Team #8

Docket #: 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

TRANSNATIONAL GAS PIPELINES, LLC.
Appellant

-and-

HOLY ORDER OF MOTHER EARTH
Appellant

v.

FEDERAL ENERGY REGULATORY COMMISSION
Appellee

Petition for Review from the CPCN Order and Rehearing Order of the Federal Energy Regulatory Commission in consolidated case nos. 23-01110 and 23-01109

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STATEMENT OF THE CASE

A. Project Background

On June 13, 2022, Transnational Gas Pipelines ("TGP") applied for an application pursuant to 5 U.S.C. § 717f(c) and 18 C.F.R. § 157 for authorization to construct and operate the American Freedom Pipeline ("AFP Pipeline"). Order at 1. The FERC ("FERC") issued an order in Docket No. TG21-616-000 on April 1, 2023 authorizing the TGP Project subject to conditions in the Certificate of Public Convenience and Necessity Order ("CPCN Order"). *Id.*

In the CPCN Order, FERC found that the benefits of the TGP Project will outweigh any adverse effects on existing shippers, other pipelines and captive customers, or on landowners in surrounding communities. *Id.* at 3. Pursuant to this requirement, TGP has made changes to over 30% of the proposed pipeline route in order to address concerns from landowners. *Id.* at 41. After completion of an Environmental Impact Statement ("EIS"), FERC concluded that the

project will not have significant adverse environmental impacts provided that the project implements FERC's recommendations and complies with applicable laws and regulations. *Id.* Final authorization was granted subject to conditions outlined in the CPCN Order. *Id.*

The TGP project will be approximately 99 miles long, extending from Jordan County, Old Union, to existing TGP facilities in Burden County, Old Union. Order at 1. The project requires the construction of numerous facilities and will cost approximately $559 million once completed. The natural gas to be transported is produced at Hayes Fracking Field ("HFF") in Old Union County and will be liquified into liquified natural gas ("LNG"). *Id.* at 10. Binding precedent agreements have been made for the transport of 450,000 dekatherms ("Dth") per day for the International Oil & Gas Corporation ("International") and 50,000 Dth per day for the New Union Gas and Energy Services company ("NUG"). *Id.* at 11.

The project will not involve increased production at HFF, but instead will reroute 35% of the gas produced at HFF to other regions. Market evidence shows that LNG demands in regions east of Old Union have been in decline due to various factors, and market needs are better met by rerouting the LNG produced at HFF through the AFP Pipeline. *Id.* at 13. This rerouting will not lead to gas shortages for any of the customers currently served by HFF. *Id.* The LNG purchased by International will be exported to Brazil. *Id.* at 14. In addition to exporting LNG to Brazil, FERC has determined that the project will serve multiple domestic needs. Order at 27. These needs include providing natural gas to underserved areas in New Union, expanding access to sources of natural gas supply within the United States, and providing opportunities to improve regional air quality through the use of natural gas over dirtier fossil fuels. *Id.*

B. Environmental Conditions of the Project

The CPCN Order includes conditions that TGP take steps to mitigate the greenhouse gas emissions of the project ("GHG Conditions"). These conditions include: (1) planting or causing to be planted an equal number of trees as those removed during construction; (2) utilizing electric-powered equipment wherever practicable (including electric removal equipment and electric vehicles); (3) purchasing only "green" steel pipeline segments produced by net-zero steel manufacturers; and (4) purchasing all electricity from renewable sources when available. *Id.* at 67. TGP challenges these conditions as beyond FERC's authority, but they are imposed as part of FERC's efforts to comply with recent guidance from the Council on Environmental Quality and the EIS analysis. *Id.* at 69-72.

The EIS analyzed downstream effects of the pipeline and found that the project would result in at most 9.7 million metric tons of CO2e per year, though this upper estimate is unlikely to be met under actual operating conditions. *Id.* at 72. The GHG Conditions would significantly reduce the CO2e emissions resulting from the project. *Id.* at 73. FERC declined to consider upstream emissions given the difficulties of quantifying these and the need to consider them on a case-by-case basis. Given that the HFF to be transported is already being produced and will simply be transported to different destinations, FERC found no reasonably significant upstream consequences of the approval of the TGP project. Order at 74.

TGP concedes the numerical analyses of environmental impacts but contests the GHG Conditions, asserting that the conditions implicate the major questions doctrine. *Id.* at 76. TGP sought rehearing on this issue, and was denied on the grounds that the imposition of the GHG Conditions is within FERC's authority and does not implicate the major questions doctrine. *Id.* at 78-92.

C. HOME's Objections to the Project

Holy Order of Mother Earth (HOME) is a not-for-profit religious organization located on a 15,500-acre property in Burden County, New Union. *Id.* at 9. HOME considers the natural world sacred, with its core religious tenet being that conservation must be promoted over all other interests. *Id.* at 45-46. Every winter and summer 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, then journey back along a different path (the Solstice Sojourn). *Id.* at 48. The AFP Route will pass through two miles of HOME property, requiring the removal of approximately 2,200 trees from the property. Order at 38. The AFP Route will also cross the Solstice Sojourn in both directions. *Id.* at 48.

HOME sought rehearing on three aspects of the CPCN Order: the granting of the CPCN order, the approval of the AFP route, and the failure to mitigate upstream and downstream GHG impacts. *Id.* at 15. HOME additionally claims that the CPCN Order is contrary to the Religious Freedom Restoration Act (RFRA). Order at 54.

Regarding the CPCN Order, HOME contends that no "public necessity" has been established given the exporting of 90% of the gas and that the granting of the CPCN Order was therefore arbitrary. *Id.* at 22-24. FERC denied this request as the Certificate Policy Statement explains that binding precedent agreements are always important, and TGP has executed binding precedent agreements using 100% of the design capacity of the AFP Pipeline. *Id.* at 26. Further, FERC has found numerous other domestic benefits of the project. *Id.* at 27.

HOME argues that the approval of the AFP Route over its property was arbitrary and capricious, arguing that the benefits outweigh the costs. HOME points to the removal of 2,200 trees on its property and the impact that the AFP pipeline will have on its religious beliefs. *Id.* at 38, 45. HOME proposes an alternative route (the Alternate Route) that would avoid HOME's

property entirely by routing the pipeline through the Misty Top Mountain range. *Id.* at 39. The Alternate Route, however, would add an additional $51 million in cost while leading to more environmental harm. Order at 44. HOME does not contest these impacts of the Alternate Route. *Id.* at 45.

FERC denied this grounds for rehearing as the CPCN Order specifically includes conditions that the pipeline be buried underground where it crosses over HOME's property, and the construction will be timed and expedited so as to minimize any disruption on HOME's religious practices. *Id.* at 41. Further, the removed trees will all be replanted elsewhere. *Id.* at 38. HOME alternatively contends that the CPCN Order and the approval of the AFP route constitute a substantial burden on its religion in violation of the Religious Freedom Restoration Act (RFRA), both by compelling it to support the use of fossil fuels and by effectively preventing the Solstice Sojourn by destroying its meaning. *Id.* at 57-58. While respectful of HOME's religion, FERC disagrees with HOME's argument that approval of the CPCN Order will substantially burden HOME's religion in light of the mitigating conditions of the Order and the fact that the members of HOME will not be prevented from practicing their religion. Order at 59-61.

Finally, HOME claims it was arbitrary and capricious for FERC to fail to mitigate upstream and downstream GHG impacts. *Id.* at 92. FERC denied HOME's request for rehearing as it is within FERC's authority to decline such mitigation measures and that the decision to do so is not arbitrary given the weak connection between the TGP Project and any increased upstream or downstream effects. *Id.* at 97.

SUMMARY OF THE ARGUMENT

The Federal Energy Regulatory Commission (FERC) properly granted a Certificate of Public Convenience and Necessity (CPCN) to Transnational Gas Pipelines, LLC because export

precedent agreements may be considered as evidence of market demand. The Commission should rely on factors including precedent agreements and evidence of shifting market demand in determining whether a pipeline project would serve the public convenience and necessity. Precedent indicates that precedent agreements, which are binding contracts to fill pipeline capacity, are strong evidence of market demand. Congress has indicated its intent for export precedent agreements to also be considered as part of the public convenience and necessity, when export agreements are entered into with Free-Trade Agreement nations. However, even where the United States does not maintain a Free Trade Agreement with a country, the Commission and the Department of Energy have determined that to ignore such precedent agreements would thwart Congressional intent. Here, where the TGP project is supported by two precedent agreements for 100% of the project capacity with non-affiliate shippers, FERC properly found substantial evidence of market demand.

Next, HOME contends that FERC did not properly weigh the benefits of the pipeline against the environmental and social harms to their organization, especially where so much of the gas will be exported. As described above, the final destination of the gas is not a relevant factor for the consideration of the Commission. What are relevant factors are economic in nature, indeed the balancing test is primarily an economic one. Because HOME does not allege economic damage from the current pipeline route, TGP has met its burden of mitigating adverse effects and FERC properly balanced the relevant adverse effects against the public benefit.

HOME's RFRA claim is similarly without merit as HOME cannot establish a substantial burden on the practice of its religion. The government imposes a substantial burden on religion only when it coerces an individual to act contrary to their religious beliefs through either the denial of a benefit or the imposition of a penalty. This test is consistent with the text and

legislative history of RFRA, being adopted by numerous circuit courts. Pre-RFRA Supreme Court precedent dealing with the free exercise clause, which Congress intended for courts to consult when evaluating RFRA claims, also applied this standard. HOME cannot satisfy this standard here as FERC has neither threatened to withhold a benefit nor to impose a penalty in order to coerce HOME to act contrary to its religion. HOME instead can only show that FERC's actions may inhibit HOME members' sense of personal spiritual fulfillment, which does not rise to the level of a substantial burden.

Alternatively, even if a substantial burden could be established here, FERC can pass the strict scrutiny required under RFRA. FERC has a compelling interest in establishing an efficient pipeline permitting system, and a uniform permitting system that makes reasonable accommodations is the least restrictive means of accomplishing that interest. Requiring FERC to make unreasonable religious exemptions or accommodations of the kind that HOME is requesting here would lead to a highly inefficient permitting system.

HOME and TGP have also raised issues regarding certain conditions contained in the CPCN. These conditions limit the greenhouse gas (GHG) emissions that will be produced by the construction of the pipeline. TGP claims that these conditions invoke the major questions doctrine because they have significant economic and political effects and the Natural Gas Act (NGA) does not specifically authorize them. On the other hand, HOME claims that these conditions did not go far enough because they did not restrict downstream or upstream emissions of GHG. While the NGA does not specifically address GHG emissions, it does permit the Commission to impose conditions on CPCNs that protect the public convenience and necessity. Further, the conditions placed on the construction project constitute a mere 15.1% reduction in emissions, which falls short of the significant economic or political significance required for the

major questions doctrine. Conversely, the upstream and downstream emissions are prohibited by the major questions doctrine because they have massive significance and because many of them are specifically prohibited by the NGA.

STANDARD OF REVIEW

FERC's granting of certificate of public convenience and necessity may be set aside if found to be "arbitrary and capricious." 5 U.S.C.A. §706(2)(A). A decision may be considered arbitrary and capricious if unsupported by subtantial evidence of relevant factors, including precendent agreements and evidence of market demand. *Id.* at § 706(2)(E). Under RFRA, government actions that substantially burden the exercise of religion will be subject to strict scrutiny. The government must show that its action is in furtherance of a compelling interest and that it has selected the least restrictive means of achieving that interest. The plaintiff bears the burden of establishing a *prima facie* RFRA case, being required to show that the government's action substantially burdens a practice of religion. *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1068-1069 (9th Cir. 2008). The imposition of the GHG conditions will be evaluated under 5 U.S.C.A. §706(2)(A), asking whether FERC acted in an "arbitrary and capricious" manner by imposing them. As this relates to FERC's interpretation of the Natural Gas Act, FERC is entitled to the *Chevron* deference and must show that its interpretation of the Act was reasonable. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

I. FERC properly considered the appropriate factors when determining public need.

The "[g]ranting or denial of a certificate of public convenience and necessity is a matter peculiarly within the discretion of the Commission." *Oklahoma Nat. Gas Co. v. Fed. Power Comm'n*, 257 F.2d 634 (D.C. Cir. 1958). Following a determination by the Federal Energy

Regulatory Commission (FERC) that the construction of a natural gas pipeline would support the public convenience and necessity (CPCN), that determination may only be overturned if it is found to be arbitrary and capricious, as defined in the Administrative Procedure Act. 5 U.S.C.A. §706(2)(A); Natural Gas Act (NGA), 15 U.S.C.A. §717f(c)(1)(A).

The granting of a CPCN is considered to be arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Envtl. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021), (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29. 43 (1983)). In short, an appellate court's review must be limited to "ensuring 'that the decision was based on a consideration of the relevant factors' and not a result of 'a clear error of judgment.'" *Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234 (3d Cir. 2018), (quoting *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015)).

In determining whether to grant a CPCN, the Federal Energy Regulatory Commission is guided by the Certification of New Interstate Natural Gas Pipeline Facilities (Order Further Clarifying Statement of Policy). *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (F.E.R.C. 1999), *corrected*, 89 FERC ¶ 61,040 (F.E.R.C. 1999), and *order clarified*, 90 FERC ¶ 61,128 (F.E.R.C. 2000), *order clarified*, 92 FERC ¶ 61,094 (F.E.R.C. 2000). This Certificate Policy Statement clarifies "the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison

of projected demand with the amount of capacity currently serving the market." *Envtl Def. Fund*, 2 F.4th at 961, 62 (quoting 88 FERC at *17).

A. Precedent agreements are sufficient evidence of market demand and therefore, public need.

In the instant case, FERC cites in support of its finding such relevant factors as existing domestic and international precedent agreements, as well as shifting market demand for the Southway Pipeline. Order at 30-34. In *Environmental Defense Fund v. FERC*, the Court found that the Commission had arbitrarily and capriciously awarded a CPCN where a pipeline project had secured only one precedent agreement with an affiliate company of the pipeline builder, the pipeline was not meant to serve any new or shifting demand, and "there was no Commission finding that a new pipeline would reduce costs." *Envtl. Def. Fund v. FERC*, 2 F.4th 953, 973 (D.C. Cir. 2021). Relying primarily on the inadequacy of precedent agreements with affiliates, the court found that FERC should have looked "'behind' the precedent agreement in determining whether there was market need." In the absence of "plausible evidence of self-dealing," though, "it is Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers." 937 F.3d at 606 (quoting Myersville, 783 F.3d at 1311).

Precedent agreements are therefore almost prima facie evidence of demand for the project. Here, where the AFP has secured two precedent agreements for 100% of the project need from non-affiliate organizations, and where there is shifting demand indicating need for a new project, the precedent agreements certainly add up to the "more than a scintilla" of evidence required to avoid a reviewing court's scorn. Order at 11; *Myersville* 783 F.3d at 1309.
Given the "extreme degree of deference" accorded to FERC, the Commission has properly identified sufficient evidence supporting the granting of a CPCN. *Myersville* 783 F.3d at 1308.

1. The export of natural gas also results in domestic benefits, which lend sufficient evidence to FERC's finding of public convenience and necessity.

To determine market demand, FERC requires an 'open season', during which pipeline companies solicit bidders for the capacity of the project. Precedent agreements entered during the open season "constitute significant evidence of demand for the project." 88 FERC ¶ 61,227. Under *Oberlin II*, FERC may consider precedent agreements for the export of natural gas when determining public convenience and necessity. *City of Oberlin, Ohio v. FERC*, 39 F.4th 719 (D.C. Cir. 2022). The court in *Oberlin II* considered both congressional intent and the "myriad domestic benefits" that stem from exports when deciding that export agreements may be counted towards a finding of public need. *Oberlin*, 39 F.4th at 727. Thus, while International Oil & Gas Corporation intends to export to Brazil, a country with which the United States does not maintain a free trade agreement, the domestic benefits referred to in *Oberlin* are also present here. HOME contends that because the existing Southway Pipeline transports the entirety of the natural gas produced in the HFF, the AFP will not "support the 'production and sale of domestic gas' which 'contributes to the growth of the economy and support domestic jobs,'" but the AFP will *prevent* the decrease of domestic LNG production. *Oberlin*, 39 F.4th at 727.

The creation of a pipeline to mitigate projected decreasing demand serves the public benefit and constitutes a relevant factor for FERC to consider when granting a CPCN. The Commission did not err in finding the AFP to serve the public convenience and necessity because it based its decision off of sufficient evidence of shifting domestic demand. *Envtl Def. Fund*, 2 F.4th at 961. Where the majority of the LNG transported is ultimately consumed is irrelevant to the Commission's analysis so long as the construction of the pipeline also serves a domestic purpose. *Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206 (F.E.R.C. 2022).

2. The lack of free trade agreement with Brazil is not fatal to FERC's finding of public convenience and necessity given the broad discretion accorded to FERC to determine need.

FERC may credit precedent export agreements "so long as FERC's crediting of export agreements is consistent with the Natural Gas Act," and "nothing in Section 7 [of the Natural Gas Act] prohibits considering export precedent agreements in the public convenience and necessity analysis." *Oberlin*, 39 F.4th at 728. Furthermore, the Commission has previously found it "appropriate to give precedent agreements for the transportation of gas destined for export the same weight in determining need that it gives to other precedent agreements for transportation." *Columbia Gulf Transmission, LLC*, 180 FERC at *5. This finding was based in part on the congressional determination that the exportation of natural gas to a company with which the United States maintains a free trade agreement "shall be deemed to be consistent with the public interest." 15 U.S.C.A. § 717b(c).

While the Congressional determination in 15 U.S.C.A. §717b indicated specifically that export and import of natural gas to and from countries with which the United States maintains a free trade agreement serves the public interest, the FERC has recognized and abided by Department of Energy authorizations of the export of domestically produced LNG to non-free trade agreement countries so long as the exports are not "inconsistent with the public interest." *Tennessee Gas Pipeline Co., L.L.C. S. Nat. Gas Co., L.L.C.*, 180 FERC ¶ 61,205 (F.E.R.C. 2022); *Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206. While TGP has not introduced an authorization from the Department of Energy explicitly allowing the export of LNG to a non-free trade agreement country, the Commission's previous deference to such precedent agreements indicates that FERC appropriately considered the precedent agreement with International when determining whether to grant a CPCN.

In Columbia Gulf Transmission, LLC, the Commission considered a challenge by the Sierra Club on the granting of a CPCN for a project where 100% of the project capacity was destined for export to both Free and non-Free-Trade agreement nations. Holding that the CPCN grant was proper, the Commission stated that "[a]s explained in the Certificate Order, Congressional direction and intent . . . would be thwarted if the Commission did not credit such precedent agreements as evidence of need." 180 FERC at *5. Similarly, in discussing the Evangeline Pass Expansion Project, a project also designed solely to facilitate the exportation of natural gas, the Commission found, "constitent[ly] with *Oberlin II*," that "even though the gas transported by the project is bound for export, the project will strengthen the domestic economy and support domestic jobs." *Id.*

Thus, the precedent agreement TGP secured with International Oil & Gas Corporation was not considered in "clear error" by FERC because Congress and the Department of Energy have indicated that even export agreements with non-free trade countries evidence public demand and will serve the domestic, public interest. *Bordentown*, 903 F.3d 234 at 262. Further, FERC's explanation of its finding of public convenience and necessity is analogous to the proper explanations given in *Columbia Gulf Transmission* and *Tennessee Gas*. Because the explanation given below was adequate, this Court must uphold FERC's grant of the CPCN to TGP as neither abirtrary nor capricous. *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. Cir. 2016)).

II. FERC's finding that the benefits from the AFP outweighed the environmental and social harm was within the wide berth of discretion awarded to the Commission and consistent with existing policy.

The Commission "enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines." *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014) (quoting *Am. Gas Ass'n*, 593 F.3d at 19). The balance of

public benefits against adverse effects is the second "analytical step" that guides the Commission's decision to grant or deny a CPCN application. 88 FERC ¶ 61,227. As with the first step (determining market need), FERC's affirmative finding at any step of a process resulting in the granting of a CPCN will stand unless found to be arbitrary and capricious— that is, unsupported by "substantial evidence" of one or more important factors identified by the Commission. 15 U.S.C. 717r(b). In the instant case, the Commission has properly balanced the adverse economic impacts and the mitigation tactics proposed by TGP.

A. HOME does not assert any adverse economic impacts, such as the kind that FERC may consider when balancing adverse impacts against the public benefit.

In comparing the benefits from the AFP to its adverse effects, the Commission considers three external interests: "the adverse effects of the project on the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline." *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (F.E.R.C. 1999). HOME, as the current owner of land to be affected by the AFP, falls into the latter category. However, the Commission's examination of adverse effects on landowners and communities affected by the proposed pipeline route is limited; it ends at the "the economic interests of landowners and communities affected by the route of the new pipeline." 88 FERC ¶ 61,227 at *14.

While HOME asserts that the construction of the AFP would significantly injure their religious beliefs and practices, as well as harm the environment, neither of these factors are currently included in the *primarily economic* analysis of adverse effects versus public benefits. The social harms claimed by HOME may not be considered by FERC given the subjectivity of the analysis, and environmental harms are considered at a later step in the analysis. Thus,

HOME's argument fails because the organization did not assert any economic damage to their interests outside of those already considered by the Commission and addressed by TGP.

In an analogous 2018 case, the Commission affirmed its finding of public need where landowners appealed the granting of a CPCN, alleging an improper balancing of public need and harm to the landowners and environment. In the appeal, the landowners asserted "that the project will have adverse landowner impacts by devaluing property, engaging in a compulsory taking of private property through eminent domain, and preventing property enjoyment." *Mountain Valley Pipeline, LLC Equitrans, L.P.*, 163 FERC ¶ 61,197 (F.E.R.C. 2018). FERC declined to consider issues of public enjoyment or environmental considerations despite petitioners' assertions that it should do so, stating "[t]he Certificate Policy Statement's balancing of adverse impacts and public benefits is an economic, not an environmental analysis." *Id.* at *14.

1. TGP has met its duty of minimizing adverse impacts on landowners and surrounding communities.

Under FERC's 1999 Certificate Policy Statement, a pipeline company has the duty to "ma[k]e efforts to eliminate or minimize" any adverse effects the construction of the pipeline may have on the surrounding communities and landowners. 88 FERC ¶ 61,227 at *14. If adverse effects still exist after an attempt at minimization, the project may nonetheless continue, so long as the public benefits outweigh the adverse effects. HOME asserts that TGP's efforts at minimizing the adverse effects were ineffective, and that the commission therefore "improperly balanced the evidence of public benefits to be achieved against the residual adverse effects." Order at 40. Existing precedent, however, indicates that FERC's consideration of TGP's minimization efforts and the persisting adverse effects was proper.

In *Mountain Valley*, the pipeline company changed the pipeline route over eleven times and allowed roughly 30% of the route to be adjacent to existing rights-of-way. 163 FERC ¶

61,197 at *13. In the instant case, TGP has "made changes to over 30% of the proposed pipeline route" and agreed to bury the pipeline through HOME's property and construct it as quickly as possible. Order at 41. These efforts by TGP, analogous to *Mountain Valley*, where FERC found that the pipeline company met its burden of minimization, indicate that FERC properly assessed TGP's efforts to minimize adverse effects as sufficient. 163 FERC ¶ 61,197.

HOME's contention that significant adverse effects remain misstates the applicable standard. That adverse effects *remain*, indeed, indicates that HOME concedes FERC's efforts to minimize adverse effects, which is all that is required of the Commission for the granting of a CPCN. 88 FERC ¶ 61,227. Further, the remaining adverse effects asserted by HOME are related to environmental and social harms, not economic ones. The environmental concerns are assessed at a later step in the process, and to consider HOME's religious beliefs as an adverse effect in the balancing test would be to give the organization undue sway in the Commission's process. "The Commission must balance the concerns of all interested parties and [] not give undue weight to the interests of any particular party." 163 FERC ¶ 61,197 at *13.

HOME additionally asserts that TGP's failure to enter easement agreements with over 40% of landowners along the route should be considered in the Commission's assessment of adverse effects. However, TGP need not enter easement agreements with every landowner along the route to move forward with construction. While it is true that the Certificate Policy Statement encourages pipeline companies' "good faith efforts to negotiate with landowners for any needed rights," and that an inability to obtain an easement agreement may be evidence of an adverse effect, FERC asserted in *Mountain Valley* that the pipeline company's "failure to reach easement agreements with many landowners" was not damning to the company's efforts to minimize adverse effects. 163 FERC ¶ 61,197 at *13. Here, where TGP has entered into easement

agreements with a majority of landowners, TGP has made sufficient efforts to minimize adverse effects. The Certificate Policy Statement further asserts "if an applicant had precedent agreements with multiple parties for most of the new capacity, that would be strong evidence of market demand and potential public benefits that could outweigh the inability to negotiate right-of-way agreements with some landowners." 88 FERC ¶ 61227, at *20.

B. The Commission need not examine alternatives to the pipeline path where the economic and environmental harms in the alternative are greater than those faced by the existing path.

HOME argues that "at a minimum," the alternate route proposed for the AFP should be used. However, the alternative route introduces real economic and environmental hardship— $51 million more in construction costs and environmental havoc caused by a longer pipeline built through a more environmentally sensitive ecosystem. Order at 44. Given the economic nature of the balancing of public benefits against adverse effects, a loss of $51 million where the existing pipeline route is already mitigating adverse effects against all relevant parties would certainly fail the assessment. FERC has considered the appropriate factors in its economic balancing test at this stage of the analysis and properly exercised its discretion to find that the AFP's benefits outweighed the adverse effects of the project. 88 FERC ¶ 61227; *Minisink*, 762 F.3d 97 at 111.

III. The CPCN Order is not a substantial burden on HOME's Religion

HOME's claim that the CPCN Order constitutes a violation of RFRA is without foundation in the law. To establish a *prima facie* claim under RFRA, a plaintiff must show that a government action imposes a "substantial burden" on the plaintiff's "exercise of religion." *Navajo Nation*, 535 F.3d at 1068. Once a substantial burden is established, the government is then required to show that its action is in furtherance of a compelling interest and is the least restrictive means of accomplishing that interest. *Id.* If a plaintiff cannot sufficiently prove a substantial burden, then their RFRA claim fails as a matter of law. *Id.* HOME has not established

that their religion will be substantially burdened, and they have thus failed to establish a *prima facie* RFRA claim triggering strict scrutiny under the compelling interest test.

A. The Definition of a Substantial Burden Under Ninth Circuit and Pre-RFRA Supreme Court Precedent

RFRA does not define what constitutes a "substantial burden" on the exercise of religion, but the statutory language and Supreme Court precedent provide the proper frame of analysis. RFRA was enacted in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which Congress viewed as eliminating the requirement that the government justify burdens imposed on religion through the compelling interest test. *Navajo Nation*, 535 F.3d at 1067. RFRA's purpose is to overturn *Smith* and "restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(a)-(b). RFRA explicitly references the Supreme Court cases of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as establishing the appropriate test. *Id.* These cases involved instances where the government imposed the coercive choice between violating religious beliefs and facing either the loss of government benefits (*Sherbert*) or criminal sanctions (*Yoder*). *See Navajo Nation*, 535 F.3d at 1069 (describing the facts of *Sherbert* and *Yoder*). In both cases, the government burden on the free exercise of religion consisted of this coercive choice.[1]

Congress's choice to specifically include *Sherbet* and *Yoder* in the text of RFRA leads to one conclusion: that the government imposes a substantial burden on the practice of religion only when it coerces or compels an individual to act contrary to their religious beliefs through the

[1] *See Yoder*, 406 U.S. at 218 (holding that a compulsory attendance law compels the Amish respondents "under threat of criminal sanction, to perform acts . . . at odds with . . . their religious beliefs" and that this is "precisely the kind of objective danger to the free exercise of religion the First Amendment was designed to prevent."); *see also Sherbert,* 374 U.S. at 404 ("Government imposition of such a [coercive] choice puts the same kind of burden upon free exercise of religion as would a fine imposed against appellant for her Sunday worship.").

denial of a benefit or the imposition of a penalty. This is the view of the Ninth Circuit, which has held that "[u]nder RFRA, a 'substantial burden' is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1069-1070 (emphasis added). Absent any government coercion, no substantial burden can be established and the government will not be subject to strict scrutiny.

Navajo Nation involved facts that are similar to the present controversy. The case addressed the use of recycled wastewater to make artificial snow for a ski resort located on the San Francisco Peaks, an area sacred to the Navajo. *Id.* at 1063. The plaintiff tribes argued that the use of wastewater on the mountain would spiritually contaminate the site and devalue their religious exercises. *Id.* The Ninth Circuit rejected the tribes' RFRA claim, holding that there was "no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs" and therefore no showing of a substantial burden. *Id.* The court stressed that this high bar for establishing a substantial burden is necessary because otherwise "[e] ach citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires." *Id.* While we might wish that the government "take no action that decreases our spiritual fulfillment, no government . . . could function if it were required to do so." *Id.* at 1064. Thus, government action that damages or even degrades a plaintiff's exercise of religion will not rise to the level of being a substantial burden absent the presence of coercion.

The Ninth Circuit is by no means alone in its interpretation of RFRA. The Eight Circuit holds that a substantial burden "exists when the Government forces a person to act, or refrain

from acting, in violation of [their] religious beliefs, by threatening sanctions, punishment, or denial of an important benefit as a consequence for noncompliance." *Doe v. United States*, 901 F.3d 1015, 1026 (8th Cir. 2018). The D.C. Circuit, citing *Sherbert*, has similarly defined a substantial burden as existing when the government puts substantial pressure on an individual to modify their religious behavior or violate their beliefs. *See Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). The district court for the District of Columbia rejected a RFRA claim involving the construction of a pipeline through sacred land using reasoning parallel to the Ninth Circuit's in *Navajo Nation*.[2]

The Supreme Court has also addressed a case with remarkably similar facts to those at issue here and declined to impose strict scrutiny. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). *Lyng* involved the construction of a road by the United States Forest Service through an area of the Six Rivers National Forest that is deeply sacred to several Native American tribes, having long been used for spiritual activities and rituals. *Id.* at 442-443. The area's "undisturbed natural setting" was found to be integral to its spiritual importance. *Id.* A Native American organization filed suit on behalf of the tribes, claiming that the government's actions violated the Free Exercise Clause of the Constitution. *Id.* at 443-444. The Court rejected this claim, holding that while the government's actions would "interfere significantly with private persons' abilities to pursue spiritual fulfillment", they would not coerce any individual to violate their religious beliefs. *Id.* at 449. Even under the assumption that the construction of the road would "virtually destroy the Indians' ability to practice their religion", the government's non-coercive actions were not in violation of the Free Exercise Clause. *Id.* at 451-452 (*quoting*

[2] *See* Standing Rock Sioux Tribe v. United States Army Corps. of Eng's, 239 F. Supp. 3d 77 (D.D.C 2017) (finding that the construction of a pipeline under a sacred lake did not constitute a substantial burden given the absence of coercion).

Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1985). According to the Court, "incidental effects of 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" are not subject to strict scrutiny. *Id.* at 450-451.

Lyng is a pre-*Smith* case dealing with the Free Exercise Clause rather than RFRA, but it is nevertheless controlling here. As stated above, the central purpose of RFRA is to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*" and to overturn *Smith*. 42 U.S.C. § 2000bb. *Lyng* is within the progeny of *Sherbert* and *Yoder*, citing both extensively. RFRA's legislative history also clarifies that Congress intended for courts to look to pre-*Smith* case law such as *Lyng* when assessing RFRA claims. The Senate Committee Report on RFRA stated that "[t]he committee expects that courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. No. 103-111 at 8-9 (1993). Additionally, the fact that *Lyng* involved government action over publicly-owned land rather than private land is irrelevant as the reasoning of the case does not hinge on land ownership but on "the nature and extent of the intrusion on religious beliefs and practices as such." *Thiry v. Carlson*, 78 F.3d 1491, 1495 fn. 2 (10th Cir. 1996). *Lyng*, along with the circuit court decisions cited above, provides the standard that this court should apply in reviewing RFRA claims.

HOME cannot meet the above standards for establishing a substantial burden on its religion. While FERC does not deny that the CPCN Order and the AFP Route will impose some cost on HOME's religious practices, there is simply no coercion present. At no point will the members of HOME be faced with the Hobson's choice between violating their deeply-held

religious beliefs or facing a state-imposed penalty. Instead, they will be free to practice their faith as before, with no government action being taken to prevent their practice of religion.

HOME's argument that it is being prevented from practicing its religion must be rejected. HOME has alleged that the AFP Route and CPCN Order will hinder its members' sense of spiritual fulfillment from the Solstice Sojourn in such a way as to effectively prevent the practice. This however is identical to both the free exercise claim that the Supreme Court considered in *Lyng* and the RFRA claim that the Ninth Circuit considered in *Navajo Nation*. Just as those claims were rejected, HOME's claim should be rejected here. The government is not required to ensure that each citizen achieves full spiritual satisfaction, and a diminishment of spiritual fulfillment does not constitute by itself a substantial burden. *Navajo Nation*, 535 F.3d at 1070; *see also Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214 (9th Cir. 2008) (holding that interference with the ability to practice religion is "irrelevant" absent government coercion). Thus, HOME has not shown that they will be prevented from practicing their religion in a legally cognizable way.

HOME further argues that the CPCN Order is effectively compelling it to support the use of fossil fuels in violation of their faith. However, at no point is it alleged that FERC is withholding a benefit (as in *Sherbert*) or threatening to impose a penalty (as in *Yoder*) in order to compel HOME to act in a manner contrary to its religion. No action is required of HOME whatsoever, and it is free to continue to denounce fossil fuels on religious grounds. While HOME's land would be used to transport natural gas, this would be through a valid exercise of eminent domain under 15 U.S.C § 717f(h). HOME itself would not be required or compelled to take any action in support of fossil fuels, and any cost on their religion resulting from this would be an "incidental effect" of a government program with "no tendency to coerce individuals to act

contrary to their religion." *Lyng,* 485 U.S. at 450. Following *Lyng*, granting the CPCN Order is not an act of government coercion requiring strict scrutiny.

On this record, HOME cannot show that their religion has been substantially burdened as defined by the Ninth Circuit and the Supreme Court in pre-*Smith* cases and they have thus failed to establish a *prima facie* RFRA claim.

B. The CPCN Order Passes Strict Scrutiny.

Assuming that a substantial burden could be established, the CPCN Order can pass strict scrutiny under the compelling interest test. Under RFRA, a government action substantially burdening the exercise of religion is prohibited unless the government can prove that the action furthers a "compelling government interest" and "is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(b). This is an individualized test that examines the interests of the government and the harm of granting an exception to "the particular claimant whose sincere exercise of religion is being substantially burdened."[3]

FERC's interest here is in maintaining a sound and efficient natural gas pipeline permitting system rather than one that would unreasonably bend to the demands of any single religion. Courts have found similar government interests to be compelling, with the need for an efficient tax system often surviving RFRA challenges.[4] Maintaining uniform, efficient standards in approving the construction of gas pipelines is of similar importance to the maintenance of the

[3] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 708 (2014) (quoting Gonzalez v. O Centro Espirita Beneficente Unuiao do Vegetal, 546 U.S. 418, 430-431 (2006)).

[4] *See* United States v. Indianapolis Baptist Temple, 224 F.3d 627, 630 (7th Cir. 2000) (finding that "maintaining a sound and efficient tax system" is a compelling government interest); *see also* Browne v. United States, 176 F.3d 25, 26 (2d Cir. 1999) (finding a "compelling governmental interest in uniform, mandatory participation in the federal income tax system.").

tax system given the centrality of natural gas to this country's energy needs.[5] FERC has thus raised a compelling interest.

In determining whether the government has selected the least-restrictive method, courts must "compar[e] the cost to the government of altering its activity to . . . the cost to the religious interest imposed by the government activity." *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 967 (E.D. Mich. 2014) (quoting S. Ridge Baptist Church v. Indus Comm'n of Ohio, 911 F.2d 1203, 1206 (6th Cir. 1990)). The question is a balancing test of different interests and the existence of some cost to the religious interest will not automatically defeat the government's interest.

The facts establish that FERC has chosen the least restrictive means of achieving its compelling interest. A uniform pipeline permitting system that makes reasonable accommodations to minimize impacts on religion correctly balances FERC's interest with the interests of religious groups like HOME. A uniform pipeline system avoids burdening FERC with having to make drastic alterations to pipeline projects whenever religious objections are made. Further, the CPCN Order as written goes to great lengths to minimize any burden imposed on HOME's religion. The pipeline will be buried underground, allowing for the members of HOME to freely cross over it in the course of performing the Solstice Sojourn. Additionally, the construction process of the pipeline would be expedited and timed to minimize any short-term impacts on the Solstice Sojourn while avoiding long-term impacts entirely. While there may still be some unavoidable costs imposed on HOME's religious practices, these costs must be balanced against the costs to FERC of abandoning its uniform permitting system.

[5] *Electric Power Sector Basics*, ENVIRONMENTAL PROTECTION AGENCY (last updated May 11, 2023), https://www.epa.gov/power-sector/electric-power-sector-basics (showing that natural gas supplies 38.4% of electricity in the United States).

If FERC is required to capitulate to religious objections even after making all reasonable accommodations and despite showing that doing so would add tens of millions in costs, it is hard to see how an efficient pipeline system could ever be maintained. Under such a standard, FERC would be incapable of granting a CPCN order in the face of religious objections even if alternative routes prove to be prohibitively expensive. This would be ruinous not only for the AFP pipeline, but would also have disastrous implications going forward. Religious groups would be able to significantly hinder if not shut down needed pipeline projects by forcing the selection of impracticable alternative routes. This is directly analogous to "the difficulties inherent in administering a tax system riddled with judicial exceptions for religious employers." *Indianapolis Baptist Temple*, 224 F.2d at 630. While FERC takes religious objections seriously and will work to avoid burdening religion to the greatest extent practicable, there is still a pressing need for a smooth permitting system that avoids acquiescing unreasonably to demands for religious exceptions. A uniform system, particularly one that makes accommodations when feasible, is thus the least restrictive means of accomplishing FERC's compelling interest.

The facts of the present case show just how costly accommodating unreasonable requests for religious exemptions can be. It is undisputed that rerouting the AFP to avoid HOME property would add over $51 million in costs while leading to greater environmental harm. Order at 44. The Alternate Route would therefore impose both an unduly onerous burden on the pipeline project and more damage to the environment than the AFP Route. A system that would require FERC to accommodate similar religious exemptions whenever they arise is the very opposite of an efficient system. Once it is remembered that FERC is also willing to make reasonable accommodations, it becomes clear that a uniform system is the least restrictive method of achieving FERC's compelling interest.

IV. The conditions on greenhouse gas emissions were neither in excess of the statutory mandate nor were they arbitrary and capricious for neglecting upstream and downstream emissions.

The Commission appropriately exercised its discretion when it implemented conditions on the construction of the AFP, but not on the upstream or downstream emissions. TGP's challenge of the greenhouse gas (GHG) conditions inappropriately invokes the major questions doctrine while simultaneously ignoring the approval of such measures in the Natural Gas Act (NGA). Meanwhile, HOME's challenge is misdirected in two ways. First, HOME failed to appreciate the Commission's reasoned analysis of GHG emissions data and the accompanying deference. Second, HOME's insistence on broader reaching conditions is prohibited by the major questions doctrine. The Commission has a responsibility to attach such conditions as are necessary for the public well being; however, broad expansions of this power are unprecedented and beyond the scope of power given by Congress.

A. The greenhouse gas restrictions on the pipeline's construction are not in violation of the major questions doctrine.

The major questions doctrine is a fence limiting the bounds of executive administrative action. In addition to requiring a colorable statutory basis, the Supreme Court requires asking if "common sense" indicates a "reason to hesitate before concluding that Congress meant to confer [the asserted agency] authority?" *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). The doctrine is triggered when an agency attempts to regulate areas of "[S]uch economic and political magnitude" that Congress would not likely delegate away. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The limitations on the AFP construction project were minor and well within accepted measures enforced on prior projects. However, even if these limitations constitute significant economic or political regulations, there is ample authority in the NGA to confirm Congress's willful delegation of this power.

1. The major questions doctrine was not invoked by this small exercise of power.

The restrictions on AFP's construction were not economically or politically significant enough to invoke the major questions doctrine. Indirect effects like GHG emissions may be restricted to protect the public necessity if they are reasonably foreseeable and if the agency is a legally relevant cause of the indirect effects. *See EarthReports, Inc. v. FERC*, 424 U.S. App. D.C. 127 (2016); *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (2017). The EIS predicted 104,100 metric tons per year of CO2e will be produced annually by the construction project barring any restrictions, thus the indirect effects appear imminent. Order at 73. In addition, the Commission qualifies as a legally relevant cause of these indirect effects because it has the power to deny the pipeline certificate. *Sierra Club*, 867 F.3d at 1372.

The conditions implemented by the Commission were minor and consistent with prior conditions on similar projects. While the total estimated emissions without conditions was 104,100 metric tons per year of CO2e, the conditions were only expected to reduce that number to 88,340 metric tons, a mere 15.1% reduction. Order at 67. Furthermore, all but one of the contested conditions had a "where available" clause ensuring that the AFP would not be halted on account of these conditions. Order at 67. This is far from the economic and political magnitude required to invoke the major questions doctrine.

Precedent confirms that these conditions are nothing new. In fact, some of the restrictions, specifically regarding felling and replanting trees, were not contested by TGP because these are traditional restrictions commonly imposed on similar projects. Order at 83. Even the less traditional conditions involving GHG emissions are comparable to conditions placed on other projects. When proposed mitigation measures are supported by substantial evidence, the EPA may utilize those measures to mitigate environmental impacts. *Nat'l Audubon*

Soc. v. Hoffman, 132 F.3d 7, 17 (2d Cir. 1997). The EPA has relied on this authority in pipeline certificates to place conditions on everything from dinosaur fossil identification to honey bee pollen sources and, of course, to air quality standards. *Sierra Club*, 867 F.3d at 1374 (referencing Fla. Southeast Connection, LLC, 154 F.E.R.C. P61,080 (F.E.R.C. February 2, 2016)). These minor, non-mandatory conditions constituting a 15.1% reduction in emissions are comparable to limitations commonly imposed by the EPA.

2. If the major questions doctrine was invoked, the power vested in the Commission is sufficient to address it.

When invoked, the major questions doctrine inevitably leads the court to consult the statutory grant of authority. In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court summarized the doctrine writing: "[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The NGA, found at 15 U.S.C. § 717, does not explicitly mention GHG emissions, but it does authorize the implementation of conditions throughout the statute:

> § 717f(e).
>
> The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder *such reasonable terms and conditions* as the public convenience and *necessity* may require.
>
> § 717b(a)
>
> The Commission may by its order grant such application, in whole or in part, *with such modification and upon such terms and conditions* as the Commission may find necessary or appropriate.

(Emphasis added.) Preventing climate change is within the common sense bounds of public necessity. The Supreme Court, the Council on Environmental Quality (CEQ), and even the United Nations have emphasized the significant risk posed by GHG emissions and climate

change. In *Massachusetts v. EPA*, the EPA was required to regulate GHG emissions under the Clean Air Act because Congress expressly wanted to counteract climate change. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007). More recently, the CEQ published interim guidance addressing climate change under NEPA recognizing that "[T]here is little time left to avoid a dangerous–potentially catastrophic–climate trajectory." 88 FR 1196. The UN likewise characterized the threat as posing a severe threat to the economy, environment, and to the health of individual citizens.[6] The consensus is that the public necessity requires mitigation of GHG emissions.

The emissions from vehicles, chainsaws, and steel mills are indirect effects of the pipeline's construction, but still fall within 15 USC § 717f(e) because the threat is reasonably foreseeable. *Sierra Club v. Marsh,* 976 F.2d 763, 767 (1st Cir. 1992). Though Congress may not have had climate change in mind while drafting the NGA, such a premonition is not necessary when a more than plausible interpretation of the statute shares a common sense link with the broader economic and political ramifications. *West Virginia*, 142 S. Ct. at 2608. In *King v. Burwell*, rules promulgated based on a vague mandate to the IRS were struck down for incidentally overhauling American healthcare policy. *King v. Burwell*, 576 U.S. 473, 497 (2015). This is exactly the kind of broad economic and political change that the Supreme Court is hesitant to condone without clear, statutory justification. A 15% reduction in GHG emissions designed to protect the public necessity, however, is far from the major question contemplated in *Burwell.*

B. The Commission was not arbitrary or capricious in omitting upstream and downstream conditions because it conducted reasoned analysis subject to deference.

[6] Intergovernmental Panel on Climate Change, United Nations, *Summary for Policymakers* of Climate Change 2021: The Physical Science Basis SPM–5 (Valerie Masson-Delmotte et al. eds.) (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf (IPCC Report).

The Commission's decision not to impose upstream or downstream conditions is not arbitrary or capricious because it is supported by substantial evidence. The standard invoked by HOME requires that where an agency's "explanation is lacking or inadequate, the court must remand for an adequate explanation of the agency's decision and policy." *BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016). However, the commission's findings are conclusive "if supported by substantial evidence." 15 U.S.C. 717r(b). To be clear, there is no requirement in administrative law that the Commission's decision align with the beliefs or goals of HOME, TGP, or even the 12th Circuit. Rather, the Commission's mandate is simply to make sure that they "adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Wildearth Guardians v. Jewell*, 738 F.3d 298, 309 (2013). Once this analytical rigor is substantiated, the Commission's decision must be awarded deference. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). While the Commission did study the upstream and downstream environmental effects, the results did not warrant mitigation. Furthermore, any such efforts to place conditions on these effects would exceed the bounds of the NGA and invoke the major questions doctrine.

1. It is unclear whether the AFP will increase GHG emissions at all.

The Commission presented evidence of the potential upstream and downstream environmental effects. Though not all data was attainable, the Commission did present estimates of the amount of power-plant carbon emissions that the pipeline will enable, which is considered the minimum evidence required. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). In addition, the Commission provided a pessimistic estimate of downstream emissions that assumed that the pipeline would operate at 100% capacity at all times and that all natural gas transported

by the pipeline would be used in combustion processes. Order at 72. The Commission did not cut corners in the downstream analysis or sugarcoat the amount of potential emissions.

There is no indication that the public necessity requires the mitigation of downstream effects because the natural gas may simply replace other sources of energy. For the Commission to regulate indirect effects, the effects must be reasonably foreseeable. *EarthReports, Inc. v. FERC*, 424 U.S. App. D.C. 127, 131 (2016). It is entirely possible that the natural gas transported by the AFP will supplement or replace coal-powered energy plants thereby reducing total emissions. The Commission cannot identify a clear threat to the public necessity based on this information.

The upstream emissions from production of the natural gas are similarly difficult to quantify and subject to displacement. While NEPA and the courts have required agencies to engage in "reasonable forecasting," an agency is not required to speculate or "to do the impractical, if not enough information is available to permit meaningful consideration." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.34 1067, 1078 (9th Cir. 2011). Also, for a causal relationship between the CPCN and the alleged harm to exist, the natural gas produced must not be gas that would have been produced anyway. *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989) (approving a golf course's environmental review that ignored potential environmental harm from an adjacent construction project that would be built regardless). The total production at the Hayes Fracking Field (HFF) is not going to increase, but rather 35% of the natural gas currently being produced will be diverted to the AFP. Order at 12. Thus, while the Commission does not have data on the difficult-to-quantify upstream emissions, they have shown substantial evidence that the emissions will not increase; they will merely shift from traveling through one pipe to traveling through a different pipe.

HOME's challenge claims that mitigating the direct emissions from the construction project while foregoing conditions on upstream and downstream emissions is arbitrary and capricious despite the reasonable basis given for the omissions. However, neither TGP or HOME critique the emissions data provided by the Commission or the lack of data for upstream emissions. Order at 75. Rather, HOME insists that the total emissions should be restricted regardless of whether they will increase, decrease, or remain the same. The essence, however, of arbitrary and capricious review is not that a choice was incorrect or suboptimal, but rather that the agency's basis for a decision was lacking or inadequate. *BP Energy Co. v. FERC*, 828 F.3d 959, 965 (D.C. Cir. 2016). Even if HOME and this Court agree that additional conditions are a good idea, the law requires that this Court defer to the agency's reasoned conclusion.

2. The major questions doctrine prevents the Commission from exercising power over upstream and downstream emissions.

While the conditions placed on the construction of the AFP were small and routine speed bumps for TGP, the conditions contemplated by HOME are much broader conditions that would raise issues under the major questions doctrine. *West Virginia v. EPA* addressed a similar situation in which the EPA attempted to restructure the American energy market through an ancillary provision in the Clean Air Act. 142 S. Ct. at 2602. The ramifications in *West Virginia* were found to have such significant political and economic consequences that the major questions doctrine could not permit the regulations to stand without a more direct grant of power from Congress. *Id*. Because an exercise of common sense cannot identify clear articulation of similar authority in the NGA, this Court should uphold the Commission's decision to omit these conditions after analyzing the data and considering alternatives.

One helpful guidepost for locating the boundaries of the Commission's authority is found in 15 USC § 717(b) which specifically forbids much of the action that HOME desires. The

construction of an interstate pipeline is clearly covered by the NGA, but "The provisions of this chapter… shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 USC § 717(b). The big limitation here is on the production of the natural gas. HOME cannot, by invoking the vague power to place conditions in § 717f(e), compel the Commission to impose restrictions when § 717(b) expressly forbids it. HOME must take the bitter with the sweet and embrace this full bar on upstream emissions restrictions.

This bar on upstream and various downstream conditions negates multiple responsibilities of the Commission. In *DOT v. Public Citizen*, an agency was not required to analyze environmental effects that it had no legal authority to prevent. *DOT v. Public Citizen*, 541 U.S. 752 (2004). Furthermore, in *Sierra Club v. FERC (Freeport)*, the Commission was forbidden from relying on the effects of natural gas exports as a reason to deny a license because it had no legal authority to do so. *Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016). If there is a threat to the public necessity posed by the upstream emissions, HOME must look to a different regime tasked with regulating natural gas production or to the legislature to accomplish their goals.

The conditions placed on the construction of the AFP and the additional conditions desired by HOME differ in two key ways: size and scope. The reduction in annual construction emissions constitutes a 15.1% drop from 104,100 metric tons of CO2e to 88,340 metric tons. Order at 73. Meanwhile, the yearly estimate for maximum downstream emissions was 9.7 million metric tons of CO2e. The entire mitigated construction project will release less than 1% of the total downstream emissions. This comparison facilitates the distinction between conditions that create a minor ripple in the energy market, and conditions that could potentially impact

millions of metric tons of CO2e and the energy market as a whole. Though it is hard to say exactly how the market would change, the Supreme Court cautions courts against meddling with market forces that they may not understand. *West Virginia*, 142 S. Ct. at 2637-2638.

The scope of these upstream and downstream conditions also expands much wider than the construction project. The conditions on the construction project involve direct effects of the Commission's approval while upstream and downstream conditions would involve, at the very least, indirect effects. Indirect effects are defined as effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.1(g)(2). Ultimately, common sense must be the guide as to whether Congress would hide "elephants in mouseholes" by granting the authority to manipulate the energy market through the NGA. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). This Court should find that this massive amount of natural gas used to generate power for neighborhoods, towns, and cities constitutes exactly the kind of economic and political magnitude that the Supreme Court views with such skepticism.

Another obstacle to the imposition of HOME's conditions is the difficulty in quantifying harm and the novel nature of the climate change threat. Although the threat of climate change is wholly embraced by the EPA and the Commission, the problem is recent enough that neither are completely settled in their response. This Court is not the first to grapple with determining whether downstream emissions are significant enough to be addressed even when ample data is available, and agencies are in the midst of developing answers to that question and others similar to it. *See, Sierra Club*, 867 F.3d 1357. In *Habitat Education Center v. U.S. Forest Service*, the court found that ignoring the cumulative impacts of a project until a later date was acceptable if not enough information was available to provide a thorough analysis. *Habitat Education Center*

v. U.S. Forest Service, 609 F.3d 897, 902 (2010). The Commission is in the process of developing guidance on GHG emissions for pipeline applications, but this guidance project is not yet complete. Order at 70. Until the Commission has a more accurate system for determining the threats posed by upstream and downstream emissions, it cannot and should not attempt to regulate them by speculating on the magnitude of the threats and the best methods for protecting the public necessity.

CONCLUSION

The American Freedom Pipeline will bring prosperity and growth, benefitting the American people. It is a project worth supporting, and FERC properly found so below. The Court should affirm the Commission's grant of a Certificate of Public Convenience and Necessity because the decision was neither an arbitrary nor capricious exercise of agency power. FERC properly considered the appropriate factors in granting the CPCN, and weighed the adverse effects against the public benefits from the American Freedom Pipeline as it was required to do at that stage of the analysis. FERC did not violate the Religious Freedom and Restoration Act because HOME is unable to establish a substantial burden to their religious beliefs and practices. Therefore, the decision passes under strict scrutiny. Further, the Commission reasonably considered the environmental effects of the pipeline and thus, the decision to impose conditions must receive deference. This Court should affirm the Commission's findings below.

Certification

We hereby certify that the brief for the University of Georgia 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.

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Team Member

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Date_____