Team 21

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

FEDERAL ENERGY REGULATORY COMMISSION
Respondent
v.

THE HOLY ORDER OF MOTHER EARTH
Petitioner

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Intervenor-Respondent-Petitioner

Petition for Review of the CPCN Order and Rehearing Order in consolidated case no. 23-01109, Chief Judge Delilah Dolman

Brief of Intervenor-Respondent-Petitioner, TRANSNATIONAL GAS PIPELINES, LLC

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 15 U.S.C. § 717r(b) (2023) which provides courts of appeals jurisdiction to review the issuance of an order from the Federal Energy Regulatory Commission ("FERC"). FERC issued an Order granting a Certificate of Public Convenience and Necessity ("CPCN") to Transnational Gas Pipelines, LLC ("TGP") for construction of the American Freedom Pipeline ("AFP") on April 1, 2023. Holy Order of Mother Earth ("HOME") and TGP sought rehearing on the Order on April 20, 2023, and April 22, 2023, respectively. On June 1, 2023, FERC denied both petitions and affirmed the CPCN as issued. Both petitioners filed Petitions for Review of FERC's Order granting the CPCN and Rehearing Order with this court on June 1, 2023. The Petitions for Review were consolidated together under Docket 23-01109.

STATEMENT OF THE ISSUES PRESENTED

I. Was FERC's finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project needed where ninety percent of the gas transported by that pipeline was for export?

II. Was FERC's finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?

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

IV. Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA?

V. Was FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

I. TGP's Proposal of the AFP to Serve Domestic and International Needs

Access to natural gas, a reliable fuel for electric energy and heat, is severely lacking in many parts of New Union. R. 8, ¶ 27. However, existing pipelines are undersubscribed, and the Hayes Fracking Field ("HFF") is underproducing. *Id*. As the population shifts to New Union, demand for natural gas in Old Union has been steadily declining. R. 6, ¶ 13. The public, including in other countries, is better served by more competition in the energy industry. *Id*.

Considering this, TGP approached FERC with a proposal on June 13, 2022. R. 4–5, ¶¶ 1, 8. TGP proposed the construction of a ninety-nine-mile-long, thirty-inch diameter interstate pipeline (the AFP) and six related facilities that would together provide 500,000 dekatherms (Dth) per day of natural gas. R. 4, ¶ 1. Upon commencement of the AFP's construction, TGP will become a natural gas company under the NGA. R. 5, ¶ 8; 15 U.S.C. § 717a(6) (2023). In support of its application for a CPCN under the Natural Gas Act ("NGA"), TGP held an open season for

service on the AFP project from February 21 through March 12, 2020. R. 6, ¶ 11; 15 U.S.C. § 717f(c) (2023). Seeing the wide-ranging benefits of the AFP, two companies, International Oil & Gas Corporation ("International") and New Union Gas and Energy Services Company ("NUG") executed binding precedent agreements with TGP, together equaling the full design capacity of the AFP. R. 6, ¶ 11. 6, ¶ 14.

II. FERC's Approval of the Proposal

Given the precedent agreements and FERC's expertise on natural gas needs, the Commission authorized the AFP's construction and issued a CPCN in Docket No. TG21-616-000 on April 1, 2023. R. 4, ¶ 2. To evaluate the project, FERC relied on the Certificate Policy Statement. R. 7, ¶ 17; *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022) [hereinafter Order No. 178]. FERC found, as a threshold matter, that TGP can financially support the project without subsidization. R. 7, ¶ 19. Further, FERC found the market benefits of the AFP outweighed any adverse effects on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. R. 7, ¶ 20. Because TGP is making efforts to minimize or eliminate any adverse effects on these stakeholders, including changing over thirty percent of the pipeline's proposed route, FERC found the project's need certainly outweighed any unmitigable adverse effects. R. 10, ¶ 41.

A. HOME's Objections

HOME, a religious organization that owns 15,500 acres in Burden County, New Union, commented during the approval, objecting to the pipeline's construction as the proposed route would cross its land. R. 10, ¶ 44. During each solstice, HOME members make a ceremonial journey to the Misty Top Mountains and back (the "Solstice Sojourn"). R. 11, ¶ 48. The Sojourn path would intersect with the AFP's proposed route. *Id.* However, to mitigate the AFP's effect on

this practice and HOME's land, TGP plans to bury the pipeline and expedite construction between Soltices, ensuring the pipeline remains unseen and the Solstice Sojourn remains unaffected. R. 12, ¶ 56. TGP explored alternative routes in respect of HOME's objections, but it found the alternative route over the mountains would cost an extra fifty-one million dollars and cause greater environmental harm. R. 10, ¶ 44. FERC found that HOME's concerns, while valid, did not merit extra weight in the issuance of the CPCN and will be sufficiently mitigated such that they do not outweigh the public need. R. 11, ¶¶ 51–52.

B. GHG Conditions

In issuing the CPCN, the Commission attached Greenhouse Gas ("GHG") Conditions, requiring TGP to plant as many trees as it removes, use electric equipment and vehicles, purchase "green" steel pipeline segments, and purchase electricity from renewable sources. R. 13, ¶ 67. FERC declined to attach conditions related to upstream or downstream GHG impacts, finding it lacked clear guidance on such impacts. R. 13, 18, ¶¶ 64, 97.

III. Requests for Rehearing

Pursuant to 15 U.S.C. § 717r(a) (2023), both HOME and TGP timely applied to the Commission for rehearing of the CPCN Order on April 20, 2023, and April 22, 2023, respectively. R. 4, ¶ 4. HOME contended that FERC's finding of project need was unjustified and unsupported, the proposed route over HOME's property violated the Religious Freedom and Restoration Act ("RFRA"), and that FERC acted improperly in declining to attach conditions related to upstream and downstream GHG impacts. *Id.* TGP sought rehearing on the GHG Conditions attached to the CPCN. R. 5, ¶ 6. On June 1, 2023, FERC denied both requests for rehearing. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023). The same day, both HOME and TGP filed Petitions for Review of FERC's denial and the original CPCN Order in this court.

SUMMARY OF THE ARGUMENT

FERC supported its decision to issue a CPCN for the AFP with substantial evidence and did not act arbitrarily or capriciously. When reviewing factual findings that include a discretionary choice, courts only overturn agency decisions "in the rare instance when the standard appears to have been misapprehended or grossly misapplied." In determining project need, FERC adequately supported its finding with substantial evidence because 1) precedent agreements account for one hundred percent of the project's capacity and 2) the project provides multiple domestic benefits regardless of where the natural gas may ultimately be used.

FERC also properly weighed the domestic benefits of the project over any remaining adverse impacts. Because the balancing analysis includes a discretionary choice by the agency, the court reviews the decision under an arbitrary and capricious standard. In doing so, the court does not substitute its own judgement for the agency, but only decides whether the decision "is reasoned, principled, and based upon the record." Here, TGP limited the project's impacts on landowners and communities along the route so that only minimal impacts remain. FERC correctly weighed the numerous public benefits the entire country stands to gain from the project over one organization's minimal remaining issues. The Commission also properly weighed the interests in having the property minimally impact HOME's land rather than create far more environmental damage and costs by routing through the Mountain Range.

FERC's decision to route the AFP over HOME's property was also not contrary to law under RFRA. TGP does not contest that HOME's Solstice Sojourn is an exercise of religion. However, HOME's exercise of religion is certainly not substantially burdened by FERC's decision because it does not place substantial pressure on HOME to modify its behavior or violate its beliefs. Even if this court finds that HOME is substantially burdened, FERC has a compelling government interest in maintaining a coherent natural gas pipeline permitting system. FERC used the least

restrictive means of achieving this interest because the environmental and economic costs of rerouting the pipeline far exceed any subjective impact on HOME.

FERC did act improperly, however, when it attached the GHG Conditions to the CPCN. FERC decided to ignore the Supreme Court's analysis of the Major Questions Doctrine, especially as it relates to climate change, by seizing undelegated regulatory power. The Court does not provide an adjudicatory backdoor into regulation, and the effect would work a profound effect on the AFP and future pipeline constructions. Such effects were never considered in passing the Natural Gas Act and giving FERC regulatory authority.

Similarly, FERC was correct to limit its authority to not impose conditions related to upstream or downstream GHG impacts. While FERC claims this was in anticipation of internal guidance, such conditions would violate the MQD. Conditions related to upstream or downstream impacts would be improper to consider under NEPA, as FERC does not have the legal authority to prevent impacts not proximately caused by the issuance of a CPCN.

ARGUMENT

I. FERC's Issuance of a CPCN for the AFP Is Supported by Substantial Evidence, Not Arbitrary or Capricious, and In Accordance with RFRA

The NGA requires companies to apply for a Certificate of Public Convenience and Necessity ("CPCN") before building a new natural gas project. 15 U.S.C. § 717f(c)(1)(A) (2023). The NGA directs FERC to issue a CPCN if the proposed project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e) (2023). In reviewing applications, 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).

The Certificate Policy Statement ("CPS") guides FERC more specifically in determining whether projects meet the public convenience and necessity standard. Order No. 178 ¶ 61,197 (2022). The CPS lays out three "analytical steps" the Commission must take when reviewing a CPCN application. *Id.* As a threshold matter, FERC must first determine whether the company can finance the project without subsidization from existing customers. *Id.* Next, the Commission decides whether a project need exists, and then, lastly, it balances the adverse impacts of the project with the public benefits. *Id.*

The Administrative Procedure Act gives federal courts jurisdiction to review agency actions and set them aside for being "unsupported by substantial evidence" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E). For agency findings of fact, the court applies the substantial evidence test. *Universal Camera Corp v. NRLB*, 340 U.S. 474, 496–497 (1951). When agencies make factual findings that include some discretionary choices, like FERC's finding of project need, the substantial evidence and arbitrary and capricious standards overlap. *See* R. 7, ¶ 22 ("HOME contends that our finding of public convenience and necessity is arbitrary and capricious because

it is not supported by substantial evidence…"); *see also Myersville Citizens for Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). But "when the arbitrary or capricious standard is performing the function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test." *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683–84 (D.C. Cir. 1984). For catchall agency discretionary decisions, like issuing a CPCN after weighing the impacts and benefits, the court applies the arbitrary and capricious standard. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *City of Oberlin v. FERC*, 39 F.4th 719, 722–23 (D.C. Cir. 2022) (applying the arbitrary and capricious standard to FERC CPCN decisions). When reviewing whether the agency action may be contrary to law, courts must determine whether a plaintiff can establish a *prima facie* case under the applicable statute. *Autocam Corp. v. Sebelius*, 730 F.3d 618, 625 (6th Cir. 2013).

HOME does not challenge the threshold determination of TGP's ability to build the AFP without customer subsidization. R. 7, ¶ 21. Rather, A) it challenges FERC's project need finding and balancing of the interests as being arbitrary and capricious and contrary to law under RFRA. R. 7, ¶ 22. It attacks the project need finding because of TGP's export agreement with International. R. 8, ¶ 24. As for the balancing issue, HOME questions B) FERC's weighing of project's benefits over the residual adverse impacts. R. 9, ¶ 36. Finally, C) it argues that the agency decision violates RFRA because of their religious objections to having a natural gas pipeline run below their land. R. 12, ¶ 54. The following will address each issue in turn.

A. This Court Should Uphold FERC's Finding of Project Need Because of the Precedent Agreements and Multiple Domestic Benefits

Under the substantial evidence test, courts typically defer to the agency and only overturn the finding in the "rare instance when the standard appears to have been misapprehended or

grossly misapplied." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). If the agency explains its decision with "more than a mere scintilla of evidence" the reviewing court will uphold the finding. *Id.* The court gives broad deference to the agency's expertise, and therefore, the petitioner bears a heavy burden to show that the agency did not adequately support its finding. *Id.*

In evaluating project need, FERC must consider "*all relevant factors* reflecting on the need for the project," including but not limited to precedent agreements, demand projections, and potential cost saving to customers. *Env'l Def. Fund v. FERC*, 4 F.4th 953, 961 (D.C. Cir. 2021) (quoting *Certificate Policy Statement*, 88 FERC ¶ 61, 747–48 (Sept. 15, 1999) [hereinafter Order No. 88]). Of the relevant factors, FERC typically relies heavily on precedents agreements because they "always will be important evidence of demand for a project" since companies typically do not contract for projects their customers do not need. Order No. 178 ¶ 61,197.

HOME argues that FERC did not support its finding of project need with substantial evidence because ninety percent of the natural gas will be exported to Brazil. R. 8, ¶ 24. However, FERC sufficiently supported its decision with substantial evidence because it 1) based its decision on one hundred percent capacity precedent agreements and 2) showed multiple domestic benefits of the project despite where the natural gas may ultimately be used.

1. Two Precedent Agreements Account For One Hundred Percent of the AFP's Capacity

To begin, HOME wrongly construes the term "project need" to mean only a demand for natural gas *use* by consumers in the United States. R. 8, ¶ 28. They argue that FERC cannot support its finding of project need without Americans using all the natural gas transported through the AFP. *Id*. However, this position has no support in the NGA, CPS, or relevant precedent in sister circuits. Congress enacted the NGA because regulating the "*transportation* of

natural gas and the sale thereof in *interstate and foreign commerce* is necessary in the public interest." 15 U.S.C. § 717(a) (2023). The NGA and its sections, including the CPCN program, only concern transportation of natural gas domestically and internationally, not its ultimate use. As a result, "nothing in Section 7 prohibits considering export precedent agreements in the public convenience and necessity analysis." *City of Oberlin,* 39 F.4th at 726. In fact, Section 3 explicitly states that export agreements with free trade nations are *per se* consistent with the public interest. *See* 15 U.S.C. § 717b (2023); *Id.* at 727. While Brazil may not be a country in which the United States has a free trade agreement, the point stands—Congress considered exporting natural gas as a crucial part of the regulatory framework that cannot be left out and should be considered in the public convenience and necessity analysis.

Additionally, the CPS makes no distinction between precedent agreements with foreign companies and domestic companies. It also contains no language limiting public need to an analysis of only demand for domestic use of natural gas. It does the exact opposite. The CPS requires FERC to consider *all* factors bearing on the public interest including but not limited to "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." *City of Oberlin*, at 722 (quoting Order No. 88 at ¶ 61,748). To read the project need determination as limiting FERC to only considering domestic use of natural gas runs afoul of its own policy statements guiding application analyses. A plain reading of the statute and subsequent regulations indicates that FERC must issue a CPCN when the public *needs* to *transport* natural gas for a variety of reasons, and not just when it needs to use natural gas domestically like HOME contends.

As a result, FERC adequately supported its finding by noting that the two precedent agreements account for the entire design capacity of the AFP. R. 8, ¶ 26. And both did so only three weeks after the open season began. *Id*. FERC correctly considered the companies' eagerness contract for the AFP as strong evidence of public need for the project. Without a public need to move the unused natural gas from Old Union to New Union, the companies would not have entered into such large, binding contracts with TGP.

The D.C. Circuit considered the very issue of export agreements indicating project need last year in *City of Oberlin*. 39 F.4th at 724. There, FERC based its project need finding primarily on several precedent agreements. *Id.* at 726. Environmental groups challenged the finding because the agreements bound seventeen percent of the natural gas for Canadian export. *Id*. at 723. The court upheld FERC's project need finding even though the precedent agreements accounted for only fifty-nine percent of the project's capacity. *Id*. In doing so, the court expressly rejected the petitioner's argument that export agreements could not support project need findings under the NGA. *Id*. at 725. Due to the NGA's own congressional purpose and the numerous domestic benefits stemming from the project, FERC considered the export agreements as indicative of project need. *Id*.

Here, the precedent agreements account for all one hundred percent of the project's capacity, providing even stronger evidence of need than in *City of Oberlin*'s contracts for fifty-nine percent. The court's reasoning in *City of Oberlin* is not contingent on the amount of natural gas for export, like HOME argues. R. 9, ¶ 31. The same rationale used there applies because "the fact that a portion of the gas is bound for export does not diminish the benefits that flow from the construction of the pipeline." *City of Oberlin*, 39 F.4th at 727. FERC properly considered the project's benefits as a whole in supporting its project need finding.

2. The AFP Creates Six Domestic Benefits

FERC also included six domestic benefits in its analysis, regardless of where consumers ultimately use the natural gas. R. 6, ¶ 27. The CPS is clear. FERC must consider "*all* relevant factors bearing on the need for a project." *Env'l Def. Fund*, 4 F.4th at 961 (quoting Order No. 88, ¶ 61, 747–48). By focusing solely on the destination of the natural gas, HOME ignores the full picture of public benefit the added infrastructure brings. Each of the domestic benefits FERC included in its decision provides more than a 'mere scintilla' of evidence and, therefore, cannot be considered arbitrary and capricious. *See* R. 8, ¶ 27 (detailing the six domestic benefits).

Most critically to FERC's analysis, all the natural gas generated by the HFF in Old Union is not currently being used, and the Southway Pipeline is functioning under capacity. R. 6, ¶ 13. Demand in the region has been steadily declining as more people move to New Union. *Id*. The Southway Pipeline is already not at full capacity of what it could be exporting out of the field, and it only stands to continue decreasing capacity as the shift in population continues. *Id*. The natural gas from HFF already goes to waste, and only stands to continue doing so at higher rates. The AFP solves this issue because it reroutes thirty-five percent of the natural gas to New Union for both domestic use and export. R. 6, ¶ 12. Rerouting the gas to a place with more potential use and infrastructure benefits the public in both regions. The project stands to boost the economy and provide more jobs in Old Union by having the HFF produce natural gas to its full capacity. *See* R. 6, ¶¶ 11, 14. More profitability and less wasted natural gas benefits the economy and ensures jobs. This is also clearly in line with Congress' goals in the NGA and FERC's authority to "ensure plentiful supplies of natural gas... at reasonable prices." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976).

The AFP also increases availability of cleaner energy for consumers in New Union and provides the infrastructure to ramp up its cleaner energy grid as the population continues to grow.

New Union does not have its own independent source of natural gas in a field like the HFF in Old Union, and no infrastructure to transport gas from Old Union currently exists. Now that the area has capacity to generate more natural gas in the region through the AFP and a new domestic contract with NUG, demand for cleaner energy there may increase. This court should affirm FERC's finding of project need because it supported the decision with substantial evidence of one hundred percent capacity precedent agreements and multiple domestic benefits.

B. The Court Should Affirm FERC's Decision That the Public Benefits of the AFP Outweigh Any Remaining Adverse Impacts

After finding a project need, FERC must determine any adverse impacts on interested parties and weigh them against the public benefits of the project. *Env'l Def. Fund*, 2 F.4th at 961 (quoting Order No. 88 at ¶ 61,745). Because it involves a discretionary choice by the agency, the court reviews FERC's balancing analysis under the arbitrary and capricious standard. *Overton Park,* 401 U.S. at 416; *Env'l Def. Fund,* 2 F.4th at 967 (applying the arbitrary and capricious standard to FERC's balancing analysis under the NGA). Under arbitrary and capricious review, the court determines whether FERC's decision "is reasoned, principled, and based upon the record." *Id*. at 968. The court does not substitute its judgment for the agency, but only determines whether it considered the relevant factors and provided a reasoned explanation for its decision. *Myersville*, 783 F.3d at 1308.

When considering CPCN applications under the balancing step, FERC first determines whether the applicant made a reasonable effort to mitigate any adverse impacts on "landowners and communities affected by the route of the new pipeline." *Env'l Def. Fund*, 2 F.4th 953, 961 (quoting Order No. 88 at ¶ 61,745). Adverse impacts may be a variety of things including "negative impact on the environment or landowners' property." *Myersville*, 783 F.3d at 1309. After considering any necessary mitigation, the Commission then balances the remaining adverse

impacts with the public benefits. *Id.* As discussed above, public benefits may include a variety of things like increasing access to natural gas and improving transportation infrastructure across the country. *Id.* FERC "enjoys broad discretion to invoke its expertise in balancing competing interests." *Id.* After weighing the economics interests, FERC then balances any remaining environmental or social impacts with the public benefits. *Id.*

Here, HOME challenges the CPNC as arbitrary and capricious on two fronts. R. 10, ¶ 39. First, HOME argues that impacts remain, and FERC improperly weighed them against the project's benefits, and second, at the very least, FERC should have adopted the alternative route. R. 10, ¶ 39–40. However, FERC supported its decision with a reasoned and principled explanation based on the evidence in the record and the following addresses each issue in turn.

1. The AFP Creates Several Public Benefits for Citizens Across Old and New Union While Only Minimally Impacting One Organization

HOME argues that FERC should have given its own religious and environmental concerns more weight in the balancing analysis than *any* of the public benefits. R. 11, ¶ 45. HOME primarily points to the environmental impacts of construction and its own faith-based objections to natural gas transportation. R. 11, ¶ 49. However, this position is contrary to FERC's statutory mandate under the NGA and guidance under the CPS. Again, FERC must weigh *all* the factors bearing on the public interest. FERC is under no obligation to weigh religious contentions more heavily than all the other interested parties' considerations. Nor should it. FERC must consider the millions of families that stand to benefit from improved natural gas infrastructure alongside HOME's personal religious contentions.

Most important to its analysis, FERC noted all the steps TGP took to limit the project's economic and environmental impacts on landowners and communities along the route. R. 10, ¶ 41. The company listened to those impacted and changed thirty percent of its plan in accordance

with their feedback. *Id*. It also negotiated mutually beneficial easements with over half of the landowners along the route. R. 10–11, ¶¶ 42–43. Although, FERC notes TGP could have left all the landowners to compensation through eminent domain, which would result in far lower prices for land than a private company would offer. *Id*. HOME may be the only landowner-challenger remaining because TGP so thoroughly addressed economic impacts. *See id*.

Nonetheless, the AFP provides an enormous boost in moving natural gas to areas where consumers will benefit from it. See R. 6, ¶¶ 12–14. To put it in perspective, the average household only uses seventy Dth of natural gas per month, and the AFP will transport five hundred thousand dekatherms of natural gas *per day*. R. 6, ¶ 11; U.S. Energy Information Administration, *Number of Natural Gas Consumers*, https://www.eia.gov/dnav/ng/ng_cons_num_a_EPG0_VN3_Count_a.htm (last visited Nov. 19, 2023). New Union citizens benefit by way of a massive increase in access to cleaner, reliable energy. And Old Union benefits by having the HFF operate at full capacity, increasing profits and boosting the economy in its region.

FERC made a reasoned and principled choice based on the record when it decided to give more weight to the entire country's benefits over one small group's issue regarding only two miles of the project's ninety-nine miles. *See* R. 5–6, ¶ 10; R. 10, ¶ 38. In reality, HOME's main contention comes from an even smaller part of the project—crossing the buried pipeline once a year during their annual Solstice Sojourn. R. 11, ¶ 48. FERC properly weighed the millions of families benefitting from increased natural gas capacity every day over that of one religious group's issue once a year. Because of the significant public benefits of the project, FERC correctly considered HOME's personal contentions but did not give them weight over the volume of individuals that stand to gain under the plan. Nor did it need to.

As for HOME's property specifically, FERC reasonably assessed HOME's residual adverse impacts and found that they were not significant enough to warrant rejecting the entire project. TGP will bury the pipeline entirely in the only two miles it crosses HOME's property. R. 10, ¶ 38. It will expedite construction to complete in only four months and do so between Solstices. *Id*. The pipeline stretches ninety-nine miles across the country, and HOME's property only accounts for about two percent of the entire project. *Id*. To weigh two miles of underground pipeline for one interested party over that of millions of potential beneficiaries of the project would be unreasonable. FERC correctly weighed the impacts on HOME, one interested party, versus the potential benefit to millions of people as required under the NGA and CPS.

2. The Proposed Alternative Route Creates More Environmental Damage and Unnecessary Costs

HOME also argues that FERC, at minimum, should have adopted the proposed alternative route through the Misty Top Mountains. R. 10, ¶ 39. However, FERC properly considered the environmental impact of both routes. In the CPS, FERC includes in its goals "the avoidance of unnecessary disruption of the environment." R. 7, ¶ 18. To reroute the route over the mountains runs afoul of this goal because the proposed route would create more environmental damage on a more sensitive ecosystem and increase building costs. R. 11, ¶ 44.

A citizen group challenged a CPCN based on this very issue in *Minisink Residents for Environmental Preservation and Safety v. FERC*. 762 F.3d 97, 101 (D.C. Cir. 2014). There, FERC approved the original route proposal because "the more significant environmental impacts associated with the [alternative proposal]–rendered that option less preferable." *Id*. at 107. The court affirmed because FERC adequately supported its decision in noting the increased environmental damage associated with the Alternative Route. *Id*. Here, the AFP has significantly less environmental impacts than the Alternative Route as well. And FERC properly explained its

reasoning by stating the Alternative would run over far more sensitive ecosystems in the mountain range rather than in the valley. R. 11, ¶ 44. Additionally, it supported its decision by noting that the Alternative would cost an additional fifty-one million dollars to complete. *Id*. Together, FERC supported its rationale and reasonably chose the AFP over the Alternative Route.

C. FERC's Decision to Approve the AFP's Route Through HOME's Property Is Not a Violation of RFRA

FERC's decision to route the AFP over HOME's property was also not contrary to law under RFRA. This court has the authority to review agency decisions that are contrary to law under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) (2023). In *Employment Div. v. Smith*, the Supreme Court struck down the compelling interest test it had articulated in *Sherbert v. Verner* and *Wis. v. Yoder*. 494 U.S. 872, 879–881 (1990) (holding that Free Exercise does not permit an individual to circumvent a "valid and neutral law of general applicability" because it interferes with their religious beliefs or practices). In response, Congress enacted the Religious Freedom Restoration Act (RFRA). *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). The purpose of RFRA was to restore the compelling interest test articulated in *Sherbert* and *Yoder* and to guarantee the application of this test when the federal government substantially burdens the free exercise of religion. 42 U.S.C. § 2000bb(b)(1) (2023).

Under the RFRA analysis, as a threshold matter, the plaintiff must demonstrate that the government action at issue substantially burdens their sincerely held religious belief. *Thiry v. Carlson*, 78 F.3d 1491, 1494 (10th Cir. 1996). The court will only reach the compelling interest test if the government action substantially burdens the plaintiff. *Id.*; *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214 (9th Cir. 2008). Only if the plaintiff establishes a substantial burden does the government need to prove its action uses the least restrictive means to further a compelling government interest. *O Centro*, 546 U.S. at 424; 42 U.S.C. § 2000bb-1(c) (2023). If

the government proves its interests outweigh the religious exercise – as FERC does here – the court will uphold the government action.

1. HOME is Exercising a Sincerely Held Religious Belief

TGP does not contest that HOME's Solstice Sojourn is an exercise of religion. RFRA defines the exercise of religion as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C § 2000bb-2(4) (2023) (quoting 42 U.S.C. § 2000cc-5(7)(A)). Congress has mandated this statutory definition of exercise of religion "be construed in favor of a broad protection of religious exercise…" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014) (quoting 42 U.S.C. § 2000cc-3(g) (2023)). In light of this precedent, TGP also does not challenge that HOME's religious beliefs are sincerely held. Though RFRA's statutory definition of exercise of religion is a very low bar that could allow any group to buy land and use RFRA as an excuse to avoid government action, courts have required that the belief be religious rather than a mere "philosophy or way of life." *Thiry*, 78 F.3d at 1494. HOME considers the natural world sacred and worships nature itself as a deity. R. 11, ¶ 46. TGP does not doubt that HOME's exercise of religion is religious and, therefore, does not contest its sincerity.

2. FERC Does Not Substantially Burden HOME's Exercise of Religion Because the AFP Only Diminishes HOME's Subjective Spiritual Fulfillment

RFRA provides a government action only substantially burdens a plaintiff's religious exercise if it places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." 42 U.S.C. § 2000bb–1(a) (2023). The Supreme Court has recognized substantial pressure if: 1) the government coerces a plaintiff "to act contrary to their religious beliefs under the threat of sanctions," or 2) the government has conditioned a government benefit on "conduct that would violate [the plaintiff's] religious beliefs…" *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1067 (2008) (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Wis. v.*

Yoder, 406 U.S. 205, 207, 220 (1972)). The CPCN does not coerce HOME to act contrary to their religious beliefs, nor does it condition a government benefit on conduct that would violate HOME's religious beliefs.

HOME specifically argues that the CPCN coerces it to act contrary to its religious beliefs by forcing it to support producing, transporting, and burning fossil fuels. R. 11–12, ¶ 55. However, allowing the pipeline to cross HOME property does not prohibit HOME from continuing its religious exercise. In fact, the CPCN includes conditions, like requiring TGP to bury the pipeline where it crosses HOME property and expediting construction, to ensure HOME's religious exercise can continue unhindered. R. 10, ¶ 41. These conditions allow HOME to exercise its religion without a substantial burden as defined by the Court. Furthermore, neither HOME nor FERC dispute that the proposed alternate route over the mountain range would cause even more environmental harm, which would arguably "burden" HOME's religious beliefs to a greater extent than the approved route. R. 12, ¶ 62.

HOME also asserts that walking over the buried AFP would "significantly impact---if not prevent entirely" the sacred Solstice Sojourn because the AFP would destroy the meaning of the journey. R. 11, ¶ 57. However, diminishment of subjective spiritual fulfillment is not enough. *Navajo Nation*, 535 F.3d at 1070–72 (1988). To rise to the level contemplated by RFRA, the government must coerce a plaintiff or condition a government benefit on an action. *Id.* (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447–49 (1988)) (finding that an impact on the "subjective, emotional experience" of the tribes is insufficient); *see, e.g., Thiry*, 78 F.3d at 1495 (finding that a couple's distress of the relocation of their stillborn baby's gravesite for a highway expansion was not a substantial burden on their religious exercise because the couple was not prevented from continuing to exercise their religion elsewhere). A

government action that "diminish[es] the sacredness of the land" does not alone create a substantial burden. *Lyng*, 485 U.S. at 447–49.

In *Lyng*, the Supreme Court sought to determine whether timber harvesting and construction through a portion of a National Forest used by Native American tribes for religious purposes substantially burdened the tribes' exercise of religion. *Id.* at 441. The tribes argued that their religious rituals would not be effective if conducted at different sites and that the disturbance of the land's "natural state would clearly render any meaningful continuation of traditional practices impossible." *Id.* The Court found the tribe was not substantially burdened because incidental effects that only make the practice of religion more difficult do not require the government to demonstrate a compelling interest. *Id.* at 450–51. It did not matter that there would be grave effects on traditional religious practice. *Id.* at 441, 451. The government could not operate "if it were required to satisfy every citizen's religious needs and desires." *Id.* at 452. Free exercise does not allow citizens to "veto [] public programs that do not prohibit the free exercise of religion." *Id.* When compared with the tribes in *Lyng*, HOME alleges far less and still asks this court to find a substantial burden. TGP merely asks to place an invisible pipeline that HOME will cross only twice per year. The journey will not have to move locations and can still commence on schedule. Because the CPCN does not coerce HOME to act contrary to its religious beliefs and only diminishes its subjective spiritual fulfillment, FERC's decision to route the AFP over HOME's property does not substantially burden HOME's religion and, therefore, does not violate RFRA.

3. Even If This Court Finds That FERC's Decision Substantially Burdened HOME's Exercise of Religion, FERC Used the Least Restrictive Means of Achieving a Compelling Government Interest.

Under RFRA, the federal government is permitted to "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability…" if the

government action is the least restrictive means of furthering "a compelling government interest." 42 U.S.C. § 2000bb-1 (2023). This court only needs to reach this prong of the RFRA analysis if it finds FERC's decision substantially burdened HOME's religious exercise. *Snoqualmie*, 545 F.3d at 1214. If the court even needs to reach this prong, FERC certainly used the least restrictive means to achieve its compelling interest.

i. FERC's approval of the CPCN furthered the compelling government interest in maintaining a coherent natural gas pipeline permitting system.

A compelling government interest must show more than a sweeping claim of a rational relationship to "some colorable state interest." *Sherbert*, 374 U.S. at 406 (1963); *Yoder*, 406 U.S. at 221. It cannot be broadly formulated, so courts must "searchingly examine the interests" the government seeks to promote. *Yoder*, 406 U.S. at 221; *Hobby Lobby*, 573 U.S. at 726–27. The government can demonstrate a compelling interest "in uniform application of a particular program," such as a natural gas pipeline permitting system, by "offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *O Centro*, 546 U.S. at 435.

The Supreme Court and other appellate courts have found a compelling interest in "maintaining a sound and efficient tax system" and that "the difficulties inherent in administering a tax system riddled with judicial exceptions for religious employers makes a uniformly applicable tax system the least restrictive means of furthering that interest." *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 630 (7th Cir. 2000). For example, in *United States v. Lee*, where an Amish employer declined to pay social security taxes for religious reasons, the Supreme Court stated that the tax system could not function if religious denominations could challenge it simply "because tax payments were spent in a manner that violates their religious belief." 455 U.S. 252, 256, 260 (1982).

Similarly, Congress tasked FERC with carrying out its goal of ensuring "plentiful supplies of natural gas . . . at reasonable prices." *NAACP*, 425 U.S. at 669–70 (quoting 15 U.S.C. § 717 (2023)). Energy production and transport are crucial to not only operating the power grid in the United States but also to trade relations. If religious groups like HOME could challenge FERC's authority under the NGA every time a spiritual practice was impeded, no matter how tenuous, FERC would be inundated with lawsuits and unable to carry out its congressional mandate. The cost to the agency and the industry would skyrocket, contravening the purposes of the NGA and hampering the industry to such an extent that access to reliable energy would take a backseat to every religious objection. Without FERC's permitting of natural gas transport, access to power would be severely limited, possibly endangering the entire power grid and subjecting communities to blackouts. Religious practices across the country would be gravely threatened if they could not turn on the lights. Thus, FERC certainly has a compelling purpose in maintaining a coherent permitting system.

ii. *FERC's* approval of the CPCN used the least restrictive means to achieve the compelling interest.

The government can demonstrate that it has used the least restrictive means to achieve its compelling interest by comparing the cost to the government of altering its activity versus the cost to the religious interest caused by the government action. *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990). Here, the cost of using HOME's proposed alternative route must be compared against the impact of the buried pipeline on HOME's ability to exercise its religion. Using HOME's proposed Alternative Route over the route approved in the CPCN has both economic and environmental costs, all while further burdening HOME's religious tenets. Currently, the estimated cost of the AFP is five hundred ninety-nine million

dollars. R. 6, ¶ 10. Switching to the Alternative Route would add over fifty-one million dollars in construction costs, greatly outweighing the subjective impacts on HOME's religion. R. 11, ¶ 44.

In *Hobby Lobby*, the Supreme Court found that the Department of Health and Human Services ("HHS") requiring corporations to provide insurance policies covering contraceptives was not the least restrictive means of guaranteeing cost-free access to contraceptives. 573 U.S. at 728. The Court noted that the most straightforward, least restrictive means of achieving the compelling interest would be for HHS to cover the cost of contraceptives directly for women whose company insurance policy will not. *Id.* The Court found it particularly compelling that HHS had not shown this alternative was viable by providing an "estimate of the average cost per employee of providing access to the [] contraceptives…" or statistics on the number of employees that could be impacted. *Id.* The Court concluded that it was likely that the cost of HHS covering contraceptives directly "would be minor when compared with the overall cost of the Affordable Care Act," which was estimated to cost the federal government over 1.3 trillion dollars from 2014 to 2024. *Id.* at 729.

The present case is different because TGP can provide an estimated increased cost of fifty-one million dollars to move the pipeline route, which HHS could not do in *Hobby Lobby*. The present case is also distinguishable from *Hobby Lobby* because a private corporation, not the government, would be forced to pay an additional fifty-one million dollars on top of an already costly project to accommodate a group's religious beliefs to the detriment of ratepayers. TGP does not have access to 1.3 trillion dollars in federal funding available to it. Further, taxpayers would be forced to shoulder the cost of FERC's involvement in rerouting the AFP.

Additionally, HOME does not dispute that the Alternative Route would cause more environmental harm than the present route because the Alternative Route involves traveling three

extra miles and crossing through more environmentally sensitive ecosystems. Given that HOME worships nature itself as a respected deity and "it is a core tenant of their belief that humans should do everything in their power to promote natural preservation over *all other interests,*" it is especially puzzling that HOME proposes that the alternative route would be the least restrictive means of achieving the government interest. R. 11, ¶ 47 (emphasis added). Using its religious tenets as guidance, the interest in natural preservation should outweigh even its own interest in wanting the pipeline routed elsewhere. Because the alternative proposal would cost TGP and ratepayers significantly more, place a financial burden on taxpayers, cause far more environmental harm, and not even mitigate HOME's religion-based objections, this court cannot find it to be a less restrictive means to achieve FERC's interest. Since the route current proposed route is the least restrictive means of maintaining a coherent natural gas people permitting system, FERC's decision to route the AFP over HOME property is not a violation of RFRA.

II. FERC Acted Outside Its Authority by Imposing the GHG Conditions in the First Place, But Nonetheless, Properly Declined to Impose Conditions for Upstream and Downstream Impacts

Agencies are limited to "only those powers given to them by Congress." West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022). An agency runs afoul of the Major Questions Doctrine ("MQD") when it acts outside its traditional expertise to regulate an issue of "economic and political significance" such that a court must hesitate "before concluding that Congress meant to confer such authority" to the agency. Id. Here, FERC A) acted outside of its statutory authority in imposing GHG conditions in the first place, but B) nonetheless properly declined to extend conditions for the upstream and downstream GHG impacts. The following will address each issue in turn.

A. FERC Acted Outside of Its Authority Because Climate Change Is Too Significant of an Issue To Regulate Without Express Congressional Delegation

This court should certainly recognize the collective importance of the issues for which FERC attempts regulations here. Contrary to HOME and FERC's position, the gravity of the climate crisis and its mitigation only reinforces the need for clear authority, satisfying the legal test to raise it to a "major question," and thus not subject to agency deference. *West Virginia*, 142 S. Ct. at 2610. The Court developed the MQD not to prevent actions by the government, but rather to ensure the action is deliberate and carried out by the representative body or executive agencies in a calculated way. *Id.* at 2609. When an agency attempts regulation on issues of "economic and political significance," the courts examine the statute with "skepticism," looking for a "clear delegation" from Congress. *Id.* at 2614–16. Without such delegation, the regulatory scheme must be struck down. *Id.*

1. Climate Change Is a Major Question

The Supreme Court firmly settled climate change's "economic and political significance" in *West Virginia. Id.* at 2613–14. There, the Environmental Protection Agency ("EPA") was precluded from creating a system that would cap GHG emissions at coal plants. *Id.* at 2616. Despite the EPA's clear authority over emissions and technology in *new* sources, the Court found its attempt to apply said authority to *old* sources of the same emissions was a step too far. *Id.* at 2601 (outlining the statute directing the EPA to consider "various factors" to create a "system of emission reduction"). Here, FERC relies on significantly less clear statutory language to regulate the same issue of GHG emissions. *See* 15 USC § 717f(e) (2023). Because the Court was so clear that GHG emissions from coal plants are too significant an issue to be regulated by unexplicit terms, there is no reason to assume emissions from natural gas pipeline construction projects are any different. This court should therefore exercise a similar skepticism.

Similarly, in *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, the Supreme Court focused heavily on the detrimental health effects of tobacco use and the legislation Congress was deliberating at the time of the decision to strike down the agency's attempt to regulate cigarettes. 529 U.S. 120, 125 (2000). The Court did not quarrel with this regulation's beneficial intent. *Id.* Rather, the significance of the issue reinforced the need for a clear statement from Congress. *Id*. at 121. The Court's decision did not hamper further legislation nor agency delegation; in fact, FDA now regulates cigarettes under clear delegation. *See* 21 USC § 387o (2023). The decision reinforced Congress' role in crafting the administrative structure of the Government, especially when considering issues of such magnitude.

Here, TGP does not argue that climate change is not worth regulating. In fact, the opposite. Climate change is so important to mitigate that elected leaders must act deliberately. FERC is attempting to undermine Congress, taking actions that are unheeding to Congress' authority to delegate administrative authority in a way it so chooses, and we as citizens may influence through elections. *See West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J. concurring) ("[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure not only that all power would be derived from the people, but also that those entrusted with it should be kept in dependence on the people."). Like the tobacco use at issue in *Tobacco Corp.*, climate change is an issue of grave magnitude that should be regulated by clear congressional authority, as confirmed in *West Virginia.* 142 S. Ct. at 2614 ("The importance of the issue… makes the oblique form of the claimed delegation all the more suspect.").

Before further limiting the agency in *West Virginia*, the Supreme Court partially struck down EPA's attempt to regulate GHGs from small sources. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 308 (2014). The Court found the program at issue would radically expand the

EPA, "making [the agency and its regulations] both unadministrable and unrecognizable to the Congress that designed them." *Id.* at 312. The decision reiterated the analysis that raises an issue to the level that is now characterized as the MQD. *Id.* at 324 (finding actions that give an agency power over "a significant portion of the American economy" should be met with skepticism). The GHG Conditions imposed by FERC, especially if applied to all proposed and future pipeline projects, would force all companies, equipment providers, and steel manufacturers to restructure their supply chains and modes of operations to comply. Given the cost of the AFP, only one pipeline among many, is more than five hundred ninety-nine million dollars, such a pronouncement would work a severe and drastic change in the American economy. R. 6, ¶ 10. Though it declined to here, FERC hinted it will impose GHG Conditions on upstream and downstream impacts once it has internal guidance. R. 18, ¶ 96. Given these precedents, the question of GHG emissions is certainly so significant in breadth and importance (a.k.a. too "major") that this court should be skeptical of FERC's power to regulate.

2. FERC Lacks Clear Congressional Authority to Impose GHG Conditions

Even when an agency can cite some statutory authority enabling the action at issue, it must show "clear congressional authority" to regulate major questions. *West Virginia*, 142 S. Ct. at 2608. The MQD prevents agencies from usurping Congress and seizing regulatory power through "ancillary provisions" or "gap fillers" in old statutes. *Id.* at 2610. Clear authorization on the other hand must be specific as to the "measures, means, and techniques" that Congress envisions an agency employing on a major issue. *Id.* at 2615 (finding the statute enabling EPA's acid rain cap-and-trade program was clear authority and contrasting it with the scheme at issue).

For example, the Court prohibited the Occupational Safety and Health Administration ("OSHA") from implementing a plan to vaccinate millions of employees against COVID-19 by interpreting the disease as a "work-related hazard." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.,*

Occupational Safety & Health Admin., 595 U.S. 109, 118 (2022). While OSHA has the authority to protect against occupational hazards, and COVID-19 certainly spreads at work, it also spreads "everywhere else people gather." *Id.* Therefore, OSHA, without clear approval, could not mandate vaccinations. *Id.* The Court reiterated that responding "to a worldwide pandemic is simply not part of what the agency was built for." *Id.* at 119. In the case at hand, FERC attempts to regulate GHG emissions simply because such emissions happen while constructing a pipeline. Just as OSHA impermissibly expanded "work-related dangers," FERC desires power over the supply chains and all processes associated with pipelines it approves. It was not built for this role, and it has not shown there is unmistakable authority to assume such a duty.

The Commission instead relies on vague authority to attach "reasonable terms and conditions as the public convenience and necessity may require" in imposing the GHG conditions. 15 USC § 717f(e) (2023). The Supreme Court has previously interpreted this language to require FERC to "evaluate all factors bearing on the public interest." *Atl. Refin.*, 360 U.S. at 391. This sentence carries most of the water for HOME and FERC to argue the conditions were allowable. However, the authority to *evaluate* all factors is not the same as the authority to *regulate* all factors for a project approved by such an agency action. *See Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1137 (DC Cir. 1980) (denying FERC's assertion of a "corollary authority" over a plant manufacturing synthetic gas that was later commingled with natural gas). There, the court limited FERC's authority over synthetic gas to "consideration," and even then, only when it reached pipelines under FERC's statutory authority. *Id.* at 1146–47. If FERC cannot regulate disconnected synthetic gas facilities in issuing a CPCN, it certainly cannot regulate TGP's chainsaws, vehicles, and steel.

Even if "consideration" and "regulation" could be equivalated under the NGA, FERC still would not have the authority to impose GHG Conditions. FERC's analysis in issuing the CPCN must be limited to "what the public interest means in the context of the [NGA]... It does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools may be useful." *Id.* at 1147. Here, FERC attempts to regulate corollary environmental impacts at least three steps away from its authority. If FERC can regulate so far from its congressional authority, there are few things outside of FERC's regulatory reach. This is precisely the reason for the MQD—preventing an agency from assuming "responsibilities far beyond its initial assignment." *NFIB*, 595 U.S. at 125 (Gorsuch, J. concurring). As the Supreme Court made clear in *West Virginia*, agencies may not step into each other's roles, even when it would advance their own. *See West Virginia*, 142 S. Ct. at 2613 ("We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration."). Even though GHG emissions from steel, chainsaws and vehicles may be attributable to pipeline construction, Congress did not imbue FERC with the clear authority to regulate such emissions. The Court has been clear it may not take that authority itself.

Instead, the NGA was enacted with the principal aims of "encouraging the orderly development of plentiful supplies of . . . natural gas at reasonable prices," and "to protect natural gas customers from the monopoly power of natural gas pipelines." *NAACP*, 425 U.S. at 669–70. To that end, there are certainly conditions that FERC may attach. *See FPC v. Transcontinental Pipe Line Co*. (*Transco*), 365 U.S. 1 (1961) (permitting the Commission to consider whether the end use was ''wasteful'' of limited gas resources). The conditions there were attached in furtherance of Congress' goals in the NGA, as they promoted plentiful supplies of gas and frugal ratemaking. *Id.* With FERC's enabling purpose through the NGA in mind, it is unfathomable that

FERC would be permitted to unilaterally impose GHG Conditions on TGP or any other construction through a CPCN. *Id. a*t 17 ("It must be realized that the Commission's powers under § 7 are, by definition, limited."). FERC cannot use the umbrella term of "public necessity" to regulate in areas Congress never intended.

FERC argues its GHG Conditions are distinguishable from the Supreme Court's analysis of the MQD because the conditions are "specific and individual measures" rather than "larger scale measures taken by agencies through regulation." R. at 17, ¶ 86. However, the Court never provided such a workaround, and one cannot be implied. The Court held any "expansive construction of a statute" without clear authority was improper. *West Virginia*, 142 S. Ct. at 2609. In no MQD case has the Court constrained its holding to certain *types* of regulation or pronouncements. If it did, the Court would hardly be holding agencies to Congressional mandates, and there would simply be an onslaught of "specific and individual actions" that serendipitously applied overreaching standards. The Court doesn't consider if an agency *intends* to regulate a major question, but rather if the regulation *affects* a major question. *Id.* at 2610. Otherwise, the Court's holdings would be unworkable, opening a backdoor for agencies to address major questions so long as they do not announce them as major policy changes. This court should summarily reject such an argument.

Therefore, its authority to attach conditions is not the broad sword that FERC attempts to wield, and FERC must have shown much clearer congressional authorization to attach the GHG Conditions in the CPCN. Without such authority, this court must follow the Supreme Court's lead and limit FERC only to those powers it has been expressly granted.

B. FERC Acted Properly When it Declined to Impose GHG Conditions Addressing Upstream or Downstream Emissions

If this court agrees with TGP and follows Supreme Court precedent to find FERC did not have the authority to impose GHG Conditions in its issuance of the CPCN, the lack of "clear congressional authorization" to regulate upstream and downstream GHG emissions necessarily follows. *See West Virginia*, 142 S. Ct. at 2614. Even if this court finds FERC had clear authorization to impose the GHG Conditions through the CPCN, this court should find FERC could not rely on any clear statutory language that purports to give it authority over GHG impacts from upstream and downstream of the AFP, even if it had internal guidance.

1. FERC Lacks Clear Guidance from Congress

FERC argues that it would be proper for it to require mitigation of upstream and downstream GHG emissions once it develops "clear guidance" through a policy statement. R. 18, ¶ 96. However, this court should make clear that such guidance must come from Congress itself, not the agency. *See West Virginia*, 142. S. Ct. at 2608. FERC was correct in acknowledging there is not yet clear guidance for upstream or downstream regulation, but it cannot make guidance on its own. Instead, it may only do so in light of an "intelligible principle" from Congress. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989). No such principle exists.

In *Alabama Ass'n of Realtors v. Dept. of Health and Human Servs.*, the Supreme Court addressed when the MQD might preclude an agency attempting to regulate a downstream effect of an issue otherwise within its authority. 141 S. Ct. 2485, 2488 (2021). There, the Court invalidated the Centers for Disease Control's ("CDC") eviction moratorium during COVID-19 because the "downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute." *Id.* While the CDC could take broad action on diseases that directly related to the disease's eradication, the Court constrained the agency's interpretation, finding that moratoriums

on evictions that lead to disease spread were too attenuated to be imposed without clear authorization. *Id*.

Here, this court should certainly find downstream emissions from the gas transported by the AFP are absent from FERC's statutory authority. Even with internal guidance, FERC may not impose conditions that would require TGP or future project sponsors to mitigate upstream or downstream GHG emissions without clear congressional authorization.

2. FERC's Authority Under NEPA to Consider Alternatives Does Not Extend to Upstream and Downstream GHG Emissions

In issuing the CPCN, FERC was proper to conduct a NEPA analysis because TGP's proposed pipeline is a "major [f]ederal action significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C) (2023). TGP does not disagree with this authority, and it fully participated in the process. R. 16, ¶ 80. NEPA and cases interpreting its scope expressly limit FERC's authority to consideration of alternatives to the federal action, not alternatives to the proposal. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) ("An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving its goals."); 42 U.S.C. § 4332(2)(C). In that vein, FERC must limit its analysis to environmental effects for which its action is the "proximate cause." *Department of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). This standard is analogous to tort law, and the agency is not responsible for effects that merely bear a "but for" relationship to its action. *Id.* Here, the agency's action is limited to the issuance of a CPCN. With that issuance, FERC may only consider effects for which it has the legal authority to mitigate. *Id.* at 770. States and other agencies have clear authority over upstream and downstream emissions, so FERC may not consider them.

Upstream GHG impacts are easily dealt with, as the Record shows the HFF is not wholly dependent on this CPCN or the AFP. R. 6, ¶ 12. Because there is no additional production planned at the HFF because of this pipeline, FERC's issuance of the CPCN bears no causal relationship to upstream emissions. Any consideration of such impacts would therefore be outside the scope of FERC's authority, as it "has no ability to prevent a certain effect" in the HFF. *See Pub Citizen*, 541 U.S. at 770. For the first time in the case at hand, Congress has spoken clearly and limited FERC's authority to regulate upstream GHG impacts. 15 USC § 717(b) (2023) (stating the Commission's authority does not extend "to the production or gathering of natural gas."). FERC would be acting outside its scope and trampling on Old Union's authority if it imposed conditions requiring upstream mitigation.

Downstream GHG impacts may bear some "but for" causation, but certainly do not rise to the proximate cause required to be "legally relevant" under NEPA. To meet this high threshold, there must be a "reasonably close causal relationship" between the environmental effect and the federal action at issue. 42 U.S.C. § 4332 (2023). Here, because there are many other actors involved in the downstream use of natural gas transported by the AFP, such as the states, other agencies, and foreign governments, this court should not find FERC to be "legally responsible" for such effects. *Id.*

HOME and FERC would like this court to follow the holding in *Sierra Club v. FERC (Sabal Trail)*, wherein the D.C. Circuit found that in issuing a CPCN, FERC must have "at a minimum... estimated the amount of power-plant carbon emissions that the pipelines will make possible." 867 F.3d 1357, 1371 (D.C. Cir. 2017). The court there found downstream emissions from a Florida power plant were "reasonably foreseeable" effects that were proper to consider in the NEPA analysis. *Id.* Unfortunately, the *Sabal Trail* court failed to apply the proximate cause

test from *Pub. Citizen* as it did not consider how state permitting necessarily breaks the causal chain. 867 F.3d at 1371. A year before, the same court correctly limited FERC's analysis in light of *Pub. Citizen. See Sierra Club v. FERC (Freeport)* 827 F. 3d 36, 47 (D.C. Cir. 2016). There, court prohibited FERC from considering emissions after export, as DOE had "sole authority to license the export of any natural gas going through the export facility." *Id. a*t 40; 42 U.S.C. § 7151(b) (2023). The court in *Sabal Trail* correctly identified this rule, and cited to *Freeport* to illustrate how an agency may not "consider environmental information if it has no statutory authority to act on that information." *Sabal Trail*, 867 F.3d at 1372. However, the court failed to consider how a state's role breaks the causal chain just as a federal agency. This court can rectify that mistake and apply *Pub. Citizen* to hold FERC may not consider downstream emissions because it has no legal authority over such impacts. Here, the states maintain permitting authority over their natural gas burning facilities, and the DOE still has sole authority over the exports.

Even if this court finds that *Sabal Trail* was correct, the D.C. Circuit limited FERC's authority to "consideration" of downstream emissions. *Id.* at 1375 (rejecting the Sierra Club's argument for connecting emissions to particular impacts). As discussed above, consideration is not the same as regulation, and attaching conditions to the CPCN would be beyond consideration. Similarly, the EPA has authority over domestic downstream GHG impacts, as is made clear in the Clean Air Act and the Supreme Court's holding in *West Virginia*. 142 S. Ct. at 2613; 42 U.S.C. § 7411 (2023) (granting EPA authority over GHG emissions from stationary sources). It would be far outside FERC's authority and administratively unmanageable if it required projects to mitigate for such domestic downstream uses over which it has no authority.

Finally, when some of the natural gas that traveled through the AFP arrives in Brazil, it will be wholly the responsibility of Brazilian authorities, and FERC would be acting

extrajudicially to require TGP to mitigate any effects so far downstream. NEPA is a domestic statute that requires agencies to consider federal actions in the United States, and it imposes "no substantive requirements which could be interpreted to govern conduct abroad." *See Env. Def. Fund, Inc. v. Massey*, 986 F. 2d 528, 533 (D.C. Cir. 1993). Therefore, because FERC is constrained by the powers given to it and other agencies by Congress, and cannot act outside those bounds, it was correct to not impose mitigation measures related to upstream or downstream GHG impacts.

CONCLUSION

For the foregoing reasons, this court should find the CPCN was supported by substantial evidence, was not arbitrary and capricious, and it did not violate RFRA. However, this court should modify the CPCN to remove the GHG Conditions, as they were beyond FERC's authority, and find FERC properly limited its authority over upstream and downstream GHG impacts.