

**RAILROAD COMMISSION OF TEXAS  
HEARINGS DIVISION**

**DOCKET NO. C18-0007-SC-26-E, TEXAS MUNICIPAL POWER AGENCY  
APPLICATION FOR ACCEPTANCE OF REPLACEMENT COLLATERAL BOND AND LETTER OF CREDIT NO.  
IS000026217U, PERMIT NO. 26D, GIBBONS CREEK LIGNITE MINE, GRIMES COUNTY, TEXAS**

**ORDER ACCEPTING REPLACEMENT COLLATERAL BOND  
AND 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. TMPA has filed an application for acceptance of a replacement collateral bond and irrevocable Letter of Credit (LOC) No. IS000026217U in the amount of \$11,000,000 to replace its currently accepted collateral bond and LOC No. IS0479853U in the amount of \$11,100,000. The accepted LOC and the proffered LOC are both issued by Wells Fargo Bank, N.A. The accepted letter of credit carries an expiration date of April 9, 2018. The proffered LOC No. IS000026217U becomes effective April 9, 2018 and expires April 9, 2019. The application is made pursuant to the Texas Surface Coal Mining and Reclamation Act, TEX. NAT. RES. CODE ANN. Ch. 134 (Vernon Supp. 2017) and the "Coal Mining Regulations," TEX. ADMIN. CODE Ch. 12 (Thomson West 2017).

Acceptance of the proffered collateral bond and LOC will reduce the amount of bond for Permit No. 26D by \$100,000. 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 the collateral bond and proffered LOC may replace the currently accepted collateral bond and LOC as contained in this Order.

**FINDINGS OF FACT**

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

1. Texas Municipal Power Agency (TMPA) is a municipal power agency created by concurrent ordinances adopted by the Cities of Bryan, Denton, Garland, and Greenville, Texas in 1975. TMPA holds Permit Nos 26D and 38D. By letter dated January 9, 2017, TMPA timely submitted

replacement bonds for the permits. In this docket for Permit No. 26D, TMPA submitted a replacement collateral bond and new letter of credit (LOC) No. IS000026217U in the amount of \$11,000,000 issued by Wells Fargo Bank, N.A. (Wells Fargo or “the Bank:). TMPA requests that the new collateral bond and LOC replace the currently accepted collateral bond and LOC No. IS0479853U in the amount of \$11,100,000 issued by Wells Fargo Bank, N.A., 794 Davis Street, 2<sup>nd</sup> Floor MAC A0283-023, San Leandro, CA. The current LOC was effective April 9, 2017 for performance bonding for Permit No. 26D through April 9, 2018. The proffered collateral bond carries an effective date of April 9, 2018 and expires April 9, 2019. TMPA has filed the bonds and all required documentation relating to the bonds and LOC. The permit area is currently in reclamation.

2. By letter dated February 12, 2018, the Surface Mining and Reclamation Division (SMRD or Staff) filed the replacement collateral bond and LOC with the Hearings Division, along with other review documents and bonds for Permit No. 38D.
3. Staff calculated reclamation costs for Permit No. 26D; these costs were filed March 8, 2017 in a previous docket; however, no changes are required to this estimate and it was refiled in the instant docket. Staff’s reclamation cost estimate is in the amount of \$10,584,672. No changes were made to the approved bond map. (Revision No. 32 dated October 2015, approved administratively by letter dated March 14, 2016). Costs for equipment are not required to be updated. TMPA did not submit an updated reclamation cost estimate.
4. Staff’s estimate includes calculations by disturbance category mined, disturbed, or ancillary, and accounted for releases that have been approved. Estimates for acid seep mitigation were also included. Staff recommends adoption of its reclamation cost estimate of \$10,584,672 as the minimum required bond amount for Permit No. 26D. The estimate will ensure that costs include coverage for all bonded categories as well as mitigation costs. The proffered collateral bond and LOC in the amount of \$11,000,000 exceeds estimated reclamation costs. Staff’s estimate is approved as the amount required as sufficient should a third party perform reclamation in the event of forfeiture.
5. The legal review performed by the Office of General Counsel dated February 9, 2018 and filed with the Hearings Division by letter dated February 12, 2018, along with other materials filed,

indicates that all legal requirements are met for the proffered collateral bond, and LOC. TMPA requests acceptance of the replacement collateral bond and LOC. The proffered LOC, issued January 8, 2018, carries a provision indicating that the LOC cannot be presented for payment prior to April 9, 2018 and expires on April 9, 2019.

6. The proffered collateral bond and LOC when it becomes payable on April 9, 2018 will be in an amount that exceeds the estimated costs of reclamation set out in Finding of Fact No. 3. If the approved reclamation plan is modified, the Commission will review the bond and amendment to the LOC for adequacy and, if necessary, will initiate a bond adjustment to conform to the modified plan [§12.307(c)].
7. The proffered collateral bond, and LOC are in forms acceptable under §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 January 8, 2018. Authorized persons for TMPA and for the issuing Bank signed the proffered collateral bond (Exhibit 3), and an authorized person for the Bank signed the proffered LOC. An officer of the Bank who is authorized to execute bonds on behalf of the Bank, Patrick Hennessey, Senior Vice President, signed the collateral bond. Bob Kahn, General Manager, TMPA, signed the collateral bond for TMPA. Brian T. McConnell, Vice President, signed the LOC (Exhibit 10 of Bond Package). Documents that show the authorization for the signatories to act on behalf of TMPA and the Bank on the date of signature have been filed with the Commission. For TMPA, these are the Certificate of Incumbency (with specimen signature) dated January 8, 2018 certifying that Mr. Bob Kahn held the office of General Manager on the date of signature (Exhibit 2), and in Exhibit 1, a general certificate with attached Exhibit A, Certified Copy of Agency Rules and Regulations. Section 7 of attached Exhibit A, Article IV, states the powers of the General Manager, such powers including the authority to execute reclamation bonds and to execute agreements associated with the collateral supporting reclamation bonds, including letters of credit and reimbursement agreements. Documents that show the authorization for signatories to act on behalf of the

Bank include: Wells Fargo Bank's Secretary's Certificate dated January 8, 2018 showing that Patrick A. Hennessey on January 8, 2018 held the office of Senior Vice President of the Bank and was a signing officer of the Bank. According to this certificate, as evidenced by an extract from resolutions adopted by the Board of Directors of the Bank, a signing officer may execute agreements, instruments, or other documents relating to the property or business and affairs of the bank in accordance with paragraph C.1. but excluding letters of credit. Exhibit 10, the LOC, was accompanied by a secretary's certificate that in Section 2 indicated that persons named in Exhibit A attached to the certificate are duly appointed and acting officers and were authorized to sign letters of credit in any amount issued by the banking association and that such authority was in full force and effect on January 8, 2018. The signing officer of the LOC, Brian T. O'Connell, Vice President, is on the authorized signatory list (Exhibit A). Submitted documentation in the form of a Certificate of Corporate Existence from the Comptroller of the Currency, Administrator of National Banks, dated December 5, 2017, demonstrates that Wells Fargo Bank, N.A., is a bank authorized to do business in the United States (Exhibit 9, Bond Package). This meets the requirement of §12.309(g)(1) of the Regulations that the issuer of an acceptable LOC must be a bank authorized to do business in Texas. The replacement collateral bond and LOC are in forms acceptable pursuant to §12.308(a)(2), §12.309(g) and §12.309(h) of the Regulations and §134.121(a) of the Act, and authorized persons have signed the documents.

10. TMPA's request for acceptance of proffered replacement collateral bond and LOC is made pursuant to §134.127 of the Act and §12.307 of the Regulations.
11. 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 thereon Letter of Credit No. IS000026217U no later than April 9, 2019 at its office at Wells Fargo Bank, N.A., Standby Letter of Credit Department, 794 Davis Street, 2<sup>nd</sup> Floor, San Leandro, California on or before the expiry. The draft must be accompanied by the irrevocable standby letter of credit or a copy, and the Commission's signed and dated statement reading: "The undersigned, an authorized representative of the Railroad Commission of Texas hereby certifies that the amount drawn is due to us pursuant to the terms of 16 TAC Sec. 12.314." The Regulations, §12.314 provide for Commission forfeiture proceedings on bonds.

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 letter of credit carries an expiration date of April 9, 2019. The proposed collateral bond, upon acceptance by the Commission in accordance with this Order, will remain in effect until released or replaced by the Commission. The LOC is effective and enforceable against the issuer when the Commission received the LOC and is effective and enforceable against the issuer in the named amount in accordance with the terms of the LOC, and will remain effective, unless released or replaced, through its expiration date, April 9, 2019.
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 bonds amounts may be reduced or increased when the cost of reclamation changes.
15. Although the proffered LOC carries a term of approximately one year, the collateral for the bond is sufficient. This Order contains an ordering paragraph that is needed to ensure timely replacement of the collateral as set out in subparagraph (b) of this Finding of Fact.
  - (a). The Regulations at §12.306(a) require that the collateral bond itself must be in effect for the duration of the reclamation obligations on the affected lands; however, for a letter of credit, the letter must be irrevocable during its term [§12.309(g)(2)]. No stated term is prescribed for the letter of credit by the Regulations, other than that it be irrevocable during its term.
  - (b). The proffered LOC is payable to the Commission as required by §12.309(g)(3) of the Regulations in part or in full on demand and receipt from the Commission of a notice of

forfeiture pursuant to the Regulations. Although the proffered LOC carries a term of approximately one year, the collateral for the bond is sufficient. The Commission has recognized that letters of credit have terms that are shorter than the period of reclamation liability on the bond. Regulation §12.309(g)(2) includes text that is also included in the federal counterpart regulation to ensure continuous bond coverage. According to revised §12.309(g)(2), effective November 12, 2007, a letter of credit used as security in areas requiring continuous bond coverage shall be forfeited and shall be collected by the Commission if not replaced by another suitable bond or letter of credit at least 30 days before its expiration date. In this case, replacement bond materials (including a specimen collateral bond and LOC) were provided to SMRD at least 90 days prior to the expiration date as required by the Commission Order accepting the last accepted collateral bond and LOC. The original replacement collateral bond and LOC were filed with SMRD on January 9 2018; SMRD filed these original bonds with the Hearings Division on February 12, 2018, more than 30 days prior to the date by which forfeiture proceedings would occur if they were not filed (30 days prior to the expiration date of currently accepted LOCs, April 9, 2018). The proffered LOC is effective in amount according to its terms on April 9, 2018. A letter of credit is issued and becomes enforceable according to its terms when the issuer sends it to the beneficiary. The collateral bond and letter of credit dated January 8, 2018 was received by the Commission on January 9, 2018 was issued and enforceable according to its terms on January 9, 2018. The proffered bond and LOC were received in accordance with the previous Commission Order approving the current bonds.

- (c). Specific findings and ordering paragraphs are included in this Order to require the filing of replacement collateral with sufficient time for review and acceptance by the Commission prior to the expiration of collateral (the LOC). Due to the presence of a stated expiration date of the collateral and in order to maintain required bonding in a timely manner, the Commission finds that it is reasonable to require that TMPA file any replacement bond and collateral required as previously ordered in bond dockets in a manner that will allow adequate time for review and determination by the Commission. The Commission finds that for orderly processing, review by Staff, and determination by the Commission of replacement bond instruments for the permit area to ensure

reclamation, it is appropriate to require that TMPA file an extension, amendment to the LOC or otherwise request the initiation of processing materials to replace the bond instrument and collateral no later than Wednesday, January 9, 2019 (90 days prior to the expiration date, Tuesday, April 9, 2019) to provide for 60 days of review and adjustment of documents prior to the date the Commission must initiate forfeiture proceedings. The Commission must initiate bond forfeiture proceedings by Friday, March 8, 2019 (approximately 30 days prior to expiration of the collateral, Tuesday, April 9, 2019) if such documents are not submitted. The Commission approves Wednesday, January 9, 2019 (approximately 90 days prior to Tuesday, April 9, 2019) 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 30 days prior to the expiration date of the letter of credit whether all documents have been received or not, the Surface Mining and Reclamation Division shall send to the Hearings Division a request for a show cause hearing pursuant to §1.47 of the Commission's "Practice and Procedure" rules no later than 30 days prior to the expiration date of the currently approved letter of credit, along with all documents that have been filed or prepared relevant to the application. This mechanism will allow the Hearings Division to determine whether to immediately schedule a show cause hearing or a prehearing conference to determine appropriate steps to ensure timely approval of the bond or replacement bond or other security.
  
17. 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 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 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. 2017).
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 and 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. in San Leandro, California issued the proffered LOC. According to both California law [California Commercial Code (UCC) §5116(b)] and Texas law [Business and Commercial Code, Title 1, Uniform Commercial Code, Chapter 5, Letters of Credit, §5.116(b)], the branch of a bank is treated as a separate bank for purposes of applicable law: if the instrument does not specify the agreed upon forum, the applicable forum is the location of

the issuing bank, in this case, California. Pursuant to both laws of the State of California [§5106(a), California Commercial Code] and of the State of Texas [TEX. BUS. & COMM. CODE §5.106(a)], the proffered LOC is enforceable between the issuer (Bank) and beneficiary (Commission) as an obligation of the Bank on the date sent to the beneficiary according to its terms.

7. In accordance with the authority of the Commission in §134.011(4) of the Act to issue orders requiring a permittee to take actions that are necessary to comply with the Act and Regulations, the Commission may make reasonable provisions to ensure that replacement bonds are submitted in a timely manner. A requirement that the permittee submit a replacement collateral bond and LOC (or amendment) or other replacement bond no later than January 9, 2019, is reasonable and will ensure that a replacement bond and replacement collateral will be submitted and processed in a timely manner so that required bonding may be maintained. [Finding of Fact No. 15(c)]. In addition, the Commission may make a reasonable provision to ensure that bonds containing letters of credit are acted upon promptly. Providing dates for the filing of bond documents and providing for a show cause hearing request by the Surface Mining and Reclamation Division no later than 30 days prior to the expiration date of a currently effective letter of credit in accordance with Regulations will assist in orderly processing of letters of credit to ensure the maintenance of sufficient collateral for the bond.

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

**IT IS FURTHER ORDERED** that the Commission determines reclamation costs as \$10,584,672;

**IT IS FURTHER ORDERED** that the proffered collateral bond and irrevocable LOC No. IS000026217U issued by Wells Fargo Bank, N.A. in the amount of \$11,000,000 will provide reclamation bonding in a sufficient amount;

**IT IS FURTHER ORDERED** that the collateral bond and irrevocable LOC No. IS000026217U issued by Wells Fargo Bank, N.A. in the amount of \$11,000,000 is hereby accepted on the date of this

Commission Order, with the amount of the LOC effective on April 9, 2018, and the collateral bond and LOC No. S0479853U are hereby replaced as of April 9, 2018;

**IT IS FURTHER ORDERED** that the accepted bond and LOC in the amount of \$11,000,000 must be retained by the Commission until replaced;

**IT IS FURTHER ORDERED** that TMPA timely file a substitute bond and collateral or other replacement bond in accordance with Finding of Fact No. 15(c) no later than January 9, 2019;

**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. 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 Staff's latest reclamation cost estimate, and it has not been previously filed with the Hearings Division for docketing at least 30 days prior to the expiration date of the letter of credit whether all documents have been received by the Commission or not, the Surface Mining and Reclamation Division shall send to the Hearings Division a request for a show cause hearing no later than 30 days prior to the expiration date of the currently approved letter of credit, along with all documents that have been filed or prepared relevant to the application. This mechanism will allow the Hearings Division to determine whether to immediately schedule a show cause hearing or a prehearing conference to determine appropriate steps to ensure timely approval of the bond or replacement bond or other security;

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

**IT IS FURTHER ORDERED** by the Commission that this order shall not be final and effective until 25 days after the Commission's order is signed, unless the time for filing a motion for rehearing

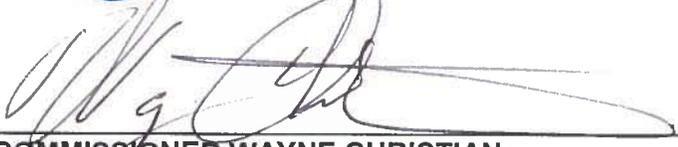
has been extended under Tex. Gov't Code §2001.142, by agreement under Tex. Gov't Code §2001.147, or by written Commission Order issued pursuant to Tex. Gov't Code §2001.146(e). If a timely motion for rehearing of an application is filed by any party at interest, this order shall not become final and effective until such motion is overruled, or if such motion is granted, this order shall be subject to further action by the Commission. Pursuant to Tex. Gov't Code §2001.146(e), the time allotted for Commission action on a motion for rehearing in this case is 100 days from the date the Commission Order is signed.

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

**RAILROAD COMMISSION OF TEXAS**

  
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CHAIRMAN CHRISTI CRADDICK

  
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COMMISSIONER RYAN SITTON

  
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COMMISSIONER WAYNE CHRISTIAN

ATTEST

  
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Secretary  
Railroad Commission of Texas

