

# CITY OF OAKLAND



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## ATTORNEY-CLIENT COMMUNICATION PRIVILEGED AND CONFIDENTIAL

HONORABLE FINANCE AND MANAGEMENT COMMITTEE  
Oakland, California

**Subject: Franchise Fees and the Calculation of the 2.5 Percent Kids First! Set-Aside**

Dear Chairperson Quan and Members of the Committee:

### INTRODUCTION

City Charter section 1300(2) mandates that the City set aside 2.5 percent of the “unrestricted general fund revenue” for the Kids First! Fund. Councilmember Quan has asked whether revenue generated from various franchise agreements with the City of Oakland is “restricted” general fund revenue, and therefore, not included in the calculation of the 2.5 percent set-aside.

According to the Budget Office, the franchise agreements are with Pacific Gas & Electric Company (“PG&E”), Alameda County Waste Management, Comcast, and East Bay Municipal Utility District (“EBMUD”).

### QUESTION

Are the City’s fees derived from the franchise agreements with Pacific Gas & Electric Company (“PG&E”), Alameda County Waste Management, Comcast, or East Bay Municipal Utility District (“EBMUD”) “restricted general funds?”

### SUMMARY CONCLUSION

The PG&E and Alameda County Waste Management franchise fees are not restricted funds. The agreements do not restrict the City’s use of the franchise fees the companies pay to the City. Two percent of the franchise fees that the City collects from Comcast are restricted

funds that must be used for cable-related activities. This Office cannot provide advice regarding the EBMUD agreement because we have not received a copy of the agreement.

## **DISCUSSION**

The Oakland City Charter does not define the term “restricted fund,” nor is there a legal definition. Therefore, in accordance with the principles of statutory construction, we must first look to the plain meaning of the terms. Then we must examine the instrument, such as the contract or legislation, creating the relationship/fee agreement to determine what mandatory restrictions or limitations, if any exist.

### **1. DEFINITIONS**

Blacks Law Dictionary (8<sup>th</sup> ed. 2004) provides no such reference to the term “restricted fund,” nor the word “restrict.” However, Blacks Law Dictionary does define the word “limit” as: “A restriction or restraint.” (Emphasis added.)

Merriam-Webster’s Dictionary does not define the term “restricted fund,” but defines “restricted” as, “to confine within bounds...restrain...to place under restrictions as to use or distribution.” Similarly, the American Heritage Dictionary of the English Language: Fourth Edition defines “restrict(ed)” as “[t]o keep or confine within limits.”

Based on these sources, we conclude that the City may properly categorize fees as restricted revenue only if the franchise agreements or legislation contain language that limits or restricts, or otherwise imposes restraints on the use of the fees.

### **2. RESTRICTIONS IDENTIFIED ON USE OF FEES**

Using the above, commonly accepted definitions and principles, we examine each of the agreements or instruments establishing the relationships.

#### **Pacific Gas & Electric Company (“PG&E”)**

The City has granted PG&E a franchise to transmit and distribute electricity and to construct, maintain and utilize electric facilities within the City of Oakland. The franchise agreement provides that PG&E pays franchise fees to the City based on a percentage of PG&E’s gross annual receipts derived from the use of the franchise. Upon our review of the agreement we have identified no limitations or restrictions on the City’s use of the franchise fees the City collects from PG&E.

#### **Alameda County Waste Management**

The City has a contract with Alameda County Waste Management for solid waste and yard waste collection services. The agreement contains various provisions pertaining to fees and surcharges. However, the fees which are at issue in the instant case, as identified by the Budget

Office, pertain to the "Franchise Fee," and are paid to the City on a monthly basis for the exclusive right to hold the franchise.<sup>1</sup> We have reviewed the agreement and have identified no limitations or restrictions on the use of the franchise fee.

Comcast

The City has a contract with Comcast of California/Colorado, LLC ("Comcast") to provide cable services. Under the agreement, Comcast is required to pay to the City a quarterly franchise fee in an amount equal to five percent per year of the company's annual gross revenues. Two percent of the franchise fee must be placed in a separate, interest-bearing Telecommunications Account under the sole control of the City Council to be used for cable-related non-regulatory activities, including but not limited to, funding public, education, and government access programming; these funds clearly are restricted. Use of the remaining balance of the franchise fee is unrestricted.

East Bay Municipal Utility District ("EBMUD")

We cannot provide advice regarding this agreement because we have not received a copy of the agreement to date from City staff. However, City staff is not aware of any restrictions on the use of the EBMUD fees. We are continuing to seek a copy of the agreement.

**CONCLUSION**

There are no restrictions on the use of the franchise fees the City collects from PG&E, and Alameda County Waste Management. We cannot provide advice regarding the EBMUD agreement because we do not have a copy of the agreement. The use of two percent of the Comcast franchise fees is restricted. The Comcast franchise agreement requires that the City place two percent of the franchise fee in a separate fund and used for cable-related non-regulatory activities.

Respectfully submitted,

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<sup>1</sup> Also, referenced in the agreement are "City Fees" that are collected for specifically enumerated hazardous waste and recycling program activities. Although the "City Fees" clearly are restricted funds, these fees are not addressed in this opinion because they are not franchise fees.