

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**NuStar Pipeline Operating Partnership, L.P.  
North Project System  
Public Convenience & Necessity**

**Case No. PU-08-194**

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

**December 10, 2009**

**Appearances**

Commissioners Kevin Cramer, Tony Clark, and Brian P. Kalk.

Thomas D. Kelsch 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.

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

Illona A. Jeffcoat-Sacco, General Counsel, Public Service Commission, 600 E. Boulevard Ave., Department 408, Bismarck, ND 58505-0480, on behalf of the Public Service Commission.

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.

**Preliminary Statement**

On April 24, 2008, NuStar Pipeline Operating Partnership LP (NuStar) applied for a Certificate of Public Convenience and Necessity (PCN) for NuStar's North Product System located in Morton, Burleigh, Kidder, Stutsman, Barnes and Cass Counties, North Dakota (the Pipeline), under N.D.C.C. Chapter 49-03.1.

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. The issues to be considered were:

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

On June 26, 2008, the City of Fargo (Fargo) filed a Request for Hearing and Petition to Intervene to Appear as a Party and Comments.

On July 7, 2008, the Commission Staff filed a memorandum indicating that NuStar has the financial ability to provide service.

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

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

On August 8, 2008, Fargo filed a Request for Approval of Stipulated Extension of Time to Respond to Request to Withdraw Application for Certificate of Public Convenience and Necessity. On August 20, 2008 Fargo filed its Response.

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

On December 8, 2008, Fargo filed a Letter regarding a Commission Staff email and Memorandum.

On January 9, 2009 NuStar electronically filed the Affidavit of Joseph Graham in Support of Motion to Withdraw Application for Certificate of Public Convenience and Necessity. NuStar followed this filing by serving and filing paper copies of the affidavit on January 12, 2009. NuStar filed the original executed affidavit on January 14, 2009.

On January 13, 2009 Fargo filed a Submission of Supplemental Legal Authority.

On January 14, 2009, the Commission held an Informal Hearing.

On January 30, 2009, Fargo filed a Written Summary of Argument at Informal Hearing and NuStar filed a Post Informal Hearing Brief. On February 9, 2009, NuStar filed a Supplemental Brief and Fargo its Discussion of *Williston Basin Interstate Pipeline v. Amerada Hess Corporation*.

On May 7, 2009, Al Wahl, Administrative Law Judge, entered a Prehearing Order granting Fargo's Petition to Intervene and scheduling a hearing for June 25, 2009, for the purpose of determining ". . . whether 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

regardless whether it 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. . . .”

Judge Wahl also ordered that “Fargo shall have the burden of establishing that NuStar is a public utility within the meaning of N.D.C.C. § 49-03.1-02(2), and that NuStar shall have the burden of establishing that regardless whether it 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 26, 2009, with the concurrence of NuStar, Judge Wahl granted Fargo’s June 25, 2009, request, to continue the hearing.

The hearing was subsequently rescheduled to and held on October 6, 2009, in the Commission Hearing Room, 12<sup>th</sup> floor, State Capitol, Bismarck, ND.

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

### **Findings of Fact**

1. The Pipeline was originally constructed by Standard Oil Company of Indiana, a predecessor to Amoco Corporation (Amoco) in the 1950s, as a proprietary pipeline to transport petroleum products from Amoco’s Mandan, North Dakota refinery to various destinations in North Dakota and Minnesota.
2. At the time the Pipeline was built and until December 2002, the same entity owned both the Pipeline and the refinery.
3. The Pipeline remained a proprietary pipeline, in which products transported in the Pipeline were owned by the entity that owned the Pipeline, or its affiliate. until NuStar, under its former name, Kaneb Pipeline Operating Partnership, L.P. (Kaneb), purchased the pipeline from the owner/operator and converted it to a common carrier pipeline in 2002. Kaneb filed an initial tariff for the Pipeline with the Public Service Commission in 2002.
4. Effective March 31, 2008, Kaneb changed its name to NuStar Pipeline Operating Partnership L.P.
5. NuStar transports through the Pipeline refined petroleum products that it does not own. Tesoro retains ownership of the refined products, and NuStar only acts as a transporter of Tesoro’s refined products.
6. Since Kaneb’s purchase of the Pipeline in 2002, through March 2008, Kaneb and NuStar have filed 9 tariffs with the Commission.

7. NuStar issued Tariff No. 2 and filed it with the Commission as a result of the name change from Kaneb Pipeline Operating Partnership, L.P. to NuStar Pipeline Operating Partnership L.P., effective May 9, 2008. The predecessor tariff, NDPSC No. 9, was published and supplemented by NuStar under its previous name, Kaneb Pipeline Operating Partnership, L.P.

8. NuStar's North System operates and delivers refined products to the following five NuStar owned terminals on the Pipeline.

- a. North System: Jamestown – North, ND
- b. North System: Moorhead, MN
- c. North System: Sauk Center, MN
- d. North System: Roseville, MN
- e. East System: Jamestown – East, ND

9. NuStar's North System operates and delivers refined products to one Burlington Northern owned and operated terminal on the Pipeline on a separate dedicated 3" pipeline. NuStar's Burlington Northern Railroad (BNRR) Line is a 2.7-mile, 3-inch diameter delivery line that transports RR40 diesel fuel from Tesoro's Mandan Refinery to Burlington Northern's Mandan, North Dakota, Railroad Yard. NuStar's 2.7-mile line section terminates at BNRR's custody transfer point.

10. The shipper of record for all shipped Pipeline volumes transported by NuStar has been and currently is only one shipper, Tesoro.

11. Since 2002, NuStar's and its predecessor Kaneb's tariffed rates, filed with the North Dakota Public Service Commission, only apply to refined product volumes that originate at Mandan, North Dakota.

12. Transportation via the Pipeline between Tesoro's Mandan, ND refinery to Burlington Northern's Mandan, ND terminal or between Tesoro's Mandan, ND refinery and NuStar's Jamestown, ND terminals occurs entirely within North Dakota. Any other destinations on the Pipeline are outside of North Dakota and are outside the jurisdiction of the Commission.

13. NuStar is statutorily subject to the jurisdiction of the North Dakota Public Service Commission by virtue of its filed intrastate tariff.

14. The Pipeline's Jamestown, ND terminal (the Jamestown North Terminal) is supplied only from the Mandan, ND refinery.

15. A separate terminal at Jamestown, serves as a destination point for products that are transported along a separate pipeline called NuStar's East System, (the Jamestown East Terminal"). The Jamestown East Terminal is located approximately 10.9 miles

from the Jamestown North Terminal and was not part of the Pipeline built by Amoco and purchased by Kaneb from Tesoro. Kaneb constructed a pipeline connecting the Jamestown East Terminal to the Pipeline allowing the Pipeline to deliver to the Jamestown East Terminal. The Jamestown East Terminal is supplied from volumes that originate at Mandan, North Dakota, as well as from volumes that originate outside of ND. Refined product volumes destined for the Jamestown East Terminal that originate outside of North Dakota are not transported through the Pipeline.

16. Refined petroleum products have not been transferred and cannot be transferred from the East System Pipeline to the Pipeline because there is no connection between the two pipelines.

17. Refined petroleum product cannot be transferred from the Jamestown East terminal into the Pipeline because neither the Jamestown East terminal nor the East System Pipeline is engineered to be compatible. The East System Pipeline and the Jamestown East terminal have pumping capacity of approximately 400 barrels per hour. The Pipeline pumps product at approximately 1,800 to 2,000 barrels per hour. Therefore, these pipelines are highly incompatible.

18. NuStar's North Pipeline connects to terminals in Minnesota. However, product does not move from east to west along the pipeline from Minnesota into North Dakota. The Pipeline is uni-directional from Mandan to Roseville, Minnesota.

19. At the NuStar Internet Site, NuStar represented "the North System has three origination points: Tesoro Mandan; BP Whiting; and Magellan Midstream Partners, L.P." All products transported in the Pipeline originated at the Tesoro Mandan, North Dakota refinery. However, the other two origination points referenced above, (BP Whiting and Magellan Midstream Partners, L.P.), refer to locations outside of North Dakota from which it is possible for product to be delivered only to NuStar's Roseville, Minnesota Terminal. No product that originates from BP Whiting or Magellan Midstream Partners, L.P. is transported along the Pipeline.

20. The NuStar Internet Site is maintained by an affiliate of NuStar and is available to the general public.

21. The NuStar Terminals on the Pipeline are distribution terminals from which, at its shipper's request, NuStar will permit tanker trucks to load refined products. Access to NuStar's Jamestown North terminal is controlled by Tesoro. Access to the NuStar Jamestown East terminal is controlled by Tesoro and the shipper(s) on the East pipeline. NuStar simply provides a storage and terminal service for the benefit of Tesoro on the Jamestown North Terminal (which includes all terminals on the North System Pipeline) for Tesoro shipping from the Mandan refinery and for the shippers on the East System Pipeline delivering into the Jamestown East Terminal. NuStar does not deliver any products directly to the public.

22. All product delivered to NuStar's North Jamestown Terminal in North Dakota originates from Tesoro's Mandan, ND refinery. All product delivered to Burlington Northern's Mandan, ND terminal originates from Tesoro's Mandan, ND refinery. In addition all product on the Pipeline is owned by NuStar's single shipper, Tesoro. NuStar represented to the Securities and Exchange Commission that the Pipeline, including Minnesota terminals, is supplied primarily by the Tesoro Mandan refinery. Graham testified that the Roseville, MN terminal could receive product at the terminal for BP Whiting or Magellan Pipelines but that none of their product could be shipped on the Pipeline.

23. Under Item No. 25 of NuStar's tariff, effective May 9, 2008, any shipper or consignee may provide facilities for receiving, storing, and loading petroleum products at any delivery point on the pipeline, not limited to carrier's terminals. Only one shipper has historically or is currently providing these needed facilities.

24. Any new origination point on the Pipeline requires written tariff notification to current tariff subscribers as well as to the Federal Energy Regulatory Commission and the North Dakota Public Service Commission on no less than 30 days notice.

25. N.D.C.C. § 49-03.1-01 provides

**49-03.1-01. Certificates of public convenience and necessity - Who to secure.** No public utility shall begin construction or operation of a public utility plant or system without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction and operation.

26. N.D.C.C. § 49-03.1-2 (2) provides, in part:

"Public utility" includes any association, person, firm, corporation, limited liability company, or agency engaged or employed in this state to furnish its product or services *to the public generally* which is statutorily subject to the jurisdiction of the commission. . . . (*emphasis added*)

27. There is no dispute in the record that the Pipeline is a utility, that it is a common carrier, that it serves a public need, and that it is a monopoly provider of pipeline services between the Mandan, North Dakota refinery and the Jamestown North Terminal.

28. Under N.D.C.C. Ch. 49-03.1, the definition of "public utility" and the consequent requirement to obtain a Certificate of Public Convenience and necessity, do not depend solely on whether an entity is a utility, a common carrier, or a monopoly provider serving a public need. Rather, for an entity to meet the definition of "public utility" requiring a Certificate of Public Convenience and Necessity the entity must also be "engaged or employed. . . to furnish its products or services to the public generally."

28. The preponderance of the evidence fails to establish that NuStar is engaged or employed to furnish its services to the public generally, or that it proposes to be so engaged or employed.

29. NuStar is not “engaged or employed in this state to furnish its product or services to the public generally” under N.D.C.C. Ch. 49-03.1 and consequently, does not need to obtain a certificate of public convenience and necessity under that chapter.

30. North Dakota Administrative Code § 69-02-02-07(2) provides:

2. **Withdrawals.** A participant desiring to withdraw a pleading filed with the commission may file a notice of withdrawal. The notice must set forth the reason for the withdrawal. A copy of the withdrawal notice must be served upon all other participants and a certificate of service to that effect must be filed with the notice of withdrawal. This section does not allow, without express permission of the commission, withdrawal of any pleading in any proceeding in which a hearing has been held or convened.

31. NuStar’s Request to Withdraw Application for Certificate of Public Convenience and Necessity contained the information necessary to comply with the requirements of a Notice to Withdraw under N.D. Admin. Code § 69-02-02-07(2).

32. NuStar served its Request to Withdraw on Fargo. At the time the Application to Withdraw was filed by NuStar, the Commission had not scheduled, held or convened a hearing.

33. NuStar may be required to secure a Certificate of Public Convenience and Necessity in the future if it changes its operation in such a manner that the changes require a Certificate of Public Convenience and Necessity.

34. The Commission has established legal precedent in a number of cases concerning the definition of the meaning of “furnish its products or services to the public generally” under N.D.C.C. § 49-03.1-02(2).

35. In *In re Western Gas Processors, Ltd.*, Case No. 9981, in a decision on reconsideration issued May 29, 1980, the Commission found that Western Gas Processors, Ltd. would not be selling its products or services to the public generally. Western Gas Processors, Ltd. was planning to purchase gas from producers at the wellhead and transport the gas to its processing facility. After processing, the gas was contracted to be sold to a sole purchaser. The Commission determined that it did not have jurisdiction to require Western Gas to obtain a Certificate of Public Convenience and Necessity.

36. In *In re Amoco Production Company*, Case No. 10.084 (July 15, 1980), Amoco Production Company filed, under protest, for a Certificate of Public Convenience and Necessity for a gas gathering system. The Commission found that Amoco Production Company was engaged in the production and processing of raw natural gas for sale under private contract to one customer. Amoco Production Company had a joint interest in the wells, was operating partner for them, and had sole title to the gas and the pipeline. The Commission concluded that Amoco Production Company would not be selling its products or services to the public generally and did not need to obtain a Certificate of Public Convenience and Necessity.

37. In *Williston Basin Interstate Pipeline v. Koch*, Case No. PU-552-92-442, (August , 1992), the Commission found that the preponderance of the evidence failed to establish that Koch was engaged or employed to furnish its products or services to the public generally, or that Koch proposed to be so engaged or employed. Koch bought gas from producers under percentage of proceeds contracts. Five to ten percent of the residue gas was under a buy back option to producers. Koch gathered compressed natural gas from approximately 1,100 producer wells, and then transported gas owned by Koch and gas owned by in-kind owners. The Commission found that Koch intended to transport only its own gas through the pipeline, but was also willing to transport small portions of the residue gas that it did not own. No Certificate of Public Convenience and Necessity was required.

38. In *Williston Basin Interstate Pipeline v. Amerada Hess Corporation*, Case No. PU-552-92-524 (August 12, 1992), the Commission stated:

7...We agree that the term 'public generally' as found in N.D.C.C. § 49-03.1-02(2) refers to the relevant public who would potentially and in the course of their business, be able to utilize common pipeline carrier services. . . .

Although the Commission found Amerada to be a common pipeline carrier, the Commission did not find that Amerada was holding itself out to serve the public generally.

39. Commission precedent is not inconsistent with our finding that NuStar is not a public utility under N.D.C.C. Ch. 49-03.1 and supports our conclusion that the operative statutory language must be interpreted on a case by case basis.

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

### **Conclusions of Law**

1. The Commission has jurisdiction over the parties to and the subject matter of this proceeding.

2. Fargo has the burden of proving NuStar is a public utility under N.D.C.C. Ch. 49-03.1.

3. The preponderance of the evidence fails to establish that NuStar is engaged or employed to furnish its services to the public generally, or that it proposes to be so engaged or employed.

3. NuStar is not a public utility as defined by N.D.C.C. § 49-03.1-02(2) because it is not engaged or employed in this state to furnish its products or services to the public generally.

4. NuStar is not required to obtain a Certificate of Public Convenience and Necessity.

4. NuStar may be required to secure a Certificate of Public Convenience and Necessity in the future if it changes its operation in such a manner that the changes bring NuStar within the applicability of N.D.C.C. Ch. 49-03.1.

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

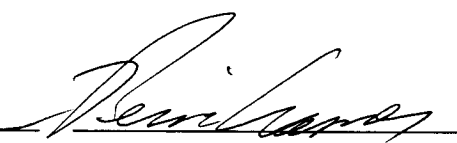
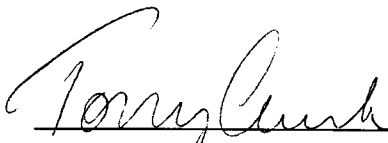
### Order

The Commission Orders:

1. NuStar is not a public utility under N.D.C.C. § 49.03.1-02(2) and is not required to obtain a Certificate of Public Convenience and Necessity for the Pipeline.

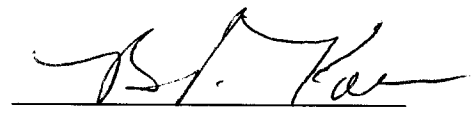
2. NuStar's Request to Withdraw its Application for Certificate of Public Convenience and Necessity is GRANTED.

### PUBLIC SERVICE COMMISSION



**Tony Clark**  
Commissioner

**Kevin Cramer**  
Chairman



**Brian P. Kalk**  
Commissioner