

CITY OF OAKLAND
AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2008 FEB 21 PM 6:00

TO: Office of the City Administrator
ATTN: Deborah Edgerly
FROM: Finance and Management Agency
DATE: March 4, 2008

RE: **A Resolution Submitting To The Voters At The June 3, 2008 Special Election A Proposed Ordinance Amending Chapter 4.28 Of The Oakland Municipal Code In Order To Modernize The Provisions Of The Telephone Utility Users Tax; Requesting Consolidation Of The Election With The General Election To Be Held June 3, 2008; Requesting The Services Of The Registrar Of Voters; And Directing The City Clerk To Fix The Date For Submission Of Arguments And To Provide For Notice And Publication In Accordance With The June 3, 2008 General Election**

SUMMARY

Staff has prepared a proposed amendment to the Telephone Utility Users Tax Ordinance that will modernize the Ordinance, address potential legal challenges and ensure with reasonable certainty in the continued collection and receipt of this source of general purpose fund taxes. This revenue source is critical to the public welfare and the City's ability to provide essential municipal services such as police, fire and public works. The City's Telephone Utility Users Tax Ordinance is threatened by potential litigation challenging application of the tax to certain telecommunication services as a result of outdated ordinance definitions or references to outdated federal laws.

Though no increase in the tax rate is recommended, after adoption of Proposition 218 in 1996, any change to a tax ordinance can be challenged by asserting the change is a new tax or tax increase. Voter approval of a modern telephone communications tax would best resolve those types of issues. The first opportunity to present the proposed amendment of the Telephone Utility Tax Ordinance to the voters would be at the scheduled special election on June 3, 2008. The City Council would need to approve the placement of this amendment by March 8, 2007.

FISCAL IMPACT

The inability of the City to collect the Telephone Utility Users Tax could result in annual general fund revenue losses of approximately \$20,000,000 or more. Any loss in revenue from this tax source would impact the City's ability to provide essential services such as police, fire and public works.

The proposed definition of communication services subject to the tax is defined broadly and in a technology-neutral manner, and may alter the existing tax base as communications technology

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evolves. Future revenue could increase or decrease as a result of changes in communications technology, and it is not possible to predict the specific impact at this time.

BACKGROUND

Since 1968, the City of Oakland has imposed a telephone Utility Users Tax on every person with telephone service in the City. As of 1992, the tax applied to interstate, intrastate calls, or international telephone communication services. In 1993, the tax was imposed on to cellular telephone communication services. Presently, the tax is applied at a rate of 7.5% of the charges billed. The Utility Users Tax is a major source of general purpose fund revenue that supports the provision of essential City services.

Since original enactment in 1968, Oakland linked its telephone Utility Users Tax to the definitions of telephone communications as adopted in the Federal Excise Tax ("FET") in 1965. Traditionally, the City has looked to the Internal Revenue Service (IRS) interpretation of the FET for guidance on the scope and application of its tax. However, telephone charges based on time and distance that were common for long-distance in 1965 are not as common today. A variety of single-rate plans in the market place do not base charges on time and distance. In 1979, the IRS had issued Revenue Ruling (79-404) determining that a variable for distance was not necessary for a toll call to be subject to the tax. The IRS defended lawsuits around the country challenging the application of Revenue Ruling 79-404 and the FET to such phone charges.

On May 25, 2006, the IRS reversed its collection practice since 1979 issuing Revenue Notice 2006-50. The Notice stated that the IRS would no longer interpret the FET as applying to wireless communications which were billed based on time only, rather than both time and distance. The IRS also created a new service category call "bundled services," extending the ruling to billing practices of traditional phone companies as well as wireless providers. Effective August 1, 2006, the IRS no longer applied the FET to long distance and bundled service.

On January 29, 2007, the IRS issued Revenue Bulletin 2007-5 clarifying that Notice 2006-50 "did not affect the ability of state or local governments to impose or collect telecommunication taxes under the respective statutes of those governments." Despite this, some utilities claim that, based on the IRS action, local governments are precluded from collection of their telephone utility users taxes. Class action lawsuits pending in other California cities claim that local governments are precluded from continuing collection of similar outdated telephone Utility Users Taxes.

In December 2007, the City Council adopted an administrative amendment to Chapter 4.28 of the Oakland Municipal Code clarifying that the City's application of the telephone utility users tax (UUT) to intrastate telephone communications services was to remain consistent with the Internal Revenue Service's interpretation of the Federal Excise Tax prior to May 25, 2006. However, a similar non-voter approved ordinance by the City of Sacramento declaring that

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legislative body's legislative intent with respect to their telephone communications tax is now the subject of a judicial challenge on Proposition 218 grounds.

DISCUSSION

By amendment to the telephone users' tax in December 2007, the City reaffirmed that it would continue its long-standing practice of applying its tax in a manner consistent with the IRS' interpretation of the FET prior to Notice 2006-50 issued by the U.S. Treasury Department on May 25, 2006. The City Council also affirmed that it would continue to tax intrastate local, long distance, and bundled services as it always has -- based upon the IRS' interpretation of the FET prior to May 25, 2006. Finally, the non-voter amendment clarified that in 1968 and under amendments since the City linked "telephone communication services" in its ordinance to provisions to the FET "as such section existed on July 1, 1968," it did not intend, and did not adopt, either federal law or federal enforcement policy as to how to treat bundled charges.

The City's Telephone UUT was imposed in a different technological and legal environment and does not reflect current and emerging changes in telephone and communications technology. To ensure an equitable tax that applies to all users of current and emerging telephone-type communications services, whether traditional land line, wireless, or broadband telephone service (to the extent permitted by federal law), it's essential that the City modernize it's existing Telephone UUT.

The California Court of Appeal has entered a decision against the City of Los Angeles in litigation challenging their UUT. Given the uncertainty associated with litigation pending in other jurisdictions, and potential for the continued erosion in the tax base resulting from outdated terminology, a modernized voter approved telephone utility users tax ordinance should be adopted as soon as possible. The June 3, 2008 election is the next available election at which this measure can be consolidated.

Voter Approval

Under Proposition 218, any change to a tax ordinance that could result in a tax increase for any taxpayer within the taxing jurisdiction must be approved by the voters. "The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body." The next scheduled Oakland municipal general election occurs on June 3, 2008. Accordingly, the proposed amendment to Chapter 4.28 seeking voter approval for a modern communications tax may be placed on the ballot by resolution of the Council.

KEY ISSUES AND IMPACTS

Ensuring the continued collection of Telephone Utility Users Tax is critical to the City's ability to provide essential services such as police, fire and public works.

Gaining voter approval for modernizing the Telephone Utility Users Tax will address potential legal challenges that could threaten the viability of an essential revenue source. Modernizing the Telephone Utility Users Tax Ordinance language and redefining communications services subject to the tax in a technology-neutral manner allows the tax base to reflect emerging technological changes.

SUSTAINABLE OPPORTUNITIES

Economic: A modernized ordinance will provide clear intent of the City Council in applying the tax on telephone and telecommunications users, and ensure the continued collection of a general purpose fund source of revenue to support essential municipal services such as police, fire and public works.

Environmental: There are no environmental opportunities resulting from the recommended changes to the Ordinance.

Social Equity: The modernized Ordinance will clarify and update language to reflect current and emerging technology, and will ensure fair and equitable treatment of all taxpayers.

DISABILITY AND SENIOR CITIZEN ACCESS

There are no impacts on disability and senior access from the recommended changes to the Ordinance.

RECOMMENDATION AND RATIONALE

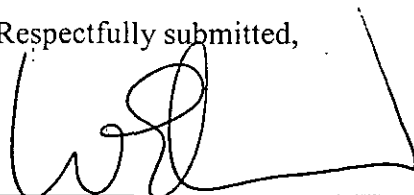
Staff recommends the City Council approve the proposed resolution placing the proposed ordinance amending Chapter 4.28 of the Oakland Municipal Code before the voters at the June 3, 2008 election. This action is necessary to eliminate potential legal issues and to ensure continued collection of tax revenue that is essential for the City to continue to provide vital public services. In addition, staff recommends that the City Council request consolidation of the election with the general election to be held June 3, 2008, request the services of the Registrar of Voters, and direct the City Clerk to fix the date for submission of arguments and to provide for notice and publication in accordance with the June 3, 2008 general election.

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ACTION REQUESTED OF THE CITY COUNCIL

Staff requests the City Council approve the proposed resolution placing the proposed ordinance amending Chapter 4.28 of the Oakland Municipal Code before the voters at the June 3, 2008 election, request consolidation of the election with the general election to be held June 3, 2008, request the services of the Registrar of Voters, and direct the City Clerk to fix the date for submission of arguments and to provide for notice and publication in accordance with the June 3, 2008 general election.

Respectfully submitted,



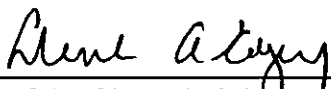
WILLIAM E. NOLAND

Director, Finance and Management Agency

Prepared by:

Terry Adelman, Revenue Manager
Revenue Division

APPROVED AND FORWARDED TO THE
CITY COUNCIL:



Office of the City Administrator

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March 4, 2008

FILED
OFFICE OF THE CITY CLERK
SECRETARY

APPROVED AS TO FORM AND LEGALITY

INTRODUCED BY COUNCILMEMBER _____

2008 FEB 21 PM 6:00

Katherine M. Berg
CITY ATTORNEY

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

A RESOLUTION SUBMITTING TO THE VOTERS AT THE JUNE 3, 2008 SPECIAL ELECTION A PROPOSED ORDINANCE AMENDING CHAPTER 4.28 OF THE OAKLAND MUNICIPAL CODE IN ORDER TO MODERNIZE THE PROVISIONS OF THE TELEPHONE UTILITY USERS TAX WITHOUT INCREASING THE TAX RATE; REQUESTING CONSOLIDATION OF THE ELECTION WITH THE GENERAL ELECTION TO BE HELD JUNE 3, 2008; REQUESTING THE SERVICES OF THE REGISTRAR OF VOTERS; AND DIRECTING THE CITY CLERK TO TAKE ANY AND ALL ACTIONS NECESSARY UNDER LAW TO PREPARE FOR AND CONDUCT THE SPECIAL ELECTION.

WHEREAS, the City of Oakland has imposed a telephone utility users tax on all persons in the City using telephone communications services since 1968; and

WHEREAS, municipal ordinances similar to Oakland's telephone utility users tax have been the subject of court challenges due to outdated definitions or references to outdated federal laws; and

WHEREAS, the City requires reasonable certainty in the collection and receipt of General Fund taxes and the City Council has determined that the steps it takes now are necessary to eliminate potential legal issues and to ensure continued collection of tax revenue that is essential for the City to continue to provide vital public services; and

WHEREAS, the Council determines that it is in the best interest of the City of Oakland to submit a telephone utility users tax to the voters that will use modern terminology that will remain current regardless of changes in technology; and

WHEREAS, accordingly, the City Council of the City of Oakland desires to amend Section 4.28.030 the Oakland Municipal Code in order to remove outdated language and to modernize the telephone utility users tax without increasing in the current tax rate; and

WHEREAS, the City desires to treat users of communications services in a uniform and equitable manner, regardless of the means of transmission or technology used, so that users of communications services transmitted by traditional technologies bear an equitable tax burden when compared with users of communications services transmitted via newly developed technologies; and

WHEREAS, the proposed definitions are technology-neutral and reflect the modern use of communications so that all telephone communications users will be treated equally; and

WHEREAS, all revenues received from the tax will be deposited in the general fund of the City to be expended for general fund purposes; now, therefore, be it

RESOLVED: That the City Council of the City of Oakland does hereby request that the Board of Supervisors of Alameda County order the consolidation of the Special Municipal election of June 3, 2008, with the statewide general election of June 3, 2008, consistent with the provisions of state law; and, be it

FURTHER RESOLVED: That the City Council of the City of Oakland does hereby submit to the voters at the June 3, 2008 special election the text of the proposed ordinance, which shall be as follows:

AN ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE IN ORDER TO MODERNIZE THE TELEPHONE UTILITY USERS TAX SO THAT ALL TELEPHONE COMMUNICATIONS SERVICE USERS ARE TREATED EQUALLY REGARDLESS OF THE TECHNOLOGY USED AND WITHOUT INCREASING THE TAX RATE.

Be it ordained by the People of the City of Oakland:

Section 1. The Municipal Code is hereby amended to add, delete, or modify sections as set forth below (section numbers and titles are indicated in **bold type**; additions are indicated by underscoring and deletions are indicated by strike-through type; portions of the regulations not cited or not shown in underscoring or strike-through type are not changed.

Section 2. Code Amendment. Section 4.28.020 of the Oakland Municipal Code is hereby amended to read as follows:

4.28.020 Definitions.

Except where the context otherwise requires, the definitions given in this section govern the construction of this chapter.

'City' means the City of Oakland.

'Commercial or industrial plant location' means one or more contiguous sites for which the service user receives one or more utility billings.

'Month' means a calendar month.

'Person' means any domestic or foreign corporation, firm, association, syndicate, joint-stock company, partnership of any kind, joint venture, club, Massachusetts business or common-law trust, society, or individual, whether engaged in First Amendment or non-First Amendment enterprises.

"Primary place of use" of a telephone communications service shall be the address to which the service supplier sends invoices for that service unless the service user provides evidence to the reasonable satisfaction of the Tax Administrator that the billing address is not the primary place of use.

'Service address' means the address or location where the user has its equipment (e.g., cellular phone, telephone, pager, facsimile machine) receiving utility services.

"Service supplier" means a person required to collect and remit a tax imposed by this chapter.

'Service user' means a person required to pay a tax imposed by this chapter.

'Tax administrator' means the Director of Finance and Management Agency of the City of Oakland or his or her designee.

'Telephone corporation,' 'electrical corporation,' 'gas corporation,' and 'cable corporation' shall have the same meanings as defined in Section 234, 218 and 222, 215.5, respectively, of the Public Utilities Code of the state of California, as said sections existed on January 1, 1975. "Electrical corporation" shall also be construed to include any municipality, district or franchised agency engaged in selling or supplying electrical power.

'Telephone communication services' includes any telephonic quality communication for the purpose of transmitting messages or information (including but not limited to voice, telegraph, teletypewriter, data, facsimile, video, or text) by electronic, radio or similar means through 'interconnected service' with the 'public switched network' (as these terms are commonly used in the Federal Communications Act and the regulations of the Federal Communications Commission - see 47 USCA Section 332(d)), whether such transmission occurs by wire, cable, fiber-optic, light wave, laser, microwave, broadband, computer processing applications such as voice over internet protocol service and services classified by the Federal Communications Commission as "enhanced" or "value added," radio wave (including, but not limited to, cellular service, wireless broadband, commercial mobile service, personal communications service (PCS), specialized mobile radio (SMR), and other types of personal wireless service - see 47

USCA Section 332(c) (7) (C) (i) – regardless of radio spectrum used), switching facilities, satellite, any other similar facilities, or any other technology now existing or developed after the adoption of this ordinance. Telephone communication services does not include charges for internet access or digital downloads, such as downloads of books, music, ringtones, games and similar digital products.”

‘Utility’ means any person, whether or not regulated by the Public Utilities Commission, that distributes or provides services regarding tangibles or intangibles via the public rights-of-way including but not limited to furnishing services such as telephone, gas, alternate fuels, electrical, cable television, pay television, satellite dish reception, teletype writer, facsimile exchange and other electronic and telecommunication transmissions.

~~Except where the context otherwise requires, the definitions given in this section govern the construction of this chapter.~~

~~‘City’ means the City of Oakland.~~

~~‘Commercial or industrial plant location’ means one or more contiguous sites for which the service user receives one or more utility billings.~~

~~‘Month’ means a calendar month.~~

~~‘Person’ means any domestic or foreign corporation, firm, association, syndicate, joint-stock company, partnership of any kind, joint venture, club, Massachusetts business or common law trust, society, or individual, whether engaged in First Amendment or non-First Amendment enterprises.~~

~~‘Service address’ means the address or location where the user has its equipment (e.g., cellular phone, telephone, pager, facsimile machine) receiving utility services.~~

~~“Service supplier” means a person required to collect and remit a tax imposed by this chapter.~~

~~‘Service user’ means a person required to pay a tax imposed by this chapter.~~

~~‘Tax administrator’ means the Treasurer of the City of Oakland.~~

~~‘Telephone corporation,’ ‘electrical corporation,’ ‘gas corporation,’ and ‘cable corporation’ shall have the same meanings as defined in Section 234, 218 and 222, 215.5, respectively, of the Public Utilities Code of the state of California, as said sections existed on January 1, 1975. “Electrical corporation” shall also be construed to include any municipality, district or franchised agency engaged in selling or supplying electrical power.~~

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~~'Utility' means any person, whether Public Utilities Commission ("P.U.C.") or non P.U.C.-regulated, that distributes or provides services regarding tangibles or intangibles via the public rights of way including but not limited to furnishing services such as telephone, gas, alternate fuels, electrical, cable television, pay television, satellite dish reception, teletype writer, facsimile exchange and other electronic and telecommunication transmissions.~~

Section 3. Code Amendment. Section 4.28.030 of the Oakland Municipal Code is hereby amended to read as follows:

4.28.030 Telephone users tax imposed.

A. There is imposed a tax upon every person, other than a telephone corporation, using telephone communication services including, but not limited to, cellular telephones and facsimile transmissions, whose place of primary use is within the city of Oakland. The tax imposed by this section shall be at the rate of seven and one-half (7.50) percent of all charges made for such services and shall be paid by the person using such services, and collected by the provider of such services.

B. The following shall be exempt from the tax imposed by this section:

(1) Charges paid for by inserting coins in coin-operated telephones available to the public with respect to local telephone service, or with respect to long distance telephone service if the charge for such long distance telephone service is less than 25 cents; except that where such coin-operated telephone service is furnished for a guaranteed amount, the amounts paid under such guarantee plus any fixed monthly or other periodic charge shall be subject to the tax.

(2) Except with respect to local telephone service, any charges for services used in the collection of news for the public press, or a news ticker service furnishing a general news service similar to that of the public press, or radio broadcasting, or in the dissemination of news through the public press, or a news ticker service furnishing a general news service similar to that of the public press, or by means of radio broadcasting, if the charge for such service is billed in writing to a person engaged in such activity.

(3) Charges for services furnished to an international organization or to the American National Red Cross.

(4) Charges for any long distance telephone service which originates within a combat zone, as defined in section 112 of the Internal Revenue Code, from a member of the Armed Forces of the United States performing service in such combat zone, as determined under such section, provided a certificate setting forth such facts as the Secretary of the U.S. Treasury may by regulations prescribe is furnished to the person receiving such payment.

(5) Charges for any long distance telephone service to the extent that the amount so paid is for use by a common carrier, telephone or telegraph company, or radio broadcasting station or network in the conduct of its business as such.

(6) Amounts paid by a nonprofit hospital for services furnished to such organization. For purposes of this subsection, the term 'nonprofit hospital' means a hospital referred to in Internal Revenue Code section 170(b)(1)(A)(iii) which is exempt from income tax under Internal Revenue Code section 501(a).

(7) Charges for services or facilities furnished to the government of any State, or any political subdivision thereof, or the District of Columbia.

(8) Charges paid by a nonprofit educational organization for services or facilities furnished to such organization. For purposes of this subsection, the term 'nonprofit educational organization' means an educational organization described in Internal Revenue Code section 170(b)(1)(A)(ii) which is exempt from income tax under Internal Revenue Code section 501(a). The term also includes a school operated as an activity of an organization described in Internal Revenue Code section 501(c)(3) which is exempt from income tax under Internal Revenue Code section 501(a), if such school normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

~~A. There is imposed a tax upon every person, other than a telephone corporation, using telephone communication services including, but not limited to, cellular telephones and facsimile transmissions, whose place of primary use is within the jurisdictional boundaries of the city of Oakland. The tax imposed by this section shall be at the rate of~~

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~~—— (2) Except with respect to local telephone service, any charges for services used in the collection of news for the public press, or a news ticker service furnishing a general news service similar to that of the public press, or radio broadcasting, or in the dissemination of news through the public press, or a news ticker service furnishing a general news service similar to that of the public press, or by means of radio broadcasting, if the charge for such service is billed in writing to a person engaged in such activity.~~

~~—— (3) Charges for services furnished to an international organization or to the American National Red Cross.~~

~~—— (4) Charges for any long distance telephone service which originates within a combat zone, as defined in section 112 of the Internal Revenue Code, from a member of the Armed Forces of the United States performing service in such combat zone, as determined under such section, provided a certificate setting forth such facts as the Secretary of the U.S. Treasury may by regulations prescribe is furnished to the person receiving such payment.~~

~~—— (5) Charges for any long distance telephone service to the extent that the amount so paid is for use by a common carrier, telephone or telegraph company, or radio broadcasting station or network in the conduct of its business as such.~~

~~—— (6) Amounts paid by a nonprofit hospital for services furnished to such organization. For purposes of this subsection, the term 'nonprofit hospital' means a hospital referred to in Internal Revenue Code section 170(b)(1)(A)(iii) which is exempt from income tax under Internal Revenue Code section 501(a).~~

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Section 4. Severability. Should any provision of this Ordinance, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions hereof are severable.

Section 5. Majority Approval; Effective Date. This Ordinance shall be effective only if approved by a majority of the voters voting thereon and shall go into effect ten (10) days after the vote is declared by the City Council.

Section 6. Council Amendments. The City Council of the City of Oakland is hereby authorized to amend Sections 4.28.020, 4.28.030 and 4.28.190 of the Oakland Municipal Code as adopted by this Ordinance in any manner that does not increase the rate of the telephone users tax, otherwise constitute a tax increase for which voter approval is required by Article XIII C of the California Constitution or entirely dispense with the requirement for independent audits stated in Section 4.28.190.

FURTHER RESOLVED: That in accordance with the Elections Code and Chapter 3 of the Oakland Municipal Code, the City Clerk shall fix and determine a date for submission of arguments for or against said proposed ordinance, and said date shall be posted in the Office of the City Clerk; and be it

FURTHER RESOLVED: That in accordance with the Elections Code and Chapter 3 of the Oakland Municipal Code, the City Clerk shall provide for notice and publication as to said proposed ordinance in the manner provided for by law; and be it

FURTHER RESOLVED: That the City Council does hereby request that the Registrar of Voters of the County of Alameda perform necessary services in connection with said election.

FURTHER RESOLVED: That the City Clerk is hereby directed to obtain printing, supplies and services as required.

FURTHER RESOLVED: That the City Clerk is hereby authorized to provide such other services and supplies in connection with said election as may be required by the Statutes of the State of California and the Charter of the City of Oakland.

FURTHER RESOLVED: That the City Clerk and City Administrator are hereby authorized and directed to take any and all actions necessary under law to prepare for and conduct the special election and appropriate all monies necessary for the City Administrator and City Clerk to prepare and conduct the June 3, 2008 special election, consistent with law.

IN COUNCIL, OAKLAND, CALIFORNIA, March 4, 2008

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, AND
PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION

Attest: _____

LaTonda Simmons
City Clerk and Clerk of the
Council of the City of Oakland, California