

Richter, Susan K.

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Date Submitted: 3/9/2016 4:36:30 PM CST
Filing Code: Brief
Filing Desc: Public Service Commission's Pre-Hearing Brief
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The following are service contacts on this filing:
Public Service Commission:

Mitchell Armstrong (marmstrong@smithbakke.com)

Sara Forsberg (sforsberg@smithbakke.com)

Tiffany Knopik (tknopik@smithbakke.com)

Anna Heinen (aheinen@smithbakke.com)

Brian Schmidt (bschmidt@smithbakke.com)

Illona Jeffcoat-Sacco (ijs@nd.gov)

Auto-Owners Insurance Company:

Michael Morley (mmorley@morleylawfirm.com)

Toni Nicolson (tnicolson@morleylawfirm.com)

Other Service Contacts not associated with a party on the case:

Sue Schaumburg (sschaumburg@camrudlaw.com)

Scott Knudsvig (sknudsvig@pringlend.com)

John Schroeder (jschroeder@northdakotalaw.net)

Daniel Gaustad (dan@grandforkslaw.com)

295 GE-15-36 Filed 03/09/2016 Pages: 11
E-file to Court – Public Service Commission's Pre-Hearing Brief
Public Service Commission
Mitch Armstrong, Illona Jeffcoat-Sacco

Russ Melland (rmelland@camrudlaw.com)

Tracy Kennedy (tracykennedy@northdakotalaw.net)

Susan Richter (srichter@nd.gov)

Jon Brakke (jbrakke@vogellaw.com)

Daniel Gaustad (dan@grandforkslaw.com)

Joel Arneson (jfamoose@gra.midco.net)

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STATE OF NORTH DAKOTA
COUNTY OF GRAND FORKS

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

CIVIL NO. 18-2015-cv-00240

Public Service Commission,)
)
Petitioner,)
)
vs.)
)
Grand Forks Bean Company, Inc., and)
Auto-Owners Insurance Company)
)
Respondents.)

**PUBLIC SERVICE COMMISSION'S
PRE-HEARING BRIEF**

I. INTRODUCTION

[¶1] The hearing on the Public Service Commission's Report and Recommendations (Doc ID # 155) begins on March 14, 2016. There have been several objections filed to the report. (Doc ID #'s 217, 219, 221, 223). Bremer Bank has also filed a brief in support of its objection. (Doc ID # 227). The PSC's purpose in filing this pre-hearing brief is to attempt to assist in the Court's understanding of and preparation for the upcoming hearing. The PSC also expects there to be some evidentiary issues that will arise at the hearing, primarily related to relevance of certain evidence as well as expected questions of witnesses that may be requesting legal opinions.

[¶2] It appears the primary disputed issues fall into two categories. The first is whether the farmer-claimants had credit-sale contracts with Grand Forks Bean. At the hearing, the Court will see that various *Price Later Marketing Agreements* are at issue. Bremer asserts the *Price Later Marketing Agreements* constitute credit-sale contracts, and therefore, any payments to the farmers should come out of the credit-sale contract indemnity fund rather than trust assets. The PSC asserts the *Price Later Marketing Agreements* are not credit-sale contracts.

[¶3] The second issue is the date of insolvency. The majority of the farmer-claimants assert an insolvency date of October 15, 2013. One claimant, WJS Nelson, asserts an insolvency date of May 30, 2014. The PSC's report recommends an insolvency date of December 19, 2014. The primary effect of the insolvency date is its impact on the market price of the beans, which will affect the recommended payments.

[¶4] These are the two main issues from the PSC's perspective. Other issues that will need to be decided include interest, storage, and other deductions from the recommended distribution. The PSC has outlined the statutory provisions and other applicable law in its report, but provides additional support below in advance of the hearing. The PSC anticipates providing more detailed and comprehensive analysis based on the evidence in a post-hearing brief.

II. APPLICABLE LAW AND ARGUMENT

A. Credit Sale vs. Non-Credit Sale

[¶5] As the Court will see at the hearing, there are several *Price Later Marketing Agreements* at issue in this case. All the farmer-claimants except Curt Amundson deny signing or entering into the *Price Later Marketing Agreements*. There are several issues that the PSC expects the Court will need to determine with respect to these claimed agreements, including whether the parties entered into them, whether they were signed by the claimants, what affect the lack of a signature has on the agreements, and, if so, whether the terms of the agreement create valid credit-sale contracts. In its *Brief in Support of Claimant Bremer Bank, National Association's Objection to Report and Recommendation of Trustee*, Bremer's arguments include: 1. that the agreements do not have to comply with N.D.C.C. § 60-02-19.1; 2. The agreements do not have to be signed by the farmer; and 3. the PSC's licensing division's past inspections and industry presentations are relevant to this issue (estopping the PSC from recommending the contracts are not credit-sale

contracts). The PSC disagrees with Bremer's arguments, and asserts its past inspections and industry presentations are irrelevant to determine this issue. The PSC views this determination as primarily an issue of law that will be more fully briefed after the hearing. The PSC provides the following additional support for the Court's information and consideration as there will likely be evidentiary issues to consider at the hearing.

[¶6] Bremer argues the *Price Later Marketing Agreements* meet the definition of a credit-sale contract. A credit-sale contract is defined as 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. When 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." N.D.C.C. § 60-04-01(2); see also N.D.C.C. § 60-02-01(2). Bremer argues this is the only language controlling the classification of the *Price Later Marketing Agreement*. However, N.D.C.C. § 60-02-19.1 also lists several requirements of a credit-sale contract. Bremer argues the status of these agreements is not dependent on the requirements of N.D.C.C. § 60-02-19.1

[¶7] Along with its report, the PSC filed a district court decision in Public Service Comm'n v. Grabanski Grain, LLC, and Platte River Ins. Co., Northeast Judicial District Case No. 50-2011-CV-00029, which indicated the requirements of N.D.C.C. § 60-02-19.1 must be complied with to establish a credit-sale contract. As additional support for the PSC's position, the testimony for HB 1197 which amended various provisions of Ch. 60-02 relating to credit-sale contracts includes the following:

REP. BELTER: A lot of farmers sell grain and 'the manager asks do you want a check or do you want to defer it. The farmer says I don't know. So it just sits there. Is that grain covered under those circumstances?

JON MIELKE. In that case it would be covered because for the credit sales contract to be valid, it must be signed. This is something that the PSC fought hard for in Federal Court In (sic) the Wembelton (sic) case. There were a number of contracts where that had been exactly that kind of a discussion between the warehouse and the farmer and the contracts had not been signed. We went to court. An unsigned contract is not a contract. It is open storage. Something that are (sic) warehouse inspectors look for when they go out and we advise the warehouseman. If the farmer dose (sic) not come in an (sic) sign a contract, the elevator should do one of two things. Either Put (sic) the grain on a warehouse receipt and start charging storage or cut a check to the farmer. So the farmer can't have the best of both worlds. Just hang out there in open storage indefinitely.

Something has to happen within thirty days.

REP. BELTER If it goes beyond those thirty days is it still covered by bond?

JON MIELKE: You are still covered until the contract is signed but at that time it is incumbent on the warehouseman to get back in touch with the farmer and say we have to do something with this. It can just sit there. Get a signed contract or issue a check. The warehouseman has to force the issue. If there is not a signed contract there is bond protection.

REP. BELTER: Why can we just run this under a bond or is there no bonding company that will do that. I have heard in the past it cost to (sic) much to do that but we are incurring the cost throughout this method.

JON MIELKE: That is exactly what the PSC proposed four years ago. We did have a larger bill that resulted in the passage in Chapter 1602.1 of the Century code. The PSC did have a section in there that would have required bond coverage on credit sale contracts. I believe the estimate at that time would cost the industry .06 cents per bushel. So it was very expensive insurance. The real down side with that proposal is that there would be a number of elevators that would not be able to get bonded. They would not be considered a solid enough risk to get a bond at any rice (sic). This would really weaken the overall structure of the industry.

Hearing on HB 1197 before the H. Agriculture Comm., 1/23/03, 58th Assembly (N.D. 2003)

(statements of Rep. Belter and Jon Mielke) at p. 5-6 (attached as Exhibit A).

[¶8] This legislative history supports that a contract cannot be considered a credit-sale contract unless it is signed and that the requirements of N.D.C.C. § 60-02-19.1 are more than mere

regulatory provisions. This is also consistent with Grabanski Grain, LLC. Neither N.D.C.C. § 60-04-01(2) nor § 60-02-01(2) contains an explicit signature requirement. The signing requirement for a credit-sale contract is found in N.D.C.C. § 60-02-19.1 which states the following:

A warehouseman shall not purchase grain by a credit-sale contract except as provided in this section. All credit-sale contracts must be in writing and must be consecutively numbered at the time of printing the contract. The warehouseman shall maintain an accurate record of all credit-sale contract numbers, including the disposition of each numbered form, whether by execution, destruction, or otherwise. Each credit-sale contract must contain or provide for all of the following:

1. The seller's name and address.
2. The conditions of delivery.
3. The amount and kind of grain delivered.
4. The price per unit or basis of value.
5. The date payment is to be made.
6. The duration of the credit-sale contract.
7. Notice in a clear and prominent manner that the sale is not protected by the bond coverage provided for in section 60-02-09. However, if the warehouseman has obtained bond coverage in addition to that required by section 60-02-09 and such coverage extends to the benefit of credit-sale contracts, the warehouseman may state the same in the credit-sale contract along with the extent of such coverage.

The contract must be signed by both parties and executed in duplicate. One copy shall be retained by the warehouseman and one copy shall be delivered to the seller. Upon revocation, termination, or cancellation of a warehouseman's license, the payment date for all credit-sale contracts shall, at the seller's option, be advanced to a date not later than thirty days after the effective date of the revocation, termination, or cancellation, and the purchase price for all unpriced grain shall be determined as of the effective date of revocation, termination, or cancellation in accordance with all other provisions of the contract. When a public warehouse is transferred under this chapter, credit-sale contracts may be assigned to another licensed public warehouseman or facility-based grain buyer.

N.D.C.C. § 60-02-19.1 (emphasis added).

[¶9] This issue was also addressed by the United States District Court for the District of North Dakota in its *Order Following Evidentiary Hearing in United States of America v. Wimbledon Grain Co. et al*, Civil No. A3-02-46, (D.N.D. 2002) (attached as Exhibit B). In Wimbledon Grain Co., the court found that the only means by which a contract can be classified

as a credit-sale contract is when the actual seller, not his representatives, signed the contract. *Id.* at pp. 1-2. Therefore, any contracts that were not signed by the actual seller cannot be classified as credit-sale contracts. This further shows that the requirements of N.D.C.C. § 60-02-19.1 must be satisfied for a valid credit-sale contract to exist. The PSC is unaware of any court which has evaluated this issue and concluded otherwise.

[¶10] As a result, a credit-sale contract cannot exist unless it satisfies all of the requirements of N.D.C.C. §§ 60-02-01(2), 60-04-01(2) and 60-02-19.1.

B. Evidence Regarding the PSC's Past Inspections and Presentations is Irrelevant.

[¶11] The PSC anticipates Bremer will attempt to ask questions of witnesses and attempt to introduce evidence regarding the PSC's past inspections of Grand Forks Bean and about presentations the PSC has made to industry. The PSC asserts this evidence is irrelevant to the issue of determining whether the claimed agreements at issue meet the legal requirements of a credit-sale contract. The PSC intends to object to this testimony and evidence at the hearing. If this evidence is allowed, it will create a trial within a trial about the PSC's inspections and presentations rather than focusing on whether the agreements at issue actually satisfy the legal requirements to be considered credit-sale contracts.

[¶12] Bremer attempts to establish relevancy by making an estoppel argument in its brief. The crux of its argument is that Tim Erdmann did not note any deficiencies during his inspections of Grand Forks Bean, and therefore, the *Price Later Marketing Agreements* must be considered credit-sale contracts. Further, Bremer asserts that presentations by the PSC used definitions of N.D.C.C. §§ 60-02-01(2) and 60-04-01(2) for credit-sale contracts. The PSC disagrees with the accuracy of Bremer's assertions, but regardless, this type of evidence should be excluded. Even if one presumes Tim Erdmann concluded these were credit-sale contracts at his inspection, it is for

the Court to decide in this proceeding whether the agreements meet the legal requirements to be considered credit-sale contracts.

[¶13] As a result, this evidence is irrelevant and inadmissible under Rules 401 and 402 of the North Dakota Rules of Evidence. Pursuant to Rule 401, "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Here, it is completely irrelevant whether Erdmann noted deficiencies during his past inspections. The PSC's authority is constrained by N.D.C.C. § 60-02-03. It does not have authority to make a final determination as to whether a contract is a credit-sale contract. Final approval of the PSC's report and recommendation is with the district court under N.D.C.C. § 60-04-09. Whether Erdmann noted deficiencies in his past inspections or whether all presentations provided information relating to the requirements in N.D.C.C. § 60-02-19.1 is not relevant in making a legal conclusion as to whether these claimed agreements actually meet the statutory requirements of a credit-sale contract. As a result, this evidence is not relevant and is inadmissible pursuant to N.D.R.Ev. 402 which provides that "[i]rrelevant evidence is not admissible."

[¶14] Allowing this evidence at hearing will unnecessarily prolong the presentation of evidence on an irrelevant issue, and create a trial within a trial on the PSC's past inspections of Grand Forks Bean and any presentations it has given. The relevant issue is not what may have occurred during an inspection or presentation in the past, but whether the claimants actually had credit-sale contracts. The presentation of evidence and focus of the evidence should be confined to those issues.

C. Insolvency Date

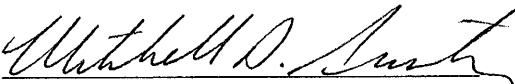
[¶15] The PSC also believes the determination of the insolvency date is largely a legal determination. Pursuant to N.D.C.C. § 60-04-02, “A licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored.” When the date a warehouseman becomes insolvent is unclear, the North Dakota Supreme Court has upheld an interest award (which is based on the insolvency date) from the date the PSC filed an application for appointment as trustee. North Dakota Public Service Com’n v. Valley Farmers Bean Ass’n, 365 N.W.2d. 528, 548 (N.D. 1985) (holding the district court did not err in directing interest to accrue from the date of filing when “it is unclear when VFBA first failed to redeem a receipt, it was not later than the date the PSC filed an application for appointment as trustee along with supporting documents indicating VFBA’s insolvent status.)

[¶16] In the present case, the Court will have to determine when Grand Forks Bean became insolvent. It is expected there will be testimony from the various claimants about when, how, and under what conditions they each requested payment for their beans. None of these requests were in writing and there appear to be various differing circumstances relating to the requests. However, the PSC was never contacted about concerns until November 2014. After a brief period of investigation, these issues were not resolved and the claimants submitted written claims to the PSC beginning on December 19, 2014.

III. CONCLUSION

[¶17] The PSC looks forward to the hearing on March 14 to address these issues, and will request to be allowed to file a post-hearing brief further explaining the rationale for its recommendations after all the evidence has been presented.

Dated this 9th day of March, 2016.

By 
Mitchell D. Armstrong (ND ID No: 05892)
marmstrong@smithbakke.com
Brian D. Schmidt (ND ID No: 07498)
bschmidt@smithbakke.com
Special Assistant Attorney Generals
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

and

Illona A. Jeffcoat-Sacco (ND ID No: 03315)
ijs@nd.gov
Special Assistant Attorney General
State Capitol – 12th Floor
600 East Boulevard Ave – Dept. 408
Bismarck, ND 58505-0480
(701) 328-2400

Attorneys for Petitioner, Public Service
Commission