NO. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

TRANSNATIONAL GAS PIPELINES, LLC
PETITIONER,

-AND-

THE HOLY ORDER OF MOTHER EARTH
PETITIONER,

V.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR PETITIONER TRANSNATIONAL GAS PIPELINES, LLC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

JURISDICTIONAL STATEMENT

This court has jurisdiction under Section 717(r) of the Natural Gas Act. 15 U.S.C.A. § 717r. On April 1, 2023, the Federal Energy Regulatory Commission ("FERC") granted a Certificate of Public Convenience and Necessity (the "CPCN") to Transnational Gas Pipelines, LLC to construct the American Freedom Pipeline ("AFP") subject to conditions. (R. 2). Within thirty days, TGP and the Holy Order of Mother Earth ("HOME") petitioned FERC for rehearing on separate grounds. (R. 2). On May 19, 2023, FERC denied both petitions for rehearing and affirmed the original order. (R. 2). Both HOME and TGP filed timely petitions for review of the FERC Orders within sixty days of the Commission's denial. (R. 2); 15 U.S.C.A. § 717r.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was FERC's finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project needed where 90% of the gas transported by that pipeline was for export.?
2. Was FERC's finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?
3. Was FERC's decision to route the AFP over HOME property despite HOME's religious objections in violation of RFRA?
4. Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA?
5. Was FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

This case stems from a cross appeal filed by both the Holy Order of Mother Earth ("HOME") and Transnational Gas Pipelines, LLC ("TGP"), with the court consolidating each petition for review into a single appeal.

In June 2022, TGP filed an application to FERC seeking authorization for the construction and operation of the American Freedom Pipeline ("AFP"), a 99-mile interstate natural gas transportation system. Ten months later, FERC granted authorization for the AFP, subject to specified GHG conditions (the "GHG conditions") in its CPCN Order. HOME, having a vested interest due to property ownership along the pipeline's designated route, sought rehearing on three issues outlined in the CPCN Order. TGP also sought rehearing of the FERC mandated conditions of the Order. However, FERC denied each requested rehearing in their Order Denying Rehearing. This appeal to the Twelfth Circuit ensued.

The AFP is designed to span from Main Road M&R Station in Jordan County, Old Union to TGP's existing transmission facility, Broadway Road M&R Station, in Burden County, New Union. TGP estimates a cost of $599 million, which will be completely privately funded by TGP and its binding precedent agreements. The AFP better serves market needs by redirecting liquefied natural gas (LNG) from the Hayes Fracking Field (HFF). This shift benefits regions east of Old Union, which have witnessed a decline in population.

HOME sought rehearing on three parts of FERC's CPCN Order: (1) the "project need" finding, (2) the approval of the pipeline route over HOME's property, and (3) FERC's decision not to mitigate upstream and downstream GHG impacts.

First, HOME contended that FERC's finding of public convenience and necessity for the AFP was arbitrary and capricious because HOME believed that this conclusion was not supported

by evidence of public need or any comparative analysis between public benefits and adverse effects.

In FERC's Order Denying Rehearing, the Commission rejected HOME's allegations, pointing to substantial evidence of public need such as full subscription of precedent agreements. Though a portion of the LNG will be exported to Brazil, there are a plethora of domestic benefits, including providing natural gas services to those without current access, extending natural gas service to underserved areas, optimizing existing systems for market competitiveness, and enhancing regional air quality by substituting cleaner-burning natural gas for fossil fuels. Significantly, all parties acknowledge that TGP's existing customers, the current pipelines in the market, and their captive customers will not experience any adverse impacts.

Additionally, FERC refuted HOME's assertions that the AFP harms them by being routed across their property, that the AFP is environmentally damaging by requiring tree removal along its route, and that an alternate route should be implemented. In so doing, FERC recognized that TGP laboriously worked to address landowner concerns by changing over 30% of the AFP route and negotiating easement agreements.

Second, FERC determined that the chosen pipeline route offers greater public benefit and less environmental harm than the Alternate Route, which would extend an additional three miles through more sensitive ecosystems. Despite HOME, a religious order valuing nature as a deity, implying that their spiritual connection with the environment should hold greater weight in FERC's balancing test, FERC clarified that such religious considerations do not carry additional weight, affirming the validity of the selected route.

Relatedly, HOME contended that the CPCN Order violates the Religious Freedom Restoration Act ("RFRA") because the AFP route substantially burdens their religious exercise.

Specifically, HOME asserts that their ceremonial Solstice Sojourn, a biannual foot-journey from their property to the Misty Top Mountains would be adversely affected by the AFP. Acknowledging this concern, FERC imposed a condition to the CPCN order, mandating TGP to bury the pipeline under the entirety of HOME's property and complete the construction of the pipeline completely between solstices. HOME further claimed that, independent of the Solstice Sojourn, they are effectively compelled to endorse the purported "harmful environmental effects" associated with fracking, the transportation, and the burning of LNG, merely by the AFP's presence, which contradicts their religious beliefs. Given the conditions imposed in the Order and FERC's conclusion that a substantial burden must be physical not emotional, FERC rejected that HOME's religious exercise would be substantially burdened by the pipeline.

Third, HOME argued for rehearing because it asserts that FERC acted arbitrarily in failing to include any upstream and downstream mitigation measures in the Order's GHG Conditions. In the EIS, the Project's GHG emissions were quantified at 9.7 million tons of CO2e per year in downstream impacts, 104,100 metric tons per year for construction, or 88,340 tons with mitigation, and a finding of no reasonably foreseeable impact upstream. HOME claims that FERC not only has the authority to require GHG mitigation but it is *required* to address upstream and downstream GHG impacts in its conditions. FERC rejected this requirement, holding instead that while mitigation measures are within its authority, whether these measures are included is up to FERC's discretion.

TGP sought a rehearing of FERC's CPCN Order, contending that FERC exceeded its authority by imposing GHG conditions. TGP argued that the GHG conditions address "major questions" because the GHG conditions "require interpretation of the NGA to venture beyond plain meaning," an interpretation outside the agency's authority.

FERC rejected the claim, asserting that the GHG conditions, specific to the AFP, do not raise a major question. Instead, FERC argued that addressing such a major question is only appropriate on a broader, nationwide level rather than measures concerning a specific project, such as here. Rather, FERC folds in its authority to impose GHG Conditions under its vague authority in Section 7 of the NGA, which "empowers the Commission to set specific terms and conditions when granting authorization."

STANDARD OF REVIEW

Reviewing courts must uphold a Commission determination so long as it is not arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). In doing so, the reviewing court must not substitute its judgment for the Commission but intercede only where FERC exceeds statutory authority, neglects the record, or departs from Congressional and precedential guidelines. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 549 (1978). Further, so long as the Commission finding is supported by substantial evidence and aligns with statutory authority and policy, it is conclusive. 15 U.S.C.A. § 717r (b). Thus, the only task of this court is to confirm that the Commission considered relevant facts and reached a conclusion rationally connected to the facts. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42–43 (1983).

SUMMARY OF THE ARGUMENT

The record supports three alternative rationales for a finding of need: the AFP serves market need, brings domestic benefits, and meets growing future demand. As such, the finding of need is not arbitrary and capricious. Nor, for that matter, is the Commission's balancing of benefits and harms tied to the pipeline. The Commission correctly concluded that AFP furthers public

interest and while potential harms were recognized – none outweighed the domestic benefits of the pipeline.

HOME's RFRA claim fails because the alleged substantial burden to its religious exercise cannot be attributed to FERC's approval of the AFP. However, even if this Court finds that FERC can be implicated, HOME cannot establish a prima facie RFRA case because the AFP does not pose a substantial burden as there is no physical barrier to religious practice. However, even if this Court determines that HOME is substantially burdened, the AFP must proceed because it furthers a compelling government interest and is the least restrictive means of doing so.

The GHG conditions trigger the Major Questions Doctrine (MQD) rendering the conditions beyond the Commission's statutory authority. Several signs of a major question are present, requiring this Court to scrutinize the clear congressional authorization. HOME's assertion that "reasonable terms and conditions" supports its statutory construction is not enough. Thus, this Court should remand FERC's Order and strike the GHG conditions. However, if this Court holds the MQD does not apply, FERC reasonably limited mitigation to construction impacts because NEPA carries procedural rather than substantive requirements. NEPA's sole requirement is sufficient discussion for informed decision-making and public comment, which the AFP project's EIS has done. Thus, the Commission's decision to mitigate solely construction impacts was reasonable.

ARGUMENT

I. The Commission's finding of project need is supported by the record and law.

Precedent agreements are significant evidence of market demand whether gas is contracted for domestic or foreign consumption. *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 728 (D.C. Cir. 2022) (*Oberlin II*); *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227,

61,748 (1999) (*Policy Statement*). Moreover, contracts for foreign consumption evidence public interest because benefits accrue from the project, not from end use. *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233 at P 43, reh'g denied, 164 FERC ¶ 61,099 (2018). Therefore, the precedent agreements with both International and New Union Gas and Energy Services Company support project need.

Further, relevant factors for the need analysis are derived from Congress' statutory directives as further clarified by the Policy Statement and federal courts. The Policy Statement provides the analytical framework for assessing need and the judiciary has left no doubt: "[n]othing in Section 7 prohibits considering export agreements in the public convenience and necessity analysis." *Policy Statement* at 61,743; *Oberlin II* at 726. Taken together, Congress, the Policy Statement, and reviewing courts support need where a portion of gas is for export. Accordingly, FERC's consideration of export agreements is not arbitrary and capricious. Because FERC's finding of project need is supported by both the record and the law, this Court should affirm.

A. The record supports FERC's finding of project need.

Because the record provides support for not one, but three alternate rationales for a finding of need, FERC's conclusion of public necessity and convenience is supported by substantial evidence.

First, precedent agreements will always be significant evidence of current market demand, especially where the project is fully subscribed to with unaffiliated shippers. *Tennessee Gas Pipeline Co., L.L.C. S. Nat. Gas Co., L.L.C.*, 180 FERC ¶ 61,205 (2022); *Policy Statement* at 61,748. Both export and domestic precedent agreements are evidence of need because benefits flow from the construction of the project "irrespective of whether the gas end[s] up here." *Town of Weymouth v. FERC*, 2018 WL 6921213, at *1 (D.C. Cir. Dec. 27, 2018). Thus, export precedent

agreements are appropriately considered under Section 7 and FERC correctly found that binding agreements for the AFP's full capacity made "strong showing" of project need. (R. 8). HOME attempts to undermine this finding by claiming that exported gas does not support need, but FERC and reviewing courts have dispelled this misguided notion. *Tennessee Gas Pipeline Co*., 180 FERC ¶ 61,205; (R. 8) Accordingly, FERC's credit of the International agreement is consistent with case law, the finding should not be disturbed.

Further, export precedent agreements with non-free trade agreement countries have not been shown to be inconsistent with the public interest and therefore evidence market demand. *See Tennessee Gas Pipeline Co*., 180 FERC ¶ 61,205. Accordingly, where 100% of the project capacity is contracted with an unaffiliated shipper, market need is established – even where a portion of the agreements are with exporters. Here, the record establishes a myriad of domestic benefits and binding precedent agreements substantiate current market demand for the project's full design capacity. (R. 8). Put plainly, export precedent agreements show market demand and domestic benefits and are thus essential evidence of project need.

Second, where projects carry gas for both domestic and foreign consumption, domestic precedent agreements "of any percentage of capacity" constitute "independent and alternative" evidence of need. *Oberlin II* at 729–30; *City of Oberlin, Ohio* v. FERC, 937 F.3d 599, 605 (D.C. Cir. 2019) (*Oberlin I*). Thus, even if the International agreements are excluded, the NUG contracts provide adequate evidence of need. Because discounting domestic agreements for a minority of project capacity is "fundamentally misguided", the Certificate Policy Statement does not impose a bright-line rule regulating when precedent agreements are evidence of market demand. *Oberlin I* at 605.

Recognizing these principles, the NUG precedent agreements demonstrate sufficient domestic market demand and benefits under Section 7. (R. 8). HOME frames these domestic agreements as a proportion to give the appearance of minimal amounts of gas being delivered domestically, but this is misguided: "there is no floor on the subscription rate needed for FERC to find a pipeline is or will be in the public convenience and necessity." *Oberlin II* at 729–30. Moreover, minority precedent agreements are indiscriminately considered because project benefits are not tied to the proportion of gas for domestic consumption. *Tennessee Gas Pipeline Co.,* 180 FERC ¶ 61,205 (2022). Thus, AFP contracts for American customers and improvement of regional air quality account for "independent and alternative" evidence of need. (R. 8, 9); *Oberlin II* at 729–30.

Finally, FERC's finding is further supported by a tertiary rationale: public benefits and future domestic need. The Commission must credit all facts indicative of public interest, including benefits derived from exported gas because most domestic benefits "accrue from the proposed project itself, not from the end use." *Fla. Se. Connection, LLC,* 162 FERC ¶ 61,233 (2018). Moreover, the Natural Gas Act explicitly considers credit of future service, thus demand projections are demonstrative of future demand. 15 U.S.C. § 717f(e); *Policy Statement* at 61,747. Again, the record presents several domestic benefits derived from the AFP – and, despite HOME's contentions, these benefits are not tied to the end use of gas in the United States. (R. 8). Further, HOME does not contest future market demand for gas routed through the AFP based on declining demand to the east of Old Union. (R.6). As such, the numerous domestic benefits, current, and future market demand support FERC's finding of public necessity and convenience.

B. FERC properly applied the evidence to relevant factors.

The project need finding was consistent with the NGA, Certificate of Policy Statement, and precedent. This finding is grounded in the record and law, it is not arbitrary and capricious. First, FERC met its mandate by evaluating all "public interest" factors under the NGA. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 391 (1959). In line with this directive, FERC necessarily credited the International agreements based on a multitude of benefits derived from gas regardless of end use, and correctly found that 100% subscription demonstrates market demand. Further, the Commission recognized that "there is no floor" on the relevance of precedent agreements and found need based on evidence of current and future domestic market demand. *Oberlin II* at 729–30. Lastly, in further allegiance to the policy statement, the Commission also relied on factors outside of market demand including a long list of domestic benefits. (R. 8).

Moreover, courts have affirmed that project need where a large portion of gas is contracted for export "easily comports" with the NGA. *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1188 (D.C. Cir. 2023). And while Section 3 sets out a general presumption favoring export to free-trade nations, Congress did not see fit to outlaw export to countries without free trade agreements with the United States. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016). Accordingly, the Commission's finding is not doomed because a portion of the gas is contracted for export to Brazil.

Second, because the *Oberlin* court approved crediting export agreements in Section 7 analyses without any limiting language, FERC's finding of need is also consistent with precedent. *Oberlin I* at 605. HOME misinterprets *Oberlin* as creating conditions for when an export agreement is relevant and distinguishes the AFP from the NEXUS pipeline. (R. 9). But this narrow reading contorts the opinion. *Oberlin* proclaims that export agreements are a valid indicator of

public need and does not condition this validity on the amount of gas meant for export. *See Oberlin II* at 722. And, even taking this narrow misreading as accurate, HOME mischaracterizes the Commission's reliance on *Oberlin*. Thus, even if *Oberlin* were inapplicable, domestic current and future demand and benefits provide additional and alternative rationale under Section 7.

Finally, even excluding export agreements, the Commission reasonably found that the public benefits demonstrate need. The Commission has certificated projects serving no new market based solely on benefits and would be justified doing so here. *Policy Statement* at 61,743. The Commission pointed to the NUG agreements and evidence of domestic need that "no commenter disputed," and tied its finding to domestic current and future demand. (R. 6, 8). Lastly, the Commission's reliance on the AFP's service of an interconnection, distribution of gas to currently unserved areas, and benefits to regional air quality is in lockstep with the policy of the NGA. (R. 8). In sum, a plethora of evidence demonstrates need and FERC rationally connected the evidence with Congressional and common law. Thus, its finding must not be disturbed on remand.

II. The law supports the finding that AFP's benefits outweigh harms.

To evaluate whether a project will be in the public convenience and necessity, the Commission performs a flexible balancing process wherein the project's benefits are weighed against harms. *Policy Statement* at 61,743. The Commission's balance is guided by the Policy Statement and in furtherance of several natural gas regulatory policies. *Id.* at 61,743, 61, 745.

While the Commission looks broadly for benefits, the Policy Statement identifies only three adverse effect considerations, one of which is relevant here: the interests of landowners and surrounding communities. *Id.* at 61,747; (R. 10). Importantly, the Commission recognizes that eliminating all adverse effects is not always possible. *Policy Statement* at 61,747. Thus, projects are not required to be free of adverse impacts, but only to demonstrate more benefits than harms.

Because FERC's balancing of benefits and adverse impacts comports with the Certificate Policy Statement, it is not arbitrary and capricious.

A. FERC identified all relevant benefits, harms, and alternatives.

To comply with the Policy Statement, FERC must consider "all" factors to be balanced. *Id.* Among the positive factors to be considered are the proposal's market support, economic, operational, and competitive benefits, and environmental impact. *Id.* at 61,743. Conversely, the interests of the landowners and the surrounding community contemplate environmental and social harms. *Id.* at 61,748. Because the Commission identified benefits, harms, and alternatives, its balance is reasonable.

To begin, FERC correctly identified all relevant benefits to be balanced. FERC will consider all relevant impacts such as meeting an unserved demand, improving the interstate grid with new interconnects, and furthering clean air objectives. *Id.* at 61,748. This requirement necessitates a careful review of the record for "any relevant evidence." *Id.* Accordingly, FERC's recitation of AFP's ample benefits is in accordance with this requirement.

Here, FERC complied with the Policy Statement by identifying benefits spanning nearly every category identified as relevant. Specifically, FERC highlighted economic and operational benefits including market support evidenced by binding precedent agreements; meeting unserved demand with the NUG terminal; and increasing access within New Union and the United States. (R. 8). Further, FERC pointed to environmental benefits such as the opportunity to shift from fossil fuel burning to natural gas and improving regional air quality. (R. 8). And, finally, the Commission noted the competitive benefits tied to the AFP, which optimizes existing systems to the benefit of current and new customers. (R. 8). Accordingly, FERC's recitation of AFP's ample benefits is in accordance with this requirement.

Secondly, as for harms, the Policy Statement directs the Commission to look for adverse effects to property rights of landowners and "take into account" any other interests of the surrounding community. *Policy Statement* at 61,749. While identifying harms, FERC recognizes the reality that it is rarely possible to acquire all necessary right-of-way by negotiation. *Id.*

Again, FERC adequately identified all relevant harms on record. The Commission properly noted that while TGP had negotiated easement agreements with just under 60% of landowners, those in the minority that have not signed face an adverse impact. (R. 10). Moreover, The Commission pointed to the project's residual environmental harms including the removal of trees along a two-mile span within HOME's 15,500-acre property. (R. 10, 11). And, FERC detailed, at great length, the tenets and traditions HOME observes, noting that they neither dispute the sincerity of HOME's beliefs nor the possible disruption even expeditious construction may pose. (R. 12). In sum, FERC searched the record and exhaustively noted every potential harm identified by HOME in perfect alignment with the Policy Statement.

In addition to identifying benefits and harms, the Certificate Policy Statement instructs FERC to include alternate routes where available. *Policy Statement* at 61,749. Specifically, the Policy Statement requires that the weighing be "reopened" to reflect the adverse effects of the changed route. *Id.* Thus, to be in compliance with the Policy Statement, FERC must identify and assess the alternate route proposed.

Now for a third time, FERC has satisfied the Policy Statement's requirements. First, FERC identified the Alternate Route available through the Misty Top Mountain Range. (R. 11). Next, FERC properly scrutinizes the economic, environmental, and social impacts tied to this option. Economically, FERC noted that an added $51 million in construction costs could not be overlooked. (R. 11). Environmental concerns also counted against the Alternate Route as FERC

found, and HOME does not debate, the Alternate Route would cause more environmental harm stemming from increased length and disruption to the Misty Top Mountain ecosystem. (R. 11). Finally, HOME cited the sole social benefit of the Alternative Route: avoiding HOME property – albeit at great economic and environmental cost. (R. 10).

As the foregoing demonstrates, FERC's diligent search for all pertinent benefits and harms on record comports with the Certificate Policy Statement.

B. FERC balanced benefits and harms as directed by the Policy Statement.

HOME asserts that FERC's balance of benefits and harms was unreasonable, but to be truly arbitrary and capricious, an agency must fail to comply with its own guidance. *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1258 (2009). Accordingly, FERC's weighing of benefits and harms tied to the AFP must comport with the Policy Statement's instruction to survive judicial review. Because FERC assessed harms at face value, investigated alternatives, and furthered the NGA's regulatory goals, the Commission scrupulously followed the Policy Statement, and its decision must not be set aside.

First, the Commission correctly refused to magnify harms in light of HOME's religious views. As the Commission noted, fairness and First Amendment concerns prevent agencies from assigning subjective value to harms out of deference to religious groups. (R. 12). Further, HOME's implication that religious beliefs afford extra weight to adverse effects finds no support in the Certificate Policy Statement. To the contrary, the Policy Statement urges the Commission to "largely focus on economic interests such as the property rights of landowners," while "other interests" must only be "taken into account." *Policy Statement* at 61,749. Considering these instructions, the Commission properly refused to place a thumb on the scale in favor of HOME when balancing harms.

Further, the Policy Statement tasks the Commission with considering alternative routes and their potential adverse effects on landowners. *Id.* To meet the minimums imposed in the Policy Statement, FERC must only evaluate these alternate routes, with the ultimate "choice of how to structure the project at this stage is left to the applicant's discretion." *Id.* at 61,745. So long as FERC's selected route is rationally tied to the record, this court must not substitute its judgement for the Commission's. *Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs*, 87 F.3d 1242, 1246 (11th Cir.1996).

HOME asserts the alternate route as the only path potentially deserving of a CPCN but FERC's decision to proceed with the AFP's original route as opposed to the alternate route is anchored in the record and reason. Recognizing the $51 million cost increase and considerable damage to the Misty Top Mountain's delicate ecosystem, the Commission correctly found that the alternate route is more harmful than the AFP's proposed path. (R. 11).

Still, the Commission heeded HOME's claims that the alternate route carried a major benefit of avoiding HOME property; thereby, minimizing the AFP's adverse impact to property owners. (R. 11). But, as the Commission concluded, the economic and environmental harms make it an inadequate alternative to the AFP. (R. 11). Thus, the Commission's decision not to mitigate harms identified in the balancing process is in line with the record and Policy Statement.

Third, and finally, FERC's balance of benefits and harms is on one accord with the Policy Statement and goals of the Natural Gas Act. While FERC's weighing is governed by the Policy Statement, the Commission has identified natural gas regulatory policies as an overarching guide. *Policy Statement* at 61,743. Essentially, the Policy Statement requires a sufficient showing of public benefits that outweigh residual adverse effects with the ultimate objective of furthering the Commission's natural gas goals. *Id.* at 61,747; 61,743. Thus, the reasonableness of FERC's finding

that AFP's benefits outweigh harms may be confirmed by checking its allegiance to stated regulatory policy.

Here, FERC's balance of benefits harms is a direct reflection of FERC's stated objectives. Among the chief regulatory objectives are fostering competitive markets, meeting increasing demands for natural gas, and – where possible – avoiding unnecessary environmental and community impacts. *Policy Statement* at 61,743. As previously stated, the strong showing of benefits tied to the AFP includes exceeding these goals: the AFP creates a more competitive market, meets present and future demand for natural gas, and optimizes existing systems. (R. 8). Further, as FERC noted, TGP engaged in a smattering of mitigation measures including changing over a third of the route, negotiating easements, and expediting construction. (R. 10). Thus, to the extent possible, adverse impacts were avoided and residual impacts represented only what was necessary to reap AFP's long list of benefits. (R. 10). FERC's balance of benefits and harms makes full use of the record and is in harmony with the Policy Statement and natural gas regulatory policies. As such, it is not arbitrary and capacious.

III. HOME's RFRA claim fails because FERC and the AFP lack a close nexus, the alleged burden is not substantial, and the AFP advances a compelling government interest in the least restrictive means.

"However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lying v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 452 (1988).

The Religious Freedom Restoration Act ("RFRA"), enacted in 1993, grants a private right of action against the federal government if its actions significantly impedes the free exercise of religion. 42 U.S.C. § 2000bb-1(a). However, the exception to RFRA allows the government to burden a person's religious exercise if it can prove the governmental action (1) serves a compelling

governmental interest and (2) represents the least restrictive means of furthering that interest. *Id*. at 2000bb-1(b)1-2.

A. FERC may not be held responsible under RFRA for a measure taken by TGP, a private actor.

RFRA holds that the "*Government* shall not substantially burden a person's exercise of religion . . . ." 42 U.S.C. § 2000bb-1(a) (emphasis added). "Government" is defined as "a branch, department, agency, instrumentality, and official of the United States." *Id.* § 2000bb-2(1).

FERC is undeniably an "agency" of the United States, and as such is prohibited from "substantially burden[ing] a person's exercise of religion." However, FERC cannot be implicated in HOME's present RFRA action because though it is an agent of the federal government, it is not responsible for AFP's construction, nor is there a sufficiently close nexus between FERC's CPCN Order and the AFP. *See Vill. Of Bensenville v. FAA,* 457 F.2d 52, 57 (D. C. Ct. App. 2006); *Standing Rock Sioux Tribe v. U. S. Army Corps of Eng'rs,* 239 F.Supp.3d 77 (D.D.C. 2017).

In an analogous case to the one at bar, the petitioners filed a RFRA claim against the Federal Aviation Administration ("FAA") for approving the City of Chicago's plan to expand the O'Hare International Airport. *Vill. Of Bensenville,* 457 F.2d at 57, 372. The petitioners alleged that the expansion plan substantially burdened their exercise of religion because the FAA approved runway configuration required relocation of a church cemetery, *id.*, burdening "their belief in the physical resurrection of the bodies of Christian believers." *Id.* at 59.

The court held, however, that "any burden on the exercise of religion caused by the City's airport expansion plan [was] not fairly attributable to the FAA." *Id.* at 57. Rather, the City caused the burden as the expansion plan's "inventor, organizer, patron, and builder." *Id.* at 65. Further, the court noted that the City would fund the majority of the project and would ultimately "carry out the [cemetery's] seizure and physical relocation." *Id.* The FAA approved the expansion plan,

"[b]ut the measured approach the FAA took in approving the City's [plan did] not make the City's plan an action of the federal government" *Id.*

In making its decision, the court determined that there was *not* a "sufficiently close nexus" between the FAA and the City's plan such that the "latter may be fairly treated as that of the [federal government] itself." *Id.* at 62 (citing *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777 (1982)). This "nexus" did not exist because there was "no indication that the FAA 'exercised coercive power' or 'provided . . . significant encouragement,' that provoked the City to choose a plan that would harm the cemetery." *Vill. Of Bensenville,* 457 F.2d at 65 (internally citing *Blum,* 457 U.S. at 1004). Petitioner's RFRA claim failed because the cemetery relocation's burden on religious exercise was only attributable to the City's plan, not the FAA's "mere approval or acquiescence" of the plan. *Vill. Of Bensenville,* 457 F.2d at 66.

Here, FERC's approval of the AFP via its CPCN Order does not confer a sufficiently close nexus between FERC and TGP's plan, and HOME's RFRA claim should be dismissed. Like the FAA's mere approval or acquiescence of the City's expansion plan in *Vill. Of Bensenville v. FAA,* 457 F.2d 52 (D. C. Ct. App. 2006), FERC merely approved TGP's pipeline construction plan. (R. 2). "The Supreme Court has never held that a government's mere acquiescence in a private action converts that action into that of the government." *Id.* at 67. The record is void of any evidence that indicates that FERC "exercised coercive power" or "provided significant encouragement" of TGP's plan. *See id.,* 457 F.2d at 65. Similar to the City's plan, TGP is the AFP's inventor, organizer, patron, and builder, and is fully funding the project without any government or existing customer subsidization. R. 7. Therefore, any burden the AFP causes to HOME's religious exercise is not fairly attributable to FERC and its issuance of the CPCN Order.

Because RFRA only prevents the *Government* from substantially burdening religious exercise and FERC has not done so, HOME's RFRA claim fails.

B. The AFP does not impose a substantial burden on HOME's religious exercise.

Even if this Court finds that HOME may allege a RFRA claim against FERC, HOME cannot establish a prima facie case, which entails two main elements. *See* 42 U.S.C. § 2000bb-1(a) ("Government shall not [(1)] substantially burden a person's [(2)] exercise of religion . . ."). TGP does not challenge that HOME has sincerely held religious beliefs that constitute an "exercise of religion" within the meaning of RFRA. *See* 42 42 U.S.C. § 2000cc-5(7)(a). Thus, the only question is whether the AFP "substantially burdens" HOME's religious exercise. It does not.

The proper definition of "substantial burden" is a burden that forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or coerces the individuals to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Navajo Nation v. U. S. Forest Serv.,* 535 F.3d 1058, 1070 (9th Cir. App. 2008).[1]

In *Navajo Nation v. U. S. Forest Serv.,* 535 F.2d 1058 (9th Cir. Ct. App. 2007), the court asked whether the government's use of recycled water that contained human waste to create artificial snow on a skiing portion of a mountain that was sacred to the American Indian's exercise of religion constituted a "substantial burden." To the tribe, recycled water would "spiritually desecrate a sacred mountain and [would] decrease the spiritual fulfillment they get from practicing their religion on the mountain," *id.* at 1070, even though the artificial snow would not prohibit the tribe from "continu[ing] to pray, conduct[ing] their religious ceremonies, and collect[ing] plants for religious use" on the mountain, *id.* at 1063. The court held that the recycled wastewater did not

[1] This definition is derivative of two Supreme Court cases expressly adopted in RFRA's text: *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972). 42 U.S.C. 2000bb(b)(1).

force the tribe to choose between following the tenets of their religion and receiving a government benefit and did not coerce the tribes to act a certain way due to threat of criminal or civil sanction. *Id.* at 1070. "The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the [ski hill]." *Id.* Rather, the government guaranteed "that religious practitioners would still have access to the [mountain]." *Id.* The recycled water only affected the tribe's "subjective emotional religious experience." *Id.* at 1070. The tribe's "diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' . . . ." *Id.*[2]

Here, the AFP will not substantially burden HOME's religious exercise. Even though HOME may find their Solstice Sojourn "unimaginable" in the wake of the pipeline, (R. 12), there is no physical barrier to the journey. The AFP does not force HOME to choose between the Solstice Sojourn and receiving the benefits of the AFP, nor does HOME risk the threat of civil or criminal sanctions by partaking in the Solstice Sojourn. Indeed, FERC introduced modifications to the CPCN Order to minimize the impact on HOME's Sojourn. These modifications involved burying the pipeline across the entirety of HOME's property (R. 12). and accelerating the construction timeline, ensuring completion between solstices (R. 13).

[2] *See also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs,* 239 F.Supp.3d 77 (D.C.C. 2017) (Holding that the construction of the underground oil pipeline beneath Lake Oahe, a sacred place to the Sioux tribe, did not impose a substantial burden and rejected the tribe's contention that the water would be desecrated whether or not the oil actually touched it given that the "the pipeline itself never enters the lake waters but instead runs under the lakebed."); *Thiry v. Carlson,* 78 F.2d 1491 (10th Cir. App. 1996) (Holding that a highway expansion that would require the plaintiffs to relocate their stillborn daughter's grave did not substantially burden their religious exercise because though "the plaintiffs establish[ed] that they w[ould] be both distressed and inconvenienced over the relocation of their daughter's gravesite . . . they also testified that they w[ould] still continue their religious beliefs and practices even if the condemnation proceeds as planned.")

Without any true physical barrier to their Sojourn, HOME's mere subjective emotional religious experience does not constitute a substantial burden. Thus, HOME cannot prove a prima facie case under RFRA.

C. Even if this Court determines that HOME has been substantially burdened, the AFP should nevertheless proceed because it furthers a compelling government interest and is the least restrictive means of doing so.

If this Court determines that the AFP substantially burdens HOME's religious exercise, the burden of persuasion shifts to the government to prove that the pipeline furthers a "compelling government interest" and is implemented by "the least restrictive means." 42 U.S.C. 2000bb-1(b).

1. *The AFP furthers a compelling government interest.*

"RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal,* 546 U.S. 418, 431 (2006). Thus, the question becomes whether the government's interests in the pipeline would be adversely affected by reversing the CPCN Order. It would.

To accept HOME's plea to deny the CPCN Order, all of the previously discussed benefits above would be lost. That is, the pipeline would not exist without the Order and would no longer extend natural gas service to underserved areas in New Union, expand access to U.S. natural gas sources, optimize existing systems for market competitiveness, and enhance regional air quality by substituting cleaner-burning natural gas for fossil fuels. (R. 8). HOME itself gains the pipeline's benefits as well because they will have access to the competitive market's lower gas prices. Choosing the proposed pipeline route around Misty Top Mountains could help evenly distribute

the population and prevent overconcentration. (R. 6). The Alternate Route would not provide this benefit, allowing the population to continue shifting west.

2. *AFP's selected route is the least restrictive route to further the government's compelling interests.*

"Least restrictive means" has its plain meaning. *Sossamon v. Lone Star State of Tex.,* 560 F.3d 316, 322 (5th Cir. 2009). A "least restrictive means" cannot be done "without some evaluation of the alternative measures put in issue by the parties." *Casey v. City of Newport*, 308 F.3d 106, 114 (1st Cir. 2002). Here, the pipeline's selected route must be compared to the proposed Alternate Route, *see* (R. Exhibit A), to determine if the selected route is the least restrictive route for furthering all the government's compelling interests above. It is.

The AFP's selected route is the least restrictive means to further the government's compelling interests because the Alternate Route "is excessively expensive, and, . . . would cause *more* overall environmental harm than the route approved in the CPCN Order." (R. 13). "[C]ost may be an important factor in the least-restrictive-means analysis . . . ." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014). The Alternate Route of the pipeline would *add over $51 million* in construction costs because the pipeline would have to go *through* the Misty Top Mountain range. (R. 11). HOME does not dispute this fact. *Id.* Even if HOME remains unconvinced by the government's economic motivations, the designated route serves as a better custodian of the environment compared to the Alternate Route. This distinction is crucial for HOME, as it upholds its commitment to the "fundamental core tenet . . . that humans should do everything in their power to promote natural preservation over all other interests." *Id.*

Opting for the Alternate Route would impose additional constraints on HOME's religious practices and overall mission. HOME was established in direct response to the adverse consequences of the industrial revolution. (R. 11). Should FERC mandate the adoption of the

Alternate Route, it would inadvertently promote increased industrialization, contradicting HOME's core purpose. While HOME acknowledges that the Alternate Route would inevitably result in more significant environmental harm, spanning an additional three miles and traversing environmentally sensitive mountain ecosystems, (R. 11), it underscores the inherent conflict with its commitment to environmental preservation. Therefore, the chosen route represents the most viable approach for safeguarding HOME's religious practices, as it is not only economically sensible but also more effectively preserves the environment.

IV. The greenhouse gas conditions imposed by the Commission trigger the Major Questions Doctrine rendering the conditions beyond the authority Congress granted to the Commission under the Natural Gas Act.

According to the Supreme Court's decision in *West Virginia v. EPA,* "extraordinary cases" call for a different approach, because this case is one of those extraordinary cases this Court should apply the Major Questions Doctrine and prohibit FERC from imposing the greenhouse gas (GHG) conditions in the AFP project's CPCN, as they are beyond the authority that Congress granted to FERC under the NGA. 142 S. Ct. 2587 (2022). This is a major questions doctrine case because FERC asserts the authority to impose GHG mitigation within its section 7 certificate powers to attach "reasonable terms and conditions." 15 U.S.C. § 717f(e). As a result, the extent of FERC's alleged authority within its section 7 powers to require GHG mitigation as "reasonable terms and conditions" is a matter of vast economic and political significance, a novel use of an 81-year-old section of the statute, unheralded, a transformative assertion of authority, and is beyond the FERC's expertise – all of which are key signs of a major question. *West Virginia*, 142 S. Ct. at 2587. Therefore, this Court should "counsel skepticism" towards FERC's regulation because FERC has failed under the Major Questions Doctrine to point to "clear congressional authorization" for its alleged authority. *Id*. at 2614.

A. This is a Major Questions Doctrine case.

An agency's statutory authority "must be 'shaped, at least in some measure, by the nature of the question presented' – whether congress in fact meant to confer the power the agency has asserted." *West Virginia*, 142 S. Ct, at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Major question cases are those "in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.*

The Major Questions Doctrine is a constitutionally based clear-statement canon rooted in "both separation of powers principles and a practical understanding of legislative intent." *Id.* at 2609. This Court must "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* This Court must also exercise "common sense as to the manner in which Congress is likely to delegate a policy decision of … economic and political magnitude." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

Clear-statement rules "ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion). The Major Questions Doctrine "operates as a vital check on expansive and aggressive assertions of executive authority." *U.S. TelecomAss'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

B. The key Major Questions Doctrine factors are present in this case.

The Supreme Court requires a "clear and manifest" statement from Congress before permitting an agency to encroach into areas of "vast economic and political significance." *Util.*

Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("*UARG*"); *See Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 616 (1978) (rejecting a purported plain meaning construction because it would bring about a "major ... alteration in established legal relationships based on nothing more than an overly literal reading of a statute, without any regard for its context or history.")

There is little doubt that FERC requiring natural gas projects to mitigate GHGs to obtain a certificate intrudes into an area of "vast economic and political significance." *UARG*, 573 U.S. at 304. Indeed, Congress has declared in the NGA, and the Supreme Court has confirmed in *NAACP v. Federal Power Comm'n*, that "public convenience and necessity" in the NGA means "a charge to *promote the orderly production of plentiful supplies* of electric energy and natural gas at just and reasonable rates." 425 U.S. 662, 670 (1976) (emphasis added); *see also Federal Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 17 (1961) ("It must be realized that the Commission's powers under § 7 are, by definition, limited.") This history is important because Congress and the Supreme Court both make clear the NGA serves an economic purpose. Not to mention permitting FERC to impose GHG mitigation impermissibly burdens the U.S. economy because "natural gas is the reliability that 'keeps the lights on'" while the nation is adapting its energy grid to more environmentally friendly resources.[3] Therefore, given the NGA's well-established economic purpose of promoting plentiful supplies of natural gas taken in conjunction with the threat of energy insecurity our nation would face as a result of burdening natural gas, FERC's alleged authority is a matter of vast economic significance.

FERC's asserted authority is also a "transformative expansion" of FERC's authority – another key sign of a major question. *UARG*, 573 U.S. at 324. Prior uses of the FERC's § 717f(e)

[3] *See NERC December 2021 Long-Term Reliability Assessment*, at 5 (Dec. 2021) ("Natural gas is the reliability 'fuel that keeps the lights on,' and natural gas policy must reflect this reality.").

authority to impose conditions maintained the status quo because they were limited to traditional environmental mitigation such as felling trees. (R. 16). The authority exercised here is a different kind. The Commission is no longer just implementing environmental conditions to ensure a project is in the public interest; they are mandating climate change mitigation. Thus, the Commission is not preserving the status quo for the conditions it imposes but elevating them to an entirely new regulatory regime.

This new assertion of authority by the Commission is also "unheralded." *West Virginia,* 142 S. Ct. at 2610. Until recently, the Commission has never relied on its NGA § 717f(e) "power to attach to the issuance of the certificate and to the exercise of the rights granted […] reasonable terms and conditions" in the Act's 81-year history as an authority for FERC to require GHG mitigation. 15 U.S.C. § 717f(e). It wasn't until the Commission's 2022 issuance of its Interim GHG Policy Statement that the Commission asserted the broad authority under its section 7 power to require GHG mitigation.[4] "It is telling" that the Commission "has never before adopted" a greenhouse gas or climate change mitigation program under its NGA authority until recently. *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022).

Additionally, given the natural gas industry's significance, "it is highly unlikely that Congress would leave the determination of whether" the natural gas industry "will be entirely, or even substantially" required to mitigate GHGs to FERC. *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). Nevertheless, it is this unlikely discretion FERC argues Congress left to the Commission. (R. 18). Congress did not hide the authority to require GHG mitigation within the vague and ambiguous language of "reasonable terms and conditions" within

[4] *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews,* 178 FERC ¶ 61,108 (2022) (Interim GHG Policy Statement).

§ 717f(e) of the NGA. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not… hide elephants in mouseholes."). Instead, Congress passed the Clean Air Act (CAA) and delegated the authority to regulate GHGs to the Environmental Protection Agency (EPA). *Am. Elec. Power Co. v. Conn*., 564 U.S. 410, 426 (2011). ("*Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants*.") (emphasis added); *Am. Lung Ass'n. v. EPA*, 985 F.3d at 959-60 (D.C. Cir. 2021) ("[T]here is no question that the regulation of greenhouse gas emissions by power plants across the Nation falls squarely within the EPA's wheelhouse."). Additionally, President Biden has confirmed that the power to regulate GHGs lies with the EPA – rather than FERC – in Executive Order 13,990 which directs the Administrator of the EPA to consider "proposing new regulations to establish comprehensive standards of performance and emissions guidelines for […] existing operations in the oil and gas sector…." Exec. Order No. 13,990, 86 C.F.R. 7037 (2021).

Another key sign that a major question is present is FERC's construction of "reasonable terms and conditions" to include GHG mitigation alters and conflicts with a pervasive regulatory scheme. *Whitman*, 531 U.S. at 468 ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions..."). The regulatory scheme here refers to the preexisting management by another federal agency, the EPA, and the States within their borders. The Supreme Court has long held that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Particularly relevant here, "[s]tate and municipal authorities retain the right to forbid new entrants from providing new capacity, to require [the] retirement of existing generators, to limit new construction to more expensive, environmentally friendly units, or to take any other action in their role as regulators of

generation facilities without direct interference from" FERC. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). Thus, FERC's alleged authority to impose GHG mitigation impermissibly intrudes on a well-established regulatory scheme by interfering with the EPA's powers delegated to the agency by Congress and rights traditionally left to the States.

The Commission's assertion of the broad authority to mitigate greenhouse gases likewise moves the Commission outside its legitimate role and "policy expertise." *West Virginia*, 142 S. Ct. at 2612. The Commission is not equipped to "balanc[e] the many vital policy considerations of national policy implicated" when requiring GHG mitigation including its impacts on other federal programs. *Id.* Such a balancing task is a task for Congress. FERC alleges its authority to mitigate greenhouse gases is part of its "reasonable terms and conditions" authority within the NGA. 15 U.S.C. § 717f(e). Yet, the Commission has "no comparative expertise" in air pollution, greenhouse gases, or mitigating the effects of climate change; FERC's expertise is limited to the production of plentiful natural gas resources. *West Virginia*, 142 S. Ct. 2613 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)). By proffering such a justification for mitigation, FERC assumed a role beyond what Congress intended.

C. FERC has not identified clear authorization from Congress to support its reading of the Natural Gas Act.

Because the Major Questions Doctrine applies, FERC must identify "clear congressional authorization" to mitigate GHGs under § 717f(e) of the Natural Gas Act. *West Virginia*, 142 S. Ct. at 2609. Neither "vague terms" nor "oblique or elliptical language will suffice." *Id.* Yet, that is all FERC offers. It points to its authority under the act to impose "reasonable terms and conditions" in a certificate. R. 18. However, the Supreme Court has made clear that this kind of language does not provide the required clear authorization.

This Court should follow the line of Supreme Court precedent requiring more than "cryptic" language from Congress to qualify as congressional authorization for the regulation. In *UARG*, the Court rejected the idea that Congress had clearly authorized the EPA to regulate GHGs under a specific provision of the CAA just because GHGs fell within a literal interpretation of the Act's vague term "air pollutant." *UARG*, 573 U.S. at 318. Similarly, in *Brown & Williamson Tobacco Corp.*, the Court denied the FDA the authority to regulate tobacco products under the Food, Drug, and Cosmetic Act (FDCA) even though tobacco fell within that statute's vague terms of "drug" or "device." 529 U.S. at 125–26. The vague term "reasonable terms and conditions" in the NGA is much like "air pollutant" in the CAA or "drug" or "device" in the FDCA. Therefore, this Court should hold, as the Supreme Court held in both above cases, that vague terms are too "cryptic" to qualify as clear congressional authorization for such a major question. *Id*. at 160.

Each of these cases demonstrates that a vaguely worded definition is not akin to clear congressional authorization. So, in a major questions case, more is required before holding that the agency has been granted the asserted power. Yet, FERC cannot point to anything else. The sole basis for FERC's reading is the NGA's use of "reasonable terms and conditions." This vague language is insufficient to overcome the "skepticism" this Court must apply to such an assertion of power.

V. If this Court holds the Major Questions Doctrine does not apply, it was reasonable for FERC to limit the mitigation of greenhouse gas emissions to construction impacts because NEPA requires procedural rather than substantive measures.

FERC action taken under the National Environmental Policy Act (NEPA) is entitled to a high degree of deference. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989); *see also EarthReports v. FERC*, 828 F.3d 949, 954-55. The Court's role is to ensure that NEPA's procedural requirements have been satisfied. *See Nat'l Comm. for the New River, Inc. v. FERC,*

373 F.3d 1323, 1327 (D.C. Cir. 2004) (the "'court's role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious'") (quoting *Balt. Gas & Elec. v. Nat'l Res. Defense Council*, 462 U.S. 87, 97-98 (1983)).

When reviewing factual determinations by an agency under NEPA, a court "must generally be at its most deferential." *Balt. Gas & Elec. Co.*, 462 U.S. at 103; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) ("NEPA merely prohibits uninformed - rather than unwise - agency action."). If an agency's NEPA "decision is fully informed and well-considered, it is entitled to judicial deference, and a reviewing court should not substitute its own policy judgment." *EarthReports*, 828 F.3d at 954-55.

Nevertheless, this Court is responsible for holding FERC to the standard NEPA establishes. An EIS is deficient and the agency action it undergirds is arbitrary and capricious if the EIS does not contain "sufficient discussion of the relevant issues and opposing viewpoints," *Nevada v. Department of Energy*, 457 F.3d 78, 93 (quoting *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988)), or "if it does not demonstrate reasoned decision making."

Delaware Riverkeeper Network v. FERC, 753 F.3d 1304, 1313 (D.C. Cir. 2014). The overarching question is whether the EIS's deficiencies are significant enough to undermine informed public comment and informed decision-making. *Nevada*, 457 F.3d at 93 (D.C. Cir., 2006). This is NEPA's "rule of reason." *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004); *see also Myersville*, 783 F.3d at 1322 (declining to "flyspeck" an agency's environmental analysis, by looking for "any deficiency no matter how minor.").

A. The Commission reasonably analyzed the AFP project's downstream greenhouse gas impacts satisfying its NEPA obligations.

HOME argues that because the Commission decided to impose greenhouse gas conditions for the American Freedom Pipeline project's construction impacts it was arbitrary for the Commission to decide not to impose greenhouse gas conditions for downstream impacts. (R. 18). However, the Commission's decision was reasonable and satisfied its NEPA obligations regarding downstream gas emissions because it allowed for informed decision-making and informed public comment, which is all NEPA requires.

The EIS in this case satisfies NEPA's goal of informed decision-making and public comment regarding downstream GHG emissions making FERC's decision regarding the emissions reasonable. In *Sierra Club*, the D.C. Circuit held that FERC's approval of a project in which there was no quantification of the greenhouse gases or discussion of their significance was arbitrary under NEPA because it prevented FERC from engaging in "informed decision-making" concerning the greenhouse gas impacts of the project and such a failure prevented "informed public comment." *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). Therefore, the court held that because FERC had not attempted to quantify or explain why it decided against quantifying the GHG emissions the agency had not adequately disclosed the environmental impacts of its actions. *Id.* Thus, the agency's approval was arbitrary under NEPA. *Id.*

The EIS that was held to be arbitrary in *Sierra Club* is distinguishable from the EIS in the present case in several ways. First, unlike the EIS that failed to give a quantification in *Sierra Club*, the EIS, in this case, gave a quantitative estimate of downstream GHG impacts finding the Project would result in 9.7 million metric tons of CO2e per year. (R. 15). Second, unlike the EIS's failure to discuss the significance of the greenhouse gas impacts in *Sierra Club*, the EIS in the present case discussed the significance of the emissions by stating that the estimates assumed that the maximum amount of gas is transported 365 days a year, which is rarely the case, the project's gas

may displace other fuels lowering CO2e emissions, and that the project may displace gas transported from other means resulting in no change in emissions. *Id.* Thus, the EIS in the present case was reasonable and satisfied FERC's procedural requirements under NEPA because it allowed the public to be informed about the downstream emissions and gave the agency decisionmaker the ability when reviewing the EIS to know whether the project would increase or decrease emissions fulfilling its primary purpose.

Therefore, because the EIS in the present case permitted FERC to engage in informed decision-making and public comment regarding downstream greenhouse gas emissions FERC's decision regarding the EIS and the conditions it imposed in the certificate were reasonable according to the agency's NEPA requirements. As always with NEPA, an agency is not required to select the course of action that best mitigates greenhouse gas emissions, but rather is only required to take a "hard look" at the problem. *Balt. Gas & Elec. Co.*, 462 U.S. at 97–98. NEPA requires nothing more.

B. The Commission reasonably analyzed the AFP's upstream greenhouse gas impacts satisfying its NEPA obligations.

HOME also contends that the Commission's decision not to mitigate upstream greenhouse gas impacts given its choice to mitigate construction impacts was arbitrary. (R. 18). FERC must consider upstream impacts *only* if they were reasonably foreseeable. 40 C.F.R. § 1508.1(g). However, HOME fails to point to any evidence undermining FERC's reasoned conclusion that such upstream impacts were not reasonably foreseeable. (R. 15). Thus, any NEPA challenge regarding upstream impacts should fail.

The Commission explained in its conclusion why expanded upstream production, in this case, is not a reasonably foreseeable consequence of the AFP Project. Regarding the upstream impacts of the project, the Commission noted that the gas in Hayes Fracking Field (HFF) is already

in production and the AFP project does not contemplate additional production at HFF. (R. 15). Rather, the gas already in production at HFF will be rerouted for AFP project purposes to different locations. *Id.* Therefore, the Commission reasonably concluded that there is no reasonably foreseeable upstream consequence of their approval of the TGP project. *Id.*

Further, courts have repeatedly declined to require the guesswork regarding upstream emissions that HOME demands in this case. Like in *Birckhead v. FERC*, HOME here "ha[s] identified no record evidence that would help the Commission predict the number and location of any additional wells that would be drilled as a result of the production demands created by the project." 925 F.3d 510, 517 (D.C. Cir. 2019). HOME also fails to point to any evidence that shippers "would not extract and produce [the] gas" if the Project did not go forward. *Id.* Further, like in both *Birckhead* and *Delaware Riverkeeper Network*, HOME "nowhere claim[s] that the Commission's failure to seek out additional information [regarding upstream effects] constitutes a violation of its obligations under NEPA." *Id.* at 518; *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 109 (D.C. Cir. 2022). Therefore, since HOME nowhere claims the Commission's failure to seek out more information constitutes a violation of its NEPA obligations, this Court, like the courts in *Birckhead* and *Delaware Riverkeeper Network*, is left with no basis for concluding that the Commission acted arbitrarily, capriciously, or otherwise violated NEPA in declining to consider the environmental impacts of upstream gas production. *Id.*

Again, HOME's failure to raise a claim regarding FERC's obligation to seek out more information under NEPA dooms HOME's claim regarding upstream emissions on its face. Even if this Court were to hold otherwise, FERC's decision to mitigate construction impacts but not upstream impacts was reasonable as NEPA does not require a substantive result just a "hard look" at the problem. *Balt. Gas & Elec. Co.*, 462 U.S. at 97–98. This FERC has done.

C. The Commission reasonably considered the greenhouse gas impacts of the construction of the AFP.

Contrary to HOME's argument, FERC reasonably considered the AFP projects GHG construction emissions and decided to require their mitigation. HOME insists that this decision was arbitrary given the Commission's decision not to require the mitigation of the downstream and upstream emissions of the AFP project. (R. 18). However, this argument is without merit. The Commission acted reasonably because it fulfilled its procedural NEPA obligations and therefore could choose any mitigation measures it wished since NEPA does not mandate a substantive result.

The Commission took a hard look at the AFP project's impacts from construction and quantified the greenhouse gas emissions associated with the construction of the Project. (R. 15). The EIS quantified construction GHG emissions at 104,100 metric tons of CO2e per year and discussed their significance stating that they will be a direct result of the TGP project. *Id.* FERC also considered the significance of the construction emissions by determining that, with mitigation, the construction emissions could be reduced to 88,340 tons per year by implementing the conditions in the CPCN. *Id.* In this case, the quantification and discussion satisfy the deficiencies the D.C. Circuit found in the EIS in *Sierra Club* because this quantification and discussion allowed for informed public comment and decision-making. 867 F.3d at 1374. Therefore, FERC's decision was reasonable as it satisfied the agency's NEPA obligations by taking a "hard look" at the issue of construction impacts.

D. Any NEPA challenge by HOME fails because the Commission's decision was reasonable as NEPA does not mandate substantive measures.

HOME misconstrues FERC's NEPA obligations when it argues that FERC's decision to require mitigation of construction impacts, but not upstream and downstream impacts was arbitrary. (R. 18). The EIS discussed in sufficient detail the AFP project's greenhouse gas

emissions downstream, upstream, and from construction satisfying NEPA's procedural requirement that the agency take a hard look at the issue. NEPA requires no more.

It is well settled that NEPA does not mandate results but simply prescribes the necessary process. *See Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–228 (1980) (per curiam); *Vermont Yankee.*, 435 U.S. 519, 558. If the proposed action's adverse environmental effects are qadequately evaluated, NEPA does not restrict the agency from deciding that other values outweigh the environmental costs. *See Strycker's Bay Neighborhood Council, Inc.*, 444 U.S., at 227–228; *see also Kleppe v. Sierra Club*, 427 U.S. 370, 410 n. 21 (1976). Thus, because NEPA does not require a particular substantive result like the mitigation of *all* greenhouse gas emissions associated with the Project as HOME argues, FERC's decision to mitigate construction emissions, but not downstream and upstream, was reasonable.

CONCLUSION

For the foregoing reasons, this court must remand FERC's certification, dismiss HOME's RFRA claim, and strike down the GHG conditions.