



Friday, February 19, 2016

Board Room – 2nd Floor

Special Meeting

The Public Portion Of The Meeting Will Begin At 3:30 p.m.

ROLL CALL

Commissioner Butner, Commissioner Cluver, Commissioner Martinez, Commissioner Story, 2nd Vice-President Colbruno, 1st Vice President Yee and President Hamlin.

1. CLOSED SESSION (2:00 p.m.)

Closed Session discussions and materials may not be disclosed to a person not entitled to receive it, unless the Board authorizes disclosure of that confidential information.

1.1 CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION (Pursuant to Paragraph (1) of Subdivision (d) of California Government Code Section 54956.9):

Outer Harbor Terminal, LLC: U.S. Bankruptcy Court, District of Delaware; Bankruptcy Petition No.: 16-10283-LSS

File ID: [32-16]

1.2 PUBLIC EMPLOYEE APPOINTMENT- (Pursuant to California Government Code Section 54957).

Title: Director of Aviation

File ID: [33-16]

OPEN SESSION/ROLL CALL

Commissioner Butner, Commissioner Cluver, Commissioner Martinez, Commissioner Story, 2nd Vice-President Colbruno, 1st Vice President Yee and President Hamlin.

CLOSED SESSION REPORT

The Port Attorney or Board Secretary will report on any final actions taken in Closed Session.

2. CONSENT ITEMS

Action by the Board under "Consent Items" means that all matters listed below have been summarized and will be adopted by one motion and appropriate vote. Consent Items may be removed for further discussion by the Board at the request of any member of the Board.

3. MAJOR PROJECTS

This segment of the meeting is reserved for action and discussions regarding the status of Major Projects and issues of special importance.

4. BUDGET & FINANCE

This segment of the meeting is reserved for action or discussion regarding the status of Budget and Finance issues.

5. STRATEGY & POLICY

This segment of the meeting is reserved for action or discussion on Strategy and Policy Issues.

6. REMAINING ACTION ITEMS

Remaining Action Items are items not previously addressed in this Agenda that may require staff presentation and/or discussion and information prior to action by the Board.

- 6.1 Resolution:** Settlement Agreement with Outer Harbor Terminal, LLC (formerly known as Ports America Outer Harbor Terminal, LLC), HHH Oakland, Inc. and Terminal Investment Limited SA concerning the Cessation of Operations at Berths 20-24 and Berths 25-26, together referred to as the Ports America Outer Harbor Terminal **(Maritime)**

File ID: [\[29-16\]](#)

Attachments: [Agenda Report](#)

7. UPDATES/ANNOUNCEMENTS

The President, Members of the Board and the Executive Director will report on noteworthy events occurring since the last Board Meeting.

8. SCHEDULING

This segment of the meeting is reserved for scheduling items for future Agendas and/or scheduling Special Meetings

OPEN FORUM

The Board will receive public comment on non-agenda items during this time. Please fill out a speaker card and present it to the Secretary of the Board.

ADJOURNMENT

The next Regular Meeting of the Board will be held on February 25, 2016.

PUBLIC PARTICIPATION

To Speak on an Agenda Item

You may speak on any item appearing on the Agenda. Please fill out a Speaker's Card and give it to the Board Secretary **before the start of the meeting** or immediately after conclusion of Closed Session. Cards received after the start of the meeting will be treated as a single request to speak in Open Forum. All speakers will be allotted a minimum of one minute.

To Receive Agendas & Related Materials

Should you have questions or concerns regarding this Agenda, or wish to review any of the Agenda Related Materials, please contact the Board Secretary, John Betterton, at: (510) 627-1696, or visit our web page at: www.portoakland.com
<<http://www.portoakland.com>>

To receive Port Agendas and Agenda Related Materials by email, please email your request to: jbetterton@portoakland.com

Disability Related Modifications

Any person who requires a disability-related modification or accommodation, including auxiliary aids or services, in order to participate in the meeting, may submit a written request, electronic request, or telephone request [via the California Relay Service (telephone) for the hearing impaired at (800) 735-2922], to the Secretary of the Board **no later than five working days** prior to the scheduled meeting date.

John Betterton, Secretary of the Board
530 Water Street, Oakland, CA 94607
jbetterton@portoakland.com
(510) 627-1696

Language & Interpretive Services

As a grantee of federal aid grant funds from the US Department of Transportation, the Port is responsible for ensuring equal access to its programs, services, and benefits. To request bilingual interpreters or materials in alternate formats, please contact the Assistant Secretary of the Board no later than five working days prior to the scheduled meeting date.

Daria Edgerly, Assistant Secretary of the Board
530 Water Street, Oakland, CA 94607
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(510) 627-1337

Scented Products

Please refrain from wearing scented products to this meeting so attendees who experience chemical sensitivities may attend

Commissioner's Statement of Intention

We are a governing Board whose authority lies with the entirety of the Board.

We govern in accordance with our fiduciary duty to the Port of Oakland.

We conduct ourselves with clarity and transparency, grounded in the principles of integrity, trust and respect.

We reach our decisions through candid, open and deliberative debate and hold both staff and ourselves accountable for implementing them.

AGENDA REPORT

Resolution: Settlement Agreement with Outer Harbor Terminal, LLC (formerly known as Ports America Outer Harbor Terminal, LLC), HHH Oakland, Inc. and Terminal Investment Limited SA concerning the Cessation of Operations at Berths 20-24 and Berths 25-26, together referred to as the Ports America Outer Harbor Terminal **(Maritime)**

MEETING DATE: 2/19/2016

AMOUNT: Termination of approximately \$36 million of annual Maritime revenue, partially offset by additional revenue from existing Maritime activities

PARTIES INVOLVED: Outer Harbor Terminal, LLC
HHH Oakland, Inc.
Terminal Investment Limited SA

SUBMITTED BY: John C. Driscoll, Director of Maritime

APPROVED BY: J. Christopher Lytle, Executive Director

ACTION TYPE: Resolution

EXECUTIVE SUMMARY

In 2009, the Port of Oakland (“Port”) entered into a 50-year Concession and Lease with Ports America Outer Harbor Terminal, LLC (“PAOH”), which recently changed its name to Outer Harbor Terminal, LLC (“OHT”),¹ for marine terminal operations at Berths 20-24. In August 2010, PAOH assumed the lease for the adjacent Berths 25-26 marine terminal from International Transportation Service, Inc., and combined both leaseholds to create one terminal, the Ports America Outer Harbor Terminal (the “PAOH Terminal”). OHT notified the Port it desires to cease operations at the PAOH Terminal effective March 31, 2016. The Port and OHT commenced negotiations over an agreement to terminate operations and related issues (“Termination and Handback Agreement” and “Guaranty Agreement”); however, during those negotiations, on February 1, 2016, OHT filed for Chapter 11 bankruptcy. After analyzing operational, legal and financial factors, Staff believes that entering into a Settlement Agreement that contains terms addressing monetary compensation and operational transition is the preferable course of action. As of the writing of this Agenda Report, the Settlement

¹ On January 7, 2016, PAOH changed its name to “Outer Harbor Terminal, LLC.” References herein to “OHT” refer to the PAOH entity that changed its name to Outer Harbor Terminal, LLC. References herein to “PAOH” refer to matters that occurred before the name change.

Agreement is still being negotiated by the parties. Assuming the final version of the Settlement Agreement contains certain key terms recommended by Staff, Staff is seeking approval from the Board to enter into the Settlement Agreement.

BACKGROUND

PAOH Operations at the Port

In November 2009, the Port entered into a 50-year Concession and Lease (“Concession”) with PAOH for marine terminal operations on approximately 166 acres of land in the Outer Harbor portion of the Port Seaport known as Berths 20-24 (the “B20-24 Terminal”). In January 2010, PAOH began operations at the B20-24 Terminal. In connection with the Concession, in December 2009, the Port and PAOH also entered into a Crane Lease, which was amended several times, which provides for the lease to PAOH of certain cranes on the B20-24 Terminal. Finally, the Port and PAOH entered into a Generating Facility Interconnection Agreement (“Interconnection Agreement”) in 2014 to permit and allow PAOH to interconnect and operate its shore power facility in parallel with the Port’s distribution system.

Separately, in August 2010, PAOH assumed the Non-Exclusive Preferential Assignment Agreement (“NEPAA”) for the adjacent 44-acre marine terminal known as Berths 25-26 (the “B25-26 Terminal”) from the prior tenant, International Transportation Service, Inc. PAOH integrated the B25-26 Terminal into the B20-24 Terminal to operate the combined terminal, the PAOH Terminal, which is depicted on Exhibit A of this Agenda Report. The NEPAA for the B25-26 Terminal expired in June 2013, was extended several times, and has been on a month-to-month term since July 2014. The B20-24 Concession, the B25-26 NEPAA and the Crane Lease are collectively referred to as the “Port Agreements.”

Since 2012, the Port and PAOH negotiated for a longer term extension of the NEPAA for the B25-26 Terminal, but the parties were not able to reach agreement. The Port is currently in active negotiations over a proposed new NEPAA with another party for the B25-26 Terminal.

In Fiscal Year (“FY”) 2014-15, PAOH paid the Port approximately \$27.4 million in rent for the B20-24 Terminal, \$8.7 million in rent for the B25-26 Terminal, and \$1.9 million for variable crane rental, for a total of about \$37.9 million. For FY 2015-16, the Port budgeted \$35.7 million per year of revenue from PAOH.

Negotiations

On January 19, 2016, OHT publicly announced it would cease operations at the PAOH Terminal effective March 31, 2016. The Port and OHT were negotiating a proposed Termination and Handback Agreement and related Guaranty Agreement.

On January 22, 2016, Staff prepared an Agenda Report titled *Termination and Handback Agreement with Outer Harbor Terminal, LLC (formerly known as Ports America Outer Harbor Terminal, LLC) and related Guaranty Agreement Concerning the Cessation of Operations at*

Berths 20-24 and Berths 25-26, together referred to as the Ports America Outer Harbor Terminal (Maritime). It is important to emphasize that at the time the Agenda Report was written, neither the Termination and Handback Agreement nor the Guaranty Agreement were fully negotiated by the parties and that Staff recommended that the Board approve both agreements only if certain key terms were included.

Subsequent to the Agenda Report posting, OHT did not agree to the key terms in the Termination and Handback Agreement or the Guaranty Agreement recommended by Port Staff, and on February 1, 2016, OHT filed Chapter 11 bankruptcy in the Delaware Bankruptcy Court where OHT is incorporated.

Following the bankruptcy filing, the Port took certain actions including successfully drawing down on an approximate \$6.8 million letter of credit. On February 9, 2016, the Port filed a motion seeking an order from the Bankruptcy Court compelling OHT (a) to immediately pay rent for the months of February 2016 and March 2016 or, (b) in the alternative, to assume or reject the B20-24 Lease and the B25-26 NEPAA.

Soon after the bankruptcy filing, OHT and the Port began negotiating the terms of a proposed Settlement Agreement among the Port, OHT, HHH Oakland, Inc. (“HHH”) and Terminal Investment Limited SA (“TIL”).

ANALYSIS

The Port has analyzed the pros and cons of entering into a Settlement Agreement with OHT, HHH and TIL and has identified the following factors for consideration:

Proposed Terms of Settlement Agreement

Assuming certain key terms are included in the Settlement Agreement, Staff has concluded that entering into such an agreement would help ensure (a) a smooth and efficient transition of the PAOH Terminal to the Port and, (b) the basic cleanup of certain OHT equipment and debris. Further, the proposed Settlement Agreement would include payment to help offset the Port’s costs of performing certain maintenance/repair/cleanup activities after OHT’s vacation. As indicated above, as of the writing of this Agenda Report, the Port and OHT are still negotiating the terms of the proposed Settlement Agreement. Port Staff is proposing that the key terms would likely include, without limitation, the following:

- **Effective Date**: The Settlement Agreement would become effective on the date that all of the following have been completed: a) it is executed by all parties; b) it has been approved by the Board; and c) the Bankruptcy Court has entered a Final Order approving the agreement and the transactions contemplated therein, taking into account the time period for which someone could appeal. Assuming the parties reach agreement on the final terms of the Settlement Agreement and that it is executed soon, the Port Board approves the agreement, and the Bankruptcy Court promptly enters a Final Order, the Settlement Agreement would likely become effective by late March 2016;

- **Acknowledgement of Letter of Credit Draw and Prior Payments to the Port:** OHT, HHH and TIL would acknowledge and agree that the Port's approximate \$6.8 million drawdown on the letter of credit and all prior payments by OHT to the Port, including a \$60 million upfront fee, were valid and proper;
- **Payment of Rent:** OHT would agree to pay the rent for both leaseholds for the months of February and March 2016, plus utility charges (approximately \$6.0 million) for that same time period;
- **April Rent Free:** During the month of April 2016, the Port would permit OHT to continue operations and perform clean-up activities at the PAOH Terminal rent-free;
- **Additional Payment:** HHH and TIL would pay the Port an additional \$5.288 million;
- **Vacation Date:** OHT would vacate the PAOH Terminal by April 30, 2016;
- **Cleanup Obligations:** OHT would remove certain agreed-upon debris and equipment by April 30, 2016, which would be subject to a dispute resolution process if the parties cannot agree on the work completed;
- **Rejection of Port Agreements:** Assuming certain conditions precedent are met, the Port Agreements would be "deemed rejected" as of April 30, 2016 ("Rejection Date");
- **New Storage Lease:** The Port and OHT would enter into a new Storage Lease for the purpose of storing certain equipment on a month-to-month basis for a period of up to three months; and
- **Releases and Indemnities:** Upon the Rejection Date, there would be certain releases by parties and limited indemnities.

Impacts of PAOH Terminal Closure

While not directly related to the decision of whether to enter into a Settlement Agreement or not, Staff highlights the following broader factors for consideration:

- During the past six years, PAOH was not able to appreciably grow new business at the Port, instead supporting its operations primarily through the intra-port re-allocation of cargo. This resulted in some loss of revenue in excess of the Minimum Annual Guarantee ("MAG") revenue from other terminals to the Port, referred to as over-MAG revenue;
- For some time, the Port's marine terminal operators (including OHT) have been operating at utilization levels (i.e., cargo throughput per acre) that are below optimum, resulting in profitability challenges and, in some cases, operating losses. In turn, this has affected the Port's ability to grow business and its revenues;
- The anticipated reduction of marine terminal capacity (and the resulting increase in utilization and improved financial health of terminal operators) is expected to help mitigate the risk that leases due to expire in the next seven years will not be renewed;
- In order to maintain overall Port cargo volumes after closure of the PAOH Terminal, other terminal operators must be able to handle the displaced cargo. There is a risk that the sudden displacement of cargo could result in delays that, in turn, could result in diversion (and associated revenue loss). Staff is working closely with its business partners to minimize impacts on cargo activity;
- As the Port proceeds to "re-purpose" the PAOH Terminal for other users and uses, certain infrastructure repairs or improvements may be necessary. The extent and cost of this work will depend on the uses and cannot be estimated with any meaningful

- accuracy at this time, but will be shared with the Board when Staff seeks authorization to enter into future agreements for uses of the then former PAOH Terminal; and
- The vacation of the PAOH Terminal also provides opportunities for expansion by other Port tenants. Other current terminal operators at the Port have expressed interest in expanding their operations at the Port, including one terminal operator with whom the Port has been negotiating for a new NEPAA for the B25-26 Terminal.

Bonds

The documents governing the Port's outstanding senior lien bonds and intermediate lien bonds require that the Board not take any action that, in the Board's judgment at the time of the action, will substantially impair or materially affect the revenues of the Port that are pledged to the repayment of the Port's senior lien bonds and intermediate lien bonds. Based on the Port Staff's analysis described above, Port Staff has concluded that agreeing to a Settlement Agreement with OHT, HHH and TIL is likely to have less of an adverse effect on the Port's pledged revenues than having OHT cease operations at the PAOH Terminal without entering into such an agreement.

BUDGET & STAFFING

Certain statements contained in this "Budget" section reflect not historical facts but forecasts, projections, estimates and other "forward-looking statements." The achievement of results, or other expectations, involves known and unknown risks, uncertainties and other factors that may cause actual results to be materially different from forecasted results. Actual results will vary and may vary materially. The Port is not obligated to issue updates or revisions to this discussion if and when the expectations, events, conditions or circumstances on which these statements are based occur or fail to occur, as the case may be.

Maritime revenues (excluding utility revenues) in FY 2014-15 were \$149.2 million, of which \$37.9 were from PAOH. Budgeted FY 2015-16 revenues are \$140.6 million, of which about \$35.7 million are from OHT. As a result of the proposed action, assuming the Settlement Agreement is fully executed, Staff anticipates:

- Minimal impacts to FY 2015-16 budgeted Maritime revenues due to the timing of the PAOH Terminal closure and receipt of termination payment;
- In FY 2016-17, the Port is anticipated to lose approximately \$36.4 million of Maritime revenues, which is anticipated to be partially offset by over-MAG and other anticipated revenue, as discussed above. Nonetheless, Staff anticipates a reduction in Maritime revenues in FY 2016-17. Adjusted revenue is now expected to be within an approximate range of \$125-130 million; and
- The Port is anticipated to manage its expenses to reflect lower Maritime revenues, and will develop a FY 2016-17 budget that prudently balances revenues, operating expenses, debt service payments and capital expenses, consistent with prior years.

At the time of writing this Agenda Report, Staff is still refining its revenue projections; accordingly, the above analysis is subject to change.

In the near term, Maritime Division Staff will be focused on working with its tenants and other business partners to generate new revenue and help ensure cargo retention during a transition period. As a result, Staff resources will be diverted from other projects and efforts.

MARITIME AVIATION PROJECT LABOR AGREEMENT (MAPLA)

Major maintenance work that may be performed by the Port and/or its tenant pursuant to the terms of the proposed Settlement Agreement falls within the scope of the Port of Oakland Maritime and Aviation Project Labor Agreement (MAPLA). If the MAPLA is in effect when the Port issues a permit for the tenant work, the provisions of the MAPLA will apply.

STRATEGIC PLAN

The applicable goals/objectives of the Strategic Plan in the near-term include:

- Goal A: Objective 1: Maximize the use of existing assets
- Goal B: Objective 1: Retain existing customers and tenants

The applicable goals/objectives of the Strategic Plan in the longer term include:

- Goal A: Objective 1: Maximize the use of existing assets
- Goal A: Objective 1: Increase revenue, job creation, and small business growth
- Goal B: Objective 3: Price Port services to provide a highly competitive value

LIVING WAGE

Living wage requirements, in accordance with the Port's Rules and Regulations for the Implementation and Enforcement of the Port of Oakland Living Wage Requirements (the "Living Wage Regulations"), do not apply because the requested action is not an agreement, contract, lease, or request to provide financial assistance within the meaning of the Living Wage Regulations; however, any construction work related to the handback activities will be subject to prevailing wages.

ENVIRONMENTAL

The Settlement Agreement, which requires OHT to undertake certain debris/equipment removal and repair activities, was reviewed in accordance with the requirements of the California Environmental Quality Act (CEQA) and the Port CEQA Guidelines. The Settlement Agreement is not a project under CEQA pursuant to Section 15061(b)(3) of the CEQA Guidelines, which states that CEQA applies only to activities that have a potential for causing a significant effect on the environment. It can be seen with certainty that there is no possibility that temporary cessation of activity on the marine terminal prior to negotiation of a new lease

will result in a physical change in the environment, and therefore this action is not subject to CEQA.

The repairs and related activities proposed in this agenda report are categorically exempt from the requirements of CEQA pursuant to:

- Section 15301(d) of the CEQA Guidelines, which exempts restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety;
- Section 15301(f), which exempts the addition of safety or health protection devices for use during construction of or in conjunction with existing structures, facilities, or mechanical equipment. Installation of sacrificial anodes on the sheet pile wall meets the criteria for this exemption;
- Section 15309, which consists of activities limited entirely to inspections, to check for performance of an operation, or quality, health, or safety of a project. Inspections of facilities, substations and other infrastructure meet the criteria for this exemption; and
- Section 15330, which consists of any minor cleanup actions taken to prevent, minimize, stabilize, mitigate, or eliminate the release or threat of release of a hazardous waste or substance which are small or medium removal actions costing \$1 million or less. Testing and removal of any contaminated material or storage tanks meets the criteria for this exemption.

GENERAL PLAN

This action does not change the use of any existing facility, make alterations to an existing facility, or create a new facility; therefore, a General Plan conformity determination pursuant to Section 727 of the City of Oakland Charter is not required.

OWNER-CONTROLLED INSURANCE PROGRAM (OCIP)/ PROFESSIONAL LIABILITY INSURANCE PROGRAM (PLIP)

While the Owner Controlled Insurance Program (OCIP) and the Professional Liability Insurance Program (PLIP) coverages would not apply to the Settlement Agreement itself, the applicable OCIP and PLIP coverages and provisions will apply to any activities that may be performed by the Port pursuant to these agreements if such activities are determined to be capital improvement construction projects or design projects supporting such construction.

OPTIONS

Staff has identified the following options for the Board's consideration:

1. Approve and authorize execution of a Settlement Agreement with OHT, HHH and TIL as described herein with the understanding that not all key terms have been tentatively agreed upon as of the writing of this Agenda Report. .
2. Approve a Settlement Agreement under different terms than those recommended by Staff.
3. Do not approve a Settlement Agreement.

All three options are expected to result in the same initial revenue loss, but Option 3 presents the risk that the Port's ability to secure additional offsetting revenues may be delayed.

RECOMMENDATION

Staff recommends the Board:

- Find that entering into a Settlement Agreement with OHT, HHH and TIL as described herein, is in the best interest of the Port for the purpose of limiting the adverse impact of OHT's cessation of PAOH Terminal operations on the Port's revenues that are pledged to the repayment of the Port's senior lien bonds and intermediate lien bonds;
- Authorize the Executive Director to enter into a Settlement Agreement with OHT, HHH and TIL for the cessation of operations at the PAOH Terminal;
- Make the appropriate findings and determinations required under CEQA, as outlined in this Agenda Report; and
- Authorize the Executive Director to approve any Port permits that may be required by OHT to perform any obligations under the Settlement Agreement.

Exhibit A

Location of PAOH Terminal

