

23-01109

UNITED STATES COURT OF APPEALS FOR  
THE TWELFTH CIRCUIT

TRANSNATIONAL GAS PIPELINES, LLC  
*Plaintiff-Appellant-Cross Appellee*

v.

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION  
*Defendant-Appellee-Cross Appellee*

-and-

THE HOLY ORDER OF MOTHER EARTH  
*Intervenor Plaintiff-Appellant-Cross Appellant*

On Appeal from the United States Federal Energy Regulation Commission in consolidated case  
nos. 23-01109 and 23-01110, Judge Delilah Dolman.

Brief of Appellant, TRANSNATIONAL GAS PIPELINES, LLC

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## **STATEMENT OF JURISDICTION**

The United States Federal Energy Regulatory Commission accepted a Petition for Review in consolidated cases 23-01109 and 23-01110 for a denial of a rehearing for the Holy Order of Mother Earth (“HOME”) and Transnational Gas Pipelines’ (“TGP”). Order Denying Rehearing at 4. The District Court has subject-matter jurisdiction under 5 U.S.C. § 702 (entitled to judicial review caused by agency action) and 28 U.S.C. § 1331 (federal question). HOME and TGP both filed timely Notices of Appeal under Fed. R. App. P. 4 and 18 C.F.R. § 157.23(b) (a request for a rehearing is filed with the Court of Appeals). 28 U.S.C. § 1296(b) allows courts to review certain agency actions including petitions for review filed within a timely manner. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1294(1) (provides that a circuit court has jurisdiction over the district court that it encompasses) and 18 U.S.C. § 2334(a) (general personal jurisdiction asserted as HOME and TGP are domiciled in New Union).

## **STATEMENT OF ISSUES PRESENTED**

- I. Was FERC’s finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project needed where 90% of the gas transported by that pipeline was for export?
- II. Was FERC’s finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?
- III. Was FERC’s decision to route the AFP over HOME property despite HOME’s religious objections in violation of 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 downstream and upstream GHG impacts arbitrary and capricious?

## **STATEMENT OF THE CASE**

### **I. Purpose of the American Freedom Pipeline**

Transnational Gas Pipelines (“TGP”) acted on their plan to construct the American Freedom Pipeline (“AFP” or “pipeline”) in 2020. The AFP is a multi-million-dollar interstate natural gas transmitter that is 99 miles long and 30 inches in diameter. It would stretch from one point in Jordan County, Old Union to another point in Burden County, New Union. The idea for the AFP stems from a market need in New Union. TGP supplied evidence in their application that demonstrates liquified natural gas (“LNG”) is in high demand in New Union due to population shifts, efficiency improvements, and increased electrification of heating in Old Union. TGP established precedent agreements on March 12, 2020, with International Oil & Gas Corporation (“International”) and New Union Gas and Energy Services Company (“NUG”) for transportation services thus fulfilling the LNG capacity for the AFP. Currently, the full production of the LNG is being transported by the Southway Pipeline to the regions east of Old Union. The AFP would reroute 35% of the LNG from the Southway Pipeline to support TGP’s agreements with International and NUG. TGP stipulates that the reroute will not diminish Old Union’s access to LNG when catering to New Union.

### **II. Application and Award of the Certificate of Public Convenience and Necessity**

TGP moved forward with their proposed project on June 13, 2022, by applying under the United States Federal Energy Regulatory Commission (“FERC” or “Commission”) as required by the Natural Gas Act (“NGA” or “Act”). As part of their application, TGP contended that the AFP would (1) deliver up to 500,000 dekathermas per day of natural gas; (2) provide natural gas to

areas to those without it in New Union; (3) provide natural gas to people across the United States; (4) create a better and more competitive market; (5) fill the NorthWay Pipeline to its capacity; and (6) improve air quality in the region by using cleaner-burning natural gas rather than fossil fuels.

In addition to TGP's application, FERC conducted an Environmental Impact Statement ("EIS"). The EIS showed that the pipeline would yield some environmental impacts, but that these impacts will be insignificant when considering the overall benefits that the pipeline will generate. In any case, FERC issued several conditions to TGP to counteract the few environmental concerns noted in the EIS: (1) planting trees to mitigate the effect of greenhouse gases ("GHG"); (2) using electric-powered equipment; (3) purchase "green" steel pipeline segments; and (4) invest in renewable energy. Regardless of these conditions, FERC granted TGP its Certificate of Public Convenience and Necessity ("CPCN or "Certificate") on April 1, 2023. The CPCN grants permission to TGP to start the construction of the pipeline.

### **III. Petitions for Rehearing Order**

After FERC granted TGP its Certificate, a religious organization called the Holy Order of Mother Earth ("HOME") filed a Petition for rehearing raising concerns over the approval of the AFP. The Petition cited weak justification for public necessity, concern over adverse environmental impacts, and raising a defense under the Religious Freedom Restoration Act ("RFRA") for the construction of the pipeline on their land. Specifically, HOME claimed that the CPCN failed to demonstrate significant public necessity for the construction of the pipeline as 90% of its production will result in overseas exports and only 10% goes towards domestic use. HOME further challenges the impact of the pipeline on the environment, claiming that the benefit of the pipeline is greatly outweighed by the destruction that will affect surrounding ecosystems. HOME's members engage in a practice called the Solstice Sojourn which requires members to walk across

where the AFP is set to be built. TGP agreed to build the pipeline underground within four months and in between the Solstice Sojourns to allow members to walk across the land without any disruption. However, HOME contended that even with this requirement the construction will place an undue burden on their religious practice.

In addition to HOME's petition, TGP also filed one based on the conditions FERC listed in the Certificate. TGP mainly addresses the conditions associated with greenhouse gases ("GHG") asserting that this is not under FERC's authority. FERC's basis of these conditions was founded upon completion of the EIS. The EIS concluded that the downstream impact of GHG emissions could result in up to 9.7 million metric tons of CO<sub>2</sub>e per year and construction of the pipeline would yield 104,100 metric tons of CO<sub>2</sub>e per year. As a result, FERC claims that the GHG emissions are concerning enough that they have the right to impose the conditions listed under the National Environmental Policy Act ("NEPA").

#### **IV. Denial of HOME'S Rehearing Request**

FERC denied HOME's rehearing petition stating discretionary powers are awarded to them under standards created by the NGA. In participating in FERC's pre-filing process in which it created appropriate easements and addressed landowner's concerns, FERC determined that TGP took sufficient steps to minimize the adverse economic effects. According to the Commission, HOME failed to demonstrate that the AFP would significantly impact their property and cause a substantial burden on them to exercise their religious beliefs. In addition to their claims, HOME proposed an alternate route for the pipeline to be constructed that does not interfere with their property. However, the alternate route would cost TGP an additional \$51 million and create greater environmental harm to the surrounding ecosystem. To alleviate HOME's concerns about the pipeline, TGP agreed to construct it underground within four months to comply with their religious

practice. HOME denied the compromise stating that the mere existence of the pipeline, even if underground, would require their members to violate their religious beliefs that all nature is sacred. FERC ultimately denied the proposed alternate route because granting it would create an unintended precedent.

## **V. Denial of TGP’s Rehearing Request**

In evaluating and approving the pipeline, FERC imposed specific conditions (i.e. (1) planting trees to mitigate the effect of GHG; (2) using electric-powered equipment; (3) purchasing “green” steel pipeline segments; and (4) investing in renewable energy) that are meant to mitigate the environmental impacts caused by the pipeline. Yet it is undisputed that the estimates of CO2 emissions of the pipeline are from an evaluation of maximum use of the pipelines which is not realistic. Because the emissions are likely to be much lower than expected, TGP contends that their mitigation efforts are enough, and any further conditions placed upon them would be outside the scope of FERC’s authority. FERC responds that the agency’s actions are supported by precedent showing that they can impose conditions in a localized effort to tackle adverse environmental impacts and does not claim to attempt to dictate broader national climate change actions.

## **VI. Current Litigation**

On June 1, 2023, both HOME and TGP petitioned for their rehearing to be reviewed by the United States Court of Appeals for the Twelfth Circuit. The Court granted the review on June 15, 2023, and consolidated the two cases into one. On review HOME petitions that (1) FERC wrongfully determined the pipeline met the requisites for construction; (2) FERC wrongfully held the route of the pipeline did not violate RFRA; and (3) FERC should control the conditions meant for the GHG emissions. On the other side, TGP only petitions that FERC should not control the conditions meant to mitigate GHG emissions.

## SUMMARY OF THE ARGUMENT

Transnational Gas Pipeline (“TGP”) was properly approved for their pipeline disarming any claims established by the Holy Order of Mother Earth (“HOME”) and rendering any additional conditions for environmental protections as decided by the Federal Energy Regulation Commission (“FERC” or “Commission”) as irrelevant. *Minisink Residents for Env’t. Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014); *West Virginia v. EPA*, 142 S. Ct. 2587, 2613, 2616 (2022). The language and statutory interpretation of administrative agencies list the requirement and express that authorities have procedural power to approve a pipeline, but not congressional permission to enact anything further. 15 U.S.C. § 717b; *West Virginia v. EPA*, 142 S. Ct. at 2616 (2022).

FERC approved TGP’s proposed project of the American Freedom Pipeline (“AFP” or “pipeline”) because they provided evidence for the market’s need for natural gas. *See Minisink Residents for Env’t. Pres. & Safety v. FERC*, 783 F.3d at 1311. HOME argues that the export of natural gas to a foreign country should halt construction altogether as the market need has not been met and it is not serving the community’s public interest. Order Denying Rehearing at 8. However, HOME fails to recognize that the Natural Gas Act (“NGA” or “Act”) explicitly permits such precedents associated with agreements regarding exports to foreign countries as meeting the market needs and public interest requirements. 15 U.S.C. § 717b; *City of Oberlin v. FERC*, 39 F.4th 719, 727 (D.C. Cir. 2022). Between the plain language of statutes and current case law, FERC was undoubtedly correct in granting the CPCN to TGP. 15 U.S.C. § 717b; *See Minisink Residents for Env’t. Pres. & Safety v. FERC*, 783 F.3d at 1311; *see City of Oberlin v. FERC*, 39 F.4th at 727.

The application process also requires FERC to conduct an Environmental Impact Statement (“EIS”). National Environmental Policy Act Guidance on Consideration of Greenhouse House Gas

Emissions and Climate Change, 88 Fed. Reg. 1196, 1199 (January 9, 2023). The results indicated, like any other construction project, that there will be an impact on the environment, but the impact is minimal compared to the entirety of the project. Order Denying Rehearing at 8. If FERC was wrong in its environmental findings of the AFP, the Commission could have done nothing else since it is beyond its authority. *See Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *see Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 68 (D.C. Cir. 2011); *see West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022). Courts strongly stated that administrative agencies need to be careful not to overstep their authority as that can be a “slippery slope.” *Id.*

HOME's primary concern is that the approval of the CPCN is a violation of their beliefs under the Religious Freedom Restoration Act (“RFRA”). 42 U.S.C. § 2000bb. The RFRA establishes a right of action for religious groups in scenarios where the government has placed a substantial burden on their right to practice. *Id.* Under the RFRA's substantial burden test, HOME must show that the existence of the pipeline constitutes a substantial burden. *Sherbert v. Verner*, 374 U.S. 398, 408 (1963). Even if HOME were to show a substantial burden, the *Wisconsin v. Yoder* test says the government must have a compelling interest that is achieved within the least restrictive means. 406 U.S. 205, 227 (1972). HOME is inherently resistant to the idea of fracking and LNG transport because they believe nature to be a deity, and any action that causes environmental affliction is a direct antithesis to their core values. Order Denying Rehearing at 11. TGP changed 30% of its project to appease concerns raised by HOME and other nearby landowners. Order Denying Rehearing at 10. As a result, HOME was not coerced or compelled to engage in any violation of their beliefs. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1076 (9th Cir. 2008). If they were to show a substantial burden, then AFP is a compelling interest because the benefits of its function greatly outweigh the minimal environmental harm.

*Sherbert v. Verner*, 374 U.S. at 408. The alternate route proposed would add a significant financial burden while resulting in more environmental damage, meaning that the government has a compelling interest in constructing the AFP, and TGP has taken steps to do so in the least restrictive ways. *Wisconsin v. Yoder*, 406 U.S. at 227.

FERC is acting beyond its authority in imposing GHG conditions on TGP. *West Virginia v. EPA*, 142 S. Ct. at 2587. In *West Virginia v. EPA*, the Court limited the power of administrative agencies because of the major question doctrine. *Id.* As a result, independent agencies, including FERC, cannot act outside the scope of the powers the EPA has. *Id.* FERC has no authority to require the TGP to follow the GHG conditions. *See id.* FERC failed to establish statutory authority and precedent authority in being able to force the GHG conditions on TGP, as the conditions would necessarily rely on generation shifting to achieve the mandated reductions. *See id.* Further, even if FERC did have the authority to impose these restrictions, the potential impacts are insufficient to justify the burden placed on TGP by the conditions.

### **STANDARD OF REVIEW**

The Administrative Procedures Act gives guidance on standards for judicial review of decisions made by administrative agencies. 5 U.S.C. § 551(5)-(7). Issues I, II, and V raise factual disputes concerning the substantial expertise of an agency and are to be reviewed under the arbitrary and capricious standard. *City of Oberlin v. FERC*, 39 F.4th 719, 721 (D.C. Cir. 2022). A court may change an agency’s decision “under the deferential standard of the Administrative Procedure Act... only if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Sierra Club v. FERC*, 867 F.3d 1357, 1377 (D.C. Cir. 2017). An agency’s decision may also be reversed if the court finds that the agency has acted beyond Congress’ intention, failed to consider important factors counter to its decision, and acted with implausibility, outside

the scope of its expertise. 5 U.S.C. § 706. Issues III and IV raise the question of statutory discretion and should be reviewed *de novo*. *Sierra Club v. FERC*, 867 F.3d at 1368.

## ARGUMENT

### I. VALID CONSIDERATION UNDER BOTH THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY PROCEDURAL PROCESS AND THE NATURAL GAS ACT ARE SUBSTANTIAL EVIDENCE TO ESTABLISH PUBLIC INTEREST FOR PIPELINE CONSTRUCTION ALONG WITH MAINTAINING CONSTITUTIONAL RIGHTS.

The United States Federal Energy Regulatory Commission (“FERC” or “Commission”) correctly held that the American Freedom Pipeline (“AFP” or “pipeline”) was of public convenience and necessity based on the arbitrary and capricious standard. *City of Oberlin v. FERC*, 39 F.4th 719, 725 (D.C. Cir. 2022). The National Environmental Policy Act (“NEPA”) and the Natural Gas Act (“NGA” or “Act”) lay out the requirements that the Commission follows when deciding whether to approve projects. National Environmental Policy Act Guidance on Consideration of Greenhouse House Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1198-99 (January 9, 2023); 15 U.S.C. § 717b.

#### A. The procedural process of the Certificate of Public Convenience and Necessity is only concerned with the pipeline’s economic viability and ensuring public interest.

The NGA regulates and encourages the transportation and sale of natural gas. 15 U.S.C. § 717; *Minisink Residents for Env’t. Pres. & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014). When an entity has a project request that arises underneath the NGA, the Commission has jurisdictional oversight of the process. *Sierra Club v. FERC*, 867 F.3d 1357, 1364 (D.C. Cir. 2017). FERC therefore must determine that the entity is financially supported and will provide present or future public interest to the affected communities to be approved for a Certificate of Public Convenience and Necessity (“CPCN” or “Certificate”). *Minisink Residents for Env’t.*

*Pres. & Safety v. FERC*, 762 F.3d at 101; *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015).

The Commission does this by assuring the entity has the funds to complete the project without relying on their already existing customers and that there is a market need. *Minisink Residents for Env't. Pres. & Safety v. FERC*, 762 F.3d at 101; *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1309. It is uncontested that Transnational Gas Pipeline (“TGP”) has the funds to construct the pipeline, but they must still justify the project based on the market. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1309. Natural gas has increasingly become in more demand forcing the economy to invest in the field. *Minisink Residents for Env't. Pres. & Safety v. FERC*, 783 F.3d at 1311. The demand combined with the domestic needs the pipeline plans to serve, including providing natural gas to those who struggle to obtain it, is enough to justify the project. *Minisink Residents for Env't. Pres. & Safety v. FERC*, 783 F.3d at 1311; Order Denying Rehearing at 8. The market need continues to be met despite the Holy Order of Mother Earth’s (“HOME”) contention that the requirement is insufficient because 90% of the liquified natural gas (“LNG”) is exported to a foreign country. Order Denying Rehearing at 6. The export of LNG produced in the United States has always been considered a public interest. 15 U.S.C. § 717b. Not only is it common practice for LNG to be exported internationally and domestically, but there is no percentage threshold on either type of export that entities are required to meet. *City of Oberlin v. FERC*, 39 F.4th at 724, 727.

After establishing the market need, FERC employs a balancing test to determine whether the benefits of the proposed project outweigh the potential harm. 15 U.S.C. § 717f; *see Minisink Residents for Env't. Pres. & Safety v. FERC*, 783 F.3d at 1311. Per the NGA, all factors concerning public interest must be evaluated before the Commission grants a CPCN. 15 U.S.C. § 717f; *City*

of *Oberlin v. FERC*, 39 F.4th at 722. Public interest encompasses a variety of actions that agencies use to promote their natural gas projects, including creating opportunities, granting access, decreasing costs, eliminating bottlenecks, and advancing clean energy objectives. *Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d at 1309 (quoting *Certificate Policy Statement*, 88 FERC at 61,748). “The fact that a portion of the gas is [bound] for export’ does not diminish the benefit that flows from the construction of the pipeline.” *City of Oberlin v. FERC*, 39 F.4th at 727 (citing *Town of Weymouth v. FERC*, 2018 U.S. App. LEXIS 36652 (D.C. Cir. 2018)).

Note that in conjunction with the CPCN, an Environmental Impact Statement (“EIS”) is required. National Environmental Policy Act Guidance on Consideration of Greenhouse House Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (January 9, 2023). *Minisink Residents for Env’t. Pres. & Safety v. FERC*, 762 F.3d at 101. This process is further discussed in another issue raised, but regarding the approval process, the Commission’s technical expertise awards them extreme discretion to determine whether entities have met the requirements needed to obtain a CPCN. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1308 (citations omitted). There is substantial evidence to show that there is a market need for the pipeline. Order Denying Rehearing at 8. The standard substantial evidence “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence,” which the Commission found during TGP’s application process. *Minisink Residents for Env’t. Pres. & Safety v. FERC*, 762 F.3d at 108 (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002)).

B. Furthermore, the NGA and case law support precedent agreements regarding natural gas being exported to foreign countries while also categorizing it as public interest.

As already stated above, a major concern HOME has is that the foreign exports from the pipeline are not considered a public interest. Order Denying Rehearing at 6. Yet the NGA plainly

states exporting natural gas to foreign countries with which the United States has a free trade agreement (“FTA”) “shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification of delay.” 15 U.S.C. § 717b. Since 2011 the United States has had an FTA with Brazil thus allowing the exports from the AFP to be permitted. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, AGREEMENT ON TRADE AND ECONOMIC COOPERATION (March 19, 2011).

The NGA supports precedent agreements as they are also seen as a public interest. 15 U.S.C. § 717b. FERC considers precedent agreements, even with foreign entities, lawful and an indication of market need. *City of Oberlin v. FERC*, 39 F.4th at 724; see *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1310. FERC finds presented agreements to aid in the production and sales of natural gas, which is by the NGA because it “contributes to the growth of the economy and supports domestic jobs...” *City of Oberlin v. FERC*, 39 F.4th at 727 (citations omitted). Additionally, “FERC decided that refusing to credit such precedent agreements would thwart ‘Congress; directive and intent, as expressed in Section 3.’” *City of Oberlin v. FERC*, 39 F.4th at 727 (citing 15 U.S.C. § 717b). FERC’s stance on precedent agreements combined with the acknowledgment of congressional authority leaves no room to doubt TGP’s agreement with International is not arbitrary and capricious. See *City of Oberlin v. FERC* 39 F.4th at 724, 727.

C. Regardless of HOME’s claims, the AFP is protected by the Commerce Clause because public policy favors competitive markets as supported by congressional intention.

The Commerce Clause is meant “to regulate commerce with foreign nations, among states, and with the Indian tribes.” U.S. CONST., art. I, § 8, cl. 3. The Clause is a part of the NGA as evidenced by 15 U.S.C. § 717b, which establishes LNG transportation and sales, both at the national and international level, as a public interest. U.S. CONST., art. I, § 8, cl. 3. Thereby making

any denial of TGP's exports to Brazil unconstitutional and vulnerable to repercussions subject to Congress. *See id.* The Commerce Clause promotes market expansion and competition and, as a result, FERC has the discretion to approve projects that are governed by public convenience and necessity. *City of Oberlin v. FERC*, 39 F.4th at 728.

## **II. THE EIS' CONCLUSION OF THE CONSTRUCTION AND USAGE OF THE PIPELINE IS INSIGNIFICANT BECAUSE FERC ONLY POSSESSES PROCEDURAL AUTHORITY.**

- A. The benefits shown in the EIS outweigh the minimal effects impacting HOME's community, along with all other alternatives being exhausted.

Along with the CPCN process, an EIS is required when a major project is being completed that could affect the environment. U.S. EPA, National Environmental Policy Act Review Process (October 3, 2023) <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>; *Minisink Residents for Env't. Pres. & Safety v. FERC*, 762 F.3d at 101. The purpose of the analysis is to have FERC take a "hard look," which means reasonably discussing the issues associated with a project and considering the different viewpoints. *Sierra Club v. FERC*, 867 F.3d 867 F.3d 1357, 1368 (D.C. Cir. 2017). The emphasis of FERC's job is on the phrase "hard look." *Id.* FERC's due diligence in discussing the results of the EIS is sufficient according to the "hard look" standard and does not require further mitigation beyond that. *See id.* Furthermore, any construction project will create some sort of environmental impact, hence why FERC employed the "rule of reason." National Environmental Policy Act Guidance on Consideration of Greenhouse House Gas Emissions and Climate Change, 88 Fed. Reg. at 1198. According to NEPA, it "allows agencies to determine, based on their expertise and experience, how to consider an environmental effect and prepare an analysis based on the available information." *Id.* But it is more than that as it dissuades

commissions from “flyspecking” or finding every possible deficiency no matter how insignificant. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1323.

For an alternate route to be considered at all, it must be reasonable. *Id.* The proposed alternate route by HOME is more expensive and environmentally harmful. Order denying Rehearing at 13. Requiring TGP to build the alternate route to combat the already minimal effects, would be a burden on the project and outside the scope of the agency’s authority as additional action is not required in this case. *Minisink Residents for Env’t. Pres. & Safety v. FERC*, 762 F.3d 97 at 102; *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1323. The United States also has a demand for natural gas, so if TGP is unable to build a pipeline that has shown that its benefits outweigh the negative impacts, then another entity will be able to propose a substitute or take over the project. *Minisink Residents for Env’t. Pres. & Safety v. FERC*, 762 F.3d at 100. FERC only needs to consider the alternate route but is not required to impose it even if it yields a smaller environmental impact. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1324. This means that the “hard look” is at the environmental impact to inform the entity of their decision, but not have FERC make them enact the best decisions. *New York v. Nuclear Regulatory Comm’n*, 681 F.3d 471, 476 (D.C. Cir. 2012); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 256 (3d Cir. 2018). FERC fulfilled its duty of informing TGP of the impacts their pipeline would yield. *Sierra Club v. FERC*, 867 F.3d at 1370-71.

B. Even if there were significant environmental impacts as a result of the pipeline, FERC exercised its due diligence in its assessment before approving the CPCN.

FERC has no duty to further mitigate the minimal environmental impacts. *Twp. of Bordentown v. FERC*, 903 F.3d at 256. Their responsibility is to properly approve entities for a CPCN using the guidance of the NGA and NEPA. *Myersville Citizens for a Rural Cmty., Inc. v.*

*FERC*, 783 F.3d at 1322; *Twp. of Bordentown v. FERC*, 903 F.3d at 256. The EPA states that at the end of the EIS report, FERC must explain their decision, including alternatives, and any potential plans for monitoring the project, but does not state they are required, or have the power to, enforce. U.S. EPA, National Environmental Policy Act Review Process (October 3, 2023) <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>. In support of the EPA's guideline on EISs, FERC's obligation only requires that they identify and consider the environmental impacts. *See id.* "As always with NEPA, an agency is not required to select the course of action that best serves environmental justice, only to take a "hard look" at environmental justice issues." *Sierra Club v. FERC* 867 F.3d at 1368.

FERC's authority stops short of enforcing changes onto an entity's project because it is beyond its scope. *Sierra Club v. FERC* 867 F.3d at 1368; *Twp. Of Bordentown v. FERC*, 903 F.3d at 257. NEPA only allows FERC to look at the environmental effects of natural gas, but "not to take one type of action or another." *Twp. Of Bordentown v. FERC*, 903 F.3d at 248 (citations omitted). Additionally, FERC's threshold for approving entities for a CPCN is based on the proposed project's ability to proceed without the entities' existing customer, demonstrate there is a market need, and "stand on its own financially," all of which emphasizes FERC's analysis for natural gas projects to be focused solely on the process of being approved rather than enforcing substance change. *Vt. Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519, 558 (1978); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 68 (D.C. Cir. 2011); *see West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022). FERC concluded its duties by processing TGP's application. *Id.*

### **III. HOME FAILED TO SHOW SUBSTANTIAL EVIDENCE THAT THE AFP IMPOSES ON THEIR RELIGIOUS BELIEFS UNDER THE RELIGIOUS FREEDOM AND RESTORATION ACT.**

The protection of religious practices requires, under the government to not place a substantial burden unless there is a compelling interest. 42 U.S.C. § 2000bb-1(b). HOME's main points of contention regarding the construction of the pipeline rest on two premises: (1) that the pipeline will go through a portion of the property where HOME's members will take their spiritual walk; and (2) that the existence of the pipeline and potential environmental impacts are anathema to HOME's core beliefs. Order Denying Rehearing at 12. There is no undue burden placed on HOME's religious practices, but if an undue burden is placed, then the necessity of the pipeline is a compelling interest. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 705 (1981).

#### **A. TGP has taken mitigating steps to avert the substantial burden on HOME's beliefs and religious practices while following the guidelines of the RFRA.**

The threshold created by the Religious Freedom Restoration Act ("RFRA") in showing an undue burden is consequential. 42 U.S.C. § 2000bb-1(c); *see Adorers of the Blood of Christ U.S. Province v. Transcon. Gas Pipe Line Co.*, 53 F.4th 56, 60 (3d Cir. 2022). For HOME to establish an undue burden, the facts must sufficiently show under the *Sherbert v. Verner* and *Wisconsin v. Yoder* tests that the government either coerced them to engage in practice in direct violation of their beliefs or that the government prohibited them from engaging with their religion. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 228 (1972). TGP took substantial steps to mitigate any impact to HOME's religious practice by expediting the construction of the pipeline so that it was not obstructed when HOME's Solstice Sojourns occurred. Order Denying Rehearing at 13; *Sierra Club v. FERC*, 867 F.3d at 1367.

To meet the threshold for undue burden, HOME would have to show that even with the efforts taken by TGP, the construction of the pipeline would still “place substantial pressure....to modify [his] behavior and to violate [his] beliefs.” *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. at 710. This means that the government would have to force HOME to violate their religion. *Id.* HOME’s members would not need to change the path they took or the time that they engaged in their practice, so they fail to show any prohibition on their religion. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1073 (9th Cir. 2008). HOME argues that in having to walk over the pipeline, the government, per the CPCN, is compelling HOME to support fracking and the transport of fossil fuels which is against their religion. Order Denying Rehearing 11. TGP respects HOME’s religious beliefs, but “much we might wish that it were otherwise, the government simply could not operate if it were required to satisfy every citizen's religious needs and desires.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d at 1072 (citation omitted). HOME’s practice has not been disrupted, and the perceived reduction in their religious experience is merely an inconvenience that falls short of showing a substantial burden. *See Navajo Nation v. U.S. Forest Serv.* 535 F.3d at 1091; see also *Sherbert v. Verner*, 374 U.S. at 409. Notwithstanding the substantial burden test, the alternative pipeline route would impede more on HOME’s religious belief due to greater environmental harm. Home proposed an alternative route that was not pursued because it would add \$51 million to the cost while also increasing the environmental harm. Order Denying Rehearing at 11. HOME’s proposal of the alternate route is hypocritical, because HOME believes nature is to be valued, yet the alternate route would cause more great environmental damage. 42 U.S.C. § 2000bb-1; Order Denying Rehearing at 11.

B. Assuming there is a substantial burden placed on HOME's religious practices, the construction of the AFP is a compelling interest done so under the least restrictive means according to 42 U.S.C. § 2000bb-1(b).

The test set forth by the RFRA requires that when a substantial burden is shown, the government must also show a compelling interest to justify it. *Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972). The RFRA established the compelling interest test, as outlined in *Sherbert v. Verner* and *Wisconsin v. Yoder*, that the government's actions must be more beneficial than harmful, meet a public interest requirement, and have less restrictive means. *Sherbert v. Verner*, 374 U.S. at 398; *Wisconsin v. Yoder*, 406 U.S. at 229; 42 U.S.C. § 2000bb-1(b)(1). Even if HOME were to show that the construction of the pipeline on their property would be a substantial burden, the benefits of the AFP far outweigh the potential burden that HOME would sustain concerning their religious practices. *Sherbert v. Verner*, 374 U.S. at 404.

HOME fails to cite how the pipeline keeps them from exercising their beliefs or compels them to engage in activity that is against them. *Id* at 406. TGP does not assert that walking above the pipeline is an endorsement of the use of fossil fuels in contrast to HOME's beliefs. Order Denying Rehearing at 11. The court in *Navajo Nation v. U.S. Forest Serv.* held that "...under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a "substantial burden" on the free exercise of religion." 535 F.3d at 1058 (citing *Lyng v. Northwest Indian Cemetery Protective* 485 U.S. 439 (1988)). Further, the compelling interest test laid out in *Wisconsin v. Yoder*, states that the government cannot reasonably be expected to bend to the satisfaction of every citizen's religious desires. 406 U.S. at 229. In furthering operations for the betterment of citizens, TGP and FERC took reasonable steps to make sure that any imposition on HOME's land is within the least restrictive means possible. *Id* at 236.

**IV. THE GHG CONDITIONS IMPOSED BY FERC ARE UNCONSTITUTIONAL PER THE MAJOR QUESTIONS DOCTRINE AS DETAILED IN THE PRECEDENT SET IN *WEST VIRGINIA V. EPA*.**

The AFP is entitled to the deference given in *West Virginia v. EPA* regarding the GHG conditions FERC wants to impose. 142 S. Ct. at 2616. If the impact of GHGs is not able to be addressed by FERC via the use of the pipeline, then there is no true distinction in their authority to mitigate the construction of the pipeline. *West Virginia v. EPA* 142 S. Ct. at 2616; Order Denying Rehearing at 18. FERC intends to contain its actions at the local level, but they will inadvertently create a precedent for future cases thus violating the major question doctrine. *West Virginia v. EPA*, 142 S. Ct. at 2576; *N.C. Coastal Fisheries Reform Grp. v. Captain Gaston LLC*, 76 F.4th 291, 296 (4th Cir. 2023).

- A. Pipelines are considered a compelling interest because LNG energy is in high demand, thus the construction of any pipeline strengthens the United States' position in the global market.

Congress prescribed natural gas regulation to FERC through NEPA for FERC to have, with clear intent to give greater deference to the construction of pipelines. 15 U.S.C. § 717f; *see* National Environmental Policy Act Guidance on Consideration of Greenhouse House Gas Emissions and Climate Change, 88 Fed. Reg. at 1194. FERC contends that they are an independent agency without a requirement to follow the Council on Environmental Quality's ("CEQ") climate mitigation protocols but based on precedent cases, they continue to do so. Order Denying Rehearing at 18; *Sierra Club v. FERC* 867 F.3d at 1334. FERC has done this in the past, but that does not make it permissible. *West Virginia v. EPA*, 142 S. Ct. at 2587.

- B. FERC cannot impose conditions on TGP since it would constitute an overreach of their limited administrative power and defy the congressional authority.

When NEPA was created Congress intended to grant the sole decision-making power to oversight agencies, like the CEQ, to further guide independent agencies like FERC. National Environmental Policy Act Guidance on Consideration of Greenhouse House Gas Emissions and Climate Change, 88 Fed. Reg. at 1197. Thereby making it beyond the scope of FERC's power to impose these decisions. *See id.* The EIS contends that the CO2 emissions will likely be lower than predicted in the statement. In *Sierra Club v. FERC*, NEPA "directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another" as stated in Issue II. *Sierra Club v. FERC* 867 F.3d at 1374. The court further explains that the statute is mainly information forcing. *Id.* This means FERC's conditions would need to show specific results that the GHG conditions will create a significant enough impact that would outweigh the undue burden placed on TGP. *West Virginia v. EPA*, 142 S. Ct. at 2604. FERC has failed to demonstrate a uniform system for imposing these conditions and the test as to whether the benefits outweigh the impact on the companies. *Id.* "[I]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia v. EPA*, 142 S. Ct. at 2587. To ensure that a "slippery slope" is not created within the bounds of an agency's power, the court also explained that "[T]o convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 2595. Therefore, FERC would need to show evidence that their previous mitigating actions were done by congressional authority bestowed upon them. *Id.*

The NGA grants FERC the authority to regulate the transportation of natural gas for the benefit of interstate commerce. 15 U.S.C. § 717. FERC's assertion that the authority allows them to step within the scope of environmental regulation is an issue of statutory interpretation. *West*

*Virginia v. EPA*, 142 S. Ct. at 2583. Additionally, FERC states that their authority is created from their precedent is insufficient to establish real statutory authority. Order Denying Rehearing at 16. If Congress wished to provide that power to FERC, it would have been explicitly stated within the act itself. *West Virginia v. EPA*, 142 S. Ct. at 2583. We respect FERC's wanting to mitigate climate change and do not contest that it is an important factor in the construction of pipelines, however, the conditions they are proposing are unreasonable, thereby an undue burden and outside their authority. *Id.* TGP has made changes to over 30% of the proposed pipeline route to accommodate FERC despite their lack of authority to regulate their conditions. Order Denying Rehearing at 10.

**V. FERC IS AN INDEPENDENT AGENCY THAT LACKS CONGRESSIONAL AUTHORITY TO ADDRESS CLIMATE CHANGE CONCERNS.**

FERC is correct in its assertion that mitigation regarding upstream and downstream GHG is beyond their discretionary authority. Order Denying Rehearing at 17. NEPA has not provided agencies with the proper guidance or mandated any requirements for private agencies to take in. National Environmental Policy Act Guidance on Consideration of Greenhouse House Gas Emissions and Climate Change, 88 Fed. Reg. at 1193; *Twp. Of Bordentown v. FERC*, 903 F.3d at 261. Any attention from FERC to this issue would reach beyond its expertise which leads to an abuse of discretion. *Sierra Club v. FERC*, 867 F.3d at 1357.

A. No statutory authority exists to allow FERC to mitigate GHG and its impact since there are only regulations prescribed to the issue on a national scale.

NEPA authorizes FERC to look at the potential impacts of projects on the environment but stops short of granting FERC any authority to impose conditions on the project beyond the assessment created by the EIS. National Environmental Policy Act Guidance on Consideration of Greenhouse House Gas Emissions and Climate Change, 88 Fed. Reg. at 1196; *Sierra Club v. FERC*, 867 F.3d at 1360. In *West Virginia v. EPA* the Court outlined FERC's lack of authority by

stating “[w]e cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions ‘had become well known, Congress considered and rejected’ multiple times.” *West Virginia v. EPA*, 142 S. Ct. at 2595 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000)). Regulation of GHG and the requirement to mitigate the upstream and downstream effects needs a clear congressional prescription of authority and resulting instruction on how to implement stated guidelines. *West Virginia v. EPA*, 142 S. Ct. at 2595; *Sierra Club v. FERC*, 867 F.3d at 1357.

Any attempt by FERC to address the upstream and downstream GHG impacts would enter the larger scale prohibition addressed by the major question doctrine. *West Virginia v. EPA*, 142 S. Ct. at 2597. Because FERC lacks guidance on how to mitigate GHG conditions, it cannot measure the actual emissions of the upstream and downstream conditions. *Id.* Similar to *Sierra Club v. FERC*, “FERC [next] raises a practical objection, arguing that it is impossible to know exactly what quantity of greenhouse gases will be emitted as a result of this project being approved. True, that number depends on several uncertain variables, including the operating decisions of individual plants and the demand for electricity in the region.” 867 F.3d at 1374. Though GHG emissions can be foreseeable, FERC lacks sufficient evidence showing that it is within their discretion to mitigate. *Id.*

- B. Imposing the GHG conditions as recommended by FERC would create an unstated change in agency practice in addressing the national climate crisis that is not substantiated by any applicable law.

EPA has the sole authority to mandate climate action and that authority has not been imputed to independent administrative agencies. U.S. EPA, National Environmental Policy Act Clean Power Act (September 27, 2023) <https://www.epa.gov/clean-air-act-overview>. An attempt by FERC to engage in mitigation of GHG impacts beyond the “hard look” standard of the NEPA

would pose significant economic and political consequences and alter the separation of powers. National Environmental Policy Act Guidance on Consideration of Greenhouse House Gas Emissions and Climate Change, 88 Fed. Reg. at 1197. It would create a precedent that has not been previously found within FERC's agency actions, "[A] decision of such magnitude and consequence rests with Congress itself, or an agency acting under a clear delegation from that representative body." *West Virginia v. EPA*, 142 S. Ct. at 2616. As outlined in the previous sections, uniformity within the administrative agencies is vital to maintain order across administrative agencies. *Id.* A sudden change to include mitigating effects for the upstream and downstream GHG impacts would not only be outside FERCs but would signal a change in the function of the agency's duties. Order Denying Rehearing at 17; *see West Virginia v. EPA*, 142 S. Ct at 2601.

## **CONCLUSION**

For the foregoing reasons, this Court should (1) rule that FERC's finding of public convenience and necessity for the AFP was not arbitrary and capricious and was supported by substantial evidence concerning that 90% of the pipeline would be exports; (2) rule that FERC's finding that the benefits from the AFP outweighed the environmental and social harms were not arbitrary and capricious; (3) rule that FERC's decision to route the AFP over HOME's property despite religious objections was not in violation of the RFRA; (4) rule that the GHG conditions imposed by FERC were beyond FERC's authority; and (5) rule that FERC's decision not to impose any GHG conditions addressing downstream and upstream GHG impacts were not arbitrary and capricious. These rulings allow TGP to move forward with the construction of the AFP.