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**PUBLIC SERVICE COMMISSION**

January 30, 2009

Darrell Nitschke, Executive Secretary  
Public Service Commission  
600 E. Boulevard, Dept. 408  
Bismarck, ND 58505-0480

Via E-Mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov) and  
U.S. Mail

**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 Mr. Nitschke:

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

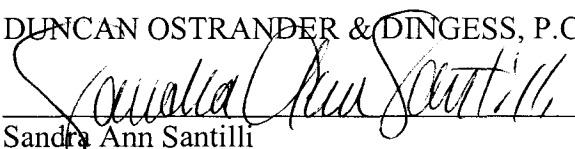
- Fargo's Written Summary of Argument at Informal Hearing

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.  
Patrick Fahn, Chief Engineer  
Illona Jeffcoat-Sacco, Esq.

**30** **PU-08-194** Filed: 1/30/2009 Pages: 8  
**City of Fargo Written Summary of Argument at Informal Hearing**

City of Fargo

DuncanOstrander&DingessPC, John Dingess

**PUBLIC SERVICE COMMISSION  
STATE OF NORTH DAKOTA**


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

**AFFIDAVIT OF SERVICE  
FARGO'S WRITTEN SUMMARY OF ARGUMENT AT INFORMAL HEARING**

The undersigned certifies that on the 30<sup>th</sup> day of January, 2009, I deposited with the U. S. Postal Service in Denver, Colorado, sufficient postage affixed, true and correct copies of the Fargo's Written Summary of Argument at Informal Hearing, addressed to the following persons:

Thomas D. Kelsch, Esq. Arlen M. Ruff, Esq. and Todd D. Kranda, Esq. Kelsch, Kelsch, Ruff & Kranda 103 Collins Avenue P.O. Box 1266 Mandan ND 58554-7266	Al Wahl, Esq. Office of Administrative Hearings 1707 North 9 <sup>th</sup> Street Bismarck, ND 58501
Patrick Fahn, Chief Engineer Public Service Commission State Capitol Bismarck, ND 58505	Illona Jeffcoat-Sacco, Esq. 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 Darrell Nitschke, Executive Secretary, [ndpsc@nd.gov](mailto:ndpsc@nd.gov).

  
\_\_\_\_\_  
Sandra Ann Santilli  
Legal Secretary to  
John M. Dingess, Esq.

**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 )**

**APPEARANCES**

Commissioners Tony Clark, Kevin Cramer, and Brian Kalk

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

Illona A. Jeffcoat-Sacco, General Counsel, North Dakota Public Service Commission, 600 East Boulevard, Department 408, Bismarck ND 58505-0480

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

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

This matter came on for Informal Hearing before this Commission on January 14, 2009. Appearing in person before Commissioners Clark, Cramer, and Kalk were General Counsel for the Commission Illona A. Jeffcoat-Sacco, counsel for Applicant, Thomas D. Kelsch and Todd D. Kranda, and PSC Director of Compliance Patrick Fahn; appearing by telephone were counsel for Intervenor City of Fargo, Erik R. Johnson, John M. Dingess, and Patricia A. Madsen. Karen Thompson and Joseph Graham, employees of NuStar, were available to comment and answer questions.

**FARGO'S WRITTEN SUMMARY OF  
ARGUMENT AT INFORMAL HEARING**

1. Applicant NuStar is the moving party. The Commission has indicated that whether Applicant is a public utility is an issue of fact. Generally, the moving party has the burden of proof. The question before the Commission at this stage is thus: has the moving party, NuStar, shown by a preponderance of the evidence in the record that, contrary to its Application, it is *not* a public utility?

2. North Dakota law requires that before Applicant begins operation of a public utility plant or system, it first obtain from this Commission a certificate (CPC&N) that public convenience and necessity requires such operation. NDCC § 49-03.1-01.

3. Applicant has been operating the North Product System without a CPC&N since 2002. The language of § 49-03.1-01 renders NuStar's Application late but not moot. Operating a public utility without a required certificate for six years does not excuse a public utility from obtaining a required CPC&N. The convenience and necessity in issue are the public's, not the utility's.

4. In accordance with NDCC § 49-03.1-03, an entity is a public utility under North Dakota law when the following elements are present:

- (1) an association, person, firm, corporation, limited liability company, or agency
- (2) is engaged or employed in North Dakota
- (3) to furnish its services to the public generally, and
- (4) the association, person, firm, corporation, limited liability company or agency is subject to the jurisdiction of the commission.

5. The First Element is present by the undisputed fact that NuStar Pipeline Operation Partnership, L.P. (NuStar) is an association, legal person, and firm. NuStar has not placed this element in dispute.

6. The Second Element, engagement or employment in North Dakota, is present by the following undisputed facts:

- a. Tesoro Petroleum Corporation ("Tesoro"), operator of the Mandan Refinery, employs NuStar to transport refined petroleum products intrastate from the Refinery to: (1) the Burlington Northern railroad terminal in Mandan,<sup>1</sup> (2) Jamestown, North Dakota,<sup>2</sup> (3) Moorehead, Minnesota, from where some of the products originating in North Dakota are returned to Fargo for distribution to the public in North Dakota.<sup>3</sup>
- b. One of the three originations of the pipeline in issue, North Product System, is Magellan Midstream Partners, LP.<sup>4</sup> Magellan

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<sup>1</sup> Application, Section III

<sup>2</sup> Application, Section III

<sup>3</sup> Request to Withdraw Application, page 3

<sup>4</sup> Fargo's Response to Request to Withdraw, Exhibit A

Midstream Partners, LP, states that it has a terminal in Fargo, North Dakota.<sup>5</sup>

- c. NuStar engages to move anyone's product through the pipeline on stated terms, without discrimination.<sup>6</sup>

7. The Third Element, furnishing of services to the public generally, is present by the following undisputed facts:

- a. NuStar holds out to the public that it will provide service "to any shipper of refined petroleum products who requests such services and satisfies the conditions and specifications for transportation."<sup>7</sup>
- b. Applicant operates the pipeline in issue as a common carrier pipeline.<sup>8</sup>
- c. By filing tariffs, NuStar holds out to anyone who may need its pipeline transportation services that NuStar will provide those services without discrimination on terms specified in the tariff.<sup>9</sup>
- d. Before 2002, the same corporate person owned the pipeline, the refinery, and the products produced at the refinery. The pipeline was therefore a proprietary pipeline carrier, rather than a common pipeline carrier.<sup>10</sup>
- e. When ownership of the pipeline was severed from ownership of the products of the Mandan Refinery which are moved through the pipeline, Applicant voluntarily filed federal and North Dakota tariffs for use of the pipeline, thereby transforming its own legal status to common carrier.<sup>11</sup>

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<sup>5</sup> Fargo's Response to Request to Withdraw, Exhibit B

<sup>6</sup> NDCC § 49-19-11: "A common pipeline carrier, in the acceptance of the provisions of this chapter, shall agree expressly that is, *without discrimination*, will accept, carry, or purchase, the oil, coal, gas, or carbon dioxide of the state or of any person not the owner of any pipeline, operating a lease or purchasing oil, coal, gas, or carbon dioxide at prices and under regulations to be prescribed by the commission." (Emphasis added.) *See also* additional non-discrimination requirements for common pipeline carriers at NDCC § 49-19-19, 20. Tesoro is a person that does not own the pipeline which is the subject of the Application before the Commission (Northern Product System). The Local Tariff itself does not contain language which would permit discrimination, and in several places acknowledges the possibility of more than one shipper, *e.g.*, Item No. 50, "...each shipper or consignee shall be entitled to receive only that portion of its shipment remaining..." Item No. 60, "petroleum products offered by each shipper for transportation will be prorated..."

<sup>7</sup> Application, Exhibit B (Form 10-K), page 15

<sup>8</sup> Application, Section II, and also Exhibit B (Form 10-K)

<sup>9</sup> NDCC § 49-19-19 and 20 bar discrimination by common pipeline carriers.

<sup>10</sup> Application, Section II

<sup>11</sup> Application, Section II

- f. NuStar holds out to the public that the North Pipeline (aka North Product System) “is capable of delivering or receiving products to or from the East Pipeline, located in North Dakota.”<sup>12</sup>
- g. NuStar represents that the pipeline in issue serves a “very critical public need,” and that “[t]here is a need for the petroleum product transportation service that the Applicant provides. . . .”<sup>13</sup>

8. The Fourth Element, being subject to the jurisdiction of this Commission, is present by the following undisputed facts:

- a. NuStar voluntarily filed a tariff with the Commission, most recently in 2008;<sup>14</sup>
- b. NuStar is a North Dakota “common pipeline carrier”;<sup>15</sup>
- c. NuStar filed an Application, thus placing its status before this Commission.<sup>16</sup>

9. The three cases previously decided by the Commission on issues of whether a pipeline was public or proprietary did not hinge on whether the pipeline had one customer or many customers. Rather, the deciding facts were that a pipeline moved its owner’s product and in one case, that the pipeline did not become a common carrier voluntarily. In *Western Gas Processors*, PSC Case No. 9981, a small gathering line moved product to the pipeline owner’s processing plant. In *Amoco Gathering Line, Dunn County*, PSC Case No. 9981, the pipeline was owned by the refinery. In *Williston Basin Interstate Pipeline Company v. Koch Industries, Inc.*, PSC Case No. 552-92-442, U.S. Forest Service rules required the filing of a common carrier tariff even though the pipeline was a connecting pipeline owned by the plant. By contrast, NuStar’s common carrier pipeline moves product belonging to Tesoro, not NuStar, and NuStar voluntarily made its pipeline a common carrier.<sup>17</sup>

10. In 1977, the Legislature deleted from NDCC §49-03.1-02 the phrase “in any business enumerated in this title”. The current replacement language is, “in this state to furnish its product or services to the public generally which is statutorily subject to the jurisdiction of the commission.”<sup>18</sup>

11. It may be fairly inferred that in 1977 there were businesses enumerated in Title 49 of the NDCC, “Public Utilities,” which either did not furnish their products or services to the public generally, or were outside the jurisdiction of the commission, or

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<sup>12</sup> Application, Exhibit B (Form 10-K), page 13

<sup>13</sup> Request to Withdraw Application, page 3; Application, Section VI

<sup>14</sup> Application, Exhibit B, Local Non-Incentive Pipeline Tariff, attached to Form 10-K and preceding map

<sup>15</sup> Application, Section II, and also Exhibit B (Form 10-K)

<sup>16</sup> Application and cover letter

<sup>17</sup> Application, Section II

<sup>18</sup> S.L. 1977, ch 440 § 2; S.L. 1979, ch 497 § 1; S.L. 1993, ch. 54 § 106; S.L. 2005 395 § 1.

both, and which the Legislature wished to remove from the definition of “public utility.” It may not be fairly inferred that the Legislature wished to allow businesses to hold themselves out as available to the public on stated terms, or to control a service of vital importance to the public, while avoiding the requirement that such businesses answer to the public’s convenience and necessity by satisfying the Commission that they would operate safely and with fiscal capability equal to the particular needs of the operation.

12. In North Dakota, common pipeline carriers, and other common carriers such as railroads and motor carriers, are regulated by the Public Service Commission, but the scope of the Commission’s authority extends beyond carriers. The situation was similar in South Dakota when it held that:

[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), *certiorari denied*, 91 S.Ct. 455, 400 U.S. 991, 27 L.Ed.2d 439. In South Dakota, common carriers were defined as message carriers by telephone and telegraph, but the South Dakota Public Utility Commission had regulatory authority over not only common carriers, but also a variety of other concerns.

13. 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.

14. This Commission should deny NuStar’s Request to Withdraw Application. If disclosure and discovery produce information that raises safety concerns, then NuStar and Fargo will attempt to negotiate terms and conditions that guarantee safe operation of the Northern Product System and present them to the Commission for approval. If negotiation is not fruitful, then the Commission will be asked to conduct a formal hearing on such terms and conditions.

15. Safety issues are of concern because the pipeline crosses beneath Fargo’s water supply and is 50 years old. NuStar represented to U.S. Security and Exchange Commission that it:

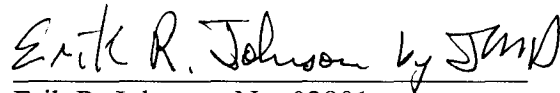
“ . . . calculates depreciation expense using the straight-line method over *the estimated useful lives of our property and equipment*. Because of the expected long useful lives of our property and equipment, *we depreciate our property and equipment over periods ranging from 10 to 40 years*. Changes in the estimated useful lives could have a material adverse effect on our results of operations.”

Application, Exhibit B, page 61, emphasis added. NuStar itself estimates that the useful life of the longest-lived of its own property and equipment is 40 years. Potential hazards to public health and safety have impact on beneficial interests and therefore give rise to

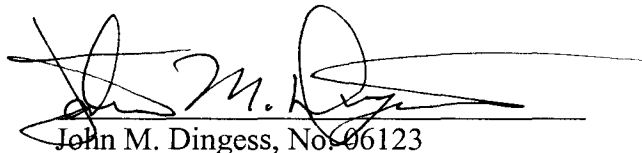
standing as to petroleum pipelines. *Eckre v. PSC*, 247 N.W.2d 656, 662 (N.D. 1976). Safety terms and conditions which reflect increased risks should be in place.

Based upon the facts and law adduced above, Fargo requests that this Commission deny NuStar's Request to Withdraw and proceed to process NuStar's Application.

Respectfully submitted this 30<sup>th</sup> day of January, 2009.



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