



Office of the City Manager

ACTION CALENDAR  
June 12, 2012

To: Honorable Mayor and Members of the City Council  
From:  Christine Daniel, City Manager  
Submitted by: Robert Hicks, Director of Finance  
Zach Cowan, City Attorney  
Subject: Utility Users Tax Ballot Measure

RECOMMENDATION

1. Adopt a Resolution placing the attached measure to amend the utility users tax on the ballot at the November 6, 2012 General Municipal Election.
2. Determine whether to designate, by motion, specific members of the Council to file ballot measure arguments on this measure as provided for in Elections Code Section 9282.

FISCAL IMPACTS OF RECOMMENDATION

None; the measure would not change the tax rate, but would preserve future revenue.

The cost to submit the measure to the voters at the November 2012 General Election is estimated to be approximately \$26,000.

CURRENT SITUATION AND ITS EFFECTS

Due to changes in federal law and continually evolving communications technology, the City's utility users tax on telephones has become increasingly out of date. As a result it affects similarly-situated telephone users differently. The proposed amendments would apply the tax more evenly and fairly, and would also take account of current federal law exemptions. The proposed amendments would not change the tax rate or existing exemptions from the tax.

The proposed amendments would add a requirement for an annual verification and public report to ensure that the tax is being collected and remitted properly, and spent in accordance with law. It would also add a new low income exemption.

Additionally, with respect to who can author arguments about ballot measures, Elections Code Section 9282(b) provides that "the legislative body, or any member or members of the legislative body authorized by that body...may file a written argument for or against any city measure." The City Council may authorize the Council as a whole, or members of the Council, to submit arguments in favor of any measure placed on the ballot by the Council.

BACKGROUND

See “Current Situation and its Effects”

RATIONALE FOR RECOMMENDATION

The measure would ensure the City’s ability to collect the UUT, thereby safeguarding an existing predictable revenue stream for the provision public services, and enforce consistency in collection practices among telephone communication service providers.

ALTERNATIVE ACTIONS CONSIDERED

The City could take no action, but this could lead to declining revenues absent expensive litigation.

CONTACT PERSON

Robert Hicks, Director of Finance, 981-7330  
Zach Cowan, City Attorney, 981-6998

Attachments:

1: Resolution

Exhibit A: Text of the Measure

2: City Attorney’s Impartial Analysis

RESOLUTION NO. ##,### –N.S.

SUBMITTING TO THE BERKELEY ELECTORATE A MEASURE TO AMEND THE  
UTILITY USERS TAX

WHEREAS, residents of the City of Berkeley currently pay a Utility Users Tax (UUT) on telecommunications services; and

WHEREAS, like many cities, Berkeley uses this funding to provide important and essential public services; and

WHEREAS, communication technology has advanced considerably over the past several decades since the UUT was last amended, and the City must update its UUT law to match current technology, including definitions for new communications technologies to ensure all taxpayers are treated alike whether or not they can afford the latest telecommunications technology; and

WHEREAS, the amendments are primarily technical and do not change the tax rate and preserve the existing exemptions for nonprofit educational organizations and hospitals; and

WHEREAS, the amendments would add an exemption for low income taxpayers and a requirement for an annual verification and public report as to the collection and expenditure of the tax; and

WHEREAS, the Council has requested that the Alameda County Board of Supervisors consolidate the General Municipal Election with the Presidential General Election; and

WHEREAS, the Council desires to submit all measures to be placed upon the ballot at said consolidated election.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Board of Supervisors of Alameda County is hereby requested to include on the ballots and sample ballots the measure enumerated above to be voted on by the voters of the qualified electors of the City of Berkeley.

BE IT FURTHER RESOLVED that full text of the measure and the City Attorney's analysis shall be printed in the Voter Information Pamphlet mailed to all voters in the City of Berkeley.

BE IT FURTHER RESOLVED that the above enumerated measure requires a majority vote threshold for passage.

BE IT FURTHER RESOLVED that the City Clerk is hereby directed to cause the posting, publication and printing of notices, pursuant to the requirements of the Charter

of the City of Berkeley, the Government Code and the Elections Code of the State of California.

BE IT FURTHER RESOLVED that the Registrar of Voters of Alameda County is required to perform necessary services in connection with said election.

BE IT FURTHER RESOLVED that the City Clerk is hereby directed to obtain printing, supplies and services as required.

BE IT 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 Berkeley.

BE IT FURTHER RESOLVED that said proposed measure shall appear and be printed upon the ballots to be used at said election as follows:

<b>CITY OF BERKELEY BALLOT MEASURE</b>	
Without increasing the rate, shall an ordinance be adopted to update Berkeley's existing utility users tax, which funds police, fire and other essential City services, to keep current with changes in technology and Federal and State laws while maintaining exemptions for nonprofit educational organizations and hospitals, adding an exemption for low-income taxpayers, and requiring an annual verification and public report as to collection and expenditure of the tax?	YES
	NO

BE IT FURTHER RESOLVED that the text of the measure be as shown on Exhibit A and attached hereto and made a part hereof.

**TEXT OF MEASURE**

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

**AN ORDINANCE OF THE CITY OF BERKELEY AMENDING CHAPTER 7.70 OF THE BERKELEY MUNICIPAL CODE TO MODERNIZE THE APPLICATION OF THE UTILITY USERS TAX**

THE PEOPLE OF THE CITY OF BERKELEY ORDAIN AS FOLLOWS:

**Section 1. Code Amendment.**

That Section 7.70.020.Q of the Berkeley Municipal Code is hereby amended to read as follows:

Q. "Telephone communication services" shall mean ~~any telephonic type and quality of communication including that which is interconnected to the public switched network, which allows people to talk to each other without the necessity of conversing in person. In determining whether a service constitutes a telephone communication service, all technology used to transmit voice communications from one person to another shall be included irrespective of whether, for example, such technology utilizes computer processing applications on the form, code or protocol of the content of the communication or where the origination and/or termination points of the transmission, conveyance or routing are not fixed. Such means of transmission shall include, without limitation 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 whether such transmission occurs by wire, cable, fiber optic, light wave, laser, microwave, radio wave including, but not limited to, cellular service, personal communications service (PCAS), specialized mobile radio (SMR), and other types of personal wireless service regardless of radio spectrum used, switching facilities, satellite or any other similar facilities.~~ 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 entitle 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.

## **Section 2. Code Amendment.**

That a new subdivision (S) is hereby added to Section 7.70.020 of the Berkeley Municipal Code, to read as follows:

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.**

That Section 7.70.050 of the Berkeley Municipal Code is hereby amended to read as follows:

### **7.70.050 Telephone users tax**

A. There is hereby imposed a tax upon every person who uses any international, interstate and/or intrastate telephone communication services in the City, other than a telephone corporation. Interstate calls shall include calls to and from the District of Columbia or any U.S. territory. The tax imposed by this section shall be at the rate of seven and one-half percent (7.5%) of the charges made for such telephone communication services. The tax shall be collected from the service user by the telephone communication services supplier or its billing agent. To the extent allowed by federal and state law, the tax on telephone communication services is intended to, and does, apply to all charges within the city's tax jurisdiction, such as charges billed to a telephone account having a situs in the city as permitted by the Mobile Telecommunications Sourcing Act of 2000, 4 U.S.C. Section 116 et seq. There is a rebuttable presumption that telephone communication services billed to a billing or service address in the city are used, in whole or in part, within the city's boundaries, and that such services are subject to taxation under this Chapter. There is also a rebuttable presumption that telephone communication services sold within the city that are not billed to a billing address or provided to a primary physical location are used, in whole or in part, within the city's boundaries and that such services are subject to taxation under this chapter.~~shall apply to a service user if the billing or service address of the service user is within the City's boundaries, irrespective of whether a particular telephone communication service originates and/or terminates within the City. If the billing address of the service user is different from the service address, the service address of the service user shall be used.~~

B. The following shall be exempt from the tax imposed by this ~~Section~~ Section, if any:

1. Service paid for by inserting coins in coin-operated telephones with respect to local telephone service, or with respect to toll telephone service if the charge for such toll 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. Payment received from any person 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 such person.

3. Payment received for services furnished to an international organization designated under the International Organizations Immunities Act and defined in 22 USCA § 288, or to the American National Red Cross.

4. Payment received for any toll telephone service which originates within a combat zone 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 may by regulations prescribe, is furnished to the person receiving such payment.

5. The amount paid for any toll 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. The amount paid by a nonprofit hospital for services furnished to such organization. For purposes of this subsection, the term "nonprofit hospital" means a hospital which is exempt from federal and state income tax under section 501(a) of the Internal Revenue Code.

7. Any payment received for services or facilities furnished to the government of any State, or any political subdivision thereof, or the District of Columbia.

8. Any amount 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 which is exempt from income tax under section 501 (a) of the Internal Revenue Code. The term also includes a school operated as an activity of an organization which is exempt from income tax under 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.

9. Private mobile radio service. For purposes of this chapter "private mobile radio service" is a radio communication service which is not a commercial mobile service. A "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding. A "commercial mobile service" is a "mobile service" that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public.

C. The tax administrator may, from time to time, issue and disseminate to telecommunication service suppliers, which are subject to the tax collection requirements of this ~~e~~Chapter, ~~an~~ administrative rulings identifying those telecommunication services that are subject to the tax of subsection (A) above. The administrative rulings shall implement the intent of the City Council that the telephone users tax be imposed on any person who initiates or receives high-quality voice communications without regard to the type or kind of transmission media or technology that exists on the date the amendments to this section became effective or which may be developed in the future. Such administrative rulings shall be consistent with legal nexus and laws pertaining to telephone communications services and shall not impose a new tax, revise an existing tax methodology, or increase an existing tax, except as allowed by California Government Code §§ 53750(h)(2) and (h)(3) or other law. The tax administrator may consider state-wide interpretive rules and guidelines promulgated by

any government agency or association of government agencies as a factor in determining the intent of voters adopting this section. To the extent that the tax administrator determines that the tax imposed under this section shall not be collected in full for any period of time, such an administrative ruling falls within the tax administrator's discretion to settle disputes. The tax administrator's exercise of prosecutorial forbearance under this chapter does not constitute a change in taxing methodology for purposes of Government Code § 53750(h), and the city does not waive or abrogate its ability to impose the telephone users' tax in full as a result of issuing such administrative rulings and may suspend such rulings and recommence collection of the tax without additional voter approval. The administrative ruling shall be consistent with and shall not impose a new tax or increase an existing tax without voter approval.

D. 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 telephone communication services. 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 identifies, by verifiable data, non-taxable charges based upon its books and records that are kept in the regular course of business, which shall be consistent with generally accepted accounting principles. The service supplier has the burden of proving the proper apportionment of taxable and non-taxable charges.

E. As used in this section, the term "charges" shall not include charges for any type of service or equipment furnished by a service supplier subject to public utility regulation during any period in which the same or similar services or equipment are also available for sale or lease from persons other than a service supplier subject to public utility regulation.

F. To prevent actual multi-jurisdictional taxation of telephone communication services subject to tax under this section, any service user, upon proof to the tax administrator that the service user has previously paid the same tax in another American state or city on such telephone communication services, shall be allowed a credit against the tax imposed to the extent of the amount of such tax legally imposed in such other state or city; provided, however, the amount of credit shall not exceed the tax owed to the City under this section. ~~For purposes of establishing sufficient legal nexus for the imposition and collection of utility users' tax on charges for telephone communication services pursuant to this chapter, "minimum contacts" This ordinance shall be construed broadly in favor of the imposition and collection of the utility users' tax to the fullest extent permitted by California and federal law, and as it may change from time to time.~~

G. The tax on telephone communication services imposed by this section shall be collected from the service user by the service supplier. The amount of tax collected in one (1) month shall be remitted to the tax administrator on or before the last day of the following month; and must be received by the tax administrator on or before the last day of the following month.

H. For purposes of imposing a tax or establishing a duty to collect and remit a tax under this Section, "substantial nexus" and "minimum contacts" shall be construed broadly in favor of the imposition, collection and/or remittance of the utility users tax to the fullest extent permitted by state and federal law, and as that law may change from

time to time. Any telephone communication service (including VoIP) used by a person with a service address in the city, which service is capable of terminating a call to another person on the general telephone network, shall be subject to a rebuttable presumption that "substantial nexus/minimum contacts" exists for purposes of imposing a tax, or establishing a duty to collect and remit a tax, under this chapter. A service supplier shall be deemed to have sufficient activity in the city to be obligated to collect and remit the tax imposed by this chapter if it does any of the following: maintains or has within the city, directly or through an agent or subsidiary, a place of business of any nature; solicits business in the city by employees, independent contractors, resellers, agents or other representatives; solicits business in the city by means of advertising that is broadcast or relayed from a transmitter within the city or distributed from a location within the city; or advertises in newspapers or other periodicals printed and published within the city or through materials distributed in the city by means other than the United States mail.

I. The tax imposed by this Section shall not apply to any person whose total personal income, from all sources, for the previous calendar year, does not exceed that level which shall constitute "very low-income," as may be established by resolution of the City Council. Any taxpayer claiming the exemption under this Section shall be required to demonstrate his or her entitlement thereto annually by submitting a claim for a refund, with supporting documentation, to the Finance Director in the manner and at the time established in regulations and/or guidelines hereafter promulgated by the City Manager. Such applications shall be on forms provided by the Finance Director, or his or her designee, and shall provide and/or be accompanied by such information as the Finance Director shall require, including but not limited to, federal income tax returns and W-2 forms. Upon timely receipt and verification of the required claim and supporting documentation, the Finance Director shall promptly refund the tax paid for the prior 12 months. Any person or entity claiming an exemption from the tax imposed by this Chapter shall file a verified statement of exemption on a form prescribed by the City Manager prior to June 30th of the first fiscal year for which the exemption is sought.

#### **Section 4. Code Amendment.**

That a new Section 7.70.055 is hereby added to the Berkeley Municipal Code to read as follows:

#### **7.70.055 Exclusion of Internet Access from Telephone Tax**

Nothing in section 7.70.050 (Telephone users tax) is intended to include charges for Internet Access within the scope of taxable charges for telephone communications services.

#### **Section 5. Code Amendment.**

That Section 7.70.180 of the Berkeley Municipal Code is hereby added to read as follows:

**7.70.180 Effect of state and federal authorization**

To the extent that the City's authorization to impose or collect any tax imposed under this chapter is expanded or limited as a result of changes in state or federal law, no amendment or modification of this Chapter shall be required to conform the tax to those changes, and the tax shall be imposed and collected to the full extent of the City's authorization up to the full amount of the tax imposed under this Chapter.

**Section 6. Code Amendment.**

That Section 7.70.190 of the Berkeley Municipal Code is hereby added to read as follows:

**7.70.190 Independent Audit**

The City shall annually verify that the taxes owed under section 7.70.050 have been properly applied, exempted, collected, and remitted in accordance with this Chapter, and properly expended according to applicable law, and issue a public report of the findings of such verification. The annual verification shall be performed by a qualified auditor and shall employ reasonable, cost-effective steps to assure compliance, including the use of sampling audits. The audit of a service supplier shall not be required where the cost of the audit is expected to exceed the additional tax revenue to be derived from the performance of the audit.

**Section 7. Amendment of Ordinance.**

Chapter 7.70 of the Berkeley Municipal Code as amended by this Ordinance may be repealed or amended by the City Council without a vote of the people except as follows: as required by Proposition 218, any amendment to that Chapter that increases the amount or rate of tax beyond the levels authorized by this Ordinance may not take effect unless approved by a vote of the people. The City Council may impose the taxes authorized by that Chapter in any amount or rate which does not exceed the rate approved by the voters of the City.

**Section 8. Ratification.**

Ordinance Nos. 6,926-N.S. and 6580-N.S., are hereby ratified.

**Section 9. Severability.**

If any section, sentence, clause, phrase, or portion of this Ordinance is for any reason held to be invalid or unenforceable by a court of competent jurisdiction, the remaining sections, sentences, clauses, phrases, or portions of this ordinance shall nonetheless remain in full force and effect. The people of the City of Berkeley hereby declare that they would have adopted each section, sentence, clause, phrase, or portion of this Ordinance, irrespective of the fact that any one or more sections, sentences, clauses, phrases, or portions of this Ordinance be declared invalid or unenforceable and, to that end, the provisions of this Ordinance are severable.

**Section 10. Majority Approval; Effective Date; Execution.**

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. The Mayor and City Clerk are hereby authorized to execute this Ordinance to give evidence of its adoption by the voters.

### **City Attorney's Impartial Analysis**

This measure is proposed by the Berkeley City Council to update the City's existing Utility Users Tax ("UUT") to be consistent with current practice. This measure will not increase the current tax.

The UUT is levied on utility users in the City. The City has imposed the UUT on telephone services since 1984. The proceeds of the UUT can only be spent on City services and cannot be taken away by the State. UUT revenues are paid into the City's general fund to pay for such services as police and fire protection, public health services and recreational programs, maintenance of City infrastructure such as streets and parks, and senior programs.

The City's UUT, like those of most California cities, referred to federal law to describe telephone services. These definitions have changed and telephone technology has changed significantly. The measure would update the UUT to modernize its language and to treat all technologies equally so every phone customer is treated fairly, whether they use the latest technology or older phone services. It would ratify Council ordinances that updated the tax.

This measure would also add a requirement for an annual verification and public report to ensure that the tax is being collected and remitted properly, and spent in accordance with law. It would also add a new low income exemption.

This measure would not apply to charges for internet access, internet content or downloads of music, video and other information.

This measure also does not increase the current UUT rate. Voter approval would be required for any increase in the rate or the scope of services subject to the UUT.

The proposed measure requires approval of a majority of voters. A "yes" vote is a vote in favor of adopting the updated UUT. A "no" vote will reject the proposed amendments and continue the UUT in its present form.

s/ZACH COWAN  
Berkeley City Attorney

