

**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

**MEMORANDUM OF APPLICANT AMERICAN TRANSMISSION
SYSTEMS, INCORPORATED IN OPPOSITION TO MOTION TO
INTERVENE OF NEXUS GAS TRANSMISSION, LLC**

Nexus Gas Transmission, LLC's ("Nexus") request for intervention in these proceedings is legally inadequate, far too late and should be denied. As provided at R.C. 4906.08(B), untimely motions to intervene should be granted by the Board only in extraordinary circumstances, and nothing in the request from Nexus meets this high threshold. In fact, Nexus' sole basis for intervention, a vague and unsubstantiated claim that the amendments might pose an un-quantified risk to the construction timeline for a proposed, but as yet unapproved, pipeline, is not a sufficient basis for intervention in these proceedings even under the normal standard of review found in Adm.Code 4906-2-12. Although it is likely that American Transmission Systems, Incorporated ("ATSI"), the applicant in these proceedings, and Nexus, will be able to work out issues related to the construction of the proposed pipeline, if it is approved, there is no basis for the Board to grant Nexus intervention in these cases at the eleventh hour, and doing so

will harm ATSI's substantial interests in the timely approval of these amendment requests. ATSI therefore requests that the Board deny the request to intervene in these proceedings.

Summary of Proceedings

To say that Nexus' request comes at the very end of these proceedings is an understatement. The Board approved the construction of the Hayes West Fremont 138kV Transmission Line Project in Case No. 12-1636-EL-BTX on August 25, 2014. On July 29, 2016, ATSI filed with the Board three amendment applications to the approved Hayes West Fremont Transmission Line Project. The first of these amendment applications, Case No. 16-1593-EL-BTA, is seeking to add a second circuit to the approved route. The other two amendment applications, Case Nos. 16-1954-EL-BTA and 16-1595-EL-BTA, request ten minor adjustments to the approved route of the Hayes West Fremont 138kV Transmission Line to accommodate the requests of property owners. These are the two amendment cases that Nexus is seeking to delay by filing its untimely motion to intervene.

Following the filing of the amendment applications on July 29, 2016, and in accordance with the Board's rules for public notice, the amendment applications for the route adjustments were public noticed on August 3, 2016, and proof of publication of the public notice was docketed with the Board on August 12, 2016. Staff Reports of Investigation were filed in all the amendment cases on October 27, 2016. In the Staff Reports of Investigation for the proposed changes to the route of the Hayes West Fremont 138kV Transmission Line, the Staff concluded that the proposed amendments would likely reduce land use impacts, avoid land use conflicts and not increase ecological impacts. See, *Staff Report*, pg. 2 (the same Staff Report of Investigation was docketed in all three amendment cases). Staff concluded that the proposed amendment applications met the requirements of R.C. 4906.10 and recommend approval of the amendments,

subject only to the conditions contained in the original approval of the Hayes West Fremont 138kV Transmission Line Project. Consequently, the cases were ripe for decision by the Board at the end of October 2016.

On November 14, 2016, more than 90 days after public notice of the amendment applications, at least 60 days late for filing motions to intervene, and more than 2 weeks after the Staff Reports were docketed, Nexus filed its request to intervene. ATSI suspects that this was done because the Board has scheduled a meeting for November 29, 2016, and although the agenda had not been announced at the time of Nexus' filing, it appears that ATSI's amendment applications could have been considered at that meeting. Nexus' request for intervention appears to have delayed consideration of the amendments by the Board at that meeting. ATSI requests that this very late request for intervention not interfere with the Board's decision on these amendment applications, nor delay it further.

Standard for Granting Untimely Intervention and Argument

Both the Board's implementing statute, R.C. 4906.08(B), and the Board's procedural rule, Adm.Code 4906-2-12(C), provide that motions for intervention should be filed within 30 days of the public notice required for applications to the Board, and untimely motions to intervene should only be granted only in extraordinary circumstances, and then only if good cause exists. In these amendment cases, the deadline for filing a timely motion to intervene was September 5, 2016. Nexus missed this deadline by more than 60 days. Consequently, Nexus is now entitled to intervene in these proceedings only if it can show both that good cause exists for intervention and that extraordinary circumstances justify its failure to file a timely motion to intervene. R.C. 4906.08(B). Nexus has failed to meet the good cause standard, and nothing

about this situation creates an extraordinary circumstance adequate to support such an untimely request.

The Board, in rules that mirror provisions of the rules of the Public Utilities Commission of Ohio (“Commission”), requires parties seeking untimely intervention to not only show good cause for intervention under the traditional elements found in Adm.Code 4906-2-12(B), but that extraordinary circumstances exist to support the untimely request. The logic behind this higher standard for untimely requests to intervene was articulated by the Commission when it refused to change this higher intervention standard in a rulemaking proceeding governing a similar rule. In reaching its decision, the Commission stated that “[t]he Commission believes that failure to meet a deadline for intervention in a case has consequences for other parties in the case as well as for the Commission as it attempts to process its cases. Therefore, the Commission finds that ‘extraordinary circumstances’ rather than ‘good cause shown’ is the more appropriate test when considering a late-filed motion to intervene.” *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, 2006 Ohio PUC LEXIS 746, *35-36.

Not only does Nexus have to establish good cause for intervention under the four part test in Adm.Code 4906-2-12(B), it must also show that there is something extraordinary about these cases that warrant the disruption and delay of these proceedings at the very last minute. Nexus has failed on both accounts.

- A. There is nothing extraordinary about this situation that warrants granting an extremely untimely motion for intervention.

Nexus offers no valid excuse for its untimely request for intervention in these cases. Although ATSI and Nexus have had technical discussions concerning the requirements for the placement of the pipeline in relation to the transmission line, ATSI and Nexus have not reached

any final agreements regarding any particular crossing. Nor, for that matter, has Nexus obtain a Certificate from the Federal Energy Regulatory Commission (“FERC”) for the pipeline. It is impossible for Nexus to assert, therefore, that it is entitled to intervene in these proceedings because ATSI has moved the transmission line in contravention of some sort of agreement. It is equally inappropriate for Nexus to base intervention on a claim that adjusting the transmission line route to accommodate property owners will have a significant adverse impact on Nexus when its pipeline route has not been approved. To suggest that the amendments to the Hayes West Fremont 138kV Transmission Line, which, as Nexus admits, “are likely to be resolved with very minor siting adjustments...” will have so significant an impact on Nexus in its FERC proceeding that it is entitled to the extraordinary relief of intervention at the very end of these proceedings is simply unsupported by the facts. Nexus needs to make a far more robust showing to meet the requirements for intervention so late in these proceedings.

To the extent Nexus is claiming entitlement to extraordinary relief in this case because it was engaged in discussions with ATSI, Nexus is in effect arguing that the public notice and intervention provisions of the Board’s rules can be ignored when there is any sort of communication with an applicant. ATSI and Nexus may have engaged in periodic discussions regarding the requirements for installation of the pipeline, but those discussions had not resulted in any final agreements, particularly since the pipeline itself had not been approved. Nexus bears the substantial burden of showing that there is something extraordinary about this situation that warrants its untimely intervention, a standard that Nexus does not meet.

Nexus’ request also runs contrary to the Board’s ability to manage its case flow. Allowing intervention after these amendment applications have been reviewed and Staff Reports with recommendations to approve docketed, appears to be highly disruptive to the Board’s

ability to manage its docket, considering that these amendment applications were ripe for decision by the Board. Certainly more should be required for intervention in these circumstances than a vague claim that possible minor adjustments could disrupt the construction schedule of the pipeline.

B. Granting Nexus' request will unduly delay these proceedings.

Putting aside the potential disruptive impact of this late request on the Board's management of these amendment cases, and contrary to Nexus' claims that its participation at this late stage of this proceeding will not unduly delay them, given the procedural status of the case, the late filing of the motion to intervene has impose additional costs and likely has already delayed the proceedings. As previously discussed, these cases were ripe for decision by the Board. Although these cases are not now on the agenda for the November 29, 2016 Board meeting, they were ripe for decision at the time of Nexus' filing, and ATSI believes it may have been possible that they could have been on the Board's November 29, 2016 meeting agenda. Nexus' motions disrupt the timing of these cases after all reviews have been completed and appear designed to cause delay. This is fundamentally unfair to ATSI.

It is also important to note that Nexus' requests, if granted, will impose on ATSI delay and hardships that mirror the alleged delay and hardships that Nexus' claims justify its intervention. In their requests for intervention, Nexus argues that the minor adjustments to the proposed pipeline route purportedly needed as a result of the amendment cases, pose a risk to their project timeline because "[a]ltering that routing would create new information which FERC has not reviewed in preparing these important project milestone approvals." *Motion to Intervene*, pg. 6. In response to this alleged harm, Nexus is seeking to have the Board force ATSI to do exactly what it is complaining the transmission line amendment cases will do to

Nexus, namely push back the approval process. There is absolutely no doubt that the purpose of Nexus untimely motion to intervene is to delay these proceedings, and in fact, the relief requested by Nexus, the further review by the Board of the route amendments to take into account Nexus' proposed pipeline route, can only be accomplished by delaying these proceedings to allow for further review by the Board's Staff and ultimately some sort of hearing by the Board. Nexus could have raised these concerns with the Board months ago, yet it did not. Nexus should not now be allowed to derail these proceedings when it could have raised its concerns at a point in the proceeding when it would have been possible for the Board to consider their concerns in the regular course of reviewing the amendment applications. ATSI's entitlement to a full, fair and expeditious review and approval of its applications need not yield to Nexus' untimely and unsubstantiated claims.

ATSI also notes that any delay caused by the filing of the motions to intervene may impact the construction schedule of the Hayes West Fremont 138kV Transmission Line generally, which in turn may extend the curtailment of the Oregon Clean Energy Center as discussed in Case No. 12-2959-EL-BGN. As noted in the *System Impact Study* docketed in Case No. 12-2959-EL-BGN on March 6, 2013, PJM anticipates the need to curtail the output from the Oregon Clean Energy Center due to transmission system impacts from the new generation until the completion of certain ATSI system upgrades, principally the Hayes West Fremont 138kV Transmission Line Project. *See, System Impact Study for Filing with the Ohio Power Siting Board*, Case No. 12-2959-EL-BGN, March 6, 2013, pgs. 10-11. At this time, it is ATSI's understanding that the Oregon Clean Energy Project is still expected to be completed and available for commercial operation between March and July 2017. *See, In the matter of the application of Oregon Clean Energy, LLC for a Third Amendment to its Certificate of*

Environmental Compatibility and Public Need, Case No. 15-0853-EL-BGA (Third Amendment Application clarifying project construction timeline), pg. 1. Consequently, any delays in these proceedings that impact the construction schedule of the Hayes West Fremont 138kV Transmission Line will, by implication, extend the curtailment period for the Oregon Clean Energy Center. Nexus' request for intervention will delay these proceedings and could have real and substantial impacts on not only the Hayes West Fremont 138kV Transmission Line Project, but the Oregon Clean Energy Project. Nexus has certainly not presented any evidence of an extraordinary circumstance that warrants this type of potential disruption to other major projects.

- C. To the Best of ATSI's Ability to Determine None of the Proposed Changes to the Hayes West Fremont 138kV Transmission Line impose significant impacts on Nexus' propose pipeline and Nexus' requests fails to provide any information concerning such impacts.

No matter what standard for intervention is considered, be it the standard found in Adm.Code 4906-2-12 for timely requests, or the standard found at R.C. 4906.08(b) for granting untimely requests for intervention in extraordinary situations, it is axiomatic that the party seeking intervention must make a showing of good cause. Nexus' motion for intervention brushes past this requirement with a cursory statement that "ATSI's newly proposed Transmission Line structure locations will interfere with Nexus' surveyed easement areas." *Motion to Intervene*, pg. 6. Putting aside that "interference with surveyed easement areas" is not a meaningful statement of harm, ATSI has been unable to identify any areas where the transmission line amendments proposed in these cases will present an insurmountable problem for the Nexus pipeline, a fact Nexus readily admits. Certainly nothing in the motion by Nexus provides any specific evidence on this most fundamental point.

Nexus has failed to provide the Board with facts adequate to support its request for intervention. Nexus cannot base a claim of good cause to intervene on a vague, non-specific, unsubstantiated allegation of some sort of minor impact that could hypothetically require a change in the route of their unapproved pipeline. To suggest that this is sufficient renders the criteria for intervention meaningless. It is even questionable whether the Board has the jurisdiction to consider this type of unspecified allegation, as it certainly does not obviously fall into any of the Board's decision criteria in R.C. 4906.10.

Even read in the light most favorable to Nexus, the requests for intervention lack sufficient information for the Board to analyze not only what the alleged problem is but also whether or not the Board has the authority to address it. This is fatal to Nexus' request. The Board's standards for intervention, if they require anything at all, require Nexus to articulate meaningful grounds for concluding that good cause exists to allow intervention. Nexus' request fails at this most basic level.

Conclusion

It should not be lost in the consideration of this request that what Nexus is asking is for the Board to delay these proceedings and engaged in a further review of ATSI's route amendments to accommodate Nexus' unapproved pipeline route. Granting this request upends the review process already undertaken by the Board's Staff which has confirmed that the minor adjustments, which were requested by property owners, may reduce the overall impacts of the transmission line, certainly from the perspective of the requesting property owners. Even putting aside the delay and cost to ATSI, Nexus' fails to provide sufficient justification for seeking to intervene in these proceedings at such a late date in an effort to secure changes to the

transmission line amendments that favor its proposed pipeline over property owners that are asking the Board through ATSI to approve reasonable changes to the transmission line route.

Nexus has not met its obligation to show that good cause exists for it to intervene in these proceedings and its request is simply too late. ATSI requests that the Board deny the request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Opposition to Nexus Pipeline LLC's Motion to Intervene* was served upon the following persons by electronic filing and by emailing a copy on November 28, 2016 to:

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Summary: Memorandum in Opposition to Motion to Intervene of Nexus Pipeline LLC
electronically filed by Mr. Robert J Schmidt on behalf of American Transmission Systems Inc.