

**RAILROAD COMMISSION OF TEXAS
HEARINGS DIVISION**

**DOCKET NO. C20-0015-SC-38-E, TEXAS MUNICIPAL POWER AGENCY
APPLICATION FOR ACCEPTANCE OF REPLACEMENT COLLATERAL BOND AND
LETTER OF CREDIT NO. IS000117313U
PERMIT NO. 38D, GIBBONS CREEK LIGNITE MINE V, GRIMES COUNTY, TEXAS**

**ORDER ACCEPTING REPLACEMENT COLLATERAL BOND
AND IRREVOCABLE 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. The permit is currently bonded by a collateral bond dated July 2, 2019 and LOC No. IS000068491U, as amended by Amendment No. 002, in the amount of \$11,900,000 and self-bond in the amount of \$3,300,000 that were accepted by Orders dated April 9, 2019 and August 20, 2019, respectively. By letter dated February 20, 2020, TMPA filed an application for acceptance of a replacement collateral bond and LOC No. IS000117313U in the amount of \$6,500,000 issued by Wells Fargo Bank, N.A, to replace both the existing bonds. The application is made pursuant to the Texas Surface Coal Mining and Reclamation Act, Tex. Nat. Res. Code Ann. Ch 134 (Vernon Supp. 2020) (Act) and the "Coal Mining Regulations," Tex. Admin. Code Ch. 12 (Thomson West 2020) (Regulations).

Acceptance of the proffered collateral bond and new LOC will result in bonding in excess of the approved reclamation cost estimate \$6,134,953 for Permit No. 38D. 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 may be accepted in accordance with the terms of this Order and that and that the proffered collateral bond and LOC may replace the currently accepted bonds.

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 February 20, 2020, TMPA timely submitted a replacement collateral bond dated February 19, 2019 and a new Letter of Credit (LOC) No. IS000117313U in the amount of \$6,500,000 for its Gibbons Creek Lignite Mine V, Permit No. 38D, with a schedule of collateral issued by Wells Fargo Bank, N.A. ("Bank" or "Wells Fargo"). (Tab 6,

Texas Municipal Power Agency
Docket No. C20-0015-SC-38-E
Application for Bond Acceptance

2

Collateral Bond of 38D, Schedule of Collateral).¹ TMPA requests that the new collateral bond and LOC replace the existing self-bond in the amount of \$3,300,000 and the collateral bond with LOC No. IS000068491U, as amended by Amendment No. 002 in the amount of \$11,900,000 issued by Wells Fargo Bank, N.A., Standby Letter of Credit Processing, 794 Davis Street, 2nd Floor, San Leandro, California 94577-6922, accepted for performance bonding of its Gibbons Creek Lignite Mine V, Permit No. 38D, by Commission Orders dated April 9, 2019 and August 20, 2019, respectively [Docket Nos. C19-0012-0022-SC-38-E and C19-0022-SC-38-E]. The current LOC, as amended, was effective April 9, 2019 for performance bonding for Permit No. 38D through June 9, 2020. The proffered collateral bond carries an effective date of June 9, 2020 and expires June 8, 2021.

2. By letter dated March 3, 2020, the Commission's Office of General Counsel (OGC) indicated that it had performed a legal review of the proposed collateral bond with the LOC and determined that the TMPA's application meets the requirements of 16 Tex. Admin. Code §§ 12.309(g) and (h). By letter dated April 17, 2020, the Commission's Surface Mining and Reclamation Division (SMRD or Staff) filed the replacement collateral bond and new LOC No. IS000117313U with the Hearings Division, including the OGC legal review of the documents, along with a bond for Permit No. 26D.
3. By letter dated April 17, 2020, Staff indicates that the reclamation cost estimate for Permit No. 38D had been approved administratively in Revision No. 41, on February 25, 2020. By letter dated April 23, 2020, the ALJ requested Staff to provide the approved reclamation cost estimate given an inconsistency in the amount stated in Staff's letter dated April 17, 2020 and OGC's legal review dated March 3, 2020. By letter via email dated April 24, 2020, Staff confirmed that the reclamation cost estimate for Permit No. 38D had been approved in the amount of \$6,134,953, Revision No. 41, approved administratively on February 25, 2020.
4. At the time the that proffered replacement collateral bond and LOC in the amount of \$6,500,000 becomes payable on June 9, 2020, it will be in an amount that exceeds the approved estimated reclamation cost of \$6,134,953 [Finding of Fact No.3, *supra*] and 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). 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)].
5. The proffered replacement collateral bond and LOC are in forms acceptable under §§12.308-12.309 of the Regulations and §134.121 of the Act.

¹ Tab numbers refer to the Bond Package filed by TMPA.

Texas Municipal Power Agency
 Docket No. C20-0015-SC-38-E
 Application for Bond Acceptance

6. The terms of the proffered LOC provide that it is irrevocable during its term as required by §12.309(g)(2) of the Regulations. The subject bond includes a schedule of collateral that sufficiently identifies the proffered LOC [§12.309(h)(2)].

7. The collateral bond was signed February 19, 2020. Authorized persons for TMPA and for the issuing Bank signed the proffered collateral bond (Tab 6, Collateral Bond of 38D, Schedule of Collateral) and an authorized person for the Bank signed the proffered LOC No. IS000117313U (Tab 10, LOC, Permit No. 38D). 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, and Bob Kahn, General Manager, TMPA, signed the collateral bond for TMPA.
 - a. 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, the Certificate of Incumbency (with specimen signature) dated February 19, 2020 certifies that Bob Kahn held the office of General Manager on the date of signature (Tab 2, Certificate of Incumbency), and a General Certificate dated February 19, 2020 with attached Exhibit A, Certified Copy of Agency Rules and Regulations (certified: February 19, 2020) and Exhibit B, Certified Copy of General Policy (certified: February 19, 2020) (Tab 1, General Certificate). Exhibit A, Article IV Officers, Section 7: General Manager, on page 6 of 14, 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.

 - b. Documents that show the authorization for signatories to act on behalf of the Bank include: Signature Identification and Authority Certificate of Wells Fargo Wells Bank, National Association dated February 19, 2020, and attached Exhibit A Secretary's Certificate dated July 2, 2019 showing that Patrick A. Hennessey held the office of Senior Vice President of the Bank and was a signing officer of the Bank on the date the collateral bond was signed, and that Exhibit A contained resolutions and bylaws were duly adopted and in full force and effect as of the date of the authority certificate, February 19, 2020. (Tab 7, Signature Identification and Authority Certificate and Exhibit A, Secretary's Certificate) According to Exhibit A, Secretary's 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. (Tab 7, Exhibit A, Secretary's Certificate, Paragraph C, Signing Officers, No. 1, Lending). The signing officer of the LOC, Angela Mendenhall, was authorized to sign the LOC on the date of the signature. (Tab 10, LOC, Permit No. 38D). Submitted documentation in the

Texas Municipal Power Agency
Docket No. C20-0015-SC-38-E
Application for Bond Acceptance

4

form of a Certificate of Corporate Existence from the Comptroller of the Currency, Administrator of National Banks, dated January 3, 2020, demonstrates that Wells Fargo Bank, N.A., is a bank authorized to do business in the United States (Tab 8, Certificate of Corporate Existence). 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.

8. 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.
9. 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. IS000117313U at its office at Wells Fargo Bank, N.A., Standby Letter of Credit Processing, 794 Davis Street, 2nd 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)". 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.
10. 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 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 8, 2021.
11. 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.
12. 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.

13. Although the LOC carries a term of approximately one year (June 9, 2020 through June 8, 2021), 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 is payable to the Commission as required by §12.309(g)(3) of the Regulations [Finding of Fact No. 9, *supra*]. 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 docket, the proffered replacement collateral bond and new LOC dated February 19, 2020 were received by the Commission on February 20, 2020 and was issued and enforceable according to its terms on February 19, 2020. The proffered bond and LOC were timely submitted in accordance with previous Commission Order dated August 20, 2019, accepting the current collateral bond.
 - c. Specific findings and ordering paragraphs were included in the Order accepting the current collateral bond and LOC No. IS000068491U with sufficient time for review and acceptance by the Commission prior to the expiration of the existing collateral [Docket No. 19-0022-SC-38-E]. 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. 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 18, 2021 (110 days prior to the expiration date, Tuesday, June 8, 2021) 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 Monday, May 10, 2021² (if such documents are not submitted approximately 30 days prior to expiration of the collateral, Tuesday, June 8, 2021). The Commission approves Thursday, February 18, 2021 (110 days prior to Tuesday, June 8, 2021) for submittal of the bond instrument(s) and related documents.

14. 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.
15. Acceptance of the proffered 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.
16. All documentation required by the Act and Regulations for the proffered collateral bond with amendment to the accepted LOC has been submitted.

² Section 1.9(2) of the Commission's "Practice and Procedure" provides, in part, that the computation of any period of time set by rule, the last day of the period being computed shall be included, unless it is a Saturday, Sunday, or weekday on which the Commission has officially closed prior to 5 p.m. due to weather or other exigency, or an official state or federal holiday, in which event the period shall continue to run until 5 p.m. on the next business day except as otherwise provided by statute. In this instant, Sunday May 9, 2021, is the 30th day prior to the expiration of the collateral bond on Tuesday, June 8, 2021; therefore, Monday May 10, 2021 is last day for the Commission to initiate bond forfeiture proceeding pursuant to §12.309(g)(2).

17. 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. 2020).
2. The total amount of bond for Permit No. 38D 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 LOC have been met.
4. The Commission is authorized by the Act and Regulations to accept the proffered 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. ("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 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 18, 2021 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. 13(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 \$6,134,953;

IT IS FURTHER ORDERED that the proffered collateral bond dated February 19, 2020 and LOC No. IS000117313U in the amount of \$6,500,000 is hereby accepted according to its terms on the date of this Commission Order and the self-bond in the amount of \$3,300,000 and collateral bond dated July 2, 2019 and LOC No. IS000068491U, as amended by Amendment No. 002, in the amount of \$11,900,000, is hereby replaced as of May 20, 2020;

IT IS FURTHER ORDERED that the accepted collateral bond dated February 19, 2020 and LOC No. IS000117313U in the amount of \$6,500,000 must be retained by the Commission until replaced;

IT IS FURTHER ORDERED that the accepted collateral bond with LOC No. IS000117313U in the amount of \$6,500,000 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. 13(c) of this Order, no later than February 18, 2021;

IT IS FURTHER ORDERED that with LOCs that contain a specified effective date, as the accepted LOC, the additional mechanism set out in Finding of Fact No. 14 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

Texas Municipal Power Agency
Docket No. C20-0015-SC-38-E
Application for Bond Acceptance

9

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

Texas Municipal Power Agency
Docket No. C20-0015-SC-38-E
Application for Bond Acceptance

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 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 May 20, 2020.

RAILROAD COMMISSION OF TEXAS

DocuSigned by:
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CHAIRMAN WAYNE CHRISTIAN

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Secretary
Railroad Commission of Texas

