

ORDINANCE NO. 28498

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING CHAPTER 4.70 OF TITLE 4 OF THE SAN JOSE MUNICIPAL CODE, BY ADDING A NEW PART TO ESTABLISH A CAP ON THE AMOUNT OF TELECOMMUNICATIONS USERS TAX PAID UNDER THIS CHAPTER BY SERVICE USERS PROVIDED CERTAIN CONDITIONS ARE SATISFIED, WHICH PART SHALL EXPIRE ON DECEMBER 31, 2012 UNLESS OTHERWISE EXTENDED, SHORTENED, OR REVISED BY THE CITY COUNCIL

WHEREAS, since 1970, the City of San José (“City”) has imposed a telephone utility users tax on every person in the City using intrastate telephone services at the rate of 5%; and

WHEREAS, on August 5, 2008, the City Council approved for placement on the November 4, 2008 ballot, a measure, designated as Measure K, to replace the existing tax with an updated telecommunications users tax, which would reduce the 5% tax rate to 4.5%, apply the tax to all intrastate, interstate and international communications services regardless of the technology used to provide such services, such as private communication services, voice mail, paging and text messaging, and continue to tax existing communication services including landline, wireless, Voice over Internet Protocol (VoIP), and bundled services, where taxable and nontaxable services are bundled together; and

WHEREAS, on August 5, 2008, the City Council also directed the Finance Department to continue working with large business partners to determine if the new telecommunications users tax would create a disproportionate financial impact on large businesses, and, if so, to provide a mitigation plan to the Council if the ballot measure were approved by the voters; and

WHEREAS, on November 4, 2008, the voters approved Measure K; and

WHEREAS, the Finance Department recommends the approval of an ordinance

amending Chapter 4.70 of Title 4 of the San José Municipal Code by adding a new Part to cap the maximum amount of telecommunications users tax payable by service users that meet certain threshold requirements related to payment of the telecommunications users tax or the predecessor tax provided certain conditions are satisfied in order to mitigate any disproportionate financial impact on service users; and

WHEREAS, the cap on the telecommunications users tax does not increase the rate of the tax levied pursuant to Chapter 4.70 of the San José Municipal Code and, therefore, does not require voter approval under Chapter XIIC of the California Constitution; and

WHEREAS, in light of the severe economic recession, it is in the City's interest not to increase the amount of taxes previously paid by service users that meet certain eligibility requirements so as to stimulate economic activity in the City; and

WHEREAS, the cap is available to all service users that voluntarily apply to pay the tax cap and that meet the eligibility requirements set forth below;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN JOSE:

Chapter 4.70 of Title 4 of the San José Municipal Code is hereby amended by adding a new Part to be numbered and entitled and to read in its entirety as follows:

**Part 7
Tax Cap**

4.70.900 Definitions

The definitions set forth in this Part shall govern the application and interpretation of this Part.

4.70.910 Base Year Tax

“Base Year Tax” means the amount of Telecommunications Users Tax or the amount of the telephone users tax imposed pursuant to Section 4.68.080 of this Code, as applicable, that was paid by a Service User during the calendar year preceding the calendar year for which the Service User applies to the Director for the Tax Cap.

4.70.920 Service User

“Service User” means, collectively, the Service User as defined in Section 4.70.350 and each of its wholly owned subsidiaries located in the City.

4.70.930 Tax Cap

“Tax Cap” means, for each Service User, the Base Year Tax as determined by the Director, increased by two percent (2%) annually.

4.70.940 Threshold Requirement

In order to be eligible for the Tax Cap described in this Part, the Service User must demonstrate to the reasonable satisfaction of the Director that the Service User paid the Base Year Tax in an amount that meets the applicable threshold amount specified in the table below.

Tax Cap Year	Base Year	Base Year Tax
2009	2008	\$50,000
2010	2009	\$51,000
2011	2010	\$52,020
2012	2011	\$53,060

**4.70.950 Calculation of Tax Cap After Threshold Requirement
Has Been Satisfied**

- A. Once the Service User has demonstrated to the reasonable satisfaction of the Director that its Base Year Tax met the applicable threshold requirement specified in Section 4.70.940, the Service User shall pay to the City the amount of its Base Year Tax as determined by the Director, increased by two percent (2%) annually, as its Tax Cap.
- B. No Service User that complies with the provisions of this Part shall be required to pay Telecommunications Users Taxes in excess of the Tax Cap set forth herein.

4.70.960 Application Process for Tax Cap

- A. Each Service User requesting a Tax Cap must submit an application to the Director, using a form prescribed by the Director, setting forth the names and addresses of each of its Service Suppliers with which it transacts business in the City, in addition to any other information requested by the Director which the Director deems reasonably necessary to determine the amount of tax paid to the City for the previous calendar year for purposes of determining the Service User's Base Year Tax.
- B. For calendar year 2009, the Service User must submit its application to the Director and provide the Director with all required documentation on or before July 31, 2009. For calendar year 2010 and for every calendar year thereafter, the deadline to submit an application and all substantiating documentation as required by the Director shall be March 1.
- C. The Director of Finance shall grant or deny the Service User's application for the

Tax Cap no later than sixty (60) Days after the date of the Service User's submission of the complete application, including substantiating documentation. The Director's failure to take action on the Service User's application shall be deemed a denial. The decision of the Director shall be final.

4.70.970 Payment of the Tax Cap

- A. No later than thirty (30) Days after written notification from the Director that Service User has satisfied the requirements of this Part, the Service User shall prepay the Tax Cap. The Service User may deduct from its Tax Cap the amount of the tax paid by the Service User pursuant to this Chapter 4.70 or pursuant to Chapter 4.68 of the Code, as applicable, during the calendar year. If the Service User elects to take such deduction, the Service User shall provide proof of payment of the previously paid tax, subject to the Director's verification and approval, along with its payment of the Tax Cap to the Director. For each calendar year thereafter, Service User shall prepay to the City the full amount of its Tax Cap by January 31, commencing January 31, 2010 for calendar year 2010.

- B. If the amount of tax paid to City during the calendar year in which the Service User applies to the Director for the Tax Cap exceeds the amount of the Tax Cap owed by the Service User, then the Service User may apply for a refund under Section 4.70.700 or, at its election, have such amounts applied towards its Tax Cap payment for the following calendar year.

4.70.980 Notification of Service Suppliers

Within thirty (30) Days of the City's receipt of the prepaid Tax Cap, the City will notify each Service Supplier identified on Service User's application that the Service User has pre-paid the Tax Cap to the City and the Service Supplier is no longer required to collect the City's tax under this Chapter from the Service Supplier. Failure by the Service User

to sufficiently or correctly identify each of its Service Suppliers with which it transacts business in the City on its application shall alleviate City of its obligation to notify such Service Supplier of Service User's prepayment and the Service Supplier shall continue to collect and remit the tax that would have been owed to the City.

4.70.990 No Refund If Service User Elects to Prepay Tax Cap

A Service User that elects to prepay the Tax Cap under the provisions of this Part, will not be entitled to a refund in the event that the Tax Cap exceeds the amount of the tax the Service User would have otherwise paid to the City under Section 4.70.500.

4.70.1000 Ability to Opt Out of Tax Cap

Once the Tax Cap has been determined by the Director, the Service User shall pay to the City the Tax Cap for each calendar year thereafter, unless the Service User elects to opt out of paying the Tax Cap. In the event a Service User elects to opt out of paying the Tax Cap, the Service User will pay the tax owed the City for that calendar year and every calendar year thereafter as provided under Section 4.70.500, until such time as the Director determines a new Tax Cap for the Service User after the Service User satisfies each of the requirements set forth in this Part.

4.70.1010 Service User's Records; Retention

Every Service User that satisfies the requirements of this Part and elects to pay the Tax Cap as determined by the Director, shall keep and preserve for a period of no less than three (3) years from the due date set forth in Section 4.70.970 above, all records as may be necessary for the Director to determine the amount of the Tax Cap owed the City.

4.70.1020 Compliance Audits; Deficiency Determinations

- A. The Director may conduct compliance audits of Service Users and Service Suppliers to ensure proper compliance with this Part as set forth in Section 4.70.590 and make deficiency determinations, when applicable, as set forth in Section 4.70.570.

- B. If the Director determines that the Service User has underpaid the amount of the tax owed, the Service User shall pay a first penalty of 10% of the amount of the tax owed in addition to the tax. If the tax owed and the first penalty are not paid on or before thirty (30) Days following the due date, Service User shall pay a second penalty of ten percent (10%) of the amount of the tax owed in addition to the tax and the first penalty. Service User shall pay interest on the tax owed and all penalties assessed thereon at the rate set forth in Chapter 1.17 of Title 1, until paid.

4.70.1030 Failure to Make Timely Payment of the Tax Cap

If Service User fails to deliver payment to the Director as set forth herein, the provisions of this Part shall no longer apply to Service User and Service User shall be required to reapply to Director for the Tax Cap as described in Section 4.70.960. Commencing January 1 of the calendar year for which the Tax Cap was to be paid, Service User shall commence remitting to its Service Suppliers the tax that would have otherwise been owed the City under Section 4.70.500.

4.70.1040 Waiver

The Director may waive the provisions of Section 4.70.1030 and reinstate the Tax Cap, if the Service User pays the Tax Cap and a penalty of ten percent (10%) of the amount of the Tax Cap owed and interest on the Tax Cap and penalty at the rate set forth in Chapter 1.17 of Title 1, no later than fifteen (15) Days after the due date for payment of

the Tax Cap.

4.70.1050 Expiration

This Part shall expire on December 31, 2012 unless otherwise extended, shortened, or revised by the City Council.

PASSED FOR PUBLICATION of title this 24th day of February, 2009, by the following vote:

AYES: CAMPOS, CHU, CONSTANT, HERRERA, KALRA,
LICCARDO, NGUYEN, OLIVERIO, PYLE, REED.

NOES: NONE.

ABSENT: CHIRCO.

DISQUALIFIED: NONE.

CHUCK REED
Mayor

ATTEST:

LEE PRICE, MMC
City Clerk