

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

The Holy Order of Mother of Earth  
*Appellant*

-and-

Transnational Gas Pipelines, LLC  
*Appellant*

v.

Federal Energy Regulatory Commission  
*Appellee*

On Petition for Review from the Federal Energy Regulatory Commission in Order no. TG21-  
616-000

Brief of Appellee, FEDERAL ENERGY REGULATORY COMMISSION

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## **STATEMENT OF JURISDICTION**

On May 19, 2023, the Commission issued an Order that affirmed the original Certificate of Public Convenience and Necessity (CPCN) and denied requests for a rehearing (the Rehearing Order). Order at 2. Both HOME and TGP separately filed a petition for review of the Order in the 12th Circuit for the United State Court of Appeals. Order at 2. The Court of Appeals has subject-matter jurisdiction because it is specially authorized by a statutory grant of power under the Natural Gas Act. 15 U.S.C. § 717r(b). Pursuant to the Administrative Procedures Act, judicial review is appropriate only for “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Here, the order from the Commission is considered final agency action because it imposes obligations and denied a rehearing on the order, which consummated the administrative process of the Commission. *Transwestern Pipeline Co. v. F.E.R.C.*, 59 F.3d 222, 226 (1995).

## **STATEMENT OF ISSUES PRESENTED**

- I. Was FERC’s finding of public convenience and necessity for the Project arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project needed where 90% of gas transported by that pipeline was for export?
- II. Was FERC’s finding that the benefits from the Project outweighed the environmental and social harms arbitrary and capricious?
- III. Was FERC’s decision to route the Project 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**

#### **A. Transnational Gas Pipelines' Proposed Project.**

Transnational Gas Pipelines, LLC (TGP) seeks to construct a 99-mile, 30-inch-diameter interstate pipeline and related facilities known as the American Freedom Pipeline Project (the Project) to transport liquified natural gas (LNG) into New Union. Order at 4. TGP, the proposed operator of the Project, is a limited liability company organized and existing under the laws of the State of New Union. Order at 5. TGPS's Project would extend from a receipt point in Jordan County, Old Union to a proposed interconnection with an existing TGP gas transmission facility in Burden County, New Union. Order at 5. Currently, Hayes Fracking Field (HFF) produces liquified natural gas (LNG) in Old Union which is then transported to states East of Old Union through the Southway Pipeline. Order at 6. However, TGP seeks to reroute 35% of HFF's production into New Union through the Project's pipeline. Order at 6. To transport the LNG into New Union, the Project proposes creating subsequent facilities including but not limited to a meter station (Main Road M&R Station) in Jordan County, Old Union, as well as a meter, regulation, and delivery station (Broadway Road M&R Station) in Burden County, New Union. Order at 5-6. TGP estimates the Project will cost approximately \$599 million. Order at 6.

#### **B. Open Season Begins in Early Spring.**

From February to March of 2022, TGP held an open season for service on the Project, resulting in TGP executing two binding precedent agreements for firm transportation service with both the International Oil & Gas Corporation (International) and the New Union Gas and Energy Services Company (NUG). Order at 6. Together these precedent agreements equal the

Project's full design capacity of up to 500,000 Dth per day of firm transportation service with International subscribing for 450,000 dekatherms (Dth) per day and NUG for 50,000 Dth per day. Order at 4, 6.

The LNG purchased by International will be diverted through NorthWay Pipeline, which is currently not at full capacity. Order at 6. Through the NorthWay Pipeline, International will carry the LNG into the M&R Station at the Port of New Union on Lake Williams. Order at 6. Next, International will load the LNG onto tankers at the Port of New Union for export to Brazil as Lake Williams connects via the White Industrial Canal to the Atlantic Ocean. Order at 6.

### **C. TGP Files Its Project Application with the Commission.**

On June 13, 2022, TGP filed an application with the Federal Energy Regulatory Commission (the Commission) pursuant to section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations seeking authorization for the Project's construction. Order at 4. Once TGP begins to operate the Project it will become a natural gas company within the meaning of section 2(6) of the NGA. Order at 4.

In its application, TGP contended that the Project serves multiple domestic needs including: (1) delivering up to 500,000 Dth per day; (2) providing natural gas service to areas currently without access within New Union; (3) expanding access to sources of natural gas supply in the United States; (4) optimizing existing systems for the benefit of both current and new customers by creating a more competitive market; (5) fulfilling capacity in the undersubscribed NorthWay Pipeline; and (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. Order at 8. TGP presented evidence that market needs are better served by rerouting 35% of HFF's production into New Union since LNG demands are declining in the regions east of Old Union. Order at 6.

#### **D. The Project's Proposed Route.**

The Project's proposed route runs through the 15,500 acres of land in Burden County, New Union, owned by the Holy Order of Mother Earth (HOME), a not-for-profit religious organization. Order at 5. The property is just north of the proposed end point of the Project's pipeline. Order at 5. The Project's proposed route crosses over the HOME property east of HOME's headquarters. Order at 5. The construction will require 2,200 trees and other forms of vegetation from HOME property to be removed. Order at 10. For safety reasons, the majority of trees will not be replaced, however the greenhouse gas emission conditions (GHG Conditions) require an equal number of new trees be planted in other locations. Order at 10.

HOME's fundamental core tenet is that humans should do everything in their power to promote natural preservation over all other interests, especially economic interests. Order at 11. Each solstice, HOME members take the Solstice Sojourn, a ceremonial journey from a temple at the western border of the property to a sacred hill on the eastern border and back. Order at 11. The hill sacred to HOME is located in the foothills of the Misty Top Mountains. Order at 11. The Project's route would cross through the path of the Solstice Sojourn in both directions. Order at 11.

TGP changed over 30% of the Project's route to address concerns from landowners. Order at 10. After negotiating mutually acceptable terms, TGP signed easement agreements with landowners, with approximately 60% of the landowners along the route. Order at 10. TO minimize disruptions with HOME, TGP also agreed to bury the Project segment crossing HOME property and agreed to expedite construction "to the extent feasible." Order at 10. TGP stated the two-mile stretch over HOME property can be completed in a four-month period. Order at 10.

The Commission considered an alternate route for the Project that would have rerouted around HOME's property through the Misty Top Mountain Range. Order at 10. The Commission determined that this alternate route would add over \$51 million in construction costs. Order at 11. Additionally, it is not disputed by the parties that this alternate route would potentially cause more objective environmental harm because it requires the project to be extended three miles and through more environmentally sensitive ecosystems in the mountains. Order at 11.

**E. The Commission's Initial Order Granting TGP a CPCN.**

On April 1, 2023, the Commission issued an Order granting TGP a CPCN for the Project (the CPCN Order). Order at 2. The Commission granted the CPCN based on its finding that the Project's benefits outweighed its adverse effects and its conclusion that the conditions imposed in the CPCN would reduce the Project's adverse environmental impacts to less-than-significant levels. Order at 4. The Commission found the Project's benefits outweighed any adverse effects on existing shippers, other pipelines, and their captive customers, and on landowners and surrounding communities. Order at 4. Relying on the Environmental Impact Statement (EIS), the Commission concluded that the CPCN conditions would reduce the Project's resulting adverse environmental impacts to less-than-significant levels Order at 4.

**F. The Commission Attaches GHG Conditions to TGP's CPCN.**

On January 9, 2023, the Council on Environmental Quality (CEQ) published interim guidance (the CEQ Climate Guidance) to address climate change in the context of the National Environmental Policy Act (NEPA). Order at 14. The Commission is currently in the process of creating its own GHG rules for the review of pipeline applications. Order at 14. While proceeding with draft guidance, the Commission does not characterize upstream or downstream impacts as significant or insignificant in order to attach GHG Conditions. Order at 16.

The GHG Conditions attached to the CPCN Order require TGP to take certain steps to mitigate GHG emission impacts of the construction of the Project. Order at 14. These Conditions include: (1) TGP shall plant or cause to be planted an equal number of trees as those removed in the construction; (2) TGP shall utilize, wherever practical, electric-powered equipment in the construction of the Project, including, without limitation and where available, electric chainsaws, other removal equipment and electric powered vehicles; (3) TGP shall purchase only “green” steel pipeline segments produced by net-zero steel manufacturers; and (4) TGP shall purchase all electricity used in construction from renewable sources when sources are available. Order at 14.

Both GHG downstream and upstream impacts were evaluated in the EIS. Order at 15. For downstream impacts, the analysis showed that if all 500,000 Dth per day were sent to combustion end uses, the downstream end-use could result in the upper bound for CO<sub>2</sub>e emissions. Order at 15. This estimate assumes that the maximum capacity of LNG is transported 365 days per year which the Commission noted that this estimate is rarely accurate for downstream impacts because projects are designed for shippers’ peak day use. Order at 15. Additionally, LNG from downstream impacts may be displaced by other fuels or be transported by different means. Order at 15.

**G. The Commission Denies HOME and TGP’s Individual Requests for Rehearing.**

On April 20, 2023, HOME officially sought rehearing from the Commission on the CPCN Order. Order at 4. HOME requested rehearing based on three issues: the Commission’s finding of “project need,” the approval of the Project route over HOME property, and the Commission’s decision not to require mitigation for upstream and downstream GHG impacts. Order at 6.

HOME contended that allowing the route to cross over their property would violate that Religious Freedom and Restoration Act (RFRA). Order at 5. HOME has asserted that the Project and its route is anathema to HOME's religious beliefs and practices to allow its land to be used for the transport of LNG due to the harmful environmental effects of the fracking process to obtain LNG in the first place, effects from creating a route for the Project, and the overall climate effects of burning fossil fuels, which includes LNG. Order at 11. HOME members testified that walking over the project on their own land for the Solstice Sojourn would be "unimaginable" and destroy the meaning of the religious practice. Order at 12. Two days after HOME submitted its request, TGP also sought rehearing claiming the GHG Conditions were not within the Commission's authority to impose as it constituted a "major question." Order at 15.

The Commission affirmed the CPCN Order finding of public necessity for the Project reasoning that TGP's precedent agreements for 100% of design capacity were sufficient no matter the end use of the LNG. Order at 9. The Commission explained export precedent agreements are simply one input into the assessment of present and future public convenience and necessity. Order at 9. The Commission reasoned that the TGP precedent agreements are sufficient to demonstrate domestic benefits because they secure availability of LNG in the New Union for the future. Order at 9. The Commission did not put any significant weight on the LNG's end use. Order at 9. The Commission determined the Project provided transportation for domestically produced gas to some domestic customers while filling additional capacity at the International New Union City M&R Station. Order at 9.

Then, the Commission denied rehearing on HOME's claims that the CPCN Order should have been denied. Order at 10. The Commission found TGP had taken sufficient steps to minimize adverse economic impacts on landowners and surrounding communities given the

common use of eminent domain in the construction of pipelines. Order at 10. Next, the Commission found HOME failed to demonstrate the Project route would create significant impacts on its property. Order at 10. The Commission then rejected HOME's implication to ascribe extra weight to environmental harms or uses on HOME's property which the Commission reasoned would be unjust and preferential to certain religions. Order at 10, 11.

The Commission concluded that the impacts on HOME's religious practices are not substantial and rejected HOME's assertion that the CPCN Order must be reviewed under strict scrutiny. Order at 13. For these reasons, the Commission rejected HOME's claim that the CPCN Order violated the RFRA. Order at 13. No party disputes that rerouting the Project through the alternate route would result in greater environmental harm and "burden" HOME's religious beliefs. Order at 13. After determining mitigation measures are within the Commission's discretionary authority and that upstream as well as downstream impacts could not be significant absent clear guidance, the Commission denied HOME's request for rehearing. Order at 19.

Separately on rehearing, TGP argued the Commission acted beyond its scope of authority in attaching GHG Conditions. Order at 15. TGP contends the attachment of the GHG Conditions addressed "major questions" and was not within the Commission's authority under the NGA. Order at 15. In opposition to TGP's claim, the Commission reasoned the GHG Conditions were a continuation of its long-standing practice under the NGA requiring the Commission to attach conditions to mitigate environmental harms. Order at 17, 18. Additionally, the Commission reasoned the NGA provided it with sufficient authorization to attach the GHG Conditions in the CPCN Order. Order at 18. Citing its scope of authority and long-standing precedent under the NGA, the Commission denied TGP's request for rehearing. Order at 18.

On May 19, 2023, the Commission issued the Rehearing Order which affirmed the original CPCN Order and denied both HOME and TGP's requests for rehearing. Order at 2.

#### **H. HOME and TGP File Action for Appeal with the Court of Appeals.**

On June 1, 2023, HOME and TGP both filed actions for appeal which this court consolidated under Docket 23-01109. Order at 1. HOME petitions for review of the Commission's Orders based on three issues. Order at 2. First, HOME disputes the Commission's determination that TGP demonstrated a public need for the Project given the fact that the Project will export approximately 90% of the gas to Brazil. Order at 2. Second, HOME takes issue with the Commission's determination that routing the Project across HOME property does not violate the RFRA. Order at 2. Third, HOME opposes the Commission's determination not to require upstream and downstream mitigation. Order at 2.

TGP's independent petition for review of the Commission's Orders takes issue solely with the GHG Conditions imposed in the CPCN Order, which TGP contends the NGA does not authorize the Commission to impose. Order at 2. On June 15th, this United States Court of Appeals for the 12th Circuit ordered the parties to brief the following issues. Order at 2, 3.

#### **SUMMARY OF THE ARGUMENT**

The court should only disturb the Commission's finding of public convenience and necessity insofar as the Commission found the Project needed if the Commission acted without substantial evidence or arbitrarily and capriciously. *Myersville Citizens for a Rural Cmty., Inc. v. F.E.R.C.*, 783 F.3d 1301, 1308 (2015). Factual findings such as the Commission's finding of need are conclusive and are supported by substantial evidence. 15 U.S.C. §717r(b). The Commission's Certification of New Interstate Natural Gas Pipeline Facilities outlines the criteria it considers in determining whether to issue a CPCN. Certification of New Interstate Natural Gas Pipeline

Facilities, 88 F.E.R.C. ¶ 61,227 (1999), *clarified*, 90 F.E.R.C. ¶ 61,128, *further clarified*, 92 F.E.R.C. ¶ 61,094 (2000) (Certificate Policy Statement). The threshold determination for the Commission is whether the applicant has shown a market need which can be substantiated by precedent agreements for full subscription. *Myersville*, 783 F.3d at 1311. Guided by the Certificate Policy Statement, the Commission found TGP's precedent agreements indicated the project was fully subscribed and thus met the threshold for establishing need.

Section 7 does not prohibit the Commission from considering export precedent agreements. *City of Oberlin v. F.E.R.C.*, 39 F.4th 719, 726 (2022). Rather, "export precedent agreements are simply one input into the assessment of present and future public convenience and necessity." *Id.* at 727. Following the *Oberlin* court's reasoning, the Commission based its finding of need on TGP's precedent agreements which indicated additional transportation services were needed, no matter the LNG's end destination.

Within the Commission's analysis to approve a CPCN, the Commission considers whether a project has any potential adverse impacts. 88 F.E.R.C. ¶ 61,227, at 61,747. If there are impacts, the Commission then evaluates whether that harm can be minimized. *Id.* This minimized harm is then weighed against the benefits the project would have. *Id.* On balance, the Commission reasonably determined the Project's myriad of public benefits outweighed its minimized and minimal adverse harms.

The Project provides transportation for domestically produced gas, LNG to domestic customers, and even fills additional capacity in the Northway Pipeline. Even looking down the line, past the Project's present benefits, and into future public convenience and necessity, the Commission found the Project did not just have potential, no, rather, the Project outrightly preserved future availability of LNG in New Union.

The conditions the Commission so carefully imposed in the CPCN Order will ensure TGP minimizes its Project's adverse environmental impacts to less than significant levels. Additionally, TGP's commitment to minimizing their Project's adverse harms despite HOME's resistance illustrates the lengths TGP is willing to go to ensure its Project is an overwhelming benefit to the public. TGP stipulated to expediting construction of the Project's pipeline which will lay underneath HOME's property in order to accommodate their Solstice Sojourn. Further, TGP will restore the loss of trees and other forms of vegetation due to safety concerns by planting new trees on HOME's property. Moreover, TGP's success in negotiating easement agreements with approximately 60% of landowners along the route solidifies their commitment to minimizing the Project's effects.

HOME cannot succeed on its RFRA claim because it cannot establish a prima facie claim. To establish a prima facie claim under the RFRA, HOME must prove that its religious exercises are being substantially burdened by the government. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008). A substantial burden exists if and only if the government forces individuals to make a choice between practicing a "tenet" of their religion and receiving governmental benefits or is being coerced to act contrary to their beliefs by the threat of criminal or civil sanctions. *Id.* at 1070. No facts suggest that the Commission is withholding a governmental benefit in exchange for support from HOME to allow the Project. Also, no criminal or civil sanctions have been levied on HOME to compel it to support the Project.

Even if strict scrutiny is applied using the compelling interest test, HOME's argument fails because the Project is a compelling governmental interest and that interest is being achieved through the least restrictive means. 42 U.S.C. 2000bb-1(b)(1)-(2). The government has a "fundamental" and "overriding interest" to provide new and cleaner sources of energy to its

citizens and to improve existing systems that would expand access to current and new energy consumers. *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 604 (1983). Using the least restrictive means, means that the government lacks other means of achieving its desired goal without imposing a “substantial burden on the exercise of religion.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). The Commission determined that using the alternate route would be too costly and cause more environmental damage.

The GHG Conditions attached to the construction of the Project are within the Commission’s authority and is not a Major Question because it has clear congressional authorization and is not claiming a power that would have vast economic or political significance. An agency claims powers of “vast economic or political significance” when that power seeks to control a significant portion of the American economy or attempt answer a major political issue that congress would have likely reserved for itself. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609-10. The power that the Commission is using comes from section 7(e) of the NGA, which is being used in a localized and specific way by only attempting to reverse the adverse environmental effects of the construction of the project.

An agency has clear congressional authorization when the provision it points to for its power is not “ambiguous” and it can point to more than a “plausible textual” explanation for that provision. *West Virginia*, 142 S. Ct. at 2609. Section 7(e) is not a “gap filler,” as it fits within the overall statutory scheme and is central to determining issuance of a CPCN. *Id.* at 2610. The Commission’s use of section 7(e) is within the focus and meaning of the NGA and is not being used to solve a newer problem. *Id.* at 2611-12 & 2623. In fact, the Commission’s interpretation of section 7(e) in this case is the same as it has been for decades now. Fed. Energy Comm’n, FERC Updates Policies to Guide Natural Gas Project Certifications (2022), <https://www.ferc.gov/news->

events/news/ferc-updates-policies-guide-natural-gas-project-certifications. The Commission’s attachment of GHG Conditions is within the scope of its mission as it pertains to the certification of new natural gas facilities. *West Virginia*, 142 U.S. 682 at 2612-13.

The Commission has the power to set specific conditions when granting authorization for a CPCN. 15 U.S.C. § 717f(e). Moreover, an agency is not obligated to impose action on an environmental effect if there is no clear statutory authority to act on that information. *Dep’t of Trans. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

Acting within its discretionary authority, the Commission decided to refrain from attaching mitigation measures for downstream and upstream GHG Conditions absent clear guidance on how to measure their significance.

#### **STANDARD OF REVIEW**

Under the Administrative Procedure Act, a reviewing court is “limited to determining” whether the Commission’s findings are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Myersville*, 783 F.3d at 1308 citing 5 U.S.C. §706(2)(A). The Commission’s factual finding of public convenience and necessity for the Project is conclusive if supported by substantial evidence. 15 U.S.C. §717r(b). The court must set aside the Commission’s determination that the benefits of the Project outweighed the environmental social harms if the decision was “arbitrary and capricious or otherwise contrary to law.” *Oberlin*, 937 F.3d at 605. The Commission’s determination that the route of the Project over HOME’s property does not violate their religious rights under the RFRA is “a question of law which is subject to *de novo* review.” *Navajo*, 535 F.3d at 1067. As well as the issue of whether the Commission’s determination that the GHG Conditions imposed on TGP is not a “Major Question” within its authority under the NGA is a question of law that is subject to *de novo*

review. *Sinclair Wyoming Refining Co. v. United States Environmental Protection Agency*, 887 F.3d 986, 990 (10th Cir. 2017). Review of an agency’s decision to not impose conditions addressing GHG impacts is arbitrary and capricious. *Sierra Club v. F.E.R.C.*, 867 F.3d 1357, 1367 (D.C. Cir. 2017).

## ARGUMENT

### **I. The Commission’s Finding of Public Convenience and Necessity was not Arbitrary and Capricious Insofar as Its Finding of Need was Substantiated by TGP’s Precedent Agreements which Subscribed the Project and Indicated Need.**

The Commission must issue a CPCN if a proposed project is required either by present or future public convenience and necessity. 15 U.S.C. §717f(e). As a threshold matter, “the applicant must show that there is market need for the project.” *Myersville*, 783 F.3d at 1309; *see* 88 F.E.R.C. ¶ 61,227, at 61,745. The criterion for market need is “whether the pipeline will be self-supporting;” An argument that a project only serves a pipeline developer’s motive for profit, rather than any public need, misunderstands the test. *Sierra Club*, 867 F.3d at 1379.

Precedent agreements are “long-term contracts with shippers who would use the pipeline to transport natural gas.” *Oberlin*, 39 F.4th at 722. Precedent agreements demonstrating that a project is fully subscribed, constitutes substantial evidence supporting a finding of market need. *Myersville*, 783 F.3d at 1311. Nothing in Section 7 prohibits the Commission from considering export precedent agreements, which are simply one consideration in the public convenience and necessity analysis. *Oberlin*, 39 F.4th at 726-727.

In finding need, the Commission adequately relied on the fact that the precedent agreements demonstrated the project is fully subscribed at 100% design capacity. In *Myersville*, the court ruled the Commission’s finding of need was substantiated by the evidence before it which demonstrated the project was fully subscribed through three precedent agreements. 783 F.3d at 1310-1311. In parallel here, the Commission found TGP’s precedent agreements with

International and NUG, like those in *Myersville*, fully subscribed the Project—which no commenter contests.

Importantly, in finding the Commission did not have to look beyond precedent agreements in establishing need, the court in *Myersville* reasoned against considering a general market study which had no relation to a project's intended service market. 783 F.3d at 1311. While not required, even if the Commission evaluated the decreased market demand for East of Old Union, this evidence, like the general market study in *Myersville*, had no bearing on need in the Project's intended market of New Union.

The Commission reasonably explained that TGP's precedent agreements demonstrated additional transportation services were needed in New Union, regardless of the LNG's end use. Significantly, the court in *Oberlin* found it is entirely irrespective of where gas is ultimately consumed when export precedent agreements evidence the need for additional domestic capacity to transport gas to shippers. *Oberlin*, 39 F.4th at 727. Following the court's reasoning in *Oberlin*, TGP's precedent agreements illustrated to the Commission that additional domestic transportation services were needed in New Union and would even fulfill the additional capacity needed in the currently undersubscribed Northway Pipeline.

As the court in *Oberlin* was mindful to emphasize, nothing in NGA Section 7 prohibits the Commission from considering export precedent agreements which are simply one input in the public convenience and necessity analysis. 39 F.4th at 726-727. While the court in *Oberlin* was satisfied with the Commission's explanation that in finding need, it was directed under NGA Section 3 to credit export precedent agreements with countries the United States has a free trade agreement with, a Section 3 analysis is not dispositive of finding public convenience and necessity under Section 7 anyway. *Id.* at 727. Echoing the *Oberlin* court, the Commission

explained that TGP's precedent agreements are simply one consideration that factored into the Commission's analysis of public convenience and necessity.

The Commission's finding of need was reasonably based on TGP's precedent agreements which fully subscribed the Project and expressed the need for domestic transportation services. Consequently, the court should affirm the Commission's finding of public convenience and necessity insofar as its finding of need was not arbitrary and capricious, nor unsupported by substantial evidence.

**II. The Commission's Finding that the Benefits from the Project Outweighed the Harms Was Not Arbitrary and Capricious Because the Commission Reasonably Considered the Benefits Against the Project's Minimized Potential Harms.**

The court must review the Commission's Order, including the approval of the Certificate application under an arbitrary and capricious standard. *B&J Oil & Gas v. F.E.R.C.*, 353 F.3d 71, 75-76 (D.C. Cir. 2004). The role of the Court of Appeals is to ensure that the Commission's decision-making is "reasoned, principled, and based upon the record." *Penn. Office of Consumer Advocate v. F.E.R.C.*, 131 F.3d 182, 185 (D.C. Cir. 1997). The Court must look at whether the Commission's decision was made by considering the relevant factors and if there has been a clear error of judgment. *Minisink Residents for Env't Pres. & Safety v. F.E.R.C.*, 762 F.3d 97, 106 (D.C. Cir. 2014).

Tracing the steps outlined in the Certificate Policy Statement, the Commission, after establishing market need, balanced the Project's several public benefits against its potential adverse effects. 88 F.E.R.C. ¶ 61,227, at 61,744. From the balancing act, the Commission's goal is to consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded

exercise of eminent domain in evaluating new pipeline construction. *Id.* at 61,737. The main objective is for the applicant to create a project where the public benefits outweigh the potential adverse effects, after efforts have been made by the applicant to mitigate the effects. *Id.* at 61,748. Only the remaining adverse residual effects are weighed against the Project's benefits. *Id.* at 61,747.

A. The Project Provides Real Benefits to the Public of New Union.

Indicators of public benefits can be quite diverse and include meeting an unserved demand, eliminating bottlenecks, access to new supplies, lower costs to customers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives. 88 F.E.R.C. ¶ 61,227, at 61,744. When evaluating public benefit, precedent agreements will always be “important, significant evidence of demand for a project.” *Minisink*, 762 F.3d at 111 n.10 (D.C. Cir. 2014).

The Commission properly considered the real benefits that TGP has to the domestic public that far outweigh the potential adverse impacts the Project causes to any environmental or social harms. First, the Project provides new interconnects by delivering 500,000 of Dth per day of natural gas with the NUG terminal and the NorthWay Pipeline. Second, the Project would provide an unserved demand in the New Union where currently there are areas without access to natural gas. Third, the Project expands access to new sources of natural gas supply in the United States. Fourth, the system provides competitive alternatives which optimize existing systems for the benefit of both current and new customers. Fifth, the Project increases electric reliability by fulfilling capacity in the undersubscribed NorthWay Pipeline. And lastly, the Project advances clean air objectives through providing opportunities to improve regional air quality from using cleaner burning natural gas in lieu of dirtier fossil fuels.

Additionally, TGP executed binding precedent agreements for transportation service with International and also with NUG. As stated in *Minisink*, precedent agreements are recognized as an important public benefit because it evidences demand for a project. 762 F.3d at 111 n.10. TGP has precedent agreements that cover the full amount of gas that would be produced, meaning there is a significant demand for the project that would benefit the public benefit of unserved demands. The end result of these precedent agreements does intend for the LNG to make its way to Brazil, however, similar to *Oberlin*, the precedent agreement can be considered, regardless of the destination. *Oberlin*, 937 F.3d at 728. As the Commission reasoned, the precedent agreements created by TGP are probative of domestic benefits because they secure the availability of LNG in New Union for the future. This goes above and beyond the mere potential expectancy the court found sufficient for the Commission to rely on in *Oberlin* when ascertaining whether export precedent agreements were probative of domestic benefits.

The majority of indicators used as examples to measure public benefits for the approval of the application in the Certificate Policy Statement are used to measure the public benefits the Project would bring. From catering to the unserved demand of the New Union to advancing clean air objectives. The Commission made its decision to approve the application based upon the record set before them.

**B. TGP Minimized the Adverse Impacts the Project had on HOME and the Environment.**

Part of the balancing act that the Commission partakes in considering the approval or denial of the application is determining whether the applicant has made efforts to eliminate or minimize any adverse effects. 88 F.E.R.C. ¶ 61,227, at 61,745. If residual adverse effects on impacted groups are identified after efforts have been made to minimize them, the Commission

will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. *Id.*

A commission does not “close its eyes” to the possibility of an alternative project when it openly considers the alternate but finds it to not be as effective as the proposed project. *Minisink*, 762 F.3d at 110. Residents of the town of Minisink argued against the approval of a project considered by the Commission because they believed that the alternative placement of the project was “economically, environmentally, and operationally” superior. *Id.* at 106. The court found that the Commission satisfied its obligation to consider the alternative route because the Order outlined the exploration of this alternative route. *Id.* at 107. After exploring this alternate route, the Commission reasoned that there were more significant environmental impacts associated with the alternative because it would require the replacement of seven miles of the existing pipeline. *Id.* at 103, 107. The court held that the Commission’s approval was not arbitrary and capricious because the Commission did not “close its eyes” to the issue of the alternative by giving the alternate proper consideration. *Id.* at 110.

There is an alternative route that TGP could use for the Project that would circumvent the HOME property. However, this route would pass through Misty Top Mountain Range which adds over \$51 million in construction costs and causes more objective environmental harm by traveling an additional three miles. The alternate route would run through a more environmentally sensitive ecosystem in the mountains. This route was not adopted by TGP for the reasons listed above and having the Project run through HOME property, when weighed against the alternate route, overwhelmingly becomes the least harmful alternative. Similar to *Minisink*, the Commission did not close its eyes to the suggestion of the alternative route. The

Commission properly considered and assessed the impact and effects that the alternative route would have on the environment and decided to continue with the proposed project.

TGP made efforts to eliminate or minimize the adverse effects the Project has on the landowners and communities, as well as the harm this Project brings to the environment. TGP made changes overall to 30% of the proposed route to accommodate concerns from landowners. TGP also negotiated mutually acceptable easement agreements with landowners for the Project. Somewhere under 60% of landowners signed easement agreements with TGP. Minimizing the project's effect on HOME, TGP agreed to bury the Project entirely and expedite construction "to the extent feasible" across the HOME property. Due to concerns about the quality of their land, harm to the environment, and religious practices, TGP estimates that it will complete the route within the HOME property within a four-month period. Also, as a part of the GHG Conditions, TGP agreed to replace an equal number of trees that will be removed during the construction of the Project, use electrical equipment, purchase electricity through renewable sources, and input "green" steel pipelines from zero-net manufacturers. These steps that TGP will take with the implementation of the pipeline are all remedial environmental actions to combat the potential adverse effects on landowners and environment.

Although TGP has not signed easement agreements with over 40% of landowners along the route and this project could bring some amount of harm to the HOME's use of their own property, the Commission reasonably weighed and evaluated the public benefit against the adverse effects. Here, there is no "clear error" of judgment because the Commission had considered all relevant factors, both the benefits and the potential negative effects to make its decision.

C. The Commission's Finding was Reasonable Because the Environmental and Social Harm was Minimal due to the Efforts from TGP and the Commission Minimizing these Impacts.

The Commission must examine whether the Project has potential adverse effects and if it does, balance these against the public benefits it brings. 88 F.E.R.C. ¶ 61,227, at 61,749. The more interests adversely affected or more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact. *Id.* The adverse effects at issue here are the impacts on landowners and communities and environmental impacts the Project would create.

Pipeline applicants are expected to take all appropriate steps to minimize the need to use eminent domain to accommodate landowners. 88 F.E.R.C. ¶ 61,227, at 61,744. The Certificate Policy also notes that in many cases, pipeline applicants will not be able to acquire all the necessary right of way negotiations, making the need to use eminent domain. *Id.* at 61,749. To determine the certificate of public convenience and necessity, the Commission will consider the steps the pipeline applicant takes with eminent domain, along with potential impacts to weigh against the benefits of a proposal. *Id.* at 61,747.

The impact on landowners, communities, and the environment is minimal. The Project passes through two miles of the HOME's property. This requires 2,200 trees and many other forms of vegetation to be removed from the landowner's property. Due to safety reasons, many of these trees cannot be replaced with new trees along the route. Compared to the impact this construction and installation of the Project would cause to the landowner's sincere religious practice would cause some disruption, but the Commission weighed these disruptions against the public benefits and the efforts to minimize the adverse impacts. After considering both sides, the

Commission came to the reasonable conclusion that the benefits significantly outweigh these harms.

To conclude, TGP tried to negotiate easement agreements with HOME and many other landowners. Even though 40% of landowners along the route, including HOME, have not signed easement agreements, TGP took steps to minimize the effects to HOME and the environment by agreeing to bury the Project underground and constructing the HOME portion faster to accommodate the landowner. The Commission has properly looked through the potential adverse impacts along with minimizing eminent domain by signing easement agreements with approximately 60% of landowners along the route. The Commission's decision was not arbitrary or capricious because the harm minimized by TGP's efforts were outweighed by the significant public benefits the project brings to the New Union.

**III. The Commission's Decision to Route the Project Through HOME's Property does not Violate the RFRA, Because HOME Cannot Establish a Prima Facie Claim Under the RFRA and the Commission has a Compelling Interest, and the Commission is Using the Least Restrictive Means to Achieve that Interest.**

The plaintiff can be successful only if they establish a prima facie claim by providing enough evidence to prove two important elements. *Navajo*, 535 F.3d at 1068. Those elements include the plaintiff's activities being burdened by the government action are an "exercise of religion" and that the governmental action substantially burdens those activities. *Id.* If the plaintiff cannot provide enough evidence to establish these elements, then their claim fails. *Id.* However, if the court finds that a prima facie case is established, then the court applies the compelling interest test. *Id.*

The Commission did not violate the RFRA when they determined the route through HOME's property because it furthers a compelling governmental interest, and they are using the least restrictive means to achieve this compelling interest. When a plaintiff brings a claim under the

RFRA, the statute requires that the judiciary use the “compelling interest test.” 42 U.S.C. 2000bb-1(b). The compelling interest test is an exception in the RFRA, that allows the government to “substantially burden” someone’s exercise of religion if the government can show two elements. *Id.* The government needs to show that the “application of burden” is in “furtherance to a compelling governmental interest,” and it is using the “least restrictive means” to achieve it. 42 U.S.C. 2000bb-1(b)(1)-(2). Here, HOME cannot show that there is a substantial burden on their religious activities. Additionally, the Commission furthers a compelling governmental interest by approving the Project and uses the least restrictive means.

A. HOME Fails to Establish a Prima Facie Claim Under the RFRA Because They Lack Evidence to Show the Project Causes a Substantial Burden on Their Religious Activities.

HOME fails to establish a prima facie claim under the RFRA, because it cannot show that the Project causes a substantial burden on its religious activities. For HOME to establish a prima facie claim it needs to provide evidence to prove two elements. *Navajo*, 535 F.3d at 1068. First, HOME must show that the activities that it claims are being burdened by the government are an “exercise of religion.” *Id.* Second, the government’s actions must “substantially burden” that exercise of religion. *Id.* The RFRA subscribes to section 8 of the Religious Land Use and Institutionalized Persons Act to define “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. 2000cc-5(7)(A), *see* 42 U.S.C. 2000bb-2(4).

It is not up to the courts to decide what a belief is, or even if that belief is central to the system of religious belief. The Supreme Court has repeatedly held that even determining the “centrality” of a person’s religious belief is to “determine the importance” of one’s religious belief. *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular

litigants' interpretations of those creeds.”). HOME could be successful here if it proves that the activities claimed to be burdened are religious activities that are part of its belief system. However, HOME is unable to prove that the government actions “substantially burden” that exercise of religion.

The government can only substantially burden the exercise of religion by forcing persons to choose between practicing a tenet of their religion and receiving governmental benefits or by coercing persons to act contrary to their beliefs by threatening sanctions. *Navajo*, 535 F.3d at 1070. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (explaining an agency ruling forcing a person to either abandon their religious practice or forgo unemployment compensation burdened their free exercise of religion.); *See also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (finding a compulsory attendance law substantially burdened a family's right to free exercise by compelling them to act at odds with their religious tenets or face criminal sanctions.). Anything that falls short of this does not meet the standard under the RFRA. *Id.* HOME is unable to prove that the government actions “substantially burden” their exercise of religion.

Here, HOME alleges that its exercise of religion is “substantially burdened” because the project goes through its property and crosses a sacred path used during a religious practice called the Solstice Sojourn. The Solstice Sojourn requires that on each solstice, the members embark on a ceremonial journey from the temple at the western edge of the property to a sacred hill on the eastern edge. When the Commission became aware, it altered the route by burying the pipeline. HOME, still not satisfied with this alteration, argues that the Project will leave a bare mark and the presence of it crossing the paths would ruin the meaning of the Solstice Sojourn. HOME also argues that the Project's presence in effect is compelling HOME to support fossil fuels.

HOME's arguments do not reach the standards necessary to establish a prima facie claim because it is not being forced to choose between practicing a tenet of their religion or a governmental benefit. *Navajo*, 535 F.3d at 1070. Nothing in the facts suggest there is any governmental benefit a stake. In fact, there is no choice to be made because the Project will be buried, leaving no physical barrier preventing HOME from practicing its religion.

The only other way to establish a prima facie claim under the RFRA is by showing that HOME is being "coerced to act contrary to their religious beliefs under criminal or civil sanction." *Navajo*, 535 F.3d at 1070. Nothing in the facts that suggest that any criminal or civil sanctions are levied against HOME. *Id.* HOME's argument that the Project is "compelling" or "coercing" it to act against its religious beliefs by indirectly supporting fossil fuels is not supported by the case law. There is nothing in the facts to support the conclusion that the Commission is attempting to coerce HOME through criminal or civil sanctions.

At its core HOME's argument is attempting to force the government to conform with HOME's beliefs. The Court has stated that the government cannot be "forced to conduct their own internal affairs" on behalf of anyone group's religious beliefs. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988). If the court were to rule in favor of HOME, it would be forcing the government to accept and change its behavior based on each person's or group's religious beliefs and "the government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 452.

HOME is not able to establish a prima facie claim under the RFRA, as HOME cannot show that it is being forced to choose between a governmental benefit and practicing a tenet of its religion. Furthermore, HOME cannot demonstrate that they are being coerced into acting contrary to its religious beliefs through criminal or civil sanctions.

B. The Project Furthers a Compelling Governmental Interest, Because the Government has a Fundamental and Overriding Interest to Provide Newer and Cleaner Sources of Energy to Its Citizens and the Market.

The Project furthers a compelling governmental interest. A compelling interest is a “fundamental, overriding interest” that “outweighs the burden” that it would cause. *Bob Jones*, 461 U.S. at 604. The compelling interest test is a strict scrutiny test requiring a “more focused inquiry.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). The compelling interest test can be satisfied by applying the statute in question “to the person.” *Burwell*, 573 U.S. at 726. Since the inquiry is more focused the government needs to provide reasoning that “looks beyond broadly formulated interest.” *Id.* at 726-27. The government must show more “particularity” how its “strong interest would be adversely affected” by granting an exception here. *Gonzales*, 546 U.S. at 431.

The Commission notes several compelling governmental interests connected to the Project that would serve several domestic needs, that a religious exemption would severely undermine. The government has a “fundamental” and “overriding interest” to provide new and cleaner sources of energy to its citizens and to improve existing systems that would expand access to current and new energy consumers. *Bob Jones*, 461 U.S. at 604.

HOME asserts that the Commission violated the RFRA, because the Project travels under its property leaving a bare mark with no trees. HOME states that this would prevent it from practicing an important tenet of their religion, the Solstice Sojourn. It argues that having the Project on their property essentially compels them to support all aspects of the fossil fuel industry, which goes against its beliefs. An exception here would prevent the government from approving projects that even had a slight effect on spiritual beliefs. There is no physical barrier preventing them from accessing the sacred hill during the Solstice Sojourn. Therefore, it is a spiritual or mental barrier that HOME says is being violated.

This kind of exception would cause the government to have to bend to the whim of every potential spiritual violation. The Supreme Court has established, that some government programs or actions may conform with one-person religious tenets and may be “deeply offensive to another person.” *Lyng*, 485 U.S. at 452. It would be near impossible for the government to juggle the endless amount of potential conflicting religious beliefs. This would greatly affect the government’s ability and control over the important mission of improving, expanding, and establishing new sources of energy and managing and expanding the market. The court should recognize that the government has a compelling interest in constructing this Project.

C. Because the Commission Determined that Re-Routing the Project Would Be Too Costly and Cause More Environmental Damage, the Project’s Route is the Least Restrictive Means.

The Commission is using the least restrictive means to achieve this compelling governmental interest. The government uses the least restrictive means when it lacks other means of achieving its desired goal without imposing a “substantial burden on the exercise of religion.” *Burwell*, 573 U.S. at 728. The Project has two potential routes, the one that goes through HOME’s property and one that goes around its property through the Misty Top Mountains. It was determined that rerouting the Project would be too costly and burdensome. TGP estimated that the alternate route would cost an extra \$51 million dollars, cause more environmental harm by adding an extra three miles of pipeline and it would go through more sensitive ecosystems.

When the Commission is evaluating a project, it looks to see if the applicant has worked to minimize or eliminate any adverse effects the project may have. TGP states that it can build the HOME section in four months between the solstices. TGP offered to bury the project, which is now required, creating no physical barrier for the Solstice Sojourn. There is no action here that would cause or should cause HOME to “modify their behavior” or prevent it from practicing its

religion. *Navajo*, 535 F.3d at 1092. There is no construction or barrier that would interfere with the Solstice Sojourn. The alternative is too costly, too burdensome, and too destructive.

The Commission is using the least restrictive means possible to accommodate the concerns of HOME. The Commission has made several changes to the project minimizing the impact on HOME. Therefore, the Commission asks the court to recognize this compelling interest, and that the interest is being achieved through the least restrictive means.

**IV. The GHG Conditions Imposed on TGP are not Beyond the Commission's Authority, Because the Commission has Clear Congressional Authorization and This Issue is not one of Vast Political and Economic Significance.**

There is no Major Question in this case, as the Commission has clear congressional authorization to impose these GHG Conditions and is not attempting to address an issue of vast economic and political significance. A "Major Questions Case" is an extraordinary case where there "may be reason to hesitate before accepting the reading of that would, under more "ordinary" circumstances, be upheld." *West Virginia*, 142 S. Ct. at 2609-10. The Supreme Court is very skeptical when an agency asserts "extravagant statutory power over the national economy." *Id.* The Major Question Doctrine addresses the issue of "agencies asserting highly consequential power beyond what Congress could reasonably understood to have granted." *Id.* An agency must point to "clear congressional authorization." *Id.* When it attempts to claim power with "vast economic and political consequences." *Id.* at 2605.

The Major Question Doctrine becomes involved when an agency claims powers of "vast economic or political significance." *West Virginia*, 142 S. Ct. at 2605. The Court states that this is seen when an agency seeks to "control a significant portion of the American economy." *Id.* at 2608. Or when an agency takes it upon itself to address "major policy decisions" that Congress would likely have reserved for itself. *Id.* at 2608. In *West Virginia*, the Court tackles the EPA's Clean Power Plan which attempted to move the American electrical grid from a reliance on coal

to green sources through generational shifting. *Id.* at 2603-04. The Court stated that this was a Major Questions case because the goal of the EPA was to “substantially restructure the American energy market,” calling it “unprecedented power over the American industry.” *Id.* at 2610. The Court described how unlikely it is that an important policy issue would be delegated by Congress to a “rarely used gap filler” provision in the Clean Air Act. *Id.* at 2613.

*West Virginia* clarified that “ambiguous,” “vague,” “oblique,” “modest,” and “subtle” terms do not justify extraordinary claims of power. 142 S. Ct. at 2609. The Court needs more than a “plausible textual basis.” *Id.* at 2609. The Court determines if an agency has clear congressional authorization in several ways. *First*, the court looks at the provision and its place in the “overall statutory scheme” to determine if it is a “gap filler.” *Id.* at 2610. *Second*, the Court examines the “age and focus of the statute” looking to discover if the agency is attempting to solve a new problem with an older statute. *Id.* at 2611-12 & 2623. *Third*, the Court considers the agency’s past interpretations of that statute. *Id.* at 2611-12. *Fourth*, the Court considers whether there is a “mismatch” between the agency’s actions and its assigned congressional mandate and expertise they were given. *Id.* at 2612-13.

This is not a Major Question case because the Commission is not claiming power with vast economic or political consequences. The Commission is not attempting “control a significant portion of the American economy,” it is only attempting to mitigate GHG emissions produced from the construction of the Project. *West Virginia*, 142 S. Ct. at 2608. In addition, the Commission is not attempting to solve a major political question, because CEQ set recommendations in the CEQ Climate Guidance for GHG emissions. The CEQ Climate Guidance recognized that the United States faces a “profound climate crises” that can be reduced by actions from the Federal Government to mitigate GHG emissions. National Environmental

Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1197 (Jan. 9, 2023). The report further recommends that where possible agencies should implement mitigation measures to reduce GHG emissions. *Id.*

Under section 7(e) of the NGA, the Commission has the power to “attach reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). Courts have long recognized when considering the public convenience and necessity the Commission must address any “adverse environmental factors.” *Sierra Club*, 867 F.3d at 1379 (“FERC will balance ‘the public benefits against the adverse effects of the project . . . including adverse environmental effects.’”). The Commission only attached conditions in places where it believes its authority applies.

These Conditions are focused and localized to the GHG emissions that would be produced from the construction of the project. In fact, the Commission refused to go further and impose GHG conditions on the upstream and downstream effects, because it did not know if it was in its authority. These GHG Conditions are reasonable as the Commission prioritizes using electric-powered tools and machinery wherever practical and to use all green energy sources for the construction when available. The Commission is not attempting to “solve the climate crisis” as TGP suggest or attempting to control a significant portion of the American economy but is only attempting to combat the adverse environmental effects produced by the construction of the project.

Section 7(e) is not a “gap filler” provision, because it discusses how and when a company receives a CPCN. 15 U.S.C. § 717f. Case law has determined for the CPCN the Commission must balance the public benefits and harms and Section 7(e) is meant to allow the Commission to attach conditions that will lessen these harms. *Twp. of Bordertown v. F.E.R.C.*,

903 F.3d 234, 261 n.15 (3rd Cir. 2018) (“the imposition of special conditions, enforced through permits and adequately supervised could ‘ensure that the measures would be enforced in a manner that properly reduced negative environmental impact.’”).

Section 7(e) was enacted by the congress through amendments to the NGA in 1942. Natural Gas Act, ch. 49, 52 Stat. 824 (1942) (codified as amended at 15 U.S.C. § 717f). Section 7 focuses on the granting of the CPCN for the construction of new pipelines or the extension of existing pipelines. 15 U.S.C. § 717f(c)-(e). Section 7(e) allows the Commission to add terms and conditions to lessen the adverse impacts, thereby balancing out the harms with the benefits and putting it in the public interest and necessity. *Twp. of Bordertown*, 903 F.3d at 261 n.15. These Conditions do not solve a new issue it only lessens the effects of direct environmental harm from the construction of the Project. It has long been recognized that attaching conditions can be used to tackle adverse environmental effects. *Sierra Club*, 867 F.3d at 1373.

At least since 1999 the Commission has issued numerous policy statements involving the environment. Fed. Energy Comm’n, FERC Updates Policies to Guide Natural Gas Project Certifications (2022), <https://www.ferc.gov/news-events/news/ferc-updates-policies-guide-natural-gas-project-certifications>. The Certificate Policy Statement details how it takes the relevant environmental concerns and uses that information to attach conditions on a project so “benefits outweigh the adverse effects.” 88 F.E.R.C. ¶ 61,227 (1999), *clarified*, 90 F.E.R.C. ¶ 61,128, *further clarified*, 92 F.E.R.C. ¶ 61,094 (2000). The Draft 2022 Policy Statement is meant to reaffirm consistent policy, involving environmental effects of projects, but adding that it will clarify how its GHG emissions considerations. Fed. Energy Comm’n, FERC Updates Policies to Guide Natural Gas Project Certifications (2022), <https://www.ferc.gov/news-events/news/ferc-updates-policies-guide-natural-gas-project-certifications>.

There is no mismatch between the GHG Conditions and the mission and expertise that the Congress assigned to the Commission. The Commission was established in 1977 and it inherited its powers from the Federal Power Commission, which is to regulate electric transmissions across stateliness and natural gas pipelines and facilities for transportation, storage, and certification. Lawrence R. Greenfield, *An Overview of the Federal Energy Regulatory Commission and the Federal Regulation of Public Utilities*, Fed. Energy Comm'n. (June 2018), <https://www.ferc.gov/sites/default/files/2020-07/ferc101.pdf>. Section 7 and 7(e) are being used here to certify a new natural gas pipeline which is within its mission. *Id.*

The attachment of GHG Conditions on the construction of the project are not a Major Question and is within the Commission's authority as it has clear congressional authorization and is not claiming power that has vast economic or political significance.

**V. The Decision to not Impose Mitigation Measures on Downstream and Upstream Conditions is not Arbitrary Because the Commission did not have Reasonable Guidance to Properly Consider the GHG Impacts.**

Review of an agency's decision to not impose any conditions addressing GHG impacts is arbitrary and capricious, and the court reviews to ensure "that the agency has adequately considered and disclosed the environmental impact of its actions" *Sierra Club*, 867 F.3d at 1367. Under the NGA, Section 7 unambiguously empowers the Commission to set specific terms and conditions when granting authorization. 15 U.S.C. § 717f(e). ("The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."); see also *id.* § 717b(a) (stating that the Commission may "grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate"). *Twp. of Bordertown*, 903 F.3d at 261 n.15.

An agency does not have an obligation to impose action on an environmental effect if there is no statutory authority to act on that information. *Dep't of Trans. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). In *Public Citizen*, an agency within the Department of Transportation issued an environmental assessment under NEPA without addressing environmental impacts that could be caused from trucks entering the United States from the United States-Mexican border. *Id.* at 761. The Court held that an agency does not need to consider the environmental effects in its decision when the statutory authority is limited over its actions to combat the effects at question. *Id.* at 770.

The Commission reasonably considered the GHG emission estimates from the EIS and decided not to act without concrete guidance on how to attach conditions addressing upstream and downstream effects. Due to the Commission's guidance on conditions to address GHG impacts not yet being final, having no determination on giving GHG conditions in this case is reasonable logic for the agency to follow. The CEQ Climate Guidance document is specifically given for NEPA context, it is not guidance for the Commission. National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023). Even though the Commission generally looks to the CEQ to follow, it is independent of having to follow these specific rules.

The Commission decided to not impose any conditions because it is still in proceedings on determining the mechanics of how it will conduct significance determinations for GHG emissions going forward. The guidance that the Commission is drafting is not finalized and due to the guidance not being finalized internally, it is reasonable to not decide on GHG impacts for upstream and downstream of the pipelines yet. In contrast, the Commission is able to attach conditions to GHG impacts on the construction aspect of the project because those GHG impacts

are more readily determinable from the actual construction of the project because the issues stemming is more directly related to the Commission's authority.

Furthermore, the Commission only has conditional authority and would be going beyond its authority by burdening TGP with GHG conditions that are still not made clear by the Commission and other governmental entities' guidance. To address the lack of action for downstream emissions, the EIS completed by TGP shows a skewed estimate of GHG impacts. The EIS estimate for downstream effects assumes the maximum capacity of transported gas for 365 days a year, which is unlikely to reflect the total amount because projects are designed for shoppers' peak day use. Additionally, the downstream gas from the project could actually lower or result in no change in the total CO<sub>2</sub>e emissions by displacing other fuels with the gas or displace gas that is transported via different means.

Moreover, the Commission considered upstream emissions and found that they are not relevant here. Upstream emissions in the past have been considered on a case-by-case basis and due to unknown factors, it is difficult to determine factors such as the location of the supply source or whether the gas comes from a new or existing production. Here, the HFF gas is already being produced and this new pipeline will be just transporting the gas to different destinations. Because of this analysis, the Commission concluded that there is no reasonably foreseeable significant upstream consequence of the approval of the TGP Project.

To conclude, the Commission decided not to address the upstream and downstream impacts because of the lack of specific and clear guidance. The Commission considered these impacts by looking at if upstream impacts can be properly addressed. By deciding not to act, the Commission made a reasonable decision that was not arbitrary.

## **CONCLUSION**

For the foregoing reasons, this court should affirm the Commission's Orders.