

Board Office Use: Legislative File Info.	
File ID Number	12-3254
Introduction Date	Jan 9, 2013
Enactment Number	13-0121
Enactment Date	1-9-13



OAKLAND UNIFIED
SCHOOL DISTRICT

Community Schools, Thriving Students

Memo

To Board of Education

From Jacqueline Minor, General Counsel

Board Meeting Date January 9, 2013

Subject **APPROVAL OF MEMORANDUM OF UNDERSTANDING BETWEEN OUSD AND THE CITY OF OAKLAND FOR DISBURSEMENT OF PUBLIC EDUCATION GOVERNMENT FUNDS**

Action Requested Approval of MOU between the District and THE CITY OF OAKLAND Fiscal Years 2012-13 for disbursement of Public Education Government Funds ("PEG") funds.

Background
A one paragraph explanation of the the MOU.

Oakland's Local Cable and Video Franchise with AT&T and COMCAST require that they quarterly pay to the City 1% of their gross revenue, to be used for capital expenses for Public, Education, and Government ("PEG") cable and video television channels operating in Oakland. PEG Funds received by the City for Fiscal Years 2010-2011 and 2011-2012 have previously been apportioned and allocated to the PEG recipients, including OUSD. The City is expected to continue to receive PEG Funds at least through June 30, 2017, including \$700,000 in PEG Funds for Fiscal Year 2012-2013. The MOU with the City authorizes the City to disburse 2012-13 PEG funds to the District.

Discussion
One paragraph summary of the MOU.

Approval of MOU between the District and THE CITY OF OAKLAND authorizing the City to disburse and for the District to accept PEG fund of approximately \$233,333.

Recommendation Approval of MOU between the District and THE CITY OF OAKLAND, for the Fiscal Years 2012-13.

Fiscal Impact Funding resource name: City of Oakland will disburse approximately \$233,333

Attachments

- Memorandum of Understanding with the City of Oakland

MEMORANDUM OF UNDERSTANDING
BY AND BETWEEN THE CITY OF OAKLAND, AND
THE OAKLAND UNIFIED SCHOOL DISTRICT,
FOR PEG FUNDS

THIS MEMORANDUM OF UNDERSTANDING (hereinafter, “MOU”) is entered into this 9th day of January, 2013, by and between the City of Oakland (hereinafter, the “City”), and the Oakland Unified School District (hereinafter the “OUSD”), (collectively referred to as the “Parties.”)

WHEREAS, the City’s Local Cable and Video Franchise agreement with franchise holders AT&T and COMCAST (hereinafter the “Franchise Holders”), and Oakland Municipal Code section 5.17.210, require that the Franchise Holders quarterly pay to the City 1% of their gross revenue, to be used for capital expenses for Public, Education, and Government (“PEG”) cable and video television channels operating in Oakland, and

WHEREAS, currently, and since at least 2008, the City and OUSD each operate a PEG Channel in Oakland, and

WHEREAS, the City’s PEG Channel is known as “KTOP,” and the Oakland Unified School District’s PEG Channel is known as “KDOL,” and

WHEREAS, the City has received and holds on account \$1,635,745.69 of PEG Funds for Fiscal Years (July 1 to the next June 30) 2008-2009 and 2009-2010 combined, and

WHEREAS, PEG Funds received by the City for Fiscal Years 2010-2011 and 2011-2012 have previously been apportioned and allocated between the parties by Oakland City Council Resolution No. 82988 C.M.S., and by separate Memoranda of Understanding between the City, and OUSD, which expired on July 1, 2012, and

WHEREAS, the terms and conditions for payment of previously apportioned and allocated PEG Funds for Fiscal Years 2010-2011 and 2011-2012 pursuant to Oakland City Council Resolution No. 82988 C.M.S., are now addressed in this MOU, and

WHEREAS, the City is expected to continue to receive PEG Funds from the Franchise Holders at least through June 30, 2017 or the termination of the Franchise Agreements, and

WHEREAS, the City is expected to receive approximately \$700,000 in PEG Funds for Fiscal Year 2012-2013, and

WHEREAS, the Oakland City Council has passed Resolution No. 84050 C.M.S. apportioning and allocating the PEG funds from Fiscal Years 2008-2009, 2009-2010, and 2012-2013 in equal shares between the then operating PEG Channels, and

WHEREAS, Oakland Unified School District has passed Enactment No. 13-0121 accepting the apportionment of PEG Funds made in Oakland City Council Resolution No. 84050 C.M.S., and

WHEREAS, the City and OUSD wish to enter into this MOU with respect to the City's apportionment, appropriation, and distribution terms for the PEG Funds from Fiscal Years 2008-2009, 2009-2010, 2010-2011 and 2011-2012, and 2012-2013 to support the cable and video television facilities capital needs of the their respective PEG Channels,

NOW THEREFORE, THE PARTIES HEREBY AGREE AS FOLLOWS

1. EFFECTIVE DATE/TERM OF MOU -- The term of this MOU will commence on July 1, 2012 and terminate on June 30, 2013 unless earlier terminated as set forth in this MOU. The Parties intend the MOU to provide PEG Fund Apportionment, as described below, to the PEG Recipient for Fiscal Years 2008-2009, 2009-2010, and 2012-2013.
2. PEG FUND APPORTIONMENT AND ALLOCATION -- The City agrees to apportion and allocate to KTOP, KDOL, and Peralta TV, portions of the 1% PEG Funds capital support for cable and video television facilities ("PEG Capital Grant") as set forth in Oakland City Council Resolution No. 84050 C.M.S. and 82988 C.M.S.
 - a. For Fiscal Years 2008-2009 and 2009 – 2010 combined, each of said PEG Channels shall be apportioned one third (1/3) or \$545,248.56 of the PEG Funds received from the Franchise Holders for that time period.
 - b. For Fiscal Years 2010-2011 and 2011-2012, the City has, pursuant to Oakland City Council Resolution No. 82988 C.M.S., apportioned and allocated to each of said PEG Channels one third (1/3) or approximately \$200,000.00 of the PEG Funds received from the Franchise Holders for each Fiscal Year in that time period.
 - c. For Fiscal Year 2012-2013, each of said PEG Channels shall be apportioned an equal share of the PEG Funds received from the Franchise Holders for that time period, which is estimated to be a one-third (1/3) share of a projected \$700,000.00 (or \$233,333.33 to each PEG Channel).
 - d. Said apportioned funds shall be allocated to their respective project account assigned by The City.
 - e. The Parties acknowledge that if the number of PEG Channels operating in Oakland increases or decreases during Fiscal Year 2012-2013, then the equal apportionment and allocation of PEG Funds will be adjusted accordingly for the remainder of Fiscal Year 2012-2013. This means that each Party and PEG Channel agrees and understands that its current PEG Funds may be increased or reduced accordingly in the future for Fiscal Year 2012-2013 if the number of PEG Channels operating in Oakland changes. Any additional PEG Channel that begins operating in Oakland will be required to agree to the terms of this MOU.

3. RESTRICTION ON THE USE OF PEG FUNDS -- The Parties agree and understand that the funds and amounts identified as herein as "PEG Funds" are restricted for the purchase of capital facilities equipment related to providing PEG Channel programming, and consistent to City's Local Franchise, the State Video Services Franchise ("SVSF") and the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA").
4. CITY LEAD AGENCY -- The City's Department of Information Technology shall be the lead Agency for the City to coordinate, approve all distributions of PEG Funds for the PEG Channels.
5. DISBURSEMENT OF PEG FUNDS -- The City shall hold all PEG Funds for the various PEG Channels operating within Oakland. Within thirty (30) days of receipt of an invoice evidencing a qualified expenditure (including a copy of canceled checks) from a Party or its corresponding PEG Channel, the City shall disburse from that PEG Channel's project account, the amount of the invoice
5. AUDIT PEG -- Recipient shall maintain (a) a full set of accounting records in accordance with generally accepted accounting principles and procedures for all funds received under this MOU, and (b) full and complete documentation of performance related matters such as benchmarks and deliverables associated with this MOU.

PEG Funds Recipient shall (a) permit the City to have access to those records for the purpose of making an audit, examination or review of financial and performance data pertaining to this MOU, and (b) maintain such records for a period of four years following the last fiscal year during which the City paid an invoice to PEG Funds Recipient under this MOU.

In addition to the above, PEG Funds Recipient agrees to comply with all audit, inspection, recordkeeping and fiscal reporting requirements incorporated by reference. All PEG Funds must be expended for authorized PEG capital improvement purposes and PEG Funds recipient shall provide satisfactory proof and documentation to the City of such appropriate expenditure and use of PEG Funds, and all such funds not so documented or accounted for shall be immediately returned to the City.

6. INDEMNIFICATION OF CITY -- OUSD agrees to defend, indemnify and hold harmless the City and its officials, agents and employees from and against any and all claims, actions, suits, or proceedings of any kind brought against the City from any party, related to the MOU.

- a. Notwithstanding any other provision of this MOU, PEG Fund Recipient shall indemnify and hold harmless (and at City's request, defend) City, and each of its Council members, officers, partners, agents, and employees (each of which persons and organizations are referred to collectively herein as "Indemnitees" or individually as "Indemnitee") from and against any and all liabilities, claims, lawsuits, losses, damages, demands, debts, liens costs, judgments, obligations, administrative or regulatory fines or penalties, actions or causes of action, and expenses (including reasonable attorneys' fees) caused by or arising out of or from the use and expenditure of PEG Funds by PEG Funds Recipient and from any:
 - (i) Breach of PEG Funds Recipient's obligations, representations or warranties under this MOU,
 - (ii) Act or failure to act in the course of performance by PEG Fund Recipient under this MOU,
 - (iii) Negligent or willful acts or omissions in the course of performance by PEG Fund Recipient under this MOU, and
 - (iv) Claim for personal injury (including death) or property damage to the extent based on the strict liability or caused by any negligent act, error or omission of PEG Fund Recipient.
- b. For purposes of the preceding Subsections (i) through (iv), the term "PEG Fund Recipient" includes PEG Fund Recipient its officers, director, employees, representatives, agents, servants, sub consultants and sub PEG Fund Recipients
- c. City shall give PEG Fund Recipient prompt written notice of any such claim of loss or damage and shall cooperate with PEG Fund Recipient, in the defense and all related settlement negotiations to the extent that cooperation does not conflict with City's interests
- d. Notwithstanding the foregoing, City shall have the right of PEG Fund Recipient fails or refuses to defend City with Counsel acceptable to City to engage its own counsel for the purposes of participating in the defense. In addition, City shall have the right to withhold any PEG Fund Allocation due PEG Recipient in the amount of anticipated defense costs if PEG Fund Recipient fails or refuses to defend City. In no event shall PEG Fund Recipient agree to the settlement of any claim described herein without the prior written consent of City, which will not be unreasonably withheld
- e. PEG Fund Recipient acknowledges and agrees that it has an immediate and independent obligation to indemnify and defend Indemnities from any action or claim which potentially falls within this indemnification provision, which obligation shall arise at the time any action or claim is tendered to PEG Fund Recipient by City and continues at all times thereafter, without regard to any alleged or actual contributory negligence of any Indemnity. Notwithstanding anything to the contrary contained herein PEG Fund Recipient's liability under this MOU shall not apply to any action or claim arising from the sole negligence, active negligence or willful misconduct of an Indemnity

7. ASSIGNMENT -- PEG Recipient shall not assign or otherwise transfer any rights, duties, obligations or interest in this MOU or arising hereunder to any person, persons, entity or entities whatsoever without the prior written consent of the City and any attempt to assign or transfer without such prior written consent shall be void. Consent to any single assignment or transfer shall not constitute consent to any further assignment or transfer.
8. PUBLICITY -- Any publicity generated by PEG Fund Recipient for the project funded pursuant to this MOU, during the term of this MOU or for one year thereafter, will make reference to the contribution of the City of Oakland in making the project possible. The words "City of Oakland" will be explicitly stated in all pieces of publicity, including but not limited to flyers, press releases, posters, brochures, public service announcements, interviews and newspaper articles. City staff will be available whenever possible at the request of PEG Fund Recipient to assist PEG Fund Recipient in generating publicity for the project funded pursuant to this MOU. PEG Recipient further agrees to cooperate with authorized City officials and staff in any City generated publicity or promotional activities undertaken with respect to this project
9. TERMINATION -- Either party may terminate this MOU immediately for cause or without cause upon giving (30) calendar days' written notice to the other party. Unless otherwise terminated as provided in this MOU, this MOU will terminate on July 1, 2017.
10. NON-DISCRIMINATION/EQUAL EMPLOYMENT PRACTICES -- PEG Fund Recipient shall not discriminate or permit discrimination against any person or group of persons in any manner prohibited by federal, state or local laws. During the performance of this MOU, PEG Fund Recipient agrees as follows:
 - a. PEG Recipient shall not discriminate against any employee or applicant for employment because of age, marital status, religion, gender, sexual orientation, gender identity, race, creed, color, national origin, Acquired-Immune Deficiency Syndrome (AIDS) AIDS-Related Complex (ARC) or disability. Thus nondiscrimination policy shall include, but not be limited to, the following employment, upgrading, failure to promote, demotion or transfer recruitment advertising, layoffs, termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship
 - b. PEG Fund Recipient shall state in all solicitations or advertisements for employees placed by or on behalf of PEG Fund Recipient that all qualified applicants will receive consideration for employment without regard to age, marital status, religion, gender, sexual orientation, gender identity, race, creed, color, national origin, Acquired-Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARK) or disability

- c. PEG Fund Recipient shall make its goods, services, and facilities accessible to people with disabilities and shall verify compliance with the Americans with Disabilities Act by executing **Schedule C-1, Declaration of Compliance with the Americans with Disabilities Act**, attached hereto and incorporated herein

 - d. If applicable, PEG Fund Recipient will send to each labor union or representative of workers with whom PEG Fund Recipient has a collective bargaining agreement or contract or understanding, a notice advising the labor union or workers' representative of PEG Fund Recipient's commitments under this nondiscrimination clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment
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- 11. **POLITICAL PROHIBITION** -- Subject to applicable State and Federal laws, moneys paid pursuant to this MOU shall not be used for political purposes, sponsoring or conducting candidate's meetings, engaging in voter registration activity, nor for publicity or propaganda purposes designed to support or defeat legislation pending before federal, state or local government

 - 12. **RELIGIOUS PROHIBITION** -- There shall be no religious worship instruction, or proselytization as part of, or in connection with the performance of the MOU

 - 13. **VALIDITY OF PEG FUND APPORTIONMENT AND ALOCATION** -- This MOU shall not be binding or of any force or effect until it is i) approved by a resolution or equivalent act of each of the parties, ii) approved for form and legality by the Office of the Oakland City Attorney, and iv) signed by the Oakland City Administrator or his or her designee and an authorized representative of the OUSD and Peralta Community College District.

 - 14. **GOVERNING LAW** -- This MOU shall be governed by the laws of the State of California

 - 15. **NOTICES** -- If either party shall desire or be required to give notice to the other, such notice shall be given in writing, via facsimile and concurrently by prepaid US certified or registered postage, addressed to recipient as follows:

City of Oakland
150 Frank H. Ogawa Plaza, Suite 7335
Oakland, CA 94612-2033
Attn: _____

Oakland Unified School District
314 East 10th Street
Oakland, CA 94606
Attn: Mario Capitelli

Any party to this MOU may change the name or address of representatives for purpose of this Notice paragraph by providing written notice to all other parties ten (10) business days before the change is effective

16. ENTIRE AGREEMENT OF THE PARTIES -- This MOU supersedes any and all agreements, either oral or written, between the parties with respect to the rendering of services by PEG Fund Recipient for the City and contains all of the representations, covenants and agreements between the parties with respect to the rendering of those services. Each party to this MOU acknowledges that no representations inducements promises or agreements orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which is not contained in this MOU, and that no other agreement statement or promise not contained in this MOU will be valid or binding
17. MODIFICATION Any modification of this MOU will be effective only if it is in writing and signed by all parties to this MOU
18. SEVERABILITY/PARTIAL INVALIDITY If any term or provision of this MOU, or the application of any term or provision of this MOU to a particular situation, shall be finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then notwithstanding such determination, such term or provision shall remain in force and effect to the extent allowed by such ruling and all other terms and provisions of this MOU or the application of this MOU to other situation shall remain in full force and effect. Notwithstanding the foregoing, if any material term or provision of this MOU or the application of such material term or condition to a particular situation is finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then the Parties hereto agree to work in good faith and fully cooperate with each other to amend this MOU to carry out its intent.
19. AMENDMENT Any change to this MOU, must be agreed upon in writing by all parties herein
20. APPROVAL If the terms of this MOU are acceptable to PEG Fund Recipient and the City, sign and date below

