the operation of the cable system for the provision of cable services.⁴⁹ This applies to all cable companies, including Verizon's provision of FiOS TV.

State regulations do not require that there be a franchise fee for cable television service, but if one is imposed, the franchise provision must specify the precise amount and method of calculation and must be competitively neutral when compared to the amount or method of calculation of a franchise fee provision in any other franchise granted by the municipality. The provision also should specify if any facilities or support for Public, Educational, and Governmental (PEG) access are to be considered a part of the fee.

Cable companies are also assessed a special franchise tax on the value of their physical plant (cables, poles, etc.) in the municipal right-of-way. Section 626 of the Real Property Tax Law gives cable companies the right to offset the amount payable under this special franchise tax against the amount of their franchise fee payable to the municipality.

The U.S. Cable Communications Policy Act of 1984 confirmed

that cable television service came under federal jurisdiction. Federal law provides that municipalities may negotiate with cable companies for their franchise rights.⁵⁰ The maximum fee equals 5 percent of the revenues attributable to the franchise locality. Wireless cable company competitors, such as Direct Broadcast Satellite (DBS) providers, do not operate in public rights-of-way, and are, therefore, not subject to these franchise fees. State law limits the duration of local franchise agreements to fifteen years.

Many franchises have provisions which reduce the fee payable to the municipality by the amount of the regulatory assessment (currently about two-tenths of one percent) payable annually to the PSC under Article 11 of the Public Service Law.

Under federal law, cable companies have the right to pass through the amount of the franchise fee directly to subscribers, and to include both the amount of the franchise fee and the name of the franchising authority as a separate line item on each subscriber's bill.

A New York City franchise fee applies to facilities-based telecommunications providers. The rate of approximately 5 percent is collected separately by providers.⁵¹

Utility Assessments

Section 18-a of the Public Service Law requires all utilities to contribute to the cost and operations of the Department of Public Service. Each telephone company with annual revenues in excess of \$500,000 is assessed an amount based on its gross operating revenues derived from intrastate utility operations in the prior calendar year. The maximum amount that can be collected cannot exceed one-third of one percent of a company's gross operating revenues derived from intrastate utility operations.⁵²

Cable companies, including telephone companies that provide video services, are assessed separately under Section 217 of Public Service Law. The PSC annually estimates the costs (direct and indirect) and expenses related to regulation of cable television companies, and it apportions those costs based on the gross receipts of each company.

Targeted Accessibility Fund

The Targeted Accessibility Fund (TAF) is a mechanism created by the Public Service Commission to share, on a competitively-neutral basis, the costs associated with socially-beneficial programs, specifically Lifeline, the State's telephone relay service for the hearing impaired, emergency services (i.e., 911), and public interest payphones. Assessments for each telecommunications carrier are calculated based on the total cost of the programs and the carrier's revenue. Traditional landline providers are required to participate in the program. Wireless carriers do not participate. Due to the regulatory uncertainty of jurisdiction, the PSC has not required cable companies that provide voice services to participate. However, Time Warner Cable makes voluntary contributions to TAF, but does not collect any money.

The Real Property Tax

New York's property tax is imposed by local governments rather than the State. It currently is the largest of all taxes levied and generates approximately \$43 billion annually for local governments that include counties (57), cities (62), towns (932), villages (556), school districts (685), fire districts (867), and some 2,428 additional independent special-purpose units of government and local authorities.

Unlike most of the other states, New York does not tax personal property (taxation of personalty was discontinued in 1933). However, the exact definition as to what is real property and what is personal property varies greatly from state to state. Thus, it is possible to identify certain property components which are considered taxable realty in New York that would be either taxable personalty or exempt personalty in other states (see later discussion on "special franchise property," for example).

Taxable Status of Various Types of Telecommunications Property

As a general rule, all real property in New York is taxable unless specifically exempted.⁵³ Real property includes land and things affixed to the land. Real property also includes "special franchises," which are the rights of utility companies, including telecommunications firms, to place equipment in the public right-of-way.⁵⁴ For telecommunications equipment, the taxable status will often depend also upon the ownership and/or the type of telecommunication involved. The views of the New York State Office of Real Property Services (ORPS), based on interpretation of the statutes, case law, and relevant legal opinions are set forth below.

According to the Real Property Tax Law (RPTL) section 102, "real property," "property" or "land" mean and include:

(a) Land itself, above and under water, including trees and undergrowth thereon and mines, minerals, quarries and fossils in and under the same, except mines belonging to the State;

(b) Buildings and other articles and structures, substructures and superstructures erected upon, under or above the land, or affixed thereto.

Special provisions apply to telecommunications property, in which case the terms "real property," "property" or "land" mean and include:

"(d) When owned by a telephone company all telephone and telegraph lines, wires, poles, supports and enclosures for electrical conductors upon, above and underground. For purposes of this paragraph the term "real property" shall not include station connections and the term "telephone company" shall mean a company subject to regulation by the public service commission which provides, to the general public within its local exchange area, non-cellular switched local exchange telephone service at the points of origination and termination of the signal."

"(i) When owned by other than a telephone company as such term is defined in paragraph (d) hereof, all lines, wires, poles, supports and enclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain, except that such property shall not include: (A) station connections; (B) fire and surveillance alarm system property; (C) such property used in the transmission of news wire services; and (D) such property used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public, whether or not a fee is charged therefore."

Cable Television Property

In 1985, Section 102(12) of the RPTL was modified to exclude certain cable television equipment from the definition of taxable real property. That cable television equipment located on privately owned land was classified as personal property, and thus became exempt. However, the definition of special franchise property contained in Section 102(17) was not changed, and cable television equipment located in public rights-of-way therefore continues to be taxable real property.⁵⁵

Television and Radio Towers

Questions have been raised concerning television and radio towers. The towers themselves are taxable as "supports" for equipment pursuant to RPTL section 102(12)(i). The electronic equipment used in the transmission of television and radio signals are excluded from the definition of real property in that paragraph and thus are not taxable. Some radio station towers are not merely structures to which equipment is affixed but rather are directly involved in the transmission of signals. These towers are thus also specifically excluded from the definition of realty.

Generally, equipment used in the transmission or switching of electromagnetic voice, video and data signals, which is not owned by a phone company as defined in section 102(12)(d) (see above), should be analyzed pursuant to the provisions of section 102(12)(i). While this section appears to make taxable all such equipment, it does exclude four items: (A) station connections; (B) fire and surveillance alarm system property; (C) such property used in the transmission of news wire services; and (D) such property used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public, whether or not a fee is charged therefore.

A literal reading of the statute is the best way to classify broadcasting towers. If the tower is not "actually used in the transmission of radio signals" but rather, is merely a support for equipment, it should be classified as real property. However, if the tower is actually used in transmitting the signal it would be excluded by the language of RPTL section 102(12)(i)(D). If a tower actually acts as an antenna, and the radio signal is transmitted through the tower itself, the tower then meets the other requirements of section 102(12)(i)(D), then the tower would not be taxable.

In most situations, absent specific inclusion or exclusion from the statute sections discussed above, a determination of taxable status of tower-like structures under section 102(12)(b) will entail the so called "fixtures test." The New York State Court of Appeals, in its landmark decision in *Metromedia, Inc. v. Tax Commission*,² recited the test for determining whether such improvements or "fixtures" are to be considered real property for real property taxation purposes. In reaching its decision, the Court noted the common law test used for determining whether a particular item is a "fixture;" i.e., the item must:

- be actually annexed to the real property or something appurtenant thereto;
- be applied to the use or purpose of the real property; and
- be intended as a permanent accession thereto.

Cellular Telephone Towers and Related Equipment

The law concerning the taxable status of cellular telephone towers and related equipment was significantly clarified in 2004 in the case *Matter of Nextel of New York Inc. v. Assessor*.⁵⁶ In the decision, the court found that Nextel's communications equipment was fully taxable under RPTL section 102 (12) (i), because, within the terminology of the statute, the antennae are "poles," the coaxial cables are "lines" or "wires," and a 40,000 pound communications shed is an "enclosure."

The court also found that, alternatively, such infrastructure would be taxable pursuant to RPTL section 102 (12) (i) because it constitutes the outside telecommunications plant of entities other than local telephone companies. This is because the cellular telephone equipment functions like "lines, wires, poles supports and enclosures" by connecting cellular telephone users to other telephone users.

Endnotes

1. Tax Law § 1111(l)(2).
2. Tax Law § 1105(b)(1)(B).
3. Tax Law § 1105(b)(2).
4. Section 527.2 of the Sales and Use Tax Regulations was last updated on September 15, 1980.
5. Cable television service is defined in regulations as the service of “receiving and amplifying programs broadcast by television or radio stations or any other programs originated by a cable television company or by any other party, and distributing such programs by wire, cable, microwave, or other similar means ...” Music service is defined in regulations as the “initiation of musical programs and the distribution of such programs by wire, cable, or other similar means.... Sales and Use Tax Regulation §527.2(d)(3).
6. 4 USC § 116, *et seq.*
7. Tax Law § 1111(l)(3)(b).
8. TSB-M-02(4)C, (6)S.
9. AL, AZ, CO, CT, HI, ID, KY, LA, ME, MN, MS, NE, NJ, NM, SD, TX, UT, VT, WA, WV and WY.
10. TSB-A-99(48)S.
11. TSB-A-01(15)S.
12. TSB-A-07(14)S.
13. The exemptions are not limited to traditional telecommunication providers, but are instead available to any provider that meets the necessary criteria.
14. Tax Law §1115(a)(12-a), 1105(c)(3)(k).
15. Tax Law § 1105(b).
16. The Federal Internet Tax Freedom Act (ITFA), which is discussed in greater detail below, is broader than the State exemption.
17. Tax Law § 1115(v).
18. Tax Law § 1105(c)(9).
19. Tax Law §§ 1101(b)(6), 1115(a)(5).

-
20. Tax Law § 1115(b)(i).
 21. Tax Law § 1115(e).
 22. Tax Law § 1115(a)(37).
 23. Tax Law § 1115(a)(38).
 24. Tax Law § 186-e (1)(g).
 25. 488 US 252 (1989).
 26. *See* Tax Law § 186-c. 1(b).
 27. Tax Law § 1132(c); Sales and Use Tax Regulations § 527.1.
 28. Tax Law § 186-e(g).
 29. Tax Law §§ 186-e.2(b)(4), 1111(l)(2).
 30. 47 USC § 151 (note § 1106).
 31. *See, e.g.*, Tax Law § 1111(l)(2); NYT-G-07(2)C & (3)S.
 32. TSB-M-97(1.1)C,(1.1)S .
 33. Tax Law §§ 179, 1115(v).
 34. Public Law No. 105-227.
 35. 47 USC § 151 (note § 1106).
 36. *See, e.g.*, Tax Law § 1111(l)(2); NYT-G-07(2)C & (3)S.
 37. Public Law No. 108-435.
 38. TSB-M-08(4.1)C &(2.1)S.
 39. Public Law No. 110-108.
 40. *See* 4 USC § 124(9); Tax Law § 1101(b)(22).
 41. *See* Tax Law § 1212(a).
 42. Prior to September 1, 2009, this surcharge was imposed by Section 309 of the County Law. The surcharge imposed by Tax Law section 186-f is substantially similar to the surcharge that was imposed by County Law section 308. Differences include the ability of the Tax Department to enforce payment of the surcharge and to pay refunds of surcharge monies paid in error. *See, Public Safety Communications Surcharge*, TSB-M-09 (8)C.

-
43. The 10 counties outside of New York City that do not impose the wireless surcharge are: Delaware, Hamilton, Jefferson, Lewis, Monroe, Niagara, Oneida, Oswego, Schoharie and St. Lawrence.
 44. Local exchange service access line provides the connection between the customer's premises and the local exchange carrier (regulatory term for local telephone company) which provides access to the PSN.
 45. *See* County Law § 303. Recently enacted County Law sections 334 and 335 respectively authorized Onondaga and Tompkins Counties, to impose an additional \$0.65 per month, for a total of \$1.00. *See* Chapters 264 and 210 of the Laws of 2009.
 46. *See* General City Law § 20-b (Ch. 321, L.1937); Village Law §5-530 (Ch. 591, L. 1950). The cities of Buffalo, Rochester, and Yonkers are authorized to impose this tax at the rate of 3 percent.
 47. *See* New York City Administrative Code § 11-1101(4).
 48. The term "local telephone business" is defined in Tax Law Section 184.1 to mean the provision of telecommunications services consisting of carrier access service or service that originates and terminates within the same geographic local access and transport area (LATA). "Telecommunications services" is defined to have the same meaning as it does in Tax Law Section 186-e. Tax Law § 186-e.1(g) defines "telecommunications services" to mean "telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber optic, laser, microwave, radio wave, satellite or similar media or any combination thereof" and includes "services that are ancillary to the provision of telephone service (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call waiting, and the like) and also includes any equipment and services provided therewith."
 49. *See* 47 USC § 542.
 50. *Id.*
 51. The applicability of the New York City Franchise Fee to Verizon New York, Inc is being litigated. *See City of New York v. Verizon N.Y., Inc.*, 2008 N.Y. Misc. Lexis 4572 (2008).
 52. Many franchises require cable operators to provide in addition to the franchise fee significant support for PEG Access and Institutional Networks as well as free service to municipal facilities and schools.
 53. Real Property Tax Law § 102(12).
 54. Time Warner Cable pays an assessment to the PSC based on its end user digital phone service revenue.

-
55. On the other hand, telecommunication property located on a private right-of-way is taxable, while cable property located in a private right-of-way is not.
 56. 60 NY2d 85 (1983).
 57. 4 Misc. 3d 233 (Sup. Ct. Rockland Co., Feb. 2, 2004).

Matrix of Taxes by Type of Service

The goal of this report is to inform policy makers about the landscape of the telecommunications industry, and to describe the various taxes and fees that apply in New York. The industry has experienced significant changes in just the last decade and has become so dynamic that providing an analysis of the taxes paid on different services is challenging. How tax applies can be shaped by factors such as what service is being provided, the business model of the provider, and how the service is billed to the customer. For example, a cable company providing VoIP service may face a tax burden that differs from that of a traditional landline service – or even from another corporate entity providing similar VoIP service. Moreover, definitions are not consistent from tax to tax. A company defined as providing taxable telephone service for sales tax purposes may not be considered to be providing telephone service for local gross receipts tax purposes. Indeed, there is no way to cover every nuance of how taxes are applied to telecommunication services. As such, this report and the matrix that follows should not be viewed as an exhaustive description of the taxes on the telecommunication industry.

However, because the matrix is a two-dimensional depiction of a multi-dimensional concept, certain simplifying assumptions were made. For instance, where a row heading is labeled with a particular service, it is assumed that the service is being provided by a company that is principally engaged in that line of business. So, for example, an entity that is principally engaged in providing cable television services shows in the matrix that they pay franchise tax under Article 9-A. If another company is principally engaged in providing telephone services, but also provides some television services, they would pay franchise tax under Article 9.

The matrix focuses on services offered by communications providers, not the taxes paid by customers. Consequently, it cannot be used to directly compare the taxes paid by one customer with another for a package of communications services. Nonetheless, one can examine the matrix and

conclude, for example, that a traditional landline service provided by an entity principally engaged in telecommunications would be subject to all the taxes and fees represented in the matrix (except for the surcharges on wireless service). These taxes and fees would in some instances be imposed directly on the consumer, and in other instances imposed on the provider and built into the cost of those services. In contrast, an Internet-based communications service provider who provided this service to users at no charge would be subject only to the Article 9-A franchise tax (and possibly the MTA surcharge). Because the service is free to customers, no taxes would be imposed directly on them.

Despite the difficulties, Table 3 presents a matrix that attempts to describe the taxability of telecommunications services. The column headings represent the various taxes discussed throughout the report; while the row headings are representative of services offered by the industry.¹ Where appropriate, the taxability of the service is indicated by providing the Tax Law article or section that imposes the particular tax on the service, other times taxability is indicated by a simple yes or no.

The complexity of taxing bundled services was previously discussed. Those complexities are evident in the matrix. We list bundled service under the subcategory of Internet Services. However, the nature of bundled services means it could be placed in any of the three subcategories. In general, when telephone, cable and Internet are bundled into one charge, sales tax applies to the entire charge. However, if the provider separately states nontaxable charges (e.g. charges for cable television service), or if they “identify the charges for Internet access from its books and records kept in the regular course of business”,² then only the portion related to telephone service will be subject to tax.

Previously, the report discussed the differences in how prepaid calling cards and prepaid calling service is taxed. Those differences can be seen in the matrix. Sales tax is imposed on prepaid calling cards under section 1105(b)(1)(D), while the sales tax on prepaid wireless is imposed under section 1105(b)(2).

Whether or not streamed audio and video products are subject to the sales tax is dependent on what service is being streamed. If the streamed service falls within the definition of an

information or entertainment service provided by means of telephony or telegraphy or telephone or telegraph service then it is subject to tax under 1105(c)(9).

There is an interesting disparity in the treatment of texting services under wireless communication and e-mail listed under Internet services. The lines between the two services have begun to blur, but the tax treatment remains distinct.³ E-mail, whether or not provided with an Internet connection, is included in the definition of Internet access under the federal Internet Tax Freedom Act, and is therefore exempt from sales and excise taxes. The only taxes that apply to e-mail services are franchise taxes that are imposed on the corporate entity providing the service. However, texting is still considered a telecommunications service offered by telephone service providers, and as such faces different tax burdens – such as the sales tax and a myriad of state and local wireless surcharges.

One of the more contentious issues in the area of telecommunications taxation is in regard to the disparity in the treatment of cable television and satellite television. As the matrix shows, the treatment is the same across the board except cable providers pay local franchise fees and PSL Section 217 assessments while satellite providers pay neither. The satellite industry argues that the additional fees are equivalent to a business expense and that satellite providers have additional operating expenses not faced by cable providers. The cable industry has argued that functionally equivalent services should be taxed in the same manner. This is an issue that policy makers will need to confront in the future.

Finally, the matrix does not include a column for real property tax because real property taxes are not based on the service rendered but rather relate to the holding of property by entities that are engaged in providing telecommunication services. Instead, Table 4 provides the tax treatment of certain property and whether or not that property is held by certain telecommunication providers. Land line telephone companies and cellular telephone companies pay tax on lines, poles, towers and on certain electronics regardless of whether they are located on public or private land. Cable providers, on the other hand, pay tax on lines, poles and towers and certain electronics only when they are located on public land.

Table 3: Taxable Status of Various Services Offered by the Telecommunication Industry by New York State Tax Type

	Franchise Taxes	Excise Taxes	MTA Surcharges	Sales Tax	Consumer Utility Tax (school District Sales Tax)	MCTD Tax	Local GRT	NYC Taxes	State Public Safety Communications Surcharge	Local 911 Surcharges (Wireless) Including NYC	Local 911 Surcharges (Wired) Including NYC	Local Franchise fees	18-a Assessments & Section 217
Communication Services													
Wired Communication													
Traditional Landline	183/184	186-e	183-a/184-a & 186-c	1105(b)(1)(B)	Yes	Yes	Yes	Yes	No	No	Yes	Yes*	18-a
VolP	183/184	186-e	183-a/184-a & 186-c	1105(b)(1)(B)	Yes	Yes	Yes	Yes	No	No	Yes	Yes*	No
Cable Company VolP	9-A	186-e	209-B & 186-c	1105(b)(1)(B)	Yes	Yes	Yes	Yes	No	No	Yes	Yes*	No
Prepaid calling card	9-A	No	209-B & 186-c	1105(b)(1)(D)	No	Yes	No	No	No	No	No	No	Yes
No Charge Services	9-A	No	209-B & 186-c	No	No	No	No	No	No	No	No	No	No
Wireless Communication													
Regular Wireless	183/184	186-e	183-a/184-a & 186-c	1105(b)(2)	Yes	Yes	No	Yes**	Yes	Yes	No	No	No
Wireless VolP	183/184	186-e	183-a/184-a & 186-c	1105(b)(2)	Yes	Yes	No	Yes	Yes	Yes	No	No	No
Prepaid Wireless	183/184	186-e	183-a/184-a & 186-c	1105(b)(2)	Yes	Yes	No	Yes	No	No	No	No	No
Prepaid calling card	9-A	No	209-B	1105(b)(1)(D)	No	Yes	No	No	No	No	No	No	No
Texting and other Data	183/184	186-e	183-a/184-a & 186-c	1105(b)(2)	Yes	Yes	No	Yes**	Yes	Yes	No	No	No
Video and Audio Entertainment Services													
Television													
Broadcast Television	9-A	No	209-B	No	No	No	No	No	No	No	No	No	No
Cable Television	9-A	No	209-B	No	No	No	No	No	No	No	No	Yes	Yes
Satellite Television	9-A	No	209-B	No	No	No	No	No	No	No	No	No	No
Internet Based Television	9-A	No	209-B	No	No	No	No	No	No	No	No	No	No
Wireless Based Television	9 or 9-A	No	183-a or 209-B	1105(c)(9)	No	Yes	No	No	No	No	No	No	No
Audio Products													
Downloaded	9-A	No	209-B	No	No	No	No	No	No	No	No	No	No
				No unless		No unless							
Streamed	9-A	No	209-B	1105(c)(9)	No	1105(c)(9)	No	No	No	No	No	No	No
Other Video													
Downloaded	9-A	No	209-B	No	No	No	No	No	No	No	No	No	No
Streamed	9-A	No	209-B	1105(c)(9)	No	1105(c)(9)	No	No	No	No	No	No	No
Other Digital Products													
Text (E-book)	9-A	No	209-B	No	No	No	No	No	No	No	No	No	No
Games	9-A	No	209-B	1105(a)	No	Yes	No	No	No	No	No	No	No
Graphics	9-A	No	209-B	No	No	No	No	No	No	No	No	No	No
News	9-A	No	209-B	1105(c)(1) or (c)(9)	No	Yes	No	No	No	No	No	No	No
Software	9-A	No	209-B	1105(a)	No	Yes	No	No	No	No	No	No	No
Internet Services													
Internet Access	9-A	No	209-B	No	No	No	No	No	No	No	No	No	No
E-mail	9-A	No	209-B	No	No	No	No	No	No	No	No	No	No
Bundled Services	9 or 9-A	Yes***	183-a or 209-B & 186-c	Yes****	Yes****	Yes****	No	No	No	No	Yes*	No	Yes*****

* Local Franchise fees are subject to Negotiation

** Percent of receipt is subject to tax

*** Telephone service is taxable

**** All taxable unless cable charge is separately stated and if identify the charges for Internet access from its books and records kept in the regular course of business then only telephone portion is taxable

***** To the extent a service in the bundle falls within PSC jurisdiction

Table 4: Status of Real Property Tax on Various Telecommunication Providers

<u>Type of Real Property</u>	Type of Telecommunications Provider		
	Land Line Telecommunications	Cable Television Operator	Cellular Phone Provider
franchise to operate on public land	taxable	taxable	N/A
lines, poles, towers on public land	taxable*	taxable**	taxable
lines, poles, towers on private land	taxable	exempt	taxable
certain electronics, on public land	taxable***	taxable	taxable
certain electronics, on private land	taxable****	exempt	taxable

* listed specifically as components of the franchise (RPTL sect. 102 (12-d))also taxable as "tangible" component of the franchise (RPTL sect. 102 (17))

** taxable as a "tangible" component of the franchise (RPTL sect. 102 (17))

*** except for "central office equipment" and "station equipment" first appearing on rolls completed after 10/01/1995 (RPTL sect. 102 (17))

**** except for "station connections" (RPTL sect. 102 (12-d))

Endnotes

1. It should also be noted that the services described in the matrix and previously in Section I are not a complete list of the services offered by the industry. We attempted to highlight some of the services that have changed dramatically in just the past few years, as well as the services where the taxability is in question and or controversial.
2. 47 USC § 151 (note § 1106).
3. There are applications available on certain handheld wireless devices such as the iPod Touch that allows users to send text messages to cell phones. The application may or may not be free but texting using the application is free.

For more information concerning the data provided in this publication, please contact:

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
W.A. Harriman State Campus Office
Albany, New York 12227
Phone (518) 457-3187