

**RAILROAD COMMISSION OF TEXAS  
HEARINGS DIVISION**

**DOCKET NO. C19-0021-SC-26-E, TEXAS MUNICIPAL POWER AGENCY  
APPLICATION FOR ACCEPTANCE OF REPLACEMENT COLLATERAL BOND AND  
AMENDMENT TO LETTER OF CREDIT NO. IS000068489U  
PERMIT NO. 26D, GIBBONS CREEK LIGNITE MINE, GRIMES COUNTY, TEXAS**

**ORDER ACCEPTING REPLACEMENT COLLATERAL BOND  
AND AMENDMENT TO LETTER OF CREDIT FOR PERMIT NO. 26D**

Statement of the Case

Texas Municipal Power Agency (TMPA) operates the Gibbons Creek Lignite Mine in Grimes County, Texas under Permit No. 26D. The permit is currently bonded by a collateral bond and irrevocable Letter of Credit (LOC) No. IS000068489U in the amount of \$10,000,000 accepted by Order dated April 9, 2019. TMPA has filed an application for acceptance of a replacement collateral bond and amendment to the accepted LOC (Amendment No. 002) in the amount of \$11,400,000 issued by Wells Fargo Bank, N.A. The application is made pursuant to the Texas Surface Coal Mining and Reclamation Act, Tex. Nat. Res. Code Ann. Ch 134 (Vernon Supp. 2019) (Act) and the "Coal Mining Regulations," Tex. Admin. Code Ch. 12 (Thomson West 2019) (Regulations).

The accepted LOC became effective on April 9, 2019 and expires June 9, 2020. The proffered amendment (Amendment No. 002) increases the amount of bond for the permit by \$1,400,000 and carries a provision that the Railroad Commission of Texas (Commission) may collect on the LOC pursuant to the terms of either or both of §12.314 or §12.309(g)(2) of the Regulations. No other terms of the existing LOC are altered by Amendment No. 002.

Acceptance of the proffered collateral bond and amendment to the LOC will result in bonding in excess of the approved reclamation cost estimate for Permit No. 26D. Based upon the application for acceptance of the replacement bond, associated documents, legal review, and recommendation of the administrative law judge, the Commission finds that the proffered collateral bond with LOC, as amended, may be accepted in accordance with the terms of this Order and that the proffered collateral bond and LOC, as amended, may replace the currently accepted collateral bond.

**FINDINGS OF FACT**

Based upon the evidence in the record, the following Findings of Fact are made:

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 July 8, 2019, TMPA timely submitted replacement bonds for the permits. In this docket for Permit No. 26D, TMPA timely submitted a replacement collateral bond dated July 2, 2019 and an amendment to the accepted irrevocable Letter of Credit (LOC) No. IS000068489U (Amendment No. 002)

issued by Wells Fargo Bank, N.A. (Bank or "Wells Fargo"). The existing collateral bond dated March 18, 2019 and LOC No. IS000068489U were accepted for performance bonding of Permit No. 26D, Gibbons Creek Lignite Mine, by Commission Order dated April 9, 2019. The accepted LOC is in the amount of \$10,000,000, was effective beginning on April 9, 2019 and expires on June 9, 2020. The proffered Amendment No. 002 was executed on July 2, 2019 and provides bonding in the increased amount of \$11,400,000 during the accepted term. By letter dated July 12, 2019, TMPA submitted a replacement Secretary Certificate showing the person that signed the proffered amendment had the authority to bind the Bank on the date Amendment No. 002 was signed.

2. By letter dated July 24, 2019, the Commission's Surface Mining and Reclamation Division (SMRD or Staff) filed the replacement collateral bond and Amendment No. 002 to LOC No. IS000068489U with the Hearings Division, along with the Commission's Office of General Counsel's (OGC) legal review of the documents and bond for Permit No. 38D.
3. In the Order accepting the existing collateral bond and LOC in the amount of \$10,000,000, the Commission adopted Staff's most recent reclamation cost estimate in the amount of \$10,924,642 as the minimum amount required to ensure sufficient bonding of the permit area of Permit No. 26D [Order dated: April 9, 2019; Docket No. C19-0011-SC-26-E at Finding of Fact No. 5 and Ordering Paragraph No. 2]. The reclamation cost estimate for the permit has not been revised since the April 9, 2019 Order. TMPA did not and is not required to update reclamation costs upon the submittal of the subject application. The minimum amount required to ensure sufficient bonding of the permit area remains \$10,924,642.
4. The Order accepting the current collateral bond and LOC required TMPA to submit an application proposing 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 of the Order (April 9, 2019) [Docket No. C19-0011-SC-26-E at Finding of Fact No. 6 and Ordering Paragraph No. 6]. The subject collateral bond with Amendment No. 002 to the LOC that increases the amount of the accepted LOC to \$11,400,000 complies with the ordering provision contained in the April 9, 2019 Order in that the amount of the proffered LOC, as amended, exceeds Staff's most recent reclamation cost estimate in the amount of \$10,924,642. The proffered replacement collateral bond and LOC, as amended by Amendment No. 002, is 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. TMPA timely submitted the subject application pursuant to the Commission Order issued in Docket No. C19-0011-SC-26-E given the application was filed on July 8, 2019 (90 days from the date of the Order).
5. The legal review performed by the Commission's Office of General Counsel dated July

22, 2019 and filed with the Hearings Division by letter dated July 24, 2019, along with all other materials filed, indicates that all legal requirements for acceptance are met for the proffered collateral bond and amendment to the LOC. Pursuant to §12.309(h) of the Regulations, collateral bonds must be accompanied by a schedule of real or personal property which shall be pledged to secure the obligation under the indemnity agreement and shall include a description of the property. The subject collateral bond, dated July 2, 2019, includes a schedule of collateral that identifies LOC No. IS000068489U, dated January 9, 2019, amendment to the LOC dated March 15, 2019 (Amendment No. 001), and the proffered amendment to the LOC dated July 2, 2019 (Amendment No. 002). Amendment No. 001, accepted with the current collateral bond and LOC by Order dated April 9, 2019, replaced a provision in the LOC to indicate that the LOC cannot be presented for payment prior to April 9, 2019 and that the LOC expires on June 9, 2020. Amendment No. 002, proffered in the subject application, increases the amount of the LOC from \$10,000,000 to \$11,400,000.

6. 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)].
7. The proffered collateral bond and LOC are in forms acceptable under §§12.308-12.309 of the Regulations and §134.121 of the Act.
8. The terms of the proffered LOC provide that it is irrevocable during its term as required by §12.309(g)(2) of the Regulations.
9. The collateral bond was signed July 2, 2019. Authorized persons for TMPA and for the issuing Bank signed the proffered collateral bond (Tab 3) (Tab numbers refer to the Bond Package filed by TMPA, as supplemented), and an authorized person for the Bank signed the proffered LOC and Amendment No. 002. 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. Sharon P. Peace, Assistant Vice President, Bank, signed Amendment No. 002 to the LOC (Tab 7). 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 July 2, 2019 certifying that Mr. Bob Kahn held the office of General Manager on the date of signature (Tab 2), and in Tab 1, a general certificate dated July 2, 2019 with attached Exhibit A, Certified Copy of Agency Rules and Regulations (certified: July 2, 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 July 2, 2019

showing that Patrick A. Hennessey on July 2, 2019 held the office of Senior Vice President of the Bank and was a signing officer of the Bank (Tab 3) on the date the collateral bond was signed. 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. Amendment No. 002 to the accepted LOC was executed on July 2, 2019 and was signed by Sharon P. Peace (Tab 7). By letter dated July 12, 2019, TMPA submitted a Secretary's Certificate dated July 10, 2019 that certifies Ms. Peace is a 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 Amendment No. 002 to 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 6). 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 the United States. The replacement collateral bond and amendment to the 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.

10. TMPA's request for acceptance of the proffered replacement collateral bond and LOC is made pursuant to §134.127 of the Act, §12.307 of the Regulations and the sixth Ordering Provision of the Order accepting the current LOC [Docket No. C19-0011-SC-26-E].
11. The accepted 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. IS000068489U 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 either or both 16 TAC Sec. 12.314 or 16 TAC Sec. 12.309(g)(2)" (Paragraph B. of LOC No. IS000068489U as amended by Amendment No. 002). The Regulations at §12.314 provide for Commission forfeiture proceedings on bonds, while 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. Amendment No. 002 amends Paragraph B of the LOC in accordance with a request made by Staff in the docket accepting the current collateral bond and LOC [Docket No. C19-0011-SC-26-E]. In the previous replacement bond docket for Permit No. 26D, Staff stated that inclusion of language that allows the Commission to draw on the LOC pursuant to §12.309(g)(2) of the Regulations would

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.*, *Id.* at Finding of Fact No. 17; Finding of Fact No. 16, *infra*]. In the previous docket, TMPA committed to include Staff's additional language pertaining to §12.309(g)(2) on an instrument filed in accordance with the terms of the Commission Order accepting the current bond and LOC [See Docket No. C19-0011-SC-26-E at Finding of Fact No. 12]. TMPA has honored its commitment made in the previous docket by amending Paragraph B of the accepted LOC through Amendment No. 002 that allows the Commission to call on the LOC pursuant to either or both of §12.314 or §12.309(g)(2).

12. 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 Amendment No. 002 to the LOC does not alter the term of accepted LOC (April 9, 2019 through 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. Amendment No. 002 to the LOC is effective and enforceable against the issuer when the Commission received the amendment and is effective and enforceable against the issuer in the named amount in accordance with the terms of the LOC, as amended, and will remain effective, unless released or replaced, through its expiration date, June 9, 2020.
13. 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.
14. 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.
15. Although the LOC, as amended, carries a term of approximately fourteen months (April 9, 2019 through June 9, 2020), 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 LOC, as amended by Amendment No. 001 and Amendment No. 002, is payable to the Commission as required by §12.309(g)(3) of the Regulations [Finding of Fact No. 11, *supra*]. Although the proffered LOC, as amended, 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.” A letter of credit is issued and becomes enforceable according to its terms when the issuer sends it to the beneficiary. The current LOC and Amendment No. 001 to the current LOC were accepted by Commission Order dated April 9, 2019 [Docket No. C19-0011-SC-26-E]. The accepted LOC and Amendment No. 001, issued and received by the Commission on January 9, 2019 and March 21, 2019, respectively, became enforceable according to their terms on the dates they were received by the Commission. Amendment No. 002, proffered in the subject docket, was received by the Commission on July 8, 2019, making the LOC enforceable in the increased amount and according to its revised terms on that date.
- (c). Specific findings and ordering paragraphs were included in the Order accepting the current collateral bond and LOC No. IS000068489U, as amended by Amendment No. 001, to require the filing of replacement collateral with sufficient time for review and acceptance by the Commission prior to the expiration of the existing collateral [Docket No. C19-0011-SC-26-E at Findings of Fact Nos. 16(c) and 17]. The replacement collateral bond and Amendment No. 002 proposed for acceptance in the subject docket were submitted in accordance with the Finding of Fact and corresponding ordering paragraph related to the sufficiency of the bond amount that were adopted by the Commission in the previous replacement bond docket for the permit [Finding of Fact No. 4, *supra*]. 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 continues to find that it is reasonable to require that TMPA file any replacement bond and collateral required in a manner that will allow adequate time for review and determination by the Commission. Given the expiration date of LOC No. IS000068489U remains unchanged by Amendment No. 002 and as previously Ordered on April 9, 2019 with respect to the LOC, 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.

16. 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.
17. Acceptance of the proffered collateral bond and amendment to the accepted 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.
18. All documentation required by the Act and Regulations for the proffered collateral bond with amendment to the accepted LOC has been submitted.
19. 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. 2019).
2. The total amount of bond for Permit No. 26D is sufficient to cover estimated costs of reclamation.
3. All requirements of the Act and the Regulations for acceptance of the proffered collateral bond with amendment to the accepted LOC have been met.
4. The Commission is authorized by the Act and Regulations to accept the proffered collateral bond with LOC, as amended.
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. ("Bank") in San Leandro, California issued the proffered LOC and Amendments. 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 and Amendments are 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. 15(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 \$10,924,642;

**IT IS FURTHER ORDERED** that the proffered collateral bond dated July 2, 2019 and LOC No. IS000068489U, as amended by Amendment No. 001 and Amendment No. 002, in the amount of \$11,400,000 is hereby accepted according to its terms on the date of this Commission Order and the collateral bond dated March 18, 2019 is hereby replaced as of August 20, 2019;

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

**IT IS FURTHER ORDERED** that the accepted collateral bond with LOC No. IS000068489U, as amended by Amendment No. 001 and Amendment No. 002, in the amount of \$11,400,000 provide for continuation of bonding for the permit 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. 15(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. 16 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

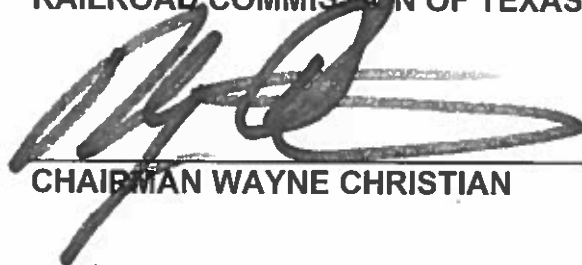
the Commission containing a letter of credit as collateral that either reduces the amount of bond or does not increase the amount of bond in at least the amount of the latest reclamation cost estimate, and it has not been previously filed with the Hearings Division for docketing at least 45 days prior 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 August 20, 2019.

**RAILROAD COMMISSION OF TEXAS**



**CHAIRMAN WAYNE CHRISTIAN**

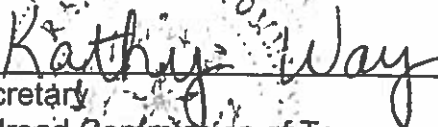


**COMMISSIONER CHRISTI CRADDICK**



**COMMISSIONER RYAN SITTON**

**ATTEST:**



Secretary  
Railroad Commission of Texas

