

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

IN THE MATTER OF LW SALES/LW ) SEED'S FAILURE TO OBTAIN ) NECESSARY LICENSURE PRIOR TO ) OPERATION AS A GRAIN DEALER IN THE ) STATE OF SOUTH DAKOTA ) )	ORDER FOR AND NOTICE OF MOTION HEARING ON CERTAIN ISSUES RAISED BY MOTION FOR SUMMARY JUDGMENT  GD07-001
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On March 1, 2007, Commission Staff (Staff) filed a Motion for Order to Show Cause against LW Sales/LW Seeds (LW or Respondent) alleging that LW was acting as a grain dealer without a license as is required by SDCL 49-45-1. At its March 13, 2007, regular meeting, the Commission voted unanimously to issue an Order to Show Cause against LW. On April 30, 2007, the Commission issued an Order Setting Procedural Schedule. On July 26, 2007, the Commission issued an Order Granting Motion for Amendment of Scheduling Order and a Second Order Setting Procedural Schedule.

On July 27, 2007, the Commission received a Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment from Commission Staff. On August 13, 2007, the Commission received LW Sales Brief in Resistance to Commission Staff's Motion for Summary Judgment. On August 24, 2007, the Commission received a Reply Brief in Support of Motion for Summary Judgment from Commission Staff. At its regularly scheduled meeting of August 28, 2007, the Commission considered the Motion for Summary Judgment. Neither LW nor its attorney appeared. Commission Staff recommended approval. The Commission unanimously voted to grant the Motion for Summary Judgment.

On September 12, 2007, the Commission received Respondent's Motion for Reconsideration/Motion to Set Aside and Staff's Letter Response to Respondent's Motion for Reconsideration. On September 25, 2007, the Commission received a Brief in Response to Letter of September 12, 2007, from LW. At its regularly scheduled meeting of September 25, 2007, the Commission considered Respondent's Motion for Reconsideration. Hearing no objection from Staff and finding sufficient cause therefore, the Commission unanimously voted to grant Respondent's Motion for Reconsideration and on September 26, 2007, issued its Order Granting Respondent's Motion for Reconsideration. On November 9, 2007, the Commission received Staff's Request for Hearing on the issues raised by its Motion for Summary Judgment with respect to whether LW has operated as a grain dealer without a license in violation of SDCL 49-45-1 and whether LW should be enjoined from future such activities, reserving for a later date hearing issues related to whether and how large a civil fine should be levied against LW.

The Commission has jurisdiction to consider and rule on the Motion for Summary Judgment pursuant to SDCL 1-26-18, 15-6-56 and 49-45-1 through 49-45-9 and ARSD 20:10:01:01.02 and 20:10:12.

A motion hearing will be held on the substantive definitional and culpability issues raised by Staff's Motion for Summary Judgment and LW's response(s) to it on November 20, 2007, beginning at 1:30 PM, in Rm. 412 of the State Capitol Building in Pierre, South Dakota. The hearing will not address any penalty issues that may result from a decision granting Staff's Motion in part on the culpability issues. The parties and their attorneys may appear either in person or by conference call. Staff shall file and serve any additional affidavits and/or exhibits that it wishes to file in support of the Motion at least five (5) days prior the hearing, and Respondent shall file any additional affidavits and/or exhibits in opposition to the Motion at least two (2) days prior to the hearing.

The issues at the hearing are: (i) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact with respect to whether the millet sold by LW to mushroom growers was "grain" within the meaning of SDCL 49-45-1.1(2); (ii) whether Commission Staff is therefore entitled to judgment as a matter of law as to this issue; (iii) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact with respect to whether such sales of millet to mushroom growers did not constitute "the isolated or occasional resale of grain by a person who does not hold himself or herself out as engaging in the business of reselling grain" pursuant to SDCL 49-45-1.1(3); (iv) whether Commission Staff is therefore entitled to judgment as a matter of law on this issue; (v) based on the findings and conclusions of (i) – (iv), whether LW has been acting as a "grain dealer" pursuant to SDCL 49-45-1.1(3) and 49-45-1; (vi) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact with respect to LW's having operated as a grain dealer without a license in violation of SDCL 49-45-1; and (vii) whether LW should accordingly be enjoined from operating as a grain dealer without a license in violation of SDCL 49-25-1.

The hearing will be an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to be present and to be represented by an attorney. These rights and other due process rights may be forfeited if not exercised at the hearing. The Commission will consider all pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, and the arguments of counsel presented at the hearing and may grant, deny or grant in part and deny in part Staff's Motion for Summary Judgment. To the extent the Commission grants the Motion, the Commission may issue a final decision that enjoins LW's operation as a grain dealer without a license and making further sales of grain to mushroom growers and following further proceedings may issue a final decision levying a civil fine against LW and/or such other and further relief as the Commission may deem appropriate. To the extent the Commission's decision results in a final decision or to the extent the decision results in an appealable interlocutory decision, it may be appealed by the parties to the circuit court and the state Supreme Court as provided by law. It is therefore

ORDERED, that a motion hearing shall be held at the time and place and in the manner specified above, on the issues set forth above.

Dated at Pierre, South Dakota, this 9<sup>th</sup> day of November, 2007.

<b>CERTIFICATE OF SERVICE</b>
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.
By: <u>Aldine Kalbo</u>
Date: <u>11/9/07</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Dustin M. Johnson  
DUSTIN M. JOHNSON, Chairman *dk*

Gary Hanson  
GARY HANSON, Commissioner

Steve Kolbeck  
STEVE KOLBECK, Commissioner