

C.A. No. 23-01109

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT**

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HOLY ORDER OF MOTHER EARTH  
*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION  
*Respondent,*

and

TRANSNATIONAL GAS PIPELINES,  
*Petitioner.*

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Brief of Respondent, FEDERAL ENERGY REGULATORY COMMISSION

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## STATEMENT OF ISSUES PRESENTED

- I. Was FERC's finding that the AFP is supported by public convenience and necessity arbitrary and capricious because the primary evidence of demand are export-driven precedent agreements?
- 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 under HOME property despite HOME's religious objections violate 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 FACTS

**THE PARTIES.** The Federal Energy Regulatory Commission ("FERC") is empowered by the Natural Gas Act to approve natural gas projects. 15 U.S.C. § 717f(e). TGP is a limited liability company organized and existing under the laws of the State of New Union. HOME is a not-for-profit religious organization, organized under the laws of the State of New Union.

**THE PROJECT.** On July 13, 2022, Transnational Gas Pipelines, LCC ("TGP") applied to construct and operate the American Freedom Pipeline ("AFP"). Order at 4. The AFP is an approximately 99-mile-long, 30-inch diameter interstate pipeline extending from a receipt point in Jordan County, Old Union, to a TGP gas transmission facility in Burden County, New Union. Order at 4. This pipeline will provide up to 500,000 dekatherms (Dth) per day of firm transportation service and will cost approximately \$599 million. Order at 4. Hayes Fracking Field

(“HFF”) in Old Union produces the natural gas the AFP will transport. Order at 6. This gas is liquified into natural gas before being transported by pipeline. Order at 6. Currently, the Southway pipeline transports the gas produced at the HFF to states east of Old Union. Order at 6. After construction, the AFP will transport approximately thirty-five percent of the gas produced at HFF. Order at 6. TGP executed a binding precedent agreement with International Oil & Gas Corporation for 450,000 Dth per day of firm transportation service. Order at 6. International will subsequently export the liquid natural gas to Brazil. Order at 6. TGP also executed a binding precedent agreement with New Union Gas and Energy Services Company for the remaining 50,000 Dth per day of firm transportation service. Order at 6.

**THE CPCN ORDER.** On April 1, 2023, the Federal Energy Regulatory Commission (“FERC”) issued an Order granting TGP a Certificate of Public Convenience and Necessity (“CPCN”) to construct the AFP. Order at 2. In the Order, FERC concluded that the benefits of the TGP project outweigh its adverse effects. Order at 2. Because the Commission found that the AFP will have significant environmental impacts, the Order included conditions (“GHG Conditions”) on the approval to mitigate harmful greenhouse effects to less-than-significant levels Order at 13.

**THE REHEARING.** On April 20, 2023, the Holy Order of Mother Earth (“HOME”) sought a rehearing of the issues in the CPCN. Order at 2. HOME is a religious organization that owns land along the proposed route of the AFP. Order at 2. Approximately two days later, TGP also sought a rehearing from the FERC on the conditions included in the Order. Order at 2. On May 19, 2023, the FERC issued an Order denying the petitions for rehearing and affirming the CPCN. Order at 2.

**THE PRESENT PETITION FOR REVIEW.** On June 1, 2023, both HOME and TGP filed Petitions for Review of the CPCN and Rehearing Order. Order at 2.

## SUMMARY OF THE ARGUMENT

After evaluating the costs and benefits of TGP's project, FERC found that the project was supported by public convenience and necessity, but had adverse effects that could be mitigated if TGP followed certain conditions. The NGA empowers FERC to perform this cost-benefit analysis and to impose conditions to mitigate a natural gas project's harm. 15 U.S.C. § 717f(e). FERC's Order should be upheld because the Commission followed the NGA's requirements, acted within its authority under the NGA, and a rational connection exists between the evidence and FERC's findings. Further, the conditions on the CPCN mitigate the harm to HOME and do not create a substantial burden on HOME's members under RFRA.

FERC's finding of public convenience and necessity for the AFP was not arbitrary and capricious and was supported by substantial evidence. Evaluating public convenience and necessity requires the Commission to consider "all factors bearing on the public interest." *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959). Precedent agreements are important evidence of public need. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107, 61,687 (2022).

FERC may consider export precedent agreements while evaluating public convenience and necessity, but it must rationally explain why it credits the agreements. *See City of Oberlin, Ohio v. FERC* ("Oberlin I"), 937 F.3d 599, 606 (D.C. Cir. 2019). Here, FERC explained that the export precedent agreements were evidence of public need because: (1) TGP secured binding precedent agreements for 100% of the pipeline's capacity, serving as evidence of demand for the pipeline; (2) TGP produced evidence that the pipeline could support future demand as existing pipelines diminish in service; and (3) TGP produced evidence that the agreements to transport gas would support jobs and economic growth domestically regardless of the end use. The court recognized

these types of findings as evidence of public need in *City of Oberlin, Ohio v. FERC* (“*Oberlin II*”), 39 F.4th 719, 722 (D.C. Cir. 2022).

Further, FERC’s finding that the benefits from the AFP outweigh the environmental and social harms was not arbitrary and capricious. FERC’s Order shows that it not only considered evidence of environmental impact and social harm, but imposed conditions on the AFP to mitigate those harms. HOME also proposed an alternative path to TGP’s, and FERC considered the path and found it caused more environmental harm. While there are undoubtedly negative effects on HOME, FERC’s CPCN reflects not an arbitrary and capricious approval but one focused on limiting negative effects after taking a hard look at the project’s effects.

Neither does FERC’s decision to route the AFP under HOME property despite HOME’s religious objections violate RFRA because the AFP does not substantially burden HOME’s exercise of religion. HOME cannot satisfy either of the ways to establish a substantial burden: (1) with sufficient evidence that the government is forcing practitioners to choose between following their religion and receiving a governmental benefit; or (2) with sufficient evidence that the government is coercing adherents to act contrary to their religious beliefs by threat of civil or criminal sanctions. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008).

Constructing the AFP does not require HOME to choose between a benefit and its exercise of religion, as HOME is not excluded from the benefits demonstrated by TGP. And FERC imposed conditions, such as the buried nature of the pipeline and expedited construction, to minimize adverse effects to HOME. Order at 13.

And even if there’s a substantial impact on HOME’s exercise of religion, the CPCN should be upheld because the alternate route would cause more environmental harm, be excessively expensive, and a uniform pipeline permitting system would be the least restrictive means of



furthering the governmental interest. Order at 13; *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957 (E.D. Mich. 2014) (holding that the least restrictive means inquiry under RFRA involves weighing the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity.)

The GHG Conditions FERC imposed to mitigate the AFP’s environmental harm were not beyond FERC’s authority under the NGA. Courts have historically shown great deference to FERC’s discretion in attaching conditions to CPCNs. *See Great Lakes Gas Transmission Ltd. P’ship*, 984 F.2d 426 (D.C. Cir., 1993). Neither do the conditions implicate a major question.

The major-questions doctrine addresses measures taken by agencies representing a transformative expansion of their powers, based on vague language in long-extant, but rarely used statutes designed as a gap fillers. *W. Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (referring to a “major questions case” as one where an agency claimed to discover an a “transformative expansion” of its authority in the “vague language of a long-extant”, and rarely used statute designed as a gap filler.)

Here, 15 U.S.C. § 717f(e) clearly authorizes FERC to impose the kind of conditions it imposed here. (Stating that FERC “shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder *such reasonable terms and conditions* as the public convenience and necessity may require.”) (emphasis added); see also *id.* § 717b(a) (stating that FERC may “grant such application, in whole or in part, *with such modification and upon such terms and conditions as the Commission may find necessary or appropriate*”) (emphasis added). Thus, upholding the Order would not be an extraordinary expansion of authority based on vague language.

And FERC's decision not to impose GHG Conditions addressing downstream and upstream GHG impacts was not arbitrary and capricious. NEPA requires FERC to take a "hard look" at problems raised by a project's Environmental Impact Statement. *Sierra Club v. FERC*, 867 F.3d 1357, 1376 (D.C. Cir., 2017). In this case, the Environmental Impact Statement showed that construction of the AFP would result in significant upstream and downstream greenhouse gas impacts. Order at 15. Since FERC does not yet have clear guidance on addressing upstream and downstream greenhouse gas impacts, it declined to exercise its discretionary authority to impose conditions on them. Order at 19. Because the decision is rationally based on the facts presented to FERC, FERC's decision should be upheld.

After evaluating the costs and benefits of TGP's project, FERC found that the project was supported by public convenience and necessity, but had adverse effects that could be mitigated if TGP followed certain conditions. The NGA authorizes FERC to perform this cost-benefit analysis and to impose conditions to mitigate a natural gas project's harm. 15 U.S.C. § 717f(e). FERC's Order should be upheld because the Commission followed the NGA's requirements, a rational connection exists between the evidence and FERC's findings, and the Order was not a transformative exercise of power based on a vague statute. Rather, § 717f(e) expressly grants this power.

#### ARGUMENT

**I. FERC's finding that TGP demonstrated public need for the AFP was not arbitrary and capricious because FERC considered relevant factors under the NGA and did not make a clear error in judgment.**

An agency's determination is not arbitrary and capricious when the agency relies only on relevant factors and does not make a clear error in judgment. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Further, the agency must "articulate

a satisfactory explanation for its action including a “‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Under the arbitrary and capricious standard, a court “may reverse only if the agency’s decision is not supported by substantial evidence.” *Safe Environment, Inc. v. Federal Aviation Administration*, 509 F.3d 593 (D.C. Cir. 2007).

In reviewing an agency determination, a court’s “scope of review under the ‘arbitrary and capricious’ standard is narrow.” *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292 (2016), *as revised* (Jan. 28, 2016) (quoting *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The relevant factors in FERC’s public necessity analysis are “all factors bearing on the public interest.” *Atl. Refin.*, 360 U.S. 378, 391 (1959).

**A. FERC must evaluate all factors bearing on the present and future public interest when evaluating public convenience and necessity.**

The Natural Gas Act is the source of FERC’s authority “to regulate the transportation and sale of natural gas in interstate commerce.” *City of Oberlin, Ohio v. FERC* (“*Oberlin II*”), 39 F.4th 719, 722 (D.C. Cir. 2022). Under 15 U.S.C. § 717f(e), FERC must issue a CPCN to “any qualified applicant” proposing a project that “is or will be required by the present or future public convenience and necessity”. The relevant factors to evaluate public convenience and necessity are “all factors bearing on the public interest.” *Atl. Refin.*, 360 U.S. 378, 391 (1959). A statute requiring the assessment of public interest is not “a broad license to consider the public welfare”, but “take[s] meaning from the purposes of the regulatory legislation.” *NAACP v. FPC*, 425 U.S. 662, 669 (1976). In *NAACP*, the Court held that the purpose of the NGA is encouraging the orderly development of plentiful supplies of natural gas at reasonable prices. *Id.* at 669-70.

FERC's finding of public convenience and necessity was not arbitrary and capricious because FERC weighed the relevant factors as informed by the NGA's purpose, and FERC's finding was supported by substantial evidence. FERC articulated a rational connection between the evidence before FERC and its finding of public need. Therefore, this Court should uphold FERC's determination.

FERC relies on its Certificate Policy Statement to evaluate all factors bearing on the public interest. *See Certification of New Interstate Nat. Gas Facilities ("Certificate Policy Statement")*, 178 FERC ¶ 61107, 61686 (2022). A natural gas facility may only be approved when the facility does not require subsidies from the company's existing customers to proceed. *Certificate Policy Statement*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000).

If the applicant satisfies the threshold requirement, FERC balances adverse effects that cannot be eliminated against the public benefits of the project, an exercise that "is essentially an economic test." *Oberlin II*, 39 F.4th 719, 722 (D.C. Cir. 2022) (quoting *Certificate Policy Statement*, 88 FERC at 61,745) Adverse effects include "increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property," and public benefits "include 'meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.'" *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) (quoting *Certificate Policy Statement*, 88 FERC at 61,748).

**B. FERC’s finding should be upheld because FERC properly explained why it credited export precedent agreements when evaluating public convenience and necessity.**

Export precedent agreements are “one input” to assess present and future public convenience and necessity. *Oberlin II*, 39 F.4th at 727 (D.C. Cir. 2022). In *Oberlin II*, the court upheld FERC’s finding of public convenience and necessity for a pipeline which was partially supported by export precedent agreements. *Id.* at 725. The City argued that FERC crediting export precedent agreements was arbitrary and capricious. *Id.* But once FERC gave a satisfactory explanation of why it credited the export agreements, the court held FERC explained a rational connection between the facts found and the choice made. *Id.* at 727.

FERC’s explanation in this case is similar to FERC’s explanation in *Oberlin II*. Three out of four factors that FERC relied on in *Oberlin II* are present in this case. While the *Oberlin II* pipeline was with a country with a free trade agreement with the United States, *id.* at 723, and thus statutorily considered in the public interest, 15 U.S.C. § 717b(c), the court also considered three other factors: (1) FERC’s explanation describing several domestic benefits from increased transportation services for gas shippers, *Oberlin II*, 39 F.4th at 727; (2) FERC’s explanation that the precedent agreements themselves were evidence of need for the capacity provided by the pipeline, *id.* at 727-28; and (3) FERC’s finding that agreements to transport gas would support the production and sale of domestic gas which support economic growth and domestic jobs regardless of whether the gas’s end use. *Id.*

The court relied on *Town of Weymouth v. FERC*, 2018 WL 6921213, at \*1 (D.C. Cir. Dec. 27, 2018), which reasoned that “a portion of the gas [being bound] for export” does not minimize the benefits that “flow” from the construction of the pipeline. *Oberlin II*, 39 F.4th 719, 727 (D.C. Cir. 2022). FERC may consider export precedent agreements while evaluating public convenience

and necessity, but it must rationally explain why it credits the agreements. *City of Oberlin, Ohio v. FERC* (“*Oberlin I*”), 937 F.3d 599, 606 (D.C. Cir. 2019).

Here, FERC considered that AFP did not depend on any subsidies from existing customers. Order at 7. TGP secured binding precedent agreements for 100% of the design capacity of the pipeline project. Order at 8. Further, FERC considered the benefits that flow from the precedent agreements securing the pipeline: (1) the pipeline deliver up to 500,000 Dth per day of natural gas to the interconnection with the NUG terminal and the NorthWay Pipeline; (2) provide natural gas to areas currently without access in New Union; (3) expand access to sources of natural gas supply in the United States; (4) optimize existing systems to benefit current and new customers by creating a more competitive market; (5) fulfill capacity in the undersubscribed Northway Pipeline; and (6) provide opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. Order at 8. Because FERC explained why it credited the export agreements based on benefits that flowed from the pipeline despite the end use of the gas, its finding should be upheld. *Oberlin I*, 937 F.3d at 606.

Further, FERC may consider the future public convenience and necessity when granting a certificate. 15 U.S.C. § 717f(e) (allowing FERC to grant a certificate when the facility “is or will be required by the present or future public convenience and necessity”). FERC’s explanation is adequate here based on the future public convenience and necessity. FERC found that while the existing Southway Pipeline currently transmits all oil produced in the HFF, the gas demands served by the Southway Pipeline are declining. Order at 9. Therefore, TGP’s pipeline would transmit gas that may not otherwise be purchased in the future. Order at 9. Because rational connection exists between the evidence before FERC and its decision, its decision should be upheld.

As informed by the NGA's purpose of encouraging the orderly development of plentiful supplies of natural gas at reasonable prices, *NAACP*, 425 U.S. at 669-70, FERC considered only relevant factors bearing on the public interest and adequately explained its findings. Thus, the finding of public convenience and necessity should be upheld.

**II. FERC's finding that the benefits from the AFP outweigh its environmental and social harms was not arbitrary and capricious because FERC considered proposed alternatives and imposed conditions to mitigate environmental and social harms.**

The National Environmental Policy Act ("NEPA") requires FERC to evaluate the environmental impact of each proposed project. *Midcoast Interstate Transmission v. FERC*, 198 F.3d 960, 967 (2000). However, the NEPA does not constrain FERC from deciding that the benefits of a project outweigh its environmental costs so long as FERC adequately identifies and evaluates the environmental effects of its proposed action. *Id.* These requirements are procedural in nature and do not require a particular result. *Myersville Citizens*, 783 F.3d at 1309. Instead, it only requires FERC to identify reasonable alternatives to its contemplated action and look hard at the environmental effects of its decision. *Id.* In this case, FERC considered HOME's proposed alternative to route the AFP through the Misty Top Mountains. Still, it ultimately declined to adopt the alternative because it would cause significantly more environmental damage. Order at 11. The FERC complied with the process prescribed by the NEPA, and there is a rational connection between the facts presented to the FERC and its decision; thus, the FERC's finding should be upheld.

**A. FERC considered the environmental impact of the AFP and examined reasonable alternatives to mitigate these impacts.**

The FERC must take a hard look at the environmental impacts of a proposed project and examine reasonable alternatives to those projects. *Midcoast Interstate Transmission*, 198 F.3d

at 967; *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 412 U.S. App. D.C. 97, 107 (2014). The FERC gives a project the requisite “hard look” if its decision is fully informed and sufficiently discusses the relevant issues the project poses. *Myersville Citizens*, 783 F.3d at 1309 (D.C. Cir. 2015). In other words, FERC satisfies the requirements imposed by the NEPA as long as it can fully articulate the basis for its decision. *Id.*

In this case, because FERC evaluated the AFP’s significant environmental impacts, FERC adopted remedial measures in its CPCN order to mitigate those impacts. The AFP passes through two miles of HOME property and requires the removal of approximately 2,200 trees and other forms of vegetation. Order at 10. While these trees cannot be replaced along the proposed route, the CPCN order adopted a condition requiring an equal number of new trees be planted in other locations. Order at 10. Further, TGP participated in the Commission’s pre-filing process and took affirmative steps to decrease the impacts of its project on HOME. For example, TGP agreed to bury the AFP through HOME property. Order at 10. TGP additionally agreed to expedite its construction to minimize disturbance. Order at 10.

The Commission considered an alternate route that avoids HOME property by crossing through the Misty Top Mountains, but declined to adopt it. Order at 11.

**B. FERC considered the proposed alternative and found it would cause more environmental damage.**

When a party raises a reasonable alternative to FERC’s position, the agency must either consider the alternative or explain why it declined to do so. *Id.* For example, in *Minisink Residents*, the Commission approved a proposal to construct a natural gas compressor station in Minisink, NY. *Minisink Residents*, 412 U.S. App. D.C. at 103. The residents in Minisink were resistant to the project and suggested FERC relocate the station to an alternative site. *Id.* They insisted the alternative site was better than the Minisink location. *Id.* However, this alternative site would



require replacing a 7-mile segment of pipe along the pipeline. *Id.* FERC balanced the two options and found that even though the alternative site had some favorable outcomes, the negative consequences of replacing the pipe outweighed those favorable outcomes. *Id.* Hence, the Commission preferred the Minisink location because it would cause less environmental damage. *Id.* Further, FERC adopted other mitigation measures to decrease the Minisink Location's environmental impact. *Id.*

Like the Minisink residents, HOME urged FERC to route the AFP through the Misty Top Mountains. Order at 11. However, HOME recognized this alternative would have significant environmental impact. Order at 11. The proposed route would be three miles longer and run through a more environmentally sensitive ecosystem. Order at 11. Furthermore, routing the AFP through the mountain range will add over fifty-one million dollars in construction costs. Order at 11. FERC weighed the two choices, considered the Environmental Impact Statement, and favored routing the AFP through HOME property because it would cause less environmental damage and more economic utility. Order at 4; Order at 11. Because there is a rational connection between the facts presented to FERC and its decision, the decision should be upheld.

### **III. FERC's decision to route the AFP over HOME property did not violate the RFRA because the route does not substantially burden HOME's exercise of religion.**

To establish a prima facie claim under the Religious Freedom Restoration Act ("RFRA"), the claimant bears the burden to show the governmental action substantially burdens their sincere exercise of religion. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008). To prove substantial burden, the claimant must show sufficient evidence that the government is forcing practitioners to choose between following the tenets of their religion and receiving a governmental benefit. *Id.* Alternatively, a claimant can show substantial burden with sufficient evidence that the government is coercing adherents to act contrary to their religious beliefs by

threat of civil or criminal sanctions. *Id.* at 1068. In other words, if the government action does not compel the adherents to modify their behavior and violate their beliefs, no substantial burden exists. *Id.* at 1069. If the claimant cannot meet this burden, the second prong to establish a claim under the RFRA fails. *Id.* at 1069.

In this case, HOME asserts routing the AFP over HOME property will substantially burden HOME's ability to participate in a sincere religious exercise, the Solstice Soujourn. The Solstice Sojourn is a ceremonial journey from a temple at the western border of the HOME property to a sacred hill on the eastern border of the property in the foothills of the Misty Top Mountains. Order at 11. The journey's path would cross the proposed buried pipeline's route in both directions. Order at 11. Undoubtedly, the Solstice Sojourn is an exercise of religion, thus satisfying the first element of the RFRA claim. Here, HOME cannot show that crossing a buried pipeline compels HOME to modify their behavior and violate their beliefs. Therefore, HOME's claim fails under the second prong of the RFRA's requirements—showing a substantial burden on HOME's exercise of religion.

**A. FERC is not forcing HOME practitioners to choose between following the tenets of their religion and receiving a governmental benefit.**

The government cannot back its citizens into a corner between a proverbial 'rock and a hard place' by compelling individuals to choose between adhering to their religion or forfeiting governmental benefits. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963). A law with this effect is similar to fining a worshipper for adhering to a certain religious practice. *Id.* For example, in *Sherbert v. Verner*, the claimant lost her job after she declined to work on Saturdays due to her faith. *Id.* at 399. She subsequently filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. *Id.* at 399–400. However, the Employment Security Commission ultimately denied benefits, *id.* at 400–01, and the South Carolina Supreme

Court affirmed. *Id.* at 402. It held the claimant's ineligibility did not infringe on her constitutional liberties because the construction of the statute did not restrict her freedom of religion or prevent her from practicing her faith, it merely denied a benefit. *Id.* at 402. But the Supreme Court reversed because the disqualification compelled the claimant to choose between her beliefs and benefits that she would otherwise be entitled to receive. *Id.* at 404.

In this case, however, the Order does not require HOME to choose between abandoning their beliefs and receiving a governmental benefit. Rather, the decision to bury the AFP through HOME land provides domestic benefits. The AFP serves multiple domestic needs, including but not limited to providing natural gas service to areas that need access to natural gas within New Union and optimizing the existing systems for the benefit of both current and new customers by creating a new market. Order at 8. Further, the pipeline provides future domestic benefits because the gas demands served by Southway Pipeline are declining. (Order at 9.) Unlike the Employment Security Commission's decision in *Sherbert*, FERC's decision in this case does not deny HOME a governmental benefit. The evidence does not support that a buried pipeline, that brings domestic benefits, would force HOME to choose between its exercise of religion and a benefit.

**B. The FERC is not coercing HOME to act contrary to their religious beliefs.**

The government may not compel citizens to act contrary to their religious convictions under the threat of civil or criminal sanctions. *Navajo Nation*, 535 F.3d at 1070; *see also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). However, if the government action does not require the individual to abandon their religious convictions to receive a governmental benefit, then there is no substantial burden on that individual. *See id.*

Here, it is undisputed that the production, transportation, and burning of fossil fuels contradict HOME's religious beliefs. Order at 11. Nonetheless, the mere presence of a buried

pipeline does not compel HOME practitioners to engage in any actions contrary to their faith. FERC is not forcing HOME to act contrary to the tenets of their faith under the threat of civil or criminal sanctions. Further, HOME is not being penalized in any way for practicing their faith. Instead, FERC added conditions to mitigate any subjective offense HOME practitioners may feel by burying the AFP. Order at 13.

Not only would the Order be able to continue the practice of Solstice Sojourn, but the FERC ensured the practitioners could do so without any physical obstacles by keeping the pipeline underground and expediting its construction. Order at 13. While the presence of the AFP may affect the practitioners, the extent of its effect is solely on the practitioners' subjective emotional experience. HOME members testified that even though there would be no physical obstacle in their path, walking on the path would be unimaginable. Order at 12. However, though serious and unfortunate, this decreased spiritual satisfaction does not count as a substantial burden on HOME's free exercise of religion. *See Navajo Nation*, 535 F.3d at 1070; *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

This issue is similar to an issue presented before the 9th Circuit Court of Appeals in *Navajo Nation*. In that case, the plaintiffs asserted the government's decision permitted an action that injured the plaintiff's religious beliefs by contaminating their land. *Id.* at 1063. Notably, the plaintiffs in *Navajo Nation*, like HOME, continued to have unlimited access to their sacred land for both religious and cultural purposes. *Id.* Further, the federal government's decision did not inhibit the plaintiffs' ability to pray or conduct their religious ceremonies. *Id.* The only effect of the decision was it would decrease the subjective spiritual satisfaction derived from practicing their religion on the affected land. *Id.* The court held that decreased satisfaction derived from the practice of religion is not enough to establish substantial burden. *Id.* Here, the only injury suffered

by HOME will be to their subjective spiritual satisfaction from embarking on the Solstice Sojourn. Therefore, this effect does not constitute a substantial burden.

**C. Even if the AFP substantially impacts HOME's exercise of religion, the CPCN should be upheld because the alternate route is more environmentally harmful and because a uniformly applicable permitting system is the least restrictive means of achieving the government interest.**

And even if there's a substantial impact on HOME's exercise of religion, the CPCN should be upheld because the alternate route would cause more environmental harm, be excessively expensive, and a uniform pipeline permitting system would be the least restrictive means of furthering the governmental interest. Order at 13; *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957 (E.D. Mich. 2014). (holding that the least restrictive means inquiry under RFRA involves weighing the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity.)

In *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000), the court held that applying federal employment tax laws to a church did not violate RFRA because maintain and efficient tax system was a compelling government interest, and uniformly applicable tax system was the least restrictive means of achieving that interest. Here, the NGA empowers FERC to encourage the orderly development of plentiful supplies of natural gas at reasonable prices. *NAACP v. FPC*, 425 U.S. 662, 669 (1976). A uniformly applicable natural gas permitting process is the least restrictive means of achieving this interest, so FERC's decision should be upheld.

**IV. The GHG Conditions imposed by FERC were not beyond FERC's authority under the NGA.**

This issue centers on whether the GHG Conditions FERC imposed on TGP's construction of the AFP exceeded FERC's authority under the NGA. Under the NGA, Congress authorized FERC to attach any conditions to the issuance of a CPCN that may be needed for the public's

convenience and necessity. 15 U.S.C. § 717f(e). Courts have historically shown great deference to FERC's discretion in attaching conditions to CPCNs. *See Great Lakes Gas Transmission Ltd. P'ship*, 984 F.2d 426 (D.C. Cir., 1993).

This court should hold that the GHG Conditions imposed by FERC were not beyond FERC's authority under the NGA. This is for two reasons: (1) FERC has very broad authority to impose conditions on issued Certificates of Public Convenience and Necessity; and (2) the conditions imposed on TGP's project do not implicate the major-questions doctrine.

**A. FERC has broad authority to impose conditions on issued Certificates of Public Convenience and Necessity.**

The plain language of the NGA, as well as the common law interpretation of “public convenience and necessity” in the context of other agencies, and the wide latitude of discretion courts have applied to FERC's decision-making indicate that the GHG Conditions imposed by FERC were not beyond FERC's authority under the NGA. To start, the NGA states that “[FERC] shall have the power to attach . . . such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). When interpreting statutes, courts must give effect to the language as it is expressed when the statute is unambiguous. *In re Sauer*, 403 B.R. 722, 727 (Bankr. D. Kan., 2009). A statute is only considered ambiguous when it is capable of being understood differently by reasonably well-informed people. *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1161 (10th Cir. 2011). Here, the only reasonable understanding of the statutory language is that FERC has the power to attach conditions to the issuance of a CPCN. This means that the statute is unambiguous. In this case, the effect is that FERC did not exceed its statutory authority by imposing the GHG Conditions.

Even if the plain language of the NGA was somehow ambiguous, FERC was within its authority to impose the GHG Conditions in this case after evaluating the “public convenience and necessity”. The Supreme Court held that the public convenience and necessity inquiry allows an agency to do its own fact-finding and exercise its judgment to determine whether public convenience and necessity exists. *ICC v. Parker*, 326 U.S. 60, 65 (1945). This shows how “public convenience and necessity” should be interpreted as applied to government agencies. Applying the Supreme Court’s definition to FERC indicates that it has the authority to determine whether public convenience and necessity exists when imposing conditions on CPCNs. This further shows that FERC did not exceed its authority when it imposed the GHG Conditions.

Finally, courts have consistently recognized FERC’s wide discretion to impose conditions on CPCNs. The D.C. Circuit Court of Appeals has stated that FERC has “extremely broad authority” to impose conditions on CPCNs. *Great Lakes Gas Transmission Ltd. P’ship* 984 F.2d at 432. In this case, the conditions imposed on the CPCN were imposed as a result of the extensive analysis in the Environmental Impact Statement prepared by TGP. Order at 15.

The D.C. Circuit Court of Appeals stated that FERC has authority to mitigate greenhouse gas emissions, even in cases where the gases are an “indirect effect” of authorizing the project. *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir., 2017). In this case, the Environmental Impact Statement prepared by TGP provides that the greenhouse gas impacts would be directly connected to the authorization of the project. Order at 15. Since FERC has authority to mitigate greenhouse gas emissions even when they are an indirect effect of authorizing a project, FERC had authority to issue the GHG Conditions in this case.

**B. The Conditions imposed on TGP’s construction of the AFP do not implicate the major-questions doctrine.**

The major-questions doctrine has no clear application in this case. Historically, the major-questions doctrine has applied to agency action when the history, breadth, and significance of the action makes a court hesitate before deciding that Congress meant to give the agency such authority to act. *N.C. Coastal Fisheries Reform Grp. v. Captain Gaston LLC*, 76 F.4<sup>th</sup> 291, 296 (4th Cir., 2023). The doctrine addresses measures taken by agencies representing a transformative expansion of their powers, based on vague language in long extant, but rarely used statutes designed as a gap fillers. *W. Va. v. EPA*, 142 S. Ct. at 2595 (Referring to a “major questions case” as one where an agency claimed to discover a “transformative expansion” of its authority in the “vague language” of a long extant, rarely used statute designed as a “gap filler.”)

Thus, the major questions doctrine may be implicated when an agency engages in an extremely significant exercise of power not clearly granted by statute. Here, 15 U.S.C. § 717f(e) clearly authorizes FERC to impose the kind of conditions it imposed on the CPCN. (Stating that FERC “shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder *such reasonable terms and conditions* as the public convenience and necessity may require.”); *id.* § 717b(a) (stating that FERC may “grant such application, in whole or in part, *with such modification and upon such terms and conditions as the Commission may find necessary or appropriate*”) Thus, FERC did not exercise an extraordinary expansion of authority based on vague language.

This is particularly evident when considering the circumstances in which courts have applied the major-questions doctrine, and those in which courts have not. Historically, courts have applied this doctrine only in instances of a clear overreach of agency authority. In *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Serv.*, 141 S.Ct. 2485, 2488-89 (2021). the major-questions



doctrine applied to stop the CDC from issuing a moratorium on eviction during the COVID-19 pandemic under its authority to adopt measures “necessary to prevent the... spread of disease.” *Id.*

In contrast, there has been at least one case where, similar to the current case, FERC used its authority in a new way and yet the major-questions doctrine did not apply. In *Transcontinental Gas Pipe Line Corp. v FERC*, 589 F.2d 186, 187 (5th Cir. 1979), FERC issued a CPCN with the condition that Transcontinental had to utilize the proposed pipeline at sixty percent capacity. The court noted that about twenty Certificates were issued to Transcontinental in past years, and that this was the first time the sixty percent condition was imposed. *Id.* at 190.

Yet, the court found the condition to be within FERC’s authority. *Id.* at 192. This shows that in the past, FERC has exercised its authority to condition its CPNCs in new manners, so FERC’s conditions on the AFP are not a transformative use of its power. FERC is within its authority under the NGA to impose conditions that mitigate greenhouse gases on the CPCN. *See Sierra Club* 867 F.3d at 1374. Thus, the major-questions doctrine does not apply in this case.

**V. FERC’s decision not to impose any Greenhouse Gas Conditions addressing downstream and upstream greenhouse gas impacts was not arbitrary and capricious.**

This issue focuses on whether FERC’s decision not to impose any GHG Conditions on TGP’s pipeline addressing downstream and upstream greenhouse gas impacts was arbitrary and capricious. FERC has congressional authorization to impose attach any conditions to the issuance of a CPCN that may be needed for the public’s convenience and necessity. 15 U.S.C. § 717f(e). However, Congress does not require FERC to actually exercise this power in any particular way. *See id.*

This court should hold that FERC’s decision not to impose any GHG Conditions addressing downstream and upstream greenhouse gas impacts was not arbitrary and capricious. This is for two reasons: (1) FERC is not required to impose conditions on the issuance of a CPCN; and (2)

FERC's decision is not arbitrary and capricious because a rational connection exists between the evidence before FERC and FERC's decision.

**A. FERC is not required to impose any conditions with the issuance of a CPCN.**

The language of the NGA provides that FERC "shall have the power" to attach conditions to a CPCN. 15 U.S.C § 717f(e). This language demonstrates congressional intent to place the choice of whether to impose a condition within FERC's discretionary authority. Furthermore, NEPA only requires FERC to take a "hard look" at problems raised by a project's Environmental Impact Statement. *Sierra Club*, 867 F.3d at 1376.

In this case, the Environmental Impact Statement prepared by Transnational Gas Pipelines showed that construction of the AFP would result in significant upstream and downstream greenhouse gas impacts. Order at 15. However, FERC does not yet have clear guidance on addressing upstream and downstream greenhouse gas impacts. Order at 18. Further, FERC found that the evidence did not fully support a finding that emissions would increase. Order at 18. Thus, it declined to exercise its discretionary authority to impose conditions on them. Order at 19. Because FERC took a "hard look" at the issue and the decision to impose conditions is within FERC's discretionary authority, FERC's decision was rationally based on the evidence before FERC and rational because of the lack of guidance on addressing GHG issues. Therefore, FERC's decision should be upheld.

**B. FERC's decision not to impose conditions on upstream and downstream greenhouse gas impacts was not arbitrary and capricious.**

Nothing about FERC's decision-making in this case indicates that its decision to not impose upstream or downstream GHG Conditions on the issuance of the CPCN was arbitrary or capricious. Under the Administrative Procedures Act, an agency action that is arbitrary or capricious must be set aside. *Biovail Corp. v. U.S. FDA*, 448 F.Supp.2d 154, 160 (D.C. Cir., 2006).

An agency action is usually arbitrary or capricious if “the agency has... entirely failed to consider an important aspect of the problem”. *Id.* Further, the scope of judicial review under this standard is narrow, and a court cannot substitute its judgment for that of the agency. *Id.* This means that the agency’s judgment may only be set aside if its judgment is clearly arbitrary or capricious. As explained, FERC’s decision not to attach conditions on upstream and downstream greenhouse gas emissions was not due to the agency’s failure to consider the problem. Rather, the decision was due to a lack of guidance in dealing with the problem. Since FERC’s decision was not due to a failure of the agency to consider the problem, the decision was not arbitrary and capricious.

### **CONCLUSION**

The NGA empowers FERC to engage in a cost benefit analysis considering present and future effects on the public interest, and to impose conditions to mitigate a project’s social and environmental harms. TGP showed evidence of public need by securing binding precedent agreements for 100% of the pipeline’s capacity, and that the pipeline benefits the future public benefit considering the Southway’s pipeline decline. TGP’s plan and FERC’s Order mitigate the harm to HOME’s religious practices, and FERC’s power to mitigate harm does not implicate a major question.