

ORDINANCE NO. 07-14

ORDINANCE OF THE CITY OF EMERYVILLE AMENDING  
ARTICLE 5, CHAPTER 3, TITLE 3 OF THE CITY OF EMERYVILLE  
MUNICIPAL CODE WITH RESPECT TO A UTILITY USERS' TAX

THE PEOPLE OF THE CITY OF EMERYVILLE DO ORDAIN AS FOLLOWS:

**SECTION ONE. Amending Article 5, Chapter 3, Title 3 of the City of Emeryville Municipal Code.** Article 5, Chapter 3, Title 3 of the City of Emeryville Municipal Code is hereby amended in its entirety to read as follows:

ARTICLE 5

UTILITY USERS' TAX

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3-3.502 Definitions.

3-3.503 Constitutional, Statutory, and Other Exemptions.

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**Sec.3-3.501. Short Title**

This Article shall be known as the "Utility Users' Tax Ordinance" of the City.

**Sec.3-3.502. Definitions.**

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

(a) "Ancillary telecommunication services" means services that are associated with or incidental to the provision, use or enjoyment of telecommunications services, including but not limited to the following services:

(1) "Conference bridging service" means an ancillary service that links two or more participants of an audio or video conference call and may include the provision of a telephone number. Conference bridging service does not include the telecommunications services used to reach the conference bridge.

(2) "Detailed telecommunications billing service" means an ancillary service of separately stating information pertaining to individual calls on a customer's billing statement.

(3) "Directory assistance" means an ancillary service of providing telephone number information, and/or address information.

(4) "Vertical service" means an ancillary service that is offered in connection with one or more telecommunications services, which offers advanced calling features that allow customers to identify callers and to manage multiple calls and call connections, including conference bridging services.

(5) "Voice mail service" means an ancillary service that enables the customer to store, send or receive recorded messages. Voice mail service does not include any vertical services that the customer may be required to have in order to utilize the voice mail service

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

(d) "City" shall mean the City of Emeryville.

(e) "Communication Services" means: "telecommunication services" and "ancillary telecommunication services".

(f) "Mobile Telecommunications Service" has the same meaning and usage as set forth in the Mobile Telecommunications Sourcing Act (4 U.S.C. Section 124) and the regulations thereunder.

(g) "Month" shall mean a calendar month.

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

(j) "Place of Primary Use" means the street address representative of where the customer's use of the communications service primarily occurs, which must be the residential street address or the primary business street address of the customer.

(k) "Post-paid telecommunication service" means the telecommunication service obtained by making a payment on a communication-by-communication basis either through the use of a credit card or payment mechanism such as a bank card, travel card, credit card, or debit card, or by charge made to a service number which is not associated with the origination or termination of the telecommunication service.

(l) "Prepaid telecommunication service" means the right to access telecommunication services, which must be paid for in advance and which enables the origination of communications using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

(m) "Private telecommunication service" means a telecommunication service that entitles the customer to exclusive or priority use of a communications channel or group of channels between or among termination points, regardless of the manner in which such channel or channels are connected, and includes switching capacity, extension lines, stations, and any other associated services that are provided in connection with the use of such channel or channels. A communications channel is a physical or virtual path of communications over which signals are transmitted between or among customer channel termination points (*i.e.*, the location where the customer either inputs or receives the communications).

(n) "Service Address" means either:

(1) The location of the service user's communication equipment from which the communication originates or terminates, regardless of where the communication is billed or paid; or,

(2) If the location in subsection (1) of this definition is unknown (*e.g.*, mobile telecommunications service or VoIP service), the service address means the location of the service user's place of primary use.

(3) For prepaid telecommunication service, "service address" means the location associated with the service number.

(o) "Service Supplier" shall mean any entity or person, including the City, that provides communication service to a user of such service within the City.

(p) "Service User" shall mean a person required to pay a tax imposed under the provisions of this Article.

(q) "State" shall mean the State of California.

(r) "Tax Administrator" means the finance director of the city or his or her designee.

(s) "Telecommunications services" means the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points, whatever the technology used, and includes broadband services [e.g., T-1, digital subscriber line (eDSL), fiber optic, coaxial cable, and wireless broadband, including Wi-Fi, WiMAX, and Wireless MESH] to the extent federal and/or state law permits taxation of such broadband services, now or in the future. The term "telecommunications 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 is functionally integrated with "telecommunication services". "Telecommunications services" include, but are not limited to the following services, regardless of the manner or basis on which such services are calculated or billed: ancillary telecommunication services; broadband service (to the extent federal and/or state law permits taxation of such service); mobile telecommunications service; prepaid telecommunication service; post-paid telecommunication service; private telecommunication service; paging service; 800 service (or any other toll-free numbers designated by the Federal Communications Commission); and 911 service (or any other similar numbers designated by the Federal Communications Commission for services whereby subscribers who call in to pre-recorded or live service). "Telecommunication services" shall not include digital downloads that are not "ancillary telecommunication services", such as video programming, music, ringtones, games, and similar digital products.

**Sec.3-3.503. Constitutional, statutory, and other exemptions.**

(a) Nothing in this Article shall be construed as imposing a tax upon any person or service when the imposition of such tax upon such person or service would be in violation of a federal or state statute, the Constitution of the United States or the Constitution of the State.

(b) Any service user that is exempt from the tax imposed by this Article pursuant to subsection (a) of this section shall file an application with the Tax Administrator for an exemption; provided, however, this requirement shall not apply to a service user that is a state or federal agency or subdivision with a commonly recognized name for such service. Said application shall be made upon a form approved by the Tax Administrator and shall state those facts, declared under penalty of perjury, which qualify the applicant for an exemption, and shall include the names of all utility service suppliers serving that service user. If deemed exempt by the Tax Administrator, such service user shall give the Tax Administrator timely written notice of any change in utility service suppliers so that the Tax Administrator can properly notify the new utility service supplier of the service user's tax exempt status. A service user that fails to comply with this section shall not be entitled to a refund of utility users' taxes collected and remitted to the Tax Administrator from such service user as a result of such noncompliance..

The decision of the Tax Administrator may be appealed pursuant to Section 3-3.519 of this Article. Filing an application with the Tax Administrator and appeal to the City Manager pursuant to Section 3-3.519 of this Article is a prerequisite to a suit thereon.

(c) Residential Exemption

(1) Eligibility. Any service user who is personally responsible for the payment of the utility services subject to this tax and who personally pays for those services shall be eligible for an exemption from the taxes imposed by this article on service supplied the service user's residential living quarters if the aggregate gross income of all persons who share the service user's residential living quarters does not exceed the sum of twelve thousand dollars (\$12,000) per year. Only one (1) such residential exemption shall be allowed to any person. The person in whose name the utility services are established with the utility companies will be deemed to be the person responsible for purposes of this section. The provisions of this exemption shall also apply to any individual who meets the criterion of disability, as established by the Social Security Administration's Supplemental Income Program for the Aged, Blind and Disabled (Title XVI of the Social Security Act as amended).

(2) Application. Applications for exemption may be filed with the Tax Administrator at any time on such forms as may be provided.

(3) Effective Date. The application shall be approved or denied by the Tax Administrator within seventy-five (75) days of receipt.

(4) Contents of the Application. Applications shall be verified by declaration under penalty of perjury and shall contain such information and shall certify the service users as exempt if the eligibility requirements of subsection (a) are met, except that no exemption shall be granted to a service user who is receiving service from a service supplied through a master meter and no exemption shall be granted with respect of any tax imposed by this article which is or has been paid by a public agency or where the service user receives funds from a public agency specifically for the payment of such tax.

(5) Notice to Service Supplier. If a service is certified as exempt, the Tax Administrator shall promptly notify the service user's service suppliers stating the name of the service user, the address to which such exempt service is being supplied, the account number, if any, and such other information as may be necessary for the service supplier to remove the exempt service user from its tax billing procedure.

(6) Discontinuance of Tax. Upon receipt of such notice, the service supplier shall within sixty (60) days discontinue billing the service user for taxes imposed by this article, except as otherwise provided in subsection (c)(7).

(7) Prior Taxes to be Collected. Taxes billed by the service supplier to the service user prior to removing the service user from its tax billing procedure, shall be collected from the service user and the service user shall pay such taxes to the service supplier. Taxes billed to and paid by the service user who is eligible for exemption between the time when an application is submitted and when the service supplier removes the service user from its taxing procedure shall be refunded to the service user.

(8) Duration of Exemption. Exemptions certified by the Tax Administrator shall continue so long as the facts supporting qualification for the exemption shall exist. The exemption will automatically terminate with any change in service address or residence of the exempt individual. The individual may apply for a new exemption with each change of address of residence.

(9) Duty to Disclose Disqualification. Any service user who has been exempted under this section shall notify the City within ten (10) days of any change in fact or circumstance that might disqualify the individual from receiving such exemption. It shall be a misdemeanor for any person to knowingly receive the benefit of the exemption provided by this section when the basis for such exemptions does not exist or ceases to exist. Any service supplier, who determines by any means that a new or nonexempt service user is receiving service through a meter or connection exempt by virtue of an exemption issued to a previous user or exempt user of the same meter or connection, shall immediately

notify the Tax Administrator of such fact and the Tax Administrator shall conduct an investigation to ascertain whether or not the provisions of this section have been complied with, and when appropriate, order the service supplier to commence collecting the tax from the nonexempt service user.

(10) Audit by the Tax Administrator. Tax Administrator shall have the power and right to demand evidence of continued eligibility of a service user for exemption under the provisions of this section. Such evidence may include, but need not be limited to, copies of business records, letter or statements from the Social Security Administration and State, County, City and private pension administrators or unemployment or welfare agencies, and such other evidence concerning the service user or other member of his or her household as may tend to prove or disprove such eligibility. Failure to provide such evidence as is within the control of a service user to provide, either directly or by consent of a member of the household when such evidence is requested may be the basis for immediate discontinuance of the service user's eligibility for exemption under the provisions of this section. Evidence provided to the Tax Administrator at the Tax Administrator's request or voluntarily provided by the service user without the Tax Administrator's request may not be used against such service user as evidence in violation of the provisions of this section. Such evidence may only be used as grounds for termination of the exemption herein provided.

**Section 3-3.504. Maximum Amount Paid.**

No single service user at one location or multiple locations, provided there are not multiple users at such location or locations, shall pay more than seventy- five thousand dollars (\$75,000.00) per year between July 1 and June 30, which shall be annually adjusted downward or upward according to the Bay Area Consumer Price Index, with 1994 serving as the base year.

**Sec.3-3.505. Communication Users' Tax.**

(a) There is hereby imposed a tax upon every person in the City using communication services. The maximum tax imposed by this section shall be at the rate of five and one-half percent (5.5%) of the charges made for such services and shall be collected from the service user by the communication services supplier or its billing agent. There is a rebuttable presumption that communication services, which are billed to a billing or service address in the City, are used, in whole or in part, within the City's boundaries, and such services are subject to taxation under this Article. If the billing address of the service user is different from the service address, the service address of the service user shall be used for purposes of imposing the tax. 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 communication services.

(b) “Mobile Telecommunications Service” shall be sourced in accordance with the sourcing rules set forth in the Mobile Telecommunications Sourcing Act (4 U.S.C. Section 124). The Tax Administrator may issue and disseminate to communication service suppliers, which are subject to the tax collection requirements of this Article, sourcing rules for the taxation of other communication services, including but not limited to post-paid communication services, prepaid communication services, and private communication services, provided that such rules are based upon custom and common practice that further administrative efficiency and minimize multi-jurisdictional taxation.

(c) The Tax Administrator may issue and disseminate to communication service suppliers, which are subject to the tax collection requirements of this Article, an administrative ruling identifying those communication services, or charges therefor, that are subject to or not subject to the tax of subsection (a) above.

(d) As used in this section, the term “telecommunication services” shall include, but are not limited to charges for: connection, reconnection, termination, movement, or change of telecommunication services; late payment fees; detailed billing; central office and custom calling features(including but not limited to call waiting, call forwarding, caller identification and three-way calling); voice mail and other messaging services; directory assistance; access and line charges; universal service charges; regulatory, administrative and other cost recovery charges; local number portability charges; and text messaging and instant messaging. “Telecommunication services” shall not include digital downloads that are not “ancillary telecommunication services”, such as video programming, music, ringtones, games, and similar digital products.

(e) To prevent actual multi-jurisdictional taxation of 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 state or local jurisdiction on such 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 local jurisdiction; provided, however, the amount of credit shall not exceed the tax owed to the City under this section.

(f) The tax on 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, and must be received by the Tax Administrator on or before the twentieth (20<sup>th</sup>) day of the following month.

**Sec. 3-3.506. Electricity Users’ Tax.**

(a) There is hereby imposed a tax upon every person using electricity in the City. The tax imposed by this section shall be at the rate of five and one-half percent (5.5%) 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.

(b) As used in this section, the term “charges” shall apply to all services, components and items that are: i) necessary for or common to the receipt, use or enjoyment of electric service; or, ii) currently are 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) stand-by, reserves, firming, ramping, 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 or surcharges which are necessary for or common to the receipt, use or 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, whether or not such charges, fees, or surcharges appear on a bundled or line item basis on the customer billing.

(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.

(d) The Tax Administrator, from time to time, may 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 therefor, including those items that are mandated by state or federal regulatory agencies as a condition of providing such electric service. The Tax Administrator, thereafter, may issue and disseminate to such electric service suppliers an administrative ruling identifying those components and items which are: i) necessary for or common to the receipt, use or enjoyment of electric service; or, ii) currently are 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. Charges for such components and items shall be subject to the tax of subsection (a) above.

(e) As used in this section, the term “using electricity” shall not include the mere receiving of such electricity by an electrical corporation or governmental agency at a point within the City for resale.

(f) The tax on electricity provided by self-production or by a non-utility service supplier not under the jurisdiction of this Article shall be collected and remitted in the manner set forth in Section 3-3.508 of this Article. All other taxes on charges for electricity imposed by this section shall be collected from the service user by the electric 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 twentieth (20<sup>th</sup>) 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 twentieth (20<sup>th</sup>) day of the following month, provided that such person 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 remittance that becomes due.

**Sec. 3-3.507. Gas Users’ Tax.**

(a) There is hereby imposed a tax upon every person using gas in the City, which is transported and delivered through a pipeline distribution system. The tax imposed by this section shall be at the rate of five and one-half percent (5.5%) of the charges made for such gas, including all services related to the storage, transportation and delivery of such gas. The tax shall be collected from the service user by the service supplier or non-utility service supplier, or its billing agent.

(b) As used in this section, the term “charges” shall apply to all services, components and items for gas service that are: i) necessary for or common to the receipt, use or enjoyment of gas service; or, ii) currently are 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 supplier shall not be required to apply the tax to any charges for gas storage services when the service supplier 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, transition charges, customer charges, minimum charges, annual and monthly charges, and any other charges which are necessary for or common to the receipt, use or 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.

(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.

(d) 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, thereafter, may issue and disseminate to such gas service suppliers an administrative ruling identifying those components and items which are: i) necessary for or common to the receipt, use or enjoyment of gas service; or, ii) currently are 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. Charges for such components and items shall be subject to the tax of subsection (a) above.

(e) There shall be excluded from the calculation of the tax imposed in this section, charges made for gas which is to be resold and delivered through a pipeline distribution system.

(f) The tax on gas provided by self-production or by a non-utility service supplier not under the jurisdiction of this Article shall be collected and remitted in the manner set forth in Section 3-3.508 of this Article. All other taxes on charges for gas imposed by this section shall be collected from the service user by the gas 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 twentieth (20<sup>th</sup>) 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 twentieth (20<sup>th</sup>) day of the following month, provided that such person 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 remittance that becomes due.

**Sec. 3-3.508. Collection of Tax from Service Users Receiving Direct Purchase of Gas or Electricity.**

(a) Any service user subject to the tax imposed by Section 3-3.506 or by Section 3-3.507 of this Article, which produces gas or electricity for self-use (*e.g.*, cogeneration or distributed generation); which receives gas or electricity, including any related supplemental services, directly from a non-utility service supplier not under the jurisdiction of this Article; or which, for any other reason, is not having the full tax collected and remitted by its service supplier, a non-utility service supplier, or its billing agent on the use of gas or electricity in the City, including any related supplemental services, shall report said fact to the Tax Administrator and shall remit the tax due directly to the Tax Administrator within thirty (30) days of such use. In lieu of paying said actual tax, the service user may, at its option, remit to the Tax Administrator within thirty (30) days of such use an estimated amount of tax measured by the tax billed in the previous month, or upon the payment pattern of similar customers of the service supplier using similar amounts of gas or electricity, 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.

(b) The Tax Administrator may require said service user to identify its non-utility service supplier and provide, subject to audit: invoices; books of account; or other satisfactory evidence documenting the quantity of gas or electricity used, including any related supplemental services, and the cost or price thereof. If the service user is unable to provide such satisfactory evidence, or if the administrative cost of calculating the tax in the opinion of the Tax Administrator is excessive, the Tax Administrator may determine the tax by applying the tax rate to the equivalent charges the service user would have incurred if the gas or electricity used, including any related supplemental services, had been provided by the service supplier that is the primary supplier of gas or electricity within the City. Rate schedules for this purpose shall be available from the City.

**Sec.3-3.509. Bundling Taxable Items with Non-Taxable Items.**

Except as otherwise provided by applicable federal or state law, if any nontaxable charges are combined with and not separately stated from taxable service charges on the customer bill or invoice of a service supplier, the combined charge is subject to tax unless the service supplier identifies, by reasonable and verifiable standards, the portions of the combined charge that are nontaxable and taxable through the service supplier's books and records kept in the regular course of business, and in accordance with generally accepted accounting principles, and not created and maintained for tax purposes. The service supplier has the burden of proving the proper apportionment of taxable and non-taxable charges.

**Sec.3-3.510. Substantial Nexus / Minimum Contacts.**

For purposes of imposing a tax or establishing a duty to collect and remit a tax under this Article, “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 it may change from time to time by judicial interpretation or by statutory enactment. Any 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 Article. A service supplier shall be deemed to have sufficient activity in the City for tax collection and remittance purposes if its activities include, but are not limited to, 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 on a continuous, regular, seasonal or systematic basis by means of advertising that is broadcast or relayed from a transmitter with the City or distributed from a location with 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.

The City shall make available, upon request, an accurate description of its jurisdictional boundaries based on street addresses and/or ZIP Plus Four, in an electronic format. If a service supplier relies upon such information provided by City, it shall not be responsible for any errors in taxation that may result.

**Sec.3-3.511. Duty to Collect--Procedures.**

(a) **Collection by Service Suppliers.** The duty of service suppliers to collect and remit the taxes imposed by the provisions of this Article shall be performed as follows:

(1) The tax shall be collected by service suppliers insofar as practicable at the same time as, and along with, the collection of the charges made in accordance with the regular billing practice of the service supplier. Where the amount paid by a service user to a service supplier is less than the full amount of the charge and tax which was accrued for the billing period, a proportionate share of both the charge and the tax shall be deemed to have been paid. In those cases where a service user has notified the service supplier of refusal to pay the tax imposed on said charges, Section 3-3.515 shall apply.

(2) The duty of a service supplier to collect the tax from a service user shall commence with the beginning of the first regular billing period applicable to the service user where all charges normally included in such regular billing are subject to the provisions of this Article. Where a service user receives more than one billing, one or more being for different periods than another, the duty to collect shall arise separately for each billing period.

(b) **Filing Return and Payment.** Each person required by this Article to remit a tax shall file a return to the Tax Administrator, on forms approved by the Tax Administrator, on or before the due date. The full amount of the tax collected shall be included with the return and filed with the Tax Administrator. The Tax Administrator is authorized to require such additional information as he or she deems necessary to determine if the tax is being levied, collected, and remitted in accordance with this Article. Returns are due immediately upon cessation of business for any reason. Pursuant to *Revenue and Tax Code Section 7284.6*, the Tax Administrator, and its agents, shall maintain such filing returns as confidential information that is exempt from the disclosure provisions of the Public Records Act.

**Sec.3-3.512. Collection Penalties – Service Suppliers.**

(a) Taxes collected from a service user are delinquent if not received by the Tax Administrator on or before the due date. Should the due date occur on a weekend or legal holiday, the return must be received by the Tax Administrator on the first regular working day following the weekend or legal holiday. A direct deposit, including electronic fund transfers and other similar methods of electronically exchanging monies between financial accounts, made by a service supplier in satisfaction of its obligations under this subsection shall be considered timely if the transfer is initiated on or before the due date, and the transfer settles into the City's account on the following business day.

(b) If the person required to collect and/or remit the utility users' tax fails to collect the tax (by failing to properly assess the tax on one or more services or charges on the customer's billing) or fails to remit the tax collected on or before the due date, the Tax Administrator shall attach a penalty for such delinquencies or deficiencies at the rate of fifteen (15%) percent of the total tax that is delinquent or deficient in the remittance, and shall pay interest at the rate of and 75/100ths (0.75%) percent per month, or any fraction thereof, on the amount of the tax, exclusive of penalties, from the date on which the remittance first became delinquent, until paid.

(c) The Tax Administrator shall have the power to impose additional penalties upon persons required to collect and remit taxes pursuant to the provisions of this Article for fraud or gross negligence in reporting or remitting at the rate of fifteen (15%) percent of the amount of the tax collected and/or required to be remitted, or as recomputed by the Tax Administrator.

(d) For collection purposes only, every penalty imposed and such interest that is accrued under the provisions of this section shall become a part of the tax herein required to be paid.

(e). Notwithstanding the foregoing, the Tax Administrator may, in his or her discretion, modify the due dates of this Article to be consistent with any uniform standards or procedures that are mutually agreed upon by other public agencies imposing a utility users tax, or otherwise legally established, to create a central payment location or mechanism.

**Sec.3-3.513. Actions to Collect.**

Any tax required to be paid by a service user under the provisions of this Article shall be deemed a debt owed by the service user to the City. Any such tax collected from a service user which has not been remitted to the Tax Administrator shall be deemed a debt owed to the City by the person required to collect and remit and shall no longer be a debt of the service user. Any person owing money to the City under the provisions of this Article shall be liable to an action brought in the name of the City for the recovery of such amount, including penalties and interest as provided for in this Article, along with any collection costs incurred by the City as a result of the person's noncompliance with this Article, including, but not limited to, reasonable attorneys fees. Any tax required to be collected by a service supplier or owed by a service user is an unsecured priority excise tax obligation under *11 U.S.C.A. Section 507(a)(8)(C)*.

**Sec.3-3.514. Deficiency Determination and Assessment – Tax Application Errors.**

(a) The Tax Administrator shall make a deficiency determination if he or she determines that any person required to pay or collect taxes pursuant to the provisions of this Article has failed to pay, collect, and/or remit the proper amount of tax by improperly or failing to apply the tax to one or more taxable services or charges.

(b) The Tax Administrator shall mail a notice of such deficiency determination to the person required to pay or remit the tax, which notice shall refer briefly to the amount of the taxes owed, plus interest at the rate of 75/100ths (0.75%) percent per month, or any fraction thereof, on the amount of the tax from the date on which the tax should have been received by the City. Within fourteen (14) calendar days after the date of service of such notice, the person may request in writing to the Tax Administrator for a hearing on the matter.

(c) If the person fails to request a hearing within the prescribed time period, the amount of the deficiency determination shall become a final assessment, and shall immediately be due and owing to the City. If the person requests a hearing, the Tax Administrator shall cause the matter to be set for hearing, which shall be scheduled within thirty (30) days after receipt of the written request for hearing. Notice of the time and place of the hearing shall be mailed by the Tax Administrator to such person at least ten (10) calendar days prior to the hearing, and, if the Tax Administrator desires said person to produce specific records at such hearing, such notice may designate the records requested to be produced.

(d) At the time fixed for the hearing, the Tax Administrator shall hear all relevant testimony and evidence, including that of any other interested parties. At the discretion of the Tax Administrator, the hearing may be continued from time to time for the purpose of allowing the presentation of additional evidence. Within a reasonable time following the conclusion of the hearing, the Tax Administrator shall issue a final assessment (or non-assessment), thereafter, by confirming, modifying or rejecting the original deficiency determination, and shall mail a copy of such final assessment to person owing the tax. The decision of the Tax Administrator may be appealed to the City Manager pursuant to

Section 3-3.519 of this Article. Filing an application with the Tax Administrator and appeal to the City Manager pursuant to Section 3-3.519 of this Article is a prerequisite to a suit thereon.

(e) Payment of the final assessment shall become delinquent if not received by the Tax Administrator on or before the thirtieth (30th) day following the date of receipt of the notice of final assessment. The penalty for delinquency shall be fifteen percent (15%) on the total amount of the assessment, along with interest at the rate of 75/100ths (0.75%) percent per month, or any fraction thereof, on the amount of the tax, exclusive of penalties, from the date of delinquency, until paid. The applicable statute of limitations regarding a claim by the City seeking payment of a tax assessed under this Article shall commence from the date of delinquency as provided in this subsection (e).

(f) All notices under this section may be sent by regular mail, postage prepaid, and shall be deemed received on the third calendar day following the date of mailing, as established by a proof of mailing.

**Sec.3-3.515. Administrative Remedy - Non-Paying Service Users.**

(a) Whenever the Tax Administrator determines that a service user has deliberately withheld the amount of the tax owed by the service user from the amounts remitted to a person required to collect the tax, or whenever the Tax Administrator deems it in the best interest of the City, he or she may relieve such person of the obligation to collect the taxes due under this Article from certain named service users for specific billing periods. To the extent the service user has failed to pay the amount of tax owed for a period of two (2) or more billing periods, the service supplier shall be relieved of the obligation to collect taxes due. The service supplier shall provide the City with the names and addresses of such service users and the amounts of taxes owed under the provisions of this Article.

(b) In addition to the tax owed, the service user shall pay a delinquency penalty at the rate of fifteen percent (15%) of the total tax that is owed, and shall pay interest at the rate of 75/100ths (0.75%) percent per month, or any fraction thereof, on the amount of the tax, exclusive of penalties, from the due date, until paid.

(c) The Tax Administrator shall notify the non-paying service user that the Tax Administrator has assumed the responsibility to collect the taxes due for the stated periods and demand payment of such taxes, including penalties and interest. The notice shall be served on the service user by personal delivery or by deposit of the notice in the United States mail, postage prepaid, addressed to the service user at the address to which billing was made by the person required to collect the tax; or, should the service user have a change of address, to his or her last known address.

(d) If the service user fails to remit the tax to the Tax Administrator within thirty (30) days from the date of the service of the notice upon him or her, the Tax Administrator

may impose an additional penalty of fifteen percent (15%) of the amount of the total tax that is owed.

**Sec.3-3.516. Additional Powers and Duties of the Tax Administrator.**

(a) The Tax Administrator shall have the power and duty, and is hereby directed, to enforce each and all of the provisions of this Article.

(b) The Tax Administrator may adopt administrative rules and regulations consistent with provisions of this Article for the purpose of interpreting, clarifying, carrying out and enforcing the payment, collection and remittance of the taxes herein imposed. A copy of such administrative rules and regulations shall be on file in the Tax Administrator's office.

(c) Upon a proper showing of good cause, the Tax Administrator may make administrative agreements, with appropriate conditions, to vary from the strict requirements of this Article and thereby: (1) conform to the billing procedures of a particular service supplier so long as said agreements result in the collection of the tax in conformance with the general purpose and scope of this Article; or, (2) to avoid a hardship where the administrative costs of collection and remittance greatly outweigh the tax benefit. A copy of each such agreement shall be on file in the Tax Administrator's office, and are voidable by the Tax Administrator or the City at any time.

(d) The Tax Administrator may conduct an audit, to ensure proper compliance with the requirements of this Article, of any person required to collect and/or remit a tax pursuant to this Article. The Tax Administrator shall notify said person of the initiation of an audit in writing. In the absence of fraud or other intentional misconduct, the audit period of review shall not exceed a period of three (3) years next preceding the date of receipt of the written notice by said person from the Tax Administrator. Upon completion of the audit, the Tax Administrator may make a deficiency determination pursuant to Section 3-3.5140 of this Article for all taxes (and applicable penalties and interest) owed and not paid, as evidenced by information provided by such person to the Tax Administrator. If said person is unable or unwilling to provide sufficient records to enable the Tax Administrator to verify compliance with this Article, the Tax Administrator is authorized to make a reasonable estimate of the deficiency. Said reasonable estimate shall be entitled to a rebuttable presumption of correctness.

(e) Upon receipt of a written request of a taxpayer, and for good cause, the Tax Administrator may extend the time for filing any statement required pursuant to this Article for a period of not to exceed forty-five (45) days, provided that the time for filing the required statement has not already passed when the request is received. No penalty for delinquent payment shall accrue by reason of such extension. Interest shall accrue during said extension at the rate of 75/100ths (0.75%) percent per month, prorated for any portion thereof.

(f) The Tax Administrator shall determine the eligibility of any person who asserts a right to exemption from, or a refund of, the tax imposed by this Article.

(g) Notwithstanding any provision in this Article to the contrary, the Tax Administrator may waive any penalty or interest imposed upon a person required to collect and/or remit for failure to collect the tax imposed by this Article if the non-collection occurred in good faith. In determining whether the non-collection was in good faith, the Tax Administrator shall take into consideration industry practice or other precedence.

**Sec.3-3.517. Records.**

(a) It shall be the duty of every person required to collect and/or remit to the City any tax imposed by this Article to keep and preserve, for a period of at least three (3) years, all records as may be necessary to determine the amount of such tax as he/she may have been liable for the collection of and remittance to the Tax Administrator, which records the Tax Administrator shall have the right to inspect at a reasonable time.

(b) The City, through the City Council, may issue an administrative subpoena to compel a person to deliver, to the Tax Administrator, copies of all records deemed necessary by the Tax Administrator to establish compliance with this Article, including the delivery of records in a common electronic format on readily available media if such records are kept electronically by the person in the usual and ordinary course of business. As an alternative to delivering the subpoenaed records to the Tax Administrator on or before the due date provided in the administrative subpoena, such person may provide access to such records outside the City on or before the due date, provided that such person shall reimburse the City for all reasonable travel expenses incurred by the City to inspect those records, including travel, lodging, meals, and other similar expenses, but excluding the normal salary or hourly wages of those persons designated by the City to conduct the inspection.

(c) The Tax Administrator is authorized to execute a non-disclosure agreement approved by the City Attorney to protect the confidentiality of customer information pursuant to *California Revenue and Tax Code Sections 7284.6 and 7284.7*.

(d) If a service supplier uses a billing agent or billing aggregator to bill, collect, and/or remit the tax, the service supplier shall: i) provide to the Tax Administrator the name, address and telephone number of each billing agent and billing aggregator currently authorized by the service supplier to bill, collect, and/or remit the tax to the City; and, ii) upon request of the Tax Administrator, deliver, or effect the delivery of, any information or records in the possession of such billing agent or billing aggregator that, in the opinion of the Tax Administrator, is necessary to verify the proper application, calculation, collection and/or remittance of such tax to the City .

(e) If any person subject to record-keeping under this section unreasonably denies the Tax Administrator access to such records, or fails to produce the information requested in an administrative subpoena within the time specified, then the Tax Administrator may impose a penalty of \$500 on such person for each day following: i) the initial date that the person refuses to provide such access; or, ii) the due date for production of records as set forth in the administrative subpoena. This penalty shall be in addition to any other penalty imposed under this Article.

**Sec.3-3.518. Refunds.**

Whenever the amount of any tax has been overpaid or paid more than once or has been erroneously or illegally collected or received by the Tax Administrator under this Article from a person or service supplier, it may be refunded as provided in this section:

(a) The Tax Administrator may refund any tax that has been overpaid or paid more than once or has been erroneously or illegally collected or received by the Tax Administrator under this Article from a person or service supplier, provided that no refund shall be paid under the provisions of this section unless the claimant or his or her guardian, conservator, executor, or administrator has submitted a written claim to the Tax Administrator within one year of the overpayment or erroneous or illegal collection of said tax. Such claim must clearly establish claimant's right to the refund by written records showing entitlement thereto. Nothing herein shall permit the filing of a claim on behalf of a class or group of taxpayers unless each member of the class has submitted a written claim under penalty of perjury as provided by this subsection.

(b) The Tax Administrator, or the City Council where the claim is in excess of the amount set by separate resolution of the City Council relating to the settlement of general liability claims against the City, shall act upon the refund claim within forty-five (45) days of the initial receipt of the refund claim. Said decision shall be final. If the Tax Administrator/City Council fails or refuses to act on a refund claim within the forty-five (45) day period, the claim shall be deemed to have been rejected by the Tax Administrator/City Council on the forty-fifth (45th) day. The Tax Administrator shall give notice of the action in a form which substantially complies with that set forth in *Government Code Section 913*.

(c) The filing of a written claim pursuant to *Government Code Section 935* is a prerequisite to any suit thereon. Any action brought against the City pursuant to this section shall be subject to the provisions of *Government Code Sections 945.6 and 946*.

(d) Notwithstanding the notice provisions of subsection (a) above, the Tax Administrator may, at his or her discretion, give written permission to a service supplier, who has collected and remitted any amount of tax in excess of the amount of tax imposed by this Article, to claim credit for such overpayment against the amount of tax which is due the City upon a subsequent monthly return(s) to the Tax Administrator, provided that: i) such credit is claimed in a return dated no later than one year from the date of overpayment or erroneous collection of said tax; ii) the Tax Administrator is satisfied that

the underlying basis and amount of such credit has been reasonably established; and, iii) in the case of an overpayment by a service user to the service supplier that has been remitted to the City, the Tax Administrator has received proof, to his or her satisfaction, that the overpayment has been refunded by the service supplier to the service user in an amount equal to the requested credit.

(e) Notwithstanding subsections (a) through (d) above, a service supplier shall be entitled to take any overpayment as a credit against an underpayment whenever such overpayment has been received by the City within the three (3) years next preceding a deficiency determination or assessment by the Tax Administrator in connection with an audit instituted by the Tax Administrator pursuant to Section 3-3.516(d). A service supplier shall not be entitled to said credit unless it clearly establishes the right to the credit by written records showing entitlement thereto. Under no circumstances shall an overpayment taken as a credit against an underpayment pursuant to this subsection qualify a service supplier for a refund to which it would not otherwise be entitled under the one-year written claim requirement of this section.

### **Sec.3-3.519. Appeals.**

(a) The provisions of this section apply to any decision (other than a decision relating to a refund pursuant to Section 3-3.518 of this Article), deficiency determination, assessment, or administrative ruling of the Tax Administrator. Any person aggrieved by any decision (other than a decision relating to a refund pursuant to Section 3-3.518 of this Article), deficiency determination, assessment, or administrative ruling of the Tax Administrator, shall be required to comply with the appeals procedure of this section. Compliance with this section shall be a prerequisite to a suit thereon. [See *Government Code Section 935(b)*]. Nothing herein shall permit the filing of a claim or action on behalf of a class or group of taxpayers.

(b) If any person is aggrieved by any decision (other than a decision relating to a refund pursuant to Section 3-3.518 of this Article), deficiency determination, assessment, or administrative ruling of the Tax Administrator; he or she may appeal to the City Manager by filing a notice of appeal with the City Clerk within fourteen (14) days of the date of the decision, deficiency determination, assessment, or administrative ruling of the Tax Administrator which aggrieved the service user or service supplier.

(c) The matter shall be scheduled for hearing before an independent hearing officer selected by the City Manager, no more than thirty (30) days from the receipt of the appeal. The appellant shall be served with notice of the time and place of the hearing, as well as any relevant materials, at least five (5) calendar days prior to the hearing. The hearing may be continued from time to time upon mutual consent. At the time of the hearing, the appealing party, the Tax Administrator, and any other interested person may present such relevant evidence as he or she may have relating to the determination from which the appeal is taken.

(d) Based upon the submission of such evidence and the review of the City's files, the hearing officer shall issue a written notice and order upholding, modifying or reversing the determination from which the appeal is taken. The notice shall be given within fourteen (14) days after the conclusion of the hearing and shall state the reasons for the decision. The notice shall specify that the decision is final and that any petition for judicial review shall be filed within ninety (90) days from the date of the decision in accordance with *Code of Civil Procedure Section 1094.6*.

(e) All notices under this section may be sent by regular mail, postage prepaid, and shall be deemed received on the third calendar day following the date of mailing, as established by a proof of mailing.

**Sec.3-3.520. No Injunction/Writ of Mandate.**

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this City or against any officer of the City to prevent or enjoin the collection under this Article of any tax or any amount of tax required to be collected and/or remitted.

**Sec.3-3.521. Notice of changes to ordinance.**

If a tax under this Article is added repealed, increased, reduced, or the tax base is changed, the Tax Administrator shall follow the notice requirements of *California Public Utilities Code Section 799*.

**Sec.3-3.522. Future Amendment to Cited Statute.**

Unless specifically provided otherwise, any reference to a state or federal statute in this Article shall mean such statute as it may be amended from time to time.

**Sec.3-3.523. No Increase in Tax Percentage or Change in Methodology Without Voter Approval.**

(a) Regarding Sections 3-3.505 through 3-3.508 hereof, the City may not increase the tax percentage or change a methodology for calculating the tax so as to result in an increase in a tax imposed on a person, without voter approval.

(b) Notwithstanding (a), pursuant to *Government Code Section 53750*, the City may make the following changes without voter approval:

1) reduce the percentage rate, and at any time thereafter increase such percentage rate, so long as the subsequent increase does not exceed the rate previously approved by the voters in the enactment of this ordinance;

2) change the methodology so as to reduce the amount of the tax being levied, and at any time thereafter change the methodology, so long as the subsequent change

in methodology does not result in an increase in the amount being levied under the methodology previously approved by the voters in the enactment of this ordinance;

3) change a methodology or definition so as to avoid or eliminate a discriminatory tax on taxpayers that are similarly situated, so long as the change does not result in an increase in the amount levied on such class of similarly situated taxpayers under the methodology or definition previously approved by the voters in the enactment of this ordinance;

4) establish a class of persons that is exempt or excepted from one or more taxes hereunder, and at any time thereafter, discontinue such exemption or exception;

5) decide that all or a part of a tax imposed under Article 5 should not be enforced for administrative reasons, and at any time thereafter, decide to enforce the full amount of such tax as previously approved by the voters in the enactment of this ordinance; or,

6) establish, and at any time thereafter change, the value and/or apportionment (including a “safe harbor” percentage) of taxable and nontaxable services that are bundled or packaged under a combined charge, in response to changes in the marketing of combined services and the components thereof, or in reevaluating the values thereof [*See Section -3.509* ].

**Sec.3-3.524. Independent Audit of Tax Collection, Exemption, Remittance, and Expenditure.**

The City shall annually verify that the taxes owed under this Article have been properly applied, exempted, collected, and remitted in accordance with this Article, and properly expended according to applicable municipal law. The annual verification shall be performed by a qualified independent third party and the review shall employ reasonable, cost-effective steps to assure compliance, including the use of sampling audits. The verification shall not be required of tax remitters where the cost of the verification may exceed the tax revenues to be reviewed.

**Sec. 3-3.525. Remedies Cumulative.**

All remedies and penalties prescribed by this Article or which are available under any other provision of law or equity, including but not limited to the California False Claims Act (*Government Code Section 12650 et seq.*) and the California Unfair Practices Act (*Business and Professions Code Section 17070 et seq.*), are cumulative. The use of one or more remedies by the City shall not bar the use of any other remedy for the purpose of enforcing the provisions of this Article.

**Sec.3-3.526. Interaction with Prior Tax.**

(a). Collection of Tax by Service Providers. Service providers shall begin to collect the tax imposed by this amended Article 5 as soon as feasible after the effective date of the Article, but in no event later than permitted by *Section 799* of the *California Public Utilities Code*.

(b). Satisfaction of Tax Obligation by Service Users. Prior to April 1, 2008, any person who pays the tax levied pursuant to Article 5 of this Code, as it existed prior to its amendment as provided herein, with respect to any charge for a service shall be deemed to have satisfied his or her obligation to pay the tax levied pursuant to Article 5 as amended herein, with respect to that charge. The intent of this paragraph is to prevent the imposition of multiple taxes upon a single utility charge during the transition period from the prior Utility Users' Tax ordinance to the amended Utility Users' Tax ordinance (which transition period ends April 1, 2008) and to permit service providers or other persons with an obligation to remit the tax hereunder, during that transition period, to satisfy their collection obligations by collecting either tax.

**SECTION TWO. Effective Date.** This Article shall become effective immediately upon the date that this Ordinance is confirmed and approved by the voters of the City of Emeryville at the Election of November 6, 2007.

**SECTION THREE. Amendment or Repeal.** Article 5, Chapter 3, Title 3 of the City of Emeryville Municipal Code, as amended herein, may be repealed or amended by the City Council without a vote of the people. However, as required by Article XIIC of the California Constitution, voter approval is required for any amendment provision that would increase the rate of any tax levied pursuant to this Ordinance.

**SECTION FOUR. Severability.** If any section, subsection, 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 portions of this Ordinance shall nonetheless remain in full force and effect. The people hereby declare that they would have adopted each section, subsection, sentence, clause, phrase, or portion of this Ordinance, irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, or portions of this Ordinance be declared invalid or unenforceable.

**SECTION FIVE. Ratification of Prior Tax.** The voters of the City of Emeryville hereby ratify and approve the past collection of the Utility Users' Tax under Article 5, Chapter 3, Title 3 of the City of Emeryville Municipal Code as it existed prior to the effective date of this Ordinance.

**SECTION SIX. Codification.** Section One of this Ordinance shall be codified in the City of Emeryville Municipal Code. Sections Two, Three, Four, Five, Six and Seven shall not be codified in the City of Emeryville Municipal Code.

**SECTION SEVEN. Execution.** The Mayor of the City of Emeryville is hereby authorized to attest to the adoption of this Ordinance by the voters of the City by signing where indicated below.

I hereby certify that the foregoing Ordinance was PASSED, APPROVED and ADOPTED by the people of the City of Emeryville voting on the 6<sup>th</sup> day of November, 2007.

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney