

CITY OF OAKLAND MEASURE J

J MEASURE J: Without raising current tax rates, shall Oakland's existing telephone utility user tax be modernized so that tax payers are treated equally regardless of technology used?

YES

NO

CITY ATTORNEY'S BALLOT TITLE AND SUMMARY OF MEASURE J

This measure modernizes the existing telephone utility users tax (UUT) without increasing the current tax rate of 7.5% on charges for telephone use in Oakland. The measure uses modern definitions that will remain current despite changes in technology. It will tax telephone communications services in a uniform and equitable manner, regardless of the means of transmission or technology used. Revenue from the UUT is deposited in the City's general fund to be used for municipal services and general governmental purposes. Approval of the measure requires a vote by the majority of the electorate.

CITY ATTORNEY'S IMPARTIAL LEGAL ANALYSIS OF MEASURE J

Oakland Municipal Code section 4.28.030 imposes a telephone utility users tax on all telephone service customers whose primary place of use (typically the billing address) is within Oakland. The tax is collected by service providers from customers on all charges for wireless cellular service and traditional wired service through land lines. All UUT revenue is deposited in the City's general fund and used for general governmental purposes including police, fire, street resurfacing, traffic lights, infrastructure maintenance, library and parks and recreation programs. The proposed measure does not change the existing UUT rate of 7.5%.

Oakland's UUT was enacted in 1968 to apply to telephone communications. The UUT used the definitions of telephone communications in the 1965 Federal Excise Tax. Oakland relied upon the Internal Revenue Service (IRS) interpretation of the Federal Excise Tax for guidance on the scope and application of the UUT. The definitions and terminology have not been changed since the UUT was enacted. Consistent with the IRS' 1979 ruling, Oakland's UUT and Federal Excise Tax have been assessed for telephone charges that are based on time and distance, as well as cellular phones and rate plans that are based only on time or bundled plans, which combine billing for various types of services.

After revolutionary changes in telephone communication technology and customer billing methods that have occurred since the 1960's, the IRS has faced challenges to its collection of the Federal Excise Tax for wireless communications services that are billed based on time only or "bundled" billing plans. On May 25, 2006, the IRS reversed its long standing interpretation and ruled that the Federal Excise Tax would no longer apply to wireless communications that are billed based on time only or to "bundled" billing plans.

The 2006 IRS ruling does not preclude collection of local taxes like Oakland's telephone UUT. However, a number of federal and state court actions have challenged local collection of telephone UUTs. In December 2007, the City Council adopted an administrative amendment to Chapter 4.28 of the Oakland Municipal Code to clarify that the City was not changing its application of the telephone UUT in response to the IRS' new interpretation of the Federal Excise Tax in 2006 and that Oakland would continue to apply its telephone UUT to telephone communications services.

As discussed above, approval of this measure will not change the tax rate that is currently enforced. Voter approval of the proposed measure will avoid potential court rulings that could preclude the City from continuing to collect the telephone UUT. The proposed measure uses modern terminology to include communications through new technologies and remain current in spite of evolving communications technology. It treats users communications services in a uniform and equitable manner, regardless of the means of transmission or technology used. The telephone UUT does not apply to charges for internet

access or digital downloads, such as books, ringtones, games and similar products.

Approval of this measure requires a vote by the majority of the electorate.

s/JOHN RUSSO
City Attorney

CITY AUDITOR'S IMPARTIAL FINANCIAL ANALYSIS OF MEASURE J

"Without raising current tax rates, shall Oakland's existing telephone utility user tax be modernized so that tax payers are treated equally regardless of technology used?"

BACKGROUND

The purpose of the measure is to obtain voter approval to amend the utility user's tax (UUT) ordinance contained in the Oakland Municipal Code. City of Oakland (City) residents and businesses are assessed a tax at a rate of 7.5% on charges for telephone communication services under the UUT ordinance. The service providers collect the telephone UUT from customers and remit the proceeds to the City.

Approval of the measure will not change the existing 7.5% tax rate applied to telephone communication charges. The measure clarifies the types of telephone communication services, and the transmission methods used to deliver them, that are subject to the tax. These services include, but are not limited to, voice, telegraph, teletypewriter, data, facsimile, video and text. However, telephone charges for internet access and downloadable digital content such as ring tones and games are not subject to the tax.

FISCAL IMPACT

Based on our analysis of data provided by the City's Finance and Management Agency, telephone UUT revenues over the last three fiscal years have averaged approximately \$20 million per year. The tax revenue is used to fund general City services. Whether telephone UUT revenues will increase with adoption of the measure is not known. However, for the immediate future, we estimate the current rate of collections averaging approximately \$20 million per year will be maintained. Although our estimates are based upon the best available data at this time, it is difficult to make such estimates with precision. Thus, the actual results may vary from our estimates.

s/COURTNEY A. RUBY, CPA
City Auditor

ARGUMENT IN FAVOR OF MEASURE J

Without raising the tax rate, Measure J will modernize and continue the 40-year-old Oakland Telephone Utility Users Tax so taxpayers are treated the same regardless of the technology used. The Telephone Utility Users Tax funds vital municipal services, such as police, fire, public works, parks and libraries.

The current Telephone Utility Users Tax was enacted in 1968 in a different technological and legal environment. To keep pace with communications advances and comply with changes to the Federal law, the City must modernize and ratify the existing Telephone Utility Users Tax today.

The State requires voter approval of changes to any tax ordinance. Consequently, we seek voter approval of Measure J to continue and bring up to date the Oakland Telephone Utility Users Tax.

Measure J is not a new tax, and the rate will not increase. Measure J simply updates and continues the existing Telephone Utility Users Tax. It will help keep our city budget balanced and protect every neighborhood from major cut-backs in vital public services, such as police, infrastructure, maintenance, youth programs, fire, paramedic and library services.

s/Betty Olson-Jones

Oakland Education Association President

s/Wayne G. Tucker

Chief of Police

s/Raul Godinez, II

Public Works Agency Director

s/Daniel D. Farrell

Fire Chief

s/Julie Waldman

President, Friends of the Oakland Public Library

NO ARGUMENT AGAINST MEASURE J WAS SUBMITTED.

FULL TEXT OF MEASURE J

A proposed ordinance amending Chapter 4.28 of the Oakland Municipal Code in order to modernize the provisions of the Telephone Utility Users Tax without increasing the tax rate.

WHEREAS, the City of Oakland has imposed a telephone utility users tax on all persons in the City using telephone communications services since 1968; and

WHEREAS, municipal ordinances similar to Oakland's telephone utility users tax have been the subject of court challenges due to outdated definitions or references to outdated federal laws; and

WHEREAS, the City requires reasonable certainty in the collection and receipt of General Fund taxes and the City Council has determined that the steps it takes now are necessary to eliminate potential legal issues and to ensure continued collection of tax revenue that is essential for the City to continue to provide vital public services; and

WHEREAS, the Council determines that it is in the best interest of the City of Oakland to submit a telephone utility users tax to the voters that will use modern terminology that will remain current regardless of changes in technology; and

WHEREAS, accordingly, the City Council of the City of Oakland desires to amend Section 4.28.030 the Oakland Municipal Code in order to remove outdated language and to modernize the telephone utility users tax without increasing in the current tax rate; and

WHEREAS, the City desires to treat users of communications services in a uniform and equitable manner, regardless of the means of transmission or technology used, so that users of communications services transmitted by traditional technologies bear an equitable tax burden when compared with users of communications services transmitted via newly developed technologies; and

WHEREAS, the proposed definitions are technology-neutral and reflect the modern use of communications so that all telephone communications users will be treated equally; and

WHEREAS, all revenues received from the tax will be deposited in the general fund of the City to be expended for general fund purposes; now, therefore, be it

RESOLVED: That the City Council of the City of Oakland does hereby submit to the voters at the June 3, 2008 special election the text of the proposed ordinance, which shall be as follows:

AN ORDINANCE AMENDING THE OAKLAND MUNICIPAL CODE IN ORDER TO MODERNIZE THE TELEPHONE UTILITY USERS TAX SO THAT ALL TELEPHONE COMMUNICATIONS SERVICE USERS ARE TREATED EQUALLY REGARDLESS OF THE TECHNOLOGY USED AND WITHOUT INCREASING THE TAX RATE.

Be it ordained by the People of the City of Oakland:

Section 1. The Municipal Code is hereby amended to add, delete, or modify sections as set forth below (section numbers and titles are indicated in **bold type**; additions are indicated by underscoring and dele-

tions are indicated by strike-through type; portions of the regulations not cited or not shown in underscoring or strike-through type are not changed).

Section 2. Code Amendment. Section 4.28.020 of the Oakland Municipal Code is hereby amended to read as follows:

4.28.020 Definitions.

Except where the context otherwise requires, the definitions given in this section govern the construction of this chapter.

'City' means the City of Oakland.

'Commercial or industrial plant location' means one or more contiguous sites for which the service user receives one or more utility billings.

'Month' means a calendar month.

'Person' means any domestic or foreign corporation, firm, association, syndicate, joint-stock company, partnership of any kind, joint venture, club, Massachusetts business or common-law trust, society, or individual, whether engaged in First Amendment or non-First Amendment enterprises.

'Primary place of use' of a telephone communications service shall be the address to which the service supplier sends invoices for that service unless the service user provides evidence to the reasonable satisfaction of the Tax Administrator that the billing address is not the primary place of use.

'Service address' means the address or location where the user has its equipment (e.g., cellular phone, telephone, pager, facsimile machine) receiving utility services.

'Service supplier' means a person required to collect and remit a tax imposed by this chapter.

'Service user' means a person required to pay a tax imposed by this chapter.

'Tax administrator' means the Director of Finance and Management Agency of the City of Oakland or his or her designee.

'Telephone corporation,' 'electrical corporation,' 'gas corporation,' and 'cable corporation' shall have the same meanings as defined in Section 234, 218 and 222, 215.5, respectively, of the Public Utilities Code of the state of California, as said sections existed on January 1, 1975. 'Electrical corporation' shall also be construed to include any municipality, district or franchised agency engaged in selling or supplying electrical power.

'Telephone communication services' includes any telephonic quality communication for the purpose of transmitting messages or information (including, but not limited to, voice, telegraph, teletypewriter, data, facsimile, video, or text) by electronic, radio or similar means through 'interconnected service' with the 'public switched network' (as these terms are commonly used in the Federal Communications Act and the regulations of the Federal Communications Commission - see 47 USCA Section 332(d)), whether such transmission occurs by wire, cable, fiber-optic, light wave, laser, microwave, broadband, computer processing applications such as voice over internet protocol service and services classified by the Federal Communications Commission as "enhanced" or "value

added," radio wave (including, but not limited to, cellular service, wireless broadband, commercial mobile service, personal communications service (PCS), specialized mobile radio (SMR), and other types of personal wireless service – see 47 USCA Section 332(c) (7) (C) (i) – regardless of radio spectrum used), switching facilities, satellite, any other similar facilities, or any other technology now existing or developed after the adoption of this ordinance. Telephone communication services does not include charges for internet access or digital downloads, such as downloads of books, music, ringtones, games and other similar digital products.

'Utility' means any person, whether or not regulated by the Public Utilities Commission, that distributes or provides services regarding tangibles or intangibles via the public rights-of-way including, but not limited to, furnishing services such as telephone, gas, alternate fuels, electrical, cable television, pay television, satellite dish reception, teletype writer, facsimile exchange and other electronic and telecommunication transmissions.

Except where the context otherwise requires, the definitions given in this section govern the construction of this chapter.

'City' means the City of Oakland.

'Commercial or industrial plant location' means one or more contiguous sites for which the service user receives one or more utility billings.

'Month' means a calendar month.

'Person' means any domestic or foreign corporation, firm, association, syndicate, joint stock company, partnership of any kind, joint venture, club, Massachusetts business or common law trust, society, or individual, whether engaged in First Amendment or non First Amendment enterprises.

'Service address' means the address or location where the user has its equipment (e.g., cellular phone, telephone, pager, facsimile machine) receiving utility services.

'Service supplier' means a person required to collect and remit a tax imposed by this chapter.

'Service user' means a person required to pay a tax imposed by this chapter.

'Tax administrator' means the Treasurer of the City of Oakland.

'Telephone corporation,' 'electrical corporation,' 'gas corporation,' and 'cable corporation' shall have the same meanings as defined in Section 234, 218 and 222, 215.5, respectively, of the Public Utilities Code of the state of California, as said sections existed on January 1, 1975.

'Electrical corporation' shall also be construed to include any municipality, district or franchised agency engaged in selling or supplying electrical power.

'Telephone communication services' includes any telephonic quality communication for the purpose of transmitting messages or information (including, but not limited to, voice, telegraph, teletypewriter, data, facsimile, video, or text) by electronic, radio or similar means through 'interconnected service' with the 'public switched network' (as these terms are commonly used in the Federal Communications Act and the regulations of the Federal

Communications Commission – see 47 USCA Section 332(d)), whether such transmission occurs by wire, cable, fiber optic, light wave, laser, microwave, broadband, computer processing applications such as voice over internet protocol service and services classified by the Federal Communications Commission as "enhanced" or "value added," radio wave (including, but not limited to, cellular service, wireless broadband, commercial mobile service, personal communications service (PCS), specialized mobile radio (SMR), and other types of personal wireless service – see 47 USCA Section 332(c) (7) (C) (i) – regardless of radio spectrum used), switching facilities, satellite, any other similar facilities, or any other technology now existing or developed after the adoption of this ordinance.

'Utility' means any person, whether Public Utilities Commission ("P.U.C.") or non P.U.C. regulated, that distributes or provides services regarding tangibles or intangibles via the public rights of way including, but not limited to, furnishing services such as telephone, gas, alternate fuels, electrical, cable television, pay television, satellite dish reception, teletype writer, facsimile exchange and other electronic and telecommunication transmissions.

Section 3. Code Amendment. Section 4.28.030 of the Oakland Municipal Code is hereby amended to read as follows:

4.28.030 Telephone users tax imposed.

A. There is imposed a tax upon every person, other than a telephone corporation, using telephone communication services including, but not limited to, cellular telephones and facsimile transmissions, whose place of primary use is within the city of Oakland. The tax imposed by this section shall be at the rate of seven and one-half (7.50) percent of all charges made for such services and shall be paid by the person using such services, and collected by the provider of such services.

B. The following shall be exempt from the tax imposed by this section:

(1) Charges paid for by inserting coins in coin-operated telephones available to the public with respect to local telephone service, or with respect to long distance telephone service if the charge for such long distance telephone service is less than 25 cents; except that where such coin-operated telephone service is furnished for a guaranteed amount, the amounts paid under such guarantee plus any fixed monthly or other periodic charge shall be subject to the tax.

(2) Except with respect to local telephone service, any charges for services used in the collection of news for the public press, or a news ticker service furnishing a general news service similar to that of the public press, or radio broadcasting, or in the dissemination of news through the public press, or a news ticker service furnishing a general news service similar to that of the public press, or by means of radio broadcasting, if the charge for such service is billed in writing to a person engaged in such activity.

(3) Charges for services furnished to an international organization or to the American National Red Cross.

(4) Charges for any long distance telephone service which originates within a combat zone, as defined in section 112 of the Internal Revenue Code, from a member of the Armed Forces of the United States performing service in such combat zone, as determined under such section, provided a certificate setting forth such facts as the Secretary of the U.S. Treasury may by regulations prescribe is furnished to the person receiving such payment.

(5) Charges for any long distance telephone service to the extent that the amount so paid is for use by a common carrier, telephone or telegraph company, or radio broadcasting station or network in the conduct of its business as such.

(6) Amounts paid by a nonprofit hospital for services furnished to such organization. For purposes of this subsection, the term 'nonprofit hospital' means a hospital referred to in Internal Revenue Code section 170(b)(1)(A)(iii) which is exempt from income tax under Internal Revenue Code section 501(a).

(7) Charges for services or facilities furnished to the government of any State, or any political subdivision thereof, or the District of Columbia.

(8) Charges paid by a nonprofit educational organization for services or facilities furnished to such organization. For purposes of this subsection, the term 'nonprofit educational organization' means an educational organization described in Internal Revenue Code 170(b)(1)(A)(ii) which is exempt from income tax under Internal Revenue Code section 501(a). The term also includes a school operated as an activity of an organization described in Internal Revenue Code section 501(c)(3) which is exempt from income tax under Internal Revenue Code section 501(a), if such school normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

A. There is imposed a tax upon every person, other than a telephone corporation, using telephone communication services including, but not limited to, cellular telephones and facsimile transmissions, whose place of primary use is within the jurisdictional boundaries of the city of Oakland. The tax imposed by this section shall be at the rate of seven and one half (7.50) percent of all charges made for such services and shall be paid by the person using such services, and collected by the provider of such services.

B. The following shall be exempt from the tax imposed by this section:

(1) Charges paid for by inserting coins in coin-operated telephones available to the public with respect to local telephone service or with respect to long distance telephone service if the charge for such long distance telephone service is less than 25 cents; except that where such coin-operated telephone service is furnished for a guaranteed amount, the amounts paid under such guarantee plus any fixed monthly or other periodic charge shall be subject to the tax.

(2) Except with respect to local telephone service, any charges for services used in the collection of news for the public press, or a news ticker service furnishing a gen-

eral news service similar to that of the public press, or radio broadcasting, or in the dissemination of news through the public press, or a news ticker service furnishing a general news service similar to that of the public press, or by means of radio broadcasting, if the charge for such service is billed in writing to a person engaged in such activity.

(3) Charges for services furnished to an international organization or to the American National Red Cross.

(4) Charges for any long distance telephone service which originates within a combat zone, as defined in section 112 of the Internal Revenue Code, from a member of the Armed Forces of the United States performing service in such combat zone, as determined under such section, provided a certificate setting forth such facts as the Secretary of the U.S. Treasury may by regulations prescribe is furnished to the person receiving such payment.

(5) Charges for any long distance telephone service to the extent that the amount so paid is for use by a common carrier, telephone or telegraph company, or radio broadcasting station or network in the conduct of its business as such.

(6) Amounts paid by a nonprofit hospital for services furnished to such organization. For purposes of this subsection, the term 'nonprofit hospital' means a hospital referred to in Internal Revenue Code section 170(b)(1)(A)(iii) which is exempt from income tax under Internal Revenue Code section 501(a).

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(8) Charges paid by a nonprofit educational organization for services or facilities furnished to such organization. For purposes of this subsection, the term 'nonprofit educational organization' means an educational organization described in Internal Revenue Code section 170(b)(1)(A)(ii) which is exempt from income tax under Internal Revenue Code section 501(a). The term also includes a school operated as an activity of an organization described in Internal Revenue Code section 501(c)(3) which is exempt from income tax under Internal Revenue Code 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.

Section 4. Severability. Should any provision of this Ordinance, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions hereof are severable.

Section 5. Majority Approval; Effective Date. 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.

Section 6. Council Amendments. The City Council of the City of Oakland is hereby authorized to amend Sections 4.28.020, 4.28.030 and 4.28.190 of the Oakland Municipal Code as adopted by this Ordinance in any manner that does not increase the rate of the telephone users tax, otherwise constitute a tax increase for which voter approval is required by Article XIII C of the California Constitution or entirely dispense with the requirement for independent audits stated in Section 4.28.190.