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August 25, 2016

VIA ELECTRONIC DELIVERY

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, N.W.
Washington, DC 20423

RE: *Dyno Nobel, Inc. and Dyno Nobel Louisiana Ammonia, LLC v. NuStar Pipeline Operating Company, L.P.*, Docket No. NOR 42147: NuStar Pipeline Operating Company, L.P. Motion for Oral Argument

Dear Ms. Brown:

NuStar Pipeline Operating Partnership, L.P. (“NuStar”) hereby files a Motion for Oral Argument with the Surface Transportation Board (“Board”) in the above captioned proceeding.

If there are any questions regarding this filing, please feel free to contact the undersigned directly, either by telephone (202) 661-6950 or by e-mail: cbarr@postschell.com.

Very truly yours,

/s/

Christopher J. Barr

ENTERED
Office of Proceedings
August 25, 2016
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Public Record

CERTIFICATE OF SERVICE

Pursuant to Rule 1104.12 of the Surface Transportation Board's Rule on Service of Pleadings and Papers, I hereby certify that I have this day served a copy of the foregoing document on all parties of record in this proceeding, Docket No. 42147, electronically or by first class mail postage prepaid.

Dated at Washington, D.C., this 25th day of August 2016.

/s/
Jessica R. Rogers
Post & Schell

**UNITED STATES OF AMERICA
BEFORE THE
SURFACE TRANSPORTATION BOARD**

Dyno Nobel, Inc. and)	
Dyno Nobel Louisiana Ammonia, LLC,)	
Complainant)	Docket No. NOR 42147
)	
v.)	
)	
NuStar Pipeline Operating Partnership, L.P.)	
Defendant)	

**MOTION FOR ORAL ARGUMENT
OF
NUSTAR PIPELINE OPERATING PARTNERSHIP, L.P.**

Pursuant to of the Surface Transportation Board’s (“Board”) Rules of Practice, 49 C.F.R. § 1116, NuStar Pipeline Operating Partnership, L.P. (“NuStar”) submits this Motion for Oral Argument (“Motion”), to be held regarding NuStar’s Motion to Dismiss filed on July 20, 2016, which responded to the Unreasonable Practice Complaint (“Complaint”) of Dyno Nobel, Inc. and Dyno Nobel Louisiana Ammonia, LLC (individually and collectively, “Dyno” or “Complainant”) in the above-captioned proceeding. In support of this Motion, NuStar states as follows:

Argument

NuStar requests a hearing on its Motion because it believes oral argument will facilitate the resolution of the novel issues before the Board in this proceeding. Complainant seeks relief for NuStar’s alleged unreasonable practices in violation of 49 U.S.C. §§ 15901(b) and 15904. While the Complaint alleges a number of claims, all of them are premised on the theory that NuStar had a common carrier obligation to provide service on NuStar’s Fortier Lateral, which links Dyno’s Waggaman, Louisiana plant (“Waggaman”) to NuStar’s pipeline system, even

though the Fortier Lateral had been idled and out of service since the 1990s and could not be placed back into service without significant investment.

The Complaint presents a legal issue of first impression for the Board's consideration: whether or not NuStar had an obligation to start up and operate an idled pipeline. While Complainant has attempted to present this case as one riddled with fact disputes, the truth is that core operative facts are not disputed: at the time Complainant contacted NuStar, the Fortier Lateral was not providing service, had been idled for many years, and could not be placed back into service without significant investment. It is also undisputed that Waggaman was not being offered as a point of origin in NuStar's tariff at the time Complainant contacted NuStar.¹

While Complainant argues otherwise, it cannot cite to any judicial, Board or Interstate Commerce Commission ("ICC") precedents supporting its legal theory that NuStar had a duty to provide service on a long-idled lateral pipeline. In fact, contrary to Complainant's position, it has long been established that, *unlike a railroad*, other common carriers may cease to provide service at any time, as pipeline operators are permitted to begin and end common carrier service in accordance with their business needs. *See, e.g., Lucking v. Detroit & Cleveland Navigation Co.*, 265 U.S. 346, 350-351 (1924) ("*Lucking*"). If, as NuStar has argued, it lacked a common carrier obligation because its system could not operate to provide service to Waggaman, the Fortier Lateral was idled and inoperative, and it was not offering service to any shipper from Waggaman, then the central premise of the Complaint is invalid – *i.e.*, that it was an

¹ Complainant disputes the importance of Waggaman being excluded from the tariff. NuStar merely notes it as one of many factors indicating that NuStar was not holding itself out as providing service to Waggaman, as no facilities were physically available to provide such service.

unreasonable practice for NuStar to require Complainant to pay the costs of restoring service on the inoperative pipeline.²

The question of whether NuStar had a common carrier obligation on the idled and inoperative Fortier Lateral is a question of law. Moreover, the common carrier obligations of non-rail common carriers to provide service to customers not located on their systems, and services that they do not hold themselves out to provide, is a question that the Board has not addressed, and would best be considered by the Board with the assistance of an oral argument. As an example, at oral argument the Board could consider full arguments regarding the applicable precedents. In Complainant's Reply, the Complainant did not respond to or distinguish the *Lucking* precedent, and instead relied upon *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, 5 I.C.C.2d 303 (1989) ("*Ashley Creek*"). *Ashley Creek* is entirely inapposite to the issues in this proceeding. In *Ashley Creek*, the pipeline was already providing service on the facilities for which the complainant sought to require commencement of common carrier services via tariff. In contrast to the undisputed facts here, in which no service was being provided, or could have been provided, on the Fortier Lateral, in *Ashley Creek* the respondent did not contend that it was not providing transportation, only that it was transporting its own product, when the request for rate information was made. Further, the ICC's holding in that proceeding was that the pipeline should publish a tariff with rate information. *Ashley Creek* provides no guidance on when a common carrier obligation arises for a pipeline that is not currently

² NuStar notes that in both the Complaint and the subsequent "Reply to Motion to Dismiss," filed August 9, 2016, Dkt. No. 42147 ("Complainant's Reply"), Complainant seems to contend that it was an unreasonable practice for NuStar to raise its original estimate of the cost of restoring service to be provided by Dyno, when NuStar learned of the lapse of easement rights due to long-term lack of use. At the same time, Complainants do not challenge the basis for the loss of easement rights (*i.e.*, that long-term lack of use created a loss of easement as a matter of Louisiana law), and do not suggest that requiring a contribution of the original estimate would have been an unreasonable practice. However, resolution of the Complaint based on the legal points discussed *infra* would moot the need to sort through Complainants' inconsistent theories and inconsistent factual claims. Further, NuStar notes that it disagrees with many other factual and legal claims in the Reply, but is not addressing those disagreements in the context of this Motion.

providing (and cannot provide, under its then-existing physical and legal status) transportation service on a portion of its pipeline.³

In sum, NuStar believes oral Argument is appropriate so the Board can fully explore and weigh the legal arguments, particularly where there is no dispute as to the core operative facts. Further, NuStar believes a hearing will provide the Board an opportunity to explore what additional information, if any, is required and what the parameters of any further proceeding at this docket should encompass, should it consider any steps short of full dismissal.

For these reasons, NuStar requests that the Board grant this Motion for Oral Argument on whether, as a matter of law, NuStar had a common carrier obligation on the Fortier Lateral when the line was idled and NuStar did not and could not offer service at the time the dispute arose.

Respectfully submitted,

By: _____ /s/
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Counsel for NuStar Pipeline Operating Partnership, L.P.

Dated: August 25, 2016

³ NuStar notes that railroad cases are not generally relevant in this context, because in contrast to railroad common carriers, pipeline common carriers do not receive certificates to commence and to abandon service.