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September 2, 2008

**RECEIVED**

SEP 02 2008

**PUBLIC SERVICE COMMISSION**

GLORIA GEIGER  
ACTING EXECUTIVE SECRETARY  
PUBLIC SERVICE COMMISSION  
600 EAST BOULEVARD, DEPT 408  
BISMARCK ND 58505-0480

Re: NuStar Pipeline Operating Partnership, LP  
PSC Case No: PU-08-194  
Our File No. 12607

Dear Ms. Geiger:

Enclosed for filing is an original and seven copies of a Reply Memorandum to Response to Request to Withdraw Application for Certificate of Public Convenience and Necessity and Affidavit of Service. An electronic copy will be submitted to the Public Service Commission separately.

If you have any questions, please feel free to contact me.

Sincerely,

  
Thomas D. Kelsch

TK:ls  
Encs

c: NuStar Pipeline Operating Partnership, LP  
Attorney Illona Jeffcoat-Sacco  
Attorney Erik R. Johnson  
Attorney John Dingess

23 PU-08-194 Filed: 9/2/2008 Pages: 6

Reply Memorandum to Response to Request to  
Withdraw Application for Certificate of Public  
Convenience & Necessity

NuStar Pipeline Operating Partnership, L.P.

KelschKelschRuff&Kranda, Todd Kranda



BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF NORTH DAKOTA

NUSTAR PIPELINE OPERATING PARTNERSHIP, LP ) CASE NO. PU-08-194  
NORTHERN PRODUCT SYSTEM )  
PUBLIC CONVENIENCE AND NECESSITY )

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 2 day of September, 2008, the undersigned served by email, a true and correct copy of the following document(s) in the above-captioned action:

Reply Memorandum to Response to Request to Withdraw Application for Certificate of Public Convenience and Necessity  
Letter to Public Service Commission

That a copy of the above document(s) was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

ILLONA JEFFCOAT-SACCO  
ATTORNEY AT LAW  
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600 E BOULEVARD, DEPT 408  
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Thomas D. Kelsch

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF NORTH DAKOTA

NUSTAR PIPELINE OPERATING PARTNERSHIP, LP ) CASE NO. PU-08-194  
NORTHERN PRODUCT SYSTEM )  
PUBLIC CONVENIENCE AND NECESSITY )

**REPLY MEMORANDUM TO RESPONSE TO  
REQUEST TO WITHDRAW APPLICATION FOR  
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

On April 24, 2008, NuStar Pipeline Operating Partnership, LP (NuStar Pipeline) filed an Application of North Product System for a Certificate of Public Convenience and Necessity (PCN) before the Public Service Commission

On June 30, 2008, NuStar Pipeline received notice of the City of Fargo's Petition to Intervene as a party and Request for Hearing.

On July 31, 2008, NuStar Pipeline, after a review of Public Service Commission legal precedence, determined that a PCN was not necessary and filed a Request to Withdraw its Application for PCN.

The City of Fargo filed a response objecting to NuStar Pipeline's Request to Withdraw its Application for PCN.

**Factual Errors in City of Fargo's Response**

In I. Facts B.4, the City of Fargo states that NuStar Pipeline on its website has three "originations": Tesoro Mandan, BP Whiting; and Magellan Midstream Partners LP.

Within the State of North Dakota, NuStar Pipeline is transporting only the refined products of one company, Tesoro Petroleum Corporation Refinery in Mandan. The BP Whiting and Magellan Midstream Partners LP are located in Roseville, Minnesota and are not under the jurisdiction of the North Dakota Public Service Commission.

Tesoro Petroleum Corporation Refinery is the sole user of the NuStar Pipeline in North Dakota. Tesoro retains ownership of the refined products in the NuStar Pipeline until delivering to Tesoro's customers.

The only service provided by NuStar Pipeline in North Dakota is to transport Tesoro's refined products for Tesoro.

NuStar Pipeline, in the State of North Dakota, is not engaged in nor employed to furnish its products or services to the public generally, nor does NuStar Pipeline propose to be so engaged or employed. The services provided by NuStar Pipeline are furnished solely to the Mandan Tesoro Refinery.

The fact that NuStar Pipeline may be considered a common carrier under Federal Law as provided by N.D.C.C. § 49-19-01(4), does not make NuStar Pipeline a public utility under N.D.C.C. § 49-03.1-2 unless NuStar Pipeline is engaged or employed in the State to furnish its products or services to the public generally.

**Legal Errors in City of Fargo's Response**

In Western Gas Processors LTD Case No. 9981 (1980), the Public Service Commission recognized the legislation definition of "public utility" found in N.D.C.C. § 49-03.1-02(2) which requires the entity "to furnish its product or services to the public generally which is statutorily subject to the jurisdiction of the Commission."

In Western, the Commission found that Western purchased casinghead gas from several oil producers and transported the gas through Western's pipeline to Western's processing plant and then sold the gas after processing to Montana Dakota Utilities as the sole purchaser of the output of the plant.

The Commission found that under these facts, Western was not selling its products or services to the public generally and concluded as a matter of law that the Commission did not have jurisdiction to require or to issue PCN to Western.

The Public Service Commission's decision in the Western case supports NuStar Pipeline's position that because NuStar Pipeline is not selling its products and services to the public generally that NuStar Pipeline is not a public utility.

The fact that NuStar Pipeline filed an application for a PCN does not create jurisdiction in the Public Service Commission where no jurisdiction existed in the first place.

In Williston Basic Interstate Pipeline Company v. Koch Industries, Inc., Case No. PU-552-92-442, the Commission found that interstate transportation of gas by Koch through its pipeline is not subject to Public Service Commission jurisdiction.

In Koch, the Commission recognized that while Koch was a common carrier under federal law, it was not a public utility under North Dakota law because Koch was not engaged or employed to furnish its services to the public generally. The Commission found that Koch was not required to obtain a PCN.

In Koch, the Public Service Commission recognized that if Koch changes its intended operations to furnish its products or service to the public generally, Koch may then be required to obtain a PCN. Only if NuStar Pipeline would change its operations to furnish its services to the public generally would NuStar Pipeline be required to file for a PCN.

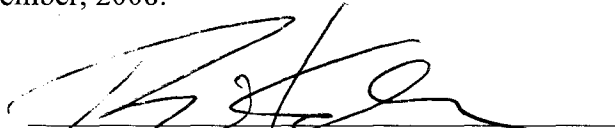
### **Conclusion**

In this case, there is no evidence that NuStar Pipeline is providing pipeline service to the general public within the State of North Dakota. NuStar Pipeline does not fall within the

statutory definition of public utility and the Public Service Commission does not have either jurisdiction or authority to require or issue a PCN for NuStar Pipeline.

The Application for PCN filed by NuStar Pipeline should be allowed to be withdrawn.

Dated this 2 day of September, 2008.



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