

RAILROAD COMMISSION OF TEXAS
HEARINGS DIVISION

SMRD DOCKET No. C15-0015-SC-42-E
DOS REPÚBLICAS COAL PARTNERSHIP
APPLICATION FOR ACCEPTANCE OF AMENDMENT
No. 4 TO LETTER OF CREDIT
FOR PERMIT No. 42B, EAGLE PASS MINE, MAVERICK COUNTY, TEXAS

ORDER ACCEPTING AMENDMENT NO. 4 TO LETTER OF CREDIT

Statement of the Case

The Railroad Commission of Texas received an application by Dos Repúblicas Coal Partnership (DRCP) for acceptance of an amendment (Amendment No. 4) to its currently accepted letter of credit No. SB270572 issued by Sterling Bank in the amount of \$10,478,632, accepted by Commission Order dated September 16, 2014 in Docket No. C14-0019-SC-42-D. In that docket, Amendment No. 3 provided that Comerica Bank is the successor by merger to Sterling Bank, extended the letter of credit to October 4, 2015, and provided that the letter of credit is now Comerica Bank LOC SB270572. DRCP now requests acceptance of Amendment No. 4 in the same amount in order to provide a new expiration date of October 4, 2016. The permit is also bonded with an additional bond in the amount of \$10,000,000, a collateral bond with Letter of Credit No. SC 8030 by Amegy Bank that will not expire until the bonded areas are fully released. The two currently accepted bonds provide the required bonding for the Eagle Pass Mine in Maverick County, Texas. The application is made pursuant to the Texas Surface Coal Mining and Reclamation Act, TEX. NAT. RES. CODE ANN. Ch. 134 (Vernon Supp. 2015) and the Coal Mining Regulations, TEX. ADMIN. CODE Ch. 12 (Thomson West 2015).

DRCP and Comerica Bank submitted the documentation required for approval of the amendment to the letter of credit. The Commission finds that the amendment to LOC SB270572 (Amendment No. 4) and the documentation submitted meet requirements of the Act and Regulations for

acceptance.

The Commission determines that Amendment No. 4 to Comerica Bank Letter of Credit No. SB270572 is accepted as security for the collateral bond and with the separate collateral bond and Amegy Bank LOC No. SC 8030 will provide the required bonding in a sufficient amount as extended through October 4, 2016 for Permit No. 42B.

FINDINGS OF FACT

Based upon the evidence in the record, the Commission makes the following Findings of Fact:

1. The currently accepted bonds for Dos Repúblicas Coal Partnership's (DRCP) Permit No. 42B, Eagle Pass Mine, are made up of a collateral bond and amended letter of credit (LOC) No. SB270572 (Amendment No. 3) by Comerica Bank in the amount of \$10,478,632, as extended through October 4, 2015, and an additional bond, a collateral bond with letter of credit No. SC 8030 issued by Amegy Bank, N.A. (Amegy Bank) in the amount of \$10,000,000 for total bonding for the permit area in the amount of \$20,478,632.
2. By cover letter dated July 3, 2015, DRCP filed its amendment No. 4 to the LOC; the letter was signed by Armando Sañudo Trueba, who is authorized to act on behalf of DRCP. DRCP requests acceptance of Amendment No. 4 to Comerica Bank's Letter of Credit No. SB270572. The amendment to the LOC also includes previous language providing that Comerica Bank is the successor to Sterling Bank by result of a merger with Comerica Bank, provides that Sterling Bank's LOC No. SB270572 is now Comerica Bank's LOC SB270572, and provides that the

expiration date is extended to October 4, 2016. DRCP previously filed proof in Docket No. C14-0019-SC-42-D that Comerica Bank and Sterling Bank merged in the form of a certified copy of articles of merger. Evidence is included in the record that Comerica Bank is authorized to do business in the United States, as required by § 12.309(g)(1) of the Regulations for the issuer of an acceptable LOC. Comerica Bank is a bank organized in Texas; DRCP filed a certified copy of articles of merger of Sterling Bank into Comerica Bank, Charter No. 3187-26, merged July 28, 2011 issued by the Texas Department of Banking. The copy was certified on August 13, 2014. According to the Texas Department of Banking, the branch included on Amendment No. 4 is an active bank of Comerica Bank. All evidence pertinent to the acceptance of the amendment to the LOC has been filed in this docket or is available to the Commission.

3. Neither the amounts of the collateral bonds nor the amounts of the LOCs issued by Comerica Bank and Amegy Bank are proposed to change. The latest approved reclamation cost estimate (\$19,154,001) for the mine was approved administratively in Revision No. 2 by letter dated December 5, 2014 from the Director of the Surface Mining and Reclamation Division and filed in this docket. This amount is less than the aggregate \$20,478,632 bond amount (a collateral bond of \$10,478,632 by Comerica Bank and a \$10,000,000 collateral bond with Standby Letter of Credit No. SC 8030 by Amegy Bank) currently accepted by the Commission and is also an amount less than the Amegy Bank LOC with Amendment No. 4 to the Comerica LOC.

4. By memorandum dated July 17, 2015, legal staff of the Office of General Counsel reviewed the proffered amendment to the letter of credit and related documents, and Staff filed this review by

letter dated July 21, 2015. Staff review indicated that the amendment meets the requirements of the Commission. After review by the Hearings Division, additional clarifying documentation was requested relating to the current operator of the mine and the individual who signed the cover letter transmitting the amendment. The position of the individual had not been identified. DRCP provided documentation to clarify these matters by letter dated July 29, 2015, and Staff filed a letter dated July 29, 2015 with an attached copy of the form SMRD-1C (approved in Revision No. 5 by letter dated May 29, 2015) setting out the names of persons authorized to act on behalf of the applicant. All items requiring documentation have now been addressed. Based on the Staff-estimated reclamation costs, the evidence submitted, Amendment No. 4 to the LOC, along with the accepted bond and LOC No. SC8030 by Amegy Bank, and Staff review, the two currently accepted bonds and LOC as amended will ensure bonding in an amount sufficient to reclaim the permit area should a third party be required to reclaim the permit area at the direction of the Commission.

5. Two Comerica Bank officers signed the proffered amendment to the LOC, Laura T. Jordan, Assistant Vice President, and Elizabeth Williams, Assistant Vice President, who are authorized to sign the document on behalf of the Bank. In its letter dated July 3, 2015, DRCP included original Bank corporate authorizations and proofs of incumbency of both Ms. Jordan and Ms. Williams documenting their positions and authority. Each authorization was certified by the Assistant Secretary of the Bank on July 3, 2015, the date of the signed amendment to the LOC. Specimen signatures were included with the authorizations that match the signatures on the amendment to the LOC. Exhibit B, attached to each corporate authorization and incumbency

certificate, is a copy of a certified resolution of the Bank indicating in paragraph 2(d) that any officer of the Bank is authorized to sign letters of credit on behalf of the Bank. Paragraph 13 of the exhibit also provides that any Assistant Secretary may sign certifications of resolutions and certificates of incumbency.

6. The proffered original Amendment No. 4 to the LOC was submitted by letter dated July 3, 2015, received by the Commission on July 7, 2015. This is in accordance with the Commission Order dated September 16, 2014 in Docket No. C14-0019-SC-42-D providing that DRCP provide an extension to the letter of credit or a replacement bond on or before July 3, 2015 to ensure continued sufficiency of the collateral. July 3, 2015 was not a Commission business day; the amendment was filed on the next business day, July 7, 2015 and is timely.
7. The proffered amendment extends the expiration date of the LOC to October 4, 2016. The additional Amegy LOC accepted for the permit states on its face that it will not expire until the Commission provides a letter stating that all obligations have been completed. With acceptance of Amendment No. 4 and considering the term of the Amegy LOC, bonding will be provided through October 4, 2016 in a sufficient amount, unless revised activities are proposed and required to be bonded in an additional amount, or reclamation costs increase in excess of the bonded amount.
8. An ordering paragraph is included in this Order to ensure timely replacement of the collateral as set out in subparagraph (b) of this Finding of Fact.

- (a). The Regulations at § 12.309(a) require that the collateral bond itself must be in effect for the duration of the reclamation obligations on the affected lands; however, for the letter of credit collateral, the letter must be irrevocable during its term [§ 12.309(g)(2)]. No specific term is prescribed for an LOC by the Regulations, other than that it be irrevocable during its term. At § 12.309(g)(2), the Regulations further provide that an LOC used as security in areas requiring continuous bond coverage shall be forfeited and collected by the Commission if not replaced by another suitable bond or LOC at least 30 days before its expiration date. Both of the accepted LOCs and the proffered LOC are irrevocable during their terms. Because the proffered amendment to the LOC carries a term expiring October 4, 2016, it is necessary that the amendment be replaced or extended at least 30 days before its expiration date of October 4, 2016.
- (b). In order to maintain required bonding in a timely manner, the Commission finds that it is reasonable to require that DRCP file any replacement bond and required collateral in a manner that will allow adequate time for review and determination by the Commission. The Commission finds that for orderly processing, review by Staff, and determination by the Commission of replacement bond instruments for the permit area to ensure reclamation, it is appropriate that the Commission retain the approved requirement that DRCP file an extension to the amendment to the LOC issued by Comerica Bank or otherwise request the initiation of processing materials to replace the bond instruments and collateral on a date sufficient so that there will be at least 90 days for review and

adjustment of documents prior to the date the Commission must initiate forfeiture proceedings (at least 30 days prior to the expiration date of October 4, 2016). An extension of the expiration date in 2016 or a replacement bond must be submitted on or before July 3, 2015, approximately 90 days prior to the expiration date. (October 4, 2015 falls on a Sunday, not a Commission business day. The last date prior to October 4, 2015 on which the Commission could act would be Friday, October 2, 2015 prior to Sunday, October 4, 2015. The 90 day period for submittal of documents from Friday, October 2, 2015 back would be Saturday, July 4, 2015, a date on which documents cannot be filed; therefore, the 90-day period has been calculated beginning on Friday, July 3, 2015). The 30-day period by which forfeiture proceedings must begin if an extended or replacement bond has not been filed is Wednesday, September 2, 2015 (calculated as 30 days prior to Friday, October 2, 2015, which is Wednesday, September 2, 2015). Requiring DRCP to file an extension to the letter of credit on or before Wednesday, July 6, 2016 should ensure that an extension or replacement is filed and processed for Commission acceptance prior to the expiration date of the LOC.

9. The amended LOC meets the three conditions set out in § 12.309(g). The letter was issued by a bank organized or authorized to do business in the United States [§ 12.309(g)(1)]. The letter is irrevocable during its term [§ 12.309(g)(2)]. The letter is payable to the Commission in part or in full upon demand and receipt of a notice of forfeiture issued in accordance with § 12.314-.317 of the Regulations [§ 12.309(g)(3)].

10. The Commission may adjust the amount of the performance bond applicable to the permit when the cost of reclamation changes [§ 12.307(a)].
11. Bond coverage has been continuous and, with acceptance of the proffered amendment to the LOC, will continue uninterrupted. The amendment will continue to provide collateral for reclamation until its expiration date. The approved Amegy letter of credit renews automatically from year to year and will remain in effect until all reclamation is completed and the principal has been released from liability, or until the bond is increased, decreased, or replaced.
12. The bond provides a mechanism for the permittee to give prompt notice to the Commission in compliance with § 12.309(e) of the Regulations of any notice received or action filed alleging the insolvency or bankruptcy of the bank or which could result in suspension or revocation of the bank's authority to do business. Comerica Bank is subject to the notice provision.
13. DRCP has submitted information that addresses all requirements set out in the Act and Regulations for the amendment to the LOC.
14. DRCP, a Texas general partnership, through its general partners Eagle Pass Coal Corporation and Maverick County Coal Corporation, both Texas corporations, has complied with payment of corporate franchise taxes, as required by TAX CODE §§ 171.001 and 171.251 (Vernon Supp. 2015), and are reflected as active corporations by the Texas Secretary of State.

15. Open meeting notice of Commission consideration of this matter has been provided in accordance with the Administrative Procedure Act, GOV'T CODE § 551.041, and written notice of the order required by the APA has been provided, as required by GOV'T CODE § 2001.051. The Commission also provided notice to Amegy Bank.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the following Conclusions of Law are made:

1. All required notice for consideration of this matter has been provided.
2. The approved reclamation cost estimate is sufficient to demonstrate the adequacy of the currently-accepted performance bonds.
3. In accordance with § 12.309(g)(2), DRCP has provided a timely amendment to the LOC. The amendment meets all requirements of the Act and Regulations for acceptance. The Commission may accept the proffered amendment to the LOC.
4. Pursuant to TEX. BUS. & COMM. CODE Art. 1, Ch. 5, § 5.106(a), a letter of credit is enforceable according to its terms against the issuer (Comerica Bank) for money payment when it is sent to the beneficiary (Commission). Pursuant to TEX. BUS. & COMM. CODE Art. 1, Ch. 5, §§ 5.103(d) and 5.108(f), the issuer of a letter of credit is not responsible for the performance or nonperformance of the underlying contract (DRCP's reclamation performance). The bond is an agreement between the permittee and the Commission, and the letter of credit is independent of

the underlying obligation between the permittee and the Commission under Texas law. The Bank's obligation is through the LOC, should DRCP fail to meet its obligations to reclaim disturbed areas within the permit area or to provide funds for reclamation.

5. The existing collateral bond in the amount of \$10,478,632 and the proffered amendment to the LOC by Comerica Bank, along with the accepted collateral bond and LOC issued by Amegy Bank in the amount of \$10,000,000 that will remain in place, are in a total amount of \$20,478,632 and are sufficient to cover the costs of reclamation of the permit area should the Commission direct a third party to reclaim the permit area in the event of forfeiture.
6. Commission Regulation § 12.309(e)(1), "Bonding bank and surety company requirements," states that the bond shall provide a mechanism for a bond or surety company to give prompt notice to the Commission and the permittee of any action filed alleging the insolvency or bankruptcy of the surety company or the bank or alleging any violation which would result in the suspension or revocation of the surety or bank's charter or license to do business. The permittee has signed the approved collateral bond that contains this language. The collateral on the bond is the responsibility of Comerica Bank as the surviving bank in its merger with Sterling Bank, and it has executed an amendment specifying that Sterling Bank's LOC No. SB270572 is now Comerica Bank's LOC No. SB270572.
7. Pursuant to TEX. BUS. & COMM. CODE, Art. 1, § 5.106(a), the proffered amended LOC is enforceable between the issuer and beneficiary (Commission) according to its terms, including

the expiration date of October 4, 2016. In accordance with the authority of the Commission in § 134.011(4) of the Act to issue orders requiring that a permittee take actions necessary to comply with the Act and Regulations, the Commission may make reasonable provisions to ensure that replacement bonds are submitted in a timely manner. DRCP must provide an extension to Comerica Bank LOC No. SB270572 or a replacement bond on or before July 6, 2016 to provide the Commission with sufficient time for review and action to ensure that appropriate bonding is maintained.

8. All requirements of the Act and the Regulations have been met for acceptance of the amendment to Comerica Bank LOC No. SB270572. The Commission may accept the amendment.

THEREFORE IT IS ORDERED that the above Findings of Fact and Conclusions of Law are adopted;

IT IS FURTHER ORDERED that the existing collateral bond and the proffered Amendment No. 4 to LOC No. SB270572 in the amount of \$10,478,632, and the collateral bond and Amegy Bank LOC No. SC 8030 in the amount of \$10,000,000, are together sufficient to cover the costs of reclamation;

IT IS FURTHER ORDERED that Amendment No. 4 to LOC No. SB270572 in the amount of \$10,478,632 is accepted;

IT IS FURTHER ORDERED that DRCP shall file an extension to the amended Comerica Bank

LOC No. SB270572 or a replacement bond in a sufficient amount on or before July 6, 2015;

IT IS FURTHER ORDERED that the Commission may vary the total bond amount and the terms of acceptance from time to time as affected land acreages are increased or decreased or where the cost of reclamation changes; and

IT IS FURTHER ORDERED by the Commission that this order shall not be final and effective until 20 days after a party is notified of the Commission's order. A party is presumed to have been notified of the Commission's order three days after the date on which the notice is mailed. If a timely motion for rehearing is filed by any party of interest, this order shall not become final and effective until such motion is overruled, or if such motion is granted, this order shall be subject to further action by the Commission. As authorized by TEX. GOV'T CODE § 2001.146(e), the time allotted for Commission action on a motion for rehearing in this case prior to its being overruled by operation of law, is hereby extended until 90 days from the date the parties are notified of the order.

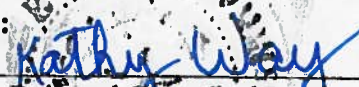
SIGNED IN AUSTIN, TEXAS, this 25th day of August, 2015.

RAILROAD COMMISSION OF TEXAS


CHAIRMAN DAVID PORTER


COMMISSIONER CHRISTI CRADDICK


COMMISSIONER RYAN SITTON

ATTEST: 
Secretary, Railroad Commission of Texas

