

Richter, Susan K.

From: Jeffcoat-Sacco, Ilona
Sent: Monday, September 29, 2008 2:46 PM
To: Richter, Susan K.
Cc: -Grp-PSC Legal
Subject: Response to question about cash bond options

Sue:

In response to your 8-12-08 question about accepting cash bonds in lieu of surety bonds, I can advise the following:

The first criteria necessary for accepting cash bonds is to determine if we have statutory authority to do so. As noted in your memo, the Commission does have statutory authority to accept cash bonds, which was confirmed in an Attorney General's Letter Opinion responding to a PSC question regarding forms.

The second criteria relates to how a cash bond would fare in the event a licensee files for bankruptcy before our insolvency proceeding is complete. The question is whether a cash bond, in the event of a bankruptcy, is at risk of being included in the bankruptcy estate. I understand from discussions with those who handle bankruptcy proceedings that if the cash bond escrow agreement between the licensee, the Commission and the bank (escrow agent) is sufficient, a cash bond will be as safe as a surety bond in a bankruptcy situation.

I also understand that the Industrial Commission accepts cash bonds for oil and gas drilling in amounts as high as \$100,000, which are deposited in the Bank of North Dakota. I have obtained a copy of the escrow agreement used by the Industrial Commission and will proceed to review that document, compare it to the one we now use in Public Utilities, and use it as a template for drafting one for use by your division, should the Commission agree to accept a cash bond.

Based on the above, there is no legal reason why a cash bond cannot protect the producer as well as a surety bond does. I did not research the question of accepting letters of credit or other financial instruments and my conclusion on cash bonds does not extend to letters of credit or other financial instruments.

Note that once the escrow agreement is drafted, I would recommend that it be reviewed by an Assistant or Special Assistant Attorney General with more expertise in this area before it is formally executed for a particular licensee.

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