STATE OF NEBRASKA
Department of Banking & Finance

In the Matter of the Application of:	)	
	)	PROPOSED FINDINGS OF FACT,
Premier Bank	)	PROPOSED CONCLUSIONS OF LAW,
16802 Burke Street	)	AND RECOMMENDED ORDER
Omaha, NE	)	
	)	
For Cross Industry Merger	)	

INTRODUCTION

THIS MATTER comes before the Nebraska Department of Banking and Finance ("Department") upon the application for cross-industry merger of Premier Bank, Nebraska ("Premier") for approval of the acquisition of substantially all of the assets and assumption of substantially all of the liabilities of Premier by GreenState Credit Union of North Liberty, Iowa ("GreenState").

On September 8, 2021, a hearing on this matter was held and was continued on September 20, 2021, before Jim R. Titus, Hearing Officer, on behalf of Kelly Lammers, Director of the Department. Representing the Department were General Counsel Patricia Humlicek Herstein, Legal Counsel Tag Herbek and Christopher German, and Review Examiner Darren Davis. David J. Routh, Robert Routh, and Teri Koller represented Premier. The Protestant, Nebraska Bankers Association ("NBA"), was present and represented by Gerald M. Stilmock, Robert J. Hallstrom, and Ryan K. McIntosh. The Court Reporter for the hearing was General Reporting Service. Exhibits 1 – 37 (inclusive) were received, over objections to exhibits 14, 22 and 23. Testifying at the hearing were Christopher Maher, CEO and Chairman of the Board for Premier, Jeffrey Disterhoft, President and CEO of GreenState, Marsha Wolff, Chief Human

Resource Officer and Chief Information Officer for GreenState, Jim Kelly, Chief Marketing Officer for GreenState and Todd Fanning, Chief Financial Officer for GreenState.

Being fully advised in this matter, the Department, by and through its director, makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Premier is a state-chartered bank under the supervision of the Department with locations in Omaha and Nebraska City, Nebraska.

2. GreenState is an Iowa state-chartered credit union doing business in various locations in the state of Iowa.

3. On May 25, 2021, Premier Bank submitted an Interagency Bank Merger Act Application where Premier seeks approval for the sale of substantially all of its assets and the transfer of substantially all of its liabilities, including all of its deposit liabilities, to GreenState. Following the proposed transaction, Premier would surrender its charter as a bank and discontinue operations. The application was filed under Neb. Rev. Stat. § 8-1510 (Cum. Supp. 2020) and Neb. Rev. Stat. § 8-1,140 (Cum. Supp. 2020).

4. Premier has paid all application fees required by Neb. Rev. Stat. § 8-602(15) (Cum. Supp. 2020, LB649) and the publication costs required by Neb. Rev. Stat. § 8-1510(4) (Cum. Supp. 2020).

5. Pursuant to Neb. Rev. Stat. § 8-1510 (Cum. Supp. 2020), notice of application for cross-industry acquisition and for establishment of a branch bank was published in the Omaha World-Herald of Douglas County, Nebraska, on June 25, 2021, and in the News-Press of Otoe County, Nebraska, on June 25, 2021, and in the Leader of Johnson County, Iowa on June 24, 2021.

6. Objections, requests for hearing, and letter of support were received by the Department between July 7, 2021, and July 13, 2021

7. Pursuant to Neb. Rev. Stat. § 8-1510(2) (Cum. Supp. 2020), notice of the hearing was published in the Omaha World-Herald of Douglas County, Nebraska, on July 30, 2021, and August 6, 2021, and in the News-Press of Otoe County, Nebraska, on July 30, 2021, and August 6, 2021, and in the Leader of Johnson County, Iowa on July 29, 2021, and August 5, 2021.

8. Notice of the hearing was published on the State of Nebraska's Electronic Public Meeting Calendar.

9. On July 23, 2021, Director Lammers appointed Jim R. Titus as Hearing Officer in this matter.

10. A hearing was held on September 20, 2021, at which Premier and the NBA participated.

11. The testimony of Premier's witnesses established that the shareholders and officers of Premier and GreenState are persons of integrity and responsibility; that the deposits currently insured by the Federal Deposit Insurance Corporation ("FDIC") shall after closing be insured by the National Credit Union Administration ("NCUA") with limits equivalent to the FDIC; that there is no increase in the number of institutions in the market and no decrease in the number of institutions in competition in the affected market; that GreenState has a sound financial basis and is well capitalized; and therefore, the promotion of public necessity, convenience and advantage are satisfied.

12. GreenState is not a Nebraska financial institution and neither Premier nor GreenState are federal financial institutions authorized to do business in Nebraska, though Premier is a

Nebraska-chartered bank doing business in the state of Nebraska under the supervision of the Department.

13. The purchase agreement at Exhibit 18 requires as a condition of the purchase that Premier will surrender its charter after closing and as soon as possible its assets shall transfer to its holding company, Premier Bancshares, Inc., for liquidation. Upon closing all branches of Premier will become branches of GreenState.

14. Approvals of the transaction have been requested of the FDIC, NCUA and the Iowa Division of Credit Unions, all of which applications are pending as of the time of hearing. The approvals of such agencies would be required, as well as the approval of the Department, for the transaction to proceed to closing.

15. No evidence was offered that either party to the proposed transaction is under any consent order or insolvent.

16. The Hearing Officer and Court Reporter costs for the hearing totaled $11,938.70.

CONCLUSIONS OF LAW

1. The burden of proof in an application case shall be upon the applicant. 49 NAC §3.002. An applicant for a cross-industry acquisition must meet requirements of applicable statutes, set forth below, and the requirements of 49 NAC §3.008.

2. Neb. Rev. Stat. § 8-1510 (Cum. Supp. 2020) provides that the Department may permit cross-industry acquisition or merger of one or more financial institutions under its supervision upon the application of such institutions to the Department. Neb. Rev. Stat. § 8-1516 (Reissue 2012) supplements the cross-industry acquisition statute by providing:

> "Bank; purchase or merger; financial institution; cross-industry merger or acquisition; when.

(1)(a) With the approval of the director, a bank may only acquire another bank in Nebraska as a result of a purchase or merger if the acquired bank and its branches are converted to branches of the acquiring bank.

(b) With the approval of the director, a financial institution may only acquire another financial institution in Nebraska as a result of a cross-industry merger or acquisition under section 8-1510 if (i) the acquired financial institution and its branches are converted to branches of the acquiring financial institution and (ii) section 8-1510 has been satisfied.

(2) For purposes of this section:

(a) Bank means a bank organized under the laws of this state or organized under the laws of the United States to do business in this state; and

(b) Financial institution means a bank, savings bank, savings and loan association, building and loan association, trust company, or credit union, organized under the laws of this state or organized under the laws of the United States to do business in this state."

These statutes allow for cross-industry acquisition or merger. Arguments have been made as to whether GreenState is an applicant and thereby has met the conditions for acquisition in the aforementioned statutes. However, the Department does not need to decide those issues as Neb. Rev. Stat. § 8-1516 clarifies that the parties authorized to participate in a cross-industry acquisition or merger must be financial institutions defined as a bank or credit union (among other entities not relevant to this matter) organized under the laws of this state or organized under the laws of the United States to do business in this state. GreenState is a credit union organized under the laws of the state of Iowa and is not a financial institution authorized to acquire a Nebraska financial institution under such statute. To the extent Neb. Rev. Stat. § 8-1510(1) was unclear on whether all financial institutions to a merger or acquisition needed to be under the Department's supervision, Neb. Rev. Stat. § 8-1516, specifically referring to §8-1510 resolves the issue by its definition of financial institution and requirements for the acquiring financial institution. The acquiring financial institution must convert the branches of the acquired financial institution to branches of the acquiring financial institution. A financial institution by definition excludes a

financial institution organized under the laws of another state, rather than under Nebraska's laws or under the laws of the United States doing business in Nebraska.

3. Neb. Rev. Stat. § 8-1,140 (Cum. Supp. 2020) commonly referred to as the "wildcard statute" allows any bank incorporated under the laws of this state and organized under the provisions of the Nebraska Banking Act to have all the rights, powers, privileges, benefits, and immunities which may be exercised as of January 1, 2021, by a federally chartered bank doing business in Nebraska.

4. Premier argues that 12 USC § 1828(c)(1)(C) (2018) provides specifically for the power of a national bank to transfer assets to any non-insured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured depository institution. However, that is not precisely how the statute reads; instead, it is a provision where the statute says no insured depository institution shall take such action except with the prior written approval of the FDIC. Otherwise, in the statute under subsection (c), there are provisions for circumstances whereby the FDIC shall not approve the transaction and it includes factors to take into consideration such as the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served and the risk to the stability of the United States banking or financial system. This is not an empowerment statute, but rather a statute dealing with circumstances where approvals are necessary with the FDIC and where they are not.

5. Premier also argues that 12 CFR § 5.33 (2021) authorizes federal banks to do "other combinations" under this regulation dealing with business combinations involving a national bank or federal savings association. However, the "other combinations", defined in paragraph (d)(10) of this regulation, may require an application under 12 CFR § 5.53 (2020). This particular

regulation does not actually authorize such other combinations but states that it must be applied for under a different regulation since § 5.33 (2021) is dealing with business combinations for Office of the Comptroller of the Currency ("OCC") review and approval of an application resulting in a national bank or federal savings association.

6. 12 CFR § 5.53 (2020) requires a national bank to obtain the approval of the OCC for a substantial asset change, defined as the sale or other disposition of all, or substantially all, of the national bank's assets in a transaction or a series of transactions. Factors which the OCC are to consider under (d) of such section include the capital level of any resulting national or federal savings association. Again, this regulation is dealing with submitting an application for approval to the OCC, but is not an authorizing statute for the authority of a bank to enter into the transaction, rather a regulation of what transactions need OCC approval and some of the procedures and factors to consider in such approval process.

7. Premier has submitted two conditional approval letters of the OCC, namely #1095 dated May 2014 and #1244 dated June 2020. OCC #1095 in part approved the application by Flint River National Bank in Georgia to change the composition of its assets by sale of substantially all of its assets to and assumption of substantially all of its liabilities by, Five Star Credit Union of Alabama, pursuant to 12 CFR § 5.53 (2020). The letter states that the bank was under a consent order, the nature of which is not provided, but required a strategic plan the contents of which are also not stated in the letter. The approval was subject to the separate approval by the FDIC, the National Credit Union Administration and the Alabama State Credit Union Administration.

8. OCC #1244 conditionally approved the application by Neighborhood National Bank of Minnesota to sell substantially all of its assets and liabilities and merge with Wings Financial Credit Union, also of Minnesota, which the letter states is clearly within the scope of

12 CFR § 5.53(c)(1)(i) which provides the substantial change for which OCC approval is required includes "the sale or other disposition of all, or substantially all, of the national bank's or Federal savings association's assets in a transaction or a series of transactions." The letter also states that "national banks have long been authorized to engage in purchase and assumption transactions, both as seller and buyer, as part of their general banking powers under 12 USC § 24(7)." It cites two cases *City Nat. Bank of Huron, v. Fuller,* 52 F.2d 870 (8th Cir. 1931), and *In Re: Cleveland Savings Society,* 192 N.E. 2d 518 (Ohio Com. Pl. 1961). The power referred to in these cases and in any other authority referring to 12 USC § 24(Seventh) is not a specific power to sell or buy a bank's assets, but rather a power by a bank's board of directors or duly authorized officers or agents, subject to law, to exercise all incidental powers as shall be necessary to carry on the business of banking. In the *City Nat. Bank of Huron* case, the court stated:

> "While it may not clearly appear from the evidence that the City National was technically insolvent at the time of the transaction in question, it does show it was in a financial condition closely approaching insolvency in fact, and was selling its assets to another bank in the attempt to take care of its liabilities. The transaction was not a consolidation under section 33, title 12, USCA. It was not a transfer of stock, but a sale of assets, and was not unusual in the banking world. As far as the First National was concerned, there can be no question that it had the right, in carrying on a general banking business, to take over the assets and assume the liabilities of the City National. It was within the general power of a national bank granted by section 24 (7), title 12, USCA, 'to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking.'
>
> Whether the City National could sell its assets presents more difficulty. The sale was preliminary to its voluntary liquidation, which, to carry through, required the approval of shareholders owning two-thirds of the stock. Section 181, title 12, chapter 2, USCA. The liquidation of the City National, however, was not permitted to be voluntary. The Comptroller of the Currency took possession of it under section 191 et seq., title 12, USCA, and there was no opportunity to carry out the voluntary liquidation. So far as this record shows, there was no stockholders' confirmation of the sale of assets as there probably would have been had the attempted voluntary liquidation become a finality. In Railway Company v. Allerton, 18 Wall. 233, 21 L.Ed. 902, the court pointed out that the power granted to directors refers to 'ordinary Business Transaction' of the corporation. [52 F.2d 873]

> It is the duty of directors of a failing corporation to do what they can to conserve the property for the benefit of the creditors. If a concern is in fact a going concern, the board of directors ought not to be permitted to strike it down by selling all its assets. The situation is entirely different when the corporation is not a going concern, and a corporation on the verge of insolvency is not going far.
>
> In George v. Wallace, 135 F. 286, this court pointed out that the expression 'usual course of business' has reference to a going concern and not to a concern on the threshold of insolvency. The rule is stated in 3 Thompson on Corporations, Sec. 2429, as follows: "Where the corporation is in failing circumstances, or is in fact insolvent, the directors and managing officers may dispose of all the property, or make an assignment of all the corporate property for the benefit of creditors." See, also, In re Kenwood Ice Company (D.C.), 189 F. 525; In re United Grocery Company (D.C.), 239 F. 1016; In re S. & S. Manuf'g & Sales Co. (D. C.) 246 F. 1005; Fitts v. Custer Slide Mining & Development Co. (C.C.A.), 266 F. 864; In re De Camp Glass Casket Co. (C.C.A.), 272 F. 558; In re Beaver Cotton Mills (D.C.), 275 F. 498; In re Ann Arbor Mach. Corp. (C.C.A.), 274 F. 24; In re E. T. Russell Co., Inc. (D.C.), 291 F. 809; In re Lone Star Shipbuilding Co. (C. C. A.) 6 F.(2d) 192; Geddes v. Anaconda Copper Mining Company (C.C.A.), 245 F. 225; Winston v. Gordon, 115 Va. 899, 80 S.E. 756.
>
> These cases hold that under general law, in the absence of restrictions national or state prohibiting it, directors of corporations may under certain circumstances mortgage or pledge the corporate assets; may make an assignment for the benefit of creditors; may throw the corporation into bankruptcy. While most of them do not involve national banks, they discuss the general powers of boards of directors under circumstances analogous to those presented here, and we think they are applicable in considering the question of what is the 'ordinary business" of the banking corporation. Under the National Banking Act, section 24 (7), title 12, USCA, directors are given 'all such incidental powers as shall be necessary to carry on the business of banking.' Such business includes the meeting of the bank's liabilities."

The court in particular indicates that such incidental powers would include that there is no question that the acquiring bank had the right in carrying on its general banking business to take over the assets and assume the liabilities of the other bank. However, whether the selling bank had the right to sell its assets the court said presented more difficulty, but it resolved that issue by finding that such incidental powers would include a meeting of the bank's liabilities, which in this case the bank seeking to be acquired was approaching insolvency and it was the duty of the directors of the failing corporation to do what they can to conserve the property for the benefit of the creditors. The court went on to say as quoted above "If a concern is in fact a going concern, the

board of directors ought not be permitted to strike it down by selling all of its assets." The court also pointed out that the expression "usual course of business" is referenced to a going concern and not to a concern on the threshold of insolvency. Therefore, the court did not find that a bank as part of its incidental powers as shall be necessary to carry on the business of banking included selling its assets, except in the case where it was approaching insolvency and the business included a meeting of its liabilities.

9. The second case, *In Re: Cleveland Saving Society*, used as authority in OCC #1244 referred to the incidental powers of a bank to acquire the assets of another bank to carry on its business of banking, but in this case the acquired financial institution was a state mutual savings bank which had filed a petition in the Ohio court for judicial supervision of proceedings and dissolution. It is similar to the *City Nat. Bank of Huron* case, involving a bank in financial difficulties and in that case the question of whether it was allowed to sell its assets was addressed under Ohio's state law. There has been no change in the law that addresses the issue of whether incidental powers would also include the power to sell substantially all the assets of a bank where those powers are being exercised not to carry on the business of banking but rather to liquidate. While the other statutes referred to in the OCC letters, which have been addressed above, referred to where approvals are needed in the case a transaction does not meet an exception, there is no specific authority given for a bank to sell its assets in the process of going out of business where insolvency is not involved, and it is not clear that above cited federal statutes are rather referring to these same types of situations as addressed in the two court decisions where the acquired institution was in financial difficulty.

10. In *First National Bank of Eastern Arkansas v. Ron Taylor, Commissioner of the Insurance Department for the State of Arkansas,* 907 F.2d 775 (8th Circuit 1990), the court noted

that "the National Bank Act grants national banks the power to exercise 'all such incidental powers as shall be necessary to carry on the business of banking.' 12 USC § 24(Seventh)." Citing 12 CFR § 7.7495, the Comptroller had "interpreted incidental powers to include the offering of debt cancellation contracts, and the Supreme Court has made clear that the Comptroller's interpretation of the National Bank Act must be given 'great weight'." The court found that the National Bank Act did authorize national banks to offer debt cancellation contracts as incidental to the business of banking, but in its analysis found "courts have analyzed the issue by asking whether the activity is closely related to an express power and is useful in carrying out the business of banking."

11. In this case, similar to the *City Nat. Bank of Huron* case, there is difficulty in finding in the statutes the authority of a bank to sell substantially all of its assets as being an incidental power to the carrying on of the business of banking, since Premier is not going to be carrying on the business of banking, but rather terminating it.

12. Therefore, Premier has not carried its burden of proof in this proceeding to show that there is express power under federal law for a national bank to sell substantially all of its assets under the factual circumstances presented in this proceeding.

13. In accordance with the Department's rules of practice for application cases in 49 NAC § 2.011.06, costs of the hearing are to be apportioned between the parties based on their proportionate involvement.

ORDER

IT IS THEREFORE ORDERED that the application for cross-industry acquisition or merger of Premier Bank be, and hereby is, denied.

IT IS FURTHER ORDERED that the total hearing costs in this matter of $11,938.70 shall be apportioned one-half, or $5,969.35, to Premier and one-half, or $5,969.35, to NBA. Payment shall be made by check payable to the Nebraska Department of Banking and Finance within 30 days of this order.

DATED THIS 29th day of December, 2021.

Jim R. Titus, #16064, Hearing Officer
ENDACOTT PEETZ TIMMER &
KOERWITZ, PC LLO
5825 South 14th Street, Ste. 200
Lincoln, NE 68512
(402) 434-5203 - phone
(402) 904-7097 – fax
jtitus@eptlawfirm.com

I have reviewed the foregoing Proposed Findings of Fact, Proposed Conclusions of Law, and Recommended Order and hereby certify that they are adopted as the official and final Order of the Department of Banking and Finance in this matter.

ORDERED BY:

STATE OF NEBRASKA DEPARTMENT OF BANKING AND FINANCE

DATED THIS 30th day of December, 2021.

By: _____
Kelly Lammers, Director

1526 K Street, Suite 300
Lincoln, NE 68508
(402) 471-2171

CERTIFICATE OF SERVICE

I certify that on this 30th day of December, 2021, I served a true and correct copy of the foregoing Department's Order by U.S. Certified Mail and electronically to the following addresses:

David J. Routh (NE #22521)
Robert Routh (NE #13598)
Cline Williams Wright Johnson & Oldfather, L.L.P.
1900 U.S. Bank Building
233 South 13th Street
Lincoln, Nebraska 68508-2095
drouth@clinewilliams.com
rrouth@clinewilliams.com

Teri Koller (NE #22437)
Cline Williams Wright Johnson & Oldfather, L.L.P.
Sterling Ridge
12910 Pierce Street, #200
Omaha, Nebraska 68144
tkoller@clinewilliams.com

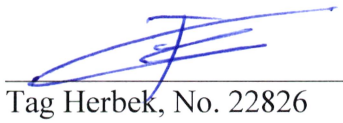
Gerald M. Stilmock (NE #17422)
Nebraska Bankers Association
233 South 13th Street, Suite 700
Lincoln, Nebraska 68508
jerry.stilmock@nebankers.org

Robert J. Hallstrom (NE #16576)
Nebraska Bankers Association
591 South 32nd Road
Syracuse, Nebraska 68446
bob.hallstrom@nebankers.org

Ryan K. McIntosh (NE #25523)
Nebraska Bankers Association
1310 First Avenue
P.O. Box 399
Nebraska City, Nebraska 68410
ryan.mcintosh@bhhslawfirm.com

I certify that on this 30th day of December, 2021, I served a true and correct copy of the foregoing Department's Order by hand-delivery and electronically to the following addresses:

Tag Herbek (NE #22826)
Patricia A. Herstein (NE #15415)
Nebraska Department of Banking and Finance
1526 K Street, Suite 300
Lincoln, NE 68508
tag.herbek@nebraska.gov
patricia.herstein@nebraska.gov



Tag Herbek, No. 22826
Nebraska Department of Banking & Finance
1526 K St., Suite 300
Lincoln, Nebraska 68508
(402) 471-2171