Team 26

C.A. No. 23-01109 (consolidated with No. 23-01110)

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OR MOTHER EARTH

Petitioner

-and-

TRANSNATIONAL GAS PIPELINES, LLC

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION

Respondent

On Petition for Review of Orders of the Federal Energy Regulatory Commission, TG21-616-000, Certificate of Public Convenience and Necessity (Apr. 1, 2023), 199 FERC ¶ 72,201 (June 1, 2023).

Brief of Petitioner, HOLY ORDER OF MOTHER EARTH

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STATEMENT OF JURISDICTION

The Natural Gas Act ("NGA") requires any entity seeking to build a pipeline to obtain a Certificate of Public Convenience and Necessity ("CPCN"). 15 U.S.C. § 717f(c)(1)(A). Any person aggrieved by a Federal Energy Regulatory Commission ("FERC") order granting a certificate may request rehearing within thirty days. 15 U.S.C. § 717r(a). FERC issued Transnational Gas Pipelines, LLC ("TGP") a CPCN for construction of the American Freedom Pipeline ("AFP") on April 1, 2023. Order of the 12th Circuit Court of Appeals ("Order") at 2. Appellant Holy Order of Mother Earth ("HOME") owns land along the proposed route of the pipeline and filed a timely rehearing request on April 20, 2023. Order at 2.

FERC issued an order denying HOME's rehearing request on May 19, 2023. Order at 2. HOME filed a timely Petition for Review of the CPCN Order and Rehearing Order in the Twelfth Circuit Court of Appeals on June 1, 2023. *Id.* This Court consolidated HOME's Petition for Review with that filed by TGP. *See* Docket No. 23-01109. The NGA grants jurisdiction over Petitions for Review of orders issued by FERC to the federal court of appeals in the circuit where the natural gas company is located or has its principal place of business. 15 U.S.C. § 717r(b). TGP is organized under the laws of and is located in the State of New Union accordingly, this Court has jurisdiction over TGP. *Id.*

STATEMENT OF THE ISSUES PRESENTED

I. Was FERC's finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project needed where 90% of the gas transported by that pipeline was for export.

II. Was FERC's finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?

III. Was FERC's decision to route the AFP over HOME property despite HOME's religious objections in violation of RFRA?

IV. Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA?

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

STATEMENT OF CASE

I. HOME and Its Sacred Land

HOME is a religious order, organized in 1903 as a not-for-profit under the laws of New Union, that believes the natural world is a sacred deity that must be worshipped and respected. Its fundamental core tenet is that humans should do everything in their power to promote natural preservation over all other interests, especially economic interests. HOME owns 15,500 acres of land at the base of the Misty Top Mountains. This land contains a temple at its western border and the sacred foothills of the Misty Top Mountains at its eastern border.

During each summer and winter solstice, members of HOME partake in the Solstice Sojourn, a ceremonial journey across its land, starting from the temple and ending at one of these sacred hills. At the hill, all children that have reached the age of 15 in the prior six months undergo a sacred religious ceremony. Upon completing the Solstice Sojourn, HOME members, then, journey back along a different path. HOME has performed the Solstice Sojourn since at least 1935.

II. The TGP Project

On June 13, 2022, TGP applied to FERC for authorization to construct and operate the American Freedom Pipeline ("AFP"), a 99-mile-long interstate pipeline that will transport

liquified natural gas ("LNG"), and supporting facilities. The AFP will transport LNG from the Hayes Fracking Field ("HFF") in Old Union

The AFP, as proposed and later approved by FERC, will run through HOME's sacred land and permanently desecrate it. HOME's beliefs are deeply influenced by the harms the Industrial Revolution and capitalism have manifested on the natural world. Consistent with this belief, the idea of its land being to transport of liquified natural gas (LNG) that will later be burned and emit millions of metric tons of carbon dioxide (CO2e) into the atmosphere is anathema to HOME's beliefs and practices. As such, HOME entered into the AFP proceedings as a commenter.

To make matters worse, the pipeline will pass through approximately two miles of HOME's property, interfering with HOME's ability to conduct its Solstice Sojourn. Second, the AFP's construction requires the removal of approximately 2,200 trees and many other forms of vegetation on HOME's property. The vast majority of these trees cannot be replaced with new trees along the route, permanently altering HOME's land.

III. The CPCN Order

On April 1, 2023, FERC issued a CPCN authorizing TGP to construct and operate the AFP, subject to certain conditions ("GHG Conditions") laid out in the Order ("CPCN Order"). In the CPCN Order, FERC found that the benefits of the AFP and its supporting facilities outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities, including HOME.

FERC also concluded that the GHG Conditions sufficiently reduced the AFP's adverse environmental impacts identified in the project's Environmental Impact Statement ("EIS") to less-than-significant levels. The GHG Conditions mandate that:

(1) TGP shall plant or cause to be planted an equal number of trees as those removed in the construction of the TGP Project;
(2) TGP shall utilize, wherever practical, electric-powered equipment in construction of the TGP Project, including, without limitation:
    (a) Electric chainsaws and other removal equipment, where available; and
    (b) Electric powered vehicles, where available;
(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 where such sources are available.

Additionally, FERC's CPCN Order approved TGP's proposed route, despite identifying an alternate route, through the Misty Top Mountains, that would avoid HOME's property altogether.

IV. FERC's Order Denying Rehearing of the CPCN Order

Determined to protect its sacred land and religious practice, on April 20, 2023, HOME properly sought rehearing from FERC on certain issues in the CPCN Order as an aggrieved party under 15 U.S.C. § 717r(a). HOME requested that FERC reconsider its findings and protect HOME's sacred land. Specifically, HOME contended that the project need finding in the CPCN Order was unjustified and unsupported. Further, even if FERC could properly find sufficient public need, HOME argued that the negative impacts of the proposed project outweighed its benefits. HOME also contended that the decision to route the AFP over HOME's sacred land violated RFRA. Finally, while HOME agreed that FERC had authority to attach conditions to mitigate the GHGs emitted by the project, HOME argued that the GHG Conditions FERC attached did not go far enough to mitigate those emissions. FERC issued an order on June 1, 2023, denying HOME's request for rehearing ("Rehearing Order"). In the Rehearing Order, FERC declined to consider both HOME's contentions and TGP's concerns, which TGP had separately filed on April 22, 2023.

V. Current Litigation

On June 1, 2023, HOME petitioned the United States Court of Appeals for the Twelfth Circuit for review of the CPCN Order and the Rehearing Order (the "FERC Orders"). HOME's petition was docketed as 23-01109. TGP separately filed a petition for review of the FERC Orders, which was docketed as 23-01110. This Court consolidated both dockets under 23-01109 and instructed both HOME and TGP to brief and argued the issues thereunder.

STANDARD OF REVIEW

Courts will overturn FERC orders if they are arbitrary and capricious or otherwise contrary to law. *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 358 (D.C. Cir. 2017); 5 U.S.C. § 706(2)(A). To survive review, FERC must use "reasoned decisionmaking, which requires it to "examine the relevant data and articulate a satisfactory explanation for its actions, including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 52 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Courts only deem factual findings by FERC as conclusive if the findings are supported by substantial evidence. 15 U.S.C. § 717r(b). FERC's decision will be set aside if it has not "examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *FERC. v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016).

RFRA claims are reviewed *de novo.* See *Navajo Nation v. U.S. Forest Serv.,* 535 F.3d 1058, 1067 (9th Cir. 2008).

SUMMARY OF ARGUMENT

No new interstate natural gas pipeline may be constructed in the United States unless FERC grants the project a CPCN. 15 U.S.C. § 717(f). FERC cannot issue a CPCN unless it finds that the project is "required by the present or future public convenience and necessity." *Id.* Such factual findings by FERC must be supported by substantial evidence. *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 108 (D.C. Cir. 2022). FERC must determine whether a pipeline will serve the public interest before making this finding. *Statement of Policy Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), ¶ 61,745 (clarified 90 FERC ¶ 61,128 (2000)) (hereinafter "Policy Statement"). FERC's finding of public convenience and necessity for the AFP was not supported by substantial evidence because 90% of the project's benefits would go to Brazil, domestic benefits were only evidenced by vague assertions, FERC did not review or conduct a market study, and FERC gave excessive weight to precedent agreements. Rehearing Order at ¶¶ 23-29. FERC's granting of a CPCN to TGP for the AFP was arbitrary and capricious because its finding of need was not supported by substantial evidence.

FERC must also find that the benefits of a new pipeline outweigh its harms before approving the project. Policy Statement at ¶ 61,744. The most important benefit in this analysis is whether the project is needed. *Id.* at ¶ 61,745. The harms FERC should review include environmental impacts, impacts to landowners, and impacts to communities surrounding the pipeline. *Id.* at ¶ 61,745-46. The purported benefits of the AFB are minimal and are not supported by evidence such as a market study. Rehearing Order at ¶ 23-35. The harms of the AFP would be significant, including environmental harms and harms to landowners who would be subject to having their properties condemned. *Id.* at ¶¶ 38, 42. Additionally, the harm the AFP would cause to HOME's religious practices would be severe. *Id.* at ¶ 57-58. Given the immense

harms of the AFP and the minimal and unsupported benefits, FERC's finding that the benefits of the AFP would outweigh the harms is arbitrary and capricious.

Under RFRA, a government may substantially burden a person's exercise of religion if it demonstrates that the burden (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(a) (2018).

Because the AFP would significantly impact HOME's annual Solstice Sojourn, AFP would go against HOME's fundamental religious tenant that humans should do everything in their power to promote natural preservation over all other interests (especially economic ones). Rehearing Order at ¶ 47. Thus, the AFP would substantially burden HOME's core religious tenants. Furthermore, exporting oil to other countries is not a compelling governmental interest. While the AFP will provide some interest to the U.S. government by diverting ten percent of LNG to domestic sources and will increase the U.S.'s GDP with its exports, the substantial burden on HOME's religion does not serve a compelling governmental interest. Rehearing Order at ¶ 5.

Lastly, even if the burden on HOME's religion serves a compelling governmental interest, creating the AFP is not the least restrictive means. Routing the AFP under HOME property is not the least restrictive means because the pipeline will predominantly benefit nations other than the United States. *Id.* While it is more convenient to route the AFP under HOME's property, it is not the least restrictive means. Routing the AFP alternatively would ensure FERC's compelling governmental interest is met while also protecting the core tenants of HOME's religious practices, even if it would cost additional money to build. Accordingly, this Court should hold that FERC's decision to route AFP over HOME property violated RFRA.

FERC has broad authority to attach reasonable terms and conditions to the issuance of a CPCN as the public convenience and necessity may require. § 717f(e). As FERC properly concluded, this authority includes the ability to attach GHG Conditions. When determining whether to approve a new natural gas pipeline project, FERC is required to consider the project's foreseeable direct and indirect environmental impacts. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). Additionally, FERC has authority to mitigate such effects. *Id.*

TGP claims that the GHG Conditions address a "major question" and are outside of FERC's authority. However, this claim relies on a misunderstanding of what triggers the major questions doctrine (MQD), and FERC was correct in rejecting TGP's attack. The MQD only applies in "extraordinary cases" where the agency's action or interpretation of its authority runs contrary to the "history and breadth" of its recognized authority or where the agency's action implicates a question of "economic and political significance." *See N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 296 (4th Cir. 2023) (citations omitted) (articulating the MQD as formalized in *West Virginia v. EPA*). Here, the GHG Conditions are sufficiently specific and individual to the TGP Project. *See* Rehearing Order at ¶¶ 67, 87. While climate change and the impacts of GHG emissions have previously been found to be matters of economic and political significance, these specific GHG Conditions do not attempt to regulate the U.S. economy or its climate and energy policies at large. This is evidenced by the relatively small monetary value and the narrow applicability of these Conditions.

Even if the MQD was implicated, FERC is the executive agency charged with protecting and regulating the public interest as it relates to natural gas. Congress gave very broad authority to FERC as demonstrated by the language of section 7 of the NGA and courts have upheld FERC's authority to attach conditions in service of the public interest as very broad. *See*

Transcontinental Gas Pipeline, LLC v. FERC, 589 F.2d 186, 190 (5th Cir. 1979)*; see also Florida Power & Light Co. v. FERC,* 598 F.2d 370, 379 (5th Cir. 1979). As such, the GHG Conditions can withstand TGP's MQD attack.

Finally, in light of FERC's decision to attach GHG Conditions to construction emissions, FERC acted arbitrarily and capriciously when it refused to attach GHG Conditions for the TGP Project's upstream and downstream GHG emissions. FERC claims that it is unable to make a significance determination for upstream and downstream emissions because it is in the process of determining its overall policy for upstream and downstream emissions. Order at 2. However, FERC has failed to provide an explanation for how determining significance in this specific proceeding would harm its overall policy in the future. FERC itself recognizes the CPCN determination process to be case-by-case and fact specific. *Id.*

FERC also determined that the TGP Project's construction emissions were significant enough to impose mitigation conditions. The TGP Project's construction emissions are estimated to be significantly lower in amount and duration than the project's downstream emissions (FERC failed to consider upstream emissions or provide an explanation for why it could not do so). Order at 3. As such, FERC should have also found the downstream emissions significant and in need of mitigation.

ARGUMENT

I. FERC's Granting of a Certificate of Public Convenience and Necessity was Arbitrary and Capricious Because Its Finding That the AFP was Needed Was Not Supported by Substantial Evidence.

No new interstate natural gas pipeline may be constructed in the United States unless FERC grants the project a certificate of public convenience and necessity. 15 U.S.C. § 717(f). FERC may only grant the certificate if it finds that the pipeline is required by the "public

convenience and necessity." *Id.* Whether a project is required by the public convenience and necessity is fundamentally an inquiry into whether the project is needed. Policy Statement at ¶ 51,745-46; *see also Draft Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*, 87 FERC ¶ 11,548 (2022) at ¶ 11,556 (hereinafter "Draft Policy Statement"). In determining whether a project is needed, FERC must evaluate "all factors bearing on the public interest." *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y*, 360 U.S. 378, 391 (1959).

Factors bearing on the public interest should include the end use of the gas, why the project is needed to serve its planned end use, increased reliability, lower prices through adding competition to the market, current and future demand support, and precedent agreements. Policy Statement at ¶ 61,746; Draft Policy Statement at ¶ 11,557. Evidence of project need will "usually include a market study". *Envt'l Def. Fund v. FERC*, 2 F.4th 953, 962 (D.C. Cir. 2021). Such factual findings by FERC must be supported by substantial evidence. *Del. Riverkeeper Network*, 45 F.4th at 108. The substantial evidence "standard requires more than a scintilla but can be satisfied by something less than a preponderance of the evidence." *FPL Energy M.E. LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002). FERC's finding of public convenience and necessity for the AFP was not supported by substantial evidence. Therefore, FERC's granting of a certificate of public convenience and necessity to TGP for the AFP was arbitrary and capricious.

B. <u>The purported benefits of the AFP are not supported by substantial evidence and FERC has impermissibly relied on TGP's vague and unsubstantiated assertions of public benefit in making its finding of public convenience and necessity.</u>

"Vague assertions of public benefit will not be sufficient" evidence for FERC to find that a pipeline project is needed. *Envt'l Def. Fund*, 2 F.4th at 972. Despite this clear guidance, FERC relied on vague and unsubstantiated claims of public benefit when it found that the AFP was

needed. FERC considered the following six assertions by TGP in determining that the AFP was needed: (1) that the AFP would provide natural gas to a terminal-pipeline intersection; (2) that the AFP would provide gas to areas of New Union currently without natural gas service; (3) that the AFP will expand the gas supply within the United States; (4) that the AFP will create a more competitive market; (5) that the AFP would fill underused capacity in the North Way pipeline; and (6) that the AFP will improve air quality by replacing fossil fuels with natural gas. Rehearing Order at ¶ 27.

TGP has provided no market study or other evidence to corroborate their assertions. When asserting that the public convenience and necessity requires a new pipeline, market studies are generally required. Policy Statement at ¶ 61,556; *Envt'l Def. Fund*, 2 F.4th at 972. Without a market study or other evidence to support its claims of public benefit, there is no substantial evidence to support FERC's factual finding that the AFP is needed. Second, even if TGP's claims were backed by evidence, TGP's assertions do not reflect true public benefit as only a small portion of the gas to be transported by the AFP would actually serve the purported benefits.

TGP's assertions that the AFP will bring gas to a pipeline intersection and fill underused capacity in the North Way pipeline do not fall within the Certificate Policy Statement's definitions of public benefit. Policy Statement at ¶ 61, 745. TGP's other assertions also do not reflect public benefits in terms of actual price reduction, actual demand for natural gas in New Union, or tangible effects on air quality. *Id.*; Rehearing Order at ¶ 27. Even if these assertions reflected evidence of benefits to the public, the benefits would only come from the ten percent of gas to be transported by the AFP that would actually remain in the United States. Rehearing Order at ¶ 24. Given the lack of evidentiary support for TGP's assertions and the minimal public

benefits the AFP would provide if these assertions were supported, FERC's finding that the AFP is required by the public necessity is not supported by substantial evidence.

C. The precedent agreements entered into by TGP are not sufficient evidence of public benefit because FERC cannot rely solely on precedent agreements to establish public benefit where there is a lack of other evidence.

The Certificate Policy Statement, which was issued in 1999, is currently undergoing revision. Draft Policy Statement at ¶ 11,548. The 2022 Draft Policy Statement states that FERC had been relying "almost exclusively on precedent agreements to establish project need" under the 1999 Policy Statement and that, going forward, FERC should be far less reliant on precedent agreements. *Id.* Precedent agreements are not adequate on their own to establish project need, especially where there is a lack of other evidence. *Envt'l Def. Fund*, 2 F.4th at 973.

In finding that the AFP was needed, FERC considered the two binding precedent agreements entered into by TGP to be a "strong showing of public benefit." Rehearing Order at ¶ 26. FERC arbitrarily and capriciously treated the two precedent agreements entered into by TGP as substantial evidence of project need on their own. Rehearing Order at ¶ 26. Although precedent agreements are important evidence of project need, FERC is obligated to consider "all factors" bearing on the public interest and the two precedent agreements entered by TGP are not substantial evidence of project need. Policy Statement at ¶ 61,746; *Atl. Ref. Co.,* 360 U.S. at 391.

TGP was only able to enter into two precedent agreements, one with International for ninety percent of the AFP's capacity and one with NUG for the remaining ten percent. Rehearing Order at ¶ 11. The D.C. Circuit Court of Appeals held in *Environmental Defense Fund v. FERC* that a single precedent agreement, where there is no other evidence of benefit beyond vague assertions, is not substantial evidence of project need. *Envt'l Def. Fund*, 2 F.4th at 973. Similarly, FERC's finding of project need here is not supported by substantial evidence due to the small

number of precedent agreements, the lack of substantiated evidence of project need, and the fact that the precedent agreement with International that accounts for nearly all of the planned pipeline's capacity would only serve the Brazilian market. Rehearing Order at ¶¶ 11, 24. Here, as it did in *Environmental Defense Fund*, FERC has taken an "ostrich-like approach [that] flies in the face of the guidelines set forth in the Certificate Policy Statement." *Envt'l Def. Fund*, 2 F.4th at. 975.

D. Gas destined for Brazil does not serve the public benefit because the public benefit should be interpreted as the domestic public benefit and because Brazil does not have a free trade agreement with the United States.

When considering public benefit, FERC must consider need. Policy Statement at ¶ 61,745-46. In considering need, FERC should examine the planned end use of the LNG and why this project is needed to serve that end use. *See* Draft Policy Statement at ¶ 11,556. Considering the planned use of the LNG makes sense, given that if the gas were to never to be used it would not be needed or serve the public benefit. In its analysis of the AFP, FERC considered the end use of the gas to be transported by the AFP and determined that the AFP would serve the public convenience and necessity even though 90 percent of the gas that the AFP would transport is destined for Brazil. Rehearing Order at ¶¶ 24, 26, 30, 33. This determination is not supported by substantial evidence and is contrary to Congress's intentions in the NGA.

Section 3 of the NGA states that applications for export of natural gas to countries with which the United States has a free trade agreement should be approved as being "consistent with the public interest." 15 U.S.C. §717b. The court in *Oberlin II* held that natural gas exported to countries with which the United States has a free trade agreement serves the public convenience and necessity under Section 7 of the NGA. *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 726 (D.C. Cir. 2022). Here, FERC arbitrarily concluded that Section 3 of the NGA, coupled with the

holding in *Oberlin II*, means that gas exported to Brazil, a country with which the United States does not have a free trade agreement with, serves the public convenience and necessity. Rehearing Order at ¶ 30, 33.

FERC's finding that gas exported to Brazil serves the public convenience and necessity is not supported by substantial evidence because there is no statutory or caselaw basis for the determination, since there is no free trade agreement between the United States and Brazil. The finding also goes against Congress's intent because the NGA is a domestic statute, and the public convenience and necessity should therefore be interpreted to mean the domestic public convenience and necessity. Interpreting the statute otherwise could lead to FERC approving projects with little to no domestic benefit and high domestic costs, such as the AFP, under the guise of public benefits being realized outside the country.

II. FERC's Finding that the Benefits from the AFP Outweigh the Environmental and Social Harms Was Arbitrary and Capricious Because the Benefits are Minimal and Not Supported by Evidence and the Harms are Severe.

Once FERC has made a determination that a pipeline is required by the public convenience and necessity it must then balance the project's benefits against its adverse impacts. Policy Statement at ¶ 61,745-46. The harms to consider in this analysis include environmental impacts, impacts to landowners, and impacts to communities surrounding the pipeline. *Id.*; *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330-31 (D.C. Cir. 2021). The most important consideration in assessing benefits is whether the project is needed. Policy Statement at ¶ 61,745-46. While FERC has broad discretion in this decision, FERC's discretion cannot go unchecked. *Envt'l Defense Fund*, 2 F.4th at 975. FERC cannot simply conclude "without deeper analysis" that the benefits of a project outweigh the harms. *Id.* at 966.

If FERC decides with only "cursory" analysis that the benefits of a project outweigh the harms, then its decision is arbitrary and capricious. *Id.* at 976.

As discussed above, when FERC determined that the AFP was needed it relied on vague assertions of public benefit by TGP and did not base its decision on substantial evidence of the benefits of or need for the project. Rehearing Order at ¶¶ 26-27, 30, 33. TGP has asserted that the 10 percent of the gas to be transported by the AFP will improve air quality because it will replace fossil fuels where it is used domestically. Rehearing Order at ¶ 27. However, this benefit, like the others asserted by TGP, is not evidenced in the record and therefore should not be given great weight. There is also no substantial evidence in the record of economic benefits from the TGP, because TGP failed to provide a market study. FERC's balancing of the purported benefits against the harms of the AFP should be viewed in light of the fact that 90 percent of any benefits the AFP would have would be felt in Brazil, but 100 percent of the harms the pipeline would cause would be felt in the United States. *Id.* at ¶¶ 24, 27-28.

A. <u>The severe environmental harms the AFP would cause on the planned route or the alternate route outweigh its purported benefits.</u>

Failure by FERC to consider a pipeline's overall environmental impacts, including failure to adequately analyze potential impacts on the climate, is a violation of both NEPA and the NGA. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1328-31 (D.C. Cir. 2021). In considering the environmental harms the AFP would cause, FERC dismissed the environmental harms to HOME's property as not significant and failed to look beyond HOME's property for further harms. Rehearing Order at ¶¶ 38, 44. The environmental harms to HOME's property alone are significant, including the clearing of a swath of the property for the pipeline by removing 2,200 trees and many other forms of vegetation. *Id.* at ¶ 38. FERC arbitrarily and capriciously dismissed these harms as insignificant without evidence. *Id.*

The portion of the AFP that would run through HOME's property is only two percent of the AFP's total length. Rehearing Order at ¶¶ 10, 38. Given the immense destruction the pipeline will cause on HOME's property, the environmental harm the AFP will cause over its entire length is likely to be great. FERC acknowledged that the route as planned will have impacts on "environmentally sensitive ecosystems" and that the pipeline's path if rerouted will harm even "more sensitive" ecosystems. *Id.* at ¶ 44. Yet, in its balancing analysis, FERC acknowledged only the environmental harms the AFP would cause to HOME's property and failed to analyze the project's overall environmental harms, including potential contributions to climate change and the extent of impacts on sensitive ecosystems. *Id.* at ¶¶ 38-53.

FERC's failure to analyze the overall environmental harms of the AFP mirrors its failure in *Vecinos*. In *Vecinos*, FERC did not consider harms to communities beyond a two-mile distance from a pipeline project and failed to consider the harm the pipeline would cause by contributing to climate change. *Vecinos para el Bienestar de la Comunidad Costera*, 6 F.4th at 1328-31. This failure was held to be arbitrary and capricious under the APA and the NGA. *Id.* at 1331. Here, the full extent of the AFP's environmental impacts, including contributions to climate change throughout the life of the project, cannot be mitigated by FERC's inclusion of short-term conditions, such as requiring electric tool usage during construction or rerouting the pipeline. Rehearing Order at ¶¶ 38, 44, 67. Therefore, FERC's finding that the benefits of the AFP outweigh the costs is arbitrary and capricious.

B. <u>If built, the AFP would cause severe harms to landowners because TGP has been unable to reach easement agreements with 40% of landowners in the AFP's path and because the AFP would decimate HOME's ability to practice its religion.</u>

"The harm to an individual from having their land condemned is one that may never be fully remedied, even in the event they receive their constitutionally-required compensation."

Draft Policy Statement at ¶ 11,559. Given this harsh reality, FERC should use caution to prevent the excessive use of eminent domain by pipeline projects. In addition to analyzing the use of eminent domain when assessing the impacts of a proposed project on landowners, FERC is directed by the Policy Statement to consider other impacts on landowners and surrounding communities. Policy Statement at 317.

If the AFP is approved, the use of eminent domain will be excessive because TGP has been unable to reach easement agreements with over 40 percent of the landowners whose properties will be harmed by the AFP, including HOME. Rehearing Order at ¶ 42. This means that nearly half the landowners being directly impacted by the AFP would experience a harm "that may never be fully remedied." *Id.* at ¶¶ 42-43; Draft Policy Statement at ¶ 11,559. Even if the AFP is rerouted around HOME's property, the severe impact on these landowners remains. If the AFP's route is approved as planned, the AFP will also cause irreparable and severe harm to HOME's ability to practice its religion. Rehearing Order at ¶¶ 46-50.

A central tenet of HOME's religion is the Solstice Sojourn, a sacred journey made by members of HOME across the same part of HOME's property that the AFP would tear through. Rehearing Order at ¶¶ 48, 57. Members of HOME have been practicing the Solstice Sojourn for almost 90 years. *Id.* at ¶ 48. To cross the AFP while making this sacred journey would be "unimaginable" and would destroy the Sojourn's very meaning. *Id.* at ¶ 57. This loss to HOME is significant on its own. When considered with the severe and unavoidable impacts on the other landowners, the harms the AFP would cause far outweigh any of the its purported benefits. For this reason, FERC's finding that the benefits of the AFP outweigh the harms was arbitrary and capricious.

III. FERC Erred in Finding that the CPCN Did Not Violate RFRA.

The Religious Freedom Restoration Act ("RFRA") applies to federal governmental actions that "substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a) (2018); *see City of Boerne v. Flores*, 521 U.S. 507, 534-36 (1997). Under RFRA, the government may substantially burden a person's exercise of religion if it demonstrates that the burden (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(a) (2018).

A. The installation of the AFP over HOME's property substantially burdens HOME's exercise of religion.

To establish that a plaintiff's exercise of religion was substantially burdened, the plaintiff must show that the burden on his religion substantially interferes with a tenet or belief central to his or her religion. *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997). A substantial burden exists when an entity puts substantial pressure on adherents to modify their behavior, which then violates their beliefs. *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (quoting *Thomas v. Rev. Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981)).

In *Thiry v. Carlson*, a proposed highway project would run through Native American parents' land and require the removal of their stillborn daughter's grave. *Thiry v. Carlson*, 78 F.3d 1491, 1493(10th Cir. 1996). The Tenth Circuit held that the project was not a substantial burden on the parents' religion. *Id.* at 1495-96. The Court reasoned that because the plaintiff's American Indian spirituality and Quaker beliefs allowed for moving gravesites when necessary and because their religion allowed them to worship in areas other than the gravesite, protecting the gravesite was not a central aspect of their religion. *Id.*

Thiry is distinguishable from the present case because unlike in *Thirty*, the AFP would violate the central tenants of HOME's religious beliefs. Here, the AFP would substantially

burden's HOME's religion because HOME's founding principle is that nature itself is a deity that should be worshipped and respected. Rehearing Order at ¶ 49. HOME's religion was founded in response to the industrial revolution and the harmful effects HOME's founders saw that industrialization and capitalism were causing to the environment. *Id.* Thus, even if the AFP is buried underneath HOME's property, it would substantially burden HOME's beliefs. Walking over the AFP pipeline on their own land would be "unimaginable" and would destroy the meaning of the Solstice Sojourn, the central event of HOME's religion. Rehearing Order at ¶ 57. While in *Thiry* the proposed highway project would not prohibit the plaintiffs' worship because their daughter's grave would be moved, here, the AFP would make it impossible for HOME members to practice their religion. Thus, the AFP would violate RFRA.

Furthermore, the present case is distinguishable from *Navajo Nation v. U.S. Forest Service.* In *Navajo Nation*, the court found that the proposed use of recycled wastewater to make artificial snow for a commercial ski resort on a mountain considered sacred would not "substantially burden" free exercise of religion by tribal members. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063-64 (9th Cir. 2008). The court reasoned that the proposed use did not prevent tribal members from accessing the mountain to carry out religious observances because the ski resort occupied around one percent of the mountain's surface. *Id.* at 1070. Because the use of recycled wastewater in *Navajo Nation* covered only one percent of the plaintiff's sacred land, and the effect of the artificial snow was a "subjective spiritual experience," the court held that a governmental action that decreases one's spirituality or satisfaction is not what Congress intended to be a "substantial burden." *Id.* at 1063-64.

Navajo Nation is distinguishable from the present case. Unlike in *Navajo Nation*, here the construction of an AFP pipeline, even if it is buried under HOME's land, would not merely affect

HOME's members' "subjective spiritual experience." Rather, the AFP pipeline would disrupt HOME's ability to worship because HOME's fundamental core tenet of protecting nature over everything else centers around the land where the Solstice Sojourn takes place. Rehearing Order at ¶ 47. The AFP would also significantly impact HOME's annual Solstice Sojourn. *Id.* The AFP would go against HOME's fundamental religious tenant that humans should do everything in their power to promote natural preservation over all other interests (especially economic ones). *Id.* at *Id*. Therefore, the AFP would substantially burden HOME's core religious tenants.

B. Exporting oil to other countries is not a compelling governmental interest, and creating the AFP is not the least restrictive means because the pipeline will predominantly benefit nations other than the U.S.

1. Exporting natural gas internationally is not a compelling governmental interest.

RFRA allows the federal government to substantially burden an individual's sincere exercise of his religion only if furthers a compelling governmental interest. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-29 (2006).

Courts have previously held that governments have compelling interests in protecting bald and golden eagles, *United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011), restricting heroin used for allegedly religious purposes that could be diverted for non-religious use, *United States v. Anderson*, 854 F.3d 1033, 1036 (8th Cir. 2017), and ensuring prison security and penological institutional safety goals, *Muhammad v. City of New York Dep't of Corr.*, 904 F. Supp. 161, 189 (S.D.N.Y. 1995). Given bald eagles were (1) once on the verge of extinction and (2) the national bird of the U.S., their preservation serves a compelling interest. Also, encouraging safety in prisons and the wellbeing of its members is also extremely important because inmates sometimes try to escape and there are sometimes instances of inmates who harm other inmates and bring in contraband. Yet, unlike the cases mentioned, the AFP pipeline project

serves no compelling governmental interest. Given that 90 percent of AFP's capacity will be used for Brazilian natural gas exports, the pipeline would only serve TGP's interests, rather than the government's. Rehearing Order at ¶ 28.

Here, TGP contends that the AFP would serve domestic needs by delivering natural gas to areas currently without it within New Union, expanding access to sources within the U.S., creating a more competitive market, and fulfilling the NorthWay Pipeline's capacity. Order at 8. While its possible that the AFP would provide some small interest to the U.S. government by diverting ten percent of LNG to domestic sources or increasing the U.S.'s GDP with its exports, these benefits are minimal and the substantial burden on HOME's religion does not serve any compelling governmental interests.

2. Creating the AFP is not the least restrictive means.

Even if a government demonstrates that its actions serve a compelling governmental interest, it must show that the means of advancing that compelling governmental interest are the least restrictive means available. *See United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003). The government must demonstrate that an exception carved out for the religious individual would defeat its compelling interest rather than serving merely to accommodate the religious practitioner in the case at issue. *See Gonzales v. O Centro*, 546 U.S. at 429-30.

In *Craddick v. Duckworth*, the Seventh Circuit held that a blanket regulation prohibiting a Native American inmate from wearing medicine bags was not the least restrictive means of achieving the government's compelling interest in enhancing prison security. *See Craddick v. Duckworth*, 113 F.3d 83, 85 (7th Cir. 1997). Given that the AFP only serves a marginal domestic need and only marginally benefits domestic interests, it is not the least restrictive means in fulfilling its alleged compelling governmental interest. Here, like in *Craddick*, even if the

government interest alleged were compelling, the AFP's proposed location is not the least restrictive means to achieve the alleged compelling governmental interest.

To avoid substantially burdening HOME's exercise of its religion, FERC could adopt the proposed alternate route that circumvents HOME's property by routing the pipeline through the Misty Top Mountain range. Rerouting the AFP would ensure FERC's alleged compelling government interest is met while also protecting the core tenets of HOME's religious practices, even if it would cost additional money to build. The most convenient means is not necessarily the least restrictive means. Accordingly, this Court should hold that FERC's decision to route AFP over HOME property violated RFRA.

IV. The GHG Conditions Imposed by FERC Were Within Its Authority Under the NGA and Do Not Implicate the Major Questions Doctrine.

TGP argues that FERC's imposition of the GHG Conditions addresses a "major question" for which the NGA contains no clear grant of authority. However, as FERC properly concluded in its Order, the MQD does not apply here because the GHG Conditions do not pose a "major question" of "economic and political significance." *See West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022). Further, the NGA clearly grants FERC broad authority to attach terms and conditions to its CPCN orders. 15 U.S.C. § 717f(e). This broad grant of authority includes the authority to implement GHG Conditions. Additionally, even if the MQD did apply, FERC's imposition of GHG Conditions was within its authority.

A. Standard of review.

When faced with a question of statutory interpretation, a court must consider whether Congress, in enacting the statute at issue, spoke directly to the question at issue. *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) If not, the court must

consider whether the agency interpreted the statute permissibly. *Id.* at 843. The *Chevron* doctrine is extremely deferential to the agency's interpretation of the statute it has been charged with administering. *Id.* at 844. So long as the interpretation is reasonable, a reviewing court should uphold the agency's interpretation. *Id.* at 845.

As clarified by *West Virginia v. EPA*, there may be an additional step in "extraordinary cases." 142 S. Ct. at 2608. It is only in these "extraordinary cases," when the 'history and breadth' and 'economic and political significance' of the action at issue gives [the court] 'reason to hesitate before concluding that Congress' meant to confer such authority to act on the agency," that the major questions doctrine (MQD) may apply. *N.C. Coastal Fisheries Reform Grp.*, 76 F.4th at 296 (internal citations omitted) (articulating the MQD as formalized in *West Virginia v. EPA*). In such cases, the agency "must point to 'clear congressional authorization' for the power it claims." *West Virginia*, 142 S. Ct. at 2609.

B. FERC's interpretation of its authority to attach reasonable terms and conditions is consistent with the NGA's intent and is entitled to deference.

Section 7 of the NGA enables FERC "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." § 717f(e). Section 7 also states that "[FERC] may by its order 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." 15 U.S.C. § 717b(a).

The NGA was enacted in 1938 recognizing that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." Natural Gas Act, H.R. 6586, ch. 556, § 7, 52 Stat. 824 (1938). FERC is charged with determining whether natural gas projects

are within the public interest. Further, FERC's interpretation of its authority to attach GHG Conditions is reasonable under the NGA's broad language. The NGA does not mandate what the "public interest" does or does not include, presumably granting that authority and expertise to FERC. Consistent with the NGA's broad grant of authority to FERC, courts have held that "[a]ny attack on a condition in a certificate issued by the Commission must confront the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity." *Transcontinental Gas Pipeline, LLC*, 589 F.2d at 190.

Finally, FERC is required to consider a project's environmental impacts when determining whether to grant a CPCN. Specifically, FERC has long evaluated proposed projects' direct and indirect GHG emissions. *See, e.g.*, Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012); Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515000, at 29 (Feb. 29, 2012). Practically, it would be odd to require FERC to consider these emissions in determining whether to approve a project, yet not allow them to attach conditions to mitigate the effects of them.

C. The major questions doctrine does not apply because the GHG conditions are specific to the TGP Project and do not pose significant political or economic consequences.

TGP's position that the GHG Conditions were outside of FERC's authority under the NGA because they address a major question is based on a flawed understanding of the MQD. The GHG Conditions are specific and individualized to the TGP project and their imposition will not have significant economic or political consequences. *See* Rehearing Order at ¶ 86. Additionally, though a major question may also exists where the agency's interpretation would "generate an '[e]xtraordinary grant[ ] of regulatory authority" or create "new-found powers in

old statutes against a backdrop of an agency failing to invoke them previously," FERC has attached environmental conditions to its CPCN Orders for many years. *N.C. Coastal Fisheries Reform Grp.*, 76 F.4th at 297.

FERC's imposition of GHG Conditions do not pose a major question because the GHG Conditions will not have significant political and economic consequences. "Significant political and economic consequences" have been found, for example, where agencies have sought to impose an "aggressive transformation in the domestic energy industry," regulate "millions of small sources," cancel the student debt of more than 40 million borrowers, and institute a nationwide eviction moratorium during a global pandemic. *See West Virginia*, 142 S. Ct. at 2604; *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014); *N.C. Coastal Fisheries Reform Grp.*, 76 F.4th at 296 (citing *Biden v. Nebraska*, 143 S. Ct. 2355 (2023)); *Ala. Assn. of Realtors v. Dep't of Health and Hum. Servs.*, 141 S. Ct. 2485 (2021). In each of these actions, the asserted authority had a profound effect on national public policy and implicated billions of dollars. TGP cannot honestly and rationally assert that the imposition of GHG Conditions has such a profound effect on our nation's economy or policies.

While there is no monetary threshold for what is or is not a significant amount of money, the AFP project is nowhere near the billions of dollars implicated in MQD cases. *E.g.*, *N.C. Coastal Fisheries Reform Grp.*, 76 F.4th at 296 (citing *Biden v. Nebraska*, 143 S. Ct. 2355 (2023)) (stating that the cancellation of student debt would delete student borrowers' "obligations to repay $430 billion in student loans). Here, the AFP project is only worth $599 million. Even if some of the GHG Conditions require TGP to spend more money than it otherwise would have, or to conduct transactions with certain vendors, or to alternative materials, the changes to these expenditures are unlikely to change the makeup of the national economy. Each of the

transactions impacted are for supplies and services that are widely available and any change in cost is likely marginal.

Additionally, FERC, through these GHG Conditions, is neither explicitly nor implicitly attempting to regulate GHG emissions beyond this project. The GHG Conditions are tailored specifically to the AFP project. For example, one GHG Condition requires TGP to "plant or cause to be planted an equal number of trees as those removed *in the construction of the TGP Project*." Rehearing Order at ¶ 67 (emphasis added). This condition is specific to activities required by the AFP project—not every pipeline project will require tree removal and this condition creates no policy for other pipeline projects that will require tree removal. Further, the condition by its very language only implicates this project. One could not reasonably read an impact on other natural gas pipelines or pipeline developers into this condition. The other GHG conditions share these features.

Even if the MQD applied here, FERC has sufficient authority to withstand the doctrine, as discussed in detail above. *See supra* Part IV.B. Courts have held that "[a]ny attack on a condition in a certificate issued by the Commission must confront the well-established principle that generally the Commission has extremely broad authority to condition certificates of public convenience and necessity." *Transcontinental Gas Pipeline, LLC*, 589 F.2d at 190.

V. FERC's Decision not to Impose any GHG Conditions Addressing Downstream and Upstream GHG Impacts, in Light of its Adoption of GHG Conditions for Construction, was Arbitrary and Capricious.

A. Standard of review

FERC acted arbitrarily and capriciously when, in light of its EIS findings, it only opted to adopt conditions to mitigate GHG emissions from construction activities but not downstream and upstream GHG impacts. When a court reviews FERC's orders, it does so under the APA's

"arbitrary and capricious standard." *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 105-06 (D.C. Cir. 2014) ; *see also* 5 U.S.C. § 706(2)(A). Under this standard, a court will "set aside decisions of the Commission if it is arbitrary and capricious or otherwise contrary to law." *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019). FERC's decisions must be "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Minisink*, 762 F.3d at 106 (quoting *ExxonMobile Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002)). FERC's decision must "examine[] the relevant considerations and articulate[] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Allegheny Def. Project v. FERC*, 932 F.3d 940, 945 (D.C. Cir. 2019), *rehr'g granted*, 964 F.3d 1 (2020) (quoting *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016)).

B. By imposing GHG conditions on construction, FERC determined that those emissions were significant and should have also found its upstream and downstream emissions significant.

According to the TGP Project's EIS, FERC estimated that, prior to its imposition of GHG Conditions, the AFP would create an average of 104,100 metric tons per year of CO2e for four years. Rehearing Order at ¶ 73. FERC determined that the environmental impact of these constructions emissions is significant. Rehearing Order at ¶ 3. FERC stated that if AFP is "constructed and operated in accordance with applicable laws and regulations, the project will result in some adverse environmental impacts, but that these impacts *will be reduced to less-than-significant* levels with the implementation of [the GHG Conditions]." *Id.* FERC properly found the GHGs that will be emitted during the TGP Project's construction phase significant and imposed conditions to mitigate the subsequent adverse effects. *Id.* at ¶¶ 3, 67. However, FERC should not have stopped there. Instead, FERC should have also attached GHG Conditions to mitigate the Project's upstream and downstream emissions.

In addition to calculating the construction emissions, FERC calculated the downstream emissions from this Project. FERC determined that that the downstream emissions from the Project could be up to 9.7 million metric tons per year. *Id.* at ¶ 72. The estimated downstream emissions are substantially higher than the construction emissions. Further, unlike the construction emissions which will end once the pipeline is completed, the downstream emissions will continue indefinitely. These downstream emissions, by the numbers, are objectively more significant than the construction emissions. This determination did not require a complex calculation but merely a side-by-side comparison of the numbers. Upon seeing the drastic difference between 104,100 metric tons of CO2e and 9.7 million metric tons of CO2e, FERC should have easily concluded that if GHG Conditions were necessary for the smaller emissions load, they would also be necessary for the larger emissions load.

HOME finds it likely that, just as the annual downstream emissions were significantly higher than the construction emissions, so too would the upstream emissions. Unfortunately, FERC failed to consider these emissions in its NEPA analysis, despite being required to. *See Sierra Club*, 867 F.3d at 1374; *see also* NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1204 (Jan. 9, 2023). As such, FERC could not meaningfully consider whether and what GHG Conditions to attach without completing its analysis of upstream conditions.

A. Even if FERC could reasonably decide not to attach GHG conditions addressing upstream and downstream emissions, its explanation for its decision was insufficient.

FERC failed to provide an adequate explanation for its decision not to impose upstream and downstream GHG Conditions as required by the arbitrary and capricious standard. *See Allegheny Def. Project*, 932 F.3d at 945. Thus, even if FERC could legitimately decide not to impose GHG Conditions, that decision was improperly supported and should be set aside.

With regard to its decision not to impose downstream emissions, FERC's only support for its decision not to attach GHG Conditions for downstream emissions was that "construction impacts are a more direct result of the TGP Project, and thus require mitigation." Rehearing Order at ¶ 99. However, it has been established that "greenhouse-gas emissions are an indirect effect of authorizing [a] project, which FERC could reasonably foresee, and which the agency *has legal authority to mitigate*." *Sierra Club*, 867 F.3d at 1374 (emphasis added). In other words, FERC is required to consider *both* reasonably foreseeable direct and indirect effects of its proposed projects. Here, FERC foresaw the indirect downstream effects from the TGP Project and calculated projected emissions associated with them in its EIS. Yet, FERC proceeded to dismiss consideration of attaching GHG Conditions for those downstream effects only because they were *less direct*. Rehearing Order at ¶ 99. In doing so, FERC failed to meaningfully consider whether GHG Conditions could or should have been attached for downstream effects. Given the large quantity of emission, especially compared to that of the construction emissions, as well as FERC's duty to consider indirect effects, FERC's choice to decline conditions merely because they are less direct is insufficient.

Additionally, as discussed above, FERC failed to initially estimate the TGP Project's upstream GHG emissions. In its EIS, FERC claimed that upstream emissions were not relevant to the TGP Project and thus decided not to consider them. FERC stated that "[i]t can often be difficult to quantify upstream emissions due to unknown factors, including the location of the supply source and whether transported gas will come from new or existing production." Rehearing Order at ¶ 74. While FERC did explain that "the HFF gas is already in production" and is merely "being transported, in part, to different destinations," FERC did not address whether the TGP Project would lead to an increase in production of natural gas at the HFF. *Id.*

Even if FERC did not have this information available, it was obligated to either explain that it had asked for the information from the project applicant or why it could not reasonably obtain such information. *Del. Riverkeeper Network*, 45 F.4th at 109; *Birkhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019); *see also* National Environmental Policy Act Guidance on Consideration of GHG Emissions and Climate Change at 1202 ("[a]gencies should seek to obtain the information needed to quantify emissions, including by requesting or requiring information held by other entities (such as project applicants), because such information is generally essential to reasoned decision making."). Here, FERC did neither. As such, its evaluation of the TGP Project's GHG effects was incomplete and its decision not to impose upstream GHG Conditions was arbitrary and capricious.

Finally, FERC stated that it had "concluded that the upstream and downstream impacts—at least absent clear guidance—cannot be considered 'significant' under NEPA." Rehearing Order at ¶ 97. Later, FERC stated that "[g]iven the weak connection between the TGP Project and any increased upstream or downstream GHG impacts, [it saw] no need for mitigation." *Id.* Once again, FERC failed to explain why such a determination cannot be made and why this "weak connection" should be so obvious. This seems especially necessary in light of its choice to impose Conditions for construction emissions, despite construction causing significantly less emissions for a shorter period of time.

FERC blames its inability to make a significance determination on the rulemaking that is currently open for comments regarding its Draft Policy Statement. *See* Certification of New Interstate Nat. Gas Facilities, 178 FERC ¶ 61,197 (2022) (Order on Draft Policy Statement). However, FERC failed to make clear why this should affect projects it considered during the rulemaking process. First, the current Certificate Policy Statement does not discuss the

significance of greenhouse gas emissions generally nor of those specific to construction emissions. Rather, it merely lays out a policy whereby FERC should work with the project applicant to mitigate adverse effects where the public benefit outweighs those harms. Certificate Policy Statement at ¶ 61,745. Thus, FERC need not even decide significance prior to attaching conditions. Second, the evaluation of an application for a CPCN is case-by-case and fact specific. *Id.* at ¶ 61,737. As such, the significance of *this* project's upstream and downstream GHG emissions would not affect the significance of another project. FERC did not demonstrate anything to the contrary. Finally, it is unclear why and how construction emissions could be found significant, yet that same method of analysis could not apply to upstream or downstream emissions.

CONCLUSION

For the foregoing reasons, FERC erred in issuing the CPCN Order for the construction and operation of the AFP and in denying HOME's request for rehearing. The FERC Orders should be vacated and remanded pursuant to the NGA, 15 U.S.C. § 616r(b), and the APA, 5 U.S.C. § 706(2)(A).