

In the United States Court of Appeals for the Twelfth Circuit
No. 23-01109
(consolidated)

The Holy Order of Mother Earth,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent.

On Petitions for Review of Orders of the Federal Energy Regulatory
Commission

Brief For Petitioner
The Holy Order of Mother Earth

Table of Contents

| | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| Table of Contents | 1 |
| Table of Authorities | 4 |
| Page(s) | 4 |
| Jurisdictional Statement | 7 |
| Statement of Issues Presented For Review | 7 |
| Statement of the Case | 8 |
| I. Procedural History..... | 8 |
| II. Statement of Facts..... | 9 |
| A. FERC’s Initial Granting of the CPCN Authorizing Construction of the AFP..... | 10 |
| B. FERC’s Denial of Rehearing on the CPCN..... | 11 |
| (i) FERC’s finding of sufficient public necessity..... | 11 |
| (ii) FERC’s finding that the CPCN properly balanced the AFP’s benefits and harms..... | 12 |
| (iii) FERC’s determination that the AFP will not substantially burden HOME’s religious practices..... | 14 |
| (iv) FERC’s determination to impose conditions on the CPCN to mitigate direct GHG impacts, but not indirect GHG impacts..... | 15 |
| Summary of the Argument | 16 |
| I. FERC’S FINDING THAT TGP HAD DEMONSTRATED SUFFICIENT PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP LACKED SUBSTANTIAL EVIDENCE, IMPROPERLY BALANCED THE PUBLIC BENEFITS AGAINST THE PROJECT’S RESIDUAL ADVERSE EFFECTS, AND THUS SHOULD BE SET ASIDE AS ARBITRARY AND CAPRICIOUS..... | 16 |
| II. FERC ERRONEOUSLY CONCLUDED THE AFP ROUTE CREATED NO SUBSTANTIAL BURDEN TO HOME’S RELIGIOUS LIBERTIES AND FURTHER FAILED TO PROVIDE EVIDENCE SHOWING THE AFP ROUTE IS THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING INTEREST..... | 17 |
| III. FERC IS EMPOWERED UNDER THE NGA TO ATTACH SUCH “REASONABLE | |

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| TERMS AND CONDITIONS” TO A CPCN AS REQUIRED BY PUBLIC CONVENIENCE AND NECESSITY..... | 19 |
| Standing..... | 20 |
| Standard of Review..... | 21 |
| Argument..... | 23 |
| I. FERC’S FINDING THAT TGP DEMONSTRATED SUFFICIENT EVIDENCE OF PUBLIC CONVENIENCE AND NECESSITY WAS NOT THE PRODUCT OF "reasoned decisionmaking," LACKS SUBSTANTIAL EVIDENCE, AND AS SUCH SHOULD BE SET ASIDE AS ARBITRARY AND CAPRICIOUS..... | 23 |
| A. Under § 717f(e) of the NGA, FERC’s Granting of a Certificate of Public Convenience and Necessity Requires Finding the Proposed Project Fulfills a “present or future public convenience and necessity.” | 23 |
| B. FERC’s Uncritical Evaluation of Project Need Places Excessive Weight on TGP’s Precedent Agreements and Lacks Substantial Evidence to Support its Conclusion..... | 25 |
| (i) FERC was incorrect in finding that TGP’s precedent agreements were dispositive evidence public necessity had been demonstrated..... | 25 |
| (ii) FERC’s reliance on City of Oberlin is misplaced, as there are several distinguishing factors between the Nexus pipeline at issue there and the AFP, which renders that case entirely unpersuasive in supporting FERC’s finding that TGP’s precedent agreements demonstrated public necessity..... | 27 |
| D. Even if the TGP's precedent agreements, alone, were sufficient to demonstrate the AFP served the present or future public need, it was still arbitrary and capricious for FERC to find that the public benefits of the AFP outweigh its “residual adverse effects” on local landowners, the environment, and pre-existing pipelines and their customers..... | 30 |
| II. FERC’S AUTHORIZATION OF THE AFP ACROSS HOME’S PROPERTY CREATES A SUBSTANTIAL BURDEN ON HOME, AND FERC HAS FAILED TO DEMONSTRATE THAT THE AUTHORIZATION WAS NO LESS RESTRICTIVE THAN THE ALTERNATE ROUTE PROPOSED BY HOME TO ACHIEVE ITS COMPELLING INTEREST..... | 33 |
| A. RFRA protects HOME’s right to freely exercise their religious beliefs by prohibiting FERC from taking action that may substantially burden HOME’s exercise of religion..... | 34 |

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| B. Under RFRA, FERC’s authorization of the AFP across HOME’s sacred land substantially burdens HOME’s exercise of religious beliefs..... | 35 |
| (i) HOME faces substantial pressure under the threat of civil penalties to violate their religious beliefs..... | 35 |
| (ii) The CPCN threatens not only HOME’s right to freely exercise their religious beliefs but also threatens to eradicate the very foundation of HOME’s religion..... | 38 |
| C. Once there is a showing of a substantial burden, RFRA demands FERC satisfy the compelling interest test, a burden FERC did not meet..... | 41 |
| (i) FERC did not provide evidence showing the critical importance of furthering their interest, if any, outweighs HOME’s fundamental right to exercise its religious beliefs.... | 42 |
| (ii) Even if there is a compelling interest, FERC did not present evidence to show how the CPCN is the least restrictive means of furthering that interest..... | 43 |
| D. FERC refused lesser restrictive alternatives, despite HOME providing evidence that the CPCN will substantially burden its Religious Practices, and therefore the CPCN stands in clear contradiction with RFRA..... | 44 |
| III. FERC’S DECISION TO NOT REQUIRE MITIGATION OF INDIRECT GHG IMPACTS WAS ARBITRARY GIVEN SUCH IMPACTS WERE REASONABLY FORESEEABLE UNDER THE CIRCUMSTANCES..... | 45 |
| A. The Natural Gas Act provides a comprehensive statutory framework that empowers FERC with extensive authority to protect consumers and contemplate both the current and future public interest..... | 45 |
| (i) FERC's mandate under Section 7(e) to ensure that natural gas facilities, such as pipelines, serve the public interest also provides that FERC “shall have the power. . .to attach. . .such reasonable terms and conditions as the public convenience and necessity may require.”..... | 46 |
| B. FERC’s Refusal to Mitigate Indirect GHG Impacts Implies Arbitrary Limits on the Scope of FERC’s Authority in Section 7 Proceedings to Safeguard the Public Interest..... | 47 |
| Conclusion and Relief Requested..... | 49 |
| Certificate of Compliance and Service..... | 50 |

Table of Authorities

| | Page(s) |
|----------------------------------------------------------------------------------------------------|------------|
| <u>Cases</u> | |
| <i>Am. Pub. Gas Ass'n v. U.S. DOE</i> , 72 F.4th 1324 (D.C. Cir. 2023)..... | 34 |
| <i>ANR Pipeline Co. v. FERC</i> , 205 F.3d 403 (D.C. Cir. 2000)..... | 19, 48 |
| <i>Atlantic Ref. Co. v. Public Serv. Comm'n of N.Y.</i> , 360 U.S. 378, (1959)..... | 23, 47 |
| <i>Baltimore Gas & Elec. Co. v. NRDC</i> , 462 U.S. 87 (1983)..... | 20 |
| <i>Braunfeld v. Brown</i> , 366 U.S. 599..... | 36 |
| <i>Bryant v. Gomez</i> , 46 F.3d 948 (9th Cir. 1995)..... | 38 |
| <i>Burwell v. Hobby Lobby</i> , 573 U.S. 682 (2014)..... | 35, 38 |
| <i>Capitol Hill Baptist Church v. Bowser</i> , 496 F.Supp.3d 284 (D.C. Cir. 2020)..... | 43 |
| <i>Citizens to Pres. Overton Park, Inc. v. Volpe</i> , 401 U.S. 402, 91 S. Ct. 814 (1971)..... | 20 |
| <i>City of Oberlin v. FERC</i> , 39 F.4th 719 (D.C. Cir. 2022)..... | Passim |
| <i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)..... | 42 |
| <i>Consolidated Edison Co. v. Labor Board</i> , 305 U.S. 197 (1938)..... | 20 |
| <i>Ecee, Inc. v. Fed. Power Com.</i> , 526 F.2d 1270 (5th Cir. 1976)..... | 23, 50 |
| <i>Envtl. Defense Fund v. Fed. Energy Regulatory Comm'n</i> , 2 F.4th 953 (D.C. Cir. 2021)..... | Passim |
| <i>Fed. Power Com. v. Hope Natural Gas Co.</i> , 320 U.S. 591 (1944)..... | 46 |
| <i>Fed. Power Comm. v. Transcontinental Gas Pipe Line Corp.</i> , 365 U.S. 1 (1961)..... | 46, 49, 50 |
| <i>Federal Power Com. v. Hunt</i> , 376 U.S. 515 (1964)..... | 46, 47 |
| <i>Fla. Mun. Power Agency v. FERC</i> , 315 F.3d 362 (D.C. Cir. 2003)..... | 20 |
| <i>Found. on Econ. Trends v. Heckler</i> , | |

| | |
|---------------------------------------------------------------------------------------|----------------|
| 756 F.2d 143 (D.C. Cir. 1985)..... | 21 |
| <i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal</i> , | |
| 546 U.S. 418 (2006)..... | 34, 35, 42, 43 |
| <i>Henderson v. Kennedy</i> , | |
| 253 F.3d 12 (D.C. Cir. 2001)..... | 38 |
| <i>Korte v. Sebelius</i> , | |
| 735 F.3d 654 (7th Circ. 2013)..... | 36 |
| <i>Labor Board v. Columbian Enameling Stamping Co.</i> , | |
| 306 U.S. 292 (1939)..... | 20 |
| <i>Lujan v. Defenders of Wildlife</i> , | |
| 504 U.S. 555 (1992)..... | 19 |
| <i>Mahoney v. Doe</i> , | |
| 642 F.3d 1112 (D.C. Cir. 2011)..... | 34 |
| <i>Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.</i> , | |
| 463 U.S. 29 (1983)..... | 21 |
| <i>Myersville Citizens for a Rural Cmty., Inc. v. Fed. Energy Regulatory Comm'n</i> , | |
| 783 F.3d 1301 (D.C. Cir. 2015)..... | 24 |
| <i>Navajo Nation v. United States Forest Serv.</i> , | |
| 535 F.3d 1058 (9th Circ. 2008)..... | 38, 39, 40 |
| <i>Oceana, Inc. v. Ross</i> , | |
| 920 F.3d 855 (D.C. Cir. 2019)..... | 34 |
| <i>Oklahoma Natural Gas Co. v. Federal Power Com.</i> , | |
| 257 F.2d 634, (D.C. Cir. 1958)..... | 47 |
| <i>Priests for Life v. United States HHS</i> , | |
| 808 F.3d 1 (2015)..... | 38, 43 |
| <i>Riverkeeper Network v. FERC</i> , | |
| 753 F.3d 1304 (D.C. Cir. 2014)..... | 20, 21 |
| <i>Schneidewind v. ANR Pipeline Co.</i> , | |
| 485 U.S. 293 (1988)..... | 23, 47 |
| <i>Sherbert v. Verner</i> , | |
| 374 U.S. 408 (1963)..... | 35, 36, 42 |
| <i>Sierra Club v. FERC</i> , | |
| 827 F.3d 36 (D.C. Cir. 2016)..... | 19 |
| <i>Sierra Club v. United States DOE</i> , | |
| 867 F.3d 189 (D.C. Cir. 2017)..... | 50 |
| <i>Susquehanna Int'l Grp., LLP v. SEC</i> , | |
| 866 F.3d 442 (D.C. Cir. 2017)..... | 34 |
| <i>Thiry v Carlson</i> , | |
| 78 F.3d 1491 (10th Circ. 1996)..... | 38 |
| <i>Thomas v. Collins</i> , | |

| | |
|------------------------------------------------------------------------------------------|------------|
| 323 U.S. 516 (1945)..... | 42, 45 |
| <i>Transwestern Pipeline Co. v. FERC</i> , 747 F.2d 781 (D.C. Cir. 1984)..... | 19 |
| <i>Universal Camera Corp. v. Nat'l Labor Relations Bd.</i> , 340 U.S. 474 (1951)..... | 20, 21, 22 |
| <i>Washington Gas Light Co. v. FERC</i> , 532 F.3d 928 (D.C. Cir. 2008)..... | 20 |
| <i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)..... | 36, 37 |

Statutes

| | |
|----------------------------------------------------------------|----------------|
| The Administrative Procedure Act, 5 U.S.C. § 706(2)(A)..... | 34 |
| The Natural Gas Act, 15 U.S.C. §§ 717 et seq. | |
| § 717(b)..... | 47 |
| § 717b(c)..... | 29 |
| § 717f(c)..... | 9 |
| § 717f(e)..... | 46, 47, 48 |
| § 717f(h)..... | 36, 37 |
| § 717r(a)..... | 9 |
| § 717r(b)..... | 9, 19, 20 |
| Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. | |
| § 2000bb-1..... | 10, 34, 41, 42 |
| § 2000bb-2(a)(1)..... | 34 |
| The National Environmental Policy Act, 42 U.S.C. 4321 et seq. | |
| § 4321..... | 20 |

Regulations and Administrative Materials

| | |
|--------------------------------------------------------------------------------------------------------------------|---------------|
| 40 C.F.R. § 1508.8..... | 50 |
| <i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999)..... | Passim |
| Order Clarifying Statement of Policy 90 FERC ¶ 61,128 (Issued February 9, 2000)..... | 24, 36 |
| Order Further Clarifying Statement of Policy 92 FERC ¶ 61,094 (Issued July 28, 2000)..... | 24 |
| <i>Certification of New Interstate Natural Gas Facilities</i> 178 FERC ¶ 61,107 (Issued February 18, 2022)..... | 25-27, 31, 33 |

Jurisdictional Statement

Under 15 U.S.C. § 717r(b), Petitioner, the Holy Order of Mother Earth (“HOME”), who was an intervening party in the agency proceedings below, seeks review of two final orders issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”). The first order, issued on April 1, 2023, under Section 7 of the Natural Gas Act (“NGA”), 15 U.S.C. § 717f(c), authorized Transnational Gas Pipelines, LLC (“TGP”) to construct and operate the American Freedom Pipeline (“AFP”). Thereafter, on April 20, 2023, HOME timely filed its request for rehearing of the FERC’s first order.

On May 19, 2023, FERC issued its second order under 15 U.S.C. § 717r(a) of the NGA, denying HOMES’ request for rehearing. *See Transnational Gas Pipelines, LLC*, 199 FERC ¶ 72,201 (June 1, 2023) (“Rehearing Order”). Following this, on June 1, 2023, HOME timely filed its petition for review of both final orders issued by FERC. This Court has jurisdiction under both 15 U.S.C. § 717r(b).

Statement of Issues Presented For Review

1. Whether FERC’s finding of public convenience and necessity for the AFP was arbitrary and capricious or not supported by substantial evidence insofar as FERC found:
 - a) the AFP is required by “the present or future public convenience and necessity” based on precedent agreements indicating that 90 percent of gas to be transported by the project will be exported to a country without a Free Trade Agreement with the United States, and
 - b) the public benefits of the AFP outweighed the project’s “residual adverse effects,” where it was uncontested that TGP had not secured easement agreements with over 40 percent

of landowners along the proposed route, the pipeline would not increase gas production and would instead divert supplies already transmitted by a pre-existing pipeline, and FERC did not conduct an environmental analysis.

2. Whether FERC's order authorizing construction of the AFP across HOME's property, despite HOME's religious-based objections, substantially burdens HOME's exercise of religion and, if so, whether FERC presented evidence showing the authorization is the least restrictive means of furthering a compelling government interest, as set forth under the Religious Freedom Restoration Act, 42 USC §§ 2000bb et seq.?
3. Whether, under § 717f(e) of the NGA, FERC's statutory authority to attach "reasonable terms and conditions as the public convenience and necessity may require" empowers FERC to impose the GHG Conditions as a condition of granting the CPCN to construct the AFP?
4. Whether FERC's conclusion that it need not consider reasonably foreseeable indirect downstream environmental impacts of the AFP, including the GHG and climate effects of burning upwards of 500 million cubic feet of natural gas per day for several decades, given the availability of tools utilized by other federal agencies exist to measure such impacts, violates NEPA, violates CEQ regulations, and is arbitrary and capricious?

Statement of the Case

I. Procedural History.

On June 13, 2022, TGP filed an application with FERC for a certificate of public convenience and necessity ("CPCN") authorizing the construction of the proposed AFP. (R. at ¶ 1). This application was granted by FERC on April 1, 2023, wherein it issued an order granting

TGP a CPCN to construct and operate the AFP along a proposed route crossing approximately two miles of land privately owned by the HOME. (R. at ¶ 38). Thereafter, on April 20, 2023, HOME submitted a petition to FERC for rehearing on the CPCN. Two days later, TGP also submitted a petition for rehearing to the Commission.

On May 19, 2023, FERC issued an order addressing objections raised by both HOME and TGP that ultimately denied rehearing on all issues and affirmed the CPCN as originally issued on April 1, 2023 (“Rehearing Order”). *See Transnat’l Gas Pipelines, LLC*, 199 FERC ¶ 72,201 (May 19, 2023). Therefore, on June 1, 2023, HOME and TGP each submitted timely petitions to this Court for review of both FERC’s initial order granting the CPCN to authorize construction of the AFP, and the subsequent Rehearing Order affirming such (collectively “FERC Orders”).

II. Statement of Facts.

HOME, petitioner-appellant herein, is a religious order centered on beliefs holding the natural world to be sacred, with nature itself embodying a divine spirit, and that “humans should do everything in their power to promote natural preservation over all other interests, especially economic interests.” (R. at ¶ 46-47). HOME is headquartered on a large acreage of land in New Union that extends from the shoreline of Lake Williams to the foothills of the Misty Mountains. (R. at ¶ 9). Since 1935, these lands have provided HOME’s members with a sanctuary to retreat into a pristine natural realm which they hold to be sacrosanct. (R. at ¶ 48). Further, these lands are the site of HOME’s sacred Solstice Sojourn—a bi-annual pilgrimage made by HOME’s members that holds a central role in the group’s coming-of-age traditions. (*Id.*). However, this natural sanctuary is now under threat of being fundamentally altered as a result of FERC’s authorization to construct a pipeline across approximately two miles of HOME’s property,

directly over the routes of egress and ingress for the Solstice Sojourn pilgrimage. (*See* R. at ¶¶ 38, 48-49).

A. FERC’s Initial Granting of the CPCN Authorizing Construction of the AFP.

The AFP is slated to be a 99-miles-long pipeline project, stretching from Haye’s Fracking Field (“HFF”) in Jordan County, Old Union to an existing TGP gas transmission facility in Burden County, New Union, with a carrying capacity of 500,000 dekatherms (“Dth”) per day of liquid natural gas. (R. at ¶ 1). In granting TGP its requested CPCN on April 1, 2023, the Commission required TGP to implement certain conditions to mitigate social and environmental impacts of the AFP that had been raised as concerns by public comment. (*See* R. at ¶ 56).

To mitigate harm to HOME’s particular property, FERC required TGP to expedite “to the extent feasible” construction of this segment of the pipeline and required such to be buried for the entirety of its passage through HOME’s property. (R. at ¶ 41). Additionally, FERC acknowledged, based upon an Environmental Impact Statement (“EIS”) supplied by TGP, that construction of the AFP would result in “some adverse environmental impacts,” but these impacts could be “reduced to less-than-significant levels” with the implementation of the mitigation measures attached to the CPCN as issued. (R. at ¶ 3). Specifically, the mitigation measures attached to the CPCN (the “GHG Condition”) require TGP to:

- (1). . .plant or cause to be planted an equal number of trees as those removed in the construction of the TGP Project;
- (2). . .utilize, wherever practical, electric-powered equipment in the 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). . .purchase only ‘green’ steel pipeline segments

produced by net-zero steel manufacturers; and (4). . .purchase all electricity used in construction from renewable sources where such sources are available.” (R. at ¶ 67).

Denying rehearing, FERC affirmed the CPCN as issued, including the attachment of the aforementioned conditions, in the Rehearing Order dated May 19, 2023.

B. FERC’s Denial of Rehearing on the CPCN

In the Rehearing Order, FERC addressed issues with the CPCN raised by both HOME and TGP, which broadly relate to: “the need for the project, the impacts on landowners and communities affected by the route, and the [project’s] environmental impacts.” (R. at ¶ 21).

(i) FERC’s finding of sufficient public necessity

In rejecting HOME’s argument that the CPCN was unsupported by substantial evidence of public necessity, FERC found the two precedent agreements submitted by TGP were “sufficient to demonstrate a public necessity here.” (R. at ¶ 33). Specifically, these precedent agreements were explained to have been the product of a 20-day bidding process conducted in 2020, in which TGP secured agreements with International Oil & Gas Corporation (“International”) for the purchase of 450,000 Dth of liquid natural gas per day, and New Union Gas and Energy Services Company (“NUG”) committing to the remaining 50,000 Dth of daily transportation service capacity available. (R. at ¶ 11).

FERC recognized the uncontested fact that the precedent agreements evidenced that approximately 90 percent of the liquid natural gas carried by the AFP was intended for export to Brazil—a country with which the United States does not have a free trade agreement. (*See* R. at ¶ 24, 33). Further, FERC also acknowledged that the full production of natural gas at Hayes Fracking Field (“HFF”) is currently already transported by the existing Southway Pipeline, and,

thus, the precedent agreements submitted by TGP “do not contemplate additional production” but instead would “reroute” approximately 35% of the current production at HFF. (R. at ¶ 12). Despite these uncontested facts, FERC found TGP’s precedent agreements were “nonetheless sufficient to demonstrate a public necessity here.” (R. at ¶ 33).

While FERC primarily relied on the precedent agreements as being “important, significant evidence of demand for a project,” (R. at ¶ 26), it also pointed to additional claims proffered by TGP’s application as support for its conclusion to affirm the finding of the CPCN. (See R. at ¶ 27). These claims provided that the AFP fulfills “multiple domestic needs,” including expanding access to “some domestic customers” and filling additional capacity at the International New Union City M&R Station where gas will be transported for export to Brazil. (R. at 27, *see also* 34). FERC also stated that, due to declining demands for gas served by the Southway Pipeline, which already transports gas from HFF, the AFP would transmit gas that “may or may not otherwise be purchased in the future.” (R. at ¶ 34). However, FERC does not explain whether it engaged in any additional fact-finding to confirm the validity or extent of these alleged benefits provided by the AFP.

(ii) *FERC’s finding that the CPCN properly balanced the AFP’s benefits and harms.*

Addressing HOME’s objection that the CPCN improperly balanced the adverse impacts of the AFP against the public benefits the Commission relied upon to find sufficient project need exists, FERC concluded in the Rehearing Order that TGP had taken sufficient steps to “minimize adverse economic impacts on landowners and surrounding communities” to warrant issuance of the CPCN. (R. at ¶ 43). In so doing, FERC stated it was “mindful” that TGP had not yet secured easement agreements with over 40 percent of landowners along the proposed route, including HOME. (*Id.*). However, FERC pointed to the fact that TGP had altered more than 30

percent of the AFP's proposed route in response to landowners' concerns and questions. (R. at ¶ 41). Further, FERC also explained that because "[u]se of eminent domain is common in construction of pipelines," TGP's lack of easement agreements with numerous affected landowners was not "significant" when evaluating the harms and the benefits of a proposed project. (R. at ¶ 43).

Concerning HOME's particular property, FERC found that HOME had failed to demonstrate the authorized route would cause "significant impacts" worthy of denying the CPCN, nor rerouting the AFP. (R. at ¶ 52-53). FERC acknowledged that over two thousand trees and "many other forms of vegetation" will be removed from HOME's property alone to construct the AFP—the "vast majority" of which will not be able to be replaced due to safety reasons. (R. at ¶ 38). The result of this, FERC recognized, was that the AFP would result in a permanent "bare spot" on HOME's property. (R. at ¶ 59). Nonetheless, FERC found that the mitigation measures attached as a condition of the CPCN sufficiently reduced its adverse impacts, both generally and to HOME's land, to justify granting issuance of the CPCN.

In considering whether it should have required a rerouting of the AFP to avoid HOME's property, FERC stated the alternative route for the AFP would cost TGP an additional \$51 million to construct, and would likely cause "more objective environmental harm" than the authorized route. (R. at ¶ 44). FERC stated such would be "impractical and overly burdensome, in light of the minimal impacts on HOME." (R. at ¶ 62). Therefore, upon concluding it could not ascribe "extra" weight to the environmental harms threatening HOME's property based on its members' religious beliefs, as discussed further below, FERC affirmed the granting of the AFP's proposed route. (R. at ¶ 52).

(iii) *FERC's determination that the AFP will not substantially burden HOME's religious practices.*

In authorizing the construction of the AFP, FERC recognized that the proposed route does not simply touch upon HOME's land, but will cut across both routes of HOME's Solstice Sojourn pilgrimage. (R. at ¶ 48). Further, FERC does not dispute the sincerity of HOME's religious beliefs and acknowledges it would be "anathema to HOME's religious beliefs and practices to allow its land to be used for the transport of [liquid natural gas]." (R. at ¶ 49, *see also* ¶ 51). However, in denying HOME's petition for rehearing, FERC rejected that the CPCN would substantially burden HOME's ability to practice its religion.

Specifically, FERC found that HOME's members will not be prevented from practicing their religious beliefs given TGP was required, as a condition of the CPCN, to bury the section of the AFP crossing over HOME's property. (*See* R. at ¶ 59, 61). Seeing that the AFP will not create a "physical barrier" blocking the pathways of the Solstice Sojourn, FERC found there to be no "substantial burden" evident on HOME's ability to practice its religion. As such, the CPCN was found to be neither subject to strict scrutiny review nor violative of RFRA. (R. at ¶ 61).

FERC refused to reach the issue pressed by TGP's assertion that even if the AFP were to be found to result in "substantial" impacts on HOME's religious practices, FERC should nonetheless uphold the CPCN as issued rather than requiring the project to reroute. (R. at ¶ 63). Instead, FERC contended that because the AFP was not found to have a "substantial burden" on HOME's religious practices, it need not "reach that issue unless subsequent judicial review determines that strict scrutiny is the appropriate standard." (R. at ¶ 64).

- (iv) *FERC's determination to impose conditions on the CPCN to mitigate direct GHG impacts, but not indirect GHG impacts.*

In addressing the anticipated environmental effects from the construction of the AFP, the Rehearing Order only analyzed the impacts of the project's construction as relates to HOME's particular property based on the EIS provided by TGP. (R. at ¶ 38). However, FERC also explained that the EIS from TGP forecasted that the operation of AFP could result in upwards of 9.7 million metric tons of CO₂e emissions per year. (R. at ¶ 72). But, noting this figure likely represented the "upper bound" for what is commonly referred to as "downstream emissions," FERC refused to consider these downstream GHG emissions as significant. (*Id.*). Similarly,

FERC also found upstream GHG emission impacts to be irrelevant, given the AFP is not expected to generate increases in the production of liquid natural gas. (R. at ¶ 74, *see also* ¶ 12). Therefore, FERC stated it would not characterize the AFP's upstream and downstream GHG impacts (*i.e.*, indirect GHG emissions) as either significant or insignificant due to an ongoing "generic proceeding" the agency was undertaking to determine "whether and how the Commission will conduct significance determinations for GHG emissions going forward." (R. at ¶ 81).

Unlike conditions to mitigate indirect GHG, FERC affirmed the GHG Conditions attached to the CPCN requiring TGP to undertake measures for mitigating the *direct* GHG impacts resulting from the construction of the AFP. (R. at ¶ 80-82). Justifying its conclusions, FERC stated that "the GHG impacts resulting from the construction of the AFP are more directly related to our authority under the NGA and the issues relevant to the CPCN, so they can be more readily addressed through mitigation." (R. at ¶ 82). Thus, FERC rejected the contention by TGP that Section 7 of the NGA does not empower FERC with the scope of authority to attach the

GHG Conditions to the CPCN, instead finding such to be “precisely directed at the core of our authority” and “well within the scope of our powers under the NGA.” (R. at ¶ 91).

Summary of the Argument

I. FERC’S FINDING THAT TGP HAD DEMONSTRATED SUFFICIENT PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP LACKED SUBSTANTIAL EVIDENCE, IMPROPERLY BALANCED THE PUBLIC BENEFITS AGAINST THE PROJECT’S RESIDUAL ADVERSE EFFECTS, AND THUS SHOULD BE SET ASIDE AS ARBITRARY AND CAPRICIOUS.

As asserted in its petition for rehearing, HOME now argues that the FERC failed to provide substantial evidence to support its finding that the AFP was required by the “public convenience and necessity,” as required under § 717f(e). To uphold FERC’s finding of facts, this Court must find that FERC relied on “more than a mere scintilla” of evidence, *Universal Camera Corp.*, 340 U.S. at 477, after reviewing the “whole” record of the proceedings, including evidence contradictory to the agency’s findings. *Id.* at 491.

Chiefly, FERC relied almost exclusively on precedent agreements that were insufficient to show the proposed project would fulfill local market needs or consumer demands. FERC’s rationale misunderstands the guidance provided by the 1999 Policy Certificate Statement for assessing the significance of precedent agreements when determining whether a proposed project is a present or future public necessity. Additionally, FERC misplaces reliance on *City of Oberlin v. FERC*, 39 F.4th 719 (D.C. Cir. 2022) as supporting its conclusion that TGP’s precedent agreements were dispositive evidence of the project fulfilling a public necessity. There are several distinctions in the factual circumstances of *City of Oberlin* and the case at bar, some of

which FERC recognized in the Rehearing Order, that ultimately cut against upholding FERC's conclusion that the AFP "is or will be required by the present or future public convenience and necessity." § 717f(e).

Even if the TGP's precedent agreements were sufficient to demonstrate the AFP served the present or future public need, it was still arbitrary and capricious for FERC to find that the public benefits of the AFP outweigh its "residual adverse effects" on local landowners, the environment, and existing pipelines and their captive customers. Specifically, FERC's finding that the public benefits of the AFP outweigh its "residual adverse effects" on local landowners and the environment should be set aside as arbitrary and capricious.

II. FERC ERRONEOUSLY CONCLUDED THE AFP ROUTE CREATED NO SUBSTANTIAL BURDEN TO HOME'S RELIGIOUS LIBERTIES AND FURTHER FAILED TO PROVIDE EVIDENCE SHOWING THE AFP ROUTE IS THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING INTEREST.

RFRA prohibits agency action from imposing a substantial burden on any exercise of religion unless the challenged action is the least restrictive means of furthering a compelling government interest. HOME argues the CPCN violates RFRA because HOME has presented evidence showing such will impose a substantial burden on its free exercise of religion. In response, FERC did not provide evidence to satisfy their burden under the compelling interest test, but instead reached the erroneous conclusion that the AFP's burden on HOME will not be "substantial."

A substantial burden coerces an adherent to modify their behavior and to violate their beliefs. Confronted with the threat of allowing irreparable harm to occur to their sacred lands,

HOME faces substantial pressure, under threat of civil penalty, to modify their religious practices and violate their beliefs. Once FERC issued the CPCN to TGP, HOME's property became subject to condemnation should it refuse to sell the portion of its lands needed to construct the AFP. HOME argues that being confronted with the pressure to comply with the CPCN, and thus sacrifice their nature sanctuary in dereliction of their religious beliefs, or face the condemnation of their land and the potential imposition of civil penalties, is certainly one that rises to the level of a substantial burden to HOME.

FERC claims the conditions included in the CPCN reduce any burdens to HOME to warrant whatever burden remains insignificant or non-substantial. However, HOME asserts a substantial burden still exists despite the conditions attached by FERC to the CPCN. First, although FERC required that the segment of the AFP crossing HOME's property be buried, the pipeline still meaningfully interferes—if not entirely prevents—HOME's conducting of its sacred ceremony, the Solstice Sojourn.

The AFP's route bisects HOME's property in such a manner that would be a continual reminder to HOME's members of how their land has been violated. Specifically, the AFP cuts across both the ingress and egress pathways of the Solstice Sojourn and allows for no possible alternative route for accessing the sacred land in the foothills of the Misty Mountains. Equally, the condition that trees destroyed due to construction of the AFP construction be replanted, does nothing to mitigate any burden on HOME because: (1) the trees cannot be replanted on HOME's property, resulting in a "bare spot," and (2) the sheer existence of the AFP on HOME's land, buried or not, was recognized as "anathema" the group's religious belief. , FERC's replanting condition does not mitigate land use impacts resulting from regular maintenance and safety requirements of the AFP, which also threaten to disrupt HOME's natural sanctuary.

Because HOME has presented significant evidence showing how the CPCN will substantially burden HOME, RFRA requires that FERC present evidence satisfying the compelling interest test under a strict scrutiny standard of review. Thus, HOME maintains the onus is on FERC to present evidence of a compelling interest, a burden that FERC has not met. Alternatively, HOME maintains that even if this court did find a compelling interest to exist, the CPCN as it currently stands does not represent the least restrictive means for achieving the compelling government interest at stake. Rather, FERC failed to show, with convincing evidence to support its conclusions, how the AFP's approved route constitutes the least restrictive means available, especially given TGP has indicated an alternative route avoiding HOME's property exists. Because FERC did not present evidence to satisfy the compelling interest test in response to HOME's evidence showing a substantial burden, this court should invalidate the CPCN as contrary to RFRA.

III. FERC IS EMPOWERED UNDER THE NGA TO ATTACH SUCH “REASONABLE TERMS AND CONDITIONS” TO A CPCN AS REQUIRED BY PUBLIC CONVENIENCE AND NECESSITY.

Section 7 of the NGA has long been understood to empower the federal government with the authority to regulate the conditions of entry into the interstate natural gas market. *See e.g. Federal Power Com. v. Hunt*, 376 U.S. 515, 526 (1964) (“Clearly, [under §§ 717f(c) (e)] the Commission was given the power to lay down conditions precedent to the entry of the natural gas into interstate commerce.”). Section 7(e) provides that FERC “shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C.S. 717f(e). Therefore, as FERC correctly noted in the Rehearing Order, the GHG

Conditions attached to the CPCN issued to TGP to mitigate direct GHG impacts “are precisely directed at the core of [FERC’s] authority.” R. at ¶ 91. HOME does not dispute this position of FERC, but instead takes issue with FERC’s failure to consider the reasonably foreseeable downstream environmental effects of the AFP, which violates NEP, CEQ regulations, and is arbitrary and capricious.

Standing

HOME is a non-profit religious organization owning land that will be directly affected by the AFP, and has thus alleged sufficient “immediate prospect of future injury” from FERC’s orders authorizing construction of the AFP at issue herein to establish proper standing for judicial review under 15 U.S.C. § 717r(b). *See ANR Pipeline Co. v. FERC*, 771 F.2d 507, 516 (D.C. Cir. 1985) (citing *Transwestern Pipeline Co. v. FERC*, 747 F.2d 781, 785 (D.C. Cir. 1984)).

Furthermore, the construction, maintenance, and operation of the AFP will cause HOME concrete, particularized, and imminent harm, which this Court can redress by setting aside FERC’s findings, vacating the certificates based upon such, and remanding back to the agency with instructions for additional fact-finding, including, but not limited to, ordering FERC to conduct an environmental analysis of the proposed project that is compliant with NEPA. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Sierra Club v. FERC*, 827 F.3d 36, 45 (D.C. Cir. 2016) (vacating FERC’s order authorizing proposed projects based on failure to conduct a sufficient environmental analysis as required by NEPA, which “because, if error occurred, the Commission might come to a different result on remand, [making] the lawfulness of the Commission's action remains very much a live legal issue.”).

Standard of Review

In reviewing FERC's actions originating under Section 7 of the NGA, appellate courts are guided by an arbitrary and capricious standard of review, in which FERC's factual findings are to be upheld if such is found to be supported by “substantial evidence.” *Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008) (citing *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) and 15 U.S.C. § 717r(b)).

The Supreme Court has explained that “substantial evidence” in the context of reviewing an agency’s findings of fact requires “more than a mere scintilla” of evidence present to uphold an agency’s decision; and, instead, means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (citing *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229). Accordingly, for evidence to be considered substantial, it “must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” *Id.* (citing *Labor Board v. Columbian Enameling Stamping Co.*, 306 U.S. 292, 300 (1939)). Furthermore, when reviewing the agency’s factual determinations, a court is to consider the “whole” record of the proceedings, including evidence that may be contradictory to the agency’s findings. *Id.* at 491; *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419, 91 S. Ct. 814, 825 (1971) (Explaining that “the basis for review required by § 706 of the Administrative Procedure Act” comprises “the ‘whole record’ compiled by the agency”).

Additionally, under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., judicial review of agency actions is available “to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not

arbitrary or capricious.” *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1312-13 (D.C. Cir. 2014) (citing *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983)). Although reviewing courts are not to “second-guess” an agency’s substantive decision under NEPA’s analytical framework, an agency’s determination must still be found to have conformed to “principles of reasoned decisionmaking, NEPA’s policy of public scrutiny, and [the Council on Environmental Quality’s] own regulations.” *Del. Riverkeeper Network.*, 753 F.3d at 1313 (alteration in original) (citing *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985)). Therefore, only after an agency is found to have articulated “a satisfactory explanation for its action including a rational connection between the facts found and the choice made,” will a reviewing court proceed to consider “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” 753 F.3d at 1313 (internal citations omitted).

Put succinctly, if the reviewing court finds the agency’s decision was not the product of “reasoned decisionmaking,” then this decision should be set aside as arbitrary and capricious. *Id.* (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 52 (1983)).

Argument

I. FERC’S FINDING THAT TGP DEMONSTRATED SUFFICIENT EVIDENCE OF PUBLIC CONVENIENCE AND NECESSITY WAS NOT THE PRODUCT OF “reasoned decisionmaking,” LACKS SUBSTANTIAL EVIDENCE, AND AS SUCH SHOULD BE SET ASIDE AS ARBITRARY AND CAPRICIOUS.

A. Under § 717f(e) of the NGA, FERC’s Granting of a Certificate of Public Convenience and Necessity Requires Finding the Proposed Project Fulfills a “present or future public convenience and necessity.”

The NGA empowers FERC with exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 301 (1988). Under this authority, any party wishing to construct an interstate pipeline must be granted a certificate of public convenience and necessity (“CPCN”) from FERC. *See* § 717f(c). Applications for CPCNs are granted or denied according to the standards provided in Section 7(e) of the NGA, under which FERC may issue a CPCN “only if, among other things, it finds that the proposed construction or extension ‘is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.’” *Env’tl. Defense Fund v. Fed. Energy Regulatory Comm’n*, 2 F.4th 953, 961 (D.C. Cir. 2021) (citing § 717f(e)), *reh’g denied*, 2021 U.S. App. LEXIS 26917 (D.C. Cir. Sept. 7, 2021), *reh’g denied en banc* 2021 U.S. App. LEXIS 26918 (D.C. Cir. Sept. 7, 2021), *cert. denied*, 142 S. Ct. 1668 (2022).

In Section 7 CPCN proceedings, FERC has been recognized to serve as a “guardian” of the public interest, and as such must always consider whether granting “the certificate applied for is in public interest or whether that interest calls for some other disposition.” *Ecee, Inc. v. Fed.*

Power Com., 526 F.2d 1270, 1275 (5th Cir. 1976) (internal citation omitted) *cert. denied*, 429 U.S. 867 (1976). Therefore, FERC “*must consider all factors bearing on the public interest, not simply those immediately relating to the objects of its jurisdiction.*” *City of Oberlin*, 39 F.4th at 722 (citing *Atlantic Ref. Co. v. Public Serv. Comm'n of N.Y.*, 360 U.S. 378, 391, (1959)) (emphasis added).

FERC has promulgated a policy statement providing guidance for determining whether a proposed pipeline is in the current or future public convenience and necessity. *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”). Under this Certificate Policy Statement, FERC first evaluates as a threshold question, “whether the project can proceed without subsidies from [the company's] existing customers.” *Certificate Policy Statement*, 88 FERC at 61,745.

If the threshold question has been satisfied, FERC then determines whether an applicant has made efforts to eliminate or minimize “*any adverse effects the project might have on . . . existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline.*” *Id.* (emphasis added). “Adverse effects” can include an array of considerations, such as “unfair competition, or negative impact on the environment or landowners’ property.” *Myersville Citizens for a Rural Cmty., Inc. v. Fed. Energy Regulatory Comm'n*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) (citing 88 FERC at 61,747-48).

If any “residual adverse effects” have been determined—that is, impacts to relevant interest that the applicant could not eliminate—FERC then balances the evidence of such against that of the public benefits expected from the project. *City of Oberlin v. FERC*, 39 F.4th 719, 722 (D.C. Cir. 2022) (citing *Certificate Policy Statement*, 88 FERC at 61,745). Here, public benefits

typically contemplated may include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." *Myersville*, 783 F.3d at 1309 (citing 88 FERC at 61,748). This exercise is described as being "essentially an economic test." *Id.*

The Certificate Policy Statement clarifies that projects that are determined to have residual adverse effects should be "approved only where the public benefits to be achieved from the project can be found to outweigh the adverse effects. *Rather than relying only on one test for need*, the Commission will consider *all* relevant factors reflecting on the need for the project." 88 FERC at 61,747 (emphasis added). Hence, the "objective" of this analytical framework is ultimately for an applicant to demonstrate "a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects. . ." *Id.*

B. FERC's Uncritical Evaluation of Project Need Places Excessive Weight on TGP's Precedent Agreements and Lacks Substantial Evidence to Support its Conclusion.

- (i) *FERC was incorrect in finding that TGP's precedent agreements were dispositive evidence public necessity had been demonstrated.*

In deciding whether to issue a certificate of public convenience and necessity, FERC must decide whether, on balance, the project will serve the public interest. To make such a determination, FERC must consider all of the benefits of a proposal together with all of the adverse impacts, including the economic and environmental impacts. *See* 178 FERC at ¶ 61,693. Therefore, while FERC's assertion that TGP's precedent agreements constitute "a valid consideration" may have some basis of support, its ultimate conclusion that such agreements

were sufficient to evidence project need does not. *See* R. at ¶ 30. Thus, without the significant weight given to the precedent agreements by FERC, the additional domestic benefits demonstrated by TGP were insufficient, standing alone, to justify the issuance of the CPCN to construct and operate the AFP.

FERC's reliance on the Policy Certificate Statement to find that precedent agreements “will always be important, significant evidence of demand for a project” is misplaced, and inaccurately implies a blanket policy in which precedent agreements themselves can always be dispositive of existing need for a particular project. R. at ¶ 26 (footnote citations omitted), *see also* R. at ¶ 33. Instead, the Policy Certificate Statement clearly explains the intent to move away from such a rigid approach for determining whether there is sufficient “need” to grant a CPCN and establish a sliding-scale approach to balance public benefits with adverse effects. 88 FERC at ¶ 61748. Accordingly, the amount of evidence required to demonstrate sufficient need for a proposed project is “depend[ant] on the potential adverse effects of the proposed project on the *relevant interests*.” *Id.*(emphasis added). Thus, the “more interests adversely affected [by a project] or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact.” 88 FERC at 61,749.

Among the “relevant interests” that FERC must consider include those of “competing existing pipelines and their captive customers,” and “landowners and surrounding communities” that will be impacted by a proposed pipeline project. 88 FERC at ¶ 61747. Additionally, FERC issued updated guidance in 2022 that reaffirmed Section 7 evaluations are “to consider *all* relevant factors bearing on the need for a project.” 178 FERC ¶¶ 61,107, 61686-87 (Issued February 18, 2022) (emphasis in original). Furthermore, this updated policy statement explains

that “[a]lthough precedent agreements remain important evidence of need. . .the existence of precedent agreements may not be sufficient in and of themselves to establish need for the project. The Commission will also consider, as relevant, the circumstances surrounding the precedent agreements. . .as well as other evidence of need.” *Id.* at 61687.

While the precedent agreements provided in TGP’s application do provide some degree of evidence of market need, FERC’s finding that these agreements sufficiently demonstrate the AFP is in the public convenience derogates from clear guidance that Section 7 CPCN evaluations must consider *all* relevant factors affecting bearing on the “need” for the project. This finding harkens back to a persistent problem with precedent agreements in Section 7 proceedings that both the Policy Certificate Statements sought to eliminate. *See* 178 FERC at 61,686 (stating that FERC “cannot adequately assess project need without also looking at evidence beyond precedent agreements.”).

(ii) FERC’s reliance on City of Oberlin is misplaced, as there are several distinguishing factors between the Nexus pipeline at issue there and the AFP, which renders that case entirely unpersuasive in supporting FERC’s finding that TGP’s precedent agreements demonstrated public necessity.

First, FERC acknowledged HOME’s assertion correctly identifying inconsistencies between the circumstances in *City of Oberlin* and those dealing with the AFP. Namely, it was recognized that:

- (1) only 17 percent of the precedent agreements for the Nexus pipeline were for gas to be exported, compared to approximately 90 percent for the AFP;
- (2) that some portion of the exported gas in the Nexus pipeline would be imported back into the United States, whereas such is not expected to occur with the AFP; and

(3) where the Nexus pipeline increased domestic production, the AFP does not, but instead reroutes approximately 35 percent of gas already transported by a pre-existing pipeline. Despite recognizing these distinctions, and being “particularly cognizant” that the natural gas the AFP proposes to transport is already fully transmitted by the existing Southway Pipeline, FERC still found the precedent agreements to be “nonetheless sufficient to demonstrate a public necessity.” *See* R. at ¶ 31-33.

Each of the above distinctions bears significantly on the *domestic* public benefits expected from the AFP. For instance, the increases in domestic product expected for the Nexus project would generate a domestic benefit that the AFP is not expected to produce. Likewise, where only 17 percent of gas transported by the Nexus pipeline was to be exported, with a portion of this expected to be re-imported, the AFP proposed to export over 450,000Dths of liquid natural gas per day without any expected increases in production or re-importation.

Additionally, FERC points to claims of declining demands to justify diverting gas currently transmitted by the Southway Pipeline to the AFP, but its conclusion that the precedent agreements therefore evidence a public necessity because this gas “may or may not otherwise be purchased in the future” is wholly unpersuasive. *See Envtl. Defense Fund v. Fed. Energy Regulatory Comm’n*, 2 F.4th 953, 962 (D.C. Cir. 2021) (quoting 88 FERC at 61,747-48) (Providing that “the evidence necessary to establish the need for the project will usually include a market study. . . .Vague assertions of public benefits will not be sufficient.”).

Second, FERC failed to acknowledge that the export precedent agreements at issue in *City of Oberlin* were with a country (*i.e.* Canada) that the United States has a Free Trade Agreement (“FTA”), a key distinction from the AFP that significantly cuts against FERC’s attempt to support its conclusion. Accordingly, the Court in *City of Oberlin* did uphold FERC’s

finding that the export precedent agreements were able to be properly considered as a public benefit in evaluating whether sufficient need for a project had been demonstrated. However, this was precisely because Congress determined this to be the case, according to Section 3(c) of the NGA, in circumstances involving export agreements with countries entered into a Free Trade Agreement with the United States. *see* 39 F.4th at 726-27 (citing 15 U.S.C. § 717b(c)).

To be sure, the court recognized that Section 3 of the NGA provides an entirely different permitting scheme for export facilities than provided under Section 7 for interstate pipelines. Thus, the court in *City of Oberlin* explained that an application could still be denied a Section 7 certificate despite evidencing export precedent agreements if the overall benefits of the proposed pipeline failed to outweigh the overall costs. *Id.* Therefore, as quoted by FERC in the Rehearing Order, “export precedent agreements *are simply one input into the assessment* of present and future public convenience and necessity.” *Id.* (emphasis added).

It is uncontested that the precedent agreements provided by TGP indicate approximately 90 percent of the liquid natural gas transported by the AFP will be exported to Brazil. (*See* R. at ¶ 24). Outside of TGP’s proffered precedent agreements, FERC provides scant evidence to support the additional public benefits alleged to result from the construction and operation of the AFP. *See* R. at ¶ 34 (stating that additional public needs fulfilled by the AFP include “provid[ing] transportation for domestically produced gas, provid[ing] gas to some domestic customers, and fill[ing] additional capacity at the International New Union City M&R Station.”).

FERC did not conduct any market studies or analysis to evaluate the veracity of the proclaimed benefits of the AFP asserted by TGP. Rather, FERC merely restated vague public benefits without any form of quantification that could be used to compare such benefits with the project's “residual adverse effects.” Put succinctly, FERC refused to seriously engage with

HOME's nonfrivolous arguments challenging the probative weight of the export precedent agreement and instead deferred to those proffered by TGP in its CPCN application. The analysis in the Rehearing Order does not evince "reasoned and principled decisionmaking" and, as such, FERC's findings on the matter should be found to lack substantial evidence. *See Envtl. Defense Fund*, 2 F.4th at 960 (Holding it was arbitrary and capricious FERC to rely solely on precedent agreements to establish market need for a proposed pipeline when key facts show (1) there was a single precedent agreement for the pipeline, (2) all parties agreed that projected demand for natural gas in area to be served by new pipeline was flat for foreseeable future, and (3) FERC neglected to make finding as to whether construction of the proposed pipeline would result in cost savings or otherwise represented more economical alternative to existing pipelines.).

D. Even if the TGP's precedent agreements, alone, were sufficient to demonstrate the AFP served the present or future public need, it was still arbitrary and capricious for FERC to find that the public benefits of the AFP outweigh its "residual adverse effects" on local landowners, the environment, and pre-existing pipelines and their customers.

Even if this court were to find that the precedent agreements, standing alone, are sufficient to demonstrate public necessity, FERC nonetheless failed to properly balance the public benefits of the AFP against its "residual adverse effects." Specifically, FERC acknowledged evidence indicating potential adverse effects of the AFP affecting landowners' rights along the proposed route of the AFP, the broader environment beyond merely HOME's particular property, and the Southway pipeline and its customers. However, FERC did not address any of the impacts on these relevant interests in the Rehearing Order, let alone conduct any form of analysis to determine their significance. Instead, FERC found that the precedent agreements submitted by TGP were sufficient to demonstrate a public necessity based primarily

upon an analysis of the AFP's "residual adverse effects" on HOME's particular property—an approximately 2-mile segment of the 99-miles-long pipeline

Concerning landowners, while the Rehearing Order acknowledges that TGP had altered over 30 percent of the AFP in response to public comments, FERC recognized over 40 percent of landowners along the proposed route who had yet to enter into easement agreements with TGP. As such, the Rehearing Order fails to address the significant potential impacts on these landowners' property rights resulting from the construction of the AFP. *See* 178 FERC at 61691 (providing that "looking only at the economic impacts associated with eminent domain does not sufficiently account for the full scope of impact on landowners."), *see also Env'tl. Defense Fund*, 2 F.4th at 961 (recognizing that, due to eminent domain considerations, "good reason" exists for the "thoroughness and caution mandated" under the procedure established by Section 7 of the NGA).

Concerning the broader environmental impacts of the AFP, the 1999 Policy Certificate Statement clarifies that landowner property rights issues "can be distinct" from environmental issues considered under NEPA. 88 FERC at ¶ 61748. Thus, although FERC analyzed the environmental impacts of the TGP's construction on HOME's particular property—roughly 2 miles of the proposed 99-mile-long pipeline—this analysis did not provide any additional assessments of the AFP's broader environmental impacts. While the Rehearing Order noted that the GHG Conditions imposed by the CPCN should reduce the expected environmental impacts to "less-than-significant levels," this conclusion was only supported by pointing to its estimation that adherence to the GHG Condition would reduce the average annual CO₂e emissions resulting from the construction of the AFP from 104,100 metric tons per year to 88,340 metric tons per year. *See* R. at ¶ 73. However, the Rehearing Order makes no mention of environmental

impacts concerning residual adverse impacts to, for example, wildlife, water quality, recreational access, or other interests affected by the AFP's proposed route. While the broader environmental impacts of the AFP constitute relevant interests in their own right, these considerations also concern the interests of surrounding landowners and communities.

Concerning pre-existing pipelines, FERC provides no detailed market study, nor any analysis of the impact on local rates or market competition for suppliers. *See* 88 FERC at 61748 (stating that “the evidence necessary to establish the need for the project will usually include a market study” and that “[v]ague assertions of public benefits will not be sufficient.”). Instead, FERC relied on TGP's claims of diminishing demands for gas to find that a public benefit would be provided by the AFP's transmission of gas that “may or may not otherwise be purchased in the future.” (R. at ¶ 34). This conclusion itself indicates that FERC was uncertain of the AFP's impact on the current market for natural gas, which raises the question of how FERC could properly evaluate the residual adverse effects on the existing pipelines and their captive customers.

Given FERC recognized that the AFP is expected to divert approximately 35 percent of the gas currently transmitted by the Southway pipeline, at minimum, a market study should have been conducted to ensure FERC has the adequate information to properly balance the public benefits expected from the AFP against its residual adverse effects on the Southway pipeline and its captive customers. *See Env'tl. Defense Fund v. Fed. Energy Regulatory Comm'n*, 2 F.4th 953, 962 (D.C. Cir. 2021) (quoting 88 FERC at 61,747-48) (Providing that “projects to serve new demand might be approved on a lesser showing of need and public benefits than those to serve markets already served by another pipeline. However, the evidence necessary to establish the need for the project will usually include a market study.”) *and* 178 FERC at 61,688 (Stating that

although FERC's role is not “to protect existing pipelines from the effects of competition. . .The Commission must consider the possible harm to captive customers that can result from a new pipeline, regardless of whether there is evidence of unfair competition.”).

In sum, even if TGP’s precedent agreements were sufficient evidence, standing alone, to demonstrate the public necessity required for a CPCN, FERC’s subsequent balancing of the public benefits and residual adverse effects was improper because it failed to consider potential impacts to important relevant interests. As laid out in the Policy Certificate Statement, FERC is expected to consider *all* relevant factors when assessing whether a proposed project is or will be in the present or future public convenience and necessity. 178 FERC at 61,693, *see also* 88 FERC at 61,747. Further, even if the economic benefits of the AFP were assumed to outweigh its adverse economic effects, under the guidelines of the Policy Certificate Statement, FERC would still need to consider the environmental impacts and other residual adverse effects associated with the project. 178 FERC at 61,693.

**II. FERC’S AUTHORIZATION OF THE AFP ACROSS HOME’S PROPERTY
CREATES A SUBSTANTIAL BURDEN ON HOME, AND FERC HAS FAILED TO
DEMONSTRATE THAT THE AUTHORIZATION WAS NO LESS RESTRICTIVE
THAN THE ALTERNATE ROUTE PROPOSED BY HOME TO ACHIEVE ITS
COMPELLING INTEREST.**

Under a *de novo* standard of review, the court should decide whether FERC’s CPCN violates the RFRA. Although the Plaintiff bears the initial burden in showing a substantial burden on their exercise of religious beliefs, RFRA demands an agency show how the challenged action is the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000bb-1. If

the agency does not meet its burden, the action is not in accordance with RFRA and must be invalidated. *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 445 (D.C. Circ. 2017).

A court is required to invalidate agency action “not in accordance with the law.” 5 U.S.C. § 706(2)(A); *Am. Pub. Gas Ass’n v. U.S. DOE*, 72 F.4th 1324, 1336 (D.C. Circ. 2023). Although the court gives deference to an agency’s decision, the court does not “rubber stamp” an agency decision if the agency has not appropriately considered all relevant factors. *Oceana, Inc. v. Ross*, 920 F.3d 855, 863 (D.C. Circ. 2019); *See also Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Circ. 2011) (“Whether a burden is substantial for purposes of RFRA is a question of law for a court to answer, not a question [] of fact proven by the credibility of the claimant.”). While HOME showed FERC’s CPCN is a substantial burden, FERC did not provide evidence to satisfy the compelling interest test, and thus, FERC’s CPCN is contrary to RFRA.

A. RFRA protects HOME’s right to freely exercise their religious beliefs by prohibiting FERC from taking action that may substantially burden HOME’s exercise of religion.

Congress enacted RFRA to provide broad protection to religious beliefs, recognizing an individual’s fundamental right to exercise their religion is unalienable and worthy of the utmost protection. 42 U.S.C. § 2000bb-2(a)(1). Under RFRA, only when the government demonstrates a challenged action is the least restrictive means of furthering a compelling interest may it substantially burden an individual’s religious liberties. 42 U.S.C. § 2000bb-1. The plaintiff must first show the challenged action is a substantial burden to its exercise of religion. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The burden then shifts to the government to prove the substantial burden to the adherent is the least restrictive means of furthering a compelling governmental interest. *Id.* at 418, 429. Here, FERC has imposed a

substantial burden by authorizing the AFP pipeline to cross HOME's property, substantially interfering with HOME's exercise of religious beliefs and way of life. And FERC refused to reach the issue of satisfying their burden under the compelling interest test.

B. Under RFRA, FERC's authorization of the AFP across HOME's sacred land substantially burdens HOME's exercise of religious beliefs.

Where, as here, sincerity of religious beliefs is not at issue, the substantial burden test is satisfied when government action has placed substantial pressure on the adherent to violate their religious belief. *Burwell v. Hobby Lobby*, 573 U.S. 682, 705 (2014). A substantial burden may also be found when government actions force an adherent to choose between following the tenets of their religion and receiving a government benefit. *Sherbert v. Verner*, 374 U.S. 408-09 (1963). FERC claims the impacts on HOME are not substantial or significant; however, HOME presented evidence showing a substantial burden exists for 2 reasons. First, the CPCN places substantial pressure on HOME, under threat of civil penalty, to violate their religious beliefs. Second, the CPCN directly threatens HOME's right to meaningfully perform its religious ceremonies, including the Solstice Sojourn.

- (i) *HOME faces substantial pressure under the threat of civil penalties to violate their religious beliefs.*

The severity of the consequences HOME faces if subject to FERC's order places substantial pressure on HOME. FERC erred when asserting those consequences are "not substantial or significant" to HOME's religious exercise.

A challenged action may exert substantial pressure when the consequences of non-compliance coerce an adherent into modifying their behavior. *Sherbert*, 374 U.S. at 408.

Courts evaluate the coercive effect of the challenged action on the adherent's exercise of religion. *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Circ. 2013). An adherent may feel substantial pressure when consequences, such as threat of civil penalties, or denial of government benefits are at issue. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972). Consequences need not be direct to rise to the level of substantially burdening an individual's religious liberties. *Sherbert*, 374 U.S. at 403; quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 ("if the effect of the law is to impede the observance of one [] religion...the law is constitutionally invalid even though the burden may be characterized as being only indirect."). Indirect consequences of agency decisions, such as condemning religious land, indicate the threat of such a consequence may be a substantial burden. *See* 15 U.S.C. § 717f(h). FERC considers condemning land through eminent domain among the most significant actions an agency may take, and the harm to an individual from having their land taken from them is a harm that may never be fully remedied. 90 FERC ¶ 61,128 at 61,398 (Feb. 9, 2000).

Subjecting a parent to criminal penalties for complying with their Amish religion, and violating state law, indicates a substantial burden. In *Yoder*, members of the Amish faith refused to send their children, ages 14 and 15, to public school even though Wisconsin state law required public education until the age of 16. *Yoder*, 406 U.S. at 207-08. The parents asserted the law was directly at odds with the Amish way of life and contrary to their religion. *Id.* at 209-10. Conduct of Amish members is regulated by the *Ordnung*, or rules, of the church community. *Id.* Amish members also participate in adult baptisms, like the Bar Mitzvah of the Jews, where Amish children in late adolescence undertake obligations to abide by rules set forth by the faith. *Id.* at 210-11. If the parents complied with state law, the Amish teens would be forced to conform to the styles, manners, and ways of their peers. *Id.* Additionally, the Amish teens would be stripped

from their community, both physically and emotionally, and denied the opportunity to grow their faith and relationship with the other members of the Amish faith. *Id.* at 211-12. Although the state had a strong interest in educating its citizens, the compulsory law, and criminal penalties for non-compliance, imposed a substantial burden on the Amish parents.

Here, like in *Yoder*, the CPCN substantially burdens HOME because the CPCN imposes serious consequences for non-compliance. Like the Amish, HOME's conduct is regulated by the central tenant of their religion – to preserve the natural world. For nearly a century, HOME has dedicated its entire 15,500-acre property to its deity Mother Nature. Additionally, like the Amish teens, the young members of HOME actively participate in the religious ceremony, the Solstice Sojourn on HOME's property. Although the sanctions for not complying with FERC's order are civil, and not criminal sanctions like in *Yoder*, HOME parents are substantially pressured like the parents in *Yoder*. If HOME parents do not adhere to the provisions stipulated by the CPCN, under 15 U.S.C. § 717f(h) HOME's land may be condemned.

HOME parents are now faced with the realization that if they do not conform to FERC's order, HOME children will be stripped of their community, both physically and emotionally. HOME children would be denied the opportunity to participate in the Solstice Sojourn and be immersed in HOME's culture and ways of life. Like the adult baptism in *Yoder*, the Solstice Sojourn marks the transition of HOME children to practicing members of the faith. This transition is particularly important for HOME children, as the integration into HOME's religious culture and ceremonies occurs during the crucial formative years. The substantial pressure imposed on HOME members substantially burdens the exercise of its religious beliefs.

- (ii) *The CPCN threatens not only HOME's right to freely exercise their religious beliefs but also threatens to eradicate the very foundation of HOME's religion.*

Alternatively, if HOME members comply with the CPCN, they will be forced to violate their religious beliefs. HOME argues there is a substantial burden despite FERC's conditional provisions included with the CPCN because numerous real, physical harms remain to HOME's religious liberties – harms which threaten the very foundation on which HOME has built their religion and entire way of life.

Under RFRA, agency actions may rise to the level of substantially interfering with the exercise of religion when the effects are both subjective and real, physical harms. *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Circ. 2008). Under RFRA, courts do not inquire as to second-guessing religious beliefs about the wrongfulness of an act or facilitating another individual's wrongful act. *Priests for Life v. United States HHS*, 808 F.3d 1, 2 (2015) (quoting *Hobby Lobby*, 573 U.S. at 724). Real, physical harms include actions that inhibit or constrain religious conduct. *Thiry v Carlson*, 78 F.3d 1491, 1495 (10th Circ. 1996). Additionally, actions that leave an individual with no other alternatives to freely exercise their religious beliefs may be a substantial burden. *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Circ. 2001); quoting *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Circ. 1995) (“there is no ‘substantial burden’ on a person's right to free exercise of religion where there are alternatives available.”).

Effects on religious experiences that go beyond subjective and emotional indicate a substantial burden. In *Navajo*, an Indian tribe regularly used a public mountain as the site for religious and cultural ceremonies. *Navajo*, 535 F.3d at 1064. The tribe also incorporated materials, such as plants and water, from the mountain into their religious ceremonies. *Id.*

Although the government conducted an extensive review to determine the potential impact of the recycled water on the local tribes, making over 500 contacts and holding 40 to 50 meetings, the tribe argued the waste in recycled water desecrated their sacred ceremony. *Id.* at 1065-66. The government asserted that in addition to maintaining recreational activities on the mountain, the recycled water would also be used for fire suppression in rural areas and to combat forest fires. *Id.* Further, the government pointed out that “no plants, natural resources, shrines with religious significance, or religious ceremonies” would be affected by the use of recycled water. Ultimately, the recycled water did not impose a substantial burden on the tribe’s religious experience because the only effect of the recycled water on the tribe is their subjective, spiritual experience. *Id.* at 1070.

Relying on *Navajo*, FERC claims the effects on HOME are subjective and therefore not a substantial burden to HOME’s exercise of religious beliefs. HOME does not contest the many subjective harms FERC’s order imposes. Like the tribe in *Navajo*, HOME members object to the desecration of land used for their religious ceremonies. Both the tribe in *Navajo* and members of HOME use natural elements in their religious practice. For the tribe, it was the side of a sacred mountain; for HOME, it is their entire property, including a sacred site at the base of the mountains. As the tribe asserted in *Navajo*, the presence of waste-contaminated water would desecrate ceremonial land. Similarly, HOME members testified the mere presence of the AFP on HOME’s property is anathema to HOME’s core, fundamental religious tenet – humans should do everything in their power to promote natural preservation. FERC does not contest HOME’s assertion that the harmful effects of fracking to obtain natural gas and lasting harm from the construction and continued operation of the AFP will further desecrate HOME’s sacred land.

However, FERC misinterprets the court's holding in *Navajo*. The court explained the recycled water was not a substantial burden because the tribe could articulate *only* subjective harms. The presence of recycled water did nothing more than offend the tribe's religious sensibilities. The tribe in *Navajo* would still be able to freely access the ceremonial site on the mountain, along with the continued use of their environmental surroundings, including the surrounding plants, for ceremonial purposes. Unlike the tribe in *Navajo*, in addition to subjective harms, HOME faces real, physical harms that arise from their strong property interest in the land at issue. FERC attempts to address these physical harms by including the following conditional provisions in the CPCN: TGP is to bury the AFP over the entire span of HOME's property and that vegetation destroyed along the AFP route would be replanted in "other locations".

HOME argues the real harms to their religious practices, even with FERC's provisions in place, are a substantial burden. FERC states that because the AFP will be buried, HOME will not be physically prevented from performing their Solstice Sojourn and any impact does not amount to a substantial burden. Although the AFP will be buried, HOME is nonetheless harmed because HOME is obligated to comply with FERC's land use restrictions in the CPCN. As previously stated, HOME's religious ceremony is intimately and inextricably tied to their property. The religious significance of HOME's land includes the vegetation that freely grows on the property. FERC entirely dismisses the religious significance that HOME places on their land by ordering the AFP route to remain "bare" and stripped of the vegetation HOME holds sacred. Although FERC states the same number of trees that were destroyed by the AFP will be replanted, FERC did not specify the trees must be replanted on HOME property. As the court noted in *Navajo*, if the tribe had been denied items such as plants or shrines with religious significance, there may have been reason to find the action a substantial burden to the tribe. Here, HOME is stripped of

trees they hold sacred and permanently denied the opportunity to replace items of religious significance along the barren path. The real, physical harm imparted on HOME's religious practices amounts to harm that is a substantial burden.

HOME asserts the AFP path is a substantial burden because the route constrains HOME's religious ceremony. FERC approved a route that prevents HOME members from accessing the sacred ceremonial site without crossing over the pipeline. Although the pipeline does not physically prevent HOME from accessing their sacred land, HOME would be forced to violate their religious beliefs to continue exercising their religious beliefs. HOME members testified that crossing over the pipeline during the ceremony would destroy the entire meaning of their ceremony. (R. at ¶ 57). The foundation of HOME's religious expression is directly tied to the location of the sacred hill at the foothills of Misty Top Mountains. FERC's reliance on Navajo is again misplaced because, as the court explained in the holding, the tribe was still able to exercise its religious beliefs. Here, unlike the tribe in *Navajo*, HOME is left with no alternate path to use for the Solstice Sojourn. Further, HOME has no other sacred hill journey to and use in welcoming their children into the faith. The constraint imposed on HOME by FERC's approval of this route for the AFP shows the action is a burden on HOME's religious practices.

C. Once there is a showing of a substantial burden, RFRA demands FERC satisfy the compelling interest test, a burden FERC did not meet.

Under RFRA, an agency is explicitly prohibited from taking any action that substantially burdens religious exercise unless the agency satisfies the compelling interest test. 42 U.S.C. § 2000bb-1. Further, under RFRA, it is the agency's burden to provide evidence on record showing there is a compelling interest *along with* whether the agency has adopted the least restrictive

means of furthering that interest. *Id.*; *See also O Centro*, 546 U.S. at 430-31. In analyzing whether an agency has met its burden, courts use a strict scrutiny standard, the most demanding test known to constitutional law. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

HOME asserts it has presented sufficient evidence to show FERC's CPCN is a substantial burden. HOME argues that because there is a substantial burden, RFRA now requires FERC to show the AFP route in their CPCN is the least restrictive means of furthering a compelling interest. HOME argues FERC has not satisfied its burden for two reasons. FERC (1) provided no evidence to support it has a compelling interest in a natural gas project with no public need; and (2) even if the court does find a compelling interest here, FERC did not show how the AFP route in the CPCN is the least restrictive means on HOME's religious beliefs of furthering that interest.

(i) *FERC did not provide evidence showing the critical importance of furthering their interest, if any, outweighs HOME's fundamental right to exercise its religious beliefs.*

Home argues FERC did not satisfy the compelling interest test because FERC put forth no evidence showing it has a compelling interest in regulating a natural gas project not supported by public need.

Under RFRA, an agency does not satisfy the compelling interest test under strict scrutiny when the agency shows merely a rational relationship to some colorable interest. *Sherbert*, 374 U.S. at 406; *quoting Thomas v. Collins*, 323 U.S. 516, 530 (1945). Further, the agency's interest must be critically important to justify overriding an individual's fundamental right. *Priests for Life*, 808 F.3d at 7. The agency does not satisfy its burden when showing a compelling interest in the uniform application of the law; rather, the agency must apply the challenged action 'to the

person’ – the particular claimant whose sincere exercise of religion is being substantially burdened. *O Centro*, 546 U.S. at 430.

Here, HOME asserts FERC has no compelling interest in regulating a pipeline project with no public need. As stated previously, FERC claims the precedent agreements indicate a public need. However, in this case, FERC relied on precedent agreements with a country that does not have a free trade agreement with the United States, and thus are not presumed as in the public need. Further, HOME argues the AFP project is not “critically important” enough to justify eradicating HOME’s fundamental rights. HOME maintains FERC did not provide evidence to show why the AFP is critically important to the government’s interests, when: there is already an existing pipeline transporting the full production from HHF to states east of Old Union; 90% of the LNG transported by the AFP is planned for export use; and there’s no empirical data or studies provided by other agencies pointing to the critical nature of the AFP project.

(ii) Even if there is a compelling interest, FERC did not present evidence to show how the CPCN is the least restrictive means of furthering that interest.

The exceptionally demanding least restrictive means standard requires the government to use less restrictive means if available. *Capitol Hill Baptist Church v. Bowser*, 496 F.Supp.3d 284, 299 (D.C. Circ. 2020). HOME asserts it is FERC’s burden to show how the CPCN is the least restrictive means of furthering a compelling interest. HOME argues the court need only look at the record to see if FERC has not met its burden.

HOME argues FERC has not provided evidence to support the conclusion that the CPCN is the least restrictive means of furthering their interest. In HOME’s petition for rehearing,

HOME presented an alternate route, allowing FERC and TGP to construct and operate the AFP without substantially interfering with HOME's religious practices. However, FERC dismissed HOME's proposed alternate route as impractical and overly burdensome. These conclusory statements do not satisfy the burden required by the least restrictive means standard because FERC does not articulate or provide evidence showing how it knows the alternate route to be impractical and burdensome. Although FERC states the alternate route would add only 10% of additional expense to TGP's total project cost, FERC does not provide evidence on how it knows what factors are contributing to the additional expenses. Further, FERC states the proposed alternate route would cause "more environmental harm" by traveling over the mountain side. And yet again FERC is silent on how it determined what specific harms and how many harms would be caused by going through the alternate route. Although FERC addressed HOME's alternate route, FERC merely provided conclusory statements not supported by any additional fact-finding nor empirical evidence from environmental studies to support FERC's conclusion. And because FERC has the burden to bring forth evidence that the CPCN is the least restrictive means of furthering its interests, this court should hold FERC did not satisfy its burden.

D. FERC refused lesser restrictive alternatives, despite HOME providing evidence that the CPCN will substantially burden its Religious Practices, and therefore the CPCN stands in clear contradiction with RFRA.

In a highly sensitive constitutional area such as the fundamental right to exercise religious beliefs, "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation". *Thomas*, 323 U.S. at 530. Congress recognized there may be interests that outweigh the burden placed on religious exercise. The compelling interest test embedded in RFRA gives latitude to the government to take action which may substantially burden religion

but *only after* the government satisfies the compelling interest test. Invalidating FERC’s decision does not erode FERC’s interest in regulating the natural gas industry but instead reaffirms the religious liberty protections fundamental to the founding of this country.

Here, FERC erroneously claims HOME is not substantially burdened even though HOME is faced with substantial pressure to modify their religious practices and violate their beliefs. HOME presented evidence showing the real, physical harm FERC’s CPCN will impose. This court should find HOME provided sufficient evidence to support the finding of substantial burden, and, because FERC did not satisfy their burden in presenting evidence to overcome the compelling interest test, this court should invalidate FERC’s CPCN as contrary to RFRA.

III. FERC’S DECISION TO NOT REQUIRE MITIGATION OF INDIRECT GHG IMPACTS WAS ARBITRARY GIVEN SUCH IMPACTS WERE REASONABLY FORESEEABLE UNDER THE CIRCUMSTANCES

A. The Natural Gas Act provides a comprehensive statutory framework that empowers FERC with extensive authority to protect consumers and contemplate both the current and future public interest.

Section 1(a) of the NGA declares 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.” 15 U.S.C.S. 717. In recognizing the need for federal regulations, Congress enacted the Natural Gas Act (NGA) as a means of creating a comprehensive and effective regulatory scheme with the “primary aim” of “protect[ing] consumers against exploitation at the hands of natural gas companies.” *Fed. Power Com. v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944); *see also Fed. Power Comm. v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28

(1961) (Explaining that “Congress did not desire an ‘attractive gap’ in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource.”). To these ends, the NGA has long been understood to empower FERC with “exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale,” as well as “a variety of powers” to exercise this authority. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 301 (1988), *see also* § 717(b).

- (i) *FERC's mandate under Section 7(e) to ensure that natural gas facilities, such as pipelines, serve the public interest also provides that FERC “shall have the power. . .to attach. . .such reasonable terms and conditions as the public convenience and necessity may require.”*

One of the primary powers provided to FERC under the NGA’s permitting scheme is the ability to exercise “control over the conditions under which gas may be initially dedicated to interstate use.” *Atlantic Refining Co. V. PSC of New York*, 360 U.S. 378, 389 (1959). This authority derives from FERC authority under Section 7 of the NGA, which has been recognized to hold a central role in federal natural gas regulations. *See Oklahoma Natural Gas Co. v. Federal Power Com.*, 257 F.2d 634, (D.C. Cir. 1958), *cert. dismissed*, 358 U.S. 948 (1959). Hence, the certificate process established under sections 7(c) and (e) of the NGA provides FERC with an “opportunity to scrutinize” a proposed project “at a time when such vital matters can readily be modified as public interest may demand.” *Federal Power Com. v. Hunt*, 376 U.S. 515, 525 (1964) (citing House Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1290, 77th Cong., 1st Sess., 2-3).

To these ends, the NGA empowers FERC to impose conditions on certificates of public convenience and necessity to ensure compliance with various statutory requirements, including

environmental protection, safety, and landowner rights. *See* § 717f(e). Specifically, Section 7(e) states:

The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. 15 U.S.C.S. 717f(e).

This language has been interpreted to specifically permit FERC, in certificate proceedings, to “look down the road” to contemplate developments affecting the “future public convenience and necessity.” *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 340 (D.C. Cir. 2000) (emphasis in original). Hence, under this statutory framework, it may be “entirely appropriate” for FERC to “change its regulatory approach in response to technological changes in the industry.” *Id.* at 407.

B. FERC’s Refusal to Mitigate Indirect GHG Impacts Implies Arbitrary Limits on the Scope of FERC’s Authority in Section 7 Proceedings to Safeguard the Public Interest.

FERC acknowledged, based upon an Environmental Impact Statement (“EIS”) supplied by TGP, that construction of the AFP would result in “some adverse environmental impacts,” but these impacts could be “reduced to less-than-significant levels” with the implementation of the mitigation measures attached to the CPCN as issued. (R. at ¶ 3). Specifically, the operation of the AFP could result in upwards of 9.7 million metric tons of CO₂e emissions per year. (R. at ¶ 72). However, noting this figure likely represented the “upper bound” for what is commonly referred to as “downstream emissions,” FERC refused to consider these indirect GHG emissions as significant. (*Id.*). Similarly, FERC also found upstream GHG emission impacts to be irrelevant, given the AFP is not expected to generate increases in production of liquid natural gas. (R. at ¶ 74, *see also* ¶ 12). FERC, moreover, stated it would not characterize the upstream

and downstream impacts of the AFP as significant or insignificant due to an ongoing “generic proceeding” to determine how to conduct “significance determinations for GHG emissions.” (R. at ¶ 81).

FERC ultimately required TGP to undertake measures for mitigating only the direct GHG impacts resulting from the construction of the AFP, refusing to address indirect GHG impacts. (R. at ¶ 80-82). FERC reasoning was premised upon the logic that “the GHG impacts resulting from the construction of the AFP are more directly related to our authority under the NGA and the issues relevant to the CPCN, so they can be more readily addressed through mitigation.” (R. at ¶ 80-82). However, this framing is inaccurate and misstates FERC's authority to regulate indirect and direct emissions.

First, FERC erroneously presumes FERC's role envisioned under § 717f(e) of the NGA is focused on mitigating impacts relating to the construction of a proposed pipeline, instead of those which may be reasonably estimated to result from the pipeline's subsequent operation. However, both direct and indirect emissions are equally relevant to the granting of a CPCN, as neither direct emissions (those resulting from construction) and indirect emissions (those resulting from operation) will otherwise occur without FERC's authorization. Further, Section 7 has long been interpreted as allowing FERC to consider factors relating to both future public interest considerations and “end use” of the gas being transported. *See Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 31 (1961).

Additionally, FERC's reasoning arbitrarily presumes its authority is oriented towards considering GHG impacts resulting from the AFP's construction because mitigation of indirect GHG emissions “pose[s] a broader, more significant, question.” (R. at ¶ 88). However, the NGA's mandate that FERC shall only issue a CPCN after determining that a proposed project is

required by current or future public necessity does not imply FERC is limited to considering only impacts that are more immediate in time and relating to sole construction of the pipeline. Rather, as past precedent and agency practice suggest, FERC is empowered under the NGA to broadly consider the impacts of a proposed project—including those relating not just to construction but also to subsequent operations—to determine whether granting “the certificate applied for is in the public interest or whether that interest calls for some other disposition.” *Ecee, Inc.*, 526 F.2d. at 1275, *see also Transcon. Gas Pipe Line Corp.*, 365 U.S. 1 (1961) *and*

Lastly, the authority conveyed to FERC under Section 7 of the NGA is not confined merely to regulating the construction of interstate pipelines, but instead broadly encompasses regulation of their subsequent operation as well. Hence, FERC's rationale that direct GHG impacts resulting from the construction of the AFP are more directly related to our authority under the NGA implies inaccurate limitations on the scope of FERC's authority under the NGA. To the contrary of FERC's suggested rationale in the Rehearing Order, courts have previously upheld FERC's authority to consider both direct and indirect impacts from the operation of a proposed facility. *See Sierra Club v. United States DOE*, 867 F.3d 189, 193 (2017) (quoting 40 C.F.R. § 1508.8) (Stating that FERC must consider “not just the ‘direct’ environmental effects that ‘are caused by the [agency's] action and occur at the same time and place,’ but also the action's ‘indirect’ environmental effects that ‘are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.’”).

Conclusion and Relief Requested

Based on the foregoing arguments, HOME requests that this court set aside FERC's findings, vacate the CPCN authorizing construction of the AFP based upon such findings, and

remand with instructions for FERC to conduct additional analysis, in compliance with NEPA, CEQ regulations, and the NGA.