Team Number 48

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Docket No. 23-01109

THE HOLY ORDER OF MOTHER EARTH,
Petitioner,

and

TRANSNATIONAL GAS PIPELINES, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON CONSOLIDATED PETITIONS FOR REVIEW OF ORDERS OF
THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

November 20, 2023

Non-Measuring Brief

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STATEMENT OF JURISDICTION

The United States Federal Energy Regulatory Commission ("FERC" or "Commission") entered a Rehearing Order (199 FERC ¶ 72,201) in Docket No. TG21-616-000 denying timely petitions for review from the Holy Order of Mother Earth ("HOME") and Transnational Gas Pipelines, LLC ("TGP") on June 1, 2023. FERC has the authority to deny rehearing pursuant to the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(a). HOME and TGP filed timely petitions for review of FERC's final order with the United States Court of Appeals for the Twelfth Circuit, which consolidated the petitions into one. The Twelfth Circuit has jurisdiction over this appeal because the TGP has pipeline facilities located in the states of Old Union and New Union, both of which are within the Twelfth Circuit. 15 U.S.C. § 717r(b).

STATEMENT OF THE ISSUES

1. Were FERC's intermediate findings of project need and prevailing public benefits, based on analysis conducted pursuant to its 1999 Certificate Policy Statement, and subsequent finding of public convenience and necessity, pursuant to its authority under § 7 of the NGA, supported by substantial evidence and not arbitrary and capricious?
2. Under the Religious Freedom Restoration Act ("RFRA"), does FERC's order to route the American Freedom Pipeline ("AFP") through HOME's land create a substantial burden on HOME's religious exercise, when the AFP will be placed underground, be timed for construction when the land is not used for HOME's Solstice Sojourns, and cause no physical barrier to HOME's religious practices?
3. Does FERC address a major question where it acts on Congressional authority under the NGA to impose conditions to mitigate some of the greenhouse gas ("GHG") impacts

from an individual project, and FERC is continuing to exercise its comparative expertise over environmental impacts of natural gas projects within a broader statutory scheme?

4. Did FERC properly find that the upstream and downstream GHG impacts of the AFP Project are not significant where FERC guidance to define significant impacts from upstream and downstream GHG emissions is not final?
    a. Does the forthcoming FERC guidance to define significant impacts address a major question where the guidance would not mandate a particular outcome, and the guidance will fit in with the overall regulatory scheme over GHG emissions?
    b. Did FERC reasonably find that the upstream and downstream GHG impacts of the AFP Project are not significant in the absence of final guidance, where the pipeline does not alter existing production, and it is unlikely that all downstream emissions would occur?

STATEMENT OF THE CASE

I. RELEVANT FACTS

TGP is a company incorporated and doing business under the laws of the state of New Union. *Transnational Gas Pipelines, LLC*, 199 F.E.R.C. ¶ 72,201 at P 8(2023). In June 2022, TGP filed an application with FERC, pursuant to NGA § 7(c), to construct and operate the AFP. *Id*. at P 1. The AFP is an approximately ninety-nine-mile-long interstate pipeline that would reroute thirty-five percent of the liquefied natural gas ("LNG") produced at the Hayes Fracking Field ("HFF") in Jordan County, Old Union, to the Northway Pipeline in Burden County, New Union. *Id*. at P 12 and Exhibit A. Prior to submitting the application, TGP signed precedent agreements with two companies that guaranteed firm transportation service for the entire design capacity of the AFP project. *Id*. at P 11. Once operations begin on the pipeline, TGP will become

a natural gas company as defined in the NGA, 15 U.S.C. § 717a(6), and as such will be under FERC jurisdiction. *Id*. at P 8. Ninety percent of the rerouted LNG will be exported to Brazil. *Id*. at P 14.

FERC has sole authority to grant or deny a Certificate of Public Convenience and Necessity Order ("CPCN Order") for all interstate natural gas pipeline projects. 15 U.S.C. § 717f(c). FERC reviews are guided by the Certificate Policy Statement, which requires a review of public benefits versus adverse consequences. *Certification of New Interstate Nat. Gas Facilities,* 178 FERC ¶ 61,197 (2022). FERC reviewed TGP's application and determined that the benefits of the project to the market outweighed "any adverse effects on existing shippers, other pipelines and their [] customers, and on landowners and surrounding communities." 199 F.E.R.C. ¶ 72,201 at P 3(2023). FERC found that there was a need for the project as evidenced by the signed precedent agreements for firm service for 100% of the AFP design capacity. *Id.* at P 26. FERC also found that, based on the Environmental Impact Statement ("EIS"), the AFP construction process would result in significant GHG emissions but that those emissions could be mitigated with the addition of certain conditions (GHG conditions) in the CPCN Order. *Id*. at P 3 and 82. As a result, FERC approved the CPCN Order with the GHG conditions, allowing TGP to proceed.

The AFP will cross approximately two miles of the property of HOME and require the removal of about 2,200 trees and vegetation there. *Id*. at P 38 and Exhibit A. HOME is a non-profit religious organization headquartered in Burden County, New Union. *Id*. at P 9. HOME parishioners believe that "nature . . . should be worshiped and respected," and that "humans should . . . promote natural preservation over . . . economic interests." *Id*. at P 46. Every winter and summer Solstice, HOME parishioners take a sojourn from a temple on the western side of

the property to a sacred hill on the eastern border with the Misty Top Mountains, where a religious ceremony is conducted, and then return to the temple along a different path. *Id*. at P 48. The approved AFP route would cross both paths.

HOME opposes the AFP route for three reasons. First, HOME insists that the AFP has not demonstrated enough public need to justify construction, especially because ninety percent of the LNG carried in the AFP will be exported to Brazil. Second, HOME argues that the impacts of construction and operation of the AFP outweigh any public benefits because of the harmful environmental effects associated with LNG mining, transport, and use. *Id*. at 49–50. Third, HOME argues that, even though TGP will bury the AFP where it crosses HOME land and will time construction to avoid the Solstice Sojourns, HOME's right to religious exercise would be substantially burdened in violation of the RFRA because conducting the Sojourns over the buried pipeline would be "unimaginable" and HOME should not be forced to use its land to support fossil fuels. *Id*. at P 54–58. HOME asserts that the alternative route through Misty Top Mountains should be adopted, despite the uncontested higher cost and increased environmental harm that would result. *Id*. at P 44 and Exhibit A.

Both HOME and TGP oppose the GHG conditions in the CPCN Order but for different reasons. Because the GHG conditions only require mitigation of AFP construction impacts, and not of upstream and downstream operational impacts, HOME asserts that FERC erred in failing to require mitigation for those upstream and downstream impacts. *Id*. at P 77. TGP, however, argues that FERC's imposition of the GHG conditions addresses "major questions" and is thus beyond the authority granted FERC by the NGA. *Id*. at P 76.

II. PROCEDURAL HISTORY

This case comes before the Twelfth Circuit on consolidated petitions for review by HOME and TGP of FERC's decision to deny rehearing of the CPCN Order issued to TGP to build the AFP. *Id.* at P 7.

FERC retains authority to approve or deny the issuance of a CPCN Order for all interstate natural gas pipeline projects. 15 U.S.C. § 717f(c). FERC issued the CPCN Order in April 2023 with conditions designed to reduce the adverse environmental impacts to "less-than-significant." 199 FERC ¶ 72,201 at P 3.

HOME and TGP both timely filed for rehearing of the CPCN Order. *Id.* at P 4. HOME's position is that the AFP will not meet the burden of proof for public necessity because ninety percent of the gas will be exported; the negative impacts of the AFP will outweigh the benefits and create a substantial burden under RFRA that will prevent HOME from exercising its religious practice; and failing to include upstream and downstream GHG mitigation conditions in the CPCN Order was arbitrary and capricious. *Id.* at P 5.

TGP contends that the GHG conditions in the CPCN order requiring TGP to mitigate GHG emissions occurring during construction of the AFP implicate "major questions" and thus exceed FERC's authority under the NGA.

FERC denied both parties' request for rehearing, which led to this petition for review.

SUMMARY OF THE ARGUMENT

Under the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA"), the court must affirm FERC if relevant information is examined and a "rational connection between the facts found and the choice made" is provided. *PJM Power Providers Grp. v. Fed. Energy Regul. Comm'n.*, 880 F.3d 559, 562 (D.C. Cir. 2018). FERC, applying its authority under the NGA, properly found public convenience and necessity for the AFP through

an analysis pursuant to its 1999 policy statement. 15 U.S.C. §717f(e); *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,745-50 (1999). In doing so, FERC also properly found that the public benefits of the AFP outweighed the adverse effects, relying on the record and the various demonstrated needs and demands throughout the journey of AFP's LNG.

FERC properly found that the precedent agreements between TGP and the International Oil & Gas Corporation ("International") and New Union Gas and Energy Service Company ("NUG"), respectively, evidenced a project need for the AFP. Contrary to HOME's contentions, AFP's capacity bound for export is still considered interstate commerce, and therefore governed under § 7 of the NGA, since "gas commingled with other gas indisputably flowing in interstate commerce becomes itself interstate gas[.]" *Okla. Nat. Gas Co. v. FERC,* 28 F.3d 1281, 1285 (D.C. Cir. 1994). FERC's finding was also based on multiple other factors to establish demand. FERC's particular reliance on precedent agreements is at its discretion. *Minisink Residents for Env't Pres. & Safety v. Fed. Energy Regul. Comm'n.*, 762 F.3d 97, 111 n. 10 (D.C. Cir. 2014). FERC also properly used its discretion and authority when considering the AFP's public benefits and adverse effects. TGP made efforts to mitigate many of these adverse effects on landowners while FERC attached conditions to the CPCN requiring further mitigative actions to address several environmental impacts. TGP also took actions in relation to the route of the AFP while FERC evaluated the alternative route, determining it less ideal despite HOME's support.

In finding that the AFP route did not cause a substantial burden to HOME's practice of religious exercise, FERC properly used the *Navajo* test preferred by the Ninth and D.C. Circuits. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008). Courts must avoid employing sincerity tests (*Thiry v. Carlson,* 78 F.3d 1491 (10th Cir. 1996)) when reviewing religious

exercise and instead focus on whether the government action creates a "physical barrier," 199 FERC ¶ 72,201 at P 59, or creates "substantial pressure . . . to modify [] behavior and to violate [] beliefs." *Id*. at P 55. Here, FERC correctly found that HOME will experience no physical barrier, and thus bear no substantial burden, due to the AFP crossing its land along two sacred paths because the AFP will be buried and construction will be timed to avoid interference with HOME's religious ceremonies. *Id*. at P 56, 60. In the alternative, if this Court finds that the AFP route will substantially burden HOME's religious practice, the project can still be granted the CPCN because the LNG pipeline is a compelling government interest (42 U.S.C. § 2000bb–1(b); 15 U.S.C. § 717; *see also* Diane Stanley, *Prayers and Pipelines: RFRA's Possible Role in Environmental Litigation, 30 B.U. Pub. Int. L.J. 89,* n. 163, at p. 109) and the route uses the least restrictive means necessary (the alternate route through Misty Top Mountains being significantly more costly and destructive to the environment). 199 FERC ¶ 72,201 at P 44.

In issuing conditions to mitigate fifteen percent of construction GHG conditions from the AFP, FERC acted within its authority to attach "reasonable terms and conditions as public convenience and necessity may require." 15 U.S.C. § 717f(e). Congress "explicitly left a gap" in the language of the NGA to allow FERC to exercise its discretion to attach "reasonable" conditions. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 834 (1984). FERC does not address a major question of "vast economic and political significance." *West Virginia v. Env't. Prot. Agency*, 142 S. Ct. 2587, 2605 (2022) (quoting 84. Fed. Reg. 32523 (2019)). Even if this Court finds that the major questions doctrine is applicable, FERC acts with "sufficient authority under the NGA." 99 FERC ¶ 72,201 at P 91(2023).

FERC's GHG policy guidance will not address major questions of "vast economic and political significance." *West Virginia v. EPA*, 142 S. Ct. at 2605 (quoting 84. Fed. Reg. 32523

(2019)). Instead, the guidance will offer regulatory certainty. FERC will act upon its power to regulate environmental impacts from natural gas projects in concert with other agencies. This Court must affirm FERC's finding that TGP's upstream and downstream GHG impacts are insignificant. The National Environmental Policy Act ("NEPA") does not require particular findings of significance. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). There is a rational connection between TPG's evaluation of GHG impacts in its EIS and FERC's determination.

ARGUMENT

I. FERC'S ASSESSMENT OF THE AFP'S PROJECT NEED, PUBLIC BENEFIT, AND ADVERSE EFFECTS, PERFORMED PURSUANT TO THE NGA, SUPPORTS ITS FINDING OF PUBLIC CONVENIENCE AND NECESSITY.

A. FERC has authority to determine public convenience and necessity and grant a certificate pursuant to its certificate policy statement and the NGA.

The grant or denial of a § 7 certificate "is a matter peculiarly within the discretion of the Commission." *Minisink*, 762 F.3d at 105-06. When FERC makes findings of public convenience and necessity, the evidence in the record must be adequate and supportive. *See Atl. Refin. Co. v. Pub. Serv. Comm'n. of State of New York*, 360 U.S. 378, 392-93 (1959). FERC has discretion as the federal body authorized to enforce and regulate interstate natural gas projects by Congress. 15 U.S.C. § 717(b). The Commission's finding of public convenience and necessity for the AFP was proper based on the record, as well as consistent with previous findings by FERC in other matters.

Under § 7 of the NGA, FERC must grant a CPCN to a qualified applicant if it is found that the applicant is (1) able and willing to perform the proposed service, (2) conforms to "the provisions of this chapter and the requirements, rules, and regulations of the Commission

thereunder," and (3) the proposed project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. §717f(e). FERC makes this determination by balancing the public benefits and adverse effects of the proposed project. In 1999, it revised its analysis for assessing the public convenience and necessity of interstate facilities and has since applied the practice of determining "project need" by first assessing whether there is a market need for the proposed pipeline. 88 FERC ¶ 61,227, 61,745-46 (1999).

Under the certificate policy statement, an applicant must also consider the proposed project's adverse effects on all potentially affected interests. *Id*. at 61,747. These generally include the interests of the applicant's existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities. Environmental interests may also need to be considered. *Id*. The amount of evidence necessary to find public benefit for a proposed pipeline depends on the potential adverse effects, and FERC may consider other factors and potential mitigation strategies to assess if an applicant endeavored to minimize the adverse effects of the project. *Id*. at 61,749-50.

The court reviews FERC actions under the APA's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under the NGA, this review is limited to ensuring that the decision-making of FERC is reasoned and supported by the record. *Delaware Riverkeeper Network v. Fed. Energy Regul. Comm'n.*, 45 F.4th 104, 108 (D.C. Cir. 2022); 15 U.S.C. § 717r(b). The court must affirm FERC's orders so long as it "examined the relevant data and articulated a rational connection between the facts found and the choice made." *PJM Power Providers Grp.*, 880 F.3d at 562. The court will "uphold FERC's factual findings if supported by substantial evidence." *Fla. Mun. Power Agency v. Fed. Energy Regul. Comm'n.*, 315 F.3d 362, 365 (D.C. Cir. 2003). Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a

preponderance of the evidence." *New Jersey Bd. of Pub. Util. v. Fed. Energy Regul. Comm'n.*, 744 F.3d 74, 94 (3d Cir. 2014). To meet this standard, FERC's action must "contain 'sufficient discussion of the relevant issues and opposing viewpoints,'" and "demonstrate 'reasoned decision-making,'" *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006).

FERC granted a CPCN to TGP for the AFP which would act as an interstate pipeline transporting LNG between Old Union and New Union. The project was found to have a market need based on the domestic and foreign attributes of the pipeline and associated precedent agreements. The public benefit of the proposed pipeline was properly found to outweigh its adverse effects, particularly when considering the proposed alternative route, TGP's mitigation actions, and the additional terms and conditions placed on TGP to address environmental impacts. 15 U.S.C. §717f(e) (FERC has authority to attach to a certificate of public convenience and necessity "reasonable terms and conditions as the public convenience and necessity may require.").

B. FERC's finding of project need, where 90 percent of the AFP's capacity is bound by precedent agreement to be exported, does not violate the NGA.

1. *FERC has the authority to find a project need based in part on natural gas bound for export.*

FERC, under its discretion pursuant to the NGA, appropriately found a project need for the AFP based in part on precedent agreements made with International. Section 3 and § 7 of the NGA govern similar natural gas proposals for foreign and interstate projects, respectively. *W. Virginia Pub. Servs. Comm'n v. U. S. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982). Both sections also have comparable standards for projects. *Id*. However, the NGA defines "interstate commerce" in a manner that excludes foreign commerce. 15 U.S.C § 717a(7); *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 150-52 (D.C. Cir. 1948). If a pipeline is engaged in

foreign but not interstate commerce, then the applicant would fall outside FERC's § 7 authority. *Id.* A show of interstate commerce is therefore required for the AFP to be eligible for a CPCN.

It is undisputed that ninety percent of the AFP's natural gas capacity will be exported abroad, particularly to Brazil. 199 FERC ¶ 72,201 at P 24 (2023). However, FERC and multiple courts have repeatedly reiterated that "gas commingled with other gas indisputably flowing in interstate commerce becomes itself interstate gas[,]" even though that gas is bound for export abroad. *Okla. Nat. Gas Co.*, 28 F.3d at 1285. FERC, as demonstrated in two recent orders, considers whether a project is controlled under § 3 or § 7 of the NGA when appropriate. *Tennessee Gas Pipeline Co., L.L.C. S. Nat. Gas Co., L.L.C.*, 180 FERC ¶ 61,205 at P 10-11 (2022); *Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206 at P 10-11 (2022). Despite "no portion of the project capacity" being "subscribed by a shipper that intends to serve a domestic end use" in either proposed project, FERC determined a finding a public convenience and necessity, reiterating that "the project[s] will transport natural gas that has been commingled on…[the] pipeline systems with gas bound for domestic, interstate use[.]" *Id*. FERC's finding for AFP is consistent with this rationale.

FERC's decision is also harmonious with *City of Oberlin, Ohio v. Fed. Energy Regul. Comm'n.*, 39 F.4th 719, 725-26 (D.C. Cir. 2022), where the court held that when deciding on an application for a CPCN, FERC can credit precedent agreements to transport gas bound for export. In *City of Oberlin*, there was interstate commerce in part because of six precedent agreements to transport gas from Pennsylvania and Ohio for sale across state lines. *Id*. at 726. Here, interstate commerce is evidenced through TGP's precedent agreement with NUG and the pipeline's route between New Union and Old Union connecting various stations and existing pipelines. 199 FERC ¶ 72,201 at P 11(2023).

HOME argues that the AFP pipeline and Nexus pipeline in *City of Oberlin* are aptly different in their domestic-export end-use. While domestically destined natural gas would only account for ten percent of the proposed pipeline's total capacity, the precedent agreements cumulatively represent the total capacity of the AFP. *Id*. Additionally, FERC considers both the end-use of natural gas and evidence of domestic use of the proposed project when making findings of a project need. *See* 88 FERC ¶ at 61,747-48. FERC's finding is appropriate and reasonable according to the NGA, the record, and its previous CPCN orders.

2. FERC consistently places high importance of the existence of precedent agreements when evaluating project need.

FERC properly found a significant showing of public benefit. This finding is amply supported by the record, including TGP's execution of binding precedent agreements for the use of 100 percent of the design capacity of the pipeline project. 199 FERC ¶ 72,201 at P 11(2023). Precedent agreements are long-term contracts in which gas shippers agree to buy the proposed pipeline's transportation services. *Myersville Citizens for a Rural Cmty., Inc. v. Fed. Energy Regul. Comm'n.*, 783 F.3d 1301, 1310 (D.C. Cir. 2015). FERC has consistently relied on precedent agreements as a significant piece of evidence in establishing a project need. 88 FERC ¶ 61,227, at 61,748 (stating that precedent agreements "always will be important evidence of demand for a project."). They are especially weighty when they represent a significant portion or the total capacity of a proposed project. *See Myersville*, 783 F.3d at 1309 (holding that FERC's finding of a compression station's market need was supported by substantial evidence where FERC relied on "[a]ll of the proposed capacity [being] subscribed under long-term contracts" to demonstrate "the existence of a market for the project.").

The significance of precedent agreements must be contextualized by the proposed project and the bound parties. In *Env't Def. Fund v. Fed. Energy Regul. Comm'n.*, the court found that

FERC's granting of a CPCN for a pipeline was arbitrary and capricious when FERC's finding of market need was solely based on one precedent agreement between the applicant and an affiliate shipper for less than full capacity of the pipeline. 2 F.4th 953, 973-75 (D.C. Cir. 2021). In contrast, the court in *Delaware Riverkeeper Network* held that FERC was not arbitrary and capricious in finding a market need in part because there were four precedent agreements from unique shippers for most of the pipeline capacity. 45 F.4th at 114-15.

Even in situations where precedent agreements are insufficient to establish project need, FERC may rely on other evidence to establish need. In *Allegheny Def. Project v. FERC,* environmental associations and homeowners petitioned for judicial review of FERC's orders permitting a gas pipeline company to move forward with its natural gas pipeline expansion project. 964 F.3d 1, 4 (D.C. Cir. 2020). The court determined that despite the precedent agreements possibly supporting an evidenced demand for export capacity rather than domestic use of natural gas, FERC reasonably found market need based on comments and a study that reinforced the domestic demand for natural gas shipments. *Id*. at 19. However, "nothing in the policy statement…suggest[s] that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers." *Minisink,* 762 F.3d at 111 n.10. Therefore, FERC's reliance on the two precedent agreements to establish market need was reasonable and appropriate under the Certificate Policy Statement and NGA.

C. FERC appropriately assessed the benefits and adverse effects of the AFP.

1. *FERC sufficiently evaluated efforts to mitigate adverse impacts to landowners and communities and properly required TGP to take additional actions to mitigate environmental impacts.*

FERC appropriately and sufficiently evaluated the adverse effects of the AFP, including mitigation actions taken by TGP, alternative route proposals, and environmental interest conditions placed on TGP as part of their certificate. Following an evaluation of market need, FERC assessed whether TGP made efforts to eliminate or minimize any adverse effects of the pipeline. *Certificate Policy Statement*, 88 FERC ¶ at 61,745. The AFP is proposed to allow natural gas interconnections between the existing Southway Pipeline and Northway Pipeline by extending the pipeline about ninety-nine miles from Jordan County, Old Union to Burden County, New Union. 199 FERC ¶ 72,201 at P 10(2023). Adverse effects on the interests of landowners and the surrounding communities are evident.

Consistent with other CPCN orders, FERC considered the efforts made by TGP to minimize adverse effects as much as practical. In a 2017 order, FERC determined that Transco's efforts to collocate as much of its proposed pipeline facilities within and adjacent to existing rights-of-way was sufficient to minimize impacts on landowners and the surrounding communities impacting more than 3,700 acres during pipeline construction. *Transcon. Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 at P 25(2017). Courts have also upheld applicants' mitigation efforts under the NGA. See *City of Oberlin*, 39 F.4th at 729-730 (holding that FERC's CPCN order was reasonable as the pipeline would alleviate existing capacity and grid issues and since the natural gas company acquired most of the needed land without eminent domain). To mitigate the adverse effects, TGP has signed easement agreements with more than half of the landowners along the AFP's route. 199 FERC ¶ 72,201 at P 42(2023). Furthermore, TGP has to date already made changes to thirty percent of the pipeline route to mutually benefit landowners and has made agreements with landowners to minimize disruptions. 199 FERC ¶ 72,201 at P 41(2023).

FERC determined the residual adverse effects of the AFP and balanced them against the "evidence of public benefits" to determine their respective weight. *Id*. Construction impacts on the surrounding area constitute a significant source of adverse effects by the AFP. 199 FERC ¶ 72,201 at P 82(2023). The selected pipeline route would run directly through multiple properties, including HOME's property, and is expected to require the removal of 2,200 trees throughout the path. 199 FERC ¶ 72,201 at P 38(2023). HOME argues in favor of the alternative route for the pipeline. 199 FERC ¶ 72,201 at P 39(2023). The major difference between the selected route and the alternative route is the redirection of the otherwise mostly straight route through the Misty Top Mountains. 199 FERC ¶ 72,201 at Exhibit A (2023).

Under the NGA, FERC has a duty to consider reasonable alternatives that may serve the public better than that which is laid out in the application. *N. Nat. Gas Co. v. Fed. Power Comm'n*, 399 F.2d 953, 973 (D.C. Cir. 1968). It fulfilled this requirement by performing an assessment and determining that the proposed alternative route for AFP had greater impacts. 199 FERC ¶ 72,201 at P 44(2023). In *Minisink*, the court similarly concluded that the alternative site for the proposed project station was more environmentally impactful due to it requiring more resources. 762 F.3d at 107. The added impacts of the alternative route for the AFP were both economic and environmental. The alternative route would add $51 million more in costs to the already $599 million project. 199 FERC ¶ 72,201 at P 44-45(2023). The route would also objectively cause more environmental harm due to being longer and running through more environmentally sensitive ecosystems. *Id*.

The final significant consideration of adverse effects is of environmental interests. Unlike mitigation actions under the economic test, mitigation actions under the environmental test consist of conditions issued by FERC as part of the CPCN. 199 FERC ¶ 72,201 at P 71(2023).

The condition requires that TGP take steps to mitigate construction GHG emissions and related impacts. These include actions to offset the natural impacts of the construction of the pipeline and to utilize greener alternatives for various construction-related resources. Like in other matters, FERC based its GHG conditions on the EIS conducted by TGP and the related estimated annual metric tons of CO_2e. *See Delaware Riverkeeper Network,* 45 F.4th at 107. FERC estimates 15,760 metric tons of CO_2e less per year if the TGP implemented its GHG conditions than if it didn't. 199 FERC ¶ 72,201 at P 73(2023). The considerations and actions throughout the process by both FERC and TGP show that the potential adverse effects from the AFP were sufficiently assessed and mitigated to the extent practicable.

2. FERC properly found that the public benefits of the AFP outweigh the adverse effects.

FERC appropriately found that the evidence of public benefits outweighed the potential adverse effects. 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." 88 FERC ¶ at 61,748. In the case of the AFP, these benefits are evidenced significantly by the precedent agreements and contended by TGP to include both domestic and international impacts and needs. *See City of Oberlin,* 39 F.4th at 730 (quoting *City of Oberlin v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019)) (stating that "[t]here is no floor on the subscription rate needed for FERC to find a pipeline is or will be in the public convenience and necessity…[i]nstead, FERC engages in a 'flexible inquiry,' considering 'a wide variety of evidence to determine the public benefits of the project.'").

The need that a proposed project will meet is important in establishing whether there is a public benefit. In *Twp. of Bordentown, New Jersey v. Fed. Energy Regul. Comm'n.*, the court

found a strong showing of public benefit for a proposed pipeline despite petitioners' contentions that the two related proposed projects which would further expand area natural gas infrastructure were likely to not occur. 903 F.3d 234, 262 (3d Cir. 2018). The court reasoned, however, that the precedent agreement for 100% of the proposed pipeline's capacity establishes public benefit since the contract "was not contingent on the completion of either" of the challenged projects. *Id*. The *Twp. of Bordentown* court reasoned that the need for the applicant's proposed pipeline is not capacity for the other natural gas companies' projects but instead additional capacity for the purpose of "enhanced reliability and resiliency." *Id*. at 263. In the current matter, the AFP serves to address the current demand and capacity needs for both gas shippers and the nations by serving as an interconnection for existing pipelines, which have had changing natural gas subscription needs over time. 199 FERC ¶ 72,201 at P 13, 27(2023). When evaluated based on its market need and balanced against the adverse effects of the proposed pipeline, FERC's finding that the public benefits of the AFP outweighed adverse effects is reasonable and well-supported by the record.

II. FERC DID NOT VIOLATE HOME'S RIGHTS UNDER RFRA BECAUSE THE AFP WILL CAUSE NO SUBSTANTIAL BURDEN TO HOME'S PRACTICE OF RELIGION; EVEN IF THERE IS A SUBSTANTIAL BURDEN IT IS IN FURTHERANCE OF A COMPELLING GOVERNMENT INTEREST AND THE LEAST RESTRICTIVE MEANS WILL BE EMPLOYED.

Under RFRA, government actions may not substantially burden one's exercise of religion. 42 U.S.C. § 2000bb–1(a). However, the government may substantially burden the exercise of religion if it can show that the burden was in furtherance of a compelling government interest and that the least restrictive means of furthering that interest were used. *Id*. at 1(b). 42 U.S.C. § 2000cc–5 defines religious exercise as personal expression *or* use of real property for religious practice. (emphasis added). In this case, HOME argues that it will bear a substantial burden in violation of RFRA because the AFP will cross its land twice along sacred paths used

for religious practice. Although the Circuit Courts are split on the proper test to define substantial burden, the *Navajo* test is the proper test and under *Navajo* HOME bears no substantial burden. Alternatively, if HOME does bear a burden from the AFP, it is in furtherance of a compelling government interest and the least restrictive means of routing the AFP were used.

A. The proper test for substantial burden is the *Navajo* test used by the Ninth Circuit, and under *Navajo* HOME will bear no substantial burden from the AFP.

Circuit Courts are split on how to define substantial burden, and RFRA is silent on the matter. In *Thiry v. Carlson*, the Tenth Circuit considered whether the Kansas Department of Transportation's (KDOT) planned highway expansion that would displace the gravesite of the Thirys' stillborn child, a site the Thirys also used for religious practice, would substantially burden the Thirys' practice of religion. *Thiry v. Carlson*, 78 F.3d 1491, 1494 (10th Cir. 1996). The Court looked to see if KDOT's action would substantially burden "a religious belief rather than a philosophy or way of life," that was sincerely held by the Thirys. *Id*. In doing so, the Court reviewed broadly the sincerity of the Thirys' beliefs and any impediments to the practice of their religion that would result from the relocation of the gravesite. Diana Stanley, *Prayers and Pipelines: RFRA's Possible Role in Environmental Litigation*, 30 B.U. Pub. Int. L.J. 89, 98 (2021). Upon finding that the Thirys could still practice their religion even with the displacement of the gravesite, the Court affirmed the district court's ruling that no substantial burden existed. *Thiry*, 78 F.3d at 1496.

Contrast this with the Ninth Circuit's more narrow approach in *Navajo Nation v. U.S. Forest Service*. 535 F.3d 1058 (9th Cir. 2008); *see also* Stanley, *supra* at 98. The Navajo Nation objected to the Forest Service's planned use of recycled wastewater to create artificial snow for a ski resort on a public mountain sacred to the Navajo because it contained a small amount of

human waste and would thus desecrate their holy sites. *Navajo*, 535 F.3d at 1062–63. In *Navajo*, the Court defined "substantial burden" as "forc[ing]" the individual "to choose between modifying their behavior or being subject to sanctions or the loss of benefits." Stanley, *supra* at 98. The Court ruled against the Navajo, saying "a government action that decreases the . . . satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden' . . . on free exercise of religion." *Navajo*, 535 F.3d at 1063. The Court maintained that the government was not forcing the Navajo to modify their practices or give up a benefit to which they were otherwise entitled just because they objected to the recycled wastewater being used, so there was no substantial burden. *Id*.

The D.C. Circuit, in *Standing Rock II*, cautioned against deep analysis of sincerely held beliefs and leaned toward the *Navajo* test. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (*Standing Rock II*), 239 F.Supp.3d 77, 90 (D.C.C.A. 2017) ("it is not within the judicial ken to question the centrality of particular beliefs . . . or the validity of . . . interpretations of those creeds[,]" citing *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989)). In *Standing Rock II*, the Cheyenne River Sioux Tribe ("Tribe") brought a RFRA claim against the Army Corps of Engineers (ACOE) to prevent issuance of an easement for a crude oil pipeline under Lake Oahe, an impoundment of the Missouri River that the Tribe holds sacred. *Standing Rock II*, 239 F.Supp.3d at 82. The Tribe maintained that the "mere existence of a crude oil pipeline . . . will desecrate those waters . . . and render it impossible for the Lakota to use that water in their Inipi ceremony." *Id*. The Court defines substantial burden here as "substantial pressure on adherent[s] to modify [their] behavior and violate [their] beliefs." *Standing Rock II*, 239 F.Supp.3d at 91. The Court ultimately ruled against the Tribe, saying their RFRA claim was unlikely to succeed on the merits because there

would be no physical barrier to their religious practices. This more closely aligns with the *Navajo* analysis than that of the *Thiry* test. *Id.*

In the instant case, HOME argues that having their trees removed and being forced to walk over a buried pipeline on the Solstice Sojourns would significantly impact their ability to practice their religion, and that forcing the pipeline onto their property compels HOME to participate in LNG production, transportation, and burning, in violation of their beliefs. 199 FERC ¶ 72,201 at P 57–58. But under the *Navajo* test that FERC employed, FERC found no "physical barrier," *id*. at P 59, and no "substantial pressure . . . to modify [] behavior and to violate [] beliefs." *Id*. at P 55. The modifications TGP made to the pipeline (burying and construction timing) will result in no physical barrier to HOME's practice of religion, just as the presence of the buried oil pipeline in *Standing Rock II* will create no physical barrier for the Tribe. Thus here, as in *Standing Rock II*, there is no substantial burden born by HOME and thus no RFRA violation.

B. Even if the Court finds a substantial burden, it is in furtherance of a compelling government interest.

If this Court finds that the AFP route proposed by TGP substantially burden's HOME's exercise of religion, the Court may still allow FERC to grant TGP the CPCN because the pipeline is in furtherance of a compelling government interest. 42 U.S.C. § 2000bb–1(b). The Natural Gas Act states, "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and [] Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." NGA, 15 U.S.C. § 717; *see also* Stanley, *supra* at n. 163, p. 109.

C. The least restrictive means of furthering the government interest were employed here because the alternative AFP route is costlier and more damaging.

When conducting the least restrictive means inquiry, the Court "compar[es] the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity." *Ave Maria Found. v. Sebelius,* 991 F.Supp.2d 957, 967 (E.D. Mich. 2014) (quoting *S. Ridge Baptist Church v. Indus. Comm'n of Ohio,* 911 F.2d 1203, 1206 (6th Cir.1990)). Here, HOME does not dispute that the alternative route through Misty Top Mountains would add more than fifty-one million dollars in construction costs and would add three miles of pipeline through sensitive ecosystems. 199 FERC ¶ 72,201 at P 44 and Exhibit A. In addition, RFRA's purpose is to protect the free exercise of religion, including land use, when it is otherwise targeted for discrimination, not to provide extra rights for religious landowners that others may not enjoy. Stanley, *supra,* at 109. By forcing the alternative route, HOME would be demanding special treatment because of its religious beliefs while also running afoul of its beliefs because of the additional significant environmental damage the alternative route would cause. 199 FERC ¶ 72,201 at P 62. Thus, the current AFP route is the proper one even if the project is found to substantially burden HOME's exercise of religion because the least restrictive means inquiry was employed in furtherance of a compelling government interest.

III. FERC DOES NOT ADDRESS A MAJOR QUESTION WHERE IT ACTS ON CONGRESSIONAL AUTHORITY TO IMPOSE CONDITIONS TO MITIGATE SOME OF THE GHG EMISSIONS FROM AN INDIVIDUAL PROJECT.

In issuing construction GHG conditions, FERC acted within its authority "to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as public convenience and necessity may require." 15 U.S.C. § 717f(e). Congress "explicitly left a gap" in the statutory language of the NGA to allow FERC to exercise

its discretion to attach "reasonable" conditions. *See Chevron,* 467 U.S. at 834. Therefore, this Court must give "considerable weight" to FERC's decision to impose GHG conditions on the construction of the AFP. *Id.* at 844. Conditions to reduce GHG emissions during the construction of the AFP by fifteen percent do not constitute a major question of "vast economic and political significance." *West Virginia,* 142 S. Ct. at 2605 (quoting 84. Fed. Reg. 32523 (2019)). Even if this Court finds that the major questions doctrine is applicable, FERC has "sufficient authority under the NGA" to attach these conditions. 99 FERC ¶ 72,201 at P 91(2023). This authority is well-founded in Congress's long-established practice of relying on FERC's comparative expertise and supported by the critical role that § 7 of the NGA plays within the broader statutory scheme to regulate GHGs.

This is not a major questions doctrine case. The doctrine is cabined to "extraordinary cases" in which agencies assert "extravagant power over the national economy." *West Virginia,* 142 S. Ct. at 2609. Unlike agency decisions that present a major question, FERC's "specific and individual measures focused on one proposed project" do not have broad-sweeping political or economic consequences. 99 FERC ¶ 72,201 at P 86(2023). FERC's construction GHG conditions are distinguishable from the Environmental Protection Agency's ("EPA") action in *West Virginia v. EPA.* There, the Supreme Court found that the EPA's interpretation of Section 111(d) of the Clean Air Act ("CAA") presented a major question because it "would 'drive a[n]…aggressive transformation in the domestic energy industry.'" *West Virginia,* 142 S. Ct. at 2609 (quoting White House Fact Sheet, App. in *American Lung Assn*. v. *EPA,* No. 19–1140); *see also King v. Burwell,* 576 U.S. 473, 485 (2015) (Internal Revenue Service tax credits would "affect[] the price of health insurance for millions of people.").

FERC's decision to impose conditions on construction GHG emissions from the AFP is an exercise of its jurisdiction over natural gas construction, as granted by Congress. 15 U.S.C. § 717f(c)(1)(A) ("No natural-gas company . . . shall engage in the transportation or sale of natural gas . . . unless there is in force . . .a certificate of public necessity issued by the Commission authorizing such acts or operations. . . ."). In contrast, courts have applied the major questions doctrine where agencies "seize[] expansive power" that is not granted under a statute. *Util. Air Regul. Groups v. Env't. Prot. Agency*, 573 U.S. 302, 324 (2014). In *Utility Air*, the Supreme Court applied the major questions doctrine where the EPA claimed "newfound authority" to regulate "millions of small sources," including "retail stores, offices, apartment buildings, shopping centers, schools and churches." *Id.* at 324. Similarly, in *N. Carolina Coastal Fisheries Reform Grp.* v. *Capt. Gaston, LLC,* the Fourth Circuit invoked the major questions doctrine where the EPA sought to interpret the Clean Water Act ("CWA") such that "almost every commercial or recreational fisherman in America" would need to apply for a CWA permit. 76 F.4th 291, 299-300 (E.D.N.C. 2023). Rather than claiming "newfound" jurisdiction over previously unregulated parties, FERC is simply exercising its existing grant of authority over a party squarely within its domain. *See id.*

Nor is FERC's issuance of construction GHG conditions, as TGP claims, an unstated change in agency practice. FERC's "established practice" of imposing conditions to mitigate GHG emissions "shed[s] light on the extent of power conveyed [to FERC] by [the] general statutory language" of § 7 of the NGA. *West Virginia*, 142 S. Ct. at 2610 (quoting *Fed. Trade Comm'n. v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)). For over 60 years, the Supreme Court has acknowledged FERC's power "to condition certificates in such manner as the public convenience and necessity may require." *Atl. Refin. Co.*, 360 U.S. at 391; *see also Fed. Power*

Comm'n. v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 7 (1961) (FERC is the "guardian of the public interest in determining whether [CPCNs] should be granted.").

In 1975, the Supreme Court clarified that FERC's authority includes the power to consider "environmental" questions. *Nat'l. Ass'n. for Advancement of Colored People v. Fed. Power Comm'n.*, 425 U.S. 662, 670 fn. 6 (1976). Unlike the "rarely used" Section 111(d) of the CAA that was "newly uncovered" by the EPA, *West Virginia*, 142 S. Ct. at 2596-610, it is common practice for FERC to apply its comparative expertise in considering GHG emissions in environmental assessments required by the NEPA. See, e.g., Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions); Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (operation emissions).

In *Sierra Club*, the D.C. Circuit held that even where GHG emissions are an indirect effect of authorizing a project, FERC has the "legal authority to mitigate" what it can "reasonably foresee." 867 F.3d 1357, 1374 (D.C. Cir. 2017); *see also Twp. of Bordentown*, 903 F.3d at 261 fn. 15 (FERC's authority to remediate environmental impacts is "amply supported" by the NGA.). FERC estimates the construction of the AFP would result in an average of 104,100 metric tons per year of $C0_2e$. 99 FERC ¶ 72,201 at P 73(2023). With this forecast, and the power vested in FERC under § 7 of the NGA, FERC may impose conditions to mitigate these construction GHG emissions. In addition to prior FERC orders, FERC's website should have put TPG on notice of FERC's authority to attach such conditions. The webpage titled "What FERC Does" states that the agency "oversees environmental matters related to natural gas . . . ."

The "overall statutory scheme" over GHG emissions from interstate natural gas facilities affirms FERC's statutory discretion to attach such conditions. *See King v. Burwell*, 576 U.S. 473,

486 (2015) (quoting *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)) (In deciding whether the statutory text is plain, the Supreme Court reads "words 'in their context and with a view to their place in the overall statutory scheme.'"). Since the passage of NEPA in 1970, federal agencies like FERC have used "all practicable means and measures" to "create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331(a). Pursuant to NEPA, FERC must prepare a "detailed statement" on "reasonably foreseeable environmental effects" for CPCN applications that constitute a "major Federal action." *Id.* § 4332(A)–(C). FERC has the authority to mitigate the foreseeable effects it identifies, including environmental effects. 15 U.S.C. § 717f(e); *Sierra Club*, 867 F.3d at 1374. The Council on Environmental Quality's ("CEQ") recent guidance on GHG emissions and climate change affirms this long-held authority. National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023). Unlike the Food and Drug Administration's attempt to regulate tobacco products, which the Supreme Court found to be foreclosed by an existing regulatory scheme, *FDA v. Brown & Williamson*, 529 U.S. at 138, FERC's issuance of construction GHG conditions is integral to the surrounding statutory scheme to regulate GHGs.

Even if the Court were to find that the major questions doctrine applies here, FERC "can point to 'clear congressional authorization'" to attach these conditions to the CPCN. *West Virginia*, 142 S. Ct. at 2614 (quoting *Util. Air*, 573 U.S. at 324). The NGA explicitly delegates FERC authority to attach "reasonable terms and conditions as public convenience and necessity may require." 15 U.S.C. § 717f(e). In stark contrast to major question doctrine cases, courts have repeatedly affirmed FERC's power to assign conditions to mitigate environmental impacts. *E.g. Atl. Refin. Co.* 360 U.S. at 391 (1959); *Sierra Club*, 867 F.3d at 1374; *c.f. West Virginia*, 142 S.

Ct. at 2065 (quoting 84 Fed. Reg. 32529) ("[N]o section 111 rule of the scores issued ha[d] ever been based on generation shifting.").

Congress granted FERC discretion under § 7 of the NGA to attach conditions to CPCNs. Courts have repeatedly upheld this authority, in which FERC exercises its comparative authority and acts in concert with a deliberate statutory scheme. FERC's decision to impose GHG conditions does not constitute a major question of great political or economic significance. Therefore, the court must find that the GHG imposed by FERC was within its authority under the NGA.

IV. FERC HAS CONGRESSIONAL AUTHORITY TO MITIGATE DOWNSTREAM AND UPSTREAM GHG IMPACTS, BUT NEPA DOES NOT REQUIRE FERC TO CHARACTERIZE IMPACTS FROM THE TGP PROJECT AS SIGNIFICANT UNDER CURRENT GUIDANCE.

A. Congress gave FERC authority under § 7 of the NGA to regulate significant downstream and upstream GHG impacts.

FERC has the authority to regulate GHG impacts that it can "reasonably foresee, and which the agency has legal authority to mitigate." *Sierra Club* 867 F.3d at 1374. FERC's authority to assess GHG impacts, including upstream and downstream impacts, is affirmed by consistent prior agency practice and the surrounding regulatory context. FERC's forthcoming guidance will provide consistent and lawful standards for FERC to assess the significance of these impacts. *Certification of New Interstate Nat. Gas Facilities,* 178 FERC ¶ 61,197 (2022). FERC has the legal authority to rely on this guidance, once final, in assessing the significance of how particular natural gas projects may contribute to climate change.

FERC's forthcoming policy guidance for addressing upstream and downstream GHG impacts will not address major questions of "vast economic and political significance." *West Virginia v. EPA,* 142 S. Ct. at 2605 (quoting 84. Fed. Reg. 32523 (2019)). Instead, the guidance

will offer "clarity and regulatory certainty."178 FERC ¶ 61,197 at P 73(2022). Neither NEPA nor this guidance obligates FERC to assert "extravagant power over the national economy." *West Virginia,* 142 S. Ct. at 2609; *See Robertson* 490 U.S. at 350 ("[I]t is now well settled that NEPA itself does not mandate particular results . . . ."). Rather than mandating any particular outcome by FERC, the guidance will allow FERC to continue to balance "economic and environmental impacts" together in its public interest determinations. 178 FERC ¶ 61,197 at P 73(2022). FERC will maintain the flexibility it has always had to choose to approve as-is, condition, or deny a CPCN. 15 U.S.C. § 717f(e).

The upcoming guidance maintains FERC's tradition of "reviewing economic and environmental impacts concurrently." 178 FERC ¶ 61,197 at P 72(2022). For decades, the Supreme Court has upheld FERC's practice of considering environmental impacts in public interest determinations. *NAACP*, 425 U.S. at 670 fn. 6 ("[T]he Commission has authority to consider conservation, environmental, and antitrust questions."). In Commissioner Christie's dissenting opinion to the Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, he suggests that the Supreme Court cabined the meaning of the term "public interest" in the NGA to exclude environmental considerations. 178 FERC ¶ 61,197 at P 14 n. 24 (2022). To the contrary, courts have affirmed that FERC may assess and mitigate environmental impacts, including GHG emissions, which "FERC could reasonably foresee, and which the agency has legal authority to mitigate." *Sierra Club* 867 F.3d at 1374; *See also Twp. of Bordentown*, 903 F.3d at 261 fn. 15 (FERC's authority to remediate environmental impacts is "amply supported" by the NGA). The upcoming guidance will not address a major question because courts have repeatedly upheld FERC's authority to assess and mitigate downstream and upstream GHG impacts.

FERC's assessment and mitigation of downstream and upstream GHG impacts also properly fits into an "overall statutory scheme." *King v. Burwell*, 576 U.S. at 486. FERC, CEQ, and EPA coordinate in the environmental review of onshore natural gas pipelines, such as the AFP, to ensure compliance with federal statutes[1]. As discussed, CEQ administers NEPA, which requires FERC to assess "reasonably foreseeable environmental effects" of natural gas projects, such as pipelines, through environmental assessments. 42 U.S.C. § 4332(A)–(C).

Commissioner Christie also argues that the regulation of GHG impacts lies solely within EPA's authority under the CAA. 178 FERC ¶ 61,197 at P 24 (2022). EPA collaborates with federal agencies including FERC to regulate GHG impacts. EPA reviews EISs for interstate natural gas facilities with significant environmental impacts and recommends avoidance and mitigation measures. 42 U.S.C. § 7609. Additionally, Executive Order 12,898 and Executive Order 14,008 direct agencies, including FERC, to identify and address adverse environmental effects. Exec. Order No. 12,898, 59 Fed. Reg. 7629 at 7629, 7632 (Feb. 11, 1994); Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629 (Jan. 27, 2021). The regulation of GHG impacts is a cross-agency responsibility, in which FERC plays a critical and lawful role.

FERC has Congressional authority to develop guidance for assessing upstream and downstream GHG impacts from interstate natural gas facilities. FERC has consistently acted on this authority in prior practice in proper coordination with the EPA and CEQ. Thus, the future guidance will not address a major question.

B. Absent clear and final guidance, NEPA does not mandate FERC to find that the TGP project's downstream and upstream GHG impacts are significant.

[1] *EPA's Liquified Natural Gas Regulatory Roadmap* at iv, Env't. Prot. Agency (Nov. 2006), https://www.epa.gov/sites/default/files/2015-08/documents/lng_regulatory_roadmap.pdf

In reviewing FERC's finding that TGP's upstream and downstream GHG impacts are insignificant, this Court must apply the arbitrary and capricious standard of review under the APA. *Vecinos para el Bienestar de la Comunidad Costera v. Fed. Energy Regul. Comm'n.*, 6 F.4th 1321, 1327 (D.C. Cir. 2021) (Explaining that an agency's NEPA analysis is reviewed under the arbitrary and capricious standard of the APA). The arbitrary and capricious standard of review requires this Court "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *Id.* Courts are urged against "flyspeck[ing] an agency's environmental analysis." *Id.* There is a "rational connection" between TPG's evaluation of GHG impacts in its EIS and FERC's determination that the upstream and downstream GHG impacts are insignificant. *Id.* Therefore, this Court must defer to FERC's discretion under NEPA and the NGA in finding that the upstream and downstream GHG impacts are not significant.

FERC is not currently required to make particular findings of significance under NEPA. As put by the Supreme Court, "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson,* 490 U.S. at 350. FERC adhered to the process as required by taking a "hard look" at TGP's EIS. *Sierra Club,* 867 F.3d at 1367. The EIS evaluated the environmental consequences of the TPG project, including a "lengthy evaluation" of GHG impacts. 199 FERC ¶ 72,201 at P 72(2023). The discretion left to agencies under NEPA is illustrated by CEQ's recent guidance on the consideration of GHG emissions and climate change, which "does not establish any particular quantity of GHG emissions as 'significantly' affecting the quality of the human environment." National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023).

FERC is not required to make particular findings of significance in the absence of clear guidance. FERC offered a rational connection between the findings of the EIS and its determination that the impacts from the TGP Project are not significant. As FERC explained in its order denying rehearing, "it is unlikely" that the total estimate of downstream CO_2e emissions of 9.7 million metric tons per year would occur. 199 FERC ¶ 72,201 at P 72(2023). This estimate represents an "upper bound" for CO_2 emissions. *Id.* The true quantity is "likely to be lower" due to this estimate being based on year-round transport and not accounting for the displacement of other fuels. *Id.*

As for upstream GHG impacts, FERC reasonably determined that these impacts are not relevant. Courts have acknowledged the challenge of quantifying upstream emissions and have upheld FERC's practice of considering upstream emissions on a "case-by-case basis." *See Birckhead v. Fed. Energy Regul. Comm'n*., 925 F.3d 510, 516-18 (D.C. Cir. 2019) (Discussing the difficulty of determining whether there is a causal connection between upstream gas production and a pipeline project). FERC rationally determined that the transportation of LNG via the AFP does not alter the production of natural gas from the HFF. 199 FERC ¶ 72,201 at P 74(2023).

Were FERC to make findings of significance for upstream and downstream GHG impacts before FERC's guidance is finalized, it would generate confusion and regulatory uncertainty the forthcoming guidance is intended to prevent. 178 FERC ¶ 61,197 at P 73(2023). Without a principled approach guiding this assessment, any findings of significance are likely to generate inconsistent and unpredictable outcomes. In a press release on FERC's decision to decline to find GHG impacts from the Northern Natural Gas Company's pipeline project significant, FERC Chairman Rich Glick explained that further guidance will allow FERC to "refine [its] methods"

in assessing the significance of GHG impacts[2]. Until FERC's guidance is finalized, this Court must defer to FERC's reasonable determination that the upstream and downstream GHG impacts are not significant.

CONCLUSION

FERC's issuance of TGP's CPCN based on a finding of public convenience and necessity was proper pursuant to the language of both the NGA and the Commission's Certificate Policy Statement and supported by substantial evidence. FERC's finding of project need was consistent with its previous orders where the commingled nature of liquid natural gas, the domestic benefit of proposed projects, and the demonstration of need via precedent agreements were significant. FERC's finding of AFP's public benefit outweighing its adverse effects was also reasonable based on the actions taken or required by TGP to mitigate, as well as FERC's earnest consideration of HOME's contentions and alternatives. As FERC has established that its actions were substantially evidenced and based on its authority, this Court must affirm the Commission's order.

This Court must also affirm FERC's finding that the AFP does not create a substantial burden to HOME's practice of religious exercise under RFRA. FERC properly used the *Navajo* test, rather than the *Thiry* test, to determine that no substantial burden exists because the AFP will create no physical barrier to HOME being able to use their land for religious exercise just as they did before the project. The *Thiry* test goes too far into analysis of sincerity of beliefs; the Navajo test is favored by the Ninth and D.C. Circuits and thus is the proper test. In the

[2] *FERC Reaches Compromise on Greenhouse Gas Significance, Fed. Energy Regul. Comm'n.* (Mar. 18, 2021), https://www.ferc.gov/news-events/news/ferc-reaches-compromise-greenhouse-gas-significance

alternative, if this Court was to find that the AFP route does place a substantial burden on HOME's exercise of religious practice, the Court could still find that that FERC properly awarded the CPCN to TGP because the AFP is in furtherance of a compelling government interest (interstate transmission of LNG) and the least restrictive means were used (the alternative route is significantly costlier and more environmentally harmful).

FERC's decision to attach conditions to TGP's CPCN to mitigate construction GHG emissions does not address a major question of notable economic or political significance. FERC's finding that the upstream and downstream GHG emissions are not significant was rationally based on the record. Although the forthcoming FERC guidance on GHG impacts cannot be applied here, it will not address a major question once finalized. Therefore, this Court must defer to FERC's discretion in attaching conditions to the construction emissions but not the upstream and downstream emissions of the AFP.

November 20, 2023