

NONMEASURING BRIEF

TEAM 47

DOCKET No. 23-01109
CONSOLIDATED WITH
DOCKET No. 23-01110

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH,
Petitioner

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Petitioner

v.

THE FEDERAL ENERGY REGULATORY COMMISSION
Respondent

Petition for Review of Orders issued in Federal Energy Regulatory Commission
Docket no. TG21-616-000

Brief of Petitioner, HOLY ORDER OF MOTHER EARTH

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STATEMENT OF JURISDICTION

The Federal Energy Regulatory Commission (“FERC”) issued an order granting a Certificate of Public Convenience and Necessity on April 1, 2023, in case No. TG21-616-000. (“CPNC Order”). Holy Order of Mother Earth (“HOME”) and Transnational Gas Pipelines, LLC (“TGP”) filed timely requests for rehearing on April 20 and April 22, 2023, respectively. FERC’s Commissioners issued a Notice advising that all requests for rehearing were denied on June 1, 2023.

The United States Court of Appeals for the Twelfth Circuit has jurisdiction to review final FERC orders where the licensee or public utility to which the order relates is located within the jurisdiction pursuant to 16 U.S.C. § 8251(b). HOME and TGP petitioned the court for review of the final order in the consolidated case No. 23-01109.

STATEMENT OF ISSUES PRESENTED

- I. Was FERC’s finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project needed where 90% of the gas transported by that pipeline was for export?
- II. Was FERC’s finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?
- III. Was FERC’s decision to route the AFP over HOME property despite HOME’s religious objections in violation of RFRA?
- IV. Were the GHG Conditions imposed by FERC beyond FERC’s authority under the NGA?

- V. Was FERC’s decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

TGP is a limited liability company that will become a natural gas company under the definition provided in the National Gas Act (“NGA”) upon final approval of a proposed pipeline located in the State of New Union. HOME is a not-for-profit religious organization also located in New Union which owns a 15,500-acre property that will be impacted by the proposed pipeline.

I. TGP Project

In February to March of 2020, TGP held an open season for the service of a project to construct and operate the American Freedom Pipeline (“AFP”). This proposed pipeline would transport the natural gas sourced entirely from the Hayes Fracking Field (“HFF”) in Old Union. The project would not increase production of natural gas at HFF but would instead reroute 35% of the gas that the Southway Pipeline currently transports from HFF. Once the natural gas is liquefied into liquified natural gas (“LNG”), the AFP will transport the natural gas produced at HFF at a rate of 500,000 dekatherms (Dth) per day. The pipeline will span approximately ninety-nine miles and will pass through approximately two miles of HOME property.

In addition to the pipeline, the project’s construction includes: (1) two receipt meter stations located in Jordan County (Main Road M&R Station) and Burden County (Broadway Road M&R Station); (2) a receipt tap; (3) eight mainline valve assembly locations; (4) pig launcher/receiver facilities and pic trap valves at the Main Road and Broadway Road Stations, and (5) cathodic protection and other appurtenant facilities. TDP estimates approximately a \$599 million cost for the project.

In response to the open season, TGP entered into binding precedent agreements for firm transportation service of the LNG with (1) International Oil & Gas Corporation (“International”) for 450,000 Dth per day and (2) New Union Gas and Energy Services Company (“NUG”) for 50,000 Dth per day. These agreements account for the entire TGP design project capacity.

International is Brazilian-owned company subsidiary. Utilizing the Northway Pipeline, International will export virtually all of the LNG it receives from the AFP to Brazil upon arrival at New Union City M&R station. TGP does not contest that International will export 90% of the oil it receives. Further, Brazil does not have a free trade agreement with the United States.

On June 13, 2022, TGP filed an application to FERC for authorization to construct and operate the AFP and related facilities.

II. Adverse Impacts of AFP

Despite TGP’s efforts to modify over 30% of the proposed pipeline route, TGP failed to eliminate the AFP’s adverse effects on the landowners and communities along the route. Both the proposed route and the alternative route, which runs through the Misty Top Mountains, would require clearing and excavation of the land. Additionally, an EIS completed by TGP outlines a multitude of Greenhouse Gas (“GHG”) impacts. The Council on Environmental Quality (“CEQ”) strongly encouraged agencies to mitigate these impacts because they can be “dangerous—potentially catastrophic—[to] climate trajectory.”¹ The CEQ guidance is in a preliminary draft and is not yet finalized. However, while aware of the preliminary nature of the guidance, FERC ultimately issued the conditions considering this guidance.

¹ *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023)(Guidance issued by the CEQ addressing the National Environmental Policy Act (NEPA) and climate change).

The Environmental Impact Study (“EIS”) identified multiple downstream (from transportation of the gas) emission impacts for the AFP. The EIS analysis indicates that downstream end-use would potentially result in approximately 9.7 million metric tons of CO₂e per year. Even if the AFP does not reach this maximum capacity, the analysis gives no confident prediction in the likely regular impact of CO₂e from the LNG diversion. The construction of the pipe alone could result in an average of over 88,000 metric tons of CO₂e per year for four long years.

Also, the project would have substantial effects on landowners and communities affected by the AFP route. Because of this, TGP failed to sign an easement agreement with over 40% of the landowners along the route including with HOME. The proposed pipeline passes through approximately two miles of the property, twice puncturing the sacred pathway of the Solstice Sojourn Journey, a biannual sacred religious ceremony that HOME has performed for nearly ninety years. To install the pipeline, TGP will bury the pipeline over the entire span of HOME property caught in the path of the AFP. Additionally, TGP will remove thousands of trees, many on the Solstice Sojourn pathway. This destruction of the untouched land will last for four months, if TGP is able to sustain its project timeline. Only by adhering to this timeline will the construction not interfere with the Solstice Sojourn. HOME states that this destruction of land would be anathema to the core tenets HOME’s religious order, which revolve around the preservation of nature and originated as a response to industrialization. HOME believes nature is sacred and honors it as a deity.

III. FERC Order of Approval

On April 1, 2023, FERC issued an Order granting a Certificate of Public Convenience and Necessity (“CPCN”) authorizing TGP to proceed on AFP construction under conditions

imposed in the Order. FERC issued multiple findings in this order which the Commission states demonstrates that the TGP project benefits outweighed any adverse effects on existing shippers, other pipelines, and their captive customers, and on surrounding community landowners.

According to these findings, the AFP served the following domestic needs: (1) delivery of a maximum of 500,000 Dth per day of natural gas through the rerouting of existing production and (2) providing new access to the currently produced natural gas in New Union.

IV. Current Litigation

Home and TGP each filed a timely request for rehearing on the CPCN Order, each addressing different aspects of the order. On May 19, 2023. FERC denied the requests for rehearing. Home and TGP filed petitions for review of the original CPCN and the denial for rehearing order with this Court.

SUMMARY OF THE ARGUMENT

FERC improperly issued an order authorizing the TGP project to construct and operate the AFP and erroneously rejected a request for rehearing on this order for multiple reasons.

First, FERC's CPCN order finding that TGP demonstrated a public necessity was unjustified and unsupported by substantial evidence. The FERC must determine that the AFP addresses a present or future public convenience and necessity. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement). This convenience and necessity must serve a domestic interest and FERC must demonstrate that interest with adequate evidence. 15 U.S.C. § 717f(a); 15 U.S.C. § 717a(6)–(7); 15 U.S.C. § 717(b). FERC both failed to identify a sufficient domestic interest and relied on improper evidence for support. Further, there is no additional substantial evidence that buttresses FERC's finding of public convenience and

necessity. Additionally in FERC's finding, the Commission improperly balanced public benefits achieved against adverse effects to the local community. FERC both inflated the benefits expected from the AFP and significantly minimized the harms expected. Therefore, FERC arbitrarily and capriciously acted when it conducted this erroneous project benefit calculation.

Second, FERC's determination for the AFP route compels HOME to support an action directly opposed to their religious beliefs. This clearly violates the broad religious liberty protections Congress intended with RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014); *Wisconsin v. Yoder*, 406 U.S. 205, 218, (1972). The AFP will substantially burden both the biannual Sojourn Journey which is sacred to HOME congregants, and the land that HOME owns and honors in their religious teachings. To justify this burden, FERC must demonstrate a compelling government interest and the AFP is the least restricting means of furthering that interest. *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). As stated earlier, the findings of necessity are unjustified by the facts and circumstances, and FERC's determinations rely on an improper application of the NGA. Because FERC lacks sufficient justification, it has fallen short of demonstrating a compelling government interest. Further, even if this faulty conclusion of necessity is accepted as a compelling interest, FERC failed to adequately consider the alternate proposed pipeline, which would avoid intrusion on HOME land and any interference with HOME's religious practice. *Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1977).

Lastly, FERC has the authority and responsibility to impose conditions on the TGP project that mitigate GHG impacts and the failure to do so was arbitrary and capricious. The NGA authorizes FERC to issue certificates of public convenience and necessity with attached terms and conditions as required. 15 U.S.C. §717f(e). If there are no major questions indicated in the FERC decision, the attached terms and conditions are analyzed within a plain meaning

framework. Because FERC attached terms and conditions that did not have a national economic or political impact, there is no need to apply a more rigorous analysis to determine FERC's authority to issue the attachments. *West Virginia v. EPA*, 142 S Ct. 2587, 2608 (2022).

Additionally, the stature from which FERC derives its authority from clearly authorizes the Commission's authority to "impose reasonable terms and conditions." 15 U.S.C. §717f(e).

FERC has also issue multiple previous decisions which demonstrate this authorized Commission action. *Environmental Assessment for the Philadelphia Lateral Expansion Project*, Docket No. CP11-508-000 at 24 (Jan. 18, 2012); *Minisink Compressor Project*, Docket No. CP11-515-000 at 29 (Feb. 29, 2012).

FERC acted arbitrarily and capriciously by not necessarily imposing conditions on the AFP pipeline mitigating upstream and downstream GHG emissions. Courts continuously hold that FERC must comprehensively analyze the effects of a proposed project including the upstream and downstream effects and adequately explain that analysis. *Sierra Club v. FERC*, 867 F.3d 1357, 1363 (U.S. App. D.C. 2017); *Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667, 737 (D.C. Cir. 2000); *LaFlamme v. FERC*, 852 F.2d 389, 399 (9th Cir. 1988)). FERC possesses the relevant information needed for a comprehensive analysis on the potential GHG effects. Additionally, FERC has conducted this type of analysis in the past. *Sierra Club* 867 F.3d at 1363. Failing to complete the analysis for the AFP therefore is arbitrary and capricious because it is not adequately considering and disclosing the environmental impact of the Commission action.

FERC failed to demonstrate the necessary analysis and justification for its CPCN order and further erred by denying a rehearing on the order. Because of these improper actions, this Court should grant review of the FERC Orders.

STANDARD OF REVIEW

This Court reviews a final FERC Order under the deferential arbitrary and capricious standard of review. *LSP Transmission Holdings II, LLC v. FERC*, 45 F.4th 979, 991 (D.C. Cir. 2022) Under this standard a court will not uphold an Order unless it determines that Commission “examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made” *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292, (2016). Additionally, a court does not treat FERC’s factual findings as conclusive unless “substantial evidence in the record” supports the finding. *Louisiana Pub. Serv. Comm’n v. FERC*, 860 F.3d 691, 694 (D.C. Cir. 2017). For example, courts have set aside FERC Orders where the agency’s decisions were “unreasonable” or “inadequately explained.” *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018) (citations omitted).

ARGUMENT

I. FERC’S FINDING OF PUBLIC CONVENIENCE AND NECESSITY WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

FERC shall grant a certificate for new pipeline construction if it determines that the proposed pipeline “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). Precedent agreements are a factor the Commission may consider, but capacity amount is not a sufficient need factor by itself. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

TGP executed two binding precedent agreements for firm service amounting to 100% of the pipeline’s design capacity with International and NUG. *Reh’g Order*, ¶ 11. (Hereafter

referred to as RO) Despite its name, International does not service domestic customers. Instead, it operates as a subsidiary of a Brazilian company. *RO* ¶ 24. International will transport virtually all (if not all) of the gas it receives from the AFP to Brazil rather than to domestic customers. *RO* ¶ 24.

- A. Under Section 7 of the Natural Gas Act (NGA), the provision at issue in this case, a certificate for construction requires a showing of domestic public convenience and necessity.

Congress explicitly precluded the Commission from applying Section 7 to companies engaged solely in foreign commerce. *See* 15 U.S.C. § 717f(a) (applicable only to “natural gas companies”); *see also* 15 U.S.C. § 717a(6)–(7) (defining “natural gas companies”). Instead, Congress prescribed Section 3 to govern the approval of these foreign projects. *See* 15 U.S.C. § 717b.

Under Section 7, the Commission “shall” issue a certificate for construction upon a showing of public convenience and necessity, whereas under Section 3, companies must also obtain approval from the Secretary of Energy before importing or exporting natural gas. 15 U.S.C. §§ 717f(e), 717b(a); *see also City of Oberlin v. FERC*, 39 F.4th 719, 723 (D.C. Cir. 2022). Furthermore, Section 7 authorizes the use of eminent domain to construct approved facilities, whereas Section 3 does not. 15 U.S.C. § 717f(h); *Oberlin*, 39 F.4th at 723.

Section 3 thus prescribes a different, more stringent certification process when a project involves foreign rather than domestic commerce. Because a different Section of the NGA guides the Commission’s determination of need for exclusively foreign projects, it necessarily follows that certification under Section 7 must require a showing of *domestic* public need.

- B. FERC’s finding of public convenience and necessity for the American Freedom Pipeline (AFP) improperly relied on TGP’s export contract.

Although FERC may consider precedent agreements for exports as a factor for need, it must explain the lawful reasoning for crediting demand towards the export in issuing a certificate to an interstate pipeline under Section 7. *Oberlin*, 39 F.4th at 724.

In this case, FERC failed to justify how its reliance on TGP's export contract with International satisfies evidence of a public need for the AFP. The only justification FERC offered for its reliance was Section 3 of the NGA, which states the Commission shall treat exports to a nation with which the United States has a free trade agreement (FTA) for natural gas as "consistent with the public interest." *RO* ¶ 33; *see also* 15 U.S.C. § 717b(c).

Although the Commission noted that the United States clearly does not have FTA with Brazil, it nonetheless concluded that Section 3(c) justifies its reliance on the AFP's exports to Brazil because it found the provision's FTA distinction meaningless. *RO* ¶ 33. As discussed above, however, under Section 3, every project the Commission considers *only* involves gas to be imported or exported to a foreign country.

Thus, the purpose of Section 3(c) is to differentiate between two specific subclasses of exports: (1) those heading to countries with which the U.S. has FTAs with and (2) those heading to countries with which the U.S. does not have FTAs with. Contrary to FERC's interpretation, the existence of an FTA is the exclusive consideration to determine whether Section 3(c) applies or not, not a meaningless distinction. When FERC relies on a precedent agreement for exports to substantiate the public need for an interstate pipeline, Section 3(c) only justifies that reliance if the agreement will export gas to a country with which the U.S. has an FTA with. *Oberlin*, 39 F.4th at 726–27.

- C. There is no substantial evidence which otherwise supports FERC's finding of public convenience and necessity.

Notwithstanding the export agreements, FERC found that the AFP serves a public need because, *inter alia*, it “provides transportation for domestically produced gas [and] provides gas to some domestic customers.” *RO* ¶ 34. Here, FERC’s finding relied on TGP’s contract with NUG to transport 10% of the AFP’s capacity to domestic customers. *RO* ¶ 34. These minimal domestic benefits, however, are insufficient to support a finding of public need.

All the natural gas that the AFP will transport would come from the HFF. *RO* ¶ 12. However, the Southway Pipeline already transports the full production of natural gas at HFF. *RO* ¶ 12. Consequently, although the AFP will transport a fraction of its capacity to domestic customers, the project does not address any new domestic need. Instead, the AFP would merely transport gas that is already being produced and already being transported. *RO* ¶ 12.

Under the Certificate Policy Statement (“CPS”), pipelines that merely “serve markets already served by another pipeline” require a higher showing of public need than pipelines serving new markets. Because the AFP does not increase the amount of natural gas produced for domestic service or transported to domestic customers, TGP’s precedent agreement with NUG alone is insufficient to demonstrate the public need for the pipeline. *See Oberlin*, 39 F.4th at 729 (finding evidence of public need where the project alleviates a bottleneck in the capacity to transport); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (finding evidence of public need where project provides domestic customers an additional capacity of transport, of storage capacity, and of storage withdrawal); *see also Minisink Residents for Env’t Pres. and Safety v. FERC*, 762 F.3d 97, 103 (D.C. Cir. 2014) (finding evidence of public need where project increases natural gas deliveries by 225,000 Dhz per day).

FERC further premised its finding of public need on the fact that the AFP “fills additional capacity at the International New Union City M&R Station.” *RO* ¶ 34. However, the only gas that the AFP will transport through this station is the gas that International will purchase from TGP. *RO* ¶ 14. As discussed above, International will export virtually all of this gas to Brazil. Consequently, the additional capacity provides no domestic benefit and is therefore insufficient to demonstrate a public need.

Finally, FERC reasoned that because “the gas demands served by the Southway Pipeline are diminishing,” the AFP will “transmit gas that may or may not otherwise be purchased in the future.” *RO* ¶ 34. Under the CPS, a project “built on speculation . . . will usually require more justification” to establish a public need. Under this standard, TGP’s vague and speculative assertion of a benefit amounting to a fraction of 10% of the AFP’s total capacity is insufficient to justify a finding of public need.

II. FERC IMPROPERLY BALANCED EVIDENCE OF PUBLIC BENEFITS TO BE ACHIEVED AGAINST RESIDUAL ADVERSE EFFECTS.

Under the CPS, the Commission must determine whether the applicant has made efforts to eliminate or minimize the adverse effects of the project. If residual adverse effects remain despite the applicant’s efforts, the Commission must balance the evidence of public benefits to be achieved against those adverse effects. The CSP identifies three major interests the Commission must consider, only one of which is relevant to this case: the impact on landowners and communities affected by the proposed route. *See RO* ¶ 21.

A. Significant adverse effects remained despite TGP’s efforts to minimize the harm.

In this case, TGP failed to acquire easement agreements with over 40% of landowners along the proposed route. *RO* ¶ 44. The Commission nonetheless asserted that “the lack of easement agreements [was] not significant to [its] decision” because the use of eminent domain

is common in construction of pipelines. *RO* ¶ 43. However, under the CPS, the applicant’s ability to acquire right-of-way agreements is always relevant to the Commission’s certification decision. Because the adverse effects on landowners along the route are “significant factors” the Commission must demonstrate in its balancing test, the “strength of the benefit showing [is] proportional to the applicant’s proposed exercise of eminent domain procedures.”

Importantly, TGP also failed to enter an easement agreement with the Holy Order of Mother Earth (HOME). *RO* ¶ 42. Although the Commission concluded that TGP took sufficient steps to minimize the harm to HOME, TGP’s efforts completely failed to minimize the significant adverse effects to HOME property.

B. The Commission gave insufficient weight to the adverse effects of routing the AFP through HOME property.

HOME originated as a religious order in 1903 largely in response to the harmful effects of industrialization and capitalism. *RO* ¶ 46. For well over a century, a fundamental core tenet of HOME has been to prioritize the preservation of nature over all other interests. *RO* ¶ 47. The Commission even conceded that the construction of AFP on HOME property is “anathema” to the order’s religious beliefs. *RO* ¶ 49.

Also greatly concerning is that the adverse effects of the AFP extend beyond the censoring of its religious beliefs by impeding HOME’s followers from their actual practice of religion. Twice a year, during each solstice, children in the order undergo a sacred coming of age ceremony upon reaching their fifteenth birthday (the Solstice Sojourn). *RO* ¶ 48. This ceremony involves a journey across HOME’s land, and its followers have participated in this sacred tradition for nearly ninety years. *RO* ¶ 48. The proposed route of the AFP, however, would cut across the Solstice Sojourn path in both directions. *RO* ¶ 48.

HOME's religious beliefs revolve around its view of nature as a deity, making HOME's land inextricably tied to the sacredness of the Solstice Sojourn. *See RO* ¶ 46. Consequently, the AFP would swiftly and completely strip away the long-standing sacredness of the Solstice Sojourn. It would eliminate a religious order's ability to engage in one of its most significant and most intimate traditions. Regardless of whether the AFP sits atop or underneath HOME property or how quickly TGP can construct it, the pipeline would significantly impede HOME's religious liberties. *See RO* ¶ 42 (outlining TGP's minimization efforts).

Despite these weighty consequences, the Commission concluded that this religious interference did not significantly impact HOME's interests. *RO* ¶ 44. The Commission reasoned that it could not engage in such a subjective consideration of the particular interests of each landowner. *RO* ¶ 52. However, the CPS asserts that objective, bright line standards are inappropriate here. Instead, it instructs the Commission to balance the benefits and adverse effects with enough flexibility "to resolve specific cases" and to assure that the Commission can "take into account the different interests" it must consider. FERC has the responsibility to demonstrate a balanced analysis of the benefits and harms in issuing its decision with sufficient justification supported by the evidence.

C. FERC's finding that the benefits of the AFP outweighed its adverse effects was arbitrary and capricious.

Despite the AFP's significant impact on HOME's interests, the Commission found that the AFP's benefits outweighed those adverse effects. *RO* ¶ 51. Rather than thoroughly balancing the benefits against the harm, the Commission recognized the "disruption and lasting harm" to HOME's land but perfunctorily concluded that the factors it had improperly relied upon to find a public need for the AFP "significantly outweigh[ed]" those harms. *RO* ¶ 51.

Consequently, FERC's finding was arbitrary and capricious. FERC's balancing of the interests was cursory and inadequate, and it gave undue weight to the AFP's benefits based on irrelevant factors. This is especially true under the CPS's "sliding scale approach" to sufficiency of benefit strength. Given TGP's failure to minimize the project's harm to landowners and the AFP's minimal domestic benefits, the CPS instructs the Commission that it would need to find an even stronger showing of public benefit than it might need for other projects. FERC did not demonstrate that greater showing.

D. In addition to being arbitrary and capricious, the FERC finding improperly denied the use of a viable alternative route.

A viable pipeline alternative route exists through the Misty Mountains which avoids the extraordinary harm that would result from routing the AFP through HOME's land. *See Exhibit A*. FERC has an obligation to "consider, as part of its certificating process under the NGA, reasonable alternatives" to the proposed project. *Minisink*, 762 F.3d at 107.

The Commission, however, summarily dismissed the alternative route based solely on TGP's audit of the route's environmental impacts. *RO* ¶¶ 42, 62. The Commission failed to consider the adverse effects on landowners and communities that the alternative route would affect. *See RO* ¶ 62.

Consequently, FERC did not adequately consider the Misty Mountain alternative in this case. *See Minisink*, 762 F.3d at 103, 107 (holding that FERC adequately considered the alternative route because took the additional step of issuing a supplemental notice to landowners in the vicinity of that route, requested comments, and incorporated that feedback into its "thorough" and "extensive" review); *see also Oberlin*, 39 F.4th at 729 (affirming FERC's dismissal of alternatives where FERC considered the both the benefits and the "burden on

landowners” of the alternative pipeline). Upon review, FERC should consider the alternative proposed route and sufficiently justify its decision if it denies use of the route.

III. FERC’S PIPELINE ROUTE DECISION COMPELS HOME TO SUPPORT AN ACTION DIRECTLY OPPOSED TO THEIR RELIGIOUS BELIEFS IN VIOLATION OF RFRA.

Congress created the Religious Freedom Restoration Act (RFRA) to ensure broader protections for religious liberty well beyond constitutional requirements. *Hobby Lobby*, 573 U.S. at 706. The statute provides “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.A. § 2000bb-1(a). The religious beliefs must be sincere beliefs to make a valid claim under RFRA. *Hobby Lobby*, 573 U.S. at 717. If a government rule substantially burden’s a party’s exercise of religion, RFRA exempts the party from the rule except where the government ‘demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.’” *Hobbs*, 574 U.S. at 357. (quoting 42 U.S.C. §§ 2000bb–1(a), (b)).

A. The AFP selected route substantially burdens HOME’s exercise of religion.

It is unquestionable that HOME is a religious organization which exercises its religious activities including the Solstice Sojourn on the land it owns in New Union. RFRA defines religious exercise to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C.A. § 2000(cc)(5). Central to HOME beliefs is the tenet that the natural world is sacred. *RO* ¶ 46. In fact, HOME believes that nature itself is a deity. *Id.* Courts consistently recognize that a religious activity that uses the land for a spiritual purpose is continually recognized is the type of religious belief protected the statute. *Lyng v. Nw. Indian*

Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008); *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1283 (D. Ariz. 2020).

Congress designed RFRA to add another layer of protection against government intrusion for this type of religious practice. *Hobby Lobby*, 573 U.S. at 706. While some actions by the government may permissibly impact the exercise of religion, the actions may not substantially burden the practice of religion. *Id.* at 693. In determining substantiality, the Court has examined what is being impacted and the extent of that impact. *Hobby Lobby*, 573 U.S. at 720; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 418 (2006). Because the government is compelling followers of the HOME faith to support a belief that contradicts their sincerely held beliefs, the facts of the case align with the analysis of impact in *Yoder*. See 406 U.S. at 218. (State compelling members of the Amish community to attend school against their religious beliefs). The Court in its *Yoder* analysis held that a substantial burden exists when governmental action compels a person “to perform acts undeniably at odds with fundamental tenets of their religious beliefs.” *Yoder*, 406 U.S. at 218. The Court stated that government action which forced people to act contrary to their beliefs “would gravely endanger if not destroy the free exercise of respondents' religious beliefs.” *Id.* at 219. By FERC allowing TGP to use the HOME land for the transportation of natural gases, it is forcing HOME to support and promote actions that are an “anathema to [their] religious beliefs.” RO ¶ 49. HOME subscribes to a fundamental core tenet that “humans should do everything in their power to promote natural preservation over all other interests, especially economic interests.” RO ¶ 47. The proposed pipeline significantly impacts the natural landscape including the removal of thousands of trees. RO ¶ 38. Construction of this pipeline on HOME land would also require HOME to support the

environmentally ravaging process of fracking. *RO* ¶ 49. Under the *Yoder* framework, the importance of protecting HOME's right to practice its religion freely may understandably come at the cost of the utility of the AFP. *See Yoder*, 406 U.S. at 214.

FERC erroneously determined that a substantial burden requires physical preclusion from exercising a religious belief. *RO* ¶ 59. The Supreme Court has repeatedly held that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). As argued earlier, even if HOME followers can still practice their faith in a diminished environment, compelled support of the pipeline on their land, including the destruction to the environment necessary to produce the oil, would force HOME's members to act contrary to their sincere and deeply held religious beliefs. Additionally, while FERC states that there is no physical preclusion, it relies heavily on a timeline that if delayed, would directly impede the Solstice Sojourn critical to HOME's religious practice. *RO* ¶ 57. This undoubtedly would be the physical barrier to which FERC states does not exist.

Additionally, HOME conducts its religious practices on privately held land, which minimizes this Court's need to consider competing public interests in determining whether the burden is substantial. Supreme Court precedent indicates the Court will designate less weight to the burden on religious practice if the government's action occurs on public or government owned land. *Lyng*, 485 U.S. at 451. Lower courts are more likely to find in favor of the government interest if the religious activity being affected occurred in a national park or similar public place. *Navajo Nation*, 535 F.3d at 1072; *Hoffman*, 436 F. Supp. 3d at 1287. However, in this case, HOME owns the land that TGP proposes to install a pipeline. *RO* ¶ 9. The religious activity that the AFP would impact also takes place on HOME's own property. Because all these

actions occur on private property belonging to the religious group, this Court should give greater weight to the substantiality of the government's burden on HOME.

B. If FERC determines the public necessity is a compelling interest, it must still utilize actions that are the least restrictive on religious liberties.

Because the government action substantially burdens HOME's religious practice, the Court reviews it under a strict scrutiny analysis. The government must utilize the least restrictive means of implementing a law that impedes on a person's religious exercise. *Hobbs*, 574 U.S. at 357. The government has the burden of demonstrating both the compelling interest involved and the absence of other less restricting measures. *Gonzales*, 546 U.S. at 439. If the government fails to establish either, its action violates RFRA. *Id.*

As argued earlier, FERC's cursory analysis inflated the public benefit that the pipeline would provide. Compelling government interests that may clear the standard under RFRA include significant cost savings for consumers and maintaining physical safety. *Hobby Lobby*, 573 U.S. at 728; *Hobbs*, 574 U.S. at 363. Government interests that are not sufficient under RFRA are avoiding widespread unemployment or uniform application of an existing law. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 719 (1981); *Gonzales*, 546 U.S. at 419. The government interest in installing a pipeline that reroutes currently produced oil is more akin to the impermissible interests under RFRA. In the same way that the government does not have a compelling interest in enforcing an already existing law, the government does not have a compelling interest in transporting oil that another pipeline already transports. *Thomas*, 450 U.S. at 719. While FERC argues that a public necessity for the pipeline exists, this necessity is insufficient to meet the high standard set by the courts for a compelling government interest that trumps religious liberties. *RO* ¶ 35.

If it is conceded that FERC's findings of public necessity are sufficient to satisfy a compelling interest, the Commission still failed to demonstrate that the intrusion on HOME's land is the only available option to construct the AFP. HOME argued for the adoption of an alternate route that runs south of HOME property. RO ¶ 39. FERC claimed that this alternative route would be impracticable and burdensome citing cost as a critical factor. RO ¶¶ 44, 62. However, while cost is a relevant factor, the Supreme Court has found that the preservation of land and community can triumph over increased cost. *Overton Park*, 401 U.S. at 411. The additional cost that TGP would incur is only a small percentage of the massive \$599 million that that original project would cost. RO ¶ 44. Additionally, FERC has the option available to deny the project in its entirety on the ground that the pipeline would simply divert already produced natural gas. The denial would not affect the current consumers or many potential new domestic consumers as the pipeline will be mainly used to divert the oil to an overseas consumer. RO ¶ 14. Demonstrating two less restrictive alternatives indicates that FERC erroneously dismissed the RFRA claim and should reconsider the claim upon rehearing.

IV. FERC ACTED WITHIN ITS AUTHORITY WHEN IMPOSING CONDITIONS ON THE CPCN ORDER BECAUSE FERC DOES NOT ADDRESS A MAJOR QUESTION IN ANY OF THE CONDITIONS IT IMPOSED.

- A. The terms and conditions FERC imposed on the AFP project were specific to the project with no major, national economic or political impact.

When FERC issued the CPCN Order, it required TGP to agree to the attached terms and conditions addressing specific project issues. The Commission is authorized under the NGA to issue a certificate of public convenience and necessity when the applicant is "able and willing" to conform to the rules and requirements of the NGA. 15 U.S.C. § 717f(e). The NGA also affords the Commission "the power to attach to the issuance of the certificate and to the exercise of the

rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” *Id.* The Commission is acting within its authority to impose terms and conditions when the conditions imposed are not “major questions” and thus falls under the doctrine of plain meaning.

The terms and conditions FERC imposed on the AFP Project were all specific to the project and did not have a national economic or political impact, as required by the major questions doctrine. The major questions doctrine applies in “extraordinary cases when the history and the breadth and economic and political significance of the action at issue gives the Court reason to hesitate before concluding that Congress meant to confer such authority to act on the agency.” *West Virginia*, 142 S. Ct. at 2608. The terms and conditions FERC imposed on the AFP project were all specific to the project and did not have a national economic or political impact.

In *West Virginia v. EPA*, the Supreme Court discussed whether the major questions doctrine applied to the facts and circumstances of that case. The EPA introduced the Clean Power Plan in 2015. *West Virginia*, 142 S. Ct. at 2602. Within the Clean Power Plan was the regulation of existing power plants, the implementations of emissions reduction technology, and the generation shifting to alternative clean energy sources, such as wind or solar power. *West Virginia* 142 S. Ct. at 2602. The Supreme Court found that the major questions doctrine did apply because the EPA’s power to regulate all existing power plants would affect national policies and the national economy, and the EPA acted with powers Congress did not confer to it. *West Virginia* 142 S. Ct. at 2610. The economic impact from EPA emission regulation of every existing power plant would have national affects, therefore fitting under the major questions doctrine.

In the present case, FERC imposed conditions that apply to the specifically to the AFP project, not to the natural gas industry at large. The Court in *West Virginia* did not address the fact that conditions were attached to the certificate, but rather the fact that the conditions would affect the national economy on a wide scale. In this case, each of the four conditions applies to the TGP Project. For example, the second condition focuses purely on the types of machines and equipment that must be used by TGP for the project. RO ¶ 67. FERC did not impose the condition on all future projects that TGP may take part in. The same applies to conditions 3 and 4: TGP shall only purchase “green” steel pipeline segments produced by net-zero steel manufacturers, and TGP shall purchase all electricity used from renewable sources when available. *Id.* These do not address a major question because there is no national economic or political affect from these substantially project specific conditions. Therefore, it is well within FERC’s authority to impose the specific terms and conditions it imposed.

B. When FERC imposed the terms and conditions on the AFP Project, it did not expand the construction of 15 U.S.C. §717f(e) in a way that Congress did not intend.

Courts have looked for national economic and political impacts when applying the major questions doctrine. However, the court in *N.C. Coastal Fisheries* made clear that courts should consider other factors when determining if an agency should look for clear congressional authorization in a decision. *N.C. Coastal Fisheries Reform Grp v. Capt. Gaston LLC*, 76 F.4th 291, 297 (4th Cir. 2023). There should be clear congressional authorization before adopting an “expansive construction of the statute that would generate an extraordinary grant of regulatory authority.” *Id.* One way to determine this is to look at the structure of the Act to see if it indicates whether Congress meant to regulate the issue as claimed. *Id.*

In *N.C. Coastal Fisheries*, the defendants were shrimpers off the coast of North Carolina. *Id.* at 294. To catch shrimp, they dragged nets along the ocean floor. *Id.* Inevitably, shrimpers catch fish and other marine organisms when dragging the nets, which they cannot legally keep. *Id.* As a result, they dump this so-called “bycatch” back overboard. *Id.* The government argued that this bycatch is “pollution” therefore the defendants must obtain the correct permits to be able to get rid of the bycatch. *Id.* More specifically, the government claimed the defendants violated the Clean Water Act by discharging “pollutants” back into the ocean without proper permits. *Id.* at 295. The court found that when reading the statute without considering past decisions, it does appear that “bycatch” could be a “pollutant”, but that it must consider other legal interests, such as past decisions. *Id.* at 295-96. The court held that determining if “pollution” encompassed “bycatch” under the Act was a major question because the court’s past decisions demanded that Congress must clearly authorize an agency to modify or change its determinations regarding the “pollution” definition. *Id.* at 297. The court also considered the issue of federalism in its decision. *Id.* Congress had repeatedly issued statutes that authorized states to regulate fishing in their waters. *Id.* at 298-99. The court cited to a states-rights-saving clause in the Clean Water Act and 43 U.S.C. §1311(a), which clearly indicated that Congress authorized states to regulate their own waters, including “the right and power to manage, administer, lease, develop, and use the said lands and natural resources.” *N.C. Coastal Fisheries*, 76 F.4th at 298. Because Congress clearly stated its intention to give the individual states the right to manage their own coastal waters, the court did not want to adopt a new definition that would expand a federal agency’s power and undermine past decisions. *Id.* at 299.

It is also clear from statutory authority and past FERC decisions that Commission has the authority to impose terms and conditions on a CPCN order as it sees necessary for public

convenience and necessity. 15 U.S.C. §717f(e) states that the Commission has the right to impose “such reasonable terms and conditions as the public convenience and necessity may require.” This statutory authority is further bolstered by the Environmental Assessment for the Philadelphia Lateral Expansion Project, in which FERC took into consideration GHG emissions when performing its environmental assessment. Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000 at 24 (Jan. 18, 2012). FERC also took into consideration GHG emissions when completing its assessment of the Minisink Compressor Project. Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515-000 at 29 (Feb. 29, 2012). This indicates FERC’s authority to take GHG emissions into consideration and to measure their impact when approving a CPCN. Therefore, it follows that FERC has the authority to mitigate those effects by imposing terms and conditions on the CPCN Order. The court agreed in *Twp. of Bordentown v. FERC*, when it held that FERC’s authority to enforce required mediation was “amply supported” by the applicable federal legislation. *Twp. of Bordentown v. FERC*, 903 F.3d 234, 261 n.15 (3d Cir. 2018). The court then cited to 15 U.S.C. §717(f) and the provision that the Commission had the power to attach to the certificate reasonable terms and conditions. *Id.*

The Congress’s decision-making regarding FERC’s authority to impose terms and conditions on the CPCN order is clear. FERC has the authority under 15 U.S.C. §717f(e) to impose reasonable terms and conditions that are necessary for public convenience and necessity. Past environmental assessments indicate that FERC considered GHG emissions previously, and the Third Circuit Court of Appeals in *Twp. of Bordentown* concurred that it is well within FERC’s authority to attach those terms and conditions.

V. FERC ARBITRARILY AND CAPRICIOUSLY DECIDED NOT TO ISSUE CONDITIONS MITIGATING THE UPSTREAM AND DOWNSTREAM EFFECTS FROM THE AFP GHG EMISSIONS.

- A. FERC could reasonably foresee the upstream and downstream effects of the GHG emissions and had legal authority to mitigate them, therefore it is obligated to issue mitigation conditions.

The FERC's decision not to issue mitigation conditions when granting the CPCN despite the upstream and downstream effects from the AFP project was arbitrary and capricious.

The Commission must publicly address the effects of GHG emissions when granting a CPCN when the effects are reasonably foreseeable, and the Commission has the legal authority to mitigate the effects. *Sierra Club* 867 F.3d at 1372.

In *Sierra Club v. FERC*, the project at issue was a three-pipeline project in which the Sabal Trail Pipeline would connect with two other existing pipelines to carry over 1 billion cubic feet of natural gas per day. *Id.* at 1363. There were environmental groups and landowners who opposed the project for various reasons. *Id.* at 1364. FERC launched an environmental review of the project in 2013 and released an EIS in 2015. *Id.* The Sierra Club argued that the EIS failed to adequately consider the project's contribution to GHG emissions. *Id.* at 1365. The court determined whether the EIS's finding deficiencies were significant enough to undermine informed public comment and informed decision-making. *Id.* at 1368. The court held FERC acted arbitrarily and capriciously by issuing the EIS without a sufficient discussion of the relevant issues and opposing viewpoints. *Id.* at 1367. The court further determined that FERC acted arbitrarily and capriciously because the Commission knew the estimated gas transportation capacity of the pipelines and they failed to provide sufficient reasoning for not estimating the upstream and downstream effects from GHG emissions. *Id.* at 1374. The court concluded that FERC should have either issued a quantitative estimate of the downstream GHG emissions that

would likely result or explained its justification for not doing so. *Sierra Club*, at 1374. FERC could reasonably foresee that GHG emissions are an indirect effect from project authorization and the agency has legal authority to issued mitigation conditions for these emissions.

In this case, FERC knows how much gas is going to be transported by the AFP. The expected service is a maximum of 500,000 dekatherms per day. RO ¶ 1. FERC has the legal authority under 15 U.S.C. §717f(c) to issue mitigating conditions for the effects of the natural gas transportation when issuing a CPCN. Because FERC has the AFP gas transportation capacities it could reasonably estimate the upstream and downstream effects of GHG emissions. Since it has the legal authority to mitigate these effects, FERC has a duty to issue conditions addressing those effects. FERC additionally has the obligation to provide the estimates publicly for informed public decision making. FERC argued that it is not required to address upstream and downstream effects of GHG emissions, and merely has the discretion to. However, the court in *Sierra Club* clearly states that that obligation must be fulfilled when the Commission or Agency can estimate the effects of GHG emissions and has the legal authority to mitigate them.

B. FERC's failure to include upstream and downstream effects in their CPCN is arbitrary and capricious because the Commission previously considered these factors when issuing orders.

FERC's decision not to address the upstream and downstream effects of GHG emissions is arbitrary and capricious because FERC addressed the upstream and downstream effects of GHG emissions in multiple environmental assessments sometimes relying on affect estimates.

An agency must adequately consider and disclose the environmental impact of its actions the court will find the action to be arbitrary and capricious. *Sierra Club*, 867 F.3d at 1367. Included in that impact are the upstream and downstream effects of GHG emissions. In 2023, the CEQ issued a Federal Regulation addressing the indirect effects of GHG emissions. 88 Fed. Reg.

1196, 1204 (2023). The guidance stated that “NEPA requires agencies to consider the reasonably foreseeable direct and indirect effects of their proposed actions and reasonable alternatives.” *Id.* TGP has an estimated expected service at 500,000 dekatherms per day. From this information, FERC can reasonably foresee what indirect effects the GHG emissions from the Project may have. In the past, FERC has relied on estimates of the indirect effects of GHG emissions. Failing to do so in this case makes its decision very questionable.

In *Atl. Coast Pipeline, LLC*, the Commission analyzed the project’s GHG impacts, “including emissions and climate change impacts associated with downstream combustion of Project-transported gas.” *Atl. Coast Pipeline, LLC*, 161 FERC ¶61,042 (2017), *on reh’g*, 164 FERC ¶61,100, at 70 (2018). The Commission “quantified the direct and indirect greenhouse gas impacts from construction and operation of the Project.” *Id.* at 70. FERC had found that the estimate of upstream and downstream effects of the Project was not necessarily required by NEPA due to a lack of causal finding between downstream effects and the Project. *Atl. Coast Pipeline, LLC*, at 70-71. Nevertheless, FERC still estimated the direct and indirect GHG impacts from the construction and operation of the project as required by *Sierra Club*.

Because FERC has estimated the direct and indirect effects of GHG emissions on the environment of past projects, the decision of the Commission to avoid quantifying the effects of the AFP is arbitrary and capricious. Using the information known about the Projects, the Commission was able to make quantitative estimates of these effects. *Atl. Coast Pipeline, LLC* at 70. This also makes the decision of the Commission to avoid quantifying the effects now, arbitrary and capricious. Furthermore, the CEQ guidance makes clear that NEPA requires the Commission to estimate the direct and indirect effects of GHG emissions on the environment. 88 Fed. Reg 1196 (2023) The statute is consistent with past court rulings, creating a rule that the

Commission must follow even if the CEQ is in the process of creating more guidance. Therefore, for a proper decision the Commission must consider the direct and indirect effects of GHG emissions emitted by the AFP Project.

FERC can reasonably foresee the upstream and downstream effects of the GHG emissions on the environment, and it has the legal authority to mitigate these impacts. FERC has also considered and quantified these effects in past decisions, and with the same amount of information indicated in the present case. Because of this, FERC acted arbitrarily and capriciously when it declined to address the upstream and downstream effects of the GHG emissions in its CPCN.

CONCLUSION

For the foregoing reasons, this court should grant review of the final FERC CPCN order and the Rehearing Order.