

PERALTA COMMUNITY COLLEGE DISTRICT
Board of Trustees Agenda Report
For the Trustee Meeting Date of March 15, 2011

ITEM # 7

ITEM TITLE: *(Please define the subject; e.g., change order – Berkeley City College)*

Peralta TV MOU with the City of Oakland for PEG Funds

SPECIFIC BOARD ACTION REQUESTED:

Consider Approval of Peralta TV MOU with the City of Oakland for PEG Funds

ITEM SUMMARY: (PLEASE DISCUSS THIS ITEM)

Consider approval of Peralta TV MOU, as a PEG recipient, with the City of Oakland. Peralta is estimated to receive \$200,000 per year for fiscal years '10-'11 and '11-'12. All Board approved contracts are subject to final negotiation and execution by the Chancellor. The Chancellor recommends approval.

BACKGROUND/ANALYSIS:

The city of Oakland's Local Franchise, SVSF and DIVCA, requires the cable and video service providers to pay to the City quarterly 1% Gross revenue, to be used for capital expenses for PEG cable and video television facilities ("PEG funds"), payable to Peralta TV through the City of Oakland as part of a 1/3 equal division with the city, Oakland Unified School District, and Peralta CCD.

ALTERNATIVES/OPTIONS:

N/A

EVALUATION AND RECOMMENDED ACTION:

Approval is recommended.

SOURCE OF FUNDS (AND FISCAL/BUDGETARY IMPACT):

N/A – action involves receipt of funds

OTHER DEPARTMENTS IMPACTED BY THIS ACTION (E.G. INFORMATION TECHNOLOGY):

YES _____ NO _____

COMMENTS:

WHO WILL BE PRESENTING THIS ITEM AT THE BOARD MEETING?

General Counsel Nguyen and Director Heyman

DID A BOARD STANDING COMMITTEE RECOMMEND THE ITEM? YES _____ NO X

_____ **IF "YES", PLEASE INCLUDE THAT INFORMATION IN YOUR SUMMARY.**

(****Board contract approval is subject to negotiation and execution by the Chancellor.)

PLEASE ACQUIRE SIGNATURES IN THIS ORDER:

DOCUMENT PREPARED BY:

Prepared by: *Diana Fitzgerald*
Diana Fitzgerald, Sr. Secretary

Date: March 9, 2011

DOCUMENT PRESENTED AND APPROVED BY:

Presented and approved by: *Jeff Heyman (DF)*
Jeff Heyman

Date: March 9, 2011

[Enter Name of College President, (if originating from a college), or Vice-Chancellor or Manager (if originating from the District), and Title of the Individual Here]

FINANCE DEPARTMENT REVIEW

Finance review required Finance review *not* required

If Finance review is required, determination is: Approved Not Approved

If not approved, please give reason: _____

Signature: *Ron Gerhard electronically by re* Date: 3/11/11
Ron Gerhard, Vice Chancellor for Finance and Administration

GENERAL COUNSEL (Legality and Format/adherence to Education Codes):

Legal review required Legal review *not* required

If Legal review is required, determination is: Approved Not Approved

Signature: *Thuy T. Nguyen electronically by re* Date: 3/9/11
Thuy T. Nguyen, General Counsel

CHANCELLOR'S OFFICE APPROVAL

Approved, and Place on Agenda Not Approved, but Place on Agenda

Signature: *Wise E. Allen* Date: 3/10/11
Wise E. Allen, Ph.D., Chancellor

**MEMORANDUM OF UNDERSTANDING
BY AND BETWEEN THE CITY OF OAKLAND
AND
PERALTA COMMUNITY COLLEGE DISTRICT
FOR PEG FUNDS**

THIS MEMORANDUM OF UNDERSTANDING (hereinafter, "MOU") is entered into this ___ day of _____, 2011, be and between the City of Oakland (hereinafter, the "City") and Peralta Community College District (hereinafter, the "PEG Recipient").

WHEREAS:

The City's Local Franchise, SVSF and DIVCA," requires the Cable and Video service providers to pay to the City quarterly 1% Gross revenue, to be used for capital expenses for PEG cable and video television facilities ("PEG funds"); and

The City respective Cable Franchise Agreements (hereinafter "Local Franchise") and State Video Franchise Agreement (hereinafter "DIVCA") and State Video Service Franchises, (hereinafter "SVSF") provide for the 1% Capital equipment support of Public, Education, and Government (PEG) Channels; and

Currently, the City's KTOP program (hereinafter, "KTOP"), the Peralta Community College District (hereinafter "Peralta TV"), and the Oakland Unified School District (hereinafter "OUSD"), and collectively hereinafter referred to as the "jurisdictions", all operate a television channel in their respective broadcast area and share a three-way equal share split of the PEG funds: and

The City and the PEG Recipient wish to enter into this MOU with respect to the City's distribution of the PEG funds and to support the cable and video television facilities capital needs of the two jurisdictions; and

The City wishes to provide PEG funds to Peralta Community College District wishes to receive such funds.

NOW THEREFORE, THE PARTIES HEREBY AGREE AS FOLLOWS:

1. EFFECTIVE DATE/TERM OF MOU. The term of this MOU will commence on the date first above written and terminate on July 1, 2012 unless earlier terminated as set forth in this MOU. The Parties intend the Agreement to provide PEG Fund Allocation, as described below, to the PEG Recipient for fiscal years 2010-11 and 2011-12.
2. PEG FUND ALLOCATION. The City agrees to grant to the PEG Recipient one-third of the 1% PEG capital support for cable and video television facilities ("PEG Capital Grant"). If at any time a fourth PEG channel is triggered under City's Local Franchise all PEG Recipients agree to split 1% PEG capital support equally between the four Channels. The amount of the 1% PEG capital support is roughly \$600,000.00 annually from the two current cable and video providers. Payment of PEG capital support made by the respective cable and video service providers shall be divided up equally between the jurisdictions and upon receipt shall be appropriated to their respective project account assigned by The City. This means that the PEG Recipient agrees and understands that its current PEG Capital Grant may be reduced accordingly in the future.
3. RESTRICTION ON THE USE OF PEG FUNDS. The PEG Recipient agree and understands that the funds and amounts identified as herein as "capital grants" are restricted for the purchase of capital facilities equipment related to providing PEG programming; and consistent to City's Local Franchise, SVSF and DIVCA.
4. SUPERCEDES PREVIOUS MOUs. This MOU replaces and makes void any and all previous MOU(s) between the three parties.
5. CITY LEAD AGENCY. The City's Department of Information Technology shall be the lead Agency for the City to coordinate, approve all PEG capital support funds for the PEG channels.
6. INVOICING OF PEG FUNDS. The City shall hold all PEG capital support funds for the PEG Recipient; within thirty (30) days of receipt of an invoice from the two jurisdictions the City shall provide each jurisdiction the amount of the invoice; however the total annual payments can not exceed each jurisdiction's respective portion of for their PEG capital grant.
7. REPORTING ON PEG FUNDS. No later than 90 days of a PEG payment, the two jurisdictions shall provide a report to the City that documents the use of the PEG capital funding, which will include all receipts of the equipment purchased. The reporting shall provide adequate information for the two jurisdictions to fulfill their annual reporting requirements to the City on the use of the subject funds.
8. CARRY FORWARD FOR PROJECTS. The jurisdictions may carry forward any of their unused PEG capital grant for future projects. The PEG Recipient shall provide the City proof of future project needs exceeding their annual PEG capital grant by submitting documentation based on verified, invoiced expenses supporting such need to the City at least sixty (60) days prior to the expiration of this Agreement. If such proof is not provided, then the PEG Recipient shall return any such unused PEG funds or that have not been deemed by the City as carry forward funds, to the City at the expiration of the term of this Agreement.
9. 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 Agreement; and (b) full

and complete documentation of performance related matters such as benchmarks and deliverables associated with this Agreement.

PEG 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 Agreement; 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 Recipient under this Agreement.

In addition to the above, PEG Recipient agrees to comply with all audit, inspection, recordkeeping and fiscal reporting requirements incorporated by reference. All PEG funds must be expended for PEG purposes and PEG 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.

10. INDEMNIFICATION OF CITY BY PEG RECEIPT. PEG Recipient agrees to defend, indemnify and hold harmless the City and its officials, agents and employees from and against any and all claims arising. 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 Agreement, PEG Recipient shall indemnify and hold harmless (and at City's request, defend) City, and each of their respective Councilmembers, 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 Recipient, and from any:

- (i) Breach of PEG Recipient's obligations, representations or warranties under this Agreement;
- (ii) Act or failure to act in the course of performance by PEG Recipient under this Agreement;

- (iii) Negligent or willful acts or omissions in the course of performance by PEG Recipient under this Agreement; 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 Recipient.
- b. For purposes of the preceding Subsections (i) through (iv), the term "PEG Recipient" includes PEG Recipient, its officers, directors, employees, representatives, agents, servants, sub-consultants and subPEG Recipients.
 - c. City shall give PEG Recipient prompt written notice of any such claim of loss or damage and shall cooperate with PEG 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 if PEG 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 Recipient fails or refuses to defend City. In no event shall PEG 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 Recipient acknowledges and agrees that it has an immediate and independent obligation to indemnify and defend Indemnitees 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 Recipient by City and continues at all times thereafter, without regard to any alleged or actual contributory negligence of any Indemnitee. Notwithstanding anything to the contrary contained herein, PEG Recipient's liability under this Agreement shall not apply to any action or claim arising from the sole negligence, active negligence or willful misconduct of an Indemnitee.

11. ASSIGNMENT. PEG Recipient shall not assign or otherwise transfer any rights, duties, obligations or interest in this Agreement 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.

12. PUBLICITY. Any publicity generated by PEG Recipient for the project funded pursuant to this Agreement, during the term of this Agreement 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 Recipient to assist PEG Recipient in generating publicity for the project funded pursuant to this Agreement. 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.

13. **TERMINATION.** Either party may terminate this Agreement immediately for cause or without cause upon giving (30) calendar days' written notice to the other party. Unless otherwise terminated as provided in this Agreement, this Agreement will terminate on July 1, 2012.
14. **NON-DISCRIMINATION/EQUAL EMPLOYMENT PRACTICES.** PEG 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 Agreement, PEG Recipient agrees as follows:
- a. PEG Recipient and PEG Recipient's subPEG Recipients, if any, 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. This 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 Recipient and PEG Recipient's SubPEG Recipients shall state in all solicitations or advertisements for employees placed by or on behalf of PEG 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 (ARC) or disability.
 - c. PEG 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 Recipient will send to each labor union or representative of workers with whom PEG Recipient has a collective bargaining agreement or contract or understanding, a notice advising the labor union or workers' representative of PEG Recipient's commitments under this nondiscrimination clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
15. **POLITICAL PROHIBITION.** Subject to applicable State and Federal laws, moneys paid pursuant to this Agreement 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.
16. **RELIGIOUS PROHIBITION.** There shall be no religious worship, instruction, or proselytization as part of, or in connection with the performance of the Agreement.
17. **VALIDITY OF PEG GRANT.** This MOU shall not be binding or of any force or effect until it is: i) approved by resolution of the City Council as required by the Oakland City Charter, Oakland Municipal Code Title 2.04 and Oakland City Council Rules of Procedure, ii) approved for form and legality by the Office of the City Attorney, and iii) signed by the City Administrator or his or her designee.
18. **GOVERNING LAW.** This Agreement shall be governed by the laws of the State of California.

19. 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 U.S. certified or registered postage, addressed to recipient as follows:

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

Peralta Community College District
333 East 8th Street
Oakland, CA 94606
Attn: Jeffrey Heyman

Any party to this Agreement 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.

20. ENTIRE AGREEMENT OF THE PARTIES. This Agreement supersedes any and all agreements, either oral or written, between the parties with respect to the rendering of services by PEG 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 Agreement 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 Agreement, and that no other agreement, statement or promise not contained in this Agreement will be valid or binding.

21. MODIFICATION. Any modification of this Agreement will be effective only if it is in a writing signed by all parties to this Agreement.

22. SEVERABILITY/PARTIAL INVALIDITY. If any term or provision of this Agreement, or the application of any term or provision of this Agreement 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 Agreement or the application of this Agreement to other situation shall remain in full force and effect. Notwithstanding the foregoing, if any material term or provision of this Agreement 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 Agreement to carry out its intent.

23. AMENDMENT. Any change to this MOU, must be agreed upon in writing by all parties herein.

24. APPROVAL. If the terms of this MOU are acceptable to PEG Recipient and the City, sign and date below.

City of Oakland, A Municipal Corporation

(City Administrator's Office) (Date)

(Agency Director's Signature) (Date)

Approved as to form and legality:

(City Attorney's Office Signature) (Date)

Peralta Community College District

Wise Allen, Chancellor (Date)

Approved as to Form:

Thuy Thi Nguyen
General Counsel (Date)