

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Joint Application of) Application No. NG-128
NorthWestern Energy Public Service)
Corporation, Black Hills Corporation, and) MOTION TO COMPEL DISCOVERY BY
NorthWestern Energy Group, Inc. for) THE NEBRASKA PUBLIC ADVOCATE
Approval of Merger.)

The Nebraska Public Advocate, Intervenor in the above matter (hereinafter “Public Advocate”), pursuant to Rules of Commission Procedure 002.14C, hereby moves the Commission for an order compelling Applicants Black Hills Corporation and NorthWestern Energy Group, Inc., (hereinafter collectively “Applicants”) to respond to the Public Advocate’s discovery requests. In support thereof, the Public Advocate states and alleges as follows:

1. On or about November 5, 2025, the Public Advocate served her first set of discovery requests on the Applicants.
2. Request PA-1 contained in the Public Advocate’s first discovery set requested the “complete, unredacted copy of each of the transacting parties’ (Black Hills and Northwestern) Hart-Scott-Rodino premerger notification filings as referenced in the Direct Testimony of Brian Bird before the Nebraska Public Service Commission at page 25. Include complete copies of any privilege log or logs, and complete and unredacted copies of all attachments.”
3. On or about November 14, 2025, the Applicants served their separate objections and responses to the Public Advocate’s first discovery set. A true and accurate copy of the Applicants’ objections and responses are attached hereto and marked as Exhibits A and B.
4. The Applicants’ general objections included, among others, “vague and overly broad” and “seeks information or documents that are not relevant to the subject matter of the proceeding and are not reasonably calculated to lead to the discovery of admissible evidence in this proceeding.” (See Exhibit A at p.1)

5. The Applicants also specifically objected to Request PA-1 as follows:

1. **Federal Confidentiality Protections**

HSR filings are submitted pursuant to the Hart-Scott-Rodino Antitrust Improvements Act and are subject to strict confidentiality protections under federal law (15 U.S.C. § 18a(h)). Disclosure of these materials outside of authorized federal agencies is prohibited unless expressly permitted by statute or regulation.

2. **Jurisdictional Scope**

The Nebraska Public Service Commission does not have statutory authority under Nebraska law or its administrative rules to compel production of HSR filings. These materials are submitted to the Federal Trade Commission and Department of Justice for antitrust review and are not part of the standard record in state-level merger proceedings.

3. **Sensitive and Proprietary Information**

The HSR filings contain competitively sensitive business information, including market analyses, strategic plans, and financial data. Disclosure of such information, even within a regulatory proceeding, could result in harm to the applicants and their stakeholders.

(See Exhibit B at p.1)

6. The Applicants also responded to Request PA-1 (e.g. answered over objection) as follows:

Without waving or limiting its objection, the Joint Applicants state as follows:

No Hart-Scott-Rodino filings have been made by the Joint Applicants – either individually or collectively at the time of this data response.

(*Id.* at p.2)

7. On or about December 10, 2025, the Public Advocate served her third set of discovery requests on Applicant Black Hills Corporation (hereinafter “BHC”). Believing that BHC was reluctant to provide responses to the first set of discovery requests because HSR documents were explicitly sought, the Public Advocate removed the reference to HSR and requested documents and information using the instructions for HSR filing but without reference to same.

8. Also, on or about December 10, 2025, Public Advocate served her fourth set of discovery requests on Applicant NorthWestern Energy Group, Inc. (hereinafter “NWE”). Believing that NWE was reluctant to provide responses to the first set of discovery requests because HSR documents were explicitly sought, the Public Advocate removed the reference to HSR and requested documents and information using the instructions for HSR filing but without reference to same.

9. Request PA-55 contained in the Public Advocate’s third discovery set and PA-58 contained in the Public Advocate’s fourth discovery set were identical and requested the following:

[P]rovide complete and unredacted copies of all the following transaction related documents. To the extent privilege is asserted provide a complete privilege log indicating the privilege type, privilege claim, addressee and all recipients, with company name and title, of the original and any copies, subject matter, document’s present location, and who has control over it.

a. Competition Documents: Provide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead for the purpose of evaluating or analyzing the acquisition with respect to market shares,

competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. For unincorporated entities, provide such documents prepared by or for individuals exercising similar functions as officers and directors, as well as the supervisory deal team lead.

b. Confidential information memoranda: Provide all confidential information memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the ultimate parent entity of the acquiring or of the acquiring entity(s) that specifically relate to the sale of the target. If no such confidential information memorandum exists, submit any document(s) given to any officer(s) or director(s) of the acquiring person meant to serve the function of a confidential information memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a confidential information memorandum when no such confidential information memorandum exists. Documents responsive to this item are limited to those produced within one year before the date of filing.

c. Third-party studies, surveys, analyses, and reports: Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants, or other third-party advisors (“third-party advisors”) for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the ultimate parent entity of the acquiring person or of the acquiring entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets

that specifically relate to the sale of the target. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced within one year before the date of filing.

d. **Synergies and Efficiencies:** Provide all studies, surveys, analyses, and reports evaluating or analyzing synergies, and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided.

e. **Transaction Specific Agreements:** Furnish copies of all documents that constitute the agreement(s) related to the transaction, including, but not limited to, exhibits, schedules, side letters, agreements not to compete or solicit, and other agreements negotiated in conjunction with the transaction that the parties intend to consummate, and excluding clean team agreements. Documents that constitute the agreement(s) (e.g., Agreement and Plan of Merger, Letter of Intent, Purchase and Sale Agreement, Asset Purchase Agreement, Stock/Securities Purchase Agreement) must be executed, while supporting agreements, such as employment agreements and agreements not to compete may be provided in draft form if that is the most recent version. If the executed agreement is not the definitive agreement, submit a dated document that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate, such as an agreement in principle, or term sheet, or the most recent draft agreement. Such document should include information regarding some combination of the following terms: the identity of the

parties; the structure of the transaction; the scope of what is being acquired; calculation of the purchase price; an estimated closing timeline; employee retention policies, including with respect to key personnel; post-closing governance; and transaction expenses or other material terms.

f. Other agreements between joint applicants: Furnish copies of all documents that constitute the agreement(s) between joint applicants, such as agreement with non-compete or non-solicitation terms between joint applicants, leases, licensing agreements, master service agreements, operating agreements, supply agreements, or other agreements.

10. On or about December 22, 2025, BHC and NWE separately served their respective objections and responses to the Public Advocate's third and fourth discovery set requests. A true and accurate copy of the Applicant BHC's objections and responses to the Public Advocate's third discovery set are attached hereto and marked as Exhibits C and D. A true and accurate copy of the Applicant NWE's objections and responses to the Public Advocate's fourth discovery set are attached hereto and marked as Exhibits E and F.

11. The Applicants' general objections each included, among others, "vague and overly broad" and "seeks information or documents that are not relevant to the subject matter of the proceeding and are not reasonably calculated to lead to the discovery of admissible evidence in this proceeding." (See Exhibit C at p.1 and Exhibit E at p.1)

12. The Applicants also specifically objected, BHC objecting to Request PA-55 and NWE objecting to Request PA-58 as follows:

a-f. In addition to Joint Applicants' general objections, please see Joint Applicant's Response to PA Request No. 1.1.

[Applicant] objects to this data request on the grounds that the information sought is not relevant to this proceeding and therefore will not lead to the discovery of admissible evidence. This data request seeks the same information required under a Hart-Scott-Rodino (“HSR”) filing with the Federal Trade Commission and the Department of Justice. As noted in its objection in response to PA Request No. 1.1, the Joint Applicants objected to production of this information because this data request requires Joint Applicants to produce irrelevant and draft information that contains competitively sensitive business information, including market analyses, strategic plans, and financial data. Disclosure of such information, even within a regulatory proceeding, could result in harm to the Joint Applicants and their stakeholders.

The Nebraska Public Service Commission (“Commission”) does not have statutory authority under Nebraska law or its administrative rules to compel production of HSR filings or similar requests. These materials are submitted to the Federal Trade Commission and Department of Justice for antitrust review and are not part of the standard record in state-level merger proceedings.

In addition, the Commission has not required this type of discovery or analysis as part of its approval of transactions filed under Neb. Rev. Stat. § 66-1827. Instead, the Commission considers five different factors:

- a. Management;
- b. Local Commitments;
- c. Impact on Rates and Services;
- d. Investment and Long-term Ownership; and

e. Stability

See Commission Application No. NG-0037 (Babcock & Brown/NorthWestern), Commission Application No. NG-0039 (Kinder Morgan/SourceGas), Commission Application No. NG-0044 (Aquila/Black Hills Corporation), and Commission Application No. NG-084 (Source Gas/Black Hills).

The direct testimony submitted by Joint Applicants addresses and satisfies each of these factors, including the Merger Agreement attached to the Direct Testimony of Brian B. Bird as Exhibit BBB-1.

(See Exhibit D at pp.3-4 and Exhibit F at pp.3-4)

13. As a result of each Applicant's objections, a second ten-day response time elapsed where the Public Advocate sought the same documents, without production of any of those documents. Nearly a month was consumed from an already abbreviated procedural schedule.

14. On or about December 23, 2025, the Public Advocate, along with legal counsel and expert consultants, met and conferred with representatives of the Applicants, including respective legal counsel and corporate representatives, to discuss and try to resolve the Applicants' objections and refusal to respond to the above discovery requests.

15. At the meeting, the Applicants did not commit to responding to the above discovery requests and only requested the Public Advocate to narrow its discovery or ask more specific questions.

16. According to the Commission's rules of procedure, "[t]he use of depositions and discovery in proceedings before the Commission is governed by the rules and regulations of the Nebraska Supreme Court unless otherwise ordered by the Hearing Officer." Neb. Admin. Code Tit. 291, Ch. 1 at § 002.14.

17. Under Nebraska law, “the scope of discovery is extremely broad.” *Christianson v. Educ. Serv. Unit No. 16*, 243 Neb. 553, 563 (1993).

18. The Nebraska Supreme Court has held that “the concept of relevancy is broader in the discovery context than in the trial context” and a “party may discover relevant evidence that would be inadmissible at trial, so long as it may lead to the discovery of admissible evidence.” *Moreno v. City of Gering & Scotts Bluff Cty.*, 293 Neb. 320, 323 (2016).

19. The Applicants’ general objections to discovery based on vagueness, overly breadth and relevance are inappropriate under Nebraska law.

20. The Applicants’ specific objections also are flawed.

21. First, the Applicants misread the federal Hart-Scott-Rodino Antitrust Improvements Act (hereinafter “HSR”).

22. The relevant statutory provision under HSR states:

(h) Disclosure exemption. Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.

15. U.S.C. § 18a(h).

23. This HSR provision merely protects the disclosure of materials filed with and in the hands of the Department of Justice (hereinafter “DOJ”) and/or the Federal Trade Commission (hereinafter “FTC”) from public disclosure by those federal agencies pursuant to a request under the federal Freedom of Information Act, 5 U.S.C. § 552 (hereinafter “FOIA”).

24. The Public Advocate is not making a FOIA public records request to either the DOJ or the FTC.

25. Additionally, the HSR provision contains an express exception for information or documentary materials “as may be relevant to any administrative or judicial action or proceeding.” 15 U.S.C. § 18a(h).

26. This HSR provision does not protect the same information in the hands of utility companies from disclosure based on requests directly to the utility companies, including within administrative actions and proceedings.

27. Second, the Commission does have legal authority to compel production of documents or other records that are relevant to the subject matter of the current proceeding.

28. As stated above, discovery in proceedings before the Commission is governed by the rules and regulations of the Nebraska Supreme Court. Neb. Admin. Code Tit. 291, Ch. 1 at § 002.14.

29. The Nebraska Discovery Rules authorize motions to compel and grant the adjudicating authority the power to enter orders to compel. See Neb. Ct. R. Disc. § 6-337.

30. Third, the Applicants conflate the purpose of the HSR filings with the DOJ and/or FTC (that being, according to the Applicants, *federal agency* “antitrust review”) with purposes that may be relevant to these proceedings before the Commission.

31. The Applicants on their own do not get to decide what is or is not relevant.

32. While it may be within the realm of possibilities that some of the information contained in HSR filings may ultimately not be usable or relevant at a hearing in this matter, at this stage of the proceedings that cannot be determined.

33. Fourth, the Applicants incorrectly suggest that only federal agencies have authority to investigate antitrust issues.

34. According to federal antitrust laws:

Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act [15 USCS §§ 1 et seq.]. . .

15 U.S.C. § 15c(a)(1).

35. Also:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

15 U.S.C. § 15(a).

36. Thus, federal law does reflect that there can be antitrust review at the state level. Any assertion by the Applicants that “antitrust review” is only within the purview of the federal government is flat wrong.

37. Fifth, the Applicants' inference that the Commission's review, and ultimate approval or rejection, of utility mergers itself does not in some way consider, touch or concern antitrust issues is not accurate.

38. The purpose of federal antitrust laws is similar to, or not inconsistent with, the Commission's considerations in the issuance of franchises and certificates of convenience, which relates to "being consistent with the public interest." See Neb. Rev. Stat. § 66-1821.

39. According to the United States Supreme Court:

"The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, *to maintain its appropriate freedom in the public interest*, to afford protection from the subversive or coercive influences of monopolistic endeavor. . . . The decisions establish . . . 'that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, *prejudice the public interests* by unduly restricting competition or unduly obstructing the course of trade.'"

Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60, 53 S. Ct. 471, 474 (1933) (emphasis added)(internal citations omitted).

40. Sixth, the Commission has entered a Protective Order authorizing the Applicants to designate "Confidential Materials" and requiring any participant to the proceedings receiving such Confidential Materials to complete and abide by a "Non-Disclosure Certificate."

41. Thus, procedures have been put in place to protect the "competitively sensitive business information" allegedly contained in the Applicants' HSR filings.

42. The Public Advocate, and her attorney and expert consultant, have submitted non-disclosure certificates.

43. But what the Applicants fail to explain is how “[d]isclosure of such information, even within a regulatory proceeding, could result in harm to the applicants and their stakeholders.”

44. The Public Advocate fully believes that the Applicants’ HSR documents, records and information are relevant, reasonably calculated to lead to the discovery of admissible evidence, and may be admissible in the hearing in this matter.

45. On or about December 17, 2025, Commission staff separately issued their first set of discovery requests seeking information that, in whole or in part, are the types of documents that will be required to be submitted under the Applicant’s HSR obligations, and which were also sought by the Public Advocate.

46. Commission staff discovery requests 7, 8 and 9 seek “description and quantification of the anticipated advantages and benefits from the Merger” as averred on page 12 of the Joint Application, and production by each Applicant of “all analyses and any documents generated by [each], its parents or affiliates, or its consultants of potential synergies, savings or other benefits associated with the merger.”

47. Commission staff discovery requests 10 and 11 seek “all analyses and any documents generated by [each Applicant], its parents or affiliates, or its consultants of any costs (such as transitioning to a single customer system) or any other costs to be incurred in order to achieve the benefits identified in Question 7” [seeking “description and quantification of the anticipated advantages and benefits from the Merger”].

48. Commission staff discovery request 12 seeks “all merger-related documents executed by Applicants”.

49. Commission staff discovery requests 13 and 14 seek for each Applicant: “For the last five years, please provide all presentations and analyses provided to [each Applicant] and/or their respective Board of Directors regarding strategic direction or mergers.

50. Commission staff discovery requests 15 and 16 seek for each Applicant: “For the last five years, please provide all presentations and analyses provided to or made by an executive of [Applicant] (e.g., CEO, CFO) regarding strategic direction of mergers.”

51. Commission staff discovery request 19 seeks from BHC: “For the last two years, please provide all analyses prepared by Black Hills Corporation or BHNE, or their consultants/advisors (including Goldman Sachs & Co. LLC (and any other financial advisors), Faegre Drinker Biddle & Reath LLC (and any other legal advisors), tax advisors, etc.), regarding the planned merger.”

52. Commission staff discovery request 20 seeks from NWE: “For the last two years, please provide all analyses prepared by NorthWestern Energy Group, Inc. or NW, or their consultants/advisors (including Goldman Sachs & Co. LLC (and any other financial advisors), Faegre Drinker Biddle & Reath LLC (and any other legal advisors), tax advisors, etc.), regarding the planned merger.”

53. The Applicants have been granted an extension of time beyond ten business days to respond to the Commission staff’s first discovery requests, to January 9, 2026. It is not known whether the Applicants will provide the requested documents in full or in part or will instead object as it has to the Public Advocate’s third and fourth discovery requests. In any event, very little time will be available to the Public Advocate and to Commission staff to analyze any information provided and resolve any discovery disputes prior to the February 3, 2026, deadline for intervenor testimony.

54. The proposed merger of BHC and NWE is very important because it proposes consolidating two natural gas operations into by far the largest natural gas operation in Nebraska. Furthermore, the diversification touted as a benefit by the Applicants adds electric operations in other state regulatory jurisdictions that add risks to the parent company of Black Hills Nebraska Gas. The documents sought from each company by the Public Advocate and Commission staff distill in depth due-diligence and analysis by company senior management, consultants and investment advisors resulting in a *board of director determination that potential benefits of the merger transaction outweigh the risks and potential negative consequences to the companies' shareholders*. The detailed analysis of risks and benefits contained in the various presentations is as directly relevant to the respective boards' considerations as it is to the Nebraska Public Service Commission's deliberations on the proposed transaction. The Public Advocate (and the Commission staff) should have this information to perform its own analysis and assessment on behalf of the natural gas consumers in the State of Nebraska.

55. The documents sought include presentations and analyses performed by each Applicant's senior management and retained consultants and investment advisors, as ultimately provided to each company's board of directors. Similarly, there will be many separate analyses evaluating the competitive landscape, other similar deals, identification/analysis of sources of synergies, and valuation and financial market considerations performed by consulting advisors and investment banks, also shared to the boards of directors, updated on a rolling basis during the six months or year that the transaction is being considered.

56. The Applicants throughout the Joint Application and testimonies describe expected benefits from the proposed transaction. However, this discussion is aspirational in nature and does not provide specific or measurable data in support of the expected benefits. Based on experience,

the Public Advocate expects that the documents sought contain data and discussion in detail of expected benefits (including synergy estimates) and risks of the proposed transaction, from each Applicant's fiduciary perspective on behalf of its shareholders. These assessments of expected benefits and risks should be available for review by the Public Advocate (and Commission staff) from the perspective of Nebraska's natural gas consumers.

57. There is no appreciable burden to the Applicants to producing these documents. The information already exists and has been collected for use by senior management and the companies' boards of directors and has been or will be collected for submission to the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino Act filing requirements.

WHEREFORE, the Public Advocate respectfully requests that the Commission Hearing Officer enter an order compelling the Applicants to fully respond to Public Advocate discovery requests PA-1, PA-55, and PA-58, and for such other relief as may be granted by the Hearing Officer.

DATED this 30th day of December, 2025

NEBRASKA PUBLIC ADVOCATE

By:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of a public version and a confidential version of the Public Advocate's Motion to Compel Discovery was served electronically on this 30th day of December 2025 upon the following:

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The undersigned further hereby certifies that a true and correct copy of a public version of the Public Advocate's Motion to Compel Discovery was served electronically on this 30th day of December 2025 upon the following:

The Laborers International Union of North America	
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