

Team 43

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION

Plaintiff-Appellee

v.

HOLY ORDER OF MOTHER EARTH

Appellant

-and-

TRANSNATIONAL GAS PIPELINES, LLC

Defendant-Appellant

On Appeal from the United States District Court for the District of new Union in consolidated
case nos. 23-01109 and 23-01110, Chief Judge Delilah Dolman

Brief of Appellant, UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF JURISDICTION

Transnational Gas Pipelines, LLC (“TGP”) and Holy Order of Mother Earth (“HOME”) timely filed Petitions for Review of an Order and Rehearing Order issued by the Federal energy Regulatory Commission (“FERC”) granting a Certificate of Public Convenience and Necessity (the “CPCN”) to TGP for the construction of the American Freedom Pipeline (“AFP”) subject to mitigation of greenhouse gas (the “GHG Conditions”) impacts in consolidated cases No. 23-01109 and 23-01110. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over these petitions under 28 U.S.C. § 1296(a)(1), which provides that “the United States Court of Appeals for the Federal Circuit shall have jurisdiction over a petition for review of a final decision . . . of . . . an appropriate agency.”

STATEMENT OF ISSUES PRESENTED

- I. Was FERC’s finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project needed where 90% of the gas transported by that pipeline was for export?
- II. Was FERC’s finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?
- III. Was FERC’s decision to route the AFP over HOME property despite HOME’s religious objections in violation of the Religious Freedom Restoration Act?
- IV. Were the GHG Conditions imposed by FERC beyond FERC’s authority under the Natural Gas Act?
- V. Was FERC’s decision not to impose any GHG Conditions addressing downstream and upstream greenhouse gas impacts arbitrary and capricious?

STATEMENT OF THE CASE

I. The TGP Project

The proposed TGP Project is a \$599 million construction project of the AFP, an interstate pipeline spanning 99 miles from a receipt point in Jordan County, Old Union to a proposed interconnection with an existing TGP gas transmission in Burden County, New Union, as well as its related facilities. The AFP is designed to provide up to 500,000 Dth per day of firm transportation service.

In February and March 2020, TGP held open season for service on the TGP Project. TGP ultimately executed binding precedent agreements with International Oil & Gas Corporation (“International”) and with New Union Gas and Energy Services (“NUG”) for 450,000 dekatherms (Dth) per day and for 50,000 Dth per day of firm transportation service respectively. Combined, the agreements comprise the full design capacity of the TGP Project.

The natural gas to be transported by the AFP is made into liquefied natural gas (“LNG”) at Hayes Fracking Field (“HFF”) in Old Union. While TGP concedes that full production of its LNG at HFF is transported by the Southway Pipeline to states east of Old Union, the precedent agreements would instead reroute 35% of the production at HFF to the AFP. TGP asserts, and FERC and HOME do not dispute, that the reduction of transport through the Southway Pipeline would not cause gas shortages because of low LNG demands due to a population shift, efficiency improvements, and increased electrification of heating in those states. LNG purchased by International would be diverted at the NorthWay Pipeline to the New Union City M&R Station and later exported to Brazil.

II. Proceedings

On June 13, 2022, TGP filed an application under section 7(c) of the National Gas Act and Part 157 of FERC's regulations to construct the TGP Project. After review, on April 1, 2023, FERC issued an Order granting a CPCN to TGP for the construction of the TGP Project subject to conditions for approval. In the CPCN Order, FERC held that the benefits of the TGP Project outweighed adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities. Based on its Environmental Impact Statement ("EIS"), FERC also determined that the TGP Project would cause adverse environmental impacts. Consequently, FERC imposed GHG Conditions requiring TGP to implement recommendations to mitigate these impacts, including the replanting of trees removed, the use of practical, electric-powered equipment, the purchase of net-zero pipeline segments, and the purchase of electricity from renewable sources as available throughout the construction of the TGP Project.

On April 20, 2023, HOME, a non-profit organization that directly owns 15,500 acres in Burden County, New Union, timely submitted a request for rehearing on the CPCN order. HOME alleged that FERC acted arbitrarily by granting the CPCN because the AFP did not constitute a public necessity and violated the Religious Freedom and Restoration Act ("RFRA"). HOME also claimed that FERC acted arbitrarily by failing to require mitigation measures for upstream and downstream greenhouse gas impacts.

On April 22, 2023, TPG also submitted a timely request for rehearing on the CPCN order. TGP sought rehearing on the mandatory GHG Conditions, arguing that FERC acted without authority to impose conditions that addressed a major question beyond the scope of its regulatory authority permitted under the NGA.

On May 19, 2023, FERC issued an Order denying both petitions for rehearing (the “Rehearing Order”). The Rehearing Order affirmed the CPCN as originally issued. On June 1, 2023, HOME and TGP filed Petitions for Review of FERC’s CPCN Order and Rehearing Order (the “Orders”).

SUMMARY OF THE ARGUMENT

FERC correctly held and affirmed the issuance of the CPCN for the construction of the TGP Project, with approval subject to the GHG Conditions, in its Orders.

FERC acted neither arbitrarily nor capriciously in its determination of a public necessity for the AFP. Even if 90% of the LNG transported was bound to be exported, the AFP establishes a sufficient project need because TGP expressed domestic benefits of the AFP and had entered into preceding agreements demonstrative of public demand and interest.

FERC was neither arbitrary nor capricious in its decision that the benefits of the AFP outweighed the environmental and social harms. This holding was consistent with FERC’s guidelines and statute and was neither arbitrary nor capricious. FERC, under NGA and NEPA, must review the environmental impacts of a project and consider the environmental and social harms of the AFP, including the mitigation efforts of TGP. Because it is within FERC’s discretion to balance a project’s harms and consider the adequacy of an applicant’s mitigation efforts, FERC did not act arbitrarily nor capriciously in finding that the AFP’s benefits outweighed the adverse effects.

FERC’s decision to allow the AFP to be routed over HOME’s property does not violate HOME’s rights under RFRA. Contrary to HOME’s argument, the presence of the AFP does not prevent them from practicing their Solstice Sojourn primarily because construction will take place between Sojourns. HOME’s perception that the sanctity of their land is diminished by the presence of the pipeline does not rise to the level of coercion that constitutes a substantial

burden. Even if the court determined that there was a substantial burden on the plaintiffs' religion, FERC's approval of the pipeline route is in furtherance of a compelling government interests of maintaining uniform, cohesive standards for a pipeline network and constitutes the least restrictive means of furthering that interest.

The GHG Conditions imposed by FERC were not beyond the scope of FERC's authority under the NGA. The GHG Conditions do not address major question under the major-questions doctrine concerning a nationwide issue with large political and economic consequences. In addition, the GHG Conditions do not broadly regulate across the industry and are specific to the AFP and the TGP Project based on the EIS and FERC's findings.

Finally, FERC's decision to not impose GHG Conditions for downstream and upstream GHG impacts was neither arbitrary nor capricious. FERC determined that, under the NGA, it was not required to mandate mitigation measures for downstream and upstream. FERC acted appropriately within its discretion based on the lack of clear significance for downstream and upstream GHG emissions in the EIS and the absence of guidance on GHG emissions.

STANDARD OF REVIEW

A reviewing court decides all relevant questions of law, meaning of agency guidelines, and constitutional and statutory issues. 5 U.S.C § 706. A court should hold unlawful agency actions, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or not in accordance with the law. *Id.* Courts generally defer to an agency's interpretation of its own statute unless an action is unreasonable. *Fla. Gas Transmission Co. v. FERC*, 741 F.2d 1307, 1309 (11th Cir. 1984). If the court is assessing a statute, it will first consider whether Congress has addressed the issue; if not, the court will determine whether the agency's decision is based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984).

ARGUMENT

I. FERC’S FINDING OF PUBLIC CONVENIENCE AND PUBLIC NECESSITY FOR THE AFP WAS NOT ARBITRARY AND CAPRICIOUS AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE FERC FOUND A PROJECT NEEDED WHERE 90% OF GAS TRANSPORTED BY THE AFP WAS FOR EXPORT.

FERC was not arbitrary nor capricious in its issuance of the CPCN for the approved construction of the AFP and the use of eminent domain. Furthermore, substantial evidence supported FERC’s finding of public convenience and necessity even where 90% of the natural gas transported by the AFP was for export purposes.

The Natural Gas Act (“NGA”) authorizes FERC to regulate interstate commerce and transportation of natural gas. 15 U.S.C. § 717(a). Section 7 of the NGA applies exclusively to “natural gas companies. . . engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.” *Id.* at § 717a(6). Interstate commerce comprises “commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.” *Id.* at § 717a(7). Interstate commerce excludes foreign commerce involving companies responsible solely for import and export. *City of Oberlin v. FERC*, 39 F.4th 719, 723 (D.C. Cir. 2022). Section 7 applies where the facility seeking approval is a “was still a ‘pipeline transporting gas in interstate commerce.’” *Id.* at 724 (quoting *Nexus Gas Transmission, LLC*, 172 F.E.R.C. ¶ 61,199 (Sept. 3, 2020)) (distinguishing facility entirely within one state bound solely for export from facility transporting gas through an interstate pipeline). Section 7 governs where a pipeline is engaged in interstate commerce, regardless of where the gas is ultimately bound for export by precedent agreements. *Id.* at 726.

To receive approval for the construction of a proposed interstate pipeline, Section 7 requires a natural gas company to obtain a CPCN from FERC. *See* 15 U.S.C. § 717f(c)(1)(A). FERC grants the CPCN under Section 7 upon a demonstration that the facility “is or will be required by the present or future public convenience and necessity” amongst other requirements. *Id.* at § 717f(e). FERC bears a duty to protect the public interest when issuing a CPCN. *Atl. Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 392 (1959). To determine whether a pipeline is required by public convenience and necessity, the Commission must evaluate “all factors bearing on the public interest.” *Id.* at 391. When reviewing applications, the Commission relies on the Certificate Policy Statement as a guide for determining a need for a proposed project and whether the project will serve the public interest. Certification of New Interstate Natural Gas Pipeline Facilities (“*Certificate Policy Statement*”), 88 F.E.R.C. ¶ 61,227 (Sept. 15, 1999), *clarified* 90 F.E.R.C. ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 F.E.R.C. ¶ 61,094 (Jul. 28, 2000). To demonstrate public convenience and necessity, the pipeline company applying for approval must first show that financial support for the project will not rely on subsidization from existing customers. *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227. Next, FERC balances adverse effects that cannot be mitigated against public benefits of the proposed project. *Id.* To approve a project, the public benefits must outweigh the adverse effects. *Id.* Adverse impacts may include “increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners’ property” while public benefits may include “meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.” *Id.* at 61,748. Evidence for demand of a project, and by extension, a present public

benefit, includes a free trade agreement for natural gas. *Oberlin II*, 39 F.4th at 723. In addition, precedent agreements and long-term contracts with shippers who intend to use the pipeline for the transportation of natural gas. *Id.* at 722. FERC may also consider the future public convenience and necessity of a project. *Id.* at 729.

Once the commission grants a CPCN, a natural gas company receives the federal eminent domain power. *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227. When reviewing an exercise of eminent domain, the Court must turn to the legislature to determine if the exercise is for “public use.” U.S. Const. amend. V. As Congress has certified natural gas pipelines for public use, the determination for whether public necessity is sufficient for a use of eminent domain is the same as for whether to grant a CPCN. 15 U.S.C. § 717f(h). A natural gas companies exercise of eminent domain is consistent with the Takings Clause so long as the FERCs determination to grant a CPNC is consistent with the NGA. *Oberlin II*, 39 F.4th at 728.

In *Oberlin II*, the United States Court of Appeals for the District of Columbia Circuit held that FERC was not arbitrary and capricious in its decision to grant a CPCN for the construction of an interstate pipeline transporting and exporting LNG. *Id.* at 721. To establish public interest, FERC appropriately relied on two of eight precedent agreements, which comprised 17% of the pipeline’s total capacity, to export LNG to Canada. *Id.* at 721, 723. Furthermore, the *Oberlin* court held that while the natural gas would ultimately be exported to Canada, the domestic sale and production of natural gas sufficed multiple domestic benefits stemming from the construction of the pipeline. *Id.* at 727-28. The additional capacity to transport natural gas also demonstrated future public convenience and necessity. *Id.* at 728.

In *Atlantic Refining Co.*, the United States Supreme Court held that FERC improperly issued a CPCN for the sale of natural gas under Section 7 of the NGA because evidence was

insufficient to support the Federal Power Commission's finding of public convenience and necessity. 360 U.S. at 392. There, the approval of the proposed, above-average price could result in general price increases to the applicant's existing rates, thereby failing to align with public interest. *Id.* at 393.

In *Allegheny Defense Project*, the United States Court of Appeals for the District of Columbia Circuit held that the FERC properly granted a CPCN based on both precedent agreements as well as comments from two shippers and one end user to establish, demonstrated sufficient public necessity. *Allegheny Def. Project v. FERC*, 964 F.3d 1, 19 (2020). Although FERC, in its review, declined to address arguments on whether precedent agreements alone sufficed domestic demand and public necessity, the *Allegheny Defense Project* court underscored that the combined showing of evidence constituted a sufficient demonstration of public necessity. *Id.*

Here, the project satisfies the first requirement of the public convenience and public necessity analysis. There is no dispute that the project has financial support exclusive of subsidies from existing customers.

Instead, HOME raises an issue with whether the AFP is required by public convenience and necessity under section 7(e) of the NGA. HOME argues that the NGA, as a domestic statute, require domestic needs. Consequently, HOME alleges that the AFP fails to meet nor provide substantial evidence of the requisite project need; rather, the AFP serves a Brazilian need for LNG because approximately 90% of the LNG transported by the AFP will be diverted and exported by International. HOME alleges that TGP failed to demonstrate, if any, domestic benefits resulting from the AFP to domestic consumers.

On the contrary, FERC appropriately determined public necessity for the AFP. While TGP does not dispute that International's parent company is Brazilian, that nearly all of International's LNG supply is exported to Brazil, and there is no free trade agreement with Brazil, TGP nevertheless demonstrated sufficient public benefits in its application. TGP expressed six potential domestic public benefits, including expanded delivery and greater access of LNG throughout the New Union and the United States, and supporting market competition and cleaner air through an alternative energy source. *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227. In addition to transportation to domestic customers, the gas will be domestically produced and will add to the remaining capacity of the NorthWay Pipeline and the New Union City M&R Station. Like the *Oberlin II* pipeline company, TGP also entered into a precedent agreement with International, an export company, which establishes a strong public benefit even when the LNG is bound for export. 39 F.4th at 722. Unlike *Atlantic Refining Co.*, the construction of the AFP would not create adverse impacts to consumers and would serve a public interest. 360 U.S. at 392. Finally, like *Allegheny Defense Project*, the combined domestic benefits and precedent agreements sufficed public necessity. 964 F.3d at 19. The present and future domestic benefits and the precedent agreements resulting from construction, maintenance, and continued use of the project are all factors that heavily weigh in FERC's determination of a public interest. Thus, the present and future domestic benefits and the precedent agreements provide substantial evidence of public convenience and necessity for the construction of the AFP.

II. FERC WAS NOT ARBITRARY NOR CAPRICIOUS IN FINDING THAT THE BENEFITS FROM THE AFP OUTWEIGHED THE ENVIRONMENTAL AND SOCIAL HARMS BECAUSE TGP DEMONSTRATED SUFFICIENT EFFORTS TO MINIMIZE ADVERSE EFFECTS.

FERC was not arbitrary nor capricious in its determination that the environmental and social harms of the AFP are outweighed by public benefits is not arbitrary and capricious because the decision to implement reasonable guidelines fell well within FERC's discretion. In its review, FERC compares the public benefits of a proposed project with its adverse effects, including environmental and social harms. *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227. Section 7(e) of the NGA requires FERC to evaluate all factors affecting public interest. *Atlantic Refining Co.*, 360 U.S. at 391. Under NEPA, federal agencies are required to take a "hard look" at the environmental effects of major projects. *Certificate Policy Statement*, 178 F.E.R.C. ¶ 61,107 (Feb. 18, 2022). FERC may deny a project based on its impact on new and existing pipeline customers, as well as the environment and landowners in the area. *Id.* at 61,688. FERC expects applicants to mitigate environmental damage, and FERC may condition approval on an applicant's implementation of mitigation measures. *Id.* at 61,689. Pipeline applicants are also expected to engage with landowners to minimize the need for eminent domain. *Id.* at 61,694. The most important consideration, however, is the need that will be served by the project. *Id.* at 61,686. Precedent strongly favors FERC's interpretation of its own regulations and guidelines and its weighing of environmental and social interests of the pipeline project under the Certificate Policy Statement. *Fla. Gas Transmission Co.*, 741 F.2d at 1309.

Here, HOME has not provided sufficient evidence to support that FERC was arbitrary and capricious in its finding that the public benefits of the AFP outweighed its adverse effects. TGP has made meaningful efforts to mitigate the environmental damage to justify eminent domain. Although HOME cites 2,200 trees to be removed from the pipeline path, TGP has agreed to replant trees where feasible. TGP's participation in the prefiling process also included changes in approximately 30% of the route in response to concerns and negotiations with

landowners, including HOME. TGP also agreed to specifically accommodate HOME by burying the AFP on HOME's property and expediting the construction to minimize disruptions. While TGP has not reached agreements with HOME and other landowners, use of eminent domain is typical in pipeline construction, so it is not necessary for TGP to meet a certain threshold of easement agreements. Consequently, FERC appropriately found that TGP engaged in sufficient efforts to mitigate the environmental damage and the harm to landowners. *Certificate Policy Statement*, 178 F.E.R.C. ¶ 61,689. FERC's finding was not arbitrary and capricious because the discretion falls squarely within its authority under NEPA and the NGA. *Id.* at 61,107.

HOME's argument that FERC should use an alternate route to minimize the social harm attributed to using HOME's property also fails to demonstrate an arbitrary and capricious decision by FERC. The alternate route would add \$51 million to the construction costs and the route would necessitate a longer pipeline going through more sensitive ecosystems. Consequently, the alternate route would cause more environmental damage by negating TGP's mitigation efforts and raising environmental concerns and inflict social harm to HOME's religious convictions. TGP has also agreed to expedite construction to minimize the social harms associated with HOME's religious practices. Thus, it is rational for FERC to conclude that given TGP's efforts to mitigate damage to the trees on HOME's property, as well as TGP's agreement to expedite construction on HOME's land, FERC was not arbitrary and capricious in finding that the public benefits of the AFP outweighs its adverse harms.

III. FERC DID NOT VIOLATE RFRA IN ITS DECISION TO ROUTE THE AFP OVER HOME'S PROPERTY DESPITE HOME'S RELIGIOUS OBJECTIONS BECAUSE THERE IS NO SUBSTANTIAL BURDEN TO HOME'S RELIGIOUS PRACTICES.

FERC's decision to grant the CPCN for the construction of the AFP does not constitute a RFRA violation because HOME fails to assert a substantial, long-term burden to its religious

practices. Even if the court found that HOME's religious beliefs were substantially burdened by the AFP, the burden is justified by the furtherance of a compelling government interest and as the least restrictive means in attaining that interest.

A. HOME failed to demonstrate that the construction and existence of the AFP created a substantial burden to their religious practices.

FERC appropriately found that HOME established no substantial burden to their religious practices resulting from the construction and existence of the AFP. Under the Religious Freedom Restoration Act ("RFRA"), the government must not impose a substantial burden to a person's exercise of religion unless the burden is "in furtherance of a compelling governmental interest" and constitutes "the least restrictive means of furthering that governmental interest." 42 U.S.C. § 2000bb-1. The appellant bears the burden of establishing that a policy inflicts a substantial burden to their religious practices. *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008).

In *Navajo Nation*, the Ninth Circuit ruled that the use of recycled wastewater as artificial snow on a public mountain did not substantially burden a tribe's religious practices because they were neither coerced into acting against their belief under threat of government sanction nor having a benefit withheld on that basis. 535 F.3d at 1063. The court determined that a government action which decreases the perceived spirituality of a place or does not meet the subjective belief of a person is not sufficient to constitute a substantial burden on the plaintiff. *Id.* The court underscored that permitting subjective perception of spirituality to constitute a substantial burden would essentially grant every individual a problematic "veto" to government policies. *Id.* Similarly, in *Standing Rock Sioux Tribe*, the D.C. District Court held that there was no RFRA violation where an oil pipeline through reservations of American Indian tribes. *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 91

(D.D.C. 2017). The presence of the oil pipeline did not affect the water nor prevented the Tribe from performing its religious practices at Lake Oake. *Id.*

In *Thiry*, the Tenth Circuit held that a couple's religious practices faced no substantial burden because they faced mere difficulties, not coercion, since their practices were not contingent on the location of their daughter's grave. *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). The couple's religious beliefs did not explicitly disclaim moving grave sites nor would their beliefs cease with the movement of the grave; thus, the court determined that the government had not substantially burdened their religious practices. *Id.* at 1094. Similarly, in *Lyng*, the United States Supreme Court found that an Indian organization and Indian individuals failed to demonstrate a substantial burden to their religious practices. *Lyng*, 485 U.S. at 456. Preventing the spirit of a child from gaining more spiritual power did not constitute a substantial burden to the exercise of religion. *Id.*

Here, TGP has agreed, as a condition of its CPCN, to bury the pipeline for the extent that it runs through HOME property, and complete construction during a four-month period between both of HOME's Solstice Sojourn rituals. While HOME alleges a burden to its religious practices, like the plaintiffs in *Navajo Nation* who still had access to the sacred peaks at issue, HOME's subjective perception that the AFP's existence would "destroy the meaning" of their ritual does not fall within the parameters of a substantial burden because the AFP did not physically obstruct HOME's religious practices. 535 F.3d at 1063. TGP has demonstrated meaningful steps to ensure that HOME's access to the Solstice Sojourn route remains uninterrupted by the construction and existence of the AFP. The mere fact that the AFP would

subjectively diminish the spirituality of the space does not constitute a substantial burden on its religious practice because obstruction to HOME's exercise of religious practices. *Id.* at 1069.

Furthermore, FERC's approval of the AFP does not coerce HOME to behave contrary to its religion. Although HOME argues that the allowance of the construction of the AFP would constitute its participation in the fossil fuel industry, FERC correctly denies adding weight to the environmental harms based on HOME's subjective, religious beliefs. The government does not need to measure its actions against the subjective spirituality of a plaintiff, even if the plaintiff asserts that there could be devastating effects on their religious practice. *Lyng*, 485 U.S. at 451. The *Lyng* court specifically places the interest of government operation above the religious interests of the plaintiffs even though government action in that case would significantly impact the plaintiff's ability to practice their religion. *Id.* at 452. Both *Lyng* and *Navajo Nation* emphasize the impermissibility of allowing "an individual veto" on government actions that are distasteful to their religion. *Id.* at 451; *Navajo Nation*, 535 F.3d at 1063. By arguing that FERC should give more weight to its objections based on the spirituality of the matter, HOME essentially requests that, contrary to *Lyng* and *Navajo Nation*, it should be able to influence policy based on its values. This, as stated above, has been generally held impermissible.

While HOME claims that the removal of trees and the presence of pipeline below the route of the Solstice Sojourn are antithetical to its religious beliefs, HOME fails to demonstrate that it will be physically unable to practice its beliefs due to the AFP. The site of HOME's religious practice is still accessible after the construction of the AFP. Even in *Thiry*, the court declined to find that the plaintiffs' religious practices were substantially burdened by moving their daughter's grave site because the plaintiffs acknowledged that their religious beliefs were not exclusively tied to the site. 78 F.3d at 1494. Furthermore, the missing or depleted trees at the

site will not physically prevent HOME from practicing the Solstice Sojourn. Therefore, HOME's alleged difficulties resulting from the construction and presence of the AFP do not meet the threshold of a substantial burden for an RFRA violation. *Navajo Nation*, 535 F.3d at 1068.

B. Even if the court determines that the AFP substantially burdens HOME's religious practices, FERC's approval of the AFP is in furtherance of a compelling government interest and constitutes the least restrictive means of furthering that interest.

FERC successfully demonstrated that its approval of the AFP furthers a compelling government interest of providing energy to the surrounding area, and that the proposed pathway of the pipeline is the least restrictive means of achieving that goal. If a plaintiff establishes that the government has imposed a substantial burden on its religious practices, then the burden falls on the government to prove that the burden furthers a compelling interest and is the least restrictive means of attaining the government's purpose. *Id.* The court has considered governmental policies compelling. *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 630 (7th Cir. 2000).

In *Indianapolis Baptist Temple*, the Seventh Circuit held that the implementation of a uniformly applicable tax provision furthered a compelling government interest. 224 F. 3d at 630. While the *Indianapolis Baptist Temple* plaintiffs argued for exemption from paying taxes for religious reasons, the court ultimately held that, even where feasible for the government to exempt this individual church, a uniformly applicable tax law was the least restrictive way for the government to overcome the difficulties inherent in administering a uniform tax system inhibited by many religious exemptions. *Id.* Likewise, in *Roth*, the Nebraska District Court held that the Air Force's COVID-19 vaccination mandate served a compelling governmental interest in preventing COVID-19 impairment of the readiness and health of its forces. *Roth v. Austin*, 603 F. Supp. 3d 741, 768, 771 (D. Neb. 2022). Despite medical, administrative, and religious

protests, the mandate is the least restrictive means to further the compelling interest, as evidenced by scientific findings. *Id.* at 771, 774.

Here, FERC possesses a compelling interest to meet energy needs efficiently and sustainably. The AFP is an important part in achieving that goal because it will deliver up to 500,000 Dth per day of natural gas, connect areas previously without access to this source of energy, expand the supply of natural gas in the United States, and provide opportunities to improve regional air quality, among others. Maintaining this system, like *Indianapolis Baptist Temple* and *Roth*, is necessary to further the compelling interest. *Indianapolis Baptist Temple*, 224 F.3d at 630; *Roth*, 603 F. Supp. 3d at 774.

While HOME argues that FERC and TGP should have adopted the alternative route, which does not go through its property, to accommodate for HOME's religious beliefs, this alternative is significantly more expensive and detrimental to ecosystems. Given FERC's interest in cost efficiency and uniformity, routing the AFP through only two miles of HOME's property constitutes the least restrictive means of furthering this interest. It would be infeasible for FERC to mandate that applicants reroute pipelines based on the requests of every group with a religious exemption at a reasonable cost. *Indianapolis Baptist Temple*, 224 F.3d at 630. Thus, FERC did not violate RFRA in its decision to route the AFP underneath HOME's land because the AFP does not impose a substantial burden on HOME's religious practices.

IV. FERC ACTED WITHIN THE SCOPE OF ITS AUTHORITY TO IMPOSE GHG CONDITIONS.

FERC properly imposed GHG Conditions in its Order and Rehearing Order that require the mitigation of GHG emissions in the construction of the TGP Project because: (1) the major-questions doctrine ("MQD") does not apply to FERC's GHG Conditions and (2) even if the MQD applied, FERC acted within its authority under the NGA.

A. FERC’s agency action to impose GHG Conditions does not address a major question that requires Congressional authority.

TGP argues that the GHG Conditions concerning mitigation measures for the construction of the TPG project addressed a major question defined under the MQD and therefore requires interpretation of the NGA to act beyond its plain meaning. The MQD applies where “‘extraordinary cases’ when the ‘history and breadth’ and ‘economic and political significance’ of the action at issue gives [the Court] ‘reason to hesitate before concluding that Congress’ meant to confer such authority to act on the agency.’” *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 296 (4th Cir. 2023).

In *West Virginia*, the EPA issued the Clean Power Plan to widely regulate and mitigate GHG emissions across multiple industries, including the domestic energy industry. *West Virginia v. EPA*, 142 S. Ct. 2587, 2592-93 (2022). There, the U.S. Supreme Court held that the agency’s plan addressed a major question concerning a “transformative expansion” of its regulatory power. *Id.* at 2595. Based on the absence of “clear congressional authorization” in the Clean Air Act, the Court determined that the EPA lacked the requisite authority to implement the Clean Power Plan. *Id.* Similarly, in *N.C. Coastal Fisheries Reform Grp.*, the Fourth Circuit held that the MQD applied to the EPA’s authorization of permits under the Clean Water Act to regulate bycatch released by commercial and recreational fisheries in state waters. 76 F.4th at 297. There, the court affirmed that the EPA, a federal agency, had no clear statutory authority and lacked the expertise to regulate state waters and fisheries, and that such broad regulation would affect “a significant portion of the American economy.” *Id.* at 297, 299.

Here, the MQD does not apply to FERC’s agency decision to impose GHG Conditions regarding the construction of the AFP because the conditions are specific to that project. Unlike the Clean Power Plan in *West Virginia*, the GHG conditions do not broadly impose regulation

across the natural gas industry to address a nationwide issue that produces significant economic and political consequences. 142 S. Ct. at 2595. Although there is a climate crisis as determined by the Council on Environmental Quality, the GHG Conditions specifically mitigate the GHG emissions specific to the construction of the AFP based on the TGP Project’s EIS. Furthermore, FERC’s act of imposing conditions for mitigation measures is not a new expansion of regulatory power; rather, the FERC has historically subjected its authorizations to conditions pertaining to the mitigation of environmental harms. *See e.g., Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 604 (6th Cir. 2010) (“FERC issued the certificate subject to several conditions. . .”); *United Distribution Cos. v. FERC*, 88 F. 3d 1105, 1123 (D.C. Cir. 1996) (“the Commission conditioned receipt of a blanket certificate . . .”). As a result, FERC acted within its scope of authority because the GHG Conditions do not constitute a major question under the MQD.

B. Even if the GHG Conditions address a major question, FERC’s agency action to impose GHG Conditions was within its long-standing authority unambiguously authorized by Congress.

Even if the GHG Conditions imposed by FERC addressed a major question under the MQD, FERC acted within its scope of authority as unambiguously expressed under the NGA and long-established in previous agency actions. Under Section 7 of the NGA, FERC unambiguously possesses the authority to establish “reasonable terms and conditions” as required for issuance of the CPCN. 15 U.S.C. § 717f(e). Likewise, FERC may also require “necessary and appropriate” terms and conditions to grant an application. *Id.* at § 717b(a). As discussed prior, FERC has a long-standing history of authorizations requiring the modification of proposals and the completion of conditions to require mitigation of environmental harms. *See e.g. Am. Energy Corp.*, 622 F.3d at 604; *United Distribution Cos.*, 88 F.3d at 1123; *United Gas Pipe Line Co. v.*

Mobile Gas Serv. Corp., 350 U.S. 332, 344 (1956); *see also Atlantic Refining Co.*, 360 U.S. 378 at 391 (“The Congress, in § 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require.”). Here, FERC appropriately imposes reasonable GHG Conditions as expressly authorized under the NGA based on its EIS and the recommendation of its staff.

V. FERC WAS NOT ARBITRARY AND CAPRICIOUS IN ITS DECISION TO NOT IMPOSE GHG CONDITIONS TO MITIGATE DOWNSTREAM AND UPSTREAM GHG IMPACTS BECAUSE FERC IS NOT OBLIGATED TO IMPOSES SUCH MEASURES ABSENT CLEAR GUIDANCE.

FERC was not arbitrary and capricious in its decision to not impose mitigation measures for upstream and downstream GHG impacts in the GHG Conditions described in its Order and Rehearing Order. NEPA mandates the preparation of an EIS for every federal agency action significantly concerning the environment. *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). The EIS requires an agency to “take a ‘hard look’ at” and publicly disclose the environmental impacts of its agency decisions including the consideration of alternative courses of action. *Id.* The EIS assesses reasonably foreseeable environmental impacts, including GHG and climate change impacts. *Food & Water Watch v. FERC*, 28 F.4th 277, 288 (2022); *Sierra Club*, F.3d at 1374. The EIS must discuss the clear significance, if any, of environmental impacts and where there is an increased risk, an agency can only conclude impacts as insignificant after a comprehensive analysis. *California v. Bernhardt*, 273 F. Supp. 3d 573, 622 (N.D. Cal. 2020).

Here, FERC utilizes the EIS to impose appropriate GHG Conditions to reduce the GHG emissions resulting from the construction of the TGP Project. Unlike *Sierra Club*, the EIS for the TGP Project provided estimates of the GHG emissions caused by the project, including GHG emissions resulting from upstream and downstream impacts and from the construction of the AFP. *Id.* Downstream impacts involve the use of LNG transported by the AFP. The EIS analysis

determined that downstream impacts involving the use of LNG transported by the AFP amounted to an estimate of 9.7 million metric tons of CO₂e per year if all 500,000 Dth of the LNG was consumed. Nevertheless, the actual amount would pose low risk: projects are designed for shippers' peak day use and some of the gas may lower emissions by displacing other fuels and transporting through other means. The upstream emissions resulting from the production of LNG in the TGP Project are insignificant since LNG is already produced by HFF and merely transported to other locations. On the other hand, the construction of the AFP may result in an average of 104,100 metric tons per year of CO₂e for four years, or, if GHG Conditions are implemented, 88,340 metric tons per year of CO₂e over four years. Accordingly, FERC imposed GHG Conditions concerning only the construction of the TGP Project as determined by the EIS and the absence of a final determination about the significance of upstream and downstream GHG impacts on the environment.

Although HOME contends that FERC was required to include mitigation measures for upstream and downstream GHG impacts, FERC acted within its discretion. While NEPA mandates an EIS, the statute does not require specific mitigation measures. *Sierra Club*, F.3d at 1376. Here, in the interest of creating a consistent policy, FERC was not arbitrary nor capricious in its discretion to not require mitigation measures for upstream and downstream GHG impacts. The EIS included appropriate measures and there was no clear guidance regarding the significance of the impacts under NEPA and whether the TGP Project would cause a significant increase in the GHG emissions. *California*, 273 F. Supp. 3d at 622. Consequently, absent clear significance, FERC was neither arbitrary nor capricious in its decision to not impose mitigation measures for upstream and downstream GHG impacts in the GHG Conditions of its Orders.

CONCLUSION

For the foregoing reasons, Appellee FERC respectfully requests that this Court affirm its CPCN Order and Rehearing Order to grant a CPCN to TGP for the construction of the TGP project, and by extension, the AFP, subject to conditions in the CPCN Order.