

**RAILROAD COMMISSION OF TEXAS
HEARINGS DIVISION**

**DOCKET NO. C18-0008-SC-38-E, TEXAS MUNICIPAL POWER AGENCY
APPLICATION FOR ACCEPTANCE OF SELF-BOND AND REPLACEMENT COLLATERAL BOND AND LETTER OF
CREDIT NO. IS0479755U, PERMIT NO. 38D, GIBBONS CREEK LIGNITE MINE V, GRIMES COUNTY, TEXAS**

**ORDER ACCEPTING REPLACEMENT SELF-BOND AND COLLATERAL BOND
AND LETTER OF CREDIT FOR PERMIT NO. 38D**

Statement of the Case

The Texas Municipal Power Agency (TMPA) operates the Gibbons Creek Lignite Mine V in Grimes County, Texas under Permit No. 38D. TMPA has filed an application for acceptance of a replacement self-bond in the amount of \$8,900,000 to replace the currently accepted self-bond in the amount of \$7,450,000 and a replacement collateral bond and irrevocable Letter of Credit (LOC) No. IS000026218U in the amount of \$9,600,000 issued by Wells Fargo Bank, N.A. to replace the currently accepted collateral bond and LOC No. IS07479755U in the amount of \$10,850,000 issued by Wells Fargo Bank, N.A. The accepted letter of credit carries an expiration date of April 9, 2018. The proffered letter of credit becomes effective in the reduced amount on April 9, 2018 and expires April 9, 2019. The application is made pursuant to the Texas Surface Coal Mining and Reclamation Act, TEX. NAT. RES. CODE ANN. Ch. 134 (Vernon Supp. 2017) and the "Coal Mining Regulations," TEX. ADMIN. CODE Ch. 12 (Thomson West 2017).

The total amount of self-bond and collateral bond with LOC Amendment currently accepted for the permit is \$18,300,000; TMPA proposed replacing this amount by the proffered self-bond and collateral bond with LOC in a total amount of \$18,500,000. Based upon the application for acceptance of the replacement bonds, associated documents, and legal and financial reviews, the Commission finds that the proffered self-bond and the collateral bond with LOC may be accepted in accordance with the terms of this Order and that the self-bond may replace the currently accepted self-bond and the proffered collateral bond and LOC may replace the currently accepted collateral bond and LOC.

FINDINGS OF FACT

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

1. Texas Municipal Power Agency (TMPA) is a municipal power agency created by concurrent

ordinances adopted by the Cities of Bryan, Denton, Garland, and Greenville, Texas in 1975. TMPA holds Permit Nos 26D and 38D. By letter dated January 9, 2018, TMPA timely submitted replacement bonds for the permits. In this docket for Permit No. 38D, TMPA timely submitted a replacement self-bond in the amount of \$8,900,000 to replace the currently accepted self-bond in the amount of \$7,450,000 and a replacement collateral bond and irrevocable Letter of Credit (LOC) No. IS0479755U in the amount of \$9,600,000 issued by Wells Fargo Bank, N.A. (Bank or "Wells Fargo") to replace the collateral bond and LOC No. IS07479755U in the amount of \$10,850,000 issued by Wells Fargo. The currently accepted bonds were accepted for performance bonding of TMPA's Permit No. 38D, Gibbons Creek Lignite Mine V through April 9, 2018. The proffered collateral bond carries an effective date of April 9, 2018 and expires April 9, 2019. TMPA initially filed the bonds and related documentation relating to the bonds and LOC by letter dated 9, 2018. The permit area is currently in reclamation.

2. By letter dated February 12, 2018, the Surface Mining and Reclamation Division (SMRD or Staff) filed the replacement self-bond and collateral bond and LOC with the Hearings Division, along with other review documents and bonds for Permit No. 26D. TMPA later supplemented the application with unaudited financial information for its first quarter ending December 31, 2017.
3. Staff calculated reclamation costs for Permit 38D as \$17,934,635 (Revision No. 35 approved February 7, 2017). TMPA did not submit an updated reclamation cost estimate. Staff indicates no changes that require updated costs. The total amount of the self-bond and proffered collateral bond and LOC, \$18,500,000, exceeds Staff's estimate of reclamation costs, \$17,934,635. Staff's estimate of reclamation costs is accepted as the amount required to ensure sufficient bonding of the permit area of Permit No. 38D.
4. The legal review performed by the Office of General Counsel dated February 9, 2018 and filed with the Hearings Division with Staff's filing dated February 18, 2018, along with other materials filed, indicates that all legal requirements are met for the proffered self-bond, collateral bond, and LOC. TMPA requests acceptance of the replacement self-bond and the collateral bond and LOC. The proffered LOC, effective January 9, 2018, carries a provision indicating that the LOC cannot be presented for payment prior to April 9, 2018 (the currently accepted LOC expires on April 9, 2018) and that the LOC expires on April 9, 2019. The proffered self-bond

amount, \$8,900,000, in effect upon the Commission's acceptance, when added to the amount of the proffered collateral bond and LOC when it becomes payable on April 9, 2018 will total \$18,500,000, an amount that exceeds the estimated costs of reclamation set out in Finding of Fact No. 3.

5. Based on the Findings of Fact, the Commission finds that the amount of the proffered replacement self-bond and the proffered replacement collateral bond and LOC will be 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. If the approved reclamation plan is modified, the Commission will review the bond and amendment to the LOC for adequacy and, if necessary, will initiate a bond adjustment to conform to the modified plan [§12.307(c)].
7. The proffered self-bond, collateral bond, and LOC are in forms acceptable under §12.309 of the Regulations and §134.121 of the Act.
8. The Commission may accept a self-bond for a business or governmental entity when the conditions set out in §12.309(j)(2) are met. The self-bond meets requirements for acceptance of a self-bond from a business or governmental entity.
 - (a). The regulation requires that the applicant must designate a suitable agent to receive service of process in the state. Bob Kahn, TMPA's General Manager, is TMPA's agent for service of process, and he also signed the self-bond for TMPA. Documents that show the authorization for Mr. Kahn to act on behalf of TMPA have been filed with the Commission. TMPA filed a General Certificate providing a copy of the Rules and Regulations of Texas Municipal Power Agency that includes Article IV, Section 7, that provides that the General Manager is authorized to execute reclamation bonds as well as other related documents (Exhibit 1) and an updated certificate of incumbency (Exhibit 2) showing that Mr. Kahn held the position of General Manager on the date he signed the bond (January 8, 2018) (Exhibits 4 and 5) (Exhibit numbers refer to the Bond Package filed by TMPA, as supplemented). Mr. Kahn was duly authorized to sign the

self-bond.

- (b). TMPA has been in continuous operation for a period of not less than five years immediately preceding the date of application and has not been in bankruptcy proceedings during that time (Exhibit 1).
- (c). TMPA has submitted financial information in sufficient detail to show that TMPA meets one of the criteria for acceptance of self-bonding listed in §12.309(j)(2)(C). Meeting at least one of the criteria is a prerequisite for approval of self-bonding, in addition to meeting the requirement addressed in subsection (d) of this Finding of Fact (tangible net worth requirement). TMPA meets the requirement set out in §12.309(j)(2)(C)(i): Staff financial review indicates that TMPA has a current rating for its most recent bond issuance of A or higher by Moody's Investor Service or Standard and Poor's Corporation. TMPA's rating by Moody's Investor Service is "A2" and by Standard and Poor's is "A+" (financial review and Exhibit 1).
- (d). Financial staff has reviewed TMPA's audited financial statements for TMPA's fiscal year ending September 30, 2017. Based on the review, TMPA meets the requirement of Regulation §12.309(j)(4)(A) that its existing and proposed self-bonds must not total more than 25% of its tangible net worth. TMPA has no existing or proposed self-bonds other than the currently accepted bond and the proposed replacement self-bond proposed in this application. The amount of the proposed self-bond, is 20.2% of TMPA's tangible net worth in the United States, \$44,045,000, based on the September 30, 2017 audited financial statement (first attachment to financial review memorandum dated February 9, 2018 and pp. 6-7, and 22 from audited report for TMPA) and the OGC staff attorney review (p 17, Memorandum dated February 9, 2018). Pursuant to §12.309(j), TMPA is required to submit the next audited annual report no later than 90 days after the close of the fiscal year ending September 30, 2018. TMPA has submitted the unaudited financial statement for the quarter ending December 31, 2017.

- 9. The terms of the proffered LOC provide that it is irrevocable during its term as required by §12.309(g)(2) of the Regulations.

10. The collateral bond was signed January 8, 2018. Authorized persons for TMPA and for the issuing Bank signed the proffered collateral bond (Exhibit 4), and an authorized person for the Bank signed the proffered LOC. An officer of the Bank who is authorized to execute bonds on behalf of the Bank, Patrick Hennessey, Senior Vice President, signed the collateral bond. Bob Kahn, General Manager, TMPA, signed the collateral bond for TMPA. Brian T. McConnell, Vice President, Bank, signed the LOC (Exhibit 11 of Bond Package). Documents that show the authorization for the signatories to act on behalf of TMPA and the Bank on the date of signature have been filed with the Commission. For TMPA, these are the Certificate of Incumbency (with specimen signature) dated January 8, 2018 certifying that Mr. Bob Kahn held the office of General Manager on the date of signature (Exhibit 2), and in Exhibit 1, a general certificate with attached Exhibit A, Certified Copy of Agency Rules and Regulations. Section 7 of attached Exhibit A, Article IV, states the powers of the General Manager, such powers including the authority to execute reclamation bonds and to execute agreements associated with the collateral supporting reclamation bonds, including letters of credit and reimbursement agreements. Documents that show the authorization for signatories to act on behalf of the Bank include: Wells Fargo Bank's Secretary's Certificate dated January 8, 2018 showing that Patrick A. Hennessey on January 8, 2018 held the office of Senior Vice President of the Bank and was a signing officer of the Bank. According to this certificate, as evidenced by an extract from resolutions adopted by the Board of Directors of the Bank, a signing officer may execute agreements, instruments, or other documents relating to the property or business and affairs of the bank in accordance with paragraph C.1. but excluding letters of credit. Exhibit 10, the LOC, was accompanied by a secretary's certificate that in Section 2 indicated that persons named in Exhibit A attached to the certificate are duly appointed and acting officers and were authorized to sign letters of credit in any amount issued by the banking association and that such authority was in full force and effect on January 8, 2018. The signing officer of the LOC, Brian T. O'Connell, Vice President, is on the authorized signatory list (Exhibit A). Submitted documentation in the form of a Certificate of Corporate Existence from the Comptroller of the Currency, Administrator of National Banks, dated December 5, 2017, demonstrates that Wells Fargo Bank, N.A., is a bank authorized to do business in the United States (Exhibit 9, Bond Package). This meets the requirement of §12.309(g)(1) of the Regulations that the issuer of an acceptable LOC must be a bank authorized to do business in Texas. The replacement

collateral bond and LOC are in forms acceptable pursuant to §12.308(a)(2), §12.309(g) and §12.309(h) of the Regulations and §134.121(a) of the Act, and authorized persons have signed the documents.

11. TMPA's request for acceptance of the self-bond and proffered replacement collateral bond and LOC is made pursuant to §134.127 of the Act and §12.307 of the Regulations.
12. The proffered LOC is payable to the Commission as required by §12.309(g)(3) of the Regulations in part or in full on presentation to the bank of a draft drawn on the Bank at sight mentioning Letter of Credit No. IS00026218U at its office at Wells Fargo Bank, N.A., Standby Letter of Credit Department, 794 Davis Street, 2nd Floor, San Leandro, California on or before the expiry. The draft must be accompanied by the irrevocable standby letter of credit or a copy, and the Commission's signed and dated statement reading: "The undersigned, an authorized representative of the Railroad Commission of Texas hereby certifies that the amount drawn is due to us pursuant to the terms of 16 TAC Sec. 12.314." The Regulations, §12.314 provide for Commission forfeiture proceedings on bonds.
13. The proffered collateral bond will remain in effect until all reclamation requirements are met or the bond is replaced, and the LOC will remain in effect according to its terms, unless released or replaced by Commission Order. The proffered letter of credit carries an expiration date of April 9, 2019. The proposed collateral bond, upon acceptance by the Commission in accordance with this Order, will remain in effect until released or replaced by the Commission. The LOC is effective and enforceable against the issuer when the Commission received the LOC and is effective and enforceable against the issuer in the named amount in accordance with the terms of the LOC, and will remain effective, unless released or replaced, through its expiration date, April 9, 2019.
14. The replacement collateral bond provides a mechanism for the permittee to give prompt notice to the Commission 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, in compliance with §12.309(e) of the Regulations.

15. The Commission may adjust the amount of the required performance bond applicable to the permit area when the cost of reclamation changes [§12.307(a)]. Required bonds amounts may be reduced or increased when the cost of reclamation changes.
16. Although the LOC carries a term of approximately one year, the collateral for the bond is sufficient. This Order contains an ordering paragraph that is needed to ensure timely replacement of the collateral as set out in subparagraph (b) of this Finding of Fact.
 - (a). The Regulations at §12.306(a) require that the collateral bond itself must be in effect for the duration of the reclamation obligations on the affected lands; however, for letters of credit, the letter must be irrevocable during its term [§12.309(g)(2)]. No stated term is prescribed for the letter of credit by the Regulations, other than that it be irrevocable during its term.
 - (b). The proffered LOC is payable to the Commission as required by §12.309(g)(3) of the Regulations in part or in full on demand and receipt from the Commission of a notice of forfeiture pursuant to the Regulations. Although the proffered LOC carries a term of approximately one year, the collateral for the bond is sufficient. The Commission has recognized that letters of credit have terms that are shorter than the period of reclamation liability on the bond. According to §12.309(g)(2), effective November 12, 2007, a letter of credit used as security in areas requiring continuous bond coverage shall be forfeited and shall be collected by the Commission if not replaced by another suitable bond or letter of credit at least 30 days before its expiration date. In this case, replacement bond materials (including a specimen collateral bond and LOC) were provided to SMRD at least 90 days prior to the expiration date as required by the Commission Order accepting the last amendment to the currently accepted collateral bond and amended LOC. The required original self-bond and the original replacement collateral bond and LOC were filed with SMRD on January 9, 2018; SMRD filed these original bonds with the Hearings Division on February 12, 2018, more than 30 days prior to the date by which forfeiture proceedings would occur if they were not filed (30 days prior to the expiration date of currently accepted LOCs, April 9, 2018). The proffered LOC is effective in amount according to its terms upon the expiration date

of the accepted collateral bond and LOC, April 9, 2018. A letter of credit is issued and becomes enforceable according to its terms when the issuer sends it to the beneficiary. The collateral bond and letter of credit dated January 8, 2018 received by the Commission on January 9, 2018 was issued and enforceable according to its terms when sent to the Commission. The proffered bonds and LOC were received in accordance with the previous Commission Order approving the current bonds.

- (c). Specific findings and ordering paragraphs are included in this Order to require the filing of replacement collateral with sufficient time for review and acceptance by the Commission prior to the expiration of existing collateral (the amended LOC). Due to the presence of a stated expiration date of the collateral and in order to maintain required bonding in a timely manner, the Commission finds that it is reasonable to require that TMPA file any replacement bond and collateral required as previously ordered in bond dockets 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 to require that TMPA file an extension, amendment to the LOC or otherwise request the initiation of processing materials to replace the bond instrument and collateral no later than Wednesday, January 9, 2019 (90 days prior to the expiration date, Tuesday, April 9, 2019) to provide for 60 days of review and adjustment of documents prior to the date the Commission must initiate forfeiture proceedings. The Commission must initiate bond forfeiture proceedings by Friday, March 8, 2019 if such documents are not submitted (approximately 30 days prior to expiration of the collateral, Tuesday, April 9, 2019). The Commission approves Wednesday, January 9, 2019 (90 days prior to Tuesday, April 9, 2019) for submittal of the bond instrument(s) and related documents

17. With letters of credit that contain a specified effective date, it is reasonable to provide an additional mechanism to ensure that bonds that reduce the amount of bonding or do not increase the amount of bonding in a sufficient amount based on the Commission's latest reclamation cost estimate are replaced, reviewed, and acted upon prior to or on the effective date of the change in amount of the letter of credit. The Commission approves the following

additional mechanism: If a bond application or application for replacement of bond is filed with the Commission containing a letter of credit as collateral that either reduces the amount of bond or does not increase the amount of bond in at least the amount of the latest reclamation cost estimate, and it has not been previously filed with the Hearings Division for docketing at least 30 days prior to the expiration date of the letter of credit whether all documents have been received or not, the Surface Mining and Reclamation Division shall send to the Hearings Division a request for a show cause hearing pursuant to §1.47 of the Commission's "Practice and Procedure" rules no later than 30 days prior to the expiration date of the currently approved letter of credit, along with all documents that have been filed or prepared relevant to the application. This mechanism will allow the Hearings Division to determine whether to immediately schedule a show cause hearing or a prehearing conference to determine appropriate steps to ensure timely approval of the bond or replacement bond or other security.

18. Acceptance of the proffered self-bond and collateral bond and LOC is not a bond release or a release of any reclamation obligations for which public notice would be required. The required public posting of Commission consideration of this application has occurred. The Staff, TMPA, and the Bank have been sent notice of the Commission's consideration of this matter.
19. All documentation required by the Act and Regulations for the proffered self-bond and collateral bond with LOC has been submitted.
20. No exceptions were filed to the proposed order. The docket has been posted for consideration by the Commission.

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 in accordance with the Act, Regulations, and the Open Meetings Act, TEX.GOV'T CODE Ch.551 (Vernon Supp. 2017).

2. The total amount of bond for Permit No. 38D is sufficient.
3. All requirements of the Act and the Regulations for acceptance of the proffered self-bond and collateral bond and LOC have been met.
4. The Commission is authorized by the Act and Regulations to accept the proffered self-bond and collateral bond with LOC.
5. A letter of credit may be accepted for a lesser term than the length of completion of reclamation as long as procedures are in place to ensure timely replacement of collateral [§12.309(g)(2)].
6. A branch of Wells Fargo, N.A. in San Leandro, California issued the proffered LOC. According to both California law [California Commercial Code (UCC) §5116(b)] and Texas law [Business and Commercial Code, Title 1, Uniform Commercial Code, Chapter 5, Letters of Credit, §5.116(b)], the branch of a bank is treated as a separate bank for purposes of applicable law: if the instrument does not specify the agreed upon forum, the applicable forum is the location of the issuing bank, in this case, California. Pursuant to both laws of the State of California [§5106(a), California Commercial Code] and of the State of Texas [TEX. BUS. & COMM. CODE §5.106(a)], the proffered LOC is enforceable between the issuer (Bank) and beneficiary (Commission) as an obligation of the Bank on the date sent to the beneficiary according to its terms.
7. In accordance with the authority of the Commission in §134.011(4) of the Act to issue orders requiring a permittee to take actions that are 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. A requirement that the permittee submit a replacement collateral bond and LOC (or amendment) or other replacement bond no later than January 9, 2019 is reasonable and will ensure that a replacement bond and replacement collateral will be submitted and processed in a timely manner so that required bonding may be maintained. [Finding of Fact No. 16(c)]. In addition, the Commission may make a reasonable provision to ensure that bonds containing letters of credit are acted upon promptly. Providing dates for the filing of bond documents and providing for a show cause hearing request by the Surface Mining

and Reclamation Division no later than 30 days prior to the expiration date of a currently effective letter of credit in accordance with Regulations will assist in orderly processing of letters of credit to ensure the maintenance of sufficient collateral for the bond.

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

IT IS FURTHER ORDERED that the Commission determines reclamation costs as \$17,934,635;

IT IS FURTHER ORDERED that the proffered self-bond, collateral bond, and irrevocable LOC No. IS000026218U issued by Wells Fargo Bank, N.A., that total \$18,500,000 will together provide reclamation bonding in a sufficient amount;

IT IS FURTHER ORDERED that the proffered self-bond in the amount of \$8,900,000 is hereby accepted and replaces the self-bond in the amount of \$7,450,000;

IT IS FURTHER ORDERED that the collateral bond and LOC No. IS000026218U in the amount of \$9,600,000 is hereby accepted on the date of this Commission Order, with the amount of the LOC effective on April 9, 2018, and the collateral bond and LOC No. IS0479755U in the amount of \$10,850,000 are hereby replaced as of April 9, 2018;

IT IS FURTHER ORDERED that the bonds and LOC must be retained by the Commission until replaced;

IT IS FURTHER ORDERED that the accepted self-bond in the amount of \$8,900,000 and the collateral bond with LOC No. IS000026218U in the amount of \$9,600,000 provide for continuation of sufficient bonding for the permit in a total amount of \$18,500,000 in accordance with this Order;

IT IS FURTHER ORDERED that TMPA must timely file a substitute bond or bonds and collateral or other replacement bond in accordance with Finding of Fact No. 16(c) of this Order, no later

than January 9, 2019;

IT IS FURTHER ORDERED that with letters of credit that contain a specified effective date, as the proffered LOC, the additional mechanism set out in Finding of Fact No. 17 shall be used to ensure that bonds that reduce the amount of bonding or do not increase the amount of bonding in a sufficient amount based on Staff's latest reclamation cost estimate are replaced, reviewed, and acted upon prior to or on the effective date of the change in amount of the letter of credit. If a bond application or application for replacement of bond is filed with the Commission containing a letter of credit as collateral that either reduces the amount of bond or does not increase the amount of bond in at least the amount of Staff's latest reclamation cost estimate, and it has not been previously filed with the Hearings Division for docketing at least 30 days prior to the expiration date of the letter of credit whether all documents have been received by the Commission or not, the Surface Mining and Reclamation Division shall send to the Hearings Division a request for a show cause hearing no later than 30 days prior to the expiration date of the currently approved letter of credit, along with all documents that have been filed or prepared relevant to the application. This mechanism will allow the Hearings Division to determine whether to immediately schedule a show cause hearing or a prehearing conference to determine appropriate steps to ensure timely approval of the bond or replacement bond or other security;

IT IS FURTHER ORDERED that the Commission may vary the total bond amount and the terms of acceptance 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 25 days after the Commission's order is signed, unless the time for filing a motion for rehearing has been extended under Tex. Gov't Code §2001.142, by agreement under Tex. Gov't Code §2001.147, or by written Commission Order issued pursuant to Tex. Gov't Code §2001.146(e). If a timely motion for rehearing of an application is filed by any party at 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. Pursuant to Tex. Gov't Code §2001.146(e), the time allotted for Commission action on a motion for rehearing in this case is 100 days from the date the Commission Order is signed.

SIGNED IN AUSTIN, TEXAS, on March 20, 2018.

RAILROAD COMMISSION OF TEXAS



Christi Craddick

CHAIRMAN CHRISTI CRADDICK

Ryan Sitton

COMMISSIONER RYAN SITTON

Wayne Christian

COMMISSIONER WAYNE CHRISTIAN

ATTEST:

Kathy Way

Secretary
Railroad Commission of Texas

