

**BEFORE THE  
OHIO POWER SITING BOARD**

**In the matter of the Application for  
Amendment Two to the Hayes-West  
Fremont 138 kV Transmission Line  
Project**

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**Case No. 16-1594-EL-BTA**

**In the matter of the Application for  
Amendment Three to the Hayes-West  
Fremont 138 kV Transmission Line  
Project**

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**Case No. 16-1595-EL-BTA**

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**MEMORANDUM IN REPLY TO NEXUS PIPELINE LLC’S REPLY TO  
AMERICAN TRANSMISSION SYSTEM’S MEMORANDUM IN  
OPPOSITION TO MOTION TO INTERVENE**

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**I. Introduction**

Although Nexus Pipeline, LLC (“Nexus”) claims it was surprised by American Transmission System, Incorporated’s (“ATSI”) motion in opposition, it should not have been given the weakness of its arguments for untimely intervention. *See Reply* at 1. Nexus’ reply offers no further basis for its intervention other than, again, overstating to the point of inaccuracy the hardships it may endure as a result of the proposed route amendments, complaining that ATSI should have consulted with Nexus before seeking these amendments and analogizing its untimely request to factually dissimilar, and therefore irrelevant and unpersuasive, authorities. Due to the highly overstated nature of these arguments, it was necessary for ATSI to file this brief response.

Nexus might have taken the opportunity in its reply to offer the Board additional factual information in an effort to substantiate its claim that there is “good cause” and “extraordinary circumstances” to grant its untimely motion. It did not. Instead, Nexus chose to focus its effort

on distracting the Board from its failure to meet the standard for intervention by pointing to the irrelevant past actions of ATSI. Nexus goes so far as to assert that it cannot be “reasonably” expected to monitor its own pipeline project, incomprehensibly suggesting that ATSI bears that responsibility. *See Reply* at 6. These complaints are irrelevant to whether Nexus should be granted untimely intervention; therefore, ATSI respectfully requests that the Board deny the motion to intervene in these proceedings.

## **II. Alleged Impact on Nexus Project Does Not Demonstrate “Good Cause” Justifying Late Intervention**

In its reply to ATSI’s Memorandum in Opposition to Motion to Intervene, Nexus states that it “believes that approximately three (3) minor changes to the locations of the proposed (not constructed) Transmission Line structures would resolve the issues between the parties.” *Reply* at 8. By Nexus’ own admission, the alleged impact on Nexus’ project is not as “significant” as they claim it to be. *See id.* If the only impact to Nexus’ project is the placement of three poles, these circumstances cannot rise to the level of an “extraordinary circumstance” that would merit late intervention in this proceeding. Additionally, if only one of the parties is going to have to make, as Nexus calls them, “minor adjustments,” basic sensibilities of fairness and common sense suggest that Nexus should be the party to make such “minor adjustments,” because not only is the Nexus project not approved, but the ATSI proposed route amendments were made to accommodate landowner requests. *See Reply* at 9.

Part of Nexus’ reasoning as to why ATSI should have to make these “minor adjustments” is that ATSI did not notify Nexus of these proposed amendments at issue. However, this argument is unpersuasive as it attempts to distract from Nexus’ own failures; simply stating that Nexus and ATSI had exchanged some communications in the past does not place an affirmative

duty on ATSI to alert Nexus of its plans or seek Nexus' approval, and it certainly does not relieve Nexus of its duty to monitor its own project. Nexus claims it "is unreasonable to expect N[exus] to continuously monitor all local newspapers in all of the counties where the Project route is planned." *Reply* at 6. However, Nexus is not shy to remind the Board over and over again that it has a \$2 billion investment in its project. *Reply* at 6. It is inconsistent, if not outright disingenuous, for Nexus to suggest that its investment is so large that it cannot be bothered to make "minor adjustments" to circumvent three poles and accommodate reasonable property owner requests, yet at the same time claim that the investment is not important enough to monitor a dozen local newspapers. *See id.* (stating the "Project spans across twelve (12) counties in Ohio"). In either scenario, no matter the weight of the investment, under no circumstances is Nexus entitled to shift the burden of monitoring its own pipeline project to ATSI.

In the same vein, Nexus asserts that inquiring into the "significance" of the alleged impact in motions to intervene will "result in a mini-trial every time a party seeks to intervene in a case." *Reply* at 4. First, it is important to remember that Nexus has made an untimely motion to intervene, so in that regard this claim is inappropriately broad in scope. Additionally, the rule requires that the moving party show "good cause," (Ohio Adm.Code 4906-7-04), not just *any* cause, which necessarily must involve some factual inquiry into the extent of the alleged impact. Finally, even if the claim were valid that "mini trials" are conducted in the cases of untimely motions, ATSI believes that the risk of conducting "mini-trials" is preferable to the possibility that a party, late to a proceeding, taking issue with three poles, be given the power to delay an already-approved transmission line project.

As a final attempt to manufacture "extraordinary circumstances," Nexus refers back to its misleading argument that "ATSI's proposed adjustments to the Transmission Line ... are very

likely to adversely impact the [p]roject.” *Motion to Intervene* at 6; *Reply* at 3 (“This change in the pipeline route may delay consideration of N[exus]’ application before FERC [Federal Energy Regulatory Commission].”). However, Nexus exaggerates the potential impact of these proposed amendments. In FERC’s Final Environmental Impact Statement for Nexus’ project, the Staff Recommendations provide a standard condition creating a mechanism for minor modifications to the pipeline route that only require Nexus to:

- a. “request any modification to these procedures, measures, or conditions in a filing with the Secretary;
- b. justify each modification relative to site-specific conditions;
- c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and receive approval in writing from the Director of OEP before using that modification.” Final Environmental Impact Statement at 5-19 (original emphasis removed) (available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14411409>).

Not only would Nexus have a strong justification for modifications necessary to adjust to these proposed amendments under this general condition, namely to accommodate landowner requests, the Staff Recommendations include an explicit exemption for minor landowner requests, stating that “[t]his requirement does not apply to extra workspace allowed by NEXUS and Texas Eastern’s respective *E&SCPs* and/or minor field realignments per landowner needs and requirements that do not affect other landowners or sensitive environmental areas such as wetlands.” *Final Environmental Impact Statement* at 5-20. Nexus exaggerates the potential adverse impacts these proposed amendments may have on Nexus’ project, particularly since there are mechanisms likely to be included in their final FERC approval that would provide adequate relief for Nexus to address their concerns.

### **III. Inappropriate Use of Irrelevant Authorities**

Nexus tries to argue that “ATSI should be more than willing to accept this proposal [that ATSI must work with Nexus] because this is exactly what ATSI requested in *In re NRG Ohio*

*Pipeline Company, LLC*, Case No. 14-1717-GA-BLN.” However, unlike Nexus’ motion to intervene in this proceeding, ATSI’s motion to intervene was timely. *ATSI Motion to Intervene in In re NRG Ohio Pipeline Company, LLC* at 1. Additionally, ATSI’s interest for which it timely intervened concerned existing structures, unlike Nexus’ as-yet-unapproved pipeline. *Id.* at 2 (“have numerous structures in the vicinity”). These are not, therefore, similar situations.

As is explained in the same ATSI motion to intervene that Nexus relies on, “Ohio Adm.Code 4906-7-04 provides ... that the Board ‘shall grant petitions for leave to intervene only upon a showing of “good cause” upon consideration of the following four factors:

- (a) The nature and extent of the person’s interest[;]
- (b) The extent to which the person’s interest is represented by existing parties[;]
- (c) The person’s potential contribution to a just and expeditious resolution of the issues involved in the proceeding[;] and
- (d) Whether granting the requested intervention would unduly delay the proceeding or unjustly prejudice an existing party.” *ATSI Motion to Intervene in In re NRG Ohio Pipeline Company, LLC* at 1-2; Ohio Adm.Code 4906-7-04(B)(1).

ATSI’s request for intervention was built upon a showing of these key elements. Nexus’ request provides little in this regard.

Additionally, in its effort to manufacture “extraordinary circumstances” justifying untimely intervention, Nexus tries to analogize its untimely motion to other inapposite situations where such motions have been granted. For example, in *Dayton Power and Light*, PUCO Case Nos. 08-1094-EL-SSO, et al., the proceeding concerned a standard service offer before the Public Utilities Commission of Ohio (“Commission”), where the Commission had already granted twelve other timely motions to intervene, and one untimely motion, all of which had gone unopposed, before the PUCO granted the final untimely motion to intervene to which Nexus analogizes. *Dayton Power* at 2-3. Those circumstances are so dissimilar to the present

proceeding that relying on its authority is unpersuasive. The same is true for the other authorities cited in Nexus' reply; they offer no justification for concluding that Nexus' untimely motion is supported by "good cause."

#### **IV. Conclusion**

Nexus has not met its obligation to show either that "good cause" exists for it to intervene in this proceeding or that "extraordinary circumstances" justify the late, untimely fashion of its request. The self-proclaimed scope of Nexus' concern, three poles, does not amount to "good cause" to delay these proceedings, thus upending the review process already taken by the Board. Neither is Nexus' argument that ATSI has an affirmative duty to monitor the potential impact on Nexus' project persuasive in any way, nor are the attempted analogies to an unrelated past ATSI motion to intervene. Therefore, ATSI respectfully requests that the Board deny this untimely request.

Respectfully submitted,

s/Robert J. Schmidt

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Memorandum in Reply to Nexus Pipeline LLC's Reply to American Transmission System's Memorandum in Opposition to Nexus' Motion to Intervene* was served upon the following persons by electronic filing and by emailing a copy on December 12, 2016 to:

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s/Robert J. Schmidt  
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Summary: Reply MEMORANDUM IN REPLY TO NEXUS PIPELINE LLC'S REPLY TO AMERICAN TRANSMISSION SYSTEM'S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE electronically filed by Mr. Robert J Schmidt on behalf of American Transmission Systems Inc.