TEAM 39

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH,
Petitioner,

-and-

TRANSNATIONAL GAS PROJECT, LLC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

On Petitions for Review of Orders of the Federal Energy Regulatory Commission in consolidated case nos. 23-01110 and 23-01109, Chief Judge Delilah Dolman.

Brief for Respondent, FEDERAL ENERGY REGULATORY COMMISSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The Federal Energy Regulatory Commission ("FERC" or "Commission") denied petitions for rehearing by the Holy Order of Mother Earth ("HOME") and Transnational Gas Pipelines, LLC ("TGP"), per 15 U.S.C. § 717r(a). FERC affirmed its issuance of an Order granting TGP a Certificate of Public Convenience and Necessity ("CPCN Order") to construct the American Freedom Pipeline ("AFP" or "AFP Project"). HOME and TGP filed individual Petitions for Review of the CPCN and Rehearing Orders with the United States Court of Appeals for the Twelfth Circuit, consolidated under Docket 23-01109. This Court has jurisdiction under 15 U.S.C. § 717r(b), which provides "any circuit wherein the natural-gas company to which the order relates is located" the ability to review an order issued by the FERC.

STATEMENT OF THE ISSUE

I. Was FERC's finding of public convenience and necessity for the export-driven AFP project arbitrary and capricious or not supported by substantial evidence?

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

III. Did FERC's decision to route the AFP over HOME property violate RFRA?

IV. Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA?

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

STATEMENT OF THE CASE

I. Development of Pipeline Project

On June 13, 2022, TGP filed an application in Docket No. TG21-616-000 for authorization to construct and operate the AFP, pursuant to section 7(c) of the Natural Gas Act

("NGA") and Part 157 of FERC's regulations. R. at ¶ 1. This followed TGP's open season for service on the AFP, held February 21 to March 12, 2020, during which binding precedent agreements were executed with two providers for 100% of the AFP's capacity. R. at ¶ 11. The AFP would carry natural gas from the Hayes Fracking Field ("HFF") in Old Union to a proposed connection with an existing transmission facility ("the TGP Project") in New Union. R. at ¶ 12.

As part of its application, TGP presented evidence that the liquefied natural gas "LNG" demand in regions east of Old Union has been steadily declining. Due to this decline, market needs will be better served by rerouting the LNG through the AFP. Approximately 35% of the production at HFF will be rerouted through the AFP rather than the existing Southway Pipeline, resulting in increased access to natural gas and optimization of existing systems. R. at ¶¶ 12-13.

II. Issuance of Certificate of Public Convenience and Necessity

On April 1, 2023, FERC issued an order in Docket No. TG21-616-000 authorizing TGP, under Section 7 of the NGA, to construct and operate the American Freedom Pipeline subject to the conditions in the order. R. at ¶ 2. Section 7 of the NGA grants FERC the authority to issue a certificate of public convenience and necessity for the construction of an interstate pipeline if the pipeline "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e); 15 U.S.C. § 717f(c).

FERC further laid out its analytical approach to balancing public interest with adverse effects in order to evaluate public convenience and necessity. *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) ("Certificate Policy Statement"). First, FERC assesses "whether the project can proceed without subsidies from their existing customers." *Id.* at ¶ 61,745. It is not disputed that this threshold was successfully met in the present case. R. at ¶

21. Next, FERC evaluates "any adverse effects the project might have on the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline." Certificate Policy Statement, 88 FERC ¶ 61,227 at ¶ 61,745. FERC found "that the benefits the TGP Project will provide to the market outweigh any adverse effect[ ]" the project might cause. R. at ¶ 3.

FERC imposed the environmental conditions recommended in the AFP's Environmental Impact Statement ("EIS"). FERC found that the AFP's adverse environmental impacts could be "reduced to less-than-significant levels" with the implementation of the measures. R. at ¶ 3.

III. Challenges to CPCN at Rehearing

HOME and TGP each filed requests for rehearing of the CPCN Order. HOME sought rehearing, contending that: 1) the export-driven nature of the AFP precludes a finding of project need, 2) the negative impacts of the AFP outweigh its benefits, 3) the decision to route the AFP over HOME property violated the Religious Freedom and Restoration Act ("RFRA"), and 4) the CPCN Order must require mitigation measures for upstream and downstream greenhouse gas ("GHG") impacts. R. at ¶ 5. TGP challenged FERC's ability to impose GHG mitigation measures ("GHG Conditions") to address the AFP's construction-based emissions, arguing that the GHG Conditions imposed addressed "major questions" beyond FERC's authority.

IV. FERC Order Denying Rehearing

FERC denied the rehearing petitions of both HOME and TGP. FERC identified many domestic benefits from the AFP: providing natural gas to underserved areas in New Union; expanding national access to natural gas sources; optimizing the existing systems to help market competition; fulfilling capacity in the NorthWay Pipeline; and improving air quality by replacing dirtier fossil fuels with cleaner-burning natural gas. R. at ¶ 27. FERC affirmed its decision using

prior cases in which export precedent agreements were sufficient to demonstrate market need and support a finding of public convenience and necessity. R. at ¶¶ 16, 30.

FERC likewise provided evidence that the benefits from the AFP outweigh its social and environmental harms, specifically rejecting HOME's support for their alternative route and criticism of TGP's limited easement agreements. R. at ¶ 44.

FERC concluded that the AFP does not impede HOME's free exercise rights sufficiently to be in violation of RFRA. There will be minimal impediments to HOME's practices, including the Solstice Sojourn, because TGP agreed to bury the AFP and expedite construction. R. at ¶ 41.

FERC demonstrated that imposing conditions to mitigate the AFP's construction-based emissions relates directly to the Commission's authority under NGA, and cannot be seen as a major question due to the conditions' project-specific nature. R. at ¶¶ 86-89. FERC supported this position with case law affirming its expertise and discretion in determining appropriate mitigation measures. R. at ¶ 87.

FERC determined that it would be inappropriate to impose GHG conditions to address the AFP's upstream and downstream GHG emissions. FERC comprehensively evaluated the expected impacts of those emissions, then concluded that their mitigation would be unwarranted because of their limited scope and the Commission's lack of finalized internal guidance. R. at ¶¶ 97, 99-100. FERC nonetheless affirmed its authority to impose such measures. R. at ¶ 96.

V. Current Status of Cases

HOME and TGP filed individual petitions for review with the United States Court of Appeals for the Twelfth Circuit challenging FERC's CPCN Order and Rehearing Order.

SUMMARY OF THE ARGUMENT

FERC has broad authority under section 7 of the NGA to consider a range of factors in deciding public convenience and necessity. 15 U.S.C. § 717f(e); R. at ¶ 16. From a plain reading of section 7, there is no statutory limit to the factors FERC may consider. 15 U.S.C. § 717f(e); *see Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 391 (1959) (holding that section "7(e) requires the Commission to evaluate all factors bearing on the public interest.").

Courts have consistently affirmed FERC's practice of relying on precedent agreements to determine market need. *See Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015); *see Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019); *see Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 108 (D.C. Cir. 2022); *see City of Oberlin, Ohio v. FERC (Oberlin II)*, 39 F.4th 719 (D.C. Cir. 2022). FERC's discretion in determining the probative value of export precedent agreements is equal to its discretion over non-export precedent agreements; the nature of the end user is not the sole determinant of market need. *See Del. Riverkeeper*, 45 F.4th at 11 (finding a contract for gas to be transported to unknown end-users still indicative of market need); *c.f. Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392, 1398-99 (11th Cir. 1998) (affirming FERC's application of general economic assumptions to a finding of public convenience and necessity). FERC also does not distinguish between export to countries with which the United States has free trade agreements ("FTA countries") and non-FTA countries, thereby arguing that the domestic benefits from trade explained in the Rehearing Order and in *Oberlin II* apply regardless of the existence of a free-trade agreement ("FTA"). R. at ¶¶ 16, 30.

FERC's finding that the benefits from the AFP outweighed the environmental and social harms was not arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). FERC has the discretion to designate which factors are relevant in balancing public benefits against adverse impacts and relied only on factors within its congressional authority in making its determination. *See Myersville,* 783 F.3d 1301. Furthermore, FERC properly considered all important aspects of the problem, including HOME's alternative route and TGP's failure to obtain easement agreements. Finally, FERC's approval of the AFP was well supported by the evidence before it and was a clear application of agency experience. *See Twp. of Bordentown, New Jersey v. FERC,* 903 F.3d 234 (3d Cir. 2018).

FERC's decision to route the AFP over HOME property did not violate RFRA. As required by 42 U.S.C. § 2000bb-1(a)(b), FERC's approval of the AFP did not substantially burden HOME; even if it had, the approval was the least restrictive means of furthering a compelling governmental interest. Despite disrupting sacred elements of HOME's beliefs, FERC's approval of the AFP did not compel HOME's members to either modify their behavior or violate their beliefs. *See Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996). FERC also did not force HOME to choose between exercise of religion or a punitive outcome. *See Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981). Additionally, given the AFP's public necessity, its approval is clearly a compelling governmental interest. As the effects of the approval were applied equitably and uniformly, it was the least restrictive means of furthering that interest. *United States v. Indianapolis Baptist Temple,* 224 F.3d 627 (7th Cir. 2000).

FERC was authorized by Congress to impose conditions to mitigate the AFP's GHG emissions ("GHG Conditions") through the project's CPCN Order. FERC has clear authority to impose environmental conditions through CPCN Orders. *Bordentown,* 903 F.3d at 261 n.15. The widespread federal recognition of the environmental impacts of GHG emissions requires FERC to consider such emissions when evaluating the environmental impact of proposed projects. The

AFP's GHG Conditions do not implicate a major question because they not produce a material "'change' to [the] statutory scheme" of the NGA, and because the economic impacts of these project-specific conditions are insignificant compared to EPA's claims to authority in *W. Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Even if these conditions' inclusion did implicate a major question, the NGA grants FERC the power to attach to proposed projects any terms warranted by public necessity. 15 U.S.C. § 717f(e); 15 U.S.C. § 717b(a). Moreover, FERC's regulation of the environmental impacts of natural gas pipeline construction relates directly to the purpose of the NGA. 15 U.S.C. § 717(a). Finally, FERC's decision to impose these GHG Conditions is not an unstated change in practice because FERC imposes conditions in a project-specific manner. *See* Certificate Policy Statement, 88 FERC ¶ 61,227 at ¶ 61,737.

It was not arbitrary or capricious for FERC to decline to compel mitigation of the AFP's indirect GHG emissions. Following *State Farm*, FERC evaluated all factors relevant to the issue, including environmental impacts and legal risk. *See* 463 U.S. at 43. FERC gave the emissions the required 'hard look' under NEPA, *see Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) ("*Sierra Club*"), and determined that the risks of compelling their benefits outweighed the benefits. FERC duly considered the evidence and concluded that mitigation of these emissions was unnecessary, especially given FERC's lack of finalized policy on their significance. *See also WildEarth Guardians v. Zinke*, 368 F.Supp. 3d 41, 71 n.27 (D.D.C. 2019).

Nonetheless, the Commission did have the authority to compel mitigation of the AFP's indirect GHG emissions. FERC's "authority to enforce any required remediation . . . is amply supported by the applicable federal legislation." *Bordentown*, 903 F.3d at 261 n.15. As the public would bear the negative impacts of these emissions, FERC was authorized to determine that "public convenience and necessity . . . require[d][ ]" their mitigation. *See* 15 U.S.C. § 717f(e).

STANDARD OF REVIEW

FERC's issuance of the CPCN Order and Rehearing Order are to be reviewed under the 'arbitrary and capricious' standard, per the Administrative Procedure Act. 5 U.C.S. § 706(2)(A); *see Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 105-06 (D.C. Cir. 2014).

Agency action is arbitrary and capricious if it: (a) "has relied on factors which Congress has not intended it to consider," (b) "entirely failed to consider an important aspect of the problem," (c) "offered an explanation for its decision that runs counter to the evidence before the agency," or (d) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm,* 463 U.S. at 43. Under this standard, FERC's actions are evaluated to "ensure they are supported by substantial evidence in the record." *Myersville,* 783 F.3d at 1309. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Colo. Interstate Gas Co. v. FERC,* 599 F.3d 698, 704 (D.C. Cir. 2010)); *see Del. Riverkeeper*, 45 F.4th at 108.

The standard of review for alleged undue burdens to HOME's religious beliefs is provided by RFRA. 42 U.S.C. § 2000bb-1 If a government action is found to be substantially burdensome, strict scrutiny review is applied. The standard of review for alleged major questions is "'clear congressional authorization' for the authority . . . claim[ed]" by the agency. *W. Virginia v. EPA*, 142 S. Ct. at 2595, *quoting Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

ARGUMENT

I. FERC'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR AFP WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY AND CAPRICIOUS IN ITS CONSIDERATION OF A PRECEDENT AGREEMENT FOR EXPORT TO BRAZIL.

Oberlin II affirms the permissibility of demonstrating market need by relying on precedent agreements for export to FTA countries. 9 F.4th 719. HOME acknowledged *Oberlin*

II. R. at ¶ 31. Yet, HOME claimed that FERC is acting in an arbitrary and capricious manner by relying on "an explanation for its decision that runs counter to the evidence before the agency." *State Farm,* 463 U.S. at 43. There was an attempt to distinguish (1) between export to Brazil and export to an FTA country, and (2) between 90% for export and 17% for export. R. at ¶¶ 31, 33. HOME's assessment mischaracterized the nature of FERC's determination of market need.

Rather than cursorily checking factors that incompletely assess market need, such as the existence of an FTA or a percentage threshold for exports, FERC engaged in a thorough and reasoned analysis of "public convenience and necessity" based its broad authority under section 7 of the NGA. 15 U.S.C. § 717f(e); R. at ¶ 16; *see also Atl. Ref. Co.,* 360 U.S. at 391 (holding that section "7(e) requires the Commission to evaluate all factors bearing on the public interest."). Congress leaves "public convenience and necessity" undefined and thus open to FERC's interpretation. 15 U.S.C. § 717f(e). This intentional broadness does not prevent FERC from relying on specific factors to demonstrate market need and, crucially, permits FERC's determination of important factors. FERC does not rely "on factors which Congress has not intended it to consider." *State Farm,* 463 U.S. at 43.

To ensure that its decisions are internally consistent and plausible, consider all important aspects of an issue, and are substantiated with evidence, *see id.,* FERC has developed its own guidance in the form of a policy statement. Certificate Policy Statement, 88 FERC ¶ 61, 227. To grant the CPCN Order for the AFP Project, FERC followed the same formula and considered the same substantial factors as usual in order to identify sufficient public convenience and necessity. *Id.*; R. at ¶¶ 18-20, 26. FERC explained that its decision is not a departure from precedent, but rather relies on prior practices and decisions to demonstrate that the decision is not arbitrary and capricious. *See United Mun. Distribs Grp. v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984) ("It is,

of course, elementary that an agency must conform to its prior practice and decisions or explain the reason for its departure from such precedent.").

A. Precedent agreements are a probative factor of market need.

One factor FERC has consistently considered is the existence of precedent agreements in its determination of market need. "Precedent agreements are long-term contracts in which gas shippers agree to buy the proposed pipeline's transportation services." *Del. Riverkeeper,* 45 F.4th at 113-14 (quoting *Allegheny Def. Project v. FERC,* 964 F.3d 1, 19 (D.C. Cir. 2020)). "A contract for a pipeline's capacity [...] reflects a 'business decision' that such a [market] need exists," and furthermore, if "there were no objective market demand for the additional gas, no rational company would spend money to secure the excess capacity." *Bordentown,* 903 F.3d at 262 (quoting *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 884 (9th Cir. 1982)). Here, FERC explained it "found a strong showing of public benefit based on the fact that TGP had executed binding precedent agreements for firm service using 100% of [the] design capacity." R. at ¶ 26.

Courts have granted deference to FERC's "broad discretion in determining [...] public convenience and necessity," *Myersville,* 783 F.3d at 1314, and upheld its reliance on precedent agreements to assess the underlying market need in the following scenarios. The precedent agreements were not in the record but represented by an affidavit. *Id.* at 1310. The precedent agreements accounted for less than 100% of project capacity *Del. Riverkeeper,* 45 F.4th at 114. The precedent agreements were with affiliate corporate shippers. *Appalachian Voices*, 2019 WL 847199 at *1. The precedent agreements were partially for export. *Oberlin II,* 39 F.4th 719. The precedent agreements were for transport to unknown users. *Del. Riverkeeper*, 45 F.4th at 114.

Delaware Riverkeeper underscores FERC's broad discretion in finding market need; FERC granted a CPCN for a project for which the precedent agreements accounted for 76% project capacity but failed to identify all specific end users. 45 F.4th at 114. Crucially, the court

found that contracts for the transport of gas to an undefined end user and undefined end point is still evidence of market demand, despite the indefinite nature of two key factors. *Id*. The same reasoning can be applied to the current case, where some of the gas will be further transported to a foreign end user. R. at ¶¶ 33-34. One distinction is that there is an actual end user in this case, Brazil; therefore, there is a more concrete showing of market need. However, an established end user is not necessary for FERC to identify market need; there simply needs to be a demonstration of market need. The nature of the end user, whether known or unknown, domestic or foreign, is not necessary for a determination of market need.

B. Export precedent agreements are analogous to precedent agreements in FERC's determination of market need.

HOME principally argued that FERC cannot rely on an *export* precedent agreement to demonstrate public necessity. Its presumption that export precedent agreements should be weighed differently than precedent agreements is in tension with FERC's established practices and past court decisions. Export precedent agreements have previously been held to be sufficient in determining market need and thereby public convenience and necessity. *See Oberlin II,* 39 F.4th 719; *see Town of Weymouth, Massachusetts v. FERC*, No. 17-1135, 2018 WL 6921213, at *1 (D.C. Cir. Dec. 27, 2018). Export precedent agreements can be viewed as a subgroup of precedent agreements and therefore retain their probative value in determining market need.

Similar to HOME, the petitioners in *Weymouth* challenged FERC's assessment of public necessity and convenience when a substantial portion of a project's gas was meant for export. No. 17-1135, 2018 WL 6921213, at *1. Petitioners contended that exportation does not advance public interest and necessity. *Id*. The court disagreed, highlighting that the "exportation of natural gas to a nation with which there is in effect a free trade agreement"—as is the case for Canada—is "consistent with the public interest." *Id.* (quoting 15 U.S.C. § 717b(c)).

Following *Weymouth*, in *City of Oberlin, Ohio v. FERC (Oberlin I)*, 937 F.3d 599 (D.C. Cir. 2019), the court initially pushed FERC to explain the lawfulness of allowing export precedent agreements to serve as indicators of domestic need. FERC substantially evidenced its decision by partially relying on a section 3 finding of public interest to inform its decision to approve a section 7 project substantiated by export precedent agreements. *Oberlin II*, 39 F.4th at 724, 727; 15 U.S.C. § 717b(c); *see Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1065 (D.C. Cir. 1974) ("The Commission has long regarded the Section 3 'public interest' standard and Section 7's 'public convenience and necessity' standard as substantially equivalent.").

FERC pointed to *Oberlin II* in response to HOME's claim that the export-driven purpose of the AFP does not serve public interest. R. at ¶ 30. The *Oberlin II* court accepted that "myriad domestic benefits stem from increasing transportation services for gas shippers regardless of where the gas is ultimately consumed," such as increasing "capacity to transport gas out of the Appalachian Basin" and supporting "production and sale of domestic gas." 39 F.4th at 727. Similar benefits are expected from the AFP, as it will provide natural gas to underserved areas in New Union, expand national access to natural gas sources, optimize the existing systems to help market competition, fulfill capacity in the NorthWay Pipeline, and improve air quality by replacing dirtier fossil fuels with cleaner-burning natural gas R. at ¶¶ 27, 33.

FERC extends to export precedent agreements its general reasoning regarding the probative value of precedent agreements in determining market need. In *Atlanta Gas Light Co.*, FERC justified its decision to implement a specific bypass policy by describing the general economic benefits derived from such a policy, such as enhanced competition, improved general welfare, and an efficient allocation of resources. 140 F.3d at 1398. Rather than relying on a more specific analysis of this particular bypass policy, FERC acknowledged that its section 7 finding

of public convenience and necessity for the bypass policy is "based on several economic assumptions about the way the market for natural gas as a whole will perform." *Id.* Notably, the court upheld FERC's determination and stated that "it is well within the Commission's discretion to make such 'predictions' so long as they are 'rationally based on record evidence,'" *Id.* (quoting *Mich. Consol. Gas Co. v. FERC*, 883 F.2d 117, 124 (D.C. Cir. 1989). With the AFP Project, FERC justified its export-driven determination of market need the same way as it did in *Atlanta*, applying general economic assumptions regarding the value of precedent agreements to the specific subcategory of export precedent agreements.

C. The export precedent agreement to Brazil demonstrated public convenience and necessity under Section 7 of the NGA.

FERC's reasoning in *Oberlin II* is conclusive. In *Oberlin II*, FERC relied on the congressional determination that approval of natural gas exports to any country is allowed by section 3(a) in the NGA "unless the proposed exportation 'will not be consistent with the public interest[.]'" *Oberlin II,* 39 F.4th at 726 (quoting 15 U.S.C. § 717b(a)). FERC further explained that section 3 reasoning can be used in a section 7 determination of public convenience and necessity in order to give "precedent agreements for the transportation of gas destined for export the same weight [...as] other precedent agreements," *Oberlin II,* 39 F.4th at 727; 15 U.S.C. § 717f(c). Lack of section 3 authorization for gas exportation to Brazil does not bar FERC's finding "that LNG that is produced in the United States and exported serves the 'public interest'" and does not draw a meaningful distinction between trade to an FTA country and non-FTA country. *See* R. at ¶ 33. There are substantial benefits of trade to the public, notwithstanding the existence of FTAs. "[A]n essential ingredient of public convenience and necessity is adequate markets;" accordingly, trade with countries with which the United States has long had "policies of cooperation" is consistent with public interest and encourages the development of adequate

markets. *Mich. Consol. Gas Co. v. Fed. Power Comm'n*, 246 F.2d 904, 912 (3d Cir. 1957). *Michigan Consolidated Gas Company v. Fed. Power Comm'n* recognized the importance of trade with Canada prior to any FTA. *See generally Statement On the United States-Canada Free Trade Agreement,* 1 Pub. Papers 4 (Jan. 2, 1988) (announcing the US-Canada FTA). Just as the proposed pipeline in *Oberlin II* was determined to provide indubitable public benefits and contributions to the domestic economy, such as supporting domestic jobs and promoting stability, so will the AFP Project. *See* R. at ¶¶ 27, 33-34.

By refusing to distinguish between FTA and non-FTA countries, FERC makes the argument that domestic benefits from trade apply regardless of the existence of a FTA This is especially true in the case of LNG exports, where none of the top four importers of U.S. LNG are FTA countries. *See* FERC, *2022 State of the Markets: A Staff Report to the Commission* (2023) (noting that about half of U.S. LNG exports were to France, United Kingdom, Spain, and Netherlands); *see generally* Office of the United States Trade Representative, *Free Trade Agreements,* (Nov. 03, 2023), *https://ustr.gov/trade-agreements/free-trade-agreements* (listing FTA countries).

From an energy security and comparative advantage perspective, FERC's decision to allow for the construction of an interstate pipeline that will export LNG benefits the United States. *See generally* Sam Kalen, *A Bridge to Nowhere? Our Energy Transition and the Natural Gas Pipeline Wars*, 9 Mich. J. Envtl. & Admin. L. 319 (2020). The environment in which FERC made its determination concerning the AFP was one where "[t]ight LNG supplies contributed to increasing international prices, which reached record levels, incentivizing U.S. LNG exports." *State of the Markets* at p. 8 This is reflected in FERC's "approval and expansion of multiple

LNG export facilities in 2022" that increased "LNG liquefaction capacity to serve the growing international LNG demand to higher-priced regions." *Id.*

FERC read section 7 of the NGA plainly, applied economic reasoning and its understanding of global markets, and relied on key decisions and arguments from *Weymouth, Oberlin*, and other cases to evaluate the AFP Project and provide substantial evidence in order to justify a finding of public convenience and necessity in TGP's proposed pipeline.

II. FERC'S FINDING THAT THE BENEFITS FROM THE AFP OUTWEIGHED THE ENVIRONMENTAL AND SOCIAL HARMS WAS NOT ARBITRARY AND CAPRICIOUS.

FERC's finding that the benefits outweighed the harms did not meet any of the prongs established in *State Farm* and thus was not arbitrary and capricious. 463 U.S. at 43.

A. FERC relied only on factors that Congress intended for it to consider.

FERC has the discretion to designate which factors are relevant in balancing benefits and adverse impacts. FERC's congressional authority to evaluate environmental and social harms was well established by its discretionary authority and precedent. *See Myersville,* 783 F.3d 1301.

In balancing the benefits and harms of proposed projects, FERC's responsibility is not just to those who stand to be adversely affected by the construction of the AFP but also to the wider public which stands to benefit. *Panhandle E. Pipe Line Co. v. Fed. Power Comm'n,* 386 F.2d 607 (3d Cir. 1967). FERC is a public guardian, and thus must ensure that broader factors of public interest are always considered in balancing interests of infrastructure. Furthermore, FERC should be given a broad discretionary latitude to determine the most relevant factors of public benefit. *Fla. Power & Light Co. v. FERC,* 598 F.2d 370 (5th Cir. 1979). Additionally, HOME's religious beliefs are not given extra weight against the multitude of other factors that FERC must balance. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

In their consideration, FERC drew upon its expertise and authority in balancing the broad public benefits of the AFP in improved natural gas access with the individual objections of HOME. R. at ¶¶ 30, 33. Thus FERC carefully evaluated the many considerations and relied only on congressional authorized factors.

B. FERC considered all important aspects of the problem.

HOME contends that FERC acted arbitrarily and capriciously in approving the AFP without considering HOME's alternative route or the fact that TGP failed to obtain easement agreements with all landowners along the route of the AFP. However, FERC properly considered both aspects in their approval of the AFP and correctly dismissed both issues.

1. FERC was not required to adopt HOME's alternative route.

FERC properly considered HOME's alternative route, thus the route's rejection was not arbitrary and capricious. No single factor should be given overwhelming significance in FERC's consideration of alternative actions. *See Midcoast Interstate Transmission, Inc. v. FERC,* 198 F.3d 960 (D.C. Cir. 2000). Thus, FERC properly considered HOME's proposed alternative route.

In determining the appropriateness of alternative actions, FERC can account for potential environmental impacts. *Minisink,* 762 F.3d 97. In *Minisink,* FERC rejected a proposed alternative site for an LNG infrastructure project based on the fact that the site would have had more significant environmental impacts. *Id*. FERC also can consider factors that outweigh ecological impacts. Even when an alternative route had less environmental impacts, economic considerations led FERC to dismiss it. *Midcoast,* 198 F.3d 960. Likewise, FERC prioritizes public need and convenience when deliberating alternatives. FERC has chosen routes where public convenience and necessity were better served, despite being more expensive. *Tex. E. Transmission Corp. v. Wildlife Preserves, Inc.*, 225 A.2d 130 (1966).

In approving the AFP, FERC was not compelled to adopt HOME's alternative route for the AFP. Similarly to *Minisink*, FERC saw that the proposed alternative route would have run through more environmentally sensitive ecosystems; a fact which HOME does not dispute, R. at ¶ 44, and rejected the proposal that would have led to greater environmental impacts. Moreover, like in *Midcoast*, the alternative route was rejected as it would have resulted in an additional $51 million in construction costs. *Id.* Finally, as in *Texas*, the societal importance of the AFP and its infrastructure benefits were given proper weight over the HOME's objections.

Given FERC's consideration of relevant factors and the heightened impacts of the alternative route, FERC's decision to reject HOME's route was not arbitrary and capricious.

2. TGP was not required to obtain comprehensive easement agreements with landowners along the route of the AFP.

FERC properly considered TGP's failure to obtain comprehensive easement agreements with landowners along the route of the AFP. As such, FERC's subsequent decision to approve the AFP in spite of this was not arbitrary and capricious. TGP negotiated in good faith with landowners, and where objecting landowners were not completely placated, the usage of eminent domain was reasonable. *See Columbia Gas Transmission Corp. v. An Exclusive Gas Storage Easement*, 578 F. Supp. 930 (N.D. Ohio 1983).

Natural gas operators have consistently been permitted to exercise eminent domain following good faith negotiations with landowners. *See, e.g., Alliance Pipeline L.P. v. 4.360 Acres of Land, Renville Cnty., N.D.*, 746 F.3d 362 (8th Cir. 2014); *Millennium Pipeline Co. v. Acres of Land, Inc.*, 107 F. Supp. 3d 249 (W.D.N.Y. 2014). Even in cases where a significant proportion of landowners did not agree to easements, the importance of natural gas infrastructure and public need has overruled individual objections and disputes. Eminent domain has been found to be justified in distinct cases of a natural gas pipeline and a storage facility based on the

importance of supplying natural gas to the public. *See, e.g., Mountain Valley Pipeline, LLC v. W. Pocahontas Properties Ltd. P'ship*, 918 F.3d 353 (4th Cir. 2019); *Columbia*, 578 F. Supp. 930. Finally, export precedent agreements have also been used by FERC to authorize the use of eminent domain. *Oberlin II*, 39 F.4th at 728.

In negotiating the AFP, TGP was not required to obtain easement agreements with all landowners along the route. TGP demonstrated good faith in its negotiations with HOME and other landowners on the route of the AFP. R. at ¶¶ 41, 43. Furthermore, FERC acknowledged the environmental objections raised and imposed numerous measures aimed at mitigating these concerns. R. at ¶ 67. Given the proper nature of the negotiations, eminent domain was justified, like in the cases of *Alliance* and *Millenium*. Additionally, like in *Mountain Valley, Columbia*, and *Oberlin*, eminent domain was correctly necessitated because the interests of the landowners along the path of the AFP were appropriately balanced against the overall public benefits of improved natural gas access. R. at ¶¶ 30, 33. Thus, FERC adequately considered TGP's failure to obtain easement agreements with all landowners along the route of the AFP.

As FERC did not inappropriately dismiss HOME's alternative route or the lack of easement agreements, FERC properly considered all important aspects of the problem. Consequently, FERC's decision to approve the AFP was not arbitrary and capricious.

C. FERC did not offer an explanation for its decision that runs counter to the evidence before the agency, & the action is not so implausible that it could not be ascribed to a difference in view or the product of agency experience.

FERC's finding that the environmental impacts of the AFP did not outweigh the social benefits was well supported by the evidence before it and consistent with previous FERC actions, demonstrating agency experience. *See, e.g., Ariz. Pub. Serv. Co. v. Fed. Power Comm'n*, 490 F.2d 783 (D.C. Cir. 1974); *Bordentown*, 903 F.3d 234. FERC's approval of the AFP was

based on its thorough process of determining environmental impacts and its precedent of recognizing the importance of public benefits over adverse impacts of energy infrastructure.

There are multiple procedural requirements placed upon FERC in the determination of environmental impacts. FERC is usually required by NEPA to develop an EIS. 42 U.S.C. § 4332(a). Within an EIS, FERC must include reasonable discussion of GHG impacts. *See Sierra Club*, 867 F.3d 1357. FERC must further act critically and objectively, not just to rationalize a pre-made approval. *See City of Los Angeles, California v. Fed. Aviation Admin.*, 63 F.4th 835 (9th Cir. 2023). Where the public is party to proceedings, FERC is not required to be the primary producer of the EIS. *Ariz.*, 490 F.2d 783.

In determining the AFP's potential environmental impacts, FERC followed all appropriate procedures. The AFP's EIS properly assessed the project's specific ecological impacts and accounted for carbon emissions. R. at ¶ 89. The GHG Conditions FERC imposed and TGP's subsequent pushback demonstrates that the EIS was not created to rationalize a pre-made approval, satisfying the requirements of *Sierra Club* and *City of Los Angeles*. R. at ¶¶ 67, 72. Thus, FERC's evidence to support its environmental findings was properly produced.

From the evidence, FERC appropriately determined that the environmental impacts of the AFP as approved are not significant. While FERC is required under NEPA to produce a "hard look" substantive report of environmental effects, it is not required to make a worse case analysis. *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835 (1989). FERC appropriately considered the reasonable ecological impacts of the AFP, and required mitigation of the project's significant impacts. R. at ¶ 67.

Finally, FERC's approval of the AFP was a product of its experience and was consistent with historical decision making. Supported by its authority in balancing public benefits involving

energy demand, access, and environmental objectives, FERC appropriately found that improved natural gas infrastructure outweighs the adverse impacts of the AFP. *See, e.g., Env't Def. Fund v. FERC,* 2 F.4th 953 (D.C. Cir. 2021); *Nat'l Coal Ass'n v. Fed. Power Comm'n,* 191 F.2d 462 (D.C. Cir. 1951); R. at ¶¶ 30, 33. FERC has further specifically recognized the importance of natural gas infrastructure *See, e.g., Allegheny,* 964 F.3d 1; *Bordentown,* 903 F.3d 234. Thus, FERC's approval of the AFP was based on its agency experience and was not implausible.

Therefore, by all standards, FERC's finding did not fall under any of the prongs established in *State Farm* and thus was not arbitrary and capricious.

III. FERC'S DECISION TO ROUTE THE AFP OVER HOME PROPERTY DID NOT VIOLATE THE RFRA.

FERC's decision to route the AFP over HOME property despite HOME's religious objections was not in violation of the RFRA. The AFP is not substantially burdensome of HOME members' exercise of religion, is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest.

A. The AFP does not substantially burden HOME's members' exercise of religion.

Substantial burdens occur when individuals or groups are compelled either to modify their behavior or violate their beliefs. *Thiry,* 78 F.3d 1491.

The AFP does not substantially burden HOME by compelling its members to modify their behavior. Under the RFRA, government actions that may interfere with sacred elements or beliefs of one's religion do not necessarily compel modified behavior. *See Navajo Nations v. U.S. Forest Serv*., 535 F.3d 1058 (9th Cir. 2008). Only when the ability to physically exercise is limited is the RFRA violated. Although fake snow on a sacred mountain was sacrilegious, it did not prevent access to the mountain to perform religious observances. *Id.* Similarly, a power plant

that disrupted a religiously significant waterfall but did not limit any ability to perform religious activities was approved. *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008).

Even in cases where access was changed, such disruptions have to be substantially interruptive to compel modified behavior. *Thiry*, 78 F.3d 1491. For example, the moving of a gravesite, despite beliefs in the sanctity of burial sites, did not interrupt access and thus was not substantially burdensome. *Id.* Likewise, although inconvenient, banning parking near a religious site neither prevented nor significantly burdened followers' access and thus did not compel modified behavior. *Storm v. Town of Woodstock, New York*, 944 F. Supp. 139 (N.D.N.Y. 1996).

In contrast, government actions that force individuals to choose between religion or a punitive outcome do compel modified behavior. *See Thomas*, 450 U.S. 707. Forcing an employee to choose between their jobs and their beliefs by producing arms was substantial pressure to modify behavior. *Id.* Similarly, demotion due to religious refusals to undergo testing was substantial pressure. *Navy Seal 1 v. Austin*, 599 F. Supp. 3d 1233 (M.D. Fla. 2022).

FERC's authorization of the AFP did not compel HOME's members to modify their behavior. There is no element of HOME's religious practices that can no longer be performed due to the construction of the AFP. R. at ¶ 56, 59. Although the AFP represents a sacrilegious usage of land, like in *Navajo* and *Snoqualmie*, it does not physically interrupt the religious activities including the Solstice Sojourn. Additionally, disruption to HOME's property is minimal and are inconveniences at most. Like *Thiry* and *Storm*, the pipeline's presence underground and the cut trees do not substantially interrupt access. *Id.* Finally, FERC does not force HOME to choose between exercising their religion or a punitive outcome. HOME is not coerced into any specific type of behavior. R. at ¶ 60. Unlike the cases of *Thomas* or *Navy*,

HOME is completely free to exercise their religious beliefs. *Id.* Given these considerations, the AFP does not substantially burden HOME by compelling members to modify their behavior.

Furthermore, the AFP does not substantially burden HOME by compelling its members to violate their beliefs. Interference with sacred beliefs does not necessarily compel the violation. *See Navajo*, 535 F.3d 1058. Like modified behavior, neither fake snow nor a disrupted waterfall actually compelled individuals to violate those same beliefs. *Id*; *Snoqualmie*, 545 F.3d 1207. Similarly, the moving of a gravesite did not compel parents to violate spiritual beliefs. *Thiry*, 78 F.3d 1491. In contrast, government actions that coerce exercise of religion do compel violation of beliefs. Forcing employees to perform objectionable tasks was found to constitute substantial pressure. *Thomas*, 450 U.S. 707.

FERC's authorization of the AFP did not compel HOME's members to violate their beliefs. The AFP does not compel members to violate their religious beliefs. R. at ¶ 60. Like in *Navajo*, *Snoqualmie*, and *Thiry*, HOME's members were not substantially pressured to violate their beliefs by the AFP. *Id.* Unlike in *Thomas*, members were not forced to decide between exercise of religion or a punitive outcome. *Id.* Nothing related to the AFP prevented HOME from exercising their religious beliefs nor imposed limitations against them.

As the AFP does not substantially burden HOME by compelling them to modify their behavior nor violate their beliefs, it is not substantially burdensome.

B. The AFP is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Even if found to be substantially burdensome, FERC's approval of the AFP was correct as the AFP is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

With respect to religion, compelling governmental interests can involve balancing broad schemes with marginal interests. *See Burwell*, 573 U.S. 682. A compelling interest was demonstrated by balancing the need for an efficient tax system versus religious interests. *See, e.g., id.*; *Baptist Temple*, 224 F.3d 627. The AFP is clearly a compelling government interest as demonstrated through FERC's determination of the AFP's public necessity.

Moreover, FERC's authorization of the AFP was the least restrictive means of furthering that interest. Least restrictive means are identified when government action is applied equitably and uniformly. *See Baptist Temple*, 224 F.3d 627. Uniformity of means was required for taxes affecting religious groups. *Id.*; *Burwell*, 573 U.S. 682. In contrast, a mandatory vaccine program was ruled to violate the RFRA, as less invasive means of preventing the spread of COVID-19 were available for those with religious objections. *Air Force Officer v. Austin*, 588 F. Supp. 3d 1338 (M.D. Ga. 2022).

Furthermore, agencies are given appropriate latitude to limit religious exercise. *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996). Prison officials have been given deference to maintain safety despite religious objections. *Id.*; *Show v. Patterson*, 955 F. Supp. 182 (S.D.N.Y. 1997). This deference has been applied to broader fields, including limitations on public religious gatherings. *See Mahoney v. United States Capitol Police Bd.*, 566 F. Supp. 3d 1 (D.D.C. 2022).

Given FERC's balancing of the public benefits of the AFP, there is a compelling governmental interest, like *Burwell* and *Baptist Temple*. R. at ¶¶ 26, 33. The AFP also uniformly impacts all property owners along the route, constituting a least restrictive means. R. at ¶ 63. Furthermore, HOME's religious interests could not be prioritized over the other considerations. *Panhandle*, 386 F.2d 607. FERC is also given authority to create appropriate decisions based on

their analysis of the AFP's impacts, like *Show* and *Mahoney*. Thus, the AFP is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

Therefore, by all standards, FERC's decision to route the AFP over HOME property despite HOME's religious objections was not in violation of the RFRA.

IV. FERC HAD CLEAR STATUTORY AUTHORITY TO IMPOSE THE GHG CONDITIONS.

FERC is authorized by the NGA and subsequent legislation to impose GHG Conditions on the AFP. Despite TGP's assertion to the contrary, FERC's use of its discretionary authority to impose GHG Conditions is not an unstated change in practice. FERC imposes conditions tailored to each specific project's environmental impacts with the best available information.

A. Congress authorized the Commission to impose enforceable environmental conditions on the approval of natural gas pipelines.

The Commission is authorized by Congress to impose environmental conditions as a part of its issuance of CPCN Orders. This authority is undisputed by TGP and HOME.

In 1938, Congress granted the Commission "the power to attach to the issuance of the [CPCN Order] . . . reasonable terms and conditions" through the NGA. 15 U.S.C. § 717f(e). Violating such conditions has severe consequences; each violation is enforceable by "a civil penalty" of up to "$1,000,000 per day[.]" 15 U.S.C. § 717t-1. Congress gave "explicit endorsement of the view that the Commission should consider environmental issues when granting annual licenses[ ]" through the 1986 Electric Consumers Protection Act. *Platte River Whooping Crane Critical Habitat Maint. Tr. v. FERC*, 876 F.2d 109, 117 (D.C. Cir. 1989).

The Commission routinely exercises this authority to impose environmental conservation measures on proposed projects. *See generally, e.g., Transco. Gas Pipe Line Co., LLC*, 155 FERC ¶ 61,016, at P 90 (2016) (issuing a CPCN Order approving the project's construction and imposing environmental conditions recommended in the project's Environmental Assessment,

including measures related to erosion control, sedimentation, and revegetation).

B. The federal government has recognized the negative environmental impact of GHG emissions.

All three branches of the federal government have recognized that GHG emissions impact the environment. This recognition requires FERC to consider such emissions when evaluating the environmental impact of proposed projects.

Congress has studied the link between GHG emissions and environmental impacts for decades. In 1990, Congress established the U.S. Global Change Research Program (GCRP) to "understand[ ] and respond[ ] to global change, including the cumulative effects of human activities and natural processes on the environment[.]" Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096, 3096 (1990). The National Climate Assessments issued by the GCRP emphasize the link between GHG emissions and environmental impacts. *See generally, e.g.*, GCRP, Fourth National Climate Assessment: Volume II 16 (2018) (declaring the need for global reduction of GHG emissions to avert significant environmental impacts).

More recently, Congress explicitly named the environmental impacts of GHG emissions throughout the Infrastructure Investment and Jobs Act. *See generally*, Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, 751, 860, 1045-46, 1267 (2021) (directing various agencies to reduce, identify, or research GHG emissions due to the environmental impacts of those emissions). Congress specifically directed one agency to consider "construction materials that reduce greenhouse gas emissions" in evaluating grant proposals. *Id.* at 721.

The Supreme Court has also recognized the environmental impacts of GHG emissions. While the Court "endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change," *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 417 n.2 (2011), it has recognized the link between GHG emissions and climate change when agency

action concerning GHG emissions mitigation has been challenged. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) (acknowledging that EPA could legitimately make a judgment that GHG emissions contribute to climate change); *W. Virginia v. EPA*, 142 S. Ct. at 2614 (acknowledging that "the dangers posed by greenhouse gas emissions 'ha[ve] become well known'"); *W. Virginia v. EPA*, 142 S. Ct. at 2626 (Kagan, J., dissenting) (asserting that "the emission of greenhouse gases like carbon dioxide" has environmental consequences).

In the executive branch, President Biden has recognized the environmental impacts of GHG emissions through Executive Orders, speeches, and actions such as establishing a National Climate Task Force and Federal Sustainability Plan. *See generally*, Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021); Joseph R. Biden Jr., Remarks by President Biden on Actions to Tackle the Climate Crisis (July 20, 2022); Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021); Exec. Order No. 14057, 86 Fed. Reg. 70935 (Dec. 8, 2021). Agencies such as the Council on Environmental Quality and EPA have affirmed the environmental harms of GHG emissions. *See generally*, NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023); *Basics of Climate Change*, EPA, (Nov. 19, 2023, 4:48 PM), https://www.epa.gov/climatechange-science/basics-climate-change.

In light of this widespread recognition of the environmental impacts of GHG emissions, FERC cannot exclude GHG emissions from its consideration of projects' environmental impacts.

C. The GHG Conditions imposed on the AFP are environmental conservation measures within FERC's statutory authority to impose.

FERC had clear authority to impose on the AFP conditions relating to environmental considerations, including the GHG Conditions. TGP asserts that the GHG Conditions FERC imposed on the AFP exceeded its authority, and that FERC's imposition of similar conditions in several section 7 CPCN Orders issued since this CPCN Order's issuance indicates an "unstated

new policy" implicating a "major question[ ]" of "economic and political significance[.]" *W. Virginia v. EPA*, 142 S. Ct. at 2595, 2596; R. at ¶¶ 83-85. FERC rejects both assertions.

Under the major-questions doctrine, certain "extraordinary cases" can "provide a 'reason to hesitate before concluding that Congress' meant to confer . . . authority to an agency." *W. Virginia v. EPA*, 142 S. Ct. at 2608, *citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000). Relevant considerations include when an agency utilizes "[n]ew-found powers in old statutes[,]" *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 297 (4th Cir. 2023), *citing W. Virginia v. EPA*, 142 S. Ct. at 2610, "when there is a . . . 'distinct regulatory scheme' already in place to deal with the issue[,]" *N.C. Coastal Fisheries*, 76 F.4th at 297, *citing Brown & Williamson*, 529 U.S. at 143-46, when an "[e]xtraordinary grant[ ] of regulatory authority" is taken from "'modest words,' 'vague terms,' or 'subtle device[s][,]'" *W. Virginia v. EPA*, 142 S. Ct. at 2609, *citing Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001), or when an agency utilizes "oblique or elliptical language . . . to make a 'radical or fundamental change' to a statutory scheme," *W. Virginia v. EPA*, 142 S. Ct. at 2609, *citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994). If agency action implicates a major question, the agency must point to "'clear congressional authorization' for the authority it claims." *W. Virginia v. EPA*, 142 S. Ct. at 2595, *quoting Util. Air*, 573 U.S. at 324.

The GHG Conditions FERC imposed on the AFP do not implicate a major question. FERC's power to impose discretionary conditions is not a "[n]ew-found power[ ]" in an "old statute[ ]" but a discretionary power explicitly granted authority under the NGA. *N.C. Coastal Fisheries*, 76 F.4th at 297; *see* 15 U.S.C. § 717f(e). As described above, FERC routinely utilizes this authority to impose environmental conditions. *See generally, e.g., Transco. Gas Pipe Line Co., LLC*, 155 FERC ¶ 61,016, at P 90. Recent consensus on the negative environmental impacts

of GHG emissions rationally led FERC to impose the GHG Conditions.

FERC's imposition of the AFP's GHG Conditions does not produce a "'change' to [the] statutory scheme" of the NGA, let alone a "radical or fundamental" one. *W. Virginia v. EPA*, 142 S. Ct. at 2609. The GHG Conditions imposed on this specific project's construction do not materially impact the NGA's statutory scheme; in fact, they adhere to it by regulating the relevant environmental impacts of a proposed project. There is likewise no "'distinct regulatory scheme' already in place to deal with the issue" of GHG emissions from pipeline construction. *N.C. Coastal Fisheries*, 76 F.4th at 297. FERC itself sets the regulatory scheme for the interstate natural gas pipeline construction and ensures that projects' impacts are not outsized.

The GHG Conditions imposed on the AFP cannot reasonably be understood to implicate a 'major' question because their impacts are orders of magnitude less significant than the EPA's claims to authority in *W. Virginia v. EPA*. Even factoring in the four unrelated CPCN Orders that impose construction-specific GHG Conditions, the projects approved by those orders have decidedly less "economic and political significance" than EPA's claim to "'unheralded' regulatory power over 'a significant portion of the American economy'" with "billions of dollars of impact" through the Clean Power Plan. *W. Virginia v. EPA*, 142 S. Ct. at 2613, 2605, 2608.

Even if the AFP's GHG Conditions were to implicate a major question, Congress granted FERC clear authorization to impose such measures. The NGA explicitly grants FERC the power to attach to proposed projects any terms it deems warranted by public convenience and necessity. 15 U.S.C. § 717f(e); 15 U.S.C. § 717b(a). This authority is not granted through modest words, vague terms, or subtle devices, *see W. Virginia v. EPA*, 142 S. Ct. at 2609, but through language so clear that it includes an enforcement mechanism for violations. 15 U.S.C. § 717t-1. Congress "need not specifically authorize each and every action taken by" an agency "so long as [its]

action is reasonably related to the duties imposed upon [it][ ]" by statute. *See Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164, 179 (D.C. Cir. 2022) (quoting *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979)). Courts have affirmed the Commission's Congressional authorization to impose environmental conditions at its discretion, *Bordentown*, 903 F.3d at 261 n.15, both for 'direct' emissions resulting from project construction and 'indirect' upstream and downstream emissions. *Sierra Club*, 867 F.3d at 1374. Thus, Congress clearly authorized FERC to impose the GHG Conditions on the AFP.

Moreover, FERC's decision to impose GHG Conditions on the AFP aligns with the purpose of the NGA. "Where Congress has delegated general authority to carry out an enabling statute, an agency's exercise of that authority ordinarily must be 'reasonably related to the purposes of the legislation.'" *Wash. All.*, 50 F.4th at 178 (quoting *Doe, 1 v. Fed. Election Comm'n*, 920 F.3d 866, 871 (D.C. Cir. 2019)) (affirming the Department of Homeland Security's authority to issue a rule because the rule aligned with "nature and purpose" given to its subject matter in the authorizing statute). FERC's regulation of the environmental impacts of pipeline construction relates directly to the purpose of the NGA: to provide "[f]ederal regulation in matters relating to the transportation of natural gas and the sale thereof[.]" 15 U.S.C. § 717(a).

FERC's decision to impose project-specific environmental conditions, including GHG Conditions, is not unstated new policy. The Commission imposes environmental conditions with the best information available during the time a given project is reviewed, tailored to each proposed project's facts and circumstances. *See* Certificate Policy Statement, 88 FERC ¶ 61,227 at ¶ 61,737. Given the overwhelming scientific evidence of the negative environmental impacts of GHG emissions and the burgeoning governmental recognition of those impacts, FERC's determination that the AFP's construction-related GHG emissions required mitigation was

wholly appropriate. TGP's contention to the contrary mischaracterizes the project-specific nature of FERC's decision to impose *any* condition within its authority.

FERC's decision to impose GHG Conditions on the AFP is supported by its authority under the NGA. FERC exercised its authority appropriately by imposing these conditions.

V. FERC'S DECISION NOT TO IMPOSE GHG CONDITIONS TO MITIGATE THE AFP'S INDIRECT GHG IMPACTS WAS NOT ARBITRARY AND CAPRICIOUS.

It was not arbitrary and capricious for FERC to decline to compel mitigation of the AFP's indirect GHG emissions, despite HOME's contention otherwise. FERC's determination was informed by *procedural* considerations, not the concerns about statutory authority TGP suggests.

A. It was within FERC's statutory authority to impose such conditions.

FERC has definitive statutory authority to impose GHG Conditions to mitigate indirect emissions. As established above, Congress authorized FERC to impose environmental conditions on projects approved by the agency. *See* 15 U.S.C. § 717f(e). Courts have affirmed that FERC's "authority to enforce any required remediation . . . is amply supported by the applicable federal legislation." *Bordentown*, 903 F.3d at 261 n.15. FERC is authorized to compel mitigation of a project's GHG emissions when such mitigation is required by public convenience and necessity.

GHG emissions mitigation is a matter of significant public importance. In *Sierra Club*, FERC was required to estimate the proposed project's indirect GHG emissions because the project's EIS acknowledged that GHG emissions are "the primary contributing factor" causing climate change. 867 F.3d at 1371. Furthermore, as established in the previous section, all three branches of the federal government have acknowledged the role of GHG emissions in contributing to the severity of climate change. As the public will bear the negative impacts of these emissions, GHG mitigation measures are "reasonable terms and conditions" that "public convenience and necessity may require." 15 U.S.C. § 717f(e).

Thus, FERC had the authority to compel mitigation of the AFP's indirect GHG emissions. Though FERC declined to impose conditions to mitigate such emissions for reasons detailed below, such action was within FERC's authority.

B. FERC did not act arbitrarily or capriciously by declining to impose indirect GHG Conditions.

FERC's decision not to impose GHG Conditions to address the AFP's indirect emissions was not arbitrary or capricious. Agency action is deemed arbitrary and capricious if the agency relied on improper factors, failed to consider an important aspect of the issue, offered an explanation that runs counter to the evidence, or could not be attributed to a difference in view or agency expertise. *State Farm,* 463 U.S. at 43. The "scope of review" under this standard is "narrow and a court is not to substitute its judgment for that of the agency[;]" a court should only evaluate "the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.*

FERC's decision not to impose the conditions HOME demanded was not arbitrary and capricious. The determination was rationally made in the interest of agency-wide consistency.

1. FERC relied only on factors that Congress intended for it to consider.

Congress granted FERC broad latitude to designate which factors to consider when determining whether and under what conditions a proposed project will be approved. 15 U.S.C. § 717(o); *see* 15 U.S.C. § 717f(e). To clarify this intentionally broad authority, FERC has issued policy statements detailing the factors it considers relevant to determinations of project approval. These factors include "the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain." Certificate Policy Statement, 88 FERC ¶ 61,227 at ¶ 61,737. Another relevant factor is the minimization of legal risk, consistent with the NGA's provisions

seeking to minimize FERC's exposure to legal action. *See Pub. Serv. Comm'n of State of N.Y. v. Fed. Power Comm'n*, 543 F.2d 757, 775 n.116 (D.C. Cir. 1974).

These are the only factors FERC considered when approving and determining what conditions to impose on the AFP. HOME does not contend that FERC considered other factors.

2. FERC considered all important aspects of the problem.

FERC considered all important aspects of the problem before declining to impose GHG Conditions to mitigate the AFP's indirect emissions. FERC thoroughly assessed the potential environmental and legal ramifications of imposing such conditions when making this decision.

FERC evaluated the impacts of the AFP's indirect GHG emissions through a thorough NEPA review. NEPA requires agencies to "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983); *see Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991). "Environmental factors" do not have "preemptive force[;]" the Commission may "conclude[ ] that licensing [a project] would be in the public interest[ ]" so long as it has "weigh[ed] its findings regarding the environmental issues versus the potential benefits[.]" *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992); *see also Sierra Club*, 867 F.3d at 1367.

FERC's evaluation of the AFP's indirect GHG emissions complies with NEPA's hard look requirement. In *Sierra Club*, the court held that the Commission's NEPA requirements would be satisfied with respect to pipeline construction by "a quantitative estimate of the downstream greenhouse emissions" of the pipeline, "a discussion of the significance of this indirect effect," and a discussion of "the incremental impact of the action when added to other" actions. 867 F.3d at 1374. In the instant case, FERC estimated the upper-bound of the project's downstream GHG emissions and provided qualitative information regarding why actual emission amounts are unlikely to reach the estimated quantity. R. at ¶ 72. FERC likewise noted that the

project will have no reasonably foreseeable upstream impacts because the specific natural gas to be transported by the pipeline is already in production. R. at ¶ 73. The Commission also determined that the AFP's indirect emissions cannot be considered significant, R. at ¶¶ 97, 99, and that the project's incremental impacts are likely irrelevant because the gas to be transported by the AFP is already in the market through Southway Pipeline. R. at ¶¶ 100, 12.

Having duly considered the indirect emissions' environmental impacts, FERC determined that the legal risk of imposing conditions to mitigate them outweighed their environmental benefits. FERC's policy assessing the significance that it assigns to indirect GHG emissions when conducting environmental review is currently in draft form. *See generally Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022). Absent finalized policy, FERC cannot selectively impose such measures without risking arbitrary and capricious action.

FERC's actions have satisfied the "hard look" requirement imposed by NEPA, as outlined in *Sierra Club*. Having satisfied NEPA's requirements, the Commission made a rational determination that mitigation measures for indirect GHG emissions should not be imposed.

3. FERC did not offer an explanation for its decision that runs counter to the evidence before the agency, & the action is not so implausible that it could not be ascribed to a difference in view or the product of agency experience.

FERC's determination to not impose indirect GHG conditions on the AFP was made in the interest of agency-wide consistency and avoiding legal risk. The Commission reject's HOME's characterization of its rational exercise of our discretionary authority as arbitrary. R. at ¶¶ 93, 98. The evidence most relevant to FERC's decision making was not the environmental impacts of the AFP's indirect GHG emissions but the absence of clear policy to enable the Commission to mitigate such impacts with procedural consistency.

FERC's policy on assigning significance to indirect GHG emissions in NEPA review has not been finalized and is therefore not actionable. Federal agencies' "draft guidance is not

binding or persuasive authority[.]" *WildEarth*, 368 F.Supp. 3d at 71 n.27; *accord S. Utah Wilderness All. v. Dabney*, 222 F.3d 819, 829 (10th Cir. 2000). Thus, FERC's draft policy does not allow the agency to categorize the AFP's indirect GHG impacts as significant because this policy is categorically barred from influencing the agency. Such inconsistency would inevitably result in a flood of litigation, as epitomized by the instant case.

Outside of FERC's draft guidance, the question of whether indirect GHG emissions should be considered legally significant during NEPA review has been answered inconsistently. *Compare Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004)) ("where . . . an agency 'has no ability to prevent a certain effect due to' that agency's 'limited statutory authority over the relevant action[ ],' then that action 'cannot be considered a legally relevant 'cause' of the effect' for NEPA purposes"), *with Sierra Club*, 867 F.3d at 1373 (quoting *Sierra Club v. FERC*, 827 F.3d at 47) ("Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves."). Given this inconsistency, FERC could not justifiably impose indirect GHG Conditions on the AFP even though it justifiably imposed direct GHG Conditions.

Even assuming *arguendo* that the AFP's indirect GHG emissions were legally significant, it would be arbitrary for the Commission to impose mitigation measures to this project alone without finalized guidance delineating the manner in which we should impose such measures. If FERC were to inconsistently apply conditions in this manner, it would face avoidable legal exposure resulting in a waste of substantial public resources and a breach of public trust.

Thus, FERC's determination not to impose conditions to mitigate the AFP's indirect GHG emissions was not arbitrary or capricious. While these measures are within FERC's

authority to impose, the Commission "considered the factors relevant to" whether to include them and "articulated a rational connection" to the reason it chose not to do so. *Keating v. FERC*, 569 F.3d 427, 433 (D.C. Cir. 2009). This decision is not HOME's or TGP's to make; the Commission is entitled to deference based on our significant expertise in this area. *Balt. Gas*, 462 U.S. at 105; *see Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

C. FERC's duty is to balance competing considerations for the sake of the American public.

FERC has an obligation to the public to regulate in a manner that allows for the development of necessary energy infrastructure. *See Panhandle*, 386 F.2d at 607. The Commission is not permitted "to elevate environmental concerns over other appropriate considerations." *See Balt. Gas*, 462 U.S. at 97. FERC would be shirking its responsibility if it were to allow insignificant environmental considerations to halt the construction of a beneficial proposed project. *Cf. Midcoast*, 198 F.3d at 968 (declaring that FERC's conclusion that "other values outweighed . . . the project's limited but nonetheless acceptable environmental costs . . . str[uck] [the court] as responsible agency decision making[ ]").

CONCLUSION

The petitions for rehearing should be denied and the CPCN Order should be affirmed.