

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF ANDERSON SEED
CO. INC'S GRAIN BUYER'S LICENSE**

)
) **MOTION FOR AND BRIEF IN**
) **SUPPORT OF RECONSIDERATION**
) **GW12-001**

COMES NOW, the Staff of the Grain Warehouse division of the SD Public Utilities Commission (Staff), by and through it attorney, Kara Semmler, and hereby moves the Public Utilities Commission to reconsider its March 15, 2012 Order. Specifically, Staff request reconsideration of the Order to take receivership of Anderson's grain inventory, processed grain inventory, and other assets located in South Dakota, including recently transferred or assigned assets, and proceeds from the sale or liquidation of such assets.

I. PROCEDURAL BACKGROUND

On February 17, 2012 the Commission suspended Anderson Seed Co. Inc.'s (Anderson Seed) grain buyer license due to acts of insolvency. Anderson Seed did not contest the suspension nor did it request a hearing. As a result, the Commission revoked Anderson Seed's license at its meeting on March 13, 2012. The suspension and ultimate revocation are a result of Anderson's failure to pay for grain delivered to it. At some point in late 2010, Anderson Seed encountered financial challenges that ultimately resulted in significant unpaid secured and unsecured liabilities. As part of the suspension and revocation process, Staff conducted an audit to identify the affected South Dakota grain sellers. In addition Staff sought information regarding the total liabilities and available assets to construct the possible outcome for South Dakota seller losses.

At the March 13, 2012 Commission meeting, in addition to a recommendation regarding license revocation, Staff recommended the Commission seek receivership over the grain buyer's bond and its proceeds. At that time, Staff did not have sufficient documentation to provide the Commission with the financial status of Anderson Seed assets to liabilities. Staff further did not have complete information regarding Anderson Seed business transactions. Due to recent corporate transactions, the Commission had reason to believe Anderson Seed assets were at risk. More specifically, it appeared that Anderson Seed assets were transferred from Anderson Seed in an effort to insulate assets from the reach of Anderson Seed grain seller creditors. As a result of the missing information, in an effort to preserve the assets of Anderson Seed, the Commission Ordered, in addition to receivership over the bond and its proceeds that:

"that the Commission shall commence an action for receivership in Spink County pursuant to SDCL 49-45-16.1... for the purpose of taking possession, as custodian in a fiduciary capacity, of Anderson's grain inventory, processed grain inventory, and other assets located in South Dakota, including recently transferred or assigned assets, and proceeds from the sale or liquidation of such assets, pending determination by the Court as to the rights of sellers and other creditors to such assets and proceeds or until another structure or process is in place for the preservation of such assets and proceeds pending the conclusion of the claims and litigation."

Since March 13, 2012, Staff received complete information regarding Anderson Seed corporate transactions. The new information affects the receivership action Ordered by the Commission. The new information makes such action to protect Anderson Seed assets unnecessary and legally inappropriate. Staff sees no benefit to South Dakota grain sellers and anticipates unnecessary risk to South Dakota tax payers should the Commission pursue receivership as Ordered on March 13, 2012.

II. NEW INFORMATION

The Commission is aware Legumex Walker, Inc. or a subsidiary of Legumex Walker Inc. (Legumex) purchased Anderson Seed real estate assets excluding the Redfield, SD location (the facility). The Commission is also aware that the facility was excluded due to environmental concerns. Specifically, the facility is located on land previously used as a municipal landfill. Upon discovery of the environmental issue, Anderson Seed isolated those assets and liabilities by transferring them to a separate entity called BinCo Holdings, LLC (BinCo). That transfer appeared as if it could have a negative impact on South Dakota creditors. It appeared the transfer may have been done in an effort to insulate South Dakota assets from creditor claims. As a result, in an effort to protect the Anderson Seed assets and transferred assets, the March 13, 2012 receivership action was ordered. The following known facts, however, eliminate the concern and the need to seek receivership over Anderson Seed assets and recently transferred assets.

- a. As part of the Legumex/Anderson Seed non-South Dakota asset purchase, Legumex paid a \$2.6 million advance to Anderson Seed. The advance was requested by US Bank, Anderson Seed's secured creditor, in the sale of non-South Dakota Anderson Seed assets. That advance directly paid down the US Bank liability. In exchange, Legumex received a security interest (second to US Bank) in the facility. The Legumex mortgage is publically filed with the Spink County Register of Deeds.
- b. The US Bank debt was substantially paid down with this transaction, but it remained the first secured creditor with an interest in the facility. Staff has been provided with confidential business records by Legumex and Anderson Seed showing that on or about February 15, 2012, Legumex and Anderson Seed entered into a purchase agreement for the facility. The purchase agreement includes, among other things: real property, items

of personal property necessary to operate the facility, and accounts receivable.

Additionally, the asset purchase agreement calls for a minimum working capital requirement. Working capital is calculated by adding: accounts receivable, to inventory, to the prepayments made and attributable to the asset purchase. The purchase price is adjusted according to whether the working capital requirement is met. In other words, if the working capital is too low, the purchase price is decreased.

- c. The processed seed is considered part of the "inventory" subject to the asset purchase agreement working capital requirement. The remaining unprocessed seed was purchased, above current market value, by Legumex and contributed to a decrease in outside creditor claims against Anderson Seed.
- d. When the parties close on the sale of the facility, proceeds will pay first US Bank and second Legumex for its advance. In light of the remaining balance owing on the U.S. Bank mortgage, there is negative property value. In other words, there is not enough value in the property to completely pay both secured creditors.

III. REQUEST FOR RECONSIDERATION

Staff believes it remains prudent and necessary to pursue receivership over the bond and its proceeds. Based on the new information listed above, however, Staff respectfully requests the Commission reconsider its Order regarding receivership over Anderson Seed assets, whether current or recently transferred.

a. Receivership Over Unprocessed Seed Inventory

We now know all unprocessed grain on site was legitimately sold for more than its market value to Legumex. The proceeds of the sale decreased Anderson Seed liabilities. There is no unprocessed grain inventory left to preserve. There are no unprocessed seed assets over which to take receivership of. Even if the Commission desired to undo the purchase, it has no legal standing or legitimate legal argument to do so. Moreover, due to a decrease in the price of seed since Legumex's purchase, Anderson Seed's financial position would further deteriorate if the seed-purchase transaction were reversed. If the Commission chooses to pursue receiver over the unprocessed seed inventory, the receiver would either: i) take subject to the purchase by Legumex, leaving nothing to take receivership over or ii) receive a Court Order to release the product to Legumex. Either way the Commission gains nothing for South Dakota grain sellers.

b. Receivership Over Anderson Seed Assets and Recently Transferred Assets Including Processed Seed Inventory

We now know Anderson Seed assets were sold pursuant to a legitimate asset purchase agreement. Legumex purchased the facility and all assets necessary to carry out business at the facility. Additionally, the processed seed was sold also pursuant to the asset purchase agreement as part of the working capital requirement. Again, there is nothing to protect and nothing to take receivership of.

Furthermore, based on new information, Staff does not question the purpose of the transfer to BinCo. While Legumex does admit the transfer causes some complications related to the asset purchase agreement, it is in the process of remedying those complications. Specifically, the asset purchase agreement is between Anderson Seed and Legumex. BinCo, the current

owner of record, is not a party to the asset purchase agreement. Anderson Seed and BinCo are working with Legumex to fix the problem. The asset purchase agreement is not at risk, neither is the property subject to it. The assets do not, however, have significant enough value to completely pay all secured creditors, let alone unsecured creditors.

Based on the new information, to seek receivership requires the Commission to assume significant potential and unknown liabilities. The asset purchase agreement is contingent upon resolution of the outstanding environmental issues. While staff sees no reason for those issues to impede the planned closing of the agreement, it could happen. If the Commission pursues and is appointed receiver and the asset purchase sale does not close, the Commission will be holding an asset of very little value, which asset would furthermore be subject to potential environmental concerns. Tax payer money would be required to maintain and sell the facility for far under the dollar amount owed to creditors.

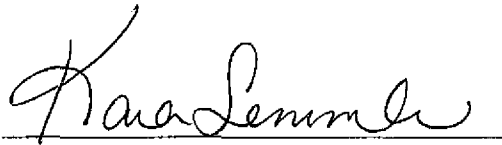
IV. CONCLUSION

In conclusion, Staff understands the Commission was handicapped by a lack of information on March 13, 2012. The missing information caused the Commission to believe Anderson Seed assets were at risk. As a result, the Commission ordered the pursuit of receivership to protect and preserve Anderson Seed assets. The new information now shows assets are not at risk. In fact, all assets have been sold or are committed to sale for cash. As a result of the sales, no assets remain to protect thus eliminating the purpose behind the Commissions March 13 decision and March 15, 2012 Order.

The Commission has neither legal standing to reverse the purchases, nor is it in the best interest of South Dakota grain sellers to do so. Staff believes this Commission can and should

play a role in claims made against the bond and distribution of bond proceeds. Staff respectfully requests, however, the Commission reconsider its March 15, 2012 Order regarding receivership of Anderson's grain inventory, processed grain inventory, and other assets located in South Dakota, including recently transferred or assigned assets, and proceeds from the sale or liquidation of such assets.

Dated this 20th day of March, 2012.

A handwritten signature in cursive script, reading "Kara Semmler", is written over a horizontal line.

Kara Semmler

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Kara Semmler certifies on this 20 th day of March, 2012 a true and correct copy of the Motion for and Brief in Support of Reconsideration was electronically served on the following:

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