

DISTRICT COURT, COUNTY OF JEFFERSON STATE OF COLORADO 100 Jefferson County Parkway Golden, Colorado 80401	▲ COURT USE ONLY ▲ DATE FILED April 16, 2024 10:34 AM
Plaintiff: METROPCS CALIFORNIA, LLC v. Defendants: CITY OF LAKEWOOD COLORADO	Case No. 2022CV30412 Division: 9 Courtroom: 550
ORDER REGARDING SUMMARY JUDGMENT	

THIS MATTER is before the Court concurrently on Plaintiff’s Motion for Summary Judgment and Defendant’s Motion for Summary Judgment. The Court, having reviewed the record, briefings, exhibits, and relevant law, **FINDS** and **ORDERS** as follows:

I. BACKGROUND

Plaintiff, MetroPCS California, LLC, is a limited liability company and subsidiary of T-Mobile, organized under the laws of the State of Delaware, and doing business in Colorado. Defendant, City of Lakewood, is a political subdivision of the State of Colorado. On April 11, 2022, Plaintiff filed their Complaint, initiating the instant action against Defendant, and alleging that City Ordinance O-96-43 (the “1996 Ordinance”) and City Ordinance O-2015-3 (the “2015 Ordinance”) both violate the Taxpayer’s Bill of Rights, as enshrined in Article X, section 20, of the Colorado Constitution (“TABOR”). Plaintiff seeks the following relief from the Court:

1. An Order holding Defendant in violation of TABOR;
2. A declaration of Plaintiff’s rights, status, and other legal relations;
3. An Order directing Lakewood to refund all revenue collected, kept, or spent illegally in the four fiscal years proceeding the filing of their Complaint, with 10%

annual simple interest calculated from the date of the initial illegal conduct, as required by Colo. Const. art. X, § 20(1);

4. An award of reasonable attorney fees and costs as allowed by law, including as provided by Colo. Const. art. X, § 20(1).

Complaint at 11. Defendant has denied that either Ordinance violates TABOR. *See generally Answer to Plaintiff's Complaint.*

This matter was scheduled for a two-day bench trial, set to commence on March 13, 2023. In anticipation of trial, the Parties filed competing motions for summary judgment, both addressing the singular issue in this case: whether the Ordinances violate TABOR. Plaintiff filed its Motion for Summary Judgment on December 12, 2022 (“Plaintiff’s Motion”) and Defendant filed its Motion for Summary Judgment on January 4, 2023 (“Defendant’s Motion”). Both motions have been fully briefed and reviewed by the Court. Then, on January 24, 2023, the Parties filed a Joint Motion to Continue Trial stating that “no material facts are in dispute . . . the Court may enter judgment as a matter of law,” and requesting that the Court resolve the case by ruling on the Parties competing motions. *Joint Motion to Continue Trial and Pre-Trial Deadlines* ¶ 3. The Court granted the Parties’ Motion to Continue and vacated the trial date. *Order: Joint Motion to Continue Trial and Pre-Trial Deadlines*. Now, having thoroughly reviewed the record, briefings, exhibits, and relevant law, the Court enters this Order.

II. STANDARD OF REVIEW

A. SUMMARY JUDGMENT

Summary judgment is an extraordinary remedy that is warranted only upon a clear showing that: (1) no genuine issues of material fact remain for the trier of fact to decide; and (2) the moving party is entitled to judgment as a matter of law. *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 225 (Colo. 2001); *Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 311 (Colo. 2003); C.R.C.P. 56(c). In ruling on a motion for summary judgment, the Court may consider “the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits.” C.R.C.P. 56(c). But in no case is the Court required to search the record for evidence or to otherwise consider materials not cited by the parties in their briefs. *Southern Cross Ranches, LLC v. JBC Agricultural Management, LLC*, 442 P.3d 1012, 1019 (Colo. App. 2019).

As to the first prong of the summary judgment analysis, the moving party has the initial burden of showing that there are no genuine issues of material fact, and all doubts as to this question must be resolved against the moving party. *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991). A material fact is any fact that will affect the outcome of the case. *Morley v. United Services Automobile Association*, 465 P.3d 71, 74 (Colo. App. 2019). The Court’s inquiry is strictly limited to determining whether genuine issues of material fact *exist*; the Court may not resolve genuine issues of material fact when ruling on a motion for summary judgment. *Primock v. Hamilton*, 168 Colo. 524, 528 (Colo. 1969) (“Any issue of [material] fact must be determined by the court or jury at a trial and should not be determined by the court on a motion for summary judgment”). Importantly, the Court cannot forego this analysis merely because both parties agree that there are no genuine issues of material fact, and that summary judgment is appropriate. *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791, 795 (Colo. 1993).

As to the second prong of the summary judgment analysis, the nonmoving party “must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts” when determining whether the moving party is entitled to judgment as a matter of law. *Tapley v. Golden Big O Tires*, 676 P.2d 676, 678 (Colo. 1983).

B. TABOR (COLO. CONST. ART. X, § 20)

Colorado voters approved TABOR as a state constitutional amendment in 1992. It generally provides that the State of Colorado, and all taxing districts therein, must obtain voter approval before implementing any “new tax,” “tax rate increase,” or “tax policy change directly

causing a net tax revenue gain to any district.” Colo. Const. art. X, § 20(4)(a). TABOR itself does not define these terms, and case law provides only limited insight into their meanings. To the extent that it is without applicable case law to guide its interpretation, the Court assigns TABOR’s terms their “ordinary and popular meaning,” with the ultimate goal of giving effect to the electorate’s intent. *Dwyer v. State*, 357 P.3d 185, 191 (Colo. 2015). The Court is further guided by TABOR’s command that “[i]ts preferred interpretation shall reasonably restrain most the growth of government.” Colo. Const. art. X, § 20(1). Accordingly, “if there are multiple interpretations of TABOR’s text, [the Court] must choose the one that would ‘create the greatest restraint’ on government’s growth.” *HCA-Healthone, LLC v. City of Lone Tree*, 197 P.3d 236, 240-241 (Colo. App. 2008) (quoting *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994)).

While TABOR’s voter-approval requirement places a broad check on the taxing power of government entities, it is not without limitations. Most notably, in *TABOR Foundation v. Regional Transportation District*, the Colorado Supreme Court held that “legislation causing only an incidental and de minimis tax-revenue increase does not amount to a ‘new tax’ or a ‘tax policy change.’” 416 P.3d 101, 102 (Colo. 2018). A legislative act is incidental when its purpose is to accomplish something other than a tax-revenue increase *and* when the act’s function comports with that purpose. *Id.* at 106. To determine whether a tax-revenue increase is de minimis, it must be viewed both “in light of the District[‘s] annual tax revenues *and* budgets” *Id.* at 104 (emphasis added). In *TABOR Foundation*, the Supreme Court found that a projected revenue increase of roughly \$2.7 million was de minimis because it constituted a 0.6% increase in the districts tax revenue and made up 0.1% of its annual budget. *Id.* at 107.

C. STATUTORY CONSTRUCTION

Finally, in resolving whether either Ordinance violates TABOR’s voter-approval requirement, the Court must take into consideration the well-developed principles of statutory

interpretation, which apply equally to the interpretation of municipal ordinances. *Town of Erie v. Eason*, 18 P.3d 1271, 1275 (Colo. 2001). The Court must first consider the plain language of the ordinance in question. *Larson v. Sinclair Transp. Co.*, 285 P.3d 42, 44 (Colo. 2012). To do this, the Colorado Supreme Court has instructed that the Court must “read a statutory scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and [] ascrib[ing] plain and ordinary meaning to its terms.” *Educhildren LLC v. County of Douglas Board of Equalization*, 531 P.3d 986, 992 (Colo. 2023) (internal quotations omitted). If the scheme is unambiguous, then the Court will interpret the ordinance as written. *Miller v. Brannon*, 207 P.3d 923, 932 (Colo. App. 2009). “A statute is ambiguous when it ‘is capable of being understood by reasonably well-informed persons in two or more different senses.’” *Jefferson County Bd. Of Equalization v. Gerganoff*, 241 P.3d 932, 935 (quoting 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 45:2, at 13, 19 (7th ed. 2007)). However, if the scheme *is* ambiguous, the Court must attempt to determine its meaning by considering other factors, such as “the consequences of a given construction, the end to be achieved by the statute, and legislative history.” *Bostelman v. People*, 162 P.3d 686, 690 (Colo. 2007). In so doing, the Court must “avoid constructions that would yield illogical or absurd results.” *Educhildren LLC*, 531 P.3d at 993.

III. ANALYSIS

A. UNDISPUTED FACTS

The following facts have been offered to the Court through the Parties’ respective pleadings, Motions, responses, replies, affidavits, and exhibits. The Court finds that these facts are material and undisputed, and further finds that no material facts remain for the trier of fact to adduce at trial.

1. Plaintiff is a subsidiary of T-Mobile US, Inc.. Plaintiff provides cellular voice, messaging, and data services, on a pre-paid basis, to customers throughout the United States, including

in Lakewood, Colorado. Plaintiff provides these services by using T-Mobile's network. Third-parties affiliated with Plaintiff own and maintain receivers and antennas throughout Lakewood. Cellular traffic received at these cell-sites is transported by fiberoptic cables to T-Mobile's core network computers, located in Aurora, Colorado, where routing decisions are made. Plaintiff neither owns nor maintains operating property of any kind in Lakewood.

Affidavit of Sukhbir Nehra ¶¶ 2, 5, 6-7, 10.

2. In 1969 Lakewood enacted a business and occupation tax through Ordinance O-69-5 (the "1969 Ordinance"). The substance of the 1969 Ordinance provides as follows:

SECTION 1. Levy of Tax. There is hereby levied on and against utility companies operating within [Lakewood] a tax on the occupation and business of maintaining a telephone exchange and lines connected therewith in [Lakewood] and of supplying local exchange telephone service to the inhabitants of the city. The amount of tax levied hereby shall be equal to three per cent of the gross revenues received by such utility company arising from the supplying, furnishing, distributing and selling of local exchange telephone service within the corporate limits of [Lakewood] as now or hereafter established.

Ordinance No. 5, Series of 1969, § 1. The 1969 Ordinance is straightforward and unequivocal in setting the scope of the B&O tax to providers that: (1) were utility companies; (2) that maintained a telephone exchange and lines in Lakewood; (3) for the purpose of supplying local exchange telephone service to the inhabitants of Lakewood. From the enactment of the 1969 Ordinance to the enactment of the 1996 Ordinance, Lakewood did not alter the scope of the B&O tax. *See generally Pomerantz Exhibit B*.

3. Beginning in 1976, Lakewood set the B&O tax at flat annual rate of \$330,978.00, which was to be increased for inflation with every fiscal year. *Affidavit of Neil Pomerantz* ¶¶ 3-5; *Pomerantz Exhibit B* at 1. In 1995, the adjusted tax rate was \$842,448.00. *Pomerantz Exhibit C* ¶ 3.

4. Between 1969 and 2000, Mountain States Telephone & Telegraph Co. (hereafter “Mountain Bell”) was the only telecommunications provider required to pay Lakewood’s B&O tax. *Complaint* ¶¶ 31, 32; *Answer* ¶¶ 31, 32; *Defendant’s Motion* at 2-3.
5. In 1996 Lakewood updated its B&O tax through the 1996 Ordinance. The text of the 1996 Ordinance states that it does not constitute a new tax, tax extension, or tax increase, and that it is being created for the purpose of reducing taxes on new providers entering the Lakewood market. Ordinance No. 43, Series of 1996, § 5.32.010(G). The City neither sought nor obtained voter approval for the 1996 Ordinance. *Complaint* ¶ 34; *Answer* ¶ 34.

The substance of the 1996 Ordinance provides as follows:

§ 5.32.015 Levy of Tax.

There is hereby levied a tax on and against each person engaged in the business or occupation of providing basic local telecommunications service within the City of Lakewood.

§ 5.32.020 Definition of basic local telecommunications service.

Basic local telecommunications service is the electronic or optical transmission of information between separate points by prearranged means, which includes the provision of local dial tone line and local usage necessary to place or receive a call. Basic local telecommunications service does not include long distance service, cellular service or mobile radio telephone service. However, the provision of cellular or mobile radio service to any business or entity as its primary local telecommunications service shall be deemed basic telecommunication service for the purpose of determining the applicability of this business and occupation tax.

Ordinance No. 43, Series of 1996. The 1996 Ordinance sets the tax rate for incumbent provider Mountain Bell at a flat rate of \$716,937.00, adjusted each year for inflation “based on the percentage change in the U.S. Bureau of Labor Statistics Consumer Price Index for Denver-Boulder.” Ordinance No. 43, Series of 1996, § 5.32.025(A). The 1996 Ordinance sets a per-line per-month tax rate for all other providers that is equal to Mountain Bell’s

tax rate if it were calculated as a per-line amount. Ordinance No. 43, Series of 1996, § 5.32.025(B). Between 1999 and 2014, the annual B&O per-line per-month tax rates were as follows:

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007
	\$0.82	\$0.83	\$0.90	\$1.07	\$1.20	\$1.30	\$1.35	\$1.42	\$1.49

Year	2008	2009	2010	2011	2012	2013	2014
	\$1.70	\$1.94	\$2.27	\$2.66	\$2.99	\$3.60	\$3.70

Pomerantz Exhibit C ¶ 5. Between 1996 and 2014 Lakewood collected the following B&O revenue from Mountain Bell (“M. Bell”) and other providers (“Others”):

Year	1996	1997	1998	1999	2000	2001
M. Bell	\$864,348	\$889,416	\$908,983	\$923,532	\$944,773	\$975,005
Others	\$0	\$0	\$0	\$0	\$121,902	\$67,186
Total	\$864,348	\$889,416	\$908,983	\$923,532	\$1,066,675	\$1,042,191

Year	2002	2003	2004	2005	2006	2007
M. Bell	\$1,021,805	\$1,044,285	\$1,062,037	\$1,054,603	\$1,069,368	\$1,110,004
Others	\$266,614	\$300,685	\$188,913	\$389,848	\$331,150	\$482,762
Total	\$1,288,419	\$1,344,970	\$1,250,950	\$1,444,451	\$1,400,518	\$1,592,766

Year	2008	2009	2010	2011	2012	2013
M. Bell	\$1,137,754	\$1,179,851	\$1,172,772	\$1,192,709	\$1,238,032	\$1,295,316
Others	\$419,331	\$561,346	\$736,247	\$949,670	\$1,117,494	\$1,374,540
Total	\$1,557,085	\$1,741,197	\$1,909,019	\$2,142,379	\$2,355,526	\$2,669,856

Year	2014
M. Bell	\$1,295,643
Others	\$1,278,285
Total	\$2,573,928

Pomerantz Exhibit C ¶¶ 3, 15.

4. In 2015 Lakewood once again updated its business and occupation tax through the 2015 Ordinance. Much like the 1996 Ordinance, the 2015 Ordinance states that its purpose is to reduce taxes for “new basic local exchange providers” and that its contents “do not constitute a change in tax policy.” Ordinance No. 3, Series 2015 at 1. Also like the 1996

Ordinance, Lakewood neither sought nor obtained voter approval for the 2015 Ordinance.

Complaint ¶ 46; *Answer* ¶ 46. The 2015 Ordinance provides as follows:

5.32.015 Levy of tax

There is hereby levied a tax on and against each person engaged in the business or occupation of providing basic local exchange service within the City of Lakewood.

5.32.020 Definitions

“Basic local exchange service” is the service that provides: (a) A local dial tone; (b) local usage necessary to place or receive a call within an exchange area; and (c) access to emergency, operator and interexchange telecommunications services. . . . The provision of cellular, mobile radio or any wireless voice service to any business, person or entity shall be deemed basic local exchange service for the purpose of determining the applicability of this business and occupation tax.

Ordinance No. 3, Series 2015. The 2015 Ordinance set the tax rate for all providers at the 2014 per-line per-month tax rate of \$3.70 adjusted for inflation each year based on the percentage change in the U.S. Bureau of Labor Statistics Consumer Price Index for Denver-Boulder. Ordinance No. 3, Series of 2015, § 5.32.025. Between 2015 and 2022, the annual B&O per-line per-month tax rates were as follows:

Year	2015	2016¹	2017	2018	2019	2020	2021	2022
	\$3.70	\$3.74	\$2.85	\$3.97	\$4.10	\$4.15	\$4.26	\$4.34

Pomerantz Exhibit C ¶ 5. Between 2015 and 2022 Lakewood collected the following B&O revenue from Mountain Bell (“M. Bell”) and other providers (“Others”):

Year	2015	2016	2017	2018	2019	2020
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¹ Defendant avers that the per-line rate for 2016 was \$3.71. *Defendant’s Motion for Summary Judgment* at 4; *Defendant’s Response* at 5. Plaintiff avers that the per-line rate for 2016 was \$3.74. *Plaintiff’s Motion for Summary Judgment* at 9. This discrepancy appears to stem from an inconsistency on Lakewood’s part. In its response to Plaintiff’s interrogatories, Defendant identifies the 2016 rate as \$3.74. However, in the Affidavit of Lakewood’s Revenue Manager, Nicole Stehr, the 2016 rate is identified as \$3.71. *Affidavit of Nicole Stehr, Revenue Manager, City of Lakewood* ¶ 10. Because Defendant identifies its discovery responses as undisputed facts, the Court finds that there is no genuine dispute to the 2016 tax rate being \$3.74. *Defendant’s Motion for Summary Judgment* at 5; *Defendant’s Response* at 6.

M. Bell	\$1,153,587	\$877,150	\$801,601	\$823,996	\$819,369	\$758,840
Others	\$1,385,479	\$2,320,135	\$2,482,214	\$2,592,098	\$2,732,337	\$3,159,382
Total	\$2,539,066	\$3,197,285	\$3,283,815	\$3,416,094	\$3,551,706	\$3,918,222

Year	2021	2022
M. Bell	\$685,080	-
Others	\$3,182,800	-
Total	\$3,867,880	\$2,373,759

Pomerantz Exhibit C ¶¶ 3, 15.

- On November 6, 2018, Lakewood electors approved Ballot Measure 2D, which authorized Lakewood to “retain and spend the full amount of city taxes and all other revenue collected from all sources in 2017 and each year thereafter until December 31, 2025, in excess of the revenue and spending limitations in Article X, Section 20, of the Colorado Constitution.”

Affidavit of Jay Robb, City Clerk, City of Lakewood; Defendant’s Exhibit 1.

Now, having established the procedural history of the case, the undisputed facts, and the guiding principles of law to which it must adhere, the Court turns its attention first to Defendant’s Motion for Summary Judgment, and then to Plaintiff’s Motion for Summary Judgment. For all the reasons explained below, Defendant’s Motion for Summary Judgment is **DENIED** and Plaintiff’s Motion for Summary Judgment is **GRANTED**.

B. DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Defendant seeks summary judgment in its favor as to all of Plaintiff’s claims. Defendant’s primary argument is that neither the 1996 Ordinance nor the 2015 Ordinance are subject to TABOR’s voter-approval requirement because, to the extent that either Ordinance resulted in a revenue increase for the city, such increases were both incidental to the Ordinances’ respective purposes and de minimis to Lakewood’s annual revenues and budgets. *Defendant’s Motion* at 3. The Court addresses each Ordinance in turn, beginning with the 1996 Ordinance.

1. The 1996 Ordinance

i. Incidental

Defendant argues that the purpose of the 1996 Ordinance was to bring Lakewood’s B&O tax into compliance with newly written state and federal laws, and that any resulting increase in tax revenue was incidental to that purpose. *Defendant’s Motion* at 7-8. The state law in question — C.R.S. § 38-5.5-107(2)(a) — states that “[a]ny tax, fee, or charge imposed by a political subdivision shall be competitively neutral among telecommunications providers.”² C.R.S. § 38-5.5-107(2)(a) (1996). The federal law in question — 47 U.S.C. § 253(a) — states that “[n]o State or local statute . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Defendant avers that the 1969 Ordinance wasn’t competitively neutral because it set the B&O tax at a flat rate, to be paid annually regardless of the payor’s size or market share. *Defendant’s Motion* at 8. Accordingly, Defendant claims that the purpose of the 1996 Ordinance was to rectify this deficiency by modifying the B&O tax so that it would comply with these new standards. *Id.* Plaintiff responds that even if the 1996 Ordinance’s true purpose was to achieve harmonization with state and federal law, Lakewood deliberately chose to achieve that purpose in a way that raised taxes despite other options being available. *Plaintiff’s Response* at 20-21. Specifically, Plaintiff suggests that Lakewood could have made its B&O tax competitively neutral by eliminating it altogether. *Id.* at 20.

While the Court does not doubt that Lakewood adopted the 1996 Ordinance for the purpose of bringing its B&O tax into conformity with state and federal law, the Court cannot conclude that harmonization was its *only* purpose. Instead, the Court finds that the 1996 Ordinance was intended

² The version of the statute cited by Defendant states that the tax must be competitively neutral among “telecommunication providers and *broadband providers*.” *Defendant’s Motion* at 8 (emphasis added). This is misleading as broadband providers were not covered by the statute until its amendment in 2014. 2014 Colo. Legis. Serv. Ch. 149 (H.B. 14-1327).

to generate tax revenue by expanding Lakewood's B&O tax to previously untaxed services, including cellular services as well as landline services that would not have been taxed under the 1969 Ordinance. Thus, while raising taxes may not have been the singular purpose of the ordinance, neither was it a merely incidental outcome. The Court reaches this conclusion based on the consideration of several factors.

First, the Court compares the text of the 1969 Ordinance and the text of the 1996 Ordinance and finds that the latter expanded the scope of Lakewood's B&O tax by causing it to apply to previously untaxed activities and providers. As it was originally written, Lakewood's B&O tax only applied to (1) utility companies; (2) that maintained a telephone exchange and lines in Lakewood; (3) for the purpose of supplying local exchange telephone service to the inhabitants of Lakewood.³ Ordinance No. 5, Series of 1969, § 1. Drawing all reasonable inferences in Plaintiff's favor, the Court finds that the 1969 Ordinance explicitly precluded providers who did not meet these requirements from being taxed. That changed with Lakewood's adoption of the 1996 Ordinance, which applied the B&O tax generally to anyone providing "basic local telecommunications service within the City of Lakewood" regardless of whether they were a utility company and regardless of whether they maintained a telephone exchange and lines in Lakewood. Ordinance No. 43, Series of 1996 § 5.32.015. The 1996 Ordinance deemed basic local telecommunications services to include landline providers who provided service by the use of prearranged means that included the use of a local dial tone line, as well as cellular providers who provided cellular service "to any business or entity as its primary local telecommunications

³ Plaintiff has offered extensive argument that cellular telephone service providers do not qualify as utility companies under Colorado law. *Plaintiff's Motion* at 15-17; *Plaintiff's Response* at 12-14. Defendant has taken no position on this issue, other than to say that the 1969 Ordinance's use of the term "utility" cannot be used to forever limit Lakewood's B&O tax to Mountain Bell. *Defendant's Response* at 15. The Court agrees with Plaintiff; at the time the 1969 Ordinance was adopted, the common law definition of the term "utility" would not have included providers offering cellular service.

service.” Ordinance No. 43, Series of 1996 § 5.32.020; *see also See Pomerantz Exhibit C* at 7 (containing Defendant’s admission that, prior to the 1996 Ordinance, persons who did not maintain a telephone exchange within Lakewood and persons who did not supply local exchange telephone services to Lakewood inhabitants were not subject to the B&O tax). Based on these amendments, the Court finds that the 1996 Ordinance directly expanded the scope of the B&O tax to reach both limited cellular services as well as landline services provided by previously untaxed companies.⁴

Second, the Court notes that passage of the 1996 Ordinance resulted in direct revenue gains for Lakewood. Although the collection of revenue under the 1996 Ordinance began in January 1997, new providers (i.e., telecom providers other than Mountain Bell) were not taxed until the year 2000 when they first entered Lakewood’s telecom market. *Defendant’s Motion* at 2-3. Thereafter, Lakewood assessed and collected the B&O tax against these providers despite the fact that they would not have been eligible for the tax under the 1969 Ordinance. For example, in 2010 Lakewood completed an audit of T-Mobile West and found that it owed the city \$64,521.52 in unpaid B&O taxes. *Pomerantz Exhibit G* at 1. This is despite the fact that T-Mobile West was not a utility company under the 1969 Ordinance and appears to only have provided wireless services during the audit period. *Id.* at 2. In addition to this, the Court notes that when new, telecommunications providers entered the Lakewood market in 2000, the city collected from B&O taxes from them equivalent to \$121,902. *Pomerantz Exhibit C* ¶¶ 3, 15. Prior to its adoption of the 1996 Ordinance, Lakewood would not have been entitled to these taxes unless the new market entrants met the stringent definitional requirements of the 1969 Ordinance — including the

⁴ The Court is aware that Mountain Bell was the only telecommunications provider operating in Lakewood until new providers joined the market in 2000, and that as a result the city’s B&O tax was not levied against any new providers in the years immediately following Lakewood’s adoption of the 1996 Ordinance. Nonetheless, what is relevant to the Court’s inquiry is whether the 1996 Ordinance *could* have been used to apply Lakewood’s B&O tax to reach new providers and services had they been operating in Lakewood.

requirement that the new market entrants qualify as utility companies. This data clearly demonstrates that after adoption of the 1996 Ordinance Lakewood collected, attempted to collect, or was entitled to collect, monies that it would not have been entitled to under the 1969 Ordinance.

Third, the Court considers Lakewood's argument that it was attempting to harmonize its B&O tax with Colorado law. The Court agrees with Defendant that C.R.S. § 38-5.5-107(2)(a) required Lakewood to modify its B&O tax so that it would be competitively neutral among all telecommunications providers operating within city limits. However, Defendant has cited no authority to suggest that, in pursuing compliance with state statutory law, Lakewood was excused from complying with state constitutional law.⁵ To the contrary, the statute in question provides that if a political subdivision is required to amend its B&O tax, it must do so in accordance with TABOR's voter-approval requirement. C.R.S § 38-5.5-107(2)(c). It further provides that if the tax cannot be properly amended, then it must not be applied to *any* telecommunications providers. C.R.S. § 38-5.5-107(2)(c)(II). Thus, Plaintiff is correct that Defendant could have achieved competitive neutrality by either amending the tax in conformity with TABOR's voter approval requirement, or by simply eliminating the tax altogether. *Plaintiff's Response* at 20.

Finally, the Court turns to Defendant's argument that, by updating its B&O tax, Lakewood was simply continuing its longstanding policy of taxing all telecommunications services within city limits. The Court passes no judgment on the legislative wisdom of that policy. The Court agrees with Defendant that local governments cannot be expected to predict the advent and proliferation of new technologies when writing their tax codes. Indeed, Colorado law imposes no such requirement. However, the fact remains that Lakewood chose to implement language in the 1969 Ordinance that narrowed application of the B&O tax to a limited subset of providers. That

⁵ This same observation is true with respect to federal law. Defendant has cited no authority to suggest that pursuing compliance with 47 U.S.C. § 253(a) exempted it from the requirements imposed by TABOR.

new methods of providing telecommunications services emerged outside of this definition is not a matter of fault, but a matter of fact. To the extent that Defendant sought to expand the application of its B&O tax beyond the narrow scope of the 1969 Ordinance, it was required to do so in accordance with TABOR.⁶

In sum, the Court finds that the generation of tax revenue was not incidental to the 1996 Ordinance. By altering the definition of “local telecommunications service,” Defendant expanded the B&O tax base, and directly received revenue from providers that would not have otherwise been required to pay the B&O tax under the 1969 Ordinance. This all occurred despite the fact that C.R.S. § 38-5.5-107(2)(c) put Lakewood on notice that any alterations to its B&O tax were still subject to the requirements of TABOR.

ii. De Minimis

Defendant next claims that the effect of the 1996 Ordinance was de minimis because there was no increase in tax revenue for three years after its passage, until 2000 saw an increase of \$121,092.00. *Defendant’s Motion* at 8. Defendant states that this increase was de minimis as a matter of law because it accounted for just 0.18% of Lakewood’s annual revenue that year. *Id.* Plaintiff contests this claim and argues that the 1996 Ordinance directly resulted in year-to-year revenue increases for Defendant. *Plaintiff’s Response* at 8. To determine whether the tax increase caused by the 1996 Ordinance was de minimis, the Court consider ordinance related revenue gains in light of Lakewood’s annual tax revenues and budgets. *See TABOR Foundation*, 416 P.3d at 104.

⁶ Additionally, the Court recognizes that the prefatory language of the 1996 Ordinance declares that it “is not a new tax, or the extension of an existing tax or an increase in a tax, but is the reduction of an existing tax to new entrants in order to eliminate a potential barrier to the entry of new providers into the business of providing basic local telecommunications service within the City.” Ordinance No. 43, Series of 1996 § 5.32.010(G). Although this pronouncement certainly weighs in Defendant’s favor, it is not outcome determinative. Indeed, an absurd result would be obtained if a municipality could simply declare that an action did not constitute a new tax. The Court finds that this kind of reasoning would be counterintuitive both to TABOR’s text and to the intent of the electorate. Instead, to determine the true nature of the 1996 Ordinance, the Court looks to its function and effect.

The Court begins by comparing revenues collected in 1999, before new entrants entered Lakewood's telecom market, and revenues collected in 2000, after new entrants entered Lakewood's telecom market. In 1999, Lakewood collected \$923,532.00 in B&O tax revenue, and in 2000 Lakewood collected \$1,066,675.00 in B&O tax revenue. *Affidavit of Nicole Stehr*. Lakewood's 2000 B&O tax revenue constituted \$944,773.00 from Mountain Bell and \$121,902.00 from new market participants. *Id.* This latter figure of \$121,902.00 constituted an 11.43% increase above the B&O taxes collected by Lakewood in 1999. At the same time, however, it constituted only 0.18% of Lakewood's total operating revenue for 2000, which totaled \$66,791,349.00.⁷ *Affidavit of Nicole Stehr*. Accordingly, this year-to-year increase is both substantial when viewed in the narrow context of Lakewood's B&O tax revenue, and de minimis when viewed in the broader context of Lakewood's total operating revenue.

Looking at later year-to-year increases does little to elucidate the issue. For instance, where Lakewood's B&O tax revenue increased by a total of 15.5% between 1999 and 2000, it contracted by 2.3% between 2000 and 2001. *See Pomerantz Exhibit C*. Similarly, Lakewood's B&O tax revenue increased by 23.63% between 2001 and 2002, and further increased by 4.39% between 2002 and 2003, only to contract by 6.99% between 2003 and 2004. This erratic pattern of growth and contraction pervaded the nineteen years that the 1996 Ordinance was in effect, and this data provides little to no insight for the Court regarding the revenue-generating effect of the 1996 Ordinance.⁸

⁷ Measured as a percentage of Lakewood's operating revenue, this increase is roughly double the increase at issue in *TABOR Foundation*. 416 P.3d at 107.

⁸ This is especially true given the fact that year-to-year revenue increases were also tied directly to other factors, such as: (1) inflation, measured as percentage changes in the U.S. Bureau of Labor Statistics Consumer Price Index for Denver-Boulder; (2) the consistency of Lakewood's enforcement of the tax, which Plaintiff has repeatedly called into question; (3) changes in consumer behavior; and (4) changes in the number of taxpayers living in Lakewood. Ordinance No. 43, Series of 1996, § 5.32.025(A); *Plaintiff's Response* at 7-8; *Defendant's Reply* at 6.

Ultimately, the Court sees some merit in both arguments concerning the substance of revenue generated by the 1996 Ordinance. However, because the 1996 Ordinance undoubtedly resulted in the collection of additional B&O tax revenue, and because the Court has already determined that the generation of tax-revenue was not an incidental effect of the 1996 Ordinance, the question of whether the resulting revenue increase was *de minimis* is not material to the Court's decision.⁹ *Morley*, 465 P.3d at 74. Defendant's Motion for Summary Judgment is therefore **DENIED** as to the 1996 Ordinance.

2. The 2015 Ordinance

i. Incidental

Defendant posits that the 2015 Ordinance served two purposes, neither of which were intended to raise taxes. First, Defendant states that one purpose of the 2015 Ordinance was to clarify ambiguous language from the 1996 Ordinance.¹⁰ *Defendant's Motion* at 9. Second, Defendant asserts that, far and away from increasing taxes, the 2015 Ordinance instead served to decrease the per-line tax rate imposed on telecommunications providers.¹¹ *Defendant's Motion* at 4, 6; *Affidavit of Nicole Stehr*. Plaintiff disputes these arguments and instead claims that the 2015 Ordinance directly resulted in substantial increases in Lakewood's revenue – increases that Plaintiff argues would be even more pronounced if Lakewood applied the tax consistently to all eligible providers. *Plaintiff's Response* at 8-9.

⁹ Defendant appears to admit that the 1996 Ordinance resulted in tax increases beginning when new market participants appeared in 2000, stating: "Plaintiff clearly wants to avoid the unassailable facts that the 1996 ordinance caused no increase in taxation *until* 2000 . . ." *Defendant's Reply* at 6 (emphasis added).

¹⁰ Support for this proposition can be found in the *whereas* section of the 2015 Ordinance, which states that its intended purpose is to "remove ambiguities and clarify terminology," and that it does "not constitute a change in tax policy." Ordinance No. 3, Series 2015 at 2. The Court reiterates that, while language of this nature has some persuasive weight it is certainly not dispositive. More important to the Court's analysis is the substantive effect of the ordinance.

¹¹ More specifically, Defendant points to the sworn affidavit of Lakewood's Revenue Manager, Nicole Stehr, which states that the actual per-line rate for 2016 was \$3.71 but would have been \$6.03 without adoption of the 2015 Ordinance.

From all of this, the Court concludes that the 2015 Ordinance served multiple purposes – at least one of which was to expand the B&O tax base and allow Lakewood to collect revenue from new sources. The Court does not doubt that another purpose of the 2015 Ordinance was to clarify ambiguities in Lakewood’s tax code, as Defendant suggests. In addition to those changes, however, the 2015 Ordinance also substantively altered the tax’s effect by expanding the definition of “basic local exchange service,” and thereby expanding the base of providers required to pay the tax. *See* Ordinance No. 3, Series 2015, § 5.32.020. This is evident in the fact that, where the 1969 Ordinance didn’t apply to cellular services at all (the Court fully recognizing that those services weren’t yet available), and where the 1996 Ordinance only applied to cellular services provided to a “business or entity as its primary local telecommunications service,” the 2015 Ordinance applies broadly to “[t]he provision of cellular, mobile radio or any wireless voice service” without limitation. Ordinance No. 5, Series of 1969, § 1; Ordinance No. 43, Series of 1996 § 5.32.015; Ordinance No. 3, Series 2015, § 5.32.020.

Additionally, this expansion appears to have been purposeful given that Lakewood was acutely aware of the 1996 Ordinance’s definitional limitations regarding the taxation of cell service. This understanding is typified by Lakewood’s interaction with providers prior to 2015. For example, on February 13, 2006, Lakewood released a Sales/Use Tax Audit Report for Verizon Wireless, in which it found that Verizon’s records were insufficient because they “did not specify the number of customers using their cellular service as their primary local telecommunication service.” *Pomerantz Exhibit E* at 6. Lakewood went on to calculate Verizon’s arrearage by using Verizon’s estimate “that approximately 6% of U.S. households are wireless only customers.”¹² *Id.*

¹² In another example, on June 30, 2010, Lakewood released a Business & Occupation Tax Audit Report for T-Mobile West, in which it explained “section 5.32.020 speaks to the inclusion of cellular or mobile radio service to any business or entity as its primary local telecommunications service, which shall be deemed basic telecommunication service for the purpose of determining the applicability of this business and occupation tax.” *Pomerantz Exhibit G* at 2.

Episodes such as this directly contradict Defendant’s claim that the B&O tax has always applied to cellular service. *Pomerantz Exhibit C* ¶ 7. Instead, the text of each the successive Ordinance, as well as Lakewood’s own conduct, suggest that prior to 2015 Lakewood was well aware that the B&O tax applied to only *some* cellular services. Even if the 2015 Ordinance did stop the per-line rate from increasing to the degree it otherwise would have, it undoubtedly resulted in the collection of monies from previously untaxed services and providers related to cellular service. Accordingly, the Court agrees with Plaintiff, and finds that by expanding the B&O tax to cover the provision of all cellular services, the 2015 Ordinance brought in additional revenue from new sources. Raising taxes was, therefore, not an incidental effect of the 2015 Ordinance.

ii. De Minimis

While Defendant admits that B&O tax revenues increased by \$658,219.00 in 2016, it nonetheless claims that this increase was solely attributable to “additional lines and additional compliance with the Lakewood B&O taxing scheme.” *Defendant’s Motion* at 6. Plaintiff argues that this increase was the direct result of the 2015 Ordinance, and that the amount in question is substantial. The Court agrees with Plaintiff.

Revenue from the B&O tax totaled \$2,539,066.00 in 2015 and \$3,197,285.00 in 2016. *Pomerantz Exhibit C* ¶ 3. This represents a year-to-year increase of \$658,219.00, or 25.92%. *See Id.* Further, this sum of \$658,219.00 accounted for 0.38% of Lakewood’s 2016 budget of \$171,555,325. Thus, the tax increase caused by the 2015 Ordinance exceeds the increase caused by the tax at issue in *TABOR Foundation* and is substantial when viewed either through the narrow lens of the B&O tax itself, as well as when viewed through the broader lens of Lakewood’s overall operating budget.¹³ While Defendant may claim that this increase is a matter of mere correlation

¹³ Despite this, it is also worth noting that the 2015 Ordinance *is* similar to the 1996 Ordinance in the sense that year-to-year revenue increases are somewhat volatile. While it’s true that Lakewood’s B&O tax revenue has increased most

caused by improvements in compliance and changes in consumer habits, the Court is not so sure. Specifically, the Court questions how this substantial increase could have occurred when Mountain Bell – the entity historically responsible for paying the great bulk of the B&O tax – saw its 2016 tax obligation decrease by \$276,437.00 from the previous year. *Id.* ¶ 15. In fact, the Court notes that Defendant has not pointed to any evidence substantiating its claim that the 2016 tax increase was the result of improved compliance or consumer habits. As such, the Court rejects those arguments as conclusory, and instead finds that the 2015 Ordinance directly resulted in substantial increases in tax revenue. Accordingly, Defendant’s Motion is **DENIED** as to the 2015 Ordinance.¹⁴

C. PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

Next, the Court turns its attention to Plaintiff’s Motion for Summary Judgment. Plaintiff argues that both the 1996 Ordinance and the 2015 Ordinance expanded the scope of Lakewood’s B&O tax without voter approval. Plaintiff further argues that each ordinance constituted either a new tax or a tax policy change as defined by TABOR. As a result, Plaintiff requests that this Court find both ordinances unconstitutional, find that Plaintiff is entitled to judgment as a matter of law, and grant its requested relief. “[M]unicipal ordinances are presumed to be constitutional, and the party challenging an ordinance bears the burden to prove its unconstitutionality beyond a reasonable doubt.” *Town of Dillon v. Yacht Club Condos Home Owners Ass’n*, 325 P.3d 1032, 1038 (Colo. 2014). Thus, to show that it is entitled to relief as a matter of law, Plaintiff must show

years since the 2015 Ordinance was enacted, it has also undergone periods of contraction. *See Pomerantz Exhibit C*. Most significantly, revenues contracted by 38.63% from 2021 to 2022. *Id.*

¹⁴ Even had the Court found that the tax increases caused by the 2015 Ordinance were de minimis, the Court would nonetheless deny this portion of Defendant’s Motion based on its earlier finding that the tax increases caused by the 2015 Ordinance were not incidental.

that each ordinance violates TABOR beyond a reasonable doubt. As before, the Court reviews each ordinance in turn.

1. The 1996 Ordinance

Plaintiff alleges that the 1996 Ordinance violates TABOR because it constitutes an unlawful “new tax,” “tax policy change directly causing net tax revenue gain,” and a “tax rate increase.” *Plaintiff’s Motion* at pp. 15, 23. The Court considers the 1996 Ordinance in the context of each of these definitions, and concludes that the 1996 Ordinance was a new tax, but not a tax policy change or a tax rate increase.

i. The 1996 Ordinance Was a New Tax

Plaintiff argues that the 1996 Ordinance qualifies as a new tax because it expanded the scope of the city’s B&O tax to reach previously untaxed services, such as cellular services. *Plaintiff’s Motion* at pp. 14-21. Defendant takes the position that the 1996 Ordinance could not have been a “new” tax since it merely modified the 1969 Ordinance, which was an already existing tax. *Defendant’s Response* at 8-9. For the reasons explained below, Defendant’s argument fails as a misinterpretation of TABOR.

In support of its position, Plaintiff correctly analogizes to *HCA-Healthone, LLC*, which involved the unauthorized expansion of Lone Tree’s use tax. As it was first approved by voters in 1996, Lone Tree’s use tax originally imposed a 1.5% tax on the use and consumption of construction and building materials purchased at retail. *HCA-Healthone, LLC*, 197 P.3d at 238. In 2006 the City of Lone Tree amended the tax to apply to the use and consumption not just of construction materials, but of *all personal property* at retail in the city. *Id.* at 239. Lone Tree did not obtain prior voter approval for this amendment. *Id.* Thereafter, HCA brought suit and alleged that the amendment qualified as a new tax adopted without voter approval in violation of TABOR. *Id.* at 240. The Colorado Court of Appeals agreed, explaining that “the expansion of the use tax to

all tangible personal property constituted a new tax on all such property that was not construction or building materials, particularly because it was designed to raise revenue for the City by collecting additional funds.” *Id.* at 242.

The Facts of this case bear a striking resemblance to *HCA-Healthone*. First, just as Lone Tree expanded the scope of its use tax to reach previously untaxed services, so too has this Court already determined that the 1996 Ordinance expanded the scope of Lakewood’s B&O tax to reach previously untaxed cellular and landline services. *See supra* pp. 12-15. Second, just as the Court of Appeals determined that the amendment to Lone Tree’s use tax “was designed to raise revenue for the City by collecting additional funds,” so too has this Court already determined that the 1996 Ordinance was intended to generate tax revenue for the city of Lakewood. *See supra* pp. 12-15; *HCA-Healthone*, 197 P.3d at 242. These findings remain unchanged even when the facts of the case are viewed in the light most favorable to Defendant. Even then, it is incontrovertible that the 1969 used stringent narrowing language to limit application of the B&O tax, that the 1996 Ordinance expanded the scope of the B&O tax to previously untaxed services, and that as a direct and proximate result thereof, Lakewood collected B&O tax revenue that it would not have otherwise been entitled to collect. For all these reasons, the Court agrees with Plaintiff and finds, beyond a reasonable doubt, that the 1996 Ordinance constitutes a new tax adopted by the city of Lakewood without prior voter approval. Having shown that it is entitled to relief as a matter of law, Plaintiff’s Motion for Summary Judgment is therefore **GRANTED** as to the 1996 Ordinance.

ii. The 1996 Ordinance Was a Tax Rate Increase

Plaintiff argues that the 1996 Ordinance implemented an unapproved tax rate increase by adopting a new per-line tax rate methodology for non-incumbent service providers (i.e., providers other than Mountain Bell). *Plaintiff’s Motion* at 25. Plaintiff argues that this was a tax rate increase specifically because it “produced consistent and rapid rate increases, both because the figure used

in the numerator of the calculation, Mountain Bell's flat annual charge, increased annually (due to an annual inflation adjustment to the charge), and because the denominator of the calculation, Mountain Bell's number of service lines in Lakewood, consistently fell." *Id.*

In weighing in on the merits of Plaintiff's argument, the Court looks to *Huber v. Colorado Mining Ass'n*, 264 P.3d 884 (Colo. 2011). There, the Colorado Supreme Court found that a pre-TABOR ordinance that included a non-discretionary quarterly inflation adjustment, did not constitute a tax rate increase requiring prior voter approval under TABOR. *Huber*, 264 P.3d at 891. Central to the court's reasoning in this case was both the fact that the *Huber* tax was adopted prior to TABOR's implementation and the fact that the *Huber* tax left no room for discretion in its application. *Id.* at 892.

The present case bears both similarities and dissimilarities to *Huber*. On the one hand, the 1996 Ordinance was adopted by Lakewood well after TABOR's implementation. Beyond that, the methodology used to calculate the per-line tax rate for non-incumbent telecommunications providers is undoubtedly more complicated than the relatively straightforward quarterly inflation adjustment at issue in *Huber*. Rather than making a simple inflation adjustment to the per-line tax rate, the 1996 Ordinance instead requires the city to calculate the per-line tax rate by: (1) adjusting Mountain Bell's flat rate tax for inflation and setting that number as the numerator; and (2) taking Mountain Bell's reported number of service lines in Lakewood and setting that number as the denominator. Ordinance No. 43, Series of 1996 § 5.32.025(A)-(B).

Nonetheless, the fundamental effect of this 1996 Ordinance is not so different from the effect of the tax rate formula at issue in *Huber*. While the *Huber* tax controlled for inflation, the 1996 Ordinance's per-line tax rate formula controls for both inflation and market share. This, in and of itself, does not qualify the 1996 Ordinance as a tax rate increase. Additionally, the Court

finds it highly relevant that the 1996 Ordinance’s per-line tax rate methodology leaves no room for discretion in its application. The inflation formula at issue in *Huber* was likewise non-discretionary, and this fact was central to the Colorado Supreme Court’s finding that it did not qualify as a tax rate increase. *See Huber* 264 P.3d at 892 (“Because the limitations of Amendment 1 apply only to discretionary action taken by legislative bodies, the Department’s implementation of the formula and collection of the tax does not require voter approval”).

Ultimately, the Court is persuaded that the 1996 Ordinance was not a tax rate increase. As it relates to non-incumbent providers who would not have been taxed under the 1969 Ordinance, the 1996 Ordinance was not a tax rate increase because it created an entirely new tax. As it relates to Lakewood’s incumbent provider, the 1996 Ordinance was not a tax rate increase because, while it did change the manner in which Mountain Bell’s tax obligation was calculated, it does not appear to have *increased* Mountain Bell’s tax obligation.¹⁵ To the contrary, the Court notes that the fluctuation in Mountain Bell’s B&O tax obligation after the passage of the 1996 Ordinance does not appear to be any different than the fluctuation of its B&O tax obligation prior to its passage. *See Pomerantz Exhibit C ¶ 15* (indicating that Mountain Bell paid \$818,700.00 in 1994, \$842,448.00 in 1995, \$864,348.00 in 1996, and \$889,416.00 in 1997).

i. The 1996 Ordinance Was Not a Tax Policy Change

Next, the Court finds that the 1996 Ordinance was not a tax policy change. In addition to new taxes and tax rate increases, TABOR mandates voter approval in advance for any “tax policy change directly causing a net tax revenue gain to any district.” Colo. Const. art. X, § 20(4)(a). On this subject, the Colorado Supreme Court has explained that the tax policy change “requirement is

¹⁵ For purposes of clarity, the Court notes that this finding only applies to the taxes paid by Mountain Bell. As explained on pages 13-14 of this Order, the Court does find that the 1996 Ordinance directly resulted in a tax revenue gain from Lakewood’s non-incumbent providers.

an undefined ‘catch-all’ phrase attempting to encompass any district action that is the equivalent of a new tax or a tax rate change that would not be covered by the more specific requirements listed before it.” *Mesa County Bd. Of County Com’rs v. State*, 203 P.3d 519, 529 (Colo. 2009). At the same time however, to apply this standard too broadly “would make any legislative action in the revenue arena nearly impossible and cripple the government’s ability to function.” *Id.* As such, the court has said that to qualify as a tax policy change, the state action in question must result in a net revenue gain in excess of TABOR’s subsection (7) spending limits. *Id.*

Here, Plaintiff has shown that the 1996 Ordinance directly resulted in direct revenue gains for the city of Lakewood beginning when new providers entered the market in 2000. *See supra* 13-14. Plaintiff has not, however, shown that these revenue gains exceeded the spending limits set forth in TABOR’s subsection (7). As such, the Court cannot conclude that the 1996 Ordinance was a tax policy change causing a direct net tax revenue gain.

2. The 2015 Ordinance

As with the 1996 Ordinance, Plaintiff argues that the 2015 Ordinance violates TABOR because it constitutes an unlawful “new tax,” “tax policy change directly causing net tax revenue gain,” and a “tax rate increase.” *Plaintiff’s Motion* at 15, 23. Again, the Court considers the 2015 Ordinance in the context of each of these definitions , and concludes that . . .

i. New Tax

Plaintiff argues that the 2015 Ordinance qualifies as a new tax because it expanded the scope of the city’s B&O tax beyond a narrow subset of cellular services, instead allowing it to reach *all* cellular services. *Plaintiff’s Motion* at 22-23. For its part, Defendant argues that the 2015 Ordinance served, not to impose a new tax, but to lower year-to-year increases of the per-line tax rate. *Defendant’s Response* at 3.

The Court has already determined that the 2015 Ordinance significantly expanded the reach of Lakewood’s B&O tax by altering the definition of “basic local exchange service” to include “[t]he provision of cellular, mobile radio or any wireless voice service to any business, person or entity.” *See supra* p. 18; Ordinance No. 3, Series 2015, § 5.32.020. Thus, even if the Court were to construe the facts in the light most favorable to Defendant and accept that the 2015 Ordinance reduced year-to-year increases of the per-line tax rate, the Court would still conclude that the 2015 Ordinance constituted a new tax. Regardless of its effect on tax rates, the 2015 Ordinance undoubtedly expanded the scope of Lakewood’s B&O tax, causing providers to incur tax obligations they were not required to pay previously. Based thereon, the Court has no difficulty concluding that the 2015 Ordinance was a “new tax” adopted without prior voter approval in violation of TABOR. As such, Plaintiff’s Motion is **GRANTED** as to the 2015 Ordinance.

ii. Tax Rate Increase

Plaintiff argues that the 2015 Ordinance imposed an unlawful tax rate increase by altering the rate methodology to create consistent year-to-year rate increase. *Plaintiff’s Motion* at 16. However, as already explained with respect to the 1996 Ordinance, the mere fact that the 2015 Ordinance calls for annual inflation based adjustments does not mean that the ordinance is a tax rate increase for purposes of TABOR. Rather, the Court finds that the 2015 Ordinance is best classified as a new tax based on the significant expansion it caused of the B&O tax base.

iii. Tax Policy Change

The Court is unable to conclude that the 2015 Ordinance was a tax policy change for the same reasons that it was unable to conclude that the 1996 Ordinance was a tax policy change. While Plaintiff has shown that the 2015 Ordinance directly resulted in revenue gains for the city of Lakewood, Plaintiff has not shown that those revenue gains exceeded the spending limits set forth in TABOR’s subsection (7).

3. Effect of the 2018 Ordinance

Defendant argues that because Lakewood voters approved a 2018 Ordinance permitting the city to retain all taxes collected from 2017 through 2024, Defendant has no TABOR revenue limit. *Defendant's Response* at 13. Based thereon, Defendant cites to *Mesa County*, and argues that without a TABOR revenue limit neither the 1996 Ordinance nor the 2015 Ordinance required prior voter approval. *Id.* at 13-14. Defendant is incorrect.

First, Defendant contends that *Mesa County* stands for the proposition that “[i]n order for a new tax or tax policy change to implicate TABOR, the change causing a net tax revenue gain only requires advance voter approval when the gain exceeds a subsection (7) revenue limit.” *Defendant's Response* at 13. This reading is overly broad. *Mesa County* stands simply for the proposition that, as a catch-all category, *tax policy changes* require voter approval when the anticipated revenue gains would exceed any of TABOR’s subsection (7) limits. *Mesa County*, 203 P.3d at 529 (“When read together, it becomes apparent that a ‘tax policy change directly causing a net tax revenue gain to any district’ only requires advance voter approval when the gain exceeds one of the subsection (7) revenue limits”). *Mesa County* does not apply this rule to new taxes or tax rate increases.

Second, Defendant argues that because the 2018 Ordinance permits the city to retain all taxes collected from 2017 through 2024, it did not require voter approval for any B&O taxes collected during that time. *Defendant's Motion* at 13-14. Again, Defendant is mistaken. TABOR subsection (7)(d) provides that tax revenue collected in excess of its spending limits must “be refunded in the next fiscal year unless voters approve a revenue change as an offset.” Colo. Const. art. X, § 20(7)(d). Subsection (7)(d) does not state that such a vote immunizes a taxing authority from its other constitutional obligations. Not only would such an interpretation fly in the face of TABOR’s requirement that voter approval be obtained in *advance* of a new taxes implementation,

but such an interpretation would also yield an absurd result by de facto authorizing taxing district to unlawfully collect taxes. *See Educhildren LLC*, 531 P.3d at 993 (explaining that the Court most avoid legal interpretations that would create in illogical or absurd results); *HCA-Healthone*, 197 P.3d at 243 (Confirming that TABOR’s use of the word “advance” requires taxing districts to obtain voter approval before implementation of a new tax).Neither of these interpretations would “reasonably restrain most the growth of government” as TABOR requires. Colo. Const. art. X, § 20(1). As such, the Court finds that the 2018 Ordinance does not immunize either the 1996 Ordinance or the 2015 Ordinance from TABOR’s voter approval requirement.

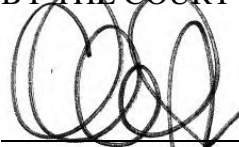
IV. CONCLUSION

Defendant’s Motion for Summary Judgment is **DENIED**. Plaintiff’s Motion for Summary Judgment is **GRANTED**. As such, the Court **ORDERS** and **DECLARES** as follows:

1. Defendant may not lawfully require MetroPCS to pay the City of Lakewood Utilities–Business & Occupation Tax, Lakewood Municipal Code, Chapter 5.32 (“B&O Tax”);
2. Defendant’s modifications to the B&O Tax made in Ordinance Nos. O-96-43 (1996) and O-2015-03 (2015) enacted a new tax, without advance voter approval, in violation of the Taxpayer’s Bill of Rights Amendment to the Colorado Constitution, art. X, § 4(a) (“TABOR”);
3. The modifications made by Ordinance Nos. O-96-43 (1996) and O-2015-03 (2015) to the B&O Tax are unlawful, unenforceable, and void under TABOR; and
4. The declarations of Plaintiff’s rights, status and other legal relations, as requested in the Second Claim for Relief of the Complaint, are granted.

DONE AND SIGNED: April 16, 2024.

BY THE COURT



CHANTEL CONTIGUGLIA
District Court Judge