

**UNITED STATES COURT OF APPEALS FOR THE  
TWELFTH CIRCUIT**

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**No. 23-01109**

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THE HOLY ORDER OF MOTHER EARTH,

*Petitioners,*

TRANSNATIONAL GAS PIPELINES, LLC,

*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent.*

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

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**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

On Petition for review of orders of the Federal Energy Regulatory Commission in consolidated  
case nos. 23-01109 and 23-01110, Judge Delilah Dolman

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## **STATEMENT OF JURISIDITION**

On April 1, 2023, the Federal Energy Regulatory Commission (“FERC”) issued a Certification of Public Convenience and Necessity (the “CPCN”) to Transactional Gas Pipelines, LLC (“TGP”) for the construction of the American Freedom Pipeline (“AFP”). On April 20, 2023, the Holy Order of Mother Earth (“HOME”) requested a rehearing after FERC issued an Order granting a CPCN. 15 U.S.C. § 717r(a). On April 22, 2023, TGP also sought rehearing on certain issues in the CPCN. *Id.* When a party is denied a rehearing, the aggrieved party can seek judicial review in the court of appeals within sixty days after FERC’s order regarding the rehearing on June 1, 2023. 15 U.S.C. § 717r(b). After FERC denied both parties rehearing on May 19, 2023, via a Rehearing Order reinstating its original April 1 Order, both parties filed petitions for Review of the CPCN Order and the Rehearing Order with the Twelfth Circuit Court.

## **STATEMENT OF THE ISSUE PRESENTED**

- I. Did FERC’s meet its obligations under the Natural Gas Act (“NGA”)when it found there was a public need when there was substantial evidence that the project was fully subscribed, expand natural gas access, optimized existing pipelines, and fulfilling unused capacity?
- II. Was FERC’s decision to route the AFP over HOME’s property despite HOME’s religious objections in violation of RFRA when the Order does not substantially burden their religious exercise because it does not coerce HOME into violating their religious beliefs to receive a governmental benefit nor punish them via criminal or civil sanctions, and even if there was a substantial burden, FERC has a compelling government interest in ensuring that our government acts in a procedurally necessary manner and its application to HOME uses the least restrictive means possible?

- III. Was FERC's finding that the benefits of the project outweigh the environmental and social harms arbitrary and capricious or contrary to law when its fully considered HOME's religious objections and properly considered the environmental harms of both routes under the National Environmental Policy Act ("NEPA")?
- IV. Were the greenhouse gas ("GHG") conditions imposed by FERC beyond FERC's authority under the NGA and thus a major question when FERC is acting consistent with historical practice, is not engaging in a new regulatory scheme, is not practicing law in a new area never before explored by the Commission, and the statutory language grants FERC broad authority to condition CPCN orders?
- V. Did FERC meet its obligations under the NGA and NEPA when it issued a CPCN Order with conditions to address direct GHG emissions from the AFP when FERC has discretion in how it imposes its statutory scheme and when it was unclear if downstream and upstream GHG emissions were substantial?

### **STATEMENT OF THE CASE**

This case concerns the FERC authority to properly execute its statutory duties when issuing a CPCN. On June 13, 2022, TGP filed an application with FERC under Section 7(c) of the NGA and Part 157 of the Commission's regulations. CPCN Order & Order Denying Rehearing, 199 FERC p. 72, 201, p. 1 (June 1, 2023) (hereafter referred to as the "FERC Order"). TGP is a limited liability company organized and existing under the laws of the state of New Union and will become a natural gas company within the meaning of Section 2(6) of the NGA when the project begins. FERC Order at p. 8. The application was for the AFP, which is an approximately 99-mile-long, 30-inch diameter interstate pipeline that would connect a recipient point in Jordan County, Old Union, to an existing TGP gas transmission facility in Burden County, New Union (the TGP Project). FERC Order at p. 1.

Before filing their application, TGP held an open season for service from February 21 through March 12, 2020. FERC Order at p. 11. TGP secured two binding precedent agreements. One precedent agreement was with International Oil & Gas Corporation (International) for 450,000 dekatherms (Dth) per day for transportation services. *Id.* The second precedent agreement was with New Union Gas & Energy Service Company (“NUG”) for 50,00 Dth per day for transportation service. *Id.* Combined, this represents 500,000 Dth per day, the pipeline's total capacity. FERC Order at p. 1. Under these precedent agreements, the natural gas will be fracked at Hayes Fracking Field (“HFF”) in Old Union, made into liquefied natural gas (“LNG”), and then transported by the AFP. FERC Order at p. 12.

The TGP Project also involves the construction of a receipt meter station and a receipt tab located in Jordan County, Old Union (Main Road M&R Station), a meter, regulation, and delivery station in Burden County, New Union (Broadway Road M&R Station), mainline valves assembled at eight different locations along the AFP, pig launcher/receiver facilities in pig valve taps at the Main Road M&R Station and the Broadway Road M&R Station, and a cathodic protection and other related appurtenant facilities. FERC Order at p. 10. TGP estimates that the project will cost approximately \$599 million. *Id.*

LNG purchased by International will be diverted from the Burden Road M&R Station to the existing NorthWay Pipeline. FERC Order at p. 14. The NorthWay pipeline will carry the LNG to the New Union City M&R Station, which is on the shores of Lake Williams in New Union City. *Id.* From there, the gas will be transported via the White Industrial Canal to the Atlantic Ocean, where LNG will load it into tankers and export it to Brazil. *Id.*

Currently, the full production of natural gas at HFF is transported to the Southway Pipeline to states east of Old Union. FERC Order at p. 12. Thus, the precedent agreements do not



give additional production at Hayes, but rather would reroute approximately 35% of its production through AFP instead of the Southway Pipeline. FERC Order at p. 12.

In their application, TGP presented evidence that the LNG demand in states east of Old Union has been steadily declining due to a population shift, increased electrification of heating in those states, and efficiency improvements. FERC Order at p. 13. TGP asserts, and FERC agrees, that the market will be better served by re-routing AFP because of the declining demand. FERC Order at p. 13. Even though there will be reduced transportation in the Southway Pipeline, it will not lead to gas shortages and affect the pipelines' existing consumers. *Id.* Additionally, the APF serves several domestic needs, including (1) delivering up to 500,000 Dth per day of LNG through the NUG Terminal and the NorthWay Pipeline, (2) providing natural gas to customers in New Union who do not currently have natural gas access, (3) expanding national access to natural gas, (4) optimizing the existing system to the benefit of existing and future consumers by making the market more competitive, (5) fulfilling capacity in an undersubscribed NorthWay Pipeline, and (6) improving regional air quality by using cleaner-burning natural gas in place of dirtier fossil fuels. FERC Order at p. 27

On April 1, 2023, FERC issued a CPCN Order under Section 7 of the NGA authorizing the TGP Project to construct and operate the AFP subject to conditions. FERC Order at p. 2. These conditions include: (1) TGP shall plant an equal number of trees removed during construction; (2) whenever practicable, TGP shall utilize where available electric-powered equipment during construction, including but without limitation, electric removal equipment and electric-powered vehicles; (3) TGP shall use only use "green" steel that net-zero steel manufacturers produce for the pipeline segments; and (4) TGP shall purchase all electricity used in construction from renewable sources where such sources are available. Order at p. 67. All

these conditions were imposed to mitigate the greenhouse gas (“GHG”) emissions during construction. FERC Order at p. 66.

Two commenters, Holy Order of Mother Earth (“HOME”) and TGP, each filed a timely request for rehearing on different parts of the CPCN Order. FERC Order at p. 4. HOME sought rehearing on four aspects of the Order: (1) FERC’s finding that there was a project need when 90% of the gas transported by the AFP was to be exported, (2) FERC’s decision to route the pipeline over HOME’s property in violation of the Religious Freedom Restoration Act (“RFRA”), (3) FERC’s approval of the AFP because even if it was a public necessity, the negative impacts outweigh the benefits, and (4) FERC’s decision not imposing upstream and downstream GHG mitigation measures. FERC Order at p. 5. TGP sought rehearing on the GHG mitigation measures, arguing that imposing GHG conditions on the CPCN Order was a “major question” and beyond FERC’s ability to regulate under the NGA. FERC Order at p. 6.

### **SUMMARY OF THE AGRUMENT**

FERC did not violate the NGA when it found a public need because it considered international precedent agreements. Under Section 7 of the NGA, which governs this AFP, gas that commingles with other gas that is flowing through interstate commerce, it is interstate gas. *Okla. Nat. Gas Co. v. FERC*, 28 F.3d 1281, 1286 (D.C. Cir. 1994). Thus, while 90% of the gas may be bound for international use, FERC can consider the international precedent agreements with the same weight as domestic agreements because the relevant inquiry is whether it crossed a state line, not where its destination is. Thus, when FERC found that there was a public need, it did so with a substantially supported record and with thorough and reasonable analysis. FERC Order at p. 5.

Before addressing why the public benefits outweigh the adverse harms, FERC must address the alleged RFRA violation. FERC did not violate RFRA when issuing the CPCN Order because the construction of the pipeline does not rise to a level of a substantial burden. 42 U.S.C. § 2000bb-1. FERC is not forcing HOME to choose between practicing their religion or receiving a government benefit, nor making them face criminal or civil sanctions for their religious exercise. *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). While HOME may be upset and feel that they can no longer practice knowing gas is underneath the ground, this does not rise to the level of being a substantial burden because it does not coerce HOME into acting contrary to their religious tenets. Even if this Court finds a substantial burden, FERC has a compelling government interest in ensuring when it issues a CPCN Order it serves the public need and is substantially supported by the record. FERC's actions are the least restrictive means because the government cannot be required to conduct its affairs in alignment with every citizen's particular religious view. Furthermore, for this Court to require FERC to adopt the alternative route as HOME requests would force FERC to violate both the NGA and the Administrative Procedure Act ("APA") because it would be adopting an unsupported and arbitrary route.

Weighing the public benefit against the adverse environmental and social harms, FERC's decision that the CPCN Order was a public convenience and necessity was not arbitrary, capricious, or contrary to the law. First, TGP made substantial efforts to significantly mitigate the impacts of the AFP on HOME's property by expediting the construction, placing the portion of the pipeline on HOME's property underground, and doing the construction between solstices so as not to disturb their sacred trek. FERC Order at p. 60. Second, FERC fulfilled its obligations under NEPA by giving a hard look at the environmental consequences of both routes. Third, the public benefits of increased national natural gas supply, optimizing the existing system,

providing access to new customers, and providing opportunities to use natural gas over dirtier fossil fuels outweigh the environmental harms. Thus, FERC did not act arbitrarily and capriciously when it issued the CPCN Order, and its findings were supported by substantial evidence.

Finally, imposing a condition on the CPCN Order addressing direct GHG emissions was not a major question. *West Virginia v. EPA*, 597 U.S. \_\_\_, 142 S.Ct. 2587 (2022). Firstly, FERC has a long history of imposing conditions on its CPCN Order and is not implementing an unprecedented regulatory scheme. Secondly, FERC also has the apparent statutory authority to impose GHG conditions. If this Court finds that imposing GHG conditions is not a major question, the final inquiry is whether FERC acted arbitrarily and capriciously or contrary to law when it used its discretion not to impose upstream and downstream GHG conditions. Under NEPA, FERC is required to address the reasonable and foreseeable effects of a project. *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). That includes quantifying, where feasible, possible GHG emissions. *Id.* at 1371.

Here, FERC quantified all feasible GHG emissions but used its discretion in executing its regulatory scheme. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 130 (2015). Additionally, FERC found it unclear whether the upstream and downstream GHG emissions were significant and thus determined that they did not warrant mitigation under the NGA. Therefore, FERC only needed to impose GHG mitigation measures under the NGA for the construction of the pipeline. For these reasons, this Court should favor FERC in all issues and uphold FERC's Order granting the conditional CPCN.

## ARGUMENT

### **I. FERC's Finding of Public Convenience and Necessity was Not Arbitrary, Capricious or Contrary to Law and Was Supported by Substantial Evidence.**

Under Section 7(e) of the NGA, FERC can grant a CPCN when it has found that the applicant is able and willing to properly do the acts and perform the services proposed and that the proposed service and construction is required by the present or future public convenience and necessity. 15 U.S.C. § 717f(e). When determining whether a CPCN should be issued, the Commission is required to evaluate all factors bearing on the public interest. *Alt. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959).

The CPCN process of application review is guided by the Certificate Policy Statement that has two key criteria. FERC Order at p. 17.<sup>1</sup> First, the project must be able to proceed without subsidies from its existing consumers.<sup>2</sup> The subsidized requirement is deeply aligned with the purpose of the Natural Gas Act, which “was to underwrite just and reasonable rates to the consumers of natural gas.” *Alt. Refin. Co.*, 360 U.S. at 388 citing *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Second, the applicant must have made efforts to eliminate and minimize any adverse effects of the project on existing customers, any existing pipelines and their captive consumers, and the interests of landowners and the surrounding community. 90 FERC p. 61,128, \*1.

Reviews of CPCN's are governed by the APA. Under the APA, an agency's decision is to be reviewed under an arbitrary and capricious, abusive discretion, or contrary to law standard. 5

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<sup>1</sup> The policy statement in this case is not being challenged. If HOME alleged that the policy statement was not aligned with the statutory language, FERC would be entitled to Skidmore deference. See *U.S. v. Mead Corp.*, 533 U.S. 218 (Chevron applies when there is a promulgated rule. When Chevron deference does not apply there is room for Skidmore deference for policy statements and guidance).

<sup>2</sup> Certificate of New Interstate Natural Gas Pipeline Facilities (“Certificate Policy Statement”), 88 FERC p. 61,227 (1999), *clarified*, 90 FERC p. 61,128, \*1, 92 FERC p. 61,094 (2000)

U.S.C. § 706. Additionally, a reviewing Court can hold a CPCN unlawful if it is unsupported by substantial evidence. *Id.* To come to this determination the Court shall review the whole record, or those parts cited by a party. *Id.*

A. FERC's Finding That There Was a Public Need Under Section 7 of The NGA Was Not Arbitrary and Capricious Because It Considered Precedent Agreements With LNG Bound for International Use.

Even though 90% of the LNG involved here is bound for international use, Section 7 still governs FERC's public convenience and necessity analysis because it is interstate gas. FERC Order at p. 24. For Section 7 to apply, TGP must be a natural gas company engaged in interstate commerce. 15 U.S.C. § 717a. For natural gas to be considered part of interstate commerce, or "interstate gas," it only needs to cross from one point in a U.S. state to any point outside of that state. 15 U.S.C. § 717a(7). Furthermore, the determination of whether something is interstate gas, and therefore subject to the federal jurisdiction of the NGA, is focused on "the flow of electrical energy," as opposed to a legalistic or governmental test. *Conn. Co. v. Federal Power Comm'n*, 342 U.S. 515, 529 (1945). Looking at the flow of energy in the AFP from a scientific lens, there is no distinction between what is bound for domestic use and international use when the gas is removed and enters the pipeline. Thus, any gas that is bound for export that commingles "with other gas indisputably flowing in interstate commerce becomes interstate gas." *City of Oberlin v. FERC*, 39 F.4th 719, 726 (D.C. Cir. 2022) citing *Okla. Nat. Gas Co.*, 28 F.3d at 1286.

This means that gas that is going to be exported is subject to the jurisdiction of the Commission and is evaluated under the same criteria as gas bound for domestic use. The inquiry is not where the gas will end up, but whether it crossed state lines along the way. Here, the gas will be collected at HFF in Old Union where it will become LNG and be transported via the

existing NorthWay Pipeline to the New Union City M&R Station. FERC Order at p. 14. When this gas crosses the state line from Old Union into New Union, it becomes interstate gas. In conclusion, all gas, even gas bound to be sold internationally, should be given the same weight of consideration as gas used domestically under Section 7. See *City of Oberlin*, 39 F.4th at 727 (“the export agreements are simply one input into the assessment of present and future public convenience and necessity.”).

*B. FERCs Finding That There Was a Public Need for The Project Based on The Pipeline Being Fully Subscribed, Its Optimization of the Current Market and Providing Cleaner Fuel Was Not Arbitrary and Capricious and Was Supported by Substantial Evidence.*

HOME alleges that FERC finding that there was a project need was arbitrary and capricious because FERC considered the international export agreements when it should have only looked at the U.S. need. FERC Order at p. 2. Under the Certificate Policy Statement, the “threshold requirement” for determining if there is a market need is the finding that the project is not subsidized by existing customers. 90 FERC p. 61,128, \*5. This test is essentially an economic one. The subsidy requirement was adopted by FERC after previously using long-term contracts to be the sole measure of market demand. 88 FERC p. 61,227, \*35. By changing the policy to look at subsidization, the policy change allowed “the market to decide which projects should be built.” 88 FERC p. 61,227, \*43. Thus, “if an applicant can show that the project is financially viable without subsidies, then it will have established the first indicator of public interest” and will have shown “an important indicator of market-based need for the project.” 88 FERC p. 61,227, \*47 & FERC Order at p. 20.

HOME has identified “nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by

looking beyond the market needs reflected by the applicants existing contracts with shippers.” *Minisink Residents for Env’t Prot. and Safety v. FERC*, 762 F.3d 97, 111 n. 10 (D.C. Cir. 2014). See also *Myersville Citizens of a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (court found that FERC has demonstrated market need based solely on the finding that the project was to be fully subscribed). HOME does not dispute that TGP can financially support the project without relying on subsidization and will have no adverse impacts on TGP’s existing customers or existing pipelines in the market and their captive consumers. Order p. 19. Thus, under the Certified Policy Statement, even HOME agrees that TGP has passed the threshold requirement to demonstrate market need.

HOME further contends that *City of Oberlin*, where the D.C. Circuit held FERC properly considered international precedent agreements, is distinguishable from this case because only 17% of the precedent agreements for the Nexus pipeline would be exported and some portion of the exported gas were expected to be imported back into the U.S. FERC Order at p. 31. FERC recognizes these differences, however, there are additional domestic benefits from increasing the transportation of natural gas regardless of where it is ultimately consumed internationally. LNG exports could support between 220,00 and 452,000 additional American jobs and add anywhere from \$50.3 billion to \$73.6 billion to the U.S. economy by 2040.<sup>3</sup> Additionally, as the nation works to de-carbonize our electrical grid and wind off coal, natural gas will become an important part of a greener future.<sup>4</sup>

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<sup>3</sup> Harry Vidas, *Impact of LNG Exports on the U.S. Economy: A Brief Update*, American Petroleum Institute, Sept. 2017, at 16.

<sup>4</sup> Dr. Fatil Birol, *The Role of Gas in Today’s Energy Transitions*, International Energy Agency, (July 2019) <https://www.iea.org/reports/the-role-of-gas-in-todays-energy-transitions>.



As TGP asserts, the reduced transportation of LNG in the SouthWay Pipeline would not lead to gas shortages even though there is declining demand in Old Union due to a population shift, efficiency improvements, and increase electrification of heating in Old Union. FERC Order p. 13. When issuing a CPCN, FERC can consider the *future* public convenience and necessity. 15 U.S.C. 717f(e). Thus, by routing LNG through AFP, FERC is looking towards the future needs of the market which will be better served by the AFP. Additionally, the NUG has executed a binding precedent agreement with International to receive 50,000 Dth per day of their transportation services. FERC Order p. 11. The AFP will also provide natural gas to consumers who have never had access, expand the national natural gas supply, optimize the existing market, and provide an opportunity to improve the regional air quality by using natural gas as opposed to dirtier fossil fuels. FERC Order at p. 27. Thus, FERC's finding that there was a public need for the project was substantially supported by the AFP being fully subscribed and the domestic benefits for the increased transportation of natural gas. Therefore, this court should uphold FERC's Order.

## **II. FERC's Decision to Route the AFP Through HOME's Property Was Not a Violation of RFRA.**

Before addressing whether FERC properly considered HOME's religious objections under the NGA, we must address the more important inquiry, whether FERC's Order violated RFRA. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law...prohibiting the free exercise [of religion]." U.S. Const. amend. I. "Prohibiting" is dispositive, indicating an intent by the framers that the government must not take action that rises to a level beyond a citizen's mere spiritual displeasure or offense of a government action. The Religious Freedom Restoration Act ("RFRA") states that the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The government may substantially burden a person's

exercise of religion only if it demonstrates the burden's application to the person is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling government interest. 42 U.S.C. § 2000bb-1(b).

RFRA was enacted to restore the compelling interest test established in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) after the Supreme Court “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion in *Employment Division v. Smith*, 494 U.S. 872 (1990).” 42 U.S.C. § 2000bb. The first inquiry under RFRA is whether the conduct of HOME constitutes an exercise of religion. The Commission does not dispute that HOME's property holds religious significance and it is not FERC's place to question the validity of their interpretation of their religious beliefs. FERC Order at p. 49. Thus, the next question, and the crux of the issue in this case, is whether FERC's granting of the CPCN substantially burdens HOME's right to exercise their religion.

A. The Issuance of the CPCN Does Not Rise to A Substantial Burden Because HOME Is Not Being Coerced into Violating Their Religious Beliefs to Receive a Government Benefit and Is Not Subject to Criminal or Civil Sanction.

A substantial burden exists where an individual is subject to substantial pressure to violate their religious beliefs to receive a government benefit or face civil or criminal sanction for non-compliance. *Thomas*, 450 U.S. at 718. In *Wisconsin v. Yoder*, the Supreme Court held a compulsory education statute was unconstitutional because the statute affirmatively compelled the Amish to act contrary to a fundamental tenet of their religion under the threat of criminal sanction. 406 US 205 (1972). In *Sherbert v. Verner*, the Supreme Court held South Carolina could not deny Sherbert employment compensation for refusing to work on Sundays as part of

her day of rest because it forced her to choose between following her religion and forfeiting her rights or abandoning one of her precepts of her religion to accept work. 374 U.S. 398 (1963).

The most instructive case on this matter is *Lyng v. Northwest Indian Cemetery Protective Association*, which addressed whether the Forest Service's attempt to cut down trees and construct a road through a federal forest that was traditionally used for religious purposes of several Native American Tribes violated the Free Exercise Clause. 485 U.S. 439 (1988). To link two California towns, the Forest Service had to upgrade 49 miles of previously unpaved roads that went through a section of Chimney Rock in the Six Rivers National Forest. *Id.* at 442. As part of an Environmental Impact Statement, the Forest Service conducted a study on the importance of the area to the three Native American tribes who used the area for religious practices. *Id.* The study found that the entire area held religious significance because it was "an integral and indispensable part of Indian religious conceptualization and practice." *Id.* The most important features of the area to the tribes were the privacy, silence, and undisturbed nature of the setting. *Id.*

Despite the study's recommendation not to build the road, the Forest Service decided to go forward with the project, but with significant modifications. *Id.* at 443. This included selecting a route that avoided any archaeological sites, minimizing the visibility of the road from the contemporary religious site, and placing the road as far from the contemporary stie as possible. *Id.* The Regional Forester, the head of that Forest Service's regional offices, decided not to route around Chimney Rock completely because that would have required acquiring private land, it would pose serious soil stability problems, and would traverse other areas that held ritualistic value to the tribes. *Id.* Still unsatisfied and having exhausted all administrative

recourse, the Northwest Indian Cemetery Protective Association filed suit, requesting a permanent injunction. *Id.*

The Supreme Court held that while the government was significantly interfering with the tribe's "ability to pursue spiritual fulfillment according to their religious beliefs" by building the road, this did not rise to a substantial burden. *Id.* at 449. The burden was an incidental effect of a government program and while it made it more difficult for them to practice certain religious exercises, the permit has "no tendency to coerce individuals into acting contrary to their religious beliefs. *Id.* at 450. See *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008) (substantial evidence supported FERC's finding that the relicensing of a hydroelectric project did not substantially burden the tribes free exercise of religion as they did not lose a government benefit and did not face criminal or civil sanctions for practicing their religion). The court went as far to say that even if the court adopted the reasoning of the lower circuit court and found that the road "virtually destroyed the...Indian's ability to practice their religion," the Constitution cannot allow a principle that requires the government to "satisfy every citizen's religious needs and desires." 485 U.S. at 451-452.<sup>5</sup>

*Lyng* is analogous to this case because FERC has not placed HOME in a position to choose between exercising their religious and giving up a governmental benefit or being coerced to violate their religious beliefs to avoid criminal or civil sanctions. While HOME may feel that it would be "unimaginable" to walk over the land knowing a pipeline is underneath, they are not prevented from engaging in their religious exercise and will not be punished for it. FERC Order p. 57. Another analogous case is *Standing Roch Sioux Tribe v. U.S. Army Corps of Eng'rs* where

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<sup>5</sup> See also *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (D.C. Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009) ("a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden" ...on the free exercise of religion.").

a Native American tribe argued that the flow of oil in a pipeline underneath a lake made the members feel unable to do their religious exercises in the lake. 239 F.Supp.3d 77, 86 (D.C. Cir. 2017). The DC Circuit denied their injunction because there was no specific ban on their activities, they faced no sanctions, no loss of governmental benefits, or other collateral harm. *Id.* at 96.

Furthermore, FERC is not penalizing HOME's religious activity by "denying any person an equal share of rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449. In *Lyng* the Supreme Court notes that the tribe's claims would rise to a possible level of a substantial burden if they were denied the right to use and access the land. *Id.* at 453. Neither HOME's right to use the land nor their ability to access the land is at issue here.<sup>6</sup> Thus, this Court should find that FERC did not violate RFRA by substantially burdening HOME's exercise of religion.

*B. Even If There Is a Substantial Burden, FERC Has a Compelling Government Interest in Ensuring the Government Does Not Make it a Arbitrary or Capricious Decisions and Used the Least Restrictive Means.*

If this Court finds there is a substantial burden, FERC must prove it has a compelling government interest and has used the least restrictive means of achieving that government interest. 42 U.S.C. § 2000bb-1(b). A compelling government interest is "one of the highest order." *Ave Maria Found. v. Sebelius*, 991 F.Supp.2d 957, 966 (E.D. Mich. 2014) citing *Church of the Lukumi Babal Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). This interest must be one that overrides the substantial burden. *United States v. Lee*, 455 U.S. 252, 258 (1982). When examining the compelling interest of the government, the Court must look beyond the "broadly

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<sup>6</sup> See *South Fork Band v. U.S. DOI*, 643 F.Supp.2d 1192 (D. Nev. 2009) (court held that the Bureau of Land Management approving a proposed gold mining project did not substantially burden a Native American tribes right to exercise their religion because they would still have access to the areas they indicated has religiously significant).

formulated interest justifying the general application of the statute” and examine the impediment of those objectives” if an exemption was carved out for the plaintiff. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). To determine whether something is the least restrictive means the Court is asked to compare “the cost to the government of altering its activities to continuing unimpeded versus the cost to the religious interest imposed by the government activity.” *S. Ridge Baptist Church v. Indus. Comm’n of Ohio*, 911 F.2d 1203, 1206 (6<sup>th</sup> Cir. 1990).

Complying with HOME’s demands would require FERC to select a route that violates the NGA which uses the CPCN process to protect consumers and the APA which ensures that government actions are supported, justified, and aligned with the law. In *Kaemmerling v. Lappin*, the Seventh Circuit held that even if a felon was being required to have his DNA collected and it substantially burden his religious exercise, the government has a compelling interest “in accurately and expeditiously solving past and future crimes...to protect the public and ensure conviction of the guilty and exoneration of the innocent.” 553 F.3d 669, 679 (7<sup>th</sup> Cir. 2000). This compelling interest arises out of the government's duty to protect the public and serve society’s interest in reducing reoffending. *Id.* at 681-682. Similarly, FERC has a duty to the public – ensuring that when it issues a CPCN Order, it meets the needs of the public at large and doing so in a manner that is substantially supported by the record. If FERC were to grant an exception to HOME, it sends a message that the views of those who believe the earth is sacred are more important than those who do hold no religious views or hold views contrary to HOME’s. Under the First Amendment the state must be neutral in its relation to groups with and without religions because it cannot aid one religion over another. *Everson v. Bd. of Educ.*, 330 U.S. 1. 15 (1947). Additionally, granting an exception would violate the Establishment Clause because FERC

would be endorsing the religious view of HOME. See 42 U.S.C. § 2000bb-4 (“nothing in this chapter shall be construed to affect, interpret, or in any way portion the First Amendment.”)

Furthermore, to adopt HOME’s view would be to draw a line in the sand that whether the government is violating RFRA depends on the religious objectors subjective, and spiritual beliefs.<sup>7</sup> The court in both *Lyng* and *Bowen v. Roy* speak to the implications of adopting a standard that is based on subjective, spiritual beliefs. In *Bowen v. Roy*, two applicants for governmental benefits contended that a federal statute that required states to use Social Security numbers in administering welfare programs violated their religious beliefs because assigning a number to their 2-year-old daughter would rob her spirit and “prevent her from attaining spiritual power.” *Bowen v. Roy*, 476 U.S. 693, 696 (1986). The court was unpersuaded.

“The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that [the Roys] engage in any set form of religious observance, so [they] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter... The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.” 476 U.S. at 699–700.

*Lyng* echoes the same sentiment, “The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.” 485 U.S. at 452. FERC has a compelling interest in ensuring that our government is working in a manner consistent with the Constitution and cannot conform to every religion’s belief(s). More specifically, FERC has a compelling interest in ensuring that consumers can have access to LNG and that they are

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<sup>7</sup> See *Lyng*, 485 U.S. at 451 (“Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.”).

selecting pipeline routes that are the least environmentally damaging to all parties, not routes based solely on religious objections.

*C. The Pipeline's Construction Would Not Compel HOME to Support the Production and Transportation of Natural Gas Because the Pipeline Will Not be Operating On Its Property.*

HOME contends that the CPCN Order compels them to support the production, transportation, and subsequent burning of fossil fuels because the pipeline will be on its property that is fully devoted to Mother Earth. FERC Order at p. 58. When a CPCN is issued, the holder of the Certificate has the authority to engage in eminent domain proceedings when the holder is unable to acquire it through an agreement with the owner of the property. 15 U.S.C. § 717f(h). If this Court rightfully upholds the CPCN, the property where the pipeline is placed will no longer be HOME's property because it will become TGP's property via eminent domain. Thus, HOME is not being compelled to support the pipeline. This contention is further supported by the language of the statute. The statute explicitly recognizes that eminent domain proceedings are to be used when the Certificate holder "cannot acquire by contract or is unable to agree with the owner of the property to the compensation to be paid for" on the necessary land. 15 U.S.C. § 717f.

In conclusion, FERC has not violated RFRA because it has not substantially burdened HOME's free exercise of religion because they are not being coerced to violate their religion to receive a government benefit and are not facing criminal and civil sanctions for practicing their religion. Even if this Court finds a substantial burden, FERC has a compelling government interest in ensuring government actions are supported and justified. Furthermore, the government has taken the least restrictive means possible because granting HOME an exception would place



the government in a position of prioritizing or endorsing certain religious views. Thus, this Court should uphold FERC's Order.

### **III. FERC's Properly Balanced HOME's Religious Objections and the Environmental Impacts Against the Public Need When Issuing the CPCN Order and Selecting the Route.**

If this Court chooses to uphold the CPCN despite HOME's religious objections under RFRA, the next inquiry becomes whether FERC properly considered and weighed HOME's religious objection and the adverse environmental impacts against the public need. As previously stated, under the APA an agency's decision is reviewed under an arbitrary, capricious, abusive discretion, or contrary to law standard. 5 U.S.C. § 706. Additionally, the agency's action, finding, and conclusion must be supported by substantial evidence. *Id.* To determine whether such substantial evidence exists, the Court shall review the whole record, or those parts cited by a party. *Id.* Under the Certificate Policy Statement, adverse effects the Commission will consider include the interests of the landowners and the surrounding community and the environmental impacts of the project. 90 FERC 61,128, \*11.

#### **A. FERC Fully Considered HOME Religious Objections and Addressed Them Through Substantial Mitigation.**

While HOME has religious objections, TGP has taken several steps to ensure that its religious exercise is not disturbed. First, TGP modified over 30% of the initially proposed pipeline route to address the concerns of HOME and other landowners. FERC Order at p. 41. Second, TGP has agreed to put the AFP that passes through HOME's property entirely underground to ensure that they can still use the area without any change in their behavior. *Id.* Third, TGP has agreed to expedite construction so that the portion of the pipeline that will be going under HOME's property will be completed within four months. *Id.* Fourth, TGP will start and finish the construction of the pipeline between solstices. FERC Order at p. 60.

Besides not building the pipeline and selecting the more damaging alternative route, it is difficult to imagine how TGP could be more mindful to HOME's objections. See *Lyng*, 485 U.S. at 454 ("Except for abandoning its project entirely, and thereby leaving the two existing segments of road to deadend in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous."). HOME also pointed out that TGP has not acquired easements from around 40% of landowners along the route. FERC Order at p. 42. While FERC does need to consider the interests of the landowners, lack of easement agreement is not a significant consideration under the Certificate Policy Statement because the use of eminent domain is common in pipeline construction. FERC Order. at p. 43. Thus, none of HOME's religious behavior will have to change and TGP has taken substantial steps to mitigate any adverse effects to HOME.

*B. FERC Complied with the National Environmental Policy Act By Giving a Hard Look at The Environmental Consequences of Both Routes.*

While the focus of the Commission is protecting consumers against the exploitation of natural gas companies, it also addresses conservation, environmental, and antitrust issues. *NAACP v. FPC*, 425 U.S. 662, 670 & F n. 6 (1976). In tandem with the Commission's environmental considerations under this Certificate Policy Statement, FERC is also required to do an environmental review under the NEPA. *Minisink*, 762 F.3d at 102 citing 42 U.S.C. § 4321-4370h. While both NEPA and the NGA are governed by the APA, NEPA is largely a procedural statute that simply prescribes the necessary process and does not require particular results. *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 350 (1989).

While the inquiry into whether an agency complied with NEPA is "is a narrow one," case law provides insight into how this analysis is done. *Citizens to Pres. Overton Park, Inc v. Volpe*,

401 U.S. 402, 416 (1971). As stated in *Citizens to Preserve Overton Park, Inc v. Volpe*, the Court must only ask “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement. *Id.* at 416. When applying the arbitrary and capricious standard the Court need only ensure “the agency has taken a ‘hard look’ at the environmental consequences.” *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). Therefore, while HOME may not like the conclusions of FERC’s Environmental Impact Statement, so long as FERC gave a hard look at each consideration, it has satisfied its requirements under NEPA.

FERC acknowledged and considered all significant environmental impacts of the selected AFP route and the alternative route. In *Myersville Citizens for a Rural Cmty, Inc.*, petitioners argued that the Commission inadequately considered an alternative route that would have involved a 30-mile loop of pipeline instead of a compressor station in their town. 783 F.3d at 1324. They further argued that the alternative route would cost only \$2 million more and would have no emissions. *Id.* The Commission rejected the alternative route because it would disturb more land which would create a greater environmental disturbance than the compressor station and therefore was “not an environmentally preferable alternative”. *Id.* The D.C. Circuit upheld the Commission’s determination to reject this alternative because it had “adequately considered, and rejected, the [alternative] option” and therefore sufficiently discharged its NEPA obligations. *Id.*

These same circumstances are present here. FERC’s Environmental Impact Statement acknowledges the number of trees that would be removed to build the pipeline, the length of the pipeline for each route, and the impact on environmentally sensitive ecosystems. FERC Order at p. 44. Not only did FERC adequately consider these environmental impacts, but it also mitigated them. While the AFP will require the removal of approximately 2,200 trees as well as other

forms of vegetation from HOME's property, an equal number of new trees will be planted in other locations to mitigate their removals environmental impact. FERC Order at p. 38.<sup>8</sup>

Additionally, the current route of the pipeline travel causes significantly less environmental damage and it's also significantly cheaper. Placing the pipeline through the Misty Top Mountain range would extend the pipeline by three feet and would go through more environmentally sensitive ecosystems. FERC Order at p. 44. Further, to use the alternative route through the Misty Top Mountains would add an additional \$51 million to construction costs. *Id.* Thus, FERC's environmental impact statement gave a "hard look" concerning the environmental consequences of both the planned route and the alternative route and therefore satisfied its obligations under NEPA.

*C. FERC's Determination that the Public Need Outweighed the Significantly Mitigated Environmental and Social Harms Was Not Arbitrary and Capricious.*

While HOME may justifiably feel upset about the pipeline going underneath their property, their religious objections cannot be given greater weight than the environmental and economic effects of the pipeline current route. TGP has taken significant steps to ensure that it is not burdening the religious exercise of HOME and ensured that HOME's concerns were addressed in the CPCN Order. For this Court to adopt the belief of HOME's that the alternative route complies with the requirements for a CPCN it would mean FERC adopted reasoning that is arbitrary and capricious. Selecting the alternative route on the grounds of HOME's religious would be entirely unsupported by the record as it is more environmentally harmful and significantly more expensive. As previously discussed in Issue I, FERC has substantial evidence that there is a public need for the project. While there may be harm done on HOME's property

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<sup>8</sup> These trees will be placed in another location to offset the GHG impacts of the pipeline because the trees cannot be replaced along the route of the pipeline. Order p. 38.

due to the removal of trees, the benefits of upholding the CPCN as is – including the AFP being fully subscribed, expanding natural gas access to new customers, optimizing the existing system, and providing cleaner-burning natural gas - outweigh the harm.

In conclusion, FERC's CPCN Order was substantially supported by the record. FERC complied with NEPA by giving both routes a "hard look," and FERC properly weighed the environmental consequences of both routes under the NGA. Therefore, this Court should uphold FERC's Order.

#### **IV. The GHG Conditions Imposed by FERC Did Not Go Beyond Its Authority Under the NGA or Pose a Major Question.**

In light of *West Virginia v. EPA*, we are entering into a new era of administrative law that challenges the nation's courts use of *Chevron* deference. While the Supreme Court may have newly coined the term the "Major Question Doctrine" ("MQD"), it has been shaping the doctrine for decades. While the MQD inquiry is reserved for "extraordinary cases," precedent prior to *West Virginia* tells us that the court looks at the history and breadth of the agency's authority, the economic and political significance of the agency's assertion, whether the matter is one where common sense would urge the court to hesitate, and where the language cited by the agency is cryptic. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000).

The origins of the MQD can be traced back to the court decision in *MCI Telecomm. Corp. v. AT&T* in 1994 where the court addressed whether the FCC had the authority to modify any requirement imposed by the Communications Act. *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218 (1994). The court took a commonsense approach and looked at the economic and political significance of the agency action, holding that "it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to

agency discretion--and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.” *Id.* at 231.

In 2000 the court further developed the MQD in *FDA v. Brown & Williamson Tobacco Corp.*, where the court rejected the FDA’s “expansive construction of the statute” that the FDA could regulate and even ban tobacco products because Congress likely did not intend to give them such “sweeping and a consequential authority “in so cryptic a fashion.”” 529 U.S. at 160 citing *West Virginia*, 142 S.Ct. at 2608 (2022). The court revised the MQD in 2006 when an Attorney General argued he could revoke a physician’s license who lawfully engaged in assisted suicide because he had the statutory power to revoke a license when an individual acted “inconsistent with the public interest.” *Gonzales v. Oregon*, 546 U.S. 243 (2006) and 21 U.S.C. § 823(f). The Court stated the “idea that Congress gave [him] such broad and unusual authority through an implicit delegation...is not sustainable” based on its location in the statute. 546 U.S. at 267.

In *Util. Air Regulatory Group v. EPA*, the court looked at the expansive nature of the regulatory scheme in reaching individuals never before regulated. The court held that the EPA’s expansion of “air pollutants” under the Clean Air Act to include GHG’s has significant implications for the American economy and would permit the EPA to regulate smalls sources never before touched by the EPA’s regulatory scheme. *Util. Air Regul. Group v. EPA*, 573 U.S. 302, 324 (2014). In 2021, the court addressed the relevance of the language in the statute in *Ala. Ass’n. of Realtors v. Dept. of Health and Human Servs.*, 594 U.S. \_\_\_, \_\_\_, 141 S.Ct. 2485 (2021) (per curiam). In *Ala. Ass’n of Realtors* the Center for Disease Control and Prevention (the “CDC”) attempted to institute a nationwide eviction moratorium as a measure necessary to prevent the spread of COVID-19. *Id.* at 2487. The court held that the language of the statute was a “wafter-thin reed” and that the sheer scope of the CDC's claimed authority was unprecedented.

*Id.* The court additionally noted that Congress failed to extend the eviction moratorium after previously doing so. *Id.* at 2488-2490.

These cases, among others, paved the way for *West Virginia v EPA*. The MQD was formed by the Supreme Court to refer “to an identifiable body of law that has developed over a series of significant cases all addressing a particular and reoccurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.” *West Virginia*, 142 S.Ct. at 2609.

*A. FERC’s Actions of Imposing GHG Mitigation Conditions on the CPCN Is Not a Major Question Because the Action is Aligned with the Historical Practice of the Agency and Is not an Unprecedented Expansion of the Regulatory Scheme.*

Based on *West Virginia v. EPA* and prior case law, there are several common threads the court has looked at when determining if something is a major question. This first thread is the history and breadth of the action. The MQD is to be applied in “extraordinary cases” where the “history and the breadth of the authority [the agency] has asserted,” as well as the “economic and political significance” of that assertion, gives the court a “reason to hesitate before concluding that Congress” meant to confer such authority.” *Brown & Williamson*, 529 U.S. at 159-160.<sup>9</sup>

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<sup>9</sup> The Supreme Court has been inconsistent in whether it uses an absolute or relative standard when determining whether something constitutes a major question. In *Brown & Williamson*, the court looked at an absolute standard that was separate from the statute by considering the courts view of the importance of the question and the degree of attention given to the subject by Congress. *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Question Doctrine*, Thomas B. Griffith, Haley N. Proctor, 132 Yale L.J. 693, 698 (2022). This is the approach that Gorsuch takes in his concurring opinion in *West Virginia*. See 142 S. Ct. at 2620-22 (2022) (Gorsuch, J. concurring) (advocates for an absolute standard by providing a non-exhaustive list of economic, political, and structural considerations). *King v. Burwell* demonstrates a more relative inquiry where the court looks to the size of the “eyebrow-raise” that the agency’s answer provokes. 132 Yale L.J. at 698 citing 576 U.S. 473, 484-486 (2015). See *West Virginia*, 142 S. Ct. at 2636 (2022) (Kagen, J. dissenting) (“the agency had strayed out of its lane, to an area where it had neither expertise nor experience.”). It is likely that the court may engage in both inquiries depending on the types of agency actions as *Brown & Williamson* was a vast expansion of agency power and *King* was a fundamental alteration to the regulator scheme. This Court can also choose to blend both absolute and relative standards to ensure the doctrine flexibility. Regardless, this Court does not need to adopt a particular view within this case.

First, the circumstances present in this case are by no means extraordinary. TGP contends that FERC has no clear statutory authority to impose GHG mitigation conditions on the CPCN because it is imposing a new statutory scheme of regulating GHG emissions. Here, the Commission's authority was asserted under Section 7(e), which states that the Commission shall have the power to attach to the "issuance of the Certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C § 717f(e). This delegation of authority does not fall within the MQD.

Imposing conditions on CPCN orders is familiar territory for FERC.<sup>10</sup> Additionally, this case is significantly different from the actions of the CDC in *Ala. Ass'n of Realtors*. In that case, the CDC was trying to use power given to them by Congress to adopt measures necessary to prevent the spread of extremely harmful or contagious diseases to engage in landlord-tenant law. 141 S.Ct. at 2485. Landlord-tenant law is one that is in the particular domain of state law. *Id.* at 2489.<sup>11</sup> By imposing GHG mitigation for the construction of the pipeline, FERC is not attempting to practice an entirely new area of law nor regulate an unprecedented number of Americans. FERC continues to stay in its area of expertise by simply imposing conditions that are necessary to mitigate the effects of climate change. Thus, imposing GHG conditions is consistent with a long history of FERC conditioning its CPCN Orders.

The Supreme Court has also looked to the breadth of the action, an inquiry centered around the political and economic consequence of the agency's action. For example, in *Nat'l Fed'n of*

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<sup>10</sup> See, e.g., Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions); Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012) (operation emissions).

<sup>11</sup> If the CDC "wishes to significantly alter the balance between federal and state power and the power of the government over private property," Congress is required to enact exceedingly clear language. *Id.* citing *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n.*, 590 U.S. \_\_\_, \_\_\_-\_\_\_, 140 S. Ct. 1837, 1850 (2020).



*Indep. Bus. v. Occupational Safety and Health Admin* the Occupational Safety and Health Administration (“OSHA”) took unprecedented action by using its ability to regulate occupational hazards to require “84 million Americans...to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense.” 595 U.S. \_\_\_, \_\_\_, 142 S.Ct. 661, 665 (2022) (per curiam). This requirement was imposed under the Occupational Health and Safety Act that permits as exemption from typical notice-and comment procedures for “emergency temporary standard[s],” allowing a rule to go into effect immediately upon its publishing in the Federal Register.” *Id.* at 663 and 29 U.S.C. §651(c)(1). This permission, however, is one that is only allowed in the “narrowest of circumstances” and OSHA must prove the emergency standard is necessary to protect the employee from such danger. *Id.* at 663 and 29 U.S.C. §651(c)(1).

The court held by passing this rule, OSHA was engaging in “a significant encroachment into people's lives-and health-of a vast number of employees.” *Nat’l Fed’n of Indep. Bus.*, 595 U.S. at 665. Furthermore, the act was intended to empower OSHA “to set workplace safety standards, not broad public health measures.” *Id.* Regarding the economic and political magnitude of the GHG mitigation done here, FERC’s Order is limited only to impact the AFP. See 15 U.S.C. § 717a(6). While the pipeline will cost approximately \$599 million, this is not an abnormally large figure. FERC Order at p. 10. Currently, it is estimated that it costs \$10.7 million per mile of land pipeline construction.<sup>12</sup> Considering this estimate, the cost of constructing the AFP is well within the normal parameters for such a project.

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<sup>12</sup> Christopher E. Smith, Land pipeline construction costs hit record \$10.7 million/mile, Oil & Gas Journal, (Oct 2. 2023), <https://www.ogj.com/pipelines-transportation/pipelines/article/14299952/land-pipeline-construction-costs-hit-record-107-millionmile>.

Additionally, FERC is not enacting requirements that are contrary to the statutory scheme or are being used for a purpose other than ensuring that the Certificate holder's project is in the best interest of the public convenience and necessity. While the problem of how to address "climate change as a whole is undoubtedly a major question, the climate implications of the construction of the pipeline is not." FERC Order at p. 88. Because FERC upheld a historical practice and did not create an unprecedented regulatory scheme, FERC's GHG mitigation conditions do not raise an issue of the MQD.

B. Looking at the Statutory Language With Common Sense to Determine Whether Congress Would Have Permitted FERC to Issue a Conditional CPCN, Common Sense and Clear Statutory Language Tells Us the MDQ Inapplicable.

The MQD also calls on us to look at the various circumstances to ascertain whether it is "common sense as to the manner in which Congress [would have been] likely to delegate" such power to FERC. *Brown & Williamson*, 529 U.S. at 131. "Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *West Virginia*, 142 S.Ct. at 2609 citing *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). FERC must point to "clear congressional authorization" to prove it has the authority to condition the CPCN order on several GHG mitigation factors. *Utility Air*, 573 U.S. at 324.

In this case, there is clear congressional authorization in the NGA granting FERC broad authority to determine what conditions can be placed on a CPCN. It is generally acknowledged that the Commission has "extremely broad authority" to condition Certificates under section 7(e) due to the recognition of FERC's expertise on the subject matter.<sup>13</sup> All that is required of the

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<sup>13</sup> *Great Lakes Gas Transmission Ltd. Partnership v. FERC*, 984 F.2d 426, 432 (D.C. Cir. 1993) citing *Transcontinental Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir.1979), *cert. denied*, 445 U.S. 915 (1980).

condition is that it be “reasonable” and “required by the public convenience and necessity.” 15 U.S.C. § 717f(e). Nowhere in the statute’s language is FERC limited to only issue a condition that deals with exclusively “traditional” environmental considerations.

In fact, the Certificate Policy Statement states that FERC should look at “the interests of existing pipelines and their captive consumers, and the interest of landowners and the surrounding community, including environmental aspects.” 90 FERC p. 61128, \*11. Not only does this language specifically acknowledge environmental aspects, but it also instructs FERC to look at the overall interests of landowners and the surrounding community. FERC can also use conditions to protect their interest beyond protecting just the environment.

In conclusion, FERC imposing conditions on a CPCN Order is not an extraordinary circumstance. Furthermore, FERC is not engaging in an unprecedented action that is outside of its area of expertise and developing a new regulatory scheme with far-reaching political and economic implications that would cause this Court to pause. Finally, common sense tells us that this is a subject matter that Congress would have intended for FERC to regulate based on the statutory language.<sup>14</sup> This Court should find that FERC has the clear congressional authority to consider and impose mitigation conditions for GHG Emissions and thus, the MQD is inapplicable.

## **V. FERC’s Decision to Not Impose GHG Conditions Addressing Downstream and Upstream GHG Impacts is not Arbitrary and Capricious.**

If this Court finds that FERC’s order is not a major question, the final inquiry becomes whether FERC’s decision to impose conditions only on direct GHG conditions was not arbitrary,

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<sup>14</sup> “The natural gas act authorizes FERC to regulate the transportation and sale of natural gas in Interstate commerce.” *City of Oberlin*, 39 F.4t at 722 (citation omitted).

capricious, an abuse of discretion or contrary to law. 5 U.S.C. § 706. Under the NGA, FERC is required to consider “the present *or future* public convenience and necessity.” 15 U.S.C. § 717f(e) (emphasis added). By instructing FERC to look at the future when evaluating a CPCN, the NGA gives FERC the authority to consider future environmental impacts like GHG emissions. 15 U.S.C. § 717f(e).

*A. FERC Is Required to Consider Present and Future GHG Emissions and Did So By Quantifying the GHG Impacts of the Project.*

In *Sierra Club v. FERC*, the D.C. Circuit addressed a substantially similar issue to the one before this Court, whether FERC was required under NEPA and the NGA to quantify the estimated upstream and downstream GHG emissions because they are indirect consequences of the project that FERC could have reasonably foreseen. *Sierra Club*, 867 F.3d at 1374. The D.C. Circuit held that under NEPA, the agency must, “at a minimum, estimate the amount of power plant carbon emissions the pipelines will make possible.” *Id.* at 1371. Here, during its over 4-year duration of construction, the AFP may result in an average of 104,100 metric tons per year of CO<sub>2</sub>e without mitigation measure. FERC Order at p. 72. The estimated downstream impacts of the project based on the assumption that the end-use of the gas will be combustion, is 9.7 million metric tons. *Id.*<sup>15</sup> With the GHG conditions in place, the estimated average yearly emission of CO<sub>2</sub>e is 88,340 metric tons per year. FERC Order at p. 72. This is roughly over a 15% yearly decrease in emissions that will save an estimated 63,040 metric tons of CO<sub>2</sub>e being emitted during the four-year course of construction. By quantifying the amount, FERC has met its obligations under NEPA.

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<sup>15</sup> It is unlikely that this total amount of CO<sub>2</sub>e will occur because some of the gas may displace other fuels which could lower the total emissions or the displaced gas could be transported by a different means, resulting in no change in emissions. FERC Order at p. 72. Additionally, this assumes that the pipeline is running at maximum capacity 365 days a year, which is rarely the case because projects are designed to be able carry shippers peak day usage. *Id.*

B. FERC's Establishing GHG Mitigation Conditions Only on Direct Emissions Was Not Arbitrary and Capricious Because FERC Has Discretion in Implementing its Statutory Scheme.

While NEPA may require FERC to give a hard look, it does not require that FERC mitigate the GHG emissions. See *Robertson*, 490 U.S. at 350 (1989) (NEPA does not require a particular results). The purpose of NEPA is to help agencies engage in informed decision making and the public make informed public comments. *Id.* at 343. Without a clear consistent policy communicating to natural gas companies and the public how FERC wishes to characterize and treat upstream and downstream GHG emissions, it declines to use its authority to issue mitigation measures that go beyond the construction of the pipeline. FERC has deference based on its agency expertise in the complex execution of this regulatory scheme. See *Perez*, 575 U.S. at 130 (2015) (“Fundamentally, the argument about agency expertise is less about the expertise of agencies in interpreting language than it is about the wisdom of according agencies broad flexibility to administer statutory schemes.”).

Additionally, while FERC was able to estimate the amount of emissions from the pipeline if it was running at maximum capacity every day of the year, whether it will rise to the level of significant is unclear. FERC Order at p. 72. Under the Certified Policy Statement, only where significant adverse effects are identified must efforts be made to mitigate them. 90 FERC p. 61,128, \*1. Therefore, there is no need to mitigate upstream and downstream GHG emissions.

In conclusion, this Court should find that FERC met its obligations under NEPA by quantifying the direct and indirect GHG emissions from the pipeline. Additionally, this Court should find that FERC appropriately used its discretion to establish only direct GHG emission mitigation as it develops a clear and consistent policy on upstream and downstream emissions. Even if this Court finds that FERC was required to address upstream and downstream GHG

emissions, they did not rise to the level of significant and therefore warrant mitigation. Thus, this Court should uphold FERC's Order.

### **CONCLUSION**

This court should uphold FERC's finding of public convenience and necessity for the AFP because it was supported by substantial evidence demonstrating that there was a market need. Additionally, FERC properly weighed and reasoned the benefits of the project against the adverse environmental and social harms. This Court should also find that FERC did not violate RFRA because it did not substantially burden HOME's right to exercise their religion and even if it did, it had a compelling government interest that used the least restrictive means. Finally, this Court should find that the implementation of the GHG conditions is not beyond FERC's authority and its decision not to impose upstream and downstream mitigation measures was fully within the agency's discretion. Thus, this Court should uphold FERC's order.