

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

<b>IN THE MATTER OF THE GRAIN BUYER</b>	)	
<b>LICENSE OF UTICA GRAIN, INC. DBA</b>	)	<b>STAFF MEMORANDUM</b>
<b>UPPER MIDWEST GRAIN ELEVATOR</b>	)	
	)	<b>GW18-001</b>
	)	

Comes now Commission Staff and hereby files this memorandum in support of its recommendation for suspension of grain buyer’s license.

Pursuant to ARSD 20:10:12:15, “at a minimum, for a class A license the applicant’s balance sheet must show a positive net worth of \$100,000.” The rule goes on to mandate that the licensee must show current assets greater than current liabilities. At the time of the hearing, it was undisputed that Utica Grain, Inc. dba Upper Midwest Grain Elevator (Midwest Grain) did not show a positive net worth of at least \$100,000 on its balance sheets. Thus, Staff recommends the Commission suspend and ultimately revoke the grain buyer’s license for each of Midwest Grain’s four locations.

**I. On-going Concerns**

**a. Inability to Account for Expenditures**

Throughout the August 24 hearing, Midwest Grain continued to assure the Commission that the owner would take a more active role in the company and that would alleviate the financial concerns. However, Midwest Grain owner Ralph Marquardt’s same witnesses were unable to account for the origin of a \$284,941.28 cash deposit upon which they relied to ensure the Commission they were financially viable.

Upon review of the company's finances and interviews of Midwest Grain employees Jason Pearson and Dave Husby, it appears to Staff that this cash deposit is from the Ralph Marquardt-owned Barnes Hay Company. It is not uncommon for grain elevators to make large purchases, although it is unusual that a hay company owes an elevator such a sum.

**b. Lost and Unaccounted for Grain**

The USDA Memorandum of Adjustments dated August 23, 2018, notes a significant shortage of grain. Similar discrepancies have occurred in the past. The Affidavit of PUC Grain Warehouse Inspector Justin Blais notes that in August 2017, the PUC was informed of significant shortfalls in corn and soybeans.

**c. Additional Concerns**

The operators continue to show a lack of respect for the PUC Grain Warehouse Staff and their responsibilities. Grain Warehouse Staff have devoted time and efforts weekly and communicate with Midwest Grain officials on the need to achieve sustained compliance in order to protect farmers. It was not until the matter was brought to the Commission that company officials appear to take these compliance matters seriously and now pledge to be responsive to Staff.

**II. Staff's Response to Utica Grain's Compliance and Operational Plans**

The Commission specifically requested Staff provide comment on the Compliance and Operational Plans submitted by Utica Grain at the August 24, 2018 Commission meeting on the matter. Overall, Staff does not believe that this plan is adequate to ensure that Utica Grain comes back into, and remains, in compliance with state licensing requirements, nor is it sufficient to address the significant financial concerns that have been pervasive with this company for years, leaving producers at significant risk of financial harm.

The plan does include some items, specifically items 5 through 12, which Staff appreciates. However, Staff considers these items to be regular standards of practice for any grain buyer or elevator and Staff fails to understand how implementing these practices will actually lead to a change in the financial condition of Utica Grain. Additionally, item 1 may be appropriate, however the financial compliance problems Staff has worked to address with the company have been pervasive for years, and through numerous managers and employees. The financial concerns do not appear to rest with one or two unsuccessful managers, but appears to derive from unsustainable business practices. Staff is extremely doubtful that simply implementing management changes will bring this company back into a positive financial condition.

Items 2 and 3 appear to be aimed at ensuring Utica Grain submit reports as mandated. Staff assumes that this includes an assurance that all reports will be filed on time and this promise included the timely submission of any records or financial reports required by Staff. Again, while Staff does appreciate that Utica Grain included these items in the compliance plan, Staff is not confident that the company will follow through on these promises. The law has required the company comply with these items for years, and the company has failed to comply. Staff has concerns as to whether and for how long the company will meet these promises once this proceeding is a distant memory.

Staff has significant concerns with item 4. As discussed in great length at the August 24, 2018 Commission meeting, Staff has worked regularly with the company over the past four years. The company has repeatedly engaged in recapitalization as well as transactions with affiliates to infuse money into the company to no avail. Though this tactic has been successful in bringing the company back into compliance with the financial requirements in the short-term, the

company repeatedly falls out of compliance in the long-term while the company continues to post increasing losses to net profits each year for the last five years (See the attached Financial Analysis Data).

### **III. Alternatives to Revocation**

Because of the lack of sustained improvement after four years of Staff's weekly monitoring, and because Midwest Grain remains out of compliance with ARSD 20:10:12:15, Staff recommends the Commission suspend and revoke the company's grain buyer license. However, if the Commission chooses to allow Midwest Grain to maintain its licenses, Staff recommends the following.

#### **a. Class B Grain Buyer License**

A Class B license provides additional protections for sellers. SDCL 49-45-7.1 provides that a Class B Grain Buyer may not purchase grain in excess of five million dollars for the annual licensing period and may not enter into voluntary credit sales. Because this facility is a federally licensed warehouse, this would not limit the company to doing business only with those sellers who wish to have their grain priced and sold. Those transactions would be subject to the federal warehouse bond, adding a necessary layer of protection. Under the Class B license, the purchases of grain would all be covered by a bond.

Voluntary credit sale contracts currently in existence would not need to be priced and cleared. SDCL 49-45-7.1 proves that the holder of a Class B license may not *enter into* voluntary credit sale contracts. Any contracts currently in existence were entered into while the facility held a Class A license.

#### **b. Monthly Financial Statements Reviewed by a Third Party**

Staff's weekly monitoring of this facility has not proven successful in bringing the

company into sustained compliance. Therefore, Staff does not believe it is effective to devote time weekly to this effort going forward. Instead, Staff recommends monthly financial statements be submitted confidentially to the docket as compliance filings. The financial statements should be reviewed by a third party not currently or previously involved in reviewing Midwest Grain's financial statements. Midwest Grain went to great length to point out how items were missed under previous managers and asserting that balance sheets would be more accurate going forward. For that reason, any party involved in the preparation of the balance sheets prior to August 2018, should not be the third party reviewing the balance sheets for compliance with this condition.

**c. Ring Fencing**

In addition to the monthly financial statements, it is essential that Midwest Grain engage in ring fencing with the finances of this business. Similar to what is required of investor-owned utility companies in South Dakota, this particular regulated business should not be mingling assets and liabilities with those of the owner's other business, outside of transactions occurring in the regular course of business such as buying grain from Marquardt Farms. Staff has previously had tremendous difficulty deciphering which expenses on the balance sheet are truly those of Midwest Grain.

Farmers should not be at risk when the owner or holding company of a PUC-licensed grain buyer invests in new unrelated business ventures.

**d. Guarantee from Owner**

Staff requests that Midwest Grain's owner, Ralph Marquardt, sign a guarantee confirming he will personally insure that all producers are paid in the event of an insolvency. Mr. Marquardt stated on the record that he would personally guarantee payment, however,

without a signed written document, such a statement would not be binding on his estate.

Nonetheless, allowing an elevator to remain out of compliance with state licensing laws simply because an owner guarantees the company's payables gives Staff pause. As PUC Staff Inspector Blais testified, Staff licenses more than 300 grain buyer locations statewide. Therefore, it is impossible for Staff to know each individual owner personally, know their personal financial situation, and allow special treatment based on this. If the owner of a personally-owned company verbally agreed to pay farmers from his or her own pocket, the elevator happened to fail and the owner pass away, even if that owner were financially able, the farmers may not be paid. Some farmers may become insolvent waiting for an estate to go through probate, hoping a grain buyer's heirs and assigns honor a verbal agreement.

Thus, the necessary course of action, save revocation, is for Midwest Grain to come into compliance with the \$100,000 minimum, maintain and continually attest to such compliance, and for owner Ralph Marquardt to sign a personal guarantee.

#### **IV. Conclusion**

The record shows the grain buyer's pattern of disregard for the warnings and instructions of PUC Grain Warehouse Staff. Midwest Grain does not meet the financial criteria for licensing. The grain buyer license held by Midwest Grain should be suspended pending an evidentiary hearing if a request for such hearing is made pursuant to SDCL 49-45-16. In the alternative, Staff recommends the Commission revoke the Class A license and issue a Class B grain buyer license. Finally, if Midwest Grain is allowed to maintain a license, either Class A or Class B, Staff recommends it be subject to the conditions laid out in this memorandum and with the understanding that if any condition is not met, Staff will recommend revocation.