

## **MEMORANDUM OF LAW**

**DATE:** November 14, 2001

**TO:** The Honorable Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** *Distribution of revenue from the proposed license with CityNet Telecommunications, Inc.*

### **QUESTION PRESENTED**

Can revenue from the proposed license with CityNet Telecommunications, Inc. [CityNet], be distributed to City accounts outside the Sewer Revenue Fund?

### **CONCLUSION**

Revenue from the proposed license with CityNet must be deposited in the Sewer Revenue Fund in an amount directly proportional to the extent CityNet's fiber optic network is routed through the sewer collection system. The balance of the revenue, received through CityNet's use of the stormwater collection system, may be deposited into other City accounts.

### **BACKGROUND**

CityNet proposes to install fiber optic cable in the City's sewer and stormwater collection systems. The precise route and proportional use of each system will not be determined until after CityNet's proposal is approved and extensive investigation and inspection conducted by CityNet. In return, CityNet offers to pay the City a portion of the gross revenue it receives from leasing capacity in the fiber optic cable to telecommunication carriers. The City Council has inquired whether revenue received under this proposed license can be distributed to City accounts outside the Sewer Revenue Fund.

### **ANALYSIS**

On October 12, 1993, the City approved a sewer bond issue of \$250 million. As a condition of that bond issue and all three subsequent bond issues, the City promised that "all System Revenues shall be received by the City in trust and shall be deposited when and as received in the City of San Diego Sewer Revenue Fund . . . ." *Master Installment Purchase Agreement*, Section 5.02, September 1, 1993. System Revenues is defined as follows:

The term “System Revenues” means all income, rents, rates, fees, charges and other moneys derived from the ownership or operation of the Wastewater System, including, without limiting the generality of the foregoing,

- (i) all income, rents, rates, fees, charges (including standby and capacity charges), or other moneys derived by the City from the wastewater services, facilities, and commodities or byproducts sold, furnished or supplied through the facilities of or in the conduct or operation of the business of the Wastewater System . . .
- (ii) the proceeds derived by the City directly or indirectly from the lease of a part of the Wastewater System;
- (iii) any amount received from the levy or collection of taxes which are solely available and are earmarked for the support of the operation of the Wastewater System;
- (iv) amounts received under contracts or agreements with governmental or private entities and designated for capital costs; and
- (v) grants received from the United States of America or from the State of California;

provided, however, that System Revenues shall not include: (a) in all cases, customers’ deposits or any other deposits or advances subject to refund until such deposits or advances have become the property of the City; and (b) the proceeds of borrowings . . . .

*Master Installment Purchase Agreement*, Section 1.01, September 1, 1993.

Revenue received from the proposed license to CityNet clearly falls within the definition of System Revenues, to the extent the sewer system is used. The revenue is both “income . . . derived from the ownership or operation of the Wastewater System” and “proceeds derived . . . from the lease of a part of the Wastewater System” under paragraph (ii) above. Neither of the exceptions to System Revenues applies here.

This interpretation is reflected in the City Charter and the Municipal Code. The Charter defines “revenues” subject to deposit into the Sewer Revenue Fund as all sewer service charges and “all other income and revenue derived by the city from the operation of the sewer system or

any part thereof.” San Diego City Charter section 90.2. The Municipal Code provides:

64.0403 Sewer Revenue Fund Established

(a) There is hereby created a “Sewer Revenue Fund.” All revenues derived from the operation of the wastewater system shall be paid into the Sewer Revenue Fund.

(b) All revenues shall be used for the following purposes only:

(1) Paying the cost of maintenance and operation of the City’s wastewater system.

(2) Paying all or any part of the cost and expense of extending, constructing, reconstructing, or improving the City’s wastewater system or any part thereof.

(3) Any purpose authorized by Section 90.2 of the City Charter.

(4) Paying the cost of mitigation of fair share overburdens within any City Council district as more fully set forth in Section 64.0403(c).

San Diego Municipal Code section 64.0403 [subsection (c) omitted].

The covenants of the bond issues, the City Charter, and the Municipal Code all require sewer revenue to be deposited into the Sewer Revenue Fund. Therefore, revenue realized through CityNet’s use of the sewer collection system must be deposited into the Sewer Revenue Fund.

Revenue associated with CityNet's use of the storm drain system, however, is a different matter. The stormwater department is funded in part by the General Fund. There are no bond covenants, City Charter provisions, or Municipal Code sections directing the deposit or use of new revenue. Therefore, that portion of the revenue realized through CityNet's use of the stormwater collection system may be deposited and allocated as the City Manager directs.

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By

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