

SUBJECT: Proposed Settlement of Measure T Litigation (Chevron and City of Richmond) and Dispute with Chevron Regarding Community Benefits Agreement, Including Proposed Revenue Agreement

STATEMENT OF THE ISSUE:

In November 2008, Richmond voters adopted Measure T, which imposed a manufacturer's tax as part of the City's Business License Tax. Chevron challenged the tax, arguing that Measure T violated the Commerce Clause of the United States Constitution, and other federal and state laws. The trial court agreed with some of Chevron's claims, and invalidated Measure T, requiring the City to refund to Chevron the taxes it paid under Measure T, and to pay \$1.2 million in interest. The City has refunded the taxes, but has not yet paid the interest. The City has appealed the trial court judgment.

City and Chevron representatives have been meeting for several months to resolve the Measure T litigation. Those settlement discussions have included a number of components that would provide additional financial stability for the City, and more recently, a proposal to resolve dispute about the operation of the Community Benefits Agreement (CBA) (Attachment 3) between the City and Chevron in light of court decisions invalidating the City approval of the Chevron Hydrogen Renewal Project.

On Thursday, May 6, City and Chevron representatives reached a proposed settlement of these matters. A copy of that proposed agreement is attached (Attachment 1). The proposed settlement would include the terms described below, which are discussed in greater detail in the body of this staff report. (It should be noted that there may be some minor changes to the settlement agreement included in the final document for consideration by the City Council at its meeting of May 11th.)

- a) The City dismisses its Measure T appeal;
- b) Chevron waives the prejudgment interest in the Measure T litigation;
- c) Chevron agrees that a petition for a proposed initiative measure that would amend the Utility User's Tax (UUT) will not be submitted to the City Clerk, and the City agrees to withdraw a measure it previously placed on the November 2010 ballot that would amend the UUT. These measures are discussed in more detail below;
- d) Chevron affirms its CBA obligations regarding:
 - a. Support for the Bay Trail – easement and security improvements (item 2.D of the CBA), valued by Chevron at \$5,000,000;
 - b. Ground level air quality data monitoring and collection (item 2.F[2] of the CBA), valued by Chevron at \$1,000,000; and
 - c. Greenprint transportation element funding of \$2 million (item 2.F[3] of the CBA), provided that the Greenprint funds will be paid in three equal annual installments beginning on July 1, 2010.
- e) In addition to its liability under the current UUT and Business License Tax, Chevron will make the following payments for the next 15 years, with no CPI adjustment. These payments total \$114 million in new revenue over the next 15 years.
 - a. In each of the first two years beginning in FY 2011-2012, Chevron will pay the City \$10 million in new revenue. These payments are in addition to the \$5 million Chevron agreed to pay the City in each of the next two years under a previous settlement regarding UUT tax liability.
 - b. In each of years 3-5, Chevron will pay the City an additional \$13 million.
 - c. In each of the years 6-10, Chevron will pay the City an additional \$7 million.
 - d. In each of the years 11-15, Chevron will pay an additional \$4 million.
- f) Chevron will commit to continuing to pay its UUT obligation based on the maximum tax payment provision of that ordinance (the "cap") for the initial five years of the settlement agreement, regardless of any change in the refinery's operation that would change utility consumption to reduce its UUT payment to an amount below the cap. If Chevron obtains permits for its hydrogen renewal project within five years, then this commitment would extend through year 10 of the settlement agreement.

- g) In the event a new tax measure is enacted by the voters during the term of this agreement that would otherwise increase Chevron's tax liability, Chevron will continue to be obligated to pay the amounts set forth above, but will be entitled to receive a credit for the additional amounts that would be due under the new tax. This provision does not apply to increases in the sales tax or to payment of property taxes.
- h) In the event that a force of nature substantially destroys the Chevron refinery, the agreement would terminate. If Chevron sells the refinery, either side would have the ability to terminate the agreement

RECOMMENDED ACTION:

CONSIDER and APPROVE a proposed settlement agreement with Chevron USA. The terms of that proposed settlement include, but are not limited to, the following:

1. The City will dismiss its appeal of the trial court decision invalidating Measure T, adopted by Richmond voters at the November 2, 2008 election (Chevron v. City of Richmond, Court of Appeal No. A127876) ;
2. Chevron waives the prejudgment interest in the Measure T litigation (approximately \$1.2 million);
3. Chevron agrees that the proposed initiative measure petition that would amend the Utility User's Tax (UUT) and is currently being circulated for signatures will not be submitted;
4. Chevron agrees that the City will receive the CBA benefits regarding fenceline air quality monitoring, the Bay Trail, and \$2 million in funding for Greenprint, provided that the Greenprint funds will be paid in three equal installments beginning on July 1, 2010;
5. In addition to its liability under the current UUT and Business Licence Tax, Chevron will make the following payments for the next 15 years, with no CPI. These payments total \$114 million in new revenue over the next 15 years.
 - a. In each of the first two years beginning in FY 2011-2012, Chevron will pay the City \$10 in new revenue. These payments are in addition to the \$5 million Chevron agreed to pay the City in each of the next two years under a previous settlement regarding UUT tax liability.
 - b. In each of years 3-5, Chevron will pay the City an additional \$13 million.
 - c. In each of the years 6-10, Chevron will pay the City an additional \$7 million.
 - d. In each of the years 11-15, Chevron will pay an additional \$4 million;
6. In the event a new tax measure is enacted by voters in the during the term of this proposed agreement that would otherwise increase Chevron's tax liability, Chevron will continue to be obligated to pay the amounts set forth above, but will not be required to pay any additional amounts that would be due under the new tax;
7. In the event that force of nature substantially destroys the Chevron refinery, the agreement would terminate; and
8. If the Chevron refinery were sold, either side would have the ability to terminate the agreement.

FINANCIAL IMPACT OF RECOMMENDATION:

Financial impacts may be summarized as follows:

- The City receives annual settlement payments for fifteen years in an aggregate amount of \$114 million beginning in July 2010. The settlement payment cash flows are attached to this report.

- The City receives benefits that were formerly included in the Community Benefits Agreement related to construction of the Bay Trail (valued by Chevron at \$5 million), Chevron fence-line air quality monitoring (valued by Chevron at \$1 million), and the Greenprint transportation element (\$2 million to be received in three equal annual installments beginning in July 2010).
- Chevron will waive its claim to receive interest from Richmond on Measure T taxes refunded pursuant to the court judgment in an amount of approximately \$1.2 million.

DISCUSSION:

The proposed settlement agreement addresses a number of issues. Each of these issues is discussed below.

Measure T Litigation

Richmond imposes a business license tax on all persons engaged in businesses in the City. Before January 1, 2009, the tax was based on the number of persons employed by a business. On November 4, 2008, Richmond voters adopted Measure T, to amend the license tax on manufacturers. Measure T requires manufacturers to pay an annual license fee of the greater of: (1) the license fee which would apply to such person if such person were subject to the City's general business license tax or (2) a fee equal to one-fourth of one percent (0.250%) of the value of materials used in the manufacturing process.

In 2009, Chevron paid the tax due under Measure T, but sued to invalidate the measure and obtain a refund of its Measure T payment. Chevron claimed that Measure T violated the Commerce Clause of the United States Constitution, and a number of other federal and state laws.

On December 16, 2009, the trial court issued a decision invalidating Measure T. The court concluded that Measure T violated the Commerce Clause and is preempted by California's sales and use tax law.

After the trial court ruling, the City refunded Chevron its tax payments under Measure T, to limit to \$1.2 million the amount of "pre-judgment interest" it would be required to pay as a result of the trial court decision unless reversed on appeal. The City has appealed the trial court judgment. It is likely that any court of appeal decision would not be issued for at least a year, and would not resolve all of Chevron's challenges to Measure T.

Under the settlement agreement, the City would dismiss this appeal.

The Utility User's Tax Issues

Under the City's current Utility Users' Tax (UUT) Ordinance, users of utility services pay a tax based on the use of those services. The UUT Ordinance, however, permits a user to choose to pay an alternate amount of utility user tax that is not based on the amount of utility services actually used. This alternative tax amount is known as "the cap."

After Chevron did not elect to pay under the cap for tax years beginning July 1, 2006 and July 1, 2007, the City conducted an audit which indicated that the tax imposed on Chevron's actual use of utility services was substantially greater than it would have paid under the Maximum Tax Payable provisions. The City and Chevron settled this dispute for a total of \$28 million. Under the settlement agreement, Chevron has two more settlement payments in the amount of \$5 million in each of the next two fiscal years, for a total of \$10 million.

In May 2009, the City Council voted to submit a proposed amendment to the UUT to the voters at the November 2010 election. Under the proposed amendment, all users would pay the UUT tax based on actual use. In addition, the proposed amendment is intended to ensure that the tax covers all gas which is used or consumed to produce energy or for any other purpose.

In recent weeks, an initiative petition supported by Chevron has been circulated within the City in order to qualify it for the ballot. The proposed ballot measure would provide for a modified "cap," would make clear that some oil refinery uses of gas would not be subject to the UUT, would reduce the UTT rate for individuals by 50 percent, and would exempt from the UUT seniors and certain low income households. Chevron representative have informed the City that the petition will have sufficient signatures to qualify for the November 2010 ballot. Were this measure to pass and obtain more votes than the City Council's measure proposed ballot measure, it would prevail over the City Council measure and become law.

Under the proposed settlement, the City would withdraw its proposed measure (which is a separate item on the agenda), and the initiative petition would not be submitted.

Community Benefit Agreement

In connection with the City's land use approval for the Chevron Energy and Hydrogen Renewal Project, the City and Chevron negotiated a Community Benefits Agreement (CBA). Chevron made payments in 2009 of \$5,565,000 under the CBA. The CBA has a provision stating in relevant part that "[i]n the event that a court sets aside the City's approval of the Renewal Project for any reason except as a result of a challenge by CHEVRON, this Agreement shall terminate and be null and void and CHEVRON shall have funding obligations hereunder. . . ." (CBA, § 2.K.)

After the City certified the Environmental Impact Report (EIR) and issued the land use approvals for the Renewal Project in 2008, environmental groups filed a lawsuit challenging the EIR and approvals. On, July 1, 2009, the trial court entered judgment invalidating the EIR and land use approvals on a number of grounds. On April 26, 2010, the court of appeal affirmed the trial court decision invalidating the EIR and land used decisions.

After the trial court decision, Chevron asserted that, under the termination provision quoted above, the CBA was no longer valid, and it had no further obligation under the CBA. The City disagreed, arguing that, at a minimum, Chevron had a duty to provide those benefits that became due prior to the trial court decision. These benefits include providing an easement for the Bay Trail, installing ground level air quality data monitoring and collection devices, and paying the City \$2 million for the transportation element of Greenprint to reduce greenhouse gas emissions.

Under the CBA, in the event of a dispute, the parties must submit the dispute to mediation (CBA, § 3.Q). The City has demanded mediation of this dispute, but the selection of a mediator has not yet occurred.

As part of the proposed settlement, Chevron has agreed to provide the Bay Trail easement, ground level air quality data monitoring and collection devices, and \$2 million Greenprint payment which are to be made in equal parts in each of the next three years.