Docket: 23-01109

United States Court of Appeals for the Twelfth Circuit

The Holy Order of Mother Earth v. Federal Energy Regulatory Commission

Non Measuring Brief

Filed on Behalf of Transnational Gas Pipelines, LLC

Appeal

Agency TG21-616-000: Federal Energy Regulatory Commission

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Jurisdictional Statement

The Federal Energy Regulatory Commission ("FERC") derives jurisdiction over pipeline projects involved in the transportation of natural gas in interstate commerce, pursuant to the Natural Gas Act ("NGA"). 15 U.S.C. § 717.

The Court of Appeals has jurisdiction, pursuant to the Federal Power Act ("FPA"), to review FERC orders, which the Court assesses to determine whether orders are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); Federal Power Act, 16 U.S.C. §§ 791–825r, 16 U.S.C. § 825l(b). The final judgment that is being appealed from disposed of all issues in this cause and was entered on June 1, 2023.

Issues Presented

1) 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 need where 100% of project design capacity was met through binding precedent agreements?

2) Was FERC's finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious where FERC has substantial discretion and the project would allow for domestic economic benefits and better air quality while harm was localized to just one organization's property?

3) Was FERC's decision to route the AFP over HOME property despite HOME's religious objections in violation of RFRA?

4) Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA where FERC found its authority in a non-pertinent section of the Act decades after its creation?

5) Was FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious where FERC's discretion to decide whether to implement conditions does not allow it to use the Act in a way Congress did not intend?

Opinion Below

Transnational Gas Pipelines, LLC, 199 FERC ¶ 72,201 (2023) (order denying rehearing)

I. Introduction

When Congress enacted the Natural Gas Act ("NGA"), it sought to facilitate the plentiful supply of reasonably priced natural gas—not to condition its supply on compliance with religious or environmental agendas. Indeed, Congress vested the Federal Energy Regulatory Commission ("FERC") with the precise task of determining if projects providing for the transportation and sale of natural gas can be certified based on public necessity and convenience, reflected by a showing of market need. Congress was clear: FERC shall issue certificates for projects responding to market need, and needlessly burdening a project's provision of natural gas contravenes statutory intent. Transnational Gas Pipelines, LLC, ("TGP") obtained a certificate of public necessity and convenience ("CPCN") for the American Freedom Pipeline ("AFP"), which uses its entire design capacity to satisfy market need. TGP has already shown generous flexibility in response to the Holy Order of Mother Earth's ("HOME") religious sensibilities and FERC's proposed environmental measures. TGP urges this Court to reject any request to invalidate the AFP's CPCN or to impose conditions restricting its highly-demanded provision of natural gas because, ultimately, the NGA was designed with the Project's exact profile in mind.

HOME proposes a suspect alternate vision of the NGA: one where FERC should disapprove of a project offering extensive domestic benefits based on absent prohibitions. HOME imputes to FERC the onus of aggressively tracking a project's supply of natural gas from cradle to grave, and rejecting the project if its gas is ultimately destined for export. Yet the NGA is not RCRA—where gas ends up is of no relevance to the project's proven market need and its domestic benefits under Section 7, and suggesting otherwise threatens FERC's ability to facilitate the provision of natural gas under the NGA. Included in HOME's reimagination of the NGA is its belief that the supply of natural gas in a competitive market should legally cede to the

most delicate of religious sensibilities. TGP's Project neither limits nor threatens HOME's exercise of religion: the AFP is invisible to HOME's members. If it were up to HOME, any religious claimant could object to natural gas crossing sacred land and force FERC to prostrate itself despite its duty to certify highly-demanded pipelines like TGP's.

While FERC correctly interpreted its statutory duty in certifying the AFP, FERC seems to view the NGA as a menu of options. On one hand, FERC vindicated the NGA's core purpose of facilitating the transportation of natural gas upon a showing of market need, and rightly dismissed HOME's request to condition TGP's permit on environmental requirements not contemplated in the NGA. Simultaneously, FERC imposed its own innovative environmental conditions on TGP's Project. FERC has discretion in fulfilling its statutory mandate, but what FERC does not have is the power to keep one foot within the NGA's perimeter and one outside it. Whether the AFP is regulable under the Clean Air Act is a separate matter. Congress did not, however, contemplate the mitigation of particular pollutants in the NGA, and it granted FERC no authority to do so either. The NGA is the only statute governing this case and the NGA is not the Clean Air Act.

The issues before this Court arise from one source. HOME cannot turn the NGA into RCRA or into a nullity at the feet of hollow grievances. Neither can FERC turn the NGA into a canvas colored by agency caprice. We urge the Court to affirm the NGA's requirements and, in doing so, allow the AFP to meet demand, benefit our economy, and operate unencumbered.

II. Statement of the Case

TGP is a limited liability company organized and existing under the laws of the State of New Union. 199 FERC ¶ 72,201 (2023), Order Den. Reh'g ¶ 8. Upon the commencement of operations proposed in its application, TGP will become a natural gas company within the meaning of section 2(6) of the NGA. *Id.* HOME is a not-for-profit religious organization,

organized under the laws of the State of New Union. *Id.* ¶ 9. HOME is a religious order that considers the natural world to be sacred. *Id.* ¶ 46. HOME argues that its fundamental core tenet is that humans should do everything in their power to promote natural preservation over all other interests. *Id.* ¶ 47. HOME owns its headquarters, which are situated toward the western end of a 15,500-acre property in Burden County, New Union. *Id.* ¶ 9. Every summer and winter solstice, members of HOME make a ceremonial journey from a temple at the western border of the property to a sacred hill in the foothills of the Misty Top Mountains, then a journey back along a different path (the "Solstice Sojourn"). *Id.* ¶ 48. The proposed AFP route crosses over the HOME property east of the headquarters and its property lies just north of the proposed end point of the AFP. *Id.* ¶ 9.

On June 13, 2022, TGP filed an application, pursuant to section 7(c) of the Natural Gas Act ("NGA") and Part 157 of FERC's regulations, for authorization to construct and operate an approximately 99-mile-long, 30-inch diameter interstate pipeline (the AFP) and related facilities 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 (the "TGP Project"). *Id.* ¶ 1. The proposed pipeline is designed to provide up to 500,000 dekatherms per day ("Dth/day") of firm transportation service from two preconstruction contracts: one for 450,000 Dth/day with International Oil and Gas ("International") and one for 50,000 Dth/day with New Union Gas and Energy Services Company ("NUG"), utilizing 100% of the design capacity of the pipeline project. *Id.* ¶¶ 1, 11, 26.

Because of these contracts, the AFP offers numerous domestic benefits including 500 Dth/day to the interconnection with NUG and Northway; greater access to natural gas for energy deserts in New Union; significantly greater overall availability of energy; the optimization of

existing systems for consumers in their use of the currently undersubscribed Northway Pipeline; and cleaner-burning natural gas rather than dirty fossil fuels, which will allow for improved air quality for citizens. *Id.* ¶ 27. Although a substantial portion of the LNG carried by the AFP will be diverted to the Port of Union City for export by International, the AFP provides transportation for domestically produced gas, provides gas to domestic consumers, and even fills additional capacity at the International New Union City M&R Station. *Id.* ¶¶ 24, 34. The AFP ensures that gas that might not be purchased in the future because of diminishing returns from Southway Pipeline is transmitted now. *Id.* ¶ 34. TGP estimates that the proposed project will cost approximately $599 million. *Id.* ¶ 10.

On April 1, 2023, FERC issued an order authorizing the TGP Project, subject to the conditions in the Order ("the CPCN Order"). Dkt. 23-01109, Dkt. Notice at 2. In the CPCN Order, FERC found that the benefits the TGP Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities. Order Den. Reh'g ¶ 3. Based on the Environmental Impact Statement ("EIS"), FERC concluded that the project will result in some adverse environmental impacts, but that these impacts will be reduced to less-than-significant levels with the implementation of the conditions in the CPCN Order. *Id.* The conditions in the CPCN order further stipulated that TGP shall take certain steps to mitigate the greenhouse gas ("GHG") emission impacts of the construction of the AFP (the "GHG Conditions"), including: (1) planting or causing to be planted an equal number of trees as those removed in the construction of the TGP Project; (2) utilizing, 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; (3) purchasing

only "green" steel pipeline segments produced by net-zero steel manufacturers; and (4) purchasing all electricity used in construction from renewable sources where such sources are available. *Id.* ¶ 67.

The Project's environmental impacts will include the removal of approximately 2,200 trees and other vegetation along HOME property, but will only pass through two miles over HOME's 15,000 acres of land. *Id.* ¶¶ 38, 44. The project may also produce greenhouse gas emissions, including downstream emissions, which occur when the natural gas transported from the pipeline is used, and upstream emissions, which occur when the natural gas that will be transported is produced. *Id.* ¶¶ 72, 74. These emissions may occur as a less direct result of the Project, and it is unclear to FERC if this particular project will result in a change in upstream or downstream emissions. *Id.* ¶¶ 99–100.

TGP managed to secure easement agreements with over half of the landowners along the route through continuous negotiations, ultimately changing over 30% of its proposed pipeline route to address concerns and ensure that the final agreements were acceptable to all parties involved. *Id.* ¶¶ 41, 42. Out of respect for HOME's religious preferences, TGP further agreed to both bury the pipeline throughout the two miles on HOME's property and expedite construction across its property. *Id.* ¶ 41. While TGP remained open to alternative routes, the only route HOME proposed crossed into environmentally sensitive ecosystems in the mountains and would cause objectively more harm to the environment than the chosen route. *Id.* ¶ 44. The alternative route would also add over $51 million in construction costs. *Id.*

On April 20, 2023, HOME sought rehearing from FERC on certain issues in the CPCN. *Id.* ¶ 5. HOME contended that the project need finding was unjustified and unsupported, because 90% of the gas transported by the pipeline will be exported to Brazil, constituting insufficient

"public necessity" within the United States to approve the pipeline or to exercise eminent domain over the pipeline's planned route. *Id.* HOME also argued that even if there were a public necessity, the negative impacts of the AFP outweigh the benefits, and the decision to route the AFP over HOME's property violated the Religious Freedom and Restoration Act ("RFRA"). *Id.* Finally, HOME argued that FERC's failure to require mitigation measures for upstream and downstream greenhouse gas ("GHG") impacts was arbitrary. *Id.* On April 22, 2023, TGP sought rehearing from FERC on certain conditions imposed in the CPCN, which required TGP to take mitigation measures designed to mitigate GHG impacts in construction of the AFP (the "GHG Conditions"). *Id.* ¶ 6.

On May 19, 2023, FERC issued an Order denying the petitions for rehearing and affirming the CPCN as originally issued (the "Rehearing Order" or "Order Denying Rehearing"). On June 1, 2023, both HOME and TGP filed Petitions for Review of the CPCN Order and Rehearing Order (the "FERC Orders") with this Court. *Id.*

III. FERC's Approval of TGP's CPCN Must Be Upheld Because FERC's Well-Reasoned Decision-Making Falls Firmly Outside the "Clear Error" Needed for Reversal.

A reviewing court may only reverse FERC's approval of a CPCN under Section 7 of the NGA where FERC's approval is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 15 U.S.C. §§ 717(c)–(e); 5 U.S.C. § 706(2)(A); *see Minisink Residents for Env't Pres. & Safety v. FERC,* 762 F.3d 97, 105–06 (D.C. Cir. 2014). So long as FERC's findings of fact are supported by substantial evidence, they are "conclusive." *B & J Oil & Gas v. FERC,* 353 F.3d 71, 76 (D.C. Cir. 2004) (citing 15 U.S.C. § 717r(b)). This Court may not "substitute its judgment for that of [FERC]"; indeed, only where there has been a "clear error of judgment" may any reviewing court reverse FERC's order. *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002); *see Am. Gas Ass'n v. FERC,* 593 F.3d 14, 19 (D.C. Cir. 2010); *see*

also Minisink Residents for Env't Pres., 762 F.3d at 108 (D.C. Cir. 2014) (noting that FERC's findings do not even require a preponderance of the evidence to withstand the standard of review). The approval of a CPCN always constitutes a matter "peculiarly within [FERC's] discretion." *Oklahoma Natural Gas Co. v. Fed. Power Comm'n*, 257 F.2d 634, 639 (D.C. Cir. 1958); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015); *Minisink Residents for Env't Pres.*, 762 F.3d at 106.

FERC may issue a CPCN under Section 7 of the NGA to "any qualified applicant" where the project is "required by the present or future public convenience and necessity." 15 U.S.C. §§ 717f(e), 717f(c)(1)(A). First, FERC looks to "whether the project can proceed without subsidies from … existing customers" based on the market need of new customers. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (Sept. 15, 1999), clarified, 90 FERC ¶ 61,128 (Feb. 9, 2000), further clarified, 92 FERC ¶ 61,094 (July 28, 2000). FERC is then required to balance the project's "adverse effects with the public benefits of the project." *Myersville Citizens*, 783 F.3d at 1309. In balancing harms and benefits in accordance with the NGA's goals, FERC laid out its procedure in the Rehearing Order. Order Den. Reh'g ¶ 20. First, it considers whether the applicant "has made efforts to eliminate or minimize impacts on" existing customers of the proposed pipeline, existing pipelines and their customers, or "landowners and communities affected by" the pipeline's route. *Id.* ¶ 20. If there are still negative impacts after these efforts, the Commision must then ensure the benefits outweigh the adverse impacts on economic interests. *Id.* ¶ 41. Environmental concerns and other interests are considered only after "the benefits outweigh the adverse effects on economic interests." *Id.* ¶ 20. HOME has only raised concerns about the Project's adverse environmental and social effects on

the environment and landowners and communities around the pipeline; thus, only these impacts will be discussed. *Id.* ¶ 22.

A. As FERC Found, TGP's Project Reflects Ample Market Need By Standing On Multiple Precedent Agreements and Offering A Rich Array of Domestic Benefits.

To make a proper showing of public necessity and convenience, an applicant must establish that its project satisfies market need through preconstruction contracts. *See Env't Def. Fund v. FERC*, 2 F.4th 953, 962 (D.C. Cir. 2021) (finding that preconstruction contracts "constitute significant evidence" of market need, especially if the applicant contracted with multiple customers for most of the pipeline's capacity during an open season); Order Den. Reh'g ¶ 26 (emphasizing the Certificate Policy Statement's instruction to view precedent agreements as "important, significant evidence of demand for a project"); *see also Myersville Citizens*, 783 F.3d at 1309 (noting that for a project to "stand on its own financially" it must show support from new customers subscribed to the expanded capacity through preconstruction contracts).

Precedent agreements will only prove insufficient in extreme cases like where an applicant's open season yields no customers and the applicant fabricates "market need" by privately contracting with an affiliate. *Env't Def. Fund*, 2 F.4th at 973 (finding the Project not required by the public necessity and convenience where the applicant privately contracted with a corporate affiliate to "manipulate evidence" of market need after a failed open season). Nothing requires FERC to "look beyond the market need reflected by … existing contracts." *Myersville Citizens*, 783 F.3d at 1311 (holding that a project's being "fully subscribed" through such contracts sufficed for market need); *see also City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 726

(D.C. Cir. 2022) (holding that a project's being subscribed through export-based precedent agreements constituted sufficient evidence of market need).

Second, even where FERC looks beyond market need and inquires into the nature of preconstruction contracts, it enjoys free rein in assessing "all factors bearing on the public interest" when determining if a project satisfies market need when it involves gas destined for export. *Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 391 (1959); *see also City of Oberlin*, 39 F.4th at 725. For example, FERC can consider domestic benefits and fulfilling a demonstrated need for additional capacity, whether or not gas is destined for export to a U.S. free trade partner. *See City of Oberlin*, 39 F.4th at 726–27 (noting that "nothing in Section 7 prohibits considering export precedent agreements in the public convenience and necessity analysis," and that FERC was justified in considering such agreements' domestic benefits as "factors bearing on the public interest."). In fact, whether gas will be exported to non-U.S. free trade partners has nothing to do with the issuance of a CPCN under Section 7: an export recipient's status as a U.S. free trade partner bears only on whether the U.S. Secretary of Energy can approve an "export facility" under Section 3 of the NGA, a separate provision altogether. 15 U.S.C. § 717b(c) (governing approvals for export facilities); *cf.* 15 U.S.C. §§ 717f(c)–(e) (governing CPCN approvals for pipelines); *see also City of Oberlin*, 39 F.4th at 723.

Simply put, a project with multiple preconstruction agreements surpasses the requisite showing of market need for a CPCN under Section 7. *See* 15 U.S.C. §§ 717f(c)–(e). Even where FERC inquires into whether such agreements do not contemplate the additional production of gas or the agreements involve gas bound for export, FERC can consider any factors bearing on

the public interest to make a finding of public necessity and convenience. FERC's issuance of a CPCN warrants "extreme" deference. *See Myersville Citizens*, 783 F.3d at 1308.

The Court should affirm FERC's finding that the AFP is required by public necessity and convenience because it can proceed without subsidies from existing customers given TGP's two preconstruction contracts accounting for 100% of its firm transport—no further inquiry is needed to prove the project can "stand on its own financially." *See* Order Den. Reh'g ¶¶ 11, 26; *Myersville Citizens*, 783 F.3d at 1309; *see also Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 114 (D.C. Cir. 2022) (holding that pipeline company's multiple preconstruction contracts suffice for market need, and FERC need not look "beyond the market need reflected by the applicant's existing contracts" (international quotation marks omitted)).

In *Myersville Citizens*, the D.C. Circuit affirmed FERC's finding that Dominion's natural gas compressor station was required by the public necessity and convenience because Dominion's open season yielded multiple preconstruction contracts. 783 F.3d at 1307, 1310, 1315. Prior to seeking FERC's approval for a CPCN, Dominion contracted with three customers for the supply of gas. In response to market need for new or expanded natural gas facilities, Dominion could provide an additional 115,000 Dekatherms per day ("Dth/day") of transportation to several states. *Id.* at 1307. The D.C. Circuit did not hesitate to reject petitioners' challenge to FERC's finding of public necessity and convenience for Dominion's project because of these contracts, representing "100% market commitment." *Id.* at 1310. In affirming Dominion's CPCN based on market need, the Court stated it does not look "beyond the market need reflected by the applicant's existing contracts with shippers." *Id.* at 1311.

TGP's AFP pipeline is required by the public necessity and convenience precisely for the same reason Dominion's natural gas compressor station was in *Myersville Citizens*: TGP's open season yielded multiple preconstruction contracts, and while the Court does not mention Dominion's project's percentage use of total design capacity, TGP's contracts account for 100% of its Project's capacity. Order Den. Reh'g ¶¶ 11; *see Myersville Citizens*, 783 F.3d at 1310. TGP has one preconstruction contract with International Oil & Gas Corporation ("International") for a stunning 450,000 Dth/day and with New Union Gas and Energy Services Company ("NUG") for an additional 50,000 Dth/day, totaling to the "full design capacity" of the TGP Project. Order Den. Reh'g ¶¶ 1, 11.

The AFP exceeds the primary test for market need: the pipeline stands on multiple valid preconstruction contracts, representing full market commitment allowing the Project to proceed without the subsidization of existing customers. *See, e.g., Myersville Citizens*, 783 F.3d at 1310 (upholding FERC's finding of public necessity and convenience for Dominion's natural gas compressor station because it stood on multiple preconstruction contracts); *cf. Env't Def. Fund v. FERC*, 2 F.4th 953, 975–76 (D.C. Cir. 2021) (holding that FERC's approval of a CPCN for a pipeline company merited reversal only where the pipeline company had but one precedent agreement with a corporate affiliate after a failed open season; all parties agreed demand for natural gas in the area would be flat; and FERC did not find that the pipeline would be cost-efficient or economically prudent, all at once). The Court need look no further despite HOME's objections below.

HOME argues that TGP's contracts are insufficient to establish the Project's public necessity for two reasons: the precedent agreements do not contemplate increased production of

LNG for transport, and 90% of the gas for which TGP contracted with International will be exported to Brazil, a non-U.S. free trade partner. Order Den. Reh'g ¶¶ 24–5.

HOME's opposition to FERC's approval of TGP's AFP stands on thin ice: our Project only needs preconstruction contracts to satisfy market need, and even where FERC has "looked beyond" such contracts, it has free rein to assess "all factors bearing on the public interest" to find market need. *Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 391 (1959); *City of Oberlin*, 39 F.4th at 725. HOME argues under the pretense that not producing additional LNG or not transporting to a U.S. free trade partner can negate dispositive preconstruction contracts and robust domestic benefits. Not so.

In response to HOME's first contention, our Project need not increase domestic production of natural gas to offer a litany of public benefits. Indeed, our Project's domestic benefits outnumber the approved Nexus Pipeline's benefits in *City of Oberlin*. *See* 39 F.4th 719 at 727–28 (approving FERC's consideration of "all factors bearing on the public interest," and its of finding fulfilling additional capacity and stimulating job growth sufficient without inquiring into whether the pipeline exports in concordance with Section 3 or produces additional gas). Our Project provides 500 Dth/day of natural gas to the interconnection with the NUG Terminal and NorthWay pipeline; grants energy deserts in New Union direly needed access to natural gas; significantly expands access to sources of energy; optimizes existing systems for consumers' benefit by stimulating competition; fulfills capacity for the undersubscribed NorthWay pipeline; and even uses cleaner-burning natural gas rather than fossil fuels to improve regional air quality. Order Den. Reh'g ¶ 27. Not only does the AFP bring these domestic benefits, but it also transports domestic gas, provides gas to domestic customers, and fills additional capacity at the

International New Union City M&R Station. Order Den. Reh'g ¶ 34; *see also City of Oberlin*, 39 F.4th at 725 (approving FERC's issuance of a CPCN given a pipeline's domestic benefits such as economic stimulation and its serving additional capacity).

Second, HOME mistakenly believes that our high rate of gas for eventual transport to a non-free trade partner has any bearing on FERC's finding of public necessity and convenience. *See City of Oberlin*, 39 F.4th at 725, 727 (holding that FERC's consideration of export precedent agreements was lawful and adequately justified under a Section 7 analysis for the issuance of a CPCN "regardless of where the gas is ultimately going to be consumed" because of the pipeline's domestic benefits). First, the fact that AFP's gas is largely bound for export does not negate how the U.S. market vigorously competed for 100% of its full design capacity, and export-bound gas likewise has no bearing on our Project's numerous benefits. Second, if our gas were bound for export to a free trade partner, TGP's AFP would merely tally up yet another domestic benefit to its list—but the fact that gas is bound for export to a non-free trade partner is dispositive only of whether the U.S. Secretary of Energy can approve an "export facility" under Section 3 of the NGA. 15 U.S.C. § 717b(c); *cf.* 15 U.S.C. §§ 717f(c)–(e) (governing CPCN approvals for pipelines). In sum, our Project satisfies market need because of its multiple preconstruction contracts, sturdy domestic benefits, and fulfillment of additional capacity, healthily surpassing any valid requisite showing for public necessity and convenience.

B. FERC Was Not Arbitrary or Capricious in Balancing the Project's Effects Due to TGP's Efforts to Mitigate Harm, the Project's National Benefits, and Adequate Consideration of Alternatives.

In considering whether FERC properly weighed benefits and harms under arbitrary and capricious review, courts must simply ask if FERC's "decision making is 'reasoned, principled,

and based upon the record.'" *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). Due to FERC's "broad discretion" in balancing competing interests, courts have found that the petitioning party bears the burden of proving its analysis inadequate or unreasonable by pointing to specific parts of the record and providing specific evidence to contradict its testimony. *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 111 (D.C. Cir. 2014). Because of FERC's high discretion, courts have found its reasoning sufficient in this regard where it reasonably addressed potential harms and considered alternatives, regardless of whether it chooses the least harmful or "best" outcome. *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1188 (D.C. Cir. 2023) (finding sufficient balancing where Project would cause noise pollution and disturb beluga whales in the area due to FERC's high discretion and work to minimize harm, showing FERC "comported with its regulatory obligations" despite the petitioner's disagreement with FERC's policy choice to approve the project); *Minisink Residents for Env't Pres.*, 762 F.3d at 107. The AFP's potentially adverse effects mentioned by HOME include that (1) the pipeline will run through two miles of its 15,500 acres of land, resulting in the required removal of around 2,200 trees and other vegetation along the route due to safety concerns, (2) HOME is ideologically opposed to pipelines, so the AFP socially affects it, and (3) TGP has not reached precedent agreements with a portion of homeowners along the route. Order Den. Reh'g ¶¶ 38, 44, 49.

TGP has made significant efforts to minimize the Project's potentially adverse effects—those remaining are minimal and mostly specific to HOME's property. Generally, TGP was amenable to concerns and changed the pipeline's route by over 30% in an effort to adapt the Project to the needs of the communities and landowners around the project site. *Id.* ¶ 41. This allowed TGP to secure easement agreements with over 50% of the landowners along the AFP's

route that would be acceptable to all parties. *Id.* ¶ 41, 42. As it relates to HOME's religious and environmental arguments, TGP agreed to both expedite construction and bury the pipeline so it would not show on HOME's land. *Id.* ¶ 41. These measures significantly reduce any burden on HOME, as it would have to deal with minimal disruption and will not have to see the AFP once built. While the Project's potential adverse effects are localized around HOME and its property, past cases have found FERC's reasoning to be sufficient even where the proposed project's adverse effects were more widespread. *Ctr. for Biological Diversity*, 67 F.4th at 1186–87.

Courts have also found HOME's listed potential adverse impacts insufficient to meet its burden. First, ideological opposition to a project is insufficient under the NGA as a reason for FERC to reject it. *Id*. at 1187. Rather, FERC and its approval simply must comply with regulatory obligations. *Id*. As such, despite TGP's utmost respect for HOME's religious beliefs, religion alone is insufficient to meet HOME's heavy burden of showing FERC's decision unreasonable and justify the denial of an entire pipeline project. Furthermore, HOME's concerns regarding TGP's failure to reach precedent agreements with a portion of homeowners along the route is insufficient because eminent domain is an expected result of pipeline construction—courts agree that the NGA requires, at most, that TGP attempt "in good faith to agree with [landowners] on a price for the land or property rights sought by" them, which the previous negotiations demonstrate. *Millennium Pipeline Co. v. Certain Permanent & Temp. Easements*, 777 F. Supp. 2d 475, 482–83 (W.D. N.Y. 2011) (finding the pipeline plaintiff's CPCN entitled it to relief through eminent domain because the company was at most required to make a good faith effort to reach agreements, which the Court found was met when the company negotiated with landowners and allowed for a back-and-forth on terms). TGP thus at least met, and likely even went above and beyond, the Act's requirements in attempting to make the

pipeline's construction a painless process for all involved. The NGA also explicitly provides for eminent domain by those implementing projects—were the need for eminent domain an indicator of intense adverse effects, the provision would be meaningless. *See* U.S.C. § 717f(h). As such, past cases have concluded that the harm HOME alleges is not sufficient to meet its burden of showing FERC to be unreasonable.

The minimal harm HOME mentions, which primarily affects its own property and not the larger environment, is significantly outweighed by the project's broader and nationwide benefits. TGP has signed binding precedent agreements for 100% of the pipeline's design capacity—this indicates that there is a significant need for the project. Order Den. Reh'g ¶ 26. FERC has also found that the project will expand access to natural gas supply throughout the United States and allow for an increase in regional air quality as natural gas burns much cleaner than other fossil fuels. *Id.* ¶ 27. Courts in cases like *City of Oberlin* have found large benefits where precedent agreements accounted for only 59% of the pipeline's capacity, as they are evidence of market demand. *City of Oberlin*, 39 F.4th at 723–24 (holding FERC properly balanced harms and benefits when using precedent agreements as evidence of market demand, further finding that export precedent agreements also qualify due to their similar national benefits). If 59% of a pipeline's capacity is indicative of market demand, then 100% must serve as an incredibly strong indicator of such demand. It does not matter whether the agreements are for exported or domestically contained natural gas—the Court in *City of Oberlin* found that export precedent agreements similarly have vast public interest benefits. FERC's decision is thus a valid exercise of its "broad discretion" to balance competing interests, granted to it due to its long-time regulatory experience. *Minisink Residents for Env't Pres.*, 762 F.3d at 111 (finding that FERC

adequately balanced factors in part because deciding whether to grant or deny a CPCN "is a matter peculiarly within the discretion of the Commission").

Finally, FERC is simply required to consider alternative routes: it is not required to make actual changes to the route. *Minisink Residents*, 762 F.3d at 107 (finding FERC adequately considered alternatives as it was simply obligated to identify reasonable alternatives and had no obligation to implement any alternative, especially since the alternative had worse environmental impacts). While HOME proposed an alternative in order to avoid its property, the alternative was unacceptable due to the increased environmental harm it would cause. Undisputed by all parties, the alternate route would add to the pipeline's length and run through a sensitive mountain ecosystem, causing much greater environmental harm. Order Den. Reh'g ¶ 44. The Court in *Minisink Residents* found that FERC need not pick the best alternative as long as it adequately considers reasonable alternatives. Thus, there is also no obligation to choose an alternate route because it avoids just one organization's land, especially if it is more harmful to the environment.

Courts often do not rule against FERC in its balancing of factors—this has primarily occurred where there is evidence of improprieties that require the court to take a closer look. In *Env't Def. Fund v. FERC*, the Court ruled against FERC in its balancing where there was both minimal evidence of precedent agreements, with only one agreement for less than full capacity coming from "a corporate affiliate of the applicant," and evidence of "only cursorily balancing public benefits and adverse impacts." *Env't Def. Fund v. FERC*, 2 F.4th 953, 973 (D.C. Cir. 2021). FERC's approval of TGP's CPCN differs as TGP entered two agreements that constitute full capacity with no evidence of self-dealing or connections between the pipeline and those signing the agreements. Order Den. Reh'g ¶ 11. Thus, while one agreement resulting in less than full capacity and improperly connected to the pipeline commissioner may require a closer look,

two that account for full capacity signals that the entire pipeline is in high demand. Because the FERC has discretion in balancing factors under the TGP and the petitioner thus has the burden of proving that FERC's reasoning is insufficient, this Court should rule that HOME failed to meet its burden and FERC properly approved the CPCN.

IV. FERC's Decision to Route the AFP over HOME's Property Despite HOME's Religious Objections Does Not Violate RFRA Because HOME Has Failed to Articulate a Substantial Burden Beyond Incidental Effects on Religious Practices.

Under the RFRA, a "substantial burden" is imposed only when a governmental benefit is contingent on conduct in violation of one's religious beliefs or when one is coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–70 (9th Cir. 2008); *see also Guam v. Guerrero,* 290 F.3d 1210, 1222 (9th Cir. 2002) ("[a] statute burdens the free exercise of religion if it 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs …,' result[ing] in the choice to the individual of either abandoning his religious principle or facing criminal prosecution'") (internal citations omitted). Further, "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' are not substantial burdens on the exercise of religion." *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988)).

Here, the proposed route is contingent on expedited construction and TGP's burial of the pipeline over the entire span of where the pipeline crosses HOME's property, including the two intersections with the path of the Solstice Sojourn. Order Den. Reh'g ¶¶ 56–57, 59. Short-term impacts of construction disturbances may also be minimized by timing the construction to occur entirely between the solstices, as such no long-term impacts on the observance of the Solstice

Sojourn are expected. *Id.* ¶¶ 60. Because of this, the proposed route does not create any physical barriers to where HOME would be outright prevented from observing the Solstice Sojourn. *See Navajo Nation*, 535 F.3d at 1067 ("though proposed action might offend tribal members' religious sensibilities … [it] did not prevent tribal members from accessing [the] mountain for purpose of carrying out religious observances … as required to establish a 'substantial burden' on religious exercise under RFRA"). HOME fails to articulate a substantial burden beyond that of merely incidental effects on its religious practices. Therefore, HOME is not coerced to abandon its religious beliefs under the threat of sanctions nor forced to choose between its fundamental tenets over a government benefit, and its RFRA claim fails. *See, e.g., Navajo Nation*, 535 F.3d at 1070 ("[the project] will spiritually desecrate a sacred mountain and … decrease the spiritual fulfillment … from practicing their religion on the mountain. Nevertheless…the diminishment of spiritual fulfillment … is not a 'substantial burden' on the free exercise of religion"); *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("[a]lthough the government's activities with [plaintiffs] fluid or tissue sample … may offend [his] religious beliefs, they cannot be said to hamper his religious exercise because they do not 'pressure [him] to modify his behavior and to violate his beliefs'" (internal quotations omitted)); *Lyng*, 485 U.S. at 451 ("[t]he crucial word in the constitutional text is 'prohibit …'; [the free exercise clause is] written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government").

HOME contends that "walking over the pipeline (and the clear-cut path above it) on its own land on this sacred journey … would be "unimaginable" and would destroy the meaning of the Solstice Sojourn." Order Den. Reh'g ¶ 57. HOME also contends that the CPCN order compels the support of "the production, transportation, and burning of fossil fuels." *Id.* ¶ 58. Yet

HOME's alternative proposal would run the AFP through more sensitive ecosystems in the mountains, causing more environmental harm. *Id.* ¶ 44. This would result in HOME's causing great environmental harm, violating its fundamental tenet to "promote natural preservation over all other interests." *Id.* ¶ 47. The original proposed route, a less invasive project with minor environmental impacts, is thus no substantial burden when HOME is able to continue observing its most significant religious ceremonies and promote natural preservation. *Id.* ¶ 3; *see Thiry*, 78 F.3d at 1495–96 (holding that the proposed condemnation would not violate the RFRA, because the plaintiffs' beliefs allowed for the moving of gravesites when necessary). Accordingly, HOME is not coerced to abandon its religious beliefs under the threat of sanctions nor forced to choose between its fundamental tenets and a government benefit. There is no substantial burden and no violation of the RFRA. *See*, *e.g., Lyng*, 485 U.S. at 448 (1988) (finding that the building of a road and harvesting of timber does not coerce the plaintiffs into violating their religious beliefs, nor penalize religious activity through the denial of rights, benefits, and privileges enjoyed by other citizens); *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986) ("[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures").

Even if HOME's religious beliefs are substantially burdened, the proposed route is still appropriate under strict scrutiny. The government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person if it is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. *See* 42 U.S.C. § 2000bb–1. The least restrictive means inquiry under RFRA 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.

See Ave Maria Found. v. Sebelius, 991 F. Supp. 2d 957 (E.D. Mich. 2014). FERC's interpretation of the application of the RFRA is a question of law reviewed de novo. *See Thomas v. CalPortland Co*., 993 F.3d 1204, 1208 (9th Cir. 2021).

Here, the government has a compelling interest in maintaining a coherent natural gas pipeline permitting system. Natural gas is a vital energy source and a coherent permit system ensures continuous, adequate, affordable, and efficient access. As discussed previously, the AFP is a public necessity as it will provide natural gas service to areas currently without access to natural gas within New Union, expand access to sources of natural gas supply in the United States, optimize the existing systems for the benefit of both current and new customers through the creation of a more competitive market, fulfill capacity in the undersubscribed NorthWay Pipeline, and provide opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. Order Den. Reh'g ¶ 27. Accordingly, the least restrictive means for furthering the government's compelling interest is achieved through reasonable mitigation of environmental impacts and not unreasonably bending to the desired exceptions of any religion.[1]

As previously discussed, it is undisputed that the proffered alternative route would add an additional three miles and run through more environmentally sensitive ecosystems in the mountains. Order Den. Reh'g ¶ 44. In doing so, the Project would add an additional $51 million in costs, in excess of the original $599 million, while causing more overall environmental harm in the process. *Id.* ¶¶ 10, 44. Although some environmental impacts are expected and will require the removal of some trees and vegetation from HOME's property, TGP will plant or cause to be planted an equal number of trees as those removed. *Id.* ¶¶ 38, 67. The least restrictive means are

[1] *See generally Adams v. Comm'r of Internal Revenue*, 170 F.3d 173, 176 (3d Cir. 1999) (holding that the government's failure to accommodate her religious beliefs by ensuring her tax payments did not fund the military did not violate RFRA).

even further exemplified by TGP's efforts to minimize impacts on HOME and their religious practices. *Id.* ¶ 60. As such, the costs to implementing the alternative route significantly outweigh any burden imposed upon HOME's religious beliefs. Accordingly, HOME's environmental concerns on its own property should not be given greater consideration in the narrow tailoring of the CPCN Order, therefore the proposed route is appropriate under strict scrutiny. *See, e.g., United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000) (holding that RFRA was not violated by application of federal employment tax laws to church; maintaining a sound and efficient tax system was a compelling government interest; and uniformly applicable tax system was the least restrictive means of furthering that interest); *see also United States v. Friday*, 525 F.3d 938, 957 (10th Cir. 2008) (holding that the permitting process provide the least restrictive means of conserving eagles and the government need not engage in outreach to ensure tribes are aware of permits for religious purposes to render the system the least restrictive means of preserving the eagle).

V. By Claiming the Authority to Regulate Greenhouse Gas Emissions Without Clear Congressional Authorization, FERC Violated the Major Questions Doctrine.

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a court is confronted with two questions regarding an agency's construction of a statute. The first is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear … the court … must give effect to the unambiguously expressed intent of Congress." 467 U.S. 837, 842–43 (1984). If Congress has not directly spoken to the precise question, or if the statute is silent or ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. However, in cases when the "history and breadth" and "economic and political significance" of the action at issue give the Court reason to hesitate before concluding that Congress meant to confer such authority to act on the agency,

agency deference is not appropriate and further action requires clear authorization by Congress. *See generally W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022). Factors the Supreme Court considers as weighing against there being a clear congressional statement authorizing action include where: (1) the language is broad or general and (2) the statute is older but the power is just now being exercised for a purpose different than what the statute was intended for. *Id.* at 2622–23.

A. The GHG Conditions Imposed by FERC Are Major Questions Beyond FERC's Authority Under the NGA as the Conditions Go Beyond the Scope of Congressional Intent and Would Result in Unintended Authority Over Major Economic Activities.

Beginning with the text of the NGA, the relevant provision states that FERC "shall have the power to attach to the issuance of the CPCN and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *See* 15 U.S.C. § 717f(e). Given the text's ambiguity, it is imperative to analyze what is considered "public convenience and necessity" in the construction of the statute as a whole. *See id.*

Courts have consistently held that the broader purpose of the NGA was to protect consumers against exploitation by natural gas companies and to give FERC jurisdiction to regulate the rates of all wholesales of natural gas in interstate commerce. *See Phillips Petroleum Co. v. State of Wis.*, 347 U.S. 672, 682–83, 685 (1954); *see also City of Clarksville, Tenn. v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) ("Congress enacted the Natural Gas Act with the principal aim of 'encouraging the orderly development of plentiful supplies of natural gas at reasonable prices,' and 'protect[ing] consumers against exploitation at the hands of natural gas companies'") (citations omitted).[2] As such, the role of FERC is that of an economic regulator,

[2] *See Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 388–89 (1959) ("[t]he heart of the Act is found in those provisions requiring initially that any 'proposed service, sale,

rather than an environmental one, to where environmental mitigation is subsidiary to FERC's main objectives. *See City of Clarksville*, 888 F.3d. at 479 ("[a]long with those main objectives, there are also several 'subsidiary purposes including conservation, environmental, and antitrust issues'") (quoting *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990)). Accordingly, the "public convenience and necessity" is best understood within the broader statutory context of economic regulation and facilitating natural gas development, rather than broad environmental public interest issues. *See, e.g.*, *NAACP v. FPC*, 425 U.S. 662, 669 (1976) (holding that the use of terms such as "public interest" in a regulatory statute are not a broad license to promote the general public welfare, but rather derive meaning from the purposes of the regulatory legislation).

With Congress' intent in mind, three of the four GHG conditions are outside the scope of FERC's authority under the NGA and can be deemed major questions. Although it is not contested that FERC has discretion in imposing conditions to mitigate traditional, direct environmental harms such as felling of trees, a broad power to regulate indirect GHG emissions has not been delegated to FERC. Order Den. Reh'g ¶ 83. Conditions that require the use of electric-powered equipment in the construction of the project, the purchase of "green" steel, and purchasing all electricity used in construction from renewable sources are not directly related to environmental impacts arising from the pipeline itself. *Id.* ¶ 67. As such, regulating indirect GHG emissions in adjacent production activities would be an exercise of expansive regulatory authority over major economic activities—i.e., the decarbonization of the natural gas sector. This is evidenced by the fact that FERC has imposed GHG conditions in four or five subsequent CPCN orders in other matters, reflecting an unstated change in agency practice overall and

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operation, construction, extension, or acquisition will be required by the present or future public convenience and necessity'") (internal citations omitted).

FERC's overreach. *Id.* ¶ 84. Accordingly, no project sponsor will believe that mitigation is optional and the submission of an application or EIS without a mitigation proposal would be anything other than a waste of time and money, thus broadly implicating the breadth, efficiency, and function of the natural gas market. *Id.* As such, the ambiguous notions of "public convenience and necessity" could not possibly reflect Congress' intent to confer such expansive regulatory to FERC beyond the boundaries of the intent articulated in the NGA. Therefore, a clear authorization from Congress is necessary before FERC may wield such power.[3] Hence, the three GHG conditions are not permissive exercises of FERC's limited jurisdiction, rendering the conditions as major questions. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) ("[t]he Commission may not, . . . when it lacks the power to promote the public interest directly, do so indirectly by attaching a condition to a certificate that is . . . already in the public convenience and necessity") (internal citations omitted).

FERC asserts that the conditions are grounded in its "mandate to protect the public interest and are based on factual and scientific considerations about GHG emissions and their environmental impact." Order Den. Reh'g ¶ 89. FERC further contends that the conditions imposed are project-specific and do not address or regulate broader GHG emission concerns across the entire natural gas sector or beyond. *Id.* As such, the economic and political ripple effects are minimized and the GHG impacts resulting from the construction of the AFP are more directly related to its authority under the NGA. *Id.* ¶¶ 82, 89. However, such assertions disregard the statutory context of the "public interest." As previously discussed, the "public interest" is not a broad license to regulate, as the term does not derive its definition from a broader

[3] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("no matter how important, conspicuous, and controversial the issue . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress") (internal citation omitted).

understanding of the "public interest," but rather from the context of the regulatory statute in which it appears. *See Brown & Williamson*, 529 U.S. at 161. In this case, the "public interest" is narrow in its application and limited to ensuring fair rates for consumers and facilitating the development of the natural gas sector, with subsidiary environmental mitigation goals limited to direct impacts. *See City of Clarksville*, 888 F.3d. at 479.

FERC's argument also disregards the long-term implications for imposing the GHG conditions. FERC has already begun an unstated change in agency practice when it imposed GHG conditions in four or five subsequent CPCN orders. Order Den. Reh'g ¶ 84. This is indicative of an ongoing pattern to broadly decarbonize and regulate GHG emissions in the natural gas sector and broader supply-chain, a power FERC has not been granted. Furthermore, Congress has delegated this power elsewhere, by vesting power in the Environmental Protection Agency ("EPA") to regulate GHG emissions under the Clean Air Act.[4] In contrast, the regulatory regime in the NGA addresses entirely distinct concerns.[5] Congress could have delegated the regulation of GHG emissions to FERC, but has failed to do so. Accordingly, a clear statement of authorization is required and the conditions can be deemed as major questions. *See N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 297–98 (4th Cir. 2023) (holding that the distinct regulatory scheme of Magnuson-Stevens Act of 1976, "regulating bycatch to the states and the National Marine Fisheries service—not the EPA," suggests a major

[4] *See Am. Lung Ass'n. v. EPA*, 985 F.3d 914, 959–60 (D.C. Cir. 2021) ("there is no question that the regulation of greenhouse gas emissions by power plants across the Nation falls squarely within the EPA's wheelhouse").

[5] *See Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947) ("three things, and three things only Congress drew within its own regulatory power, delegated by the [Natural Gas] Act…[t]hese were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale").

question and expectation of a clear authorization by Congress, "before finding that it was effectively displaced by the Clean Water Act").

B. FERC Does Not Have the Authority to Regulate Upstream and Downstream Emissions Because Doing So Would Violate the Major Questions Doctrine.

The NGA says FERC "shall have the power to attach to the issuance of the CPCN and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). Upstream and downstream emissions are disconnected from pipeline projects themselves, with upstream emissions coming from the production of natural gas that will enter the pipeline and downstream emissions coming from the use of natural gas that was transported by the pipeline. Order Den. Reh'g ¶¶ 72, 74. The Supreme Court has found that newly discovered agency authority based in "ancillary" provisions of the statute and broadly affecting the national energy market are unauthorized without clear congressional authorization. *W. Virginia*, 142 S. Ct. at 2610, 2614 (finding that the EPA's ACE rule was impermissible under the Agency's authority in the Clean Air Act, as its newfound power to regulate was based on "vague language of an ancillary provision[]" of the Act and would necessarily "restructure the American energy market," requiring clear congressional authorization that the Agency did not have); *see also Util. Air Regul. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (holding that the EPA's regulation of greenhouse gas emissions from motor vehicles impermissibly addressed a major question in part due to the scope of its attempted rule, which would regulate millions of small sources across the country and had insufficient basis in the Clean Air Act).

FERC would be addressing a question of "vast political and economic significance" if allowed to regulate upstream and downstream emissions. In *Util. Air Regul. Grp. v. EPA*, the Court ruled that the EPA's attempted agency action was impermissible because the agency action

in question would regulate a large portion of the economy by affecting "the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide [which] falls comfortably within the class of authorizations [the Court] ha[s] been reluctant to read into ambiguous statutory text." 134 S. Ct. 2427, 2444 (2014). Similarly, by creating conditions that regulate upstream and downstream emissions, FERC would be allowed to regulate emissions from everywhere the gas both comes from and ends up, despite these emissions being removed from the actual pipeline project. This would ultimately alter the economics behind producing, transporting, and using greenhouse gasses, implicating nearly every sector and affecting the energy market. As FERC itself stated, there is a "weak connection between the TGP Project and any increased upstream or downstream GHG impacts." Order Den. Reh'g ¶ 100. As such, FERC would be exercising broad authority over all aspects of economic development if it could set conditions on upstream and downstream emissions despite a "weak connection" between these emissions and the project—this vast power thus warrants the requirement of a clear statement from Congress.

Permitting FERC to set conditions regulating upstream and downstream emissions would also implicate a major political question. The Supreme Court has previously found issues surrounding climate change and the regulation of fossil fuels, specifically coal in *West Virginia* and carbon dioxide emissions from vehicles in *Util. Air*, to often qualify as issues warranting a clear statement from Congress. The practical effect of putting conditions on upstream and downstream emissions is that individuals not associated with any particular project would be obligated to limit emissions or use cleaner technology, shifting the types of energy used across the country. The question of how to best address climate change and where to limit emissions is far from settled in the federal branches, so it would be impermissible to take this decision from

Congress as the politically accountable branch. As such, FERC's claim of authority to regulate upstream and downstream emissions should require a clear statement from Congress.

Because FERC, by regulating upstream and downstream emissions, would implicate a major question, the plain statement rule requires Congress to have spoken clearly on whether FERC has the power to do so. As FERC's claim of authority is identical to the EPA's in *West Virginia*, it should similarly be overruled. First, the NGA was created to promote natural gas use and in the decades since the Act's passing, FERC has not tried to regulate upstream or downstream emissions until now. Order Den. Reh'g ¶ 84. Subsequent to this project's CPCN, FERC considered upstream and downstream conditions in 80% of certificates. *Id.* It is unlikely Congress would intend, in an Act intended to promote natural gas, to allow FERC to decide how much natural gas generation there should be. *W. Virginia*, 142 S. Ct. at 2596 (stating the Court doubts that Congress intended to delegate decisions like "how much coal-based generation there should be over the coming decades[] to any administrative agency"). This provision is also not an operative part of the Act—rather, it is simply a broad addition to the NGA, allowing for necessary conditions. Regulating upstream and downstream emissions is not just any condition—rather, this authority would allow FERC to regulate broadly outside the scope of any particular project. Just as requiring a shift away from coal burning would "restructure the American energy market," limiting emissions in how natural gas is used or produced would necessarily change the energy market by making it more expensive to produce or use natural gas. Because FERC found this power within a broad provision of a statute unrelated to environmental protection, it is unlikely the Congress that created the NGA intended it to be used to limit natural gas use through placing conditions on emissions.

Furthermore, the pertinent section of the NGA employed incredibly vague language. In *West Virginia*, another discussed sign that Congress did not intend to authorize the agency's interpretation is that Congress typically does not hide important agency obligations with imprecise, or "cryptic," language. *See W. Virginia*, 142 S. Ct. at 2608. When delegating power, Congress must give clear directions to an agency against which the court can properly judge its actions—broad language, filled with discretion, does not precisely indicate to the courts what an agency can or cannot do. As such, the *West Virginia* concurrence further discusses "broad or general language" as a warning sign indicating Congress did not intend the Agency's vast interpretation, a test which the NGA provision fails. *W. Virginia*, 142 S. Ct. at 2622. Particularly, if FERC had the authority to regulate upstream and downstream emissions, it would have the power to order the restructuring of any business that uses or produces natural gas based solely on its discretionary assessment of considerations in the NGA, including what "reasonable terms and conditions" are, what qualifies as "the public convenience and necessity," and what "may require" dictates. As the NGA contains a presumption towards accepting projects and the Act was intended to increase natural gas use, it is unlikely that Congress intended to give FERC the authority to restrict the use of such gas, particularly in a manner that is not clearly connected to the project itself. *W. Va. Pub. Servs. Comm'n v. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982) (stating that parts of the NGA contain "a general presumption favoring … authorization"); *City of Clarksville*, 888 F.3d. at 479. Upstream and downstream emissions often extend far beyond the scope of any given project—as such, allowing FERC to regulate these emissions will naturally extend far beyond its general expertise and experience. Thus, the Court should find that Congress did not intend to give FERC the power to regulate upstream and downstream emissions.

Many of the previous cases that discuss FERC's authority to regulate upstream and downstream emissions as they relate to the FERC pipeline approval implicate the National Environmental Policy Act, not the NGA. *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017); *Food & Water Watch v. FERC*, 28 F.4th 277, 288–89 (D.C. Cir. 2022) (holding FERC violated NEPA in failing to consider indirect effects of upstream greenhouse gas emissions where both were "reasonably foreseeable"). As NEPA simply requires a consideration of all environmental harms, and never requires any particular action, a NEPA analysis of upstream and downstream emissions does not implicate major questions. *West Virginia* is the most accurate resource to determine FERC's bounds as the most recent case clarifying what authority agencies can take on. As such, the Court should rule that regulating upstream and downstream emissions exceeds FERC's authority.

C. Even If FERC Does Have the Authority to Regulate Greenhouse Gas Emissions, They Are Not Obligated To.

Under NEPA, FERC is only required to consider downstream and upstream emissions where it finds that these emissions are (1) reasonably foreseeable and (2) causally connected to the project. *Birckhead v. FERC*, 925 F.3d 510, 516–17 (D.C. Cir. 2019) (holding that FERC permissibly did not consider the environmental effects of upstream greenhouse gas emissions because they sufficiently explained that they were unable to due to uncertainties in "the number and location of any additional wells that would be drilled as a result of production demand" from the project). The NGA does not require any conditions; rather, courts have found FERC has wide discretion in what conditions it chooses, or chooses not, to implement. *Twp. of Bordentown v. FERC*, 903 F.3d 234, 261 n.15 (3d Cir. 2018) (holding that FERC's chosen conditions were sufficient despite Petitioner's claim they were not harsh enough, as FERC has discretion in choosing conditions).

While FERC quantified downstream emissions, it found that upstream emissions were not "relevant here" since, as the gas was "already in production, but just being transported, . . . there is no reasonably foreseeable significant upstream consequence of [FERC's] approval of the TGP Project." Order Den. Reh'g ¶ 74. Other courts have similarly described upstream emissions as difficult to quantify at points, since the gas could be coming from any number of places and produced using any number of means. *Birckhead v. FERC*, 925 F.3d 510, 517 (D.C. Cir. 2019). Due to the difficulty in quantifying these emissions and the possibility that the project may be unrelated to upstream or downstream emissions, courts also allow FERC to simply give an adequate explanation for why it cannot quantify these emissions. *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 108 (D.C. Cir. 2022) (finding FERC's analysis of upstream and downstream emissions was sufficient under NEPA because it explained its determination and the petitioner did not point to additional information sufficient to meet their burden). Here, FERC succeeded in doing so by explaining the difficulty in quantifying upstream emissions resulting from "unknown factors, including the location of the supply source and whether transported gas will come from new or existing production." Order Den. Reh'g ¶ 74. Because FERC receives deference from courts relating to whether conditions should be put in place or if FERC has to quantify emissions, and FERC has found there was no causal link between upstream emissions and the project, it sufficiently explained why it failed to quantify upstream emissions and need not do more under NEPA.

FERC is further not required to institute mitigation measures because, once a measure falls within the scope of what the NGA allows, FERC has broad discretion in deciding whether or not to implement that measure. The pertinent provision does not require FERC to act—rather, it simply says it "shall have the power to" attach reasonable conditions. 15 U.S.C. § 717f(e).

When evaluating conditions, courts defer to FERC's expertise. *Twp. of Bordentown v. FERC*, 903 F.3d 234, 261 n.15 (3d Cir. 2018). The burden is thus on HOME to prove its reasoning is insufficient. Furthermore, FERC reasonably found upstream and downstream emissions insignificant due to the "weak connection" between the pipeline project and changes in upstream or downstream emissions. Order Den. Reh'g ¶ 100. Because FERC receives deference regarding conditions under the NGA and it chose to exercise this deference in not instituting upstream and downstream conditions, FERC is by no means obligated to impose emissions conditions.

FERC's decision to institute construction standards but not upstream or downstream emissions standards is not arbitrary or capricious because there is a substantial difference between emissions from construction, related to building the project, and emissions from the natural gas before or after it enters or exits a project. *Id.* ¶ 99. While the former can be entirely controlled by the operator of the project, the latter requires discussion with those who produced the natural gas and those who will use it, which could include any number of businesses. There are no specific steps TGP itself could take to reduce upstream or downstream emissions—rather, it must rely on individuals at different ends of the production line to make changes. Finally, FERC is not saying it will never regulate upstream and downstream emissions—rather, it is refraining from instituting arbitrary conditions based on insufficient research. *Id.* This Court should find FERC was not arbitrary and capricious in not regulating upstream and downstream emissions because the NGA does not require any particular conditions and FERC has recognized differences between construction emissions and upstream and downstream emissions.

VI. Conclusion

TGP respectfully requests that this Court uphold FERC's approval of AFP's CPCN, reject HOME's claim that the approval violates the RFRA, and prevent FERC from conditioning AFP's CPCN on environmental measures outside the scope of the NGA.