

**DIVIDER**  
STATE OF NORTH DAKOTA  
INFORMATION TECHNOLOGY DEPARTMENT  
SFN 2053 (4-2002)

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**DESCRIPTION**

**GE-04-496**  
**Public Service Commission**  
**vs. Earth Harvest Mills, Inc.**  
**Complaint** 04  
**Filed 9/21/2004**      **Closed 1/20/2005**

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Public Service Commission  
Receipt of Payment

Receipt# 6039

dated 12/6/2004 Check# 1470 for \$100 00  
Project Penalty

**Docket # GE-04-496**

Earth Harvest Mills, Inc  
P. O. Box 357  
Harvey ND 58341

ME-04 495 + GE-04 496



**Earth Harvest Mills, Inc.**

500 North Street W  
Harvey, ND 58341  
(701) 324-4330

The National Bank of Harvey  
Harvey, North Dakota 58341  
Phone (701) 324-4611

77-1048/913

12/1/2004

1470

PAY TO THE ORDER OF Public Service Commission

\$ \*\*100 00

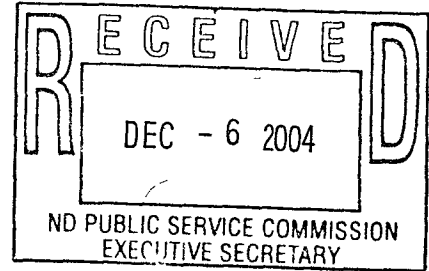
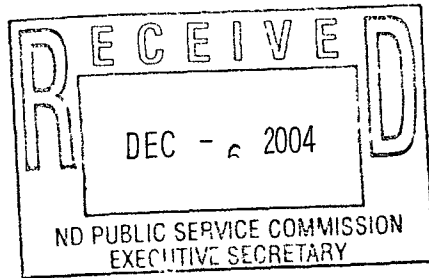
One Hundred and 00/100 \*\*\*\*\* DOLLARS

Public Service Commission

MEMO

AUTHORIZED SIGNATURE

⑈001470⑈ ⑆091310482⑆ ⑆168⑈057⑈



42 GE-04-495

Pages 1

Check for \$100 received

by Earth Harvest Mills, Inc

12/06/2004

CC Comm Legal Licensing

36 GE-04-496

Pages 1

Check for \$100 received

by Earth Harvest Mills, Inc

12/06/2004

CC Comm Legal Licensing

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist

Case No. GE-04-495

Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint

Case No. GE-04-496

STATE OF NORTH DAKOTA                    )  
  )ss  
COUNTY OF BURLEIGH                    )

Affidavit of Service by First Class Mail and Facsimile

Shelly A. Bauske deposes and says that.  
she is over the age of 18 years and not a party to this action and on the 4<sup>th</sup> day of  
November, 2004, she deposited in the United States Mail, Bismarck, North Dakota,  
three envelopes by regular mail or certified mail, return receipt requested, with postage  
fully prepaid, securely sealed and containing a photocopy of:

Findings of Fact, Conclusions of Law and Order

The envelopes were addressed as follows.

Grayson Hoberg  
Earth Harvest Mills, Inc.  
P. O. Box 357  
Harvey, ND 58341  
Cert. #7003 2260 0001 3517 9046  
Fax No 701-324-4334

Eric Hoberg  
1205 5<sup>th</sup> Ave NW  
Jamestown, ND 58401-2208

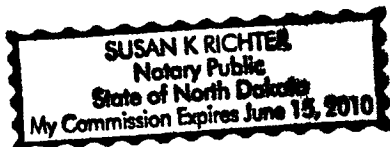
Gordon O Hoberg  
Attorney for Earth Harvest Mills, Inc.  
6771 41<sup>st</sup> Avenue SE  
Wishek, ND 58495  
Cert. #7003 2260 0001 3517 9053

To the best of affiant's knowledge the address shown is the addressee's last  
reasonably ascertainable mailing address.

*Shelly A Bauske*

Subscribed and sworn to before me  
this 4<sup>th</sup> day of November, 2004.

*Susan K Richter*



Notary Public

35 GE-04-496 Pages 1

41 GE-04-495 Pages 1

Affidavita of Service

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**November 4, 2004**

**Appearances**

**Commissioners Susan E. Wefald and Kevin Cramer**

**William W. Binek, Chief Counsel**, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, ND 58505, appearing for Public Service Commission Staff.

**Gordon O. Hoberg, Attorney at Law**, 6771 41<sup>st</sup> Ave SE, Wishek, ND 58495-9622, appearing on behalf of Earth Harvest Mills, Inc

**Al Wahl, Administrative Law Judge**, Office of Administrative Hearings, 1707 North 9<sup>th</sup> Street – Lower Level, Bismarck, ND 58501-1882, appearing as procedural Administrative Law Judge

**Preliminary Statement**

On September 23, 2004, the Public Service Commission's Staff (Staff) filed a Complaint against Earth Harvest Mills, Inc (Earth Harvest) alleging that Earth Harvest is operating as a public warehouseman or grain buyer within the State of North Dakota without the required license and corresponding bond.

On September 28, 2004, the Public Service Commission (Commission) found that the Complaint stated a prima facie case and that it be served on Earth Harvest. Also, on September 28, 2004, the Commission issued a Cease and Desist Order to immediately cease and desist the entity's grain buying or warehousing activities within the State of North Dakota.

On October 18, 2004, Earth Harvest filed a response to the Complaint and the Cease and Desist Order requesting that the matter be resolved quickly. While Earth Harvest's response was not a formal Answer, the Commission treated the response as a timely filed Answer to the Complaint and request for hearing on the Cease and Desist Order.

On October 19, 2004, Earth Harvest filed a waiver of service of the notice of hearing and waiver of time requirements for hearing.

On October 20, 2004, the Commission issued a Notice of Hearing scheduling a formal hearing on October 25, 2004, at 9:00 a.m. CDT, in the Commission Hearing Room, 12<sup>th</sup> Floor, State Capitol, Bismarck, North Dakota. The issues to be considered were identified as:

1. Whether N.D.C.C. Chapters 60-02 or 60-02.1 apply to Earth Harvest
2. Whether Earth Harvest violated N.D.C.C. Chapters 60-02 or 60-02.1 by failing to apply for and receive the required warehousing or grain buying license
3. Whether the Cease and Desist Order was lawfully issued by the Commission.
4. Whether the violations, if proved, subject Earth Harvest to the imposition of sanctions or penalties under N.D.C.C. § 49-07-01.1.

On October 21, 2004, Staff filed a Prehearing Brief in reply to Earth Harvest's letter response to the Complaint and the Cease and Desist Order.

On October 21, 2004, the Administrative Law Judge issued an Order for and Notice of Prehearing Conference to be held October 25, 2004, at 8:15 a.m., in the Commission Hearing Room, for the purpose of determining whether the proceedings can be consolidated and whether the parties can agree for a statement of material facts and for a procedure for the consolidated hearings.

At the prehearing conference on October 25, 2004, the parties agreed to consolidate the proceedings for hearing. The hearing was held as scheduled.

On October 27, 2004, the Commission received a post-hearing letter from Grayson L. Hoberg submitting additional argument on behalf of Earth Harvest regarding its position that it is not a public warehouse.

On October 28, 2004, Staff filed a response to Grayson L. Hoberg's post-hearing letter.

On October 29, 2004, in response to a request from the Commission, Staff and Earth Harvest each filed a proposed finding of fact, conclusions of law and order in these proceedings.

### Findings of Fact

1. Earth Harvest Mills, Inc. is a North Dakota Corporation with offices at 500 North Street West, P.O. Box 357, Harvey, North Dakota

2. Susan Richter, Director of the Commission's Licensing Division, testified that on April 5, 2004, the Licensing Division became aware through an article in an industry publication that Earth Harvest planned to operate a grain processing facility in Harvey, North Dakota to receive grain and mill it into flour.

3. The Licensing Division subsequently contacted Grayson Hoberg, CEO of Earth Harvest, advising him that the facility was required to be licensed as a public warehouse, and that no grain should be received until a license was granted by the Commission.

4 Under N.D.C.C. § 60-02-07, a public warehouse must be licensed by the Commission before it can conduct business in North Dakota, and before a license can be issued, N.D.C.C. § 60-02-09 requires that a bond must be filed with the Commission. N.D.C.C. § 60-02-09(6) provides that the bond is for the specific purpose of protecting the holders of outstanding receipts and to cover the costs of the Commission in the event of an insolvency.

5 Grayson Hoberg testified that between 20,000 and 30,000 bushels of grain have been purchased by Earth Harvest since February, 2004. Hoberg further testified that Earth Harvest does not have a North Dakota warehouse license.

6. Grayson Hoberg argued that Earth Harvest is not required to be licensed as a public warehouse because it is not a public buyer of grain. As authority for its position, Earth Harvest cited *Oscar H. Will & Co. v. State*, 281 N.W. 65 (N.D. 1938). Oscar H. Will & Company was a seed company. In that case, the Board of Railroad Commissioners (now Public Service Commission) sought to compel Oscar H. Will & Company to apply for a license as a public warehouseman. The Court stated that "[t]he question determinative of this controversy is whether the plaintiff, Oscar H. Will & Company, operates a public warehouse as that term is defined by the statutes of this state." *Oscar H. Will & Co.*, at 66.

7. In *Oscar H. Will & Co.*, the North Dakota Supreme Court compared the relevant provisions of the then applicable 1929 version of the public warehouse law with that of 1927, prior to the 1929 amendments. The 1927 version of the relevant law provided:

§ 7 All buildings, elevators and warehouses, and *all grist and flour mills, cereal and feed mills and seed houses, doing a shipping business* in this state, erected and operated, or which may hereafter be erected or operated by any person, association, copartnership or corporation, for the purpose of *buying, selling, storing, shipping or handling grain and seeds for profit*, are declared public warehouses and the person, association, copartnership or corporation owning or operating such buildings, elevators, mills or warehouses, which are now, or may be hereafter located or doing business within this State, whether such owners or operators reside within this State or not, are public warehousemen within the meaning of this section. Provided, that nothing in this act contained shall be construed to require any person or persons operating a flour, cereal or feed mill or seed house doing a manufacturing business only, to receive, store or purchase at said mill or seed house any kind of grain.

1927 N D Sess Laws ch. 155, § 7, cited in *Oscar H. Will & Co. v. State*, 281 N.W 65, 66-67 (N.D. 1938) (emphasis supplied).

8 The 1927 version included “seeds and seed houses” while the 1929 amendments omitted references to seeds and seed houses. Additionally, the 1929 amendments added the word “public” to modify the (slightly revised) operative phrase “buying, selling, storing and shipping.” These were the changes on which the Court relied to determine that Oscar H. Will & Company did not need a warehouse license. The relevant 1929 version read as follows.

§7. PUBLIC WAREHOUSES DEFINED.] All buildings, elevators and warehouses, and *all grist and flour mills, cereal and feed mills doing a shipping business* in this state, erected and operated, or which may hereafter be erected or operated, by any person, association, copartnership or corporation, for the purpose of *public buying, selling, storing and shipping grain for profit*, are declared public warehouses and the person, association, copartnership or corporation owning or operating such buildings, elevators, mills or warehouses which are now or may be hereafter located or doing business within this state, whether such owners or operators reside within this state or not, are public warehousemen within the meaning of this section. Provided, that nothing in this act contained shall be construed to require any person or persons operating a flour, cereal or feed mill doing a manufacturing business only to receive, store or purchase at said mill any kind of grain.

1929 N D. Sess. Laws ch. 137, § 2 (emphasis supplied).

9 In 1983, the relevant statute was revised again, but still referenced receiving grain from the public for buying, storing, selling or shipping. The 1983 revisions read as follows:

4. “Public warehouse” means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility in which *grain is received from the public for storing, buying, selling, or shipping for compensation.* Provided, however, that nothing in this subsection shall be construed to require any person operating a flour, cereal, or feed mill, doing manufacturing business only, to receive, store, or purchase any kind of grain at said mill.

1983 N.D. Sess. Laws ch 672, § 1 (emphasis denoted by italics supplied).

10. In 1985, the relevant law, codified as subsection 5 of N.D.C.C. § 60-02-01, was revised to delete reference to “public” in the definition. The 1985 version of the relevant statute provided.

4-5. “Public warehouse” means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility in which *grain is received from the public for storing, buying, selling, or shipping for compensation.* Provided, however, that nothing in this subsection chapter shall be construed to require any person operating a flour, cereal, or feed mill, a warehouseman doing manufacturing business only, to receive, store, or purchase any kind of grain at said mill.

1985 N.D. Sess. Laws ch. 661, § 1 (emphasis denoted by italics supplied)

11. In 1999, the statute was revised again, resulting in the provisions applicable to the instant case. Following are the 1999 revisions:

5. “Public warehouse” means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility not licensed under the United States Warehouse Act, 7 U.S.C. 241 et seq. in which *grain is received for storing, buying, selling, or shipping, or processing* for compensation. Provided, however, that nothing in this chapter shall be construed to require a warehouseman doing manufacturing business only, processor to receive, store, or purchase any lot or kind of grain at said mill facility.

1999 N.D. Sess. Laws ch 534, § 1 (emphasis denoted by italics supplied).

12. Currently, the 1999 version of the statute applies, and public warehouse is defined in N.D.C.C. § 60-02-01(5) as follows:

“Public warehouse” means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility not

licensed under the United States Warehouse Act [7 U.S.C. 241-273] in which grain is received for storing, buying, selling, shipping, or processing for compensation. Provided, however, that nothing in this chapter shall be construed to require a processor to receive, store, or purchase any lot or kind of grain at said facility.

13. We have carefully reviewed the *Oscar H. Will & Co.* case and the relevant statutes. The background of that case reveals that in 1927, the Legislature passed a law which vested power in the Board of Railroad Commissioners to license and regulate public warehouses. "Seed houses" were specifically identified as public warehouses in the 1927 law. In 1929, the Legislature amended the law deleting the words "seed" and "seed houses" and adding the word public before the phrase "buying, selling, storing and shipping of grain".

14. The reasoning of the Court in *Oscar H. Will & Co.* was that the omission of the words "seeds" and "seed houses" from the statute eliminated seed houses from the operation of the law, and that unless the scope of the business extended beyond that ordinarily done by seed houses, the law, as amended, did not apply to Oscar H. Will & Company. The Court then looked at the addition of the words "public buying, selling, storing and shipping of grain" and determined that the word "public," in the sense used in the amended statute, was an adjective which modified and limited the word buying. The Court determined that Oscar H. Will & Company was not a public buyer of grain. *Oscar H. Will & Co.*, at 67.

15. The *Oscar H. Will & Co.* case cited by Earth Harvest does not establish precedent that the Commission must follow in the instant case because today's relevant statutory language is different from that interpreted by the North Dakota Supreme Court in *Oscar H. Will & Co.* Today, the definition of "public warehouse" under N.D.C.C. § 60-02-01(5) includes processing facilities, while it did not under *Oscar H. Will and Co.* Additionally, today, the words "public buying, selling, storing and shipping of grain" are not found in North Dakota's definition of public warehouse or public warehouseman.

16. We find that Earth Harvest is a processor of grain and is a public warehouse as defined in N.D.C.C. § 60-02-01(5). Therefore, Earth Harvest is subject to licensing, bonding and other requirements of N.D.C.C. Chapter 60-02 applicable to processors.

17. We find that Earth Harvest has purchased grain from producers in North Dakota without a license and bond as required under N.D.C.C. §§ 60-02-07 and 60-02-09, and that Earth Harvest violated N.D.C.C. Chapter 60-02 by failing to apply for and receive a public warehouse license prior to purchasing grain. Therefore, the Cease and Desist Order was lawfully issued by the Commission.

18. The Commission has authority to impose sanctions and assess penalties under N.D.C.C. §§ 49-07-01 1 and 60-02-10.1 for violations of statutes, rules and orders.

From the foregoing Findings of Fact, the Commission makes the following:

### **Conclusions of Law**

1. The Public Service Commission has jurisdiction over Earth Harvest and the subject matter of this proceeding
2. Earth Harvest is a processor of grain and is a "public warehouse" as defined in N.D.C.C. § 60-02-01(5), and therefore, Earth Harvest is subject to licensing and other requirements of N.D.C.C. Chapter 60-02 applicable to processors.
3. Earth Harvest purchased grain from producers in North Dakota without a license and bond as required under N.D.C.C. §§ 60-02-07 and 60-02-09
4. Earth Harvest violated N.D.C.C. Chapter 60-02 by failing to apply for and receive a public warehouse license prior to purchasing grain.
5. The Cease and Desist Order was lawfully issued by the Commission.
6. The Commission has authority to assess sanctions and penalties.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following.

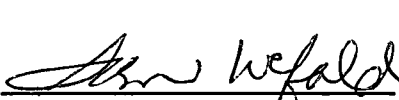
### **Order**


The Commission orders:

1. Earth Harvest Mills, Inc is prohibited from purchasing grain in North Dakota until it obtains a license from the Commission as a public warehouse in North Dakota under N.D.C.C. Chapter 60-02
2. The Cease and Desist Order issued by the Commission on September 28, 2004, remains in full force and effect.
3. A penalty of one thousand dollars (\$1,000.00) is assessed against Earth Harvest Mills, Inc., for purchasing grain without the necessary license and bond as required by N.D.C.C. §§ 60-02-07 and 60-02-09. All but one hundred dollars (\$100.00) of this amount is suspended, but will become payable if Earth Harvest Mills, Inc, violates any provisions of state warehouse laws within two years of the date of this Order. Remittance of this balance would be due in addition to the penalty assessed for the subsequent violation

4. Remittance of the one hundred dollar (\$100 00) penalty that is currently payable shall be made to the Public Service Commission within thirty days of receipt of this Order.

**PUBLIC SERVICE COMMISSION**

  
\_\_\_\_\_  
**Susan E. Wefald**  
Commissioner

  
\_\_\_\_\_  
**Tony Clark**  
President

  
\_\_\_\_\_  
**Kevin Cramer**  
Commissioner

T.C.I.

**APPROVED**

**MOTION**

DATE: 11-4-04  
KME

**November 4, 2004**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**

I move the Commission adopt the Findings of Fact, Conclusions of Law, and Order in Case No. GE-04-495 – Public Service Commission, Earth Harvest Mills, Inc., Ex Parte Cease and Desist and Case No GE-04-496 – Public Service Commission vs. Earth Harvest Mills, Inc., Complaint.

9/20 Grand Forks

AGRICULTURE

# Harvey mill leader says business goes on

■ CEO says he will get required license

**By Stephen J. Lee**  
Herald Staff Writer

The CEO of a Harvey, N D, organic wheat mill ordered to stop buying grain until it gets a license said Wednesday the business will get one soon.

Grayson Hoberg, head of Earth Harvest Mills, said he didn't know a mill needed the same kind of grain warehouse license issued by the North Dakota Public Service Commission as regular grain elevators need.

Although PSC officials contacted him months ago and told him he needed a license, Hoberg said his reading of the state law didn't make it clear that a mill needed the grain warehouse license. But, he now recognizes that Earth Harvest does need a license and said he will obtain one within a week or two, Hoberg said.

Earth Harvest Mills began producing flour last spring from organic wheat, marketed under the brandname Dakota Prairie Organic Flour Co.

Tuesday, PSC officials announced they had ordered Earth Harvest to stop buying grain until it obtained bonding and a license. A farmer complained last week that he had sold wheat to the mill but hadn't gotten paid, PSC officials said.

Hoberg said Wednesday that the farmer's wheat didn't meet the mill's standards, so the farmer wasn't paid. "He took his wheat back," Hoberg said.

His difficulty, he said, is getting the bonding needed first in order to buy the \$300 state license. Bonding companies tell him they want to see his business go for a year before

bonding him, Hoberg said.

But the business is very viable and a good investment, supported by a variety of federal, state and local funding entities, including Wells County and Harvey's jobs authority program, Hoberg said.

The mill received a loan guarantee of \$720,000 last year from the U.S. Department of Agriculture's Rural Development program; Harvey's jobs authority invested \$72,000. Hoberg declined to reveal the remainder of the public funds obtained in financing the reportedly \$2 million mills project that broke ground a year ago.

He remains in business, grinding already delivered wheat and shipping out flour, employing four people besides himself, Hoberg said. Projections reported a year ago indicated at least a dozen people or more would be employed at the plant. But Hoberg has plans to increase the number of employees, along with plans to expand the milling capacity and the types of grain milled, possibly including flax, "if I can figure out how to mill it," he said.

He said he's nearing the "break even" point at the plant of shipping and selling 11 semi-truck loads of flour per week.

"We will reach that in a couple of months," he said. The flour is being sold to bakeries on the East and West coasts, he said, but he plans to have Dakota Prairie Organic Flour available in North Dakota stores within months.

Lee can be reached at (800) 477-6572, extension 237, or at (701) 780-1237; e-mail [slee@gfherald.com](mailto:slee@gfherald.com)

EXHIBIT

38

GE-04-495

Pages 1

Copy of newspaper article "Harvey mill leader says business goes on" by Public Service Commission

10/25/2004

Exhibit # PSC-1

CC Comm Legal Licensing

32

GE-04-496

Pages 1

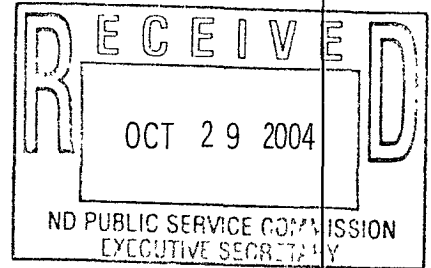
Copy of newspaper article "Harvey mill leader says business goes on" by Public Service Commission

10/25/2004

Exhibit # PSC-1

CC Comm Legal Licensing

1 Earth Harvest Mills, Inc.  
2 PO Box 357  
3 500 North Street West  
4 Harvey, ND 58341  
5  
6 (701) 324-4330



Public Service Commission Hearing

PUBLIC SERVICE COMMISSION

Case No.: GE-04-495

Case No.: GE-04-496

vs.

Proposed Findings of Fact,  
Conclusions of Law and  
Order for Judgment

EARTH HARVEST MILLS,

Ex Parte Cease & Desist  
Complaint

**Findings of Fact**

- 1) Earth Harvest Mills, Inc. (Earth Harvest) is an organic flour mill in Harvey, North Dakota. Earth Harvest purchases organic grain, mills the grain into organic and kosher products for consumers, bakeries and animal feed.
- 2) Earth Harvest broke ground for construction of the mill in October 2003 and their first commercial shipment of flour was June 21, 2004.
- 3) On September 23, 2004, the Public Service Commission's Staff (Staff) filed a Complaint against Earth Harvest alleging that Earth Harvest is operating as a public warehouseman or grain buyer within the State of North Dakota without the required license and corresponding bond.
- 4) On September 28, 2004, the Commission found that the Complaint stated a prima facie case and served it on Earth Harvest.

- 1 5) On September 28, 2004, the Commission issued a Cease and Desist Order for  
2 Earth Harvest to immediately cease and desist the entity's grain buying or  
3 warehousing activities within the State of North Dakota.
- 4 6) On October 18, 2004, Earth Harvest filed a response to the Complaint and  
5 the Cease and Desist order requesting that the matter be resolved quickly.
- 6 7) A Hearing was held before the Public Service Commission on October 25,  
7 2004.
- 8 8) Between December 2003 and February 2004 Earth Harvest Mills entered into  
9 contracts with approximately fifteen growers for the purchase of their  
10 grain. Prior to completing these contracts Earth Harvest rejected over 60  
11 percent of the grain offered to it. On the average it took a month from  
12 initial contact with the grower, receiving samples, testing samples (in  
13 our lab and a commercial lab in Kansas), negotiating a price, to signing a  
14 one-year contract with the grower.
- 15 9) Earth Harvest does not buy its grain from the public. Earth Harvest buys  
16 its grain from a restricted and selected group of producers with whom it  
17 enters into specific one-year contracts.
- 18 10) Between February and July 2004, Earth Harvest picked up some of the  
19 contracted grain. The grain is weighed on a certified scale at one of the  
20 local elevators. The grain is then stored at the mill in Earth Harvest  
21 hoppers (20,000 bushels capacity).
- 22 11) Earth Harvest does not store or ship grain for others, and does not  
23 hold itself out to the public as a buyer of grain generally. Earth  
24 Harvest does not post prices.
- 25 12) Earth Harvest does not receive compensation for the purchase of grains.

1 13) Staff filed a prehearing brief and stated that Earth Harvest should not  
2 be licensed as a grain buyer under N.D.C.C. Chapter 60-02.1 because Earth  
3 Harvest has a facility for receiving grain.

4 14) Staff testified during the hearing that Earth Harvest should not be  
5 licensed as a grain buyer under N.D.C.C. Chapter 60-02.1.

### 6 Conclusions of Law

7 1) N.D.C.C. Chapter 60-02-01 defines "Public Warehouse" and "Public  
8 Warehouseman" and it further defines "public", see also "Public  
9 Warehouseman." under Decisions Under Prior Law:

10 a) N.D.C.C. Chapter 60-02-01(5): "Public warehouse" means any elevator,  
11 mill, warehouse, subterminal, grain warehouse, terminal warehouse, or  
12 other structure or facility not licensed under the United States  
13 Warehouse Act [7 U.S.C. 241-273] in which grain is received for  
14 storing, buying, selling, shipping, or processing for compensation.  
15 Provided, however, that nothing in this chapter shall be construed to  
16 require a processor to receive, store, or purchase any lot or kind of  
17 grain at said facility.

18 b) N.D.C.C. Chapter 60-02-01(6): "Public warehouseman" means the person  
19 operating a public warehouse that is located or doing business within  
20 this state, whether or not such owner or operator resides within this  
21 state. The term does not include a person who is permitted to sell  
22 seed under chapter 4-09, if that person does not store grain for the  
23 public and buys grain only for processing and subsequent resale as  
24 seed, or an authorized dealer or agent of a seed company holding a  
25 permit in accordance with section 4-09-14.4.

1 c) N.D.C.C. Chapter 60-02-01 Decisions Under Prior Law: "Public  
2 Warehouseman." Provisions of S.L. 1927, ch. 155, as amended by S.L.  
3 1929, ch. 137 defining "public warehouseman" did not classify as such  
4 all buyers of grain but only those who held themselves out to public as  
5 being ready to purchase grain from public generally. Oscar H. Will &  
6 Co. v. State, 68 N.D. 433, 281 N.W. 65 (1938).

7 2) The Supreme Court of North Dakota in Oscar H. Will & Co. v. State, 281  
8 N.W. 65 (N.D. 1938) clarified that it was not the intention of the  
9 legislature that all who buy grain for resale must be licensed. It is the  
10 public nature of the business which brings about regulation by the state  
11 through the Public Service Commission as a protection to producers and  
12 shippers. **A public buyer of grain, as contemplated by the statute, is one  
13 who holds himself out to the public as being willing and ready to purchase  
14 grain from the public generally.**

15 3) The Oscar H Will case defines what is not a public warehouse. See page  
16 three, third paragraph last sentence: "... it definitely establishes that  
17 the plaintiff buys most of its corn not from the public, but from a  
18 restricted and selected group of producers with whom it enters into  
19 specific contracts." And page three, fourth paragraph, third sentence:  
20 "The price paid for grains is not the general market price but that which  
21 is agreed upon between the seller and the plaintiff, although the market  
22 price enters into the negotiations. The plaintiff rejects about 90 per  
23 cent of the grain offered to it. It does not maintain scales of its own  
24 for use in the purchase of grain. All grain purchased is weighed upon  
25 city scales. It does not store or ship grain for others, and does not

1 hold itself out to the public as a buyer of grain generally. It posts no  
2 prices, and pays cash for all grain selected for purchase."

3 4) The facts of the case show that Earth Harvest is a buyer and processor of  
4 grain but Earth Harvest is not a **public** buyer of grain, a **public** processor  
5 of grain or a **public** warehouse as contemplated and defined by the statutes  
6 of North Dakota.

7 5) In 1929 the statutes were changed from a "warehouse license" to a "public  
8 warehouse license". In 1938 the North Dakota Supreme Court defined **public**  
9 in the Oscar H. Will case. In 1999 **processor** was added to the language of  
10 "public warehouse". Today it is a "public warehouse license" not a  
11 "warehouse license" and the courts definition of **public** is the current  
12 law.

### 13 Order

14 1) Let Judgment be entered in favor of Earth Harvest Mills, Inc.

15 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

#### 16 PUBLIC SERVICE COMMISSION

17  
18 \_\_\_\_\_  
19 **Susan E. Wefald**  
**Commissioner**

\_\_\_\_\_

**Tony Clark**  
**President**

\_\_\_\_\_

**Kevin Cramer**  
**Commissioner**



Public Service Commission  
State of North Dakota

COMMISSIONERS

Tony Clark, President  
Susan E Wefald  
Kevin Cramer

Executive Secretary  
Illona A Jeffcoat-Sacco

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Phone 701-328-2400

October 29, 2004

Ms Illona A Jeffcoat-Sacco  
Public Service Commission  
600 E Boulevard Ave. Dept 408  
Bismarck, ND 58505-0480

RE: **Public Service Commission vs.  
Earth Harvest Mills, Inc.  
Complaint  
Case No. GE-04-496**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist  
Case No. GE-04-495**

Dear Ms Jeffcoat-Sacco

Enclosed for filing in the above referenced cases are the original and seven copies of the proposed **Findings of Fact, Conclusions of Law and Order** in these proceedings

Thank you

Sincerely,

William W. Biner  
Chief Counsel

WWBsls  
Enclosure

C Grayson Hoberg, Earth Harvest Mills, Inc  
Gordon Hoberg  
Eric Hoberg

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**Appearances**

**Commissioners Susan E. Wefald and Kevin Cramer**

**William W. Binek, Chief Counsel**, Public Service Commission, State Capitol, 600 East Boulevard Avenue, Bismarck, ND 58505, appearing for Public Service Commission Staff.

**Gordon O. Hoberg, Attorney at Law**, 6771 41<sup>st</sup> Ave SE, Wishek, ND 58495-9622, appearing on behalf of Earth Harvest Mills, Inc

**Al Wahl, Administrative Law Judge**, Office of Administrative Hearings, 1707 North 9<sup>th</sup> Street – Lower Level, Bismarck, ND 58501-1882, appearing as procedural Administrative Law Judge

**Preliminary Statement**

On September 23, 2004, the Public Service Commission's Staff (Staff) filed a Complaint against Earth Harvest Mills, Inc (Earth Harvest) alleging that Earth Harvest is operating as a public warehouseman or grain buyer within the State of North Dakota without the required license and corresponding bond

On September 28, 2004, the Public Service Commission (Commission) found that the Complaint stated a prima facie case and that it be served on Earth Harvest Also, on September 28, 2004, the Commission issued a Cease and Desist Order to immediately cease and desist the entity's grain buying or warehousing activities within the State of North Dakota.

On October 18, 2004, Earth Harvest filed a response to the Complaint and the Cease and Desist Order requesting that the matter be resolved quickly While Earth Harvest's response was not a formal Answer, the Commission treated the response as

a timely filed Answer to the Complaint and request for hearing on the Cease and Desist Order

On October 19, 2004, Earth Harvest filed a waiver of service of the notice of hearing and waiver of time requirements for hearing

On October 20, 2004, the Commission issued a Notice of Hearing scheduling a formal hearing on October 25, 2004, at 9 00 a m CDT, in the Commission Hearing Room, 12<sup>th</sup> Floor, State Capitol, Bismarck, North Dakota The issues to be considered were identified as

- 1 Whether N D C.C Chapters 60-02 or 60-02 1 apply to Earth Harvest
- 2 Whether Earth Harvest violated N D C C Chapters 60-02 or 60-02 1 by failing to apply for and receive the required warehousing or grain buying license.
- 3 Whether the Cease and Desist Order was lawfully issued by the Commission.
- 4 Whether the violations, if proved, subject Earth Harvest to the imposition of sanctions or penalties under N D C.C § 49-07-01 1

On October 21, 2004, Staff filed a Prehearing Brief in reply to Earth Harvest's letter response to the Complaint and the Cease and Desist Order

On October 21, 2004, the Administrative Law Judge issued an Order and Notice of Prehearing Conference to be held October 25, 2004 at 8 15 a m , in the Commission Hearing Room, for the purpose of determining whether the proceedings can be consolidated and whether the parties can agree for a statement of material facts and for a procedure for the consolidated hearings

At the prehearing conference on October 25, 2004, the parties agreed to consolidate the proceedings for hearing. The hearing was held as scheduled

On October 27, 2004, the Commission received a post-hearing letter from Grayson L Hoberg submitting additional argument on behalf of Earth Harvest Mills, Inc (Earth Harvest) regarding its position that it is not a public warehouse

On October 28, 2004, Staff filed a response to Grayson L Hoberg's post-hearing letter

### **Findings of Fact**

1 Earth Harvest Mills, Inc is a North Dakota Corporation with offices at 500 North Street West, P O Box 357, Harvey, North Dakota

2 Susan Richter, Director of the Commission's Licensing Division, testified that the on April 5, 2004, the Licensing Division became aware through an article in an industry publication that Earth Harvest planned to operate a grain processing facility in Harvey, North Dakota to receive grain and mill it into flour

3 The Licensing Division contacted Grayson Hoberg, CEO of Earth Harvest, advising him that the facility was required to be licensed as a public warehouse, and that no grain should be received until a license was granted by the Commission "Public Warehouse is defined in N D C C § 60-02-01(5) as follows

"Public warehouse" means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility not licensed under the United States Warehouse Act [7 U S C 241-273] in which grain is received for storing, buying, selling, shipping, or processing for compensation Provided, however, that nothing in this chapter shall be construed to require a processor to receive, store, or purchase any lot or kind of grain at said facility

4 Under N D C C § 60-02-07, a public warehouse must be licensed by the Commission before it can conduct business in North Dakota, and before a license can be issued N D C C § 60-02-09 requires that a bond must be filed with the Commission N D C C § 60-02-09(6) provides that the bond is for the specific purpose of protecting the holders of outstanding receipts and to cover the costs of the Commission in the event of an insolvency.

5 Grayson Hoberg testified that between 20,000 and 30,000 bushels of grain have been purchased by Earth Harvest since February, 2004 Hoberg further testified that Earth Harvest does not have a North Dakota warehouse license

6 Grayson Hoberg argued that Earth Harvest is not required to be licensed as a public warehouse because it is not a public buyer of grain As authority for its position, Earth Harvest cited *Oscar H Will & Co. v State*, 281 N W 65 (N D 1938) Oscar H Will & Company was a seed company. In that case, the Board of Railroad Commissioners (now Public Service Commission) sought to compel Oscar H Will & Company to apply for a license as a public warehouseman. The Court stated that "[t]he question determinative of this controversy is whether the plaintiff, Oscar H Will & Company, operates a public warehouse **as that term is defined by the statutes of this state**" (Emphasis supplied)

7 We have carefully reviewed the *Oscar H Will & Co* case. The background of that case reveals that in 1927, the Legislature passed a law which vested power in the Board of Railroad Commissioners to license and regulate public warehouses. "Seed houses" were specifically identified as public warehouses in the 1927 law In 1929, the Legislature amended the law and the words "seed" and "seed houses" were omitted from the law in the amendment The second significant change to the law in 1929 was

a provision that was added to the law referring to the “**public** buying, selling, storing and shipping of grain” (emphasis supplied)

8 The reasoning of the Court in *Oscar H Will & Co* was that the omission of the words “seed” and “seed houses” from the statute eliminated seed houses from the operation of the law, and that unless the scope of the business extended beyond that ordinarily done by seed houses, the law, as amended, did not apply to the Oscar H Will & Co case. The Court then looked at the addition of the words “public buying, selling, storing and shipping of grain” and determined that the word “public,” in the sense used in the amended statute, was an adjective which modified and limited the word buying. The Court determined that Oscar H Will & Co. was not a public buyer of grain

9 The *Oscar H. Will & Co* case cited by Earth Harvest does not establish precedent for the Commission to follow in this case because the definition of “public warehouse” under N.D.C.C. § 60-02-01(5) includes processing facilities, and because the words “public buying, selling, storing and shipping of grain” are not found in N.D.C.C. Chapter 60-02

10 We find that Earth Harvest is a processor of grain and is a “public warehouse” as defined in N.D.C.C. § 60-02-01(5), and therefore, Earth Harvest is subject to licensing and other requirements of N.D.C.C. Chapter 60-02 applicable to processors

11 We find that Earth Harvest has purchased grain from producers in North Dakota without a license and bond as required under N.D.C.C. §§ 60-02-07 and 60-02-09, and that Earth Harvest violated N.D.C.C. Chapter 60-02 by failing to apply for and receive a public warehouse license prior to purchasing grain. Therefore the Cease and Desist Order was lawfully issued by the Commission.

12. The Commission has authority to assess sanctions and penalties under N.D.C.C. §§ 49-07-01.1 and 60-02-10 1 for violations of statutes, rules and orders

From the foregoing Findings of Fact, the Commission makes the following

### **Conclusions of Law**

1 The Public Service Commission has jurisdiction over Earth Harvest Mills, Inc., and the subject matter of this proceeding

2 Earth Harvest Mills, Inc. is a processor of grain and is a “public warehouse” as defined in N.D.C.C. § 60-02-01(5), and therefore, Earth Harvest Mills, Inc. is subject to licensing and other requirements of N.D.C.C. Chapter 60-02 applicable to processors

3 Earth Harvest purchased grain from producers in North Dakota without a license and bond as required under N.D.C.C. §§ 60-02-07 and 60-02-09

4 Earth Harvest Mills, Inc violated N.D C C Chapter 60-02 by failing to apply for and receive a public warehouse license prior to purchasing grain

5 The Cease and Desist Order was lawfully issued by the Commission

6 The Commission has authority to assess sanctions and penalties

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

### **Order**

The Commission orders

1 Earth Harvest Mills, Inc is prohibited from purchasing grain in North Dakota until it obtains a license from the Commission as a public warehouse in North Dakota under N D C C. Chapter 60-02

2 The Cease and Desist Order issue by the Commission on September 28, 2004, remains in full force and effect.

3 A penalty of \_\_\_\_\_ dollars is assessed against Earth Harvest Mills, Inc., for purchasing grain without the necessary license and bond as required by N D C.C. §§ 60-02-07 and 60-02-09 All but \_\_\_\_\_ dollars of this amount is suspended, but will become payable if Earth Harvest Mills, Inc., violates any provisions of state warehouse laws within two years of the date of this Order Remittance of this balance would be due in addition to the penalty assessed for the subsequent violation

4 Remittance of the \_\_\_\_\_ dollar penalty that is currently payable shall be made to the Public Service Commission within thirty days of receipt of this Order

### **PUBLIC SERVICE COMMISSION**

---

**Susan E. Wefald**  
**Commissioner**

---

**Tony Clark**  
**President**

---

**Kevin Cramer**  
**Commissioner**





Public Service Commission  
State of North Dakota

COMMISSIONERS

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Susan E Wefald  
Kevin Cramer

Executive Secretary  
Illona A Jeffcoat-Sacco

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October 28, 2004

William W. Binek  
Attorney for Staff  
Public Service Commission  
600 East Boulevard Ave. – Dept 408  
Bismarck, ND 58505-0480

Gordon O Hoberg  
Attorney for Earth Harvest Mills, Inc.  
6771 41<sup>st</sup> Avenue SE  
Wishek, ND 58495

Re: **Case No. GE-04-495**  
**Public Service Commission**  
**Earth Harvest Mills, Inc.**  
**Ex Parte Cease & Desist**

**Case No. GE-04-496**  
**Public Service Commission**  
**vs. Earth Harvest Mills, Inc.**  
**Complaint**

Dear Mr Binek and Judge Hoberg:

Thank you for the information you have provided in this case to date.

In order to assist the Commission in making its decision on the case as expeditiously as possible, we invite you to submit Proposed Findings of Fact, Conclusions of Law and Order. If you choose to submit a filing, please do so as soon as possible. Please let us know by phone when you will be able to make this filing.

Once the proposed decisions are available for Commission review, the Commission will schedule a meeting for the purpose of making a decision on this matter. Thank you for your prompt attention to this request.

Best regards,

Illona A. Jeffcoat-Sacco  
Executive Secretary

IJS

33 **GE-04-495** Pages 1

Letter inviting Proposed Findings of Fact,  
Conclusions of Law and Order  
by Public Service Commission

10/28/2004

CC Comm Legal Licensing

27 **GE-04-496** Pages 1

Letter inviting Proposed Findings of Fact,  
Conclusions of Law and Order  
by Public Service Commission

10/28/2004

CC Comm Legal Licensing





Public Service Commission  
State of North Dakota

COMMISSIONERS

Tony Clark, President  
Susan E Wefald  
Kevin Cramer

Executive Secretary  
Illona A Jeffcoat-Sacco

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October 28, 2004

Ms. Illona A. Jeffcoat-Sacco  
Public Service Commission  
600 E Boulevard Ave. Dept 408  
Bismarck, ND 58505-0480

RE: **Public Service Commission vs.  
Earth Harvest Mills, Inc.  
Complaint  
Case No. GE-04-496**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist  
Case No. GE-04-495**

Dear Ms Jeffcoat-Sacco:

Enclosed for filing in the above referenced cases are the original and seven copies of the **Staff Response to Grayson L. Hoberg Letter** in these proceedings.

Thank you

Sincerely,

  
William W Binék  
Chief Counsel

WWBsls  
Enclosure

C Grayson Hoberg, Earth Harvest Mills, Inc  
Gordon Hoberg  
Eric Hoberg

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**

**STAFF RESPONSE TO GRAYSON L. HOBERG LETTER**

**Preliminary Statement**

On October 25, 2004, the Public Service Commission held a hearing in the above captioned cases. Both parties presented testimony at the hearing and the Commission allowed both parties to present closing arguments. On October 27, 2004, the Commission received a post-hearing letter from Grayson L. Hoberg submitting additional argument on behalf of Earth Harvest Mills, Inc. (Earth Harvest) regarding its position that it is not a public warehouse.

Mr. Hoberg again cites *Oscar H. Will & Co.* 281 N.W. 65 (N.D. 1938) as authority for his position. He referenced the annotations contained in the North Dakota Century Code following N.D.C.C. § 60-02-01 where the case is cited under heading "DECISIONS UNDER PRIOR LAW." That is precisely the problem with Mr. Hoberg's reliance on the case – it is a case that was decided under prior law.

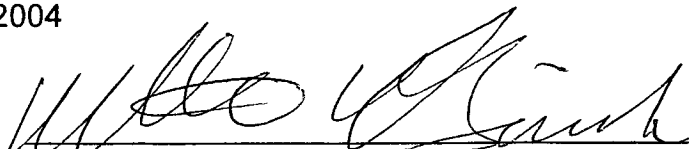
Mr. Hoberg is not operating his milling facility under 1929 law, which was the law in effect at the time the *Oscar H. Will & Co.* case was decided. He is operating under the law in effect in 2004. The law is very different today than it was in 1929. Staff pointed out in its Pre-hearing Brief and at the hearing that the definition of "public warehouse" today under N.D.C.C. § 60-02-01(5) includes processing facilities, and that the words "public buying, selling, storing and shipping of grain," which formed the basis for the Court's decision in the *Oscar H. Will & Co.* case, are not found in current law.

Under current law, Earth Harvest is by definition a "public warehouse." Earth Harvest is required to have a warehouse license from the Commission prior to purchasing grain whether Earth Harvest purchases grain from one, or a dozen, or a thousand producers or elevators.

Staff pointed out in its Prehearing Brief that the issue in the *Oscar H. Will & Co.* case was whether the company was a "public warehouse." The Court stated in that case that "[t]he question determinative of this controversy is whether the plaintiff, Oscar H. Will & Company, operates a public warehouse **as that term is defined by the**

**statutes of this state.”** (Emphasis supplied) Staff agrees with the statement made by the Court that the question of whether an entity operates as a public warehouse must be determined as the term is defined by the statutes. The question of whether Earth Harvest is a “public warehouse” must be determined according to the way “public warehouse” is defined under **current law** and not according to the definition under 1929 law.

Dated this 28<sup>th</sup> day of October, 2004

A handwritten signature in black ink, appearing to read 'William W. Binek', written over a horizontal line.

William W. Binek (ID # 02990)

Chief Counsel

Public Service Commission

600 E Boulevard Ave., Dept. 408

Bismarck, ND 58505

Attorney for Public Service Commission Staff





**OFFICE OF ADMINISTRATIVE HEARINGS**

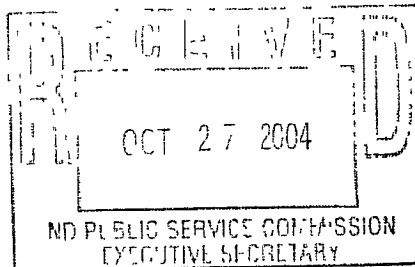
STATE OF NORTH DAKOTA  
1707 North 9th Street  
Bismarck, North Dakota 58501-1882

Allen C. Hoberg  
DIRECTOR

701-328-3260  
Fax 701-328-3254  
oah@state.nd.us  
www.state.nd.us/oah

October 26, 2004

Mr. William W. Binek  
Hearing Administrator  
Public Service Commission  
600 East Boulevard Avenue, Dept. 408  
Bismarck, ND 58505-0480



Dear Mr. Binek:

On October 20, 2004, you requested the designation of an administrative law judge by the Office of Administrative Hearings to conduct hearings in the matter of Earth Harvest Mills, Inc. (GE-04-495 and GE-04-496). I was designated as a procedural administrative law judge to conduct the hearings, but not to make findings of fact and conclusions of law, and issue an order. The hearings for this matter were held on October 25, 2004, as consolidated hearings, and completed that day. I understand that the agency will issue the appropriate order.

I have closed our file for this matter, and return the documents provided to me for the hearings to you for filing with the official agency record of this matter, as appropriate.

Sincerely,

Al Wahl  
Administrative Law Judge

AW/ljc

cc: Mr. Grayson Hoberg

**Wahl, Al**

---

**From:** Wahl, Al  
**Sent:** Thursday, October 21, 2004 3:15 PM  
**To:** Grayson L. Hoberg (grayson@dakota-prairie.com); Binek, William W.  
**Subject:** Public Service Commission, Earth Harvest Mills, Inc., Ex Parte Cease & Desist Order and Complaint

Mr. Binek and Mr. Hoberg, I have been designated the administrative law judge to conduct the hearings of the captioned matters before the Public Service Commission on October 25, 2004. Reviewing the files for these hearings, it appears to me that the hearings can be facilitated and expedited if the parties can agree to consolidate the hearings and agree for a statement of facts and for a procedure for the hearings. Considering the Commission's complaint and Mr. Hoberg's response, there does not appear to me to be any reason why these hearings cannot be consolidated, nor does there appear to be any dispute of any material fact (that is, the dispute arises upon the parties' respective interpretation of the application of the law for the conduct of EHM's business). If that is the case, I expect that we can all agree for a procedure for consolidated hearings which will facilitate these hearings for everyone involved.

Because of the shortness of time to prepare for the hearings and the need for each of you to give some thought to the proceeding, I am using e-mail to inform you of my decision to hold a prehearing conference immediately before the hearings, beginning at 8:15 o'clock a.m., October 25, 2004, in the Commission Hearing Room. A conformed copy of the order for and notice of prehearing conference is attached and a copy will be duly served by the Commission as required in accordance with the rules.

Prior to the prehearing conference, Mr. Hoberg, please carefully review and consider the Commission's complaint to decide whether you dispute any fact stated in paragraphs numbered III and IV, and that EHM has failed to apply for and receive a warehousing or grain buying license. (I understand, of course, that you dispute that EHM is required to have a warehousing or grain buying license. But that is a question of law. The question of fact is whether EHM has applied for and received a warehousing or grain buying license.) And also Mr. Hoberg, please consider and decide whether you have any reason to think that the cease and desist order served upon EHM was lawfully issued by the Commission (apart from whether or not EHM is required to have a warehousing or grain buying license to do business). If you think that it was not, please be prepared to briefly explain to me at the prehearing conference your reason or reasons for that conclusion. (Please do not communicate with me prior to the prehearing conference.)

Mr. Binek, please be prepared to discuss with Mr. Hoberg and me an agreement for a statement of material facts, and to discuss with me whether these matters may be submitted for the Commission's consideration upon oral statements to the Commissioners by you and Mr. Hoberg.

Al Wahl, Administrative Law Judge.

10/21/2004

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**

**ORDER FOR AND NOTICE OF  
PREHEARING CONFERENCE**

**October 21, 2004**

It appearing desirable to conduct a prehearing conference for the hearings of the captioned matters, it is ordered, and notice is hereby given, that a prehearing conference for the hearings of these matters will be held at 8:15 o'clock a.m. on October 25, 2004, at the Public Service Commission, in the Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota.

The purpose of the prehearing conference is to discuss with the parties and determine whether the hearings for these matters may be consolidated, whether the parties can agree for a statement of material facts and for a procedure for the consolidated hearings. The parties may also request a determination of any question regarding the conduct of the hearing.

Dated at Bismarck, North Dakota, this 21st day of October, 2004

State of North Dakota  
Public Service Commission

By: /S/ Al. Wahl  
Al Wahl, Administrative Law Judge  
Procedural Hearing Officer  
Office of Administrative Hearings  
1707 North 9th Street  
Bismarck, North Dakota 58501-1882  
Telephone No. (701) 328-3260

**Wahl, Al**

---

**From:** Grayson Hoberg [grayson@dakota-prairie.com]  
**Sent:** Thursday, October 21, 2004 3:42 PM  
**To:** Wahl, Al  
**Cc:** Binek, William W.  
**Subject:** Re: Public Service Commission, Earth Harvest Mills, Inc., Ex Parte Cease & Desist Order and Complaint

Thank you for the email. I will be at the prehearing.  
Grayson

On Oct 21, 2004, at 4:14 PM, Wahl, Al wrote:

> Mr. Binek and Mr. Hoberg, I have been designated the administrative  
> law judge to conduct the hearings of the captioned matters before the  
> Public Service Commission on October 25, 2004. Reviewing the files  
> for these hearings, it appears to me that the hearings can be  
> facilitated and expedited if the parties can agree to consolidate the  
> hearings and agree for a statement of facts and for a procedure for  
> the hearings. Considering the Commission's complaint and Mr. Hoberg's  
> response, there does not appear to me to be any reason why these hearings  
> cannot be consolidated, nor does there appear to be any dispute of any  
> material fact (that is, the dispute arises upon the parties'  
> respective interpretation of the application of the law for the  
> conduct of EHM's business) If that is the case, I expect that we can  
> all agree for a procedure for consolidated hearings which will  
> facilitate these hearings for everyone involved.

>  
>  
>  
> Because of the shortness of time to prepare for the hearings and the  
> need for each of you to give some thought to the proceeding, I am  
> using e-mail to inform you of my decision to hold a prehearing  
> conference immediately before the hearings, beginning at 8:15 o'clock  
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>  
>  
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> license. (I understand, of course, that you dispute that EHM is  
> required to have a warehousing or grain buying license. But that is a  
> question of law. The question of fact is whether EHM has applied for  
> and received a warehousing or grain buying license.) And also Mr.  
> Hoberg, please consider and decide whether you have any reason to

> think that the cease and desist order served upon EHM was lawfully  
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> have a warehousing or grain buying license to do business). If you  
> think that it was not, please be prepared to briefly explain to me at  
> the prehearing conference your reason or reasons for that conclusion.  
> (Please do not communicate with me prior to the prehearing  
> conference.)  
>  
>  
>  
> Mr. Binek, please be prepared to discuss with Mr. Hoberg and me an  
> agreement for a statement of material facts, and to discuss with me  
> whether these matters may be submitted for the Commission's  
> consideration upon oral statements to the Commissioners by you and Mr.  
> Hoberg.  
>  
>  
>  
> Al Wahl, Administrative Law Judge.  
> <Orderforphc.doc>

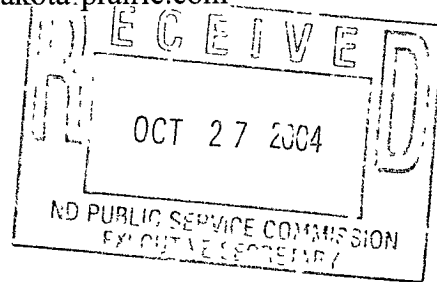


Earth Harvest Mills  
500 North Street West  
P O. Box 357  
Harvey, ND 58341

(701) 324-4330  
grayson@dakota-prairie.com

October 26, 2004

Susan Wefald  
State of North Dakota  
Public Service Commission  
600 E Boulevard Ave Dept 408  
Bismarck, ND 58505



Dear Susan Wefald.

There appeared to be some confusion at the close of the Hearing as to the role of the Supreme Court of North Dakota in defining "public". In the **2003** NDCC 60-02-01 under DECISIONS UNDER PRIOR LAW the Oscar H Will & Co. case is cited as the definition of "Public":

**"Public Warehouseman."**

*Provisions of S L 1927, ch 155, as amended by S L 1929, ch 137 defining "public warehouseman" did not classify as such all buyers of grain but only those who held themselves out to the public as being ready to purchase grain from public generally Oscar H Will & Co v State, 68 ND 433, 281 NW 65 (1938)*

Within the Oscar H. Will & Co. v. State (281 N.W. 65) it defined both a "public warehouseman" and a "public warehouse" as those who held themselves out to the public as being ready to purchase grain from public generally.

Earth Harvest Mills does not hold ourselves out to the public as being ready to purchase grain from the public generally. And as the PSC staff stated in their Prehearing Brief and testified Earth Harvest Mills is not a "grain buyer". Thus Earth Harvest Mills is not a "Public Warehouse" or a "Grain Buyer".

I hope this clears up any misunderstanding.

I talked to my father, Gordon Hoberg, about this and he informed me that I should send this letter to the PSC and the PSC attorney.

Sincerely,

Grayson L. Hoberg

cc Tony Clark  
Kevin Cramer  
William W Binek

enc 2003 NDCC 60-02-01 pp 90  
2003 NDCC 60-02-01 DECISIONS UNDER PRIOR LAW pp 91  
OSCAR H WILL & CO V STATE et al (281 N W 65)

27 **GE-04-495** Pages 7

Letter re role of ND Supreme Court defining "public" by Earth Harvest Mills Inc

21 **GE-04-496** Pages 7

Letter re role of ND Supreme Court defining "public" by Earth Harvest Mills Inc

10/27/2004 CC Comm Legal Licensing

Section		Section	
60-02-38	Refund of license fee by commission	60-02-41	Going out of business -- Redemption of receipts
60-02-39	Warehouse not to be closed without permission from commission -- Penalty	60-02-42	Cease and desist
60-02-40	Transfer of warehouse -- Redemption of receipts	60-02-43	Agricultural contracts -- Mediation or arbitration
		60-02-44	Licensed warehouse capacity and condominium storage

**60-02-01. Definitions.** In this chapter, unless the context or subject matter otherwise requires

1. "Commission" means the public service commission
2. "Credit-sale contract" means a written contract for the sale of grain pursuant to which the sale price is to be paid or may be paid more than thirty days after the delivery or release of the grain for sale and which contains the notice provided in subsection 7 of section 60-02-19 1 If a part of the sale price of a contract for the sale of grain is to be paid or may be paid more than thirty days after the delivery or release of the grain for sale, only such part of the contract is a credit-sale contract
- 3 "Grain" means wheat, durum, oats, rye, barley, buckwheat, flaxseed, speltz, safflower, sunflower seeds, tame mustard, peas, beans, soybeans, corn, clover, millet, alfalfa, and any other commercially grown grain or grass seed "Grain" as defined in this chapter shall not include grain or grass seeds owned by or in the possession of the warehouseman that have been cleaned, processed, and specifically identified for an intended use of planting for reproduction and for which a warehouse receipt has not been issued
- 4 "Noncredit-sale contract" means a contract for the sale of grain other than a credit-sale contract
- 5 "Public warehouse" means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility not licensed under the United States Warehouse Act [7 U.S.C. 241-273] in which grain is received for storing, buying, selling, shipping, or processing for compensation Provided, however, that nothing in this chapter shall be construed to require a processor to receive, store, or purchase any lot or kind of grain at said facility
- 6 "Public warehouseman" means the person operating a public warehouse that is located or doing business within this state, whether or not such owner or operator resides within this state The term does not include a person who is permitted to sell seed under chapter 4-09, if that person does not store grain for the public and buys grain only for processing and subsequent resale as seed, or an authorized dealer or agent of a seed company holding a permit in accordance with section 4-09-14 4
- 7 "Receipts" means grain warehouse receipts, scale tickets, checks, or other memoranda given by a public warehouseman for, or as evidence of, the receipt, storage, or sale of grain except when such memoranda was received as a result of a credit-sale contract

- 8 "Receiving station" means any facility other than an individually licensed warehouse that is used by a licensed public warehouseman to receive and temporarily store grain prior to transferring the grain to the warehouseman's primary licensed warehouse location or delivering it directly to market

**Source:** S L 1891, ch 126, § 4, R C 1895, § 1786, S L 1899, ch 126, § 1, R C 1899, § 1786, S L 1901, ch 140, § 1, R C 1905, § 2244, C L 1913, § 3107, S L 1925, ch 217, § 1, 1925 Supp., § 3125d1, S L 1927, ch 155, §§ 2, 7, 9, 25, 1929, ch 137, § 2, 1933, ch 4, § 1, R C 1943, § 60-0201, S L 1963, ch 413, § 1, 1983, ch 672, § 1, 1985, ch 661, § 1, 1993, ch 52, § 3, 1993, ch 585, § 1, 1999, ch 533, § 1, 1999, ch 534, § 1

#### **Bankruptcy Provisions**

Storage charges specified in this chapter and the lien provided for in section 41 07 15 are not in the nature of a setoff under 11 U S C Sec 553, and as regards grain assets, must be modified in the context of bankruptcy by 11 U S C Sec 557(h)(1), which provides that the trustee may recover from the proceeds of grain assets only the reasonable and necessary costs and expenses allowable under 11 U S C Sec 503(b) attributable to preserving or disposing of the grain. In re Woods Farmers Coop Elevator Co., 107 Bankr 678 (Bankr D N D 1989)

#### **Effect on Chapter 41-07**

This chapter is a statute for the regulation of grain and seed warehouses. Section 41-07-03 as well as section 41 07-10(4) make reference to its provisions, making it clear that chapter 41-07 must be read in conjunction with this chapter, and to the extent they are at variance this chapter overrides chapter 41-07. In re Woods Farmers Coop Elevator Co., 107 Bankr 678 (Bankr D N D 1989)

#### **DECISIONS UNDER PRIOR LAW**

##### **Constitutionality.**

Insofar as S L 1891, ch 126 defined public warehouses and prescribed maximum rates of charges for elevating and storing grain therein, the act was held to be constitutional. State ex rel Stoesser v Brass, 2 N D 482, 52

N W 408 (1892), aff'd, 153 U S 391, 14 S Ct 857, 38 L Ed 757 (1894)

##### **"Public Terminal Grain Elevator."**

Under S L 1925, ch 217, state-owned mill and elevator, with equipment, trackage, and facilities, constituted a "public terminal grain elevator" and was subject to regulation as such. State v Great N Ry, 56 N D 822, 219 N W 295 (1928)

##### **"Public Warehouseman."**

Provisions of S L 1927, ch 155, as amended by S L 1929, ch 137 defining "public warehouseman" did not classify as such all buyers of grain but only those who held themselves out to public as being ready to purchase grain from public generally. Oscar H Will & Co v State, 68 N D 433, 281 N W 65 (1938)

##### **Collateral References.**

Warehousemen  $\approx$  1-6

78 Am Jur 2d, Warehouses, § 2 et seq

93 C J S Warehousemen and Safe Depositories, §§ 1-4

Tort liability of warehouseman for theft by servant, 15 A L R 2d 847

Storage charges collectible by warehouseman guilty of negligence causing injury to, or destruction of, goods of a perishable nature, 32 A L R 2d 918

Warehouseman's liability for injury to or destruction of stored goods from floods, heavy rains, or the like, 60 A L R 2d 1097

Liability of warehouseman for injury to stored goods as result of failure to maintain proper temperatures, 92 A L R 2d 1298

Sufficiency of warehouseman's precautions to protect goods against fire, 42 A L R 3d 908

Presumption and burden of proof where subject of bailment is destroyed or damaged by fire, 44 A L R 3d 171

Bailee's liability for bailor's expense of recovering stolen subject of bailment, 80 A L R 3d 264

**60-02-02. Commission — Powers and duties.** The duties imposed by the provisions of this chapter and the powers conferred herein devolve upon the commission

**Source.** S L 1891, ch 126, § 1, R C 1895, § 1783, R C 1899, § 1783, R C 1905, § 2241, C L 1913, § 3100, S L 1927, ch 155, § 1, R C 1943, § 60 0202

#### **DECISIONS UNDER PRIOR LAW**

##### **Power to Require Bond**

Board of railroad commissioners had power

Westlaw.

281 N.W. 65  
68 N.D. 433, 281 N.W. 65  
(Cite as: 281 N.W. 65)

Page 1

Supreme Court of North Dakota.

OSCAR H. WILL & CO.  
v.  
STATE et al.

No. 6542.

July 13, 1938.

## \*66 Syllabus by the Court

1 Chapter 155, Session Laws N.D.1927, as amended by Chapter 137, Session Laws N.D.1929, defining public warehousemen does not classify as such all buyers of grain but only those buyers who hold themselves out to the public as being ready and willing to purchase grain from the public generally.

2 The evidence is examined and it is *held* that it fails to show that the plaintiff is a public warehouseman as that term is contemplated and defined by Chapter 155, Session Laws N.D.1927, and amendments thereto.

Appeal from District Court, Burleigh County; Fred Jansonius, Judge

Action by Oscar H Will & Co against the State of North Dakota and Ben C. Larkin and others, as the Board of Railroad Commissioners of the State of North Dakota, to enjoin the Board from enforcing or attempting to enforce the Grain Warehouse Law, and the rules and regulations of the Board against the plaintiff on ground that it did not conduct a business as a public warehouseman. From a judgment in favor of the plaintiff, the defendants appeal

Affirmed.

West Headnotes

Warehousemen ↪3

403k3 Most Cited Cases

The statute defining "public warehousemen" does not classify as such all buyers of grain but only those who hold themselves out to the public as being ready and willing to purchase grain from the public generally. Laws 1927, c. 155, as amended by Laws 1929, c 137.

Warehousemen ↪3

403k3 Most Cited Cases

A company operating a nursery and seed house, which secured seed corn necessary to its business by entering into contracts with certain growers, was not operating a "public warehouse," within meaning of the Grain Warehouse Law, so as to be compelled to have a license as a public warehouseman and to comply with the rules and regulations adopted by the Board of Railroad Commissioners Laws 1927, c. 155, as amended by Laws 1929, c 137  
Dullam & Young, of Bismarck, for plaintiff and respondent.

Chas. A Verret, of Bismarck, for defendants and appellants.

MORRIS, Judge

The Board of Railroad Commissioners of the State of North Dakota demanded that the plaintiff apply for a license as a public warehouseman and comply with the rules and regulations pertaining to public warehouses adopted by the Board, and threatened to invoke the penalties of the Grain Warehouse Law in event the plaintiff failed to comply with these demands. The plaintiff, by this action, seeks to enjoin the Board from enforcing or attempting to enforce the Grain Warehouse Law, and the rules and regulations of the Board against the plaintiff upon the ground that it does not conduct a business as a public warehouseman. The only witness at the trial was the president of the plaintiff company who testified at length concerning the plaintiff's business

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281 N W 65  
68 N D 433, 281 N.W. 65  
(Cite as: 281 N.W. 65)

and the methods by which it was conducted. The District Court found that the plaintiff is not a public warehouseman and is, therefore, not required to obtain a license as such and restrained the defendants as prayed for in the complaint. The defendants appeal from the judgment of the District Court and ask a trial de novo

The question determinative of this controversy is whether the plaintiff, Oscar H. Will & Company, operates a public warehouse as that term is defined by the statutes of this state. The legislature by Chapter 155, Session Laws N D. 1927, passed "An Act To Regulate Grain and Seed Warehouses," which vested in the Board of Railroad Commissioners power to license and regulate public warehouses and imposed upon the Board certain duties with reference thereto including the duty to require public warehousemen to obtain a license to operate. Sections 3 and 7 of this Act describe the duties of the Board and define public warehouses as follows

"§ 3 The Commission shall exercise general supervision of the public warehouses of this State, including the handling, weighing and storing of grain and seeds, and the management of public warehouses; it shall investigate all complaints of fraud and injustice, unfair practices and unfair discrimination, and shall make all proper rules and regulations for carrying out and enforcing any law in this State regarding the same. \* \*

§ 7 All buildings, elevators and warehouses, and all grist and flour mills, cereal and feed mills and seed houses, doing a shipping business in this state, erected and operated, or which may hereafter be erected or operated by any person, association, copartnership or corporation, for the purpose of buying, selling, storing, shipping or handling \*67 grain and seeds for profit, are declared public warehouses and the person, association, copartnership or corporation owning or operating such buildings, elevators, mills or warehouses, which are now, or may be hereafter located or doing business within this State, whether such owners or operators reside within this State or not, are public warehousemen within the meaning of this section. Provided, that nothing in this act contained shall be construed to require any person or persons operating a flour, cereal or feed mill or seed house

doing a manufacturing business only, to receive, store or purchase at said mill or seed house any kind of grain."

By Chapter 137, Session Laws N D. 1929, the legislature amended and re-enacted the two sections above quoted to read

"§ 3. The commission shall exercise general supervision of the public warehouses of this state, including the handling, weighing and storing of grain, and the management of public warehouses; it shall investigate all complaints of fraud and injustice, unfair practices and unfair discrimination, and shall make all proper rules and regulations for carrying out and enforcing any law in this State regarding the same \* \*

§ 7. All buildings, elevators and warehouses, and all grist and flour mills, cereal and feed mills doing a shipping business in this state, erected and operated, or which may hereafter be erected or operated, by any person, association, co-partnership or corporation, for the purpose of public buying, selling, storing and shipping grain for profit, are declared public warehouses and the person, association, co-partnership or corporation owning or operating such buildings, elevators, mills or warehouses which are now or may be hereafter located or doing business within this state, whether such owners or operators reside within this state or not, are public warehousemen within the meaning of this section. Provided, that nothing in this act contained shall be construed to require any person or persons operating a flour, cereal or feed mill doing a manufacturing business only to receive, store or purchase at said mill any kind of grain "

A comparison between the enactments of 1927 and 1929 discloses that the words "seeds" and "seed houses" were omitted in the amendment. Thus, by the amendment, seed houses, as such, were eliminated from the operation of the Act Unless the business which they do is such as to warrant their regulation because the scope of the business extends beyond that ordinarily done by seed houses, the Act does not now apply to them.

[1] Another significant change made by the 1929 Act was the insertion of the word public as an adjective modifying the business activities sought to

281 N.W. 65  
68 N.D. 433, 281 N.W. 65  
(Cite as: 281 N.W. 65)

Page 3

be regulated. The defendants contend that the evidence shows that the plaintiff is a public buyer of grain. That it is a buyer of grain remains undisputed. Whether the plaintiff is a public buyer is one of the chief points in controversy. The word public, as used in the amended statute, is an adjective which modifies and limits the word buying. Among the definitions of "public" found in Black's Law Dictionary, Third Edition, are, "Open to all, common to all or many, general, open to common use."

It was not the intention of the legislature that all who buy grain for resale must be licensed. It is the public nature of the business which brings about regulation by the state through the Board of Railroad Commissioners as a protection to producers and shippers. A public buyer of grain, as contemplated by the statute, is one who holds himself out to the public as being willing and ready to purchase grain from the public generally. The term grain, as defined by Section 25, Chapter 155, Session Laws N.D. 1927, "is held to signify and include the following products. Wheat, Durum, Oats, Rye, Barley, Buckwheat, Flaxseed, Speltz and Corn."

[2] The plaintiff company operates a nursery and seed house. It raises plants, flowers, shrubs, seeds, and some feed for sale. It also buys plants, flowers, and seeds, for resale. Among its purchases in past years have been varied and limited quantities of grain described in the foregoing definition. It has, therefore, been a buyer of such grain. The Grain Warehouse Act does not, however, attempt to bring everyone who buys grain within the purview of the Act. We must, therefore, examine into the nature and methods of the plaintiff's business in order to determine whether it has become a public warehouseman. The evidence discloses that the plaintiff secures 90 per cent of the seed corn necessary to its business by entering into contracts with growers. The plaintiff furnishes the seed corn, the grower plants it and cares for it. The plaintiff agrees to pay a stipulated price per bushel for the corn so grown, provided that it complies with certain stated specifications. Clearly these contracts do not indicate that the plaintiff is a public buyer of corn; on the other hand, it definitely establishes that the plaintiff buys most of its corn not from the public, but from a restricted and

selected group of producers with whom it enters into specific contracts

With respect to other grain the evidence shows that it is all bought for the purpose of being cleaned and prepared for sale and as seed or feed. The feed is mostly packaged and sold under registered brand names. The price paid for grains is not the general market price but that which is agreed upon between the seller and the plaintiff, although the market price enters into the negotiations. The plaintiff rejects about 90 per cent of the grain offered to it. It does not maintain scales of its own for use in the purchase of grain. All grain purchased is weighed upon the city scales. It does not store or ship grain for others, and does not hold itself out to the public as a buyer of grain generally. It posts no prices, and pays cash for all grain selected for purchase.

Section 24 of the 1927 Act as amended by Chapter 4, Session Laws N. D. 1933, prohibits discrimination in terms that signify its application to those who deal with the public generally and not those who purchase grain in restricted quantities from selected producers or dealers. The section referred to provides: "§ 24. No public warehouseman shall discriminate in the buying, selling, receiving and handling of grain or in the charges made or the service rendered to owners of stored grain, nor shall such warehouseman discriminate in the receiving of grain offered for sale or storage, nor in regard to the persons offering such grain for sale or storage, nor between points or stations except as the marketing factors or transportation costs or grain quality premiums may warrant; provided, that no public warehouseman shall be required to receive for storage any grain which is heating or otherwise out of condition. Storing grain free of charge is hereby prohibited except as prescribed by law. Warehouseman shall post grain prices paid in a conspicuous place in the office or driveway of his place of business."

It is apparent that the Grain Warehouse Law does not fit the business of the plaintiff which cannot be made to comply therewith without completely changing its nature and the methods of operation. Plaintiff's business as now conducted does not even approximate that of a public warehouseman as contemplated and defined by the statutes of North Dakota.

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281 N.W. 65  
68 N.D. 433, 281 N.W. 65  
(Cite as: 281 N.W. 65)

Page 4

Affirmed

CHRISTIANSON, C. J., and BURR, NUESSELE,  
and SATHRE, J.J., concur.

68 N.D. 433, 281 N.W. 65

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**OFFICE OF ADMINISTRATIVE HEARINGS**

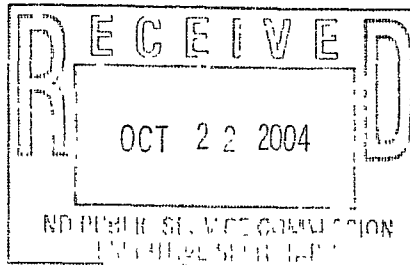
STATE OF NORTH DAKOTA  
1707 North 9th Street  
Bismarck, North Dakota 58501-1882

Allen C. Hoberg  
DIRECTOR

701-328-3260  
Fax 701-328-3254  
oah@state.nd.us  
www.state.nd.us/oah

October 21, 2004

Mr. William W. Binek  
Hearing Administrator  
Public Service Commission  
600 E. Boulevard Avenue  
Bismarck, ND 58505



Dear Mr Binek:

Thank you for your October 20, 2004, request of the designation of an administrative law judge from the Office of Administrative Hearings to conduct a hearing in the matter of Earth Harvest Mills, Inc. (GE-04-495 & GE-04-0496). I hereby designate Al Wahl to be assigned as an administrative law judge to conduct the hearing in regard to this matter. Because the administrative law judge will not be making recommended findings of fact and conclusions of law, or issuing a recommended order, the person or persons who will be making the final administrative decision in regard to this matter (*i.e.*, commission) must be in attendance at the hearing.

Please send all additional relevant documents in regard to this matter (correspondence, and other pleadings and documents) to the designated administrative law judge in care of the Office of Administrative Hearings, 1707 North 9th Street, Bismarck, North Dakota 58501-1882. The hearing is scheduled for October 25, 2004, beginning at 9:00 a.m. (CT), the Commission Hearing Room, State Capitol, 12th Floor, 600 E. Boulevard Avenue, Bismarck, North Dakota.

**Your request has been assigned OAH File No. 20040379. Please include this number on all future documents and correspondence filed for this matter with the Office of Administrative Hearings.**

Sincerely,

Allen C. Hoberg  
Director

ACH/ljc

cc. Grayson Hoberg



**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

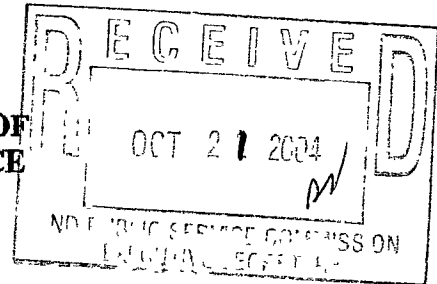
**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**

**ORDER FOR AND NOTICE OF  
PREHEARING CONFERENCE**

**October 21, 2004**



It appearing desirable to conduct a prehearing conference for the hearings of the captioned matters, it is ordered, and notice is hereby given, that a prehearing conference for the hearings of these matters will be held at 8:15 o'clock a.m. on October 25, 2004, at the Public Service Commission, in the Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota.

The purpose of the prehearing conference is to discuss with the parties and determine whether the hearings for these matters may be consolidated, whether the parties can agree for a statement of material facts and for a procedure for the consolidated hearings. The parties may also request a determination of any question regarding the conduct of the hearing.

Dated at Bismarck, North Dakota, this 21<sup>st</sup> day of October, 2004

State of North Dakota  
Public Service Commission

By:   
Al Wahl, Administrative Law Judge  
Procedural Hearing Officer  
Office of Administrative Hearings  
1707 North 9th Street  
Bismarck, North Dakota 58501-1882  
Telephone No. (701) 328-3260

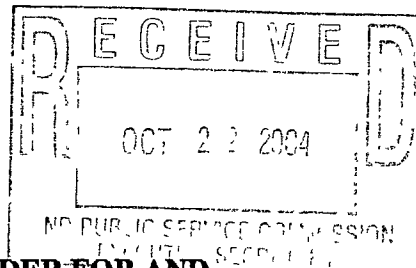
**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**



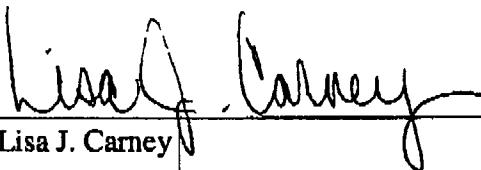
**CERTIFICATE OF SERVICE  
OAH File No. 20040379**

The undersigned certifies that a true and correct copy of the **ORDER FOR AND**

**NOTICE OF PREHEARING CONFERENCE** was faxed, via facsimile, on the 21 day of  
October, 2004, to:

Public Service Commission  
Attn.: Sandi  
600 E. Boulevard Avenue - Dept. 408  
Bismarck, ND 58505  
(701) 328-2410

**OFFICE OF ADMINISTRATIVE HEARINGS  
Al Wahl, Administrative Law Judge**

  
\_\_\_\_\_  
Lisa J. Carney



Public Service Commission  
State of North Dakota

COMMISSIONERS

Tony Clark, President  
Susan E. Wefald  
Kevin Cramer

Executive Secretary  
Illona A. Jeffcoat-Sacco

600 E Boulevard Ave Dept 408  
Bismarck, North Dakota 58505-0480  
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e-mail ndpsc@state.nd.us  
TDD 800-366-6888  
Fax 701-328-2410  
Phone 701-328-2400

October 21, 2004

VIA U.S. MAIL & FAXIMILE  
FAXIMILE NO. 701-324-4334

Mr. Grayson Hoberg  
Earth Harvest Mills, Inc.  
PO Box 357  
Harvey, ND 58341

RE: Case No. GE-04-495  
Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist

Case No. GE-04-496  
Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint

Dear Mr. Hoberg:

On October 19, 2004, I received your request for permission to purchase wheat at your facility in Harvey, North Dakota. Your request was presented to the Commission.

The Commission discussed this matter at its October 20, 2004 Commission Meeting and asked me to notify you that your request to purchase wheat IS DENIED. The Commission cannot waive the law and cannot allow Earth Harvest Mills to take in any grain.

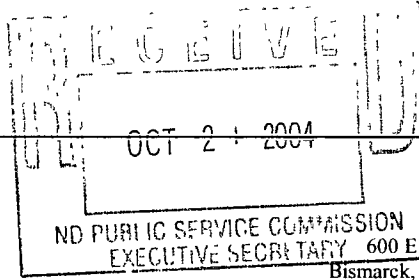
If you have questions, please call our office.

Sincerely,

Susan K. Richter, Director  
Licensing Division



Public Service Commission
State of North Dakota



COMMISSIONERS

Tony Clark, President
Susan E Wefald
Kevin Cramer

Executive Secretary
Illona A Jeffcoat-Sacco

October 21, 2004

600 E Boulevard Ave Dept 408
Bismarck, North Dakota 58505-0480
web www.psc.state.nd.us
e-mail ndpsc@state.nd.us
TDD 800-366-6888
Fax 701-328-2410
Phone 701-328-2400

Ms. Illona A. Jeffcoat-Sacco
Public Service Commission
600 E Boulevard Ave. Dept. 408
Bismarck, ND 58505-0480

RE: Public Service Commission vs.
Earth Harvest Mills, Inc.
Complaint
Case No. GE-04-496

Public Service Commission
Earth Harvest Mills, Inc.
Ex Parte Cease & Desist
Case No. GE-04-495

Dear Ms. Jeffcoat-Sacco:

Enclosed for filing in the above referenced cases are the original and seven
copies of the Prehearing Brief in these proceedings.

Thank you.

Sincerely,

William W. Binek
Chief Counsel

WWBsIs
Enclosure

C Grayson Hoberg, Earth Harvest Mills, Inc.

Table with 4 columns: Post-it® Fax Note, 7671, Date, # of pages. Rows include To, From, Co/Dept, Phone #, Fax #.

Table with 4 columns: Post-it® Fax Note, 7671, Date, # of pages. Rows include To, From, Co/Dept, Phone #, Fax #.

22 GE-04-495

Pages 1

Letter re Prehearing Brief

by Public Service Commission

10/21/2004

CC Comm Legal Licensing

16 GE-04-496

Pages 1

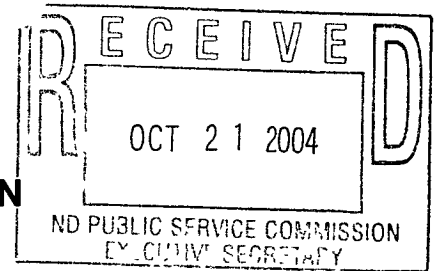
Letter re Prehearing Brief

by Public Service Commission

10/21/2004

CC Comm Legal Licensing

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**



**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**

**PREHEARING BRIEF**

**Preliminary Statement**

On September 23, 2004, the Public Service Commission's Staff (Staff) filed a Complaint against Earth Harvest Mills, Inc. (Earth Harvest) alleging that Earth Harvest is operating as a public warehouseman or grain buyer within the State of North Dakota without the required license and corresponding bond. On September 28, 2004, the Commission found that the Complaint stated a *prima facie* case and served it on Earth Harvest. Also, on September 28, 2004, the Commission issued a Cease and Desist Order for Earth Harvest to immediately cease and desist the entity's grain buying or warehousing activities within the State of North Dakota.

On October 18, 2004, Earth Harvest filed a response to the Complaint and the Cease and Desist order requesting that the matter be resolved quickly. The Commission treated the response as a timely filed Answer to the Complaint and request for hearing on the Cease and Desist Order.

Earth Harvest's response was in the form of a letter brief to the Commission basically setting forth Earth Harvest's legal arguments as to why Earth Harvest believes it does not have to be licensed to purchase grain from producers in North Dakota. Staff is compelled to reply to Earth Harvest's response.

**Law and Argument**

Earth Harvest's response contains several theories and arguments of why it should not be licensed as a public warehouse or grain buyer. Staff agrees that Earth Harvest should not be licensed as a grain buyer under N.D.C.C. Chapter 60-02.1 because Earth Harvest has a facility for receiving grain. The point that Staff makes in its pleadings is that a person who buys grain from any person or entity in North Dakota is required by law to have either a warehouse or grain buyer license unless they are specifically exempted from the law.

Earth Harvest argues that it is not required to be licensed as a public warehouse because it is not a public buyer of grain. As authority for its position, Earth Harvest cites *Oscar H. Will & Co. v. State*, 281 N.W. 65 (N.D. 1938). Earth Harvest's reliance on that case is misplaced. In that case, the Board of Railroad Commissioners (now Public Service Commission) sought to compel Oscar H. Will & Company to apply for a license as a public warehouseman. The Court stated that "[t]he question determinative of this controversy is whether the plaintiff, Oscar H. Will & Company, operates a public warehouse **as that term is defined by the statutes of this state.**" (Emphasis supplied). Oscar H. Will & Company was a seed company.

A review of the background of that case shows that in 1927, the Legislature passed a law which vested power in the Board of Railroad Commissioners to license and regulate public warehouses which included "seed houses." Then in 1929, the Legislature amended the law and the words "seed" and "seed houses" were omitted in the amendment. The second significant change in the law in 1929 was a provision that was added referring to the "**public** buying, selling, storing and shipping of grain" (emphasis supplied)

The basis for the reasoning of the Court in *Oscar H. Will & Co.* was that the omission of the words "seed" and "seed houses" from the statute eliminated seed houses from the operation of the law, and that unless the scope of the business extended beyond that ordinarily done by seed houses, the law, as amended, did not apply to them. The Court then looked at the addition of the words "public buying, selling, storing and shipping of grain" and determined that the word "public," in the sense used in the amended statute, was an adjective which modified and limited the word buying. The Court determined that Oscar H. Will & Co. was not a public buyer of grain.

There is no precedent for the Commission to follow in the *Oscar H. Will & Co.* case because the words "public buying, selling, storing and shipping of grain" are not found in N.D.C.C. Chapter 60-02, and because the definition of "public warehouse" under N.D.C.C. § 60-02-01(5) includes processing facilities. Earth Harvest is a processor of grain. N.D.C.C. § 60-02-01(5) provides:

"Public warehouse" means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility not licensed under the United States Warehouse Act [7 U.S.C. 241-273] in which grain is received for storing, buying, selling, shipping, or processing for compensation. Provided, however, that nothing in this chapter shall be construed to require a processor to receive, store, or purchase any lot or kind of grain at said facility.

Earth Harvest is a for profit corporation engaged in the processing of grain. It therefore fits the definition of under N.D.C.C. § 60-02-01(5) of a "facility. . . in which grain is received for. . . processing for compensation."

Earth Harvest argues that it should be exempt from the requirements of N.D.C.C. Chapter 60-02 because the “the Grain Warehouse Law does not fit the business of EHM.” As noted above, N.D.C.C. § 60-02-01(5) clearly includes processors. Earth Harvest should be treated no differently than other processors such as ethanol processors, corn fructose processors, and pasta plants which are all licensed as public warehouses in North Dakota.

On November 24, 1987, the North Dakota Attorney General issued an opinion stating that “based on the language of N.D.C.C. § 60-02-01(5) that the Legislature intended that facilities which buy grain for processing be licensed and bonded.” (See attached Exhibit 1). It should be noted that when the Attorney General issued his opinion the language in N.D.C.C. § 60-02-01(5) did not specifically identify processors. In order to clear up any question as to the applicability of the law to processors, N.D.C.C. § 60-02-01(5) was amended by HB 1156 in the 1999 legislative session to add the term “processing” to the law. Jon Mielke, Executive Director for the Public Service Commission provided the following testimony to the House Committee on Agriculture:

Finally, Section 2 also proposes to clarify that processors who buy grain from the public are warehousemen and that they do need a corresponding license and bond. Based on a 1987 Attorney General’s opinion, the Commission has been requiring that processors obtain a warehouse license. Section 2 of this bill puts this requirement in the statute. This change will eliminate further misunderstandings and will make it clear that people who sell grain to processors are to be provided with bond protection.

Finally, Earth Harvest asserts that because the law refers to “persons” it excludes Earth Harvest because Earth Harvest is a corporation and not a person. The legal status of a corporation is well established, not only in North Dakota but throughout the country. The attributes of a corporation are defined in *Fletcher Cyclopedia Corporations*, § 5 (Perm. Ed. 1999) as follows:

The distinguishing characteristics of a corporation are that it is an artificial **person**, a legal entity, capable of action through its corporate officers and agents, of suing, being sued, of taking and holding property, and of continuing to exist independent of individuals who compose it. (Emphasis supplied).

And at § 7.05:

The word “**person**” or equivalent words, occurring in statutes, has often been construed as including corporations. The general rule is that the construction of the word “**person**” in a statute or a constitutional provision may embrace a corporation whenever this is necessary to give effect to the reason and spirit of it. (Emphasis supplied).

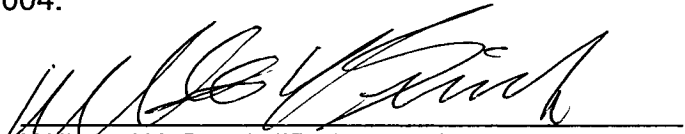
In *Baird v. First National Bank of Williston*, 215 N.W. 810, 811 (N.D. 1927), the North Dakota Supreme Court ruled that “[a] private corporation is a legal **person** and the doctrines of the substantive law are generally applicable alike to corporations and individuals. . . .” (Emphasis supplied). And in *Airvator, Inc. v. Turtle Mountain Manufacturing Company*, 329 N.W.2d 596, 602 (N.D. 1983), the North Dakota Supreme Court stated:

A corporation is not in fact or in reality a person, but is created by statute and the law treats it as though it were a person by the process of fiction, or by regarding it as an artificial person distinct and separate from its individual stockholders.

### Conclusion

The law requires Earth Harvest to be licensed and bonded as a public warehouse before purchasing grain from any person or entity in North Dakota. Earth Harvest has violated North Dakota law by purchasing grain without a license and bond. The Cease and Desist Order was lawfully issued to prevent Earth Harvest from purchasing grain without the required license and bond.

Dated this 21<sup>st</sup> day of October, 2004.



William W. Binek (ID # 02990)  
Chief Counsel  
Public Service Commission  
600 E. Boulevard Ave., Dept. 408  
Bismarck, ND 58505

## ATTORNEY GENERAL

STATE OF NORTH DAKOTA  
State Capitol  
Bismarck, North Dakota 58505

701-224-2210

Nicholas J. Spaeth  
ATTORNEY GENERAL

November 24, 1987

Capitol Offices  
Consumer Fraud  
and Antitrust Division  
701 224 3404  
800 472 2600  
Toll Free in ND

Senator Harvey D. Tallackson  
District 16  
P.O. Box 288  
53 West Fifth  
Grafton, ND 58237

Criminal Justice  
Training and  
Statistics Division  
701 224 2594

Fire Marshal  
701 224 2434

Gaming Division  
701 224 4848

Licensing Division  
701 224-2219

Division Offices  
Bismarck ND 58502  
Bureau of Criminal  
Investigation  
P O Box 1054  
701 221 6180  
800 472 2185  
Toll Free in ND

Drug Enforcement  
Unit

P O Box 993  
701 221 6188  
800 472 2185  
Toll Free in ND

Dear Senator Tallackson:

Thank you for your letter of June 12, 1987, concerning the warehouseman license requirements for Alchem, Ltd. I apologize for the delay in responding.

You indicate in your letter that Alchem, Ltd., is the processor of corn, wheat, barley and potatoes. Alchem, Ltd., processes these products into ethanol and animal feed. You request my opinion on whether Alchem, Ltd., and others similarly situated are required by law to be licensed and bonded as public warehousemen.

Public warehouseman is defined as "[t]he person operating a public warehouse . . ." N.D.C.C. § 60-02-01(6).

Public warehouse is defined by N.D.C.C. § 60-02-01(5) as:

any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility in which grain is received for storing, buying, selling, or shipping for compensation. Provided, however, that nothing in this chapter shall be construed to require a warehouseman doing manufacturing business only, to receive, store, or purchase any kind of grain at said mill.

(Emphasis supplied.)

Grain is defined by N.D.C.C. § 60-02-01(3). The definition includes grain used by Alchem, Ltd. The only exclusion is grain being cleaned and processed for use as seed, for which a warehouse receipt has not been issued. It would not appear that the activities of Alchem, Ltd., would qualify for the exclusion.

N.D.C.C. § 60-02-07 states "[a] license must be obtained . . . for each public warehouse . . ." If Alchem

Senator Harvey D. Tallackson  
November 24, 1987  
Page 2

stores, buys, sells, or ships grain for compensation, then it must be licensed.

It appears that the statute is ambiguous on the question of whether processors must be licensed. The first sentence in N.D.C.C. § 60-02-01(5) does not speak of manufacturers or manufacturing. The second sentence, however, refers to a "warehouseman [person operating a public warehouse] doing manufacturing business only." This proviso recognizes that a licensed warehouse might do only manufacturing or processing and prohibits producers from forcing such a processor to also store grain.

The definition of public warehouse [N.D.C.C. § 60-02-01(5)] does not include a facility which processes grain if the facility does not also store, buy, sell, or ship grain for compensation. Whether or not the activities of any particular facility constitute storing, buying, selling, or shipping for compensation is a question of fact to be determined, at the regulatory level, by the Public Service Commission. It is apparent, however, based on the language of N.D.C.C. § 60-02-01(5) that the Legislature intended that facilities which buy grain for processing be licensed and bonded.

Sincerely,

Nicholas J. Spaeth

dfm

7/16/87

I had Alchem  
write this letter so all the  
facts were right, & met with  
their boss and they are concerned.  
Any additional expense is a burden  
But personal Request  
Harvey

June 12, 1987

Nick Spaeth  
Attorney General  
North Dakota State Capitol  
Bismarck, ND 58505

Dear Nick:

Alchem, Ltd. is a very successful and growing agribusiness located in Grafton, ND. This company provides an excellent market for our local farm industry as the purchaser of corn, wheat, barley and potatoes.

The raw products of grain and potatoes are purchased and converted into a fuel grade ethanol and a high quality animal feed product.

Alchem purchases and processes these products and ships the produced Ethanol and Distiller Dried Grains.

Our concern is directed to you and we are requesting an official opinion as to the requirement that Alchem, Ltd. be bonded, as explained above.

Alchem, Ltd. is the end user of the agricultural products involved and we question whether they need to be bonded by the Public Service Commission. As a final user of these products do they need to be bonded?

Presently the North Dakota Public Service Commission is following the State Statute #NDSC 60-02 and the Commission takes the position that a bond is required.

As you are aware there are several companies located in North Dakota that are effected by this bonding question that also fall in the end user situation.

Few examples of the companies affected besides Alchem, Ltd., are Cargill, Ladish Malting, Noodles by Leonardo, Master Sun and Freighter.  
N S I

Please review this question and we are anxiously awaiting your opinion.

Very truly yours,

*Harvey*

Harvey Tallackson  
State Senator

Comm, Food  
SAMIZ AS  
NEWMAN LITTEK

HARVEY D. TALLACKSON  
State Senator  
District 16  
P.O. Box 288  
53 West Fifth  
Grafton, ND 58237

HT:cif





Public Service Commission  
State of North Dakota

COMMISSIONERS

Tony Clark, President  
Susan E. Wefald  
Kevin Cramer

Executive Secretary  
Illona A. Jeffcoat-Sacco

600 E Boulevard Ave Dept 408  
Bismarck, North Dakota 58505-0480  
web www.psc.state.nd.us  
e-mail ndpsc@state.nd.us  
TDD 800-366-6888  
Fax 701-328-2410  
Phone 701-328-2400

October 20, 2004

Mr. Allen C. Hoberg  
Office of Administrative Hearings  
1707 North 9<sup>th</sup> Street, Lower Level  
Bismarck, ND 58501

**Re: Case No. GE-04-495  
Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-496  
Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

Dear Mr. Hoberg:

Enclosed is a request for an administrative law judge in the above cases. The Commission has scheduled a hearing for October 25, 2004, beginning at 9 a.m. CDT in the Commission's Hearing Room, 12<sup>th</sup> Floor, State Capitol, Bismarck. The administrative law judge will serve as a procedural law judge and the hearing will be tape recorded. A copy of the cases are enclosed.

Please provide the Commission with a copy of any filings issued by your office in this matter.

If you have any questions, please contact me. Thank you.

Sincerely,

William W. Binek  
Hearing Administrator

WWB/sls  
Enclosure

c Grayson Hoberg, Earth Harvest Mills, Inc.



**REQUEST FOR ADMINISTRATIVE LAW JUDGE--COMPLAINT**  
 NORTH DAKOTA OFFICE OF ADMINISTRATIVE HEARINGS  
 SFN 17818 (Rev 03-2001)

Name of Agency, Board, or Commission Public Service Commission		
Name of Respondent(s) Earth Harvest Mills, Inc	Address 500 North Street W, P. O Box 357, Harvey, ND 58341	Telephone Number 701-324-4330

The above named agency, board, or commission has taken administrative action pursuant to its authority found in NDCC Chapters 28-32 & 60-02 & ND Admin. 69-07 (North Dakota Century Code and/or North Dakota Administrative Code)

The administrative action is more fully described as follows: Public Service Commission vs Earth Harvest Mills, Inc , Respondent - Case No. GE-04-496 and Public Service Commission, Earth Harvest Mills, Inc , Ex Parte Cease & Desist - Case No. GE-04-495
--

Has the respondent been provided a copy of the complaint?  Yes  No

Attached is a copy of the complaint, related documents and correspondence, and certificate, affidavit or admission of service. If the respondent has otherwise been notified about this administrative action, please explain in the comments section below.

It requests designation of an administrative law judge (please check one):

- To conduct the hearing and issue recommended findings of fact, conclusions of law, and order.
- To serve as a procedural administrative law judge only (no recommended decision). The agency head will be present at the hearing as required by NDCC 54-57-04(6).
- To conduct the hearing, issue findings of fact, conclusions of law, and a final order.

**PLEASE MAKE A REQUEST FOR AN ADMINISTRATIVE LAW JUDGE AT LEAST ONE MONTH BEFORE THE HEARING.**

Agency Contact Person(s) William W Binek, Chief Counsel, Public Service Commission	Telephone Number 701-328-4088
---	----------------------------------

Representation [attorney (or other)] if known:

Agency William W. Binek, Public Service Commission, 600 E Blvd Ave , Dept. 408, Bismarck, ND 58505-0480	Telephone Number 701-328-2400
Party Grayson Hoberg, Earth Harvest Mills, Inc , 500 North Street W, P.O. Box 357, Harvey, ND 58341	Telephone Number 701-324-4330
Party	Telephone Number

Additional Comments Hearing will be tape recorded

(For agencies required to use OAH, notice of hearing will be issued by the administrative law judge, unless a procedural administrative law judge is requested Other requesting agencies and agencies requesting a procedural administrative law judge should first contact OAH about scheduling a hearing If notice has already been issued, attach a copy of the notice )

Typed or Printed Name and Title of Requesting Person William W Binek, Hearing Administrator	Date 10-20-04
Signature of Requesting Person X	Telephone Number 328-4088

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist

Case No. GE-04-495

Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint

Case No. GE-04-496

STATE OF NORTH DAKOTA                    )  
  )ss  
COUNTY OF BURLEIGH                    )

Shelly A. Bauske deposes and says that she is over the age of 18 years and not a party to this action and on the **20th day of October, 2004**, she deposited in the United States Mail, Bismarck, North Dakota, 2 envelopes by certified mail, return receipt requested, with postage fully prepaid, securely sealed and containing a photocopy of

**Notice of Hearing**

The envelopes were addressed as follows.

Grayson Hoberg  
Earth Harvest Mills Inc.  
P. O Box 357  
Harvey, ND 58341

Eric Hoberg  
1205 5<sup>th</sup> Ave NW  
Jamestown, ND 58401-2208

Certified No 7003 2260 0001 3517 8971

Certified No 7003 2260 0001 3517 8988

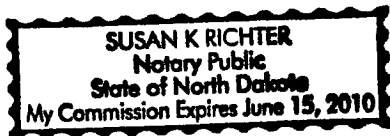
To the best of affiant's knowledge each address shown is the respective addressee's last reasonably ascertainable mailing address

*Shelly A Bauske*

Subscribed and sworn to before me  
this **20th day of October, 2004**.

*Susan K Richter*

Notary Public



**APPROVED**

**MOTION**

DATE 10-20-04  
KMF

**OCTOBER 20, 2004**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**

I move the Commission issue a Notice of Hearing in Case No. GE-04-495, Public Service Commission, Earth Harvest Mills, Inc., Ex Parte Cease & Desist and Case No. GE-04-496, Public Service Commission vs. Earth Harvest Mills, Inc , Complaint

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist**

**Case No. GE-04-495**

**Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint**

**Case No. GE-04-496**

**NOTICE OF HEARING**

**October 20, 2004**

On September 23, 2004, the Public Service Commission's Staff (Staff) filed a Complaint against Earth Harvest Mills, Inc (Earth Harvest) alleging that Earth Harvest is operating as a public warehouseman or grain buyer within the State of North Dakota without the required license and corresponding bond.

On September 28, 2004, the Commission found that the Complaint stated a *prima facie* case and that it be served on Earth Harvest. Also, on September 28, 2004, the Commission issued a Cease and Desist Order to immediately cease and desist the entity's grain buying or warehousing activities within the State of North Dakota.

On October 18, 2004, Earth Harvest filed a response to the Complaint and the Cease and Desist order requesting that the matter be resolved quickly. While their response was not a formal Answer, the Commission will treat the response as a timely filed Answer to the Complaint and request for hearing on the Cease and Desist Order.

On October 19, 2004, Earth Harvest filed a waiver of service of the notice of hearing and waiver of time requirements for hearing

The Public Service Commission (Commission) has scheduled a formal hearing for the **25<sup>th</sup> day of October, 2004, at 9:00 a.m. CDT** to consider the allegations of the Public Service Commission Staff Complaint against Earth Harvest Mills, Inc and to consider the request for hearing on the Cease and Desist Order. The hearing will be held in the Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota.

The hearing will be held pursuant to N D.C.C Chapters 28-32 and 60-02 and N D Admin Code Article 69-07.

The issues to be considered at the hearing are

**16 GE-04-495** Pages 2

Notice of Hearing  
by Public Service Commission

10/20/2004 CC Comm Legal Licensing

**10 GE-04-496** Pages 2


Notice of Hearing  
by Public Service Commission

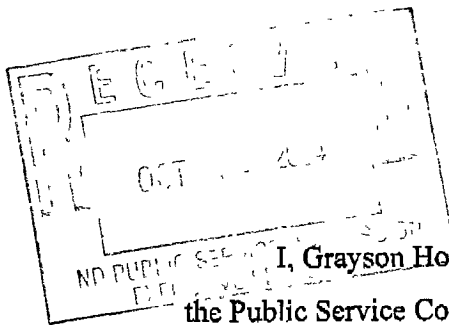
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1. Whether N D.C.C Chapters 60-02 or 60-02.1 apply to Earth Harvest.
2. Whether Earth Harvest violated N D C C Chapters 60-02 or 60-02 1 by failing to apply for and receive the required warehousing or grain buying license
- 3 Whether the Cease and Desist Order was lawfully issued by the Commission.
4. Whether the violations, if proved, subject Earth Harvest to the imposition of sanctions or penalties under N D.C C. § 49-07-01.1.

For more information contact the Public Service Commission, State Capitol, Bismarck, North Dakota 58505, 701-328-2400, or Relay North Dakota 1-800-366-6888 TTY. If you require any auxiliary aids or services, such as readers, signers, or Braille materials please notify Ilona A Jeffcoat-Sacco, Executive Secretary

**PUBLIC SERVICE COMMISSION**

 _____ <b>Susan E. Wefald</b> Commissioner	 _____ <b>Tony Clark</b> President	 _____ <b>Kevin Cramer</b> Commissioner
--	---	---



I, Grayson Hoberg, CEO, of Earth Harvest Mills, Inc., request the permission of the Public Service Commission to purchase at least one load of wheat during the interim between now and the hearing (entitled Public Service Commission vs. Earth Harvest Mills, Inc. Complaint, Case No. GE-04-496) in order to process a customer's flour.

Earth Harvest Mill does buy grain. The Grain Buyer and the Public Warehouse statuses of North Dakota were not written for all buyers of grain. They were defined for buyers who hold themselves out to the public as being ready and willing to purchase grain from the public generally. Earth Harvest Mill buys its grain from a restricted and selected group of producers with whom it enters into specific contracts. Thus as stated in our appeal, including citation from a similar case that went to the North Dakota Supreme Court, Earth Harvest Mill is not a Grain Buyer or a Public Warehouse and does not require a license from the Public Service Commission.

We have requested that the hearing be held as soon as possible at which time we will be allowed to either continue doing business without a license from the Public Service Commission or we will acquire a license from the Public Service Commission at that time. During the interim we are requesting that we are allowed to continue operations.

If there are certain restrictions that you would like to impose during the interim, like cash only purchases of wheat, we are open to those restrictions.

October 19, 2004.

15 **GE-04-495**

Pages 1

Request permission to purchase at least one load of wheat during the interim by Earth Harvest Mills, Inc

10/19/2004

CC Comm Legal Licensing

9

**GE-04-496**

Pages 1

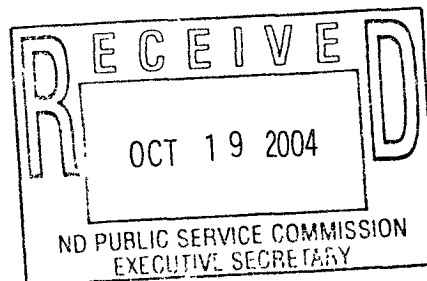
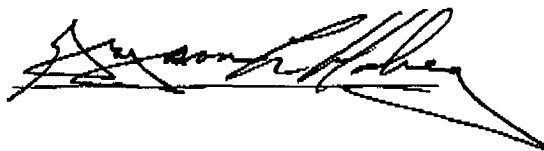
Request permission to purchase at least one load of wheat during the interim by Earth Harvest Mills, Inc

10/19/2004

CC Comm Legal Licensing

I, Grayson Hoberg, CEO, of Earth Harvest Mills, Inc., do hereby waive my rights under North Dakota Century Code § 28-32-21(1) (b) and (c) for service of the complaint at least 45 days before the hearing on the complaint and for service of the notice of hearing at least 20 days prior to the hearing in its proceeding entitled Public Service Commission vs. Earth Harvest Mills, Inc. Complaint, Case No. GE-04-496.

October 19, 2004.



14 GE-04-495

Pages 1

Waive rights under NDCC  
28-32-21(1)(b)&(c)  
by Earth Harvest Mills, Inc

10/19/2004

CC Comm Legal Licensinq

8 GE-04-496

Pages 1

Waive rights under NDCC  
28-32-21(1)(b)&(c)  
by Earth Harvest Mills Inc

10/19/2004

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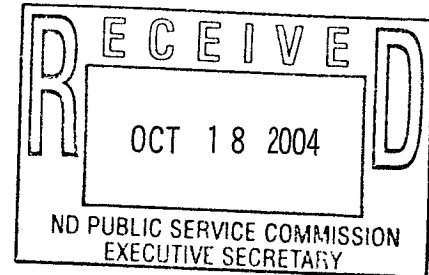


Earth Harvest Mills  
500 North Street West  
P O Box 357  
Harvey, ND 58341

(701) 324-4330  
grayson@dakota-prairie.com

October 18, 2004

State Of North Dakota  
Public Service Commission  
600 E Boulevard Ave, Dept 408  
Bismarck, ND 58505



Dear Public Service Commission:

We received a Cease and Desist Order that ordered Earth Harvest Mills (EHM) to Cease and Desist all public warehouseman or grain buying activities in North Dakota. We are requesting a hearing regarding the cease and desist and the complain since we believe per the N.D.C.C. Chapters 60-02 or 60-02.1 that we do not require a license from the Public Service Commission (PSC) and thus the Cease and Desist order was inappropriate

We are also requesting that this matter be resolved quickly since we need to purchase grain to continue our business of milling flour. During the interim Earth Harvest Mills would like permission to purchase grain until this is resolved

The topics for the hearing should consist of

1. Do the entity's operations require a public warehouse license or grain buyer license?
2. Other issues:
  - a. Does the entity possess a valid public warehouse license or grain buyer license?
  - b. Was the Cease and Desist Order lawfully issued by the Commission?
  - c. Bonding requirements.

In April Susan Richter from the Public Service Commission called and told me that we needed a license from the PSC to purchase grain. She described the two licenses as a Public Warehouse license, N.D.C.C. 60-02-01(5) and N D C C. 60-02-01(6); and a Grain Buyer license, N.D.C.C. 60-02-1-01(6). Both of us agreed that we do not fall under the definition of the Grain Buyer license. Susan felt that we required a Public Warehouse license and I have not agreed with her on this point.

I will start with the Grain Buyer license first since both parties agree that EHM does not require this license.

**Grain Buyer license, N.D.C.C. 60-02.1-01(6)**

*60-02.1-01. Definitions. In this chapter, unless the context or subject matter otherwise requires:*

*6. "Grain buyer" means any person, other than a public warehouseman as defined in*

13 GE-04-495

Pages 4

Response and request for hearing

by Earth Harvest Mills, Inc

10/18/2004

CC Comm Legal Licensing

7 GE-04-496

Pages 4

Response and request for hearing

by Earth Harvest Mills Inc

10/18/2004

CC Comm Legal Licensing

● Page 2

October 18, 2004

*chapter 60-02, who purchases or otherwise merchandises grain for compensation*

There are multiple points regarding the Grain Buyer license. A Grain Buyer is a person who purchases grain for compensation. The statute defining "Grain Buyer" does not classify all buyers of grain but only those "persons" who are not a "public warehouseman" and purchase grain for "compensation". To start with we are a corporation not a person. This in itself excludes us as a Grain Buyer. We are not a public warehouseman and I will address that later. The word compensation limits the group of people to be licensed. Among the definitions of "compensation" found in Black's Law Dictionary, Sixth Edition, are, "Remuneration for services rendered, whether in salary, fees, or commissions." EHM does not receive any compensation for the purchase of the grains. EHM processes the grain and creates multiple products that we sell to retail and wholesale markets.

In addition the statutes further define a grain buyer as a public grain buyer. As described within the Public Warehouse license section, the nature of EHM business does not even approximate that of a grain buyer.

*Under 60-02.1-15. A facility-based grain buyer shall post grain prices paid in a conspicuous place in the office or driveway of the buyer's place of business.*

*Under 60-02.1-25. Facility not to be closed without permission from commission - Penalty. Every facility operated by a facility-based grain buyer shall be kept open for business in order to serve the public.*

**Public Warehouse license, N.D.C.C. 60-02-01(5)**

*60-02-01. Definitions. In this chapter, unless the context or subject matter otherwise requires:*

*5. "Public warehouse" means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility not licensed under the United States Warehouse Act [7 U.S.C. 241-273] in which grain is received for storing, buying, selling, shipping, or processing for compensation. Provided, however, that nothing in this chapter shall be construed to require a processor to receive, store, or purchase any lot or kind of grain at said facility.*

*6. "Public warehouseman" means the person operating a public warehouse that is located or doing business within this state, whether or not such owner or operator resides within this state. The term does not include a person who is permitted to sell seed under chapter 4-09, if that person does not store grain for the public and buys grain only for processing and subsequent resale as seed, or an authorized dealer or agent of a seed company holding a permit in accordance with section 4-09-14.4*

The key point here is Public Warehouse. The PSC contend that EHM is a Public buyer of grain. That we are a buyer of grain remains undisputed. Whether EHM is a public buyer is one of the chief points in controversy. The word public, as used in the amended statute, is an adjective that modifies and limits the word buying. Among the definitions of "public" found in Black's Law Dictionary, Sixth Edition, are, "Common to all or many; general; open to common use."

It was not the intention of the legislature that all who buy grain for resale must be licensed. It is the public nature of the business that brings about regulation by the state through the PCS.

A public buyer of grain, as contemplated by the statute, is one who holds himself out to the public as being willing and ready to purchase grain from the public generally. The Grain Warehouse Act does not, however, attempt to bring everyone who buys grain within the purview of the Act. We must, therefore, examine into the nature and methods of EHM's business in order to determine whether it has become a public warehouse, public warehouseman or grain buyer. EHM secures 90 percent of the grain necessary to its business by entering into contracts with growers. EHM agrees to pay a stipulated price per bushel for the grain. Clearly the contracts do not indicate that EHM is a public buyer of grain, on the other hand, it definitely establishes that EHM buys most of its grain not from the public, but from a restricted and selected group of producers with whom it enters into specific contracts. The price paid for grains is not the general market price but that which is agreed upon between the seller and EHM, although the market price enters into the negotiations. EHM rejects about 60 percent of the grain offered to it. EHM does not maintain scales of its own for use in the purchase of grain. EHM does not store or ship grain for others, and does not hold itself out to the public as a buyer of grain generally. EHM posts no prices.

It is apparent that the Grain Warehouse Law does not fit the business of EHM, which cannot be made to comply therewith without completely changing its nature and the methods of operation. EHM business as now conducted does not even approximate that of a public warehouse, public warehouseman or a grain buyer as contemplated and defined by the statutes of North Dakota. The following are some examples of the statutes for a public warehouse:

***60-02-17. Warehouse and storage contract - Storage rates - Terminal delivery.***

*A warehouseman shall publish and post, in a conspicuous place in its warehouse, the fees that will be assessed for receiving, storing, processing, or redelivering grain.*

***60-02-20. Discrimination by public warehouseman prohibited - Posting prices. No public warehouseman shall discriminate.***

- 1. In the buying, selling, receiving, and handling of grain or in the charges made or the service rendered to owners of stored grain;*
- 2. In the receiving of grain offered for sale or storage;*
- 3. In regard to the persons offering such grain for sale or storage; nor*
- 4. Between points or stations except as the marketing factors or transportation costs or grain quality premiums may warrant*

*A warehouseman shall post grain prices paid in a conspicuous place in the office or driveway of the warehouseman's place of business.*

***60-02-39. Warehouse not to be closed without permission from commission - Penalty. Every licensed warehouse shall be kept open for business in order to serve the public.***

***69-07-01-07. Modified business hours. A facility may not deviate from normal business hours without prior commission approval.***

The argument of a public vs nonpublic warehouse was argued in "Oscar H. Will & Co. v. State et al, No. 6542 (281 N W 65). In this case it was clear that the North Dakota Statutes defining public warehousemen does not classify as such all buyers of grain but only those buyers who hold themselves out to the public as being ready and willing to purchase grain

● Page 4

October 18, 2004

from the public generally. Oscar H Will & Co. could not be treated as a public warehouseman as a term that was defined in the North Dakota Statutes. Our operation is almost identical to theirs

**Other Issues**

EHM does not have a grain buyer's license or a public warehouse license

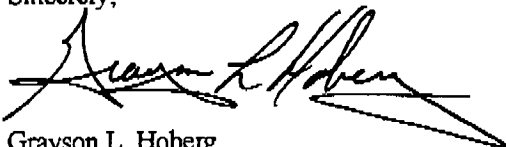
Since EHM should not be treated as a public warehouse or a grain buyer as defined by the statutes of North Dakota the Cease and Desist Order was not lawfully issued by the PSC. Also, there is a concept called innocent until proven guilty. Since we believe the nature of our business is not subject to the licensing of the PSC under the statutes of North Dakota and since the PSC has not presented a reason for why we are a "public" buyer of grain EHM should be allowed to continue to purchase grain until this matter is settled.

The bonding requirements of this statute make starting up a new business within the state of North Dakota very difficult. I was told by one of our North Dakota Representatives that North Dakota business paid ten million dollars to insurance companies for bond premiums. The insurance companies paid four million in claims. The insurance companies were not out the full four million since they had secured assets of the company to collect from. To help new business start up in this state the PSC should encourage the state to set up a state run bond fund

**Summary**

EHM does buy grain. The grain buyer and the public warehouse statutes of North Dakota were not written for all buyers of grain. They were defined for buyers who hold themselves out to the public as being ready and willing to purchase grain from the public generally. EHM buys its grain from a restricted and selected group of producers with whom it enters into specific contracts. In summary we should not be licensed as a grain buyer or a public warehouse

Sincerely,



Grayson L. Hoberg  
CEO



# Public Service Commission

## State of North Dakota

### COMMISSIONERS

Tony Clark, President  
Susan E Wefald  
Kevin Cramer

Executive Secretary  
Illona A Jeffcoat-Sacco

600 E Boulevard Ave Dept 408  
Bismarck, North Dakota 58505-0480  
web www.psc.state.nd.us  
e-mail ndpsc@state.nd.us  
TDD 800-366-6888  
Fax 701-328-2410  
Phone 701-328-2400

September 28, 2004

Mr. Grayson Hoberg  
Earth Harvest Mills, Inc.  
P. O. Box 357  
Harvey, ND 58341

**RE: Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint  
Case No. GE-04-496**

Dear Mr. Hoberg:

Enclosed is a copy of the referenced Complaint that is being served upon Earth Harvest Mills, Inc. Earth Harvest Mills, Inc. has twenty (20) days from the receipt of the complaint in which to file its answer and, if desired, to request a hearing.

Please contact us if you have any questions.

Thank you.

Sincerely,



William W. Binek  
Chief Counsel

Enclosure

cc: Eric Hoberg

6

GE-04-496

Pages 4

Letter re Complaint

by Public Service Commission

09/28/2004

CC Comm Legal Licensing

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Public Service Commission,**

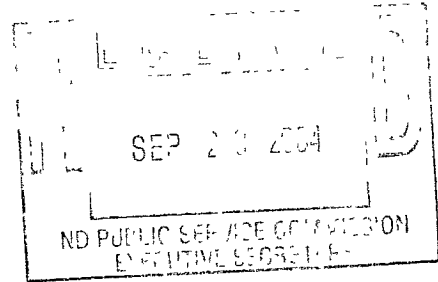
**Case No. GE-04-496**

**Complainant,**

**vs.**

**Earth Harvest Mills, Inc.,**

**Respondent.**



**COMPLAINT**

The Public Service Commission's Staff, (Staff) for its complaint against the Respondent Earth Harvest Mills, Inc , (Earth Harvest) alleges and shows the following:

I.

Earth Harvest Mills, Inc. is operating as a public warehouseman or grain buyer within the State of North Dakota without the required license and corresponding filing requirements.

II.

Under N.D.C.C 60-02-01(5) a public warehouse is defined as "any elevator, mill, warehouse. . . in which grain is received for storing, buying, selling, shipping, or processing for compensation." Under N D C.C 60-02-01(6), a public warehouseman is defined as a person operating a public warehouse that is located or doing business within this state. Under N D.C.C 60-02.1-01(6) a grain buyer means any person, other than a public warehouseman who purchases or otherwise merchandises grain for compensation

III

On April 4, 2004, staff became aware that Earth Harvest planned to operate a facility in Harvey, North Dakota to receive grain and mill grain into flour. Staff advised Earth Harvest of the licensing requirements for warehouses and grain buyers under North Dakota law. Earth Harvest acknowledged that it had already received some grain and that it did not believe it needed to be licensed. Earth Harvest was advised that buying grain without a license is illegal.

#### IV.

On September 17, 2004, staff received information that grain had been delivered by Chris Martinson to Earth Harvest in June, 2004. Earth Harvest confirmed that it had received grain from Martinson, that the grain had not been paid for, and that it owed money to another producer.

#### V.

N.D.C.C. §§ 60-02-07 and 60-02.1-07 require that grain warehouses and grain buyers must be licensed by the Commission to operate in the State of North Dakota.

#### VI.

Earth Harvest Mills, Inc., violated N.D.C.C. Chapters 60-02 or 60-02.1 by failing to apply for and receive the required warehousing or grain buying license.

#### VII.

Pursuant to N.D.C.C. §28-32-21(e), an answer to this complaint must be filed with the Commission within twenty (20) days after service of the complaint, or the Commission may deem the complaint to be admitted. If the Respondent, Earth Harvest Mills, Inc. fail to answer as required within twenty days after service of the complaint, the Commission may enter an order in default as the facts and the law may warrant.

Wherefore, the Commission Staff seeks the following relief:

### **Relief Sought**

1. That the Respondent be found to have violated N.D.C.C. Chapter 60-02 or 60-02.1 by failing to apply for and receive the required warehousing or grain buying license.
2. That the Commission impose sanctions or penalties as appropriate under the circumstances and as allowed by N.D.C.C. § 49-07-01.1, which may include a fine of up to \$5,000.
3. For such other relief that the Commission finds just and proper.

Dated this **23rd day of September, 2004.**

PUBLIC SERVICE COMMISSION STAFF



William W. Binek (ID#02990)

Chief Counsel

North Dakota Public Service Commission

600 East Boulevard Avenue, Dept. 408

Bismarck, ND 58505-0480

Phone: 701-328-4088

Fax: 701-328-2410

Counsel for Public Service Commission Staff

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Public Service Commission  
Earth Harvest Mills, Inc.  
Ex Parte Cease & Desist

Case No. GE-04-495

Public Service Commission  
vs. Earth Harvest Mills, Inc.  
Complaint

Case No. GE-04-496

STATE OF NORTH DAKOTA                    )  
  )ss  
COUNTY OF BURLEIGH                    )

**Sandra L. Scott** deposes and says that she is over the age of 18 years and not a party to this action and on the **28th day of September, 2004**, she deposited in the United States Mail, Bismarck, North Dakota, 2 envelopes by certified mail, return receipt requested, with postage fully prepaid, securely sealed and containing a photocopy of:

1. Ex Parte Motion for Cease and Desist Order
2. Affidavit in Support Ex Parte Motion for Cease and Desist Order
3. Cease and Desist Order
4. Notice of Opportunity for Hearing
5. Complaint

The envelopes was addressed as follows.

Grayson Hoberg  
Earth Harvest Mills Inc  
P. O. Box 357  
Harvey, ND 58341

Eric Hoberg  
1205 5<sup>th</sup> Ave. NW  
Jamestown, ND 58401-2208

Certified No 7002 2410 0003 4912 1064

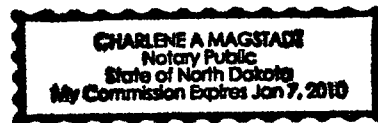
Certified No. 7002 2410 0003 4912 1071

To the best of affiant's knowledge each address shown is the respective addressee's last reasonably ascertainable mailing address.

*Sandra L. Scott*  
\_\_\_\_\_

Subscribed and sworn to before me  
this **28th day of September, 2004**.

*Charlene A. Magstade*  
\_\_\_\_\_  
Notary Public







Public Service Commission  
State of North Dakota

COMMISSIONERS

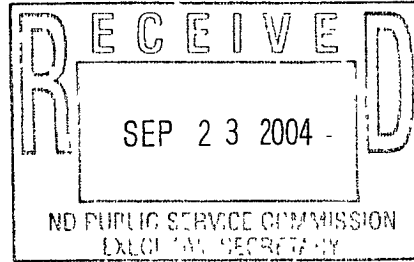
Tony Clark, President  
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Kevin Cramer

Executive Secretary  
Illona A Jeffcoat-Sacco

600 E Boulevard Ave Dept 408  
Bismarck, North Dakota 58505-0480  
web www.psc.state.nd.us  
e-mail ndpsc@psc.state.nd.us  
TDD 800-366-6888  
Fax 701-328-2410  
Phone 701-328-2400

September 23, 2004

Ms. Illona A Jeffcoat-Sacco  
Public Service Commission  
600 E Boulevard Ave. Dept. 408  
Bismarck, ND 58505-0480



**RE: Public Service Commission vs.  
Earth Harvest Mills, Inc.  
Complaint  
Case No. GE-04-496**

Dear Ms Jeffcoat-Sacco:

Enclosed for filing in the above referenced case are the original and seven copies of the **Complaint** in this proceeding.

Thank you.

Sincerely,

William W. Binek  
Chief Counsel

WWBsls  
Enclosure

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Public Service Commission,**

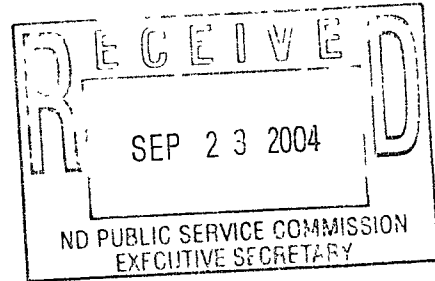
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On April 4, 2004, staff became aware that Earth Harvest planned to operate a facility in Harvey, North Dakota to receive grain and mill grain into flour. Staff advised Earth Harvest of the licensing requirements for warehouses and grain buyers under North Dakota law. Earth Harvest acknowledged that it had already received some grain and that it did not believe it needed to be licensed. Earth Harvest was advised that buying grain without a license is illegal.

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On September 17, 2004, staff received information that grain had been delivered by Chris Martinson to Earth Harvest in June, 2004. Earth Harvest confirmed that it had received grain from Martinson, that the grain had not been paid for, and that it owed money to another producer.

#### V.

N D C C. §§ 60-02-07 and 60-02.1-07 require that grain warehouses and grain buyers must be licensed by the Commission to operate in the State of North Dakota.

#### VI.

Earth Harvest Mills, Inc., violated N.D C C. Chapters 60-02 or 60-02.1 by failing to apply for and receive the required warehousing or grain buying license.

#### VII.

Pursuant to N D C C. §28-32-21(e), an answer to this complaint must be filed with the Commission within twenty (20) days after service of the complaint, or the Commission may deem the complaint to be admitted. If the Respondent, Earth Harvest Mills, Inc. fail to answer as required within twenty days after service of the complaint, the Commission may enter an order in default as the facts and the law may warrant.

Wherefore, the Commission Staff seeks the following relief.

### **Relief Sought**

1. That the Respondent be found to have violated N.D C C Chapter 60-02 or 60-02.1 by failing to apply for and receive the required warehousing or grain buying license.
2. That the Commission impose sanctions or penalties as appropriate under the circumstances and as allowed by N D C C. § 49-07-01 1, which may include a fine of up to \$5,000.
3. For such other relief that the Commission finds just and proper.

Dated this **23rd day of September, 2004.**

PUBLIC SERVICE COMMISSION STAFF



William W. Binek (ID#02990)

Chief Counsel

North Dakota Public Service Commission

600 East Boulevard Avenue, Dept. 408

Bismarck, ND 58505-0480

Phone. 701-328-4088

Fax: 701-328-2410

Counsel for Public Service Commission Staff

**Scott, Sandi L.**

---

**From:** Scott, Sandi L.  
**Sent:** Thursday, October 21, 2004 8 03 AM  
**To:** grayson@dakota-prairie.com  
**Cc:** Binek, William W , Scott, Sandi L , Richter, Susan K  
**Subject:** Notice of Hearing  
**Attachments:** 10 doc

Attached is a copy of the Notice of Hearing issued by the Commission in Case No GE-04-495 - Public Service Commission, Earth Harvest Mills, Inc , Ex Parte Cease & Desist and Case No GE-04-496 - Public Service Commission vs. Earth Harvest Mills, Inc Complaint The Commission has scheduled a hearing for October 25, 2004, beginning at 9 a m., in the Commission Hearing Room, 12<sup>th</sup> floor of the State Capitol

A copy of the Notice of Hearing was mailed to you yesterday by certified mail

If you have any questions, please contact Sue Richter at 701-328-4097

*Sandi Scott  
ND Public Service Commission  
600 E Blvd Ave , Dept 408  
Bismarck, ND 58505-0480  
Telephone, 701-328-4081  
Fax: 701-328-2410  
E-Mail Address slscott@state.nd.us*

66-04-495; 66-04-496

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3 Also complete item 4 if Restricted Delivery is desired
- Print your name and address on the reverse so that we can return the card to you
- Attach this card to the back of the mailpiece, or on the front if space permits

1 Article Addressed to

Gordon O. Hoberg  
 Attorney for Earth Harvest Mills, Inc  
 6771 41<sup>st</sup> Avenue SE  
 Wishek, ND 58495

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  
 *Gordon O. Hoberg*  Agent  
 Addressee

B Received by (Printed Name) C Date of Delivery  
 [Blank] *11/1/04*

D Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below  No

Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C O D

4 Restricted Delivery? (Extra Fee)  Yes

2 Article Number

(Transfer from service label)

7003 2260 0001 3517 9053

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3 Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you
- Attach this card to the back of the mailpiece, or on the front if space permits.

1 Article Addressed to

Eric Hoberg  
 1205 5<sup>th</sup> Ave NW  
 Jamestown ND 58401-2208

**COMPLETE THIS SECTION ON DELIVERY**

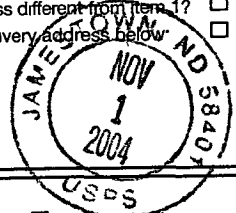
A. Signature  
 *Eric Hoberg*  Agent  
 Addressee

B Received by (Printed Name) C Date of Delivery  
 [Blank] [Blank]

D Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below  No

3 Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C O D

4 Restricted Delivery? (Extra Fee)  Yes



2 Article Number

(Transfer from service label)

7003 2260 0001 3517 8988

PS Form 3811, February 2004

Domestic Return Receipt

66-04-495 + 496

102595-02-M-1540

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3 Also complete item 4 if Restricted Delivery is desired
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits

1 Article Addressed to

Grayson Hoberg  
 Earth Harvest Mills Inc  
 PO Box 357  
 Hansley ND 58341

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  
 *Melody D Volk*  Agent  
 Addressee

B Received by (Printed Name) C Date of Delivery  
*Melody D Volk* [Blank]

D Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below  No

3 Service Type  
 Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C O D

4 Restricted Delivery? (Extra Fee)  Yes

7003 2260 0001 3517 9046

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Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent To *Shapton*

Street, Apt. No.,  
or PO Box No.

City, State, ZIP+4

PS Form 3800, June 2002 See Reverse for Instructions

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U.S. Postal Service™  
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For delivery information visit our website at [www.usps.com](http://www.usps.com)

**OFFICIAL USE**

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$	

Sent To *Lordon*

Street, Apt. No.,  
or PO Box No.

City, State, ZIP+4

PS Form 3800, June 2002 See Reverse for Instructions

HARD COPY OF Tapes

DOCKET SEQUENCE NO. \_\_\_\_\_

EXHIBIT \_\_\_\_\_

CASE NO. PU-04-496

ON FILE IN

STATE ARCHIVES

CONTROL NUMBER: 80051