

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH,  
*Petitioner,*

-and-

TRANSNATIONAL GAS PIPELINES, LLC,  
*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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

Brief of Respondent, FEDERAL ENERGY REGULATORY COMMISSION

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## **STATEMENT OF JURISDICTION**

Petitioners Holy Order of Mother Earth (“HOME”) and Transnational Gas Pipelines, LLC (“TGP”) seek review of two final orders issued by the Federal Energy Regulatory Commission (“FERC”).

On April 1, 2023, FERC issued an Order granting a Certificate of Public Convenience and Necessity (the “CPCN”) to TGP for the construction of the American Freedom Pipeline (“AFP”). Petitioners HOME and TGP timely filed requests for rehearing on issues and conditions in the CPCN on April 20, 2023, and April 22, 2023, respectively.

FERC issued its second order under 15 U.S.C. § 717r(a), denying the petitions for rehearing (the “Rehearing Order”). FERC Docket No. TG21-61-000, 199 FERC ¶ 72,201 (Jun. 1, 2023). On June 1, 2023, HOME and TGP timely filed petitions for review of FERC’s two final orders which affirmed the CPCN as originally issued. This Court has jurisdiction under 15 U.S.C. § 717r(b) to affirm, modify, or set aside FERC’s orders.

## **STATEMENT OF ISSUES PRESENTED**

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

## STATEMENT OF THE CASE

### I. STATUTORY BACKGROUND

The Natural Gas Act (“NGA”) aims to “encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.” *NAACP v. FPC*, 425 U.S. 662, 670 (1976); *see* 15 U.S.C. § 717. The statute grants FERC jurisdiction over interstate pipelines. 15 U.S.C. §§ 717b, 717c. A company must receive a Certificate of Public Convenience and Necessity from FERC before constructing a pipeline. 15 U.S.C. § 717f(c). FERC will issue a CPCN upon finding that the proposed facility “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). FERC may exercise its discretion to include “reasonable terms and conditions as the public convenience and necessity may require” in granting the CPCN. *Id.*; *Atl. Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

As the lead agency “for the purposes of complying with the National Environmental Policy Act,” 15 U.S.C. § 717n(b)(1), FERC must “adequately identif[y] and evaluate[]” the environmental effects of a proposed facility, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see* 42 U.S.C. §§ 4321, *et seq.* Before granting a CPCN, FERC must “identify the reasonable alternatives to the contemplated action” and take a “hard look” at “the environmental impact of its action[.]” *Minisink Residents for Env’tl Pres. & Safety v. FERC*, 762 F.3d 97, 102, 111 (D.C. Cir. 2010); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). The resulting “fully formed and well-considered decision” need not be a particular or best decision. *See Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010); *Methow Valley*, 490 U.S. at 350.

## II. FACTUAL BACKGROUND

### A. Approved Plans for the American Freedom Pipeline

This case involves the CPCN granted to Transcontinental Gas Pipeline for the American Freedom Pipeline (“AFP” or the “Pipeline”). Rehearing Order ¶ 1. The AFP is an approximately 99-mile long, 30-inch diameter interstate pipeline extending from Jordan County, Old Union, to Burden County, New Union. *Id.* TGP entered binding precedent agreements with New Union Gas and Energy Services Company (“NUG”) and International Oil & Gas Corporation (“International”) to provide up to 500,000 dekatherms<sup>1</sup> (Dth) per day in total. *Id.* ¶ 11.

The AFP will transport liquified natural gas (“LNG”) produced by the Hayes Fracking Field (“HFF”) in Old Union. Rehearing Order ¶ 12. The precedent agreements do not require HFF to produce additional LNG. *Id.* Rather, the AFP would reroute approximately thirty-five percent of HFF’s production. *Id.* After reaching Burden County, International will load the LNG for export to Brazil. *Id.* ¶ 14. Under the current precedent agreements, this exported LNG would account for ninety percent of the LNG carried by the AFP. *Id.* ¶ 24. The AFP would further serve a domestic terminal and pipeline, as well as strengthen regional efforts to expand access to competitive natural gas markets and improve regional air quality. *Id.* ¶ 27.

After addressing the concerns of landowners and communities along the route of the project, TGP developed a final plan to locate the AFP adjacent to the Misty Top Mountain range. Rehearing Order ¶ 27; *Id.* Exhibit A. Along its approved route, the AFP will pass underground through approximately two miles of HOME property. *Id.* ¶ 38. During its construction, TGP will minimize disruption to HOME residents, completing the local construction within four months.

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<sup>1</sup> Dekatherms are units of energy that measure the heating value of a volume of natural gas.

*Id.* ¶ 41. Although TGP was unable to reach easement agreements with some landowners along the route, it changed over thirty percent of the proposed route to reach agreements with sixty percent of the landowners along the route. *Id.* ¶¶ 41-42.

B. Impacts of the American Freedom Pipeline on HOME

As a religious order, HOME's fundamental core tenet is that humans should do everything in their power to promote natural preservation over all other interests, especially economic interests. Rehearing Order ¶¶ 46-47. HOME's practices involve a biannual ceremonial journey that would cross the proposed pipeline route in both directions. *Id.* ¶ 48. HOME states that the CPCN compelled them to support the use of fossil fuels in a real, physical way, which is irreconcilable with HOME's religious beliefs and practices. *Id.* ¶ 49.

HOME thus requests that TGP re-route the AFP through the Misty Top Mountains to leave land relevant to these spiritual practices untouched. Rehearing Order ¶ 39. This alternative route would cause more objective environmental harm by disturbing the Misty Top Mountains' more environmentally sensitive ecosystems, resulting in another burden to HOME's religious beliefs. *Id.* ¶¶ 27, 45, 62. TGP attempted to lessen the harm of the AGP's permanent removal of trees along HOME's ceremonial path by minimizing the construction period on HOME's property and burying the pipeline to remove physical, visible barriers to HOME's religious practices. *Id.* ¶ 59.

C. Environmental Impact Statement & Conditions on Certificate of Public Convenience and Necessity

TGP completed an environmental impact statement ("EIS") per the National Environmental Policy Act's ("NEPA") requirement. Rehearing Order ¶ 72. The EIS included an evaluation of GHG impacts, finding that the construction of the AFP may result in an average of 104,100 metric tons of carbon emissions per year over the four-year duration of construction. *Id.*

¶ 73. Additionally, the EIS theorized that the pipeline could emit 9.7 million metric tons of carbon emissions per year if the pipeline transported LNG at maximum capacity every day for a year. *Id.* ¶ 72. This estimate did not account for the displacement of other fuels and gas otherwise transported via different means. *Id.* The EIS did not attempt to estimate upstream emissions because the AFP only transports gas already in production. *Id.* ¶ 74. TGP and HOME do not challenge the numerical analysis of the EIS. *Id.* ¶ 75.

In response to the EIS, the conditions attached to the CPCN aimed to mitigate the greenhouse gas (“GHG”) emission impacts of the AFP (the “GHG conditions”) Rehearing Order ¶ 67. The conditions mandated the use of ecological remediation measures, electric-powered equipment, steel pipeline segments produced by net-zero steel manufacturers, and renewable energy electrical sources. *Id.* These conditions, targeting the construction emissions, would reduce the annual emissions to 88,340 per year. *Id.* ¶ 73. The conditions did not address the upstream and downstream emissions. *Id.* ¶ 77. While TGP contended that FERC did not have the authority to require the GHG conditions, HOME contended that FERC acted arbitrarily and capriciously by failing to include conditions addressing the upstream and downstream emissions. *Id.* ¶ 7677.

### **SUMMARY OF THE ARGUMENT**

The challenges both TGP and HOME have levied against FERC’s decision to grant the CPCN with conditions are without merit.

First, FERC’s decision to grant a CPCN was not arbitrary and capricious notwithstanding its finding that ninety percent of the LNG will be bound for export. FERC correctly weighed precedent agreements in line with regulatory guidance to find a market need for the AFP. The Natural Gas Act recognizes exported natural gas as a public benefit, especially in light of the effects of the pipeline on the local environment and energy infrastructure. Nothing in Section 7

of the NGA mandates that exported LNG only reach nations with free trade agreements in effect. Because FERC made reasoned factual findings based on precedent agreements and domestic benefits, FERC's decision to grant a CPCN was supported by substantial evidence and was not arbitrary and capricious.

Second, FERC properly balanced relevant benefits and harms caused by the AFP before granting a CPCN to TGP. In conducting its balancing test, FERC identified numerous public benefits, including system optimization and opportunities for improved regional air quality. FERC also identified harms the AFP will cause to Old and New Union, as well as specifically to HOME. Importantly, FERC considered the spiritual harm HOME would suffer as a result of the AFP in its balancing test. FERC also gave due weight to HOME's proposed alternative route but found that that route would be both financially and environmentally inferior. Because FERC evaluated all relevant benefits and harms of the AFP, their determination that the balancing test demonstrated a public need for the AFP was not arbitrary and capricious.

Third, FERC's decision to permit the AFP to cross HOME's property would not violate the Religious Freedom Restoration Act ("RFRA") because FERC's actions will not constitute a substantial burden. FERC's action of approving the AFP to cross over HOME's property would not force HOME to choose between tenets of their religion and a government benefit, nor coerce them to act contrary to their religious beliefs via a threat of criminal or civil sanction. The diminishment in spiritual fulfillment HOME will experience due to the AFP should not compel FERC to forego approving the AFP. Even if this Court finds that the AFP would substantially burden HOME, FERC contends that the CPCN is a narrowly tailored action furthering a compelling government interest.

Fourth, the GHG conditions imposed by FERC did not exceed statutory authority as provided by the NGA. FERC tailored the project-specific GHG conditions to the reasonably foreseeable impacts of the AFP. Such conditions, even if applied in the future to other pipelines, only impact one type of infrastructure within one subset of the energy industry. Therefore, FERC has not claimed statutory power to control the national economy and, consequently, raised a “major question.” Even if the GHG conditions influence an issue of economic and political significance, the text and history of the NGA demonstrate clear congressional authorization for FERC to attach environmental regulations, such as GHG conditions, to the CPCN.

Fifth, FERC’s decision to not impose GHG conditions addressing upstream and downstream emissions was not arbitrary and capricious. The NGA does not command FERC to attach related to all environmental impacts of a pipeline. Similarly, NEPA only required FERC to estimate the downstream emissions in the EIS of the AFP, not to act upon the estimate and impose further conditions on TGP. The choice to exclude upstream and downstream emissions conditions followed FERC’s reasoning that emissions related to construction are quantifiable and possible to regulate effectively using the CPCN conditions. Although FERC references an upcoming draft policy regarding GHG emissions, its decision to withhold consideration of said policy is not arbitrary and capricious because it would not alter TGP’s actions in the future.

This Court should uphold FERC’s rational factfinding and decisionmaking processes and affirm the CPCN Order and Rehearing Order.

### **STANDARD OF REVIEW**

The Court will review FERC orders under the Administrative Procedure Act, finding whether FERC orders lacked substantive evidence, demonstrated arbitrary and capricious reasoning, or exceeded FERC’s statutory authority. 5 U.S.C. §§ 706(2)(A), (C), (E).



FERC’s factual findings made during formal proceedings are conclusive if supported by substantial evidence. 5 U.S.C. § 706(2)(E). Under a substantial evidence test, the Court may uphold a factual finding with “more than a scintilla” but “less than a preponderance of . . . evidence”. *B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004). Because the evaluation of scientific data is within FERC’s expertise, the Court may provide FERC “an extreme degree of deference.” *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015); *see Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) (“The question . . . is not whether record evidence supports [petitioners’] version of events, but whether it supports FERC’s.”).

The Court may set aside FERC’s discretionary orders if they were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Under this “narrow” standard of review, this Court “is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292 (2016). The Court determines whether FERC considered relevant factors, made a principled decision based on the record, and avoided a clear error of judgment. *Myersville*, 783 F.3d at 1308; *Am. Gas. Ass’n v. FERC*, 539 F.3d 14, 19 (D.C. Cir. 2010). Similarly, the Court may find whether FERC’s orders exceeded statutory jurisdiction by demonstrating an “attempt[] to exercise a power ‘inconsistent and at variance with the over-all purpose and design’” of the NGA. *Katharine Gibbs School, Inc. v. F.T.C.*, 612 F.2d 658, 665 (2d Cir. 1979) (quoting *Heater v. FTC*, 503 F.2d 321, 323 (9th Cir. 1974)); 5 U.S.C. § 706(2)(C).

## ARGUMENT

### **I. FERC’S FINDING THAT THE AMERICAN FREEDOM PIPELINE DEMONSTRATED PROJECT NEED WHERE NINETY PERCENT OF THE TRANSPORTED GAS WAS BOUND FOR EXPORT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY AND CAPRICIOUS.**

FERC issues qualified applicants a CPCN upon finding that the proposed pipeline’s construction and operation “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e); *see, e.g., City of Oberlin v. FERC*, 39 F.4th 719, 722 (D.C. Cir. 2022). In 1999, FERC established a two-step analysis to determine whether a proposed pipeline demonstrated project need, i.e., whether the pipeline was required by public convenience and necessity. *See Certification of New Interstate Gas Pipeline Facilities*, 88 FERC ¶ 61, 227 (1999) (the “Policy Statement”), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000); *see also* Notice of Inquiry, *Certification of New Interstate Gas Pipeline Facilities*, 174 FERC ¶ 61,125 (2021) (soliciting comments on possible revisions to FERC’s approach under the Policy Statement).

First, FERC considers the “threshold question” of “whether the project can proceed without subsidies from [the applicant’s] existing customers.” *Myersville*, 783 F.3d at 1309 (citing Policy Statement ¶ 61,745) (alteration in original). The presence of precedent agreements demonstrates a “market need for the project” and proves that the project will not be subsidized. *Id.* If a project meets a market need, FERC “then balances the ‘public benefits against the potential adverse consequences’ of the proposal.” *Id.* (citing Policy Statement ¶ 61,745). FERC may again consider precedent agreements when determining the public benefits of a project. *See Id.* at 1309–13; *see also* Policy Statement ¶ 61,748 (noting “the types of public benefits [of a proposed project] that might be shown are quite diverse” before citing a non-exhaustive list of example benefits).

FERC, TGP, and HOME concur that the AFP would proceed without subsidies. Rehearing Order ¶ 19. As such, the AFP project cleared the “threshold question.” *See Myersville*, 783 F.3d at 1309. HOME argues that FERC’s balancing of the benefits and harms was arbitrary and capricious in numerous ways. Relevant here is HOME’s contention that FERC’s finding of public need is unsupported by substantial evidence and arbitrary and capricious because the AFP transports export-bound LNG. HOME’s remaining concerns with FERC’s balancing test are addressed in Argument Section II.

A. The precedent agreements for the export of liquified natural gas were properly considered by FERC as demonstrative of market need and project need.

Under Section 7 of the NGA, when “evidence of preconstruction contracts for gas transportation service” exists, a project “meets a ‘market need,’” and thus “will stand on its own . . .” *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (citing *Myersville*, 783 F.3d at 1309). Courts have upheld FERC’s narrow inquiry into an applicant’s existing contracts with shippers to reflect a market need. *See, e.g., Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) (quoting *Myersville*, 783 F.3d at 1311). The fact that contracts may serve an international entity is immaterial, as “[n]othing in Section 7 prohibits considering export precedent agreements in the public convenience and necessity analysis.” *City of Oberlin*, 39 F.4th at 726. While the NGA extends particular favorability to projects where proposed exports reach “a nation with which there is in effect a free trade agreement,”<sup>2</sup> the NGA does not direct

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<sup>2</sup> Although this reasoning regarding the public interest impacts of exports arises under Section 3, which gives FERC the authority to approve natural gas import or export facilities, FERC has “long regarded Section 3’s ‘public interest’ standard and Section 7’s ‘public convenience and necessity’ standard as substantially equivalent.” *Distrigas Corp. v. Fed. Power Comm’n*, 495 F.2d 1057, 1065 (D.C. Cir. 1974). Section 3 is evidence that precedent agreements concerning fuel bound for export nonetheless may demonstrate market need and public benefit. *See id.*

FERC to discount or disregard exports to nations without a free trade agreement. 15 U.S.C. § 717b(c). Rather, FERC may consider natural gas exports to be in the public interest. Such an analysis aligns with the Supreme Court’s directive for FERC “to evaluate *all factors* bearing on the public interest.” *Atl. Refining Co.*, 360 U.S. at 391 (emphasis added).

Here, TGP had “executed binding precedent agreements for . . . 100% of the design capacity of the pipeline project.” Rehearing Order ¶ 26. FERC was cognizant that the AFP supported no new LNG production and that much of the LNG transported through the AFP was ultimately bound for export. *Id.* ¶¶ 31–33. Yet, FERC found the agreements to be “nonetheless sufficient” to show public need. *Id.* ¶ 33. FERC thus abided by courts’ expectations to focus on precedent agreements and to weigh exported LNG in favor of the public interest. Therefore, in concluding that the AFP demonstrated a market need and project need, FERC properly considered precedent agreements for the full capacity of the AFP—even where the gas was bound for export to Brazil. As courts uphold and encourage the inclusion of precedent agreements in FERC’s factfinding and decisionmaking processes, FERC’s decision regarding the AFP was supported by substantial evidence and not arbitrary and capricious.

**B. The exported liquified natural gas had domestic benefits that supported FERC’s finding that the American Freedom Pipeline would serve a public need.**

Because precedent agreements reflect a “business decision” and act as a useful indicator of need, TGP’s contracts alone would act as substantial evidence for FERC to show that the AFP would serve a public need. *Twp. of Bordentown*, 903 F.3d at 262. In *City of Oberlin*, the D.C. Circuit credited FERC for inquiring into the benefits of the LNG bound for export. 39 F.4th at 726–27. The court supported FERC’s consideration of precedent agreements for export-bound LNG, as well as FERC’s explanation “that myriad domestic benefits stem from increasing transportation services for gas shippers.” *Id.* at 727. The court held that such domestic benefits

correctly resulted in a finding of public need “regardless of where the gas [was] ultimately consumed.” *Id.*

While FERC did not need to “look[] beyond the market need reflected by [precedent agreements],” *Twp. of Bordentown*, 903 F.3d at 263 (quoting *Myersville*, 783 F.3d at 1311), FERC found the following evidence further supported findings of public need. While LNG contracted to International is bound for export, the AFP will be an early link in a chain of existing infrastructure with available capacity.<sup>3</sup> The exported gas flowing through the AFP would thus increase the efficiency of the entire national system by connecting the HFF to existing infrastructure. Additionally, FERC noted that the current route for HFF, using the Southway Pipeline, reaches regions in the Old Union that display a steady decline in LNG demands. Rehearing Order ¶ 34. With the AFP in place, HFF’s produced LNG would serve high-demand customers in other regions and optimize the existing Northway Pipeline, which is not currently at full capacity. Rehearing Order ¶ 34. Therefore, in granting a CPCN to TGP, FERC used evidence of myriad benefits that the transportation of natural gas through the AFP, even gas ultimately destined for export, would have on the community.

As suggested by the D.C. Circuit, such factors amount to “more than a scintilla” of evidence from which FERC found that the AFP both met a market need and was in the public interest. *See B&J Oil & Gas*, 353 F.3d at 76. Additionally, FERC’s use of precedent agreements

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<sup>3</sup> To be exported after leaving the AFP, the LNG “must be diverted at the Burden Road M&R Station to the existing Northway Pipeline, which is not currently at full capacity. The Northway Pipeline will carry the LNG into the New Union City M&R Station, which is located at the Port of New Union on Lake Williams. Lake Williams connects via the White Industrial Canal to the Atlantic Ocean, and the LNG is to be loaded onto LNG tankers at the Port of New Union for export to Brazil by International.” Rehearing Order ¶ 14.

did not render the balancing of benefits and harms, discussed in further detail below, arbitrary and capricious. Therefore, this Court should find that FERC's CPCN was supported by substantial evidence and was not arbitrary and capricious although ninety percent of the AFP will be used for export-bound LNG.

## **II. FERC'S FINDING THAT THE BENEFITS FROM THE AMERICAN FREEDOM PIPELINE OUTWEIGHED THE ENVIRONMENTAL AND SOCIAL HARMS WAS NOT ARBITRARY AND CAPRICIOUS.**

If FERC determines that a market need exists for a pipeline, FERC must use an "economic test" to balance the pipeline's "public benefits against [its] potential adverse consequences."<sup>4</sup> Policy Statement ¶ 61,745. When a court reviews FERC's balancing test, it cannot substitute its judgment for FERC's. *Myersville*, 783 F.3d at 1308. Rather, a court must afford FERC "an extreme degree of deference" and limit its review to whether FERC's determination was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* A valid balancing test will demonstrate a reasoned, principled, and evidence-based decisionmaking process. *Id.* Thus, a court will focus on "whether the decision was based on a consideration of the relevant factors and whether there [was] a clear error of judgment." *Id.* (quoting *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C.Cir.2002)). So long as FERC considered relevant factors and avoided clear judgment errors, the results of their balancing test are not arbitrary and capricious. *Id.*

In the balancing test, "the types of public benefits that might be shown are quite diverse" and may include (1) service of unmet energy demand, (2) elimination of bottlenecks, (3) access

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<sup>4</sup> "If no adverse effects would stem from the project, no balancing is required . . ." *Myersville*, 783 F.3d at 1309. Here, no party contends that the AFP would cause no adverse effects to the community. See Rehearing Order ¶¶ 38–44.

to a new energy supply, (4) reduced customer costs, (5) new connections for the interstate grid, (6) competitive alternatives to current energy source options, (7) increased electric reliability, and (8) progress toward clean air objectives. Policy Statement ¶ 61,748. Using a valid “sliding scale approach,” FERC may lessen an applicant’s required showing of public benefits if the applicant acquired rights-of-way agreements through negotiations with landowners to avoid the use of eminent domain. *See Id.* ¶ 61,749. However, FERC notes that “[i]n most cases, it will not be possible to acquire all the necessary rights-of-way by negotiation.” *Id.* Adverse effects that FERC may weigh against public benefits include (1) increased rates for preexisting customers, (2) decline in service quality, (3) unfair competition, and (5) negative impacts on the environment or landowners’ property. *Id.* at 61,747–48.

Far from improperly weighing the benefits and harms of the AFP, FERC based its decision to grant a CPCN to TGP on factors specifically laid out in the Policy Statement.<sup>5</sup>

A. FERC properly considered the numerous benefits the American Freedom Pipeline provides to the Old and New Union’s economy and infrastructure.

FERC considered the myriad ways in which the AFP benefitted the public. First, FERC “found a strong showing of public benefit based on the fact that TGP had executed binding precedent agreements for . . . 100% of the design capacity of the [AFP].” Rehearing Order ¶ 26. As previously discussed, FERC properly weighed and considered all the precedent agreements in this case and the spillover benefits of transporting LNG bound for export. Next, instead of limiting its analysis to the precedent agreements and their spillover benefit, FERC found that “the AFP served multiple domestic needs” including:

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<sup>5</sup> If FERC properly applies the balancing test outlined in its Policy Statement, courts will hold that FERC’s outcome was not arbitrary and capricious. *See Minisink*, 762 F.3d at 111 n.10; *City of Oberlin*, 39 F.4th at 722.

- (1) delivering up to 500,000 Dth per day of natural gas to the interconnection with the NUG terminal and the Northway Pipeline;
- (2) providing natural gas service to areas currently without access to natural gas within New Union;
- (3) expanding access to sources of natural gas supply in the United States;
- (4) optimizing the existing systems for the benefit of both current and new customers by creating a more competitive market;
- (5) fulfilling capacity in the undersubscribed Northway Pipeline; and
- (6) providing opportunities to improve regional air quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels.

*Id.* ¶ 27. These services would satisfy four of the defined public benefits listed above; the pipeline meets energy demand, increases access to new energy supply, creates a more competitive energy market, and makes progress toward clean air objectives. By weighing these benefits, FERC recognized the diverse forms project benefits may take and accorded with FERC's prerogative to "evaluate all factors bearing on the public interest." *Atl. Refining Co.*, 360 U.S. at 391 (1959); *see* Policy Statement ¶ 61,748. Therefore, in granting a CPCN to TGP, FERC considered myriad benefits that the AFP would have to the community, just as the Policy Statement directs.

**B. FERC properly balanced the harms the American Freedom Pipeline would cause to landowners along the Pipeline's route and to HOME.**

As required by the balancing test, FERC weighed these numerous benefits against identified harms that the construction and operation of the AFP would cause, paying particular attention to the AFP's negative impacts on the environment and HOME's property. However, effects faced by a particular religious group need not amount to an invaluable harm that is determinative of a government agency's ultimate decision. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1064 (9th Cir. 2008) ("No matter how much we might wish the



government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government—let alone a government that presides over a nation with as many religions as the United States of America—could function were it required to do so.”) (citing *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988)).

Here, the project will require the removal of trees along the pipeline’s route. Rehearing Order ¶ 36. However, based on the EIS, the AFP will have a “less-than-significant” impact if it operates in accordance with applicable laws and regulations. *Id.* ¶ 3. The project may also harm landowners along the route who face FERC’s use of eminent domain to grant TGP the property to complete the project. FERC noted that while TGP had not negotiated easement agreements with all affected landowners (including HOME), they reached agreements with over half of the affected landowners. *Id.* ¶ 4042. Additionally, in response to various landowners’ concerns, TGP “made changes to over 30% of the proposed pipeline route . . . .” *Id.* ¶ 41. FERC correctly applied its CPCN policy to find that TGP had no obligation to negotiate land easements with *all* landowners. *Id.* ¶ 43 (“Use of eminent domain is common in construction of pipelines, so the lack of easement agreements is not significant to our consideration.”)

FERC weighed how the AFP would specifically harm HOME’s property and practices. While construction of the AFP will “pass through approximately two miles” of HOME’s twenty-four square-mile property, FERC found that TGP will take many steps to minimize the negative impact on HOME, including: (1) TGP will replant as many trees as they remove in other areas of HOME’s property; (2) TGP will bury the pipeline for the entire two-mile stretch across HOME’s property; (3) TGP will expedite construction on HOME’s property; and (4) TGP will conduct all construction at a time that does not impact HOME’s religious biannual Solstice Sojourn.

Rehearing Order ¶¶ 38–44. As reasoned in *Navajo Nation v. U.S. Forest Serv.*, HOME’s contention that the harm the AFP will cause to their religious practice is “invaluable” to the point it would outweigh *any* benefits provided by the AFP is unworkable. *Id.* ¶ 50; *See Navajo Nation*, 535 F.3d at 1064.

In deliberating the advantages and disadvantages of alternatives to a potentially harmful route, FERC retains its discretion to decide between reasonable options. *See Minisink*, 762 F.3d at 103. In *Minisink Residents for Env’t Pres. & Safety v. FERC*, the D.C. Circuit made clear that FERC would not act arbitrarily and capriciously if it rejected an alternative that did “not provide a significant environmental advantage over the proposed project.” *Id.* Instead, FERC is only required to accord an alternative “the serious consideration it was due” and, “in its judgment,” find whether the alternative route would be preferable. *Id.* at 116. A court is “not empowered to second-guess” FERC’s judgment on this point. *Id.* Rather than substituting its judgment for FERC’s, a court must “confirm that FERC thoroughly and reasonably examined the issue.” *Id.*

Here, FERC considered and acted within its discretion when it rejected HOME’s suggested alternate route for the AFP. HOME’s alternative route, FERC determined, fared no better than the alternative presented and rejected in *Minisink*. FERC found that HOME’s proposed route through the Misty Top Mountains would “cause more objective environmental harm by traveling an additional three miles and running through more environmentally sensitive ecosystems in the mountains.” Rehearing Order ¶ 44. Additionally, the alternative would “add over \$51 million in construction costs.” *Id.* Just as in *Minisink*, FERC “accorded the [HOME] Alternative the serious consideration it was due” by calculating its ecological and economic impacts. By recognizing HOME’s reverence for the environment, TGP’s financial needs, and the overall environmental impacts of the proposals, FERC thoroughly and reasonably examined the

issue before applying its expertise to reach a final judgment. *See* Rehearing Order ¶¶ 44, 62 (“We note in this regard that it is undisputed that the Alternate Route would result in even more environmental harm, which would also be a ‘burden’ to HOME’s religious beliefs.”).

Therefore, this Court should find that FERC’s evaluation of the AFP’s benefits and harms, as well as FERC’s grant of the CPCN was not arbitrary and capricious.

### **III. FERC’S DECISION TO ROUTE THE AFP OVER HOME PROPERTY DESPITE HOME’S RELIGIOUS OBJECTIONS DID NOT VIOLATE RFRA.**

To allege that FERC violated the Religious Freedom Restoration Act, plaintiff HOME bears the burden of presenting a fact-trier sufficient evidence to rationally find two elements. *Navajo Nation*, 535 F.3d at 1068. “First, the activities the plaintiff claims are burdened by the government action must be an ‘exercise of religion.’ Second, the government action must ‘substantially burden’ the plaintiff’s exercise of religion.” *Id.* (citing 42 U.S.C § 2000bb–1(a)). Even if a plaintiff establishes both elements, the government may pursue the challenged action if it “(1) is in furtherance of a compelling government interest, and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C § 2000bb–1(b).

FERC does not contest that HOME’s activities are a valid exercise of religion. Rather, FERC argues the AFP’s existence on HOME’s property does not place a substantial burden on HOME’s exercise of religion.

#### **A. Because FERC did not withhold government benefits from HOME or threaten civil or criminal action if HOME continued its religious practices, FERC did not impose a substantial burden on HOME’s religious exercise.**

Using the “express language of RFRA and decades of Supreme Court precedent,” a government agency imposes a “substantial burden” only in two scenarios. *Navajo Nation*, 535 F.3d at 1068. In the first scenario, “individuals are forced to choose between following the tenets of their religion and receiving a government benefit.” *Id.* (citing *Sherbert v. Verner*, 374 U.S.

398 (1963)). In the second, individuals are “coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.” *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). If a plaintiff cannot demonstrate either burden, the government is not required, by the RFRA, to alter or avoid the challenged action. *Id.* at 1064 (“[R]especting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another.”).

A government action that affects land with religious significance does not, without more, constitute a “substantial burden” to religious exercise. *See, e.g., Navajo Nation*, 535 F.3d 1058, 1070 (9th Cir. 2008); *Lyng*, 485 U.S. at 44749. The Supreme Court held that a government plan to construct a logging road that would “diminish the sacredness” of tribal land and “interfere significantly” with tribal members’ religious practice did not impose enough of a burden to violate the Free Exercise Clause.<sup>6</sup> *Lyng*, 485 U.S. at 44749. The Court determined that the tribal members were neither denied “rights, benefits, and privileges” on account of their religion nor “coerced by the Government’s action into violating their religious beliefs. *Id.* Following this precedent, the Ninth Circuit found that effects on an “emotional, religious experience . . . or spiritual fulfillment—serious though [they] may be—[are] not a ‘substantial burden’ on the free exercise of religion.” *Navajo Nation*, 535 F.3d at 1070.

In *Snoqualmie Indian Tribe v. FERC*, the Snoqualmie Tribe unsuccessfully argued that FERC’s relicensing of a hydroelectric dam significantly reduced the flow of a nearby waterfall

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<sup>6</sup> “That *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence. Congress expressly instructed the courts to look to pre-*Smith* Free Exercise Clause cases, which include *Lyng*, to interpret RFRA.” *Navajo Nation*, 535 F.3d at 1071 n.13 (citing 42 U.S.C. § 2000bb(a)(5)).

and thus restricted their religious exercise. 545 F.3d 1207, 1211 (9th Cir. 2008). The Tribe considered the waterfall and its mist to be sacred due to its importance in religious ceremonies. *Id.* Often, the Tribe would conduct “vision quests” below the waterfall, “multi-day events in which individual tribal members seek spiritual contact through meditation, fasting, and bathing in the [fall’s] water.” *Id.* The court found that “[t]he Tribe’s arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant” to a finding of a substantial burden on the religious exercise. *Id.* at 1214. Considering the facts above, the court held that the Tribe did not present “any evidence demonstrating that . . . members [would] lose a government benefit or face criminal or civil sanctions for practicing their religion.” *Id.*

Here, HOME considers the natural world sacred and argues the construction of the AFP across their land places an undue burden on their religious practice. Specifically, HOME contends their Solstice Sojourn, a biannual religious journey across HOME’s property, crosses the proposed path of the pipeline Rehearing Order ¶57. The pipeline’s presence “would significantly impact—if not prevent entirely—the Solstice Sojourn.” *Id.* HOME recognizes that the AFP, which TGP agreed to bury in response to HOME’s concerns, would not physically prevent their religious practice. *Id.* ¶ 5657. Rather, because of their beliefs opposing fossil fuels, HOME claims that the AFP would make their practice “unimaginable” and destroy the meaning of the Solstice Sojourn. *Id.* ¶ 57. In essence, HOME argues that the pipeline’s presence on their land will impair their religious experience.

However, this “diminishment of spiritual fulfillment” does not amount to a substantial burden on HOME’s exercise of religion. *See Navajo Nation*, 535 F.3d at 1070. HOME’s argument regarding the pipeline’s impact on the Solstice Sojourn mirrors the Snoqualmie’s argument regarding the dam’s impact on the vision quests. Just as in *Snoqualmie Indian Tribe*,

HOME cannot show that FERC forced them to choose between a government benefit or their religious exercise. Nor can they show FERC forced them to practice their religion under threat of civil or criminal sanctions. Because HOME's alleged impacts do not impose a threat of withheld benefits or legal action, this Court should find no substantial burden and refrain from requiring FERC to conform to HOME's needs. *See Snoqualmie Indian Tribe*, 545 F.3d 1214.

B. Even if the court finds the American Freedom Pipeline's construction imposed a substantial burden on HOME's religious exercise, FERC's action was the least restrictive means of furthering a compelling government interest.

Even if this Court were to find that FERC imposed a substantial burden upon HOME's religious practices, FERC's granting of a CPCN to TGP does not violate the RFRA because FERC's action furthered a compelling government interest using the least restrictive means. *See* 42 U.S.C § 2000bb–1(b). Generally, the least restrictive means test “compar[es] the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity.” *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 967 (E.D. Mich. 2014) (quoting *S. Ridge Baptist Church v. Indus. Comm'n of Ohio*, 911 F.2d 1203, 1206 (6th Cir.1990)). First, FERC must show a compelling interest in rejecting HOME's petition to deny the CPCN and HOME's alternate route. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). Second, FERC must show that “it lack[ed] other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (finding government action improper where existing, less-restrictive means furthered the same compelling interest).

While the application of the interest must be examined on the individual level, compelling government interests may include maintaining coherent, uniform systems that must reject individual challenges for exemption to preserve the system's integrity. *See Hernandez v. Comm'r*, 490 U.S. 680, 689 (1989) (finding that maintaining a sound, efficient tax system

constituted a compelling government interest); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000). Courts agree that systems that “would be difficult to accommodate . . . with myriad exceptions flowing from a wide variety of religious beliefs,” such as those related to taxes and unemployment benefits, may withstand challenges based on religious beliefs. *See United States v. Lee*, 455 U.S. 252, 259 (1982); *S. Ridge Baptist*, 911 F.2d 1203 at 1207.

FERC agrees with TGP that it has a compelling interest in “maintaining a coherent natural gas pipeline permitting system, not one that would bend unreasonably to the desired exceptions of any religion.” Rehearing Order ¶ 63. FERC’s Policy Statement acknowledges that most projects will require the use of some eminent domain precisely so that “a few holdout landowners cannot veto a project” that otherwise serves the public need. Policy Statement ¶ 61,749. Furthermore, Congress amended the Natural Gas Act to provide natural gas companies the ability to exercise federal eminent domain. 15 U.S.C. § 717f(h); 61 Stat. 459 (1947). In denying an exception to HOME, FERC has a compelling government interest—as indicated by the agency itself and Congress—to maintain a uniform system of permitting to approve natural gas pipeline routes.

The approved AFP route is the least restrictive means of furthering this interest because it (1) outperforms alternative routes, including HOME’s proposed route, and (2) reflects TGP’s changes to significantly lessen the restrictive burden the pipeline will place on HOME. First, FERC found that the alternate route that HOME themselves proposed was “excessively expensive[] and . . . would cause more overall environmental harm than the route.” Rehearing Order ¶ 63. Because the AFP cannot circumvent HOME’s property between Lake Williams and the Misty Top Mountains, no other route could reach the Broadway Road M&R Station without

replicating a portion of the Southway Pipeline and laying more miles of the AFP east the mountain range. Rehearing Order Exhibit A. Additionally, TGP agreed to bury the pipeline along HOME's property, construct it as efficiently as possible, replant trees on HOME's property, and complete construction to avoid interference with HOME's Solstice Sojourn. Rehearing Order ¶¶ 41,67.

Therefore, should this Court hold that the AFP imposes a substantial burden on HOME, it should find that FERC did not violate RFRA because the CPCN describes the least restrictive means of furthering the compelling government interest in maintaining a uniform pipeline permitting system.

#### **IV. THE GREENHOUSE GAS CONDITIONS IMPOSED BY FERC WERE NOT BEYOND FERC'S AUTHORITY UNDER THE NATURAL GAS ACT.**

The major questions doctrine does not preclude FERC's decision to impose GHG conditions because (1) FERC did not claim authority concerning an issue of vast economic and political significance, and (2) FERC had clear authorization to interpret the NGA to allow the imposition of GHG conditions.

##### **A. The greenhouse gas conditions do not raise a significant economic or political issue and therefore do not require more precise statutory authorization.**

The Supreme Court considered the implementation of GHG regulations under the major questions doctrine twice thus far. In *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014), the Court addressed the EPA's permitting framework for all stationary GHG sources. Congress did not explicitly authorize the EPA to regulate stationary GHG sources, and the Court found that the framework would "require permits for . . . the operation of millions[] of small sources nationwide." *Id.* The Court held that such an interpretation of the Clean Air Act would constitute a "claim to extravagant statutory power over the national economy." *Id.* (citation omitted). In *West Virginia v. EPA*, 142 S. Ct., 2587, 2605 (2022), the Court similarly held that



the EPA could not implement a GHG regulation that would shift the energy mix<sup>7</sup> of the nation rather than apply to an individual facility. Again, the Court reasoned that the rule, if upheld, would endorse the EPA’s ability “to order the wholesale restructuring of any industrial section.” *Id.* at 2605, 2610.

In contrast with the broad claims and programs at issue in those two cases, FERC’s imposition of GHG conditions did not reach the level of economic and political significance. Instead, in this case, FERC tailored project-specific GHG conditions to the reasonably foreseeable impacts of a single pipeline. *See* Rehearing Order ¶ 67 (imposing conditions including the replanting of trees, the use of electric powered equipment “wherever practical” and the use of renewable electricity resources only “where such sources are available.”); *see also id.* at ¶ 89 (noting that the “conditions imposed here are project-specific, targeting the GHG emissions of the construction of the AFP”). Whereas the EPA failed, per the Court’s standards, to apply regulations to an individual facility in *West Virginia*, conditions attached to Section 7 CPCNs strictly govern individual pipelines. *See* 142 S. Ct. at 2605. Even if petitioners could demonstrate that FERC initiated a pattern of imposing GHG conditions on new pipelines, the implied regulation would only impact one type of infrastructure within one subset of the energy industry. Conversely, the rules rejected in *Utility Air* and *West Virginia* reached a high volume and wide variety of emitters. *See id.*; *Utility Air*, 573 U.S. at 324. By limiting the GHGs emitted during the construction of a pipeline, FERC’s conditions would not significantly restructure the natural gas industry, let alone the entire energy industry.

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<sup>7</sup> A nation’s energy mix describes the share of primary energy derived from various sources, including both nonrenewable and renewable sources. *See* Hannah Ritchie & Pablo Rosado, *Energy Mix*, OUR WORLD IN DATA (Jul. 10, 2020), <https://ourworldindata.org/energy-mix>.

B. Even if the greenhouse gas conditions raise a “major question,” the conditions do not exceed FERC’s authority as authorized by Congress under the NGA.

When applying the major questions doctrine, the Supreme Court withholds judicial deference from agency claims that “would render the [authorizing] statute unrecognizable to the Congress.” *Utility Air*, 573 U.S. at 324 (internal quotation omitted); *see Chamber of Com. v. U.S. Dep’t of Lab.*, 885 F.3d 360, 387 (5th Cir. 2018) (“[T]he Supreme Court has been skeptical of federal regulations crafted from long-extant statutes that exert novel and extensive power over the American economy.”). In place of providing deference, the Court inquires whether an agency revised the statute to address an entirely different regulatory scheme than the one it was intended to. *West Virginia*, 142 S. Ct. at 2612.

*West Virginia*’s concurrence provides further guidance on “what qualifies as a clear congressional statement authorizing an agency’s action.” *Id.* at 2620 (Gorsuch, J., concurring). The concurrence suggests that courts must examine (1) the legislative provisions relied upon by the agency, (2) the age and focus of the statute in relation to the problem the agency seeks to address, (3) the agency’s past interpretation of the statute, and (4) the agency’s Congressionally assigned mission and expertise.<sup>8</sup> *Id.* at 262224 (Gorsuch, J., concurring). Applying these factors, this Court must find whether FERC’s action exceeded the scope of authority provided by Congress through the NGA.

*Legislative Provision.* FERC relied upon the following provision as its source of authority: “The Commission shall have the power to attach to the issuance of the certificate and

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<sup>8</sup> Federal courts have since used Justice Gorsuch’s concurrence to identify agency actions that implicate and/or violate the major questions doctrine. *See Louisiana v. Becerra*, 629 F. Supp. 3d 477, 492 (W.D. La. 2022) (applying factor test for finding clear Congressional statement); *United States v. Freeman*, No. 21-cr-41-JL, 2023 U.S. Dist. LEXIS 147548, at \*21 (D.N.H. Aug. 22, 2023) (applying factor test for finding implication of major question).

to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” Rehearing Order ¶ 71; 15 U.S.C. § 717f(e). Congress clearly provided an intelligible principle to which FERC’s conditions must conform with the phrases “reasonable” and “as the public convenience and necessity may require.” 15 U.S.C. § 717f(e); *see Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 22526 (1943) (finding intelligible principle where statutes authorize regulation in the “public interest”). Furthermore, this subsection of the NGA is the sole provision addressing the possible scope of a CPCN’s terms and conditions. By omitting an exhaustive list of what constitutes “public convenience and necessity,” Congress demonstrated an intent to maintain FERC’s discretion in attaching terms and conditions. *See C.R.S., CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES* 10 (2023) (“The more precise a delegation, the less discretion Congress affords to the agency in its execution of its delegated authority.”).

*Age and Focus of Statute.* Congress passed the NGA in 1938 to consolidate federal authority over interstate natural gas facilities. 15 U.S.C. § 717a. In 1942, Congress amended Section 7 to enable the FPC to consider all relevant factors when issuing CPCNs. *See H.R. Rep. No. 1290-2* (1941); *S. Rep. No. 985-2* (1942). The amendments, including the addition of the provision at issue, aimed to allow the FPC to ensure pipeline development occurred in the public interest. *See Act of Feb. 7, 1942, ch. 9, Pub. L. No. 444, 56 Stat. 83; FED. POWER COMM’N, TWENTIETH ANNUAL REPORT OF THE FEDERAL POWER COMMISSION* 10 (1940).

Following the amendments’ passage, courts used the phrase “public convenience and necessity” to confer the status of “the guardian of the public interest” upon FERC. *See, e.g., United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945); *Fed. Power*

*Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961). Based on this understanding, the Supreme Court further interpreted the NGA to include the “subsidiary purposes” of conservation and environmental issues. *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 66970 n.6 (1976). Accordingly, a court may infer that FERC may impose environmental mitigation measures in pursuit of orderly interstate natural gas pipeline regulation. *See id.* at 670. Therefore, FERC met the primary and subsidiary purposes of the NGA by addressing the problem of construction emissions. *See NAACP*, 425 U.S. at 66970; *Transcon. Gas Pipe Line Corp.*, 365 U.S. at 7.

*Past Interpretations.* Circuit courts have recognized FERC’s “extremely broad authority to condition certificates of public convenience and necessity.” *Transcon. Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979) (citing *Atlantic Refining Co. (CATCO) v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, (1959)); *see Mun. Distributions Grp. v. Fed. Power Comm'n*, 467 F.2d 741, 745 (D.C. Cir. 1972); *Lynchburg Gas Co. v. Fed. Power Comm'n*, 275 F.2d 847, 848 (3d Cir. 1960). Since its creation in 1977,<sup>9</sup> FERC has used this authority to include environmental conditions in pipeline CPCNs. *See Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025, 65,235, at app. C (1977) (requiring applicant to take mitigative measures for erosion control, revegetation, and endangered species protection); *Alcan Pipeline Co.*, 1 FERC ¶ 61,248, 61,642 (1977) (including environment as one of six general areas of terms and conditions). Furthermore,

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<sup>9</sup> *See infra* 42 U.S.C. § 7134.

in the past decade,<sup>10</sup> FERC has included GHG emissions estimates from project construction and operation in NEPA documents. FERC Docket No. PL21-3-000, at 8 (2022); FERC Docket No. PL18-1-000, at 10; *see* 163 FERC ¶ 61,042, at 4450 (2018). Therefore, FERC has often interpreted the “terms and conditions” provision to address environmental issues.

*Congressionally Assigned Mission.* Congress created FERC through the Department of Energy Organization Act (the “Organization Act”), which addressed Congress’ finding that the United States needed a “strong national energy program . . . consistent with its environmental and social goals.” 42 U.S.C. § 7111(3). The Organization Act gave FERC the mission “to assure incorporation of national environmental protection goals in the formulation and implementation of energy programs, and to advance the goals of restoring, protecting, and enhancing environmental quality, and assuring public health and safety,” among other objectives.<sup>11</sup> 42 U.S.C. § 7112(13). The Chairman and members of FERC required expertise in “fairly [assessing] the needs and concerns of *all interests* affected by Federal energy policy.” 42 U.S.C. § 7134 (emphasis added).

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<sup>10</sup> FERC’s actions related to greenhouse gas monitoring and reduction follow an increased focus on climate change in the federal government. *See* Massachusetts v. EPA, 549 U.S. 497, 521 (2007) (upholding scientific evidence that shows “serious and well recognized” harms of climate change); *Timeline of Progress Made in President Obama’s Climate Action Plan*, ENV’T & ENERGY STUDY INST. (Aug. 5, 2015), <https://www.eesi.org/papers/view/fact-sheet-timeline-progress-of-president-obama-climate-action-plan> (describing United States’ first Climate Action Plan developed by President Obama in 2013); Fred Krupp, *The Biggest Thing Congress Has Ever Done to Address Climate Change*, ENV’T DEF. FUND (Aug. 12, 2022), <https://www.edf.org/blog/2022/08/12/biggest-thing-congress-has-ever-done-address-climate-change> (describing Inflation Reduction Act as “largest, most ambitious climate legislation Congress has ever passed”).

<sup>11</sup> Concurrent objectives included the goals to “create and implement a comprehensive energy conservation strategy,” and “place major emphasis on the development and commercial use of . . . technologies utilizing renewable energy resources.” 42 U.S.C. § 7112(4), (6).

The Organization Act further transferred upon FERC the FPC's responsibilities, including the authority to issue CPCNs under Section 7 of the NGA. 91 Stat. 984; 15 U.S.C. § 717f. The NGA provided FERC final and exclusive discretion to approve or deny applications for natural gas exports, LNG terminals, changes in rates, and transportation facilities. [insert provisions]. Therefore, Congress assigned FERC a mission and expertise that encompassed broad authority over interstate natural gas facilities, including the environmental regulation thereof. *See* 91 Stat. 984; *see also* *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, 787 (1968) (reasoning the Natural Gas Act assigns “broad responsibilities [to FERC and] therefore demand[s] a generous construction of its statutory authority”).

For the reasons stated above, FERC's interpretation of the NGA does not “warrant skepticism.” *West Virginia*, 142 S. Ct. at 2624. Because the FERC had clear statutory authority to mitigate the environmental effects of natural gas pipelines, this Court should not apply the major questions doctrine to preclude the imposition of GHG conditions on the AFP.

**V. FERC'S DECISION NOT TO IMPOSE ANY GHG CONDITIONS ADDRESSING UPSTREAM AND DOWNSTREAM GHG IMPACTS WAS NOT ARBITRARY AND CAPRICIOUS.**

FERC's decision not to impose upstream and downstream emissions conditions was not arbitrary and capricious because (A) it did not breach a statutory duty under the Natural Gas Act or the National Environmental Policy Act, and (B) it was logical given the results of the environmental impact statement. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017); *Motor Vehicle Mfrs. Ass'n. v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29, 43 (1983).

A. FERC did not have a statutory duty to impose GHG conditions addressing downstream and upstream GHG impacts under the Natural Gas Act or the National Environmental Policy Act.

While abiding by the Natural Gas and National Environmental Policy Act, FERC did not act arbitrarily or capriciously because neither statute requires FERC to impose upstream and downstream emissions conditions.

1. *Under the Natural Gas Act, FERC had the authority, but not the duty, to impose GHG conditions addressing downstream and upstream GHG emissions.*

Recognizing the significance of climate change, the Supreme Court found that the EPA acted arbitrarily and capriciously when it failed to regulate greenhouse gases under the “clear statutory command” of the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. at 505, 533. The Clean Air Act stated that the EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles.” 42 U.S.C. § 7521(a)(1). Based on this provision, the Court found that the EPA could not avoid further action regarding GHG regulation unless they determined that GHGs, an air pollutant from motor vehicles, did not contribute to climate change or provided a reasonable explanation as to their inaction. *Massachusetts v. EPA*, 529 U.S. at 533.

In contrast, the Natural Gas Act empowers—but does not mandate—FERC to impose “reasonable terms and conditions” on applicants. 15 U.S.C. § 717f. While the EPA “shall by regulation prescribe . . . standards,” FERC “shall *have the power to* attach . . . reasonable terms and conditions *as the public convenience and necessity may require.*” 42 U.S.C. § 7521(a)(1); 15 U.S.C. § 717f (emphasis added). The imposition of terms and conditions is thus wholly discretionary, as FERC may choose to exercise its power after determining the terms which may address public convenience and necessity. *See* 15 U.S.C. § 717f. By acting upon the authority

conferred by the Natural Gas Act without exceeding the statute's bounds, FERC did not act arbitrarily or capriciously.

2. *FERC complied with the National Environmental Policy Act's mandate to conduct a hard look review of GHG emissions.*

NEPA does not require FERC to take a particular regulatory action. *See Sierra Club v. FERC*, 867 F.3d at 1376 (“NEPA does not require a particular substantive result.”); *see also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 22728 (1980) (per curiam) (“[A] court . . . cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’”) (citation omitted). Instead, FERC must complete a hard look review of their decision's environmental impacts. *City of Bos. Delegation v. FERC*, 897 F.3d 241, 246 (D.C. Cir. 2018). A hard look review involves an adequate consideration and disclosure of an action's future environmental impacts and consequences that are reasonably foreseeable. *Id.* at 253; *Balt. Gas & Elec. Co.*, 462 U.S. at 9798. The D.C. Circuit mandated that “at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible.”<sup>12</sup> *Sierra Club*, 867 F.3d at 1371.

In this case, the EIS included an estimate of the annual GHG emissions caused by the pipeline's construction (“downstream emissions”). FERC described this estimate as “the upper bound for [GHG] emissions that could result from the end-use combustion of gas transported by this project.” Rehearing Order ¶ 72. Because this estimate constitutes the approximate emissions

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<sup>12</sup> Many cases relating to CPCNs are filed in the D.C. Circuit due to the following provision of the Natural Gas Act: “Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.” 15 U.S.C. § 717r(b).



made possible by the AFP, the EIS meets NEPA and D.C. Circuit’s baseline for a valid hard look review. FERC elected to omit the annual GHG emissions caused by the production of gas (“upstream emissions”). *Id.* ¶ 74. Even with this omission, FERC complied with the NEPA standard, as the production of gas is not a future impact of a pipeline but a pre-existing production that would continue regardless of the pipeline’s construction. *See Sierra Club*, 867 F.3d at 1371. The upstream emissions thus could not be an environmental impact or consequence of the pipeline required consideration and disclosure in an environmental impact assessment.

Neither party contended that FERC erred in its numerical analysis within the EIS or failed to consider alternatives beyond HOME’s proposed path.<sup>13</sup> By completing and considering the results of a complete EIS, FERC fulfilled the requirement to conduct a hard look review of GHG emissions. Therefore, this Court should find that FERC’s decision to exclude upstream and downstream emissions was not arbitrary and capricious.

B. FERC provided logical and consistent reasoning to exclude upstream and downstream emissions from its GHG conditions.

Beyond compliance with relevant statutes, courts search for logical and consistent reasoning to support a finding that an agency did not act arbitrarily or capriciously. *Motor Vehicle Mfrs.*, 463 U.S. at 43; *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987). Circuit courts have found that an agency acted arbitrarily and capriciously where the agency’s decision (1) contradicted a rule simultaneously made by the agency or (2) aligned with a premise the agency planned to disrupt. *Portland Cement Ass’n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011); *United Church of Christ*, 707 F.2d at 144142.

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<sup>13</sup> See discussion *supra* under Argument Section II.

In this case, the distinct natures of upstream and downstream emissions versus construction emissions warranted the contrasting treatment of each under FERC’s simultaneous rules. Unlike the upstream and downstream emissions estimate, the construction emissions estimate does not need to consider external factors such as the projected use of the pipeline, the displacement of other fossil fuels, or the avoidance of other natural gas transportation methods. Rehearing Order ¶ 72. Rather, the construction emissions estimate is wholly based on the manufacturing methods planned for use over the pre-set construction period. Rehearing Order ¶ 73. Such emissions may be dependably and measurably altered by conditions like those imposed by FERC.<sup>14</sup>

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<sup>14</sup> FERC’s CPCN conditions focus largely on the implementation of electric technologies during construction. If FERC were to impose conditions on downstream emissions, it would likely require the purchase of “offset credits,” wherein TGP would fund external climate mitigation projects. See Eric M. Blanton & Samer Mosis, *The Carbon-Neutral LNG Market: Creating a Framework for Real Emissions Reductions*, COLUMBIA SCHL. INT’L & PUB. AFFAIRS (Jul. 8, 2021), <https://www.energypolicy.columbia.edu/publications/carbon-neutral-lng-market-creating-framework-real-emissions-reductions/>. The Environmental Protection Agency and state governments have approved methods to quantify the GHG emissions reductions caused by the implementation of electric technologies. See *Quantifying Energy Savings and Greenhouse Gas (GHG) Reductions*, U.S. ENV’T PROT. AGENCY (last visited Nov. 16, 9:30 AM), <https://www.epa.gov/inflation-reduction-act/quantifying-energy-savings-and-greenhouse-gas-ghg-reductions>; CAL. AIR RESOURCES BD., METHODOLOGY FOR DETERMINING EMISSION REDUCTIONS AND COST-EFFECTIVENESS 3 (2020). In comparison, carbon offsets often lack a standardized and transparent regulatory system. See generally G.C. VAN KOOTEN & F.P. DE VRIES, CARBON OFFSETS (2013). See also MARTIN CAMES ET AL., HOW ADDITIONAL IS THE CLEAN DEVELOPMENT MECHANISM? 147-54 (2016) (finding eighty-five percent of studied offset projects were not “additional” GHG emissions savings) Lisa Song & Paula Moura, *An Even More Inconvenient Truth: Why Carbon Credits for Forest Preservation May Be Worse Than Nothing*, PROPUBLICA (May 22, 2019), <https://features.propublica.org/brazil-carbon-offsets/inconvenient-truth-carbon-credits-dont-work-deforestation-redd-acre-cambodia/> (describing historical unreliability of carbon offsets). As such, downstream emissions conditions would likely impose an unreasonable burden on TGP without enacting significant benefits to the public interest.

FERC did not arbitrarily choose which phase of the project to regulate; it made a logical decision to regulate the phase that (1) is recognized in the record to cause a quantifiable increase in emissions and (2) may be regulated effectively through TGP's implementation of low-emissions technologies and measures. The decision not to regulate upstream and downstream emissions, the less measurable estimate, did not contradict a decision to regulate construction emissions. Instead, FERC's decision followed the rational principle of aligning a decision with the record's facts rather than an abstract projection.

The D.C. Circuit additionally held that a "decision on a premise the agency . . . planned to disrupt is arbitrary and capricious." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (2011). In *Portland Cement Ass'n v. EPA*, the EPA established emissions standards for cement kiln companies before closing the comment period on a new set of mutually exclusive emissions standards that the companies would subsequently need to follow. *Id.* at 184-85. The D.C. Circuit found this action to be arbitrary and capricious, reasoning that the EPA engaged in "strategic vagueness" and required commenters to "anticipate every contingency." *Id.* at 186. While the court stated that an impending definition may be a relevant factor to decisionmaking, the court held that the concurrent, contradictory rulemaking processes were arbitrary and capricious. *Id.* at 187, 189.

Here, FERC's decision to exclude upstream and downstream emissions conditions did not arbitrarily conflict with a future rule. The circumstances faced by TGP in this case differ from those faced by cement kilns in *Portland Cement Association*. First, FERC will not subject TGP to new conditions upon the completion of the guidance. Second, FERC's action concerning the AFP does not require various industries to anticipate new contingencies; the pipeline industry may properly raise their concerns during the comment period of the rulemaking process.

surrounding the draft guidance. Although FERC considered the possible future policy and the inclusion of upstream and downstream emissions conditions, FERC found that the AFP was unlikely to cause any significant increase in upstream or downstream emissions. *See* Rehearing Order ¶ 99100.

Rather than rashly justifying the imposition of additional conditions to satisfy the environmental concerns of one set of petitioners, FERC imposed conditions where the record evinced direct greenhouse gas emissions from the pipeline. *See* Rehearing Order ¶ 7274. Therefore, this Court should find that FERC's decision to exclude upstream and downstream emissions was not arbitrary and capricious.

### **CONCLUSION**

For the foregoing reasons, this Court should uphold FERC's CPCN Order and Rehearing Order, including (1) FERC's findings regarding the public need for the AFP, (2) the decision to route the AFP alongside the Misty Top Mountains, and (3) the imposition of GHG conditions relating to construction emissions.