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	* * * * * *	**STAFF'S POST HEARING REBUTTAL BRIEF** **GW23-001**

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

1) Banghart's contracts to purchase grain are South Dakota transactions.

The record clearly shows Banghart's contracts to purchase grain, and the specific transactions that followed are South Dakota transactions. Despite Banghart's attempts to convolute the issues before the Commission, Banghart's references to the UCC are not in conflict with a determination that the transactions occurred in South Dakota. Staff agrees with Banghart that the UCC is applicable to determining sale of grain between two parties. However, Banghart's argument that the purchase of grain did not occur in South Dakota is incorrect.

Banghart attempts to confuse the actual issue by attempting to merge Banghart's contracts to purchase grain from South Dakota grain sellers with separate agreements that Banghart sell grain to another entity. While these contracts may include the same grain, and may occur over similar time-frames, they are distinct contracts and no evidence has been presented that the contracts are tied together in any clear manner. It is also imperative to clarify that South Dakota only regulates grain buyer purchasing grain for resale, or purchasing more than $300,000 of grain directly from producers a year. Though Banghart claims it's business practices to resell

grain make them unique, the mere definition of a grain buyer under state law shows the resale of grain is expected by grain buyers. Because South Dakota does not regulate the sale of grain, when analyzing grain transactions in the state, the only transactions that are at issue are grain purchases by a grain buyer.

When looking at Banghart's contracts to purchase grain, the terms of the contract are very clear. The contracts set a price for the grain, designate a buyer from South Dakota and a seller from South Dakota as the parties to the contract, establish a general delivery period and set a specific "delivery" location, with a specific designation "F.O.B." at a specified location in South Dakota. See Exhibit E. Banghart does not dispute these clear terms. In fact, the only dispute regarding the terms is the impact of the "F.O.B" designation. Banghart claims Staff's assertion that this designation makes this a destination contract is incorrect and asserts that the language of the contract is clear, but under the UCC, this designation makes the contract a shipment contract. "A contract is ambiguous when application of rules of interpretation leave a genuine uncertainty as to which of two or more meanings is correct." *Alverson, 1997 SD 98, 559 N.W. 2d at 235 (*Quoting *City of Watertown v. Dakota, Minnesota & E. R.R. Co.,* 1996 SD 82, 13, 551 N.W. 2d 571, 574).]

Staff agrees the UCC provides guidance on interpreting "F.O.B." language. However, regardless of whether "FOB shipment" or "FOB destination" prevails, this is still a South Dakota transaction. Under SDCL 57A-2-319 (a), an "FOB shipment" contract, a seller "must at that place, ship the goods in the manner provided in this chapter … and bear the expense and risk of putting them into the possession of the carrier." Under SDCL 57-2-319 (b), an "FOB destination" contract, a seller must at his own expense and risk transport the goods to that place and tender delivery of them in the manner provided in this chapter." "The F.O.B. term usually

indicates the point at which delivery is to be made and will normally determine risk of loss *Electric Regulator Corp V. Sterling Extruder Corp.*, 280 F. Supp. 550, 556-558 (D.C.Conn. 1968). We also note that the "destination" type contract which we envision this to be is the-variant rather than the norm. Uniform Commercial code § 2-503 Comment 5. (citations omitted)" *National Heater Co., Inc.* 482 F. 2d 87 (8th Cir. 1973). "It is also true that any ambiguity in the acknowledgement must be construed against the appellant since it drafted the document." *Slotkin v. Willmering, 464 F. 2d at 422 (CA 8 1972).*

In this case, Staff looked to the specific South Dakota location included in Banghart's contracts to purchase, and looking to case law, Staff took a conservative approach that this language was specific and this controlling as the destination in which the Seller must provide the grain to Banghart, taking all cost and risk to get the grain to that point. However, even if, *in arguendo*, the Commission accepts Banghart's position that the contracts to purchase are "FOB shipment," the transaction still occurs in South Dakota. In a shipment contract, the seller bears the risk and cost to deliver the grain to the possession of a carrier, at which point, the Seller has completed their duty under the contract, at the specific location in South Dakota. Because under either a shipment or destination contract, the seller's duty is finished and risk shift to the buyer in South Dakota, and because the contract only includes South Dakota sellers, a South Dakota buyer, and a specific South Dakota FOB location, the transaction of purchasing grain clearly occurs in South Dakota.

The same is true that the timing of title passage does not change the location of transaction. UCC 2-401 provides parties to a contract to define when Title passes, but Comment 1 to this Act, which is treated as law, sates "[t]his section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of "public"

regulation depends upon a "sale" or upon location of "title" without further definition. And 2-401 makes it clear that the ability to determine when title transfers does not impact rights, obligations and remedies of the seller, the buyer, purchasers or third parties. Regardless of whether title to the grain passes immediately to Banghart upon grain being loaded into the truck in South Dakota, the terms of the contract which was entered into between South Dakota parties and specifying an FOB location in South Dakota are still applicable to the transaction. "Title shall pass upon acceptance of goods at the destination" is the specific language Banghart relies on to claim these contracts are not South Dakota transactions. This statement includes no claim that title will transfer in another state, nor is there any claim that a seller who agrees to this language may not have the ability to seek assistance from the South Dakota PUC in an instance of late payment, nor that there may not be bond coverage available in the case of insolvency.

This provision, drafted by Banghart, puts sellers, who may not be merchants, in an extremely poor position State law requires a person "transacting business" as a grain buyer to first obtain a grain buyer license. SDCL 49-45-1.1 (4) defines a grain buyer as a person purchasing grain for resale or purchasing more than $300,000 of grain directly from producers in a year. SDCL 49-45-10.1 requires a grain buyer to issue a uniform scale ticket or comparable receipt to a seller "upon receiving grain." None of these statutes include a requirement that the passage of title is necessary to evidence a purchase. To the contrary, the statutes require a receipt as soon as grain is delivered to a buyer. This statutory scheme clearly shows that the time title passes is not necessarily a vital part of determining if a purchase is made, or whether a person is business is transacting business in South Dakota.

2) State Statutes Contemplate Licensure and are Presumed Constitutional

Banghart is correct that *Lemke v. Farmer's Grain Co.*, 258 N.W.2d 50 (1922) did put grain buying under the umbrella of interstate commerce, but this decision did not completely take the ability to regulate grain buyers out of a state's authority. Northwest Terminal Elevator involved a "grain detention charge" *Shafer v. Farmer's Grain* dealt with state infringement of the United States Grain Standards Act. Each are distinct from Banghart's argument. These cases deal with rate regulation of grain buying, and the courts have determined such action by the state to be overstepping the state's authority and violative of interstate commerce.

However, *Lemke* and associated cases are distinguished in *Parker v. Brown*, 317 U.S. 341 (1943) where the Court recognized a "state is free to license intrastate buying where purchaser expects in the usual course of business to resell in interstate commerce" and "state regulation imposed before any operation of interstate commerce occurs is not prohibited by commerce clause of the Constitution, however drastically it may affect interstate commerce" and "state regulation of matter of local concern which is so related to interstate commerce that it also operates as a regulation of that commerce may be upheld on ground that on consideration of all relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interests of safety, health, and well-being of local communities and which because of its local character and practical difficulties involved may never be adequately dealt with by Congress." *Supra.*

Pike v. Bruce Church Inc., 397 U.S. 137, 90 S. Ct. 844 (1970) also recognized "[w]here state statute regulates even-handedly to effectuate a legitimate local public interest, and its

effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

We must also remember that state statutes are presumed to be constitutional. *State v. Asmussen*, 668 N.W. 2d 725 (SD 2003). Additionally, the state statutes requiring grain buyers obtain a license in this state prior to engaging in business coupled with the requirement that grain buyer maintain a bond serves a legitimate state purpose of protecting South Dakotan's who sell grain. Ensuring that the company's purchasing grain have met basic financial requirements, comply with state laws, and hold a grain bond for the benefit of sellers should the unthinkable occur and the buyer is unable to pay for grain purchased. These laws treat all grain buyers similarly, whether domiciled in or out of South Dakota.

Conclusion.

This Commission has been specifically tasked to enforce the laws enacted by the Legislature and presumed Constitutional. In this case, the evidence clearly shows Banghart engaged in transactions and purchases in both licensing years 2022 and 2023. If the Commission is convinced that there was a misunderstanding, or that Banghart had no intent to violate state statutes, that should be considered when determining an appropriate penalty for the violation but should not be a determining factor as to whether a violation did occur. A ruling that a grain buyer can skirt state law merely by reselling grain to an out of state entity invites bad actors into this state to take advantage of South Dakota grain sellers and will leave them with no recourse, and the PUC with no ability to step in if there is a serious incident or insolvency.

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, 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.

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 21st day of June 2023.

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