

C.A. No. 23-01109

UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH  
*Plaintiff-Appellant*

-and-

TRANSNATIONAL GAS PIPELINES, LLC  
*Plaintiff-Appellant*

v.

FEDERAL ENERGY REGULATORY COMMISSION  
*Defendant-Appellee*

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

Brief of Appellee, FEDERAL ENERGY REGULATORY COMMISSION

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## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction over this appeal pursuant to 15 U.S.C. § 717r. Upon the Federal Energy Regulatory Commission (“FERC”) issuance of a certificate, any party to the proceeding “aggrieved” may seek rehearing by FERC.<sup>1</sup> If FERC denies rehearing, the aggrieved party may petition for review in the D.C. Circuit or a designated regional court of appeals.<sup>2</sup> The court of appeals has “exclusive” jurisdiction to “affirm, modify, or set aside” the FERC order “wherein the natural-gas company to which the order relates is located” or has its principal place of business.<sup>3</sup> The court of appeals may not consider an “objection to the order of the Commission” unless that objection was raised in a petition for hearing before FERC or “there is reasonable ground for failure so to do.”<sup>4</sup> On June 1, 2023, Appellants timely appealed by filing their petitions for review in this Court within sixty days following FERC’s order on the application for rehearing.<sup>5</sup>

## **ISSUES PRESENTED**

1. 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?
2. Was FERC’s finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?

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<sup>1</sup> 15 U.S.C. § 717r(a).

<sup>2</sup> 15 U.S.C. § 717r(b).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

3. Was FERC’s decision to route the AFP over HOME property despite HOME’s religious objections in violation of RFRA?
4. Were the GHG Conditions imposed by FERC beyond FERC’s authority under the NGA?
5. Was FERC’s decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

### **STATEMENT OF THE CASE**

On April 1, 2023, FERC issued an Order (the “Rehearing Order”) granting a Certificate of Public Convenience and Necessity (the “CPCN”) to Transnational Gas Pipelines (“TGP”) for construction of the American Freedom Pipeline (“AFP”).<sup>6</sup> The AFP will serve multiple domestic needs: (1) delivering up to 500,000 dekatherms (“Dth”) per day of natural gas to the interconnection with the NUG terminal and 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 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.<sup>7</sup> The AFP will pass through approximately two miles of property owned by the Holy Order of Mother Earth (“HOME”), a party to this case, which will require the removal of approximately 2,200 trees and other vegetation from HOME property.<sup>8</sup>

HOME now appeals FERC’s findings that TGP adequately demonstrated need for the AFP project because a majority of the AFP’s liquefied natural gas (“LNG”) will be exported to

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<sup>6</sup> R. at 2.

<sup>7</sup> R. at 8.

<sup>8</sup> R. at 10.

the International Oil & Gas Corporation (“International”).<sup>9</sup> HOME avers that exporting LNG to International inadvertently serves Brazilian national interests as International is owned by a Brazilian parent company.<sup>10</sup> FERC’s rehearing of the Order determined national exportation of LNG to be a valid consideration when determining need for a project.<sup>11</sup> HOME further appeals the Order on the basis that FERC both improperly weighed the AFP’s adverse impacts against public necessity and was contrary to the Religious Freedom Restoration Act (“RFRA”).<sup>12</sup> FERC denied rehearing on both of these points, noting the insufficiency of HOME’s religious beliefs to require routing of the AFP and that the CPCN was granted provided that TGP takes sufficient steps to minimize adverse environmental and economic impacts of the AFP.<sup>13</sup>

TGP also appeals FERC’s Order to this Court, averring that certain conditions in the CPCN, namely those aimed toward mitigating the greenhouse gas (“GHG”) emissions impact of the AFP (the “GHG Conditions”), exceeded FERC’s authority under the Natural Gas Act (“NGA”) to impose on TGP.<sup>14</sup> TGP primarily asserted that FERC lacked the statutory authority to impose the GHG Conditions within the Order and the GHG Conditions require an overly broad interpretation of the NGA by FERC.<sup>15</sup> HOME joins TGP in the assertion that FERC lacked authority to impose the GHG Conditions, but averred FERC arbitrarily decided against imposing mitigation measures for upstream and downstream GHG impacts when discussing them in the CPCN’s Environmental Impact Statement (“EIS”).<sup>16</sup> Nevertheless, FERC denied TGP’s and HOME’s claims on rehearing, noting that § 7 of the NGA — as interpreted by FERC in line with

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<sup>9</sup> R. at 6.

<sup>10</sup> R. at 8.

<sup>11</sup> R. at 9.

<sup>12</sup> R. at 10.

<sup>13</sup> R. at 10–15.

<sup>14</sup> R. at 14–15.

<sup>15</sup> R. at 16–17.

<sup>16</sup> R. at 18–19.

the National Environmental Policy Act (“NEPA”) — unambiguously empowers FERC to set specific terms and conditions when granting a CPCN.<sup>17</sup>

On May 19th, 2023, FERC issued Order denying petitions for rehearing and affirmed the CPCN as originally issued.<sup>18</sup> On June 1, 2023, HOME and TGP filed petitions for review of the CPCN and Rehearing Order (collectively, the “FERC Orders”) with this Court.<sup>19</sup>

### **SUMMARY OF THE ARGUMENT**

HOME contests the evaluation of precedent agreements for transporting natural gas for export within the context of the CPCN issuance for the AFP. The NGA vests FERC with authority to determine the public necessity of proposed pipelines based on evaluating various factors, including balancing adverse effects and public benefits. HOME avers that the NGA pertains solely to domestic needs and that export-oriented agreements fall under a separate regulatory domain, § 3 of the NGA, overseen by the Secretary of Energy. However, it is FERC’s responsibility to assess all factors concerning public interest, including export-oriented agreements, within the context of public convenience and necessity. FERC’s CPS recognizes the significance of precedent agreements in determining project demand and necessity. These agreements, regardless of whether they involve gas intended for export, serve as vital evidence of public need and align with FERC’s long-standing policy. Recent case precedent supports the use of export-oriented precedent agreements as supportive evidence for a project’s necessity toward issuance of a CPCN. This aligns with FERC’s mandate under NGA § 7(e), namely in that FERC may consider agreements involving gas exportation as serving present or future public convenience and necessity.

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<sup>17</sup> R. at 17, 19.

<sup>18</sup> R. at 2.

<sup>19</sup> *Id.*

HOME then contests FERC's CPCN analysis on the basis that FERC improperly weighed the AFP's balance of project benefits versus adverse effects. We disagree. FERC evaluated adverse effects extensively, including the AFP's impact on existing customers, service degradation, unfair competition, and environmental or economic measures. The CPCN assessment was also contingent on TGP's mitigation efforts to reduce adverse and residual effects to the landowners and communities along the project route. TGP will implement proactive measures, negotiations, and changes to the pipeline route which addresses over 30% of landowners' concerns. The alternate route poses higher environmental damage risks in comparison to the original route. Furthermore, FERC did not weigh these factors arbitrarily. FERC followed precedent by adhering to their Certificate Policy Statement when weighing the benefits and adverse effects of the AFP. FERC is allowed flexibility when determining these interests (as intended by Congress), and ultimately concludes that the construction of the AFP outweighs adverse effects by offering diverse public benefits such as meeting public energy demands, improving grid interconnects and advancing FERC's clean air objectives.

HOME further contests FERC's routing of the AFP over HOME's property under the RFRA, alleging it substantially burdens HOME's religious practices. Under the RFRA, individuals can claim statutory protection if their religious exercise is substantially burdened by government action. However, FERC need not prove a compelling interest as HOME has failed to demonstrate the AFP's substantial burden on its religious exercise under the RFRA. HOME asserts that AFP's routing would disrupt their religious practice, specifically the "Solstice Sojourn," a ceremonial journey crossing the proposed pipeline route. However, courts have held that diminishment of spiritual fulfillment does not constitute a substantial burden. Furthermore, FERC's modifications to the route have been accommodating, including burying the pipeline and

timing construction around HOME's Solstice Sojourn with the aim of mitigating disruption of HOME's religious exercise. In addition, the current routing of AFP serves a compelling governmental interest, which includes FERC's statutory obligation to fulfill domestic natural gas needs and natural gas exports. Routing the AFP through the alternative route suggested by HOME is impractical and represents a significant cost increase for the AFP project.

TGP contests FERC's imposition of the GHG Conditions in the CPCN, averring that FERC exceeds its authority under NEPA. We disagree. NEPA mandates that agencies consider significant environmental impacts while making decision. Assessing a project's GHG emissions aligns with FERC's issuance of a CPCN under NEPA as courts have affirmed that assessing reasonably foreseeable GHG emissions from proposed natural gas pipelines is a relevant factor when determining whether the pipeline serves the public's convenience and necessity. Furthermore, NEPA does not mandate agencies follow a universally accepted model when ascertaining GHG emissions. This grants FERC significant autonomy in assessing environmental impacts, including GHG emissions, under NEPA.

Finally, HOME contests the aforementioned GHG Conditions on the grounds that FERC's decision to mitigate GHG impacts, not upstream/downstream impacts, was arbitrary. We disagree. FERC, under NEPA, holds significant autonomy when considering upstream/downstream impacts of GHG. NEPA only requires a thorough discussion of relevant issues in an agency's EIS for issuance of a CPCN. FERC extensively addressed GHG impacts in its EIS, including estimates of upstream/downstream impacts, ultimately determining mitigation necessary only for the construction of the AFP. FERC's decision aligned with NEPA's purpose of thorough environmental impact assessment and FERC, as aforementioned, is allowed significant autonomy when assessing environmental impacts.

## STANDARD OF REVIEW

FERC actions are reviewed by this Court under the Administrative Procedure Act’s narrow “arbitrary and capricious” standard.<sup>20</sup> Under this standard, the question is not “whether a regulatory decision is the best one possible or even whether it is better than the alternatives.”<sup>21</sup> Instead, “the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency.”<sup>22</sup>

## ARGUMENT

### **I. THE CONSIDERATION OF PRECEDENT AGREEMENTS FOR THE TRANSPORT OF NATURAL GAS THAT WILL BE EXPORTED IS APPROPRIATE WHEN CONSIDERING PUBLIC NEED FOR AN INTERSTATE PIPELINE**

The theme conveyed in HOME’s petitions expresses the weight given to long-term precedent agreements acquired by TGP for the AFP was incorrectly evaluated for purposes of issuing the CPCN because a portion of the gas is destined for export.<sup>23</sup> This claim is unsupported by statutes, policy, and existing precedent.

Section 7(e) of the NGA gives FERC exclusive authority to evaluate and determine whether a proposed interstate pipeline or facility “is or will be required by the present or future public convenience and necessity.”<sup>24</sup> This “requires the Commission to evaluate all factors bearing on the public interest.”<sup>25</sup> A policy statement issued by FERC provides a step-by-step

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<sup>20</sup> 5 U.S.C. § 706(2)(A).

<sup>21</sup> *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292 (2016).

<sup>22</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>23</sup> R. at 4, 5.

<sup>24</sup> 15 U.S.C. § 717(e).

<sup>25</sup> *Atl. Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

analysis for how proposed pipelines are determined to be in public convenience and necessity.<sup>26</sup> Part of this test is balancing unavoidable adverse effects with public benefits of the project.<sup>27</sup> A common method for applicants to demonstrate a public benefit is by showing demand for the project with precedent agreements, long-term contracts with shippers who would use the pipeline to transport natural gas.<sup>28</sup>

A. The NGA encourages including agreements for transporting gas intended for export in the evaluation of public necessity, along with other shipper agreements.

It is HOME's claim that a precedent agreement in which gas may be exported is not sufficient evidence of a project need because it is being based on a "foreign need."<sup>29</sup> It supports this by correctly saying the NGA is a domestic statute and the "project need" must be interpreted as a domestic need.<sup>30</sup>

As decided in *City of Oberlin, Ohio v. FERC*, the NGA authorizes FERC "to regulate the transportation and sale of natural gas in interstate commerce."<sup>31</sup> Section 7 of the NGA applies only to "natural gas companies," which are persons "engaged in the transportation [or sale] of natural gas in interstate commerce."<sup>32</sup> Facilities that partake in the import and export of natural gas are governed by § 3 of the NGA.<sup>33</sup> Though the AFP is a § 7 facility, FERC may look to § 3 in determining whether it may appropriately consider a proposed pipeline's agreements with

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<sup>26</sup> See *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 F.E.R.C. ¶ 61,227 (1999) [hereinafter *Certificate Policy Statement*].

<sup>27</sup> *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227.

<sup>28</sup> See *Env't Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) (citing *Certificate Policy Statement*, 88 F.E.R.C. at 61,748–49), *cert. denied*, 142 S. Ct. 1668 (2022).

<sup>29</sup> R. at 8.

<sup>30</sup> *Id.*

<sup>31</sup> *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 722 (D.C. Cir. 2022).

<sup>32</sup> 15 U.S.C. § 717a(6)–(7).

<sup>33</sup> 15 U.S.C. § 717b.

foreign shippers to transport gas that will be exported.<sup>34</sup> For a § 3 facility to be approved, all persons must receive approval from the Secretary of Energy before importing or exporting any natural gas.<sup>35</sup> The Secretary “shall issue” an order authorizing the proposed exportation or importation unless he or she finds it “will not be consistent with the public interest.”<sup>36</sup> The NGA sets out a presumption favoring authorization.<sup>37</sup>

The claims that FERC is attempting to apply the NGA inappropriately to “foreign needs” is without merit because it is not FERC that issues approval of natural gas exports. “With respect to export-bound gas, the Department of Energy has exclusive jurisdiction over whether to approve natural gas exports, and therefore FERC ‘does not have authority over, and need not address the effects of, the anticipated export of the gas.’”<sup>38</sup> Furthermore, “[n]othing in Section 7 prohibits considering export precedent agreements in the public convenience and necessity analysis. Section 7(e) directs FERC to grant a certificate to construct a new pipeline whenever the pipeline ‘is or will be required by the present or future public convenience and necessity.’”<sup>39</sup> Due to this broad language, the United States Supreme Court has explained this “requires the Commission to evaluate *all* factors bearing on the public interest.”<sup>40</sup>

HOME is correct that the NGA is a domestic statute and is applied to domestic needs. FERC appropriately applied the precedent agreements because they are factors bearing on the public interest and are relevant supporting evidence for public necessity. These precedent agreements were not incorporated into the analysis to solely outweigh the adverse effects, but the

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<sup>34</sup> *Oberlin*, 39 F.4th at 725.

<sup>35</sup> 15 U.S.C. § 717b(a).

<sup>36</sup> *Id.*

<sup>37</sup> *W. Virginia Pub. Servs. Comm’n v. U.S. Dep’t of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982).

<sup>38</sup> *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1185 (D.C. Cir. 2023) (quoting *Authorization Order*, 171 F.E.R.C. ¶ 61,134 at P 41).

<sup>39</sup> *Oberlin*, 39 F.4th at 726.

<sup>40</sup> *Atlantic*, 360 U.S. at 391 (emphasis added).

export agreement is simply one input into the assessment of present and future public convenience and necessity.

B. The Certificate Policy Statement and prior orders issued by FERC support the inclusion of precedent agreements to show public need.

In 1999, FERC released the *Certificate Policy Statement* (“CPS”) for new interstate natural gas pipeline facilities in response to concerns regarding the natural gas industry and the delicacy of maintaining appropriate capacity for meeting, but not surpassing, demands.<sup>41</sup> One topic covered in this policy statement was precedent agreements and the role they play in the evaluation of certificate issuance.<sup>42</sup> This policy provides that contracts and precedent agreements will “always be important evidence of demand for a project.”<sup>43</sup> “[I]f an applicant has entered into contracts or precedent agreements for the capacity, it will be expected to file the agreements in support of the project, and they would constitute significant evidence of demand for the project.”<sup>44</sup> The policy makes no distinction of precedent agreements which result in the exportation of natural gas, but it generally states the importance of these contracts in determining public need.<sup>45</sup>

Here, FERC is simply following longstanding policy by using the precedent agreements as evidence for determining the benefits the AFP will provide. In the recent *Order Issuing Certificate to Driftwood Pipeline LLC*, two parties filed motions to intervene with one argument being that one of the precedent agreements with an export shipper “cannot be used to support a finding that the project is in the public convenience and necessity because supplying gas for

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<sup>41</sup> *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227 at 61,736–37.

<sup>42</sup> *Id.* at 61,748.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 61,748–49.

LNG export is not in the public interest.”<sup>46</sup> Additionally, they contended “gas that is exported is not distributed to the public or used by the public indirectly, and therefore it does not benefit the public under the NGA.”<sup>47</sup> FERC was unconvinced by this argument and stated, “[b]efore a company can construct a natural gas pipeline, it must obtain approval from FERC under NGA section 7(e), which provides that FERC ‘shall’ issue a certificate if it determines that a proposed pipeline ‘is or will be required by the present or future public convenience and necessity.’”<sup>48</sup> The order for Driftwood Pipeline LLC then cited to *City of Oberlin*, noting it is lawful under § 7 of the NGA to credit foreign export precedent agreements in order to establish project need.<sup>49</sup> The shipping company at issue in the Driftwood Pipeline LLC certification held a precedent agreement with a pipeline company who shipped to countries with and without Free Trade Agreements with the United States. Nevertheless, FERC still found that the project provided a plethora of benefits domestically.<sup>50</sup> Thus, FERC correctly concluded in Driftwood Pipeline LLC “[w]e believe that when considering a proposed project under Section 7, it is appropriate to credit precedent agreements for transportation of gas volumes to facilities exporting LNG.”<sup>51</sup> Here, TGP’s binding precedent agreements showed firm services capable of using 100% of the design capacity of the pipeline project while still servicing domestic customer needs — despite the fact that most of the AFP’s LNG will be exported for foreign consumption.<sup>52</sup> Given the similar facts of Driftwood Pipeline LLC, FERC was correct in the present case to include precedent agreements in its assessment for issuing the CPCN to TGP.

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<sup>46</sup> *Driftwood Pipeline LLC*, 183 F.E.R.C. ¶ 61,049 (2023) at P 28.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at P 29 (citing *City of Oberlin, Ohio v. FERC*, 39 F.4<sup>th</sup> 719, 725–26 (D.C. Cir. 2022)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> R. at 8–9.

C. The Commission appropriately found that both precedent agreements provide domestic public benefits.

Following the finding that the two precedent agreements are relevant factors bearing on the public interest, the Commission went on to consider the domestic public benefits that stem from the two specific agreements.<sup>53</sup>

Congress enacted the NGA with two principal aims: (1) to encourage the orderly development of plentiful supplies of natural gas at reasonable prices; and (2) to protect consumers against exploitation at the hands of natural gas companies.<sup>54</sup> The Commission, in examining the project in this light, found that regardless of the ultimate destination, the transportation service for all shippers results in domestic benefits that directly correlate with the aims of the NGA.<sup>55</sup>

First and foremost, all shippers contribute to the development of the gas market and allow for the optimization of existing systems for the benefit of both current and new customers by creating a more competitive market and thus driving prices to be set reasonably. Similar to the Nexus Project in *City of Oberlin*, the Commission acknowledges the agreements to transport gas on the AFP would support the “production and sale of domestic gas,” which “contributes to the growth of the economy and supports domestic jobs” regardless of where the gas is exported.<sup>56</sup> Just because “a portion of the gas is [bound] for export, does not diminish the benefits that flow from the construction of the pipeline.”<sup>57</sup>

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<sup>53</sup> R. at 8.

<sup>54</sup> *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (citing *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669–70 (1976); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944)).

<sup>55</sup> R. at 8.

<sup>56</sup> *Oberlin*, 39 F.4th at 728.

<sup>57</sup> *Id.* (citing *Town of Weymouth, Mass. v. FERC*, No. 17-1135, 2018 WL 6921213 (D.C. Cir. Dec. 27, 2018)).

The precedent agreements TGP entered with both shippers clearly provide benefits that bear on the public interest. Because the NGA supports including these agreements in evaluating public necessity, the Commission correctly and reasonably included the benefits stemming from the contracts with these shippers into its balancing test of adverse effects and public benefit.

## **II. FERC CORRECTLY APPLIED THE CERTIFICATE POLICY ANALYSIS AND APPROPRIATELY BALANCED THE BENEFITS OF THE PROJECT WITH THE ADVERSE EFFECTS.**

It is HOME's contention that FERC improperly balanced the residual adverse effects with the benefits of the AFP.<sup>58</sup> In determining whether a project is in the interest of public convenience and necessity, FERC has a broad authority vested in it by the NGA. The CPS issued by FERC provides the framework of criteria for how Public Convenience and Necessity Certificate applications are evaluated.<sup>59</sup> In this case, FERC performed its multi-step review process that allowed for the project effects to be dissected and deemed necessary and convenient.

### A. The adverse effects of the AFP were adequately identified, and FERC appropriately found that TGP took significant mitigation efforts.

The initial step provided by the Certificate Policy is to identify the adverse effects that would be the result of the project at hand.<sup>60</sup> "Adverse effects may include increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property."<sup>61</sup> This evaluation also includes looking at the mitigation efforts made by the applicant in reducing adverse effects and the residual effects following steps taken toward lessening the negative impact.<sup>62</sup>

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<sup>58</sup> R. at 9, 10.

<sup>59</sup> *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227.

<sup>60</sup> *Id.* at 61,747.

<sup>61</sup> *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015) (citing *Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,747–48).

<sup>62</sup> *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227 at 61,747.

- i. *FERC analyzed the adverse effects relating to property ownership and the mitigating efforts proposed by TGP.*

An effect identified by HOME is the impact on landowners and communities along the route of the project.<sup>63</sup> FERC's granting of a CPCN under § 7 of the NGA allows for a company to enact eminent domain upon the land in which the project falls.<sup>64</sup> Furthermore, TGP addressed the concerns and questions of landowners and made changes to over 30% of the proposed pipeline route in response to these concerns and negotiations to reach acceptable easement agreements.<sup>65</sup> TGP signed easement agreements with roughly 60% of landowners along the route of the AFP and shown great consideration to minimizing the residual adverse effects.<sup>66</sup>

TGP proposed an alternate route if necessary, but this route makes the construction of the pipeline more difficult and increases the cost of the project exponentially.<sup>67</sup> FERC reasonably found this route to cause more adverse effects than the original plan.<sup>68</sup> Furthermore, the alternate route counter intuitively conflicts with HOME's religious position toward maintaining the environment. The reroute would cause more environmental damage to the Misty Top Mountain ecosystem than the original route.<sup>69</sup> In contrast, the original route allows TGP to provide more effective mitigation efforts, along with the ones imposed by FERC.<sup>70</sup> This is exemplified by expediting construction, burying the pipeline, replanting trees, and following the other conditions

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<sup>63</sup> R. at 10.

<sup>64</sup> 15 U.S.C. § 717f(h).

<sup>65</sup> R. at 10.

<sup>66</sup> *Id.*

<sup>67</sup> R. at 11.

<sup>68</sup> *Id.*

<sup>69</sup> R. at 11.

<sup>70</sup> R. at 10, 12, 14.

imposed — sufficient evidence that TGP has taken steps to soften the effects on HOME’s affected land.<sup>71</sup>

- ii. *The adverse effects on religious beliefs may not be weighted more heavily in FERC’s analysis.*

HOME contends that its religious beliefs, which oppose natural gas pipelines, should provide “extra” weight to the environmental harms on its property because the CPCN is effectively compelling the religious organization to support the natural gas industry.<sup>72</sup> This effect alone should not be cause for denying the pipeline altogether as HOME suggests. HOME cites *Adorers of the Blood of Christ U.S. Province v. Transcon. Gas Pipe Line Co LLC*, noting a hypothetical that if the Adorers had participated in FERC’s administrative process of issuing certificates, the Adorers would have had the *opportunity* to seek remedial relief.<sup>73</sup> However, HOME had the opportunity to seek remedial relief through the Rehearing Order, as TGP did, and was ultimately denied. Should FERC concede to HOME’s argument and allow HOME to directly participate in the administrative process — where parties such as TGP could not — it would mean adopting an unjust standard that provides preferential treatment to religious organizations.

B. The construction of the AFP would provide benefits to the economy, the natural gas industry, and consumers.

According to FERC’s CPS, the types of public benefits are quite diverse and include but are not limited to: “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.”<sup>74</sup> In its

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<sup>71</sup> *Id.*

<sup>72</sup> R. at 12.

<sup>73</sup> R. at 10 (citing *Adorers of the Blood of Christ U.S. Province v. Transcon. Gas Pipe Line Co LLC*, 53 F.4th 56, 61 (3d Cir. 2022)).

<sup>74</sup> *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227 at 61,748.

application, TGP lists a plethora of public benefits that would result from the approval of the AFP.<sup>75</sup>

The construction of the AFP would allow for a better-connected natural gas interstate grid that delivers up to 500,000 dekatherms per day to the NUG terminal, allowing for greater optimization of the undersubscribed NorthWay Pipeline.<sup>76</sup> While the AFP would not result in more natural gas on the market, it allows for the gas to enter the market where the demand is much higher instead of being transported to a region in which demand for natural gas is declining.<sup>77</sup> The construction of the AFP would allow for greater development of the natural gas market by transporting the gas to shippers who clearly have demands that could be met.

Should the AFP be constructed, it would allow for natural gas transport to regions of New Union that currently have no access.<sup>78</sup> This alone creates more natural gas consumers and plays a part in the development of the natural gas industry. The AFP allows an alternative for the currently declining natural gas market in states east of Old Union without creating a gas shortage, meaning that more natural gas would be purchased in more regions. Expanding natural gas access results in more jobs and contributes to the overall economy of the country by ensuring that the gas being produced can be capitalized on. Additionally, the spread of natural gas use enhances air quality by replacing dirtier fossil fuels.

C. FERC reasonably balanced the benefits of the project with the adverse impacts projected.

The CPS provides, “[i]f residual adverse effects on the three interests are identified, after efforts have been made to minimize them, then FERC will proceed to evaluate the project by

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<sup>75</sup> R. at 8.

<sup>76</sup> R. at 6, 8.

<sup>77</sup> *Id.*

<sup>78</sup> R. at 6, 8.

balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test.”<sup>79</sup> In assessing the benefits versus the adverse effects, the CPS claims the absence of a bright line rule is intentional, as it would not be “flexible enough to resolve specific cases and allow FERC to take into account the different interests that must be considered.”<sup>80</sup> The discretion left to FERC is abundant in this portion of the analysis.

Thus, FERC correctly found TGP provided significant public benefit based on the precedent agreements the full design capacity of the pipeline project, the decreasing demand for natural gas in the eastern regions of Old Union, and the project’s ability to meet natural gas demand in other areas without access.<sup>81</sup> The AFP would provide for natural gas market growth and expansion of the industry without causing a shortage. The system optimization and public benefits AFP project offers are more valuable than the residual adverse effects identified and provide substantial evidence for FERC to reasonably issue a CPCN for the construction of the AFP.

### **III. FERC’S DECISION TO ROUTE THE AFP OVER HOME PROPERTY IS NOT IN VIOLATION OF THE RFRA**

RFRA provides a statutory claim to individuals whose religious exercise is burdened by the federal government.<sup>82</sup> RFRA was enacted in response to the Supreme Court’s decision in *Employment Division v. Smith*.<sup>83</sup> In *Smith*, the Supreme Court held the Free Exercise Clause does not bar the government from burdening the free exercise of religion with a “valid and

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<sup>79</sup> *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227 at 61,745.

<sup>80</sup> *Certificate Policy Statement*, 88 F.E.R.C. ¶ 61,227 at 61,749.

<sup>81</sup> R. at 6.

<sup>82</sup> 42 U.S.C.A. § 2000bb-1(c).

<sup>83</sup> *Emp. Div. v. Smith*, 494 U.S. 872 (1990) (superseded by statute).

neutral law of general applicability.”<sup>84</sup> Applying that standard, the Court rejected the Free Exercise Clause claims of the plaintiffs, who were denied state unemployment compensation after being discharged from their jobs for ingesting peyote for religious purposes.<sup>85</sup>

Further, RFRA was enacted “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened.”<sup>86</sup> In general, the RFRA prohibits government actions that “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . .”<sup>87</sup> The only exception recognized by the statute allows the government to “substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>88</sup>

The governmental agency, FERC in this case, is thus not required to prove a compelling interest for its action or that its action involves the least restrictive means to achieve its purpose, unless HOME first proves the government action substantially burdens its exercise of religion.

A. Routing the AFP across HOME land does not impose a substantial burden on HOME’s exercise of religion.

To establish a prima facie RFRA claim, HOME must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements.<sup>89</sup> First, the activities HOME claims are burdened by the AFP must be an “exercise of religion.”<sup>90</sup> Second, the routing of the AFP

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<sup>84</sup> *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (citing *Smith*, 494 U.S. at 879) (citation and internal quotation marks omitted).

<sup>85</sup> *Id.*

<sup>86</sup> 42 U.S.C.A. § 2000bb(b)(1) (citations omitted).

<sup>87</sup> 42 U.S.C.A. § 2000bb-1(a).

<sup>88</sup> 42 U.S.C.A. § 2000bb-1(b).

<sup>89</sup> *Navajo*, 535 F.3d at 1068.

<sup>90</sup> 42 U.S.C.A. § 2000bb-1(a).

must “substantially burden” HOME’s exercise of religion.<sup>91</sup> FERC does not contest that HOME’s religious beliefs are sincere and constitute an “exercise of religion” within the meaning of RFRA. Therefore, the only element at issue is whether the AFP imposes a substantial burden on HOME’s exercise of religion.

A substantial burden exists when government action puts “substantial pressure on an adherent to modify his behavior and to violate his beliefs.”<sup>92</sup> Under RFRA, the government imposes a substantial burden on religion in two—and only two—circumstances: when the government “force[s] individual[s] to choose between following the tenets of their religion and receiving a governmental benefit” and when the government “coerce[s] individual[s] to act contrary to their religious beliefs by the threat of civil or criminal sanctions.”<sup>93</sup>

HOME asserts a fundamental core tenet of its religion is that humans should do everything in their power to promote natural preservation over all interests, especially economic interests.<sup>94</sup> These beliefs alone are insufficient to require rerouting of the AFP. HOME discusses its religious practices, including the “Solstice Sojourn,” which is a ceremonial journey that members of HOME make every summer and winter solstice from a temple at the western border of the property to a sacred hill on the eastern border of the property in the foothills of the Misty Top Mountains, then a journey back along a different path.<sup>95</sup> HOME has performed the Solstice

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<sup>91</sup> *Id.*

<sup>92</sup> *Navajo*, 535 F.3d at 1069 n.11 (citing *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 708 (1981)).

<sup>93</sup> *Thiry v. Carlson*, 78 F.3d 1491, 1495–96 (10th Cir. 1996) (finding that plaintiffs’ religious beliefs would not be substantially burdened by the relocation of grave sites despite being “distressed and inconvenienced”).

<sup>94</sup> R. at 11.

<sup>95</sup> *Id.*

Sojourn since at least 1935, and the path would cross the proposed pipeline route in both directions.<sup>96</sup>

HOME's members testified that walking over the pipeline on their own land would be "unimaginable" and thus destroy the meaning of the Solstice Sojourn.<sup>97</sup> Courts have found the "diminishment of spiritual fulfillment" to not be a "substantial burden" on the free exercise of religion.<sup>98</sup> Further, HOME argues that the CPCN order essentially is compelling HOME to support the production, transportation, and burning of fossil fuels, which is "anathema" to HOME's religious beliefs.<sup>99</sup> We disagree. In *Navajo Nation v. U.S. Forest Service*, the Ninth Circuit authorized the proposed use of recycled wastewater to make artificial snow for a commercial ski resort on a mountain considered sacred by tribes and found this action ***did not violate the RFRA*** because it did not "substantially burden" the free exercise of religion by tribal members within meaning of the RFRA.<sup>100</sup> The Plaintiffs in *Navajo* were not fined or penalized in any way for practicing their religion.<sup>101</sup> To the contrary, the Forest Service in *Navajo* "guaranteed that religious practitioners would still have access" to their sacred areas.<sup>102</sup> In this case, TGP made changes to over 30% of the proposed pipeline route in order to address HOME's concerns.<sup>103</sup> TGP agreed to bury the AFP through the entirety of its passage through HOME property and to expedite construction to occur fully within a four-month period, entirely between

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<sup>96</sup> R. at 11.

<sup>97</sup> R. at 12.

<sup>98</sup> *Navajo*, 535 F.3d at 1070 n.12 ("For all of the rich complexity that describes the profound integration of man and mountain into one, the burden of the recycled wastewater can only be expressed by the Plaintiffs as damaged spiritual feelings. Under Supreme Court precedent, government action that diminishes subjective spiritual fulfillment does not 'substantially burden' religion.").

<sup>99</sup> R. at 12.

<sup>100</sup> *Navajo*, 535 F.3d at 1067.

<sup>101</sup> *Navajo*, 535 F.3d at 1070 (9th Cir. 2008).

<sup>102</sup> *Id.*

<sup>103</sup> R. at 10.

the two solstices.<sup>104</sup> HOME received no threat of sanctions or punishment and TGP has guaranteed the construction of the AFP will not interfere with the Solstice Sojourn. Per the Ninth Circuit, the mere presence of the LNG routed underneath HOME property does not coerce, force, or compel HOME in any way.

The threshold for meeting “substantial burden” on religious exercise under the RFRA is further exemplified in the Supreme Court’s decision in *Lyng v. Nw. Indian Cemetery Protective Ass’n*.<sup>105</sup> In *Lyng*, Indian tribes challenged the U.S. Forest Service’s approval of plans to construct a logging road in the Chimney Rock area of the Six Rivers National Forest in California.<sup>106</sup> The tribes contended the construction would interfere with their free exercise of religion by disturbing a sacred area.<sup>107</sup> The area described was an “integral and indispensable part” of the tribes’ religious practices, and a Forest Service study concluded the construction “would cause serious and irreparable damage to the sacred areas.”<sup>108</sup> Ultimately, the Supreme Court rejected the Indian tribes’ Free Exercise Clause challenge, holding the government plan, which would “diminish the sacredness” of the land to Indians and “interfere significantly” with their ability to practice their religion, did not impose a burden “heavy enough” to violate the Free Exercise Clause.<sup>109</sup> Again, we do not contest that HOME will face some short-term impact as a result of the transport of LNG underneath their land. The AFP may diminish the sacredness of HOME’s property, but unlike the facts in *Lyng*, HOME’s religious practices will not be interfered

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<sup>104</sup> *Id.*

<sup>105</sup> *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

<sup>106</sup> *Id.* at 442.

<sup>107</sup> *Id.* at 442–43.

<sup>108</sup> *Id.* at 442.

<sup>109</sup> *Id.* at 449 (holding the plaintiffs were not “coerced by the Government’s action into violating their religious beliefs” nor did the “governmental action penalize religious activity by denying [the plaintiffs] an equal share of the rights, benefits, and privileges enjoyed by other citizens”).

with significantly. Therefore, even more so than *Lyng*, the burden on HOME is simply not “heavy enough” to constitute a RFRA violation.

Moreover, the arguments that the AFP interferes with the ability of HOME members to practice religion are irrelevant to whether the AFP either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch–22 situation.<sup>110</sup> The record in no way supports that the AFP either forces HOME members to choose between following the tenets of their religion and receiving a governmental benefit or coerces them to act contrary to their religious beliefs by the threat of civil or criminal sanctions. With the pipeline underground and the construction expedited, there will be no long-term impediments to HOME’s practices, and the short-term impact of construction will be greatly minimized by timing the construction to occur entirely between solstices.

As stated by the *Lyng* court, the government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.<sup>111</sup> If the AFP prohibited HOME members from using their land for the Solstice Sojourn, we would have a much larger issue, but that is just not the case here.<sup>112</sup> Not only can HOME continue to use its land for the same purposes without any fines or punishment, FERC has gone out of its way to accommodate these deeply held religious practices.<sup>113</sup> Whatever rights HOME may have to the use of the land, however, do not divest FERC of its right to use what is, after all, its land.<sup>114</sup> Therefore, routing the AFP across HOME land does not impose a substantial burden on HOME’s exercise of religion.

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<sup>110</sup> *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214 (9th Cir. 2008).

<sup>111</sup> *Lyng*, 485 U.S. at 452.

<sup>112</sup> *Id.* at 453.

<sup>113</sup> *Id.* at 454 (“It is worth emphasizing, therefore, that the Government has taken numerous steps in this very case to minimize the impact that construction of the G–O road will have on the Indians’ religious activities.”).

<sup>114</sup> *Id.* at 453.

B. Alternatively, routing the AFP across HOME land is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Alternatively, if it is determined that the route of the AFP across HOME land does impose a substantial burden on HOME's religious exercise, the route is nonetheless valid because it is the least restrictive means of forwarding a compelling governmental interest.

This sole statutory exception shifts the burden to the government to satisfy the compelling interest test, requiring FERC to “demonstrate[] that application of the burden to HOME—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>115</sup> Applying a strict scrutiny standard, RFRA requires “[t]he Government [to] demonstrate that the application of a substantial burden to *the person*[] . . . ‘is the least restrictive means of furthering [that] compelling governmental interest.’”<sup>116</sup> Whether the government has chosen the least restrictive means to advance its compelling interest is a question of law that the court reviews *de novo*.<sup>117</sup>

i. *In Furtherance of a Compelling Governmental Interest*

The compelling interest test, as set forth in *Sherbert* and *Yoder*, is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.<sup>118</sup> Courts have found many projects to have a compelling governmental interest.<sup>119</sup> In *United States v. Wilgus*, the court found two compelling governmental interests: (1) the

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<sup>115</sup> 42 U.S.C.A. § 2000bb-1(b).

<sup>116</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 737 (2014) (Kennedy, J., concurring) (quoting 42 U.S.C.A. § 2000bb-1(b)) (emphasis added).

<sup>117</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); *United States v. Wilgus*, 638 F.3d 1274, 1279 (10th Cir. 2011).

<sup>118</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>119</sup> *U.S. v. Indianapolis Baptist Temple*, 224 F.3d 627, 630 (7th Cir. 2000) (holding there was no RFRA violation because maintaining a sound and efficient tax system was a compelling governmental interest).

protecting the bald and golden eagles; and (2) protecting and fostering Native American culture and religion.<sup>120</sup> The *Wilgus* court specifically stated, “interest found compelling arises from the federal government’s *obligations*.”<sup>121</sup>

We have presented above that FERC’s Order for the AFP was not arbitrary and capricious. Furthermore, it is undisputed in this case that the exportation of LNG produced in the United States serves the “public interest.”<sup>122</sup> The NGA expressly states, “The exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.”<sup>123</sup> FERC has a *statutory obligation* to ensure that the continued exportation of natural gas is consistent with the public interest.<sup>124</sup> HOME avers that exporting LNG to International supports the governmental interests of Brazil, which does not have a free trade agreement with the United States, but FERC does not find this distinction to be meaningful.<sup>125</sup> FERC clearly has an interest in exporting natural gas, and that interest is advanced through the AFP.

Routing LNG through the AFP, as opposed to the current route, better serves domestic market needs.<sup>126</sup> In recent years, LNG demands in regions east of Old Union have been steadily declining due to a population shift, efficiency improvements, and increasing electrification of heating in those states. The HOME property, however, is located in New Union, which is west of

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<sup>120</sup> *U.S. v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011).

<sup>121</sup> *Wilgus*, 638 F.3d at 1285 (emphasis added).

<sup>122</sup> R. at 9.

<sup>123</sup> 15 U.S.C. § 717b(c).

<sup>124</sup> *Compania de Gas de Nuevo Laredo, S. A. v. FERC*, 606 F.2d 1024, 1029 (D.C. Cir. 1979).

<sup>125</sup> R. at 9.

<sup>126</sup> R. at 6.

Old Union.<sup>127</sup> One of the specific domestic needs the AFP will serve is providing natural gas service to areas currently without access to natural gas within New Union.<sup>128</sup> As a result, the specific route of the AFP directly benefits the region in which the HOME property and its members are located. Therefore, not only does the AFP satisfy a compelling governmental interest, but that interest is specific to the claimants in this case, as required by RFRA and its strict scrutiny test.

ii. *Least Restrictive Means*

The legislative history of RFRA reveals that, in answering the least-restrictive-means question, courts are to “look to free exercise cases decided prior to *Smith*.”<sup>129</sup> The government’s burden is two-fold: it must support its choice of regulation, and it must refute the alternative schemes offered by the challenger.<sup>130</sup> Additionally, it must do both through the evidence presented in the record.<sup>131</sup> However, the government should not be required “to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA.”<sup>132</sup>

There is sufficient support for FERC’s choice in granting the CPCN for the proposed route of the AFP, and that the compelling governmental interest would not be achieved to the same degree if the AFP were rerouted. First, as discussed above, FERC has shown support for its choice to issue the CPCN for construction of the AFP.<sup>133</sup> Thus, the question is how well the alternative route forwards FERC’s compelling interests.<sup>134</sup> To meet its burden, at a minimum,

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<sup>127</sup> Exhibit A.

<sup>128</sup> R. at 8.

<sup>129</sup> *Wilgus*, 638 F.3d at 1288.

<sup>130</sup> *Wilgus*, 638 F.3d at 1279.

<sup>131</sup> *Id.*

<sup>132</sup> *Wilgus*, 638 F.3d at 1289 (citing *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996) (characterizing such a requirement as a “**herculean burden**”) (emphasis added)).

<sup>133</sup> See parts I & II of Argument.

<sup>134</sup> *Wilgus*, 638 F.3d at 1292.

FERC must address the alternative proposed by HOME and must show the “proposed alternative either is not less restrictive within the meaning of RFRA, or is not plausibly capable of allowing the government to achieve all of its compelling interests.”<sup>135</sup>

Here, HOME proposed an alternate route through the Misty Top Mountains which would avoid HOME property.<sup>136</sup> TGP described the alternate route as “excessively expensive” and overly burdensome — we agree.<sup>137</sup> Rerouting the AFP to avoid HOME property would add over \$51 million in construction costs, which represents nearly 10% of the cost of the entire project.<sup>138</sup> In *Burwell v. Hobby Lobby Stores, Inc.*, the Court found that the least-restrictive-means standard was not satisfied when the cost of contraceptives at issue (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of the Affordable Care Act.<sup>139</sup> To the contrary, in our case, the cost of rerouting the AFP is substantial and renders it an implausible alternative.

Furthermore, the alternate route would cause even more objective environmental harm by traveling an additional three miles and running through more environmentally sensitive ecosystems, and HOME does not contest these negative impacts.<sup>140</sup> The greater the environmental harm, the greater the restriction on HOME’s exercise of religion. Therefore, the alternate route would not be “less restrictive,” which further supports FERC’s choice to approve the proposed route of the AFP.

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<sup>135</sup> *U.S. v. Grady*, 18 F.4th 1275, 1286 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 2871 (2022) (internal citations omitted).

<sup>136</sup> R. at 10 (see Exhibit A, “Alternate Route”).

<sup>137</sup> R. at 13.

<sup>138</sup> R. at 11.

<sup>139</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 (2014).

<sup>140</sup> R. at 11.

Based on all the facts presented, FERC’s proposed route for the AFP is the least restrictive means of furthering a compelling governmental interest. As a result, FERC’s decision to route the AFP over HOME property *is not* in violation of RFRA.

#### **IV. THE GHG CONDITIONS IMPOSED BY FERC WERE NOT BEYOND FERC’S AUTHORITY UNDER THE NGA**

The Supreme Court has explained that the National Environmental Policy Act’s (NEPA) purpose is to “ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts” and “that the relevant information will be made to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”<sup>141</sup> Like other environmental impacts, assessing a project’s reasonably foreseeable greenhouse gas emissions and its influence on climate change is consistent with FERC’s issuance of a CPCN under NEPA.<sup>142</sup> Furthermore, the U.S. Court of Appeals for the District of Columbia agrees a proposed natural gas pipeline’s reasonably foreseeable GHG emissions are relevant to whether the pipeline is required by the public convenience and necessity.<sup>143</sup> This commitment by TGP is necessary, as it allows FERC to review the AFP’s reasonably foreseeable GHG emissions pursuant to FERC’s responsibility

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<sup>141</sup> *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

<sup>142</sup> *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 349 (explaining that one of NEPA’s purposes is to ensure “relevant information will be made available to the larger audience that may [] play a role in both the decisionmaking process and the implementation of that decision”); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (explaining that the concept of NEPA is to ensure an agency’s awareness toward the environmental consequences of its actions and to consider options that entail less environmental damage).

<sup>143</sup> *See, e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (explaining that the pipeline project’s reasonably foreseeable GHG emissions required FERC to include a discussion toward the project’s further actions and the indirect effect toward incremental increases or decreases in GHG emissions).

under NEPA to consider the AFP’s overall environmental impact.<sup>144</sup> Evaluating GHG emissions of a proposed project, such as the AFP, provides critical input to FERC’s determination of preparing an environmental impact statement (EIS) as provided in the CPCN.<sup>145</sup>

We agree with FERC’s original finding that the Council on Environmental Quality’s (“CEQ”) published interim guidance sufficiently expresses the environmental danger of GHG emissions.<sup>146</sup> According to the CEQ, the United States is facing “a profound climate crisis,” and “[c]limate change is a fundamental environmental issue[] and its effects on the human environment fall squarely within NEPA’s purview.”<sup>147</sup> Specifically, the CEQ suggests reviews under NEPA “should quantify proposed actions’ GHG emissions, . . . disclose relevant GHG emissions and relevant climate impacts, and *identify alternatives and mitigation measures to avoid or reduce GHG emissions.*”<sup>148</sup> Furthermore, NEPA does not require that the studies, metrics, or models—scientific and otherwise—which an agency like FERC relies upon be universally accepted.<sup>149</sup> Thus, FERC is allowed great autonomy in both discerning environmental impacts like GHG emissions and imposing regulations to mitigate those impacts for the purposes of issuing a CPCN.

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<sup>144</sup> *WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) (“NEPA . . . places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action”) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)).

<sup>145</sup> R. at 3.

<sup>146</sup> R. at 69.

<sup>147</sup> National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1197 (Jan. 9, 2023).

<sup>148</sup> *Id.* (emphasis added).

<sup>149</sup> *Sierra Club v. U.S. Dep’t of Transp.*, 753 F.2d 120, 128 (D.C. Cir. 1985) (“It is clearly within the expertise and discretion of the agency to determine proper testing methods.”); *see also Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 289 (4th Cir. 1999) (“Agencies are entitled to select their own methodology as long as the methodology is reasonable. The reviewing court must give deference to an agency’s decision.”).

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

HOME avers FERC's determination for mitigation measures, in the context of GHG impacts, was arbitrary and capricious as FERC elected not to mitigate upstream and downstream GHG impacts. TGP further argues that mitigation measures designed to address downstream and upstream GHG impacts is outside FERC's authority. We reject both of these arguments.

GHG emissions are an indirect effect of authorizing this project, which FERC can reasonably foresee and has legal authorization to mitigate.<sup>150</sup> In February 2022, FERC publicly discussed procedures for evaluating climate impacts under NEPA.<sup>151</sup> Specifically, FERC disagreed with commenters' assertions that FERC is prohibited from considering GHG emissions, stating "[t]he question is not whether the Commission has regulatory authority over downstream emissions."<sup>152</sup> Therefore, mitigation measures are well within FERC's discretionary authority to consider, if not impose. However, **FERC is not required to do so.**

As discussed above, NEPA does not mandate agencies to follow a specific model for assessment, but it simply prescribes the necessary process for preventing uninformed agency action.<sup>153</sup> NEPA "directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another."<sup>154</sup> As a result, NEPA is primarily ***information-forcing rather than action-forcing.***<sup>155</sup>

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<sup>150</sup> *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (holding that the FERC has legal authority to mitigate reasonably foreseeable indirect effects).

<sup>151</sup> *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 F.E.R.C. ¶ 61108 (F.E.R.C. 2022).

<sup>152</sup> *Id.* at 61727.

<sup>153</sup> *Robertson*, 490 U.S. at 333.

<sup>154</sup> *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (internal citations omitted).

<sup>155</sup> *Id.*

There is a clear distinction between the requirement for FERC to take a “hard look” at the environmental effects of the AFP and an elusive substantive “requirement” to mitigate those effects.<sup>156</sup> FERC took a “hard look” at the potential environmental effects of the AFP, specifically the GHG Conditions, through the EIS. FERC ultimately concluded that the upstream and downstream GHG impacts could not be considered “significant” under NEPA and that there was a weak connection between the AFP and any increased upstream or downstream GHG impacts. For these reasons, FERC did not impose mitigation measures directed at those specific impacts.<sup>157</sup>

When reviewing an agency’s decision to determine if that decision was arbitrary and capricious, the scope of review is narrow. This Court may look only to see if there has been a “clear error of judgment.”<sup>158</sup>

A. The mitigation of GHG Conditions was sufficiently discussed in the EIS, as required by NEPA.

FERC’s decision not to impose GHG Conditions addressing downstream and upstream GHG impacts is arbitrary and capricious only if the EIS does not contain “sufficient discussion of the relevant issues and opposing viewpoints.”<sup>159</sup> NEPA imposes a requirement only that mitigation is *discussed* in sufficient detail to ensure that environmental consequences have been fairly evaluated.<sup>160</sup>

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<sup>156</sup> *Robertson*, 490 U.S. at 352 (“There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.”).

<sup>157</sup> R. at 12.

<sup>158</sup> *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

<sup>159</sup> *Sierra*, 867 F.3d at 1368.

<sup>160</sup> *Robertson*, 490 U.S. at 352.

Pursuant to 15 U.S.C. § 717f(e), FERC has long considered GHG impacts in its environmental analyses, and GHG Conditions were imposed in the CPCN Order at issue.<sup>161</sup> As required by NEPA, FERC took a “hard look” at the issue of GHG Conditions through the EIS.<sup>162</sup> The EIS provided estimates of GHG emissions resulting from the project, including upstream and downstream GHG impacts as well as GHG emissions from the construction of the pipeline itself.<sup>163</sup> Based on these estimates, TGP did not recommend any mitigation measures associated with GHG impacts in the EIS.<sup>164</sup> FERC determined mitigation measures were appropriate for the construction GHG impacts but not for the upstream and downstream GHG impacts.

FERC imposed GHG Conditions in the CPCN solely focused on mitigating construction impacts because the GHG impacts resulting from the construction of the AFP are more directly related to FERC authority under the NGA and the issues relevant to the CPCN, so they can be more readily addressed through mitigation.<sup>165</sup> FERC considered the upstream and downstream impacts but did not impose any conditions because as of now, the Commission does not characterize upstream or downstream impacts as significant or insignificant.<sup>166</sup>

FERC has further discussed development of guidance for addressing GHG impacts, including upstream and downstream impacts.<sup>167</sup> This guidance will help to determine whether

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<sup>161</sup> R. at 15.

<sup>162</sup> R. at 19; *see Marsh*, 490 U.S. 360 (holding that an agency takes a sufficient “hard look” when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny, and responds to all legitimate concerns that are raised).

<sup>163</sup> R. at 15; *see Sierra*, 867 F.3d at 1374 (holding that “FERC was required to reasonably estimate the amount of power-plant carbon emissions that pipelines would make possible, or explain specifically why it could not make such an estimate.”).

<sup>164</sup> R. at 16.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *See Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022).

and how FERC will conduct significance determinations for GHG emissions going forward.<sup>168</sup> Per *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, an agency does not run afoul of NEPA when it adequately analyzes mitigation measures and then provides that it will continue to develop those plans after publishing an EIS.<sup>169</sup> Thus, as in this case, a further effort to mitigate impacts serves the purposes of NEPA as opposed to constituting a procedural violation.<sup>170</sup>

NEPA requires “nothing more” than for the EIS to give the public and agency decision makers the qualitative and quantitative tools they needed to make an informed choice for themselves, and based on the facts in the record, this requirement is clearly met.<sup>171</sup> These facts represent a “reasonably complete discussion of possible mitigation measures.”<sup>172</sup> Thus, FERC has more than satisfied NEPA’s “hard look” requirement.

**B. FERC is not required by NEPA to impose any particular form of mitigation.**

NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in each EIS a fully developed mitigation plan.<sup>173</sup> It is within FERC’s expertise to determine both the proper testing methods as well as what, if any, mitigation to require.<sup>174</sup> Government agencies—and not the federal courts—are the entities NEPA entrusts

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<sup>168</sup> R. at 16.

<sup>169</sup> *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm’n*, 45 F.4th 291, 305–06 (D.C. Cir. Aug. 9, 2022).

<sup>170</sup> *Id.*

<sup>171</sup> *Sierra*, 867 F.3d at 1371.

<sup>172</sup> *Robertson*, 490 U.S. at 352.

<sup>173</sup> *Id.* at 359.

<sup>174</sup> *Sierra*, 753 F.2d at 128 (“It is clearly within the expertise and discretion of the agency to determine proper testing methods.”).

with weighing evidence and reaching factual conclusions.<sup>175</sup> Therefore, this Court must give *deference* to FERC's decision.<sup>176</sup>

15 U.S.C. § 717f(e) authorizes FERC to attach “such reasonable terms and conditions as the public convenience and necessity may require.” Pursuant to this authority, FERC has often conditioned NGA § 7 certificates on mitigation of impacts of the proposed project. However, courts have interpreted this provision broadly and given FERC broad *discretion* in deciding what types of, if any, mitigation to require.<sup>177</sup>

As discussed above, based on a lengthy evaluation of GHG impacts of the TGP Project in the EIS, FERC imposed GHG Conditions in the CPCN solely focused on mitigating construction impacts. FERC determined the construction impacts are a more direct result of the AFP and thus require mitigation, whereas the upstream or downstream GHG impacts only have a “weak connection” with the AFP.<sup>178</sup> FERC was well within its discretion to make these determinations.

NEPA does not guarantee any substantive results; all it ensures is that a particular process will be followed. As we can see, it was followed here. As always with NEPA, an agency is not required to select the course of action that best serves environmental justice, only to take a “hard look” at environmental justice issues.<sup>179</sup> FERC's discussion of environmental justice in the EIS clearly satisfies this standard. Therefore, FERC's decision not to impose mitigation measures for downstream and upstream GHG impacts was not arbitrary and capricious.

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<sup>175</sup> *Spiller v. White*, 352 F.3d 235, 243 (5th Cir. 2003).

<sup>176</sup> *Hughes*, 165 F.3d at 289 (“Agencies are entitled to select their own methodology as long as that methodology is reasonable. The **reviewing court must give deference to an agency's decision.**”) (emphasis added).

<sup>177</sup> *Twp. of Bordentown v. FERC*, 903 F.3d 234, 261 n.15 (3d Cir. 2018) (concluding that the Commission's authority to enforce any required remediation is amply supported by provisions of the NGA).

<sup>178</sup> R. at 19.

<sup>179</sup> *Sierra*, 867 F.3d at 1369; *see also Latin Ams. for Soc. & Econ. Dev. v. Fed. Highway Admin.*, 756 F.3d 447, 475–77 (6th Cir. 2014).

**CONCLUSION**

For the foregoing reasons, this Court should affirm the FERC Orders.