

Shall an ordinance increasing the Utility Users Tax on electricity and gas from 7.5% to 10%, with exemptions for low-income users, for general municipal services, including programs to equitably reduce local greenhouse gas emissions, and authorizing the City Council to increase the gas users tax by an additional 2.5%, with the total tax estimated to generate \$2.4 million annually, until repealed by the voters, be adopted?

**ORDINANCE NO. #,###-N.S.**

**INCREASING THE UTILITY USERS TAXES ON ELECTRICITY AND GAS FROM 7.5% TO 10% TO FUND GENERAL MUNICIPAL SERVICES AND TO ESTABLISH A CLIMATE EQUITY ACTION FUND TO REDUCE LOCAL GREENHOUSE GAS EMISSIONS AND CLIMATE POLLUTANTS, AND AUTHORIZING THE CITY COUNCIL TO INCREASE THE GAS USERS TAX BY UP TO AN ADDITIONAL 2.5%**

BE IT ORDAINED by the people of the City of Berkeley as follows:

Section 1. Findings and declarations.

The People of the City of Berkeley find and declare as follows:

A. Human activities have warmed the earth and global warming has set in motion catastrophic environmental changes.

B. According to climate projections, the Earth's temperature is on track to increase at a level that could cause irreparable damage to the environment and uncontrollable global warming.

C. The effects of global warming are being felt in the City of Berkeley through severe weather patterns, drought, uncontrollable wildfires, and anticipated sea level rise.

D. In November 2006, Berkeley voters issued a call to action by overwhelmingly endorsing ballot Measure G. The mandate was simple but bold: "Reduce our entire community's greenhouse gas (GHG) emissions by 80% by the year 2050."

E. In 2009, the City of Berkeley adopted a Climate Action Plan that established a vision and plan to achieve greenhouse gas emissions reduction targets of 33% below 2000 levels by 2020 and consistent with Measure G, 80% below 2000 levels by 2050.

F. While the City has made great strides in reducing greenhouse gas emissions, achieving a 15% reduction below 2000 levels, Berkeley had not yet achieved its 33% reduction target by 2020.

G. In 2018, Berkeley declared a Climate Emergency (Res. No, 68,486-N.S.) to call attention to the climate crisis and as a call to action to mobilize the city, region, state, and entire country around the urgent need to take action to reduce greenhouse gas emissions.

H. On June 16, 2020, the City adopted an ordinance declaring a Fiscal Emergency due to the significant loss of revenue attributable to the COVID-19 pandemic and does not have the resources to adequately address the climate crisis and support general municipal services. The City needs new funds to pay for municipal services and to establish a Climate Equity Action Fund to reduce greenhouse gas emissions, such as increasing electric vehicle, bicycle and pedestrian infrastructure and other clean

transportation options; increasing energy efficiency and renewable energy use in homes and businesses; investing in clean and reliable back-up power for emergency services facilities; and supporting low-income and historically marginalized individuals to reduce energy use and costs, and benefit from solutions to the climate crisis.

Section 2. Code Amendment. Berkeley Municipal Code Chapter 7.70 Utility Users Tax, Section 7.70.020 is hereby amended to read as follows:

**7.70.020 Definitions.**

The following words and phrases whenever used in this chapter shall be construed as defined in this section.

A. "Person" shall mean, without limitation, any domestic, non-profit, or foreign corporation; firm; trust; estate; association; syndicate; joint stock company; limited liability company; partnership of any kind; joint venture; club; private cogeneration facility; Berkeley business; Massachusetts business or common law trust; society; municipal corporation (other than the City); municipal district; cooperative; receiver, trustee, guardian or other representative appointed by order of any court; or any natural individual.

B. "City" shall mean the City of Berkeley.

C. "Telephone corporation," "electrical corporation," and "gas corporation," shall have the same meanings as defined in Sections 234, 218, and 222 respectively, of the Public Utilities Code of the State of California as said sections existed on January 1, 1983. "Electrical corporation" shall be construed to include any municipality or franchised agency engaged in the selling or supplying of electricity to a service user, but shall not be construed to include any private co-generation facility. "Gas corporation" shall be construed to include any municipality or franchised agency engaged in the selling or supplying of gas power to a service user, but shall not be construed to include any private cogeneration facility.

D. "Exempt Wholesale Generator" shall have the same meaning as set forth in the Federal Power Act (15U.S.C. Section 79z-5a) and regulations thereunder.

E. "Service supplier" shall mean any entity or person, including the City, that provides telephone communication, electric, gas or cable television service to a user of such services within the City. The term shall include any entity or person required to collect, or self-collect under Section 7.70.071 of this chapter, and remit a tax imposed by this chapter, including its billing agent in the case of electric, gas or cable television service suppliers.

F. "Non-utility service supplier" shall mean:

1. a service supplier, other than a supplier of electric distribution services to all or a significant portion of the City, which generates electricity for sale to others, and shall include but is not limited to any publicly-owned electric utility, investor-owned utility, cogenerator, distributed generation provider, exempt wholesale generator, municipal

utility district, federal power marketing agency, electric rural cooperative, or other supplier or seller of electricity;

2. an electric service provider (ESP), electricity broker, marketer, aggregator, pool operator, or other electricity supplier other than a ~~supplier~~provider of electric distribution services to all or a significant portion of the City, which sells or supplies electricity or supplemental services to electricity users within the City; and

3. a gas service supplier, aggregator, marketer or broker, other than a supplier of gas distribution services to all or a significant portion of the City, which sells or supplies gas or supplemental services to gas users within the City.

G. "Service user" shall mean a person required to pay a tax imposed by this chapter.

H. "Month" shall mean a calendar month.

I. "Tax administrator" shall mean the City Manager of the City, or his or her authorized representative.

J. "Gas" shall mean natural or manufactured gas or any ~~alternate~~alternative hydrocarbon fuel, which may be substituted ~~therefor~~therefor.

K. "Public utility," as used in Section 7.70.070, shall be construed to include "electrical corporations," as defined in Section 218 of the Public Utilities Code, but shall not be construed to include any private cogeneration facility.

L. "Cogenerator" shall mean any corporation or person employing cogeneration (as defined in Section ~~218.5~~216.6 of the Public Utilities Code) for producing power for the generation of electricity for self use or sale to others from a qualified cogeneration facility (as defined in the federal Public Utility Regulatory Policies Act of 1978 and regulations thereunder).

M. "Video service supplier" shall mean any person, company, or service which provides one or more channels of video programming, including any communications that are ancillary, necessary or common to the use and enjoyment of the video programming, to or from an address in the City, including to or from a business, home, condominium, or apartment, where some fee is paid, whether directly or included in dues or rental charges for that service, whether or not public rights-of-way are utilized in the delivery of the video programming or communications. A "video service supplier" includes, but is not limited to, multi-channel video programming distributors [as defined in 47 U.S.C.A. Section 522(13)], open video systems (OVS) suppliers, suppliers of cable television, master antenna television, satellite master antenna television, multichannel multipoint distribution services, direct broadcast satellite (to the extent allowed by federal law), and other suppliers of video programming or communications (including two-way communications), whatever their technology.

N. "Video services" shall mean any and all services related to the providing of video programming (including origination programming), including any communications that are ancillary, necessary or common to the use and enjoyment of the video programming, regardless of the content of such video programming or communications. "Video services" shall not include services for which a tax is paid under Section 7.70.050 of this chapter.

O. "Service address" shall mean the residential street address or the business street address of the premises of the gas or electricity service user. For a telephone communications service user, "service address" shall mean the residential street address or the business street address of the service user's primary place of telephone communication service usage.

P. "Billing address" shall mean the mailing address of the service user where the service supplier submits invoices or bills for payment by the customer.

Q. "Telephone communication services" shall mean and include the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points, whether or not such information is transmitted through interconnected service with the public switched network, whatever the technology used, whether such transmission, conveyance or routing occurs by wire, cable, fiber-optic, light wave, laser, microwave, radio wave (including, but not limited to, cellular service, 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 or any other technology now existing or developed after the adoption of the ordinance codified in this chapter, and includes, without limitation, fiber optic, coaxial cable, and wireless. The term "telephone communication services" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such services are referred to as voice over internet protocol (VoIP) services or are classified by the Federal Communications Commission as enhanced or value added, and includes video and/or data services that are functionally integrated with telecommunications services. "Telephone communication services" include, but are not limited to, the following services regardless of the manner or basis on which such services are calculated or billed: central office and custom calling features (including but not limited to call waiting, call forwarding, caller identification and three-way calling); local number portability; text messaging; ancillary telecommunication services; prepaid and post-paid telecommunications services (including but not limited to prepaid calling cards); mobile telecommunications service; private telecommunication service; paging service; 800 service (or any other toll-free numbers designated by the Federal Communications Commission); and value-added non-voice data service. For purposes of this section, "private telecommunication service" means any dedicated telephone communications service that entitles a user to exclusive or priority use of communications channels. "Telephone communication service" does not include: internet access services to the extent they are exempt from taxation under the Internet Tax Freedom

Act, 47 U.S.C. 151 note; video programming services; and digital downloads, such as downloads of books, music, ringtones, games and similar digital products.

R. Reserved.

S. "Ancillary telecommunications services" shall mean services that are associated with or incidental to the provision, use or enjoyment of telecommunications services including, but not limited to, the following:

1. Services that link two or more participants of an audio or video conference call, including the provision of a telephone number.
2. Services that separately state information pertaining to individual calls on a customer's billing statement.
3. Services that provide telephone number information, and/or address information.
4. Services offered in connection with one or more telecommunications services, which offer advanced calling features that allow customers to identify callers and to manage multiple calls and call connections.
5. Services that enable customers to store, send or receive recorded messages.

Section 3. Code Amendment. Berkeley Municipal Code Chapter 7.70 Utility Users Tax, Section 7.70.060 is hereby amended to read as follows:

**7.70.060 Electricity users tax.**

A. There is hereby imposed a tax upon every person ~~other than an electrical or gas corporation,~~ using electricity in the City, except individuals enrolled in the California Alternate Rates for Energy Program ("CARE") or the Family Electric Rate Assistance Program ("FERA"). The tax imposed by this section shall be at the rate of ~~seven and one-half ten~~ percent (7.510%) of the charges made for such electricity, and for any supplemental services or other associated activities directly related to and/or necessary for the provision of electricity to the service user, which are provided by a service supplier or non-utility service supplier to a service user. The tax shall be collected from the service user by the service supplier or non-utility service supplier, or its billing agent. There is a presumption that electricity services, which are billed to a service address in the City or have electricity meter(s) located in the City, are used within the City's boundaries, and such services are subject to taxation under this section.

B. The tax administrator may, from time to time, survey the electric service suppliers to identify the various unbundled billing components of electric retail service that they commonly provide to residential and commercial/industrial customers in the City, and the charges ~~thereforetherefor~~, including those items that are mandated by state or federal regulatory agencies as a condition of providing such electric service. The tax administrator may, thereafter, issue and disseminate to such electric service suppliers an

administrative ruling identifying those components and items which are: i) necessary or ~~the various unbundled billing components of electric retail service that they commonly provide~~ to common to the receipt, use and enjoyment of electric service; or, ii) currently, or historically have been, included in a single or bundled rate for electric service by a local distribution company to a class of retail customers. ~~Unbundled charges~~Charges for such components and items shall be subject to the tax of subsection (A) above.

C. As used in this section, the term “charges” shall include the value of any other services, credits, property of every kind or nature, or other consideration provided by the service user in exchange for the electricity or services related to the provision of such electricity. If a non-taxable service and a taxable service are billed together under a single charge, the entire charge shall be deemed taxable unless the service supplier can reasonably identify charges not subject to the utility users tax based upon its books and records that are kept in the regular course of business, which shall be consistent with generally accepted accounting principles. If a non-taxable service and a taxable service are billed together under a single charge, the entire charge shall be deemed taxable.

D. As used in this section, the term “using electricity” shall not be construed to mean:

1. The use of an electricity product of which a significant portion is derived from high-quality, new renewable resources. The tax administrator shall adopt rules and regulations not inconsistent with this section to establish definitions and criteria for electricity products that qualify under this paragraph. This paragraph shall become inoperative and be deemed repealed five years after its effective date, unless extended by an ordinance adopted by the City Council.
2. The mere receiving of such electricity by an electric public utility or governmental agency at a point within the City for resale; or the use of such electricity in the production or distribution of water by a public utility or a government agency.
3. The use of “self-generated electricity” from sources other than a conventional power source as defined in Public Utilities Code Section 2805. “Self-generated electricity” shall mean electricity which is generated by the end user of the electricity within the City and is delivered to the end user on a dedicated set of conductors that are owned by or operated exclusively on behalf of the producer/consumer. This paragraph shall become inoperative and be deemed repealed five years after its effective date, unless extended by an ordinance adopted by the City Council.

E. The tax on electricity provided by self-production or by a non-utility service supplier not under the jurisdiction of this chapter shall be collected and remitted in the manner set forth in Section 7.70.071 of this chapter. All other taxes on charges for electricity imposed in this section shall be collected from the service user by the service supplier or its billing agent. The amount of tax collected in one (1) month shall be remitted to the tax administrator, and must be received by the tax administrator on or before the last day of the following month; or, at the option of the person required to collect and/or remit the tax, such person shall remit an estimated amount of tax measured by the tax billed in the previous month or upon the payment pattern of the service user, which must be received

by the tax administrator on or before the last day of the following month, provided that the service user shall submit an adjusted payment or request for credit, as appropriate, within sixty (60) days following each calendar quarter. The credit, if approved by the tax administrator, may be applied against any subsequent tax bill that becomes due.

F. As used in this section, the term "charges" shall apply to all services, components and items that are: i) necessary or common to the receipt, use and enjoyment of electric service; or, ii) currently, or historically have been, included in a single or bundled rate for electric service by a local distribution company to a class of retail customers. The term "charges" shall include, but is not limited to, the following charges:

1. Energy charges;

2. Distribution or transmission charges;

3. Metering charges;

4. Standby, reserves, firming, voltage support, regulation, emergency, or other similar charges for supplemental services to self-generation service users;

5. Customer charges, late charges, service establishment or reestablishment charges, demand charges, fuel or other cost adjustments, power exchange charges, independent system operator (ISO) charges, stranded investment or competitive transition charges (CTC), public purpose program charges, nuclear decommissioning charges, trust transfer amounts (bond financing charges), franchise fees, franchise surcharges, annual and monthly charges, and other charges, fees and surcharges which are necessary to or common for the receipt, use and enjoyment of electric service; and

6. Charges, fees, or surcharges for electricity services or programs, which are mandated by the California Public Utilities Commission or the Federal Energy Regulatory Commission, or by any state or federal law, whether or not such charges, fees, or surcharges appear on a bundled or line item basis on the customer billing, or whether they are imposed on the service provider or the customer.

Section 4. Code Amendment. Berkeley Municipal Code Chapter 7.70 Utility Users Tax, Section 7.70.070 is hereby amended to read as follows:

#### **7.70.070 Gas users tax.**

A. There is hereby imposed a tax upon every person ~~other than a gas corporation or electrical corporation,~~ using gas within the City, which is delivered through a pipeline distribution system, or by mobile transport, except individuals enrolled in the CARE or FERA Program. The tax imposed by this section shall be at the rate of ~~seven and one-half~~ ten percent (7.510%) of the charges made for such gas, including all services related to the storage, transportation and delivery of such gas. The City Council may by ordinance

further increase the tax by up to an additional two and one-half percent (2.5%) from 10% up to 12.5%. The tax shall be collected from the service user by the service supplier or non-utility service supplier, or its billing agent, and shall apply to all uses of gas, including, but not limited to, heating, and the use of gas as a component of a manufactured product. There is a presumption that gas services, which are billed to a service address in the City or have gas meter(s) located in the City, are used within the City's boundaries, and such services are subject to taxation under this section.

B. The tax administrator, from time to time, may survey the gas service suppliers to identify the various unbundled billing components of gas retail service that they commonly provide to residential and commercial/industrial customers in the City, and the charges therefor, including those items that are mandated by state or federal regulatory agencies as a condition of providing such gas service. The tax administrator may, thereafter, issue and disseminate to such gas service suppliers an administrative ruling identifying those components and items which are: i) necessary or common to the receipt, use and enjoyment of gas service; or, ii) currently, or historically have been, included in a single or bundled rate for gas service by a local distribution company to a class of retail customers. ~~Unbundled charges~~Charges for such components and items shall be subject to the tax of subsection (A) above.

C. As used in this section, the term "charges" shall include the value of any other services, credits, property of every kind or nature, or other consideration provided by the service user in exchange for the gas or services related to the delivery of such gas. If a non-taxable service and a taxable service are billed together under a single charge, the entire charge shall be deemed taxable unless the service supplier can reasonably identify charges not subject to the utility users tax based upon its books and records that are kept in the regular course of business, which shall be consistent with generally accepted accounting principles.

D. There shall be excluded from the calculation of the tax imposed in this section:

1. Charges made for gas which is to be resold and delivered through mains, pipes, by mobile transport, or other means. ~~a pipeline distribution system by a public utility or governmental agency.~~

2. ~~Charges made for gas used in the production of electricity by a public utility, or for the production or distribution of water by a public utility or governmental agency.~~

E. The tax ~~that is calculated on charges for~~ gas provided by self-production or by a non-utility service supplier not under the jurisdiction of this chapter shall be collected and remitted in the manner set forth in Section 7.70.071 of this chapter. All other taxes on charges for gas imposed in ~~by~~ this section shall be collected from the service user by the gas service supplier or its billing agent. The amount collected in one (1) month shall be remitted to the tax administrator, and must be received by the tax administrator on or before the last day of the following month; or at the option of the person required to collect and/or remit the tax, such person shall remit an estimated amount of tax measured by the tax billed in the previous month, or upon the payment pattern of the service user, which

must be received by the tax administrator on or before the last day of the following month, provided that the service user shall submit an adjusted payment or request for credit, as appropriate, within sixty (60) days following each calendar quarter. The credit, if approved by the tax administrator, may be applied against any subsequent tax bill that becomes due.

F. As used in this section, the term "charges" shall apply to all services, components and items for gas service that are: i) necessary or common to the receipt, use and enjoyment of gas service; or, ii) currently, or historically have been, included in a single or bundled rate for gas service by a local distribution company to a class of retail customers. The term "charges" shall include, but is not limited to, the following charges:

1. The commodity charges for purchased gas, or the cost of gas owned by the service user (including the actual costs attributed to drilling, production, lifting, storage, gathering, trunkline, pipeline, and other operating costs associated with the production and delivery of such gas), which is delivered through a gas pipeline distribution system;

2. Gas transportation charges (including interstate charges to the extent not included in commodity charges);

3. Storage charges; provided, however, that the service provider shall not be required to apply the tax to any charges for gas storage services when the service providers cannot, as a practical matter, determine the jurisdiction where such stored gas is ultimately used; but it shall be the obligation of the service user to self-collect the amount of tax not applied to any charge for gas storage by the service supplier and to remit the tax to the appropriate jurisdiction;

4. Capacity or demand charges, late charges, service establishment or reestablishment charges, marketing charges, administrative charges, transition charges, customer charges, minimum charges, annual and monthly charges, and any other charges which are necessary or common to the receipt, use and enjoyment of gas service; and,

5. Charges, fees, or surcharges for gas services or programs, which are mandated by the California Public Utilities Commission or the Federal Energy Regulatory Commission, whether or not such charges, fees, or surcharges appear on a bundled or line item basis on the customer billing, or whether they are imposed on the service provider or the customer.

Section 5. Berkeley Municipal Code Chapter 7.70 Utility Users Tax, Section 7.70.073 is hereby added to read as follows:

**7.70.073 Climate Equity Action Fund; Climate Action and Energy Commission.**

A. The Climate Equity Action Fund is hereby established. Revenues received from the user tax imposed on electricity and gas above 7.5% and any other funds designated by the City Council, may be placed in the fund. The Climate Action and Energy

Commission or successor commission shall provide non-binding recommendations to the City Council on how these proceeds could be spent to address climate equity issues. At the City Council's discretion, the proceeds may be spent to reduce local greenhouse gas emissions or for any other municipal purpose. Funds may be used for City government expenditures, and/or to provide grants to local non-profit organizations, businesses, and government agencies.

B. The Energy Commission is renamed the Climate Action and Energy Commission. The Climate Action and Energy Commission shall develop guidelines for the Climate Equity Action Fund, communicate with the public on the availability and uses of the Fund, and make recommendations to the Council on how and to what extent the City should establish and/or fund programs. Considerations should include the effect of proposed actions on greenhouse gas emissions, on equity and environmental justice, the impacts of climate change on the City's low income and most vulnerable populations.

C. Each member of the Climate Action and Energy Commission must have one or more of the following qualifications:

1. Experience in community-based inclusive equity-based programs;
2. Experience in social and racial equity;
3. Experience in climate and energy conservation or renewable energy policies and programs;
4. Experience in municipal-scale inclusive and equitable energy and transportation initiatives;
5. Technical expertise in health and other disproportionate impacts of climate change on low income and vulnerable populations.

D. In addition to its standing duties and responsibilities, the Climate Action and Energy Commission shall, by majority vote, publish an annual report that includes the following:

1. Recommendations on how to allocate funds deposited into the Climate Equity and Action Fund to reduce the emission of greenhouse gases, increase participation of low income, disadvantaged, and vulnerable populations in climate action programs, and reduce the impacts of climate change on the City's low income and most vulnerable populations.

Information, if available, concerning the impact of funds deployed from the Climate Equity and Action Fund on the achievement of goals in the City's Climate Action Plan;

2. Any additional information that the Climate Action and Energy Commission deems appropriate.

E. Within 30 days of receipt of the annual report of the Climate Action and Energy Commission, the City Manager shall cause the report to be published on the City's website and transmitted to the City Council.

F. The City Council shall consider, but need not follow, the Climate Action and Energy Commission's recommendations and shall annually inform the Climate Action and Energy Commission as to the extent to which it has implemented its recommendations.

Section 6. Severability. If any word, phrase, sentence, part, section, subsection, or other portion of this ordinance, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The People of the City of Berkeley hereby declare that they would have passed this ordinance, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional.

Section 7. Increase appropriations limit. Pursuant to California Constitution Article XIII B, the appropriation limit for the City of Berkeley is hereby increased by the aggregate sum authorized to be levied by this general tax for each of the four fiscal years from 2021 through 2024.

Section 8. Amendment, repeal, and reenactment. The City Council may amend this ordinance in any manner, including reducing any applicable tax rates or adding or modifying exemptions that does not result in an increase in the tax imposed herein without further voter approval. If the City Council repeals this ordinance, it may subsequently reenact it without voter approval, as long as the reenacted ordinance does not result in an increase in the tax imposed herein.

Section 9. California Environmental Quality Act Requirements. This Ordinance is exempt from the California Environmental Quality Act, Public Resources Code section 21000 et seq., under, including without limitation, Public Resources Code section 21065 and CEQA Guidelines sections 15378(b)(4) and 15061(b)(3), as it can be seen with certainty that there is no possibility that the activity authorized herein may have a significant effect on the environment and pursuant to Public Resources Code section 21080, subdivision (b)(8), and CEQA Guidelines section 15273 as the approval of government revenues to fund existing services.

Section 10. General Tax; Majority Vote Requirement. This Ordinance imposes a general tax for general revenue purposes and shall be effective only if approved by a majority of the voters voting thereon.