C.A. No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH
Petitioner

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

On Petition for Review of an Order of the
Federal Energy Regulatory Commission in Docket No. TG21-616-000

Brief of Respondent, FEDERAL ENERGY REGULATORY COMMISSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Statutes

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

The Holy Order of Mother Earth ("HOME") and Transnational Gas Pipelines, LLC ("TGP") petition this Court for review of the Order Denying Rehearing ("Rehearing Order") entered May 19, 2023, by the Federal Energy Regulatory Commission ("FERC"), Nos. 23-01110 and 23-01109 (consolidated cases). HOME and TGP each filed timely petitions for review of the Rehearing Order on June 1, 2023. *See* 15 U.S.C. § 717r(b). This Court has jurisdiction pursuant to 15 U.S.C. § 717r over TGP's and HOME's petitions for review of the Rehearing Order.

STATEMENT OF THE ISSUES PRESENTED

1. Was FERC's finding of project need for the AFP arbitrary and capricious or not supported by substantial evidence when ninety percent of the gas will be exported?
2. Was FERC's finding that the benefits of the AFP outweighed the harms arbitrary and capricious?
3. Was FERC's decision to route the AFP under HOME property in violation of RFRA?
4. Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA?
5. Was FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

STATEMENT OF THE CASE

I. The TGP Project and the American Freedom Pipeline

On June 13, 2022, TGP filed an application under § 7(c) of the NGA, 15 U.S.C. § 717f(c), and Part 157 of FERC's regulations, 18 C.F.R. § 157 (2023), to construct and operate the proposed American Freedom Pipeline ("AFP"). R. at 4. The AFP would comprise an approximately 99-mile-long, 30-inch-diameter interstate pipeline and related facilities originating from a receipt point near the Hayes Fracking Field ("HFF") in Old Union. *Id.* The

AFP would carry liquid natural gas ("LNG") from the receipt point to a proposed junction with the existing Northway Pipeline in New Union, resulting in a connection to an existing TGP gas facility in New Union City (the "TGP Project"). *Id.* at 4, Ex. A. The AFP would carry a daily maximum of 500,000 dekatherms ("Dth") of firm transportation service. *Id.* at 4. The project will cost TGP $599 million. *Id.* at 6. It is undisputed that there will be no negative impacts on any existing nearby pipelines or their customers including TGP's existing customers. *Id.* at 7. TGP will be able to fund the project without subsidization from its customers. *Id.*

TGP held an open season for service on the TGP Project in early 2020 and executed binding precedent agreements that, taken together, used one hundred percent of the pipeline's design capacity. *Id.* at 6. The AFP precedent agreements would not increase production at HFF but would instead reroute approximately 35% of the production at HFF away from the current shipping route through the Southway Pipeline in Old Union. *Id.* Evidence from TGP indicates that LNG demands east of Old Union are declining, so the reduction in transport on the Southway Pipeline would not lead to gas shortages. *Id.*

International Oil & Gas Corporation ("International") is a Brazilian company which executed a binding precedent agreement for 450,000 Dth per day of firm transportation service in the TGP Project. *Id.* at 6. International operates a metering and regulating ("M&R") station in New Union City (the "New Union City M&R Station"). *Id.* International intends to export ninety percent of the TGP project LNG to Brazil, a country with whom the United States does not have a free trade agreement. *Id.* at 9. The LNG will be processed at the New Union City M&R Station and exported on LNG tankers. *Id.* at 6, 8. The remaining 50,000 Dth per day of firm transportation service will be purchased by New Union Gas and Energy Services Company ("NUG") for domestic use. *Id.* at 6.

TGP's application to FERC explained that the AFP would serve multiple domestic needs. *Id.* at 8. In addition to providing 500,000 Dth of LNG per day to the Northway Pipeline, the AFP would also connect LNG to areas in New Union that currently do not have access to LNG. *Id.* The AFP would also fulfill capacity in the undersubscribed Northway Pipeline and could improve regional air quality by replacing "dirtier" fossil fuels with cleaner-burning gas. *Id.*

II. Effects on HOME's Property

The AFP would pass under approximately two miles of property owned by HOME, a New Union not-for-profit religious organization. *Id.* at 5, 9. HOME claims that the fundamental tenet of its religious beliefs is that humans should prioritize natural preservation over all other interests, especially economic interests. *Id.* at 11. In a practice called the Solstice Sojourn conducted every summer and winter solstice, HOME members journey from a temple on the western border of the land to a site in the foothills of the Misty Top Mountains on the eastern border of the property, then return along a different path. *Id.* The Solstice Sojourn path would cross the proposed route of the AFP in both directions. *Id.* TGP estimated that rerouting the AFP over the Misty Top Mountains to avoid HOME's property would entail an additional three miles of pipeline construction and $51 million in construction costs and cause greater environmental damage to the mountain ecosystem. *Id.* TGP will remove trees along the AFP route through HOME's property and will replant an equivalent number elsewhere. *Id.* at 10. A CPCN condition requires the AFP to be buried along the entire span where it crosses HOME's property, eliminating any physical barriers to HOME's use of their land. *Id.* at 12. TGP intends to expedite construction of the AFP over a four-month period to avoid the solstices. *Id.* at 10, 13. TGP made changes to over thirty percent of the AFP route to address landowner concerns and negotiate

easement agreements. *Id.* at 10. TGP will need to exercise eminent domain authority to acquire the AFP right of way from over forty percent of landowners along the pipeline route. *Id.*

III. The GHG Conditions

The CPCN Order imposed GHG Conditions intended to mitigate the GHG impacts of the TGP Project. Several conditions aimed to mitigate GHG impacts from pipeline construction, including: 1) replanting an equal number of trees as those removed during construction, 2) using electric-powered equipment wherever practical, 3) purchasing only steel pipeline segments produced by net-zero steel manufacturers, and 4) purchasing electricity for construction from renewable sources where such sources are available. *Id.* at 14. FERC estimated that these GHG Conditions would reduce the AFP's average annual construction emissions from 104,100 metric tons of carbon dioxide equivalent ("CO2e") per year to 88,340 metric tons per year of CO2e over the four years of construction. *Id.* at 15.

TGP completed an environmental impact statement ("EIS") as part of the Project's review as required by the National Environmental Policy Act ("NEPA"). *Id.* The EIS estimated that if all 500,000 Dth of LNG transported daily on the AFP were sent to combustion end uses, the TGP Project would result in approximately 9.7 million metric tons per year of CO2e. *Id.* FERC declined to impose CPCN conditions mitigating upstream and downstream GHG impacts, citing its ongoing process of developing guidance addressing those types of impacts. *Id.* at 18–19; *see Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022); *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022); *Order on Draft Policy Statements*, 178 FERC ¶ 61,197 (2022).

IV. Proceedings Below

On April 1, 2023, FERC issued an order granting a conditional CPCN (the "CPCN Order") authorizing the TGP Project, under § 7 of the NGA, to construct and operate the AFP. *Id.* at 4. In the CPCN Order, FERC applied the balancing framework from its *Certificate Policy Statement* and found that the benefits of the AFP outweighed adverse effects to existing shippers, other pipelines and their captive customers, landowners, and surrounding communities. *Id.* FERC also found, based on the TGP Project EIS, that the project would result in some adverse environmental impacts. *Id.* However, by implementing staff recommendations as conditions in the CPCN Order, those impacts would be mitigated to less-than-significant levels. *Id.* FERC thus granted authorization to TGP, subject to the conditions in the CPCN Order. *Id.*

HOME and TGP each filed a timely request for rehearing of the CPCN Order. *Id.* at 4–5. HOME sought rehearing for three reasons. First, HOME claimed that the finding of project need in the CPCN Order is unsupported because ninety percent of the gas transported by the AFP will be exported, resulting in insufficient domestic need for the project. *Id.* Second, HOME contended that the Commission's decision to allow the AFP to be routed through HOME's property violated RFRA. *Id.* Third, HOME argued that the Commission's failure to impose CPCN conditions requiring mitigation of upstream and downstream greenhouse gas (GHG) impacts was arbitrary. *Id.* TGP also took issue with the CPCN conditions in its rehearing request, arguing that the conditions requiring mitigation of construction related GHG emissions addressed "major questions" and thus exceeded FERC's regulatory authority. *Id.* On May 19, 2023, FERC issued an order denying both rehearing requests. *Id.* at 2. HOME and TGP each filed a petition for review of the CPCN Order and the Rehearing Order with this Court. *Id.*

SUMMARY OF THE ARGUMENT

FERC correctly found a project need for the AFP despite ninety percent of the gas being exported. FERC also correctly found that the benefits of the AFP outweigh its adverse effects. In this finding, FERC did not violate RFRA by choosing to route the AFP under HOME's property. FERC properly chose to impose GHG conditions mitigating construction impacts of the TGP Project, but not downstream or upstream effects.

First, FERC's order finding a project need for the AFP was not arbitrary and capricious. Binding precedent agreements demonstrate market need for a pipeline. *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015). Here, not only are there up-to-date precedent agreements supporting the AFP, but the AFP is fully subscribed. Although the majority of the gas carried by the AFP will be exported to Brazil, export agreements fall under the umbrella of precedent agreements. Thus, there is "significant evidence of demand for the project." *Id.* Even if the exported gas was ignored, "there is no floor on the subscription rate needed for FERC to find a pipeline is or will be in the public convenience and necessity." *City of Oberlin v. FERC*, 39 F.4th 719, 730 (D.C. Cir. 2022). Because there is substantial evidence establishing a market need for the construction of the AFP, FERC's CPCN Order was proper.

Second, FERC correctly found that the benefits from the AFP outweighed the environmental and social harms. Because the AFP is a financially independent project, FERC next balanced the AFP's potential benefits and harms. Here, FERC found that the AFP's benefits outweighed the harms. R. at 7. So long as FERC's balancing of factors was "reasoned, principled, and based upon the record," its determination must survive judicial review. *Env't Def. Fund v. FERC*, 2 F.4th 953, 968 (D.C. Cir. 2021).

Third, FERC did not violate RFRA by allowing the AFP to be built under HOME's property. To make a prima facie RFRA claim, HOME must show that FERC's order substantially burdened their exercise of religion. *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). Because HOME will experience only a "diminishment of spiritual fulfillment," the AFP will not impose a substantial burden. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1072 (9th Cir. 2008). Even if HOME could make a prima facie case, FERC has a compelling interest in its citizens having "access to an adequate supply of natural gas at reasonable prices" and in the transportation of LNG nationally and internationally. *See East Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004); 15 U.S.C. § 717(a). Because these interests are achieved through the least restrictive means, FERC did not violate RFRA.

Fourth, the GHG Conditions attached to the TGP Project CPCN do not pose a "major question" because they are project-specific and arise out of FERC's core statutory authority under § 7 of the NGA. *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022). FERC has broad, unambiguous statutory authority to impose CPCN conditions, including the mitigation of GHG emissions from certificated projects. Even if the GHG Conditions pose a "major question," FERC has clear congressional authorization under the NGA to mitigate GHG emissions.

Finally, FERC's decision not to mitigate upstream and downstream GHG effects from the TGP Project was not arbitrary and capricious because the effects are not reasonably foreseeable. The Project's upstream effects are not reasonably foreseeable because the AFP will reroute a portion of the current production at HFF instead of causing production to increase. *See Birckhead v. FERC*, 925 F.3d 510, 517–18 (D.C. Cir. 2019). The downstream effects of the Project are not reasonably foreseeable because of a lack of record information about the specific destination or end use of the gas, which also means that FERC's full-burn analysis of the Project

likely overstates the true emissions rate of the pipeline. *See Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 110 (D.C. Cir. 2022).

STANDARD OF REVIEW

A court reviewing a FERC order is limited to determining whether the order was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Myersville*, 783 F.3d at 1308. FERC's factual findings are conclusive if they are supported by substantial evidence. 5 U.S.C. § 717r(b); *Myersville*, 783 F.3d at 1308 (quoting *B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004)). Because a FERC CPCN decision is a matter "peculiarly within the discretion of the Commission," the reviewing court "does not substitute its judgment for that of the Commission." *Myersville*, 783 F.3d at 1308 (internal quotation marks omitted) (quoting *Okla. Nat. Gas Co. v. FPC*, 257 F.2d 634, 639 (D.C. Cir. 1958); and then quoting *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004)). Further, "[w]hen considering FERC's evaluation of scientific data within its technical expertise," courts grant FERC "an extreme degree of deference." *Id.* (internal quotation marks omitted) (quoting *Wash. Gas Light Co. v. FERC*, 532 F.3d 928, 930 (D.C. Cir. 2008)).

A court reviewing a RFRA claim reviews the meaning of RFRA de novo, including the definitions of "religious belief" and "substantial burden" and whether RFRA has been violated as to those definitions. *Thiry*, 78 F.3d at 1495.

ARGUMENT

I. FERC'S DETERMINATION OF PROJECT NEED WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY AND CAPRICIOUS.

FERC's finding of project need was not arbitrary and capricious. The NGA requires FERC to issue a CPCN if the proposed project "is or will be required by the present or future

public convenience and necessity." 5 U.S.C. § 717f(e). Assessing the public convenience and necessity is a two-step analysis. First, the project must be able to "stand on its own financially because it meets a market need." *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (internal quotation marks omitted) (quoting *Myersville*, 783 F.3d at 1309). Second, if FERC finds a market need, "it will then proceed to balance the benefits and harms of the project and will grant the certificate if the former outweigh the latter." *Id.* A reviewing court will only overturn a FERC order if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Myersville*, 783 F.3d at 1308 (quoting 5 U.S.C. § 706(2)(A)). Thus, when FERC's orders are "supported by substantial evidence, [its] finding of fact are conclusive." *B&J Oil & Gas*, 353 F.3d at 76. A reviewing court is limited "to assuring that the Commission's decision-making is reasoned, principled, and based upon the record." *Am. Gas Ass'n v. FERC*, 593 F.3d 1701, 1083 (D.C. Cir. 2002) (quoting *Pa. Off. of Consumer Advoc. v. FERC*, 131 F.3d 182, 185 (D.C. Cir. 1997)).

At issue here is whether the project can stand on its own financially. Here, FERC's determination of project need was based on multiple factors, but primarily precedent agreements. Precedent agreements, including export agreements, provide evidence of project need. *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further certified*, 92 FERC ¶ 61,094 (2000) (*Certificate Policy Statement*) (instructing that "precedent agreements always will be important evidence of demand"). Accordingly, FERC's order finding project need was proper.

A. <u>Existing precedent agreements demonstrate the project need of the AFP.</u>

The *Certificate Policy Statement* outlines the criteria FERC considers in determining whether to issue a CPCN for a proposed project. *Certificate Policy Statement*, 88 FERC at

¶ 61,745–50. Thus, courts have consistently recognized adherence to the *Certificate Policy Statement* as an indicator that a FERC decision is supported by substantial evidence. *See, e.g.*, *Myersville*, 783 F.3d at 1301. This is because under the arbitrary and capricious standard, a reviewing court must accept an agency order that is "within the scope of the authority delegated to the agency by statute." *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The *Certificate Policy Statement* restates the scope of FERC's authority into a set of "analytical steps" for CPCN determination. *See Certificate Policy Statement*, 88 FERC at ¶ 61,745–46 (1999). The *Certificate Policy Statement* instructs that the "'threshold' question the Commission considers is 'whether the project can proceed without subsidies from [the applicant's] existing customers.'" *Myersville*, 783 F.3d at 1308 (citing *Certificate Policy Statement*, 88 FERC at ¶ 61,745). If the "project [can] 'stand on its own financially' through investment by the applicant and support from new customers subscribed" to the project, FERC will find that there is a project need. *Id.* at 1309 (quoting *Certificate Policy Statement*, 88 FERC at ¶ 61,746); *see also Sierra Club*, 867 F.3d at 1379. Thus, the question of project need is often resolved by precedent agreements. *Myersville*, 783 F.3d at 1307–08.

Precedent agreements can provide substantial evidence of project need. In *Myersville Citizens for a Rural Community, Inc. v. FERC*, the court found that outdated precedent agreements are sufficient to establish project need. 783 F.3d at 1311. In that case, the applicant "revised and renamed" precedent agreements from a prior, abandoned project to demonstrate market need. *Id.* at 1310. FERC nonetheless issued a finding of project need, citing the outdated precedent agreements. *Id.* The petitioners argued that FERC's consideration of outdated precedent agreements rendered FERC's "factual finding that the Project was fully subscribed unsupported by substantial evidence." *Id.* The court disagreed, finding that FERC's

considerations of an "affidavit and motions to intervene" produced a determination that was "supported by substantial evidence, despite the absence of more specifics on the revised precedent agreements." *Id.* at 1311.

FERC's finding of project need for the AFP was not arbitrary and capricious. First, it is undisputed that the AFP is not subsidized by existing customers. Thus, the only requirement for project need is that the AFP can stand on its own financially. Unlike in *Myersville*, here, FERC's finding of project need was backed by up-to-date precedent agreements. If project need can be found from precedent agreements that were outdated, lacked specificity, and stemmed from a cancelled project, *Myersville*, 783 F.3d at 1310, AFP's precedent agreements provide even stronger evidence of project need. Accordingly, this court should recognize that the AFP's precedent agreements were substantial evidence of project need.

B. Export agreements are precedent agreements indicative of project need.

Export agreements fall under the umbrella of precedent agreements. *See Oberlin*, 39 F.4th 719; *see also Town of Weymouth v. FERC*, 2018 WL 6921213, at *1 (D.C. Cir. Dec. 27, 2018) (explaining that the mere fact that "a portion of the gas is ultimately diverted for export" does not mean that a CPCN will not "still advance the public convenience and necessity"). Congress expressly recognized in the NGA that some exports are consistent with the public interest. 15 U.S.C. § 717b(c) ("[T]he exportation of natural gas to a nation with which there is in effect a free trade agreement . . . shall be deemed to be consistent with the public interest.").

Section 7 of the NGA regulates creation of new pipelines when "used to transport or sell gas interstate." *Id.* § 717f. If a pipeline will be used to transport gas bound for export, it is instead governed by § 3 of the NGA. *Id.* § 717a(6)–(7). Under § 3, exporters must get the Secretary of Energy's approval to export LNG. *Id.* § 717b(c). The Secretary "shall issue" export to free trade

countries, although the Secretary may bar export if deemed not "consistent with the public interest." *Id.* § 717b(a). "Gas commingled with other gas indisputably flowing in interstate commerce becomes interstate gas itself." *Okla. Nat. Gas Co*, 28 F.3d at 1285. Accordingly, FERC may consider export precedent agreements under § 7 of the NGA in such situations. *Oberlin*, 39 F.4th at 719 .

Export agreements can indicate project need. In *City of Oberlin v. FERC*, the court held that FERC's consideration of an export agreement as part of a finding of project need was not arbitrary and capricious. 39 F.4th at 721–22. There, the petitioners challenged FERC's order because the agency considered precedent agreements under § 7 when some of the LNG was bound for export. *Id.* at 725. The petitioners argued that FERC should only have considered export under § 3. *Id.* The court disagreed, holding that it was appropriate for FERC to treat the pipeline as a § 7 facility. *Id.* at 726. The court reasoned that although some of the LNG was bound for export, the Defendant was "indisputably using its proposed pipeline to transport gas in interstate commerce." *Id.* Thus, § 3 considerations such as "free trade status" and considerations about the "Secretary of Energy's approval" then simply became factors of benefit, but not the controlling doctrine of determination. *Oberlin*, 39 F.4th at 723. The court found that FERC's order applying § 7 was not arbitrary and capricious because "[the] explanation of how the export precedent agreements evidenced domestic benefits demonstrates a 'rational connection between the facts found and the choice made.'" *Id.* at 727 (quoting *United Airlines, Inc. v. FERC*, 827 F.3d 122, 127 (D.C. Cir. 2016)). Lastly, the court found that the pipeline was "in the public convenience and necessity even discounting the [export agreements]" because of the other domestic agreements. *Id.* at 729. The court reasoned that "there is no floor on the subscription rate needed for FERC to find a pipeline is or will be in the public convenience and necessity." *Id.*

at 729–30. Thus, the export precedent agreements were "simply one input into the assessment of present and future convenience and necessity." *Id.* at 727.

FERC's order properly found the AFP's export agreements to evidence project need. Here, like in *Oberlin*, the AFP's export agreements function merely as "one input" into the finding of public convenience and necessity. FERC's order treating the AFP's export agreement as evidence of project need was proper, but FERC could still find project need without considering export. HOME contends FERC should not consider the export agreement because there is no free trade agreement between Brazil and the U.S. R. at 8. HOME improperly implies that § 3 rather than § 7 is the sole applicable provision of the NGA. Just like in *Oberlin*, where the court deemed § 7 analysis to be appropriate for LNG bound for export and domestic use, § 7 applies because the AFP's LNG is commingled gas bound for export and domestic interstate use. Under § 7, FERC's consideration of the Brazilian export agreement was lawful "because an assessment of the public convenience and necessity requires a consideration of all the factors that might bear on the public interest." *Oberlin*, 39 F.4th at 726. Therefore, under § 7, free trade status merely becomes "one input into the assessment" of finding public necessity. *Id.* at 727.

Further, HOME's argument that the Brazil export "cannot alone sufficiently demonstrate project need" is without merit. R. at 8. The question has never been if the export to Brazil alone provides sufficient project need. Just as the court in *Oberlin* would have found project need without the export agreements, here, FERC may make a finding of project need based solely on the domestic precedent agreement. Because "there is no floor on the subscription rate" needed to evidence public necessity, the percent of LNG bound for domestic use is not at issue. *Oberlin,* 39 F.4th at 729–30. Lastly, questioning such details would be against the "[FERC] policy to not look behind precedent or service agreements." *Myersville*, 783 F.3d at 1311. The question of

need turns on whether the AFP was "fully subscribed," *id.*, which is clearly supported here by the precedent agreements.

FERC's determination of project need was not arbitrary and capricious because precedent agreements are strong evidence of project need. Because export agreements fall under the umbrella of precedent agreements and because FERC does not look behind precedent agreements to the ultimate destination or end use of the gas, FERC's approval of the AFP was supported by substantial evidence and was not arbitrary and capricious.

II. FERC'S DETERMINATION OF BENEFIT OUTWEIGHING HARM WAS NOT ARBITRARY AND CAPRICIOUS.

FERC properly balanced the benefits and harms of the AFP. Because FERC adhered to the NGA and the considerations in the *Certificate Policy Statement*, FERC's determination was not arbitrary and capricious.

As stated in Part I *supra*, issuance of a certificate is a multiple step process. *Env't Def. Fund*, 2 F.4th at 961. After finding project need, the second step is to balance the beneficial and adverse effects of the project. *Id.* FERC must consider "whether there are likely to be adverse [effects] on 'existing customers of the pipeline proposing the project, existing pipelines … or landowners and communities affected by the route of the new pipeline.'" *Id.* at 959 (quoting *Certificate Policy Statement*, 88 FERC at ¶ 61,745). "Adverse effects may include increased rates for preexisting customers, degradation in service, unfair competition, or negative impact to the environment or landowners' property." *Id.* (quoting *Myersville*, 783 F.3d at 1309). The NGA authorizes CPCN holders to exercise eminent domain in locations where the project right of way cannot be acquired by negotiation. 15 U.S.C. § 717f(h); *Certificate Policy Statement*, 88 FERC at ¶ 61,749. The *Certificate Policy Statement* requires the benefits of a proposed project to be

"proportional to the applicant's proposed exercise of eminent domain procedures." *Id.* (explaining that this requirement prevents "a few holdout landowners" from vetoing a project); *see, e.g.*, *Oberlin*, 39 F.4th 719, at 729 (finding that the increased use of eminent domain required by a larger pipeline design was outweighed by "[t]he benefit of avoiding future pipeline construction[] and the resulting cost and environmental impacts").

Next, FERC balances the adverse effects against the public benefits of the project. *Certificate Policy Statement*, 88 FERC at ¶ 61,749–50. Public benefits are "quite diverse" and include but are not limited to "meeting unserved demand, eliminating bottlenecks…providing new interconnects …[and] providing competitive alternatives." *Id.* at ¶ 61,748. Projects to serve new demand require a "lesser showing of need and public benefit." *Id.* If public benefit "will outweigh the potential adverse effects," FERC shall issue the certificate. *Id.* So long as FERC's balancing of factors is "reasoned, principled, and based upon the record," it will survive judicial review under the arbitrary and capricious standard. *Env't Def. Fund*, 2 F.4th at 968.

Balancing decisions that fail to adequately consider the benefits and harms presented in the record are arbitrary and capricious. *Env't Def. Fund*, 2 F.4th at 973–76. In *Environmental Defense Fund*, the D.C. Circuit analyzed FERC's balancing considerations. *Id.* at 973–75. FERC had determined the benefit of a proposed project to outweigh the harm even though the project had flat demand, a single precedent agreement between affiliates and would encroach on the territory of five existing pipelines. *Id.* When considering these factors, FERC failed to discuss the balancing in its order. *Id.* at 973–74. On rehearing, FERC merely included several "purported benefits" of the pipeline. *Id.* at 974. The court found FERC's order arbitrary and capricious because FERC's finding of benefit lacked evidence. *Id.* at 974–76.

In contrast to *Environmental Defense Fund*, FERC properly considered the adverse effects of the AFP under the *Certificate Policy Statement.* Here, there were no existing customers, so FERC considered existing pipelines in the region and landowners affected along the route including HOME. Unlike the order in *Environmental Defense Fund*, here, FERC issued an order that specifically addresses the adverse effects to HOME. For example, FERC specified how the current route would require the removal of "approximately 2,200 trees and many other forms of vegetation from HOME property." R. at 10. FERC considered this harm proportionally, stating in its order that most of HOME's tens of thousands of acres would be left untouched. R. at 11. TGP will need to exercise federal eminent domain powers to acquire the AFP right of way from roughly half of the landowners along the AFP route.[1] R. at 10. However, TGP also made changes to over thirty percent of the AFP route to address landowner concerns and negotiate easement agreements. *Id.* Further, FERC has specifically taken steps to ensure the harm done to HOME's property was done in the least harmful manner. *See* R. at 10–11, 14 (discussing how FERC required construction of the AFP to route the pipeline underground, to replant trees removed, and to adhere to electric- rather than fossil fuel-powered equipment when possible). These mitigation measures, combined with the AFP's benefits described below, ensure that the benefits outweigh the AFP's adverse effects.

FERC also properly addressed the benefits of the AFP. Unlike the deficient order in *Environmental Defense Fund*, the TGP Project order considered a variety of benefits supported by evidence. R. at 4–12. These include a new interstate customer base, utilizing gas that would

[1] Use of eminent domain under the NGA may prompt landowners to make Fifth Amendment takings claims, but since HOME did not raise such a claim during administrative proceedings before FERC, this court cannot consider it on review. *See Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 115 (D.C. Cir. 2022).

otherwise go unused in the future due to decreasing regional demand, and support from two non-affiliate precedent agreements. *Id.* Further, the specific route was chosen to prevent future pipeline construction through fragile mountain ecosystems nearby. *Id.* at 10. FERC's balancing considered a variety of the "indicators of public benefit" listed by the *Certificate Policy Statement.* 88 FERC at ¶ 61,747–50. Thus, FERC's balancing was reasoned, principled, and based on the record.

FERC's balancing analysis complied with the *Certificate Policy Statement*, considered various types of benefits and harms, comported with the NGA, and was supported by substantial evidence. Thus, this Court should find FERC's determination not arbitrary and capricious.

III. FERC'S APPROVAL OF THE AFP ROUTE DID NOT VIOLATE RFRA.

To prevail on a RFRA claim, a plaintiff must demonstrate by a preponderance of the evidence that the plaintiff's exercise of religion has been substantially burdened by a government action. 42 U.S.C. § 2000bb-1(a); *Thiry*, 78 F.3d at 1495. If the plaintiff establishes a substantial burden on her exercise of religion, the government may prevail by demonstrating that the action is "in furtherance of a 'compelling governmental interest' and is implemented by 'the least restrictive means.'" *Navajo Nation*, 535 F.3d at 1068 (quoting 42 U.S.C. § 2000bb-1(b)). Here, the sincerity of HOME's religious belief is not disputed. R. at 12. Thus, the only element that HOME must show is that the presence of the AFP under their property would substantially burden their religious exercise. *Id.* at 1058.

A. <u>The AFP does not substantially burden HOME's exercise of religion.</u>

RFRA "expressly adopted and restored" the holdings of two U.S. Supreme Court cases, *Sherbert v. Verner* and *Wisconsin v. Yoder*, to define "substantial burden." *Id.* at 1068–69 (first citing *Sherbert v. Verner*, 374 U.S. 398 (1963); and citing *Wisconsin v. Yoder*, 406 U.S. 205

(1972)). Under RFRA, courts may find a "substantial burden" only when "individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1069–70.

In *Navajo Nation*, the plaintiffs challenged a U.S. Forest Service decision authorizing the use of recycled wastewater to make artificial snow at a ski resort. *Id.* at 1066. Applying the standards from *Sherbert* and *Yoder*, the Ninth Circuit Court of Appeals found that the plaintiffs were not "fined or penalized in any way for practicing their religion." *Id.* at 1070. Instead, the Forest Service guaranteed that the plaintiffs would still have access to the area at issue for religious purposes. *Id.* The Ninth Circuit held that the agency's decision did not impose a substantial burden because it would only affect the plaintiffs' "subjective, emotional religious experience." *Id.* In other words, "under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden.'" *Id.*

Supreme Court precedent predating RFRA's enactment established that the government need not provide a "compelling justification" for the "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988).[2] In *Lyng*, the U.S. Forest Service approved the construction of a logging road across land holding deep significance for "traditional Indian religious practices." *Id.* at 443, 451. The Supreme Court held that the road did not infringe on the

[2] Although *Lyng* was decided prior to the enactment of RFRA, its analysis is still relevant because it relies on *Sherbert* and *Yoder*, the primary cases that laid the foundation for RFRA. *Navajo Nation*, 535 F.3d at 1069 (finding that "the cases that RFRA expressly adopted and restored—*Sherbert* [and] *Yoder* . . . also control the 'substantial burden' inquiry").

free exercise of religion because the plaintiffs were not "coerced by the Government's action into violating their religious beliefs" or penalized for their religious activity. *Id.* at 449. The Court emphasized that the Forest Service took numerous steps to "minimize the impact that construction of the road will have on the Indians' religious activities." *Id.* at 454.

HOME will not be substantially burdened by the presence of the AFP running under their property. HOME must be able to show that they will be "forced to choose between following the tenets of their religion and receiving a governmental benefit…or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions," to show they have incurred a substantial burden. *Navajo Nation*, 535 F.3d at 1069–70. Here, there is no evidence that HOME is compelled to act contrary to their religious beliefs or has been threatened with sanctions, so HOME is not substantially burdened.

The presence of the AFP on HOME's land will only affect HOME's subjective experience and thus will not impose a substantial burden. "[D]iminishment of spiritual fulfillment…is not a "substantial burden" on the free exercise of religion." *Navajo Nation*, 535 F.3d at 1070. The plaintiffs' decreased spiritual fulfillment in *Navajo Nation* from the use of recycled wastewater is analogous to the lack of fulfillment HOME may feel regarding the treeless areas on their land. Just as the plaintiffs in *Navajo Nation* had access to the entirety of their land despite the presence of the wastewater snow, HOME will be able to access the entirety of their property as soon as the AFP is built. Because the AFP will not prevent HOME from accessing a portion of their land or impose any burden beyond decreased spiritual fulfillment, HOME will not be substantially burdened.

Where a government's actions "have no tendency to coerce individuals into acting contrary to their religious beliefs," no substantial burden is imposed. *Lyng*, 485 U.S. at 450–51.

Because the *Lyng* Court found that the plaintiffs were not coerced into acting contrary to their religion when the government built a road across religiously significant land, HOME is also not compelled to act contrary to their religion when the AFP is buried beneath their land. The land in *Lyng* was not owned by the plaintiffs, but this factor does not change the analysis of the burden on the plaintiffs. *Id.* at 454. In determining whether there is a substantial burden, the only consideration is whether the plaintiffs are compelled to act contrary to their religion. *Id.* at 450–51. HOME is not compelled to act contrary to their religion by the presence of the AFP under their land, so FERC did not impose a substantial burden.

Just as the government in *Lyng* took steps to minimize the roads impact, FERC also took steps to minimize the AFP's impact on HOME's religious exercises. FERC required the AFP to be buried, built between solstices, and required TGP to replant the same number of trees that were removed. R. at 10, 12, 13. Because FERC required the AFP to be built in a way that will not prevent HOME from practicing their religion, the AFP will not be substantially burdensome.

Because HOME cannot show that their exercise of religion will be substantially burdened, RFRA has not been violated and HOME's claim fails. HOME is not compelled to act contrary to their religious beliefs and the only burden they may experience will be a decreased amount of spiritual fulfillment, thus HOME's religious exercise is not substantially burdened.

B. <u>The AFP serves a compelling government interest and is implemented by the least restrictive means.</u>

Even if the Court were to find that the AFP substantially burdened HOME, HOME's claim still fails because there is a compelling government interest that has been achieved through the least restrictive means possible. When a plaintiff makes a prima facie RFRA claim, the burden shifts to the government to demonstrate that "application of the burden to the person" is

"in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b); *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 963 (2014).

"The fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices." *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978) (citing *Sunray Mid-Continent Oil Co*. v. *FPC*, 364 U.S. 137, 147, 151–54 (1960)). The government has an interest in the construction and implementation of LNG pipelines. The NGA states "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and . . . transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a). Thus, because FERC can demonstrate the government's interest and because that interest is met through the least restrictive means, HOME's RFRA claim fails.

1. FERC acted pursuant to a compelling government interest in granting the AFP a CPCN.

"To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *United States v. Lee*, 455 U.S. 252, 257–58 (1982). "Religious beliefs can be accommodated…but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'" *Id.*

"A compelling governmental interest is one 'of the highest order.'" *Ave Maria Found.*, 991 F. Supp. 2d at 966 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). In *United States v. Lee*, the Supreme Court held that "the broad public interest in maintaining a sound tax system is of such a high order." 455 U.S. at 253 (reasoning that "[t]he tax system could not function if denominations were allowed to challenge the tax

system because tax payments were spent in a manner that violates their religious belief"). However, in *Sherbert*, the Supreme Court found no compelling interest because the government's interest was speculative, narrow, and unsupported by evidence. 374 U.S. at 398 (rejecting the mere "possibility" that "fraudulent claims by unscrupulous claimants" might "dilute the unemployment compensation fund" and affect employers' scheduling of work).

The government has a compelling interest in ensuring that its citizens "have access to an adequate supply of natural gas at reasonable prices" and in the transportation of LNG nationally and internationally. *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004), (citing *Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1145–46 (3d Cir. 1977)); 15 U.S.C. § 717(a). Beyond access to and transportation of LNG, new pipeline projects "strengthen[] the domestic economy and the international trade balance." *NEXUS Gas Transmission, LLC Texas E. Transmission, LP DTE Gas Co. Vector Pipeline, L.P.*, 172 FERC ¶ 61,199, 62,299 (2020). The government's interest in a natural gas network is like the tax system in *Lee*. Just as the tax system could not function if every religious group were to challenge it, *Lee*, 455 U.S. at 252, the natural gas network could not function if every religious group's requests were to be fully accommodated. Because "[not] every person can[] be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs" and the plaintiffs in *Lee* had to pay taxes, *id.*, here, HOME cannot overcome the government's interest in a robust natural gas infrastructure. The ultimate destination of the LNG does not undercut the government's interest in its transportation and domestic availability.

The government's interest has not only been raised in litigation before, but it has also been acknowledged by Congress during the passage of the NGA. Unlike in *Sherbert* when the government's purported interests were speculative, narrow, and unsupported by evidence, 374

U.S. at 398, here, the need for a cohesive natural gas system is undisputed and widely acknowledged. *E. Tenn. Nat. Gas Co.*, 361 F.3d at 830. Because the government has a previously contemplated interest in the transportation of LNG, the government's interest here is better grounded than it was in *Sherbert*.

2. FERC used the least restrictive means to pursue a compelling government interest.

The least restrictive means inquiry involves "comparing the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity." *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir. 1990). The government must be able to quantify "the loss of effectiveness" if other methods were to be used to achieve the compelling interest. *Ave Maria Found.*, 991 F. Supp. 2d at 967. In *Ave Maria Foundation*, because the government was unable to articulate why the plaintiff's proposal would be less effective, the court found that the least restrictive means had not been used to achieve the compelling government interest. *Id.*

FERC has used the least restrictive means because altering the AFP route would result in greater harm to the environment and greater expense to TGP. Unlike in *Ave Maria Foundation*, when the government only explained that "other proposals were considered and deemed less effective," *Ave Maria Found.*, 991 F. Supp. 2d at 967, FERC does know the monetary and environmental costs of alternative AFP routes. The only alternative route for the AFP cuts through the Misty Top Mountains. R. at 11. Not only would this route cause significantly more environmental harm because of the fragility of the mountain ecosystem but it would also cost TGP an additional $51 million and require an additional three miles of pipeline. *Id.* HOME does not dispute that the alternative route is worse for the environment. *Id.* Thus, not only is the

alternative route significantly more costly, but it conflicts to a greater extent with HOME's religious beliefs and concern for the environment. In this case, the cost of altering the AFP route is greater than the cost to HOME's religious interest from having the AFP routed under their land, so FERC used the least restrictive means.

FERC did not violate RFRA in allowing the AFP to be built under HOME's property. Ensuring there is an adequate natural gas supply at a reasonable price is a compelling government interest and FERC's chosen AFP route is the least restrictive means available to achieve this interest. Thus, even if HOME can make a prima facie case under RFRA, FERC can successfully carry its burden to show that it has not violated RFRA.

IV. THE GHG CONDITIONS DO NOT ADDRESS A MAJOR QUESTION.

Under the U.S. Supreme Court's recently articulated major questions doctrine ("MQD"), select "extraordinary cases" where an agency asserts "extravagant statutory power over the national economy" should be greeted by courts with "skepticism." *West Virginia*, 142 S. Ct. at 2609 (2022) (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), and then quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). In such cases, "the agency must point to 'clear congressional authorization' for the authority it claims." *Id.* at 2595 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

Section 7 of the NGA broadly authorizes FERC to consider "the public convenience and necessity" when evaluating CPCN applications. 15 U.S.C. § 717f(e). This authority includes the power to attach reasonable terms and conditions to an issued CPCN. *Id.* During a CPCN determination, when FERC balances the adverse effects with the public benefits of a proposed project, its analysis may include adverse environmental effects. *Myersville*, 783 F.3d at 1309 (citing *Certificate Policy Statement*, 88 FERC at ¶ 61,747–48 (1999)). GHG emissions are an

example of an environmental effect of a project that FERC has legal authority to mitigate under § 7. *Sierra Club*, 867 F.3d at 1374.

The GHG Conditions do not pose a major question because they are project-specific and arise out of FERC's core statutory authority under § 7. The broad, unambiguous language of the NGA provides FERC with clear congressional authorization to mitigate GHG emissions from pipeline projects.

A. Project-specific GHG conditions do not address a major question.

The MQD applies to "certain extraordinary cases" in which "both separation of powers principles and a practical understanding of legislative intent make [courts] reluctant to read into ambiguous statutory text the delegation [of power] claimed to be lurking there." *West Virginia*, 142 S. Ct. at 2609 (internal quotes omitted). The Supreme Court found *West Virginia v. EPA* to be a major questions case based on three characteristics of the regulatory program at issue: (1) the EPA "claim[ed] to discover in a long-extant statute an unheralded power representing a 'transformative expansion in [its] regulatory authority,'" (2) the EPA derived its "newfound power" from the "vague language of an ancillary provision" of the Clean Air Act (CAA) that "had rarely been used in the preceding decades," and (3) the EPA used its "newfound power" to "adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." *Id.* at 2610 (internal quotation marks omitted) (first quoting *Util. Air Regul. Grp.*, 573 U.S. at 324; then quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); and then citing *Brown & Williamson*, 529 U.S. at 159–60).

In *West Virginia*, the EPA relied on § 111(d) of the CAA to promulgate the Clean Power Plan rule, which required an overall shift in the power grid toward lower-emissions energy sources. *Id.* at 2595. Section 111(d) previously had been used only to reduce pollution at

individual pollution sources. *Id.* EPA modeling indicated that the new regulatory program would result in higher energy prices, retirement of dozens of coal-fired power plants, and the elimination of "tens of thousands of jobs across various sectors." *Id.* at 2604. Section 111(d) had been used "only a handful of times since the enactment of the statute in 1970," demonstrating the "ancillary nature" of the provision. *Id.* at 2602. The Court also determined that the Clean Power Plan "essentially adopted a [regulatory] scheme" for emissions even though Congress had "consistently rejected proposals to amend the Clean Air Act to create such a program." *Id.* at 2614. The Court cited *FDA v. Brown & Williamson Tobacco Corp.*, an earlier MQD case, for another example of Congress expressly depriving an agency of authority the agency later claimed to possess. 529 U.S. at 144 (finding that "Congress has created a distinct regulatory scheme [which] precludes any role for the FDA").

Unlike the Clean Power Plan rule in *West Virginia*, the GHG Conditions do not address a "major question." First, FERC's authority to impose GHG mitigation conditions on a CPCN is not a novel or transformative expansion of its regulatory authority. FERC historically has relied on § 7 of the NGA to attach project-specific environmental conditions to the issuance of CPCNs. For example, in *Atlantic Coast Pipeline, LLC*, FERC granted multiple CPCNs with a single order and imposed a total of seventy-three environmental conditions, but more than half of those conditions were tailored to apply only to one of the approved projects. 161 FERC ¶ 61,042, at app. A (2017), *on reh'g*, 164 FERC ¶ 61,100 (2018). Tailoring conditions on a case-by-case basis minimizes the political and economic impacts of individual CPCN orders. R. at 17. Due to FERC's individualized approach to CPCN orders, parties need not assume that the Commission will require GHG mitigation in all future proposals, and the Commission has not suggested that GHG emissions must be mitigated to insignificant levels to issue a CPCN for a project.

Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108, at 4 n.6 (2022). FERC's longstanding authority to attach project-specific environmental conditions to CPCN orders is not the kind of unheralded, transformative expansion of regulatory power that would pose a major question.

Second, FERC's authority to impose GHG conditions on a CPCN is derived from core substantive provisions of the NGA. Section 7(e) of the NGA is not an ancillary or rarely used provision of the statute like § 111(d) of the CAA in *West Virginia*, but rather the source of FERC's authority to issue CPCNs and attach reasonable conditions as required by the public convenience and necessity. 15 U.S.C. 717f(e). Section 3 of the NGA similarly authorizes FERC to grant applications "upon such terms and conditions as the Commission may find necessary or appropriate." 15 U.S.C. 717b(a). These provisions, including the authority to attach conditions, are invoked every time FERC issues an order for an interstate pipeline or export/import application. Thus, FERC's power to mitigate project GHG emissions is derived from the core of its statutory authority under the NGA.

Third, FERC's imposition of GHG conditions on a CPCN does not adopt a regulatory program that Congress has declined to enact itself. The CAA established a regulatory program, administered by the EPA, in which air pollution prevention is one of the programs primary goals. 42 U.S.C. § 7401(c). The CAA's definition of "air pollutant" includes GHGs. *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007). Another provision of the CAA establishes an incentive program for mitigating emissions of methane and other GHGs from petroleum and natural gas systems, including natural gas pipelines. 42 U.S.C. § 7436(a), (d)(9). The NGA also allows states to participate in environmental regulation of natural gas pipelines under the CAA. 15 U.S.C. § 717b(d)(2); *see, e.g.*, *Philadelphia Lateral Expansion Project*, Environmental Assessment,

Docket No. CP11-508-000, at 23–24 (Jan. 18, 2012). Further, FERC previously has conditioned CPCN issuance on the ability of an applicant to secure necessary CAA permits. *See, e.g.*, *Myersville*, 783 F.3d at 1308.

Unlike the Clean Power Plan in *West Virginia*, which adopted a regulatory scheme that Congress had previously and consistently rejected, FERC's authority over GHG emissions from pipeline projects works in tandem with the CAA. *West Virginia*, 142 S. Ct. at 2614; *Philadelphia Lateral Expansion Project*, Docket No. CP11-508-000, at 23–24. There is no indication that Congress intended to exclude from FERC's jurisdiction the ability to consider GHG emissions, unlike in *Brown & Williamson*. *See* 529 U.S. 120, 144 (2000). Congress enacted the CAA to regulate GHGs and did not expressly forbid FERC from mitigating GHG emissions in CPCN orders, which is inconsistent with the kind of program that poses a major question under Supreme Court precedent.

B. FERC has clear congressional authorization to mitigate GHG emissions from interstate pipeline projects.

Even if this Court finds that the GHG Conditions pose a major question, Congress provided clear authorization to FERC allowing it to mitigate GHG emissions from interstate pipelines. Under the MQD, if a court finds that a case poses a major question, it next looks for clear congressional authorization of the power claimed by the agency. *West Virginia*, 142 S. Ct. at 2609. A statute's applicability in situations not expressly anticipated by Congress demonstrates breadth, not ambiguity. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). Where an agency has no legal ability to prevent a certain environmental effect, it does not need to consider the effect in its environmental review. *Sierra Club*, 867 F.3d at 1372–73; *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004).

Unambiguous statutory text can provide clear congressional authorization even if the text grants sweeping regulatory authority. *See, e.g.*, *Massachusetts*, 549 U.S. at 528–29. In *Massachusetts*, the EPA claimed that it lacked statutory authority under the CAA to regulate GHG emissions from new motor vehicles. *Id.* The Court disagreed, finding that the CAA's definition of "air pollutant" unambiguously covered all airborne compounds. *Id.* at 528–29. The CAA's repeated use of the word "any" in phrases such as "any air pollution agent" further convinced the Court that Congress intended for the definition to have a broad reach. *Id.* at 529. The Court noted that there was no evidence Congress meant to curtail EPA's regulatory authority over GHG emissions and that an overlap with the Department of Transportation's energy efficiency mandate did not allow EPA to "shirk its duty" to implement the CAA. *Id.* at 500–01.

Here, FERC's authority to attach conditions to CPCNs likewise is characterized by breadth, not ambiguity. Sections 3 and 7 of the NGA authorize FERC to attach reasonable conditions to applications for export/import and interstate gas pipelines, respectively. 15 U.S.C. § 717b(a), 717f(e). The provision of the NGA describing FERC's administrative powers states that "[t]he Commission shall have power to perform *any and all acts* . . . as it may find necessary or appropriate to carry out the provisions of this chapter." 15 U.S.C. § 717o (emphasis added); *see also Twp. of Bordentown v. FERC*, 903 F.3d 234, 261 n.15 (3d Cir. 2018) (concluding that "FERC's authority to enforce *any* required remediation . . . is amply supported by the applicable federal legislation") (emphasis added). There is no evidence that Congress meant to curtail FERC's authority over GHG emissions.[3] Thus, an overlap between FERC's certificating

[3] The NGA's enactment was motivated primarily by consumer protection concerns, but it is equally clear that Congress did not intend to leave important aspects of the natural gas field unregulated. *See FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 19 (1961).

authority and EPA's mandate to regulate air pollutants does not allow FERC to shirk its duty to consider environmental impacts when assessing the public convenience and necessity under § 7. The plain language of the NGA thus contains a clear congressional authorization of FERC's CPCN conditioning authority.

FERC's power to deny a CPCN for a project that would cause excessive environmental harms is coupled with the responsibility to assess and, if necessary, mitigate those harms. *Sierra Club*, 867 F.3d at 1374. These characteristics of FERC's § 7 authority accord with the principle that an agency need not analyze an environmental effect in its NEPA review if the agency has no legal power to prevent that effect. *Id.* at 1372. This authority also extends to reasonably foreseeable indirect effects of natural gas projects, including some GHG emissions. *Id.* at 1374. FERC's NEPA review of an interstate pipeline project is inadequate if it lacks sufficient information about the project's GHG emissions. *Id.* at 1363. Thus, FERC's obligation to consider GHG impacts in its environmental analysis of the TGP pipeline flows from its authority under the NGA to mitigate those impacts.

V. FERC'S DECISION NOT TO MITIGATE UPSTREAM AND DOWNSTREAM GHG EFFECTS WAS NOT ARBITRARY AND CAPRICIOUS.

Courts review FERC orders, including CPCN orders, under the arbitrary and capricious standard. 5 U.S.C. § 706(2)(A); *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 105–06 (D.C. Cir. 2014). This standard limits the reviewing court "to assuring that the Commission's decisionmaking is reasoned, principled, and based upon the record." *Am. Gas Ass'n v. FERC*, 593 F.3d at 19 (quoting *Pennsylvania Off. of Consumer Advoc. v. FERC*, 131 F.3d 182, 185 (D.C. Cir. 1997)). In this role, the court "cannot substitute its judgment for that of

the Commission." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

FERC has the authority to mitigate the GHG impacts of projects it approves. *Sierra Club*, 867 F.3d at 1374; Part IV, *supra*. When FERC conducts a NEPA review of a proposed project, the agency must consider both direct and indirect environmental effects of the proposal. *Sierra Club*, 867 F.3d at 1371. Direct effects "are caused by the [agency] action and occur at the same time and place" and indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.1(g)(1), (2) (2023). FERC considers GHG emissions from the construction and operation of pipeline projects to be direct effects, while upstream and downstream GHG emissions may be indirect effects. *See, e.g.*, *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at 21 (2018) ("[We] considered direct [GHG] emissions from the construction and operation of the project and recommended mitigation measures . . . . We will continue to analyze upstream and downstream environmental effects when those effects are sufficiently causally connected to and are reasonably foreseeable effects of the proposed action . . . .") (footnote omitted).

An effect is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (quoting *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016)). Whether the upstream and downstream GHG emissions of a project are reasonably foreseeable is determined on a case-by-case basis. *See Birckhead*, 925 F.3d at 518–19 (rejecting arguments suggesting bright-line rules for reasonable foreseeability of downstream GHG emissions).

FERC did not act arbitrarily when it declined to impose mitigation conditions on the AFP's upstream and downstream GHG effects because it determined that those effects were not reasonably foreseeable.

A. The AFP's upstream effects are not reasonably foreseeable.

The D.C. Circuit's decision in *Birckhead v. FERC* lays out the court's approach to the reasonable foreseeability of upstream effects. 925 F.3d at 517–18; *see also Del. Riverkeeper Network*, 45 F.4th at 109 (stating that "*Birckhead* governs the analysis" of upstream effects). Upstream gas production may be reasonably foreseeable if the petitioner can point to "record evidence that would help the Commission predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project" or evidence that shippers "would not extract and produce [the] gas in the absence of the Project because [they] would not have the ability to bring the gas to market." *Birckhead*, 925 F.3d at 517 (first alteration in original) (internal quotation marks omitted).

Here, HOME cannot point to evidence of additional wells resulting from production demand created by the AFP because TGP's precedent agreements do not contemplate additional gas production at HFF. R. at 6. HOME also cannot identify evidence that the shippers would not be able to bring the gas to market in the absence of the AFP because the gas is currently being transported by the Southway Pipeline to states east of Old Union. *Id.* In sum, the AFP's upstream effects are not reasonably foreseeable because the AFP will reroute a portion of the current production at HFF instead of causing production to increase. Because the upstream effects of the AFP are not reasonably foreseeable, FERC's decision not to impose upstream mitigation conditions was not arbitrary and capricious.

B. The AFP's downstream effects are not reasonably foreseeable.

Downstream GHG effects of a pipeline project are reasonably foreseeable "when the project is known to transport natural gas to particular power plants." *Del. Riverkeeper Network*, 45 F.4th at 109 (citing *Sierra Club*, 867 F.3d at 1371–74). NEPA analysis "necessarily involves some reasonable forecasting" of environmental impacts. *Sierra Club*, 867 F.3d at 1374 (internal quotation marks omitted) (requiring FERC's EIS for a pipeline project to include a quantitative estimate of downstream GHG emissions or explain specifically why such an estimate was not possible). However, "there will inevitably be some limits on the foreseeability of emissions," and the D.C. Circuit "has rejected the notion that downstream emissions are always reasonably foreseeable effects of a pipeline project." *Del. Riverkeeper Network*, 45 F.4th at 109 (citing *Birckhead*, 925 F.3d at 518–19.) The D.C. Circuit also "defer[s] to the informed discretion of the Commission, especially [w]here an issue requires a high level of technical expertise." *Id.* at 109–10 (internal quotation marks omitted) (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

In *Delaware Riverkeeper Network v. FERC*, FERC determined that downstream GHG emissions of a natural gas pipeline project "were not reasonably foreseeable because the Commission was unable to identify the end users of that natural gas." 45 F.4th at 110. The court found that "[t]he Commission's reasoning was sound" because FERC "explained that natural gas would be delivered for further transportation on the interstate grid to an unknown destination and for an unknown end use." *Id.* The court rejected the petitioners' argument that "because the vast majority of natural gas is ultimately combusted for use as a fuel source, the Commission should have used the entire volume of gas to be transported on the Project as a basis for estimating emissions — a so-called full-burn analysis." *Id.* The court reasoned that downstream GHG

emissions are not categorically reasonably foreseeable under *Birckhead*. *Id.* (quoting *Birckhead*, 925 F.3d at 519).

The LNG transported by the AFP will not be transported to particular power plants, so its downstream effects are not necessarily reasonably foreseeable. Instead, the AFP will connect to the existing Northway Pipeline. R. at 6. Approximately ninety percent of the LNG carried by the AFP will then be carried by the Northway Pipeline to the New Union City M&R Station for subsequent export to Brazil via LNG tankers. R. at 6, 8. Here, as in *Delaware Riverkeeper Network*, the LNG carried by the AFP will be delivered for further transportation on the interstate grid and internationally to unknown destinations and unknown end uses. The record contains no information about the destination or end use of the ten percent of the LNG that will not be exported. The only information available about the ninety percent of the LNG that will be exported is that it will be transported via tankers to Brazil, which provides insufficient detail about its specific destination or end use.[4] *Id.* at 8.

TGP's precedent agreements detail the amount of gas to be transported and thus provide a basis for estimating emissions. *Id.* at 6. Although FERC was not required to conduct a full-burn analysis under *Birckhead*, FERC did so using the precedent agreement data. *Id.* at 15. This analysis is an example of "reasonable forecasting" under NEPA. *See Sierra Club*, 867 F.3d at 1374. However, FERC's full-burn estimate for the AFP was accompanied by several reasons why that estimate likely overstates the true emissions rate of the pipeline, including displacement

[4] Because HOME did not claim on rehearing that FERC should have sought out additional information about the destination and end use of the gas, this court lacks jurisdiction to consider such a claim on appeal. *Delaware Riverkeeper Network*, 45 F.4th at 110.

of other, higher-emissions fuels[5] and decreased transport volumes at off-peak times. R. at 15. FERC provided the best possible estimate of downstream emissions and explained specifically why, in the absence of more detailed information, a more accurate estimate was not possible.

Not only did FERC meet its NEPA obligations with this analysis, FERC also explained why the downstream effects are not reasonably foreseeable. Because the downstream GHG effects of the AFP are not reasonably foreseeable, they are not considered indirect effects of the project, so FERC did not act arbitrarily when it declined to impose downstream mitigation conditions.

CONCLUSION

For the foregoing reasons, this court should deny the petitions for review filed by HOME and TGP and affirm FERC's Order denying the petitions for rehearing.

[5] Although the *Birckhead* court found that FERC was "wrong to suggest that downstream emissions are not reasonably foreseeable simply because the gas transported by the [pipeline] may displace existing natural gas supplies or higher-emitting fuels," it reached this conclusion in the context of a project where the downstream emissions would otherwise have qualified as an indirect effect. *Birckhead*, 925 F.3d at 518–19. Here, the possibility that the AFP LNG would displace higher-emissions fuels is one of multiple factors contributing to the uncertainty around the pipeline's true downstream emissions rate. R. at 15.