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August 9, 2013

Ms. Patricia Van Gerpen, Executive Director
South Dakota Public Utilities Commission
Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070

Re: RM13-001 – In the Matter of the Adoption of Rules Regarding Grain Warehouses and Grain Buyers

Dear Ms. Van Gerpen:

On behalf of the South Dakota Farmers Union (SDFU) and its membership, thank you for accepting comments on the proposed change in rule ARSD 20:10:12:13 that would allow a voluntary credit sale grain contract that is not signed by both parties to be enforceable if a writing in confirmation is sent and no objection is made to the writing in confirmation.

SDFU is a nonpartisan, grassroots organization comprised of over 10,000 family farmers and ranchers who believe agriculture is vital to our state's economy. SDFU has consistently been engaged on the regulation of grain buyers and warehouses and these issues are of the utmost importance to our members. We appreciate the efforts of the South Dakota Public Utilities Commission (PUC) in response to the insolvency of Anderson Seed Company, the passage of H.B. 1017 during the 2013 legislative session, and the subsequent rule making that these comments are in response to.

The Fifth Circuit Court ruled on April 4, 2013, that a voluntary credit sale contract is not enforceable unless signed by both parties, pursuant to the current ARSD 20:10:12:13 rule. This proposed rule change is in response to this rule and would take language directly from SDCL 57A-1-201(3)(d) and apply it directly to a voluntary credit sale contract.

SDFU supports this proposed rule with one exception. SDFU and its membership respectfully requests that the proposed rule for ARSD 20:10:12:13, section (9), line 7, be amended to strike the word "two" and replace it with "five." This recommended change would extend the time frame that a farmer has to object to a writing demonstrating a contract, from what we think is an unrealistic time frame of 48 hours to a reasonable five business days or the equivalent of a week.

While there have been many improvements with technology and communication, there is always the possibility of human error, miscommunication, misinterpretation, weather, mail complications and other potential mistakes. If there was an instance where a farmer received written confirmation of a voluntary credit sale and there was an error, the farmer would only have 48 hours to respond. This is an unreasonable amount of time for a farmer to object in today's business world.

Even though voluntary credit sale contracts do not include a price for grain, they still include a certain quantity and date of delivery for grain. This is a large commitment that has huge financial implications and can bind the farmer to an agreement that would provide for a substantial burden if there were an error

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and the farmer failed to object to an agreement that contained an error in that 48-hour period. That is why SDFU is asking the PUC to take a reasonable and realistic approach to this rule-making process and have requested this amendment to the proposed rules.

This request would not create inconsistencies that would affect the grain industry. The formal requirements of the statute of frauds are used in the most extreme circumstances to prevent the possibility of a nonexistent agreement between two parties being proved by fraud. The South Dakota Legislature has delegated to the PUC the responsibility of regulating grain buyers and the commission should make the best possible rules that create a fair balance for both grain buyers and grain sellers.

As the Fifth Circuit Court has ruled, ARSD 20:10:12:13 applies to voluntary credit sale contracts. The statute of frauds and the voluntary credit sale rules regulate two different types of situations where contracts are created. The statutes and rules governing them do not have to be uniform. They should reflect both the needs of the farmer, the grain buyer, and the realities of establishing voluntary credit sale contracts.

For the above reasons, SDFU respectfully requests this one amendment to the proposed change in ARSD 20:10:12:13.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Doug Sombke".

Doug Sombke
President, South Dakota Farmers Union