

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH
Petitioner,

and

TRANSNATIONAL GAS PIPELINES, LLC
Petitioner,

-v.-

UNITED STATES
FEDERAL ENERGY REGULATORY COMMISSION
Respondent,

On Consolidated Petitions for Review of a Final Order Issued
Under Section 7 of the Natural Gas Act

Brief of Respondent, UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION

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JURISDICTIONAL STATEMENT

Under the Natural Gas Act (“NGA”), any company seeking to build a pipeline must receive a Certificate of Public Convenience and Necessity (“CPCN”). 15 U.S.C. § 717f(c)(1)(A). Any person aggrieved by a Federal Energy Regulatory Commission (“FERC” or the “Commission”) order granting a CPCN may seek a rehearing within thirty days. 15 U.S.C. § 717r(a). Petitioners, Holy Order of Mother Earth (“HOME”) and Transnational Gas Pipelines, LLC (“TGP”), both timely filed rehearing requests of the CPCN order. Record at 4. On June 1, 2023, FERC denied both rehearing requests. Under the NGA, this Court has jurisdiction to review FERC CPCN orders within sixty days after FERC’s order on rehearing. *See* 15 U.S.C. § 717r(b). HOME and TGP timely filed their petitions in this Court. On June 15, 2023, the petitions were consolidated in this Court. Accordingly, this Court has proper jurisdiction to hear this appeal. An order denying rehearing is a final agency action which permits judicial review of the substantive order. *See Samuel B. Franklin & Co. v. Sec. & Exch. Comm’n*, 290 F.2d 719, 724 (9th Cir. 1961).

STATEMENT OF ISSUES PRESENTED

- I. Notwithstanding the export-driven benefits, do the domestic benefits FERC considered reasonably constitute substantial evidence of public convenience and necessity?
- II. Did FERC review the public benefits and harms of the AFP in a manner consistent with its Certificate Policy Statement and the National Environmental Policy Act?
- III. Is HOME substantially burdened by FERC’s decision to route the AFP over HOME property in violation of the Religious Freedom Restoration Act?
- IV. Do the conditions requiring mitigation of greenhouse gases during AFP construction constitute a major question beyond FERC’s broad discretionary authority under the Natural Gas Act?

- V. Is FERC’s decision not to impose any greenhouse gas conditions addressing downstream and upstream emissions impacts arbitrary and capricious where FERC is in the process of developing guidance for this very question and impacts are not reasonably foreseeable?

STATEMENT OF THE CASE

On June 13, 2022, TGP filed an application pursuant to section 7(c) of the NGA and Part 157 of the Commission’s regulations for a CPCN to construct and operate the interstate American Freedom Pipeline (“AFP”) and related facilities (collectively, the “TGP Project”). Record at 4. The TGP Project would have a receipt point in Jordan County, Old Union, and interconnect with an existing TGP gas transmission facility in Burden County, New Union. *Id.* On April 1, 2023, FERC issued TGP its requested CPCN. *Id.* FERC concluded that, if the TGP Project is constructed and operated in accordance with applicable laws and regulations, as well as the terms and conditions set forth in the CPCN Order, then the TGP Project was required by public convenience and necessity and would not have significant adverse environmental impacts. *See id.* at 8–12.

Notwithstanding the export-driven benefits, FERC agreed with TGP that the TGP Project serves several domestic needs, including transporting domestically produced gas and providing gas to domestic customers. *Id.* at 8–9. The CPCN Order included greenhouse gas conditions (“GHG Conditions”) that require TGP to take certain steps to minimize any adverse effects the TGP Project might have on landowners and communities affected by the route, as well as the environment. *Id.* at 7, 14.

Petitioners Holy Order of Mother Earth (“HOME”) and TGP timely filed requests for agency rehearing on the CPCN Order. HOME sought rehearing on three aspects of the CPCN Order: (1) project need, (2) approval of the AFP and its route, and (3) environmental conditions. *Id.* at 4–5, 8–19. TGP sought rehearing on the GHG Conditions, claiming that such conditions are

“major questions” beyond FERC’s broad authority under the NGA. *Id.* at 5, 15–18. FERC denied the rehearing requests of both HOME and TGP. *Id.* at 4–19. Petitioners filed two separate petitions for review, 23-01109 and 23-01110, in this Court, which were consolidated to 23-01109.

SUMMARY OF THE ARGUMENT

FERC supplies five independent arguments to support its main contention that it did not err in its issuance of the CPCN. FERC’s finding of public convenience and necessity is supported by substantial evidence because FERC reasonably considered International’s precedent agreement and other domestic benefits for two reasons. First, FERC’s own guidance requires FERC to consider all factors in its public convenience and necessity analysis. Second, FERC’s own guidance also explains that precedent agreements always will be important evidence of demand for a project. FERC also considered domestic benefits, independent of the benefits from International’s precedent agreement, that indicated sufficient proof of public need. Namely, FERC considered six other independent benefits that TPG supplied, which include: increased interconnectedness of domestic pipelines, providing natural gas to areas without access, optimizing existing pipelines, fulfilling pipeline capacity, and environmental benefits.

Second, FERC’s finding that the public benefits from the AFP outweighed the environmental and social harms was not arbitrary and capricious. It is well-settled that FERC’s broad discretionary authority will not be overturned unless FERC’s action lacks a rational basis. In accordance with its Certificate Policy Statement, FERC sufficiently assessed the AFPS’ adverse impacts and took steps to ensure those adverse impacts were addressed and minimized. In accordance with the National Environmental Policy Act, FERC gave adequate consideration to the Misty Mountain Tops alternative. After discussing that alternative in reasonable detail, and the significant additional costs and environmental harm that would result, FERC decided against that

alternative. Instead, FERC issued its Order to TGP with conditions including addressing and minimizing direct, adverse impacts.

Third, routing the AFP over HOME's property did not post as a violation of RFRA because HOME failed to establish a substantial burden. The phrase "substantial burden" is a term of art that is narrowly defined. A substantial burden occurs only where individuals are forced to 1, choose between following the tenants of their religion or receiving governmental benefits, or 2. coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. HOME was not denied a public benefit. HOME was also not threatened with civil or criminal sanctions. Therefore, no substantial burden has occurred. Rather, HOME's complaints are more aptly described as harm to its members' subjective spiritual fulfillment, which do not constitute as a substantial burden.

Fourth, the GHG Conditions are not a major question beyond the scope of agency authority. The major questions doctrine is used to invalidate sweeping agency actions, yet FERC's GHG Conditions are narrowly tailored to emissions produced during the construction process permitted by the section 7 certificate. For decades, FERC has considered environmental harm when evaluating a certificate application and, more recently, has set emissions ceilings for construction and operation of natural gas facilities. Considered against this background, the GHG Conditions are supported by FERC's historical practices. A major question must concern a matter of political and economic significance. Whether FERC should restrict emissions from natural gas pipeline construction is not politically significant; it is not the subject of earnest and profound debate in the United States and any consideration of the topic fostered little congressional attention. TGP has failed to plead with specificity the estimated costs of compliance with the GHG Conditions, which precludes the court from considering whether they are economically significant under 15 U.S.C. §

717r. Beyond the pleading error, the total project cost is an order of magnitude smaller than agency actions found economically significant by the Supreme Court.

Finally, FERC's decision not to impose conditions requiring upstream and downstream emissions mitigation from pipeline construction was supported by its expertise and within its discretion. FERC is drafting, but has not completed, comprehensive guidance on upstream and downstream emissions mitigation. Prior to issuing that guidance, FERC hesitates to impose conditions on the TGP Project to avoid inconsistently regulating certificated projects. Additionally, FERC lacks jurisdiction to require downstream and upstream emissions mitigation from natural gas bound for international markets. The natural gas destined for domestic use will be rerouted from existing pipelines, restricting the likelihood of a foreseeable increase in downstream and upstream emissions and obviating the need for mitigation conditions. Unlike the construction impacts that are a direct result of the AFP, potential greenhouse gas impacts are indirect, unknown, and unfeasible to quantify.

STANDARD OF REVIEW

FERC orders are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. *City of Oberlin v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019). A reviewing court must uphold FERC's action if it "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) (cleaned up). A court may set aside an agency action as arbitrary and capricious where the agency

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation . . . counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

The court may not “substitute [its] judgment” for FERC’s or consider whether FERC’s decision “is the best one possible or . . . better than the alternatives.” *Elec. Power Supply Ass’n*, 577 U.S. at 292.

Any factual findings made by FERC are conclusive if supported by substantial evidence. 15 U.S.C. § 717r(b). This standard requires the administrative record to be supported by sufficient evidence that “a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). Where FERC’s decision is supported by “more than a scintilla . . . [but] less than a preponderance of the evidence” the substantial evidence standard is satisfied. *See B&J Oil & Gas v. FERC*, 353 F.3d 71, 77 (D.C. Cir. 2004).

Challenges under the National Environmental Policy Act (“NEPA”) are reviewed under the arbitrary and capricious standard. *Twp. of Bordentown v. FERC*, 903 F.3d 234, 248 (3d Cir. 2018). A reviewing court is not to “substitute its judgment for . . . the agency” or consider whether FERC made the best decision; NEPA only obligates FERC to make an informed decision. *Id.* FERC satisfies its NEPA obligations if it takes a “‘hard look’ at the environmental consequences” of its action. *Id.*

ARGUMENT

I. FERC’S FINDING OF PUBLIC CONVENIENCE AND NECESSITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Natural Gas Act (“NGA”) was passed in 1938 for the purpose of regulating “the transportation of natural gas and the sale thereof in interstate and foreign commerce.” *See* 15 U.S.C. § 717(a). Under the NGA, before undertaking “the construction or extension of any facilit[y],” companies to submit a Certificate of Public Convenience and Necessity (“CPCN”) application to the Federal Energy and Regulatory Commission (“FERC” or “the Commission”).

See 15 U.S.C. § 717f(c)(1)(A). Once FERC issues a CPCN, the company-applicant is then authorized, pursuant to the NGA, to acquire property necessary to construct the certificated facilities by exercising eminent domain. See *City of Oberlin v. FERC*, 39 F.4th 719, 722 (D.C. Cir. 2022) (citing *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 110 (D.C. Cir. 2018)).

To determine whether a CPCN should be issued, FERC goes through a three-step process. See *Certificate of New Interstate Natural Gas Pipeline Facilities* (“Certificate Policy Statement”), 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000). Here, the issue lies in the third step, which asks whether the pipeline “is or will be required by the present or future public convenience and necessity.” See 15 U.S.C. § 717f(e); see also Record at 7. The public convenience and necessity inquiry is a flexible one, wherein FERC “consider[s] a wide variety of evidence to determine the public benefits of the projects.” See *City of Oberlin*, 39 F.4th at 730.

HOME launches numerous claims in an attempt to thwart the American Freedom Pipeline (“AFP”). HOME’s first claim is that “the Commission failed to provide substantial evidence for its conclusion under section 7(e) of the NGA that the proposed projects are required by public convenience and necessity” because the company-applicant, Transnational Gas Pipelines, LLC, (“TGP”), “failed to demonstrate the need for the projects given the fact that approximately 90% of the LNG [liquid natural gas] carried by the AFP will be . . . for export by International [Oil & Gas Corporation].” See Record at 8. However, FERC reasonably considered International Oil & Gas Corporation’s (“International”) precedent agreement and other domestic benefits in deciding that public convenience and necessity exists and therefore issuing the CPCN Order.

A. FERC Reasonably Considered International's Precedent Agreement in Its Public Convenience and Necessity Analysis.

HOME seeks to unnecessarily and unreasonably restrain the public convenience and necessity analysis to exclude export-driven precedent agreements because they do not satisfy domestic public necessity. Such restraint runs contrary to FERC's mandate that the inquiry be flexible in nature and the whole-text canon of statutory interpretation. As mentioned previously, "the Commission performs a flexible balancing process during which it weighs the factors presented in a particular application" when answering the public convenience and necessity inquiry. *See Certificate of New Interstate Nat. Gas Pipeline Facilities* ("Certificate Policy Statement"), 88 FERC ¶ 61,227, ¶ 61,743 (Sept. 15, 1999). In fact, this test is so flexible that "the Commission will consider *all* relevant factors reflecting on the need for the project." *Id.* at ¶ 61,747 (emphasis added). Moreover, FERC has confirmed that "precedent agreements always will be important evidence of demand for a project" and therefore, a relevant factor. *Id.* at ¶ 61,748.

Here, FERC determined that the AFP indisputably serves domestic public interests. *See* Record at 9. In its determination, FERC looked at two binding precedent agreements between TGP and International and New Union Gas and Energy Services Company ("NUG"). *See id.* FERC's Order is particularly persuasive, seeing as FERC is in the best position to determine whether certain considerations serve the public interest or need. *See Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 111 (D.C. Cir. 2014) (finding that FERC has "broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines") (internal citations omitted); *see also Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961) (finding a "forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency").

In fact, in relying on FERC's expert knowledge, other appellate courts have supported FERC's orders in similar situations. Specifically, the *City of Oberlin* Court found that "[a] common method for applicants to demonstrate a public benefit is by showing demand for the project with precedent agreements" when considering two export-based precedent agreements to Canada. *See City of Oberlin*, 39 F.4th at 722. There, the Court reasoned that "[n]othing in Section 7 of the Natural Gas Act prohibits considering export precedent agreements in the public convenience and necessity analysis." *Id.* (internal citations omitted).

Considering export-based precedent agreements as evidence of public convenience and necessity logically coalesces with the other sections of the NGA as required by the whole-text canon. "The whole-text canon refers to the principle that a judicial interpreter should consider the entire text, in view of its structure and of the physical and logical relation of its many parts, when interpreting any particular part of the text." *See Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1192 (11th Cir. 2019). As mentioned previously, the purpose of the NGA is to regulate "the transportation of natural gas and the sale thereof in interstate and *foreign* commerce." *See* 15 U.S.C. § 717(a) (emphasis added). Congress drafting the Act to expressly include foreign commerce highlights the fact that the Act is international in nature, and that export-based precedent agreements ought to be included in the public convenience and necessity analysis.

Other sections of the NGA cement the logic of such conclusion, particularly section 3. *See* 15 U.S.C. § 717b. Section 3 grants FERC the power to regulate natural gas export and import facilities. *See City of Oberlin*, 39 F.4th at 723. Section 3(a) mandates that FERC authorizes export facilities unless the proposed facility meets the narrow exception that it "will not be consistent with the public interest." *See* 15 U.S.C. § 717b. Additionally, where exports are to "a nation with which there is in effect a free trade agreement," exports "shall be deemed to be consistent with the public

interest." *See id.* Given that FERC "has long regarded Section 3's 'public interest' standard and Section 7's 'public convenience and necessity' standard as substantially equivalent," FERC is hard-pressed to see how export-driven precedent agreements should not be considered as even a single factor in the flexible analysis when determining whether a pipeline serves public convenience or necessity. *See Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1065 (D.C. Cir. 1974).

B. The Other Benefits FERC Considered Reasonably Constitute Substantial Evidence of Public Convenience and Necessity.

Even without considering International's precedent agreement, substantial evidence still indicates that a project need exists. Currently, "[liquified natural gas] demands in regions east of Old Union have been steadily declining due to a population shift, efficiency improvements, and increasing electrification of heating in those states." *See* Record at 6. The AFP would divert some of the excess natural gas from regions east of Old Union and funnel it westward into New Union, where demand is greater. Aside from "providing natural gas service to areas currently without access to natural gas within New Union," TGP identified five other domestic benefits. *Id.* at 8. In sum, as TGP contended in its application and found by FERC, the AFP's benefits include:

(1) delivering up to 500,000 Dth per day of natural gas to the interconnection with the NUG terminal and the NorthWay pipeline; (2) providing natural gas service to areas currently without access to natural gas within New Union; (3) expanding access to sources of natural gas supply in the United States; (4) optimizing the existing system for the benefit of both current and new customers by creating a more competitive market; (5) fulfilling capacity in the undersubscribed NorthWay Pipeline; and (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels.

Id. FERC's consideration of any one of those benefits, let alone six benefits, is sufficient for this Court to conclude that FERC relied on more than a scintilla of evidence when issuing the CPCN.

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

Under the NGA, FERC has broad discretion in reviewing natural gas pipeline applications. *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (“[A]s an expert agency, the Commission is vested with wide discretion to balance competing equities against the backdrop of the public interest, and the exercise of that discretion will not be overturned unless the Commission’s action lacks a rational basis.”). As mentioned previously, FERC’s review of natural gas pipeline applications is guided by its 1999 Certificate Policy Statement. *Certificate 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). Under the Certificate Policy Statement,

the Commission balances the adverse effects with the public benefits of the [AFP], as measured by an ‘economic test.’ Adverse effects may include increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners’ property. Public benefits may include ‘meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clear air objectives.

Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1309 (D.C. Cir. 2015) (citations omitted). Under the National Environmental Policy Act (“NEPA”), in reviewing natural gas pipeline applications, FERC must also conduct an environmental review of the proposed project and give adequate consideration to alternatives. 42 U.S.C. § 4332.

[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (citation omitted).

A. FERC Reasonably Balanced the AFP's Benefits Against Its Adverse Impacts in Accordance with Its Certificate Policy Statement.

The Twelfth Circuit should affirm FERC's Order granting a CPCN to TGP for construction of the AFP, which includes certain conditions on the approval, because FERC reasonably balanced the AFP's benefits against its adverse impacts in accordance with its Policy Statement. FERC's order must include "sufficient discussion of the relevant issues and opposing viewpoints." *Nevada v. Dep't of Energy*, 457 F.3d 67, 93 (D.C. Cir. 2006) (quoting *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988)). As discussed previously, FERC sufficiently assessed the AFP's benefits. Here, FERC also sufficiently assessed the AFP's route and the impacts of that route on HOME property and the environment. Record at 10. FERC acknowledged that the AFP route requires the removal of approximately 2,200 trees and other forms of vegetation from HOME property. *Id.* Due to safety concerns, the trees cannot be replaced with new trees along the AFP route; however, FERC ensured that this adverse environmental impact was adequately addressed. FERC addressed this adverse environmental impact by including GHG Conditions in its Order granting a CPCN to TGP. One of the GHG Conditions requires that an equal number of trees be planted in other locations. *Id.*

Additionally, FERC determined that TGP has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities. *Id.* FERC acknowledged that TGP has not signed an easement agreement with all landowners along the AFP route; however, TGP "has agreed to bury the AFP through the entirety of its passage through the HOME property and has agreed to expedite construction 'to the extent feasible' across HOME property to minimize disruption." *Id.* FERC concluded that TGP's efforts were significant because of TGP's ongoing efforts to negotiate mutually acceptable easement agreements and TGP's aim to complete the construction over HOME property within a four-month period. *Id.* FERC's inclusion of the GHG Condition to plant

an equal number of new trees in other locations, coupled with TGP's steps to minimize adverse impacts on landowners and surrounding communities, demonstrates a sufficient discussion of the relevant issues and opposing viewpoints. Thus, FERC adequately balanced the AFP's benefits against its adverse impacts in accordance with its Certificate Policy Statement.

B. FERC Gave the Misty Top Mountains Alternative Adequate Consideration.

As previously stated, FERC reasonably balanced the AFP's benefits against its adverse impacts in accordance with its Certificate Policy Statement. The Twelfth Circuit should also affirm FERC's Order because FERC gave the Misty Top Mountains alternative adequate consideration. FERC is only required to identify a proposed project's reasonable alternatives and "look hard at the environmental effects of [its] decisions." *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 374 (D.C. Cir. 1999) (quoting *Citizens Against Burlington, Inc. v. Busey IV*, 938 F.2d 190, 194 (D.C. Cir. 1991)). "NEPA's 'hard look' doctrine is designed 'to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious.'" *Minisink Residents for Env't Pres. & Safety*, 762 F.3d at 111 (quoting *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004)). In its environmental review, FERC must follow a "rule of reason." *Citizens Against Burlington, Inc.*, 938 F.2d at 195. "[T]his rule of reason governs 'both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.'" *Id.* (emphasis in original) (citations omitted). Reviewing courts "uphold [an agency's] discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail." *Id.* at 196.

Here, FERC discussed the Misty Top Mountains alternative in reasonable detail. In its AFP application, TGP included an estimate for an alternate route that would avoid HOME property and instead pass through the Misty Top Mountains. Record at 11, Exhibit A, "Alternate Route." HOME

does not dispute that the alternate route would require an additional \$51 million in construction costs. *Id.* at 11. In its Order, FERC also noted that the “alternate route would necessarily cause more objective environmental harm by traveling an additional three miles and running through more environmentally sensitive ecosystems in the mountains.” *Id.* Moreover, HOME does not dispute the environmental harm that would result from this alternate route.

FERC followed a rule of reason in deciding against the Misty Top Mountains alternative. Given the significant additional costs and environmental harm that would result from the alternate route, the extent to which FERC was required to discuss the Misty Top Mountains alternative was limited. Thus, FERC gave the Misty Top Mountains alternative adequate consideration. For the foregoing reasons, FERC’s finding that the benefits from the AFP outweighed the environmental and social harms was not arbitrary and capricious.

III. ROUTING THE AFP OVER HOME’S PROPERTY DOES NOT POSE A VIOLATION OF RFRA BECAUSE HOME HAS FAILED TO ESTABLISH A SUBSTANTIAL BURDEN.

In 1993, Congress passed the Religious Freedom Restoration Act (“RFRA”), which protects citizens against government actions that “substantially burden a person’s exercise of religion.” 42 U.S.C. § 2000bb-1(a). To have a viable claim under RFRA,

a plaintiff must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements. First, the activities the plaintiff claims are burdened by the government action must be an exercise of religion. Second, the government action must substantially burden the plaintiff’s exercise of religion.

See Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069 (9th Cir. 2008) (citing 42 U.S.C. § 2000bb-1(a)) (internal citations omitted). Neither party disputes that HOME has adequately described an exercise of religion. *See* Record at 11–12. Therefore, the only remaining question is whether the exercise of eminent domain, along with the CPCN conditions, substantially burdened HOME’s freedom to exercise religion. *See id.* at 12.

The term substantial burden is one of art. *See, e.g., Navajo Nation*, 535 F.3d at 1069 n.11.

A substantial burden only exists where individuals are either

[(1)] forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert v. Verner*, 374 U.S. 398 (1963)) or [(2)] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions ([*Wisconsin v. Yoder*], 406 U.S. 205 (1972)). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA

See id. (citing *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 708 (1981)); *see also Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020); *see also Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214 (9th Cir. 2008). HOME has not supplied evidence that it was denied a public benefit or threatened with criminal sanctions; therefore, HOME cannot establish a substantial burden to its religion for a RFRA violation.

A. HOME Was Not Forced to Choose Between Following the Tenants of Its Religion or Receiving Governmental Benefits.

Public benefits include government provided benefits and services such as unemployment, school vouchers and tuition assistance, and Medicaid or Medicare. *See id.*; *see also Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022); *see also Child.'s Healthcare Is a Legal Duty, Inc. v. De Parle*, 212 F.3d 1084, 1094 (8th Cir. 2000). In 1963, the Supreme Court held in *Sherbert v. Verner* that “[t]he liberties of religion and expression may be infringed by the denial of or placing of conditions upon a [government-provided] benefit or privilege.” *See Sherbert*, 374 U.S. at 404.

In *Sherbert*, the plaintiff was denied governmental unemployment benefits due to the fact that most employers refused to hire her because she could not work any Saturday due to her religious beliefs. *See id.* at 400–01. Ultimately, the Court held that a claimant’s religious liberties are unduly restricted where she is forced “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.” *See id.* at 404.

HOME's situation is inapposite to *Sherbert's*. Here, HOME has not been forced into the choice of forgoing one's religious beliefs to receive a governmental benefit. Rather, HOME is asking the federal government to give the religious entity special treatment and prejudice the AFP by requesting a re-route of the AFP to cover more land, causing more environmental harm, and adding an additional \$51 million in construction costs to the AFP. Doing so would run contrary to the substantial burden standard, RFRA, and HOME's own religious beliefs of preserving nature.

B. HOME Was Not Coerced to Act Contrary to Its Religious Beliefs by the Threat of Civil or Criminal Sanctions.

The final nail in the coffin for HOME is that it has not pointed to any threat, real or perceived, indicating that civil or criminal sanctions would be used against HOME. In *Yoder*, the Supreme Court held a Wisconsin law unduly burdened the Plaintiff's freedom of expression where the Plaintiffs were "charged, tried, and convicted of violating the compulsory-attendance law ... and . . . fined the sum of \$ 5 each." *See Yoder*, 406 U.S. at 208. As such, this case is more in line with the slight inconveniences referenced in *Navajo Nation* than the civil or criminal sanctions referenced in *Yoder*.

In *Navajo Nation*, a native tribe requested the Ninth Circuit "to prohibit the federal government from allowing the use of artificial snow for skiing on a portion of a public mountain sacred in their religion." *See Navajo Nation*, 535 F.3d at 1062. The tribe claimed that "the use of such snow on a sacred mountain desecrates the entire mountain, deprecates their religious ceremonies, and injures their religious sensibilities." *See id.* at 1063. Ultimately, the *Navajo Nation* Court concluded that the artificial snow did not constitute a substantial burden to the tribe seeing as no "religious ceremonies that would be physically affected by the use of such artificial snow . . . no places of worship made inaccessible, or liturgy modified. The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural

purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use.” *See id.* The court reasoned “government action that diminishes subjective spiritual fulfillment does not ‘substantially burden’ religion.” *See id.* at 1070 n.12.

HOME has only pointed to diminished subjective spiritual fulfillment and has not met the standard of financial, physical, civil, or criminal restraints from its practice. HOME has repeatedly conceded the fact that it would still be able, physically, to complete the Solstice Sojourn with the conditions of the CPCN. *See* Record at 12. HOME can complete the Solstice Sojourn physically because FERC’s Order includes conditions to respect HOME’s religious beliefs. *See id.* at 10, 12. Specifically, FERC required TGP to expedite construction to under four months so as not to interfere with HOME’s semi-annual ritual migration from one end of the property to another. *See id.* at 10. Additionally, FERC required TGP to bury the AFP under the entirety of its passage through HOME property, including the two intersections of the path with the Solstice Sojourn. *See id.* at 12.

Moreover, HOME’s assertion that installing a pipeline requires HOME to support the production, transportation, and burning of fossil fuels will lead to extrapolation beyond repair. If such were true, any imported shirt and shoe that governmental officers wear may very well compel them to support child labor. The government’s hands would be tied in every decision it makes; seeing as every governmental action could be construed to be the government as compelling someone to support something. The *Navajo Nation* Court foresaw this very predicament, explaining “respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another. No matter how much the people might wish the government to conform its conduct to their religious preferences, act in ways that do not offend the people's religious sensibilities, and take no action that decreases the spiritual

fulfillment, no government—let alone a government that presides over a nation with as many religions as the United States of America—could function were it required to do so.” *See Navajo Nation*, 535 F.3d at 1064.

IV. THE CONDITIONS REQUIRING MITIGATION OF GREENHOUSE GASES DURING PIPELINE CONSTRUCTION ARE NOT A MAJOR QUESTION.

FERC has historically received deference on its public convenience and necessity determinations for natural gas pipeline construction and operation because of its expertise. *Okla. Nat. Gas Co. v. Fed. Power Comm’n*, 257 F.2d 634, 639 (D.C. Cir. 1958). For decades, courts have permitted FERC to consider air pollution that may result from its approval of certificates of public convenience and necessity. *Transcon. Gas Pipe Line Corp.*, 365 U.S. at 5–8. In the prior decade, FERC conditions to section 7 certificates mitigating greenhouse gas emissions were approved without consequence. *See, e.g.*, Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (limiting operation emissions). TGP alleges that the conditions FERC required to mitigate AFP’s construction emissions (the “GHG Conditions”) are a major question beyond the scope of its authority. Record at 16. The GHG Conditions share few traits with the handful of expansive regulatory programs vacated by the Supreme Court as major questions.

The major questions doctrine arises where an agency claims an “[e]xtraordinary grant of regulatory authority.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). There must be a “reason to hesitate before concluding that Congress” intended to grant an agency authority to act based on the “history and breadth” and “economic and political significance” of the asserted authority. *Id.* at 2608. Once it is determined that the agency is regulating on a “major question,” then the agency must identify the “clear congressional authorization” for its claimed power. *Id.* at 2609. The GHG

Conditions are an unremarkable exercise of agency authority pursuant to a clear congressional delegation in a technical field, not a major question.

A. The Greenhouse Gas Conditions Imposed on AFP Construction Lack the Breadth to Constitute a Major Question and Are Historically Consistent with FERC’s Practices of Environmental Impact Mitigation.

1. The greenhouse gas conditions are not broad enough to be a major question.

The major questions doctrine is used to invalidate sweeping regulatory efforts by agencies, and the GHG Conditions are too narrow to qualify as a major question. Regulatory efforts are major questions because of their “sheer scope” and breadth of effect. *See, e.g., Ala. Assn. of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (vacating nationwide eviction moratorium during COVID-19 pandemic); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014) (rejecting EPA’s claim of regulatory authority over air pollution from millions of small sources); *Nat. Fed’n of Indep. Bus. V. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam) (vacating rule requiring “84 million Americans . . . either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense”). Unlike the agency actions affecting millions of people across the United States that were major questions, FERC required mitigation of greenhouse gas emissions only during the construction phase of one natural gas pipeline. Record at 14. Beyond their time and scope limitations, the GHG Conditions were not draconian mitigation measures; TGP was required to reduce greenhouse gas emissions by just over 15%. *See id.* at 15. Absent were mitigation conditions affecting upstream or downstream emissions. *Id.* The conditions lack the critical breadth trait that makes an agency action a major question.

The individualized procedure FERC used to mitigate emissions is dissimilar to the agency actions vacated on major questions grounds. Generally applicable rules are targets of major questions review when their applicability exceeds the limits of the agency’s statutory authority.

See, e.g., FDA. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131–32, 159–61 (2000) (invalidating FDA’s rulemaking to broadly regulate tobacco products); *West Virginia*, 142 S. Ct. at 2600–04 (vacating Clean Power Plan, which would have affected “all covered sources” across the United States). Conditions that require greenhouse gas mitigation are imposed during construction of LNG pipelines where the facts of a particular project warrant mitigation. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). The conditions are limited to the environmental impacts of construction, which fit squarely within FERC’s regulatory purview under the NGA. *Myersville Citizens for a Rural Cmty., Inc.*, 783 F.3d at 1307. The close connection to agency expertise in pipeline construction and narrow tailoring of conditions to the NGA both weigh against finding a major question. *See West Virginia*, 142 S. Ct. at 2609 (considering agency expertise as a factor against finding a major question); *Brown & Williamson*, 529 U.S. at 138–39 (finding tailoring of agency action to structure of the statute relevant).

TGP claims project sponsors will no longer view mitigation as optional because FERC has imposed GHG Conditions in four of the past five section 7 CPCN orders, which increases delay and application costs for developers. Record at 16. The one project approved without a mitigation condition demonstrates that it is not required in every instance. *See also, e.g., N. Nat. Gas Co.*, 175 FERC ¶ 61,238 (2021) (approving pipeline without mitigation). TGP’s concern is of no consequence because application costs are already being incurred—roughly eighty-four percent of pipeline environmental assessments and environmental impact statements between 2014 and 2018 quantified their direct emissions. Romany M. Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 N.Y.U. ENV’T L.J. 179, 211, 213 (2020).

2. *FERC's history of environmental mitigation under section 7 certificates justifies the GHG conditions.*

FERC's mitigation of environmental harm emanating from pipeline construction is supported by decades of agency practice. Considered against that historical practice, the GHG Conditions are not a major question. When evaluating a section 7 pipeline certificate, FERC 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). Air pollution effects of pipeline construction are among those factors. *See Transcon. Gas Pipeline Corp.*, 365 U.S. at 5–8 (finding air pollution consideration relevant but outweighed by other factors). FERC's power under section 7 is not limitless, the agency may only impose conditions pursuant to the goals of the NGA. *See NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669–70 n.6 (1976). However, considering the environmental impacts of constructing natural gas infrastructure is a permissible basis for FERC regulations. *See id.*; *see also S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1098–99 (9th Cir. 2010) (approving FERC condition restricting use of low quality gas to mitigate downstream emissions).

The GHG Conditions are supported by the historical understanding of FERC's authority under the NGA. The Conditions align with statutory environmental protection goals because they reduce emissions during pipeline construction authorized by the NGA, which have been approved in recent section 7 certificates. *See, e.g.*, Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (capping construction emissions). The GHG Conditions are consistent with FERC's historical practice, which weighs against considering the agency action a major question.

B. The Greenhouse Gas Conditions Imposed on AFP’s Construction Are Neither Politically nor Economically Significant Enough to Be a Major Question.

1. Restricting emissions from pipeline construction is not politically significant.

FERC’s GHG Conditions lack the political significance to constitute a major question. An issue of political significance is a matter “of earnest and profound debate across the country.” *West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring); *see, e.g., Nat. Fed’n of Indep. Bus.*, 142 S. Ct. at 664–65 (vaccine mandates); *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006) (physician-assisted suicide). Contemporaneous debates in state legislatures may be evidence of earnest and profound debate. A topic may be politically significant if Congress has “considered and rejected” it. *West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring); *see, e.g., Brown & Williamson*, 529 U.S. at 144 (failed congressional attempts to authorize FDA regulation of tobacco).

The GHG Conditions implicate neither metric for political significance. The scope of relevant evidence is narrowed by the preemptive force of the NGA. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988) (noting the NGA’s field preemption of interstate natural gas transportation). The only relevant political debates are Congressional. Unlike the six pieces of legislation passed and several more bills considered by Congress on FDA tobacco regulation in *Brown & Williamson*, 529 U.S. at 143–56, congressional action requiring FERC to consider greenhouse gas emissions during the CPCN process is nearly absent. Two bills were introduced by the same House member, H.R. 3241, 115th Cong. (2017); H.R. 4657, 116th Cong. (2019), and both failed to attract a single cosponsor and died in committee. This is weak evidence of an “earnest and profound debate” on the topic or something Congress truly *considered* and rejected.

Climate change and fossil fuel use are both certainly subjects of earnest and profound debate in the United States. Whether greenhouse gas emissions released during the construction of a natural gas pipeline ought to be considered as one factor among a multitude of others during

FERC’s evaluation of a certificate of public convenience and necessity application does not capture the same significance. The GHG Conditions are not a major question.

2. TGP has not sufficiently plead that the conditions are economically significant.

The GHG Conditions are not matters of economic significance, and TGP has failed to plead that the Conditions impose significant economic hardship. The standard for what constitutes economic significance is high. A four-hundred percent increase in the number of sources requiring permits with an added 147 billion dollars in permit costs met that threshold. *Util. Air Regul. Grp.*, 573 U.S. at 321–22. TGP estimates the entire AFP project at 599 million dollars, Record at 5, yet they provide no estimate of the costs to comply with FERC’s GHG Conditions. Even if TGP met the pleading standard, the total project cost is an order of magnitude smaller than comparative agency regulations that were found to be economically significant.

This court lacks the jurisdiction to find the GHG Conditions are economically significant since TGP did not sufficiently plead this issue on rehearing. The NGA is clear: “No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.” 15 U.S.C. § 717r(b). It is a “jurisdictional prerequisite[] to judicial review,” *Sierra Club v. FERC*, 827 F.3d 36, 50 (D.C. Cir. 2016) (internal quotations omitted), and “petitioners must raise each argument with specificity; objections may not be preserved either indirectly or implicitly.” *Food & Water Watch v. FERC*, 28 F.4th 277, 287 (D.C. Cir. 2022) (citations omitted). There is good reason for this requirement—appellate courts are “not well equipped to make factual determinations.” *NO Gas Pipeline v. FERC*, 756 F.3d 764, 769 (D.C. Cir. 2014). Because TGP did not demonstrate the Conditions are economically significant, this court cannot find that the Conditions are a major question.

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

As noted previously, FERC has broad discretion in reviewing natural gas pipeline applications. NEPA requires that FERC give potential impacts from a major federal action a “hard look.” *Minisink Residents for Env’t Pres. & Safety*, 762 F.3d at 111. The ultimate determination whether to take mitigation measures, however, is within FERC’s broad discretionary authority. On February 18, 2022, FERC entered an Interim GHG Policy Statement to “explain how the Commission will assess the impacts of natural gas infrastructure projects on climate change” *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (Feb. 18, 2022). One month later, FERC issued an order and stated that it would begin working on the *draft* Interim GHG Policy Statement. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (Mar. 24, 2022). In its Order, FERC noted the following: “The Commission will not apply the Draft GHG Policy Statement to pending applications or applications filed before the Commission issues any final guidance in these dockets.” *Id.* FERC has not yet issued any final guidance.

A. Downstream and Upstream Emissions Mitigation Conditions for AFP Are Improper Because Its Domestic Emissions Are Not Reasonably Foreseeable.

The level of unique downstream and upstream greenhouse gas emissions from the construction of the AFP is uncertain, so FERC’s decision to grant the section 7 certificate without a mitigation condition was appropriate. “Reasonably foreseeable” downstream and upstream greenhouse gas emissions caused by a pipeline project may be mitigated by FERC if it has the legal authority to impose mitigation measures. *See Sierra Club*, 867 F.3d at 1374. FERC’s authority to mitigate greenhouse gas emissions requires two components: “legally relevant caus[ation]” and reasonable foreseeability. *See id.* at 1372–74 (discussing FERC’s obligations

regarding greenhouse gas emissions and stating that "in some cases quantification may not be feasible").

Downstream and upstream greenhouse gas emissions from AFP are not reasonably foreseeable because the TGP project does not contemplate additional production from the Hayes Fracking Field. AFP's precedent agreements are entirely satisfied by rerouting natural gas from the Southway Pipeline that was produced at the Hayes Fracking Field, which means downstream and upstream greenhouse gas emissions are not unique to AFP's construction. As a result, FERC properly approved AFP's section 7 certificate without greenhouse gas emissions mitigation conditions. The AFP's greenhouse gas emissions are not reasonably foreseeable, which demands that the emissions are "sufficiently likely to occur [such] that a person of ordinary prudence would take [them] into account in reaching a decision." *Sierra Club*, 867 F.3d at 1372 (citation omitted).

Reviewing whether greenhouse gas emissions from a pipeline project are significant under NEPA must "be [decided] on a case-by-case basis because every one of these projects is different." *See Birkhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019). Natural gas production is at full capacity at Hayes Fracking Field, and the AFP will reroute approximately 35% of that production from regions east of Old Union to New Union. Record at 6. Unlike the 72,400 dekatherm per day capacity increase in *Food & Water Watch*, 28 F.4th at 282, or the 200,000 dekatherm per day capacity increase in *Birkhead*, 925 F.3d at 517, TGP's "precedent agreements do not contemplate additional production at Hayes." Record at 6. FERC has a more compelling argument for rejecting greenhouse gas emissions mitigation here than in *Food & Watch Watch* or *Birkhead* because the full capacity of gas delivered to New Union would have been delivered to regions east of Old Union but for construction of the AFP. Unlike the construction impacts that are direct result of the AFP, potential greenhouse gas impacts are unknown and unfeasible to quantify. The record does

not contain any evidence that the end uses in New Union will produce more emissions than presently existing end uses east of Old Union. Therefore, downstream and upstream emissions are not reasonably foreseeable because there may not be a net increase in emissions from the AFP.

B. The Majority of AFP's Potential Downstream Emissions Will Occur Internationally, so FERC Cannot Require Mitigation Because It Does Not Approve LNG Exports.

Additionally, FERC is not a legally relevant cause for most of AFP's downstream emissions. The causation element is akin to proximate causation in tort law, where "courts must look to the underlying policies or legislative intent" to determine whether an actor is responsible for an effect. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 742, 767 (2004). FERC is not a legally relevant cause of the greenhouse gas emissions resulting from "the anticipated *export* of natural gas" because the Department of Energy has the *sole* authority to license the export of natural gas to non-free trade agreement countries. *Sierra Club*, 827 F.3d at 41, 46–47. "[A]pproximately 90% of the LNG carried by the AFP" will be exported to Brazil, Record at 8, and the United States does not have a free trade agreement with Brazil. *Free Trade Agreements*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://www.ustr.gov/trade-agreements/free-trade-agreements> [<https://perma.cc/R3YD-MJCW>]. Thus, FERC cannot be considered a legally relevant cause of the AFP's downstream emissions because the Department of Energy is solely responsible for licensing exports to Brazil.

C. Absent Clear Guidance, the Commission Reasonably Declined to Include Downstream and Upstream Mitigation Measures.

Finally, as the Commission noted in its Order, "NEPA does not mandate any specific outcome or mitigation measures." *Id.* at 19. NEPA requires reasonable forecasting but does not require that agencies engage in speculative analysis nor "do the impractical, if not enough information is available to permit meaningful consideration." *N. Plains Res. Council, Inc. v.*

Surface Transp. Bd., 668 F.3d 1067, 1078–79 (9th Cir. 2011) (citing *Env’t Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006); *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003)). Given that the Commission is in the process of developing guidance for addressing greenhouse gas upstream and downstream impacts, it was reasonable for the Commission to decline to include downstream and upstream mitigation measures. To find otherwise would interfere with the Commission’s broad discretionary authority and would be impractical because it would create the potential for inconsistent policy.

CONCLUSION

For the foregoing reasons, this Court should affirm the Commission’s Order Denying Rehearing.