

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

IN THE MATTER OF PUC STAFF'S)	STAFF'S RESPONSE IN
COMPLAINT AGAINST BANGHART)	OPPOSITION TO BANGHART'S
PROPERTIES, LLC, GETTYSBURG,)	MOTION TO ALLOW
SOUTH DAKOTA)	DELIVERY ON OPEN
)	CONTRACTS
)	
)	
)	GW23-001

COMES NOW, Staff of the South Dakota Public Utilities Commission (Staff) and hereby files this Response in Opposition to Banghart Properties, LLC's Motion to Allow Delivery on Open Contracts.

Background

This docket was opened on January 30, 2023, when Staff alleged that Banghart Properties, LLC (Banghart) had exceeded the \$5 million maximum purchase limit of Banghart's Class B Grain Buyer license for two consecutive years and had therefore been operating without a license. On February 17, 2023, Banghart filed a response to Staff's complaint. On March 20, 2023, Banghart filed a Motion to Allow Delivery on Open Contracts.

In the Motion, Banghart specifically requests the Commission allow approximately 26 South Dakota producers to deliver on their open contracts. Banghart claims it is in the producers' best interests to allow Banghart to take delivery because the prices are set higher than current market conditions.

It is Staff's understanding that Banghart's business model relies on Banghart entering into contracts to purchase grain from producers (purchase contracts), to be resold by Banghart to sell grain to another entity (sales contract). In Staff's experience with Banghart, many of these

purchase contracts are entered into with producers many months or even years before delivery is expected, with the contract generally specifying a timeframe for delivery.

When Staff works in the area of grain regulation, the term “open contract” is known to mean a contract that has been entered into by the purchaser and seller, but in which final delivery of grain has not been completed or in which final payment has not been issued. The status of an “open contract” could be that final delivery is made, but payment is pending; a partial delivery has been made; or no delivery has yet been made. Staff considers a contract to be closed only when the full terms of the contract have been met and payment is issued, or when a contract is voided.

It is significant to clarify that Staff does not include contracts as a basis in determining the value of grain purchased by a grain buyer. SDCL 49-45-1 specifies the purchase of grain “means a transaction evidenced by the issuance of a uniform scale ticket or receipt, as described in § 49-45-10.1. Based on this statute, when Staff calculates total purchases made in a licensing year, Staff only includes transactions that have already occurred. Contracts to purchase are not included in this definition and therefore Staff does not consider future contracts to purchase in and of itself to be a “purchase of grain.”

Legal Authority

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 49-45-7.1 provides “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.”

Based on these statutes, any purchase of grain without a license is made in violation of state law and subject to a civil penalty by the Commission and criminal charges, even if that purchase was made to finalize a future contract to purchase grain. Staff is unaware of any authority that would allow the Commission to actually disregard this statute and allow the purchase of grain for resale without a license. Staff concedes that the Commission has discretion to decide whether to pursue a civil penalty for a violation of conduct under this statute and discretion to decline to request criminal prosecution of potential violations. However, Staff notes, the Commission does not have the ability to agree that no criminal prosecution would occur, nor does Staff or the Commission have the ability to decline to answer questions or provide information if it is demanded by subpoena. However, just because the Commission *could* take such action, does not mean the Commission should. In this case, Staff resists Banghart’s Motion and respectfully requests the Commission deny the Motion.

Discussion

At face value, Banghart's Motion may seem reasonable, and may even appear to be beneficial and of no risk to the producers. However, Banghart's Motion presents a small snapshot of the issues in front of us. When all things are considered, it is clear that granting this Motion puts these producers at risk, and could certainly put producers at risk in the future and the Motion should therefore be denied.

1. The Motion is unclear to what Banghart seeks and the volume of the contracts at issue is significant.

Banghart's Motion requests the Commission allow Banghart to take delivery of "approximately 26" open contracts, totaling more than \$4.8 million. This request raises more than a few concerns to Staff.

First, what does "approximately" mean? Banghart specified 26 contracts in its filing, but Staff's review indicates that Banghart currently has at least 67 open contracts totaling more than \$7.4 million, one with a delivery timeframe in 2024. Granting Banghart's Motion as requested could open the door to future argument about whether "approximately" would allow delivery of all remaining open contracts, a significantly higher number and value amount than what was filed by Banghart. Additionally, this language potentially allows Banghart to change contracts of which they will ultimately take delivery without further notice to, or approval from the Commission.

Second, Staff is concerned as to how Banghart selected these 26 contracts and not the other 41 open contracts, and whether granting this Motion will result in prejudicial treatment of the remaining open contracts. Banghart's contract summary specifies the delivery timeframe on all

the 26 contracts is January through March of 2023, but viewing the language on the contracts, it appears some of the 26 contracts have delivery periods in 2022, before Staff filed the Complaint. Additionally, at least one contract has a delivery period in May-June of 2023, and another of these contracts states “deferred.” Under its Class B license, Banghart was not allowed to enter into deferred contracts. Staff is concerned that Banghart has not submitted a plan of action as to the remaining open contracts. If Banghart is not able to obtain a Class A license this year or a license for next year, we may wind up in the same position.

Finally, the value of these 26 contracts is almost \$5 million. This is significant because this is the total value of purchases permitted by a Class B license. Essentially, Banghart is requesting the Commission allow them to purchase double the amount permitted by their license and by law. This value is more concerning because Staff has not seen confirmation that Banghart has sufficient cash or credit available to pay for this grain. It is possible that Banghart has entered into sales contracts that will cover this amount of grain, confirmation of this has not been provided.

Furthermore, should some issue arise with payment to Banghart, Staff does not believe Banghart can fulfill payment on these 26 contracts. Staff is concerned that giving Banghart permission to complete these contracts would give producers a false sense of security and this may put them at risk of financial harm.

2. Staff is concerned that there is not bond coverage available for any producer deliveries occurring to a grain buyer without a valid grain buyer license.

Without a valid grain buyer license in place, there would not be bond coverage over transactions that occurred in line with Banghart’s Motion. State law requires a grain buyer to

have a bond in place before purchasing grain in South Dakota. After reviewing the language of the bond Banghart currently holds, the bond is for the benefit of all owners of grain who deliver and sell grain to a duly licensed grain buyer. This is standard language in the bonds we see here. If there is not a license in place, there is a risk to producers that there may not be any bond coverage available if Banghart failed to pay for grain delivered.

3. Staff is concerned there are inconsistencies in the financial and contract information provided by Banghart, potentially putting producers at risk.

Since Banghart first obtained a grain buyer license, Banghart has engaged in business practices that are concerning and impairs Staff's ability to appropriately monitor and regulate Banghart. Staff has found numerous instances in which Banghart has provided financial information that does not appear to align with other information available to Staff. Staff has found numerous instances of late payment. Banghart does not have records of each scale ticket, or similar receipt of transaction, forcing Staff to rely only on contract and payment information. Not only is this practice inconsistent with a grain buyer's legal obligations, it creates an enormous amount of work for Staff and makes risk difficult to identify and prevent. Even more concerning, Staff has found that in some cases Banghart has not been able to provide copies of contracts and there are gaps in contract numbers, which could indicate that there are additional contracts to be delivered for which Staff is unaware.

Even with this Motion, Staff has seen information inconsistent with what has been found by Staff or provided to Staff by Banghart. When Staff began investigating Banghart, Staff prepared a spreadsheet (Exhibit A) reflecting each open contract included in the Records obtained from Banghart. On March 17, 2023, Banghart submitted a summary sheet of open contracts to Staff

dated March 8, 2023, which Staff inputted into its Exhibit A. Banghart further updated that spreadsheet with the open contract summary Banghart filed with its March 20, 2023, Motion. When viewing Exhibit A, it is evident that there are significant inconsistencies in the information provided in each summary and with information uncovered by Staff .

While each of these items alone may not be overly concerning, the culmination is extremely concerning. Staff does not have confidence that the information provided by Banghart shows a full and accurate depiction of Banghart's business or financial position. Without understanding Banghart's full financial position, Staff cannot have confidence that Banghart actually has the financial resources to take delivery and make payment on these "approximately 26" contracts and as such, Staff must oppose Banghart's Motion.

4. Granting this Motion sets a bad precedent.

Staff certainly recognizes the importance of protecting producer interests, but granting this Motion sets a bad precedent moving forward. This Commission has been entrusted to regulate grain buyers and state law lays out specific financial requirements to obtain and maintain a license, State law also places specific restrictions on grain buyers based on the type of license the buyer holds. Banghart's Motion asks this Commission to put a stamp of approval on Banghart to engage in conduct that Staff believes violates state law.

In this case, Banghart obtained a Class B license for license period July 1, 2022, through June 30, 2023. Under the terms of that license, Banghart was limited to purchasing no more than \$5 million in grain and was not eligible to enter into voluntary credit sales. Staff has alleged that Banghart already exceeded that \$5 million limit in purchases and therefore has no license and issued a cease and desist letter to Banghart indicating as much.

However, if these allegations are found to be true and the Commission agreed with this rationale, Banghart would have exceeded its license limit and any transaction occurring after \$5 million would be an additional violation of state law, including completing contracts that were written before Banghart reached \$5 million in purchases. In such a case, granting Banghart's Motion sets an unfortunate precedent that the Commission will not hold a grain buyer to the law if there are open contracts and a producer may ultimately lose out on a contract which could benefit them financially.

Taking such a position encourages this grain buyer, and other grain buyers, to push the boundaries of the law. It further blurs the line between the classes of grain buyer licenses and the tools available to keep grain buyers from violating the law and, more importantly, to protect producers.

5. Banghart has other options available to get these producers paid.

While it may seem most simple for the Commission to just grant this Motion and allow Banghart to take delivery on these contracts, there are a number of alternative options available to Banghart to ensure these producers are not financially harmed. Banghart could assign these contracts to another entity. If Banghart does not take title to the grain, Banghart would not be "purchasing grain" under the law. Banghart, with agreement from each producer, could alternatively rewrite the contracts with the same terms, but with Banghart engaged as a grain broker instead of a grain buyer. This option does require that the ultimate purchase be a licensed grain buyer, but again this option would ensure Banghart is not "purchasing grain," Banghart could also breach the contracts, allowing the producers to sell the grain elsewhere and Banghart could cover the difference between the contract price and the producer's actual sales price.

Banghart is in the business of grain buying and maintaining state licensure is a major aspect of operating such a business. While the Commission regulates grain buyers, Banghart is ultimately responsible for making the business decisions, operating in line with the law, and ensuring there is a contingency plan available in case their business plan or business decisions do not turn out as planned. Banghart made decisions that have put these producers at risk of financial harm, and if Banghart is interested in protecting the interests of these producers, there are options available to Banghart beyond this Motion without contravening state law.

The \$5 million limit on purchases under a Class B license was not something unknown to Banghart. It was the subject of significant discussion when Banghart applied for its grain buyer license. The fact that so much discussion took place as to which form of license Banghart could obtain occurred between Staff and Banghart, with both ultimately agreeing Banghart would seek a Class B, makes it all the more concerning that the limit was ignored.

Conclusion

It is concerning to Staff and unfortunate that producers could potentially incur financial harm if Banghart is not given special approval to take delivery of contracts that have already been written. While Staff works to protect the interests of producers, at some point, there must be consequences to grain buyers who choose not to comply with the law. Allowing Banghart to take delivery of these open contracts will ultimately provide significant benefit to Banghart while putting producers at risk for all the reasons mentioned. At the end of the day, Banghart held a Class B license. Banghart chose to enter into contracts far in excess of the purchase limit imposed on Banghart by the Class B license Banghart obtained. Banghart chose not to pursue other options to fulfill their part of their contracts with these producers. Ultimately, Banghart put

these producers in this situation, and the grain buyer now asks the Commission to fix the situation for them, using financial harm to the producers as leverage to grant this Motion.

Given that Banghart does have multiple other options that would ensure producers would not incur financial harm due to Banghart's licensing situation, Staff strongly opposes granting Banghart's Motion.

WHEREFORE, Staff respectfully requests the Commission deny Banghart's Motion to Allow Delivery on Open Contracts.

Dated this 23rd day of March 2023.



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