

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Joint Application of NorthWestern Energy Public Service Corporation, Black Hills Corporation, and NorthWestern Energy Group, Inc. for Approval of Merger.))))))	Application No. NG-128 RESPONSE IN SUPPORT OF MOTION TO COMPEL DISCOVERY BY THE NEBRASKA PUBLIC ADVOCATE
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The Nebraska Public Advocate, Intervenor in the above matter (hereinafter “Public Advocate”), hereby submits this response in support of its motion to compel discovery against Applicants Black Hills Corporation and NorthWestern Energy Group, Inc., (hereinafter collectively “Applicants”).

The Hearing Officer in the order scheduling oral argument on the motion to compel indicated that the parties need to be prepared to address the discovery issues “within the scope of the hearing.” Although the Applicants have abandoned some of their reasons for objecting to discovery, they appear to be focused on an argument that a certain five-factor test defines the scope of these proceedings. The Public Advocate disagrees and contends that the scope of these proceedings – e.g. what must be proven or disproven – is broader than what the Applicants have suggested. For that reason, the Public Advocate believes it will be beneficial to the Hearing Officer to see the Public Advocate’s argument and position on what constitutes the scope of these proceedings.

**COMMISSION’S FIVE-FACTOR TEST DOES NOT COMPLY WITH NEBRASKA ADMINISTRATIVE
PROCEDURES ACT**

The State Natural Gas Regulation Act, Neb. Rev. Stat. §§ 66-1801 et seq., (“NGRA”) requires the Commission to approve any reorganization or change in control of jurisdictional utilities serving Nebraska customers. Under the NRG, the Commission shall not approve any proposed reorganization or change in control of a jurisdictional utility if the Commission finds that such reorganization or change in control will “adversely affect the utility’s ability to serve its

ratepayers.” Neb. Rev. Stat. § 66-1828(1). Additionally, the NRGAs require the Commission to determine whether any assignment, transfer or lease of a franchise or certificate of convenience granted to a jurisdictional utility serving Nebraska customers is “consistent with the public interest.” Neb. Rev. Stat. § 66-1821. These statutory sections are not further defined by the NRGAs. But see Neb. Rev. Stat. § 66-1860 (enumerating factors for determining whether extension or enlargement of natural gas service area is in public interest). The Public Advocate is not aware of, and research has not uncovered, any Nebraska court decisions interpreting these NRGAs statutory sections. The Public Advocate also is not aware of, and research has not uncovered, any published Commission rule that defines these NRGAs statutory sections.

The Applicants have pointed to a putative five-factor test cited by the Commission in prior merger cases. According to the Applicants, the Commission evaluates mergers solely using the following five factors: (1) management; (2) local commitments; (3) impacts on rates and services; (4) investment and planned long-term ownership; and (5) stability. Applicant Response at p.10.

The earliest Commission order noted by the Applicants is the order on NG-0037 entered October 17, 2006. In that order, the Commission identified the five factors without reference to any statutory, regulatory or judicial authority. The five factors do not exist in the NRGAs, in any Commission rule, or in any Nebraska court case. These factors simply existed in the Commission orders. The Applicants further noted three other Commission orders for the same proposition, the latest being the order entered in NG-0084 on January 26, 2016.

The Nebraska Administrative Procedures Act (“APA”) is the statutory mechanism state administrative agencies, such as the Commission, must follow when developing and promulgating agency rules authorized by state statute. The Legislature deemed the APA to be an important checks and balances: “When agencies create substantive standards by which Nebraskans are

expected to abide, it is essential that those standards be adopted through the rules and regulations process to enable the public to be aware of the standards and have an opportunity to participate in the approval or repeal process.” Neb. Rev. Stat. § 84-901.02.

In 2016, the Legislature revised the APA “to provide clarity to agencies about policies that must be promulgated and to ensure that the public plays a role in promulgating rules.” 2016 Neb LB 867, Introducer’s Statement of Intent, available at <https://nebraskalegislature.gov/FloorDocs/104/PDF/SI/LB867.pdf>. A key revision to the APA was to the definition of rule or regulation. The APA now provides:

Rule or regulation shall mean any standard of general application adopted by an agency in accordance with the authority conferred by statute and includes, but is not limited to, the amendment or repeal of a rule or regulation. Rule or regulation shall not include (a) internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public, (b) guidance documents as issued by an agency in accordance with section 84-901.03, and (c) forms and instructions developed by an agency. For purposes of the act, every standard which prescribes a penalty shall be presumed to have general applicability and any standard affecting private rights, private interests, or procedures available to the public is presumed to be relied upon to bind the public. Nothing in this section shall be interpreted to require an agency to adopt and promulgate rules and regulations when statute authorizes but does not require it.

Neb. Rev. Stat. § 84-901(2) (Emphasis added).

2016 Neb. LB 867 was introduced based on the recommendations from a 2015 performance audit conducted by the Legislative Performance Audit Committee. The Chairperson of that Committee was Senator Dan Watermeier. Senator Watermeier testified at the committee hearing of the Government, Military and Veterans Affairs Committee in support of LB 867. According to Senator Watermeier:

The rule definition is the first major change of LB867 as to the rule definition to resolve the lack of clarity in the current definition. The bill adds language stating that a rule must have general application, meaning that it applies to a broad class of people, as opposed to an order. LB867 also changes language regarding what is not a rule; internal procedural documents, guidance documents, forms, and their instructions.

Committee Hearing transcript at p.2 (Emphasis added), available at <https://www.nebraskalegislature.gov/FloorDocs/104/PDF/Transcripts/Government/2016-02-04.pdf>.

Tim Texel, Executive Director and general counsel for the Nebraska Power Review Board, also testified at the committee hearing in support of LB 867. According to Mr. Texel:

. . . I serve as the chair of the Legislative Review Committee for the Bar Association's Government and Administrative Practice Section. And the draft bill was provided to all 17 members of that committee, including the executive committee, who made numerous recommendations to improve the bill. Many of those comments, although not all, were incorporated into the bill as you have it now. I think the Bar will testify later on their official position, but I wanted to let you know about that vetting process.

...

I would like to say that this is modeled after the national model rules and it's by the National Conference of Commissioners on Uniform State Laws. . . . I think, this is substantially similar to what the model rules, with all of its vetting process and the national scholars that are on such a board that come up with that, and I think that's testimony to how much this is vetted too.

Committee Hearing transcript at pp.6-7 (Emphasis added).

The latest version of the Revised Model State Administrative Procedures Act promulgated by the National Conference of Commissioners on Uniform State Laws is dated October 15, 2010 ("Model APA Rules"). The official comments to Model APA Rules provide the following commentary for the definition of the term "rule":

The essential part of this definition [of the term "rule"] is the requirement of general applicability of the statement. This criterion distinguishes a rule from an order, which focuses on particular applicability to identified parties only. Applicability of a rule may be general, even though at the time of the adoption of the rule there is only one person or firm affected: persons or firms in the future who are in the same situation will also be bound by the standard established by such a rule. It is sometimes helpful to ask in borderline situations what the effect of the statement will be in the future. If unnamed parties in the same factual situation in the future will be bound by the statement, then it is a rule.

Model APA Rules at p.17 (Emphasis added), available for download at <https://www.uniformlaws.org/viewdocument/final-act-10?CommunityKey=f184fb0c-5e31-4c6d-8228-7f2b0112fa42&tab=librarydocuments>.

Based on the foregoing, it is clear that the five-factor test previously espoused by the Commission for purposes of determining whether a utility reorganization or change of control “will adversely affect the utility’s ability to serve its ratepayers” and “is consistent with the public interest” is a rule that must comply with the rulemaking requirements of the APA. It has general applicability to all utilities, rather than limited applicability to only one utility. The Commission has not promulgated a rule for purposes of further developing Neb. Rev. Stat. §§ 66-1821 and 1828. And the Commission orders in NG-0037, NG-0039, NG-0044, or NG-0084 were not issued pursuant to the rulemaking requirements of the APA. See, e.g., Neb. Rev. Stat. §§ 84-907 through 908. At best, the five-factor test is guidance which lacks the force of law. See Neb. Rev. Stat. § 84-901(5).

Because the five-factor test is not a rule or regulation of the Commission, it cannot be the sole determinative basis for the Commission’s evaluation of a utility reorganization or change of control. Other bases may be considered.

Because other bases may be considered, it is impossible to say at this stage in the proceedings that HSR filings or related records are not relevant or will not lead to the discovery of relevant information.

CONCLUSION

For the foregoing reasons, 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 20th day of January, 2025

NEBRASKA PUBLIC ADVOCATE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Public Advocate's Reply Brief in Support of Motion to Compel Discovery was served electronically on this 20th day of January 2026 upon the following:

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