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October 20, 2009

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PUBLIC SERVICE COMMISSION

DARRELL NITSCHKE
Executive Secretary & Director
Public Service Commission
600 East Boulevard, Dept. 408
Bismarck ND 58505-0480

RE: Application of NuStar Pipeline Operating Partnership LP
Case No. PU-08-194

Dear Mr. Nitschke:

Enclosed herewith for filing please find an original and seven copies of Proposed Findings of Fact, Conclusion of Law and Order which has been served on the parties as shown in the Affidavit of Service.

An electronic copy, in both Word and PDF, has also been sent to dnitschke@nd.gov.

Should there be any questions, please feel free to contact John Dingess or me.

Yours very truly,



Patricia A. Madsen

PM: hs
Encl.

**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 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

The undersigned certifies that on the 20th day of October, 2009, I deposited with the U. S. Postal Service in Denver, Colorado, sufficient postage affixed, true and correct copies of the Fargo's Proposed Findings of Fact, Conclusions of Law and Order, 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
DARRELL NITSCHKE Executive Secretary & Director Public Service Commission 600 East Boulevard, Dept. 408 Bismarck ND 58505-0480	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, dnitschke@nd.gov.


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

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**NuStar Pipeline Operating Partnership, L.P.
North Product System
Public Convenience and Necessity**

Case No. PU-08-194

**FARGO's PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

November ____, 2009

Appearances

Commissioners Kevin Cramer, Tony Clark and Brian Kalk.

Thomas D. Kelsch and Todd D. Kranda, Kelsch Kelsch Ruff & Kranda, 103 Collins Avenue, Mandan, ND 58554 on behalf of the Applicant NuStar Pipeline Operating Partnership, L.P.

Erik Johnson, 505 Broadway Street North, Suite 206, Fargo ND 58102, on behalf of intervener, City of Fargo

John M. Dingess, Patricia A. Madsen, Duncan, Ostrander & Dingess, P.C., 3600 So. Yosemite St., Suite 500, Denver, CO 80237, on behalf of Intervener, City of Fargo.

Ilona Jeffcoat-Sacco, 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 as Procedural Hearing Officer.

Preliminary Statement

On April 24, 2008 NuStar Pipeline Operating Partnership, L.P. (NuStar) filed its Application of NuStar Pipeline Operating Partnership, L.P.'s North Product System for a Certificate of Public Convenience and Necessity (Application or Appl) for its North Product System located in Morton, Burleigh, Kidder, Stutsman, Barnes and Cass Counties, North Dakota under N.D.C.C. Chapter 49-03.1. The route of the North Product System refined products pipeline (the Pipeline) in Morton, Burleigh, Kidder, Stutsman Counties, and part of Barnes County, is shown by a map included in NuStar's application.

On May 21, 2008, the Commission issued a Notice of Opportunity for Hearing setting forth the issues to be considered and inviting interested parties to comment or request a hearing by June 27, 2008. On June 25, 2008, the Commission received a request for a public hearing and petition to intervene from the City of Fargo (Fargo). Fargo petitioned to intervene on grounds that the Pipeline is years past its estimated useful life of 40 years and runs under the Sheyenne River and the Red River of the North, which are Fargo's sources of drinking water.

On July, 2008 the Commission's Director of Accounting filed a memorandum indicating that NuStar has the financial ability to provide service.

Kelsch, Kelsch, Ruff & Kranda entered an appearance on behalf of NuStar on July 3, 2009. Al Wahl was designated Administrative Law Judge for this matter July 8, 2009.

On July 9, 2008, NuStar filed a Request for Extension of Time to Respond to Request for Hearing and Petition to Intervene by City of Fargo, which request was granted by e-mail July 10, 2008.

The North Dakota Water Users Association commented on July 15, 2008. The Commission responded to those comments by letter of July 23, 2008.

On July 31, 2008, NuStar filed a Request to Withdraw Application for Certificate of Public Convenience and Necessity.

Request for Approval of Stipulated Extension of Time to Respond to Request to Withdraw Application for Certificate of Public Convenience and Necessity was filed on August 8, 2008 by Fargo.

Fargo's Response to Request to Withdraw Application for Certificate of Public Convenience and Necessity was filed on August 20, 2008. On September 2, 2008, NuStar fled a Reply Memorandum to Response to Request to Withdraw Application for Certificate of Public Convenience and Necessity.

In anticipation of an Informal Hearing January 14, 2009, NuStar filed the Affidavit of Joseph Graham in Support of Motion to Withdraw Application for Certificate of Public Convenience and Necessity January 9, 2009, and Fargo filed a Submission of Supplemental Legal Authority January 13, 2009.

The matter came on for Informal Hearing before the Commission on January 14, 2009.

On January 30, 2009, Fargo filed a Written Summary of Argument at Informal Hearing, and NuStar filed Post Informal Hearing Brief of NuStar Operating Partnership, LP. NuStar's Post Informal Hearing Brief was filed February 2, 2009.

In response to a PSC staff memo made available to the parties, Fargo submitted a Discussion of *Williston Basin Interstate Pipeline v. Amerada Hess Corporation* February 9, 2009, and NuStar a Supplemental Brief February 10, 2009.

On May 7, 2009, Judge Al Wahl issued a Prehearing Order granting Fargo's petition to intervene, setting a hearing on whether: (1) NuStar is a public utility within the meaning of N.D.C.C. § 49-03.1-02(2) and subject to the application of N.D.C.C. Ch. 49-03.1, and (2) even if NuStar is a public utility within the meaning of the statute, it is not subject to the application of N.D.C.C. Ch. 49-03.1.

On June 24, 2009, the hearing was continued from June 25, 2009, and ultimately reset for October 6, 2009.

Hearing was held October 6, 2009, in Bismarck, North Dakota.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed and considered all testimony and evidence presented, the Commission makes the following:

Findings of Fact

1. Neither NuStar nor Fargo contests the jurisdiction of the Commission (and, as set forth in the Conclusions of Law below, this Commission has jurisdiction over this matter).
2. NuStar is wholly owned by NuStar Energy L.P. (NuStar Energy).
3. NuStar owns and operates the Pipeline in the state of North Dakota. The 10-inch refined petroleum products pipeline with associated facilities crosses approximately 200 miles of North Dakota in Morton, Burleigh, Kidder, Stutsman, Barnes and Cass Counties. The Pipeline route in Morton, Burleigh, Kidder, and Stutsman Counties, and part of Barnes County, is specifically shown by a map included in NuStar's application.
4. NuStar admits that it is a firm within the meaning of N.D.C.C. § 49-03.1-02. NuStar's Response No. 18 to Fargo's Requests to Admit.
5. NuStar admits that it is engaged or employed in the State of North Dakota to furnish its services within the meaning of N.D.C.C. § 49-03.1-02. NuStar's Response No. 19 to Fargo's Requests to Admit.

6. The purpose of the Pipeline is to transport refined petroleum products from the refinery in Mandan, North Dakota currently owned by Tesoro Corporation (the Refinery) to a Burlington Northern Terminal in Morton County, two terminals in and near Jamestown, North Dakota, and to the State of Minnesota.

7. The Pipeline was built in 1953 by Standard Oil of Indiana (Standard) in anticipation of the Refinery, which was owned by Standard, coming on line. After completion of the Pipeline and before the Refinery came on-line, petroleum products were moved east to west through the Pipeline by use of a temporary pumping station. Dkt 6, Fargo Hrg Ex 6, press articles. Under Standard's ownership, and under its successors' ownership until 2002, the same entity which owned the Refinery. The Pipeline was a private utility system owned by a proprietary carrier. Dkt 1, Appl, § II.

8. NuStar, under its former name Kaneb, acquired ownership of and began operating the Pipeline in 2002. Dkt 1, Appl, § II.

9. NuStar does not own the refined petroleum products it transports through the Pipeline.

10. The Pipeline serves a very critical public need. Dkt 50, quoting from Dkt 20, Req to W/D Appl, and Supp Aff J Graham. There is no other existing pipeline system that could meet the demand for transporting petroleum products which the North Product System currently meets. [Dkt 50, quoting Dkt 1, Appl]

11. Joseph Graham testified that NuStar has a monopoly on pipeline transportation of refined petroleum products produced in North Dakota at the Refinery.

12. The North Product System provides an essential public service. [Dkt 50, quoting Dkt 20, Req to W/D]

13. Pipeline transportation is the safest and most efficient economical cost method of transporting the refined products that are required to serve the citizens of North Dakota. The Pipeline transports approximately 19,000 barrels per day (16.9 million barrels per year) to meet the refined products demand of the citizens of North Dakota via two terminals in Jamestown, North Dakota and the Moorhead, Minnesota terminal, which serves the Fargo area. Dkt 50, quoting Dkt 20, Req to W/D.

14. Other methods of transport from the Refinery are truck and rail. Transporting refined petroleum products by truck and rail costs significantly more than by pipeline. Joseph Graham stated in his testimony that if the Pipeline were unavailable to transport refined petroleum products from the Refinery, production likely would have to be cut, because, in the same amount of time, the same amount of product could not be moved by truck and rail as is now moved by the Pipeline.

15. NuStar estimates that it would take approximately 110 fuel trucks per day driving across the state of North Dakota to replace the volume of product transported via the Pipeline. Dkt 50, quoting Dkt 20, Req to W/D.

16. NuStar represents that “[t]he North Pipeline crosses our [NuStar Energy’s] East Pipeline near Jamestown, North Dakota where the two pipelines are connected. While the North Pipeline is currently supplied primarily by the Tesoro Mandan refinery, it is capable of delivering or receiving products to or from the East Pipeline.” Dkt 1, Ex to Appl, NuStar Energy Form 10-K for fiscal year ended 12/31/2007, page 13.

17. Shippers other than Tesoro use the East Pipeline. Dkt 1, Ex to Appl, NuStar Energy Form 10-K for fiscal year ended 12/31/2007, page 13.

18. NuStar is a common carrier. Dkt 1, Appl, § II. Joseph Graham testified that NuStar has issued tariffs governing use of the Pipeline and filed said tariffs with the North Dakota Public Service Commission and the Federal Energy Regulatory Commission (FERC). The Commission takes notice that its records include the tariffs filed by NuStar in North Dakota. Copies of state and federal tariffs respectively are Exhibits D and E to Dkt 22, Resp to Req to W/D.

19. Under North Dakota Century Code section 49-19-11 a common pipeline carrier that accepts the provisions of North Dakota Century Code Chapter 49-19 shall agree expressly that it, without discrimination, will accept, carry, or purchase the gas of any person not the owner of any pipeline, operating a lease or purchasing gas at prices and under regulations to be prescribed by the commission.

20. By filing a tariff with this Commission, NuStar has agreed to accept the provisions of Chapter North Dakota Century Code 49-19.

21. Under North Dakota Century Code section 49-19-20, a common pipeline carrier shall receive and transport gas delivered to it for transportation and shall receive and transport the same and perform its other duties with respect thereto without discrimination.

22. NuStar’s property in North Dakota is centrally assessed as utility property by the State Board of Equalization. Dkt 49, Fargo Ex 3, Proceedings, St. Bd. of Equalization.

23. NuStar’s property in Stutsman County, where two NuStar terminals on the North Product System are located, is classified as “utilities” in the Stutsman County property tax records. Dkt 48, Fargo Ex 2, Rept of Stutsman Co txbl prop.

24. This commission has not had previous occasion to analyze the type of service being provided by NuStar, that is, pipeline carriage of refined petroleum products owned by an entity other than the owner of the pipeline.

a. In *Application of Western Gas Processors, Ltd.*, Case No. 9961 (1980), we considered a gathering line operated by a natural gas processing company to move unprocessed product from wellheads to its own processing plant, and then its own processed gas to a customer. NuStar, by contrast, does not move its own product, rather, NuStar moves product belonging to someone else.

b. In *Amoco Gathering Line, Dunn County*, PSC Case No. 9981 (1980), Amoco held sole title to both the pipeline in issue and the product to be transported. Amoco filed for a certificate under protest, in response to a demand by the Commission, and the Commission concluded that it did not have jurisdiction under the circumstances. NuStar filed voluntarily for a certificate, and does not hold title to the product it transports.

c. In *Williston Basin Interstate Pipeline Company v. Koch Industries, Inc.*, Case No. 552-92-442 (1992), we concluded that a processor's agreement to operate as a common carrier solely to obtain a Forest Service permit, not accompanied by the processor's "holding itself out to serve the public generally," where in fact the processor transported only its own gas from wellheads to plant, did not constitute "holding itself out to serve the public generally," and would not support Commission jurisdiction to issue or deny a certificate of public convenience and necessity. NuStar voluntarily filed a common carrier tariff not to comply with Forest Service guidelines but for the purpose of transporting product for another.

d. In *Williston Basin Interstate Pipeline v. Amerada Hess Corporation*, Case No. PU-552-92-524 (1992), we concluded that a processor's pipeline transportation of its own gas, even if there was incidental transportation of non-owned gas, did not make it a common carrier, especially where there were no contracts with third parties. Where the processor agreed to operate as a common carrier solely to obtain a Forest Service permit, such agreement, unaccompanied by transportation for others or holding out as willing to transport for others, would not support a finding that the processor held itself out to the public generally. NuStar voluntarily filed a common carrier tariff not to comply with Forest Service guidelines but for the purpose of transporting product for another.

25. The Pipeline is a public utility system in North Dakota as a matter of fact.

26. NuStar is a public utility in the State of North Dakota as a matter of fact.

From the foregoing Findings of Fact, the Commission makes its:

Conclusions of Law

1. The Commission has jurisdiction over this proceeding under North Dakota Century Code Chapters 49-03.1, Chapter 49-19, and Chapter 49-22.

2. The phrase “public generally” as found in N.D.C.C. § 49-03.1-02 refers to the relevant public who would potentially, in the course of business, be able to use common pipeline carrier service. *Williston Basin Interstate Pipeline Company v. Amerada Hess Corporation*, Case No. 552-92-524 (1992), “Findings of Fact, Conclusions of Law and Order,” page 3.

3. The word “public” does not mean all the people, nor most of the people, nor very many of them as contradistinguishing them from a few. *Oscar H. Will & Co. v. State of North Dakota*, 68 N.D. 433, 281 N.W. 65 (1938).

4. The North Dakota Supreme Court has taken note that bulk terminal operators “are part of the public and their business is such that they in turn serve the public generally.” *Matter of the Application of Hvidsten*, 78 N.D. 56, 65, 48 N.W.2d 26, 31 (1951). Similarly here, the Pipeline is used to supply terminals from which the need and convenience of the public generally are served by further transportation.

5. Even if the motive which dictated the location of a utility over particular land was to reach a private industry, or because the proprietors of that industry contributed to its cost, the uses of the utility are not the less public. See *U.S. v. Louisiana P.R. Co.*, 234 U.S. 1, 25 34 S.Ct. 741, 747 (1914) (railroad regulation case). We are aware of no law which requires us to construe the word “public” differently in a statute applying to a pipeline than a statute applying to a railroad.

6. The North Dakota legislature has determined that pipeline companies are to be taxed as public utilities. N.D.C.C. §§ 57-06-01, 57-06-02.

7. Common pipeline carriers in North Dakota have the right of eminent domain, N.D.C.C. § 49-19-12, because conducting and distributing gas and oil to the inhabitants of a city or county has been deemed a public use by the legislature. N.D.C.C. § 32-15-02 (10).

8. In 1977, the North Dakota Legislature deleted from N.D.C.C. § 49-03.1-02, the phrase “in any business enumerated in this title.” This language has been replaced with “in this state to furnish its product or services to the public generally which is statutorily subject to the jurisdiction of the commission.” This Commission interprets this change to mean that there were formerly included in the category “public utilities” firms which either did not furnish their products or services to the public generally, or were outside the jurisdiction of the commission, or both. We do not interpret the statutory change to mean that the Legislature intended to permit businesses to hold themselves out as available to the public on stated terms, and exercise exclusive control of services vitally important 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 public utilities system in issue.

9. This Commission has only such authority as is conferred upon it by the legislature. *Grafton v. Ottertail Power co.*, 86 N.W.2d 197 (ND 1957). The Legislature has not conferred authority on the Commission to ignore or set aside the statutory definition of public utility.

10. The elements which, when present, demonstrate that an entity is a public utility under North Dakota law, as defined at N.D.C.C. § 49-03.1-02, are:

- a. an association, person, firm, corporation, limited liability company, or agency,
- b. is engaged or employed in North Dakota,
- c. to furnish its services to the public generally, and
- d. the association, person, firm, corporation, limited liability company or agency is subject to the jurisdiction of the commission.

11. Element 'a' is present in that NuStar is a firm within the meaning of N.D.C.C. § 49-03.1-02.

12. Element 'b' is present in that NuStar is engaged or employed in the State of North Dakota to furnish its services within the meaning of N.D.C.C. § 49-03.1-02.

13. Element 'c' is present in that NuStar has a monopoly on pipeline transportation from the Refinery, has voluntarily made itself a common carrier, transports product for the product's owner, not for itself, provides an essential public service, and serves a very critical public need.

14. Element 'd' is present in that NuStar is subject to the jurisdiction of this commission, by virtue of both its voluntary application and its tariff filings.

15. NuStar is a public utility as a matter of law, as well as fact.

16. A public utility is required to obtain a certificate of public convenience and necessity before operating a public utility system in North Dakota. N.D.C.C. § 49-03.1-01.

17. As a public utility, NuStar is required to have a certificate of public convenience and necessity as a condition of operating the North Product System in North Dakota.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes its:

Order

The Commission orders:

1. The application of NuStar Pipeline Operating Partnership L.P. for a certificate of public convenience and necessity to operate the North Product System, approximately 200 miles of 10-inch refined petroleum products pipeline and associated facilities, in Morton, Bruleigh, Kidder, Stutsman, Barnes, and Cass Counties, North Dakota may not be withdrawn. NuStar's motion to do so is denied.
2. The Commission will set a date and place for hearing on the Application. The issues remaining to be considered in this matter are as stated in our Notice of Opportunity for Hearing of May 21, 2008:
 1. Need for the service.
 2. Fitness and ability of the applicant to provide service.
 3. Effect on other public utilities providing similar service.
 4. Adequacy of the proposed service.
 5. Technical, financial and managerial ability of the applicant to provide service.

PUBLIC SERVICE COMMISSION

Tony Clark
Commissioner

Kevin Cramer
President

Brian Kalk
Commissioner