

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

**IN THE MATTER OF THE
APPLICATION OF PUC STAFF’S
COMPLAINT AGAINST BANGHART
PROPERTIES, LLC, GETTYSBURG,
SOUTH DAKOTA**

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STAFF’S POST HEARING BRIEF

PUBLIC

GW23-001

The Commission Staff, by and through its attorney of record, hereby files this post-hearing brief in the above-captioned siting proceeding.

I. Preliminary Statement.

For purposes of this brief, the South Dakota Public Utilities Commission shall be referred to as the “Commission”; Commission Staff is referred to as “Staff”; Banghart Properties, LLC is referred to as “Banghart.” Reference to the transcript of the Evidentiary Hearing will be “Transcript”, followed by the appropriate page number, and prefiled testimony that was accepted into the record will be referred to by its exhibit and page number.

II. Jurisdictional Statement and Authority.

The Commission has jurisdiction over both licensed and unlicensed grain buyers, as well as some grain broker activities pursuant to SDCL Chapter 49-45.

For licensing period 2022, beginning July 1, 2021, and ending June 30, 2022, SDCL 49-45-1 provides:

Before transacting the business of a grain buyer in this state, a person shall obtain a grain buyer license from the commission. A violation of this section is a Class 1 misdemeanor. Each purchase of grain without a license is a separate offense.

Operation as a grain buyer without a license may be enjoined upon complaint of the commission. In addition, the commission may assess a civil fine against an unlicensed grain buyer in the amount of one thousand dollars for each purchase of grain up to a maximum fine of twenty thousand dollars.

The statute was amended effective July 1, 2022. Therefore, as it applied to the 2023 licensing period, beginning July 1, 2022, and ending June 30, 2023, SDCL 49-45-1 provides:

Before transacting the business of a grain buyer in this state, a person shall obtain a grain buyer license from the commission.

A violation of this section is a Class 5 felony if the person holds himself or herself out to be a grain broker and a Class 1 misdemeanor in all other cases. Each purchase of grain without a license is a separate offense.

A grain buyer transacting business without a license may be enjoined upon complaint of the commission.

The commission may assess a civil fine against an unlicensed grain buyer in the amount of five thousand dollars for each purchase of grain, up to a maximum fine of fifty thousand dollars per licensing period, as set forth in § 49-45-3.

For purposes of this section, the term, purchase of grain, means a transaction evidenced by the issuance of a uniform scale ticket or receipt, as described in § 49-45-10.1.

SDCL 49-45-1.1(3) defines a grain buyer as “any person who purchases grain for the purpose of reselling the unprocessed grain or who purchased three hundred thousand dollars’ worth or more of grain directly from producers in a calendar year.”

SDCL 49-45-7 provides

An application for a grain buyer license shall be filed with the commission and shall be in a form prescribed by the commission. The application shall set forth the name of each owner or principal in the management of the business and shall contain financial information depicting the financial condition of the business at the

time of application. If the applicant is a corporation, the application shall include the name of the president, secretary, and treasurer of the corporation. The application shall also include the location of the principal office or place of business and any additional place of business of the applicant. The application shall contain the affirmation statement set forth in § 22-29-9.1. The application shall be signed by the owner, managing partner, or chief executive officer of the applicant and shall be notarized.

Upon receipt of an application and sufficient bond as required by § 49-45-9, the commission may grant the license applied for or may, for good cause shown and after notice and an opportunity for hearing, deny the issuance of the license.

If a grain buyer has more than one grain buying facility in the same municipality, only one license is required for all the grain buying facilities.

SDCL 49-45-7.1 provides “An applicant may apply for a Class A grain buyer's license or a Class B grain buyer's license. No grain buyer with a Class B grain buyer's license may purchase grain in excess of five million dollars for the annual licensed period or enter into voluntary credit sale contracts. The commission shall require an applicant for a Class A grain buyer's license to submit a more detailed review of its financial condition than an applicant for a Class B grain buyer's license.”

SDCL 49-45-10 provides “A grain buyer shall pay the purchase price to the owner or the owner's agent for grain upon delivery or demand of the owner or agent unless payment is to be made in accordance with the terms of a voluntary credit sale which complies with the requirements of this chapter and rules promulgated thereto. Full payment of any cash purchase shall be made by the grain buyer within thirty days of final delivery.”

SDCL 49-45-10.1 provides “Upon receiving grain, a grain buyer shall issue to the seller an original uniform scale ticket or comparable receipt for each load of grain received. Tickets or receipts shall be numbered consecutively and a copy of each ticket or receipt shall be retained for six years.”

SDCL 49-45-13.1 provides “Upon completing an inspection, an inspector may issue a memorandum of adjustments. The commission may assess a civil fine in the amount of two hundred dollars for failure to comply with the memorandum of adjustments within thirty days. After thirty days, each day that the memorandum goes uncorrected may be considered a separate offense.”

SDCL 49-45-23 provides “A grain buyer shall keep all records of grain purchased and all contracts issued and canceled in a safe place. The records shall be kept current and open for inspection by the commission. Each record shall be retained for a period of six years.”

SDCL 49-45-27 provides “The owner, manager, or chief executive officer of a grain buyer, or any other person in a managerial position, who is responsible for any violation of this chapter by a grain buyer is subject to any criminal penalty that applies to a grain buyer under the provisions of this chapter.”

SDCL 49-1-9.1 provides “No person may knowingly provide false or misleading information to the commission in response to, or in compliance with, any statute, order, tariff, rule, direction, demand, or requirement of the commission. A violation of this section is a Class 1 misdemeanor. Each separate act of providing false or misleading information pursuant to this section constitutes a separate offense. This penalty is in addition to any other authorized penalties.”

III. Statement of the Case and Facts.

On January 30, 2023, Staff filed a complaint against Banghart, alleging Banghart had been operating as a grain buyer without a valid grain buyer license and that Banghart had, in eight separate instances, failed to make payment of grain within 30 days of final grain delivery, as required by SDCL 49-45-10. Banghart first obtained a Class B grain buyer license on June 1, 2021, valid through June 30, 2022 (2022 License Year). Banghart subsequently obtained a Class B grain buyer license for the following year, valid July 1, 2022, through June 30, 2023 (2023 License Year).

On January 9, 2023, Staff conducted a regular inspection of Banghart and found that since first obtaining a Class B grain buyer license in June of 2021, Banghart made grain purchases falling under the jurisdiction of the Commission of approximately sixteen million dollars. Following the January 9, 2023, inspection, Staff engaged in a subsequent analysis of the evidence found during the inspection, including sending multiple data requests to Banghart seeking further documents and information. Through the inspection and subsequent analysis, Staff found evidence Banghart had made at least 539 grain purchases for resale, for at least \$8,719,741.80 in the 2022 License Year and Banghart made at least 420 grain purchases for resale, for at least \$7,21,628.58 in the 2023 License Year, and Staff found 8 instances where Banghart failed to make payment within 30 days of final delivery.

The Commission held an evidentiary hearing on this matter on April 27, 2023, hearing more than ten hours of testimony from Staff witness, Cody Chambliss, PUC Grain Warehouse Manager and from Banghart witnesses Jan Banghart, Jeremy Frost, Wade Hardes, Austin Gross, and Lucas Hauert, CPA for ELO CPAs and Advisors.

On May 8, 2023, Staff filed a Motion to Reopen the Record and Allow Additional Testimony. On May 9, 2023, the Commission granted Staff's Motion and additional testimony was presented by Staff's witness, Mr. Cody Chambliss and Banghart's witness Wade Hardes.

IV. Statement of the Issues.

The principal issues to be decided in this matter are:

1. Whether purchases made in excess of \$5 million are purchases made without a valid grain buyer license, in violation of SDCL 49-45-1 and SDCL 49-45-7.1.
2. Whether Banghart made South Dakota purchases in excess of \$5 million in purchases of grain for resale in the 2022 License Year and in the 2023 License Year.
3. Whether Banghart failed to make timely payment for purchases as required by SDCL 49-45-10.
4. Whether Banghart's conduct constitutes good cause to deny a grain buyer license pursuant to SDCL 49-45-7.
5. Whether, pursuant to SDCL 49-45-27, the owner, manager, chief executive officer, or any other person in a managerial position is responsible for any alleged violation.
6. Whether Banghart violated Staff's Memorandum of Adjustment.

V. Burden of Proof.

The general standard of proof for administrative hearings is by preponderance or the greater weight of the evidence. *In re Setliff*, 2002 SD 58, ¶13, 645 NW2d 601, 605: It is erroneous to require a showing by clear and convincing evidence. *Dillinghan v. North Carolina*

Dept. of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999). “Preponderance of the evidence is defined as the greater weight of evidence.” *Pieper v. Pieper*, 2013 SD 98, ¶22, 841 NW2d 787 (citation omitted). Black’s Law Dictionary defines preponderance of the evidence as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Black’s Law Dictionary (10th ed. 2014).

Staff filed the complaint against Banghart, so Staff carries the burden of proving a violation occurred.

VI. Argument and Analysis.

1. Purchases made in excess of \$5 million are purchases without a license in violation of SDCL 49-45-7.

SDCL 49-45-7.1 provides “An applicant may apply for a Class A grain buyer's license or a Class B grain buyer's license. No grain buyer with a Class B grain buyer's license may purchase grain in excess of five million dollars for the annual licensed period or enter into voluntary credit sale contracts. The commission shall require an applicant for a Class A grain buyer's license to submit a more detailed review of its financial condition than an applicant for a Class B grain buyer's license.”

This statute clearly establishes a limitation on a Class B license based on the dollar amount of purchases made in an annual licensed period. This limitation means the license is

valid for Banghart up to five million dollars in grain purchases. This limitation also means once five million dollars in grain purchases is met, the Class B license does not authorize any additional purchases. Practically, this means the license automatically expires or becomes void and any additional purchases are not authorized and are purchases without a license.

The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. *Appeal of AT & T Information Systems*, 405 N.W.2d 24 (S.D.1987). The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. *Id.*

Words and phrases in a statute must be given their plain meaning and effect. *Id.* When the language of a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. *Id.*

Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. *Id.* But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. *Id.* When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over general terms of another statute. *Nelson v. School Bd. of Hill City S.D.*, 459 N.W.2d 451 (S.D.1990). Moreover, it is presumed that the legislature does not intend to insert surplusage in its enactments. And, where possible, the law must be construed to give effect to all of its provisions. *Id.* at 455.

US West Communications, Inc., v. Public Utilities Commission, 505 NW 2d 115 (SD 1993).

Looking at the full statutory scheme confirms the Legislature intended an automatic termination of a Class B license upon reaching the five million dollars authorized by statute.

SDCL 49-45-16 provides:

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.

Clearly, this statute does not provide specific grounds for the Commission to suspend or revoke a Class B license once a buyer makes grain purchases of five million dollars, nor does any other statute in SDCL Chapter 49-45. It would be unreasonable to accept a position that the Legislature would establish specific limitations on a Class B license, and task the PUC with implementing those limitation, but fail to provide a mechanism for the PUC to enforce the limitation nor stop or punish transactions which violate those limits.

Accepting such an interpretation would mean, once a company obtains a Class B license, the company can purchase an unlimited amount of grain in that license year, and the PUC has no tool to stop the company, nor impose any type of penalty. Such an interpretation is unreasonable and seems to fly in the face of the intent of the entire statutory scheme which requires licensure of grain buyers, along with increased financial requirements to obtain a Class A license. The Court has a history of interpreting that when a license passes its expiration date, it ceases to provide the holder authority to conduct the activity which required the license. Specifically, in

Brassfield, the Court found “[f]or purposes of compliance with this statute, the number of an expired, suspended, revoked, altered or forged driver's license is the same as no driver's license number. Brassfield was not authorized to drive his vehicle. SDCL 32-12-22.” *State v. Brassfield*, 615 NW 2d 628 (SD 2000). The only reasonable interpretation is to accept that SDCL 49-45-7.1 sets a limitation on the dollar amount of grain which can be purchased in the licensing year, and once that dollar amount is met, the license automatically terminates. Such an interpretation would be similar to other licenses such as an elk hunting license which allow the holder to take one elk per season. The license allows the holder to hunt for a specific season and to take one elk. The state does not need to take action to revoke a license at the end of the season or once the license holder takes an elk, instead the license is considered filled and terminates automatically. While there are other grounds in state law allowing the state to revoke the elk license before the end of the season, this does not mean that an elk license holder can continue taking additional elk until the end of the season.

In this case, Banghart holds a Class B grain buyer license for licensing years 2022 and 2023 which permitted Banghart to make grain purchases for that licensing year, or until Banghart made five million dollars of purchases within that licensing year. Once Banghart hit either the time limitation or the dollar limitation, their Class B license automatically terminated and any additional purchases are purchases without a license, a violation of SDCL 49-45-7.

2. Banghart made South Dakota purchases without a valid grain buyer license in the 2022 License Year and in the 2023 License Year.

For Licensing Years 2022 and 2023, Banghart held a Class B grain buyer license. In that time, Banghart entered into a number of contracts to purchase grain for resale and Staff

conducted inspections of Banghart. Banghart also provided information to Staff regarding grain purchases made, with Banghart self-classifying some of these purchases as “South Dakota” purchases. It is important to note that the contracts to purchase grain are all between a producer and Banghart. There was a lot of testimony about Banghart’s sale of grain or contracts to sell grain to other end purchasers, however, the only contracts and transactions at issue in this case are those in which Banghart is purchasing grain for resale.

On January 25, 2023, Banghart responded to a data request from Staff and provided Staff a list of South Dakota transactions encompassing License Years 2022 and 2023. (See Exhibit F-Data Request 1 and See Exhibit F-Fiscal Year 2021 Purchases and Fiscal Year 2022 Purchases). Mr. Chambliss testified that upon receiving this information, he created an Excel spreadsheet organizing transactions. (See Exhibit A-Attachment 2). This spreadsheet organized transactions by date and calculated total purchases Banghart made each year, specifying the date in which Banghart hit the five million dollar license limitation for each year. Mr. Chambliss’s spreadsheet shows that from July 1, 2021, to June 2022, Banghart made \$8,719,741.80 purchases of grain in South Dakota, and that Banghart exceeded five million dollars in March of 2022. The spreadsheet also shows that from July 1, 2022, to June 30, 2023, Banghart made \$7,213,628.58 purchases of grain in South Dakota, and that Banghart exceeded five million dollars in October of 2022.

The information provided to Staff on January 25, 2023, in response to a data request corroborated this information. In that document, Banghart self-identified South Dakota purchases as evidenced by a handwritten note stating [REDACTED] [REDACTED] (See Exhibit F-Fiscal Year 2021 Purchases).

On April 14, 2023, Banghart responded to a data request from Staff and provided Staff with all South Dakota contracts to purchase grain along with associated documentation of the associated transactions (See Exhibit H). Mr. Chambliss provided testimony to the Commission that he reviewed these contracts, and the other information provided by Banghart. Mr. Chambliss testified that the contracts he reviewed aligned with those purchases Banghart self-reported as South Dakota purchases in Exhibit F. Mr. Chambliss also testified that those contracts included specific language the delivery location is “FOB” at a specific location, but all of which are in South Dakota.

Additional information put into the record corroborates Mr. Chambliss’ Testimony. On March 20, 2023, Banghart made a Motion to allow delivery of open contracts. With this Motion, Banghart filed 26 contracts and requested the Commission grant special permission for Banghart to accept delivery of these contracts. Each of the contracts submitted with this Motion included the same specific delivery location language Mr. Chambliss testified to “FOB” at a specific location, all of which are in South Dakota.

When reviewing grain purchases and the associated contracts, Staff has the ability to look at the terms of the contracts and the self-reporting and classifying maintained in a grain buyer’s records. Neither Staff, nor the Commission, has the ability to look into the minds of each grain seller to determine whether a contract adequately reflects the agreement made between buyer and seller, and under the law, such an inquiry is not appropriate. The law is clear, when a contract language is clear, that language is controlling.

The goal of contract interpretation is to determine the parties' intent. *See id.* To determine intent, we look "to the language that the parties used in the contract[.]" *Id.* (quoting *Detmers v. Costner*, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151). We do not,

however, interpret "particular words and phrases ... in isolation." *Casey Ranch Ltd. P'ship v. Casey*, 2009 S.D. 88, ¶ 11, 773 N.W.2d 816, 821 (quoting *In re Dissolution of Midnight Star Enters.*, 2006 S.D. 98, ¶ 12, 724 N.W.2d 334, 337). Nor do we interpret language "in a manner that renders a portion of [the contract] meaningless." *Estate of Fisher v. Fisher*, 2002 S.D. 62, ¶ 14, 645 N.W.2d 841, 846 (citation omitted). Instead, we interpret the contract to give "a reasonable and effective meaning to all [its] terms[.]" *Casey Ranch*, 2009 S.D. 88, ¶ 11, 773 N.W.2d at 821 (quoting *Midnight Star*, 2006 S.D. 98, ¶ 12, 724 N.W.2d at 337).

Tri-City Associates, LP v. Belmont, Inc., 2014 SD 23, 845 NW 2d 911.

In this case, when looking at the specific contract language between the producer and Banghart, the language is clear. The contract language presented in this case (see Staff's Exhibit D including Motion Exhibit B-Open Contracts and Staff's Exhibit I May) clearly sets the delivery location at specific locations in South Dakota.

Mr. Chambliss testified that the other contracts provided by Banghart which he personally reviewed, and which align with the transactions Banghart self-classified as South Dakota transactions, all include similar language and include a specific delivery location within South Dakota. Banghart did not provide testimony or evidence refuting this claim.

The only testimony Banghart presented to this point was through Austin Gross, who testified that he was aware that the grain he sold to Banghart would likely be resold outside of South Dakota. However, under the parol evidence rule, discussions or knowledge outside, or in conflict of the clear terms of a contract cannot be considered in interpreting the contract. This means that unless the Commission determines the language of the contract is not clear, testimony regarding any discussions made outside of the terms of the written contract should not be considered.

[The Court has] summarized the nature and effect of our parol evidence rule, SDCL 53-8-5, by holding that:

"The rule is substantive in character and not merely a rule of evidence. . . . It is also well settled that parol evidence is inadmissible to vary, contradict or add to a contract which has been reduced to a writing that is clear, definite and complete, and in the absence of fraud, mistake or accident, it will be presumed that the written agreement expresses the final intention of the parties upon the subject matter of the contract." *Northwestern Pub. Serv. Co. v. Chicago & N. W. Ry. Co.*, 87 S.D. 480, 484, 210 N.W.2d 158, 160.

Renner Elevator Co. v. Schuer, 267 NW 2d 204 (SD 1978).

Additionally, while this may have been Mr. Gross's understanding, Mr. Gross cannot provide testimony regarding what any other sellers knew or believed when transacting business with Banghart.

While the contract does include a general provision stating "Title shall pass upon acceptance of the goods at destination. Seller retains title until accepted." (See Staff's Exhibit D including Motion Exhibit B-Open Contracts and Staff's Exhibit X May 9 hearing). The only destination designated in the contract is the FOB-South Dakota location specified in the contract. While the law is clear that all parts of the contract should be read together and given meaning, based on the other terms of the contract, this phrase can be read to designate that title transfers when accepted by Banghart at the delivery location designated in the contract. To accept a position that this statement means this Commission must take into consideration a separate contract between Banghart and another entity or take into consideration that Banghart has the sole authority to take shipment elsewhere and direct the jurisdiction of an otherwise clear contract is an unreasonable interpretation and violative of the parol evidence rule.

As such, the evidence clearly shows that Banghart made purchases in South Dakota greater than five million dollars in both Licensing Year 2022 and Licensing Year 2023.

Specifically, in Licensing Year 2022, Banghart purchased \$8,719,741.80 of grain in South Dakota, with 184 purchases made after Banghart hit the \$5 million license limitation.

Specifically, in Licensing Year 2023, Banghart purchased \$7,213,628.58 of grain in South Dakota, with 130 transactions made after Banghart hit the \$5 million license limitation.

3. Banghart failed to make timely payment in multiple instances, in violation of SDCL 49-45-10.

SDCL 49-45-10 requires a grain buyer issue full payment of any cash purchase within thirty days of final delivery. The evidence shows multiple instances where Banghart payments were made more than thirty days after final delivery of grain. In the Affidavit of Mr. Chambliss in Exhibit A, Mr. Chambliss specified these eight instances in paragraph 15.

Customer	Final delivery	Banghart made payment
1070W	02/07/2022	03/29/2022
1062M	04/05/2022	05/10/2022
1013M	06/01/2022	07/05/2022
1004W	09/06/2022	10/25/2022
1130P	09/27/2022	11/23/2022
1120S	09/28/2022	11/08/2022
1013G	10/12/2022	11/23/2022
1120W	12/07/2022	Unpaid as of 1/09/2023

Mr. Chambliss explained he came to this conclusion reviewing information provided to him from Sarah McIntosh, a PUC grain warehouse program inspector, following an inspection of

Banghart. See Exhibit A-Affidavit of Cody Chambliss. Additionally, Mr. Chambliss requested additional information from Banghart in a data request. (See Exhibit A-Affidavit of Cody Chambliss). This information is summarized in red on Exhibit A, Attachment 2, which Mr. Chambliss explains was created by himself and another PUC inspector and is based on financial records obtained from Banghart. (See Exhibit A-Affidavit of Cody Chambliss and Attachment 2).

Banghart attempted to contest these late payments during the hearing by introducing a different document through Wade Hardes. (See Exhibit 21) This document showed, and Mr. Hardes acknowledged, certain late payments were made, but disputed some in which Staff alleged. The document can be summarized as follows:

Producer	Final delivery	Date paid
1004W	9/6	10/20
1130P	12/29/22	12/29/22
1070W	10/4/2022	10/28/22
1062M	11/28/2022	12/30/2022
1013M	6/20/2022	7/18/2022
1017G	10/12/2022	11/23/2022
1120S	11/3/2022	11/29/2022
1120W	Open	3/6/2023

While some of these contract numbers do match the late payment contract numbers alleged by Staff, there are clearly different dates associated with some of the purchases. Additionally, Banghart's exhibit includes at least one purchase Staff did not include in its complaint, 1017G. Interestingly, this transaction does not appear to be included in the Settled Ticket Reports provided by Banghart to Staff. (See Exhibit F- 2022 Settled Purchases) Coupled with the testimony, Banghart's list does not appear to be an adequate reflection of the late payments made, especially because the evidence shows Banghart may have revised contracts in order to get around the SCL 49-45-10 requirement to make payment within thirty days of final delivery. Mr. Frost provided testimony that he had, and would, add loads and extend the delivery period of a contract to push back when payment was required. (See Transcript pg. 337-340). Additionally, Mr. Frost testified he would do this, or pay producers late if they wanted, and would break the law again to make producers happy. (See Transcript pg. 337-340 and 345-346).

This testimony certainly calls into question whether contracts were altered to change a required payment date. However, the evidence as presented by Staff is clear, the eight late payments alleged by Mr. Chambliss are clearly made more than thirty days after delivery as noted in Banghart's own financial records reflecting purchases. Banghart also admitted to making at least two late payments, one of which was not alleged in the Complaint. Clearly, Banghart violated SDCL 49-45-10 on multiple occasions.

4. The violations and other actions by Banghart, Jan Banghart, Rick Banghart, and Jeremy Frost constitute good cause to deny a grain buyer license under SDCL 49-45-7.

Banghart provided false and misleading information to the Commission on multiple occasions, a violation of SDCL 49-1-9.1 .

The testimony showed Ms. Banghart repeatedly provided Staff with inconsistent financial information on applications. Specifically, Ms. Banghart included in Banghart's reviewed financial, a pickup truck. This truck was purchased with funds out of Banghart, but Jan Banghart's personal name was used on the purchase information. Ms. Banghart then submitted an application to the PUC indicating Banghart had no vehicles. However, the truck was then included as a company asset in Banghart's reviewed financials, even though we have not seen evidence that Banghart has any actual title to the truck. These inconsistencies are concerning whether intentional or inadvertent. When a company's owner does not have a thorough understanding of a company's financial situation or and understanding of whether assets are available to the company, it raises concerns about how the company is managed. Additionally, this raises concerns to Staff about whether there is a full understanding of the company's current and future financial situation when contracts are being entered into, delivered, and paid out. These major issues are certainly a red flag to Staff and if continued, could lead to late payments, returned checks, and other issues which negatively affect producers.

Banghart failed to maintain records required by law, including at least one grain purchase for resale without maintaining any record.

On January 25, 2023, Banghart provided Staff with purchase records of all transactions since June of 2021. (See Exhibit F). These records included purchase contracts and some scale tickets, some trucking tickets and settlement sheets. However, in Banghart's cover letter,

Banghart admitted they did not have records of certain contracts. Additionally, there were not scale tickets or comparable receipts to accompany each transaction as required by SDCL 49-45-10.1 and 49-45-23. Banghart did provide a settlement sheet summarizing transactions. However, Staff is concerned that the lack of physical records reflecting the actual transfers of grain as it occurs provides makes it difficult to determine when grain was actually delivered, when payment is due, and who may be owed payment without relying on Banghart's self-created settlement sheet. When accuracy of the company is an issue, this becomes even more concerning.

Banghart engaged in voluntary credit sales, in violation of Class B license limitations in SDCL 49-45-7.1.

Based on the settlement sheets provided, it appears Banghart has been operating under a practice that payment is not due to producers until the entire purchase contract is filled. This is itself concerning because many of these contracts include delivery periods over multiple months.

Additionally, testimony indicates Banghart is, in at least some instances, in control of when grain is picked up from a producer. In practice, this means that Banghart could pick up a load from a producer in January, and then wait three months to pick up the rest of the grain to be purchased under the contract, and wait another 30 days to pay for all of the grain, even if a load were initially picked up four months prior. This situation becomes even more concerning based on testimony Mr. Frost provided at testimony. In his testimony, Mr. Frost indicated he has revised contracts in the past to add additional grain and revise the delivery dates in order to push back the date when final payment is due. He also indicated he would do this again in order to get around the requirement that payment must be made within 30 days of final delivery.

This type of practice is extremely concerning to Staff as it effectively operates as a voluntary credit sale, which Banghart is not permitted to engage in with a Class B license. Coupled with Staff's concern about Ms. Banghart's uncertainty about Banghart's current financial situation, Staff is extremely concerned that this practice may put Banghart into a situation where they may not have funds available to pay for grain which may have been received by Banghart months prior. This type of operation also makes it very difficult for Staff to inspect the grain buyer as records continually change and may not align with previous inspections. Additionally, if these practices continue, what is to prevent Banghart from just amending contracts from year to year, so full payment is never due? This practice is essentially allowing Banghart to utilize voluntary credit sales without obtaining a Class A grain buyer license and adhering to the additional requirements of that license.

Ms. Banghart and Mr. Frost have been involved in prior violations of state grain buying laws.

Though this is the first time Banghart has been brought before the Commission for a violation, this is not the first time this group of individuals has been in violation of state law. While Banghart is owned by Ms. Banghart and Mr. Frost is currently classified as one of Banghart's independent contractors, Mr. Frost was previously classified as a Banghart employee, and more significantly, was listed on a grain buyer application as a Banghart manager. Additionally, Mr. Frost previously was owner of Fearless Grain Marketing, LLC (Fearless), an entity which employed Ms. Banghart and Mr. Hardes, and which made purchases of grain in South Dakota without a valid license. When Banghart obtained a Class B license shortly after the Fearless case was finalized, Ms. Banghart made representations to Staff that Banghart would utilize an advisory board, including an attorney, to ensure compliance with grain laws moving

forward. Ms. Banghart admitted to this Commission that that did not occur, and additionally, that she only made that promise to obtain a Class A grain buyer license.

Additionally, the evidence shows an additional violation of grain buyer laws in Nebraska. Staff's complaint alleged Banghart had a penalty imposed by the state of Nebraska for grain buyer violations. This is corroborated in Banghart's reviewed financial document for year end 2022. (See Staff's Exhibit E-of Banghart's Second Affidavit of Jan Banghart-Exhibit A Independent Accountant's Review Report and Financial Statement) This allegation was not contested by Banghart.

It is extremely concerning to Staff that Ms. Banghart made promises to Staff and did not follow through. But it is even more concerning that Ms. Banghart appeared to acknowledge that there was a previous lack of understanding on grain buyer laws, and in the two years since obtaining a license for Banghart, Ms. Banghart has not taken steps to adequately understand grain buyer laws.

SDCL 49-45-7 provides the Commission the authority to deny a license for good cause shown. The facts in this case make it clear that denying a license for good cause is appropriate here. The evidence presented shows that Banghart has violated nearly every state law regulating grain buyers and this is not the first offense committed by these individuals. Furthermore, Banghart has not taken responsibility for the violations up to this point, and has instead argued Banghart's actions were justified, or the fault of another. At this point, Staff is unsure how additional chances and more time to operate will ensure compliance or a better understanding of state laws in the future.

5. Jan Banghart, Rick Banghart and Jeremey Frost have been owners or in a managerial position and are each responsible for the violations found under this complaint.

The evidence shows Jan Banghart, Rick Banghart, and Jeremey Frost to be owners or managers of Banghart. Each application for a grain buyer license submitted to the PUC clearly designates Jan Banghart as owner. This is uncontested by Banghart. Additionally, Banghart's February 18, 2021, Application specifically includes statements that indicate Rick Banghart was also an owner of Banghart. (See Exhibit C-Timeline 25). Specifically, Exhibit C- Timeline 25, page 4 specifically mentions [REDACTED]

Additionally, page 6 specifically designates [REDACTED]

[REDACTED] Page 7 includes [REDACTED]

[REDACTED] provided with the Application. Each application submitted after this date includes a check mark designation in that there has been no change in ownership since the last application. (See Exhibit A- May 19, 2022, Application and Exhibit A- January 20, 2023). Moreover, in Banghart's Application for a Class A license, dated April 4, 2023 [REDACTED]. (See Exhibit 24-Application for Class A license-dated April 4, 2023, pg. 4).

The designations of these individuals as owner and manager through various documentation submitted to the PUC clearly shows these individuals are or have been owners and managers of Banghart when these violations occurred. SDCL 49-45-27 states managers and owners are personally responsible for violations of this chapter. For these reasons, if the Commission refers this matter for criminal prosecution, each of these individuals should be named. Additionally, if the Commission finds these violations are good cause to deny a license,

these individuals, in addition to Banghart should be listed and subject to license denial based on these violations.

6. Banghart violated Staff's Memorandum of Adjustment.

On January 12, 2023, Staff issued a Memorandum of Adjustment to Banghart regarding Staff's conclusion that Banghart had exceeded its Class B license limitations. This Memorandum advised Banghart of Staff's position and that Banghart had 30 days to comply with the Memorandum as required by SDCL 49-45-13.1. (See Exhibit A-Attachment 3). The evidence shows Banghart continued to make purchases in South Dakota well after the memorandum was issued. Specifically, Banghart made purchases on April 13, 2023, and April 17, 2023, which were associated with a contract to purchase grain with the delivery location designated as "FOB" "South Dakota." (See Exhibit I). This grain was then resold by Banghart to a company located in South Dakota. Based on the January 12, 2023, Memorandum issue date, the penalty could be assessed beginning February 12, 2023, and with a delivery April 17, 2023, penalty can be assessed for 65 days, for a total penalty of \$13,000 under SDCL 49-45-13.1.

VII. Conclusion.

After the introduction of evidence at the evidentiary hearing, it is clear that Banghart made at least 20 purchases of grain without a license in Licensing Year 2022; Banghart made at least 20 purchases of grain without a license in Licensing Year 2023; Banghart failed to make timely payment for grain purchases pursuant to SDCL 49-45-10 in multiple instances. These violations are significant, and Ms. Banghart and Mr. Frost are repeated violators, which requires a significant penalty be imposed on Banghart. State law provides for the following penalties: Licensing Year 2022, \$1,000 per violation up to a maximum \$20,000 penalty for the SDCL 49-

45-1 violation; Licensing Year 2023, \$5,000 per violation up to a maximum \$50,000 penalty for the SDCL 49-45-1 violation. In this case, because Banghart's purchases without a license in Licensing Years 2022 and 2023, far exceed the maximum penalty amount, imposing the maximum penalty in this case is appropriate. Additionally, given the violation of Staff's Memorandum of Adjustment, Staff believes an additional penalty of \$13,000 is appropriate.

Additionally, the evidence clearly shows repeated violations of other state laws and administrative rules, including failure to maintain records required by law, providing false or misleading information to the Commission, and making at least one grain purchase without having any record of the purchase. These violations show Banghart either does not adequately understand state law or has an utter disregard for adhering to the law. Looking through the code and administrative rules, it appears in its two years of operation, Banghart has violated almost every grain buyer law or rule on the books.

Furthermore, instead of taking responsibility for these violations at any point over the last six months, or even accepting the violations occurred and working toward future compliance with the law, Banghart has instead argued each allegation, made excuses, claimed the actions were justified, indicated they would repeat violations to make producers happy, and blamed others for Banghart's actions while repeatedly lashing out at the PUC and PUC staff members publicly. These actions suggest Banghart's violations were not just mistakes they are willing to correct in the future, but are more indicative of a disregard of state law, which would make it extremely difficult for Staff to effectively regulate this company in the future. However, if the Commission believes a license should be issued to Banghart, which Staff strongly recommends it not, Staff requests the Commission condition the license with Staff's main requirement under a

license being that Banghart follow all state laws. To ensure such compliance, Staff proposes any license granted by the Commission include the following conditions:

- Banghart shall follow all state laws and administrative rules.
- Banghart shall submit quarterly financials within 30 days following the end of each quarter..
- Banghart shall immediately surrender its license and cancel any open contracts should Banghart violate state grain buyer law or rule during Licensing Year 2024.
- Purchases which specify a delivery location within South Dakota are South Dakota transactions.
- For a Class B license, the license automatically terminates once \$5 million in grain purchases are made by the license holder.
- Banghart shall immediately surrender its license and cancel any open contracts should Banghart fall below financial requirements.
- Banghart shall immediately surrender its license upon a finding of a grain buyer violation.
- Banghart shall maintain complete and organized records in a manner conducive to conducting a meaningful inspection.

Staff respectfully requests this Commission find Banghart in violation of SDCL 49-45-1, 49-45-7.1, 49-45-10 and 49-45-10.1, 49-45-23 and 49-1-9.1 in Licensing Years 2022 and 2023. Additionally, Staff requests this Commission assess a penalty in the amount of \$70,000 against Banghart for these violations. Furthermore, Staff requests the Commission find these violations are good cause to deny a license to Banghart.

Respectfully submitted this 12th day of June 2023.

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