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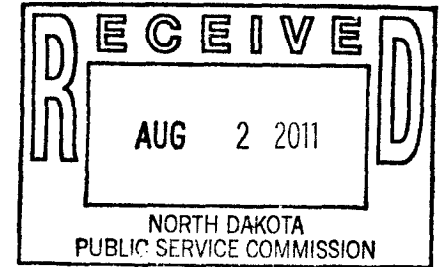
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Public Service Commission  
600 East Boulevard Avenue, Dept. 408  
Bismarck, ND 58505-0480

**RE: Case No RC-11-236**



Gentlemen:

BNI Coal, Ltd. ("BNI") appreciates this opportunity to comment on the proposed rule changes to the collateral bond provisions of N.D.A.C. § 69-05.2-12-04. **BNI supports the proposed rule changes with clarification as described below and very much appreciates the attention that the PSC and its staff have given to improving the rule so that it more "user friendly" for BNI and other permittees.**

BNI has more than once attempted to take advantage of the current rule to obtain and post a bank issued letter of credit as a collateral bond to secure BNI's reclamation obligations, but has found no bank that would issue a letter of credit upon terms that would meet the requirements of the rule as it is currently written. Two insurmountable problems of "form over substance" emerged:

➤ §§ 69-05.2-12-04(d) currently requires an issuing bank to submit a CPA certified balance sheet to establish compliance with its ten percent credit limit. The problem with this is simply that state and federal banking laws do not require all banks to have "bank only", CPA "certified" or audited balance sheets. However, all banks do submit detailed, quarterly Reports of Condition and Income to their state and federal bank regulators. The reports are filed under penalty of perjury and include the bank's balance sheet showing the bank's stock, surplus capital and retained earnings in a schedule currently denominated as Schedule RC- Balance Sheet. **Allowing an issuing bank to establish its compliance with the PSC's credit limit by submitting Report of Condition and Income information is a positive change which BNI heartily endorses.** However, the full report with all of its schedules can be lengthy and not all schedules are public, although Schedule RC- Balance Sheet is. If balance sheet information is what the Commission needs, a bank should have the option of limiting its submission of Report of Condition and Income information to the balance sheet, recognizing that the full public schedules are available online. Furthermore, we believe minor clarifying language should be added to the rule to eliminate questions about the substance of the bank's certification. To meet both of these goals, we suggest the proposed language as it relates to the submission of the Reports of Condition and Income be revised to state, "or an excerpt from its most recent reports of condition and income as prescribed by the federal financial institutions examination council and filed by the bank with its primary federal regulator consisting at a minimum of a copy of the attestation page 1 and balance sheet schedule, together with a written certification by the bank that the copies are true and accurate and are from a report of condition and income that was filed with a stated federal bank regulatory agency on a stated date. A copy of the bank's most recent balance sheet or report of condition and income information must be provided with

the letter of credit and updated balance sheets or report of condition and income information must be submitted annually to the commission within ninety days after the close of the bank's fiscal year.

➤ Banks have informed BNI Coal, Ltd. that the mandate in § 69-5.2-12-04(2)(f) for a bank to notify "the permittee and the commission of notices received or actions filed alleging the insolvency or bankruptcy of the bank or alleging violations of regulatory requirements that could result in suspension or revocation of the bank's charter or license to do business" conflicts with state and federal banking laws relating to the confidentiality of bank examinations. We understand federal and North Dakota state bank regulators have confirmed this to PSC staff. Because a bank may not comply with both the current rule and applicable bank laws and regulations, a bank that issues a letter of credit that conforms to the current rule places itself at risk for violating banking laws (something that itself can, technically speaking, jeopardize the bank's charter). In addition, occasionally, the regulatory examination process includes a discussion about whether a particular practice conforms to regulatory requirements. Many such discussions are concluded without a citation of violation or other regulatory consequence, even though the discussion may have been begun with an "allegation" of an apparent violation. **Substituting the word "citing" for "alleging" in the regulation and inserting the proviso that notice is required " to the extent allowed by state and federal banking laws and regulations" should resolve the issue for banks by removing a conflict between two sets of governing laws without interfering with the PSC's acknowledged need to be able to assess the status of the banks that are issuing the letters of credit.** As it happens, bank regulators do not close banks without first issuing some type of enforcement order, even as the vast majority of banks that are subject to an enforcement order successfully comply with it and see the enforcement order lifted. In any case, however, critical bank regulatory agency enforcement orders are generally public and, once issued, may be promptly disclosed by banks to the PSC. The proposed rule change (with the noted, slight revision) should allow the banks to issue a letter of credit that includes the disclosure obligation and also allow PSC to meaningfully evaluate the bank's status and whether to accept its letter of credit as a collateral bond.

BNI expects to attend the hearing on August 9 and to be available then or at the convenience of staff or the commission to address any questions there may be about these comments. Please direct any questions to me.

Again, BNI sincerely thanks the commission and staff for undertaking this rulemaking proceeding. We believe the adoption of the changes (revised as we suggest) will allow us to reduce our bond costs substantially to the ultimate benefit of North Dakota's consumers of electricity.

Sincerely Yours,



Marilyn Foss

Cc: Pat Clement via email transmission