



Chris Nelson, Chair  
Kristie Fiegen, Vice Chair  
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## **SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

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March 12, 2012

Patricia Van Gerpen

SD PUC Executive Director

500 E. Capitol Ave

Pierre, SD 57501

Re: GW12-001

Dear Ms. Van Gerpen,

SD PUC Commission Staff (herein Staff) has, pursuant to the February 17, 2012 Commission Order conducted an audit of Anderson Seed Co Inc's (herein Anderson Seed) records. Staff remains diligent in its efforts to both identify affected South Dakota sellers and protect them in Anderson Seed's insolvency. Staff respectfully requests the SD Public Utilities Commission (herein Commission) (i) revoke Anderson Seed's grain buyer license pursuant to SDCL 49-45-16 and (ii) determine it necessary to Petition the circuit court for appointment of receivership over the grain buyer's bond and its proceeds pursuant to SDCL 49-45-16.1.

### **I. Revocation of Anderson Seed Grain Buyer License**

On February 17, 2012 the Commission granted Staff's request, pursuant to SDCL 40-45-16, to suspend Anderson Seed's grain buyer's license. Within fifteen days of the suspension, Anderson Seed could have requested a hearing. It did not request a hearing, thus making revocation of Anderson Seed's grain buyer's license appropriate. Staff respectfully requests the Commission revoke Anderson Seed's grain buyer's license.

### **II. Receivership Over Grain Buyer's Bond and its Proceeds**

As part of its application for a grain buyer's license, Anderson Seed obtained a grain buyer's bond. Ultimately, the bond proceeds will be allocated to the various unpaid grain suppliers. We believe it is prudent for this Commission to Petition the Spink County Court for receivership of the bond and its proceeds. The Commission's involvement in this regard will ensure a fair and equitable distribution of bond proceeds. This Commission may, pursuant to SDCL 49-45-16.1 request "powers" as a receiver that it deems appropriate. In

other words, as receiver the Commission could ask for more “power” than over the bond and its distribution. Staff does not believe, however, it is in the best interest of damaged grain suppliers to do so.

Through the process of the audit ordered by the Commission, Staff learned of corporate transfers that leave Anderson Seed without real property assets. Non- South Dakota Anderson Seed real property assets were purchased by Legumex Walker Inc, a Canadian based company. The Redfield, SD location was not purchased. On or about February 9, 2012 a new Minnesota corporation known as BinCo Holding, LLC (herein BinCo) was organized and the Redfield location was deeded to it. Anderson Seed maintains the transaction was necessary due to environmental issues at the Redfield site. Specifically, in the course of Legumex’s purchase of Anderson Seed, environmental concerns at the Redfield location were exposed. The Redfield facility sits on what was previously used as a landfill. Before the Legumex purchase of the Redfield facility is complete, all environmental issues must be resolved.

In an attempt to isolate potential environmental liabilities, the BinCo entity was created. The BinCo entity currently owns all the real property assets and was assigned some Anderson Seed liabilities. US Bank, the secured creditor with an interest in those assets, agreed to the assignment. The inventory (both processed and unprocessed grain) on site was not, however, subject to the asset transfer. As a result, Anderson Seed rents the facility to keep the inventory in condition until it can be sold to pay creditors. Anderson Seed remains jointly and severally liable for the US Bank debt. The seed on site is encumbered with security interest from US Bank. We understand Anderson Seed intends to dissolve and will make a filing with the MN Secretary of State. The dissolution process requires liquidation to equitably pay creditors. The Minnesota dissolution process provides a claims process and protection for creditors.

Due to its guarantee of the debt, the Anderson Seed balance sheets remain essentially unchanged from the pre-Binco transfer. With that said, Staff is gathering information regarding the total unsecured Anderson Seed creditors to provide a clear picture of the potential outcome for South Dakota grain sellers.

As previously discussed SDCL 49-45-6.1 gives this Commission discretion when petitioning the court for receivership. The Commission is given the discretion to ask the court for receivership to the extent and with the powers as it deems appropriate. Staff identified several different options regarding receivership. We believe, for the reasons stated below, the type of receivership we recommend is the most prudent and will be most helpful for grain sellers and producers that experienced a loss.

- a. Receivership of the type requested allows the PUC to perform the duties listed in SDCL 49-45-19.

If revocation of the Anderson Seed grain buyer’s license is ordered by the Commission, SDCL 49-45-19 becomes the controlling statute regarding grain seller rights. The statute indicates that unless a timely claim is made, producers or claimants relieve the surety of any obligation to them. The statute requires the claimant send a notice to the commission, the surety and the grain buyer. Ultimately, the surety is given the authority to make judgments regarding the claims and to allocate the bond proceeds. The final sentence, of the statute, however, allows this Commission to establish its own procedure if it obtains the rights of a receiver over the bond.

We believe, by obtaining a court order regarding receivership over the bond and its proceeds, the Commission can provide a service to those grain sellers damaged by Anderson Seed. Specifically, this Commission can organize a simpler claim and notice process. Furthermore, this Commission will have authority to judge the claims and determine the most equitable way to distribute bond proceeds.

- b. Receivership of the type requested will not put the PUC in a position of plant operator.

Staff acknowledges the Commission could seek receiver over the grain itself and possibly even over the grain handling facility. We do not, however, believe to do so is in the best interest of the damaged grain sellers. As a regulatory agency the Commission's duties center on our licensing and enforcement process. We are simply not in the business of operating grain facilities. Nothing indicates a Commission operated grain facility could produce capitol to pay grain sellers. Furthermore, the Commission would be forced to hire an outside entity to do so. The cost of which would come directly off possible proceeds to pay grain sellers. If we pursued this option, the Commission would also be faced with a decision regarding the product currently on site. The Commission would be responsible to prevent spoilage forcing it to determine whether selling now, when prices are low, is the best option.

Aside from the physical challenges above, the Commission could find itself in a legal battle regarding choice of state laws. Our receivership status could contradict the dissolution process underway according Minnesota statutes. Ultimately, such proceedings could delay claims settlement and is unlikely to facilitate a greater payment for South Dakota losses.

- c. Receivership of the type requested will not prohibit or interfere with the actions of grain sellers or producers to protect their own individual interests.

Finally, the individual parties to this proceeding have interests personal to them. It is impossible for the Commission to properly represent all personal rights of damaged grain sellers. To act as litigation surrogates for the affected individuals in this case requires we ignore personal interests of individuals.

### III. Conclusion

In conclusion, Staff requests the Commission revoke Anderson Seed's grain buyer's license. Anderson Seed did not request a hearing within the statutorily required time, thus making it appropriate to do so. Staff further requests the Commission seek receivership over the grain buyer's bond and its proceeds and allocation. Staff looks forward to the discussion of its request on March 13, 2012 at the regularly scheduled Commission meeting.

Sincerely,

/s/ Kara Semmler

Kara Semmler

Staff Attorney