No. 23-01109

Docket No. 23-01110
CONSOLIDATED WITH
Docket No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

The Holy Order of Mother Earth
Petitioner-Appellee

-and-

Transnational Gas Pipelines, LLC
Petitioner-Appellee

v.

United States Federal Energy Regulatory Commission
Respondent-Appellant

On Appeal from Federal Energy Regulatory Commission's Order Denying Rehearing
Docket No. TG21-616-000.

Brief of Appellant, FEDERAL ENERGY REGULATORY COMMISSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT CASES **PAGE**

STATUTES

REGULATIONS

ADMINISTRATIVE CASES

OTHER AUTHORITIES

GLOSSARY

Rehearing Order	Order Denying Rehearing, *Transnational Gas Pipelines, LLC*, 199 F.E.R.C. ¶ 72,201 (2023)
Policy Statement	Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further certified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement). On March 24, 2022, the Commission issued an order converting the policy statements issued in February 2022 to draft policy statements. *See* Certification of New Interstate Nat. Gas Facilities, 178 FERC ¶ 61,197 (2022) (Order on Draft Policy Statements)
Commission or FERC	Respondent Federal Energy Regulatory Commission
HOME	Petitioner The Holy Order of Mother Earth
TGP	Petitioner Transnational Gas Pipelines, LLC
AFP	American Freedom Pipeline
NGA	Natural Gas Act
CPCN	Certificate of Public Convenience and Necessity
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
RFRA	Religious Freedom Restoration Act
HFF	Hayes Fracking Field
M&R Station	Meter, Regulation, and Delivery Station
MQD	Major Questions Doctrine
CEQ	Council on Environmental Quality

STATEMENT OF JURISDICTION

Congress has allowed the Commission to determine when a pipeline meets the public convenience and necessity standard, and that determination is subject to judicial review. *City of Oberlin v. FERC*, 937 F.3d 599, 604 (D.C. Cir. 2019). When a petitioner seeks review of a final order of the Federal Energy Regulatory Commission ("Commission" or "FERC"), the United States Court of Appeals for the Twelfth Circuit has jurisdiction under 15 U.S.C.S. § 717r(b). Any party "aggrieved" by an order of the Commission, may petition for review of that order, after they seek rehearing with the Commission. Natural Gas Act, 15 U.S.C. § 717r(b); *City of Oberlin*, 937 F.3d at 604. Jurisdiction is proper here because the Petitioners meet this criteria and the appeal was filed in a timely manner.

STATEMENT OF ISSUES PRESENTED

The Commission conditionally approved an application to construct and operate natural gas pipeline facilities. The questions presented on appeal are:

I. Whether the Commission's determination that Transnational Gas Pipeline, LLC ("TGP") demonstrated a public need for the American Freedom Pipeline ("AFP") despite the fact that approximately 90% of the gas carried by the pipeline will be exported to Brazil.

II. Whether the Commission's finding that the benefits from the AFP outweighed the environmental and social harms was arbitrary and capricious.

III. Whether the Commission's determination that routing the pipeline across The Holy Order of Mother Earth's ("HOME") land, despite religious objections, violates the Religious Freedom Restoration Act ("RFRA").

IV. Whether the conditions in the Certificate of Public Convenience and Necessity ("CPCN") addressing mitigation of greenhouse gas impacts are beyond the Commission's authority under the Natural Gas Act ("NGA").

V. Whether the Commission's determination requires mitigation of upstream and downstream greenhouse gas impacts of the AFP.

STATEMENT OF THE FACTS

I. Statutory and Regulatory Background

A. Natural Gas Act

Congress passed the NGA to encourage "the orderly development of plentiful supplies of natural gas at reasonable prices." *NAACP v. FPC,* 425 U.S. 662, 670 (1976). In the NGA, Congress also declared that the transportation and sale of natural gas in interstate commerce for ultimate distribution to the public is in the public interest. 15 U.S.C. § 717(a). To accomplish this goal, NGA Sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale of natural gas in interstate commerce. *Id.* §§ 717(b), (c).

Before a company may construct a natural gas pipeline, it must obtain from the Commission a "certificate of public convenience and necessity" ("CPCN"). *Id.* § 717f(c). According to Section 7(e) the Commission shall issue a CPCN to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." *Id.* § 717f(e). The Commission has a wide range of discretionary authority in determining whether certificates shall be granted. *FPC v. Transcon. Gas Pipe Line Corp.,* 365 U.S. 1, 7 (1961). The NGA also allows the Commission to "attach to the issuance of the certificate…such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e).

Once the Commission issues a CPCN, the pipeline company may acquire necessary rights-of-way through eminent domain. *See Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 110–11 (D.C. Cir. 2018). Federal eminent domain power is at times necessary to "ensure the CPCN's could be given effect." *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2253 (2021). The exercise of eminent domain is not contrary to the language of Section 7 of the NGA. 15 U.S.C. § 717f(h).

Section 3 of the NGA, gives the Commission authority over the construction and operation of natural gas import and export facilities. 15 U.S.C. § 717b; *Sierra Club v. FERC*, 827 F.3d 36, 40 (D.C. Cir. 2016). Section 3(a) provides that the Commission "shall issue" an import or export authorization unless it finds that the proposed facility "will not be consistent with the public interest." 15 U.S.C. §717b(a). Section 3 only applies when there will be construction of import and export facilities or where the exported gas will be carried via border crossing pipelines. *E.g.*, *Sierra Club*, 827 F.3d at 40. When an interstate pipeline does not meet these requirements, but may eventually serve an international market, Section 3 of the NGA may be instructive. *See City of Oberlin v. FERC*, 39 F.4th 719, 726–28 (D.C. Cir. 2022).

B. Certificate Policy Statement

The Commission has established a policy for certifying new pipeline construction. Certification of New Interstate Natural Gas Pipeline Facilities, 88 F.E.R.C. ¶ 61,227, 61737 (Sept. 15, 1999)("Policy Statement"). The Policy Statement provides the Commission with a multi-step analysis. First, a pipeline must be able to proceed without subsidies from its existing customers. *Id.* ¶ 61,745. Next, the Commission will evaluate the adverse effects on the interests of the applicant's existing customers, competing existing pipelines and their caprice customers, and landowners and surrounding communities. *Id.* ¶ 61,747. Once the pipeline applicant has

made efforts to eliminate or minimize any adverse economic effects, the Commission balances any residual potential adverse economic effects against the project's public benefits. *Id.* ¶¶ 61,745-46, 61,748-50. This analysis is essentially an economic test. *See id.* ¶ 61,745.

The purpose of this policy statement is to provide the natural gas industry with an analytical framework the Commission will use to evaluate proposals for certificating new construction. *Id.* ¶ 61,737. It sets forth several considerations the Commission should apply to each of these steps. Public benefits can include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, new interconnects that improve interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." *Minisink Residents for Env't Pres. & Safety v. FERC,* 762 F.3d 97, 101 n.1 (D.C. Cir. 2014).

The Commission also explains, the balancing analysis should consider the use of eminent domain and how much benefits must be shown to offset such an adverse economic interest. 88 F.E.R.C. ¶ 61,749. However, in most cases "it will not be possible to acquire all the necessary right-of-way by negotiation." *Id.* Lastly, the Commission will complete an environmental analysis only when the public benefits outweigh the adverse effects on economic interests. *Id.* ¶ 61,745.

C. National Environmental Policy Act

The Commission's consideration of an application for a CPCN triggers environmental review. *See* National Environmental Policy Act, 42 U.S.C. § 4332. The National Environmental Policy Act ("NEPA") delineates procedures to be followed by federal agencies to guarantee that the environmental effects of a proposed action are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989). These requirements are

purely procedural, they do not ensure a specific outcome. *Theodore Roosevelt Conservation P'ship v. Salazar,* 616 F.3d 497, 503 (D.C. Cir. 2010).

NEPA requires agencies to prepare either an environmental assessment supported by a finding of no significant impact, or a more comprehensive environmental impact statement ("EIS"). NEPA and Agency Planning, 40 C.F.R. § 1501.4 (2023). This forces agencies to consider the environmental effects of a proposed action, and "promote efforts that will prevent or eliminate damage to the environment." 42 U.S.C. § 4332. Typically environmental effects will be adequately identified and evaluated in the EIS. The EIS must contain a detailed discussion of possible mitigation measures and how the adverse environmental effects can be avoided. *Id.* § 4332 (C)(ii). Moreover, the agency must consider alternatives to the proposed action, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action. *Id.* §§ 4332 (C)(iii), (v). However, if the adverse environmental effects are adequately identified and evaluated, the agency is not constrained by NEPA and may decide that other values outweigh the environmental costs. *Robertson,* 490 U.S. at 350.

D. Religious Freedom Restoration Act

In the wake of the Supreme Court's decisions in *Employment Division, Department of Human Resources of Oregon* and *City of Boerne,* the Religious Freedom Restoration Act of 1993 ("RFRA") was passed to ensure greater protection of religious exercises than the First Amendment. *Ramirez v. Collier*, 595 U.S. 411, 425 (2022). RFRA requires a strict scrutiny analysis when examining the impact on the exercise of one's religion. Under the typical First Amendment Analysis, any law that was facially neutral and generally applicable would survive any scrutiny. *Ramirez*, 595 U.S. at 441. RFRA strengthened this test for any government action that "substantially burdened" one's free exercise of religion. Religious Freedom Restoration Act,

42 U.S.C. 2000bb-1. If it is found that a substantial burden exists, the government must prove a compelling governmental interest and act in the least restrictive means necessary to achieve that interest. *Id*.

II. Statements of the Case

In the orders on review, the Commission issued a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act to TGP, authorizing it to build and operate the American Freedom Pipeline ("AFP"). 15 U.S.C. § 717f(c); *Rehearing Order*, ¶ 2.

A. Project Overview

The AFP is approximately 99 miles long, and 30 inches in diameter. The AFP will span from a receipt point in Jordan County, Old Union, to a proposed interconnection with an existing TGP gas facility in Burden County, New Union. Also included in the AFP proposal is the construction of a new facility to be built at the receipt point in Jordan County. The proposed project will cost approximately $599 million. *Rehearing Order*, ¶ 10.

The AFP is intended to provide up to 500,000 dekatherms ("Dth") per day of firm transportation service. *Id.* ¶ 1. The natural gas to be transported by the AFP is produced in the Hayes Fracking Field ("HFF") in Old Union. *Id.* ¶ 12. Presently, the Southway Pipeline transports natural gas from HFF, however the demand for liquefied natural gas ("LNG") has been declining in the regions served by the Southway Pipeline. The precedent agreements do not provide additional production at HFF, instead it will reroute approximately 35% of the production at HFF through the AFP rather than the Southway Pipeline. *Id.*

TGP executed two binding precedent agreements for 100% of the capacity provided by the AFP. Of that capacity 450,000 Dth per day were contracted with International Oil & Gas Corporation ("International") and 50,000 Dth per day were contracted with New Union Gas and

Energy Services Company ("New Union"). *Id.* ¶ 26. International operates a meter, regulation, and delivery station ("M&R station") on the shore of Lake Williams in New Union City. *Id.* ¶ 14. Thus, the LNG purchased by International will come from HFF, traverse the AFP and then be diverted into the NorthWay Pipeline, which is not currently operating at full capacity. International's M&R station will receive its purchased gas from the LNG diverted to the NorthWay Pipeline. This LNG will then eventually be exported to Brazil. *Id.* ¶ 24. TGP also contends in its application that the AFP will serve multiple domestic needs:

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

Id. ¶ 27.

B. Order Denying Rehearing

On June 1, 2023, the Commission entered an Order Denying Rehearing ("*Rehearing Order")*. The Commission addressed each of the issues presently before the Court, and effectively denied rehearing on all arguments.

The Commission first explained that its issuance of the CPCN was an appropriate exercise of its authority under the NGA as well as a common exercise of discretion in accordance with precedent. Specifically, the Commission found that the "benefits the TGP Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities." *Rehearing Order*, ¶ 3.

With respect to the project need finding, the Commission explains TGP demonstrated a strong showing of public benefit based on the executed precedent agreements for 100% of the

subscribed capacity of the AFP. *Id.* ¶ 26. Further, TGP demonstrated multiple domestic needs such as: providing transportation for domestically produced gas, providing gas to domestic customers, and filling additional capacity at the International M&R station. The Commission also notes the potential future need where demands served by the Southway Pipeline are diminishing and may eventually need to be transmitted by the AFP to be purchased in the future. *Id.* ¶ 34.

In response to the argument raised by HOME, where the project fails to demonstrate a sufficient need due to 90% of the gas transported by the pipeline being exported internationally, the Commission explains that export precedent agreements are "valid consideration in determining the need for a project." *Id.* ¶ 30. In support of this explanation the Commission references *City of Oberlin v. FERC*, where the Court of Appeals held that "export precedent agreements are simply one input into the assessment of present and future public convenience and necessity." *Rehearing Order*, ¶ 30 (quoting *Oberlin*, 39 F.4th at 727). Moreover, the Commission notes that exported LNG still serves the "public interest," and they do not put significant weight on the end use of the LNG transported by the pipelines. *Rehearing Order*, ¶ 33.

Further in response to HOME's argument that the Commission did not properly weigh the benefits and adverse effects of the project, the Commission explains the mitigation measures undertaken by TGP were sufficient to minimize the adverse effects. *Id.* ¶ 41. These measures include: Changes to over 30% of the proposed pipeline route in order to address concerns raised by landowners and expediting construction to "the extent feasible" across HOME property. *Id.* ¶ 41. Thus the benefits were not outweighed by any residual adverse effects. *Id.* ¶ 40. The Commission also recognizes TGP will likely have to exercise eminent domain when constructing

the pipeline, however such use is common to the construction of pipelines, and is allowed under the NGA. 15 U.S.C. § 717f(h). Thus, it was not significant to the Commission's consideration of adverse economic impacts. *Rehearing Order,* ¶ 43.

The Commission indicates that the issue of a potential RFRA violation was brought to its attention during the comment portion of the CPCN, and it addressed such a violation through the imposition of a condition in the CPCN. *Id.* ¶ 56. TGP was to bury the pipeline over the area where it would cross HOME property. *Id.* Due to the conditions imposed under the CPCN and the mitigation efforts undertaken by TGP, the Commission explained there would not be a substantial impact to HOME's religious practices. *Id.* ¶ 61. As a result, the Commission determined strict scrutiny was not the applicable standard. *Id*.

Next, the Commission explains the conditions imposed in the CPCN order were within its authority. *Id.* ¶ 68. The Commission primarily relies on published interim guidance by the Council on Environmental Quality ("CEQ Guidance"), in which it expressly encourages agencies to "mitigate greenhouse gas emissions associated with their proposed actions to the greatest extent possible." *Id.* ¶ 69 (quoting 88 Fed. Reg. 1196 (Jan. 9. 2023)). The Commission notes this guidance is not binding for the agency, however it is generally followed in practice and is based on existing statutory and regulatory requirements. *Rehearing Order*, ¶ 70. This is further supported by the language in the NGA, under which the Commission may "attach to the issuance of the certificate… reasonable terms and conditions as the public convenience and necessity may require." *Id.* ¶ 71 (quoting 15 U.S.C. § 717f(e)). The NGA unambiguously empowers the Commission to set specific terms and conditions when granting authorization, thus the Commission reasons it cannot be addressing a "major question" by conditioning GHG emissions. *Rehearing Order*, ¶¶ 86, 87; 15 U.S.C. § 717f(e). The Commission also reasoned that the

conditions imposed do not require more precise statutory authorization because precedent has upheld similar mitigation measures. *Rehearing Order*, ¶ 79 (citing *Sierra Club*, 867 F.3d at 1374).

Lastly, the Commission rationalizes that upstream and downstream emissions are not relevant to the conditions imposed here. *Rehearing Order*, ¶ 74. In Section 7 proceedings upstream emissions are considered on a case-by-case basis, primarily because they can be difficult to quantify. *Id*. Here, specifically, the HFF gas is already in production and being transported, so there is no reasonably foreseeable upstream consequence of approval of the project. *Id*. Downstream impacts are dependent on the schedule of the facility, which varies based on peak shippers' schedules, and the Council on Environmental Quality ("CEQ") is currently drafting guidance on how to address these impacts. The Commission is not required to impose conditions for mitigating these impacts after finding that construction will have substantial impacts, instead it is within its discretionary authority to decide what conditions are necessary. *Id.* ¶ 97. NEPA does not mandate a specific outcome or mitigation measures, it only requires the Commission to take a "hard look" at potential impacts. *Id.*; *Sierra Club*, 867 F.3d at 1376.

SUMMARY OF THE ARGUMENT

In approving the AFP, the Commission properly considered the export precedent agreement as one of the many factors when choosing to grant a CPCN. This consideration is supported by the statutory language of the NGA, as well as case law. It has been settled that precedent agreements, even ones for export, are significant evidence of project need, and are "simply one input into the assessment of present and future public convenience and necessity." *Oberlin*, 39 F.4th at 725. The Commission also evaluated several other domestic benefits

stemming from the AFP. Further, based on the evaluation of these benefits, relevant case law, and statutory authority, the Commission reasonably concluded the finding of domestic public benefits in addition to the precedent agreement were substantial evidence that justified the CPCN determination.

The Commission's finding that the benefits from the AFP outweighed the environmental and social harms was not arbitrary and capricious. The Commission has broad discretion when reviewing benefits and harms related to new pipeline construction. When reviewing the AFP, the statutory scheme of review set out in the NGA was followed. The Commission made detailed findings of fact and thus their decision was not made in an arbitrary and capricious manner.

Additionally, the Commission's decision does not violate RFRA. The decision does not place a substantial burden upon HOME's exercise of religion because it does not force them to violate their religion. The decision is also the least restrictive means of furthering a compelling government interest. The CPCN's benefits generate a compelling government interest that can only be achieved via construction of the AFP on HOME property. Thus, the Commission does not violate RFRA, and still satisfies the standard of strict scrutiny.

The Commission's decision to impose conditions on GHG emissions resulting from construction of the AFP was wholly within its statutory authority. The NGA provides that the Commission shall issue a CPCN prior to the construction or expansion of any natural gas facility. The act further provides that the Commission may attach to the CPCN such reasonable conditions that the public convenience and necessity may require. The Commission also met its requirements under NEPA and the APA to impose GHG emission conditions. NEPA requires agencies take a "hard look" and the potential environmental impacts of the project before making any decisions; the APA requires agency action to not be arbitrary and capricious. Since the

Commission made detailed findings about the GHG emissions that would result from construction and later upstream and downstream impacts, it cannot be said that the Commission did not adhere to these statutory requirements. In light of this broad authority and careful decision making, the Commission's decision to only impose conditions on construction emissions and not on upstream and downstream ones was not arbitrary and capricious.

The Commission satisfied all of its statutory responsibilities in approving the AFP. The decision to grant a CPCN was an informed and well-reasoned one. The adverse impacts were fully identified, described, analyzed, and appropriately balanced against the pipeline's benefits. Further, Congress delegated to the Commission broad discretionary authority to determine whether a project meets the criteria under the NGA. While both the Petitioners do not believe the Commission made all the right decisions in approving the AFP, they failed to show that the Commission's choices were unreasonable or departed in any way from policy or precedent. Therefore, this Court should defer to the Commission's well-reasoned and supported decision, and dismiss the Petitioner's claims.

STANDARD OF REVIEW

The Court of Appeals' review of the Commission's decision is limited to determining whether the order was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Administrative Procedure Act, 5 U.S.C. § 706(2)(A)(2023). If supported by substantial evidence, the Commission's findings of fact are conclusive. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). The Commission's decision making must be "reasoned, principled, and based upon the record." *Id.* Because the grant or denial of a Section 7 certificate of public convenience and necessity is a matter peculiarly within the discretion of the Commission, the court should not substitute its judgment for that of the

Commission. *Nat'l Comm. for the New River, Inc. v. FERC,* 373 F.3d 1323, 1327 (D.C. Cir. 2004). Thus, when considering the Commission's evaluation of scientific data within its technical expertise, the court affords the Commission an extreme degree of deference. *Myersville*, 783 F.3d at 1308. The court reviews the Commission's factual findings to ensure they are supported by substantial evidence, or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The standard requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence. *Id*.

ARGUMENT

I. The Commission Appropriately Considered the International Precedent Agreement as Part of its Determination of Public Convenience And Necessity, Thus the Decision was not Arbitrary and Capricious

A. The NGA and Precedent Support Considering Agreements to Transport Gas Destined For Export When Determining Public Convenience and Necessity

Under the NGA, regulatory oversight for the export of LNG and supporting facilities is divided between the Commission and the Department of Energy ("DOE"). *EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016)**.** The DOE retains exclusive authority over the export of LNG as a commodity, however it has delegated the Commission authority to approve or disapprove facilities and operation of an LNG terminal for exporting. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1325 (D.C. Cir. 2021). The Commission also retains authority over the construction and operation of facilities used to transport and sell gas interstate and requires natural gas companies to receive a certificate before constructing or operating such a facility. 15 U.S.C. § 717f(c)(1)(A).

The NGA defines "interstate commerce" to exclude foreign commerce, thus if a pipeline engaged in foreign but not interstate commerce, the applicant would be outside the Commission's Section 7 authority. *Oberlin*, 39 F.4th at 723. Section 3 of the NGA controls when

the proposed project includes export facilities and/or border crossing pipelines. Here, the AFP will be built to transport LNG to an already existing, separate export facility, served by the Northway Pipeline. The AFP is clearly an interstate pipeline and "gas commingled with other gas undisputedly flowing in interstate commerce, becomes itself interstate gas." *Okla. Nat. Gas Co. v. FERC*, 128 F.3d 1281, 1285 (D.C. Cir. 1994). Thus, Section 3 of the NGA is not applicable, however, foreign precedent agreements may be considered when issuing a certificate of public convenience and necessity. *Oberlin*, 39 F.4th at 728.

When determining whether to grant a CPCN under Section 7, the Commission must first consider whether the project can proceed without subsidies from the company's existing customers. 88 F.E.R.C. ¶ 61,745. Then, the Commission is required to evaluate *all factors* bearing on the public interest. *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.,* 360 U.S. 378, 391 (1959) (emphasis added). Precedent agreements, regardless of who they are with, are significant evidence of public need. *See Oberlin,* 39 F.4th at 725. These agreements may demonstrate both market need and benefits that outweigh adverse effects. *EDF v. FERC*, 2 F.4th 953, 972 (D.C. Cir. 2021).

In *Appalachian Voices v. FERC*, the court held that the Commission's conclusion that there was a market need for the project was reasonable and supported by substantial evidence, due to the long-term precedent agreements for 100% of the project's capacity. *Appalachian Voices v. FERC*, No. 17-1271, 2019 U.S. App. LEXIS 4803, at *15 (D.C. Cir. Feb. 19, 2019). Here, TGP entered into precedent agreements for 100% of the Project's capacity. These agreements contribute significant evidence in support of the Commission's discretionary decision.

In *EDF v. FERC*, the court held that it was arbitrary and capricious for the Commission to rely solely on a single precedent agreement to establish the market need for a proposed pipeline. 2 F.4th at 973. In contrast, here the Commission relies on two precedent agreements and several additional domestic benefits as discussed below. Based on the precedent set in *EDF v. FERC*, it is unlikely a decision based on more than one precedent agreement and several other noted domestic benefits, will be considered arbitrary and capricious. *See id.*

Most notably in *City of Oberlin v. FERC*, the court expressed that there is nothing in Section 7 of the NGA that prohibits considering export precedent agreements in the public convenience and necessity analysis. 39 F.4th at 726. Further, the court is more likely to give the Commission an opportunity to provide further explanation if needed, as opposed to overturning the Commission's discretion. *Id.* Courts are reluctant to substitute their own judgment for that of the Commission. *Myersville Citizens*, 783 F.3d at 1306.

Here, the Commission does not credit the precedent agreements as more weighted than the other considerations for public convenience and necessity, but instead explains it is well within their authority to consider such agreements. The Commission states that "export precedent agreements are simply one input into the assessment of present and future public convenience and necessity." Certification of New Interstate Nat. Gas Facilities, 178 F.E.R.C. ¶ 61,107, 61,686 (2022).

The Commission addresses the difference in percentage of the precedent agreements in the Nexus pipeline in *Oberlin* and the AFP. The Commission notes that while exported gas may not directly benefit domestic needs for gas supply, the precedent agreements are sufficient to demonstrate public necessity. In fact, LNG that is produced in the United States and exported serves the "public interest" by contributing to development of the gas market. *Oberlin*, 39 F.4th

at 727. The importation and exportation of domestic products adds to the efficiency and economy of international trade in gas and domestic consumers. *See, e.g.*, Sierrita Gas Pipeline, LLC, 147 F.E.R.C. ¶ 61,192 at PP 35-37 (2014). In addition, the end use of the LNG does not hold significant weight, especially when it also serves a domestic purpose before it is exported. *See Oberlin*, 39 F.4th at 727. Here, the potentially exported gas will be intermingled with domestic gas throughout the entire length of the AFP and fills additional capacity at the International Station.

Even without the export agreement, the AFP holds a domestic precedent agreement that will serve 10% of the pipelines subscribed capacity. The Commission's policy does not require a particular percentage of subscribed capacity to be used. *See* 88 F.E.R.C. ¶ 61,750. This policy was put in place specifically because a bright-line percentage fails to account for other public benefits a project may provide. *Id.* The fact that the AFP is posed to use 100% of its subscribed capacity already places the importance of this pipeline above other case precedent where less than the whole pipeline was used even with an export precedent agreement. *See Oberlin*, 39 F.4th at 729 (stating the subscribed capacity with export agreements totaled only 59%); *see also Myersville Citizens*, 783 F.3d at 1309 ("all the proposed capacity has been subscribed under long-term contracts, demonstrating the existence of a market for the project.").

B. The Commission Reasonably Found The Project Need Was Supported by Substantial Evidence

In accordance with the Commission's responsibilities under the NGA, the Commission considered additional factors of public need and convenience. The Commission explained the AFP provides transportation for domestically produced gas, provides gas to some domestic customers, and fills additional capacity at the International Station; thus, there was sufficient demonstration of public necessity. These explanations support a rational connection between the

facts found and the choice made by the Commission.[1] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. Under the NGA, The Commission is Required To Consider Present or Future Public Convenience and Necessity.

The Commission is granted exclusive authority over whether an application to construct natural gas facilities "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). Courts have consistently held that present benefits are not the only factors contributing to a finding of public convenience and necessity. *Pittsburgh v. Fed. Power Com.*, 237 F.2d 741, 752 (D.C. Cir. 1956) ("The needs of yesterday require no fulfillment if they be not the needs of tomorrow.") Congress delegated to the Commission the "responsibility to analyze past and present and then to exercise rational judgment upon the data to ascertain the public convenience and necessity in the reasonably foreseeable future." 178 F.E.R.C. ¶ 61,686.

Here, the Commission notes the gas demands served by the Southway Pipeline are diminishing so the AFP will potentially transport more gas that will be purchased in the future (either domestically or internationally). Thus, there is a distinct possibility the AFP may eventually need to fulfill the demand previously satisfied by the Southway Pipeline. It is important to note, future public convenience can be difficult to conclusively evaluate, especially due to the changing nature of energy. *See* Alexandra B. Klass, *ARTICLE: Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change: A Spotlight on FERC and the Courts*, 39 Yale J. on Reg. 658, 691 (2022). Therefore, it is within the Commission's discretion

[1] The standard of review for informal adjudication is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A), (E). Here the agency action is clearly informal adjudication, as its certification process is essentially the same as a typical permitting process. Regardless, the record does support a determination supported by substantial evidence. Meeting a more stringent standard, means a lower standard of review is not only met but exceeded.

to evaluate project need on a case-by-case basis by determining how much additional evidence is required. 178 F.E.R.C. ¶ 61,688.

The Commission properly exercised its discretion in evaluating and balancing relevant factors under the Certificate Policy Statement for determining the need for the Project and whether it will serve the public interest.[2] The record provides substantial evidence in support of the Commission's finding. An essential criteria for determining public need and convenience is whether the project can proceed without subsidies from the existing pipeline's customers. 88 F.E.R.C. ¶ 61,745. It is undisputed that TGP meets this threshold requirement, so this is not at issue here. The Commission is then to assess the potential benefits from the project. *Id.* In *Minisink v. FERC*, the Court noted examples of public benefits including: meeting unserved demand, access to new supplies, lower costs, providing new interconnects that improve interstate grid, or advancing clean air objectives. 762 F.3d at 101.

Each of the benefits detailed in the record follow the Commission's policy and precedent. The record shows in addition to delivering up to 100% of the subscribed capacity, the AFP will (1) provide natural gas service to areas currently without access within New Union; (2) expand access to sources of natural gas supply in the US; (3) fulfill capacity in the undersubscribed North Way Pipeline; (4) optimize the existing systems for the benefit of current and new customers by creating a more competitive market; and (5) provide opportunities to improve regional air quality by using cleaner-burning natural gas as opposed to dirtier fossil fuels.[3]

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[2] The Commission is "the guardian of the public interest," and is entrusted "with a wide range of discretionary authority." *Columbia Gas Transmission Co. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984).

[3] *See Minisink*, 762 F.3d at 102 n.1 (noting the additional benefits pipelines serve environmentally and economically); *Oberlin*, 39 F.4th at 727 (acknowledging the benefit of adding additional capacity to transport gas); *Appalachian Voices*, 2019 U.S. App. LEXIS 4803 at *15 (holding that precedent agreements for 100% of the pipeline's subscribed capacity demonstrated public need).

As discussed previously, HOME's argument that 90% of the gas will be exported does not undermine the Commission's finding. HOME fails to reconcile the fact that the Commission did not base its finding solely on the precedent agreements. HOME is essentially asking the Commission to ignore other contrary evidence that is likely to force the Commission to reach a determination inconsistent with the weight of evidence. 178 F.E.R.C. ¶ 61,686. While most courts have almost exclusively relied on precedent agreements to establish project need, a project cannot be adequately assessed without looking at evidence beyond such agreements. *Id*. The agreements alone are not sufficient to establish need for the project, thus it is unlikely they will be considered determinative of a finding of project need. *Id.* The 1999 Policy Statement provides that:

> Rather than relying only on one test for need, the Commission will consider *all relevant factors* reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.

88 F.E.R.C. ¶ 61,747 (emphasis added). The record clearly indicates several of these relevant factors including demand projections in the form of filling the unsubscribed capacity of the NorthWay Pipeline, potential cost savings to consumers via the expansion of access to the natural gas supply in the United States and optimization of the existing systems specifically by interconnecting the NorthWay and Southway Pipelines thereby improving the existing interstate grid.

Substantial record evidence properly supports the Commission's finding of public convenience and necessity. The Commision applied the Certificate Policy Statement Criteria and further followed precedent by acknowledging several other present and future domestic benefits contributing to their finding, in addition to the precedent agreements. The record clearly

indicates a "public need" that, while supported by an international precedent agreement, is merely one of the many relevant factors evaluated at the discretion of the Commission. Thus, the Commission has successfully surpassed the standard of substantial evidence. Following the finding of substantial evidence of public benefits, the Commission must conclude such benefits outweigh the residual impacts. 88 F.E.R.C. ¶ 61,745.

II. The Commission's Finding That The Benefits From The AFP Outweighed The Environmental and Social Harms Was Not Arbitrary and Capricious.

The Commission properly weighed the benefits and harms of the proposed pipeline under the powers granted to them through 15 U.S.C § 717. The Commission has the "sole authority" to issue a CPCN for pipeline construction. *Adorers of the Blood of Christ United States Province v. Transcontinental Gas Pipe Line Co.*, 53 F.4th 56, 58 (3d Cir. 2022). The Commission must grant this certificate, unless through the hearing process it finds that construction of the pipeline would not be consistent with the public interest. 15 U.S.C § 717f.

A. The Commission Has Broad Discretion When Reviewing Benefits And Harms Related To New Pipeline Construction.

Through the NGA's "exhaustion provision," the Commission was granted the broad powers of exclusive jurisdiction to review the process of issuing a CPCN. *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 195 (3d Cir. 2018). Under the specific review scheme created by Congress through the NGA, de novo review is precluded, and the outcome of the Commission's review may only be reversed if it is found to be arbitrary and capricious. *Id* at 197. The court is not meant to usurp and substitute their judgment for that of the Commission. *Motor Vehicle Mfrs.*, 463 U.S. at 43. Therefore, it can only be said that the Commission's decision that the benefits of the pipeline outweighed the harms was arbitrary and capricious if there was no rational way of fulfilling the public interest under the facts presented. *Id*.

B. The Commission Followed The Statutory Scheme Of Review Set Out In The NGA, and Thus Was Not Arbitrary And Capricious In Their Decision Making.

The Commission followed the necessary administrative steps which allowed them to fully investigate the factual basis upon which it determined the benefits of the pipeline outweigh the potential impacts. The Commission's analysis also yielded the need to attach conditions to mitigate such adverse effects.

Further, HOME, in accordance with the proscribed scheme of review, raised the issue of the potential negative impacts at their hearings before the Commission. *Adorers*, 53 F.4th at 62. Unlike the situation in *Adorers,* where the issues were not raised before the proper agency prior to bringing the case before the court, the administrative procedure has been followed, affording HOME every opportunity to raise their grievances before the Commission and TGP. *Id.* The Commission was thus able to, and actually did, consider all of HOME's proposed grievances in making their conclusions. *Id*.

HOME argues that the environmental impact caused by the removal of roughly 2,200 trees and vegetation on their land will outweigh any potential benefit of the new pipeline. As discussed above, the Commission, through their grant of a CPCN, weighed the benefits of the pipeline. *Supra* pp.16–19. The construction of the pipeline will provide new energy production and economic benefits for the parties involved and the public. After considering both sides, the Commission required TGP to mitigate their potential damages via GHG emissions conditions. The Commission fairly decided that the benefit to the public will outweigh the negative impact to HOME. While HOME has the same right as all other parties to negotiate before the Commission, the impact to their land alone cannot be placed above the benefit to the public. *Adorers*, 53 F.4th at 60.

HOME further argued that even if the benefits are not outweighed by the negative impacts, the AFP could be placed on an alternate route. They argue, by placing the pipeline on their proposed alternate route, impact to their property would be avoided altogether. However, it is clear that the alternate route would cause objectively more environmental damage than the original plan. *Rehearing Order*, ¶ 63. The original route will lead to the least impact overall, which aligns with the goals and beliefs of HOME. TGP's use of eminent domain in place of an easement is common, allowed under the NGA, and does not evidence any additional impact on HOME's land or the environment. 15 U.S.C § 717(f).

It cannot be said that the Commission's conclusions, after considering all the benefits and impacts, were arbitrary and capricious. *Motor Vehicle Mfrs.,* 463 U.S. at 43. While there will certainly be some damage to the property, such damages will be offset by the conditions on the certificate. The Commission cannot give special privileges to HOME due to religious beliefs without creating an unfair standard of review subjective to each individual landowner. Since the Commission followed the statutory scheme of review, it did not step outside the scope of power granted to it via the NGA. *Id.* at 30. It is certainly rational to conclude that the benefits of the pipeline via its energy production, and other domestic economic benefits, will not be outweighed by the impact to HOME's land, and the court, even if it disagrees with the ultimate conclusion, cannot substitute their opinion for that of the Commission. *Id*. Therefore, the court must uphold the Commission's decision that the benefits created by the pipeline will outweigh any potential impacts.

II. The Commission's Decision Does Not Violate The Religious Freedom Restoration Act.

HOME argues that even if the Commission's ruling was not arbitrary and capricious, it violated RFRA. Under RFRA, the government shall not substantially burden a person's exercise

of religion. 42 U.S.C § 2000bb-1. To succeed on the argument that the Commission violated RFRA, HOME must prove their religion was substantially burdened, it is a true religious belief as opposed to a philosophy or way of life, and it is a belief they sincerely hold. *Thiry v. Carlson,* 78 F.3d 1491, 1494 (10th Cir. 1996). None of the parties to this matter contest that HOME's beliefs are true and sincere, so the issue is whether or not the impact on HOME's religion is substantial and requires a strict scrutiny analysis. 42 U.S.C § 2000bb-1. Strict scrutiny allows the government to violate RFRA only if it can prove its action is done in furtherance of a compelling government interest and through the least restrictive means of furthering that interest. *Id.*

A. The Commission's Decision Does Not Place A Substantial Burden Upon HOME's Exercise Of Their Religion.

The threshold issue of an alleged RFRA violation is whether the agency action places a substantial burden on one's exercise of religion. 42 U.S.C 2000bb-1. A burden on one's exercise of religion is generally considered substantial when there is a substantial pressure to violate one's belief. *Ave Maria Foundation v. Sebelius*, 991 F. Supp. 2d 957, 964 (E.D. Mich. 2014). Conversely, the RFRA does not protect against action that simply encumbers the practice of religion. The action must pressure one to violate their beliefs. *Id.* Exercise of religion is defined as *any* exercise of religion, whether or not compelled by or central to a system of religious belief. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014)(emphasis added).

The court in *Thiry* defined a substantial burden in the negative. It stated any impact that may make it more difficult to practice certain religions but does not have the tendency to coerce individuals into acting contrary to their beliefs would not constitute a substantial burden. *Thiry,* 78 F.3d at 1495. The court held that the impact of having to relocate the burial site of a stillborn child for a paved roadway to be constructed through the Thiry's land was not a substantial burden upon their religion. *Id* at 1496. It was established that the Thiry's would be distressed and

inconvenienced by the relocation of the gravesite, however, as Quakers, they testified they felt no more or less connected to their religion at one location versus another. *Id.* Their religion did not forbid the relocation of a gravesite, and thus no part of their religion was explicitly violated by the proposal. The impact is only an inconvenience imposed upon the Thiry's rather than a substantial burden on their religion. *Id* at 1495.

Similarly, in *Lyng v. Northwest Indian Cemetery Protective Association*, the court found that a substantial burden was not placed upon the Native American habitants of Six Rivers National Forest by paving a road through an area that was considered "integral and indispensable" to their religion and its practice. 485 U.S. 439, 442 (1988). The court found that the government's actions would not coerce the individuals into violating their religious beliefs, despite the clear disruption. *Id* at 449. Unless the government imposes a burden that forces one to violate their beliefs, such a burden is not considered to be a substantial one. *Thiry,* 78 F.3d at 1495. Mere inconvenience is simply not enough.

A government action that decreases the spirituality or satisfaction of a believer in their religion is not a substantial burden on the free exercise of religion. *Navajo Nation v. U.S. Forest Service,* 535 F.3d 1058, 1081 (9th Cir. 2008). In *Navajo Nation*, the government was creating artificial snow on a mountain considered sacred by the peoples of the Navajo Nation, however, no shrines or areas of religious significance were impacted physically. *Id* at 1066. It is not enough that an action places some burden on the religious beliefs of an individual unless they are forced to modify or violate those beliefs. *Id* at 1092. Absent some physical barrier to the enjoyment of one's religious practices beyond inconvenience, the court cannot find a substantial burden on the exercise of religion. *Id* at 1081.

In *Burwell v. Hobby Lobby Stores, Inc.*, it was found that the implementation of the Affordable Care Act ("the ACA"), which required employers to provide health insurance covering preventative care and screenings for women, substantially burdened their exercise of religion. 573 U.S. at 726. By providing this insurance, the employers were in essence forced to violate a religious belief—that contraception is immoral—by funding the act. *Id.* The Supreme Court found that the government provided the employers with a *Hobson's Choice*—either fund contraceptives and violate their religious beliefs or go against the ACA—which constitutes a clear substantial burden. *Id.* When the government provides one with no real choice of complying with the law or freely exercising their religion, a substantial burden is placed upon their exercise of religion. *Id.*

In the present case, the AFP will cause the removal of some trees and pass through land on which HOME performs a religious ceremony, the Solstice Sojourn. HOME argues that the placement of the pipeline on their land forces them to support the production, transportation, and burning of fossil fuels which is against their religion. Unlike *Burwell*, where the plaintiffs would have been using their money to directly support something against their religion, HOME would not be required to take part physically or economically in any part of the pipeline's production or usage. *Burwell* 573 U.S. at 692. The Commission is not requiring HOME to make any choice or take any action regarding the morality of fossil fuels, and they will continue to have the freedom to exercise their beliefs in opposition to fossil fuel production.

HOME further contends that the bare spot on their land near the Solstice Sojourn created by the removal of trees for the pipeline poses a substantial burden upon their religious practices. Similarly to *Thiry* and *Lyng*, the removal of the trees will clearly inconvenience and distress the individuals belonging to HOME, but in no way does it force them to violate any belief they hold.

Thiry, 78 F.3d at 1495; *Lyng*, 485 U.S. at 449. In *Thiry* and *Lyng*, areas of cultural significance were disturbed by the construction of a roadway or permanent object placed on the land and no substantial impact was found. *Thiry,* 78 F.3d at 1495; *Lyng*, 485 U.S. at 449. In the present case, the Commission has conditioned that the pipeline be buried along the path of the Solstice Sojourn to prevent any physical barrier to the ceremony, creating even less of a disturbance to sacred land than the roadways in *Thiry* and *Lyng. Thiry,* 78 F.3d at 1495; *Lyng*, 485 U.S. at 449. It cannot be said that a bare spot on the land is enough to rise above the impact of a permanent paved road over the land.

HOME contends that even with no physical barrier, their enjoyment of the Solstice Sojourn would be destroyed and "unimaginable" by the knowledge that it was taking place on land where the pipeline is buried. While HOME, like those in *Navajo*, may experience some decrease in spiritual enjoyment, they are not restricted from performing the religious ceremony, and it cannot be said that a substantial burden is placed upon this exercise of their religion. *Navajo*, 535 F.3d at 1081. During the construction of the pipeline, a physical barrier to the exercise of the Solstice Sojourn would be created, however, construction is conditioned on being timed in such a way that it will not align with any religious ceremonies so as to not impose a burden to HOME's practices.

Lastly, HOME does not contest that the proposed alternate route would be more burdensome on the environment. To approve their request that the pipeline be placed along this alternate route would be in opposition of the very religious beliefs they base their claims upon. For all these reasons, HOME's religious beliefs will not be substantially burdened by the construction of the AFP, and therefore the RFRA will not be violated. 42 U.S.C § 2000bb-1.

B. The Commission's Decision Is The Least Restrictive Means Of Furthering a Compelling Government Interest.

42 U.S.C. § 2000bb-1(b) provides an exception to the general RFRA statute, stating the government may substantially burden the exercise of one's religion only if it can demonstrate the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. A compelling government interest is one of "the highest order." *Ave Maria Foundation,* 991 F. Supp. 2d at 966. It cannot be said that a particular government action is of the highest order if it allows for large amounts of damage contrary to that interest to continue. *Id.* In *Ave Maria Foundation,* the court held that since the government allowed exceptions to the law on so many occasions, it could not then be argued that it was meeting some compelling interest when being applied against the Ave Maria Foundation. *Id* at 967. If the interests of the government were truly compelling, there would be no room for broad exceptions to the law. *Id.*

In contrast, the court in *United States v. Indianapolis Baptist Temple,* found that a federal employment tax law applied to churches was not in violation of the RFRA and met the standard for a compelling government interest. 224 F.3d 627, 630 (7th Cir. 2000). Denying religious exceptions to a system that is necessarily uniform, such as the tax system, was found to be a compelling interest. *Id.* Denying a religious exemption upholds that interest when such exemption requires unique treatment be applied to individual religious groups in a way that creates a disjointed system of applying a government interest of the highest order.

Under the RFRA, the government must show with particularity how an interest would be adversely affected by allowing a religious exemption. *Gonzalez v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006). While some government action may generally meet the test of being a "paramount" interest, it must be shown that the interest would be impeded

under the particular facts. *Id.* When examining whether governmental action is being applied through the least restrictive means, one must weigh the cost of altering the government action versus the cost to the religious group imposed by the government activity. *Ave Maria Foundation,* 991 F. Supp. 2d at 967. If the government has some other option available to them that would put less of a burden on themselves than the burden placed on the religious group, then the government is not acting through the least restrictive means necessary. *Id.*

Turning to the present case, the Commission granted a CPCN for construction of the AFP in furtherance of the government's interests of producing energy and minimizing overall environmental harms in the production of fossil fuels. When considering the large public interest in nationwide energy production, it is paramount that a uniform system of application be enforced to generate this energy while keeping environmental harm to a minimum. *Id.* If the government was compelled to give special treatment to every religious group, it would be impossible to create a uniform nationwide system of producing and transporting fossil fuels efficiently. *Id.* As such, the Commission's interests involved in the construction of the pipeline are compelling ones.

When comparing the burden placed upon the Commission and TGP through any alternate plan versus the burden placed upon HOME by the original route, it is clear that the original proposal for construction would be the least restrictive means. The Commission's interests would be directly impeded by HOME's request for a religious exception by forcing it to create a more substantial environmental impact by constructing the AFP through the Misty Top Mountains. Any burden placed upon HOME's religious beliefs are grounded in their belief that the environment and the Earth are sacred. To enact an alternative plan that creates a heavier

burden on the land is contrary to all that HOME believes and the interests of the Commission to create a pipeline through the most efficient and sustainable means possible.

Even if the burden on HOME's religious beliefs is found to be substantial, the Order still does not violate the RFRA because it passes the strict scrutiny test. 42 U.S.C. 2000bb-1. The Commission's order has not violated the RFRA in any way, and should be upheld. *Id.*

IV. Imposing GHG Conditions is Well Within the Commission's Statutory Authority

The Commission's decision to impose conditions on GHG emissions, resulting from the construction of the AFP, was well within the bounds of its authority under the NGA and thus, the major questions doctrine ("MQD") does not apply. A court is required to set aside agency action if it finds the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). Also, a court shall compel agency action that has been unlawfully withheld or delayed unreasonably. *Id.* § 706(1).

A. The Commission Has Statutory Authority to Impose Broad Conditions on Natural Gas Companies

The NGA requires natural gas companies to be issued a CPCN from the Commission prior to the construction or extension of a natural gas facility or the transportation or sale of natural gas. 15 U.S.C. § 717(c). "The Commission 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.* It has long been determined that the Commission has exceedingly broad authority over the proposed actions of natural gas companies, thus, the consideration of GHG emissions during its decision-making has been upheld.[4] *Sierra Club*, 867 F.3d 1357, 1374, (D.C. Cir. 2017). The only exception to

[4] *See e.g.*, Columbia Gas Transmissions, LLC, 158 FERC ¶61,046, at PP 116-120 (Dec. 29, 2017) (emissions from combustion); Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions);

obtaining a CPCN is for a natural gas company seeking to expand for the purpose of supplying increased market demands in its service area as defined by the Commission, and such expansion is wholly within the bounds of that service area. 15 U.S.C. § 717(f). Thus, it is clear that Congress intended the Commission to have control deciding over what construction and expansion projects are necessary to serve the public.

1. When the MQD Does Not Apply, Chevron Deference Should be Given If Congress Has Directly Spoken to the Question at Issue.

It is clear that Congress intended the Commission to be responsible for issuing certificates and imposing conditions on natural gas companies, accordingly the MQD does not apply to this case. The MQD could apply only to "'extraordinary cases' in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. EPA,* 142 S. Ct. 2587, 2595 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159-160 (2000)). Courts have noted that the following may put them on alert to search for more clear statutory direction from Congress: statutory structure indicates Congress did not mean to regulate the issue this way; there is already a distinct, conflicting regulatory scheme in place to deal with the asserted issue; a newly claimed authority from an old statute; diverting from traditional agency practices; federalism concerns, and; when the authority is beyond agency expertise. *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 297 (2023). None of these circumstances apply to the present case. Congress explicitly granted the Commission authority to impose reasonable conditions on CPCNs. 15 U.S.C. § 717(c).

Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (compressor station emissions).

When "Congress has delegated broad authority to an agency with expertise and experience within a specific industry, and the agency action is so confined, claiming no broader power to regulate the national economy" the Court shall apply *Chevron* deference. *Loper Bright Enters. v. Raimondo*, 45 F.4th 359, 365 (2022). Under *Chevron*, the Court is to determine whether Congress has directly spoken to the question at issue and if congressional intent is clear. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). When Congress has spoken unambiguously, as it did in 15 U.S.C. § 717(c), the Court must give effect to that language. *Id.* at 842-43. Therefore, the Commission has extremely broad authority to impose conditions on natural gas companies, and as discussed below, the Commission has met all other statutory requirements to impose GHG conditions.

B. The Commission Satisfactorily Met its Requirements to Impose the GHG Conditions

Under NEPA, a federal agency must conduct an EIS for any action that will have a substantial effect on the quality of the human environment. 42 U.S.C. § 4322. During this process, agencies must work with the CEQ to "identify and develop methods and procedures…which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration." *Id.* § 4322(B). On January 9, 2023, the CEQ issued guidance on the consideration of greenhouse gas emissions, in which it stated that the United States is in a climate crisis and has little time left to avoid a dangerous climate trajectory. National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2022). The guidance "encourages agencies to mitigate GHG emissions associated with their proposed actions to the greatest extent possible, consistent with national, science-based GHG reduction policies established to avoid the worst impacts of climate change." *Id.* The CEQ suggests agencies consider two things when

conducting a climate change analysis under NEPA: "(1) the potential effects of a proposed action on climate change, *including by assessing both GHG emissions and reductions from the proposed action*; and (2) the effects of climate change on a proposed action and its environmental impacts." *Id.* While the Commission is an independent agency, and thus not required to follow the CEQ's guidance, it has long done so. *See e.g. Sierra Club v. USDA*, 777 F. Supp. 2d 44 (D.C. Cir. 2011); *Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52 (D.C. Cir. 2009).

1. An Agency's Decision is Arbitrary and Capricious Only When an EIS is Deficient.

An EIS is deficient, if it does not contain sufficient discussion of the relevant issues and opposing viewpoints, does not demonstrate reasoned decision-making, or is based on factors that Congress did not intend the agency to consider. *Sierra Club*, 867 F.3d 1357, 1368 (2017); *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. 29, 43.

In *Sierra Club v. FERC*, the Commission failed to impose GHG conditions on the expansion of natural gas pipelines and petitioners challenged the inaction, asserting that the EIS was deficient for failure to consider such conditions. 867 F.3d at 1365. The overarching question to determine if the entire EIS was deficient was whether the asserted deficiency was so significant as to undermine the public comment and decision-making process. *Id.* at 1368. An agency conducting an EIS must consider both the direct and reasonably foreseeable indirect environmental effects of the proposed action. *Id.* at 1371. An effect is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take [it] into account in reaching a decision." *Id.* at 1371. The Court held that GHG emissions are a reasonably foreseeable indirect result of the expansion of all natural gas pipelines—gas pipelines produce and transport gas and emissions are always a result of such action—and the Commission has the

authority to mitigate those emissions. *Id.* at 1374. Therefore, in *Sierra Club v. FERC,* the Commission's failure to consider GHG emissions in the EIS was arbitrary and capricious. *Id.*

In the present case, the Commission's decision to impose GHG conditions was the result of extensive research involving estimates of GHG emissions that would result from the construction of the AFP, including downstream and upstream GHG impacts and emissions. The Commission also took all the concerns raised by petitioners seriously, and addressed each one individually in its denial letters. Construction of the AFP is estimated to result in 88,340 metric tons of CO2e emissions on average annually. *Rehearing Order,* ¶ 73. This assumes TGP adheres to all the GHG conditions listed in the CPCN, otherwise, construction is estimated to produce 104,100 metric tons of CO2e per year. *Rehearing Order,* ¶ 73. If the maximum number of Dth per day are sent to combustion, downstream impacts could be about 9.7 million metric tons of CO2e per year. *Rehearing Order*, ¶ 72. However, it is unlikely this amount of emissions would actually occur because it represents maximum combustion for 365 days per year, which rarely occurs because any project schedule should be designed for shippers' peak days, and these emissions could displace other fuels and gas typically transported through other means. Upstream emissions are typically considered on a case-by-case basis because of unknown factors surrounding the emitting source location and whether the gas will come from new or existing emitting sources. Here the HFF gas is already in production and being transported; the AFP will simply reroute the gas to different destinations, thus the upstream consequences of AFP's operations are insignificant.

The Commission's decision to impose GHG conditions was well within the bounds of statutory authority, since it is clear that the Commission's EIS contained a sufficient discussion

of the issue and opposing viewpoints, and Natural Gas Companies are given exceedingly broad statutory authority.

V. The Decision Not to Condition Upstream and Downstream Effects Was Not Arbitrary and Capricious.

HOME asserts that even if the conditions on GHG emissions were appropriate, the Commission's failure to mitigate upstream and downstream GHG impacts was arbitrary and capricious. TGP asserts that the Commission was correct in not including upstream and downstream conditions because they are outside of its authority. While TGP is correct that the Commission did not need to impose the conditions, its basis for this conclusion is not supported.

In light of judicial controversy over the Commission's authority to impose GHG conditions on upstream and downstream effects and the evolution of considering GHG effects since the 1999 Policy Statement, the Commission is issuing an updated statement that will "explain how [the Commission] will assess project impacts on climate change in its NEPA and NGA reviews going forward." Certification of New Interstate Nat. Gas Facilities, 178 F.E.R.C. ¶ 61,197 (2022). Although it is argued that this is beyond the Commission's authority, as discussed in detail above, the Commission has broad authority over the control of natural gas companies and has considered the impacts of GHG emissions in imposing conditions on other proposed projects. This authority is well grounded in statutory law and upheld through judicial decisions.

Under NEPA, agencies conducting an EIS are required to take a "hard look" at the potential environmental impacts of the proposed action and alternative actions before making a decision, but there is no specific outcome or mitigation measure that is required. *Theodore Roosevelt Conservation P'ship,* 616 F.3d 497, 503. The obligation of the agency to conduct an EIS is its most important responsibility under NEPA. The term "alternative" does not have a plain meaning–there could be countless alternatives to agency action and it would be impossible

to consider them all–so, it should be bound to those that are reasonable. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194-95 (1991). An alternative is reasonable if it is one that will bring about the end result that is intended by the agency. *Id.* at 195. An agency's discussion of alternative actions receives deference, and its decision will be upheld "so long as the alternatives are reasonable and the agency discusses them in reasonable detail." *Id.* at 196.

As discussed above, the Commission took a hard look at the potential impacts of the project when conducting the EIS and determined that the upstream and downstream impacts were not significant enough to impose conditions. The Commission's finding that the construction of the project will have significant environmental impacts does not require it to impose conditions on the upstream and downstream effects of that project. *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Circuit 2006). The Commission discussed alternative pathways for the AFP and considered the effects of upstream and downstream conditions, and it found that public convenience and necessity was served by only imposing conditions on GHG emissions from construction. The alternative pathways are reasonable because they would bring about the same transportation of gas that the AFP would, and the conditions are reasonable because they all bring about the result of reducing GHG emissions. Since the alternatives discussed are reasonable and were reasonably discussed in the EIS, the Commission's discussion of these alternatives receives deference, and the decision to only impose conditions on construction emissions should be upheld.

CONCLUSION

For the reasons stated, the petition for review should be denied and the challenged Commission Order should be affirmed.