Team 12

Docket No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH,
Petitioners,

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION IN AGENCY DOCKET NO. TG21-616-000

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF JURISDICTION

The Natural Gas Act ("NGA") requires an applicant seeking to construct and operate a pipeline to obtain a Certificate of Public Convenience and Necessity ("CPCN") from the Federal Energy Regulatory Commission ("the Commission"). 15 U.S.C. § 717f(c)(1)(A). After the Commission grants a CPCN, an individual may seek rehearing of the order within 30 days. 15 U.S.C. § 717r(a). The NGA mandates that parties seeking judicial review of the Commission's CPCN orders must petition the United States Court of Appeals for the Twelfth Circuit within 60 days following the Commission's rehearing order. 15 U.S.C. § 717r(b). On April 1, 2023, the Commission granted Transnational Gas Pipelines, LLC ("TGP") a CPCN for construction of the American Freedom Pipeline ("AFP") project. (R. 4). The Holy Order of Mother Earth ("HOME") and TGP timely sought rehearing of the order. (R. 4). On May 19, 2023, the Commission issued an order denying the petitions for rehearing. (R. 2). On June 1, 2023, HOME and TGP filed a petition for review in this Court docketed as 23-01109 and 23-01110 respectively. (R. 2). TGP's petition has been consolidated to docket 23-01109. (R. 1). Accordingly, this Court has jurisdiction to hear the challenges on review.

STATEMENT OF ISSUES PRESENTED

I. Was the Commission's finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as it found a project need where 90% of the gas transported by that pipeline was for export?

II. Was the Commission's finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?

III. Was the Commission's decision to route the AFP over HOME property despite HOME's religious objections in violation of Religious Freedom Restoration Act ("RFRA")?

IV. Were the greenhouse gas Conditions ("the GHG Conditions") imposed by the Commission beyond its authority under the NGA?

V. Was the Commission's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

I. Statement of the Facts

The Commission, per Section 7 of the NGA, authorizes the construction of new pipelines required by "the present or future public convenience and necessity" by granting a CPCN. (R. 6-7). TGP applied to the Commission on June 13, 2022, for a CPCN authorizing TGP to construct and operate the AFP, a 99-mile natural gas pipeline extending from the state of Old Union to the state of New Union. (R. 4).

The Commission, guided by its 1999 Certificate Policy Statement, got to work analyzing TGP's application. (R. 7). First, the Commission determined the undisputed fact that TGP could financially support the project without subsidies from existing customers (TGP is a new company, so it has no existing customers). (R. 7). After determining the project's benefits outweighed its adverse economic effects on existing customers, existing pipelines in the market, and landowners and communities affected by the pipeline's route, the Commission undertook an extensive environmental review reported in the Environmental Impact Statement ("EIS"). (R. 7, 15). Finally, on April 1, 2023—nine and a half months later—the Commission issued an order ("the CPCN Order") granting TGP a CPCN authorizing the AFP's construction. (R. 4). Based on evidence in the EIS and the Commission's delegated authority under the NGA, the Commission attached the GHG Conditions to the CPCN that mitigated adverse environmental impacts to "less-than-significant levels." (R. 4).

HOME, a not-for-profit religious organization that holds sacred the "natural world," owns a property that overlaps with a two-mile stretch of the AFP. (R. 10-11). HOME commented on the CPCN during the nine-month certification process informing the Commission that the two-mile stretch was part of an important annual religious journey (the "Solstice Sojourn") across the property. (R. 11). Accordingly, TGP agreed to bury the pipeline over the entire stretch of HOME property and expedite construction to avoid interrupting the annual journey. (R. 10). Furthermore, one of the GHG Conditions requires TGP to replant trees equal to the number removed during the pipeline's construction. (R. 14).

Despite these mitigating conditions, HOME nonetheless sought rehearing of the Commission's CPCN Order, alleging the Commission's finding of public need was unjustified, that the negative impacts of the AFP outweigh the benefits, that the routing of the pipeline over HOME's land violates its religious rights under RFRA, and the Commission's decision that mitigation of upstream and downstream GHG emissions was arbitrary. (R. 2).

TGP also sought rehearing of the CPCN Order, alleging that the GHG Conditions attached to the CPCN address "major questions" beyond the Commission's regulatory authority under the Natural Gas Act. (R. 5).

II. Procedural History

On June 13, 2022, TGP filed an application with the Commission in Docket No. TG21-616-000 for Commission authorization to construct and operate the AFP. (R. 4). The Commission issued the CPCN Order to TGP subject to the GHG Conditions defined in the CPCN Order on April 1, 2023. (R. 4).

HOME filed a timely request for rehearing of the CPCN Order. (R. 4). TGP also filed a timely request for rehearing of the CPCN Order. (R. 4). The Commission denied both rehearing

requests on May 19, 2023. (R. 5). Both HOME and TGP filed Petitions for Review of the Commission's CPCN Order and Order Denying Rehearing on June 1, 2023. (R. 2).

SUMMARY OF THE ARGUMENT

I. The Commission's issuance of a CPCN for the AFP was based on an evaluation of substantial evidence, considering market needs and economic benefits balanced against potential adverse impacts. The process followed established policy, with the Commission not required to look beyond precedent agreements for evidence of market need. The Commission, in making its decision, analyzed TGP's demand study, the AFP's potential to fulfill unsubscribed capacity in the Northway Pipeline, and expanding access to natural gas supply. The fact that 90% of the gas is for export does not upend the Commission's analysis of market need.

II. The Commission engaged in reasoned agency deliberation and decision-making, leaving HOME's record-based challenges inadequate. The Commission took a multitude of factors into consideration when balancing the AFP's potential adverse economic impacts on landowners and the public benefits that will stem from its construction and operation. The Commission aligned itself with the requirements of the National Environmental Policy Act ("NEPA") by adequately considering and disclosing the environmental impact of its action. Moreso, the Commission identified a possible alternative and deemed it unworkable for a number of reasons.

III. HOME has failed to meet its burden in proving the construction and operation of the AFP on its land substantially burdens its ability to freely exercise its religion. The CPCN Order neither compels, requires, or dictates HOME to engage in behavior contrary to its belief. Numerous Supreme Court and Circuit Court precedents support this reasoning and find RFRA claims inadequate when the governmental action does not operate as a stringent regulation.

Regardless of whether a substantial burden is found, the Commission has a compelling interest in the transportation of energy systems nationwide—and in this case—the AFP is the least restrictive means to achieving that interest.

IV. The Commission has wide authority under the NGA to attach conditions to CPCN's, considering factors such as market need, environmental impacts, and landowner effects. Courts generally uphold FERC's decisions if they are supported by substantial evidence and do not constitute an abuse of discretion. TGP's challenge to the Commissions GHG Conditions lacks standing as it does not present a concrete and particularized injury; any initial cost is offset by the opportunity for recovery and profit through the NGA's regulatory structure. Moreover, the Commission's authority is grounded in the NGA's language, which grants it broad discretion to impose conditions as necessary for public convenience and necessity, including environmental mitigation measures. The GHG Conditions are based on substantial evidence, including the EIS data, and do not represent an overreach of authority. The Major Questions Doctrine does not apply as the conditions are not a transformative expansion of Commission authority.

V. The Commission's decision not to impose conditions addressing downstream and upstream GHG impacts is justified. It is not arbitrary or capricious since the Commission considered all evidence and made a reasoned decision. Emissions from exported gas are not within the Commission's jurisdiction. As for upstream emissions, the Commission concluded they were not significant based on current production levels and transportation changes.

STANDARD OF REVIEW

The Commission's orders are evaluated under the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). Under this standard, agencies are expected to "examine the relevant data and articulate a satisfactory explanation for its action including a

'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. U. S.*, 371 U.S. 156, 168 (1962)).

In reviewing the Commission's explanation under the narrow arbitrary and capricious standard, the court examines "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974). Agency decisions of "less than ideal clarity" will be upheld "if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43.

"The granting or denial of a certificate of public convenience and necessity is a matter peculiarly within the discretion of the Commission." *Oklahoma. Nat. Gas Co. v. Fed. Power Comm'n*, 257 F.2d 634, 639 (D.C. Cir. 1958). The Commission's findings are conclusive "if supported by substantial evidence." 15 U.S.C. 717r(b). "This is a deferential standard of review." *Millar v. F.C.C.*, 707 F.2d 1530, 1540 (D.C. Cir. 1983). The standard for substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *FPL FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002); *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938) (clarifying substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

ARGUMENT

The NGA vests authority in the Commission to regulate the transportation and sale of natural gas in interstate commerce." *City of Oberlin v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019) [hereinafter *Oberlin I*]. Entities seeking to construct or expand interstate pipelines must first obtain

a CPCN from the Commission, as mandated by 15 U.S.C. § 717f(c)(1)(A). This certificate is issued if the project is required by the present or future public convenience and necessity, determined through a multi-step analysis outlined in the Commission's 1999 Certificate Policy Statement. *See* (R. 6-7); *see also Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further certified*, 92 FERC ¶ 61,094 (2000) [hereinafter 1999 Policy Statement]; *see also FERC Seeks Comment on Draft Policy Statements on Pipeline Certification, GHG Emissions,* FERC (Mar. 24, 2022), https://www.ferc.gov/news-events/news/ferc-seeks-comment-draft-policy-statements-pipeline-certification-ghg-emissions (highlighting an official statement from the Commission stating the Updated Policy Statement will not apply to pending project applications or filed applications before the Commission issues any final guidance in these dockets); *see, e.g., Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 114-15 (D.C. Cir. 2022) (stating the court's reliance on the 1999 Policy Statement rather than the draft 2022 Updated Certificate Policy Statement when balancing the public benefits against the adverse effects). *see, e.g., Env't Def. Fund v. FERC*, 2 F.4th 953, 961-62 (D.C. Cir. 2021) (noting the court relied on the 1999 Policy Statement).

The threshold question the Commission must first address is "whether the project can proceed without subsidies from [the applicant's] existing customers." 1999 Policy Statement, at 61,745. "To ensure that a project will not be subsidized by existing customers, the applicant must show that there is market need for the project." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) [hereinafter *Myersville*].

If a market need is established, the Commission assesses the potential adverse economic effects the project has on existing customers, existing competition, and surrounding communities. 1999 Policy Statement, at 61,745. If these adverse effects persist despite the

applicant's mitigation efforts, the Commission assesses the "public benefits against the potential adverse consequences" of the project, as measured by an economic test. *Id.* In addition to this balancing test, the Commission considers other relevant factors such as "demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." *Id.* at 61,747.

I. THE COMMISSION'S DECISION TO ISSUE A CPCN FOR THE AFP WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY AND CAPRICIOUS.

A. The Commission's reasonable analysis of market need was supported by substantial evidence.

The 1999 Policy Statement supports the longstanding concept that precedent agreements are essential evidence of market need. *See* 1999 Policy Statement, at 61,748 (precedent agreements "constitute significant evidence of demand for the project"). The 1999 Policy Statement eliminated the previously enforced requirement that prospective projects contract for a threshold 25 percent of capacity to demonstrate market demand. *Id.* at 61,744 ("the test relying on the percent of capacity contracted does not reflect the reality of the natural gas [industry]."). As a result, the 1999 Policy Statement expanded the public needs analysis to make obtaining a CPCN more attainable. *See Order Clarifying Statement of Policy,* 90 FERC ¶ 61,128, 61,390 (2000) (moving away from capacity minimums to a more flexible test of balancing economic public benefits against adverse economic effects).

Market studies have also been used to support a finding of market need. 1999 Policy Statement, at 61,748. However, "[t]here is no reason for an applicant to do a new market study of its own in every instance." *Id.* For example, petitioners in *Myersville* presented a market study showing evidence of declining demand. However, the Court rejected the argument that

"declining demand for natural gas [was] evidence of insufficient market demand." *Myersville*, 783 F.3d at 1311.

The Commission considered the study presented in *Myersville* but found it did not need to "look behind precedent or service agreements to make judgments about the needs of individual shippers," based on Commission policy. *Myersville*, 783 F.3d at 1311. Secondly, the Commission noted this market study did not demonstrate a decline in demand for gas in the specific markets the project intended to serve. *Id.* The Court in *Myersville* upheld the Commission's finding of a market need based on three precedent agreements, without the support of market studies. *Id.*

This holding is consistent with the 1999 Policy Statement, which does not require the Commission to look beyond precedent agreements in finding a market need. *See Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014) (holding that the Commission's reliance on existing contracts is sufficient to demonstrate a market need); 1999 Policy Statement, at 61,744 (stating the Commission "does not look behind the contracts to determine whether the customer commitments represent genuine growth in market demand").

However, market need is not supported by the 1999 Policy Statement when concerning aspects of construction cannot be overcome by a single precedent agreement with an affiliated shipper. For example, the Court in *Environmental Defense Fund* invalidated the Commission's decision to issue a CPCN based on an inadequate market need analysis. *Env't Def. Fund*, 2 F.4th at 973. As an initial matter, the construction of a new pipeline was arguably questionable. The applicant sought a CPCN; however, future demand projections were not expected to increase, the pipeline was not being constructed to serve new demand, and the applicant had only entered into a single precedent agreement for "87.5 percent of the pipeline's" transport capacity with an

affiliated shipper. *Id.* at 962-93. Moreover, "construction of the pipeline would increase shareholder earnings." *Id.* at 964.

Ultimately, the Commission issued a CPCN, stating it would not "second guess the business decision" of the applicant to enter into an agreement with an affiliated shipper. *Id.* at 976. In *Environmental Defense Fund*, the Commission's analysis overlooked several relevant factors. Notably, the Commission relied on a single precedent agreement with an affiliated shipper as conclusive evidence of market demand despite no evidence that the pipeline would reduce costs or serve any new load demand. *Id.* at 973. The Court reasoned that based on the single precedent agreement with an affiliated shipper, the Commission was required to "look behind precedent or service agreements to make judgments about the needs of individual shippers." *Myersville*, 783 F.3d at 1311.

In the present case, the Commission appropriately found a market need for the construction of the AFP based on precedent agreements for the AFP's full capacity, undisputed market studies, demand projections, and analysis TGP presented during the certificate process. (R. 8). In addition to TGP having executed precedent agreements for 100% of the AFP's capacity, the pipeline also provides multiple domestic benefits including:

> (1) delivering up to 500,000 Dth per day of natural gas to the interconnection with the [New Union Gas] terminal and the NorthWay Pipeline; (2) providing natural gas service to areas currently without access to natural gas within New Union; (3) expanding access to sources of natural gas supply in the United States; (4) optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market; (5) fulfilling capacity in the undersubscribed NorthWay Pipeline; and (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels.

(R. 8). TGP also considered demand projections that presented evidence of declining demand east of Old Union due to population shifts, energy efficiency measures, and electrification of

heating systems. (R. 13). Moreover, the AFP "fills additional capacity at the International New Union City M&R Station." (R. 9).

Unlike in *Environmental Defense Fund*, the Commission's decision to issue a CPCN was supported by substantial evidence and the 1999 Policy Statement. (R. 8). The Commission not only relied on precedent agreements but considered the AFP's general domestic benefits, TGP's demand projections, and recognized the AFP's potential to fill additional capacity.

Moving forward, the Updated Certificate Policy Statement will have the Commission look to other evidence beyond precedent agreements. However, the Commission "made clear that it would not apply the Updated Certificate Policy Statement to pending applications or applications filed before the Commission issues any final guidance in these dockets." *Delaware Riverkeeper Network*, 45 F.4th at 115 (internal quotations omitted).

Even if the Updated Certificate Policy Statement were applicable here, the updated policy does not "call into question the Commission's reliance on precedent agreements." *Delaware Riverkeeper Network*, 45 F.4th at 114-15. Additionally, "an agency's adoption of a new policy does not render decisions reached under an earlier policy arbitrary and capricious." *Id.* at 115. Based on reasoned decision-making and substantial evidence, the Commission appropriately issued a CPCN to construct the AFP.

B. Exportation does not alter the market need analysis.

HOME argues the NGA is a domestic statute and, therefore, the market need must be interpreted as a domestic need. (R. 8). Accordingly, because 90% of the gas in the AFP will be exported, HOME argues the Commission erred in finding a market need for the pipeline. (R. 8). The Commission did not "put any significant weight" on the export—nor should they. (R. 9).

Natural gas exportation requires obtaining "authorizations from both the Department of Energy (to export) and the Commission (to construct and to operate the necessary facilities)." *Sierra Club v. FERC*, 827 F.3d 36, 41 (D.C. Cir. 2016) [hereinafter *Sierra Club I*]. "The Department of Energy maintains exclusive authority over the export of natural gas." *Id.* at 40 (citation omitted). As a result, "if the gas will be exported to a country with which the United States does not have [a free] trade agreement, the Department [of Energy] must independently determine whether such exports would be inconsistent with the public interest." *Id.* at 40.

However, the Commission has limited export authority. For example, in *Oberlin I*, the Commission issued a CPCN to an applicant with eight precedent agreements for 59% of the pipeline's capacity. *See Oberlin I*, 937 F.3d at 603. Two of the eight agreements were with "Canadian companies serving customers in Canada." *Id.* Petitioners in *Oberlin I* argued the Commission could not rely on export agreements to find market need. *Id.* at 606.

The Court remanded the certificate order because the Commission had failed to adequately explain why its reliance on export agreements was proper. *Id.* In its Order on Remand, the Commission explained that exports "contribut[e] to the development of the gas market, in particular the supply of reasonably-priced gas; add[] new transportation options for producers, shippers, and consumers; strengthen[] the domestic economy and the international trade balance; and support[] domestic jobs in gas production, transportation, and distribution." *Nexus Gas Transmission, LLC,* 172 FERC ¶ 61,199 at P 17. Further, the Commission explained, "even though some of the gas was bound for export, the facility was still a 'pipeline transporting gas in interstate commerce.'" *See City of Oberlin v. FERC*, 39 F.4th 719, 724 (D.C. Cir. 2022) (citation omitted) [hereinafter *Oberlin II*]. The Court accepted this justification as "well reasoned and comport[ing] with both the Natural Gas Act and the Takings Clause." *Id.* at 722.

In the present case, the Commission is not appropriating the role of the DOE in approving the export of gas. Instead, the Commission is acting within its authority to "approve or disapprove the construction and siting of facilities where natural gas will be imported or exported" under its NGA Section 7 authority. *Oberlin I*, 937 F.3d at 603; *Myersville*, 783 F.3d at 1312-13 (holding the project was part of "several interconnected facilities in a larger network" and "not associated in any way with the [] LNG [export] [t]erminal or potential export authority at the terminal").

Here, approximately 90% of the gas will be exported to Brazil, which does not have a free trade agreement with the United States. (R. 8-9). This means the DOE, in approving the exportation, assessed the export with greater scrutiny than would have been given if the export was going to a country with which the United States had a free trade agreement. This increases, rather than diminishes—as HOME implies—the market need finding for the AFP. Under HOME's argument, no export would ever be found to be in the public need. This is an untenable position, and this Court should reject that argument as meritless and uphold the CPCN Order.

C. <u>The Commission's balance of the project benefits and residual adverse effects is reasonable.</u>

The NGA vests the Commission a "wide range of discretionary authority" in determining whether the grant of a CPCN is in the public interest. *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961); *See also Midcoast Interstate Transmission, Inc. v. FERC,* 198 F.3d 960, 964 (D.C. Cir. 2000) (explaining that FERC's review of a pipeline project is a "flexible balancing process"). Under the arbitrary and capricious standard, the Commission's decision must "contain [a] 'sufficient discussion of the relevant issues and opposing viewpoints.'" *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) [hereinafter *Sierra Club II*] (quoting *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)). Further, the Commission must

"demonstrate 'reasoned decision making'" when exercising its authority. *Id.* (quoting *Delaware Riverkeeper Network*, 753 F.3d at 1313.

Here, the Commission sufficiently discussed relevant issues and opposing viewpoints when balancing the public benefits against the residual adverse effects of the CPCN Order and came to a conclusion based on reasoned decision making. Therefore, the Commission's finding that the benefits outweigh the adverse effects of the AFP is neither arbitrary nor capricious.

According to the 1999 Policy Statement, after an applicant "makes efforts to minimize the adverse effects" of a project, the Commission may approve the project "only where the public benefits to be achieved from the project can be found to outweigh the adverse effects." 1999 Policy Statement, at 61,747.

Adverse effects include "increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property." *Myersville*, 783 F.3d at 1309 (citing 1999 Policy Statement, at 61,747-48). These effects are balanced against relevant factors reflecting the need for the project, which "include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." 1999 Policy Statement, at 61,747.

Based on the record, there is no dispute that the Commission's grant of a CPCN for the AFP will not adversely affect TGP's existing customers, existing pipelines in the market, and their captive customers. *See* (R. 7). HOME asserts the adverse effects of the CPCN Order include the impact on landowners and communities affected by the route and the environmental impacts. (R. 7). The Commission adequately considered both of these issues.

In this case, the Commission "examined the relevant considerations and articulated a satisfactory explanation for its action." *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (holding that FERC engaged in reasoned decision-making and therefore its decision was neither arbitrary nor capricious) (cleaned up). Moreso, FERC's decision that the public benefits outweighed the residual adverse effects was based on "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc.,* 463 U.S. at 43 (citing *Burlington Truck Lines*, 371 U.S. at 168).

First, the Commission found in its Rehearing Order that TGP took adequate steps to minimize adverse effects on landowners. *See* (R. 10) (finding that TGP made changes to over 30% of the proposed pipeline to address concerns from landowners). Second, the Commission noted that TGP attempted to minimize construction and operational impacts by burying the AFP through the entirety of its passage through HOME's property. (R. 10). Third, the Commission highlighted that TGP will expedite construction across HOME's property to minimize disruption of the land. (R. 10). Lastly, the Commission placed conditions on the construction of the AFP to mitigate significant environmental harm associated with the project. (R. 14). HOME contends that, regardless of TGP's efforts to minimize the project's impact on landowners, the adverse religious impact associated with the AFP outweighs the benefits of the project.

While the Commission does not contest that it is against HOME's "religious beliefs and practices to allow its land to be used for the transport of [gas]" the Commissions primary interest in balancing public benefits against residual adverse effects is economic. *See* 1999 Policy Statement, at 61,745 (noting that the balance of public benefits against residual adverse effects "is essentially an economic test"). HOME's religious arguments will be addressed in the following section assessing RFRA. *See infra* Section II. RFRA was enacted specifically to

address issues of governmental action that cause religious harm. *See* 42 U.S.C. § 2000bb-1(b). Further, the economic interests focus on "the property rights of landowners," which the Commission took into consideration when granting the CPCN. 1999 Policy Statement, at 61,745.

HOME argues that because TGP has been unable to reach easement agreements with over 40% of landowners, the AFP's benefits do not outweigh the harm. (R. 10). In its review, the Commission considered this fact after noting TGP's effort to negotiate mutually acceptable easement agreements. *See* (R. 10). Regardless, the lack of easement agreements in this context is not significant because the Commission's use of eminent domain is common in construction of pipelines. *See* 15 U.S.C. § 717f(h); *See also PennEast Pipeline Co.*, *v. New Jersey*, 141 S.Ct. 2244, 2252 (2021) (highlighting how in 1947, Congress "amended the NGA [to] authorize certificate holders to exercise the federal eminent domain power"). Counter to HOME's assertion, the Commission was reasonable in concluding the benefit of the project outweighs the claimed residual adverse effect.

As detailed above, Commission policy and precedent support findings of market need based on the existence of precedent agreements. *See* discussion *supra* Part I.A.; *Myersville*, 783 F.3d at 1311; *see also, e.g.*, *Oberlin I,* at 605 (describing how the Policy Statement "lays out a flexible inquiry that allows the Commission to consider a wide variety of evidence to determine the public benefits of the project"). As the Commission noted, third-party off-takers have already contracted for 100% of the project's design capacity. (R. 8). Further, the Commission took into account a multitude of factors in its balancing of public benefits and drawbacks, such as the project's ability to deliver up to 500,000 Dth per day of natural gas; provide liquified natural gas to areas currently without access; expand the natural gas supply in the United States; create a competitive market by optimizing existing systems; fulfill the capacity of the undersubscribed

NorthWay Pipeline; and by replacing dirtier fuels like coal and fuel oil with cleaner natural gas. (R. 8).

The Commission reasonably exercised its "considerable" discretion when balancing the public benefits against the adverse effects. *See Cal. Gas Producers Ass'n v. FPC,* 383 F.2d 645, 648 (9th Cir. 1967) (noting that Congress has "vested considerable discretion in the Commission" when making public interest decisions under NGA Section 7). After considering TGP's mitigation efforts, the Commission accurately assessed the public benefits and came to a rational conclusion that they outweighed the adverse effects on the economic interests of landowners. This Court should defer to the Commission's unique expertise in making these technical decisions.

D. The Commission adequately considered the environmental impact of the AFP and the Misty Top Mountain alternative route.

The Commission, after conducting its "economic test," will "then proceed to complete the environmental analysis where other interests are considered." *See Myersville*, 783 F.3d at 1309; *see also* 1999 Policy Statement, at 61,745. The Commission's assessment of the environmental harm and alternative route suggested by HOME went beyond taking the required "hard look" under NEPA. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). NEPA does not mandate the Commission reach a particular result when it takes a hard look at environmental consequences. *See Myersville,* 783 F.3d at 1322; *see also Sierra Club v. U.S. Dep't of Energy,* 867 F.3d 189, 196 (D.C. Cir. 2017) ("NEPA does not dictate particular decisional outcomes, but merely prohibits uninformed—rather than unwise—agency action.") (internal quotation omitted); *Theodore Roosevelt Conservation P'ship v. Salazar,* 616 F.3d 497, 503 (D.C. Cir. 2010) (stating that NEPA requires a "fully informed and well-considered decision, not necessarily the best decision").

In accordance with NEPA, the Commission came to a decision on the CPCN Order *after* an EIS was prepared. The EIS produced an extensive analysis which led the Commission to find the adverse environmental impacts of the Project will be less-than-significant with staff's recommendations. (R. 4); *See* also 42 U.S.C. § 4332 (stating that under NEPA, agencies are required to evaluate the environmental impact of each proposed project and issue an EIS). The Commission was fully informed of the environmental impact of the AFP when it rendered its decision to issue a CPCN.

HOME asserts the removal of 2,200 trees due to project construction will cause environmental harm that outweighs the benefit of the project. (R. 10). However, as conditional in the CPCN Order, 2,200 new trees will be planted in place of the ones removed. (R. 10). Moreso, FERC placed specific conditions in the CPCN Order to mitigate all known adverse environmental impacts of the AFP—including special conditions specifically for HOME's land. *See* (R. 14).

Furthermore, the *only* alternative pipeline route falls exceedingly short of being reasonable. The alternate route through the Misty Top Mountain Range not only adds over $51 million in construction costs, but re-routing also, undisputedly, will cause more objective environmental harm than the AFP. (R. 11). In addition to the Commission "identify[ing] the reasonable alternative," it assessed the alternative and rightfully rejected it. *Corridor H Alternatives, Inc. v. Slater,* 166 F.3d 368, 374 (D.C. Cir. 1999). Moreso, the Commission "look[ed] hard at the environmental effects of [its] decision," considered the alternative suggested, and reasonably decided the AFP as the best option. *Id.* (finding the only requirement for agencies is to "identify the reasonable alternatives to the contemplated action" and "look hard at the environmental effects of [its] decision").

Regardless, the Commission "is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989). Based on the record, the Commission took a hard look at the environmental effects of its decision, identified a reasonable alternative, and found that the value afforded to the public benefit outweighed the environmental cost. As a result, the Commission was well informed and acted completely within its discretion when it found the benefits from the AFP outweighed the environmental and social harms. This Court should hold that the Commission was neither arbitrary nor capricious in its balancing of the benefits and harms of the AFP project.

II. THE CONSTRUCTION AND OPERATION OF THE AFP ON HOME'S LAND COMPORTS WITH RFRA

The Commission correctly found that the CPCN Order does not violate RFRA. Under RFRA, a plaintiff must show that a government action substantially burdens their ability to freely exercise their religion. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). After a plaintiff has met their burden, the burden shifts to the government to demonstrate how the governmental action furthers a "compelling governmental interest and is the least restrictive means of furthering that interest." 42 U.S.C. § 2000bb-1(a)-(b). HOME failed to assert a substantial burden on its ability to exercise its religious beliefs. In the event this Court finds that there is a substantial burden, the Commission has a compelling governmental interest in the operation and construction of the Project asserted in the CPCN Order, and the AFP is the least restrictive means to achieving that interest.

A. The Commission's CPCN Order does not substantially burden HOME's religious exercise.

Congress crafted RFRA to reinstate the practice of Free Exercise law which ruled prior to *Employment Division v. Smith.* 494 U.S. 872 (1990); s*ee also* 42 U.S.C. § 2000bb(a)(4), (5),

(b)(1). The Supreme Court in *Smith* held that the right afforded by the Free Exercise Clause does "not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting *United States v. Lee,* 455 U.S. 252, 263, n.3, (1982) (STEVENS, J., concurring in judgment)). In other words, religious exemptions are not required from neutral laws of general applicability.

After *Smith*, however, RFRA "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith.*" *Gonzales,* 546 U.S. at 424; *See* 42 U.S.C. § 2000bb–1(a) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."). The Court clarified in *Gonzales* that a governmental action that substantially burdens a person's exercise of religion is permissible only if it passes the compelling interest test. *Gonzales*, 546 U.S. at 424.

The original version of RFRA stated that a government action "shall not burden a person's exercise of religion" unless it satisfies the strict scrutiny analysis. H.R. 1308, 103d Cong. § 3 (1993). Congress added the word "substantially" to "make it clear that the compelling interest standards set forth in the act" pertain "only to Government actions [that] place a substantial burden on the exercise of" religion, as understood prior to *Smith.*139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see id.* (statement of Sen. Hatch). Congress' intent was for courts to "look to free exercise cases decided prior to *Smith* for guidance" when handling RFRA claims. S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); *see* H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993).

RFRA recognizes the burden of "substantial" as a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir.

2011). This burden, however, is limited. Based on pre-*Smith* principles, a genuine religious objection to the government's action is not sufficient to establish a substantial burden. *See Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct," however, the law "recognize[s] such a distinction"); *See also Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (reaffirming the assertion that the law "affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.") (quoting *Bowen*, 476 U.S. at 699-700).

Moreso, a "great amount of religious objections based on third-party actions are dismissed simply because the plaintiff is not pressured to act in any way." *Ave Maria Found. v. Sebelius*, 991 F.Supp.2d 957, 965-66 (E.D. Mich. 2014); *see, e.g.*, *Bowen,* 476 U.S. at 706 (holding a governmental action that indirectly or incidentally calls for a choice is "wholly different" from an action that compels); *Lyng,* 485 U.S. at 449-52 (holding the construction of a road through a sacred religious site did not coerce individuals to act contrary to their beliefs); *Kaemmerling v. Lappin*, 553 F.3d 669, 679-80 (D.C. Cir. 2008) (holding the FBI's extraction of Appellant's DNA information did not pressure or coerce him to violate his religious beliefs); *Thiry v. Carlson,* 78 F.3d 1491, 1493-95 (10th Cir. 1996) (holding the relocation of a gravesite for public highway purposes did not substantially burden Appellant's exercise of religion because the effects are incidental and did not prohibit their religious exercise); *Navajo Nation v. U.S. Forest Serv.,* 535 F.3d 1058, 1070-73 (9th Cir. 2008) (holding the governments use of recycled waste water on a public mountain ski area did not compel the Plaintiffs to act contrary to their religion).

Here, HOME fails to establish how the CPCN Order substantially burdens its religious exercise. The CPCN Order does not impose any obligations on HOME's members, nor does it coerce them to violate their beliefs. HOME asserts that the CPCN Order compels HOME to support the production, transportation, and burning of fossil fuels. (R. 12). Further, HOME states the construction of the AFP—which will be buried under HOME's land and creates no physical barrier for HOME's religious practice—destroys the meaning of the Solstice Sojourn, promotes the removal of trees, and therefore substantially burdens its exercise of religion. (R. 12-13). The Supreme Court rejected a remarkably similar argument in *Lyng*.

In *Lyng*, organizations and individuals asserted a Free Exercise Challenge on the construction of a road through a national forest which would prevent Native American tribes from using sacred sites and the ability to engage in religious practice. *Lyng*, 485 U.S. at 441. The tribes asserted that the contested area was an "integral and indispensable part" of their religious practice and that the construction would cause "serious and irreparable damage to the sacred areas." *Id.* at 442 (internal quotation marks omitted). The Court upheld the project despite that it would not only cause a "disruption of the natural environment" but would "diminish the sacredness of the area," as well as "interfere significantly" with the tribe's ability to practice their religion. *Id.* at 447-48. While the Court acknowledged that the project would have "devastating effects on traditional Indian religious practices," and assumed that even if the project "virtually destroy[ed] the ... Indians' ability to practice their religion," the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 451-52.

The Court in *Lyng* further highlighted the importance of the government taking "numerous steps … to minimize the impact that construction of the G–O road will have on the Indians' religious activities." Here, TGP reflects similar efforts in its plan to bury the pipeline

over the entirety of HOME's land, minimize the timing of construction to occur entirely between solstices, and replant 2,200 trees that would be uprooted due to construction. (R. 13). The effects of the construction of the AFP are not nearly as "devastating" as the effects of the project in *Lyng,* in which the Court upheld the governmental action. *Lyng*, 485 U.S. at 451-52.

Further, HOME's assertion that the CPCN Order compels HOME members to support the production, transportation, and burning of fossil fuels is meritless. In this case, the CPCN Order does not endorse, mandate, or prohibit someone from engaging in their spiritual exercise. Courts have found a substantial burden when the burden "interfere[s] with the claimants' exercise" of religion and the ability to exercise "is directly implicated by federal action." *Real Alternatives v. Secretary of Dept. of HHH*, 867 F.3d 338, 360 (3rd Cir. 2017); *see e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2751 (2014) (highlighting how the provision *required* plaintiffs to provide contraceptive coverage); *Lee*, 455 U.S. at 254 (analyzing a statute that *requires* individuals pay Social Security taxes regardless of whether it goes against their religious beliefs); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 527–28 (1993) (discussing how the ordinance specifically *prohibits* individuals from engaging in the practice of sacrificing animals); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (noting that the law *required* parents to send their children to school). Under RFRA, the connection between conduct and religious belief is imperative. *See* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 U. CHI. L. REV. 1897, 1938 (2015) ("[T]he law distinguishes between direct participation and remote facilitation, treating the former as compelling and the latter as negligible."). Here, HOME's members are still able to exercise their beliefs freely under the CPCN without directly participating in the support of fossil fuels, rendering meritless their claims of harm under RFRA.

The Supreme Court's decision in *Bowen* reflects this reasoning. In *Bowen*, parents brought a Free Exercise challenge to a law that requires "a Social Security number be provided by an applicant seeking to receive certain welfare benefits." *Bowen*, 476 U.S. at 695. The parents viewed the law as requiring them "to choose between the child's physical sustenance and the dictates of their faith." *Id.* at 713 (Blackmun, J., concurring in part). The Court, however, ruled against the parents, finding no substantial burden because the right to exercise religion "does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* at 700.

Similar to *Bowen*, here the CPCN Order in no way *requires* HOME's members to choose between supporting the transportation of natural gas or abstaining from practicing their faith. The CPCN Order does not require HOME's members to take action or prevent them from taking any action they wish to take. Instead, HOME's members have the ability to freely exercise their religion without defying their faith. As a result, HOME has failed to assert a substantial burden.

B. The federal government has a compelling national security interest in supplying energy transportation systems across the country.

In the alternative that this court finds a substantial burden on HOME's religious exercise, the government has a compelling interest in supplying nationwide energy transportation systems. RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 573 U.S. at 726 (internal quotation marks omitted). The court must "look beyond broadly formulated interests" and "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 726-27. The federal government's energy transportation systems are imperative to the public health and safety. In the NGA, Congress recognized this as a compelling interest.

Congress created the NGA to give "gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices." *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004) (citing *Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1145-46 (3d Cir. 1977)); *See also Sunray Mid-Continent Oil Co. v. FPC,* 364 U.S. 137, 147, 151-154 (1960)*; Atlantic Refin. Co. v. Public Serv. Comm'n of N.Y.,* 360 U.S. 378, 388 (1959). Congress and the Supreme Court have consistently found the Commission's ability to supply natural gas is an imperative societal interest. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344-46 (1956); Natural Gas Act of 1938, 15 U.S.C. § 717 ("[T]he business of transporting and selling natural gas for ultimate distribution to the public is *affected with a public interest*, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.") (emphasis added).

Granting the construction of the AFP is within the public interest, as it would provide the general public throughout a vast area of the United States access to natural gas supplies for heating their homes and other essential living purposes at a reasonable price. (R. 27). Therefore, the government's interest in supplying natural gas is sufficiently compelling to countervail a claim brought under RFRA.

C. The AFP is the least restrictive means for achieving the government's compelling interest.

The "least restrictive means" test under RFRA requires the government to show it "lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties." *Hobby Lobby*, 573 U.S. at 728. This involves "comparing the cost to the government of altering its activity to continue unimpeded versus the cost to the

religious interest imposed by the government activity." *S. Ridge Baptist Church v. Indus. Comm'n of Ohio,* 911 F.2d 1203, 1206 (6th Cir.1990). Further, the government only needs to refute the proposed alternatives. *United States v. Wilgus,* 638 F.3d 1274, 1289 (10th Cir. 2011). Here, there is no alternative means for the pipeline, except to go through HOME's property.

As discussed, the suggestion to re-route the AFP through the Misty Top Mountain is far more expensive and would cause much more environmental harm than the route approved in the CPCN order. Not only would the cost of the government altering its activity increase by 51 million dollars, but the alternative route would further impede the "religious interest imposed by the government activity." *See* (R. 11); *S. Ridge Baptist Church,* 911 F.2d at 1206. Based on the Commission's review of TGP's findings, the alternative route will cause *more* objectionable environmental harm than the proposed project. (R. 11).

HOME's suggestion to use the alternative route is patently unreasonable as it directly contradicts their substantial burden argument. If an organization truly cares deeply for the environment, it would be contrary to that organization's mission to advocate for a pipeline pathway that does significantly more environmental damage and puts highly sensitive ecosystems at risk solely for the organization's benefit. In the alternative that the burden is found to be substantial, this Court should hold that FERC has a compelling governmental interest in supplying energy transport systems across the country and the AFP is the least restrictive means to further this interest.

III. THE GHG CONDITIONS ATTACHED TO TGP'S CPCN ARE WITHIN THE COMMISSION'S BROAD AUTHORITY UNDER THE NGA.

"Any attack on a condition in a certificate issued by the Commission must confront the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity." *Transcon. Gas Pipe Line Corp. v.*

FERC, 589 F.2d 186, 190 (5th Cir. 1979) (citing *Atlantic Refin. Co.*, 360 U.S. at 378); *see also EcoElectrica, LP,* 176 FERC ¶ 61,192, at P 5 (2021). "The Commission's authority to evaluate the public convenience, and necessity . . . is as broad as the scope of its authority to condition certificates in such manner as the public convenience and necessity may require." *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 93 (2018). Courts "uphold FERC's factual determinations under the NGA if supported by 'substantial evidence,' which is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *South Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1099 ("South Coast") (9th Cir. 2010) (citing *Bear Lake Watch v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003)). "Since Congress has vested considerable discretion in FERC under the NGA, the burden is upon petitioners to show that it has been abused." *South Coast*, 621 F.3d at 1099 (quotations omitted) (citing *Cal. Gas Producers Ass'n*, 383 F.2d at 648). Furthermore, "as long as the agency's [NEPA] decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Earthreports v. FERC*, 828 F.3d 949, 954-55 (D.C. Cir. 2014).

A. <u>TGP lacks standing to challenge the GHG Conditions because the conditions do not impose a concrete and particularized injury.</u>

To establish Article III standing, a party must allege they have suffered or will personally suffer (1) a concrete and particularized injury, (2) traceable to the unlawful actions of the opposing party, and (3) that injury is redressable by a favorable judicial decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Here, TGP fails to assert a concrete and particularized injury. Admittedly, the GHG Conditions could result in a small increase in TGP's construction expenditure. However, given the regulatory structure governing interstate pipelines, TGP is not merely able to recover any additional expenditures; it's ensured a return on them,

rendering any initial financial burden temporary and inconsequential. *See* FERC, COST-OF-SERVICE RATES MANUAL 9 (1999) ("[A] pipeline is permitted to include in rate base the cost of financing during the construction period."); *see also id.* at 8 ("Rate Base is used to compute the Return component of the cost-of-service, which permits the pipeline to earn a return on its investment."). The conditions, rather than being injurious, set TGP on a path to enhanced profitability over the life of the AFP. The initial cost increase, set against long-term gain, cannot be seen as a concrete and particularized injury.

While TGP might find the GHG Conditions cumbersome or disagreeable, an inconvenience or disagreement is not equivalent to a legally cognizable injury. Furthermore, given that TGP stands to benefit financially from these conditions, it is unclear how this Court's striking the conditions down would provide TGP any tangible relief. TGP, therefore, fails to meet both the injury and redressability elements required to establish Article III standing. Accordingly, TGP lacks standing to challenge the GHG Conditions and this Court should reject TGP's challenge.

B. The NGA's plain language provides the Commission broad discretion to condition CPCNs and to evaluate the public convenience and necessity and the GHG Conditions are within that authority.

If this Court determines TGP does have standing to refute the GHG Conditions, the plain meaning of the NGA still supports that the GHG Conditions are within the Commission's authority. When conducting statutory interpretation, courts should first look to the text of the statute itself and give the words their plain meaning. *See HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2183 (2021) (utilizing the plain meaning canon to interpret the Clean Air Act); *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1172 (2021) (utilizing the plain meaning canon to interpret the Telephone Consumer Protection Act).

NGA Section 7(e) states the "Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. 717f(e). This "unambiguously empowers the Commission to set specific terms and conditions when granting authorization." (R. 17); *see also Transcon. Gas Pipe Line Corp.*, 589 F.2d at 190 (explaining that the Commission's authority to attach conditions to CPCNs is "extremely broad"). Congressional intent to provide the Commission broad discretion over attaching terms is "obvious" from the statute's language. *See Oklahoma Nat. Gas v. FPC*, 257 F.2d 634, 640 (D.C. Cir. 1958). "[I]n the absence of an abuse of that discretion, courts should not interfere." *Id*; *See also South Coast*, 621 F.3d at 1099 (explaining that the NGA provides the Commission broad authority to condition CPCNs so long as they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (citing *Bear Lake Watch*, 324 F.3d at 1076).

The Commission properly asserted its broad discretion when it based the GHG Conditions on the "extensive analysis in the EIS"—primarily, the undisputed estimate that the GHG Conditions will prevent 63,040[1] metric tons of CO2e emissions from construction. *See* (R. 15) (providing that the AFP's construction with and without the GHG Conditions would emit 88,340 and 104,100 metric tons per year of CO2e, respectively, over the four-year construction period). While a "reasonable mind" might question whether tenuous projections of upstream and downstream emissions from the AFP's operations constitute substantial evidence, the prevention of emissions equivalent to those produced from burning over 70 million pounds of coal undoubtedly qualifies as substantial evidence on which the Commission properly based its decision. *See Greenhouse Gas Equivalencies Calculator*, EPA,

[1] (104,100 metric tons/year emitted without conditions – 88,340 metric tons/year emitted with conditions) * 4 years = 63,040 metric tons saved over course of construction.

https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator#results (last updated July 2023).

Furthermore, the White House's Council on Environmental Quality ("CEQ") has made clear that curtailing carbon emissions is in the interest of public health and safety. S*ee* National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023). The CEQ is the President's primary advisory and development body for "policies on climate change, environmental justice, federal sustainability, public lands, oceans, and wildlife conservation, among other areas." *Id*. CEQ's Climate Guidance encourages agencies to "mitigate GHG emissions associated with their proposed actions." (R. 14). Therefore, the Commission properly found that mitigating construction emissions is in the public interest.

C. The GHG Conditions do not constitute a transformative expansion of the Commission's existing authority and thus do not address "major questions" requiring more precise statutory authorization.

The Major Questions Doctrine ("MQD") provides that court's "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Assoc. of Realtors v. Dep't of Health & Human Servs.*, 141 S.Ct. 2485, 2489 (2021) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). In determining the MQD applies, courts look for "transformative expansion" of an agency's use of authority from "the vague language of a long-extant, but rarely used, statute." *West Virginia v. EPA*, 142 S.Ct. 2587, 2595 (2022).

The conditions at issue here are not analogous to the EPA's Clean Power Plan in *West Virginia.* In that case, the Court addressed the scope of the EPA's authority under the Clean Air Act to regulate greenhouse gas emissions from power plants, with opponents arguing that the agency had overstepped its statutory boundaries. The Court held that the EPA overstepped its

authority by relying on a section of the Clean Air Act that had been utilized "only a handful of times since the enactment of the statute in 1970" for authority to issue its sweeping Clean Power Plan. *West Virginia*, 142 S.Ct. at 2602.

The GHG Conditions here are a far cry from "transformative expansion" of existing authority. The Commission has "long considered" GHG emissions in its environmental analyses. (R.15) (citing Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions); Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (operation emissions)). Furthermore, the Commission regularly utilizes Section 7 of the NGA to condition CPCNs. *See, e.g.*, *Kern River Gas Transmission Co.*, 127 FERC ¶ 61,223, at ordering para. (C) (2009) (imposing environmental conditions to mitigate adverse environmental impacts from construction); *see also, e.g.*, *Florida Gas Transmission Co.*, 13 FERC ¶ 63,048, 65,278 (1980) (utilizing NGA Section 7(e) to attach environmental mitigation conditions that ensure natural gas facilities "would cause no significant long-term degradation of the environment"). In addition, courts have held the Commission's attachment of environmental mitigation measures exemplifies "responsible agency decision making." *See Midcoast Interstate Transmission, Inc.*, 198 F.3d at 968 (conditioning a pipeline project on compliance with environmental mitigation measures); *See also, e.g., Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at app. A (2017), on reh'g, 164 FERC ¶ 61,100 (2018) (attaching over 70 certificate conditions to "mitigate environmental impact associated with construction and operation").

South Coast highlights the Commission's delegated authority to oversee environmental standards for interstate natural gas pipelines. In *South Coast*, the Commission, based on its comprehensive EIS, set forth stringent conditions effectively curbing nitrogen oxide emissions

from the North Baja Pipeline's operations. *South Coast*, 621 F.3d at 1090. Furthermore, the *South Coast* court reinforced the Commission's authority to attach environmental safeguards to reduce emissions from pipeline ventures, confirming that its actions were consistent with public welfare and did not exceed its jurisdiction under the NGA.

The conditions imposed do not alter the NGA's fundamental regulatory scheme or usurp the role of Congress. Instead, they represent incremental measures to address environmental concerns that are well within existing Commission precedent, as the Ninth Circuit confirmed in *South Coast.* Accordingly, this Court should uphold the Commission's decision to attach the GHG Conditions to the CPCN.

IV. THE COMMISSION'S DECISION NOT TO IMPOSE CONDITIONS ADDRESSING DOWNSTREAM AND UPSTREAM GHG IMPACTS WAS NOT ARBITRARY OR CAPRICIOUS BECAUSE THE COMMISSION ADEQUATELY CONSIDERED ALL EVIDENCE IN THE RECORD.

It is important to note precisely what HOME is challenging here. HOME does not challenge the integrity of the Commission's EIS, but rather challenges the Commission's decision, based on the evidence in the record, not to require any measures mitigating upstream and downstream emissions. (R. 15). This decision is an extension of the Commission's balancing of public benefits and adverse effects that "requires a high level of technical expertise" in which courts "defer to the informed discretion of the [Commission]." *See Delaware Riverkeeper Network*, 753 F.3d at 1313 (D.C. Cir. 2014) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)). Just as the Commission has authority to impose conditions upon the issuance of a certificate, it also has authority to refuse to impose conditions. *Oklahoma Nat. Gas Co. v. FPC*, 257 F.2d 634, 639-40 (D.C. Cir. 1958).

The Commission "enjoys broad discretion to invoke its expertise in balancing competing interests . . . bounded by the requirements of reasoned decisionmaking." *American Gas Ass'n v.*

FERC, 593 F.3d 14, 19 (D.C. Cir. 2010) (citations omitted). This means the Commission "must fully articulate the basis for its decision." *Id.* (citing *Missouri Pub. Serv. Comm'n v. FERC*, 234 F.3d 36, 41 (D.C.Cir. 2000)). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Sierra Club v. Dep't of Energy*, 867 F.3d at 203 (quoting *Robertson*, 490 U.S. at 351).

A. The decision not to attach a condition to mitigate downstream emissions of the 90% of gas traveling through the AFP that will be exported is not arbitrary or capricious because natural gas export is not within the Commission's jurisdiction.

Here, no party disputes that approximately 90% of the gas carried by the AFP will be exported. (R. 8). Because the Commission does not have the authority to regulate the import or export of natural gas, the emissions caused by the eventual combustion of exported gas are outside of the Commission's jurisdiction. *See Sierra Club II*, 867 F.3d at 1372 ("FERC ha[s] no legal authority to consider the environmental effects of [natural gas] exports, and thus no NEPA obligation stemming from those effects."); *see also Sierra Club I*, 827 F.3d at 47 ("[T]he Commission's NEPA analysis [does] not have to address the indirect effects of the anticipated *export* of natural gas . . . because the Department of Energy, not the Commission, has sole authority to license the export of any natural gas."). As far as HOME's argument that the Commission failed to address downstream emissions related to the combustion of exported gas from the AFP, that contention has no legal basis.

B. Furthermore, the Commission's decision not to issue a condition mitigating downstream effects was properly based on substantial evidence in the record and cannot be considered arbitrary or capricious.

Here, no party disputes that all the natural gas traveling through the AFP will be produced at Hayes Fracking Field ("HFF") and that the AFP would "reroute approximately 35% of the production at HFF through the AFP" from the Southway Pipeline. (R. 6). Accordingly,

31.5% of that gas will be exported [2] and those emissions are not within the Commission's jurisdiction. The remaining 3.5% of gas transported through the AFP comes from gas that is already produced, shipped, and sent to end-uses in the United States. Therefore, simply rerouting that gas to different areas in the United States will result in no change to the current quantity of downstream emissions and could even reduce domestic emissions by 31.5%. The Commission partially based its decision on this evidence. (R. 15).

Here, there is no basis for concluding the Commission acted unreasonably in declining to evaluate downstream combustion impacts. Because the Commission "adequately identified and evaluated" evidence of potential adverse effects related to downstream emissions and provided a decision reasonably based on that evidence, this Court should defer to the Commission's expertise by upholding its decision. *See Sierra Club v. Dep't of Energy*, 867 F.3d at 203.

C. The Commission's decision not to attach a condition to mitigate upstream emissions from the AFP's construction is neither arbitrary nor capricious because the Commission considered all the relevant factors and based its decision on substantial evidence in the record.

The Commission's finding that upstream emissions are not relevant here and subsequent decision not to attach a condition mitigating the irrelevant upstream emissions is based on substantial evidence. No party disputes that "the reduction in [gas] transport on the Southway Pipeline would not lead to gas shortages." (R. 6). The Commission took this into account on the record, stating that "[h]ere, the HFF gas is already in production, but just being transported, in part, to different destinations." (R. 15). Following the evidence in the record, the Commission properly concluded "that there is no reasonably foreseeable significant upstream consequence of our approval of the TGP Project." (R. 15).

[2] 90% of gas in AFP is to be exported, multiplied by 35% of the HFF production being rerouted, provides that 31.5% will be exported.

HOME may argue that a future increase in demand for natural gas exports could induce greater gas production from domestic operations, increasing upstream emissions. The D.C. Circuit rejected this argument in the *Sierra Club I*, stating that "export effects do not fall within the Commission's bandwidth." *Sierra Club I*, 827 F.3d at 47. Therefore, "[t]o the extent that [HOME]'s argument focuses on induced production from domestic operations," their argument must fail. *Sierra Club I*, 827 F.3d at 47.

Here, the Commission "adequately identified and evaluated" evidence of potential adverse effects related to upstream emissions and provided a decision reasonably based on that evidence. *See Sierra Club v. Dep't of Energy*, 867 F.3d at 203. Accordingly, this Court should defer to the Commission's expertise by upholding its decision.

CONCLUSION

For the foregoing reasons, this Court should find the Commission's decision in the CPCN Order was not arbitrary or capricious. Accordingly, because its decision to issue the CPCN Order was based on substantial evidence, and because HOME failed to assert a substantial burden on its exercise of religion, this Court should uphold the CPCN Order.