City of Chula Vista

Legislation Details (With Text)

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On agenda:	8/5/2014	**Final action:**	8/5/2014
Title:	CONSIDERATION OF AN AMENDMENT TO CHAPTER 3.44 OF THE CHULA VISTA MUNICIPAL CODE REGARDING THE CITY'S TELEPHONE USERS TAX ORDINANCE 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 (FIRST READING)		
Sponsors:			
Indexes:			
Code sections:	03.44 - Utility Users' Tax		
Attachments:	1. Item 6 - NOTICE OF PUBLIC HEARING - TUT, 2. Item 6 - Ordinance, 3. Item 6 - TUT Memo from Scott Noya 7-25-2014, 4. Item 6 - Exhibit A - TUT, 5. Item 6 - Exhibit B - TUT, 6. Item 6 - Exhibit C - TUT, 7. Item 6 - Exhibit D - TUT, 8. Item 6 - Exhibit E - TUT, 9. Item 6 - Exhibit F - TUT		

Date	Ver.	Action By	Action	Result
8/5/2014	1	City Council	adopt	Pass

CONSIDERATION OF AN AMENDMENT TO CHAPTER 3.44 OF THE CHULA VISTA MUNICIPAL CODE REGARDING THE CITY'S TELEPHONE USERS TAX

ORDINANCE 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 (FIRST READING)

RECOMMENDED ACTION

Council hold the public hearing required under CVMC Section 3.44.150, and then, after considering all testimony presented, approve on first reading the ordinance in the form presented amending Sections 3.44.030 and 3.44.150 of the Chula Vista Municipal Code regarding the TUT.

SUMMARY

As you know, the City recently settled a class action lawsuit challenging the City's intrastate telephone communications services tax as it applies to "wireless" telephone usage. This tax is commonly known as the "TUT". In consideration for the dismissal of the case, the City agreed to fund a limited rebate program for TUT amounts paid on wireless telephone service over a three year period, to reduce the TUT rate from 5% to 4.75% starting March 1, 2014, and to clarify the TUT's application to wireless telephone services.

To complete the implementation of the TUT settlement, and to reduce the chances of further misunderstandings regarding the TUT's lawful application to "wireless" telephone usage, this item

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proposes three revisions to the City's TUT ordinance. The first revision formalizes the agreed upon reduction in the TUT rate from 5% to 4.75%. (This was done administratively back in February, 2014, but still needs to be codified.) The second revision clarifies language in Section 3.44.030(B) of the City's Municipal Code regarding the applicability of the TUT to "mobile telephone service." This proposed revision makes it clear that in 1970, when the City Council excluded "mobile telephone" service from the TUT, their intent was to exclude only "mobile telephone service" as it existed at that time, and as it was then defined under federal law. The third revision adds language that allows the City to legally "validate" the TUT under Chapter 9 of the California Code of Civil Procedure, with any challenges to the TUT also to be made under that Chapter.

ENVIRONMENTAL REVIEW

The City's Environmental Review Coordinator has reviewed the proposed activity for compliance with the California Environmental Quality Act (CEQA) and has determined that the activity of amending the Charter in the manner proposed is not a "Project" as defined under Section 15378 of the State CEQA Guidelines because it will not result in a physical change to the environment; therefore, pursuant to Section 15060(c)(3) of the State CEQA Guidelines the action proposed is not subject to CEQA.

BOARD/COMMISSION RECOMMENDATION

NOT APPLICABLE.

DISCUSSION

A. BACKGROUND

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. The City receives UUT based on the usage of natural gas, electricity and intrastate telephone services in the City. In fiscal year 2012/2013, the total amount of UUT received was approximately $7.64 million. This represents 6.13% of General Fund revenues. The current rates charged are .00919 per therm of natural gas, .0025 per kilowatt of electricity, and 5% of charges made for intrastate telephone services.

Chula Vista Municipal Code Sections 3.44.030 and 3.44.150 contain the provisions of the UUT relating to intrastate telephone communication services, also known as the "TUT". These Sections set the TUT rate, establish collection and remittance obligations for telecommunications service providers, define the charges subject to the TUT and excluded therefrom, and provides exemptions from the TUT based on references to similar exemptions contained in federal excise tax regulations. In fiscal year 2012/2013 the TUT accounted for approximately $5.15 million of the City's overall UUT revenues. Of this $5.15 million, the "wireless" telephone service component accounted for approximately $4.14 million.

In recent years, certain telecommunication service providers operating within the City have questioned their obligation to collect and remit the TUT with respect to their wireless telecommunications customers. They claimed that the TUT seemed not to apply to wireless services because the language in Municipal Code Section 3.44.030(B) states that charges on which the City can levy the TUT do not include charges for services paid for by users of "mobile telephone" service. Although all service providers ultimately cooperated, some did so "under protest" and questions remained.

More negative attention was brought to the City's TUT when the City unsuccessfully attempted

to modernize its TUT ordinance with a ballot measure in November of 2010. (Many other California cities had been successful with similar ballot measures in 2008.) If approved, the City's measure would have updated TUT collection methodologies per the uniform standards recently developed by a consortium of cities and telecommunications industry groups.

Subsequently, in April 2011, Carla Villa and Vanessa Garza filed a class action lawsuit against the City challenging certain aspects of the TUT. Plaintiffs' class action lawyers contended, among other things, that service charges for users of wireless telephones in the City should be "exempt" from the TUT because the definition of taxable charges in Section 3.44.030(B) of the City's Code excluded charges for services paid for by users of "mobile telephone" service. 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. Ultimately, however, because of the complexity of the case, the projected costs of continuing its legal defense, and the inherent risks of litigation, the City determined it would be in the best interests of its citizens to settle the case. The settlement took some time to implement, but on December 12, 2013, the Honorable Richard E. L. Strauss, Judge of the San Diego Superior Court, entered his final Order ratifying the settlement and ending the case. Key settlement terms include: (1) the dismissal of the case with plaintiff's waiver and release of all claims; (2) a City funded program for TUT rebates for wireless phone users covering the time period of April 2010 through April 2013, (3) the City's agreement to reduce the overall TUT rate from 5% to 4.75% starting March 1, 2014; and (4) the City's agreement to clarify the application of the TUT to "wireless" telephone service.

The rebate program has already been implemented. This agenda item is being presented to the City Council to formally implement the remaining terms of the above-described settlement. 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.

B. PURPOSE AND BASIS FOR CLARIFICATION OF ORIGINAL INTENT OF TUT SECTION 3.44.030(B) REGARDING "MOBILE TELEPHONE" SERVICE IN 1970 VERSUS PRESENT DAY "WIRELESS" SERVICE

This section of the report explains in greater detail the purpose and basis for the proposal amendment affirming that the TUT applies to modern "wireless" telephone services.

1. Background.

The TUT ordinance was enacted on July 7, 1970. This ordinance included language that expressly excluded from taxation any charges for "mobile telephone and marine telephone service." This original language has never been amended and remains part of the TUT ordinance today. In recent years, the dramatic advancements in telephone technology, combined with today's common usage of terminology such as "mobile" phones to mean "cellular" or "wireless" phones, have caused confusion regarding the proper application of the City's TUT to certain "modern" telephone services.

2. Original Intent Derived from Technology and Legal Framework in Existence in 1970.

Today's wireless phone services did not exist at the time of original enactment of the TUT. Wireless telephone technology was first invented later in the 1970's, and commercial wireless service didn't become available until the 1980's. In fact, the first handheld wireless telephone call was not

made until 1973. It was only then that the principal inventor of what we now know as a "mobile telephone," current City of Del Mar resident Martin Cooper, dialed a landline at a Bell Laboratory from a New York City street. The launch of publicly available cellular service in 1983 was still a decade away, and did not reach the San Diego region until 1985.

The "mobile telephone service" of 1970 was delivered using radio waves and single tower "high point" infrastructure. Other devices were more akin to "walkie talkies." These devices did not directly interconnect with the public switched telephone network and had little or no 'nexus' with City public property or infrastructure. Similarly, from a legal "definitional" standpoint, "mobile telephone" service was a very different concept in 1970. "Mobile Telephone Service" in 1970 ("MTS") was narrowly defined under federal law. 'Mobile service' was defined in the Federal Communications Act under 47 C.F.R. Part 21.1. as "[a] service of radio-communications between mobile and land stations or between mobile stations." "Marine" or "maritime mobile" telephone services, which were technologically similar, were defined in other relevant federal law provisions. The nature of these "MTS" services and their legal definitions under federal law made them legally "non-taxable". This is what the City must have looked to in 1970 to devise its TUT exclusion.

Modern cellular wireless phone services, though often commonly referred to as 'mobile' phone services in today's usage, are technologically and legally distinct from "MTS" as defined under federal law and the City's TUT ordinance. One key distinction is that a substantial amount of the telecommunications infrastructure needed to support modern "wireless" telephone service must be located within City limits. Moreover, much of this infrastructure is actually located within or adjacent to City owned properties and rights of way. In contrast to the MTS type services of 1970, this nexus to and local impact of modern "wireless" communications facilities creates a strong legal basis for the application of the TUT to wireless services.

The City Council's actions and statements at the time of the TUT's adoption are also consistent with this narrow concept of the MTS exclusion. Then-City Councilmember Frank Scott does not recall any fellow council members expressing any belief that the "mobile telephone" and "marine telephone" service exclusion in the TUT was intended to apply to anything other than radio-based communication systems such as those used by police for emergencies, maritime radio service and ham radio operators. The 1970 City Council simply could never have envisioned that wireless cellular telephone service not yet in existence would later be invented and eventually replace MTS radio technology, and then decades later be also commonly referred to as "mobile" telephones.

For all the above-stated reasons, the City's official position has consistently been that modern "cell phone" and similar "wireless services" <u>are</u> subject to the TUT and <u>not</u> part of the "mobile telephone" service exclusion.

3. <u>Staff's Recommendation.</u>

The wireless phone services widely available to consumers today sometimes referred to as "mobile telephones" clearly did not exist at the time of the 1970 original adoption of the TUT; nor were they contemplated by City Council lawmakers then in office. Instead, at the time, "mobile service" meant something completely different, both technologically and legally. Accordingly, it is easy to conclude that the TUT exclusion for "mobile telephone" service was intended to be narrowly construed, within the context of 1970 technological and legal realities. Nonetheless, because of how the term "mobile telephone" is used today, confusion has arisen regarding the proper application of the TUT.

In light of this, staff recommends that the intent of the original enactment the City's consistent ongoing application of the language in Chula Vista Municipal Code section 3.44.030(B), be clarified to limit the TUT exclusion for the 'mobile telephone' service to the definition in Section 21.1 of title 47 of the Code of Federal Regulations as such section existed on July 7, 1970. This action will, in effect, affirm the application of the TUT to modern "wireless" telephone services.

An even more detailed discussion and analysis of this subject is attached hereto in the form of a Memorandum prepared by the City's special legal counsel, Scott Noya, from the Daley & Heft law firm.

C. SUMMARY OF BASIS FOR RESOLUTION APPROVING TUT RATE REDUCTION FROM 5% TO 4.75%

The staff recommendation that City Council approve the TUT rate reduction from 5% to 4.75% is based on the settlement and final court order of Judge Strauss in the class action lawsuit, *Carla Villa, et al. v. City of Chula Vista.* On December 13, 2013 Judge Strauss issued his order which included approval of the settlement terms in the case. One of the terms of the approved settlement required the reduction in the TUT rate from 5% to 4.75% As required by the Court's order, the City Finance Department issued its Administrative Ruling on February 24, 2014 reducing the rate to 4.75% effective March 1, 2014. The amendment to Code Section 3.44.150 in the ordinance presented formally approves the reduction as specified.

D. OTHER CHANGES

The proposed ordinance also includes a provision that allows the City to legally "validate" the TUT, and any amendments thereto, under Chapter 9 of the California Code of Civil procedure, with any challenges thereto also to be made under that Chapter.

E. NEED FOR THE CITY TO CONTINUE TO WORK WITH TELECOMMUNICATOINS PROVIDERS REGARDING PROPER ADMINISTRATION OF THE TUT

It is important to note that the relatively simple clarification of the City's TUT ordinance proposed by this item is not intended to resolve all potential issues with the proper administration of the City's TUT tax. Because of the constantly evolving nature of telephone technology, the constantly evolving range of telecommunications services billing structures, and the modifications to applicable federal and state regulations that typically accompany these evolutions, it will continue to be necessary for the City to work cooperatively with its telecommunications providers to make sure that the City's TUT is being fully, but fairly, applied and collected. For now, staff recommends that this continue to be handled on an administrative level. If additional code modifications are required, these will be developed after discussions with the City's main telecommunications providers and presented to the Council for future consideration.

DECISION-MAKER CONFLICT

Staff has reviewed the decision contemplated by this action and has determined that it is not site specific and consequently the 500 foot rule found in California Code of Regulations section 18704.2 (a)(l) is not applicable to this decision Staff is not independently aware, and has not been informed by any City Council member, of any other fact that may constitute a basis for a decision maker conflict of interest in this matter.

CURRENT YEAR FISCAL IMPACT

A reduction in the Telephone Users' Tax (TUT) rate from 5% to 4.75% was implemented via Administrative Ruling of the Finance Department, effective March 1, 2014. No additional fiscal impact will result from adoption of the proposed resolution.

The previously implemented TUT rate reduction is projected to reduce discretionary General Fund revenues by approximately $189,000 in fiscal year 2014-15. This revenue loss is reflected in the adopted fiscal year 2014-15 budget. Actual impacts of the rate reduction will vary based on future wireless service charges subject to the TUT. TUT revenues have decreased an average of 4% annually since 2011. As the charges continue to decline, the fiscal impact of the rate reduction will also decrease.

ONGOING FISCAL IMPACT

The TUT rate reduction from 5% to 4.75% implemented March 1, 2014 is projected to reduce discretionary General Fund revenues by approximately $181,000 in fiscal year 2015-16. Actual impacts of the rate reduction will vary based on future wireless service charges subject to the TUT. As described above, ongoing fiscal impacts are projected to decrease at a rate of 4% annually, as wireless service charges subject to the TUT continue to decline.

ATTACHMENTS

Ordinance

Memorandum dated July 25, 2014 from City's special legal counsel Scott Noya, partner with Daley & Heft LLP.

Exhibit 'A': 1970 then-existing version of Title 47 CFR Part 21, "Domestic Public Radio Services (Other than Maritime Mobile)" Subpart A-Definitions, definition of "mobile service"

Exhibit 'B': History of Mobile Telephone and Evolution of Wireless Technology

Exhibit 'C': City map of Wireless Transmission Facilities located on City of Chula Vista public property as of 2013

Exhibit 'D': News article: "The Cell Phone Turns 40." *The Dream Villager Monthly* April 2013 p.12, 14, by Marschner, Mary G.

Exhibit 'E': Photo of Mobile Telephone System from 1970's era

Exhibit 'F': Statement of Frank Scott, former City Council Member
Proposed Ordinance

Staff Contact: Glen R. Googins

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