

PUBLIC SERVICE COMMISSION
General Counsel

Memorandum

TO: Commissioners Christmann, Haugen-Hoffart, and Kringstad

FROM:  Chris Martens, General Counsel

DATE: August 24, 2026

SUBJECT: Self-bond application and replacement of the collateral bond covering three permits held by the Falkirk Mining Company, Case No. RC-26-177

Summary – On May 22, 2026, the Falkirk Mining Company submitted an application to increase its bond to \$130,000,000. The submittal included a third-party guarantor application to self-bond, guaranteed by REMC Assets, LP (REMC), in the amount of \$117,000,000 and a new cash deposit collateral bond in the amount of \$13,000,000 that will replace its existing cash deposit collateral bond. Riders were also submitted to reduce the existing cash deposit collateral bond and the current Irrevocable Standby Letter of Credit issued by BNC National Bank on behalf of Rainbow Energy Center, LLC for the Falkirk Mining Company to zero dollars and zero acres.

REMC and the broader Rainbow Energy organization are unusually significant to North Dakota because they are not simply financial or energy-trading businesses headquartered in the state. Through their affiliated entities, they sit above Coal Creek Station and the associated transmission infrastructure, tying the corporate structure directly to one of North Dakota's largest lignite-generation complexes and the economic activity surrounding it. That connection extends directly to the Falkirk Mine, which is closely integrated with Coal Creek Station both operationally and financially. Falkirk was developed specifically to supply Coal Creek Station and remains the plant's sole lignite supplier.

The Bank of North Dakota (BND) played a critical role in enabling REMC and Rainbow Energy to acquire and continue operating Coal Creek Station and its associated transmission infrastructure after Great River Energy announced plans to close the facility. BND supported the transaction through financing that included the purchase of \$150 million in North Dakota Transmission Authority bonds used to finance acquisition of the HVDC transmission line, providing access to capital at a time when conventional financing for coal-related assets was increasingly difficult to obtain. This state-supported financing helped preserve Coal Creek Station, which in turn preserved the principal market for lignite produced by the adjacent Falkirk Mine and the substantial employment and economic activity associated with both facilities. BND's involvement therefore reflects a broader state effort to maintain the viability of the interconnected Coal Creek–Falkirk energy complex and illustrates the longstanding financial and economic relationship among the State, REMC, Rainbow, and Falkirk.

North Dakota Public Service Commission staff have worked diligently to fully evaluate the submitted self-bond application and identified several areas of concern. Those concerns

are outlined in a staff memorandum dated August 21, 2026. When those concerns were first identified, other members of staff began discussions with representatives from BND. These discussions focused on ways to use the State's ongoing financial relationship with REMC as a mechanism to identify emerging adverse financial trends early, allowing potential concerns to be recognized and addressed before they materially affect the company's financial stability or their ability to meet their obligations. Those discussions yielded a cooperative framework designed to identify risks early so alternative solutions could be discussed and implemented to ensure reclamation costs are not passed on to North Dakota citizens. This framework is outlined in a proposed MOU now before the Commission.

This memorandum is supplemental to the staff memorandum issued on August 21, 2026. The purpose of this memorandum is to discuss the legal sufficiency of the self-bonding application, and to outline the substance of the discussions with BND and the proposed cooperative framework.

Discussion

A. Discretionary Authority to Approve Self-bonding

The Commission has broad discretion when considering approval of an application for self-bonding. The applicant has suggested that approval is required once the conditions of N.D.A.C. § 69-05.2-12-05.1 are met. However, the plain language of that section makes it clear that it is discretionary rather than entitlement based. That section provides that the Commission "may accept" a self-bond when the specified conditions are met, rather than directing that it "shall" accept one. Thus, satisfying the rule's financial thresholds establishes eligibility for consideration, but it does not compel approval. The Commission retains discretion to determine whether accepting the self-bond provides adequate assurance that the reclamation obligations will be fulfilled.

While the Commission maintains broad discretion once an applicant meets the regulatory requirements, that discretion is not unlimited. The Commission must exercise its discretion based on the evidence in the record, adequately address the evidence presented, and ensure that its findings support its ultimate decision. Discretion therefore permits the Commission to weigh the circumstances surrounding a self-bond application, but not to disregard relevant evidence or reach a decision unsupported by the record.

B. Legal Sufficiency of the Application

I find the application satisfies the requirements of N.D.A.C. § 69-5.2-12-01. The company has demonstrated that it has been in continuous operation for five years and the financial information submitted does meet the requirements outlined in the rule. PSC staff has raised concerns about the valuation of assets contained in the submitted financial information. The Commission is not bound to the methodology used by the applicant to obtain that valuation. However, to withstand judicial review, if the Commission chooses to deny this application on the valuations alone, the Commission should explain why the Generally Accepted Accounting Principles (GAAP) utilized by the applicants were flawed or why a different methodology should instead be applied.

C. Indemnification Agreement Requirements

The provisions of N.D.A.C. § 69-05.2-12-05.1(4)(a) have been a subject of much discussion by the applicant and PSC Staff. That provision states that the indemnity agreement executed by the applicant and the third-party guarantor must be executed according to sections 9 and 10 of N.D.A.C. § 69-05.2-12-01. That section of our rules requires that the indemnity agreement be executed by each general partner and each parent organization or principal investor. "Principal investor" or "parent organization" means anyone with a ten percent or more beneficial ownership interest, directly or indirectly, in the applicant.

PSC staff asserts that this section should be construed in a manner that requires any limited partner with a 10 percent or more beneficial ownership in REMC to sign the indemnity agreement. In essence, PSC staff argue that given the focus of section 69-05.2-12-05.1 on third party guarantors, the incorporation of paragraphs 9 and 10 of section 69-05.2-12-01 should be read to substitute the word guarantor for the word applicant or be read as "in the applicant *or guarantor*." The applicants, on the other hand, contend that the plain language of the rule only requires limited partners in the third-party guarantor to sign the indemnity agreement if they have a 10 percent or more beneficial ownership, direct or indirect, in the applicant Falkirk Mining Company.

North Dakota law requires applying the plain meaning of statutory and administrative rule text as the mandatory first step in interpretation. This requirement is codified in multiple provisions of North Dakota Century Code and has been consistently applied by the North Dakota Supreme Court. The foundational provision is N.D.C.C. § 1-02-02, which states: "Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained." This statute establishes a clear hierarchy: (1) statutory definitions control when provided; (2) ordinary meaning governs as the default rule; and (3) departure from ordinary meaning is permitted only when the legislature has clearly indicated a different intent.

Reinforcing this rule, N.D.C.C. § 1-02-05 provides that "when the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." This provision is a direct prohibition on courts substituting their own sense of legislative purpose for the plain text of an unambiguous statute. The North Dakota Supreme Court has applied this provision consistently, holding that when a statute is clear and unambiguous, legislative intent is presumed clear from the face of the statute and the letter of the statute cannot be disregarded. *Morton Cnty. v. Henke*, 308 N.W.2d 372 (N.D. 1981).

The plain meaning rule applies equally to administrative rules and regulations. The North Dakota Supreme Court has held that administrative regulations are derivatives of statutes and are construed under rules of statutory construction. *Grossman v. Lerud*, 2014 ND 235. Accordingly, the same plain meaning framework that governs statutory interpretation governs the interpretation of administrative rules promulgated under the North Dakota Administrative Code. Words in a regulation are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears.

Based on binding North Dakota legal authority, the applicant's assertions are supported by the plain language of the rule. While staff's interpretation does significantly more to advance the spirit of the law, doing so runs contrary to the clear guidance outlined in N.D.C.C § 01-02-05.

Adhering to the plain language of the rule also prevents the PSC from imposing a requirement that is in conflict with other areas of North Dakota law. Found within North Dakota Limited Liability Partnership act, N.D.C.C. § 45-22-08.1 states: "An obligation of a partnership incurred while the partnership is a domestic limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the domestic limited liability partnership." That section further states: "A partner is not personally liable, directly or indirectly, including by way of indemnification, contribution, or otherwise under . . . any other basis of law, for an obligation under this section solely by reason of being a partner or acting as a partner.

Requiring the limited partners to sign the indemnity agreement in this case likely conflicts with this section of law and would likely render the indemnification agreement unenforceable against those partners. Additionally, this conflict with law also creates tension with N.D.A.C. § 69-05.2-12-05.1(4)(b) as the applicant would not be able to certify that the indemnity agreement is valid under applicable state law. This places us in a position to impose an unlawful requirement and then deny the application because the applicant cannot certify that the requirement is lawful.

D. The Purpose of the Bond Requirement and Unresolved Risks

The central purpose of North Dakota's Coal mine reclamation bond requirement is to ensure that the reclamation obligation will be fulfilled even if the mine operator cannot or does not perform it, without shifting that obligation to the State or the public. This ultimate purpose lends itself to an analysis focused on the worst-case scenario. It is by this lens PSC Staff have identified two primary overarching risks associated with approving this application.

First, while staff has not invalidated the GAAP methodology used to assign value to the applicant's assets, the staff has a strong basis to support the contention that at least some of those assets will be significantly devalued if the mine or REMC were to cease operations.

Second, the record supports the assessment that both the operations of the mine and REMC present market concentration both in industry and in the concentrated nature of their operations within the state. With all assets focused on operations within the state, there are significant risks to their ability to meet obligations should those operations cease. This North Dakota concentration combined with the longstanding financial and economic relationship among the State, REMC, Rainbow, and Falkirk also offers potential opportunities to mitigate this risk.

F. State Approach to Risk Mitigation

North Dakota is unusually well positioned to mitigate the incremental risk of allowing REMC Assets to serve as a third-party guarantor because the State's relationship with REMC and Rainbow Energy extends beyond the ordinary regulator-guarantor relationship. The Bank of North Dakota was instrumental in financing Rainbow's

acquisition of Coal Creek Station and the associated transmission assets. BND itself describes its state-owned structure and economic-development mission as uniquely enabling it to facilitate that transaction. That relationship gives the State an existing financial connection to the enterprise and a corresponding ability to identify adverse financial developments before they necessarily manifest themselves through the periodic financial reporting ordinarily relied upon in self-bonding.

That relationship is particularly relevant because REMC, Coal Creek Station, and Falkirk Mine are economically interconnected. Rainbow is responsible for funding Falkirk's operating costs, providing the capital necessary to operate the mine, and funding final reclamation. REMC Assets, in turn, guaranteed Rainbow's obligations under those arrangements. Thus, BND's continuing financial relationship with the REMC and the Rainbow enterprise provides the State with an additional line of visibility into substantially the same enterprise whose financial strength would support the proposed third-party self-bond.

This does not eliminate the financial risk inherent in a self-bond or substitute BND's judgment for the PSC's statutory responsibility. Rather, it is a risk-mitigation feature that may distinguish this guarantor from an otherwise comparable private third-party guarantor. The PSC remains responsible for ensuring adequate financial assurance, but North Dakota can supplement the regulatory financial tests and reporting requirements with an existing state financial relationship capable of providing earlier indications of deterioration and facilitating coordinated action before the guarantor's financial condition reaches the point at which reclamation security is jeopardized.

Put more succinctly: North Dakota is not being asked to rely solely on REMC's representations of financial strength. Through BND, the State already has an established financial relationship with the enterprise supporting the mine and is therefore unusually positioned to monitor developing financial risk and respond before that risk threatens the fundamental purpose of the reclamation bond—ensuring reclamation without transferring the obligation to the public.

G. Proposed MOU

Initial discussions with BND focused on developing a State-level response in the event of a worst-case scenario. Although BND is confident that the State's interests in existing REMC assets would be sufficient to address obligations to the State under such circumstances, the number of variables involved made it impractical to establish a precise response framework in advance. BND instead proposed serving in a more proactive role. Because of its ongoing financial relationship with REMC, BND is positioned to independently verify REMC's financial information and identify potential concerns before they become significant. Although REMC remains responsible for reporting any failure to satisfy the regulatory requirements for self-bonding, BND has assisted the PSC in identifying additional notice thresholds that would provide the Commission with substantially earlier warning than required under the current rules. BND recommended these measures based, in part, on its present assessment that early identification of financial concerns would preserve its ability to assist REMC in obtaining alternative bonding if necessary.

Based on these discussions, BND has agreed to the terms reflected in the attached MOU. Most significantly, BND has committed to notifying the Commission when specified

financial conditions are met and to assisting in determining whether alternative bonding arrangements may be necessary. BND has also committed to independently reviewing REMC's financial information at the Commission's request.

It is important to recognize that the MOU does not create a contractual guarantee. Utilizing BND as a partner will require continued engagement by PSC staff and therefore creates additional administrative responsibility associated with this matter. It also represents a shift from reliance on a worst-case scenario analysis—which may provide greater protection against an assumed failure—to an early-detection approach intended to identify and address financial deterioration before it threatens reclamation obligations. This approach necessarily provides less protection if financial conditions deteriorate rapidly. At the same time, it creates a coordinated State mechanism for identifying and addressing emerging risks while preserving flexibility to account for the State's other significant economic interests.

H. Conclusion

As indicated above, the State of North Dakota has a unique financial and economic relationship with REMC and the Falkirk Mine. While the PSC must ensure that reclamation obligations are not ultimately borne by the State or its citizens, the Commission is not prohibited from considering the State's broader financial and economic interests in these entities. Those interests cannot substitute for adequate protection of reclamation obligations, but the broad discretion afforded to the Commission permits them to be considered as part of its overall evaluation.

The proposed partnership does not eliminate risk to the same extent contemplated by a worst-case analysis. A worst-case analysis, however, provides little flexibility to account for other legitimate State interests or measures designed to mitigate risk before a worst-case scenario occurs. Although the proposed partnership with BND does not eliminate every potential risk, it provides meaningful safeguards that mitigate those risks. Consideration of these measures allows the Commission to balance and advance multiple State interests while continuing to ensure that reclamation obligations do not ultimately fall upon the State or its citizens.