C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH,
Petitioner-Appellant,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Defendant-Appellee

Brief of Appellant, THE HOLY ORDER OF MOTHER EARTH

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STATEMENT OF JURISDICTION

Petitioners, the Holy Order of Mother Earth ("HOME" or "Order"), seek review of two final orders issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") under the Natural Gas Act, 15 U.S. Code § 717f(c). The first order, issued April 1, 2023, granted a Certificate of Public Convenience and Necessity ("CPCN Order"), authorizing Transnational Gas Pipelines, LLC ("TGP") for construction of the American Freedom Pipeline ("AFP").

HOME timely petitioned for rehearing of the Commission's CPCN Order. On May 19, 2023, the Commission issued a second Order ("Rehearing Order") denying the petition for rehearing and affirming the CPCN Order as originally issued.

On June 1, 2023, HOME timely petitioned this Court for review of both Orders. Jurisdiction is proper under the Natural Gas Act, 15 U.S.C. § 717r, which authorizes any party aggrieved by a Commission order to obtain review in The United States Court of Appeals for the circuit in which the relevant facility is proposed to be constructed. 15 U.S.C. § 717r(d)(1).

STATEMENT OF ISSUES

Was it arbitrary and capricious, or otherwise contrary to law for FERC to:

I. Find that authorizing the use of eminent domain to condemn privately-held religious land for offensive use was not in violation the Religious Freedom Restoration Act; and

II. Rely on a single export precedent agreement to establish that the proposed pipeline's public benefits outweigh the adverse impacts of widespread eminent domain; and

III. Find that the limited mitigation of greenhouse gas emissions was within agency authority under the Natural Gas Act

IV. Require the mitigation of greenhouse gas emissions stemming from pipeline construction, but not require mitigation of more plentiful emissions arising from combustion downstream.

STATEMENT OF THE CASE

Statutory and Regulatory Background

Section 7(c) of the Natural Gas Act ("NGA") permits construction and operation of interstate gas pipelines only if the Federal Environmental Regulatory Commission first grants a "certificate of public convenience and necessity." 15 U.S.C. § 717f(c). Section 7(e) provides that a certificate application "shall be denied" unless FERC finds a project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). Section 7(e) "requires [FERC] to evaluate all factors bearing on the public interest." *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.,* 360 U.S. 378, 391 (1959). This evaluation is critical because pipelines are substantial infrastructure investments that have the potential to negatively impact customers, landowners, and the environment.

Section 19(d) of the NGA grants federal circuit courts original and exclusive jurisdiction to review final Commission orders. 15 U.S.C. § 717r(b). If the Court finds that such order or action is inconsistent with the Federal law governing such permit, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. 15 U.S. C. § 717r(d)(3).

I. The Holy Order of Mother Earth

HOME is a not-for-profit religious order, organized under the laws of the State of New Union. The headquarters of the order are situated toward the western end of a 15,500-acre property in Burden County, New Union, that HOME directly owns. Rehearing Order at ¶ 9.

HOME has practiced their religion continuously since 1903. Rehearing Order at ¶ 46. The religion emerged largely in response to the industrial revolution and the harmful effects of industrialization and capitalism on the environment. *Id*. HOME considers the natural world to be sacred, and worships nature itself as a deity. *Id*. For HOME adherents, a core tenet of their religion is the belief that humans should do everything in their power to promote natural preservation over all other interests, especially economic interests. Rehearing Order at ¶ 47.

A primary component of HOME's practice is a twice-yearly pilgrimage known as the Solstice Sojourn. Rehearing Order at ¶ 48. Every summer and winter solstice, members of HOME make a ceremonial journey from a temple at the western border of the property to a sacred hill on the eastern border of the property in the foothills of the Misty Top Mountains, then a journey back along a different path. *Id*. At the hill, all children in the Order that have reached the age of 15 in the prior six months undergo a sacred religious ceremony. HOME has performed the Solstice Sojourn since at least 1935. *Id*.

II. Developing Parties

Transnational Gas Pipelines, LLC ("TGP") is a limited liability company organized and existing under the laws of New Union. Rehearing Order at ¶ 8 Upon the commencement of operations proposed in its application, TGP will become a natural gas company within the meaning of section 2(6) of the NGA and, as such, will be subject to the jurisdiction of the Commission. *Id*. TGP states that it will be the operator of the new proposed pipeline. *Id*.

International Oil & Gas Corporation ("International") is a subsidiary of a Brazilian natural gas exporter. Rehearing Order at ¶ 24. International owns and operates a metering and regulating (M&R) Station located at the Port of New Union on Lake Williams in New Union City ("the New Union City M&R Station"). Rehearing Order at ¶ 14.

New Union Gas and Energy Services Company ("NUG") is a natural gas transporter operating within New Union.

III. The Project

TGP has sought authorization to construct a 99-mile-long, 30-inch diameter interstate pipeline (the American Freedom Pipeline) and related facilities extending from a receipt point in Jordan County, Old Union, to a proposed interconnection with an existing TGP gas transmission facility in Burden County, New Union ("the TGP Project"). Rehearing Order at ¶ 1. The proposed pipeline is designed to provide up to 500,000 dekatherms ("Dth") per day of firm transportation service. *Id*. TGP has executed binding precedent agreements with International for 450,000 dekatherms per day of firm transportation service, equalling 90% of capacity, and with NUG for 50,000 Dth per day of firm transportation service, equalling 10% of capacity. Rehearing Order at ¶ 11. The natural gas to be transported is produced and liquified in the state of Old Union. Rehearing Order at ¶ 12. From Old Union, the liquified natural gas ("LNG") will be transported by the AFP to the New Union City M&R Station. Lake Williams connects to the Atlantic Ocean, and the LNG purchased by International will be loaded onto LNG tankers for export to Brazil. Rehearing Order at ¶ 14.

The AFP will cut through approximately two miles of HOME property and will require the removal of approximately 2,200 trees and many other forms of vegetation. Rehearing Order at ¶ 38. The AFP route would bisect HOME's Solstice Sojourn, requiring HOME adherents to confront the pipeline going both ways. Rehearing Order at ¶ 14. TGP has been unable to reach voluntary easement agreements with HOME and 40% of the landowners along the proposed route. Rehearing Order at ¶ 42.

IV. Administrative Proceedings

On June 13, 2022, TGP filed an application under Section 7(c) of the NGA for authorization to construct and operate the AFP. Rehearing Order at ¶ 1. On April 1, 2023, the FERC issued the CPCN Order authorizing the Project, subject to the conditions in the order. Rehearing Order at ¶ 2. The CPCN Order found that the benefits of the AFP outweighed any adverse impacts to landowners, surrounding communities, existing shippers, or other pipelines and their captive customers. Rehearing Order at ¶ 1. As part of the certification process FERC commissioned an Environmental Impact Statement ("EIS"), and subsequently included conditions in the CPCN order that reduced environmental impacts to "less-than-significant" levels. *Id*. These conditions include requiring TGP to bury the section of the AFP bisecting HOME's property, completing construction on HOME's property, and certain steps relating to the mitigation of greenhouse gas emission ("GHG") impacts from construction. Rehearing Order at ¶ 56, 66–67. On April 20, 2023 and April 22, 2023, respectively Both TGP and HOME sought rehearing of the CPCN Order, with HOME contesting various fundamental aspects of the pipeline and TGP contesting conditions imposed by the CPCN. Rehearing Order at ¶ 5.

On May 19, 2023, less than a month after filing, FERC issued an order denying all rehearing requests and affirming the CPCN as originally issued (the "Rehearing Order"). On June 1, 2023, both HOME and TGP timely filed Petitions for Review of the CPCN Order and Rehearing Order (Collectively "FERC Orders") with this Court under 15 U.S.C. § 717r.

SUMMARY OF THE ARGUMENT

The Commission failed to make a reasoned and lawful decision by granting a certificate of public convenience and necessity for a pipeline project that violates federal religious protections and fails to comply with the obligations of Section 7 of Natural Gas Act. Petitioners,

HOME, now respectfully request that this Court vacate and remand FERC's orders granting a certificate of public convenience and necessity and denying Petitioners' requests for rehearing ,and stay of project pending review.

Allowing the TGP to route the pipeline over HOME's property clearly violates RFRA. To establish a RFRA claim, a petitioner must show that their exercise of religion has been substantially burdened. *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006). If a petitioner can evidence a substantial burden, the government must prove that it used "the least restrictive means" of furthering a "compelling governmental interest." *Id.* at 418, 419.

FERC's certification of the pipeline substantially burdens the religious expression of HOME by forcing HOME to cede their privately-held sacred land. A substantial burden is one in which the government action "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of the Indiana Emp. Sec. Div*., 450 U.S. 707, 718 (1981). In this case, certifying the AFP pressures HOME to both violate their religious beliefs and modify their religious behavior. Each of these burdens alone are sufficient to violate RFRA.

The CPCN Order first pressures HOME to violate their religious beliefs by mandating HOME cede their land under the threat of eminent domain. Authorizing the use of eminent domain puts HOME adherents in a position where they must 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. 2008) (citations omitted). In this case, it is impossible for HOME to reconcile the central commands of religion, to protect the natural world from economic exploitation, with the action of facilitating a natural gas pipeline. If HOME refuses, however,

they are faced with arrest and charges of civil contempt. Such a choice is impossible under RFRA.

The CPCN Order and resulting pipeline construction across HOME's privately-held land would also force HOME to modify their religious behavior. Twice-yearly, HOME adherents make a pilgrimage across their property to deepen their faith and conduct a sacred ceremony welcoming young children into the Order. The AFP would cut through the middle of this pilgrimage route. With a permanent right-of-way established by eminent domain, HOME adherents would be unable to predict or prevent disruptions to their yearly practice. Moreover, even in optimal future circumstances, by impacting the land HOME holds sacred, adherents would be forced to confront sacrilege in the middle of their most important practice.

FERC imposes a substantial burden on HOME that cannot satisfy strict scrutiny. 42 U.S.C. § 2000bb-1(b). Strict scrutiny under RFRA "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). In this case, FERC cannot prove, nor even tries to prove, that it used the least restrictive means of furthering a compelling governmental interest. In petitioning for rehearing, TGP pointed to the additional costs of alternative routes for the AFP as evidence that the current route was the "least restrictive." This argument misunderstands the "least restrictive test" articulated by the Supreme Court. While costs may sometimes be a valid consideration, courts only weigh additional costs borne by *the government*, not private parties. Any added cost of rerouting the AFP to avoid a substantial religious burden would be borne by TGP.

Next, FERC's determination that the AFP was "required by the present or future public convenience and necessity" under Section 7 of the NGA failed to properly weigh public benefit against adverse impacts. 15 U.S.C. § 717r(e). FERC is required to support its decision with

substantial evidence, and to, "evaluate all factors bearing on the public interest in assessing certificate applications." *Atl. Refin.*, 360 U.S. at 391; 15 U.S.C. § 717r(b). Here, even disregarding the religious and environmental impacts of the AFP, the massive reliance on eminent domain outweighs the minimal public benefit established by TGP.

In finding public benefit, FERC over relied on a single precedent agreement despite a clear statutory responsibility to carefully and holistically consider relevant factors. Treating a precedent agreement as probative contravenes FERC's historic certification policy and ignores more recent updates to this policy. Namely FERC is adjusting their approach to overweighting precedent agreements after finding that "looking only to precedent agreements, and ignoring other, potentially contrary, evidence may cause the Commission to reach a determination on need that is inconsistent with the weight of the evidence." Updated Statement of Policy, *Certification of New Interstate Natural Gas Facilities, et al.*, 178 FERC ¶ 61,197 (2022). The public benefit demonstrated by TGP's precedent agreements is further diminished because they overwhelmingly contract for the export of gas to international markets, rather than to domestic customers. Beyond these export precedent agreements the FERC makes only insufficient, "vague assertions of public benefits" that satisfy neither FERC's own policy nor the strictures of the Administrative Procedure Act. Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999).

The adverse impacts of the AFP substantially outweigh any minimal public benefits TGP demonstrates. One of FERC's stated goals is to "avoid the unneeded exercise of eminent domain" 88 FERC ¶ 61,227 (1999). This has resulted in a cautious approach to certifying projects that are unable to proceed without significant condemnation actions. Here, the TGP has been unable to reach easement agreements with over 40% of landowners along the proposed

route. Approving the exercise of eminent domain over such a large number of landowners flatly contradicts FERC's own policies regarding pipeline certification.

Next, TGP argues that including GHG mitigation conditions in the CPCN Order is a major question subject to the major questions doctrine. However, the conditions imposed by the CPCN Order do rise close to the "vast economic and political significance," considered by the Supreme Court. *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2605 (2022). The GHG conditions are project-specific to the construction of the AFP and do not represent any widespread, national exercise of authority by FERC. Moreover, even if the major questions analysis was applicable to FERC's authorization of GHG conditions, FERC's authorization was permissibly rooted in "clear congressional authorization" under the NGA. *See Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). Congress has granted FERC the ability to attach "reasonable terms and conditions" when issuing Section 7 certificates, which courts have determined to include environmental mitigation measures. 15 U.S.C. § 717(f)(e); *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017)

Finally, if FERC determines GHG conditions are necessary to mitigate construction emissions, it is arbitrary and capricious to ignore significant downstream impacts. Under the National Environmental Policy Act (NEPA), FERC has a legal obligation to consider mitigation measures of adverse environmental consequences when evaluating a significant federal action such as the certification of an interstate pipeline. 42 U.S.C. § 4332(2)(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989). Following the findings of the EIS, FERC determined that 104,100 metric tons of CO2e emissions per year from construction were significant enough to warrant mitigation conditions. Yet, in the same order FERC determined that downstream *9.7 million* metric tons of COe emissions per year were *not* significant. FERC's

failure to sufficiently explain the differential treatment of these two emission sources is patently arbitrary and capricious.

STANDARD OF REVIEW

The Court must set aside FERC's orders if they are arbitrary and capricious or otherwise contrary to law. *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 358 (D.C. Cir. 2017); 5 U.S.C. § 706(2)(A). To survive review under that standard, FERC must engage in "reasoned decision making, which requires it to "examine the relevant data and articulate a satisfactory explanation for its actions, including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins.* Co., 463 U.S. 29, 43, 52 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Court only accepts FERC's factual findings as conclusive if they are supported by substantial evidence. 15 U.S.C. § 717r(b).

ARGUMENT

I. The CPCN violates RFRA

Congress enacted the Religious Freedom Restoration Act (RFRA) "in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). Under RFRA, the federal "government shall not substantially burden a person's exercise of religion" unless it satisfies strict scrutiny. 42 U.S.C. § 2000bb-1(a)-(b).

RFRA claims proceed in two steps. First, a petitioner must show that the "exercise of religion" has been "substantially burdened." *Gonzales*, 546 U.S. at 431. Second, "the burden is placed squarely on the government" to prove that substantially burdening the petitioner is "the least restrictive means" of furthering a "compelling governmental interest." *Id.* at 418, 429.

Here, FERC has imposed a substantial burden by forcing HOME to cede their privately-held sacred land. FERC has not endeavored to satisfy the demands of strict scrutiny. Thus, because FERC's order violates RFRA, HOME should prevail on this argument.

A. Imposing the pipeline substantially burdens the religious expression of HOME**.**

Because RFRA does not define the term "substantial burden," courts give the term its "ordinary, contemporary, common meaning." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). Relying on ordinary meaning, the Supreme Court has held that when government action "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas* 450 U.S. at 718. FERC states this standard correctly in the Rehearing Order. However, in the sentence immediately following, FERC substitutes the operative verb for a more restrictive one, concluding there is no risk of a RFRA violation because "HOME will not be *prevented* from practicing their religious beliefs." *Id.* (emphasis added).

Government-pressured modification or violation, not just outright "prevention," of religious beliefs constitutes a substantial burden under RFRA. Under this standard, and subsequent Supreme Court precedent interpreting it, two of the burdens imposed on HOME by the CPCN order would be substantial. Standing alone, each burden independently constitutes a violation of RFRA. Considered together, a violation is indisputable.

1. *The threat of eminent domain pressures HOME to violate their religious beliefs*

The CPCN order will substantially pressure HOME to violate their religious beliefs by mandating that HOME cede their land under threat of eminent domain. Across jurisdictions, it is agreed that a substantial burden exists when religious adherents are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation*, 535 F.3d at

1070 (citation omitted); *Burwell* 573 U.S. at 720. The focus is on compelled affirmative conduct that adherents find religiously intolerable.

This was the focus of the Court in *Burwell v. Hobby Lobby Stores, Inc.* In *Burwell*, owners of the national corporation Hobby Lobby challenged a mandate from the Department of Health and Human Services ("HHS") that required them to provide employees with coverage for contraception. *Burwell* 573 U.S. at 688. The Court found that this contraceptive mandate substantially burdened Hobby Lobby's free exercise of religion by presenting an impermissible choice – for the owners "if [they] comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price . . . . [i]f these consequences do not amount to a substantial burden, *it is hard to see what would."* 573 U.S. at 691. The Court later explained that analysis of this question can be split into two parts: "First, would non-compliance have substantial adverse practical consequences? Second, would compliance cause the objecting party to violate its religious beliefs, *as it sincerely understands them*?" *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2389 (2020) (Alito, J., dissenting) (emphasis in original) (citations omitted).

Here, the answer to the first question is indisputable. As FERC concedes, HOME is ordered to transfer a large bisection of their land or else have it taken through eminent domain. Once a Section 7 Certificate is upheld, pipeline developers are free to acquire any land along the route by exercising eminent domain in district court. 15 U.S. Code § 717f(h). Landowners have little recourse. The district court's sole function in this process is to order and enforce condemnation against resisting landowners. *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 264 (10th Cir. 1989). Should HOME choose not to comply with a court-ordered

condemnation, members would face being arrested and charged with civil contempt.[1] Imprisonment and the attendant loss of liberty is *more* severe than the monetary fines faced by Hobby Lobby, and certainly constitute "substantial adverse practical consequences." *Little Sisters* 140 S. Ct. 2367, 2389.[2]

The answer to the second question is also clear. For over 120 years, HOME adherents have worshiped Mother Earth as a living deity. The core tenet of their religion is the belief individuals should do everything in their power to preserve the natural world against all other interests, particularly those motivated by profit. Complying with an order to transfer their land and facilitate the construction of a natural gas pipeline through their property runs counter to every aspect of HOME's religion. FERC similarly concedes this point in the Rehearing Order, stating "we do not contest that it is anathema to HOME's religious beliefs and practices to allow its land to be used for the transport of LNG." Rehearing Order at ¶ 49. Regarding this second question, the Court's emphasis on "as they sincerely believe them" is important here, as it was in *Burwell*. *Burwell* 573 U.S. at 724. It centers the practitioner, not the government, in defining the scope of their religious and moral philosophy. *Id*. In *Burwell*, Hobby Lobby was not itself compelled to destroy embryos or personally administer contraceptives, but the "effect of enabling or facilitating the commission of an immoral act" clearly violated their beliefs. *Id*. Here the moral dilemma faced by HOME is the same. Relenting to eminent domain does not require HOME to personally desecrate their sacred lands, but it enables TGP to do so.

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[1] *Transcon. Gas Pipe Line Co., LLC v. Certain Easements & Rts. of Way Necessary to Construct, Operate & Maintain a 30' Nat. Gas Transmission Pipeline, in Northmoreland Twp., Wyoming Cnty., Pennsylvania*, 359 F. Supp. 3d 257, 267 (M.D. Pa. 2019) (warning resisting landowners that "any person unwise enough to violate [the condemnation order] shall be hauled into Court by the United States Marshals Service and a contempt hearing conducted").

[2] *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975) (" From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different. It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual").

2. *Bisecting a privately-owned pilgrimage route modifies HOME's religious behavior*

The second aspect of the standard cited by FERC finds a substantial burden when government action pressures religious adherents to "modify their behavior." *Thomas* 450 U.S. at 718. The CPCN Order exerts substantial pressure on HOME to modify their religious behavior by authorizing TGP to use eminent domain to bisect a pilgrimage route.

RFRA's fundamental purpose is to protect the exercise of religion under the First Amendment, which naturally includes "the freedom of religious groups to engage in certain key religious activities . . . the conducting of worship services and other religious ceremonies and rituals." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 199 (2012); *Burwell* 573 U.S. at 714. In the context of substantial burden analysis, courts have recognized that religious practice "cannot function without a physical space . . consistent with theological requirements." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011).

Because sacred space and religious practice are so intertwined, a government action does not need to wholly eliminate the possibility of worship to be considered substantial. *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin,* 396 F.3d 895, 901 (7th Cir. 2005) ("[t]hat the burden would not be insuperable would not make it insubstantial."). Rather, a substantial burden exists when such an action interferes with an adherent's ability to "have a religious experience which the faith mandates," or with "a tenet or belief that is central to religious doctrine."*Miller-Bey v. Schultz*, 77 F.3d 482 (6th Cir. 1996) (quoting *Bryant v. Gomez,* 46 F.3d 948, 949 (9th Cir.1995)).

Protections are heightened when the government seeks to modify religious behavior on *private* rather than *public* land. In cases where a government action impacting land-based

religious practice was not substantially burdensome, the decision has turned on the fact that the government, not the religious group, owned the land in question. *See e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453, (1988) (preventing construction on "public land" would be a "diminution of Government's property rights, and concomitant subsidy of . . . religion" that is, "far from trivial."[3]

Guided by these underlying free exercise precepts, courts "rarely allow governments to take houses of worship by eminent domain." Patrick E. Reidy, C.S.C., *Condemning Worship: Religious Liberty Protections and Church Takings*, 130 Yale L.J. 226, 229, 239 (2020). The reasoning is that taking a faith community's principal place of worship by eminent domain will substantially burden, and may even preclude, their ability to engage in fundamental religious practices. Therefore, when weighing the potential taking of land held by religious groups, courts consider the importance of the contested property, asking whether the property is "not inherently religious," or, alternatively, "*plays the central role in . . . religious ceremonies and practices*." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 632 (7th Cir. 2007); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980) (emphasis added).

Here, the CPCN Order threatens land that is central to HOME's religious practice. For almost the entirety of their existence as a religious order, HOME adherents have made the pilgrimage known as the Solstice Sojourn across their property as a means of welcoming young children into the Order. The Sojourn processes along a uniform route, from their temple on the western edge of their property to a sacred hill on the eastern edge. Like any pilgrimage, this journey serves as an affirmation of a faith that holds the natural world to be sacred and rejects the harmful environmental effects of industrialization. In HOME's belief system, the natural world is

[3] The court in *Lyng* upheld construction through "sacred areas of the *public* lands" and rejected alternative routes because "they would have required the acquisition of *private* land") *Lyng*, 485 U.S. at 443 (emphasis added).

their house of worship, and the Solstice Sojourn an important doctrinal component of their practice therein. The CPCN Order would not allow TFP to take a privately-held site of worship, but also to bisect the sacred site with overtly profane usages. To hold that such an action does not pressure HOME to "modify their behavior" would be to obscure the words beyond any common meaning.

FERC avoids this conflict by mischaracterizing both the impact of the proposed action and its relation to HOME's religious practice. FERC's description of the impacted land as a "bare spot" evokes images of a natural clearing or meadow, and is far removed from how the pipeline would appear above ground. Rehearing Order at ¶ 49. Even in the best-case construction scenario, the pipeline would permanently deforest a three mile section of HOME's property and decrease the likelihood of any natural vegetation returning to the degraded land. Theresa Brehm & Steven Culman, *Pipeline Installation Effects on Soils and Plants: A Review and Quantitative Synthesis*, Agrosystems, Geosciences & Env't., Jan. 2022, at 13 (quantifying long-term vegetation impacts of pipeline right-of-ways). The CPCN Order also grants TGP authority to place above ground appurtenances at regular intervals, including large cathodic protection equipment, right-of-way markers, and other facilities. The land would not retain the natural character that is central to HOME's religious practice, nor would the damage be contained to one "spot."

More importantly, the character of the pipeline route would not be stagnant. Once a permanent right-of-way is established, TGP would retain broad power to access and alter the property. HOME's land would be subject to frequent aerial, foot, and vehicle patrols, routine maintenance, and emergency responses, all at the discretion of TGP. *Pipeline Rights-of-Way:*

What You Need to Know, Enbridge (2022).[4] The potential for emergencies presented by underground natural gas pipelines is particularly concerning for HOME's religious practice. Underground natural gas pipelines are vulnerable to a host of threats, which pipeline companies are often unable to mitigate. The upward trend in significant incidents associated with underground gas-transmission pipelines has been described by the U.S. DOT as "disturbingly upward over the past 20 years." Hui Wang & Ian J. Duncan, *Likelihood, Causes, and Consequences of Focused Leakage and Rupture of U.S. Natural Gas Transmission Pipelines*, 30 J. of Loss Prevention in the Process Indus. 177, 182. The DOT has specifically targeted steel pipelines like the AFP for replacement due to high risk of corrosion and failure. *Id*. In response to this volatility, the DOT has recently proposed regulations that would *increase* the frequency of pipeline patrols and require operators to conduct more frequent and disruptive pipeline testing and maintenance. Pipeline Safety: Gas Pipeline Leak Detection and Repair, 88 Fed. Reg. 31890, 31892 (proposed May 18, 2023) (to be codified at 49 C.F.R pts. 191–193). If preventative measures or emergency responses were to conflict with HOME's religious practice, TGP's access would be given priority. In short, even if one accepts FERC's characterization of the impacted land as a "bare spot," it is impossible for the agency to discount the possibility of significant disturbances in the future.

FERC further concludes that "we are not *convinced* that the mere existence of an underground pipeline itself significantly impairs [HOME's] practice." Rehearing Order at ¶ 60. This line of inquiry, however, drifts towards "address[ing] a . . .question that the federal courts have no business addressing (whether the religious belief . . is reasonable)." *Burwell* 573 U.S. at 724. As in *Burwell*, "it is not for [the court] to say that their religious beliefs are mistaken or

[4]https://www.enbridge.com/~/media/Enb/Documents/Factsheets/US-GTM-fact-sheets-fall-2019/20190927FSROWPrimerUSGTM.pdf

insubstantial." *Id*. at 725. Rather, the court's narrow function is to determine "whether the line drawn reflects an honest conviction." *Id.* (citations omitted). Here, there is no dispute that it does. For any religion, the act of disrupting a pilgrimage route with sacrilegious usages would be substantial. Indeed, it is difficult to imagine that this case would not "be seen more easily . . . if another religion were at issue." *Navajo Nation*, 535 F.3d at 1097 (Fletcher, J., dissenting). No court would approve a corporate action forcing Sunni Muslims to walk past depictions of Muhammad during the Hajj, or forcing Catholics to take communion from a desecrated host. HOME adherents should not be penalized for the unfamiliarity of their religious practices, especially when those practices take place on private land.

B. FERC cannot satisfy strict scrutiny.

Because FERC would impose a substantial burden on HOME's religious exercise, it bears the burden of satisfying strict scrutiny. 42 U.S.C. § 2000bb-1(b). Here, FERC has not even attempted to justify the taking of HOME's sacred land. Even if they tried, or if they had explicitly endorsed TGP's arguments, FERC could not satisfy strict scrutiny to prove the AFP is the least restrictive means of furthering a compelling government interest.

Strict scrutiny under RFRA "is the most demanding test known to constitutional law." *Boerne*, 521 U.S. at 534. "[I]n this highly sensitive ... area, only the gravest abuses, endangering paramount interest," allow the government to limit the free exercise of religion. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (cleaned up). "Thus, in order to establish that it has a compelling interest" sufficient to override HOME's RFRA claim, FERC would have to "show that it would commit one of the gravest abuses of its responsibilities if it did not" authorize the taking of HOME's land for natural gas distribution. *Little Sisters* 140 S. Ct. 2367, 2392 (Alito, J., concurring).

Neither FERC nor TGP claim that the pipeline serves a compelling government interest. TGP instead skips to the last prong of the RFRA test to argue that the pipeline is the "least restrictive means" of furthering said amorphous compelling interest. They emphasize the additional possible expense of alternately routing the pipeline through the Misty Top Mountains. Rehearing Order at ¶ 44. FERC implicitly supports this point by citing to district court precedent that defines least restrictive means inquiry as "comparing the cost *to the government* of altering its activity," against, "the cost to the religious interest imposed by the government." Rehearing Order at n. 15 (emphasis added).

But, "the least-restrictive-means standard is exceptionally demanding," and RFRA "may in some circumstances require *the Governmen*t to expend additional funds to accommodate citizens' religious beliefs." *Burwell* 573 U.S. at 728, 730 (emphasis added).[5] The main question is not cost, but whether the government entirely lacks other means of accomplishing the same goal without burdening religious practice. *Burwell* 573 U.S. at 728. More importantly, however, both TFP and FERC focus on the wrong costs. While cost may sometimes be a factor, courts, including those cited by TFP and FERC, consider costs borne by *the government*, not private parties. The only identified additional expenses of the alternate route would be those borne by TFP, a private company. Thus, even if a compelling government interest can be proved, the pipeline fails on this final prong.

II. FERC's finding that the AFP was required by present or future public convenience and necessity was arbitrary and capricious, and not supported by sufficient evidence.

TGP application sought certificates of public convenience and necessity authorizing acquisition, construction, and operation of the certain pipeline facilities pursuant to § 7(c) of the

[5] The Court cited to RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act, that states, "this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." They found this Congressional directive similarly applies to RFRA. *Burwell* 573 U.S. at 730.

Natural Gas Act. 15 U.S. Code § 717f(c). In evaluating whether a project "is or will be required by the present or future public convenience and necessity," 15 U.S.C. § 717f(e), FERC should adhere to its Certificate Policy and interpretations thereof.

To justify a determination of public convenience and necessity, an applicant must prove that a given project will "stand on its own financially" because it satisfies "market need." *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015). Once market need has been established, FERC weighs the purported public benefits project against the adverse effects. *Id*. "The more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact."88 FERC ¶ 61,227 (1999). In short, the Commission will approve an application for a certificate only if the public benefits from the project outweigh any adverse effects.

FERC's factual findings justifying its decision are deemed conclusive only if they are "supported by substantial evidence." *City of Oberlin, Ohio v. FERC,* 39 F.4th 719 (D.C. Cir. 2022); *see* 15 U.S.C. § 717r(b). A decision by FERC must be set aside if it has not thoroughly "examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts bound and the choice made." *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 292 (2016).

The evidence here shows the public benefits of the proposed AFP are substantially outweighed by the adverse effects to landowners and the environment. By relying on one factor, export precedent agreements, to override the adverse impacts evidenced by HOME, the Commission has failed to demonstrate that it "examined the relevant considerations" for its action as required by the NGA.

A. FERC's reliance on a single export precedent agreement to establish public benefit is arbitrary and capricious.

When considering proposed natural gas pipelines, FERC possesses a duty as "guardian of the public interest." *FPC v. Transcon. Gas Pipeline Corp.,* 365 U.S. 1, 7 (1961). This duty requires that FERC "evaluate all factors bearing on the public interest in assessing certificate applications." *Atl. Refin.,* 360 U.S. at 391. In this holistic, multifactored review "vague assertions of public benefits will not be sufficient." 88 FERC ¶ 61,227 (1999). Determining how much weight to give individual factors is guided by case law, FERC policy, and prior Commission precedent.

1. *Precedent agreements do not relieve FERC of its obligation to weigh all relevant factors.*

A precedent agreement cannot serve as the sole clearly-articulated basis for a finding of public benefit under Section 7. Precedent agreements are long-term contracts between pipeline operators and shippers that establish obligations to purchase natural gas. *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 114 (D.C. Cir. 2022). Traditionally, FERC's practice has been to rely heavily on the existence of precedent agreements to determine public benefit. *See* 178 FERC ¶ 61,197 (2022). But not all precedent agreements are created equal, and agreements must be evaluated in the context of the project as a whole. For example, a project with numerous precedent agreements better establishes a public benefit than a project with only a single agreement. *Oberlin*, 39 F.4th 719 (finding sufficient benefit for a project with eight precedent agreements); *Delaware*, 45 F. 4th at 114-115 (finding the existence of four precedent agreements is strong evidence of public benefit); *Cf. Env't Def. Fund v. FERC,* 2 F.4th 953 (D.C. Cir. 2021) (holding that one precedent agreement cannot sufficiently establish public benefit). Similarly, precedent agreements that can demonstrate gas will meet "unserved demand," are viewed more

favorably than those for areas of flat or undetermined demand. *Id.* (citing 88 FERC ¶ 61,227 at ¶ 2 (1999))

Courts have recognized that precedent agreements alone have limited probative value in FERC's assessment of public benefit. While precedent agreements remain an important factor, "there is a difference between saying that precedent agreements are always *important* versus saying that they are always *sufficient* to show that construction of a proposed new pipeline "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). (cite *EDF*) (finding sole reliance on precedent agreement was arbitrary and capricious.).

FERC specifically addressed the importance of precedent agreements in 2022 by issuing the Updated Certificate Policy Statement (2022 Policy) revising the 1999 Policy Statement (1999 Policy).

> "While precedent agreements may indicate one or more shipper's willingness to contract for new capacity, such willingness may not in all circumstances be sufficient to sustain a finding of need—e.g., in the face of contrary evidence or where there is reason to discount the probative value of those precedent agreements. Accordingly, we find that looking only to precedent agreements, and ignoring other, potentially contrary, evidence may cause the Commission to reach a determination on need that is inconsistent with the weight of the evidence in any particular proceeding, in violation of both the NGA and the Commission's responsibilities under the Administrative Procedure Act. We reaffirm the Commission's commitment to consider *all* relevant factors bearing on the need for a project."

178 FERC ¶ 61,197 (2022) (emphasis in original). While this policy statement has been opened for further public comment and is not binding on this court, it is an important and clear expression of the evolving analytical framework the Commission and courts employ to determine public benefit.

Here, FERC's reliance on precedent agreements here similarly conflates what is *important* with what is *sufficient*. FERC flatly concludes that sufficient public benefit exists "based on the fact that TGP had executed binding precedent agreements for firm service using 100% of the design capacity of the pipeline project." Rehearing Order at ¶ 26. 90% or more of the pipeline's capacity is reliant on one single precedent agreement with an exporter. While the Order then mentions other public benefits purportedly served by the AFP, it describes them only as TGP contentions that FERC has adopted. Rehearing Order at ¶ 27. FERC does not offer any investigation of the evidence underlying these contentions, nor any elaboration beyond the single-sentence conclusions. *Id*. Such "vague assertions of public benefits will not be sufficient." 88 FERC ¶ 61,227 (1999).

FERC dismisses each of HOME's concerns similarly, stating that, "nonetheless . . . the precedent agreements are . . . sufficient to demonstrate a public necessity here." This overreliance on precedent agreements is particularly egregious in light of the substantial, well-evidenced adverse impacts of the project discussed *infra*. "The more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact." 88 FERC ¶ 61,227 (1999)

2. *The probative value of precedent agreements is further diminished when they serve foreign markets.*

FERC relies not just on precedent agreements, but on precedent agreements that exclusively serve foreign customers. As a general matter, such export precedent agreements have less weight when calculating public benefit. Here, they have almost none.

FERC attempts to support its reliance by citing an *Oberlin* decision simplified to the extreme. *City of Oberlin, Ohio v. FERC,* 39 F.4th 719 (D.C. Cir. 2022). In *Oberlin*, the court considered a decision by FERC to certify a new pipeline that primarily had precedent agreements with Canadian buyers. The court initially remanded the certification decision back to the Commission, finding that it was facially unclear why "it is lawful to credit demand for export capacity in issuing a Section 7 certificate," when the gas would be benefiting "foreign shippers serving foreign customers" *City of Oberlin, Ohio, v. FERC*, 937 F.3d 599 (D.C. Cir. 2019). On remand, FERC elaborated on its reasoning for considering the export precedent agreements, and on second review, the court found these explanations to be satisfactory. While it is true following *Oberlin* Section 7 does not prohibit the consideration of export precedent agreements, the exercise of remanding and elaborating clearly established that export agreements have significantly less inherent value. *Oberlin* certainly did not establish, as FERC states, that, "[i]t cannot be disputed that LNG that is produced in the United States and exported serves the public interest." Rehearing Order at ¶ 33. (internal quotes omitted). Moreover, three determinative aspects of *Oberlin* distinguish it from the present case.

First, in *Oberlin*, the developer had secured eight precedent agreements accounting for 59% of the pipeline's total capacity. *Oberlin,* 39 F.4th at 723. Of those, only two agreements, totalling 17% of the pipeline's capacity, were with Canadian companies. *Id.* The remaining six agreements were with domestic customers, and represented 625,000 Dth per day of service, or 42% of the project's total capacity. *Id*. This breakdown was important for the final decision.

FERC explained on remand that even without the two export agreements, the domestic subscription rate was substantial enough to demonstrate a public benefit, especially considering the small adverse impacts of the project. Rehearing Order at ¶¶ 27, 30.

This explanation has no relevance. Here, the export precedent agreements presented by TGP represent "almost all (if not all)" of the AFP's total capacity. *Id*. at 8. If FERC was to similarly disregard exports and consider the AFP only on its domestic merits, it would be looking at a pipeline with, at most, one single precedent agreement, for 50,000 Dth or less per day of service, representing 10% or less of total capacity. *Id*. FERC cannot reasonably claim that it would find such a pipeline benefits the public.

Second, the international export destination of the LNG in *Oberlin* had unique properties that demonstrated a public benefit. On remand, FERC elaborated that the exported gas was bound for the Dawn Hub, a trading point that is integrated into the American natural gas market and pipeline network. *Oberlin,* 39 F.4th at 727. Because the Dawn Hub was located near the land border with Ontario, FERC clarified that it was incorrect to assume that gas shipped to the Dawn Hub would be automatically consumed in Canada." *Id.* Rather, by serving a major and proximate storage site, the export agreements increased the availability of gas that might be transported through Canada and imported back to domestic customers in New York and New England. *Id.* at 728.

Here again, there is no relevance to the present case. At issue here are export precedent agreements that *guarantee* the transported gas will exit the domestic market. Gas transported by the AFP would be shipped by tanker to Brazil. While the end-use of the gas is not specified, neither FERC nor TGP have imagined a scenario where any gas would be transported back to American consumers. Rehearing Order at ¶ 24.

Finally, and most importantly, Brazil is not a free trade partner of the United States. On remand in *Oberlin*, FERC explained that given the clear statutory directive from Congress, natural gas exports to countries with which the United States has a free trade agreement are *per se* beneficial to the public. This direction can be found in Section 3(c) of the NGA stating that the importation or exportation of natural gas from or to "a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest." 15 U.S.C. § 717b(c). As such, FERC stated their belief "that when considering a proposed project under section 7, it is appropriate to credit contracts for transportation of gas volumes subject to a free trade agreement as supporting a public convenience and necessity finding." Certificate Order, 172 FERC ¶ 61,199, at ¶ 14. This reasoning was supported by the *Oberlin* court on second review and aligned with past FERC precedent. *See, e.g., Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192, at ¶ ¶ 35-37 (2014) (finding that the need for the project was satisfied because it promoted national interests by reducing barriers to foreign trade and stimulating the flow of goods and services under the 1994 North American Free Trade Agreement). *See also NEXUS Gas Transmission, LLC Texas E. Transmission, LP DTE Gas Co. Vector Pipeline, L.P.*, 172 FERC ¶ 61,199, 62,299 (F.E.R.C. 2020); *Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190 (F.E.R.C. 2018).

FERC acknowledges that exported natural gas *per se* benefits the public when "the gas is to be exported to a county with which the United States has a free trade agreement." Rehearing Order at ¶ 9. Bizarrely, FERC then immediately concedes that the determinative fact, the existence of a free trade agreement between Brazil and the United States, is not present here. *Id*. FERC then concludes that it does "not find this distinction to be meaningful." *Id*. The Order then moves on to other topics, with FERC providing no explanation for disregarding the precedent

they themselves cite. An agency "may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). At a minimum, an agency must, "display awareness that it *is* changing position." *Id.* (emphasis in original). Here, by blindly relying on export precedent agreements to demonstrate public benefit, FERC meets none of these standards. Such an arbitrary, subjective approach epitomizes unreasoned decision making.

B. **Any public benefits of the AFP are outweighed by the evidence of substantial adverse impacts.**

Even if FERC can find evidence of minimal public benefits, these benefits are far outweighed by the potential adverse impacts. FERC generally considers four categories of adverse impacts, including those to: (1) existing customers of the pipeline applicant; (2) existing pipelines in the market and their captive customers; (3) environmental resources; and (4) landowners and surrounding communities. 178 FERC ¶ 61,107); *see also* 88 FERC ¶ 61,227 (1999). Here, the impact of eminent domain on landowners is so significant that this fourth category is dispositive. (footnote on "that is not to say")

Under section 7(h) of the NGA, a pipeline with a Commission-issued certificate has the right to exercise eminent domain to acquire any land necessary to construct and operate its proposed new pipeline. While FERC is reluctant to establish any "bright line standards" for weighing eminent domain, agency policy and decision precedent serves as a guide. The preamble of the 1999 Policy states the Commission's guiding goal is to "appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and *the unneeded exercise of eminent domain*" 88 FERC ¶ 61,227 (1999). This Commission has reiterated this principle, recognizing that, "[t]here is no question that eminent domain is among the most significant actions that a

government may take with regard to an individual's private property. And the harm to an individual from having their land condemned is one that may never be fully remedied, even in the event they receive their constitutionally-required compensation." *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order 871-B, 86 FR 26150 (May 13, 2021), 175 FERC ¶ 61,098, at ¶ 47 (2021). Generally, "a showing of significant public benefit" is necessary to "outweigh the modest use of federal eminent domain authority in this example." 88 FERC ¶ 61,227 (1999).

But at what magnitude does eminent domain become immodest? Here too, Commission policy and precedent is instructive. As an example, the 1999 Policy states that "a *few* holdout landowners cannot veto a project . . . if the applicant provides support for the benefits of its proposal" 88 FERC ¶ 61,227 (1999) (emphasis added). Similarly, in *Oberlin*, the court found that the adverse impacts of the project were relatively small, because "eminent domain proceedings will apply to, at most, *seven percent* of the land needed for the project." *Oberlin,* 39 F.4th at 727-730. In other cases, the commission has eliminated potential project sites that would result in the use of eminent domain against even one landowner. *Tennessee*, 163 FERC at ¶ 61,190 at ¶ 25. *See also Birckhead v. FERC*, 925 F.3d 510, 516 (D.C. Cir. 2019) ("The clearly expressed preference of the Commission is to "minimiz[e] the need for certificate holders to resort to eminent domain.").

Section 7 of the NGA does not contemplate the magnitude of eminent domain authorized here. FERC acknowledges that *over 40%* of landowners along the 99-mile route have refused to voluntarily enter easement agreements with TGP, but then proceeds to grant TGP a free license to exercise eminent domain over the entirety. Rehearing Order at ¶¶ 42, 43. One cannot reconcile policy calling for an action to be "few" and "modest" with an authorization that allows that

action in almost the majority of relevant situations. At the minimum, FERC should respond meaningfully to landowner concerns and ground its decision in substantial evidence. FERC does not, and only explains this move only by stating that "eminent domain is common in pipeline construction." *Id.* at 10. As with other aspects of this deficient Order, such conclusory statements do not constitute reasoned decision making, nor satisfy the Commission's obligation under the APA.

III. The imposition of GHG conditions does not rise to the level of a "major question" under the Major Questions Doctrine.

If the court still moves to uphold the approval of the AFP, FERC is authorized to include mitigation measures to minimize the environmental damage associated with the construction of the AFP. In some "extraordinary cases," "history and breadth" and "economic and political significance" of an agency action provide "reason to hesitate before concluding that Congress" meant to award an agency such authority. *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159-160 (2000). The project-specific GHG conditions imposed in the CPCN order do not come close to the "vast economic and political significance" envisioned by the major questions doctrine. *West Virginia,* 142 S. Ct. at 2605 (. The GHG conditions are project-specific only impacting TGP, and would not result in a nationwide impact.

The Major Questions Doctrine is not applicable to FERC's authorization of GHG conditions in the CPCN order because the GHG conditions are not a widespread, national grant of authority. In *West Virginia v. EPA*, the court considered the authority of the Environmental Protection Agency (EPA) to mandate a national shift away from coal-fired electricity generation. *Id.* at 2596. However, the Court held that this would be an "aggressive transformation in the domestic energy industry," because it would implement a nationwide shift in "electricity production from coal to natural gas and renewables." *Id.* at 2603, 2604. The estimated impacts

were felt nationwide and included "billions in compliance costs, raise retail electricity prices, require the retirement of dozens of coal plants, and eliminate tens of thousands of jobs." *Id.* at 2593. This was a substantial shift from EPA's prior view of its authority under the same statute. *Id.* at 2612 ("Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source."). Thus, the Court held that the EPA regulations answered a "major question" that was beyond the scope of their authority. *Id.* at 2593.

Here, the GHG conditions bear no resemblance to the national regulations considered in *West Virginia*. FERC is only asking TGP to utilize more environmentally friendly construction methods on the project, mainly when the TGP is reasonably available to do so. Rehearing Order at ¶ 67. These GHG conditions are exclusive to the TGP and apply only to the construction of the AFP. There are no broad policies of "vast economic and political significance," nor any requirements imposed outside of this project. The majority of the GHG conditions imposed are also permissive, and allow TGP flexibility. Unlike the regulation in *West Virginia* that mandated coal plants engage "in one of the three means of generation shifting," the GHG conditions do no such thing. *Id* at. 2592. In fact, the majority of the GHG conditions require the TGP to impose conditions "where available," allowing TGP flexibility to adhere to FERC's requirements. Rehearing Order at ¶ 67. Thus, requiring TGP to implement GHG conditions during the construction of the AFP will not give FERC a "breathtaking amount of authority" impacting millions in the nation. *See Alabama Assn. of Realtors v. Department of Health and Human Servs*., 141 S.Ct. 2485, 2486 (2021).

Courts consider additional factors when determining whether an agency action exceeds their statutory authority under the Major Questions Doctrine. However, none suffice in this case.

Firstly, requiring TGP to impose GHG conditions is well within FERC's specialized expertise in the natural gas sector. Rehearing Order at ¶ 87. Congress granted FERC discretion to impose GHG conditions to protect the public interest under Section 7 of the NGA. Next, the GHG conditions are not an expansive interpretation of Section 7 of the NGA "representing a 'transformative expansion in [its] regulatory authority."' *West Virginia, 142 S. Ct*. at 2610 (quoting *Utility Air*, 573 U.S. at 324). Congress awarded FERC vast discretion to set specific terms and conditions under Section 7 of the NGA, including determining mitigation measures. FERC has already utilized its authority by imposing GHG conditions in four of five subsequent Section 7 CPCN orders. Rehearing Order at ¶ 84. Furthermore, prior courts have recognized similar mitigation measures. *See Sierra Club*, 867 F.3d at 1374 (stating that GHG conditions are a reasonably foreseeable indirect which "the agency has legal authority to mitigate."). The GHG conditions required are well within FERC's expertise and discretion; therefore, FERC's decision is not subject to the Major Questions Doctrine.

a. Even if this Court applies major questions precedent, FERC had clear congressional authorization to impose GHG conditions.

To overcome the Major Questions Doctrine an agency must point to "clear congressional authorization." If this Court were to find that the Major Questions Doctrine applies, then FERC has clear authorization from Congress to support FERC's interpretation of the NGA. *Utility Air*, 573 U.S. at 324. FERC's congressional authorization must not come from "vague terms" nor "oblique or elliptical language." *Whitman v. American Trucking Assns.*, *Inc*., 531 U.S. 457, 468. (2001). Congress gave explicit authorization to FERC under Section 7 of the NGA to attach "reasonable terms and conditions as the public convenience and necessity may require" when issuing certificates. 15 U.S.C. § 717f(e). Additionally, FERC has the authorization to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and

regulations as it may find necessary or appropriate." 15 U.S.C. § 717(o). Prior courts have agreed that "reasonable terms and conditions" includes environmental mitigation measures. *See Sierra Club*, 867 F.3d at 1374 ("As we have noted, greenhouse-gas emissions are an indirect effect of authorizing this project") There is no question of congressional authorization here.

IV. It is arbitrary and capricious for FERC to fail to require mitigation measures for downstream GHG impacts.

The National Environmental Policy Act (NEPA) requires each "major federal action significantly affecting the quality of the human environment" to prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). In doing so, an agency authorizing a major federal action must take a "hard look" at the environmental consequences of their actions. 42 U.S.C. 4332(2)(C); *Robertson*, 490 U.S. at 333. NEPA requires that agencies consider mitigation measures of adverse environmental consequences when evaluating a proposed project. *Id.* at 351. These mitigation measures include effects on GHG emissions. *Sierra Club*, 867 F.3d at 1374.

In 2022, FERC published a GHG Policy Statement guiding the agency to find that "project[s] with estimated emissions of 100,000 metric tons per year of CO2e or greater will be presumed to have a significant effect, unless record evidence refutes that presumption." *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Review,* 178 FERC ¶ 61,108 at P 55 (2022). This threshold determines whether FERC will impose "GHG emission limits or mitigation to reduce the significance of impacts from a proposed project on climate change." *Id.* at 13. The threshold is set at 100,000 metric tons per year because that "captures the majority of annual emissions generated by Commission authorized projects," including projects with the potential to significantly affect the human environment through GHG emissions. *Id.* at 55.

Moreover, the Chairman of FERC further elaborated that this 100,000 metric ton threshold of significance is a *conservative* number that will likely lower when the interim policy is made permanent. (*see Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022) (Glick, Chairman, concurring at P 5 n.14) ("I recognize the now-draft GHG policy statement proposes 100,000 metric tons as a threshold over which a project's GHG emissions would be presumed significant. In my view, *that is a deliberately conservative number* . . .").

Contrary to the GHG Policy Statement, FERC approved the construction of the AFP with significant downstream impacts lacking any mitigation measures. Notably, after conducting an extensive analysis in the EIS, TGP estimated that the downstream impacts could result in *9.7 million* metric tons of CO2, and impliedly concluded that such impacts are not significant. Rehearing Order at ¶ 72. There is no rational basis for finding that a project's downstream impacts are insignificant when they are *97 times* that of the 100,000 metric tons per year threshold.

Given FERC's decision to require TGP to mitigate the emissions stemming from the pipeline's construction, this decision is even more inexplicable. Regarding the CPCN order, FERC found that 104,100 metric tons of CO2 per year, only 4,100 metric tons over the threshold, were significant enough to warrant mitigation conditions. *Id.* FERC establishes a policy *within* the CPCN order itself by deeming these construction emissions to be significant, and then departs from that policy *later in that same order* by failing to require mitigation measures for downstream impacts with considerably more GHG emissions. Quantified CO2 emissions are either significant, or they aren't. There is not a climatic difference between emissions that stem from construction and those that stem from combustion. Attempting to distinguish between the

two, especially within the same order, and when the quantity of the latter dwarves the quantity of the former, is arbitrary and capricious.

Finally, FERC's differential treatment of these two emission sources within the same CPCN order without an explanation of why they are functionally different in the context of climate change is the definition of arbitrary. It is beyond debate that an agency must explain its departure from prior actions and "may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.") (emphasis in original). FERC currently has a policy on the books clearly indicating FERC's intended threshold for GHG emissions.

CONCLUSION

For the foregoing reasons, FERC's certificate of public convenience and necessity was arbitrary and capricious and not in accordance with federal law, and must be vacated and remanded to the agency under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

November 20, 2023

Date