

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH
Plaintiff-Appellant

V.

FEDERAL ENERGY REGULATION COMMISSION
Petitioner

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Petitioner

Petition for Review in consolidated case 23-01109, Chief Judge Delilah Dolman

Brief of Petitioner, TRANSNATIONAL GAS PIPELINES, LLC

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STATEMENT OF JURISDICTION

The Federal Energy Regulatory Commission (“FERC”) issued an Order granting a Certificate of Public Convenience and Necessity (“CPCN”) and a Rehearing Order in Docket No. TG21-616-000 under 18 C.F.R. § 157 (2023). The Holy Order of Mother Earth (“HOME”) and Transnational Gas Pipelines, LLC (“TGP”) initiated the action for review of the CPCN and Rehearing Order within 60 days of FERC’s Rehearing Order Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B). The Court of Appeals for the Twelfth Circuit has jurisdiction to review a final order of FERC under 15 U.S.C. § 717(r)(b).

STATEMENT OF ISSUES

- I. Was FERC correct when it considered TGP’s binding export precedent agreements as direct evidence of project need?
- II. Did FERC reasonably balance and conclude that the benefits of the American Freedom Pipeline (“AFP”) outweigh the potential adverse social and environmental impacts?
- III. Does the decision to route the AFP over HOME property violate the Religious Freedom Restoration Act (“RFRA”)?
- IV. Did FERC improperly attach greenhouse gas (“GHG”) conditions on the CPCN Order and therefore exceed its authority under the NGA and the major questions doctrine?
- V. Was FERC’s decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

On June 13, 2022, TGP filed an application with FERC in Docket No. TG21-616-000 to construct and operate the AFP and other related facilities (“the TGP Project”). Order Den. Reh’g ¶ 2. On April 1, 2023, FERC issued an Order granting a CPCN to TGP to construct and operate the TGP project. *Id.* The TGP Project was authorized under section 7 of the Natural Gas Act (“NGA” or the “Act”) and is subject to the conditions in the CPCN. *Id.* On April 20, 2023, HOME sought review of the FERC Order insofar as: (1) FERC’s determination that TGP has demonstrated

a public need for the AFP despite the fact that approximately 90% of the gas carried by the pipeline will undisputedly be exported to Brazil; (2) FERC’s determination that routing the pipeline across HOME land, despite HOME’s religious objections, does not violate RFRA; (3) FERC’s determination does not require mitigation of upstream and downstream greenhouse gas impacts of the AFP. On April 22, 2023, TGP also sought review of the FERC Orders insofar as: (1) the conditions in the CPCN Order addressing mitigation of greenhouse gas impacts are beyond FERC’s authority under the Natural Gas Act (NGA). *Id.* On May 19, 2023, FERC issued an Order denying the two petitions for rehearing and affirmed the CPCN as originally issued (the “Rehearing Order”). *Id.* On June 1, 2023, both HOME and TGP filed Petitions for Review of the CPCN and Rehearing Order with the United States Court of Appeals for the Twelfth Circuit. The United States Court of Appeals for the Twelfth Circuit has jurisdiction under 15 U.S.C. § 717(r)(b), which provides the Twelfth Circuit jurisdiction over review of Commission Orders. The Court ordered the parties to brief the issues. Order at 1.

STATEMENT OF THE FACTS

I. Transnational Gas Pipelines

TGP is a limited liability company organized and existing under the laws of the State of New Union. Order Den. Reh’g ¶ 8. TGP will be a natural gas company within the meaning of section (2)(6) of the NGA upon commencement of operations proposed in their application. *Id.* Therefore, TGP is subject to FERC’s authority in gas pipeline construction, permitting, and operation. *Id.*

II. Holy Order of the Mother Earth

HOME is a not-for-profit religious organization that operates under the laws of the State of New Union. *Id.* ¶ 9. HOME owns a 15,500-acre property in Burden County, New Union. *Id.* The HOME headquarters is situated on the western end of the Burden County property and the

HOME property lies just north of the proposed end point of the AFP. *Id.* The proposed route of the AFP crosses over HOME's property east of the headquarters. Order Den. Reh'g., Exhibit A ("Exhibit A").

HOME is a religious organization that considers the natural world to be sacred. Order Den. Reh'g ¶ 46. HOME was founded in 1903 around the principle that nature itself is a deity that should be worshiped and respected. *Id.* HOME's core tenet is that humans should do everything in their power to promote natural preservation over all other interests, especially economic interests. *Id.* ¶ 47.

HOME presented sworn testimony that, as part of their religious practices, members of HOME make a ceremonial journey called the Solstice Sojourn. *Id.* ¶ 48. The Solstice Sojourn follows a path from a temple at the western border of the property to a sacred hill on the eastern border of the property in the foothills of the Misty Top Mountains, then back along a different path. *Id.* All children who are part of HOME and who have turned fifteen years old in the prior six months undergo a sacred religious ceremony at the sacred hill. *Id.* HOME has performed the Solstice Sojourn since at least 1935, and the path would cross the proposed pipeline route in both directions. *Id.* Neither TGP nor FERC dispute the sincerity of HOME's religious beliefs but find these beliefs alone insufficient to require rerouting of the AFP. *Id.* ¶ 51.

III. The Proposed TGP Project

A. Project Background

The TGP Project is designed to transport natural gas that is produced in the Hayes Fracking Field ("HFF") in Old Union. *Id.* ¶ 12. The AFP will serve multiple domestic needs and is designed to provide up to 500,00 dekatherms (Dth) per day of firm transportation service. *Id.* ¶ 27. Currently the full production of liquified natural gas ("LNG") at HFF is transported to states to the east of

Old Union by the Southway Pipeline. *Id.* ¶ 13. TGP has presented evidence that the LNG demands in regions east of Old Union have been steadily declining due to a population shift, efficiency improvements, and increasing electrification of heating in those states. *Id.* TGP contends that market needs are better served by routing the LNG through the AFP due to these changes in demand. *Id.* Likewise, TGP showed that the reduction in transport of LNG in the Southway Pipeline will not lead to gas shortages. *Id.*

TGP held an open season for service on the TGP Project from February 21 through March 12, 2020. *Id.* ¶ 11. As a result of this open season, TGP executed two binding precedent agreements with: (1) International Oil and Gas Corporation (“International”) for 450,000 Dth per day of firm transportation service and (2) New Union Gas and Energy Services Company (“NUG”) for 50,000 Dth per day of firm transportation service. *Id.* The two binding precedent agreements equal the full design capacity of the TGP Project. *Id.*

LNG transported by the AFP will be purchased by International and will be diverted at the Burden Road M&R Station (operated by International) to the existing Northway Pipeline, which is not currently at full capacity. *Id.* ¶ 14. The NorthWay Pipeline will carry the LNG into the New Union City M&R Station, which is located at the Port of New Union on Lake Williams. *Id.* Lake Williams is hydrologically connected to the Atlantic Ocean via the White Industrial Canal. *Id.* The LNG will be loaded onto LNG tankers at the Port of New Union for export to Brazil by International. *Id.* TGP does not dispute the fact that HOME submitted records disclosing that International’s parent company is Brazilian and nearly all of the LNG International natural gas will be exported to Brazil. *Id.* ¶ 24. Brazil does not have a free trade agreement with the United States. *Id.* ¶ 33. The AFP provides transportation for domestically produced gas, provides gas to

some domestic customers, and fills additional capacity at the International New Union City M&R Station. *Id.* ¶ 34.

The finalized TGP Project will:

1. Provide natural gas service to areas currently without access to natural gas within New Union;
2. Expand access to sources of natural gas supply in the United States;
3. Optimize the existing system for the benefit of both current and new customers by creating a more competitive market;
4. Fulfill capacity in the undersubscribed NorthWay Pipeline; and
5. Provide opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. *Id.* ¶ 27.

B. TGP Project Construction

TGP estimates that the proposed TGP Project will cost approximately \$599 million to construct the AFP and affiliated facilities. *Id.* ¶ 10. It is undisputed that TGP can financially support the project without subsidization from its existing customers. *Id.* ¶ 21. The TGP Project will involve the construction of the following facilities:

- Approximately 99 miles of 30-inch-diameter pipeline extending from a receipt point in Jordan County, Old Union, to a proposed interconnection with an existing TGP gas transmission facility in Burden County, New Union;
- A receipt meter station located in Jordan County, Old Union (Main Road M&R Station);
- A receipt tap located in Jordan County, Old Union;
- A meter, regulation, and delivery station located at Burden County, New Union (Broadway Road M&R Station);

- Mainline valve assemblies at eight locations along the pipeline;
- Pig launcher/receiver facilities and pig trap valves at the Main Road M&R Station and the Broadway Road M&R Station; and
- Cathodic protection and other related appurtenant facilities. *Id.* ¶ 11.

C. Proposed Route

The proposed route for the AFP runs through approximately two miles of HOME’s property. *Id.* ¶ 38. TGP does not have an easement agreement with 40% of landowners along the route, including HOME. *Id.* ¶ 42. To resolve this, TGP has made changes to over 30% of the proposed pipeline route to address concerns from landowners and to negotiate mutually acceptable easement agreements. *Id.* ¶ 41. TGP agreed to bury the AFP through the entirety of its passage through HOME property, and construction will be expedited “to the extent feasible” across HOME’s property to minimize disruption. *Id.* TGP assures that it can complete the two-mile stretch over HOME property within a four-month period. *Id.*

D. Environmental Impacts of the Proposed Route

The construction of the AFP pipeline will require removal of approximately 2,200 trees and many other forms of vegetation from HOME property. *Id.* ¶ 38. TGP will replant an equal number of trees in other locations along the proposed route. *Id.*

An Environmental Impact Statement (“EIS”) was completed by TGP to conform with the National Environmental Policy Act (“NEPA”). *Id.* ¶ 3. The EIS concluded that the TGP Project will result in some adverse environmental impacts, but those effects will be reduced to less-than-significant levels with implementation of staff’s recommendations. *Id.* The EIS also included a lengthy evaluation of the TGP Project’s greenhouse gas impacts. *Id.* ¶ 72. The EIS did not estimate upstream emission from production of the natural gas because the HFF gas is already in production and is simply transported in part to different destinations. *Id.* ¶ 74. The analysis of downstream

impacts (the use of the LNG transported by the AFP) showed that if all 500,000 Dth per day were sent to combustion end uses, downstream end-use could result in about 9.7 million metric tons of CO₂e per year. *Id.* ¶ 72. This estimate assumes that the maximum capacity of gas is transported 365 days per year, although in practice this is rarely the case since projects are designed for shippers' peak day use. *Id.* Therefore, the 9.7 million metric tons of CO₂e per year of downstream impacts is an upper bound for CO₂ emissions. *Id.* The EIS further estimated that if TGP follows the CPCN conditions, construction will emit an average of 88,340 metric tons per year of CO₂e over the four-year duration of construction. *Id.* ¶ 73. Without the conditions, construction emissions would average 104,100 metric tons per year. *Id.*

E. Alternate Route

The alternate route to avoid HOME property is indicated in Exhibit A, "Alternate Route." *Id.* Exhibit A. To avoid HOME property, the pipeline would need to go through the Misty Top Mountains. Order Den. Reh'g ¶ 44. This reroute would add over \$51 million in construction costs because the pipeline would be three miles longer. *Id.* Additionally, the pipeline would need to run through environmentally sensitive areas in the mountains and there would likely be a greater environmental impact than the proposed route. *Id.* HOME does not contest these additional impacts. *Id.* ¶ 45.

IV. **The CPCN Order Conditions**

The CPCN Order includes conditions that attempt to mitigate the GHG emission impacts of the construction of the proposed TGP Project. *Id.* ¶ 67. The CPCN Order conditions demand that TGP plant an equal number of trees as those removed in the construction of the TGP Project. *Id.* The order also requires that TGP utilize, wherever practical, electric-powered equipment in the construction of the TGP Project, including, without limitation: (a) electric chainsaws and other

removal equipment, where available and (b) electric powered vehicles, where available. *Id.* The CPCN Order also specifies that TGP shall purchase only “green” steel pipeline segments produced by net-zero steel manufactures and shall purchase all electricity used in construction from renewable sources where such sources are available. *Id.*

SUMMARY OF THE ARGUMENT

The NGA grants FERC the authority to regulate interstate natural gas transportation. *City of Oberlin v. FERC (“Oberlin I”)*, 937 F.3d 599, 602 (D.C. Cir. 2019). Under the Act, a natural gas company must receive a “certificate of public convenience and necessity” before constructing an interstate pipeline. 15 U.S.C. § 717(f)(c)(1)(A). A company receives a certificate when it shows that the pipeline is “required by the present or future public convenience and necessity.” *Id.* § 717(f)(e). FERC considers all relevant factors concerning the public interest to make its decision. *Atl. Ref. Co. v. Pub. Serv. Comm’n of State of N.Y.*, 360 U.S. 378, 391 (1959).

FERC issued a policy statement that outlines how it determines public convenience for new pipelines. *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999). First, a project must show that it can proceed without subsidies from existing customers. *Id.* Next, FERC balances the public benefits of the project against any unmitigable adverse effects. *Id.* Public benefits may include “meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.” *Myersville Citizens for a Rural Cmty. v. FERC*, 738 F.3d 1301, 1309 (D.C. Cir. 2015) (citing 88 FERC ¶ 61,227). Adverse impacts may include “increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property.” *Id.*

First, FERC's finding of public convenience and necessity was supported by substantial evidence and was not arbitrary and capricious. FERC properly considered binding export precedent agreements as direct evidence of project need for the pipeline. Likewise, FERC's finding of project need is reasonably based on the evidence in the record and therefore is not arbitrary and capricious.

Second, FERC's finding that the benefits of the AFP outweighed the environmental and social impacts was not arbitrary and capricious because FERC's decision making was based on substantial evidence from the record and the conclusion was logical. TGP also mitigated against potential impacts, addressed HOME's concerns, and used evidence in the record and an EIS to reasonably weigh the adverse impacts against the benefits.

Third, FERC's decision to route the AFP over HOME property does not violate RFRA because the pipeline does not impose a substantial burden on HOME's religious beliefs. Alternatively, if this court finds the AFP substantially burdens HOME's religious beliefs, it does not violate RFRA because it (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Fourth, FERC stepped outside its authority when it chose to impose GHG conditions on the certificate of public convenience and necessity. FERC's authority to impose conditions to ensure public convenience and necessity does not give the agency power to regulate for general public welfare. Congress delegated the authority to regulate GHG emissions to EPA and FERC therefore lacks the authority to regulate GHG emissions on its own. Further, because FERC operated outside of its historical area of expertise and GHG emissions are of great political concern, FERC's GHG conditions trigger a major questions doctrine. Therefore, FERC cannot

impose GHG conditions on the CPCN Order because the NGA does not give FERC clear congressional authority to regulate GHG emissions.

Fifth, FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts is not arbitrary and capricious because the environmental impact was properly addressed through TGP's EIS, satisfying NEPA requirements.

ARGUMENT

I. FERC'S REVIEW OF THE CPCN IS CLEAR ERROR AS COURTS DEFER TO AGENCY EXPERTISE.

FERC has the authority to grant or deny a CPCN under 15 U.S.C. § 717(f)(c). Courts will not set aside a FERC order unless it is "arbitrary and capricious or otherwise contrary to the law." *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 358 (D.C. Cir. 2017). An agency action is not arbitrary and capricious when it is "rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). Further, when an agency provides sufficient data and provides a "satisfactory explanation for its decision," courts defer to the agency. *Motor Vehicle*, 463 U.S. at 42–43. Only a "clear error of judgment" will cause a court to disregard the agency's explanation. *Id.* The agency fact finding, if supported by substantial evidence, is conclusive. *Oberlin I*, 937 F.3d at 605. Accordingly, the court will not hear challenges to a FERC fact finding unless there is reasonable grounds to do so. 15 U.S.C. 717r(b).

II. FERC’S GRANT OF THE CPCN WAS NOT ARBITRARY AND CAPRICIOUS BECAUSE THERE WAS A FINDING OF PUBLIC CONVENIENCE AND NECESSITY AND THE BENEFITS FROM THE AFP OUTWEIGH THE ENVIRONMENTAL AND SOCIAL HARMS.

A. FERC correctly considered export precedent agreements under Section 7 of the NGA when determining the public necessity.

Section 7 of the NGA defines a natural gas company as “a person engaged in the transportation of natural gas in interstate commerce” but specifically excludes foreign commerce from the definition of ‘interstate commerce.’ 15 U.S.C. § 717(a)(6)–(7). A pipeline is not a “natural gas company” under the Act when it transports gas in foreign gas but does not engage in interstate transport. *See Border Pipe Line Co. v. Fed. Power Comm’n.*, 171 F.2d 149, 152 (D.C. Cir. 1948) (holding that a pipeline importing gas from Canada to New York was not within FERC’s authority under the NGA). However, when a pipeline transports gas in foreign commerce as well as in interstate commerce, it properly falls under the authority of Section 7 of the NGA. *City of Oberlin v. FERC (“Oberlin II”)*, 39 F.4th 719, 726 (D.C. Cir. 2022); *see also Okla. Nat. Gas Co. v. Fed. Power Comm’n.*, 28 F.3d 1281, 1285 (D.C. Cir. 1994) (“[G]as commingled with other gas indisputably flowing in interstate commerce becomes itself interstate gas . . .”).

As FERC correctly found, TGP is a natural gas company within the meaning of the NGA. HOME does not take issue with this finding. However, HOME contends that FERC cannot consider the gas which is destined for export when determining public need because that gas is not in the interstate stream of commerce. This selective view of interstate commerce runs counter to long-standing precedent that all gas within an interstate gas pipeline is interstate gas regardless of where it eventually ends up. Therefore, FERC reasonably considered all gas in the pipeline when it found a project need. To argue that FERC must determine where each bit of gas is going and then label it accordingly is. It is antithetical to FERC’s mission of ensuring the orderly

development of natural gas resources to argue that FERC must determine where each bit of gas is going and then label it accordingly.

One significant way that a company can demonstrate a public benefit is by showing demand for the project with precedent agreements. *Oberlin II*, 39 F.4th at 722 (citing *Env't Def. Fund v. FERC*, 2 F.4th 953, 962 (D.C. Cir. 2021)). Section 7 of the NGA does not prohibit FERC from considering export agreements in its public convenience and necessity analysis. *Oberlin II*, 39 F.4th at 726. Section 7 merely requires FERC to grant a certificate for a new pipeline when it “is or will be required by the present or future public convenience and necessity.” *Id.* (citing 15 U.S.C. § 717f(e)). As the United States Supreme Court held, the NGA’s broad language “requires the Commission to evaluate all factors bearing on the public interest.” *Id.* (citing *Atl. Ref. Co.*, 360 U.S. at 391). Factors “include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.” 88 FERC ¶ 61,227. Therefore, export precedent agreements are such factors bearing on the public interest. *Oberlin II*, 39 F.4th at 726.

Further, Section 3 of the NGA deems export as inherently in the “public interest” when the United States has a free trade agreement with the destination country. *See* 15 U.S.C. § 717b(b); *see also Oberlin II*, 39 F.4th at 727. However, there does not need to be a free trade agreement for FERC to find that exports to a specific country are within the public interest. *See Mich. Consol. Gas Co. v. Fed. Power Comm’n*, 246 F.2d 904, 909–12 (3d Cir. 1957) (holding that export to Canada was in the public interest years before there was a free trade agreement with the country). In *Michigan Consolidated*, the court held that export was in the public interest because the oil in question was commonly exported, and export did not inhibit domestic supply. *Id.* at 912. When an

export is in the public interest, FERC gives export agreements the same weight as other precedent agreements. *Oberlin II*, 39 F.4th at 727.

Additionally, many domestic benefits stem from the increased shipment of natural gas, regardless of its final destination. *Id.* In *Oberlin II*, the court upheld FERC's determination that an export pipeline would lead to domestic benefits like additional capacity from the gas field, the production and sale of domestic gas, and an increase in jobs. *Id.* Accordingly, export precedent agreements are evidence of the public demand for additional capacity to ship gas from a production area. *Id.*

Here, FERC properly relied on export precedent agreements when it found a strong showing of public need. First, as the Certificate Policy Statement states and courts have repeatedly held, precedent agreements are always significant evidence of project need. 88 FERC ¶ 61,227; *see, e.g., Env't Def. Fund*, 2 F.4th at 962. Additionally, the export agreements account for one hundred percent of the AFP's design capacity. Order Den. Reh'g ¶ 26. This proves that the pipeline is "needed" in the simplest sense of the word. Further, FERC acted reasonably when it considered the export agreements because the NGA requires FERC to consider all relevant factors bearing on the public interest. This includes binding precedent agreements. If FERC disregarded export agreements, it would be abdicating its duty to fully evaluate projects.

Second, FERC properly gave the export agreements the same weight as domestic agreements. HOME argues that FERC should not have put much consideration into the export agreements because the United States does not have a free trade agreement with Brazil. *See* Order Den. Reh'g ¶ 33. This contention is misguided. The NGA merely states that if there is a free trade agreement, exports to that country are automatically in the public interest. This does not mean that FERC cannot find export to a country with no free trade is in the public interest. FERC can always

apply a balancing test to determine whether the benefits outweigh the adverse effects of export. In fact, the Third Circuit found in *Michigan Consolidated* that the export of gas to Canada was in the public interest. The court decided that case over 20 years before the United States entered into a free trade agreement with Canada. Therefore, even though there was no free trade agreement in place, FERC properly determined that the export of gas to Brazil was within the public interest. Accordingly, FERC correctly considered the export agreements as direct evidence, standing alone, of project need.

Third, FERC properly found that the AFP served multiple domestic needs. These include: (1) delivering gas to the NorthWay Pipeline which is undersubscribed; (2) expanding access to natural gas in New Union and other parts of the United States; (3) decreasing prices for new and existing customers by increasing competition; and (4) improving regional air quality by expanding access to cleaner-burning natural gas. Order Den. Reh'g ¶ 27. Additionally, FERC considered the fact that the need for natural gas in Old Union was declining. Order Den. Reh'g ¶ 34. AFP serves the public need because it provides new market opportunities for the producers in the Hayes Field. Without the AFP, those producers may not have future buyers for natural gas because of the declining demand in Old Union. Therefore, the substantial evidence in the record supports FERC's granting of a CPCN for the AFP.

B. FERC's finding that benefits from the AFP outweigh the environmental and social adverse impacts is not arbitrary and capricious.

FERC's finding that the benefits of the TGP Project outweigh the social and environmental impacts was not arbitrary and capricious because they used substantial evidence and reasoned decision making to reach the conclusion. The court uses criteria specified in the Commission's Certificate Policy Statement to review FERC's decision "to assur[e] that the Commission's decision making is reasoned, principled, and based upon the record." *Am. Gas Ass'n v. FERC*, 593

F.3d 14, 19 (D.C. Cir. 2010); *Penn. Office of Consumer Advocate v. FERC*, 131 F.3d 182, 185 (D.C. Cir. 1997). The court has held that a decision where public benefits outweigh the adverse effects is not arbitrary or capricious if there is “substantial evidence,” or “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010) (internal quotation marks omitted); *see also* 15 U.S.C. § 717(r)(b).

Under FERC’s Certificate Policy the project must first meet the threshold requirement for new projects. 88 FERC ¶ 61,227. This requires that a pipeline company must be prepared to financially support a new project without relying on subsidization from its existing customers. *Id.* It is undisputed that TGP can financially support the project without subsidization from its existing customers, and therefore this issue is not addressed on rehearing. Next, the Commission balances the “public benefits against the potential adverse consequences” of the proposal if the project is financially supported without subsidization. *Id.* If no adverse effects would stem from the project, no balancing is required, and the Commission proceeds to environmental review. *Id.* Otherwise, the Commission balances the adverse effects with the public benefits of the project, as measured by what is essentially an “economic test.” *Id.*

TGP responded to HOME’s concerns and included multiple mitigation measures with the TGP Project to reduce the adverse impacts to HOME and their property. First, TGP plans to bury the pipeline so that it will not be visible on their property. Second, TGP will expedite construction “to the extent feasible” to minimize disruption and plans to complete the two-mile stretch within a four-month period to avoid interrupting the Solstice Sojourn. Third, trees removed for the right of way will be replaced with new trees in other locations. Finally, the completion of the pipeline

does not physically stop HOME members from completing their Solstice Sojourn or other religious practices on their land.

The economic benefits from the AFP pipeline will include: (1) providing 500,000 Dth per day of natural gas to the NUG terminal and NorthWay Pipeline; (2) providing natural gas service to areas currently without access to natural gas within New Union; (3) expanding access to sources of natural gas within New Union; (4) optimizing the existing systems for the benefit of both current and new customers; (5) fulfilling capacity in the undersubscribed NorthWay pipeline; and (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. Order Den. Reh'g ¶ 27.

Here, FERC was correct to approve the proposed AFP route even though it will adversely impact HOME's religious practices on their land. HOME contends that FERC should have certified use of the alternate route because of the adverse impacts on HOME property. In *Minisink*, petitioners argued that FERC should have certified the alternative Wagoner pipeline route because the proposed pipeline route would have adverse impacts on property values in the town. *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 103 (2014). The re-route of the pipeline around the town would have required seven miles of pipeline to be buried under a river, resulting in higher construction costs and adverse environmental impacts. *Id* at 110. The court held that although the approved route would result in adverse impacts by lowering property values in the town, the decision was reasonable and reasonably explained so the decision was not arbitrary and capricious. *Id*.

In *Delaware Riverkeeper*, petitioners argued that FERC did not adequately balance public benefits against adverse consequences because the environmental analysis was inadequate. *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 115 (2022). The court held that because an

environmental analysis was properly prepared to comply with NEPA specifications, the analysis was substantial and the balancing was not arbitrary or capricious. *Id.* at 113. Here, TGP prepared an EIS as required by NEPA, Order Den. Reh'g ¶ 72, and no party has challenged the findings in the EIS, indicating that the EIS was adequately prepared and can be used to balance the environmental impacts.

In contrast, in *Environmental Defense Fund*, a proposed pipeline was not intended to serve any new demand and the single precedent agreement was not adequate to show a need for the project. 2 F.4th 953, 960. The Spire STL pipeline only had one precedent agreement, and it was with Missouri Spire which was a corporate affiliate. *Id.* at 959. The court held that since FERC exclusively relied on the single affiliated precedent agreement, the assertion of economic benefit of the project was not supported by concrete evidence so the benefits-impacts analysis was arbitrary and capricious. *Id.* at 976.

Here, the alternative route to go around HOME's property would result in two more miles of pipeline, adverse impacts to the environment, and add over \$51 million in construction costs. The impacts felt here are similar to *Minisink*, because although the proposed route will adversely impact HOME's use of their property, the adverse impacts of the alternative route are greater and more costly. Conversely, the issue at bar is unlike *Environmental Defense Fund* because TGP has executed binding precedent agreements with International and NUG for the full design capacity of the TGP project, showing demand for the project. FERC used concrete evidence from the record to reasonably support the design need of the project, whereas in *Environmental Defense Fund* the only evidence of project need was an affiliate precedent agreement.

FERC responded to HOME's concerns with mitigation measures that will reduce nearly all of the adverse impacts from the AFP. FERC also conducted the benefit-impact analysis by using

concrete evidence in the record and showed reasonable and principled decision making in concluding that the benefits outweigh the adverse impacts. Although some adverse impacts will remain, the environmental and economic benefits of the TGP Project outweigh the impacts and FERC's decision in granting the Order was not arbitrary or capricious.

III. FERC'S DECISION TO ROUTE THE AFP OVER HOME'S PROPERTY DOES NOT VIOLATE RFRA BECAUSE IT DOES NOT PLACE A SUBSTANTIAL BURDEN ON HOME'S RELIGIOUS BELIEFS.

Under RFRA, "the government shall not substantially burden a person's exercise of religion," unless that burden is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(a). The Act imposes three threshold requirements: the government action must (1) substantially burden (2) a religious belief rather than a philosophy or way of life, (3) which belief is sincerely held by the adherent. *Thiry v. Carlson*, 78 F.3d 1491, 1494 (10th Cir. 1996). Such a burden exists when a government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *See, e.g., Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 n.11 (9th Cir. 2008) (citing *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 708 (1981)). Specifically, a substantial burden exists when an adherent is forced to choose between the "tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Id.* at 1070.

When analyzing the government action, courts place a high burden on the adherent to prove a substantial burden. The United States Supreme Court stated that the incidental effects of otherwise lawful government programs "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious

beliefs” do not rise to a substantial burden on the exercise of religion. *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450–51 (1988).

HOME’s RFRA claim raises issues pertaining to the pipeline’s route, construction, and operation through HOME’s property. However, the existence of an underground pipeline does not satisfy the significant burden necessary to satisfy such a claim. The pipeline does not compel HOME to support the production, transportation, and burning of fossil fuels as HOME argues. HOME concedes that the pipeline will not create a physical barrier to the free exercise of their religion. Order Den. Reh’g ¶ 59. HOME is not being coerced to acting contrary to their religious beliefs. The organization can still participate in the Solstice Sojourn, and the lack of even a physical barrier to their religious practices does not rise to the level of a substantial burden.

Furthermore, the pipeline will be completed within a four-month period, which is easily contained between Solstices. *Id.* ¶ 41. TGP can clearly finish construction within the six-month break between the bi-annual Solstices. Additionally, while the existence of the pipeline requires the removal of approximately 2,200 trees along HOME property, an equal number will be planted in other locations on the property. *Id.* ¶ 38. Because the pipeline will not have a significant impact on HOME’s religious practices, HOME does not face a substantial burden and thus there is no RFRA violation.

HOME argues that the AFP substantially burdens the exercise of their religion. HOME argues that its fundamental core tenet is that humans should do everything in their power to promote natural preservation over all other interests, especially economic interests. *Id.* ¶ 47. HOME presented sworn testimony about its religious practices. Specifically, HOME detailed the Solstice Sojourn’s journey; every summer and winter solstice, members make a ceremonial journey from a temple at the western border of the property to a sacred hill on the eastern border

of the property in the foothills of the Misty Top Mountains, then a journey back along a different path. *Id.* ¶ 48. HOME argues that the pipeline would significantly impact, if not entirely prevent, the Solstice Sojourn. *Id.* ¶ 57. However, as detailed above, members testified that walking over the buried AFP and the path above it won't physically prevent the journey. The pipeline does not create a substantial burden on HOME's beliefs. Therefore, the pipeline does not violate RFRA.

Even if the court finds the pipeline imposes a substantial burden on HOME's religious expression, there is no RFRA violation because the pipeline falls under the statute's exceptions. As discussed above, if a practitioner suffers a substantial burden on their religious expression, the government action will be excused if it is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(a).

First, the government's interest in the pipeline is satisfied by the language of the NGA. The Act specifically states "that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717. Further, a broad range of government activities will always be considered essential to the practices of some citizens, often on the basis of sincerely held religious beliefs. *Lyng*, 485 U.S. at 452. Here, the AFP will provide natural gas service to areas currently without access to natural gas within New Union; (3) expand access to sources of natural gas supply in the United States; (4) optimize the existing systems for the benefit of both current and new customers by creating a more competitive market; (5) fulfill capacity in the undersubscribed NorthWay Pipeline; and (6) provide opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. Order Den. Reh'g ¶ 27. These

benefits are sufficiently compelling to offset HOME's RFRA claim because they provide benefits across parties; they do not simply satisfy one interest. Therefore, there is a sufficient government interest in the project and HOME fails to make a cognizable claim.

Second, positioning the AFP along the selected tract of land is the least restrictive means possible. The least restrictive means inquiry involves "comparing the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity." *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990). It is undisputed that the pipeline's alternative route would cause more environmental damage than the approved route due to the required additional three miles of pipeline that would run through more environmentally sensitive ecosystems in the mountains Order Den. Reh'g ¶ 44. Additionally, the alternative route is excessively expensive; the alternative route would add over \$51 million to construction costs. *Id.* To dispel further concerns, TGP agreed to bury the pipeline through the entire part of HOME's property, and already made changes to over 30% of the proposed pipeline to address concerns raised by landowners. *Id.* ¶ 41. These completed mitigation actions, paired with the severe detrimental economic and environmental impacts of further changes to the AFP demonstrate that the approved route is the least restrictive means possible for the pipeline. Therefore, HOME fails to bring a cognizable RFRA claim.

HOME's RFRA claim ultimately fails because there is no substantial burden to the organization's religious practices. Alternatively, if the court finds there are substantial burdens to the organization's religious practices, there is a compelling government interest in the pipeline and the current plan is the least restrictive means possible. Therefore, there is no adequate RFRA claim and this court should affirm FERC's Order.

IV. FERC DOES NOT HAVE THE AUTHORITY TO IMPOSE GHG CONDITIONS UNDER THE NGA.

A. Regulation of GHG emissions is not within the meaning of public interest.

When FERC determines that a pipeline is “required by the present or future public convenience and necessity,” it considers all relevant factors concerning the public interest to make its decision. *Atl. Ref. Co.*, 360 U.S. at 391. However, the mere mention of “public interest” in a statute “is not a broad license to promote the general public welfare.” *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669 (1976). Rather, courts must consider congressional intent when determining the meaning of public interest within a specific statute. *Id.* The principal purpose of the NGA is “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.” *Id.* at 669–70. Therefore, FERC may only regulate consequences that are directly related to the orderly development of natural gas to ensure plentiful supply and prices. *See id.* at 671.

Here, FERC is improperly attempting to expand the meaning of public interest in the NGA beyond what Congress intended. FERC claims it has the authority to regulate GHG emissions because mitigating climate change risk is necessary for future public convenience and necessity. The “future public convenience and necessity,” however, is not synonymous with “public interest.” While FERC may impose conditions on a CPCN, even environmental ones, FERC has failed to show how these conditions are reasonably necessary for the development of natural gas at reasonable prices. There is no direct link between limiting GHG emissions and future public convenience and necessity.

In fact, the GHG Conditions imposed here have the opposite effect. When FERC imposes conditions on a pipeline that do not relate to the orderly transportation of natural gas, it increases the cost of a project. Accordingly, natural gas companies will pass that cost along to customers to

turn a profit, thus increasing the cost of natural gas. Therefore, FERC's unsupported decision to impose GHG conditions on CPCN orders has the exact opposite effect on natural gas development than the one Congress intended. The conditions hinder natural gas development which runs counter to the congressional intent to promote future public convenience and necessity through natural gas development.

B. Congress delegated the authority to mitigate GHG emissions to the EPA.

When Congress expressly delegates jurisdiction to another body, FERC does not have the authority to consider the matter. *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996) (“[H]ere there is no such gap but, on the contrary, an express congressional reservation of jurisdiction to another body. That places the matter off-limits to the FERC.”). Congress “delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from” stationary sources. *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 426 (2011). EPA’s authority is not displaced merely because the agency has not yet exercised its authority to regulate. *See id.* at 425–26. Specifically, FERC “cannot do indirectly what it could not do directly.” *Altamont*, 92 F.3d at 1248.

GHG emissions are an indirect effect of approving a project. *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). However, FERC is merely required to address indirect effects in the EIS. *See id.* The purpose of an EIS is disclosure, not the creation of a mitigating course of action. *See id.* at 1368 (“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.”). When an agency adequately discusses all foreseeable impacts, the NEPA analysis is sufficient. *Id.*

Here, FERC is attempting to indirectly address greenhouse gas emissions even though it cannot do so directly. EPA has express authority to regulate GHG emissions. FERC's reliance on *Sierra Club* as evidence that FERC has authority to regulate indirect GHG effects of a project. However, that case concerned the adequacy of FERC's EIS analysis, not FERC's direct authority to regulate. Additionally, the pipeline at issue in that case served a gas power plant. This made GHG emissions a reasonably foreseeable indirect effect because a power plant is a major GHG emitter. Here, it is unclear whether construction emissions are reasonably foreseeable to the same extent as those from a power plant.

Further, EPA has a long history of regulating power plants and setting emissions standards for those facilities. EPA has no such history of setting emissions standards for stationary facilities like pipelines on their own. Even in the context of power plants, FERC merely considers GHG emissions as an indirect effect during the required NEPA process, not as a factor for public convenience and necessity. Therefore, GHG emissions from the construction of a gas pipeline are at most an indirect effect which FERC will consider during the NEPA process. Accordingly, FERC is attempting to regulate an indirect effect via a CPCN Order when EPA, with explicit authority, has chosen not to do so.

C. GHG conditions are “major questions” that require precise statutory delegation.

The federal government does not have general powers. *Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. 109, 122 (2022) (citing *McCulloch v. Maryland*, 17 U.S. 316 (1819)) (Gorsuch, J., concurring). The power is limited and divided by the separation of powers. *Id.* Therefore, “[w]e expect Congress to speak clearly’ if it wishes to assign to an executive agency decisions ‘of vast economic and political significance.’” *Id.* (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021)). How agencies regulate GHG emissions has great

economic and political significance. *See, e.g., Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). In *Utility Air*, the court held that EPA regulations concerning GHG regulations for stationary sources would be “an agency laying claim to extravagant statutory power over the national economy. . . .” 573 U.S. at 324. Likewise, in *West Virginia v. EPA*, the court stated that the EPA’s new GHG emissions rules allowed the EPA to exert “unprecedented power over American industry.” 142 S. Ct. at 2612 (quoting *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980)).

Courts use the major questions doctrine when an agency asserts authority outside its traditional expertise. *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston, LLC*, 76 F.4th 291, 297 (4th Cir. 2023) (citing *West Virginia*, 142 S. Ct. at 2612–13). Another indicator that the major questions doctrine applies is when there is a distinct regulatory scheme already in place that addresses the issue. *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143–46 (2000)). The courts consider any factors that suggest an agency has exceeded its authority to regulate a matter of great significance. *Id.* (“[T]hey are among the things that cause us to hesitate and look for clear congressional authorization before proceeding.”).

When the major questions doctrine is triggered, the court will review an agency decision *de novo* and the agency must identify “clear congressional authorization” to regulate in a given area. *Id.* at 301 (citing *West Virginia*, 142 S. Ct. at 2609). An interpretation that relies on a broad definition within a statute does not rise to the level of clear congressional authorization. *See id.* Further, “vague terms” or “oblique or elliptical language” are not sufficient evidence of clear congressional intent. *Id.* (quoting *West Virginia*, 142 S. Ct. at 2609). Congress does not delegate authority to an agency with ambiguous language. *See Tobacco Corp.*, 529 U.S. at 160 (“[W]e are

confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

Here, FERC is venturing beyond its traditional area of expertise into an area where there is already a distinct regulatory scheme in place. As stated above, FERC’s expertise is interstate natural gas development. Additionally, FERC has regulatory power over the entire natural gas transmission industry. *See* 15 U.S.C. § 717, et seq. Yet, Congress specifically delegated the authority to regulate air pollutants to EPA. Therefore, FERC’s decision to regulate GHG emission directly via the CPCN is an exercise of power that goes beyond its traditional expertise into the purview of the EPA.

FERC claims that the major questions doctrine does not apply here because the conditions at issue are project specific. However, as TGP and FERC point out, FERC imposed similar conditions on most of its subsequent section 7 CPCN approvals. Order Den. Reh’g ¶ 84. This suggests that GHG conditions are not individual measures but rather new industry-wide requirements. Additionally, as *Virginia v. EPA* and *Utility Air* demonstrate, inquiries into how agencies define and regulate GHG emissions hold considerable political significance. Accordingly, FERC’s decision to impose GHG conditions here is of vast economic and political significance. Therefore, the major questions analysis applies here. Accordingly, the Court must review FERC’s decision to impose GHG conditions de novo and FERC has the burden of showing that congress authorized that authority. FERC cannot demonstrate this.

The NGA does not contain a clear congressional authorization that directs FERC to regulate GHG emissions. The statute merely authorizes FERC to impose conditions required for public convenience and necessity. As stated above, this does not authorize FERC to promote public welfare. This sort of broad language is not an express congressional authorization. Rather, it is the

sort of cryptic language which proves that Congress did not intend to delegate the authority to mitigate GHG emissions to FERC under the NGA. Accordingly, FERC overstepped its authority under the NGA when it imposed GHG conditions on the CPCN Order.

V. FERC’S DECISION NOT TO IMPOSE ANY GHG CONDITIONS ADDRESSING DOWNSTREAM AND UPSTREAM GHG IMPACTS IS NOT ARBITRARY AND CAPRICIOUS.

Section 706(2)(A) of the APA instructs courts to invalidate any agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The scope of review for courts is narrow under this standard. *Motor Vehicle*, 463 U.S. at 43. A court is not to substitute its judgment for that of the agency. *Id.* However, this discretion is not without boundaries. The agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Id.* An agency action would be arbitrary and capricious if the agency relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.*

FERC’s decision not to impose any GHG conditions addressing downstream and upstream GHG impacts meets the narrow criteria promulgated by the APA. The GHG Conditions are the result of extensive analysis in the EIS completed by TGP. Order Den. Reh’g ¶ 72. The EIS provided estimates of GHG emissions resulting from the project, including upstream and downstream GHG impacts as well as GHG emissions from the construction of the AFP itself. *Id.* In its Order, FERC states it is in the process of developing rules for addressing GHG impacts, including upstream and downstream impacts. *Id.* ¶ 70. Further, it is within FERC’s authority to

discern the proper process by which to mitigate specific issues. HOME argues that because of FERC's finding that mitigation measures were appropriate for construction GHG impacts, it was arbitrary for the agency to decline to mitigate upstream and downstream GHG impacts. *Id.* ¶ 93. This is a misunderstanding of what is required by the agency.

FERC elected not to impose GHG Conditions in accordance with the factors Congress intended for it to consider. *Id.* ¶ 101. FERC was required to analyze the potential impacts of the project under NEPA. NEPA requires an agency to take a "hard look" at potential impacts. 42 U.S.C. § 4332(2)(C). This was done through the EIS prepared by TGP. NEPA does not, however, mandate any specific outcome or mitigation measures. *Sierra Club*, 867 F.3d at 1367. The statute is information-forcing, not action-forcing. Therefore, FERC's decision not to impose any GHG conditions addressing downstream and upstream GHG impacts is not arbitrary and capricious and HOME's argument to the contrary is misplaced.

Additionally, it can be difficult to quantify upstream emissions due to numerous unknown factors, such as the location of the supply source and whether the transported gas comes from new or existing production. Order Den. Reh'g ¶ 74. Here, the gas is already in production, and simply being transported to different destinations. *Id.* Therefore, there's no significant upstream consequences from GHG emissions that require regulatory conditions and FERC's decision not to impose any should be affirmed.

Further, as discussed above, FERC's ability to impose GHG Conditions incorporates major questions. Thus, imposing Conditions in this area requires more precise statutory authorization. Due to the NGA's lack of authorization to regulate GHG conditions, there is no statutory authority to regulate GHG emissions either upstream or downstream. This strengthens the conclusion that

FERC's decision not to impose GHG Conditions addressing downstream and upstream GHG impacts should be affirmed by the court.

CONCLUSION

Because FERC's finding of public convenience and necessity for the AFP was supported by substantial evidence, FERC's finding the benefits from the AFP outweigh the environmental and social harms, the agency's actions were not arbitrary and capricious. Further, the GHG Conditions imposed by FERC were beyond the agency's authority under the NGA, however, FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts was not arbitrary and capricious. Finally, FERC's decision to route the AFP through HOME's property was not a RFRA violation. For these reasons, we respectfully request that this court uphold FERC's finding of public convenience and necessity for the AFP and this court set aside the GHG Conditions that FERC attached to the CPCN Order.

We hereby certify that the brief for _____ is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and this brief complies with these Rules.

Date: 20 November 2023