Team 51

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH

-and-

TRANSNATIONAL GAS PIPELINES, LLC

Appellants

v.

FEDERAL ENERGY REGULATORY COMMISSION

Appellee

On Appeal from the Federal Energy Regulatory Commission case no. TG21-616-000, Jane D. Clark, Chairwoman; Scott P. Williams, Timothy S. Child, and Wendy L. Bankman.

Brief for Appellant, TRANSNATIONAL GAS PIPELINES, LLC

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STATEMENT OF JURISDICTION

This case seeks review under 717r(d) of the Natural Gas Act ("NGA"), 15 U.S.C. Sec. 717r(d), an ordered issued by the Federal Regulatory Commission ("FERC") granting a Certificate of Public Convenience and Necessity Order ("CPCN") on April 1, 2023, to Transitional Gas Pipelines, LLC ("TGP") for the construction of the American Freedom Pipeline ("AFP").

AFP is an interstate pipeline that is approximately 99-miles from a receipt point in Old Union to a proposed interconnection with an existing transmission facility in New Union. One of the commentators, Holy Order Mother of Earth ("HOME") filed a timey request for rehearing on April 20, 2023. HOME contested issues one, two, three, and five.

This Court has jurisdiction over the petitions under Section 717r(d)(2) of the NGA. The Act authorizes any party aggrieved by a FERC order to obtain review...in the United States Court of Appeals for the District of Columbia.... by filing a petition for review within sixty days after the order by FERC and raising those objections previously brought before on rehearing. TGP has satisfied these jurisdictional requirements.

STATEMENT OF ISSUES PRESENTED

I. Whether FERC's finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found 10% of gas would be used domestically and the pipeline would improve the efficiency of the market and pipeline network?

II. Whether FERC's finding that the AFP's benefits of producing 500,000 dektherms of gas a day, providing natural gas to new areas, optimizing the existing system for current and new customers, and improving the efficiency of the pipelines outweigh the adverse impacts of the destruction of vegetation and the use of eminent domain?

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

IV. Whether FERC, under its limited authority granted by the NGA, can impose conditions to mitigate green-house gas emissions on a certificate—a certificate otherwise proper under the NGA?

V. Whether FERC can regulate downstream and upstream green-house gas emissions?

STATEMENT OF FACTS

A. TGP & the AFP

TGP applied, under section 7(c) of the NGA and Part 157 of FERC's regulations, for authorization to construct and operate a 99-mile-long interstate pipeline, the AFP. Op. at 4 ¶ 1. The AFP will only be 30 inches in diameter and extend from Jordan Country, Old Union, to a proposed interconnection with an existing TGP gas transmission facility in Burden Country, New Union. Op. at 4 ¶ 1. TGP estimates that the proposed project will cost approximately $599 million. Op. at 6 ¶ 10.

TGP held an open season, which resulted in the execution of two precedent agreements. Op. at 6 ¶ 11. One precedent agreement was with International Oil & Gas Corporation (“International”) for 450,000 dekatherms (“Dth"), and the second was with New Union Gas and Energy Services Company ("NUG") for 50,000 Dth per day, which equals the full design capacity of the TGP project. Op. at 6 ¶ 11. The AFP will be transporting liquified natural gas (“LNG”) produced at Hays Fracking Field (“HFF”). Op. at 6 ¶ 12.

The LNG currently produced at HFF is transported by the SouthWay Pipeline, which is at full capacity. Op. at 6 ¶ 12. AFP will not add production to HFF but redirect 35% of the production away from SouthWay Pipeline. Op. at 6 ¶ 12. Because the LNG demand east of Old Union, where the SouthWay pipeline feeds LNG to customers, has been in a steady decline due to a population shift, efficiency improvements, and electrification of heating. Op. at 6 ¶ 13.

Due to the declining demand, the market will be better served and become more efficient by redirecting the LNG through the AFP. Op. at 6 ¶ 13. HOME does not dispute the evidence presented by TGP. Op. at 6 ¶ 13. The LNG to be exported will be diverted to the NorthWay

Pipeline, which is currently not at full capacity, thus furthering the efficiency of the pipeline network. Op. at 6 ¶ 14.

No party disputed that TGP can financially support the project without subsidization from its existing customers or that there are no adverse impacts on TGP's existing customers, existing pipelines in the market, and their captive customers. Op. at 7 ¶ 21. TGP has shown that AFP serves multiple domestic needs:

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

Op. at 8 ¶ 27. FERC authorized the AFP subject to the conditions in the CPCN conditions. Op. at 4 ¶ 2. The CPCN order found the benefits the AFP will provide to the market outweigh any adverse effects on existing shippers, pipelines, customers, and landowners in the surrounding communities. Op. at 4 ¶ 3. Based on the Environmental Impact Statement ("EIS"), FERC also concluded that the project will result in some adverse environmental impacts but will be reduced to less-than-significant levels with the implementation of staff's recommendations. Op. at 4 ¶ 3.

B. HOME

HOME is a not-for-profit religious organization. Op. at 5 ¶ 9. HOME owns 15,500 acres, which houses its headquarters. Op. at 5 ¶ 9. AFP will run through the property east of their headquarters. Op. at 5 ¶ 9.

HOME contends that the CPCN order was unsupported because 90% of the gas transported by the pipeline will be exported. Op. at 4-5 ¶ 5. Second, HOME contends that even if there is a public necessity, the negative impacts of AFP outweigh the benefits. Op. at 5 ¶ 5. Third, HOME contends that the decision to route the AFP through HOME's property violates the Religious Freedom Act ("RFRA"). Op. at 5 ¶ 5. Finally, HOME argued that FERC failed to require mitigation measures for upstream and downstream greenhouse gas ("GHG"). Op. at 5 ¶ 5.

A fundamental core tenet of their religion is that preserving nature is the most important interest. Op. at 11 ¶ 45. Therefore, HOME believes that by allowing the AFP to be built, the CPCN order is compelling HOME to support the production, transportation, and burning of fossil fuels physically. Op. at 11.¶ 50.

HOME presented sworn testimony that every summer and winter solstice, members of HOME make a ceremonial journey from a temple at the western border of the property to a sacred hill on the eastern border of the property in the foothills of the Misty Top Mountains. Op. at 11 ¶ 48. They then make a journey back along a different path (the Solstice Sojourn). Op. at 11 ¶ 48. At the hill, all children in the Order who have reached the age of 15 in the prior six months undergo a sacred religious ceremony. Op. at 11 ¶ 48. HOME has performed the Solstice Sojourn since 1935, and the path would cross the proposed pipeline route in both directions. Op. at 11 ¶ 48.

C. Alternate Route and Mitigation Efforts of Adverse Impacts

HOME proposed an alternate route for the AFP pipeline to run through the Misty Top Mountain Range. Op. at 10 ¶ 39. TGP provided an estimate of the alternate route's additional cost, which would add over $51 million in costs. Op. at 11 ¶ 44. Additionally, TGP showed that the alternate route would cause more environmental harm than the original route because it would run

an additional three miles and go through environmentally sensitive ecosystems. Op. at 11 ¶ 44. HOME did not contest the evidence put forth by TGP on the alternate route. Op. at 11 ¶ 45.

To mitigate HOME's concerns, TGP has offered to replant the 2,200 trees that will be destroyed on their property elsewhere, bury the AFP through the entirety of HOME's property, and expedite pipeline construction. Op. at 10-12 ¶ 41, 47, 59. Thus, TGP will complete the two miles of AFP pipeline on HOME's property within a mere four-months. Op. at 10 ¶ 41.

Additionally, FERC placed GHG conditions on the construction of AFP to mitigate CO2e:

> (1) TGP shall plant or cause to be planted an equal number of trees as those removed in the construction of the TGP Project; (2) TGP shall utilize, wherever practical, electric-powered equipment in the construction of the TGP Project, including, without limitation: (a) Electric chainsaws and other removal equipment, where available; and (b) Electric powered vehicles, where available; (3) TGP shall purchase only "green" steel pipeline segments produced by net-zero steel manufacturers; and (4) TGP shall purchase all electricity used in construction from renewable sources where such sources are available. Op. at 14 ¶ 67.

Finally, to mitigate other concerns from citizens potentially affected by the AFP, TGP has made changes to over 30% of the proposed pipelines in hopes of securing mutually acceptable easement agreements. Op. at 10 ¶ 41. TGP has already reached an agreement with 60% of landowners. Op. at 10 ¶ 42.

SUMMARY OF THE ARGUMENT

TGP has provided substantial evidence to establish public convenience and necessity. TGP provided market evidence of market demand by securing precedent agreements for 10% of the natural gas to be designated for domestic use. FERC enters into a flexible inquiry considering all benefits a pipeline may offer. AFP offers increased market competitiveness and efficiency and other factors that went into FERC's finding of public convenience and necessity.

TGP provided evidence of substantial economic benefits and showed an ability to mitigate environmental impacts and landowner concerns. HOME presented no evidence nor contested the

benefits that AFP offers. Because AFP has not posed any adverse effects beyond the normal destruction of vegetation that occurs with creating a pipeline, its benefits outweigh its adverse effects.

The construction and operation of the AFP will not substantially burden HOME's free exercise of religion under the RFRA because TGP nor FERC coerces or threatens by civil or criminal sanctions HOME's religious expression. TGP has implemented several mitigating measures that will not prevent HOME to continue its free exercise of religion and though HOME could experience, diminished spiritual fulfillment, such incidental effect is not a substantial burden on the free exercise of religion.

FERC cannot impose GHG conditions on a certificate—a certificate otherwise condition-free—under the NGA, because the GHG conditions do not further the NGA's purpose. The NGA does not vest FERC the authority to impose GHG conditions that do not directly or indirectly effect the physical environment of the AFP—to assert it does, is a major question.

Lastly, upstream, and downstream emissions are not a reasonably foreseeable effect of the AFP and, thus, FERC cannot regulate them. Upstream and downstream effects on the physical environment on this project are too attenuated to the construction and operation of the AFP, such that FERC cannot be considered a legally relevant cause under NEPA.

STANDARD OF REVIEW

This Court reviews FERC's actions under the arbitrary and capricious standard outlined by the Administrative Procedure Act. 5 U.S.C. § 706(2)(a). A decision is arbitrary and capricious if the agency's explanation for the decision is lacking or inadequate. *BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016) (citing *Maher Terminals LLC v. Fed. Mar. Comm'n*, 816 F.3d 888, 892 (D.C. Circ. 2016)). A decision supported by substantial evidence will be upheld under the arbitrary and capricious standard. 14 U.S.C. § 17r(b).

Additionally, the court will uphold FERC's decision if it is well-reasoned, principled, and based on the record. *Myersville Citizens for a Rural Community, Inc. v. FERC.*, 414 U.S.App.D.C.438, 445 2015 (quoting *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). Thus, the Court should consider if the decisions were based on relevant factors and if there has been a clear error in judgment. *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 71, 76 (D.C. Cir. 2002).

The review of the meaning of the RFRA is reviewed de novo. *See e.g.*, *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). Including what constitutes "substantial burden and what constitutes a religious belief, and ultimately as to whether the act has been violated in either of those respects." *Id*.

ARGUMENT

I. FERC's FINDING SHOULD BE UPHELD BECAUSE FERC ENGAGES IN A FLEXIBLE INQUIRY THAT CONSIDERS ALL ASPECTS OF A PROJECT THAT COULD ESTABLISH PUBLIC CONVENIENCE AND NECESSITY BEYOND DOMESTIC USE.

A. TGP Has Provided Substantial Evidence That The AFP Provides A Public Convenience And Necessity.

FERC has used its technical expertise and experience to grant a CPCN for the construction of the AFP. FERC will only grant a CPCN if it is determined that the proposed pipeline is or will provide a present of future public convenience and necessity. 15 U.S.C. § 717f(e). A facility will be considered a public convenience and necessity after FERC evaluates all factors bearing on the public interest. *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959). When considering FERC's evaluation of scientific data, its technical expertise should be afforded an extreme degree of deference. *Wash. Gas Light Co. v. FERC,* 532 F.3d 928, 930 (D.C. Cir.

2008) (quoting *Nat'l Comm. for the New River, Inc.v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

TGP executed multiple binding precedent agreements with foreign and domestic companies. The execution of the precedent agreements establishes market demand. Furthering the notion of public need. Under established law, precedent agreements are "always… important evidence for the demand of a project." *Env't Def. Fund v. FERC*, 2 F.4th 953, 972 (U.S. App. D.C. 2021) (quoting *Minisink Residents For Env't Preservation and Safety v. FERC*, 762 F.3d 97, 1311 (D.C. Cir. 2014)). However, HOME's position is that because 90% of natural gas is planned to be exported, the precedent agreements do not establish a market demand. HOME's argument is without precedent and makes two fatal presumptions.

1. ***A precedent agreement for exportation is not the sole factor in granting a CPCN Order.***

First, gas companies have been granted a CPCN with precedent agreements for exportation and upheld under the arbitrary and capricious standard. City of Oberlin, Ohio v. FERC, 39 F.4th 719 (D.C. Cir. 2022). City of Oberlin has two distinguishing qualities from the case at hand. The gas to be exported was 17% of the total pipeline capacity, and the gas was to be exported to Canada – a country for which the United States possesses a Free Trade Agreement. The law states that the exportation of gas to "a nation with which there is in effect a free trade agreement… shall be deemed consistent with public interest." 12 U.S.C. § 717b(a).

Here, TGP is exporting gas to Brazil, with which there is not a Free Trade Agreement. However, the court in Oberlin did not make the Free Trade Agreement the definitive reason for upholding the CPCN. Exporting the gas to a country with an FTA will always be consistent with public interest, but the statute nor Oberlin states that if there is not an FTA, then there cannot be a finding of public necessity.

Further, Oberlin states, "there is no floor on the subscription rate needed for FERC to find a pipeline is or will be in the public convenience and necessity." *Oberlin II* at 730 (quoting *City of Oberlin, Ohio v. FERC*, 39 F.3d 599 (D.C. Cir. 2019)). Thus, whether 59% or 10% of the LNG is to be used domestically, a decision of public necessity cannot be made based solely on the domestic use of the gas.

*2. **FERC weighs all factors that contribute to public convenience and necessity when granting a CPCN Order.***

The Second fatal presumption HOME made is that a CPCN will only be granted if there is an established domestic market need through evidence of precedent agreements. This presumption was disproved by Oberlin when the court upheld FERC's decision independent of the export precedent because FERC engages in a flexible inquiry considering a wide variety of evidence. Oberlin II at 730 (quoting Oberlin I, 937 F.3d at 605). TGP's application provides evidence that the AFP will serve many domestic needs, contributing to its public necessity. For example, the AFP will:

> (1) deliver up to 500,000 Dth per day of natural gas to the interconnection with the NUG terminal and the NorthWay Pipeline; (2) providing natural gas service to areas currently without access to natural gas within New Union; (3) expanding access to sources of natural gas supply in the United States; (4) optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market; (5) fulfilling capacity in the undersubscribed NorthWay Pipeline; and (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. Op. at 8 ¶ 27.

HOME intends to dismiss all of AFP's potential benefits by making a blanket statement that there is no substantial evidence or that these benefits do not actually provide domestic benefits. However, when TGP presented evidence of AFP's domestic benefits, HOME made no contention. For example, AFP will reroute 35% of the current LNG produced at HFF to customers without

current access. Thus, TGP will expand natural resource access to new customers. HOME does not deny these facts. Op. at 6 ¶ 12.

Additionally, TGP has presented evidence that LNG demands in regions east of Old Union have been steadily declining. Thus, redirecting the LNG through the AFP would better serve market needs and produce a more efficient and competitive market. HOME does not contest these facts. Op. at 6 ¶ 13. TGP has also provided evidence that the AFP will bring the existing pipeline, the NorthWay Pipeline, to full capacity, providing a more efficient and effective network of pipelines. HOME, once again, does not contest these facts. Op. at 6 ¶ 13.

FERC has approved TGP's application for a multitude of reasons. There is not one specific reason that is the utmost important because they all carry significant value. HOME would like to focus solely on precedent agreements and the domestic need for interstate use. However, it is well-settled precedent that FERC must engage in a flexible inquiry and consider a wide variety of evidence to determine public necessity. Additionally, gas bound for export that is comingled with gas for domestic interstate use undisputedly becomes itself interstate gas. *Okla. Nat. Gas Co. v. FERC*, 28 F.3d 1281, 1285 (D.C. Cir. 1994).

Thus, AFP providing various benefits to new and old customers, increasing market effectiveness and competitiveness, and providing a more effective and efficient network of pipelines is substantial evidence to justify FERC's decision. Because there is significant evidence to justify FERC's decision, there is no clear error in judgment precluding a reversal under the arbitrary and capricious standard.

II. TGP HAS PROVIDED EVIDENCE OF SIGNIFICANT ECONOMIC BENEFITS THAT ARE UNCONTESTED BY HOME AND HOME HAS ONLY PROVIDED ADVERSE ENVIRONMENTAL AFFECTS, ALL OF WHICH TGP HAS ATTEMPTED TO MITIGATE.

A. AFP Has Provided A Multitude Of Economic Benefits That Outweigh The Adverse Effects Of The Destruction Of Vegetation.

In making an ultimate determination, FERC will consider adverse effects on the interests of the applicant's existing customers, future customers, surrounding communities, and their landowners. FERC then balances the adverse effects with the project's public benefits, as measured by an economic test. *Env't. Def. Fund v. FERC*, 2 F.4th 953, 961 (D.C. Cir. 2021) (quoting *Myersville*, 783 F.3d at 1309.)). Additionally, FERC has "broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines." *Minisink*, 762 F.3d at 111.

The economic test designed by FERC considers adverse effects such as increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property. *Env't. Def. Fund v. FERC*, 2 F.4th 953, 961 (D.C. Cir. 2021). Public benefits generally include meeting unserved demand, eliminating bottlenecks, access to new supplies, lowering consumer costs, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives. Id.

1. The benefits that AFP will provide to the public.

TGP has shown evidence of many benefits that the new AFP will provide. For example, the AFP will redirect LNG away from the states east of Old Union because of the declining demand for natural gas. Op. at 6 ¶ 12. Thus, the AFP will serve a new demand that current pipelines cannot meet. TGP has also provided evidence that the redirecting of the LNG through the AFP will not lead to gas shortages. HOME does not contest these facts. Op. at 6 ¶ 13.

Additionally, redirecting the LNG will meet another public benefit by giving new customers access to natural gas who have never had access to natural gas before. Ipso facto, AFP will be improving the interstate grid of natural gas. Op. at 6 ¶ 13.

Further, the AFP will bring the NorthWay pipeline to full capacity, furthering the efficiency of LNG pipelines. Op. at 6 ¶ 13. By introducing LNG to new areas of the country, AFP will also be promoting the use of cleaner forms of fossil fuels rather than oil or coal. Thus, by burning the cleanest of fossil fuels until more clean energy sources are provided, the AFP will advance the clean air objectives by reducing CO2e emissions.

AFP may also displace gas that otherwise would be transported via different means, resulting in no change in CO2e emissions. As such, it is unlikely that this total amount of CO2e emissions would occur, and emissions are likely to be lower than the above estimate. Op. at 15 ¶ 72. Finally, it is important to note that HOME does not contest these benefits. HOME only discusses precedent agreements and the potential adverse effects that AFP may pose.

2. The adverse effects HOME provides and TGP's efforts to mitigate those concerns.

The adverse effects that HOME presents are far and few between. HOME contests that the AFP will destroy trees and vegetation on their property and along the 99-mile route. TGP understands these concerns and has presented mitigation terms. For example, TGP has pledged to replace the 2,200 trees destroyed on HOME's land to lessen its environmental impact. TGP has agreed to bury the AFP throughout its passage of HOME's property. Also, TGP offered to expedite construction "to the extent feasible" across HOME's property and complete the construction in between the solstices to minimize disruption. Op. at 10 ¶ 41. TGP contends that it can complete the two-mile stretch over HOME's property within a four-month period. Op. at 10 ¶ 41.

Further, the destruction of trees and vegetation occurs in the construction of every pipeline. HOME has no evidence that the route chosen for AFP will be more environmentally dangerous than any other pipeline.

3. There is no evidence that shows AFP will present economic adverse effects.

HOME has not contested or provided evidence surrounding adverse effects regarding increased rates for preexisting customers, degradation in service, or unfair competition. The balancing test is an economic test. *Myersville*, 783 F.3d at 1309. Yet, HOME has yet to provide any evidence that AFP will adversely affect the market of LNG or pipelines in this country.

TGP has put forth its full effort to accommodate and mitigate effects to its current customers, the states, and the market. In addition to the mitigation efforts for HOME, TGP has attempted to mitigate concerns of the general public. Since the pre-filing process, TGP has altered over 30% of AFP to address landowners' concerns and negotiate mutually acceptable easement agreements. Op. at 10 ¶ 41. Finally, 60% of the landowners along the route have reached easements, and TGP believes more landowners will reach agreements because of the 30% change to AFP.

B. The Misty Top Mountain Range Alternative Is To Costly And Causes More Environmental Harm Than The Original Route For It To Be A Reasonable Alternative.

For FERC to have properly considered reasonable alternatives the Court asks "whether the agency '(1) has accurately identified the relevant environmental concern, (2) has taken a hard look at the problem in preparing its environmental assessment, (3) is able to make a convincing case for its finding of no significant impact, and (4) has shown that even if there is an impact of true significance, an EIS is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum." *Mich. Gambling v. Kempthorne,* 525 F.3d 23, 29 (D.C. Cir.

2008) (quoting *Taxpayers of Mich. Against Casinos v. Norton*., 433 F.3d 852, 861 (D.C. Cir. 2006)).

An Environmental Assessment must include a "brief discussion" of reasonable alternatives to the proposed action. 40 C.F.R. § 1508.9(b). A reasonable alternative are alternatives that are economically practical or feasible and meet the purpose of the proposed action. *City of Alexandria v. Slater,* 198 F.3d 862, 867 (D.C.Cir.1999)); *see also* 43 C.F.R. § 46.420(b).

In FERC's rejection of the proposed alternative and approval of AFP, it considered the Misty Top Mountain Range alternative proposed by HOME. HOME argues that the AFP should be rerouted through the Misty Top Mountain Range. TGP provided an estimate of the rerouting costs, which would add over $51 million in construction costs. Op. at 11 ¶ 44. HOME did not contest the economic assessment put forth by TGP nor provided any economic assessment of its own. Also, FERC can show convincing evidence of no significant environmental impact by using the original route.

The alternate route has been shown to cause a more significant environmental and economic impact than the original route. Because TGP has shown the alternate route would cause more environmental harm by traveling through an environmentally sensitive ecosystem in the mountain range and cost an additional $51 million. *Id*. Once again, HOME did not reject or contest the impacts of the alternate route. For these reasons the alternate route is not a "reasonable alternative" route to the proposed action.

HOME states that the core tenant of their religion is to promote natural preservation over all other interests. However, HOME would rather TGP take an alternate route that would cause more environmental harm than the original route. HOME's argument for the alternate route is

inconsistent with their religious views and inconsistent with their original argument for adverse effects.

By selecting the alternate route, there would be far more damage to the environment and ecosystems bordering their land. The 2,200 trees destroyed on their land will be replanted elsewhere. However, blasting rock through a mountain range and destroying sensitive ecosystems cannot and are not so replaceable. If HOME's actual contention were to preserve the environment, they would side with TGP and the original AFP route.

III. FERC'S DECISION TO ROUTE THE AFP OVER HOME'S PROPERTY DOES NOT VIOLATE THE RFRA—THEIR RELIGIOUS OBJECTIONS NOTWITHSTANDING.

When a holder of a certificate under Section 7 of the NGA, "cannot acquire by contract…or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct [pipelines] for the transportation of natural gas…, may acquire the same by the exercise of the right of eminent domain…." 15 U.S.C.A. § 717f(h).

Under the RFRA, the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability. 42 U.S.C. § 2000bb-1. If the claimant establishes a "substantial burden on his exercise of religion, the burden of persuasion shifts to the government to prove that the challenged government action is in furtherance of a 'compelling governmental interest' and is implemented by the 'least restrictive means.'"42 U.S.C. § 2000bb-1(b); *see also Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008).

A "substantial burden" is imposed only when individuals are forced to choose between following the tenants of their religious and receiving a governmental benefit, or coerced to act contrary to their religious beliefs by threat of civil or criminal sanctions." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 709 (1981). "Any burden imposed on the exercise

of religion short of that…is not a substantial burden within the meaning of the RFRA, and does not require the application of the compelling [government] interest…." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 (9th Cir. 2008).

This Court "review[s] the meaning of the [RFRA] de novo, including what constitutes "substantial burden and what constitutes a religious belief, and ultimately as to whether the act has been violated in either of those respects." *See e.g.*, *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996).

Here, FERC has given TGP a certificate for "public convenience and necessity" under Section 7 of the NGA. Op. at 4 ¶ 3; 15 U.S.C. § 717f(e). However, "TGP has been unable to reach easement agreements with HOME," because HOME asserts its exercise of religion is "substantially burdened," contrary to the RFRA, because 1) "the AFP, though it would be buried, would significantly impact—if not prevent entirely—the Solstice Sojourn," 2) "walking over the pipeline on their own land on their sacred journey…would be 'unimaginable' and would destroy the meaning of the Solstice Sojourn," and 3) the CPNC order compels "HOME to support the production, transportation, and burning of fossil fuels"—anathema to HOME's religious beliefs. Op. at 12 ¶ 57-58; 42 U.S.C. § 2000bb-1(a). FERC correctly found the "CPCN order is not violative of [the] RFRA." Op. at 13 ¶ 61. This Court should hold the same.

A. The passage of AFP through HOME's property, though it may cause damage to HOME's property, is not sufficient to show a "substantial burden" on HOME's religion.

In *Lyng*[1], the United States Forest Service proceeded with a road construction project in the Six Rivers National Forest, a sacred site for American Indian tribes, despite the tribes'

[1] Though this case was not decided under the RFRA, the "substantial burden" test of the RFRA is akin to that of the First Amendment. *Navajo Nation*, 535 F.3d at 1063 (case decided under RFRA)

contentions that "the proposed road w[ould] physically destroy the environmental conditions and the privacy without which the religious practices [could not] be conducted" and that "too much disruption in the area's natural state would clearly render any meaningful continuation of traditional practices impossible." *Id*. at 449.

The Forest Service implemented "ameliorative measures" so that "no sites where specific rituals take place were to be disturbed." *Id*. at 454. The Supreme Court held that incidental effects on religious practices, even with potential interference to the tribe's religious practice, do not constitute substantial burdens unless individuals are compelled to violate their beliefs or punished for religious activity. *Id*. at 440.

The *Lyng* framework is instructive on this case because HOME asserts the construction and operation of the AFP will entirely prevent their Solstice journey, but HOME's "incidental effects on religious practices" is not enough to be consider a "substantial burden" on their religious practices. Op. at 10 ¶ 41, 12 ¶ 56; *Lyng*, 485 U.S. at 450. Nothing in the AFP project will "significantly impact—if not entirely prevent—" HOME's religious practices because TGP will implement "ameliorative measures," as those in *Lyng*, to minimize disruption in HOME's property. *Lyng*, 485 U.S. at 450. Those include: 1) "expedit[ing] construction to the extent feasible," 2) burying the AFP—not only where HOME members would pass during their Solstice journeys, but— "throughout the entirety of its passage across HOME's property," and 3) planning the construction of the AFP "to occur entirely between solstices." Op. at 10 ¶ 41, 12 ¶ 56.

In essence, the only difference HOME will see in their property after AFP's construction is completed is the "bare spot along the Solstice Sojourn." Op. at 13 ¶ 59. But such difference is

("[S]ubstantial burden"—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion.").

"incidental" and not a "substantial burden" on HOME's religious exercise. *Lyng*, 485 U.S. at 454; *Thiry*, 78 F.3d at 1495 ("Incidental effects of otherwise lawful government programs which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs do not constitute substantial burdens on the exercise of religion.").

Lastly, the AFP, just like in *Lyng*, will not go through HOME's "site[] where specific rituals take place." *Lyng*, 485 U.S. at 450. The AFP, though it will go through both of HOME's Solstice's paths, it will not go through "the hill, [where] all children of the Order… undergo a sacred religious ceremony." Op. at 11 ¶ 48.

B. Diminishment to HOME's spiritual fulfilment or subjective religious experience is not a "substantial burden."

In *Navajo*, under the RFRA, Indian tribes objected against the use of wastewater to make artificial snow for skiing, alleging it would "spiritually contaminate the entire mountain and devalue their religious exercises," and thus, "substantially burden" their religion. *Navajo Nation*, 535 F.3d at 1063. The court held that the government imposed no substantial burden on the tribes' religion because the use of wastewater "does not coerce the [Indian tribes] to act contrary to their religion under threat of civil or criminal sanctions." *Id*. at 1067. The court reasoned that "diminished spiritual fulfillment—serious though it may be—is not a substantial burden on the free exercise of religion." *Id*. at 1071.

Similar to *Navajo*, HOME's assertion that walking over the "bare spot" of the AFP would be "unimaginable" and would destroy the meaning of the Solstice—"decreases [in] the spirituality, the fervor, or the satisfaction with which the believer practices his religion,"—"*is not what Congress labeled as a substantial burden*." *Id*. at 1063. (emphasis added); *Thomas*, 450 U.S. at 709 ("A substantial burden is imposed only when individuals are forced to choose between

following the tenants of their religious and receiving a governmental benefit, or coerced to act contrary to their religious beliefs by threat of civil or criminal sanctions.").

There is no contention that the construction of AFP will offend HOME, "but unless such actions penalize faith, they do not burden religion." *Navajo Nation*, 535 F.3d at 1065 (quoting *Wilson v. Block*, 708 F.2d 735, 739 (D.C.Cir.1983)). As such, HOME will not undergo a "substantial burden" on its religious practice—its diminished spiritual fulfillment notwithstanding. *Navajo Nation*, 535 F.3d at 1070.

C. TGP nor FERC coerces HOME to choose between obtaining government benefit or not have civil or criminal sanctions imposed against them and abiding to their religious beliefs.

In *Thomas*, Thomas terminated his employment from a machinery because his employer transferred him from the roll laundry department to one that produced turrets for military tanks, but his religious belief prevented him from participating in the production of war materials. *Thomas*, 450 U.S. at 709. Thomas then filed for unemployment, but the reviewing board denied him compensation. *Id*. at 711. The Court held that a "substantial burden" on religion existed, because the denial of unemployment benefits put substantial pressure on Thomas to alter his behavior and violate his beliefs. *Id*. at 718.

Here, TGP nor FERC puts substantial pressure on HOME to alter its behavior and violate its belief, because there is no threat by civil or criminal sanctions that HOME "support the production, transportation, and burning of fossil fuels." Op. at 12 ¶ 58; *Thomas*, 450 U.S. at 718. The occurrence of the proposed action on HOME's property does not inherently imply that TGP or FERC is coercing HOME's support for it. Similar to the situations in *Lyng* and *Navajo* involving government projects proceeding as planned, the mere implementation of the project does not de facto compel the support of the involved parties. This parallel applies to the present case—HOME

is not under coercion to alter its position. *Thomas*, 450 U.S. at 718; *Navajo Nation*, 535 F.3d at 1063; *Lyng*, 485 U.S. at 450.

Put another way, HOME can continue to oppose the construction and operation of the AFP. As opposed to *Thomas*, here, there is no choice HOME needs to take as it relates to choosing between following the tenets of their religion and receipt of government benefit. *Thomas*, 450 U.S. at 717. There is no evidence that a government benefit is being withheld to HOME from its opposition of the "production, transportation, and burning of fossil fuels." *Id*. at 718. There is also no evidence of criminal of civil threats to HOME. As such, HOME will be under no "substantial burden" to their free exercise of religion.

Lastly, this Court should deny all three of HOME's assertions of a substantial burden under the RFRA, because, otherwise, the government could not operate "if it were required to satisfy every citizen's religious needs and desired." *Lyng*, 485 U.S. at 452. Indeed, whatever rights HOME may have to the use of the area, "however, those rights do not divest the Government of its right to use what is, after all, its land." *Navajo Nation*, 535 F.3d at 1072 (quoting *Lyng*, 485 U.S. at 451); *see also* 15 U.S.C. § 717f(h) (holder of certificate for public convenience and necessity may acquire property by exercise of eminent domain).

IV. IT IS BEYOND FERC'S AUTHORITY, UNDER THE NGA, TO IMPOSE GHG CONDITIONS TO THE CONSTRUCTION AND OPERATION OF AFP.

The Natural Gas Act (NGA) was enacted by Congress and tasked the Federal Energy Regulatory Commission (the "Commission) with the primary goal of promoting the systematic development of ample natural gas supplies at fair prices, while also safeguarding consumers from potential exploitation by natural gas companies. *City of Clarksville, Tenn. v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018). There are also "subsidiary purposes [of the NGA] …including conservation, environmental, and antirust issues." *Id*. at 479.

Under the NGA, a would-be LNG exporter must obtain a certificate from FERC to construct and operate the necessary facilities. 15 U.S.C. § 717b(e)(1). The granting of the certificate hinges on FERC's determination that the LNG construction project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). FERC is empowered to impose "such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717b(e)(1). Public convenience and necessity under the NGA means "a charge to promote the orderly production of plentiful supplies of… natural gas at just and reasonable rates," because the words "take meaning from the purposes of the regulatory legislation." *See NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976). Though such analysis may require FERC to consider "all factors bearing on public interest," the analysis is constrained by the purpose and limitations of the statute in which FERC operates. *See id*.

A. FERC's assertion of authority to regulate GHG emissions is a major question because the NGA does not vest FERC with such authority.

When dealing with a statute that grants authority to an administrative agency, the inquiry should be influenced, to some extent, by the nature of the question at hand—whether Congress intended to empower the agency with the authority it has claimed. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Ordinarily, context should have no significant effect on the analysis, but there are "extraordinary cases" that call for a different approach—cases in which the "history and the breath of authority that the agency has asserted, and the economic and political significance" of that assertion, provide reason to hesitate before concluding that Congress" meant to confer such authority. *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. 2587, 2608 (2022). Justice Gorsuch has recently explained as follows:

> The federal government's powers . . . are not general, but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of

> authority to regulate in this area or any other, it must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." We sometimes call this the major questions doctrine.

Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA, 596 U.S. 109, 121-22 (2022) (Gorsuch, J., concurring) (citations omitted). In essence, the doctrine presumes Congress reserves major issues to itself and unless a grant of authority to address a major issue is explicit in a statute administered by an agency, it cannot be inferred to have been granted. *See e.g., Alabama Ass'n. of Realtors v. Dep't of Health and Human Services*, 141 S. Ct. 2485 (2021); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 134.

This is an extraordinary case where FERC conditions, otherwise proper NGA certificates, to pursue environmental goals. Here, FERC asserts that:

> "[I]n deciding whether to authorize the construction of major new facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction. Under this policy, the threshold requirement for new projects is that the pipeline company must be prepared to financially support the project without relying on subsidization from its existing customers."

Op. at 7 ¶ 18-19. All those considerations bear on the "public interest" because they promote the NGA's primary goal—and TGP concedes as such. Op. at 7 ¶ 17; *see also City of Clarksville, Tenn.*, 888 F.3d at 479.

However, FERC asserts that, because the NGA "instructs [them] to consider the 'public convenience and necessity" and to attach to the issuance of certificate such reasonable terms and conditions as "the public convenience and necessity may require" that they have the authority to issue GHG conditions on TGP. Op. at 14 ¶ 71. This is an elephant in a mousehole for four reasons: (1) FERC's assertion of authority to issue GHG conditions was not delegated by Congress because it is not within § 7 of the NGA to mitigate GHG emissions; (2) it has not even been the historic practice of FERC to mitigate GHG conditions; (3) the GHG emissions FERC attempts to mitigate are too attenuated to environmental "effects" within FERC's jurisdiction, and; (4) the GHG conditions do not fit within the statutory framework with which the NGA was enacted. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 134.

1. Nothing in the NGA authorizes FERC to subvert the NGA's main purpose for ancillary—environmental—issues.

FERC's "powers under § 7 are, by definition, limited," and GHG mitigation is one Congress did not delegate. *NAACP v. Fed. Power Comm'n*, 425 U.S. at 669; *see also Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 17 (1961) (citing H.T. Koplin, *Conservation and Regulation: The Natural Gas Allocation Policy of the Federal Power Commission*, 64 Yale L.J. 840, 862 (1955)). FERC justifies its authority to implement GHG conditions, because "the public convenience and necessity required." Op. at 14-15 ¶ 71-71. But FERC flips the NGA's statutory framework upside down. Indeed, FERC disregards the NGA's statutory framework in favor of issues not found in Section 7 of the NGA— inter alia, climate change. *See* 15 U.S.C. § 717.

Even when there is no mention of environmental mitigation measures within the NGA, FERC asserts that "Section 7 of the NGA empowers [them] to set specific terms and conditions when granting authorization, *and that includes environmental mitigation measures*." Op. at 18 ¶ 91 (emphasis added). The question is whether the NGA *plainly* authorizes FERC's GHG conditions.

It does not, and FERC points nowhere in the statute to show it does. Ultimately, to evaluate environmental effects, from a project that otherwise meets the "public convenience and necessity" standard under the NGA, is an ungranted form of jurisdiction by FERC—one "Congress could not have intended to delegate… in so cryptic a fashion." *W. Virginia*, 142 S. Ct. at 2608 ; *see also Gonzales v. Oregon*, 546 U.S. 243 (2006).

As such, "Common sense as to [how] Congress would have been likely to delegate" makes it very unlikely that Congress did delegate FERC the authority to mitigate GHG impacts. *W. Virginia*, 142 S. Ct. at 2608; *Brown & Williamson Tobacco Corp.*, 529 U.S. at 134.

2. GHG conditions have not been FERC's historic practice to further the NGA's main purpose.

FERC's GHG conditions on TGP depart from what FERC has historically imposed as conditions on other companies seeking a certificate. *Compare* Op. at 14 ¶ 67, *with Northwest Cent. Pipeline Corp. v. F.E.R.C.*, 797 F.2d 918, 928 (10th Cir. 1986) (conditioned certificate on minimum gas throughput); *Tenn. Gas Pipeline Co., a Div. of Tenneco Inc. v. F.E.R.C.*, 689 F.2d 212, 223 (D.C. Cir. 1982) (condition to maintain 60% of annual capacity available of offshore gas pipeline); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1320 (D.C. Cir. 2015) (certificate conditioned on supplier's subsequent receipt of Clean Air Act permit from state); *ANR Pipeline Co. v. FERC*, 876 F.2d 124, 129 (D.C. Cir. 1989) (one-year term condition imposed on certificate for company transporting Canadian natural gas); *Algonquin Gas Transmission, LLC v. Weymouth, Massachusetts*, 919 F.3d 54, 59 (1st Cir. 2019). (certificate conditioned on approval of project by state agencies); *Pub. Serv. Comm'n of State of New York v. Fed. Power Comm'n*, 257 F.2d 717, 725 (3rd Cir. 1958) (rate conditions) *Hunt Oil Co. v. Federal Power Commission*, 334 F.2d 474, 482 (5th Cir. 1964) (no-increase-in-price conditions); *Cal. Oil Co., W. Div. v. Fed.*

Power Com., 315 F.2d 652, 655 (10th Cir. 1963) (issuing conditional certificate requiring new schedules for lower rates).

All these conditions further FERC's purpose under the NGA—that is, promoting the systematic development of ample natural gas supplies at fair prices, while also safeguarding consumers from potential exploitation by natural gas companies. *City of Clarksville, Tenn.*, 888 F.3d at 479; 15 U.S.C. § 717b(e)(1). But the GHG conditions do not. And TGP recognizes FERC can "rely on its authority to impose condition to control prices *outside its jurisdiction*" because it furthers the NGA's purpose. *Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1524 (D.C. Cir. 1990) (emphasis added).

But it does not follow that FERC can bring GHG emissions, which does not further the NGA's purpose, into its jurisdiction by means of conditions. Ultimately, FERC's conditions on certificates have to be, "reasonably tailored so as to accomplish" FERC's stated objective. *See e.g.*, O*zark Gas Transmission System v. F.E.R.C.*, 897 F.2d 548, 554 (D.C. Cir. 1990) (condition imposed to prevent subsidization or double recovery has to be reasonably tailored as to accomplish [FERC's] stated objective).

3. The GHG emissions do not constitute an "effect" from the construction and operation of the AFP, and thus, FERC has no authority to regulate them.

FERC ordered TGP to (1) plant an equal number of trees as those removed; (2) whenever practical utilize electric-powered equipment in the construction of AFP, including electric chainsaws and other removal equipment as well as powered vehicles; (3) only purchase "green" steel pipeline segments produced by net-zero steel manufacturers, and; (4) purchase all electricity used in construction from renewable sources. Op. at 14 ¶ 67.

TGP concedes that FERC may mitigate "environmental impacts" by ordering TGP to plant "an equal number of trees as those removed" in the project's construction, because they *directly*

impact the environment. Op. at 16 ¶ 83. However, the environmental impact that make the basis for FERC to impose the GHG conditions of the order (i.e., #2-4 above) are too attenuated from the physical environment of TGP's project. *See* 40 CFR 1508.1(g)(2)*; see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (finding that "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation," will not fall within NEPA if "the causal chain is too attenuated").

To constitute an "effect," three elements must be met: (1) there is a "change[] in the human environment," that change (2) is "reasonably foreseeable," and (3) it "has a reasonably close causal relationship to the proposed action or alternatives." 40 C.F.R. § 1508.1(g). Here, the conditions needing mitigation, other than the replanting of trees, will not constitute an "effect" in the environment, because the "effects" are too attenuated to the construction and operation of the AFP.

To illustrate, FERC has previously issued various rulings on conditions based on "environmental impacts" akin to the planting of trees, but unlike the other GHG conditions (i.e., #2-4 above). *See e.g., Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,045, at P 66, app. (2020) (conditioning certificate authority on site-specific mitigation measures when crossing abandoned mine lands, including the management and disposal of contaminated groundwater, and mitigation measures for acid mine drainage); *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,198, at PP 29-30, app. A (2020) (conditioning certificate authority on mitigation of construction impacts on karst features); *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at app. A, 61246 (2017) (conditioning certificate authority on the mitigation of construction impacts on karst features and on a nearby inn and mitigation of impacts from the discovery of invasive aquatic species during construction); *Port Arthur LNG, LP*, 115 FERC ¶ 61,344, at PP 68-71, app. A (2006) (conditioning certificate on the mitigation of construction impacts on aquatic resources and wetlands). All these conditions are

instituted to mitigate "effects" on the physical environment of a project, because the change is reasonably foreseeable, and it has a close causal relationship with the proposed action.

Here, FERC offers no explanation. For example, how does the utilization of "electric-powered equipment," and "electric chainsaws and other removal equipment," or the purchase of "green steel pipelines" and electricity from "renewable sources" will "effect" the physical environment of the project? Or how will the purchase of electricity from "renewable sources," which can come from places far from the project place, will have any "effect" on the physical environment where the project will be conducted? FERC offers no explanation.

Therefore, FERC should not bring environmental impacts outside of its jurisdiction by imposing GHG conditions on effects too attenuated to the project at hand, because the GHG impacts will not give rise to an environmental impact within FERC's jurisdiction.

Lastly, FERC's GHG conditions are not linked to "the purpose Congress had in mind when it enacted the legislation." *Fed. Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 664-65. For example, in *NAACP v. Fed. Power Comm'n*, the issue presented was whether FERC, in reference to the "public interest" under the NGA "had the authority to prohibit discriminatory employment practices on the part of its regulatees." *NAACP v. Fed. Power Comm'n*, 425 U.S. at 670. Though the fight for employment discrimination was a genuine concern to the country and FERC, the Supreme Court answered no. *Id.* In doing so, it asserted a long-standing policy that the "use of the words 'public policy' in a regulatory statute is not a broad license to promote the general public welfare." *Id*. at 669. But rather, the words "take meaning from the purposes of the regulatory legislation." *Id*.

Similarly, FERC's authority under the NGA to consider those factors bearing on the "public interest" when issuing certificates, "does not imply authority to issue orders regarding any

circumstance in which FERC's regulatory tools might be useful." *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) (citing *Louisiana Power & Light Co.*, 406 U.S. at 633). Put another way, FERC may not, because it lacks the power to promote environmental policies directly, do so indirectly by attaching a condition to a certificate that is, in its unconditional form, already in the "public convenience and necessity." *See Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990); *see also* Carl I. Wheat, *Administration by the Federal Power Commission of the Certificate Provisions of the Natural Gas Act*, 14 Geo. Wash. L. Rev. 194, 214-215 (1945) ("[I]t would appear clear that the power to prescribe 'reasonable conditions' in certificates cannot be greater in scope than the statutory authority of FERC.").

Therefore, TGP asks this Court to "greet" FERC's assertion of "extravagant statutory power" over the GHG emission with "skepticism." *Utility Air Regulatory Group*, 573 U.S. at 324. This Court should reverse FERC's order as to the GHG emissions because it does not have the authority to impose them on TFP as they are beyond the powers delegated to FERC by Congress under the NGA.

V. IT IS BEYOND FERC'S AUTHORITY TO IMPOSE ANY GHG CONDITIONS ADDRESSING DOWNSTREAM AND UPSTREAM GHG IMPACTS.

Under the National Environmental Protection Act (NEPA), FERC shall "include in every recommendation or report on the proposal for…major Federal actions *significantly* affecting the quality of the human environment, a detailed statement on… *reasonably foreseeable* environmental *effects* of the proposed agency action…." 42 U.S.C. § 4332(A)-(C) (emphasis added). Thus, the relevant question is whether the downstream and upstream GHG emissions, are

an "effect"—whether direct or indirect [2]— that are reasonably foreseeable[3] to FERC, from FERC's issuance of the certificate of public convenience and necessity. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). They are not.

FERC asserts it has the authority to regulate downstream and upstream[4] GHG emissions, because *Sierra Club* (Sabal Trail) held that GHG "emissions are an indirect effect of authorizing th[e] project, which [FERC] could reasonably foresee, *and which the agency has the legal authority to mitigate*." *See* Op. at 16 ¶ 79 n.22; *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (emphasis added).

A. FERC cannot assert jurisdiction to regulate downstream and upstream emissions because the emissions do not have a close causal relationship to the AFP.

However, "the *Sabal Trail* court narrowly focused on the reasonable foreseeability of the downstream effects, as understood colloquially, while breezing past other statutory limits and precedents—such as *Metropolitan* and *Public Citizen*—clarifying what effects are cognizable under NEPA." *Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288, 1300 (11th Cir. 2019).

Public Citizen requires for a "reasonably close causal relationship between the environmental effect[s] and the alleged cause" to make the agency "responsible for a particular effect under NEPA and the relevant regulations." *Pub. Citizen*, 541 U.S. at 764. *Metropolitan*

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[2] Direct effects are "caused by the action and occur at the same time and place; indirect effects are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R. § 1508.8; C*tr. for Biological Diversity*, 941 F.3d at 1293.

[3] Reasonable foreseeability, it means "effects are sufficiently likely to occur that a person of ordinary prudence would take them into account in reaching a decision." *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (quoting *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016)).

[4] Downstream emissions are the result of the "use of LNG transported by the AFP"—in essence, the end use of LNG. Op. at 15 ¶ 72. Upstream emissions are the those produced "from the production of the gas." Op. at 15 ¶ 74.

determined *Public Citizen*'s "causal relationship" analogous to the "doctrine of proximate cause from tort law." *Metro. Edison Co.*, 460 U.S. at 774; *Pub. Citizen*, 541 U.S. at 767 ("Under NEPA, a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect.").

Here, the natural gas transported by the AFP, unlike the one transported by the pipeline in *Sabal Trail*, will not be *burned* and produce GHG emissions—it will be transferred from Old Union's station to New Union's Station, then to the International New Union station, and finally exported to Brazil, *potentially* reaching its ultimate destination. *See Sierra Club v. FERC* (*Sabal Trail*), 867 F.3d 1357, 1371 (D.C. Cir. 2017). That is not a "close causal relationship" between the AFP and the downstream GHG emissions, because there is a "long and attenuated chain of intermediate causal factors, [from] when the gas is transported to an interconnect for further shipment on the interstate grid, eventually reaching end-use consumers only through a long intermediate path." Interstate Natural Gas Association of America (INGAA) 2021 Comments at 14.

Even then, FERC does not present any evidence that the end use of the transported LNG will involve burning; FERC merely makes a blank assumption. Op. at 5 ¶ 72. FERC cannot evade *Public Citizen*'s and *Metropolitan*'s requirements through assumptions. In other words, FERC cannot, as a basis for jurisdiction to regulate GHG emissions, assume the LNG transported by the AFP will reach combustion end-users or that FERC is "proximately liable" for such combustion. *Metro. Edison Co.*, 460 U.S. at 774.

B. The Department of Energy, not FERC, has the authority to regulate and condition downstream and upstream emissions resulting from exports.

Furthermore, FERC is not a "legally relevant cause" of the indirect environmental effect for NEPA purposes since "causation cannot exist" when FERC cannot "prevent a certain effect

due to its limited statutory authority over the relevant actions." C*tr. for Biological Diversity*, 941 F.3d at 1296. Here, the DOE, not FERC, "has the sole authority to license the export of any natural gas" and its related downstream emissions, *Sierra Club v. FERC* (*Freeport*), 827 F.3d 36, 47 (D.C. Cir. 2016), because here, unlike *Sabal Trail*, where the 100% of LNG from the interstate pipeline remained in the United States, "approximately 90% of the LNG carried by the AFP will be… *exported to Brazil*." Op. at 8 ¶ 28 (emphasis added); *Sabal Trail*, 867 F.3d at 1371.

Therefore, the ability to prevent environmental "effects" by LNG "exports" belongs to the DOE, and absent a clear delegation from the DOE to FERC to regulate downstream and upstream GHG emissions, FERC cannot usurp such authority. *See e.g.*, *W. Virginia*, 142 S. Ct. at 2608; *see also Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947) ("three things, and three things only Congress drew within its own regulatory power, delegated by the [Natural Gas] Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.").

CONCLUSION

For the foregoing reasons, this Court should affirm FERC's holding as to issues one through three and reverse FERC's determination on issues four and five.