C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH,
Petitioner,

-and-

TRANSNATIONAL GAS PIPELINES, LLC,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

On Petition for Review from the Certificate of Public Convenience and Necessity and the Order Denying the Petitions for Rehearing

Brief of Petitioner, THE HOLY ORDER OF MOTHER EARTH

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STATEMENT OF JURISDICTION

The NGA contains a statutory requirement that any party seeking judicial review of a FERC decision first seek a rehearing before FERC. *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 189 (3d Cir. 2018) (citing 15 U.S.C. § 717r(a)). Whereas HOME has sought and been denied a rehearing by FERC, this Court is a proper jurisdiction under the NGA, which states, "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Court of Appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business…" 15 U.S.C. § 717r(b). As TGP is "organized and existing under the laws of the State of New Union," the United States Court of appeals for the Twelfth Circuit is a proper forum under the NGA. R. at 5.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the Commission erred in its finding of public convenience and necessity for the AFP under the NGA when the Commission found a project need in which 90% of the gas transported was for export to a country with whom the United States does not have a free-trade agreement.

II. Whether the Commission's finding that the benefits from the AFP outweighed the environmental and social harms was arbitrary and capricious under the NGA when the Order lacked a balancing test and was silent on key considerations.

III. Whether FERC's decision to route the AFP over HOME property despite HOME's religious objections was a violation of the Religious Freedom Restoration Act.

IV. Whether FERC had the authority under section 7 of the NGA to impose the GHG conditions in its CPCN Order.

V. Whether FERC's decision not to impose any GHG conditions and failure to consider upstream and downstream impacts was arbitrary and capricious.

STANDARD OF REVIEW

Informal agency actions such as the Commission's orders are reviewed under the arbitrary and capricious standard of the APA. *B&J Oil & Gas v. FERC*, 353 F.3d 71 (D.C. Cir. 2004). The role of the court in reviewing administrative actions is limited in scope to "assuring the Commission's decisionmaking is reasoned, principled, and based upon the record." *Am. Gas Ass'n v. FERC*, 593 F.3d 14 (D.C. Cir. 2010).

STATEMENT OF THE CASE

I. HOME

Holy Mother of Earth (HOME) is a religious organization that owns 15,500-acres of land in Burden County, New Union. R.at 5. Central to HOME's beliefs is the concept of nature as a deity and of the natural world as inherently sacred. R. at 11. Since 1935, HOME has practiced these beliefs through a ceremony called the "Solstice Sojourn" in which members trek across HOME's property and children of a certain age participate in a "sacred religious ceremony." *Id*.

II. The American Freedom Pipeline and LNG export to Brazil

Transnational Gas Pipeline, LLC (TGP) filed the requisite application with the Federal Energy Regulatory Commission (FERC, or the Commission) in June of 2022 to seek authorization for the construction and operation of an interstate pipeline called the American Freedom Pipeline (AFP). R. at 4.

The AFP would be about ninety-nine miles long and extend through Jourdan County in Old Union to an existing gas transmission facility in Burden County, New Union. *Id.* TGP's project includes numerous related facilities and mainline valve assemblies along the AFP. *Id*.

In March of 2020, TGP executed binding precedent agreements for firm transportation service with International Oil & Gas Corporation (International) and New Union Gas and Energy Services Company (NUG). R. at 6. International's parent company is Brazilian, and its portion of the natural gas will be exported to Brazil. R. at 8. About 90% of the AFP's natural gas will be diverted for export by International. *Id*.

III. Proceedings Below

Both HOME and TGP filed petitions for review. R. at 1. The matters were consolidated by the Commission. *Id.*

HOME challenges the Commission's determination of public need for the AFP and asserts it is arbitrary and capricious and not supported by substantial evidence given that 90% of the natural gas is destined for export to Brazil. R. at 2. HOME also challenges the Commission's assertion that the routing of the AFP through its land is not in violation of the Religious Freedom Restoration Act (RFRA). *Id*.

TGP challenges the conditions in the Order as set forth by the Commission, which details measures to address the mitigation of greenhouse gas impacts. *Id*. TGP alleges these conditions are "beyond FERC's authority under the NGA". *Id*

SUMMARY OF ARGUMENT

The Commission's grant of a Section 7 certificate of public convenience and necessity under the NGA was not supported by sufficient evidence and failed to overcome the APA's arbitrary and capricious standard. The Commission omitted key factors in its Section 7 analysis and failed to provide an adequate explanation of how it conducted the requisite balancing test of the potential public benefit versus harm of TGP's proposed pipeline.

When FERC approved TGP's selected route for the AFP, it violated the Religious Freedom Restoration Act when the selected route would force HOME to utilize its land in direct violation of its core religious beliefs and effectively dismantle a long-standing religious practice, the Solstice Sojourn. The RFRA states, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except" when "it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Id. § 2000bb-1. The CPCN Order would "substantially burden" HOME's religious beliefs and religious practice and thus contravene HOME's rights in violation of the RFRA. Thus, FERC erred by not applying the strict scrutiny standard review to TGP's choice of route for the AFP. Under this standard, FERC must prove that the CPCN order achieves a "compelling interest" through the "least restrictive means" available. Where there is an alternative route which would not substantially burden HOME's religious beliefs and practices, FERC has not met its burden.

While FERC was within its authority under section 7 of the NGA in applying GHG conditions in its CPCN order, FERC violated its duty under NEPA by failing to take a hard-look at the facts presented and reasonably explain why it would not consider upstream and

downstream GHG impacts. Instead, FERC claimed that it could not make its decision as it was waiting on enforceable agency guidelines and that it considered the relation between the upstream and downstream emissions and the TGP project insufficient to warrant further analysis.

ARGUMENT

I. The Commission's Finding of Public Convenience and Necessity was Arbitrary and Capricious and Not Supported by Substantial Evidence.

The arbitrary-and-capricious standard of the APA requires that agency action be "reasonable and reasonably explained." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158, 209 L. Ed. 2d 287 (2021). When the Commission "rest[s] its determination, at least in part, on its 'incomplete information' ground", the court must find the orders "devoid of reasoned decision-making and set them aside as arbitrary and capricious." *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006).

The Natural Gas Act grants the Commission authority to administer the permitting process for the construction of exportation facilities under Section 3 and to authorize the construction of interstate gas pipelines under Section 7. 15 U.S.C. §§ 717b, 717f. Each section specifies the relevant standard to determine if the authorization or grant of a certificate is proper.

Section 3 details that "no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so", and that the proposed exportation must be "consistent with the public interest." 15 U.S.C. § 717b(a). This is a less demanding standard than Section 7 of the Act, which sets forth the Commission's criteria for determining whether to grant of a certificate of public convenience and necessity. A certificate may be granted where the Commission can establish the proposed pipeline is "required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). To determine whether a Section 7 certificate

ought to be granted, the Commission must conduct a balancing test between the potential benefits of a project versus the adverse consequences, as well as demonstrate the "necessity" component. *Id*.

A. The Commission failed to consider and explain an essential, relevant factor in their analysis – that a majority of the LNG from the American Freedom Pipeline is destined for exportation to a country with whom the United States does not have a free-trade agreement.

The Commission misconstrued and improperly applied the governing statutory language of the Natural Gas Act, as well as the legal precedent established by *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 727 (D.C. Cir. 2022). Although the Natural Gas Act is silent on the matter of how precisely exportation to a non-free-trade agreement country might be weighed in the Commission's Section 7 certificate analysis, it is beyond the Commission's authority to simply dismiss the question as irrelevant and unworthy of explanation. The Act's guidance on matters related to exportation is made clear through a reading grounded in the plain meaning of statutory text. The Commission has failed to explain how its reasoning complies the directives of the Act, and through this failure threatens to trample on the rights of HOME and the greater community affected by the American Freedom Pipeline without due explanation.

Although the Committee's Section 7 analysis is at issue in this case, Section 3 provides helpful context for the larger goals and intentions behind the Natural Gas Act. The Act "provides the Commission jurisdiction over three separate areas: (i) the transportation of natural gas in interstate commerce; (ii) the sale of natural gas in interstate commerce for resale; and (iii) natural gas companies engaged in such transportation or sale". *City of Clarksville, Tennessee v. FERC*, 888 F.3d 477 (D.C. Cir. 2018) (citing 15 U.S.C. § 717(b)). Notably, the Act names "interstate commerce" as within the purview of the Commission. Section 3 also notes that "the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national

treatment for trade in natural gas, shall be deemed to be consistent with the public interest." 15 U.S.C. § 717b(c).

The Supreme Court discussed the standard the Commission is tasked with satisfying in *F.E.R.C. v. Electric Power Supply Ass'n* (where it found the Commission had provided a satisfactory justification for its decision to require market operators to provide compensation to electricity consumers at the same rate as electricity generators). 577 U.S. 260 (2016). The Court explained its "important but limited role is to ensure that the Commission engaged in reasoned decisionmaking (sic)—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice", and then found that FERC had "satisfied that standard." *Id*.

The narrow exception to the domestic nature of the Commission's overall authority, as noted in the Act, explicitly states how it ought to consider exportation to countries with a free-trade agreement. And while the Act need not detail the minutia of the Section 7 certificate granting process, given the Commission's technical expertise, it is reasonable to expect that in regards to an issue of such consequence it would engage in the process of analyzing and explaining the potential impact the lack of free-trade agreement with Brazil. Given the controlling precedent in *F.E.R.C. v. Electric Power Supply Ass'n,* the Commission is undisputedly held to a higher standard of explanation than that which they have provided here.

The Commission erred in its reliance on the *Oberlin* decision. Its justification for discounting the importance of the export component of the precedent agreements therefore cannot stand. The gap of silence in the record must be remedied by further explanation from the Committee.

B. The Commission errs in its assertion that the "end use" of the LNG is irrelevant, specifically as it relates to a Section 7 analysis regarding a demonstration of "market need".

The Commission's assertion that the "end use" of the LNG need not be analyzed misses the point made by the court in *Oberlin*, where the market demand of the project was discussed at length as a core justification for the court's decision in favor of FERC. 39 F.4th at 727. Despite the Commission's characterization of *Oberlin*, the facts and circumstances in that case are in no way analogous to those of the AFP.

In general, "[a] contract for a pipeline's capacity is a useful indicator of need because it reflects a 'business decision' that such a need exists." *Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 262 (3d Cir. 2018). And while precedent agreements alone can sometimes be sufficient to establish market need this is not a fixed rule. *See Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014). Rather, it is highly dependent on the context and facts before the Commission.

The Commission cites several cases that serve as examples of scenarios where additional context and key factors were incorporated into the court's review of the agency's action. For example, in *Myersville Citizens for a Rural Cmty., Inc. v. FERC,* the precedent agreements at issue were revised from a previously named project and were not submitted as part of the record. 783 F.3d 1301 (D.C. Cir. 2015). The court held that the Petitioner's challenge to the Commission's finding of market need failed, even in the absence of the updated precedent agreements. *Id.* In addition to the sworn affidavit stating that the project was fully subscribed, the Commission had before it "motions to intervene filed by the two customers subscribed to the new natural gas transportation service." *Id.* Importantly, the court also determined that LNG at issue was *not* destined for export. *Id*.

The court in *Oberlin* asserts multiple times that the export precedent agreements specifically were "one of the *many* factors in determining the public convenience and necessity." *Id*. (emphasis added). Indeed, the Commission itself cited the importance of considering "all factors bearing on the public interest" to justify its incorporation the export precedent agreements in its Section 7 analysis. *Id*. The Commission contradicts itself again in the Order by at once acknowledging the broad and comprehensive standard, yet simultaneously claiming that the export precedent agreements alone are sufficient to prop up its determination of public necessity.

The Commission relatedly claims that the lack of a free-trade agreement is not a meaningful distinction and bases this assertion on the idea that precedent agreements in general are sufficient to establish public necessity. This circular argument is without reason. As discussed above, the NGA grants the Commission authority over certain matters of *interstate* commerce as they relate to LNG terminals, interstate gas pipelines, and related facilities. The Section 7 analysis at its core considers the impact of each element as they relate to the potential consequences of a project that might burden the domestic environment and community.

Here, the Commission fails to point to previous projects that are similarly situated to the AFP. Instead, it relies on the distinguishable set of facts in *Oberlin* and attempts to draw a comparison where a distinction is warranted instead. And although an administrative agency is entitled to shift away from precedent, this shift is only considered valid where the agency has sufficiently articulated an awareness of their pivot. *See New Fortress Energy Inc. v. FERC*, 36 F.4th 1172 (D.C. Cir. 2022). Given the recurring theme of courts taking into account the broader context of each LNG pipeline, the validity of the Section 7 certificate is often found valid on alternative grounds or else pertains to a dissimilar export pipeline with ties to countries with established free-trade agreements.

The Commission simply cannot rest its entire decision on a misinterpretation of the holding in *Oberlin* without any attempt at explaining its reasoning. HOME and the greater community impacted by the AFP is owed, at minimum, a sufficient explanation for how precedent agreements that contemplate exportation to non-free-trade agreement countries for close to the entirety of the output of the pipeline manages to establish market need.

II. The Commission's Finding that the Social and Environmental Harms Were Outweighed by the Benefits from the AFP was Arbitrary and Capricious.

The Commission's argument that the benefits of the AFP outweigh negative impacts falls short. Even if this Court were to set aside the fact that at least 90% of the AFP's precedent agreements is for gas to be exported, the Commission still has not demonstrated the existence of meaningful public benefits. "Public benefits generally 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 objective.'" *Env't Def. Fund v. FERC*, 2 F.4th 953, 961 (D.C. Cir. 2021) (quoting 88 FERC at 61,748). Although a more detailed discussion of the harms posed by the AFP follows in the sections below, it is clear the Commission did not adequately explain its process for arriving at the determination that the grave harms posed by the AFP somehow outweighed by public benefits.

A. The Commission is not afforded absolute deference where it is silent on key elements of its Section 7 certificate analysis requirements under the NGA.

The balancing test between the potential public benefit and adverse effects of a pipeline project is fact-specific and highly context-dependent. A project that poses negative impacts may still be approved if its positive public benefits tip the proverbial scale. *See Env't Def. Fund v. FERC*, 2 F.4th 953, 961 (D.C. Cir. 2021).

The Commission concedes that the AFP is a rerouting of gas already transported through an existing pipeline and that no additional production of gas is at present required. It also attempts to substantiate the AFP's public benefits by providing a list of domestic needs. However, this list contains several questionable elements discussed in more depth in later sections of this brief.

That some tangential elements of building and operating an LNG pipeline may produce a minor benefit to the public overall is not disputed. Rather, the dilemma at hand is the Commission's failure to demonstrate an understanding that the deference afforded to an administrative agency's decision-making does not extend to matters of absolute silence on behalf of the agency and especially not in areas outside of the Commission's technical expertise. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). The layers of nuance at hand merit consideration given the implications the present project.

Accordingly*, Vecinos para el Bienestar de la Comunidad Costera v. FERC* offers an example of the court's decision to remand the Commission's issuance of a Section 7 certificate for, among other issues, a "deficient" analysis that thereby voided its determinations of public interest and convenience. 6 F.4th 1321 (D.C. Cir. 2021). The court in *Vecinos para el Bienestar* focused on the location-specific facts that implicated Executive Order 12,898, § 1-101, 59 Fed. Reg. 7,629 (Feb. 11, 1994), which "requires that, '[t]o the greatest extent practicable and permitted by law,' federal agencies 'shall make achieving environmental justice part of [their] mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations.'" *Id.* (citing Executive Order 12,898, § 1-101, 59 Fed.

Reg. 7,629 (Feb. 11, 1994)). Upon remand, the court directed the Commission to explain its decision-making process as it related to the geographic boundaries the Commission assigned to "the project's impacts on climate change and environmental justice communities". *Id.*

Among the list of community-specific inquires in *Vecinos para el Bienestar* were potential impacts from the project that might "disproportionately affect those communities due to factors unique to those populations including inter-related ecological, aesthetic, historical, cultural, economic, social, or health factors." *Id*. This list serves as an example of what is missing in the Commission's balancing test of public benefit versus social and environmental harm. The Commission does not adequately address what is at stake for HOME. A passing reference to HOME's religious activities does not rise to the level of consideration merited by the unique factors presented. Nor does it serve as a true balancing test, as the NGA requires.

Given the Commission's nonconformity with precedent and the requirement's outlined in the Act, this Court should remand for further explanation by the Commission.

III. FERC's decision to route the AFP over HOME property despite HOME's religious objections was a violation of the Religious Freedom Restoration Act.

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA) in order to restore first amendment jurisprudence preceding the Supreme Court's decision in *Employment Division v. Smith*, which held that when "prohibiting the exercise of religion … is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 878 (1990).

Congress disagreed, noting that "laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb. Thus, while scholars debate whether Congress could effectively overrule Smith, the stated

purpose of the act was "to provide a claim or defense to persons whose religious exercise is substantially burdened by government" and restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). § 2000bb.

The RFRA states, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except" when "it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. § 2000bb-1.

Thus, a plaintiff bringing a claim under RFRA would need to "present sufficient evidence to allow a trier of fact rationally to find the existence of an "exercise or religion" that is "substantially burden[ed]" by the government action in question. *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (citing 42 U.S.C. § 2000bb-1). "[S]hould the plaintiff establish 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.' If the government cannot so prove, the court must find a RFRA violation." *Id.* at 1068.

Here, the CPCN Order would substantially burden HOME's religious beliefs and religious practice, and thus contravene HOME's rights in violation of the RFRA. Home presented sworn testimony describing its religious practices and the sincerity of Home's religious beliefs are not in dispute by TGP nor FERC.

Although other Circuits disagree on the definition of "substantial burden," FERC explains, "a substantial burden exists when government action puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Navajo Nation v. United States Forest*

Serv., 535 F.3d 1069 (9th Cir. 2008). This aligns with the 10th Circuit's definition in *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1138 (10th Cir. 2013), which states, "a government act imposes a 'substantial burden' on religious exercise if it: (1) 'requires participation in an activity prohibited by a sincerely held religious belief,' (2) 'prevents participation in conduct motivated by a sincerely held religious belief,' or (3) 'places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief.'" This ruling was affirmed by the Supreme Court in its landmark case *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682 (2014) (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)).

Here, HOME meets its burden of proving a substantial burden on its sincerely held religious belief by a preponderance of evidence. *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). The burden is substantial and strict scrutiny should apply when the selected route instrumentalizes HOME's private property in direct opposition to HOME's core beliefs, construction of the pipeline would effectively end or dramatically alter a multi-generational religious practice, and the conditions FERC imposes do not adequately mediate the harm.

Applying the Strict Scrutiny standard of review, this Court should find that FERC has not met its burden of proving that the chosen route is the "least restrictive means" by which it could authorize the pipeline when the interests advanced by the pipeline are not compelling, a less restrictive means is available, and HOME's costs would outweigh those of TGP. Thus, FERC erred when it denied the rehearing order on the basis that it did not violate the RFRA.

A. The CPCN Order represents a "substantial burden" on HOME's "exercise of religion," so this Court should apply the strict scrutiny standard of review.

As written, the CPCN order "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Navajo Nation*, 535 F.3d at 1069. By approving TGP's

selected route, FERC imposes upon home a land use that is in direct opposition to HOME's central beliefs and intended for its private property.

Further, HOME's long-standing religious practice will be substantially interrupted by construction as well as either ended entirely or dramatically altered by the presence of the AFP as approved by the CPCN order. Then, while FERC has added a condition for burial of the pipeline and an assurance of expedited construction, the minimal effects of these acts are insufficient to prevent a substantial burden on HOME's religious beliefs and practices and thus, Strict Scrutiny should apply.

1. The CPCN order which authorizes the selected route forcibly imposes upon HOME a land use that is in direct opposition to HOME's core beliefs.

In response to environmental damage from the industrial revolution, in 1903 HOME's founders organized the religious order "around the principle that nature itself is a deity that should be worshiped and respected." FERC does not contest that compelling HOME to use its private land for the transportation of LNG is "anathema to HOME's religious beliefs and practices." Yet, it denies that compelling use of HOME's private land for this purpose is a substantial burden on HOME's religious beliefs.

In *Navajo Nation v. United States Forest Serv.*, an American Indian tribe brought a claim under the RFRA in opposition to the use of artificial snow made from recycled wastewater containing 0.0001% human waste on a ski area of the San Francisco Peaks. 535 F.3d 1058, 1062 (9th Cir. 2008). The court held the tribe did not prove a "substantial burden" on its religious beliefs, explaining that "[t]he only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience." *Id.* at 1070.

Here, HOME's claim is distinguished from that in *Navajo Nation* when HOME is a private owner of the land in question and protecting the natural environment is a central tenet of the religion. HOME intentionally conserved the unspoiled nature of the land through private ownership. Whereas the effect of the artificial snow on "approximately one percent of the San Francisco Peaks" would only have a subjective impact on the Navajo carrying out their religious practices, the AFP would physically inhibit members of HOME from carrying out their mission of protecting its private land from economic interests. *Id.* at 1063. In fact, it compels HOME to "support the production, transportation, and burning of fossil fuels" in a physical capacity in violation of its members beliefs. Whereas the 9th Circuit notes, "giving one religious sect a veto over the use of public park land would deprive others of right to use what is, by definition, land that belongs to everyone," HOME has been given no veto power under the CPCN order. *Id*. at 1063-64. HOME is forced to either facilitate acts in direct opposition to the core tenet of your religious practice or part with the land. Thus, there is a substantial burden on HOME's beliefs.

2. Construction of the AFP would effectively end or dramatically alter a multi-generational religious practice, the Solstice Sojourn.

FERC asserts that HOME's "beliefs alone are insufficient to require rerouting of the AFP." While HOME disagrees, it further asserts that its religious practices, which are based on their use of the land, would be impeded by the CPCN order. Specifically, the Solstice Sojourn is a biannual ceremonial journey made by members of HOME across its privately owned land during the winter and summer solstices. After traveling from a stemple at the western border of the property to the eastern border at the foothills of the Misty Top Mountains, children who have "reached the age of 15 in the prior six months undergo a sacred religious ceremony." A return journey is then made. This practice has been ongoing for at least the last eighty-eight years.

In *Thiry v. Carlson*, the Tenth Circuit weighed whether the rights of a landowners under the RFRA "would be violated if a parcel of their property containing the grave of their stillborn daughter is taken for public highway purposes, necessitating the relocation of the gravesite." 78 F.3d 1491, 1493 (10th Cir. 1996). The court held that while the landowners might be "both distressed and inconvenienced over the relocation of their daughter's gravesite and loss of access to that particular site" they "will still continue their religious beliefs and practices even if the condemnation proceeds as planned." *Id.* at 1495.

While the Thiry's beliefs were an amalgamation of practices and tenants from Quakerism, Christianity, and American Indian Spirituality, here, HOME is a unique religious organization with beliefs and practices lasting multiple generations. See *Id.* at 1494. More pertinently, unlike the Thiry's prayer and mourning, HOME's eighty-eight year practice of the Solstice Sojourn could not continue after the completion of the AFP. HOME members testified that "walking over the pipeline (and the clear-cut path above it) on their own land on this sacred journey… would be 'unimaginable' and would destroy the meaning of the Solstice Sojourn." The proposed use of HOME's land might effectively end the practice, and if it did not, FERC would be forcibly altering the very meaning of the practice. Thus, the religious practices in addition to the religious beliefs are substantially burdened by the CPCN.

3. The conditions FERC imposes on FGP in the CPCN do little to mediate the harm to HOME.

In the CPCN, FERC imposes some conditions it purports mediate the harm and this diminish the burden upon HOME's religious beliefs and practices, specifically the Solstice Sojourn. First, FERC inserted a condition in the CPCN that "TGP bury the pipeline over the entire span where it would cross HOME's property, including the two intersections with the path

of the Solstice Sojourn." Second, FERC explained that the section of pipeline to be built on HOME property will have "the construction expedited" in order "to occur entirely between solstices" and thus minimize the "short-term impact of construction."

Despite FERC's assertions, these conditions do little to minimize the burden on HOME. While the burial condition ensures there will be no long-term physical barrier to the Solstice Sojourn, the condition does not mediate the fundamental change caused to the religious practice by the presence of the pipeline and the bare spot created by trees removed which "could not be replanted along the AFP route."

While "expedited" construction would be necessary, it is not an explicit requirement of the CPCN. With approximately six months between solstices, there is a very limited window during which TGP could complete construction of the section of the AFP without creating a physical barrier to the Solstice Sojourn.

B. Balancing the religious liberty and RFRA protection for HOME against the government's interests, this Court should find FERC did not meet its burden to utilize the least restrictive means to achieve its interests.

Under RFRA, once a "substantial burden" is established, the burden of persuasion shifts to the government to prove that its action advances a "compelling government interest" in the "least restrictive means" available. See *Navajo Nation*, 535 F.3d at 1068; 42 U.S.C. § 2000bb-1. With "only a small portion of the LNG actually benefiting any domestic consumers," FERC has not made apparent a compelling government interest. However, assuming the AFP would advance a compelling interest, FERC still must prove that routing the pipeline through HOME property is the least restrictive means by which it can advance its interests in comparison to other alternatives.

FERC does not support its claim that exceptions for religious beliefs of private homeowners cannot be taken into account. Further, FERC has not shown that balancing the costs would leave HOME with a lesser burden under the selected route than TGP would bear under the alternate route.

1. FERC fails to demonstrate that the least restrictive means to complete the pipeline is one that cannot account for religious beliefs.

FERC contends it "cannot treat every landowner in a subjective manner" and thus cannot account for HOME's beliefs when making its determination for routing the AFP. FERC claims that consideration of HOME's beliefs would amount to "'extra' weight" to environmental harms that are presumably already included in its calculation.

In making this claim, FERC cites *United States v. Indianapolis Baptist Temple*, a case in which a church argued under RFRA that it was "a sin for their church to pay taxes." 224 F.3d 627, 628 (7th Cir. 2000). The 7th circuit held that RFRA could not be a basis for challenging federal employment tax laws when "maintaining a sound and efficient tax system is a compelling government interest and that the difficulties inherent in administering a tax system riddled with judicial exceptions for religious employers make a uniformly applicable tax system the least restrictive means of furthering that interest." *Id.* at 630.

Here, HOME's challenge is distinct from that in *Indianapolis Baptist Temple* because it is not challenging or requesting exemption from statutory tax laws nor is it challenging laws administered in a similarly broad manner. Rather, HOME is challenging FERC's decision, authorized by the NGA, to utilize eminent domain to create an easement on HOME property through which a private company will construct, maintain, and continuously utilize the land in a manner that is in fundamental opposition to the central ideals of HOME. While for the purposes of RFRA, the application of the NGA by FERC is a "rule of general applicability" under the

RFRA, it is much more narrowly applied than tax laws, which serve a clearly compelling interest. 42 U.S.C. § 2000bb-1. In the application of the NGA to direct the use of private land, FERC must, by necessity, account for the unique features of the land and as well as the unique land uses already underway by private owners. Whereas HOME's land use is directly tied to its religious beliefs, FERC must take those beliefs into account.

2. FERC has not demonstrated that the costs to TGP in utilizing an alternate route would outweigh those HOME would incur under the selected route.

The CPCN Order did not adopt an alternate route that circumvents HOME property by routing through the Misty Top Mountain range. This alternate route could be the "least restrictive means" when compared to the selected route. FERC claims the least restrictive means inquiry under the RFRA involves "comparing 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). While costs are not confined to economic costs, the Supreme Court noted in *Burwell v. Hobby Lobby Stores, Inc.*, "cost may be an important factor in the least-restrictive-means analysis, but… RFRA… may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." 573 U.S. 682, 730 (2014).

In *Burwell v. Hobby Lobby*, the owners of two companies, both of which were run to reflect the values of the owners, argued that regulations authorized by the 2010 Patient Protection and Affordable Care Act (ACA), which required the companies to provide contraceptive services in their employer-sponsored health care plans violated their exercise of religion under the RFRA. 573 U.S. 682, 736 (2014). The Court found there was a substantial burden when "[a]ny covered employer that does not provide such coverage must pay a substantial price" and assumes the

government interest "is compelling within the meaning of RFRA." *Id.* at 696, 728. Noting that "[t]he least-restrictive-means standard is exceptionally demanding," the Court found that the United States Department of Health and Human Services (HHS) did not meet this burden when religious exceptions were already built into the law and other alternatives were available including "or the Government to assume the cost of providing the four contraceptives at issue." *Id.* at 727, 728.

Here, like the owners and the closely-held companies in *Hobby Lobby*, HOME owns private land, for which a government act would compel a use that is in violation of the owner's religious beliefs. While FERC contemplates that the alternate route "would add over $51 million in construction costs," it does not consider the costs for HOME beyond the environmental impact. FERC states the alternative route would "also be a 'burden to HOME's religious beliefs" and suggests that this demonstrates that HOME would suffer costs regardless of the route chosen. While any environmental harm is in opposition to HOME's beliefs, HOME specifically derives value from its land on the basis of it being unaffected by development and industry. If HOME used its land for a purpose considered "economically productive," the costs would be easier to calculate. However, the environmental harm on its private land also does damage to HOME's organizational appeal and credibility. Not only will HOME members be forced to abandon the eighty-eight year practice of the Solstice Sojourn, but HOME will have failed to live up to "its fundamental core tenet that humans should do everything in their power to promote natural preservation" on its own land. This loss of credibility surely leads to economic impact as well. While HOME may be able to account for costs higher than those TGP would incur if the alternate route was selected, FERC ultimately bears the burden of proof to demonstrate that the

selected route is the least restrictive means of construction the AFP. Thus, whether it is the alternate route or some yet undetermined option, FERC has not met that burden.

IV. FERC is well within its authority under the NGA in imposing the GHG Conditions in its CPCN Order because Section 7 of the Act grants an agency the power to apply any "reasonable terms" it deems necessary when considering "public condition and necessity" in its application review process; consideration of GHG impacts and subsequent mitigation attempts constitute such reasonable terms.

The Council on Environmental Quality (CEQ) recognizes climate change and its consequences as a major "crisis" for the United States.[1] The CEQ oversees the creation of regulations to enforce NEPA. Any regulations issued by the CEQ are "mandatory" for federal agencies and are given substantial deference. *See Twp. of Bordentown v. FERC*, 903 F.3d 234 (3d Cir. 2018). The CEQ has made it clear that the emission of greenhouse gases and their contribution to the "warming" of the planet is a source of concern for environmentalists. *Id.* Accordingly, agencies are encouraged to appropriately mitigate any GHG emissions associated with or resulting from proposed projects.

Under 42 U.S.C. § 4321, NEPA was enacted to "promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans." Pursuant to U.S.C. § 4332(2)(F), federal agencies are required to recognize the long-term impacts of environmental problems. As an independent federal agency, FERC is not required to adhere to CEQ guidelines but has a long-standing precedent of doing so.

FERC is authorized by Congress to regulate the interstate transmission of natural gas and construction of LNG pipelines. Section 7 of the NGA requires FERC to consider what is required

[1] National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan 9, 2023).

for "the public convenience and necessity" prior to the issuing of a certificate allowing for the construction of an LNG pipeline.[2] Specifically, Section 7 states, "Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *Id.* The statutory language here is clear: the agency has the prerogative to attach any "reasonable terms" it deems necessary to an issued certificate.

In construing the NGA and NEPA together, the result is that agencies receive "highly" deferential treatment and are not required to make decisions one way or the other when considering an Environmental Impact Statement (EIS); rather, the ultimate purpose of NEPA is to promote "information gathering "for the purpose of mitigating environmental impact. *Id*. In light of this context, GHG impacts constitute a part of this analysis as "public health and welfare" are directly impacted by the growing effects of climate change and are consequently tied to the legal analysis under "public convenience and necessity".

Thus, "major federal action significantly affecting the quality of the human environment" requires agencies to create an EIS detailing the impacts of the proposed action. In measuring GHG conditions, an agency must account for those impacts that can be "reasonably foreseen," and the agency has the discretion to mitigate those conditions if it desires to do so. *See Twp. of Bordentown v. FERC*, 903 F.3d 234 (3d Cir. 2018) (wherein the court references an agency's authority to enforce remedies under the NGA). S*ee Also Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (holding that FERC had legal authority to mitigate those conditions which it could reasonably foresee).

[2]15 U.S.C. § 717f (e)

Here, FERC was within its discretion in choosing to impose the GHG conditions in the CPCN order. The language in the statute is clear that FERC may impose any terms it deems necessary and, in this case, FERC followed suit. Having taken into account the EIS and the significant environmental impacts that would directly result from the construction of the project and its foreseeable consequences, FERC did not supersede its authority under the NGA and was correct in ordering mitigation conditions within the spirit of NEPA.

A. The project specific GHG conditions imposed by FERC in its CPCN Order do not address "major questions" per the major questions doctrine.

The major question doctrine focuses on congressional intent and arises in "extraordinary cases" when the issue at hand is of such economic, political, or historical significance that it creates the question of whether Congress truly intended to confer such authority. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (wherein the court addressed whether the EPA overrode its authority in setting a performance standard that would affect industry standards nationwide and held that it was not possible that Congress had conferred such authority to the EPA) (citation omitted).

Here, the specific conditions imposed by FERC in their CPCN order are isolated and pointed towards mitigating the effects of the AFP construction project alone. In requesting TGP to plant trees to mitigate the damage of those removed during construction or to ask TGP to purchase "only green steel pipelines segments," FERC's conditions do not inherently create an issue of "extraordinary" circumstance that has great political or nationwide economic significance. Additionally, though climate change is certainly of significance and policies related to it may bring about concerns under the major questions doctrine, FERC's conditions do not attempt to overturn's congress authority in offering solutions. Rather FERC is following NEPA in

its resolution to mitigate the specific impacts from the specific project. Therefore, while TGP asserts that these conditions in their relation to climate change may pertain to the enactment of the major questions doctrine, the specific GHG conditions imposed by FERC on TGP do not give rise to such issues.

V. FERC's decision to not impose mitigation measures for upstream and downstream emissions was arbitrary and capricious as the agency violated NEPA by refusing to take a "hard-look" at the EIS statement thereby failing to address reasonably foreseeable environmental effects due to upstream and downstream GHG impacts and refusing to mitigate them.

NEPA requires that an agency take a "hard-look" at the environmental impacts of their decisions but does not dictate that an agency take a specific action or decision over another. *See Birckhead v. FERC, 441 U.S. App. D.C. 155, 160, 925 F.3d 510, 515 (2019) (citation omitted)*. The standard for reviewing an arbitrary and capricious claim to a NEPA challenge is to "ask whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Id.* A court's role is simply to ask whether the agency adequately considered the evidence and applied a "rule of reason." *Id.*

Furthermore, under NEPA review, the Commission must consider both direct and indirect environmental effects of a pipeline project. *See Birckhead v. FERC 925 F.3d at, 515 (citation omitted).* Accordingly, indirect environmental effects are those "caused by the action and are later in time… reasonably foreseeable." *Id.*

FERC claims that it is unable to decide on the significance of upstream and downstream emissions as it is currently in a period of interim and in the process of developing guidelines to characterize GHG impacts.[3]

FERC further asserts that absent any findings of significance, findings of mitigation are unwarranted, and thus the connection between the TGP project and upstream and downstream GHG impacts must be weak.

A. FERC has a duty to take a hard-look at the evidence presented in the EIS statement and to provide a rational connection for its decision to not consider upstream or downstream GHG impacts.

Agency decisions and EIS statements are normally given high deference as the standards for executing a "hard-look" review are not stringent and can be met so long as the agency provides an adequate and reasonable explanation for their decision. In *Birckhead v. FERC*, the court found that FERC did not act arbitrarily or capriciously in declining to consider downstream gas combustion impacts. *441 U.S. App. D.C. 155, 925 F.3d 510 (2019).* The Court based this decision on a finding that the record did not have sufficient information to attribute the environmental impacts to the pipeline project at issue. The court determined that the impacts were not "reasonably foreseeable" due to "the source area for transportation being ill defined" and "the number or location of any additional wells being matters off speculation." *Id.* This meant that "foreseeability depends on information on the destination and end use of the gas in question." S*ee Food & Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022) (citing *Birckhead, 925 F.3d at 519).*

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[3] Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 (2022) (Updated Policy Statement).
See Also, Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 (2022) (Interim GHG Policy Statement).

Moreover, in *Sierra Club v. FERC*, the court established the narrow rule that agencies are not required to evaluate downstream greenhouse gas emissions for each and every case in order to comply with the "hard-look" and the "reasonably foreseeable" standard. Recognizing that not every case has the prerequisite information necessary for the agency to cast a meaningful forecast. 867 F.3d 1357 (D.C. Cir. 2017). However, agencies are expected to fulfill their duties to the "fullest extent possible." *Id.* In *Sierra Club*, greenhouse emissions were reasonably foreseeable because the destination and end use of the gas were known. *Id.* This resulted in the court holding that the agency's EIS was deficient because the agency failed to consider the environmental impacts and do its due diligence in estimating carbon emissions when it was reasonable for it to do so as it had the requisite information. *Id.*

Here, FERC first errs in its interpretation of its own policy guidelines. While the policy statement issued was followed by a March 2022 Order deeming the February 2022 statement a mere "draft". The policy statement still provides a valid framework and agency insight as to how the Commission may choose to determine pending cases in the interim. For example, the policy statement gives clear guidance and a threshold for identifying "significant" quantities of CO2e emissions based on 100% utilization. The policy statement says, the "Commission is establishing a rebuttal presumption that proposed projects with 100,000 metric tons per year of carbon dioxide equivalents are considered as significant." While it is true that FERC has not adopted this as binding, in subsequent decisions made by the agency, the Commission has adopted the threshold cited in their February 2022 statement[4]. This means that FERC has established

[4] See et. al; Commission Staff, Environmental Assessment for Golden Pass LNG Export Variance Request No. 15 Amendment, Docket No. CP14-517-001, at 25 (Mar. 22, 2022); Commission Staff, Environmental Impact Statement for Wisconsin Access Project, Docket No. CP21-78-000, at 54 (Mar. 18, 2022) Commission Staff, Environmental Impact Statement for Clear Creek Expansion Project, Docket No. CP21-6-000, at 8 (Mar. 15, 2022).

precedent that indicates a threshold of what is considered "significant" in upstream and downstream GHG impacts.

Moreover, if FERC were to apply the threshold stated in the policy statement, it would find that the downstream impacts of the TGP project, which are estimated to transport around 500,000 dekatherms (Dth) per day (indicating full use of project capacity) and would equate to 9.7 million metric tons of CO2e per year, an estimate that exceeds the preferred threshold. While the record notes this amount may be unlikely due to other factors of running the TGP project, the estimate is a reasonable calculation of the "significant" impacts that the TGP project will have on the environment. Therefore, the agency failed in not accounting for its own interim guidelines and ignoring its own established precedent in order to avoid making a decision on the matter.

Additionally, even if FERC is unable to define the GHG impacts as "significant," its argument that it need not consider them at all falls short of its duties under NEPA. FERC has a duty to perform its obligations to the best of its abilities. While it is true that FERC is not obligated under its guidelines or by existing precedent to consider the upstream and downstream GHG impacts, the 3rd Circuit has established that consideration is based on a "case by case" basis and the determinant factor is the relevant information. Here, the record contained specific information as to the use and transportation of the gas, and under established precedent it is reasonable to estimate the possible impacts of the project. Unlike in *Birckhead v. FERC*, here the record clearly states how and where the gas will be transported, indicating the meter stations, receipt taps, mainline valve assemblies as well as the eight locations that the gas will travel along the pipeline. *441 U.S. App. D.C. 155, 925 F.3d 510 (2019).* Consequently, the facts here are analogous to those in *Sierra Club v. FERC* inasmuch as the Commission should have been able to reasonably calculate the upstream and downstream emissions based on the information

provided by TGP's and its own EIS when it had everything necessary to adequately make a reasonable determination. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

Therefore, FERC's decision to not impose mitigation measures on upstream and downstream emissions was clearly arbitrary and capricious because FERC failed its obligations under NEPA. The agency had the requisite information to conduct a hard-look, and yet it refused to do so. FERC chose to deem GHG impacts insignificant and of little relation to the TGP project despite the fact that as indirect effects they would be reasonably foreseeable. Had FERC followed its own precedent, it would have likely determined that on their merits both the upstream and downstream impacts would warrant being deemed "significant" due to the high estimates of C02 emissions from the project, and thereby, FERC would have logically imposed conditions to mitigate the impacts of such a high threshold of GHG emissions. Given FERC's failure to follow its mere obligations under the Act, this Court should remand the CPCN order and instruct FERC to consider upstream and downstream GHG impacts.

CONCLUSION

For the foregoing reasons, this Court should, at minimum, remand the Commission's Order with instructions for reconsideration of its determination of public interest and convenience under Section 7 of the NGA. However, given that the deficiencies in the Commission's reasoning are incapable of remediation, this Court should remand with an order to vacate.

We hereby certify that the brief for University School of Law is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

Date November 20th, 2023