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January 13, 2009

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Illona Jeffcoat-Sacco
Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

PUBLIC SERVICE COMMISSION

RE: PSC Case No. PU-08-194, In the Matter of the Application for Certificate of Public Convenience and Necessity of NuStar Pipeline Operating Partnership L.P.

Dear Ms. Jeffcoat-Sacco:

Attached for filing in the above-captioned matter, please find an original plus seven copies of the City of Fargo's:


- Fargo's Submission of Supplemental legal Authority, and;
- Affidavit of Service of Supplemental Authority.

Thank you for your assistance.

Very truly yours,

DUNCAN OSTRANDER & DINGESS, P.C.

By:


Sandra Ann Santilli
Legal Assistant to
John M. Dingess, Esq.

:sas

Enclosures

Cc: Thomas D. Kelsh, Esq.
Arlen M. Ruff, Esq.
Todd D. Kranda, Esq.
Al Wahl, Esq.
Will W. Binek, Esq.

27 **PU-08-194** Filed: 1/13/2009 Pages: 6
City of Fargo's Submission of Supplemental Legal Authority

City of Fargo

Duncan, Ostrander & Dingess, PC

**PUBLIC SERVICE COMMISSION
STATE OF NORTH DAKOTA**

**NuSTAR PIPELINE OPERATING PARTNERSHIP L.P.)
NORTHERN PRODUCT SYSTEM) Case No. PU-08-194
PUBLIC CONVENIENCE AND NECESSITY)**

**FARGO'S SUBMISSION OF
SUPPLEMENTAL LEGAL AUTHORITY**

APPEARANCES

Commissioners Tony Clark, Kevin Cramer, and Brian Kalk

Thomas D. Kelsch, Arlen M. Ruff and Todd D. Krands, Kelsch, Kelsch, Ruff & Kranda, 103 Collins Avenue, P. O. Box 1266, Mandan ND 58554-7266, as Attorneys for NuStar Pipeline Operating Partnership, L.P.

William W. Binek, Chief Counsel, Public Service Commission, State Capitol, Bismarck, ND 58505, on behalf of the Public Service Commission

Al Wahl, Office of Administrative Hearings, 1707 North 9th Street, Bismarck, ND 58501, and/or 138 East Edmonton Drive, Bismarck ND 58501, as Procedural Hearing Officer

Erik R. Johnson, Erik R. Johnson & Assoc, Ltd., 505 Broadway, Suite 206, Fargo, ND 58102, as Fargo City Attorney

John M. Dingess, Duncan Ostrander & Dingess, P.C., 3600 S Yosemite St, Suite 500, Denver, CO 80237-1829, as Special Counsel to the City of Fargo

The matter captioned above is scheduled for informal hearing before the Commission on January 14, 2009 at 1:30 p.m.

1. South Dakota provides the most succinct description of the relationship between common carriers and public utilities:

[A]ll common carriers are public utilities, but all public utilities are not common carriers.

Aberdeen Cable TV Service, Inc. v. City of Aberdeen et al., 85 S.D. 57, 63, 176 N.W.2d 738, 741 (1970).

2. Early in the history of regulatory law, the United States Supreme Court drew the distinction between a pipeline, categorized as the utility, and its owner, categorized as the carrier. If a pipeline has been put to a public purpose, then the pipeline is a public utility and its owner a common carrier. 251 U.S. 228, 231, 40 S.Ct. 131 (1970).

3. Determination of whether a particular entity is a public utility is a mixed question of law and fact. *City of St. Marys v. Auglaize County Bd. of Comm's*, 115 Ohio St. 3d 387, 875 N.E.2d 561, 570-71 (2007). No one attribute is controlling. *Id.* A public utility must conduct its operations in such a manner as to be a matter of public concern. *Id.* To determine whether a matter of concern is present, the court looks to the good or service provided, competition in the local market, and regulation by public authority. *Id.* Other attributes which may be present are the provision of an essential good or service to the general public which has a legal right to demand or receive the good or service, and the provision of goods or service indiscriminately [internal citations omitted]. *Id.*

4. Montana holds that a public use is one which confers some benefit or advantage to the public. Such public use is not confined to actual use by the public, but is measured in terms of the right of the public to use the proposed facilities for which condemnation is sought. As long as the public has the right of use, whether exercised by one or many members of the public, a 'public advantage' or 'public benefit' accrues sufficient to constitute a public use. *Montana Power Company v. Bokma*, 153 Mont. 390, 457 P.2d 769, 772-73 (1969), cited as generally descriptive of the requisites of public use in *Square Butte Electric Coop. v. Hilken, et al.*, 244 N.W.2d 519, 523 (N.D. 1976).

5. Common pipeline carriers in North Dakota may not discriminate between or against shippers in regard to facilities furnished, services rendered, or rates charged, NDCC § 49-19-19, nor in the receipt and transport of products accepted by them for transportation, § 49-19-20.

6. To constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it. *People v. Ricketts*, 248 Ill. 428, 94 N.E. 71 (1911) (for tax assessment, tennis court and park not public utility where only residents of a particular subdivision have access).

7. Common pipeline carriers in North Dakota have the right of eminent domain, NDCC § 49-19-12, because transportation of gas and oil to the inhabitants of a city or county is a public use. NDCC § 32-15-02-10.

8. No carrier serves all the public. His customers are limited by place requirements, ability to pay, and other facts. *Terminal Taxi Cab Company, Inc. v. Kutz*, 241 U.S.252, 36 S.Ct. 583, 60 L.Ed. 984, 986 (1916).

9. A common carrier may not restrict its obligation by an act of its own. It is in the exercise of a sort of public office, and has public duties to perform, from which the carrier should not be permitted to exonerate itself without the assent of the parties concerned. The burden of proof lies on the carrier. *Brown v. Bonesteele*, 218 Or. 312, 344 P.2d 928 (1959) (liability for loss of freight by fire).

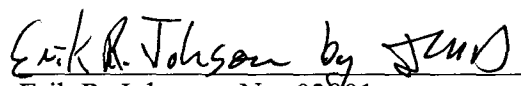
10. A carrier's status as a common carrier is determined not by reference to its authority but rather by reference to what it holds itself out to be. *Ensco, Inc. v. Weicker Transfer & Storage Co.*, 689 F.2d 921 (10th Cir. 1982).

11. As to railroads, the uses for which a track was designed are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry constituted to its cost. *U.S. v. Louisiana P.R. Co.*, 234 U.S. 1, 25, 34 S.Ct. 741, 747 (1914) (internal citations omitted).

12. The relevant factor in determining whether an interstate common carrier operates for a public use is not whether the pipeline does most of its business with its parent or how many shippers it serves, but whether the pipeline has shown a willingness to serve the general public as opposed to a refusal to do business with other than a limited group. *Phillips Pipe Line Co. v. Branstetter*, 241 Mo. Supp. 1138, 1147, 263 S.W.2d 880, 886 (1954) (pipeline condemnation case), cited favorably by the Illinois Commerce Commission in *Re Phillips Pipe Line Co.*, 70 PUR 4th 130, 139 (Ill. Comm. Comm'n 1985) (application for certificate of public convenience and necessity).

13. The test of public character is not in the number of persons and corporations located along the line of the proposed branch but in the character of the use of which the branch will be put. *Reter v. Davenport, R.I. & N.W. Ry. Co.*, 243 Iowa 1112, 1119, 54 N.W.2d 863, 867 (1952). A spur track is just as much a part of the railroad as the main line itself, whether it serves one industry or a dozen. *Id.* 243 Iowa at 1121, 54 N.W.2d at 869. *Reter* is cited as support in *Re Mid-America Pipeline Company*, 73 PUR3d 79, 88 (Iowa S.C.C. 1968) of its finding that a pipeline company, having held itself out as willing to transport products of like nature for all on like terms to the extent of its capacity under tariffs filed with the Illinois Commerce Commission, was public even though it had but one committed shipper.

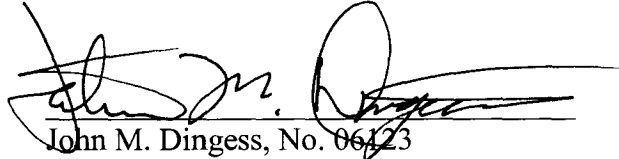
Respectfully submitted this 13th day of January, 2009.



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A handwritten signature in black ink, appearing to read "John M. Dingess", is written over a horizontal line.

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**PUBLIC SERVICE COMMISSION
STATE OF NORTH DAKOTA**

NuSTAR PIPELINE OPERATING PARTNERSHIP L.P.)
NORTHERN PRODUCT SYSTEM) **Case No. PU-08-194**
PUBLIC CONVENIENCE AND NECESSITY)

**AFFIDAVIT OF SERVICE
SUBMISSION OF SUPPLEMENTAL AUTHORITY**

The undersigned Sandra A. Santilli certifies that on the 13th day of January, 2009, I deposited with the U. S. Postal Service in Denver, Colorado, sufficient postage affixed, true and correct copies of the City of Fargo's Submission of Supplemental Authority, addressed to the following persons:

Thomas D. Kelsch, Arlen M. Ruff and Todd D. Kranda, Esqs. Kelsch, Kelsch, Ruff & Kranda 103 Collins Avenue P.O. Box 1266 Mandan ND 58554-7266	Al Wahl Office of Administrative Hearings 1707 North 9 th Street Bismarck, ND 58501
William W. Binek Chief Counsel Public Service Commission State Capitol Bismarck, ND 58505	Illona Jeffcoat-Sacco Attorney at Law Public Service Commission 600 East Boulevard, Dept 408 Bismarck ND 58505-0480

I further certify that on this same day, copies were attached to e-mail directed to Illona Jeffcoat-Sacco at ijs@nd.gov and Thomas Kelsch at tdkelsch@kelschlaw.com.

Sandra A. Santilli