

ORDINANCE NO. _____

ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CHULA VISTA AMENDING CHAPTER 3.44 OF THE CHULA VISTA MUNICIPAL CODE TO FORMALIZE A RATE REDUCTION IN THE CITY'S TELEPHONE USERS TAX ("TUT") FROM 5% TO 4.75%, TO CLARIFY THAT THE TUT APPLIES TO WIRELESS TELEPHONE USAGE, AND TO ADD STATE LAW VALIDATION PROVISIONS

WHEREAS, Chula Vista's Utility Users' Tax ("UUT") was adopted in 1970 as a means to help fund public services and capital improvement projects through the City's General Fund; and

WHEREAS, the UUT was imposed with respect to intrastate telephone communications use, electricity use, and gas use within the City; and

WHEREAS, key provisions of the telephone communications component of the UUT (commonly known as the "TUT") are contained in Chula Vista Municipal Code ("CVMC") Sections 3.44.030 and 3.44.150; and

WHEREAS, these Sections define the charges subject to the TUT, establish the maximum TUT rate, provide exclusions and exemptions from the TUT, establish collection and remittance obligations on telephone service providers, and set the actual TUT rate, which is currently 5% of qualified intrastate telephone communications charges; and

WHEREAS, in recent years, certain wireless telephone communication service providers have questioned their obligation to collect and remit the TUT for customer charges imposed on their wireless customers in the City, contending that the TUT does not apply to modern-day wireless phone charges because the language in CMVC Section 3.44.030(B) states that charges on which the City can levy tax do not include charges for services paid for by users of "mobile telephone" service; and

WHEREAS, in April 2011, Carla Villa and Vanessa Garza filed a class action lawsuit against the City challenging certain aspects of the TUT, contending, among other things, that service charges for users of wireless telephones in the City are "exempt" from taxation because the definition of taxable charges in CVMC section 3.44.030(B) excludes charges for services paid for by users of "mobile telephone" service; and

WHEREAS, through every stage of the litigation the City vigorously, and correctly, defended the legal validity of its TUT, and its application to modern, wireless telephone services; and

WHEREAS, ultimately, however, because of the complexity of the case, the projected costs of continuing its defense, and the inherent risks of litigation, the City determined it would be in the best interests of its citizens to settle the case; and

WHEREAS, the settlement agreement included various terms, including the City's agreement to reduce the overall TUT rate from 5% to 4.75% starting March 1, 2014; and the City's agreement to clarify the application of the TUT to "wireless" telephone service; and

WHEREAS, as required by the settlement, the City Finance Department issued an Administrative Ruling on February 24, 2014 reducing the TUT rate to 4.75% effective March 1, 2014; and

WHEREAS, this ordinance was prepared to formalize and implement the remaining terms of above-described settlement agreement; and

WHEREAS, by affirming the application of the TUT to "wireless" telephone services the City will also reduce the chance of future misunderstandings regarding its lawful breadth; and

WHEREAS, in accordance with the requirements of CVMC Section 3.44.150, the City Clerk set the time and place for a public hearing on August 5, 2014, in the Council Chambers in City Hall, Chula Vista Civic Center, 276 Fourth Avenue, at 2:00 p.m., to consider the ordinance, and notice of said hearing, together with its purpose was given by publication in a newspaper of general circulation in the city at least ten (10) days prior to the hearing; and

WHEREAS, the duly noticed public hearing on this ordinance was held before the City Council of the City of Chula Vista on August 5, 2014, in the Council Chambers in City Hall, Chula Vista Civic Center, 276 Fourth Avenue, at 2:00 p.m. to receive and to hear public testimony with regard to same; and

WHEREAS, at the public hearing, the City Council gave due and full consideration to the written materials presented by staff, staff's verbal presentation, and any and all public testimony.

NOW, THEREFORE, the City Council of the City of Chula Vista does hereby ordain as follows:

Section I. The City Council finds and determines that the original intent of the City Council in 1970 upon adoption of the TUT ordinance pursuant to Ordinance No. _____, was to exclude "mobile telephone service" only to the extent that it existed at the time, and as it was then defined under 47 C.F.R. Part 21.1 of the Federal Communications Act, and that, accordingly, upon its invention, modern "wireless" telephone service was, and continues to be, subject to the TUT.

Section II. Consistent with the City Council findings contained in Section I, hereof, above, Section 3.44.030 of Chapter 3.44, Title 3, of the Chula Vista Municipal Code is hereby amended to read, in full, as follows:¹

3.44.030 Telephone users' tax -- Imposition – Maximum Rate – ~~Collection~~ – ~~Exemptions~~ – ~~Charges defined~~ Exclusions and Exemptions – Collection -- Validation.

A. There is imposed a tax upon every person in the city using intrastate telephone communication services in the city. The tax imposed by this section shall be at the maximum rate of five percent (5%) of the charges made for such services, and shall be paid by the person paying for such services. Effective on July 1, 1979, said maximum rate shall be increased to six percent (6%) of the charges made for such services and shall be paid by the person paying for such service.

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. The term “charges” shall not include charges for services paid for by users of mobile telephone service and marine telephone service. The exclusion in the previous sentence for charges paid for by users of “mobile telephone service” shall only apply to such service as it existed at the time this section was first enacted in 1970, and as then defined in 47 C.F.R. Part 21.1 of the Federal Communications Act.

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 communications services to the extent that the amounts paid for such services are exempt from or not subject to the tax imposed under Sections 4251, 4252 and 4253 of Title 26 of the United States Code (“federal excise tax”). In the event that the federal excise tax is repealed, this reference to such law, including any related federal regulations, private letter rulings, case law and other opinions interpreting these sections shall refer to that body of law that existed immediately prior to the effective date of such repeal.

D. The tax imposed in this section shall be collected from the service user by the person providing the intrastate telephone communications services. The amount of tax collected in one month shall be remitted to the city finance officer on or before the twentieth day of the following month.

¹ For purposes of this ordinance, in order to highlight the changes being made, revisions to the existing code are presented in underline/strikeout format. The underline/strikeout formatting shall be removed once these changes are incorporated into the code.

E. Any action or proceeding to determine or contest the validity of this section, or any amendment thereto, must be brought pursuant to Chapter 9 (commencing with section 860) of Title 10 of Part 2 of the California Code of Civil Procedure.

Section III. Consistent with the TUT settlement agreement, and with the Finance Director's administrative action taken on February 24, 2014, which was effective March 1, 2014, Section 3.44.150 of Chapter 3.44, Title 3, of the Chula Vista Municipal Code is hereby amended to read, in full, as follows:

3.44.150 Establishment of rate – Public hearing requirements – Power to abate.

Without affecting the maximum amount authorized by this chapter, the City Council sets the utility users' tax rate at .00250 per kilowatt-hour of electricity, .00919 per therm of gas, and four and three quarters of one ~~five~~ percent (4.75 %) for intrastate telephone charges based upon gross receipts. Any change to increase this amount to the maximum authorized or decrease it to any other amount shall be subject to the requirement for a public hearing before the City Council.

Section III. Severability

If any portion of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid, unenforceable or unconstitutional, by a court of competent jurisdiction, that portion shall be deemed severable, and such invalidity, unenforceability or unconstitutionality shall not affect the validity or enforceability of the remaining portions of the Ordinance, or its application to any other person or circumstance. The City Council of the City of Chula Vista hereby declares that it would have adopted each section, sentence, clause or phrase of this Ordinance, irrespective of the fact that any one or more other sections, sentences, clauses or phrases of the Ordinance be declared invalid, unenforceable or unconstitutional.

Section III. Construction

The City Council of the City of Chula Vista intends this Ordinance to supplement, not to duplicate or contradict, applicable state and federal law and this Ordinance shall be construed in light of that intent.

Section IV. Effective Date

This Ordinance shall take effect and be in force on the thirtieth day after its final passage.

Section V. Publication

The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same to be published or posted according to law.

Presented by

Approved as to form by

Maria Kachadorian
Finance Director

Glen R. Googins
City Attorney