

**RAILROAD COMMISSION OF TEXAS  
HEARINGS DIVISION**

**DOCKET NO. C19-0012-SC-38-E, TEXAS MUNICIPAL POWER AGENCY  
APPLICATION FOR ACCEPTANCE OF REPLACEMENT SELF-BOND AND  
REPLACEMENT COLLATERAL BOND AND LETTER OF CREDIT NO. ISO00068491U  
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

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 \$3,300,000 to replace the currently accepted self-bond in the amount of \$8,900,000 and a replacement collateral bond and irrevocable Letter of Credit (LOC) No. IS000068491U in the amount of \$9,300,000 issued by Wells Fargo Bank, N.A. to replace the currently accepted collateral bond and LOC No. IS000026218U in the amount of \$9,600,000 issued by Wells Fargo Bank, N.A. The accepted letter of credit carries an expiration date of April 9, 2019. The proffered letter of credit becomes effective in the reduced amount on April 9, 2019 and expires June 9, 2020. The application is made pursuant to the Texas Surface Coal Mining and Reclamation Act, Tex. Nat. Res. Code Ann. Ch 134 (Vernon Supp. 2018) (Act) and the "Coal Mining Regulations," Tex. Admin. Code Ch. 12 (Thomson West 2018) (Regulations).

The total amount of self-bond and collateral bond with LOC Amendment currently accepted for the permit is \$18,500,000; TMPA proposed replacing this amount by the proffered self-bond and collateral bond with LOC in a total amount of \$12,600,000. 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 Railroad Commission of Texas (Commission) surface mining and reclamation Permit Nos. 26D and 38D. The permit areas are currently in reclamation. By letter dated January 9, 2019, 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 \$3,500,000 to replace the currently accepted self-bond in the amount of \$8,900,000 and a replacement collateral bond and irrevocable Letter of Credit (LOC) No. IS000068491U in the amount of \$9,300,000 issued by Wells Fargo Bank, N.A. (Bank or "Wells Fargo") to replace the

collateral bond and LOC No. IS000026218U in the amount of \$9,600,000 issued by Wells Fargo. The currently accepted LOC was accepted for performance bonding of TMPA's Permit No. 38D, Gibbons Creek Lignite Mine V through April 9, 2019. The proffered LOC carries an effective date of April 9, 2019 and expires June 9, 2020. In response to the Commission's Office of General Counsel's (OGC) legal review dated February 13, 2019, TMPA filed Supplement No. 1 to the application on March 8, 2019; providing the proffered self-bond in the amount of \$3,300,000 to replace the existing self-bond, a new collateral bond to reflect the reduced self-bond that was initially provided in the application and authorization documents showing the persons that signed the bonds and LOC have the authority to bind the respective institutions. On March 21, 2019, TMPA filed Supplement No. 2 to the application; providing additional authorization documents in response to OGC's review of Supplement No. 1 dated March 15, 2019. The application, as supplemented, requests acceptance of the bonds totaling \$12,600,000; proposing a reduction of the total bond amount from the current total of \$18,500,000.

2. On March 7, 2019, the Surface Mining and Reclamation Division (SMRD or Staff), through its attorney with OGC, filed a Motion to Show Cause (Motion) with the Hearings Division requesting the Administrative Law Judge (ALJ) require TMPA to appear at a hearing and show cause why the Commission should not call the current LOC IS000026218U in the amount of \$9,600,000. Staff's Motion was filed pursuant to Finding of Fact No. 17 and the corresponding Ordering Provision of the Commission Order accepting the currently approved LOC on March 20, 2018 [Docket No. C18-0008-SC-38-E]. The Order required SMRD to request a show cause hearing no later than 30 days prior to the expiration date of the currently approved LOC if an application for replacement of the bond contains a LOC as collateral that either reduces the amount of the bond or does not increase the amount of the bond in at least the amount of Staff's latest reclamation cost estimate. At the time of Staff's Motion, the reclamation cost estimate for Permit No. 38D was approved by SMRD on February 7, 2017 in the amount of \$17,934,635. In support of the Motion, Staff attached OGC's legal review of the initial application dated February 13, 2019; asserting TMPA did not meet the requirement for self-bonding set forth in §12.309(j)(4)(A) of the Regulations, no documentation was provided to show that the person who signed the LOC on behalf of Wells Fargo had the authority to bind the institution and the proffered bonds were not in a sufficient amount to meet or exceed the approved reclamation cost estimate. Pursuant to §1.35(c) of the Commission's "Practice and Procedure" rules, Staff's Motion was granted by the ALJ on March 7, 2019 without allowing TMPA the opportunity to file a responsive pleading due to the rapidly approaching expiration date of the current LOC. The issues raised in Staff's Motion are further addressed in Finding of Facts Nos. 4 – 6, 10(e), 11 and 17(b), *infra*.
3. On March 8, 2019, the Hearings Division issued an Order Setting a Show Cause Hearing (Show Cause) pursuant to §1.24 of the Commission's "Practice and Procedure" rules. The Show Cause was set for March 20, 2019, with a prehearing

conference to be held in the matter on March 12, 2019. Staff and TMPA waived their right to receive notice at least 10 days prior to the prehearing conference in writing on March 7 and 8, 2019, respectively.

4. The prehearing conference for the show cause portion of the docket was held on March 12, 2019. Matters related to both of TMPA's permits were addressed. During the prehearing conference, the parties stipulated that all issues raised in Staff's Motion had been sufficiently addressed by TMPA in Supplement No. 1, except for the sufficiency of the proposed bond amounts relative to the approved reclamation cost estimates for the permits. TMPA acknowledged the reclamation cost estimate for Permit No. 38D exceeds the total amount of the bonds proposed for acceptance in the subject docket, but stated it anticipated the bonds would be sufficient at the time they were submitted in the application. To address the issue, TMPA requested the subject replacement bonds be accepted by the Commission and proposed it be allotted 90 days to submit a supplemental bond in an amount sufficient to meet or exceed the approved reclamation cost estimate. Following statements from Staff related to the 90-day period, TMPA explained the internal processes required of the agency prior to offering a bond to the Commission; including the submittal of any prospective bond, with all supporting documents, to the Texas Attorney General's Office for review and approval due to the corporate structure of the municipal power agency. TMPA also committed that it would file a supplemental bond as soon as the bond package is completed but requests 90 days to ensure it has sufficient time to submit a valid instrument. The ALJ also proposed language consistent with TMPA's request for the parties' consideration. Staff now endorses this approach as evidenced by the proposed language it submitted for consideration that is discussed in Finding of Fact No. 6, *infra*. Staff withdrew its Motion to Show Cause on March 13, 2019 prior to the show cause hearing. By Order dated March 14, 2019, the Hearings Division Director severed the show cause proceeding from the instant docket into Docket No. C19-0013-SC-2638-S and dismissed the severed docket pursuant to 16 Tex. Admin. Code §1.107(3).
5. By letter dated January 17, 2019, TMPA submitted an update to the reclamation cost estimate and revised bond maps for the permit as part of the replacement bond application (Revision No. 39). The revised bond maps were approved administratively by Staff letter dated March 11, 2019. TMPA's calculation of reclamation costs in Revision No. 39 is \$10,917,699. Staff conducted an independent reclamation cost estimate as part of its review of the application and determined that \$14,766,791 is the minimum required bond amount. Staff's estimate represents a decrease from the previous estimate of \$17,934,635 (approved administratively: February 7, 2017), primarily due to areas of the permit that have been released from bond by the Commission but is higher than TMPA's estimate due to updated equipment costs used by Staff that were derived from procedures documented by the Texas Department of Transportation. At the prehearing conference held on March 12, 2019, Staff and TMPA stipulated that \$14,766,791 is the minimum cost of reclamation for Permit No. 38D. The Commission adopts \$14,766,791 as the amount required to ensure sufficient

bonding of the permit area of Permit No. 38D. Therefore, as indicated in Staff's letter transmitting the replacement bond application to the Hearings Division dated May 11, 2019, the proffered bonds totaling \$12,600,000 are not sufficient to cover the minimum cost of reclamation for Permit No. 38D. The reclamation cost estimate for the permit adopted in this Order in the amount of \$14,766,791 exceeds the total amount of the proffered bonds by \$2,166,791.

6. Pursuant to §12.309(a) of the Regulations, a performance bond shall be in an amount determined by the Commission. Based on the Findings of Fact, the Commission finds that the total amount of the proffered replacement self-bond and the proffered replacement collateral bond and LOC are not 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 as required by §12.304(b) of the Regulations. During the prehearing conference discussed in Finding of Fact No. 4, *supra*, the ALJ proposed language to be included in an order accepting the proffered bonds that requires TMPA to file a bond application or application to replace the bond that proposes to increase the amount of bond for the permit in a sufficient amount based on Staff's latest reclamation cost estimate within 90 days of the date of an order accepting the subject bonds. Failure to comply with the terms of this requirement would trigger SMRD filing a request for a show cause hearing, along with all other documents that have been filed relevant to the new bond application, with the Hearings Division to allow for review and ultimate action by the Commission based on the evidence presented. By letter dated March 13, 2019, Staff requested the following be included at the end of an ordering paragraph to this effect: "This Ordering Paragraph reflects the unusual facts of this case and shall not serve as precedent in any other matter." TMPA did not present alternative language for consideration in response to Staff's March 13 letter. The ALJ does not believe inclusion of Staff's additional language in an ordering paragraph is necessary. The Commission recognizes a permittee's ongoing responsibility to ensure sufficient bond coverage is in place throughout the reclamation process and approves the following mechanism given the unusual facts of presented in this docket: TMPA shall submit a bond application or application for replacement of bond that proposes to increase the amount of bond for the permit in a sufficient amount based on Staff's latest cost estimate within 90 days from the date this Order is signed. If a bond application or application for replacement of bond is not filed that proposes to increase the total amount of bond for the permit in at least the amount of Staff's latest reclamation cost estimate within 90 days from the date this Order is signed, the Surface Mining and Reclamation Division shall send to the Hearings Division a request for a show cause hearing no later than 110 days after the date this Order is signed, along with all documents that have been filed or prepared relevant to this paragraph. 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 the permit is sufficiently bonded.
7. Except for the sufficiency of the proffered total bond amount addressed in Finding of

Fact No. 5, *supra*, all issues set forth in the legal reviews performed by the Office of General Counsel dated February 14, March 1 and 15, 2019 have been sufficiently addressed in filings submitted by TMPA. The financial review of the proffered self-bond performed by the Financial Services Division dated March 12, 2019 indicates that all legal requirements are met for the proffered self-bond [Findings of Fact Nos. 10(c)-(e), *infra*]. TMPA requests acceptance of the replacement self-bond and the collateral bond and LOC. The proffered LOC, effective January 9, 2019, carries a provision indicating that the LOC cannot be presented for payment prior to April 9, 2019 (the currently accepted LOC expires on April 9, 2019) and that the proffered LOC expires on June 9, 2020. The proffered self-bond amount, \$3,300,000, 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, 2019 will total \$12,600,000, an amount that is less than the estimated costs of reclamation set out in Finding of Fact No. 5, *supra*.

8. If the approved reclamation plan is modified, the Commission will review the bond and LOC for adequacy and, if necessary, will initiate a bond adjustment to conform to the modified plan [§12.307(c)].
9. The proffered self-bond, collateral bond, and LOC are in forms acceptable under §12.308 of the Regulations and §134.121 of the Act.
10. 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 (Tab 1; Supplement No. 2) and an updated certificate of incumbency (Tab 2; Supplement No. 2) showing that Mr. Kahn held the position of General Manager on the date he signed the self-bond (March 7, 2019) (Tab 5; Supplement No. 1) (Tab 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 (Tab 1; Supplement No. 2).
  - (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 (e) 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 "A1" and by Standard and Poor's is "A+" (Financial Services Review Memoranda dated February 13 and March 12, 2019 and Tab 1; Supplement No. 2).

- (d). TMPA submitted audited financial statements prepared by an independent certified public accountant in conformity with generally accepted accounting principles for its most recently completed fiscal year ending September 30, 2018 (Tab 6). The independent auditor's report contains no adverse opinion pursuant to §12.309(j)(2)(D)(i) of the Regulations.
- (e). Pursuant to §12.309(j)(4)(A) of the Regulations, for the Commission to accept an applicant's self-bond, the total amount of the outstanding and proposed self-bonds shall not exceed 25% of the applicant's tangible net worth in the United States. TMPA has no existing or proposed self-bonds other than the currently accepted bond and the subject replacement self-bond submitted in Supplement No. 1 to the application. Financial staff reviewed TMPA's audited financial statements for TMPA's fiscal year ending September 30, 2018 and determined TMPA has a tangible net worth of \$13,373,000. Based on this figure, legal and financial review determined TMPA's self-bond in the amount of \$3,500,000 that was submitted in the initial application on January 9, 2019 did not meet the requirements for acceptance because the proposed bond is 26.16% of TMPA's tangible net worth. During the prehearing conference held in this matter, TMPA stated it does not dispute its tangible net worth as calculated by financial staff and acknowledged it no longer meets the requirements for self-bonding regarding the existing bond in the amount of \$8,900,000 due to its tangible net worth. In Supplement No. 1, TMPA submitted the subject replacement self-bond in the amount of \$3,300,000. Legal and financial review of the subject self-bond has determined the bond meets the requirement of §12.309(j)(4)(A). Based on financial staff review, the amount of the proposed self-bond is 24.68% of TMPA's tangible net worth in the United States, \$13,373,000 (Financial Services Review Memorandum dated March 12, 2019).
- (f). 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, 2019. Pursuant to §12.309(j)(D)(ii) of the Regulations, TMPA has submitted the unaudited financial statement for the quarter ending December 31, 2018.

11. The collateral bond was signed March 7, 2019. Authorized persons for TMPA and for the issuing Bank signed the proffered collateral bond (Tab 4; Supplement No. 1), 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. O'Connell, Vice President, Bank, signed the LOC (Tab 11). 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 March 18, 2019 certifying that Mr. Bob Kahn held the office of General Manager on the date of signature (Tab 2; Supplement No. 2), and in Tab 1 of Supplement No. 2, a general certificate dated March 18, 2019 with attached Exhibit A, Certified Copy of Agency Rules and Regulations (certified: March 18, 2019). 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 March 7, 2019, showing that Patrick A. Hennessey on March 7, 2019 held the office of Senior Vice President of the Bank and was a signing officer of the Bank (Tab 8; Supplement No. 1). 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. The LOC issued January 9, 2019 was submitted in Tab 11 of the initial application and was signed by Brian T. O'Connell. Attached to the LOC in the application, is a Secretary's Certificate from Wells Fargo dated June 14, 2018 that fails to establish Mr. O'Connell had the authority to sign the LOC because the certificate was dated prior to the issuance of the LOC (Office of General Counsel Legal Review Memorandum dated February 14, 2019). The authorization issue was raised in Staff's Motion to show cause discussed in Finding of Fact No.2, *supra*. In Supplement No. 1, TMPA submitted a replacement certificate dated February 19, 2019 that certifies Mr. O'Connell is duly appointed and acting officer and was 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 date the LOC was issued. Submitted documentation in the form of a Certificate of Corporate Existence from the Comptroller of the Currency, Administrator of National Banks, dated December 3, 2018, demonstrates that Wells Fargo Bank, N.A., is a bank authorized to do business in the United States (Tab 9). 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.

12. 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.
13. 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. IS000068491U at its office at Wells Fargo Bank, N.A., Standby Letter of Credit Processing, 794 Davis Street, 2<sup>nd</sup> Floor, San Leandro, California 94577-6922 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" (Paragraph B. of LOC No. IS000068491U). By letter dated March 7, 2019, Staff filed a supplemental legal review requesting Paragraph B. be amended to include the following emphasized language: "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 *either or both* 16 TAC Sec. 12.314 *or* 16 TAC 12.309(g)(2)" (OGC Supplemental Review Memorandum dated March 1, 2019). The Regulations at §12.314 provide for Commission forfeiture proceedings on bonds. The Regulations at §12.309(g)(2) provide the Commission with the authority to collect the LOC if it is not replaced by another suitable bond or letter of credit at least 30 days before its expiration date. Staff requested the additional language be included to allow for easier implementation of ordering provisions adopted by the Commission that provide for a procedural mechanism to ensure timely approval of bond or replacement bonds or other security when a permit area is bonded by a letter of credit that contains a specified effective date (*E.g.*, Docket No. C18-0008-SC-38-E at Finding of Fact No. 17; Finding of Fact No. 18, *infra*). During the prehearing conference discussed in Finding of Fact No. 4, *supra*, TMPA committed to include Staff's additional language on the instrument filed in accordance with Finding of Fact No. 6, *supra*, and the corresponding ordering provision. TMPA also stated language will be included in the future instrument that ties Staff's additional language to the subject LOC.
14. 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 June 9, 2020. 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, June 9, 2020.



15. 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.
16. 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 bond amounts may be reduced or increased when the cost of reclamation changes.
17. Although the LOC carries a term of approximately fourteen months, the term of 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 (c) 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. The proffered LOC provides that it is irrevocable during its term as required by §12.309(g)(2) of the Regulations.
  - (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 fourteen months, the term of the collateral 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" (emphasis added). 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, 2019; however, pursuant to §12.309(g)(2), the LOC submitted in the initial application was not "suitable" in that proper signature authorization for the LOC had not been provided and the amount of the LOC, when added to the amount of the self-bond, did not equal or exceed the approved reclamation cost estimate for the permit. These issues partially formed the basis of Staff's Motion to Show Cause (Motion) requesting TMPA be

required to show cause why the existing LOC should not be forfeited and collected by the Commission (Findings of Fact Nos. 2 and 4, *supra*). Staff's Motion was filed on March 7, 2019, 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 LOC, April 9, 2019). In Supplement No. 1, proper signature authorization for the LOC was provided to allow for Commission acceptance of the collateral bond (Finding of Fact No. 11, *supra*) and the mechanism adopted in Finding of Fact No. 6, *supra*, will ensure the permit area is sufficiently bonded based on Staff's latest reclamation cost estimate. The proffered LOC is effective in amount according to its terms upon the expiration date of the accepted collateral bond and LOC, April 9, 2019. A letter of credit is issued and becomes enforceable according to its terms when the issuer sends it to the beneficiary. The letter of credit issued and received by the Commission on January 9, 2019 became enforceable according to its terms on that date.

- (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 proffered LOC, as amended). 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 Thursday, February 20, 2020 (110 days prior to the expiration date, Tuesday, June 9, 2020) to provide for 80 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, May 8, 2020 if such documents are not submitted (approximately 30 days prior to expiration of the collateral, Tuesday, June 9, 2020). The Commission approves Thursday, February 20, 2020 (110 days prior to Tuesday, June 9, 2020) for submittal of the bond instrument(s) and related documents. The analogous finding and ordering paragraph in the Order accepting the existing bond required TMPA to submit the required filings 90 days prior to expiration date of the collateral (Docket No. C18-0008-SC-38-E at Finding of Fact No. 16(c) and eighth Ordering Paragraph). The additional 20 days for review prior to expiration of the subject collateral is approved in an attempt to avoid the processing issues presented in this docket (See Findings of Fact Nos. 2 and 6, *supra*).

18. 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 45 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 §1.24 of the Commission's "Practice and Procedure" rules no later than 45 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.
19. 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.
20. All documentation required by the Act and Regulations for the proffered self-bond and collateral bond with LOC has been submitted.
21. 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. 2018).
2. The total amount of bond for Permit No. 38D does not equal or exceed the reclamation cost estimate adopted in this Order.

3. All requirements of the Act and the Regulations for acceptance of the proffered self-bond and collateral bond and LOC have been met; however, TMPA must submit an additional bond to ensure the amount of bond is sufficient pursuant to §12.304 of the Regulations.
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 §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 require TMPA to submit a bond application that proposes to increase the amount of the bond for the permit in a sufficient amount based on Staff's latest cost estimate within 90 days from the date this Order is signed. In addition, 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 February 20, 2020 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. 17(c)]. Further, 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 45 days prior to the expiration date of a currently effective letter of credit in accordance with the 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 \$14,766,791;

**IT IS FURTHER ORDERED** that the proffered self-bond in the amount of \$3,300,000 is hereby accepted and replaces the self-bond in the amount of \$8,900,000;

**IT IS FURTHER ORDERED** that the collateral bond and LOC No. IS000068491U in the amount of \$9,300,000 is hereby accepted on the date of this Commission Order, with the amount of the LOC effective on April 9, 2019, and the collateral bond and LOC No. IS000026218U in the amount of \$9,600,000 are hereby replaced as of April 9, 2019;

**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 \$3,300,000 and the collateral bond with LOC No. IS000026218U in the amount of \$9,300,000 provide for continuation of bonding for the permit in a total amount of \$12,600,000 in accordance with this Order;

**IT IS FURTHER ORDERED** that TMPA shall submit a bond application or application for replacement of bond that proposes to increase the amount of bond for the permit in a sufficient amount based on Staff's latest cost estimate within 90 days from the date this Order is signed. If a bond application or application for replacement of bond is not filed that proposes to increase the total amount of bond for the permit in at least the amount of Staff's latest reclamation cost estimate within 90 days from the date this Order is signed, the Surface Mining and Reclamation Division shall send to the Hearings Division a request for a show cause hearing no later than 110 days after the date this Order is signed, along with all documents that have been filed or prepared relevant to this paragraph. 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 the permit is sufficiently bonded.

**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. 17(c) of this Order, no later than February 20, 2020;

**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. 18 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 the latest reclamation cost estimate, and it has not been previously filed with the Hearings Division for docketing at least 45 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 45 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** on April 9, 2019.

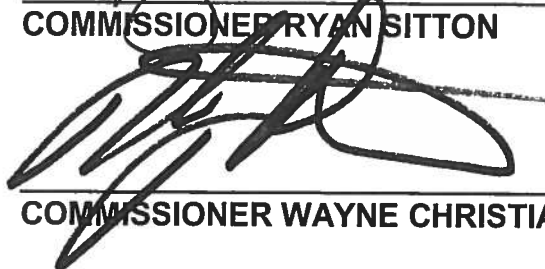
**RAILROAD COMMISSION OF TEXAS**



CHAIRMAN CHRISTI CRADDICK

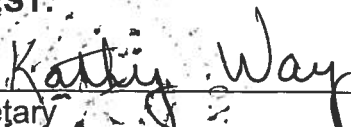


COMMISSIONER RYAN SITTON



COMMISSIONER WAYNE CHRISTIAN

ATTEST:



Secretary  
Railroad Commission of Texas