

PUC is correct in that the term “open contract” is not defined by South Dakota law. While PUC staff sets forth their own definition of “open contract,” Banghart has historically defined an open contract as grain contract with a producer where Banghart has not taken final delivery of the grain under contract. All 26 producers on Exhibit A have yet to bring final delivery, as they have been prevented from doing so because of the cease and desist letter. It should be noted that Banghart currently has no outstanding, unpaid, or unsettled grain tickets with any SD producer. Therefore, although PUC staff includes unpaid ticket matters as “open contracts,” there are no unpaid matters. As such, the “open contracts” referred to by Banghart are just those instances where producers have contracted to deliver to Banghart, and said delivery is not yet complete.

Finally, PUC staff indicates that it does not consider future contracts to be purchases of grain. Therefore it appears that the 26 contracts set forth on Exhibit A are not alleged to be violations of regulation.

CLASS B GRAIN BUYER REGULATION

PUC staff has correctly set forth SDCL 49-45-7.1 which is the statute that governs Class B grain buyer regulation and terms. However, PUC staff does not set forth any statute or regulation in support of their contention that Banghart currently does not have a valid a grain dealer license.

1. **Banghart Still Retains is License.** - Banghart currently maintains physical possession of its grain dealer license and is listed on the PUC’s website as a licensed Class B grain dealer. PUC staff has never informed Banghart that its license has been suspended, revoked, or terminated. Accordingly, Banghart has not been asked to return the license.

Banghart remains a licensed grain dealer under the rules, and is listed as so on the PUC's website.

2. Suspension of a Grain Dealer License is Regulated by South Dakota Law.

SDCL 49-45-16 sets forth the correct procedure for suspending a grain dealer license as follows:

The commission may immediately suspend the license of a grain buyer and the grain buyer shall surrender the license to the commission if:

(1) The grain buyer refuses, neglects, or is unable, upon proper demand, to redeem any scale ticket issued by the grain buyer, through redelivery or cash payment;

(2) The grain buyer refuses, neglects, or is unable to provide a bond in an amount required by the commission;

(3) The commission has knowledge of any act of insolvency, including the filing of a petition in bankruptcy naming the grain buyer as debtor; or

(4) The grain buyer refuses to submit to an inspection or cooperate with the lawful requests of a commission inspector, including requests for access to and copies of the books and records of the grain buyer.

Within fifteen days the grain buyer may request a hearing pursuant to chapter 1-26 to determine if the license should be revoked. If no request is made within fifteen days, the commission shall revoke the license.

It should be noted that is has not been even alleged that Banghart has violated any of the four enumerated violations in SDCL 49-45-16 thereby triggering the PUC's ability to immediately suspend Banghart's licensing. Despite the allegations made by the PUC staff in the Complaint in this matter, purchasing in excess of the five million dollar cap does not trigger suspension authority under SDCL 49-45-16. One would think that had legislators considered excess purchases to be sufficient grounds for immediate suspension, such a violation would have been included in this statute. In summary, Banghart's license has not been suspended, and the allegations raised in the complaint do not support relief under SDCL 49-45-16.

3. **PUC Staff Has Not Started Revocation Proceedings.** - SDCL 49-45-3 also permits the PUC to “at any time for cause shown” to revoke or suspend any grain buyer license. At this time, nor previously, as Banghart been in receipt of any request, order, or notice that proceedings have been initiated to revoke or suspend its grain dealer license.

4. **Summary.** - PUC staff maintains in its brief that Banghart does not have a grain buyer license, and therefore the request for delivery on open contracts should be accordingly denied. However, staff does not argue a clear rational as to how the license is revoked or terminated without following statutory procedure. Two things are clear: 1.) Banghart did obtain a class B license; and 2.) No proceeding has been initiated to revoke or suspend that license, and the allegations in the complaint do not give rise to immediate suspension under the enumerated factors set forth under SDCL 49-45-16. Logically, it follows that Banghart is a license grain buyer through June 30, 2023. PUC staff overlooks all statutes requiring notice, right to appeal, and other statutory safeguards for license holders. Banghart is licensed until revoked or suspended. Denying the pending motion for lack of licensure is improper.

ALLEGATIONS ARE NOT FACTS

PUC Staff has previously issued a cease and desist letter on January 12, 2023, and thereafter filed a complaint on January 30, 2023. The cease and desist letter is not a PUC order, and is merely a request to halt business until the complaints and disputes of the parties have been resolved. Banghart by all accounts has faithfully abided by the cease and desist request and fully cooperated with all discovery and records requests made by PUC staff. At this time, Banghart has denied the allegations in the complaint and the PUC staff is held to its burden of proof.

Although staff has alleged that Banghart has purchased more than 5 million dollars in grain the the licensing, years, those allegations have not been ruled upon and are still before the PUC as a pending matter. In the interim, South Dakota producers that lawfully contracted with Banghart for the purchase of grain have had their farming operations and profits interrupted as a result of the cease and desist letter issued by the PUC staff. Rather than ignoring the cease and desist letter, Banghart has faithfully abided, and now properly motions the PUC Commission for permission to take delivery. Banghart has been up-front with PUC staff and the producers, but mere allegations do not automatically make Banghart violative of the law unless properly proven or admitted.

NUMBER OF PRODUCERS SEEKING DELIVERY

PUC Staff argues that Banghart's motion is not clear as what contracts it would like to fulfill. For the sake of clarity, and Banghart seeks to take delivery on all contracts with producers as set forth on Exhibit A of the Affidavit of Jan Banghart. It appears the word "approximately" has caused concern. To be clear, Banghart wishes to address those contracts and procurers set forth on Exhibit A.

Staff next argues that Banghart has 67 open contracts. This is simply not the case. It is unclear how PUC staff arrived at that number, but it must be based on old data. Banghart's billing system may have shown on 3-8-23 that some other contracts were open, however, numerous producer's have "Act of God" provisions in their contracts thereby waiving any additional delivery in instances of weather conditions or other factors that result in lower than expected yield. The vast majority of the other "open" contracts are simply those matters that have not been marked as closed in Banghart's billing software. There are a few other open

contracts, but those matters have negotiated later delivery dates that do not make the requests as urgent. Furthermore, the 26 contracts listed in Exhibit A are with those producers that have expressed immediate desire to deliver on their contracts.

If PUC staff is concerned about “prejudicial treatment,” Banghart is willing to amend or supplement its motion to request delivery on ALL outstanding contracts regardless of delivery time. However, that does not appear to be necessary as Banghart has had open communications with all producers, and it does not appear that any “prejudiced” producers have contacted the PUC.

PUC staff then takes issue with the single, handwritten word “deferred” on one of the contracts attached to Jan Banghart’s Affidavit as Exhibit B. A complete review of that contract does not find any language or terms violative of a Class B’s licensing restrictions on licensing contracts. As a matter of explanation, Banghart generally has a policy of paying on delivery within 30 days, even if not *final* delivery. However, some producers, especially those with a delivery period around the end of the tax year, want to have payment made upon final delivery only, and thus all payments due at end of delivery. Producers routinely structure their contracts in this manner so as to have tax flexibility at the end of the year. Banghart is required under law to make payment upon final delivery, not all delivery. As such, “deferred” was written on the contract to ensure that the producer (at his request) did not receive interim payment. PUC staff’s concern of the used of deferred contracts is not a legitimate concern under the rational given, and not a “Deferred contract” under South Dakota law.

As to an plan of action, Banghart has not submitted a written plan, nor has it been requested to do so. However, Banghart, through counsel, has met with PUC staff, responded to

concerns, and this motion is an intermediate plan of action to deal with open contracts. Long term, Banghart desires to work with PUC staff and hopefully settle this matter amicably so long as open discussion can continue. Furthermore, Banghart has submitted a pending application for Class A license, and Banghart hopes to have its Class A license in the future, thereby allowing purchases in excess of five million dollars, thus mooted this matter.

Finally, PUC staff's concerns about Banghart's financial condition are unfounded. Reviewed financial statements from a reputable accounting firm show a strong financial position, well in excess of statutory regulation for both Class A and B grain buyers. The law does not require Banghart to have cash money on hand to cover all purchases. Banghart does have the grain sold and will have ample funds to pay producers. Aside from speculation, there are no genuine concerns of Banghart's financial condition. The reviewed financial statements are attached as Exhibit A of the Second Affidavit of Jan Banghart.

BANGHART HOLDS A VALID BOND

Again, PUC staff speculates as to possible risk without any justifiable facts. Banghart's bond has not been revoked. Banghart's license status on the PUC website is active. Likewise, failure to be bonded is grounds for immediate suspension, and no action has been taken in that regard. At this point, mere accusations do not terminate a bond. Banghart had received no notification from Travelers (the bonding company) that the bond has been revoked. This staff allegation is unsupported.

PUC STAFF'S CONCERNS DEAL MORE WITH THE ALLEGATIONS OF THE COMPLAINT THAN THE MOTION BEFORE THE COMMISSION

Despite the allegation of “concerning business practices” Banghart is still licensed. Banghart’s business model is different from the traditional grain buyer, and Banghart has been successful in that regard. Much of the “concern” comes from the fact that the statutory regulation does not naturally fit the business model. For example, Banghart has no scale, and it also does not issue tickets. So, alternative records need to be sourced to verify the same information. Other “concerns” arise from the fact that Banghart has been growing rapidly, and changes have been implemented on the run. Many producers trust Banghart to effectively market their grain, and there have been no complaints made by producers in this action. Many of PUC staff’s concerns are unfounded worry.

PUC staff has concerns about contract gap numbers, however, there is no record evidence in the filings, discovery, or elsewhere to indicate the existence of mystery contract holders. All contracts with producers have been provided. Gaps can come from, lost forms, updated forms, contracts that need to be resent to farmers, or out of state matters. There is nothing to support the contention that other contracts exist.

The inconsistencies of the number of contracts is discussed above. Staff is utilizing old data, incomplete information, and its in house definition of “open contract” confuses the issues. Banghart is seeking to take delivery of the 26 contracts in Exhibit A only. The other 41 contracts are either inaccurately listed by staff, closed out, contain act of god provisions, other arrangements have been worked out, or the producer has a later delivery time that does not require immediate attention.

**CREATING PRECEDENT IS NOT THE ULTIMATE GOAL, RATHER THE INTEREST
OF THE SOUTH DAKOTA PRODUCER IS HIGHEST OBLIGATION**

The PUC should address these matters on a case-by-case basis as all grain buyers are uniquely situated. As stated above, Banghart has faithfully abided by the terms of the cease and desist order with any eye toward compliance, settlement, and cooperation. Due to the numerous number of producers that want to deliver, Banghart has discussed this matter with PUC staff, and brought this motion respectfully asking the PUC commission to allow delivery.

PUC staff implies this motion is made to circumvent the law, when in actuality the purpose is to protect producers. All 26 producers want to deliver, and many will personally support this motion. Prohibiting Banghart from taking delivery based upon allegations alone, despite compliance with the cease and desist letter will result in an injustice to the producers. All PUC staff concerns are speculative or unfounded. There are no financial concerns (see reviewed financials), producers want to deliver, and market conditions are favorable. The best interest of the producers is paramount to not only Banghart, but the PUC. Both parties should want same same result; to maximize profit for the producers. The PUC staff now places the producers in the cross-fire through no fault of their own. This is not a failed elevator scenario. Banghart feels that producers are aligned with Banghart and wants these contracts to be fulfilled. Banghart seeks approval from the Commission, upon any extra conditions deemed necessary, to allow delivery. There has to be some logical way to allow consumers to take advantage of the time and market conditions without being swayed by unreasonable worry.

PUC staff's primary suggestion is for the producers to just walk away and hire a lawyer. This is not cost effective, sound, or rational. Producers do not want litigation, they want delivery before spring. The risk of financial harm is 100% speculative. Concerns about Banghart's purchasers going bankrupt apply to *all* grain sellers, not just Banghart. Banghart has ample

financial resources, it has a license, and it is motivated to help the producers. Banghart seeks permission to take delivery upon proper motion after consideration by the Commission.

Banghart has not tried to circumvent anything. Banghart has cooperated and brought this motion to protect the producer interest. PUC staff's strong opposition hurts the producers, especially in light of merely speculative producer harm.

CONCLUSION

Respondent requests that the South Dakota Public Utilities Commission:

1. Overrule the objections made by PUC staff;
2. Issue an Order authorizing Banghart Properties, LLC to take delivery on the open contracts set forth and attached to the Affidavit of Jan Banghart; and
3. To enter any other relief it deems just and equitable under the circumstances.

Dated this 23rd day of March, 2023.

/s/ Robert Konrad

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