

DUNCAN, OSTRANDER & DINGESS, P.C.
Attorneys and Counselors at Law

Robert R. Duncan
Donald M. Ostrander
John M. Dingess
Austin Hamre
Richard F. Rodriguez

Lynn B. Obernyer - 2003

3600 S. Yosemite Street, Suite 500
Denver, Colorado 80237-1829
Telephone: (303) 779-0200
Telefax: (303) 779-3662
dodpc@dodpc.com
www.dodpc.com

Special Counsel
James Birch
T. Daniel Platt
Paul C. Rufien, P.C.
Robert E. Schween, P.C.
Teri L. Pettitt
Stephanie J. Neitzel
Patricia A. Madsen
Elizabeth D. Rubinstein

February 9, 2009

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

Via E-Mail: 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:

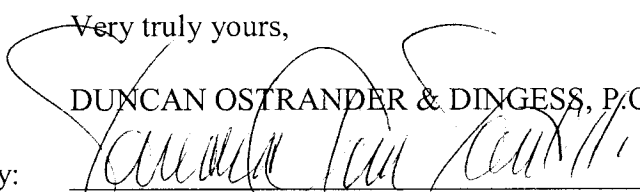
- Fargo's Discussion of *Williston Basin Interstate Pipeline v. Amerada Hess Corporation*.

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.

**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
FARGO'S DISCUSSION OF
*Williston Basin Interstate Pipeline v. Amerada Hess Corporation***

The undersigned certifies that on the 9th day of February, 2009, I deposited with the U. S. Postal Service in Denver, Colorado, sufficient postage affixed, true and correct copies of the Fargo's Discussion of *Williston Basin Interstate Pipeline v. Amerada Hess Corporation*, 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 th 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.



 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 9th 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.

Illona Jeffcoat-Sacco circulated the Findings of Fact, Conclusions of Law and Order of August 12, 1992 in *Williston Basin Interstate Pipeline v. Amerada Hess Corporation*, Case No. PU-552-92-524 and invited comment; the parties agreed they would like to discuss the case and could submit their discussions on or before February 9, 2009.

FARGO'S DISCUSSION OF
Williston Basin Interstate Pipeline v. Amerada Hess Corporation

In *Williston Basin Interstate Pipeline v. Amerada Hess Corporation*, Case No. PU-552-92-524, an existing pipeline company, Williston, complained to the Commission about respondent Amerada's plans to construct its own pipeline to connect Amerada's wholly owned refinery to a distribution pipeline. Complainant Williston had been transporting the gas from the refinery to the distribution pipeline and challenged the issuance of a Certificate of Public Convenience and Necessity to Amerada.

Amerada intended to move its own gas through the proposed pipeline. *Williston*, paragraph 16. However, it would need to cross U. S. Forest Service land, and the Forest Service permit, consistent with 30 USC § 185(r)(1), required that a successful applicant who was not a public utility had to operate as a common carrier. *Williston*, paragraph 20.

Under the combined circumstances that a pipeline operator only intended to transport its own product, but had been required to file common carrier tariffs to cross certain federal lands, the Commission found that Williston was a common carrier but nevertheless did not in fact hold itself out to serve the public generally. In *Williston*, the preponderance of the evidence failed to establish that Amerada was engaged or employed to furnish its product or service to the public generally, or that it proposed to be so engaged or employed. *Williston*, paragraph 23. The Commission therefore concluded that Amerada would be operating as a common carrier but not a public utility.

In NuStar's case, NuStar does not transport any of its own products through the North Product system. To the contrary, NuStar only transports refined petroleum products belonging to another. Moreover, NuStar's filing of common carrier tariffs was entirely voluntary. Not merely a preponderance, but *all* of the evidence is that NuStar furnishes its service to the public generally.

In *Williston*, this Commission stated that the term "public generally" as found in N.D.C.C. § 49-03.1(2) "refers to the relevant public who would potentially, and in the course of their business, be able to utilize common pipeline carrier service." *Williston*, paragraph 7. Even if the public in this case consists only of Tesoro, that public in the course of its refining business utilizes NuStar's common pipeline carrier service to move its product out of Mandan.

However, the Commission's previously adopted definition of "public generally" speaks not only to those entities which *are* utilizing a service, but to those entities which would *be able* to utilize common pipeline carrier service.

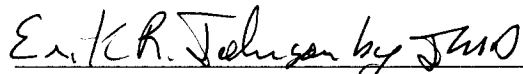
While Tesoro may be the only entity utilizing NuStar's services at this time, there is evidence before this Commission from NuStar, and also in other public records of the State of North Dakota, that one or more other entities are *able* to utilize the common pipeline carrier service. One such other entity is the owner of products refined in Mid-continent refining areas (Coffeyville, Kansas). These are transported by a NuStar pipeline to Jamestown, North Dakota. See "Pipelines and Refined Products Report," April 22, 2008, Industrial Commission of North Dakota, North Dakota Pipeline

Authority, page 2, available at <https://www.dmr.nd.gov/pipeline/assets/rppaper0804.pdf>, Executive Summary at <http://www.nd.gov/ndic/pipe/publica/exec-summary-prf.pdf>. NuStar itself notes the existence of the "T" junction between its two pipeline systems. See Exhibit A to Fargo's Response.

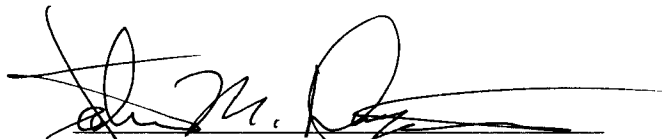
NuStar also holds out to the public that its Central North System has not one origination but three: Tesoro Mandan, BP Whiting, and Magellan Midstream Partners, LP. Magellan has a terminal in Fargo. See <http://www.nustarenergy.com/Pipeline%20Data%20Sheets/CentralNorthSystem.pdf>, and <http://www.magellanlp.com/assetmap.asp> printed copies of which were attached to Fargo's Response as Exhibits A and B.

Unlike Amerada in the situation before the Commission in *Williston*, the facts in evidence in this matter indicate that NuStar operates a third-party pipeline moving products from a refinery NuStar does not own to customers other than itself. NuStar moves these products in accordance with published, voluntarily filed tariffs. NuStar is a common pipeline carrier that is a public utility pursuant to N.D.C.C. § 49-03.1-05(2). As such, it was required to obtain a Certificate of Public Convenience and Necessity from the Commission before beginning operation of the pipeline. NuStar should not be allowed to withdraw legally required Application. Accordingly, NuStar's Motion to Withdraw should be denied.

Respectfully submitted this 9th day of February, 2009.



Erik R. Johnson, No. 03904
Erik R. Johnson & Associates, Ltd.
505 Broadway, Suite 206
Fargo, ND 58103
Telephone: (701) 280-1901
ejohnson@lawfargo.com
Fargo City Attorney



John M. Dingess, No. 06123
Duncan Ostrander & Dingess, P.C.
3600 So. Yosemite Street, Suite 500
Denver, CO 80237-1829
Telephone: (303) 779-0200
jdingess@dodpc.com
Special Counsel