Docket No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

The Holy Order of Mother Earth,
Appellant,

v.

Federal Energy Regulatory Commission

Appellee.

ON APPEAL FROM THE FERC HEARING

BRIEF OF INTERVENOR/APPELLANT
TRANSNATIONAL GAS PIPELINE LLC., *in its official capacity*

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I. JURISDICTIONAL STATEMENT

Both the Holy order of Mother Earth ("HOME") and Transnational Gas Pipelines, LLC. ("TGP") filed for review of Federal Energy Regulatory Commission ("FERC") order which brought this action. This Court has jurisdiction under the Natural Gas Act ("NGA") and Administrative Procedure Act ("APA"). The United States Court of Appeals for the Twelfth Circuit has jurisdiction under 15 U.S.C. § 717r (b)(d) (2023); and the APA, 5 U.S.C. § 702 (2023). TGP petitions for review of the Order and Policy issued by FERC, which was decided on April 1, 2023, rehearing on the issues was denied which brought this action. FERC has authority under 15 U.S.C. § 717f to regulate natural gas pipelines. This petition was timely filed on June 1, 2023.

II. STATEMENT OF ISSUES PRESENTED

1. Whether FERC acted arbitrarily and capriciously when it found the American Freedom Pipeline served the public convenience and necessity and was supported by substantial evidence?

2. Whether FERC acted arbitrarily and capriciously when it determined the benefits from the AFP outweighed any environmental and social harms?

3. Whether FERC acted in compliance with RFRA when it chose the route for the American Freedom Pipeline?

4. Whether FERC violated the Major Questions Doctrine, when it imposed conditions on the AFP that it has never had the power to place before, Congress never gave FERC that power under the NGA and is a project that will be of vast economic impact?

5. Whether FERC acted arbitrarily and capriciously when it denied to impose upstream and downstream emissions standards, when it lacks the authority to do so and NEPA does not enlarge an agency's organic power?

III. STATEMENT OF THE CASE

HOME first filed this action on April 20, 2023, after FERC granted the Certificate of Public Convenience and Necessity ("CPCN") (Record "R." page "pg."2.) TGP filed for rehearing soon after because of conditions placed on the order. (R. pg. 2). HOME fought against FERC's findings as to the need for the pipeline and its environmental determinations. (R. pg. 2). HOME began this fight over the American Freedom Pipeline ("AFP"), a 99 mile long natural gas pipeline. (R. pg. 2). FERC found that the AFP benefits to the market outweigh any adverse effects on existing shippers, other pipelines, customers, and on landowners. (R. pg. 2). FERC further found the AFP benefits outweighed any environmental harms. (R. pg. 2). The AFP will cost $599,000,000 in just construction. (R. pg. 6). TGP has also informed FERC that it has two contracts for the entire capacity of the AFP. (R. pg. 6). Despite TGP already consenting to changing 30% of the pipeline to address such concerns, HOME argues the environmental impacts are too severe to continue. (R. pg. 10). Attempting to "bury the hatchet," TGP even agreed to burying the portion of the pipeline which crossed the HOME property underground. (R. pg. 10). Further, construction of the AFP will be expedited to allow HOME to continue its religious practices. (R. pg. 10).

Yet, HOME would not accept the offer and is unwilling to work with TGP, contending the AFP should be rerouted, despite the only other potential route is through a more sensitive ecosystem and would cost an additional $51,000,000. (R. pg. 11). FERC denied their motion for rehearing and held that the conditions which TGP had agreed to was enough to address HOME's concerns. (R. pg. 13). Furthermore, TGP argues that conditions 2-4 are plainly unreasonable. (R. pg. 14). FERC states the conditions were placed because the "CEQ," but later states the CEQ is

not binding on FERC itself. (R. pg. 14). FERC even states the conditions were placed to offset the AFP running at full capacity every day. (R. pg. 15). FERC even recognizes that the AFP could drive down the total emissions, yet still overzealously placed these conditions. (R. pg. 15). FERC has placed these overzealous conditions on 4 of the next 5 projects as well, showing this agency action extends beyond just the AFP. (R. pg. 16). HOME raises the argument that FERC should have placed upstream downstream emissions even though all the upstream emissions already exist, as the AFP is only transporting gas from current sources. (R. pg. 15). Yet, FERC acted within their statutory boundaries in relation to this contention and denied HOME's argument but went beyond their powers in placing the "green" conditions on the CPCN.

IV. SUMMARY OF THE ARGUMENT

First, this Court should affirm FERC's holding that the American Freedom Pipeline served the public convenience and necessity. Findings of FERC cannot be disturbed if a rational connection can be shown between the facts of the case and the decision made, even if that connection lacks ideal clarity. The AFP will serve several public benefits including a competitive alternative in the LNG market that leads to increased electric reliability. With the increased LNG coming from Hayes Fracking Field, supply and demand will lead to lower LNG prices. Additionally, the LNG transported by the AFP will have the capability to power 500,000 American homes.

Moreover, the AFP will yield a minimal environmental impact. The alternative route proposed by HOME will substantially increase the construction costs of the AFP while requiring it to travel an additional three miles through a more sensitive ecosystem. As for HOME's land specifically, construction of the AFP will be expedited and completely buried underground in that

section. As a result, the AFP will not substantially burden any religious practices of HOME. Even if found substantially burdensome, TGP still prevails, as the AFP will survive strict scrutiny. The AFP serves a compelling interest and is the least restrictive means of doing so.

This Court should strike conditions two through four however on the CPCN as they are a violation of the MQD. The conditions are being placed on the AFP which is a $599,000,000 project which stands to affect multiple economic sectors thus meeting the first prong of the MQD. Which is that the agency action attempt to regulate a matter of vast economic significance which is what is at hand here. Secondly, the agency must lack clear Congressional authority to perform said action. FERC here, does not possess clear Congressional authority to impose conditions such as the ones listed in two through four. Never before has FERC tried to impose conditions such as those listed in the CPCN and the conditions are not reasonable. FERC can impose conditions which are reasonable under the NGA, these conditions do not meet that criteria however.

Lastly, FERC was right not to impose conditions on the upstream, downstream emissions discussed in the NEPA study. FERC lacks the authority to impose such conditions, Congress delegated the authority to impose such conditions to the EPA and the States. NEPA only requires that FERC take a hard look at the possibilities and then tell the public. NEPA does not mandate any particular outcome and there is no gap for FERC to fill in relation to upstream or downstream emissions. Congress and courts have gone out of their way to emphasize that state police powers and the Clean Air Act were not to be preempted by the NGA.

V. ARGUMENT

I. FERC'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP WAS NOT ARBITRARY AND CAPRICIOUS AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. FERC's Finding of Public Convenience and Necessity for the AFP was not Arbitrary and Capricious.

Standard of Review

FERC orders are reviewed under the deferential arbitrary and capricious standard of review. LSP Transmission Holdings II, LLC v. FERC, 45 F.4th 979, 991 (D.C. Cir. 2022); see also 5 U.S.C. § 706(2)(a). FERC decisions are upheld if the agency "examined the relevant considerations and articulated a satisfactory explanation for its action, including a *rational* connection between the facts found and the choice made." FERC v. Elec. Power Supply Ass'n, 577 U.S. 260, 292 (2016).

Argument

FERC's finding of public convenience and necessity for the AFP showed a rational connection between the facts of this case and the Commission's subsequent decision to grant the Certificate.

Natural gas companies must obtain a "certificate of public convenience and necessity" (CPCN) from FERC before constructing, extending, acquiring, or operating any facility that participates in interstate commerce by transporting or selling natural gas. 15 U.S.C. § 717f(c)(1)(A). FERC *must* grant a CPCN to gas companies who show a willingness to abide by the NGA and regulations of FERC, so long as the project is "required by the present or future public convenience and necessity." Algonquin Gas Transmission, LLC v. Weymouth, 919 F.3d 54, 58 (1st Cir. 2019). FERC decisions are always upheld when the agency can demonstrate a

rational connection between the facts of the case and its decision. Elec. Power Supply Ass'n., 577 U.S. at 292. This rational connection is established when the agency's decision is clear enough that its "path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974). Agency decisions are upheld even if it does not have "ideal clarity," so long as that path is reasonably discernable. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins., 463 U.S. 29, 42 (1983).

In this case, FERC granted a CPCN for the AFP after TGP demonstrated a willingness to conform to NGA and FERC regulations, and that the project served the public convenience and necessity. (R. pg. 4); see Weymouth, 919 F.3d at 58. In determining whether an application for a CPCN serves the public convenience and necessity, the FERC Commission must "evaluate all factors bearing on the public interest." Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y., 360 U.S. 378, 391 (1959). Neither FERC nor HOME disputes that TGP can finance the project without customer subsidization or that the project presents any adverse impacts on those customers. (R. pg. 7).

Public necessity and convenience are determined by the project's benefits when viewed proportionally to the adverse effects of the project. Certification of New Interstate Natural Gas Pipeline Facilities, 88 F.E.R.C. P61227, 61748 (1999). Factors used to weigh public benefit have a wide range and are determined on a project-by-project basis. Id. Examples of such factors 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." Id. Applicants may present any relevant evidence they view as public benefit to the Commission for consideration. Id.

TGP has shown a wide array of evidence exemplifying public benefit that the AFP would bring about. Perhaps the largest public benefit presented by the AFP is the interstate connection of gas receipt in Jordan County, Old Union to a pre-existing TGP gas transmission facility in Burden County, New Union. (R. pg. 4). This route would deliver LNG from the Hayes Fracking Field (HFF) in Old Union to the Port of New Union. (R. pg. 6). Such a new interstate connection will require construction and maintenance of 99 miles of 30-inch-diameter pipe, including mainline valve assemblies at eight different locations along the proposed route to improve the current interstate grid. (R. pg. 5,6). The construction of the AFP alone will also inject approximately $599,000,000 into the American economy, spread across every small town the Pipeline passes through. (R. pg. 6).

Another factor showing public benefit specifically noted by FERC is "providing competitive alternatives" and "increasing electric reliability." Id. Currently, the LNG produced at HFF is transported by the Southway Pipeline. (R. pg. 6). TGP has presented evidence to the Commission that rerouting approximately 35% of HFF's production through the AFP instead of the Southway Pipeline will not lead to any gas shortages, but rather will increase transportation capacity, allowing for more LNG production at HFF. (R. pg. 6). With an increased capacity for both production and transport, the construction of the AFP will lead to LNG being readily available for even more Americans. Furthermore, under the business standard of 'supply and demand,' a larger supply of LNG will likely lead to LNG being more affordable for the average citizen and thus creating another public benefit. See NextEra Energy Res., LLC v. FERC, 898 F.3d 14, 18 (D.C. Cir. 2018) (explaining the principle of supply and demand to show a larger quantity of available product will typically result in lower prices.).

International Oil & Gas Company (International) and New Union Gas and Energy Services Company (NUG) have agreed to purchase the full capacity of AFP (450,000 Dth and 50,000 Dth per day, respectively). (R. pg. 6). The proposed route of the AFP runs through the Burden Road M&R Station, where LNG purchased by International will be diverted into the NorthWay Pipeline. (R. pg. 6). From Burden Road M&R, this 450,000 Dth will increase NorthWay's load to near capacity, as it will eventually reach the New Union City M&R Station at the Port of New Union. (R. pg. 6). At that point, the LNG that originally started in the AFP will generate revenue for the Port, the City, and any involved businesses by being exported to Brazil. See (R. pg. 6).

HOME's primary contention is that the AFP will not serve any domestic convenience and necessity, but rather only serving the Brazilian convenience and necessity. (R. pg. 8). Contrary to the beliefs of HOME, the AFP will serve several domestic needs and public benefits. HOME's contention is based off its own speculative interpretation of the NGA being a domestic statute and therefore requiring service of a domestic need; however, pursuant to FERC standards, public benefits (to show public convenience and necessity) are viewed proportionally to any adverse effects. (R. pg. 8); Certificate of New Interstate Natural Gas Pipeline Facilities, 88 F.E.R.C. at 61748. The public benefits created by the AFP are substantial, including serving an unserved demand, providing new interconnects that improve the interstate grid, and provide competitive alternatives. See Id.

Although 90% of the LNG transported by the AFP will be exported to Brazil, the remaining 10% will be used to serve an American need. Since the AFP will transport 500,000 Dth per day, 50,000 of those will be kept domestically. (R. pg. 6). According to the United States Energy Information Administration, the average American residence uses around 29 kWh every

day. 2022 EIA Avg. Monthly Bill- Residential. This means the average American family only uses 0.1 Dth per day. The AFP will produce 50,000 Dth for domestic use every day, meaning the AFP could potentially power 500,000 homes across the United States every single day. See (R. pg. 6). With this determination, FERC has certainly shown a rational connection between the facts of this case and the decision to grant a CPCN for the AFP.

Under the deferential arbitrary and capricious standard of review, the Court must not disturb findings of the Commission unless the Commission failed to make a single reasonable connection between the facts and the granting of the CPCN. DOC v. New York, 139 S. Ct. 2551, 2569 (2019). The Court cannot substitute its own judgement for the judgement of the Commission unless the Commission stepped outside "the bounds of reasoned decision-making." Baltimore Gas & Elec. Co v. Natural Resources Defense Council, Inc., 462 U.S. 87, 105 (1983). The evidence in this case is clear—FERC's finding that the AFP conveys public convenience and necessity is not arbitrary and capricious.

B. FERC's Finding of Necessity for a Project Intended to Export a Majority of its Production was Supported by Substantial Evidence of Public Convenience and Necessity.

Standard of Review

This Court upholds all fact findings by FERC if the findings are supported by substantial evidence. Process Gas Consumers Grp. v. FERC, 292 F.3d 831, 836 (D.C. Cir. 2002); 15 U.S.C. § 717(r). To find substantial evidence, this Court must find more than a scintilla of evidence, but "something less than a preponderance of the evidence." FPL Energy Me. Hydro LLC v. FERC, 287 F.3d 1151, 1160 (D.C. Cir. 2002).

Argument

FERC's finding of fact that the AFP serves public convenience and necessity is supported by substantial evidence.

Under this deferential standard of review, the Court should not inquire as to whether the evidence would support HOME's version of events, but rather, must only determine if FERC's finding of public convenience and necessity is supported by substantial evidence. See Ark. Elec. Energy Consumers v. FERC, 290 F.3d 362, 367 (D.C. Cir. 2002) (explaining the court's limited review powers towards FERC decisions under a "substantial evidence" standard). Factual findings by FERC are conclusive if supported by substantial evidence. 16 U.S.C. § 825l. The Court must "defer to the agency's expertise," if the decision is supported by substantial evidence and reached through "reasoned decision making." Electricity Consumers Resource Council v. FERC, 747 F.2d 1511, 1513 (D.C. Cir. 1984). A preponderance of the evidence requires the asserted fact only be more likely than not, Metro v. Stevedore Co. v. Rambo, 521 U.S. 121, 150 (1997), and to find substantial evidence in a FERC finding of fact, the burden of proof is even less than that of a preponderance. FPL Energy Me. Hydro LLC, 287 F.3d. at 1160.

In this case, FERC's factual determination that the public convenience and necessity presented by the AFP is supported by substantial evidence should not be disturbed. When exporting LNG to a "non-Free Trade" country such as Brazil, the export is authorized unless the Department of Energy finds that the export "will not be consistent with the public interest." Sierra Club v. United States DOE, 867 F.3d 189, 192 (D.C. Cir. 2017); 15 U.S.C. § 717b(a); see (R. pg. 4) (FERC issuing the order to allow the AFP). To show the proposed export is inconsistent with public interest, the opponent must make, "an *affirmative* showing of

inconsistency with the public interest". Id. In determining public interest, FERC is to evaluate the effects on the domestic economy, such as tax revenue and job creation. Id.

Here, HOME has not affirmatively shown that exporting the LNG transported by the AFP will be inconsistent with public interest. Instead, when viewing the domestic economic effects, the construction of the AFP will have numerous positive effects. The AFP provide natural gas to areas without LNG access in New Union, expand access to LNG sources across the United States, fulfill the currently undersubscribed capacity of the NorthWay Pipeline, and will even create opportunities for cleaner air by using LNG instead of "dirtier" fossil fuels. (R. pg. 8). Each of these benefits will thrust the American economy forward through job creation and tax revenue.

Furthermore, the Certificate Policy Statement in this case shows that TGP has entered precedent agreements for firm service of the entire production of the AFP. Precedent agreements do not require specific data, but always show significant evidence of demand for a project. Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1311 (D.C. Cir. 2015); Minisink Residents for Env't Pres. And Safety v. FERC, 762 F.3d 97, 111 (D.C. Cir. 2014). Specifically, when precedent agreements are for export, that factual finding is weighed towards public convenience and necessity. City of Oberlin, Ohio v. FERC, 39 F.4th 718, 727 (D.C. Cir. 2022).

Section 3 of the NGA expressly states that exporting of LNG to "Free Trade" countries is sufficient to find public convenience and necessity. 15 U.S.C. § 717b(c); however, as previously stated, a showing of public interest must be made if the export is to a non-Free Trade country such as Brazil. In this case, FERC has found exporting 90% of the LNG transported by the AFP

serves public convenience and necessity. (R. pg. 4). The distinction between Free Trade countries and non-Free Trade countries in this context is a distinction without a difference. See (R. pg. 9).

Additionally, the AFP will transport 50,000 Dth per day just for domestic use. (R. pg. 6). The average home uses 0.1 Dth of energy per day, meaning the LNG transported by the AFP could power 500,000 homes per day. The potential to power 500,000 homes is substantially evident of the positive effect the AFP will have on the domestic energy supply and economy. The construction of the AFP alone will also inject $599,000,000 into the domestic economy in every small town its route crosses.

FERC's finding that the AFP will serve public convenience and necessity is supported by substantial evidence. FERC is the expert agency in determining public convenience and need and has wide discretion to do so. Columbia Gas Transmittion Corp. v. FERC, 750 F.2d 105, 112 (D.C. Cir. 1984); see also Exxon Mobil Gas Mktg. Co. v. FERC, 297 F.3d 1071, 1085 (D.C. Cir. 2002). FERC decisions are given great deference and their findings of fact *must* be upheld if supported by substantial evidence. Electricity Consumers Resource Council, 747 F.2d at 1513. Substantial evidence does not even rise to the level of a preponderance of evidence, FPL Energy Me. Hydro LLC, 287 F.3d. at 1160, thus presenting a low burden for FERC/TGP to meet. The AFP will expand the current LNG network in the United States, create numerous jobs, generate millions of dollars in revenue, and even create clean air opportunities by minimizing usage of "dirtier" fossil fuels. Due to the great level of deference given to FERC factual findings and the clear showing of substantial evidence in support of the AFP, this Court should uphold FERC's finding of public convenience and necessity.

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

Standard of Review

The Court should not set aside a finding of FERC unless the finding is determined to be arbitrary and capricious. 5 U.S.C. § 706(2). "This standard is exceedingly deferential" for the agency making the determination. Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996); 5 U.S.C. § 706(2)(a). The Court has a simple role—to ensure the agency came to a rational conclusion and may not "conduct its own investigation and substitute its own judgement for the administrative agency's decision." Preserved Endangered Areas of Cobb's History Inc. ("PEACH") v. U.S. Army Corps of Eng'rs, 87 F.3d 1242, 1246 (11th Cir. 1996).

Argument

FERC's finding that the benefits of the AFP outweigh the environmental and social harms was not arbitrary and capricious.

FERC decisions are always upheld when the agency can demonstrate a rational connection between the facts of the case and its decision. Elec. Power Supply Ass'n., 577 U.S. at 292. The National Environmental Protection Act (NEPA) does not require specific results, rather it only serves as a procedural guide to, "ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." Winter v. NRCD, Inc., 555 U.S. 7, 23 (2008) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). If FERC identifies the environmental effects of the project and adequately evaluates them, the agency is not required by NEPA to find environmental costs outweigh other values. Robertson, 490 U.S. at 350.

Furthermore, FERC decisions are given great deference and their findings of fact *must* be upheld if supported by more than a scintilla of evidence. Electricity Consumers Resource Council, 747 F.2d at 1513 (although not requiring a level of proof greater than a preponderance).

In this case, FERC carefully considered the detailed environmental impact information in reaching its decision to grant the CPCN to TGP. (R. pg. 10,11). HOME states that TGP's application for the CPCN should have been denied entirely and the alternative route should only be considered if the CPCN is denied. (R. pg. 11). A primary concern brought by HOME is the removal of 2,200 tress and other vegetation from their land that are not replaceable, (R. pg. 10); however, the proposed alternate route through Misty Top Mountain would add an additional, unnecessary burden of $51,000,000 to the construction cost of the AFP. (R. pg. 11.)

Despite HOME arguing for construction of the AFP along the alternate route, it does not contest that the alternate route would cause more objective environmental harm than the current route. (R. pg. 11). In the current route, TGP can negotiate easement agreements with landowners and hear their concerns, while the Misty Top Mountain alternative route requires an additional three miles of pipeline through more sensitive ecosystems. (R. pg. 11). The least impactful route of the AFP is the currently proposed route through their land. See (R. pg. 10).

One requirement for FERC's consideration is whether the applicant (in this case, TGP) has attempted to minimize its impact on existing customers, pipelines, and landowners/communities affected by the proposed route. (R. pg. 10). To meet these requirements, TGP has already altered over 30% of the AFP's route. (R. pg. 10). Included in their attempts to minimize impact, TGP has agreed to go above and beyond by burying the entirety of the AFP portion that passes through HOME property. (R. pg. 10). Furthermore, TGP has agreed to expedite construction on HOME land as much as possible and plan to finish the entire two-

mile portion in only four months. (R. pg. 10). FERC has cited TGP's diligent work to gather easement agreements with every property owner along the proposed route to minimize adverse effects by the pipeline. (R. pg. 10). Determinations by FERC, such as TGP sufficiently attempting to minimize adverse effects, are given great deference, and should not be disturbed by the Court. Electricity Consumers Resource Council, 747 F.2d at 1513.

HOME not only presents argument based on potential environmental harms, but also those on religious grounds. Neither FERC or TGP take the religious practices of HOME and its members lightly. See (R. pg. 11,12). Although the beliefs of HOME's members are sincere, the AFP will be completely underground when crossing their property and will not interfere with their practices, including the Solstice Sojourn. (R. pg. 10,11,13). Under the factual findings of FERC, moving AFP construction to the alternative route is "entirely impractical and overly burdensome, in light of the minimal impacts on HOME." (R. pg. 13). Since adjusting the AFP to the alternative route would cause a more substantial burden on TGP than is currently placed on HOME, FERC's decision to grant a CPCN for building the AFP across HOME property has a satisfactory explanation for its action, including a *rational* connection between the facts found and the choice made. See FERC v. Elec. Power Supply Ass'n, 577 U.S. 260, 292 (2016) (requiring Courts to uphold FERC findings if a rational connection is shown between the facts and the agency's ultimate decision).

As for the benefits of the AFP, the project will provide a positive thrust to the American economy. The AFP, 500,000 Dth of LNG will be transported to the NUG/NorthWay Pipleine interconnection, expanding natural gas access to those who are currently underserved and even to those outside of the United States. (R. pg. 8). The AFP will also create a more competitive market and fulfill the currently undersubscribed capacity of the NorthWay Pipeline while

creating cleaner air opportunities by minimizing the necessary use of "dirtier" fossil fuels. (R. pg. 8). Finally, perhaps the greatest benefit the AFP will create in the present is $599,000,000 of construction cost and requiring the creation of numerous jobs. (R. pg. 5). Once completed, the AFP will also produce 50,000 Dth for domestic use every day, creating enough energy to potentially power 500,000 American homes daily. (R. pg. 5,6). The *guaranteed* benefits of the AFP outweigh any *potential* harms that *could* be caused by the AFP.

FERC has found the benefits of the AFP outweigh the *potential* harms of the project. (R. pg. 12). Under the "greatly deferential" standard of review, the FERC determination regarding harms versus benefits in the CPCN application should be left undisturbed. See Fund for Animals, Inc. v. Rice, 85 F.3d at 541. Since a rational connection exists between the facts given and FERC's ultimate decision to grant the CPCN for the proposed primary AFP route, the Court cannot substitute its own judgement here. Preserved Endangered Areas of Cobb's History Inc. ("PEACH") v. U.S. Army Corps of Eng'rs, 87 F.3d at 1246. Resultingly, FERC's decision is clearly not arbitrary and capricious. See FERC v. Elec. Power Supply Ass'n, 577 U.S. at 292.

III. FERC's DECISION TO ROUTE THE AFP OVER HOME PROPERTY WAS IN COMPLIANCE WITH THE RFRA.

Standard of Review

In determining whether the RFRA violated religious exercise of a plaintiff, the appellate court must review the decision *de novo*. Iglesia Pentecostal Casa de Dios Para Las Naciones, Inc. v. Duke, 718 Fed. Appx. 646, 650 (10th Cir. 2017). Challenges under the RFRA must show the action is a substantial burden on a person's exercise of religion. 42 U.S.C. § 2000bb-1(a). If a

substantial burden is found, the Court must then apply strict scrutiny to determine constitutionality of the action. Tagore v. United States, 735 F.3d 324, 330 (5th Cir. 2013).

Argument

The burden caused by the AFP being routed over HOME's property is compliant with the RFRA because it does not create a substantial burden on HOME's exercise of religion.

Challenges under the RFRA must show the action is a substantial burden on a person's exercise of religion. 42 U.S.C. § 2000bb-1(a). Substantial burdens exist if the government action places "substantial pressure on an adherent to modify his behavior and violate his beliefs." Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 708 (1981). Courts will not challenge a plaintiff's assertion of a religious belief, so long as those beliefs are actually held. Burwell v. Hobby Lobby Stores, 573 U.S. 682, 725 (2014). On the other hand, the court has the sole authority to determine whether the challenged law constitutes a substantial burden of the religious exercise. Yellowbear v. Lampert, 741 F.3d 48, 55 (10th Cir. 2014). How the law actually operates to cause the alleged burden is given a thorough analysis. Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008).

In this case, FERC has taken the necessary steps to prevent a substantial burden on the religious beliefs and practices of HOME. See (R. pg. 55-56). When FERC issues a CPCN, the applicant must follow any conditions set forth by the Commission. Algonquin Gas Transmission, LLC v. Weymouth, 919 F.3d 54, 58 (1st Cir. 2019). `Therefore, pursuant to the CPCN issued to TGP, the AFP must be buried for the entire span it crosses HOME's property. (R. pg. 12). Not only will the Pipeline be completely buried, but construction must be expedited under the CPCN. (R. pg. 10). Since the AFP would be completely buried and will be expedited, the Pipeline would

not substantially burden the Solstice Sojourn or any other religious beliefs or practices held by HOME. (R. pg. 13).

In a similar case, artificial snow was being placed on a public mountain to create a federal government created park. Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1062 (9th Cir. 2008). Navajo Nation filed suit under the RFRA because the mountains in question were sacred to their religious practices. Id. at 1063. Specifically, Navajo Nation argued placing artificial snow across the entire surface across the mountain would substantially burden their religious ceremonies that were traditionally held on the mountain. Id. The Ninth Circuit found the placement of the artificial snow (which was composed of 0.0001% human waste) across the mountain's surface was *not* a violation of the RFRA. Id.

In the case at hand, the AFP will not cause any above-ground interference with HOME's religious practices. (R. pg. 12). The Court in Navajo Nation found placing snow across the entire surface of the property in question was not a substantial interference with their religious ceremonies. Id. If covering and altering the entire surface of a religious ground in Navajo Nation was not interference enough under RFRA to warrant a finding of unconstitutionality as a substantial burden, then burying the AFP underground for the entire time it crosses HOME property should not be deemed a substantial burden. (R. pg. 12). see Id.; see also Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996) (finding the RFRA is not violated because requiring gravesites to be moved is not a substantial burden of plaintiff's religious beliefs); see also Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n, 545 F.3d 1207, 1214-15 (9th Cir. 2008) (denying tribe's argument that FERC placed a substantial burden on their religious exercise by relicensing a hydroelectric dam at a sacred religious site).

Even if the impacts of the Pipeline are found as a substantial burden, the AFP still passes strict scrutiny review. See Tagore, 735 F.3d at 330 (requiring strict scrutiny review if the Government action is found to substantially burden the exercise of a religious practice under RFRA). To pass strict scrutiny, the Government must show the action furthers a compelling government interest by the least restrictive means *practically* available. Bernal v. Fainter, 467 U.S. 216, 227 (1984); 42 U.S.C. § 2000bb(3).

The AFP serves a countless number of compelling government interests. First, the AFP will expand access to the LNG network. The AFP will carry 500,000 Dth of LNG every day, of which 50,000 Dth will be for domestic consumption. (R. pg. 6). Since the average American home only uses 0.1 Dth per day, the AFP alone could power 500,000 domestic homes every day. One factor cited by FERC for granting the CPCN to TGP was expanding LNG access to currently underserved communities. (R. pg. 8).

The AFP also expands the LNG network by fulfilling the capacity of the Northway Pipeline after their intersection at the Burden Road M&R Station. (R. pg. 6, 8). At this time, Northway is not operating at full capacity; however, once the AFP reaches Burden Road from Hayes Fracking Field, the portion being exported by International Oil will be transported to port by Northway. (R. pg. 6). Similarly, the AFP will require construction of a new receipt meter, receipt tap, delivery station, pig launcher/receiver facilities, and eight mainline valve assemblies at different points along the proposed route to expand LNG access to underserved communities. (R. pg. 5).

Not only does the AFP have the potential to expand the LNG network to thousands of families, but it *will* also do so upon completion. TGP has entered into binding precedent agreements with International Oil and New Union Gas and Energy Services Company to operate

the AFP at full capacity. (R. pg. 5, 6, 8); see Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (holding binding precedent agreements to operate a pipeline at full capacity is substantial evidence of project need).

Not only will the AFP expand the LNG network, but it will have a substantial impact on the domestic economy. The construction of the AFP alone will inject $599,000,000 into the American economy. (R. pg. 5). These construction costs will directly benefit every small town and community that the AFP must cross along its route. See (R. pg. 5) (describing where different substantial phases of construction will take place). By constructing the AFP, every area the route crosses will have new contracting opportunities and every day revenue injected directly into their economies. (R. pg. 5). Additionally, the AFP will likely create countless permanent jobs at the pipeline exchanges and Port of New Union. (R. 5, 6).

The AFP will serve *numerous* compelling government interests. Expanding LNG access to underserved American families while injecting $599,000,000 into the American economy just from construction is unquestionably in the best interest of our nation. The AFP is an economic tool to shove the American economy into full speed.

On the other hand, the restrictions FERC placed on the AFP are the least restrictive means of furthering the government's interest. See 42 U.S.C. § 2000bb-1(a)-(b). To calculate least restrictive under RFRA, the cost of altering the government's plan is weighed against the burden placed on the religious activity if the government activity remains unchanged. Ave Maria Found. v. Sebelius, 991 F. Supp.2d. 957 (E.D. Mich. 2014). If a least restrictive mean is available to the Government, then that alternative must be used; however, if the plaintiffs present any alternatives, the government "must show that each proposed alternative either is not 'less restrictive' within the meaning of RFRA or is not plausibly capable of allowing the government

to achieve all of its compelling interests." Holt v. Hobbs, 574 U.S. 352, 364-365 (2015); See Smith v. Owens, 12 F.4th 1319, 1326 (11th Cir. 2001); see also United States v. Wingus, 638 F.3d 1274, 1279 (10th Cir. 2011); see also Knight v. Thompson, 797 F.3d 934, 946-47 (11th Cir. 2015). Under this standard, FERC/TGP must prove the alternative route is not less restrictive than the current route *or* the proposed route is not plausibly capable of allowing the government to achieve it's compelling interests.

The alternative route proposed by HOME would be more contradictory to HOME's religious beliefs and would cause a great financial burden on the Pipeline. (R. pg. 11,12). The religious beliefs of HOME are based around "promot[ing] natural preservation over all other interests." (R. pg. 11). The alternative route proposed would add an additional three miles to the AFP route and would cause a re-route through much more sensitive ecosystems, which is not contested by HOME. (R. pg. 11). In accordance with HOME's own religious views, the current AFP route is less restrictive than the only alternative proposed route. (R. pg. 11). As a result, the current AFP route is the least restrictive means of constructing the Pipeline.

Even if the alternative route is found less restrictive, rerouting the AFP would add an additional $51,000,000 to construction costs. Additional costs caused by altering the Government's planned actions are weighed against the alleged religious burdens to determine plausibility of the alteration. Ave Maria Found., 991 F. Supp.2d. at 957. In this case, the current proposed route of the AFP is the least restrictive means of building the Pipeline and does not cause a substantial interference with the religious ceremonies of HOME; however, moving the Pipeline's route to the alternative route would place a great burden on TGP by requiring an additional $51,000,000 in construction costs.

As mentioned above, the Court in Navajo Nation, allowed the federal government to add artificial snow containing human waste to a sacred mountain over religious objections. 535 F.3d at 1062-63. In that case, the mountain was home to sacred religious practices of Navajo Nation and would have been covered entirely by the artificial snow. Id. Here, the AFP's construction will be expedited, and the Pipeline buried to cause minimal interference with HOME's religious practices. (R. pg. 10). The Court upheld the government action there, just as this Court should affirm the findings of FERC here.

This construction of the AFP along its planned route is not a substantial burden on the religious exercises of HOME. See (R. pg. 10, 12,13); see also Navajo Nation, 535 F.3d at 1062. Even if deemed a substantial burden, the AFP passes strict scrutiny due to the compelling government interest presented by the AFP and it being the least restrictive means of doing so. See Myersville Citizens for a Rural Cmty., Inc., 783 F.3d at 1311; see also Ave Maria Found., 991 F. Supp.2d. at 957. FERC's decision to route the AFP over HOME property despite HOME's religious objections was not in violation of RFRA.

IV. THE CONDITIONS IMPOSED BY FERC ARE BEYOND THE SCOPE OF THE AUTHORITY GRANTED TO FERC UNDER THE NGA.

Standard of Review

This Court reviews FERC orders, "including those approving certificate applications, under the familiar arbitrary and capricious standard" of the APA. Minisink Residents for Env't Pres. & Safety v. FERC, 762 F.3d 97, 105-06 (D.C. Cir. 2014); see also 5 U.S.C. § 706(2)(A). An agency's compliance with NEPA's requirements is also reviewed under the APA's arbitrary and capricious standard. Sierra Club v. FERC, 867 F.3d 1357, 1367 (D.C. Cir. 2017). "[T]he

question is whether the Commission's Certificate and Rehearing Orders were 'based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" Minisink, 762 F.3d at 106.

Argument

The conditions being imposed by FERC are beyond its authority under the NGA. FERC has only ever made conditions which deal with the routing, land conditions, and/or rates involved in the purchase agreements. By implementing construction material and equipment usage conditions, FERC has "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

The Major Questions Doctrine ("MQD") holds that, "if Congress had intended to grant such a power to the [agency], it cannot be doubted that it would have used language open to no misconstruction, but clear and direct." ICC v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 505 (1897); West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring). "First, th[e] [Supreme] Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great 'political significance,' or end an 'earnest and profound debate across the country[.]'" NFIB v. OSHA, 142 S. Ct. 661, 665 (2022); Gonzales v. Oregon, 546 U.S. 267, 268 (2006); West Virginia, 142 S. Ct. at 2620 (Gorsuch, J., concurring). "Second, th[e] [Supreme] Court has said that an agency must point to clear congressional authorization when it seeks to regulate a significant portion of the American economy[.]" FDA v. Brown & Williamson, 529 U.S., 120, 159 (2000); Util. Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014); West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

The Court has perceived several things to be regulations on a significant portion of the economy, from restrictions on tobacco to restrictions on the operation of millions of small sources nationwide. Brown, 529 U.S. at 159; Util. Air Regulatory Group, 573 U.S. at 324. In an attempt to regulate smoking, the FDA imposed "restrictions on the sale, distribution, and advertisement of tobacco products, [all] designed to reduce the availability and attractiveness of tobacco products to young people." Brown, 529 U.S. at 126. The Court said this use of authority was something that the FDA "ha[d] expressly disavowe[d]" up until that point, and the exercise of such authority "could not have [been] intended to delegate [such] a decision of such economic and political significance to an agency in so cryptic a fashion." Id. at 125, 160.

The Court also saw this principle invoked when the EPA proposed a regulation that "require[d] permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide[.]" Util. Air Regulatory Group, 573 U.S. at 324. The Court stated, "an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed it.'" Id. at 324. The Court again found an agency had attempted to regulate a significant portion of the economy without proper authority in West Virginia v. EPA. 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring). In West Virginia, the EPA had in attempt to regulate greenhouse gas "GHG" emissions tried to force generation shifting under the best system of emission reductions found in section 111 of the Clean Air Act. Id. at 2603, 04.

In this case, the conditions imposed on the certificate are beyond the scope of FERC's authority under the NGA. FERC is tasked with regulating the transportation of natural gas within pipelines under the NGA. 15 U.S.C. § 717 et seq. (2023). Part of that inquiry is to do a NEPA

study, which includes an Environmental Impact Statement. 42 U.S.C. § 4332(2)(C) (2023). After the NEPA study, FERC can grant a Certificate of Public Convenience and Necessity ("CPCN"). 15 U.S.C. § 717f (2023). FERC can place *reasonable* terms and conditions on the granting of a certificate. Id. The issue here is that the conditions on this certificate and current "draft standard" go beyond the bounds of FERC's authority under the NGA. While draft standards are not operative, the current draft standard, which is referenced throughout the record, does not support the conditions present here. Certification of New Interstate Natural Gas Facilities 178 FERC ¶ 61,197 (Commissioner Danly).

In the "draft standard," the commission cites their authority to place conditions and fails to list any examples which conform to the conditions placed here. Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14104, 14108 (March 11, 2022). Within Footnote 69, FERC qualifies their authority to place conditions, but only cites cases and orders in which they either conditioned no harm to the land or to the aquatic resources or wetland—none on the materials or tools used specifically. See, e.g., Columbia Gas Transmission, LLC, 170 FERC ¶ 61,045, at P 66, app. (2020) (conditioning certificate authority on site-specific mitigation measures when crossing abandoned mine lands, including the management and disposal of contaminated groundwater, and mitigation measures for acid mine drainage); PennEast Pipeline Co., LLC, 170 FERC ¶ 61,198, at PP 29–30, app. A (2020) (conditioning certificate authority on mitigation of construction impacts on karst features); Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042 at app. A (conditioning certificate authority on the mitigation of construction impacts on karst features and on a nearby inn and mitigation of impacts from the discovery of invasive aquatic species during construction); Port Arthur LNG, LP, 115 FERC ¶ 61,344, at PP 68–71, app. A (conditioning sections 3 and 7 authority on the

mitigation of construction impacts on aquatic resources and wetlands), order on reh'g, 117 FERC ¶ 61,213 (2006), vacated, 136 FERC ¶ 61,196 (2011). All of these are examples of the traditional powers FERC has wielded—conditions that affect the land and how to manage it—but none on GHG emissions or on materials and tools used.

When applying the MQD, one of the common signals that the MQD is being violated is when "an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed it.'" Util. Air Regulatory Group, 573 U.S. at 324. Here, whether it be the draft standard or the CEQ guidance, there is a clear boundary to the power granted to FERC under the NGA. Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14104, 14123 (March 11, 2022). Take for example, the language from the CEQ guidance which states, "Neither NEPA, the CEQ Regulations, or this guidance require the decision maker to select the alternative with the lowest net GHG emissions or climate costs or the greatest net climate benefits. . . . [agencies should] consider mitigation measures to reduce GHG emissions to the *greatest extent possible*." National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1204 (January 9, 2023). Continually both the CEQ and draft standard use "greatest extent possible" as the authority to require mitigation, implying there is an end to that authority. The draft policy goes a step further and says that the "scale needed for such measures to meaningfully mitigate GHG emissions may render them *impractical*." Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14104, 14123 (March 11, 2022).

Undoubtedly FERC and the CEQ recognize that the authority to place mitigation conditions is limited in some fashion, otherwise they would not recognize an end with the phrase "greatest extent possible" or measures may be "impractical." So with both the agency and the CEQ claiming to have the authority, but strenuously asserting that authority, the common trend of a MQD violation is present.

Here, this project is a $599,000,000 investment in the energy and economic sector, creating numerous jobs and injecting revenue into the economy. (R. pg. 6). With more Natural Gas readily available for domestic use, prices will fall. See NextEra Energy Res., LLC, 898 F.3d 14, 18 (D.C. Cir. 2018) (explaining the principle of supply and demand to show a larger quantity of available product will typically result in lower prices.). Clearly, this is a project of major economic impact and proportions. With the agency asserting authority over an area of vast economic significance and strenuously asserting that authority, the evidence points to a MQD violation.

Yet, the final consideration is whether there is a clear congressional grant of authority for FERC to do this. The pertinent NGA section states this, "attach to the issuance of the certificate and to the exercise of the rights granted thereunder such *reasonable* terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). The operative word is "reasonable," and the conditions that FERC handed down are anything but reasonable. It is worth noting that the first imposed condition is one that FERC has the authority to implement since it has to do with the management of the land. (R. pg. 16). However, the *unreasonable* conditions regarding what tools to use and what materials to buy are beyond the scope of the congressional delegated authority. The conditions are as follows:

> (2) TGP shall 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; (3) TGP shall purchase only "green" steel pipeline segments produced by net-zero steel manufacturers; and (4) TGP shall purchase all electricity used in construction from renewable sources where such sources are available.

(R. pg. 14.) None of these conditions are found in any part of the power granted to FERC. 15 U.S.C. § 717f(e). The above conditions are not reasonable, as they impose limitations on TGP and construction that are beyond their control. For example, the last condition says that the electricity used in construction must be bought from renewable sources. Yet, TGP has no power to determine where their electricity comes from, as the Independent System Operators ("ISOs") or Regional Transmission Operators ("RTOs") control the electricity markets and decide who gets the bid under FERC and the Federal Power Act. 16 U.S.C. § 824(b)(1). As to the other conditions, the draft standard does not cite a single case where FERC placed a condition like this. Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14104, 14108 (March 11, 2022).

The material condition regarding net zero steel is drawn from the CEQ guidance, but the CEQ operates under NEPA and NEPA does not enlarge an agencies power, nor is the CEQ binding on FERC. National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1206 (January 9, 2023); Cape May Greene, Inc. v. Warren, 698 F.2d 179, 188 (3rd Cir. 1983). Similarly, no authority was cited to show FERC had ever implemented a tool and equipment mandate like the one in this case, or that they had the authority to do so. Further, the tremendous amount of work necessary to build this project will require the use of heavy equipment like dozers along with a plethora of tools and equipment. These tools and equipment will be out in the wilderness since much of the

pipeline runs in the wilderness meaning that the use of battery powered equipment is unreasonable and essentially impossible.

For the aforementioned reasons, FERC is clearly acting beyond the scope of Congressional authority granted to it by the NGA. FERC is "strenuously" trying to assert authority that it never has before on a major economic project and subsequent projects without any clear congressional delegation of authority, establishing a MQD violation. Brown & Williamson, 529 U.S., 120, 159 (2000); Util. Air Regulatory Group, 573 U.S. 302, 324 (2014); West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring). This is a clear violation of the MQD, as FERC cannot point a clear Congressional grant for the conditions given, and when this type of authority is being asserted courts have stated, "if Congress had intended to grant such a power to the [agency], it cannot be doubted that it would have used language open to no misconstruction, but clear and direct." ICC v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 505 (1897); West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring).

Therefore, for the reasons above FERC has clearly violated the MQD, and this was a clear error in its judgement because FERC went beyond the scope of their authority under the NGA.

V. FERC'S DECISION TO NOT IMPOSE CONDITIONS ON UPSTREAM AND DOWNSTREAM EMISSIONS WAS NOT ARBITRARY AND CAPRICIOUS, FERC LACKS THE POWER TO IMPOSE SUCH CONDITIONS.

Standard of Review

This Court reviews FERC orders, "including those approving certificate applications, under the familiar arbitrary and capricious standard" of the APA. Minisink Residents for Env't Pres. & Safety v. FERC, 762 F.3d 97, 105-06 (D.C. Cir. 2014); see also 5 U.S.C. § 706(2)(A). An agency's compliance with NEPA's requirements is also reviewed under the APA's arbitrary and capricious standard. Sierra Club v. FERC, 867 F.3d 1357, 1367 (D.C. Cir. 2017). "[T]he question is whether the Commission's Certificate and Rehearing Orders were 'based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" Minisink, 762 F.3d at 106.

Argument

FERC was not arbitrary and capricious when it decided not to impose conditions on upstream and downstream emissions, this action is beyond FERC's authority under the NGA.

"Statutory language cannot be construed in a vacuum[,] [i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989). "An act must be read and viewed as a whole, in order for the true meaning to be gleaned." Robinson v. Shell Oil Co.,519 U.S. 337, 341 (1997); Util. Air Regulatory Group, 573 U.S. at 321. Courts have stated, "we begin with the statutory text." Maryland v. EPA, 958 F.3d 1185, 1196 (D.C. Cir. 2020). It has long been the practice of the law to discern the intent of Congress for a statute, by looking at the statute itself. United States v. Freeman, 44 U.S. 556, 565 (1845). "The intention of the legislature, when discovered, must prevail[.]" Id. That intention is often discovered by reading the statute as a whole and giving the words their plain meanings within the context. West Virginia, 142 S. Ct. at 2607.

In this case, the decision not to impose conditions on upstream and downstream emissions was not arbitrary or capricious. FERC met its obligation under NEPA by considering the upstream and downstream emissions. Natural Resources Defense Council, Inc. v. U.S. E.P.A., 822 F.2d 104, 129 (D.C. Cir. 1987). Further, courts have stated "[t]he National Environmental Policy Act does not expand the jurisdiction [or powers] of an agency beyond that set forth in its organic statute." Natural Resources Defense Council, Inc., 822 F.2d at 129; Cape May Greene, Inc., 698 F.2d at 188. FERC here took the "hard look" required by NEPA and that's all that was required. (R. pg. 19).

FERC tried to impose conditions on upstream downstream emissions, beyond the scope of their authority. As the Supreme Court stated in Davis, "Statutory language cannot be construed in a vacuum[,] [i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." 489 U.S. 803, 809 (1989). The Court also stated that "[a]n act must be read and viewed as a whole, in order for the true meaning to be gleaned." Robinson v. Shell Oil Co.,519 U.S. 337, 341 (1997); Util. Air Regulatory Group, 573 U.S. at 321. Both the Supreme Court and the D.C. Circuit Court have recognized that the NGA is about access. Atlantic Ref. Co. v. PSC of New York, 360 U.S. 378, 388 (1959); N. Nat. Gas Co., Div. of InterNorth, Inc. v. Fed. Energy Regulatory Com., 827 F.2d 779, 787 (D.C. Cir. 1987). The Court in Atlantic, stated, "The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas." quoting Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944). The Court further stated, "As the original § 7 (c) provided, it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate

consistent with the maintenance of adequate service in the public interest.'" Atlantic, at 388. Finally, "the Act [being] framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." Id.

In a similar fashion, the D.C. Circuit laid out what the various sections mean and how they should be read together. The court stated by saying, "sections 4, 5, and 7 of the Act reveal a single and coherent design. Under sections 4 and 5, the Commission determines the allowable price of natural gas services, holding price (i.e. rate) to a 'just and reasonable' standard." N. Nat. Gas Co., Div. of InterNorth, Inc., at 787. The court elaborated further by saying, "[u]nder section 7, the Commission determines what services may be provided (as well as through which facilities), reviewing them under a 'public convenience and necessity' standard." Id. The court even discussed Congress' intent by holding, "Congress' concern in regulating the provision of services and facilities under section 7 was to avoid 'the possibilities of waste, uneconomic and uncontrolled extensions,' thereby 'conserving one of the country's valuable but exhaustible energy resources' as well as ensuring 'the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." Id.

Even if the legislative intent of the statute is not enough, there is further proof that FERC has no power to impose conditions on upstream or downstream emissions. The NGA acknowledges that once the Natural Gas has left the main pipeline, FERC no longer has authority over it. 15 U.S.C. § 717(b); South Coast Air Quality Management Dist. v. F.E.R.C., 621 F.3d 1085 (9th Cir. 2010) ("In sum, the history and judicial construction of the Natural Gas Act suggest that all aspects related to the direct consumption of gas—such as passing tariffs that set the quality of gas to be burned by direct end-users—remain within the exclusive purview of the states.") Further, the EPA has the national power to regulate emissions and any gap in its

authority is left to the states. 42 U.S.C. § 7401. The Clean Air Act specifically vests states with authority to issue permits to regulate stationary sources related to upstream and downstream activities. 42 U.S.C. 7661(e).

By granting these powers, Congress also "expressly saved states' CAA powers from preemption." 15 U.S.C. § 717b(d)(2). "In other words, laws that are part of a state's SIP are not preempted, unless the NGA says otherwise." Dominion Transmission, Inc. v. Summers, 723 F.3d 238, 243 (D.C. Cir. 2013). Courts have continuously held that "[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." Huron Portland Cement Co. v. City of Detroit, Mich., 362 U.S. 440, 442 (1960).

In the Wellhead Decontrol Act of 1989, Congress specifically removed the Commission's authority over the upstream production of natural gas. 5 U.S.C. § 3431(a)(1)(A). Courts have also interpreted this act holding, "That enactment contemplates a considerably changed natural gas world in which regulation plays a much-reduced role and the free market operates at the wellhead." United Distribution Companies v. F.E.R.C., 88 F.3d 1105, 1166 (D.C. Cir. 1996).

Further, FERC has no authority to regulate downstream emissions, as that power is already assigned to other agencies. The Supreme Court even recognized, "[i]t is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions," not FERC. American Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 428 (2011). In a situation like this with the Army Corps of Engineers, the Eleventh Circuit state,d "[b]ecause the statute authorizes the Corps to deny a permit only if the discharge itself will have an unacceptable environmental impact, the regulations cannot empower the Corps to deny permits for any other reason—including *downstream*

phosphogypsum-related effects of fertilizer production." Center for Biological Diversity v. U.S. Army Corps of Engineers, 941 F.3d 1288, 1299 (11th Cir. 2019).

Although FERC may wish to exercise such authority, "[i]n carrying out its statutory certification task FERC must recognize that 'a need for federal regulation does not establish FPC jurisdiction that Congress has not granted.'" Office of Consumers' Counsel v. Federal Energy Regulatory Commission, 655 F.2d 1132, 1147 (D.C. Cir. 1980).

Therefore, for the reasons set forth FERC was not arbitrary and capricious in declining to impose conditions on upstream and downstream emissions, because that power already resides with the states and the EPA, not FERC.

VI. CONCLUSION

This Court should find FERC's granting of a CPCN to TGP was not arbitrary and capricious, as a rational connection between the facts of the case and certification is clear. The decision to grant the CPCN was supported by substantial evidence. Furthermore, the numerous benefits the AFP presents far outweigh any *potential* environmental or societal harms. TGP has already altered a substantial portion of the AFP route to minimize the Pipeline's effects. TGP has also agreed to bury the entire AFP portion that crosses HOME property underground and expedite construction. Additionally, this Court should find that the AFP does not substantially burden the religious practices of HOME. Even if found substantially burdensome, this Court should find the AFP serves a compelling interest and that the current route is the least restrictive means of doing so. While the granting of the CPCN should remain intact, conditions 2-4 should be removed as they violate the MQD, for impacting a major economic project and go beyond FERC's clearly delegated authority from Congress. Finally, FERC did not act arbitrarily nor

capricious in denying to place conditions on upstream and downstream emissions, as FERC does not possess that authority. For the foregoing reasons, this Court should deny HOME's appeal, leave the CPCN in place and strike the conditions that are beyond the authority of FERC.