

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

**IN THE MATTER OF LW SALES/LW SEED'S     )  
FAILURE TO OBTAIN NECESSARY            )  
LICENSURE PRIOR TO OPERATON AS A        )                    **GD07-001**  
GRAIN DEALER IN THE STATE OF SOUTH     )  
DAKOTA   )**

**BRIEF IN RESPONSE TO LETTER OF SEPTEMBER 12, 2007**

COMES NOW, the Respondent, LW Sales/LW Seed and Larry Wheeting (hereinafter "LW Sales"), by and through his attorney of record and hereby submits this BRIEF IN RESPONSE TO LETTER OF SEPTEMBER 12, 2007:

In her letter of September 12, 2007, Ms. Semmler asserts that LW Sales/LW Seed has failed to review the administrative rules or to actively participate in this case. However, this is not the case. It is LW Sales position, that it was not properly given notice of the summary judgment hearing in this case. It is LW Sales position that PUC has failed to follow the following administrative rules and statutes as it relates to this case:

20:10:01:15. Opportunity for hearing. In any contested case proceeding held before the commission, the commission shall give the parties an opportunity for a hearing conducted in accordance with the provisions of SDCL chapter 1-26 and this chapter.

20:10:01:15.01. Burden in contested case proceeding. In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant, applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

20:10:01:22.02. Notice of hearing. "Except as otherwise provided by statute, written notice of hearing shall be served upon all parties and such other persons as the commission directs, at least 10 days prior to the date set for hearing, unless the commission determines a shorter or longer period of notice for good cause. The notice shall contain the contents required by SDCL 1-26-17.

- 1-26-17. Contents of notice in contested cases. The notice shall include:
- (1) A statement of the time, place, and nature of the hearing;
  - (2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
  - (3) A reference to the particular sections of the statutes and rules involved;
  - (4) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished;
  - (5) A statement of any action authorized by law, which may affect the parties, as a result of any decision made at the hearing, whether it be the revocation of a license, the assessment of a fine or other effect;
  - (6) A statement that the hearing is an adversary proceeding and that a party has the right at the hearing, to be present, to be represented by a lawyer, and that these and other due process rights will be forfeited if they are not exercised at the hearing;
  - (7) Except in contested cases before the Public Utilities Commission, a statement that if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request to the agency no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17;
  - (8) A statement that the decision based on the hearing may be appealed to the circuit court and the State Supreme Court as provided by law.

20:10:01:01.02. Use of rules of civil procedure. Except to the extent a provision is not appropriately applied to an agency proceeding or is in conflict with SDCL chapter 1-26, another statute governing the proceeding, or the commission's rules, the rules of civil procedure as used in the circuit courts of this state shall apply.

SDCL 15-6-56(c). Motion for summary judgment and proceedings thereon (In pertinent part) “The motion shall be served at least ten days before the time fixed for the hearing. . .”

20:10:01:22.03. Manner of service. An initial pleading in a proceeding requiring service upon a person other than the commission shall be served either personally or by mail as provided by SDCL 15-6-5(b). When a party has appeared by attorney, service upon the attorney is proper service. Service shall be evidenced by a certificate of service. Except in the case of a consumer complaint proceeding or as otherwise provided in this chapter, all pleadings and documents in a proceeding after the initial pleading shall be served electronically. Electronic service shall be

effected by attaching the pleading or document as a .pdf file or other commonly used file type to an email that is addressed and transmitted to the email address of the party provided pursuant to § 20:10:01:02.03. Any document containing colored graphics such as a map, that is larger than eight and one-half by fourteen inches, or that otherwise may not practicably be served by email attachment or printed by the receiving party shall be served by mail. If a party or the attorney of a party does not have the capability to effect electronic service, the party or attorney shall provide notice of such fact to the commission and the other parties and such party may then serve and receive service by mail. Upon the request of a party or the commission, a party shall provide a paper copy of a particular document to the requesting party.

Had LW Sales been provided with the Notice of Hearing in this matter as was required by law, they would gladly have appeared at the hearing. That was not the case. Counsel for LW Sales was completely unaware that a hearing was even going on in this situation. As such, LW Sales respectfully requests that their motion for reconsideration be granted and that the summary judgment motion be set for hearing pursuant to the procedures set forth above.

Dated this 25th day of September, 2007.

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Kari A. Bartling, Attorney for Defendant  
P.O. Box 467 – 102 N. Main  
Groton, SD 57445  
(605) 397-8464

### **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I have served a true and correct copy of the foregoing BRIEF IN RESPONSE TO LETTER OF SEPTEMBER 12, 2007 on Kara Semmler, at South Dakota Public Utilities Commission, 500 East Capitol Avenue, Pierre, South Dakota 57501 electronically on this 25th day of September, 2007.

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Kari A. Bartling, Attorney for Defendant

