

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

IN THE MATTER OF THE PUC)	COMPLAINT
STAFF'S COMPLAINT AGAINST)	
SOUTH DAKOTA HUTTERIAN CO-)	GW22-006
OPERATIVE OF ABERDEEN, SOUTH)	
DAKOTA)	

COMES NOW, the Staff of the South Dakota Public Utilities Commission (Staff), pursuant to SDCL 49-45-1 and hereby requests the Public Utilities Commission (Commission) issue an Order finding South Dakota Hutterian Co-operative (Coop) to be in violation of SDCL 49-45-1 and associated statutes and administrative rules, and to issue a fine for the violations.

In support of its Petition, Staff asserts as follows:

1. Coop is a grain buyer located within the State of South Dakota.
2. Coop is registered with the South Dakota Secretary of State.
3. Coop has never held a grain buyer license from this Commission.
4. In the course of our regular duties, Staff became aware that Coop was acting as a grain buyer.
 - a. Staff understands Coop's role as it relates to this complaint to be as follows:
 - i. Ag Processing Inc. (AGP) is a soybean processor and buys its grain only from cooperatives, never from producers. AGP pays significant dividends to those cooperatives from whom AGP purchases grain, thus making a business relationship very desirable for a cooperative. AGP is not a licensed grain buyer, because AGP does not buy grain from a producer, rather it buys grain from a previous purchaser, which AGP also requires to be a cooperative. Therefore, by its very nature anyone who sells untreated grain to AGP must be a grain buyer.¹
 - ii. Because AGP will not purchase grain titled to anyone other than a cooperative, Coop takes title to and markets to AGP the grain from its various members, all of whom are Hutterite Colonies.

¹ The alternative would be that AGP is, in fact, not buying from first purchasers as AGP intended but is itself a grain buyer and should, therefore, be licensed.

- iii. Coop then sells the grain to AGP. Coop receives payment and remits checkoff (See Attachment 1). In addition to payment for the grain sold, Coop also received dividends from AGP. AGP pays the dividends to the Coop.
5. As further demonstrated by the scale tickets and purchase contracts attached to this complaint, soybeans delivered to AGP were delivered by Coop. See Attachment 2.
 - a. In addition to being named on the ticket, the address listed for the delivering party matches that of Coop.
6. Staff's records indicated that Coop grain sales to AGP in previous years have exceeded \$50 million in a single licensing year. See Attachment 3, Correspondence from AGP.
7. To Staff's knowledge, Coop does not have a valid bond to cover any of the grain purchases in South Dakota.
8. Staff has contacted Coop to inform them of the need to obtain a grain buyer license, as well as inform Coop of the financial and bonding requirements. See Attachment 4, Correspondence to Coop.
9. Because of the lucrative nature of doing business with AGP, Staff is aware that other cooperatives have been formed for the purpose of selling to AGP, since AGP only buys from cooperatives. Staff has confirmed that all other cooperatives from whom AGP purchases untreated grain in this state are properly licensed.

Legal Authority

Prior to July 1, 2022, SDCL 49-45-1 provided:

Before transacting the business of a grain buyer in this state, a person shall obtain a grain buyer license from the commission. A violation of this section is a Class 1 misdemeanor. Each purchase of grain without a license is a separate offense.

Operation as a grain buyer without a license may be enjoined upon complaint of the commission. In addition, the commission may assess a civil fine against an unlicensed grain buyer in the amount of one thousand dollars for each purchase of grain up to a maximum fine of twenty thousand dollars.

Any violations occurring after July 1, 2022, would fall under the statute as it now reads, which was amended to provide for a penalty “in the amount of five thousand dollars for each purchase of grain, up to a maximum fine of fifty thousand dollars per licensing period.”

SDCL 49-45-1.1(4) defines a grain buyer as “any person who purchases grain for the purpose of *reselling the unprocessed grain* or who *purchased three hundred thousand dollars’ worth or more of grain directly from producers* in a calendar year.” *{emphasis added}*

SDCL 49-45-9 provides:

Before any grain buyer license is issued by the commission, the applicant shall file with the commission a bond conditioned to secure the faithful performance of the applicant's obligations as a grain buyer and full and unreserved compliance with the laws of this state and the rules of the commission, relating to the purchase of grain by the grain buyer. The bond is for the specific purpose of protecting persons selling grain to the grain buyer. However, the bond may not benefit any person entering into a voluntary credit sale with a grain buyer. Any person who does business as a grain buyer without a bond is guilty of a Class 1 misdemeanor. Each day a person conducts the business of a grain buyer without a bond is a separate offense.

Analysis

As a preliminary matter, AGP is exempt from the licensing requirements found in SDCL Chapter 49-45 because it neither purchases grain for resale as untreated grain nor purchases directly from producers. Rather, all grain purchased by AGP is purchased for processing and none of the grain is purchased from producers.

It is clear from the information attached to this Complaint that Coop is selling grain to AGP. It is a legal impossibility to sell something one does not own. Thus, Coop must own or have title to the grain it sells to AGP.

Clearly, a very large amount of grain is being purchased from producers. In this case, the producer is the individual colony. Therefore, some entity, either Coop or AGP, is purchasing and needs to be properly licensed. Staff interprets the facts to show that the entity purchasing from producers in this case is Coop.

The manner in which Coop conducts business is not different from any other cooperative. Cooperatives by their nature operate and exist for the benefit of their members. This does not exempt cooperatives from licensing laws. In fact, this Commission issued some 85 grain buyer licenses for cooperatives for this licensing year.

Conclusion

It appears that Coop has been operating as a grain buyer without a license in South Dakota for several years. Coop has not been receptive to Staff's requests to become properly licensed and bonded.

It is of the utmost importance that our laws are applied evenhandedly to all grain buyers in this state. Staff does not have the authority to pick and choose which grain buyers to apply the laws to and which ones to exempt. We must apply the law equally to everyone.

WHEREFORE, Staff respectfully requests the Commission find Coop to have committed a violation of SDCL 49-45-1 for each instance Coop purchased grain in South Dakota without a license and issue the maximum fine permitted by law for each licensing year.

Additionally, because Coop was operating as an unlicensed grain buyer, there is not applicable bond coverage for any purchases made in South Dakota. Given the significant number of purchases made and Coop's failure to comply with state licensing requirements, Staff respectfully requests the Commission refer this matter to the applicable States Attorneys and/or the Attorney General for prosecution in accordance with SDCL 49-45-9.

Dated this 15th day of July 2022.



Kristen N. Edwards
Amanda M. Reiss
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Phone (605)773-3201
Kristen.edwards@state.sd.us