

CITY OF OAKLAND

AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2007 NOV - 1 PM 3: 30

TO: Office of the City Administrator
ATTN: Deborah Edgerly
FROM: Finance and Management Agency
DATE: November 13, 2007

RE: An Ordinance Amending Chapter 4.28 of the Oakland Municipal Code, Entitled Utility Users Tax, to Clarify the Provisions of the Telephone Utility Users Tax and Remove Obsolete Provisions

SUMMARY

An administrative amendment to Chapter 4.28 of the Oakland Municipal Code is recommended to clarify that the City's application of the telephone Utility Users Tax (UUT) to intrastate telephone communications services has been and will continue to be consistent with the Internal Revenue Service's interpretation of the Federal Excise Tax prior to May 25, 2006.

The proposed amendment clarifies that the City is not changing its application of its telephone UUT based on the IRS' decision to discontinue taxing long distance and bundled services in order to resolve legal disputes with telephone customers. Rather, the City wishes to 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.

FISCAL IMPACT

There will be no fiscal impact. The City will continue collection of the telephone UUT for the use of telephone services. Revenue from the telephone UUT averages approximately \$20,000,000 per year.

BACKGROUND

Since 1968, the City of Oakland has imposed a telephone UUT on every person 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 cellular telephone communication services. Presently, the tax is applied at a rate of 7.5% of the charges billed.

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The City enacted its Utility Users Tax Ordinance in 1968 linking its telephone UUT 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 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. However, federal courts have sided with the utilities rejecting the IRS' interpretation.

On May 25, 2006, the IRS reversed its collection practice since 1979 by 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 called "bundled services," extending the ruling to include the 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 services.

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 bulletin, some utilities claim, based on the IRS action, that local governments are precluded from collecting telephone Utility Users Taxes.

KEY ISSUES AND IMPACTS

Because the interpretation of the FET by the IRS is not binding on the City of Oakland for purposes of levying or collecting the UUT on telephone communications services, staff recommends that the UUT be amended to clarify that the reference to the FET in the Utility Users Tax ordinance is as interpreted by the IRS prior to the issuance of Revenue Notice 2006-50. By clarifying the ordinance, the City will continue to apply its UUT to telephone services as it has historically, and be consistent with IRS Ruling 79- 404. This proposed amendment will also prevent future ad hoc reaction to changes in federal law that otherwise do not affect the City's ability to levy the UUT.

The proposed amendment is not intended to be construed as imposing a new tax or extending or increasing an existing tax. Therefore, Proposition 218 does not apply to this amendment. Instead, by this amendment to the Utility Users Tax, the City reaffirms that it will 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 proposed amendment clarifies that the City is not changing its application of its telephone UUT based on the IRS' decision to discontinue taxing long distance and bundled services in order to resolve legal disputes with telephone customers. Rather, the City wishes to 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.

Further, the amendment clarifies 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," the City did not intend and did not adopt either federal law or federal enforcement policy as to how to treat bundled services.

SUSTAINABLE OPPORTUNITIES

Economic: A modified ordinance will restate the intent of the City Council in adopting the tax on telephone utility users and ensure uninterrupted collection of the telephone Utility Users Tax.

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

Social Equity: There are no social equity opportunities resulting from the recommended changes to the ordinance.

DISABILITY AND SENIOR CITIZEN ACCESS

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

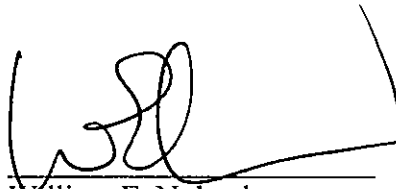
RECOMMENDATION AND RATIONALE

Staff recommends the City Council approve the proposed ordinance amending Chapter 4.28 of the Oakland Municipal Code to clarify that the City's application of the telephone Utility Users Tax to intrastate telephone communications services has been and will continue to be consistent with the Internal Revenue Service's interpretation of the Federal Excise Tax prior to May 25, 2006.

ACTION REQUESTED OF THE CITY COUNCIL

Staff recommends the City Council approve the ordinance amending Chapter 4.28 of the Oakland Municipal Code to clarify that the City's application of the telephone Utility Users Tax (UUT) to intrastate telephone communications services has been and will continue to be consistent with the Internal Revenue Service's interpretation of the Federal Excise Tax prior to May 25, 2006.

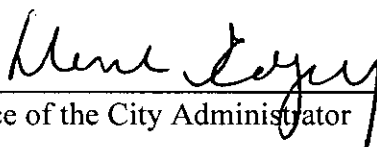
Respectfully submitted,



William E. Noland
Finance and Management Agency Director

Prepared by:
Terry Adelman, Revenue Manager

APPROVED AND FORWARDED TO THE
CITY COUNCIL:


Office of the City Administrator

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November 13, 2007

FILED
OFFICE OF THE CITY CLERK
OAKLAND

APPROVED AS TO FORM AND LEGALITY

CITY ATTORNEY

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INTRODUCED BY COUNCILMEMBER _____

OAKLAND CITY COUNCIL
ORDINANCE NO. _____ C.M.S.

AN ORDINANCE AMENDING CHAPTER 4.28 OF THE OAKLAND MUNICIPAL CODE, ENTITLED UTILITY USERS TAX, TO CLARIFY THE PROVISIONS OF THE TELEPHONE UTILITY USERS TAX AND REMOVE OBSOLETE PROVISIONS

WHEREAS, Chapter 4.28 of the Oakland Municipal Code imposes a tax on telephone communications services and includes a reference to the Federal Excise Tax on telephone services administered by the Internal Revenue Service (IRS); and

WHEREAS, this reference to the Federal Excise Tax set forth under Oakland Municipal Code § 4.28.030 specifically excludes certain definitions regarding the scope of the Federal Excise Tax base set forth under 26 USC 4251; and

WHEREAS, on May 25, 2006, the IRS announced in Notice 2006-50 that it has now changed its interpretation of the definitions set forth in 26 USC 4251 and specifically revoked notices adopted in 2005 which had reaffirmed an interpretation adopted by IRS Revenue Ruling 79-404; and

WHEREAS, subsequent to the issuance of Notice 2006-50, the IRS issued Notice 2007-11, announcing that Notice 2006-50 does not affect the ability of state or local governments to impose or collect telecommunication taxes under the respective statutes of those governments; and

WHEREAS, in implementing the City's tax, the City Council does not wish to adopt the Internal Revenue Service's new understanding of the definitions set forth under 26 USC 4251, but rather wishes to continue to impose the City's telephone users tax as it has been historically imposed without reference to those definitions; and

WHEREAS, the City Council adopted Ordinance No. 11627 on August 3, 1993, to extend the City's Utility Users Tax to cellular telephony and Ordinance No. 11627 ought to have deleted the last clause of section 4.28.030(b) of the Oakland Municipal Code, but due to a clerical error, did not repeal that language and, accordingly, the City should correct that error now; and

WHEREAS, the amendments made under this Ordinance are not intended to make any change in the way in which the Utility Users Tax on telephone services, including cellular telephone service, is calculated, imposed or administered; and

WHEREAS, the changes made by this Ordinance describing the base of the telephone users tax, and clarifying certain administrative requirements are not intended to constitute a change in methodology or otherwise constitute a tax increase for purposes of Proposition 218, but rather are intended to declare the existing intent of the tax; this Ordinance shall be interpreted in light of that intent; now, therefore

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council finds and determines the forgoing recitals to be true and correct and hereby adopts and incorporates them into this Ordinance.

SECTION 2. 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 3. Chapter 4.28 of the Municipal Code is hereby amended in its entirety 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-~~f~~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.

"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."

"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 2. 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 telecommunications service customer 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, other than a telephone corporation, (as defined by and licensed by the California Public Utilities Commission), using telephone communication services including, but not limited to, cellular telephones and facsimile transmissions. 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 receiving using such services, and collected by the provider of such services.

~~B. As used in this section, the term "charges" shall not include charges for services paid for by inserting coins in coin-operated telephones except that where such coin-operated telephone service is furnished for a guaranteed amount, the amounts paid under such guarantee plus any fixed monthly or other periodic charge shall be included in the base for computing the amount of tax due; nor shall the term "telephone communication services" include land mobile services or maritime mobile services as defined in Section 2.1 of Title 47 of the Code of Federal Regulations, as such section existed on July 1, 1968.~~

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.

~~C. Notwithstanding the provisions of subsection A of this section, the tax imposed under this section shall not be imposed upon any person for using intrastate telephone communication services to the extent that the amounts paid for such services are exempt from or not subject to the tax imposed by Section 4251 of Title 26 of the United States Code, as such section existed on July 1, 1968, without regard to subsection (b) thereof.~~

SECTION 3. 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 4. Construction. Sections 1 and 2 of this Ordinance are declaratory of existing law and express the intent of the City in the adoption of the Utility Users Tax on telephone services as originally adopted by Ordinance No. 7860 and as amended since. The adoption of this Ordinance, therefore, does not constitute a revision in the methodology by which the City calculates the tax or otherwise constitute a tax increase for which voter approval is required, and this Ordinance shall be interpreted in light of that intent.

SECTION 5. The City Clerk shall certify the adoption of this ordinance and shall cause this ordinance to be published in the manner provided in Section 214 of the Charter of the City of Oakland.

SECTION 6. This ordinance shall be effective on immediately, if passed by the affirmative vote of at least six City Council members; if this ordinance is passed by the affirmative vote of five City Councilmembers it will be effective seven days after final passage.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2007

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