

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**

No. 23-01109

HOLY ORDER OF MOTHER EARTH
Petitioner

-and-

TRANSNATIONAL GAS PIPELINES, LLC
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

**BRIEF OF RESPONDENT
FEDERAL REGULATORY ENERGY COMMISSION**

On Appeal from the Federal Energy Regulatory Commission *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023), Docket No. TG21-616-000. Petition filed for review by Transnational Gas Pipelines, LLC under No. 23-0110 was consolidated under No. 23-01109.

FINAL BRIEF: November 20, 2023

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INTRODUCTION

This case concerns the issuance of a Certificate of Public Convenience and Necessity (“CPCN”) for the American Freedom Pipeline (“AFP”), which is scheduled to be constructed on land belonging to a religious organization which opposes its presence. Respondent, the Federal Energy Regulatory Commission (“The Commission”), submits this brief in support of its order granting the CPCN pursuant to the 1938 Natural Gas Act (NGA), as well as its order denying rehearing. Petitioners falsely contend that the Commission’s issuance of the CPCN was arbitrary and capricious because the Commission did not properly weigh the benefits and disadvantages of the pipeline and the Commission’s implementation of conditions for greenhouse gas emissions exceeded the scope of its authority. The Commission’s issuance of the CPCN, with conditions, was reasonable in light of the public benefits of the pipeline and a careful consideration of the impacts of the pipeline, on landowners and on the environment at large. Moreover, although part of the pipeline will be located on sacred religious land, the approval of the pipeline is not in violation of the Religious Freedom Restoration Act (RFRA). Thus, this Court should affirm the Commission’s decision to issue a CPCN for the AFP.

STATEMENT OF JURISDICTION

The Commission denied petitions for rehearing filed by Transnational Gas Pipelines, LLC (“TGP”) and the Holy Order of Mother Earth (“HOME”). Both parties sought rehearing of an Order granting a CPCN to TGP pursuant to the NGA. On June 1, 2023, both HOME and TGP filed timely petitions with this Court seeking review of both the initial order and the order denying rehearing. This Court has jurisdiction under 15 U.S.C. § 717r(b), which confers jurisdiction to courts of appeals over final Commission decisions under the NGA.

STATEMENT OF ISSUES PRESENTED

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

STATEMENT OF THE CASE

I. Statutory Background

Congress enacted the Natural Gas Act in 1938 to ensure that the “transporting and selling [of] natural gas for ultimate distribution to the public is affected with a public interest.” 15 U.S.C. § 717(a). Section 7 of the NGA establishes the procedure by which the Commission can evaluate and approve natural gas projects. 15 U.S.C. § 717(f). Natural gas companies cannot “engage in the transportation or sale of natural gas... unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity” from the Commission. 15 U.S.C. § 717f(c)(1)(A). In evaluating Section 7 applications, the Commission will balance a proposal’s public benefits against any adverse effects. *Certification of New Interstate Natural Gas Pipeline*

Facilities, 88 FERC ¶ 61,227 at 61,745 (1999) [hereinafter *Certificate Policy Statement*]. The Commission must grant an applicant a certificate if a proposed pipeline “is or will be required by the present or future public convenience or necessity.” 15 U.S.C. §717f(e). The Commission can condition a CPCN upon “reasonable terms and conditions as the public convenience and necessity may require.” *Id.*

II. Transnational Gas Pipelines

Transnational Gas Pipelines, LLC (“TGP”) is a natural gas company that has proposed a new natural gas pipeline, the American Freedom Pipeline. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 1. The AFP will provide 500,000 dekatherms (Dth) of firm transportation service per day between Jordan County, Old Union to Burden County, New Union. *Id.* at para 10. In 2020, TGP held an open season for service, in which it sold AFP’s firm transportation service capacity. *Id.* at para. 11. TGP sold 450,000 Dth of firm transportation service per day to International Oil & Gas (“International”). *Id.* International will process the natural gas in New Union with its M&R Station and LNG processing station for export to Brazil. *Id.* at para. 14. New Union Gas and Energy Services Company bought 50,000 Dth of firm transportation service per day for domestic use. *Id.* at para. 11.

III. American Freedom Pipeline

The AFP will be approximately 99 miles long, and 30 inches in diameter. *Id.* at para 1. The AFP project will extend from a receipt point in Jordan County, Old Union, to an interconnection with an existing TGP facility in Burden County, New Union. *Id.* at para. 10. The project necessitates the construction of various other support facilities, including receipt meters, a meter, regulation, and delivery station, and valve assemblies. *Id.* The AFP will transport gas produced in the Hayes Fracking Field (“HFF”) located in Old Union, which is currently serviced by the

Southway Pipeline and sent to regions east of Old Union. *Id.* at para. 12. As part of its application, TGP provided evidence that natural gas demand east of Old Union is declining. *Id.* at para. 13. As a result, the AFP will reroute about 35% of natural gas production out of the HFF away from the Southway Pipeline, rather than require additional natural gas production. *Id.* at para. 12.

The Commission used an Environmental Impact Statement (EIS) to analyze the environmental impact of the AFP. *Id.* at para. 3. This EIS contained an evaluation of the downstream GHG impacts of the TGP project, finding that there could be 9.7 million metric tons of CO₂e per year of downstream GHG emissions. *Id.* at para. 72. While the EIS did not contain an analysis of the upstream emissions associated with the AFP, the Commission explained that these emissions “can be difficult to quantify.” *Id.* at para. 74. The Commission also determined that, because “the [Hayes Fracking Field] gas is already in production” and “just being transported . . . to different destinations,” the upstream emissions will likely not result in any significant consequences. *Id.* at para. 74.

The Commission granted TGP a CPCN with GHG Conditions attached. *Id.* at para. 67. Specifically, these conditions require TGP to take specific actions to mitigate the project’s GHG emissions that result from the construction of the pipeline. *Id.* Under these conditions, TGP must: plant a set number of trees, utilize electric-powered equipment, and purchase “green” steel pipeline segments and renewable electricity. *Id.* These conditions apply only to TGP’s project. *Id.* The conditions are also the result of the “extensive analysis” completed in the EIS. *Id.* at para. 72. The Commission did not apply these or similar conditions to TGP’s upstream or downstream GHG-related impacts. *Id.* at para. 81. The Commission is in the process of “conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations for GHG emissions going forward.” *Id.*

IV. Holy Order of Mother Earth

The Holy Order of Mother Earth (“HOME”) is a nonprofit religious organization headquartered in New Union. *Id.* at para. 9. HOME’s religious tenets consider the natural order to be sacred and center the principle that “nature itself is a deity that should be worshipped and respected.” *Id.* at 46. Thus, it believes humans should promote natural preservation over all other interests, especially economic interests. *Id.* at 47. As a result, the harmful environmental effects of fossil fuels are directly counter to HOME’s religious ethic. *Id.* HOME owns a 15,500 parcel of land through which the proposed AFP route will run. *Id.* The proposed route will pass through approximately two miles of HOME’s property, and AFP’s construction will require the removal of approximately 2,200 trees, although an equal number of trees will be planted in other locations. *Id.* at para. 38, 67. As part of HOME’s religious practices, members perform a ritual known as the “Solstice Sojourn.” *Id.* at 48. The Solstice Sojourn requires members, every summer and winter solstice, to make a ceremonial journey from a temple at the western border of the property to a hill on the eastern border of the property, then a journey back along a different path. *Id.* The path would cross the pipeline route in both directions. *Id.* The entirety of the pipeline section located on HOME’s property will be buried, and TGP contends that AFP’s construction on HOME’s property can be completed in a four-month period. *Id.* at para. 41. HOME did not sign an easement agreement with TGP agreeing to the presence of the pipeline. *Id.* at para. 42.

As part of its application, TGP included consideration of an alternate route for the AFP. *Id.* at para. 39. This alternate route circumvents HOME’s property and travels through the Misty Top Mountain Range. *Id.*; *see also id.* at Ex. A. Although the alternate route avoids HOME’s property, it is estimated to add three miles to the pipeline and cost an additional \$51 million in construction

expenses. *Id.* at para. 44. Furthermore, TGP judges that the alternate route may disrupt environmentally sensitive mountain ecosystems. *Id.*

V. Proceedings Below

TGP filed an application with FERC for a CPCN pursuant to section 7(c) of the NGA and Part 157 of the Commission's regulations on June 13, 2022. *Id.* at para. 1. TGP was awarded a CPCN on April 1, 2023, after the Commission found that the economic benefits will outweigh any adverse effects. *Id.* at para. 2-3. As part of its analysis, the Commission noted that, based on an Environmental Impact Statement (EIS), the AFP will result in some adverse environmental impact. *Id.* at para. 3. However, the Commission found that those impacts could be mitigated to less-than-significant levels if TGP adheres to the conditions included within the CPCN. *Id.*

HOME and TGP each filed timely requests for rehearing. HOME sought rehearing on the CPCN finding of project need, the approval of the AFP route over HOME property, and the Commission's decision not to require mitigation for upstream and downstream greenhouse gas impacts. *Id.* at para. 15. TGP sought rehearing on the GHG Conditions imposed in the order. *Id.* at para. 6. The Commission uniformly denied both requests for rehearing. *Id.* at para. 7, 15. The Commission held that TGP had sufficiently demonstrated the public necessity of the project, even in light of export agreements, and that HOME failed to demonstrate harms sufficient to outweigh the public benefit of the project. *Id.* at 26, 35, 44. The Commission also found that HOME's religious practices were not substantially burdened by the approval of the pipeline, and that the order was thus not in violation of RFRA. *Id.* at 59-60. Finally, the Commission held that the Commission retained the authority to impose greenhouse gas mitigation conditions on TGP, but that it was not obligated to specifically consider the upstream or downstream effects of greenhouse gas emissions. *Id.* at 79, 91, 101.

Pursuant to Section 717r(b) of the NGA, which grants regulated parties aggrieved by a final order of the Commission the right to appeal to the circuit of appeals where the pipeline in question will be located, HOME and TGP petitioned the Twelfth Circuit Court of Appeals for review. 15 U.S.C. § 717r(b).

SUMMARY OF THE ARGUMENT

The Commission correctly denied both TGP's and HOME's petition for rehearing on the CPCN Order. The Commission properly found that the AFP's public benefits outweighed its adverse effects despite 90% of the natural gas transportation capacity being contracted for export. First, the AFP will have beneficial effects on the domestic economy, including an increase in domestic jobs and economic development, increase in gas transportation capacity, decrease in environmental and health externalities. These diverse benefits were upheld by the D.C. Circuit in *City of Oberlin II*, which did not turn on the proportion of gas for export. *City of Oberlin v. FERC*, 39 F.4th 719 (2022) [hereinafter *City of Oberlin II*]. Moreover, because natural gas is a fungible global commodity, a free-flowing global natural gas market benefits domestic consumers. It ensures that there are no price constraints on global markets and encourages investment in domestic natural gas infrastructure. Lastly, the language that HOME uses for the crux of its argument is not from the relevant part of the NGA. HOME attempts to apply a Section 3 standard to a Section 7 inquiry, which would be contrary to the overall purpose of the NGA.

The Commission's finding that the benefits of the project outweigh the costs is reasonable and should be upheld. Throughout the application and review process, TGP and the Commission followed proper procedure pursuant to agency guidelines and the NGA. The Commission properly considered the environmental and social costs of the AFP. As a federal agency, the Commission is required to follow NEPA procedures for environmental analysis. NEPA requires agencies to

examine the environmental impacts of a federal action but leaves the analysis of that environmental review to the agency's discretion. By reviewing an EIS and evaluating alternative pipeline routes, the Commission properly considered the environmental impacts of the AFP. The Commission is not required to undertake environmental considerations that go beyond the scope of NEPA. HOME's contention that its religious views necessitate stricter environmental review is unfounded and incorrect. Moreover, the Commission properly issued a CPCN to TGP in light of TGP's efforts to mitigate impacts on landowners.

The CPCN is not in violation of RFRA. Although courts differ on the definition of "substantially burdens", this Court should follow the Ninth Circuit and determine that the AFP does not substantially burden HOME's religious expression. HOME is not physically barred from participating in its religious practices and is not being forced to choose between the free exercise of its religion and sanctions or a loss of government benefits. Alternatively, even if this Court finds that HOME's religious exercise is substantially burdened by the presence of the pipeline, the AFP pipeline remains in line with the purpose of RFRA because the pipeline is the least restrictive means of furthering a compelling government interest. An interstate natural gas pipeline is a compelling government interest, and the alternative routes considered by the Commission could result in greater environmental degradation, which is in and of itself antithetical to HOME's religious expression. *See Order Denying Rehearing*, 199 FERC ¶ 72,201 at para. 44.

The Commission has statutory authority to place the GHG Conditions on TGP's CPCN under the Natural Gas Act, 15 U.S.C. § 717(f)(e). First, the Commission did not decide a "major question" when it placed GHG Conditions on TGP's CPCN. The Commission's decision only impacts TGP, and therefore it does not have major economic or political ramifications. And the Commission interpreted the statute in a standard fashion. Second, the Natural Gas Act's plain

language, structure, and purpose all demonstrate that the Commission is authorized to impose these kinds of conditions on CPCNs. Third, if the Court finds that this Act is ambiguous, the Commission is still entitled to *Chevron* deference because the agency's interpretation of the Act is reasonable. Therefore, the Commission has authority to place the GHG Conditions on TGP's CPCN.

The Commission's decision not to impose any conditions addressing downstream and upstream greenhouse gas impacts was not arbitrary and capricious. This is because the Commission is abstaining from labeling upstream or downstream GHG impacts as either significant or insignificant until it has the chance to draft a guidance document on the issue. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 99. In addition, with respect to TGP's project, the Commission reasonably determined that there is a "weak connection between the TGP project and any increased upstream or downstream GHG impacts." *Id.* The commission arrived at this conclusion by reviewing the project's EIS and by using its expertise in working with this kind of data. *Id.* at para. 72, 74. The Commission is also not required to impose mitigation measures under NEPA. Finally, the Commission was justified to take into account practical considerations when deciding whether to implement mitigation measures.

STANDARD OF REVIEW

The Court reviews agency actions under the Administrative Procedure Act (APA). This Court must "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary or capricious when it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). A court's scope of review "under the 'arbitrary and capricious' standard is narrow, and a court is not to substitute its judgment for that of the agency." *Id.* at 32 (1983). Said another way, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n* 577 U.S. 260, 292 (2016). Rather, this Court must "uphold a rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action." *Id.* (internal quotation marks omitted).

The Administrative Procedure Act's arbitrary and capricious standard also applies to challenges under the National Environmental Policy Act (NEPA). *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375 (1989). When the Court reviews action taken by the Commission, under NEPA the court's role is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. V. NRDC*, 462 U.S. 87, 97–98 (1983). Agency actions taken pursuant to NEPA are entitled to a high degree of deference. *Marsh* 490 U.S. at 377-78. In reviewing an agency action under NEPA, courts may not "'flyspeck' an agency's environmental analysis, looking for any deficiency, no matter how minor." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 186 (4th Cir. 2005).

ARGUMENT

I. The Commission Correctly Considered All Relevant Factors Intended by Congress to Issue a Finding of Public Convenience and Necessity for the AFP.

Although 90% of the AFP's capacity is designated for export, the Commission followed the APA's procedural requirements in its finding of public convenience and necessity. The Commission considered all relevant factors prescribed by Congress to further the NGA's twin

purposes: “encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices and protect[ing] consumers against exploitation at the hands of natural gas companies.” *City of Oberlin v. FERC*, 937 F.3d 599, 602 (2019) (internal quotations omitted) [hereinafter *City of Oberlin I*]. In particular, the Commission must evaluate all public benefits of a natural gas pipeline and balance them against residual adverse effects after an applicant mitigates adverse impacts. *Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,745 (1999). The Commission considers a diverse set of benefits, including “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.” *Id.* at 61,478. The Commission’s finding of public convenience and necessity was reasonable and should be upheld.

A. AFP’s Numerous Direct Benefits Illustrate Domestic Need.

The Commission clearly articulated a rational connection between the AFP’s benefits and the Commission’s CPCN issuance. The Commission listed several benefits arising from the AFP, such as the use of domestic resources, an increase in domestic jobs and economic development, an increase in capacity to transport gas, and a decrease in environmental and health externalities. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 27. All of the AFP’s direct, public benefits are within the diverse set of benefits that the Commission has consistently considered.

Most importantly, the AFP will allow for the productive use of domestic natural resources that otherwise will not be utilized. The AFP will be transporting natural gas from the HFF in Old Union. *Id.* at para. 12. While natural gas is already being extracted from the HFF, demand for gas from the HFF has been steadily declining due to population shifts, energy efficiency, and electrification of heating. *Id.* at para. 13. Allowing AFP ensures that American natural resources

are being used to their fullest and most productive extent. The Commission granted a CPCN because these benefits persist regardless of where the natural gas is eventually consumed.

A pipeline of AFP's magnitude would spur significant employment and economic development regardless of the end consumer of the natural gas. The Mountain Valley Pipeline, although not fully built yet, is analogous in terms of size and impact. It will be approximately 304 miles long and transport two million Dth per day. *Mt. Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) at 61,291-92. Mountain Valley is also predicted to support 4,300 jobs at the peak of construction and induce tens of millions of dollars in terms of state tax revenue and gross regional product. FTI CONSULTING, ECONOMICS BENEFITS OF THE MOUNTAIN VALLEY PIPELINE TO VIRGINIA 2-3 (2014). While AFP will be about one-third the length of Mountain Valley and transport one-quarter of the natural gas, it will still support thousands of jobs and generate millions of dollars in state tax revenues and economic output. These benefits will be felt regardless of the end user of AFP's natural gas.

Crucially, the Commission has approved, and courts have upheld, the inclusion of these kinds of benefits when evaluating public need. In *City of Oberlin I*, the D.C. Circuit rejected the Commission's CPCN, holding that the Commission "never explained why it is lawful to credit demand for export capacity in issuing a Section 7 certificate to an interstate pipeline." *City of Oberlin I*, 937 F.3d at 606. On remand, the Commission articulated its reasoning, saying that "when the Commission finds a project is supported by precedent agreements the Commission does not look beyond those agreements for additional indications of need." *Nexus Gas Transmission, LLC*, 172 FERC ¶ 61,199 (2020) at 62,299. The Commission is agnostic about the end-use of natural gas because "the production and sale of domestic gas contributes to the growth of the economy and supports domestic jobs in gas production, transportation, and distribution." *Id.* These

public benefits allow the Commission to evaluate natural gas projects without consideration to the end consumer of gas. After remand, the D.C. Circuit upheld the Commission’s reasoning in *City of Oberlin II* as “not only lawful, but also adequately justified.” *City of Oberlin II*, 39 F.4th at 726 (2022). The D.C. Circuit accepted the Commission’s various domestic benefits, such as growth to the economy and increase in capacity to transport natural gas. The court then stated that the Commission adequately demonstrated a “rational connection between the facts found and the choice made.” *Id.* at 727.

HOME argues that *Oberlin II* is distinguishable from the current case because of the disparity in the amount of gas contracted for export. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 31. However, neither the Commission’s nor the D.C. Circuit’s analysis relies on a certain threshold of domestic or foreign natural gas consumption. The domestic public benefits of productive use of resources, economic growth, increased transport capacity, and environmental benefits are present no matter the end consumer.

B. TGP’s International Precedent Agreements for AFP Benefit the Domestic Natural Gas Market.

The Commission considers natural gas transportation services for “all shippers as providing public benefits, and [does] not weigh different prospective end uses differently for the purpose of determining need.” *NEXUS Gas Transmission, LLC*, 172 FERC ¶ 61,199 (2020) at 62,298-99. This is because even if natural gas is exported, there are domestic economic benefits. Natural gas is a fungible, global commodity, so exporting gas via the AFP affects the global natural gas market in ways beneficial to the United States. For example, it contributes to the “development of the gas market, in particular the supply of reasonably priced gas.” *Id.* at 62,299. The Commission cautions that any “constraint on the transportation of domestic gas to points of export risks negating the

efficiency and economy the international trade in gas provides to domestic consumers.” *Id.* at 62,300. The development of international natural gas trade is crucial for domestic consumers.

The AFP would also encourage additional investment in American natural gas infrastructure, such as the New Union M&R Station and LNG terminal. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 14. This supports the capacity to import natural gas back into the United States via New Union in the future. This reasoning was also upheld in *City of Oberlin II*, where the court held that demonstration of additional capacity for natural gas was probative of the proposed project’s benefits. *City of Oberlin II*, 39 F.4th at 728. A protectionist stance would only clog the arteries of global natural gas trade to the detriment of the American public.

C. HOME’s Interpretation of Public Need is Unduly Discriminatory and Contrary to Congressional Purpose.

Congress acted pursuant to twin goals when enacting the NGA: “encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices and protect[ing] consumers against exploitation at the hands of natural gas companies.” *City of Oberlin I*, 937 F.3d at 602. A non-discriminatory natural gas market is crucial in ensuring that the Commission encourages supply and prevents exploitation. Specifically, the open season process, in which natural gas firms auction off capacity to the highest bidder, ensures that “expansion capacity is allocated in a not unduly discriminatory manner.” *Algonquin Gas Transmission, LLC*, 120 FERC ¶ 61,072 (2007). HOME’s interpretation of public need would discriminate against International solely because of its country of operation and runs counter to these fundamental tenets.

The D.C. Circuit has agreed that the definition of public need is expansive and includes natural gas exports. After remand from *City of Oberlin I*, the Commission explained why it included natural gas exports in the “public convenience and necessity” evaluation under Section 7 of the NGA. *City of Oberlin II*, 39 F.4th at 726-27. The Commission largely relied on Section 3 of

the NGA, which defined “public interest” to include natural gas exports to countries with which the United States has a free trade agreement. *Id.* However, the language from Section 3 of the NGA is not binding on a Section 7 evaluation, nor is relying on Section 3 “conflating the two standards.” *Id.* at 727. The Commission simply used Section 3 as persuasive evidence to justify “giving precedent agreements for the transportation of gas destined for export the same weight . . . it gives to other precedent agreements.” *Id.* This allows for *all* export precedent agreements to be given the same weight as domestic precedent agreements, not just export precedent agreements to countries with free trade agreements.

Because Section 3 does not bind a Section 7 evaluation, HOME cannot use the “free trade agreement” language to discriminate about International. It is true that in *City of Oberlin II*, the Commission is evaluating the export of natural gas to a country with which the United States has a free-trade agreement. Here, International will export natural gas to Brazil, which does not have a similar free trade agreement. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 33. *City of Oberlin II*, 39 F.4th at 727. However, Section 3 does not establish a test in which a Section 7 finding of public interest turns on free trade agreement status. In arguing so, HOME unduly discriminates against International in a way contrary to the purpose of the NGA.

II. The Commission’s Determination that the Benefits of the AFP Outweighed the Environmental and Social Harms was Reasonable.

A natural gas pipeline cannot be constructed without a certificate of public convenience and necessity. 15 U.S.C §717f(c)(1)(A). Congress instructs the Commission to grant a certificate to construct a new pipeline if the pipeline “is or will be required by the present or future public convenience or necessity.” 15 U.S.C. §717f(e). A policy statement issued by the Commission on the Certification of New Interstate Natural Gas Pipeline Facilities further notes that a pipeline cannot be in the public convenience or necessity without due consideration of its environmental

impact. *Certificate Policy Statement*, 88 FERC ¶ 61,1227 (1999) at 61,743. In this case, the Commission strictly complied with the governing statutes and corresponding agency policy, and properly considered the environmental and social impacts of the AFP pipeline. The Commission’s findings are reasonable and should be upheld.

A. The Commission Properly Considered the Environmental and Social Costs of the Project.

A federal agency’s environmental impact analysis procedure is governed by the 1969 National Environmental Policy Act. NEPA’s purpose is to require agencies to integrate environmental consideration into their procedural decision-making. NEPA is rooted in recognition of “the profound impact of man’s activity on the interrelations of all components of the natural environment.” 42 U.S.C. § 4331(a). Consequently, NEPA asserts that it is the responsibility of the federal government “to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.” 42 U.S.C. § 4331(b)(3). However, it is important to note that NEPA is a procedural law, and “does not require specific results but rather a specific process.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Thus, although an agency’s environmental analysis must be thorough and comply with the statute, the findings of that analysis are left to the agency’s discretion. *See Utahns for Better Transp. v. U.S. DOT*, 305 F.3d 1152, 1163 (10th Cir. 2002) (“So long as the record demonstrates that the agencies in question followed the NEPA procedures, which require agencies to take a ‘hard look’ at the environmental consequences of the proposed action, the court will not second-guess the wisdom of the ultimate decision.”); *see also Robertson*, 490 U.S. at 350.

The Commission took the requisite “hard look” at the environmental impacts of the AFP, and its subsequent issuance of the CPCN is rooted in a reasonable consideration of the facts at hand. According to the Certificate Policy Statement, NEPA-compliant environmental analysis is a

key component of the natural gas pipeline certification process. *See Certificate Policy Statement*, 88 FERC ¶ 61,1227 (1999) at 61,749. The Certificate Policy Statement requires developers to try to minimize adverse effects on landowners and communities affected by a given pipeline route from the outset of their application. *Id.* at 61,750. Moreover, the Commission may only conduct an environmental analysis once it has determined that the benefits of a project outweigh its adverse economic impacts. *Id.* at 61,745. The Certificate Policy Statement instructs the Commission to continue the practice of conducting environmental assessments (EA) or environmental impact statements (EIS) on a case-by-case basis. *Id.*

Here, because the pipeline would have a significant effect on the environment, TGP prepared an EIS as part of its application. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 72 and 97. After determining that the benefits of the AFP outweighed any adverse economic effects, the Commission examined an EIS for the AFP. Consideration of the EIS effectively discharged the Commission’s required considerations under NEPA. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (“[t]he only role” for a court in applying the arbitrary and capricious standard in the NEPA context “is to ensure that the agency has taken a ‘hard look’ at environmental consequences.”). The EIS concluded that the project would result in some adverse environmental impacts, which could be mitigated with the implementation of certain recommendations as a condition of the certificate. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 3. The Commission’s use of the EIS in and of itself indicates that the Commission properly considered the environmental and social costs of the pipeline. Although HOME argues that the environmental costs outweigh the economic benefits of the AFP, HOME does not contest the methodology of the Commission’s environmental analysis. Rather, HOME argues that the certificate should have been denied outright. *Id.* at para. 45. However, disagreements about the

outcome of the Commission's evaluation do not negate its legitimacy nor its adherence to the NEPA requirements. *See Nat'l Audubon Soc'y*, 422 F. 3d at 185 ("We may not, of course, use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency"). HOME's objections to the very existence of the pipeline are not sufficient to overcome the simple fact that TGP followed the application requirements set forth by the Commission, and that the Commission was thus reasonable in determining that TGP had satisfied its requirements to receive a certificate.

HOME further argues that the Commission should have selected a proposed alternative route that avoids HOME's property and instead cuts through a nearby mountain range, and that the Commission's failure to do so was arbitrary and capricious. *Id.* at para. 39; *see also id.* Ex. A. Although the Commission is not required by statute or regulation to make any substantive cost determinations, NEPA does require the Commission to consider "reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. However, the results of that consideration are left to the discretion of the Commission. In *Minisink Residents for Environmental Preservation and Safety v. FERC*, the court held that the Commission had duly considered and properly declined to utilize an alternative route when the alternative route would result in greater environmental degradation. *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 107 (D.C. Cir. 2014). Here, the proposed alternative route could add up to \$51 million in constructions costs and result in increased adverse environmental impacts since the new route would be three additional miles longer and disrupt sensitive mountain ecosystems. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 44. The Commission's environmental analysis followed appropriate procedure, and the resulting pipeline certification is reasonable and should be upheld.

B. TGP Has Taken Steps to Minimize Negative Impacts on Landowners.

The Commission reasonably considered the environmental and social harms of issuing a certificate to TGP because TGP has taken the necessary steps to minimize negative impacts on the surrounding landowners. A certificate of public convenience and necessity gives the recipient the authority to condemn land along the route of its pipeline under the power of eminent domain. 15 U.S.C. § 717f(h). The interests of surrounding landowners could therefore be adversely affected by the approval of major certificate projects, and applicants are thus required to take steps to minimize impact on landowners. *Certificate Policy Statement*, 88 FERC ¶ 61,1227 (1999) at 61,747.

HOME contends that because the pipeline will be buried on HOME's property without HOME's consent and is contrary to HOME's religious beliefs and practices, the Commission has failed to discharge its duty to minimize the impact of the pipeline on HOME as a landowner. *Order Denying Rehearing*, 199 FERC ¶ 72,201 at para. 42. However, landowner property rights are mostly economic in character, and thus distinct from the Commission's review of environmental harms. *Certificate Policy Statement*, 88 FERC ¶ 61,1227 (1999) at 61,748. TGP has already taken sufficient steps to minimize adverse impacts on surrounding landowners, including HOME. TGP has agreed to bury the AFP through HOME's property and complete construction within four months to minimize disruption to HOME's religious practices. *Order Denying Rehearing*, 199 FERC ¶ 72,201 at para. 41. TGP adhered to its duty to minimize the impacts of the AFP on home, and the issuance of the CPCN was reasonable.

C. The Religious Beliefs of HOME and Its Members Do Not Add Extra Weight to the Consideration of Environmental Harm.

As previously mentioned, the Commission's consideration of the environmental impacts of a project is governed by NEPA. As a result, the environmental factors weighed by the Commission in making its impact determinations are left to the agency's discretion. HOME argues that its religious beliefs and practices are tied to the environment to such an extent that the environmental harms of the project should be ascribed "extra" weight during the cost-benefit analysis. *Id.* at para. 50, 52. However, the Commission is not required to ascribe any extra weight in light of HOME's religious beliefs, and thus the Commission was reasonable in its determination that the benefits of the project outweighed the environmental harm.

The manner in which the Commission ascribes weight to various factors in its benefits-and-harms analysis is left to the agency's discretion. NEPA is procedural rather than substantive, and the Certificate Policy Statement merely requires the Commission to balance the public benefit against any harm. *Certificate Policy Statement*, 88 FERC ¶ 61,227 (1999) at 61,745. The more interests that are adversely affected by a given project, or the greater the negative impact the project would have on a particular interest, the greater the showing of public benefits from the project must be to secure a CPCN. *Id.* at 61,749. So, if a project affects many interests, or will have a particularly adverse impact on one interest, the showing of public benefits must be very high. Courts have noted that adverse effects may include "increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property." *Id.* at 61,747–48; *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1310 (D.C. Cir. 2015). Public benefits may include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that

improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.” *Myersville Citizens for a Rural Cmty., Inc.*, 783 F.3d at 1310. Weight to the beliefs and opinions of landowners is not addressed by the statute, the regulations, or the courts. The Commission is not required to consider HOME’s religious beliefs at all, let alone ascribe extra weight to them, under its traditional cost-benefit analysis. The Commission’s finding that the public benefits of the pipeline outweigh its adverse impacts was reasonable and should be upheld.

III. The Commission’s Decision to Route the AFP Over HOME Property is Not in Violation of RFRA.

The 1993 Religious Freedom Restoration Act (RFRA) prohibits governments from substantially burdening the rights of individuals to religious exercise without compelling justification, even if the burden results from a neutral law of general applicability. 42 U.S.C. § 2000bb-1. Government action may only proceed if the government can demonstrate that its regulation is the least restrictive means of furthering a compelling government interest. *Id.* However, the law does not specifically define the term “substantially burden,” and the Supreme Court has not articulated a precise definition.

The Commission’s interpretation of “substantially burden” and subsequent issuance of a certificate is reasonable and should be upheld. HOME asserts that the certificate is contrary to RFRA since the presence of the pipeline on the land significantly impacts an important religious practice and the existence of the pipeline is antipathetic to HOME’s religious beliefs. *Order Denying Rehearing*, 199 FERC ¶ 72,201 at para. 57, 58. Although HOME’s religious beliefs are sincerely held, HOME is incorrect. The plain language and purpose of RFRA, as well as existing case law, support the Commission’s interpretation of the statute.

A. The Court Should Follow the Ninth Circuit and Find that the AFP Route Does Not Substantially Burden HOME's Religious Practices.

Although this Court has not yet contended with the meaning of “substantially burden” under RFRA, the Ninth Circuit has interpreted the term narrowly, to mean a coercive choice. In *Navajo Nation v. U.S. Forest Service*, the Court held that for a government action to have substantially burdened free exercise of religion, an individual must be forced to choose between (a) modifying their behavior or (b) exercising their religion and being subject to sanctions or the loss of benefits. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1,058, 1,071-73 (9th Cir. 2008). The Court further noted that “the diminishment of spiritual fulfillment—serious though it may be—is not a ‘substantial burden’ on the free exercise of religion.” *Id.* at 1,070. Since the use of artificial snow on a sacred mountain solely affected subjective spiritual experience, it did not constitute a substantial burden on the free exercise of religion and was thus not a RFRA violation. *Id.* at 1,063.

This Court should follow the Ninth Circuit and hold that the AFP does not substantially burden HOME's free exercise of its religion. As HOME noted, the pipeline most significantly impacts a practice known as the “Solstice Sojourn,” where members make a ceremonial journey over the entire property. *Order Denying Rehearing*, 199 FERC ¶ 72,201 at para. 48. The journey would cross directly over the buried pipeline in both directions. *Id.* Furthermore, although the pipeline will be buried, its installation will necessitate the removal of approximately 2,200 trees, which cannot be replanted. *Id.* at para. 38. Nevertheless, HOME does not demonstrate that it would be substantially burdened from the free exercise of its religion. The AFP does not create a physical barrier that prevents the Solstice Sojourn from taking place. *Id.* at para. 59. Furthermore, HOME is not being forced to choose between the practice of its religion and sanction or loss of government benefits. Although HOME argues that the cleared trees and pipeline will diminish the spiritual

impact of the ritual, this is not a substantial burden on the free exercise of religion. *See Navajo Nation* 535 F.3d at 1,063. The Commission properly considered issues raised by RFRA, and The Commission’s issuance of the certificate was reasonable in light of the statute.

B. The Current Pipeline Route is the Least Restrictive Means of Furthering a Compelling Government Interest.

Even where courts have interpreted the term “substantially burdened” broadly, the purpose of the statute still indicates that the AFP is permissible under the statute. In a split from the Ninth Circuit, the Tenth Circuit fashioned an expansive interpretation and held that free exercise of religion was “substantially burdened” if the government action:

“significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of . . . [an individual's] beliefs; meaningfully curtail[s] [an individual's] ability to express adherence to his or her faith; or [denies] [an individual] reasonable opportunities to engage in those activities that are fundamental to [an individual's] religion.”

Thiry v. Carlson, 78 F. 3d. 1,491, 1,496 (10th Cir. 1996). However, in *Thiry*, despite the broader definition, the court found that the plaintiff’s religious beliefs were not substantially burdened by the relocation of gravesites, since the plaintiffs could otherwise continue to practice their religion. *Id.*

HOME may argue that the presence of the AFP pipeline inhibits the expression of central tenets of its religion and denies the organization reasonable opportunities to engage in activities fundamental to its religion. However, even if the Court determines that the exercise of HOME’s religion has been substantially burdened, the broader purpose of RFRA indicates that the pipeline would still be permissible under the statute. The stated purpose of RFRA is to “restore the compelling interest test...and guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1). As previously mentioned, to “substantially burden” an individual, the government action must be “the least restrictive means of furthering

that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b)(2). Here, The Commission’s issuance of a certificate to TGP was reasonable and should be upheld because a natural gas pipeline is a compelling government interest, and running the pipeline through HOME’s land is the least restrictive means of fulfilling that interest.

The NGA posits that the federal government has a compelling national security interest in ensuring the country has adequate energy transportation systems. 15 U.S.C. § 717(a) (“the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest”); *see also Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres*, No. 17-715, 2017 U.S. Dist. LEXIS 134851, at *30-31 (E.D. Pa. Aug. 23, 2017) (“Congress and FERC have found that interstate natural gas projects...are in the public interest”). In this case, the AFP is an interstate pipeline designed to increase international energy trade. *Order Denying Rehearing*, 199 FERC ¶ 72,201 at para. 3. It is thus a compelling government interest.

Furthermore, although a government action that substantially burdens religious exercise must be the least restrictive means of furthering a compelling government interest, religious exercise cannot prevent a government action where there is no available alternative to the action. In determining alternatives, courts have held that the government should not be required “to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA.” *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) *quoting Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir.1996). In *Wilgus*, the court found that, in light of compelling government interests and a need to balance religious freedoms with those interests, the existing eagle feather permitting scheme at issue was the least restrictive means of furthering that interest. *Id.* at 1295.

Here, routing the pipeline through HOME's property is the least restrictive means of furthering a compelling government interest. As previously established, the approved route will cause the least amount of environmental degradation. The alternative route disrupts sensitive mountain ecosystems and extends the pipeline, which are antithetical to the tenets of HOME's religion. *Order Denying Rehearing*, 199 FERC ¶ 72,201 at para. 44. Moreover, HOME is not restricted from continuing to practice its religion on its own land. The pipeline is specifically being constructed between solstices, in order to best accommodate HOME's religious rituals and observations. *Id.* at para. 60. Although it may seem counterintuitive, the existing pipeline scheme is an effective balance between the need for increased energy access and the religious practices of HOME. Thus, the Commission's approval of the current pipeline route was not in violation of RFRA and should be upheld.

IV. The Greenhouse Gas Conditions Imposed by the Commission Were Well Within the Commission's Authority Under the Natural Gas Act.

The Commission has authority under the Natural Gas Act to place greenhouse gas conditions on Certificates of Public Convenience and Necessity (CPCNs). 15 U.S.C. § 717(f)(e). First, the Commission's decision to place the GHG Conditions on TGP's CPCN was not a major question, but rather it was well within their authority to impose. Second, the statute speaks clearly to this issue and grants the Commission broad authority to apply conditions to CPCNs, including GHG conditions. Third, even if the statute is found to be ambiguous, the Commission is entitled to *Chevron* deference and acted reasonably in interpreting the statute.

A. The Commission Did Not Decide a "Major Question" When It Imposed GHG Conditions on the CPCN.

A "major question" is defined as an "extraordinary case" where an agency action involves a decision of vast "economic and political significance" and where the action itself is significant

in terms of its “history and breadth.” *W. Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2608 (2022) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60, (2000)). The Commission’s decision to impose GHG conditions was not a major question.

First, the Commission’s decision to impose GHG Conditions that address GHG impacts from the AFP’s construction is not a decision of vast “economic and political significance.” Past examples of “major questions” include sweeping policy actions that affect large swaths of the American economy or society. For example, the Supreme Court found that an EPA action was a major question when it attempted to “restructur[e] the Nation’s overall mix of electricity generation” via a section of the Clean Air Act that the Court described as a “previously little-used backwater.” *W. Virginia v. Env’t Prot. Agency*, 142 S. Ct. at 2607 and 2614. In that case, the EPA’s action could have large effects on the economy by “substantially restructur[ing] the American energy market.” *Id.* at 2,610. The Commissions’ decision is not at all comparable with this kind of sweeping policy. The GHG Conditions apply only to TGP: they require TGP to plant a certain number of trees, to use electric-powered equipment, and to purchase “green” steel pipeline segments and renewable electricity. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 67. As noted in the FERC Order, the GHG Conditions “do not address or regulate broader GHG emission concerns across the entire natural gas sector or beyond.” *Id.* at para. 89.

TGP argues that the Commission’s imposition of GHG Conditions is a “major question” because it indicates an “unstated change in agency practice overall.” *Id.* at para. 84. This is not the case. The GHG Conditions do not reflect an “unstated change” in the Commission’s practice because they are tailored to TGP’s project and do not apply to other entities. *Id.* at para. 67. TGP contends that this relatively small action of imposing GHG Conditions is actually wide-ranging because “no project sponsor will believe that mitigation is optional.” *Id.* at para. 84. The

Commission is not implementing a major, economy-wide policy scheme by imposing these GHG Conditions on TGP's project. A major question should not be decided on the basis of whether TGP believes that others will make assumptions about the Commission's intentions. Rather, a major question is one that deals with vast "economic and political significance." *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. at 2,608. The GHG Conditions simply do not rise to this level.

Second, the Commission's act of imposing GHG Conditions is not significant in terms of its history nor its breadth. As will be discussed below, the Commission is interpreting the NGA in a standard fashion. The Commission is not undertaking a statutory interpretation analysis that finds new meaning in a "long-extant, but rarely used, statute." *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. at 2595. Nor does it find large powers granted in small sections of a statute, akin to finding "elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). The Commission's interpretation of the Natural Gas Act, 15 U.S.C. § 717f(e), is not significant in terms of its history nor its breadth. Paired with the inevitable conclusion that these GHG Conditions are not an issue of "vast economic and political significance," there can be no finding that the Commission decided a "major question" when it imposed these conditions on TGP.

B. The Natural Gas Act Grants the Commission Broad Authority to Impose GHG Conditions on CPCNs.

The plain language, structure, and purpose of the NGA clearly authorize the Commission to impose conditions on CPCNs to address environmental harms, including harms that result from greenhouse gas emissions.

First, the plain language of the NGA is unambiguous. The NGA authorizes the Commission to attach GHG conditions to certificates when it finds that it is reasonable and in the public interest. The Commission "shall have the power to attach to the issuance of the certificate . . . such

reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). TGP argues that the Commission’s imposition of these GHG Conditions “require[s] an interpretation of the NGA to venture beyond plain meaning.” *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 85. There is nowhere to venture here, as the plain meaning of the statute allows the Commission to impose GHG Conditions. The Commission can impose “reasonable” terms if it deems those terms to be in the public interest. 15 U.S.C. § 717f(e). In the case at hand, the GHG Conditions are clearly “reasonable”: they are limited in scope to TGP’s GHG impacts resulting from the construction of the pipeline, and the conditions are a result of “extensive analysis” conducted in the EIS. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 72. The Commission has clear authority to determine what terms “the public convenience and necessity may require.” 15 U.S.C. § 717f(e). *See Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (finding that “Congress broadly instructed the agency to consider ‘the public convenience and necessity’ when evaluating applications to construct and operate interstate pipelines.”). The Commission did so here by examining an EIS analysis, and it implemented conditions that were limited in scope and reasonable. The plain language is therefore unambiguous, and the Commission has broad authority to place GHG Conditions on a CPCN if it finds it reasonable and in the public interest.

Second, the Commission’s action of conditioning a CPCN on GHG mitigation measures easily falls within the purpose of the NGA. The purpose of the NGA is to ensure that the “transporting and selling [of] natural gas for ultimate distribution to the public is affected with a public interest.” 15 U.S.C. § 717(a). Congress clearly intended that the public interest be considered by the federal agency charged with the permitting of natural gas facilities. And the Supreme Court has noted that the primary purpose of the NGA is “to encourage the orderly

development of plentiful supplies of electricity and natural gas at reasonable prices,” and it also recognized that there are “undoubtedly other subsidiary purposes contained in these Acts,” including environmental and conservation purposes. *NAACP v. FPC*, 425 U.S. 662, 670 n.6 (1976). Recent courts have also recognized environmental and conservation principles as subsidiary purposes of the NGA. *Sierra Club v. United States DOE*, 867 F.3d 189, 202-03 (D.C. Cir. 2017). Placing GHG conditions on a CPCN to further reasonable environmental aims is therefore in accord with the purpose of the NGA.

Third, the structure of the NGA demonstrates that the Commission has broad authority to place GHG Conditions on CPCNs. In the NGA’s section on administrative powers, the statute grants the Commission broad authority to place and enforce conditions on CPCNs: “The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.” 15 U.S.C. § 717(o). This section of the NGA gives the Commission broad authority to condition CPCNs. The Commission can perform “any and all acts”—such as conditioning a CPCN on greenhouse gas emissions—if it is deemed “necessary or appropriate” to carry out its statutory obligations. *Id.* The inclusion of this section in the NGA further demonstrates that the Commission has broad statutory authority to create and enforce conditions on CPCNs when it deems those conditions reasonable and in the public interest. Other courts have also arrived at this conclusion, finding that the Commission has “extremely broad authority to condition certificates of public convenience and necessity.” *Transcon. Gas Pipe Line Corp. v. Fed. Energy Regulatory Com.*, 589 F.2d 186, 190 (5th Cir. 1979) (citing *Atl. Refin. Co. (CATCO) v. PSC of N.Y.*, 360 U.S. 378 (1959)). *See also Great Lakes Gas Transmission Ltd. P’ship v. FERC*, 984 F.2d 426, 432 (1993).

The NGA is thus unambiguous: the statute’s plain language, structure, and purpose all demonstrate that the Commission has clear authority under 15 U.S.C. § 717(f)(e) to place GHG conditions on CPCNs.

C. Even if the Statute is Ambiguous, the Commission is Entitled to *Chevron* Deference Because It Acted Reasonably by Imposing GHG Conditions on TGP’s CPCN.

Even if the statutory language is found to be ambiguous, the Commission is entitled to *Chevron* deference. An agency’s interpretation of a statute is entitled to *Chevron* deference when a court finds that (1) the statute at issue is either “silent or ambiguous with respect to the specific issue” and (2) the agency’s interpretation “is based on a permissible construction of the statute.” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984). In other words, if the statute is ambiguous, then a court should defer to the agency’s interpretation of the statute if that interpretation is reasonable. *Id.* at 843 (stating that “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”). In addition, previous courts have applied the *Chevron* deference framework when reviewing whether the Commission’s conditions on CPCNs are permissible. *Myersville Citizens for a Rural Cmty., Inc.* 783 F.3d at 1,315 (“We have previously reviewed the Commission’s interpretation of its authority to issue such a certificate by applying the two-step analytical framework of *Chevron U.S.A. Inc. v. NRDC* . . .”). So, if the statute is deemed ambiguous with respect to whether the Commission can impose GHG conditions on CPCNs, then a court must defer to the agency’s interpretation if that interpretation is reasonable.

The Commission’s interpretation of the NGA is reasonable. As discussed above, the Commission reasonably interpreted 15 U.S.C. § 717(f)(e) to authorize it to place conditions on CPCNs to mitigate the environmental effects arising from GHG emissions. It found that these

conditions are “reasonable” under § 717(f)(e) because they are limited in scope and because they are determined to be in the public interest based on the results of an EIS. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 72. The Commission was also reasonable to follow guidance from the Council on Environmental Quality (CEQ) that “encourages agencies to mitigate GHG emissions associated with their proposed actions to the greatest extent possible ...” *Id.* at para. 69 (*citing* National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023)). The Commission was reasonable to take CEQ guidance into account when interpreting the NGA. The Commission reasonably interpreted 15 U.S.C. § 717f(e) as a statute that authorizes it to impose GHG conditions on CPCNs. Therefore, under *Chevron* deference a court must defer to the Commission’s reasonable interpretation which is based on a permissible construction of the NGA.

V. The Commission’s Decision Not to Impose Any Conditions Addressing Downstream and Upstream Greenhouse Gas Impacts was not Arbitrary and Capricious.

The APA authorizes a court to set aside an agency action that is found to be “arbitrary and capricious.” 5 U.S.C. § 706(2)(A). Under this standard, an agency action must be both “reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). On the other hand, an agency’s action is arbitrary and capricious if the agency: (1) “relied on factors which Congress has not intended it to consider,” (2) “entirely failed to consider an important aspect of the problem,” (3) “offered an explanation for its decision that runs counter to the evidence before the agency,” or (4) offered an explanation that “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard is narrow, and a court cannot “substitute its judgment for that of the agency.” *Id.* Further, “an agency must engage in ‘reasonable

forecasting and speculation,’ . . . with *reasonable* being the operative word.” *Sierra Club v. United States DOE*, 867 F.3d at 198 (citing *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)).

The Commission’s decision not to impose conditions on downstream and upstream GHG impacts was not arbitrary and capricious. Rather, the Commission’s decision not to impose mitigation measures for these GHG impacts was reasonably discerned. The Commission determined that, although these impacts are likely to be insignificant, it is prudent to abstain from labeling upstream or downstream GHG impacts as either significant or insignificant until the agency has a chance to issue a singular guidance document. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 99. The Commission has broad discretion to implement mitigation measures, and “NEPA does not mandate any specific outcome or mitigation measure” such as the kind requested by HOME. *Id.* at para. 97 (citing *Sierra Club v. FERC*, 867 F.3d at 1376).

First, the Commission reasonably forecasted that there were likely no significant impacts from downstream or upstream effects. In terms of downstream effects, the Commission reviewed an EIS that analyzed the amount of potential downstream emissions resulting from TGP’s project. *Id.* at para. 72. Although the EIS estimated that there could be 9.7 million metric tons of CO₂e per year attributed to downstream emissions, the Commission found that it is “unlikely that this total amount of CO₂e emissions would occur, and emissions are likely to be lower than the above estimate.” *Id.* The Commission is justified in making this determination given its range and depth of expertise. Further, courts generally award an “extreme degree of deference” to the Commission when it evaluates “scientific data within its technical expertise.” *Myersville Citizens for a Rural Cmty., Inc.* 783 F.3d at 1308 (quoting *Washington Gas Light Co. v. FERC*, 532 F.3d 928, 930 (D.C. Cir. 2008)). The Commission determined that this estimate is not significant given the many

different factors that could affect the data. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 72. This alone is a valid reason to overcome a finding of arbitrary and capricious decision-making with respect to downstream emissions: the Commission’s decision to not label downstream emissions as significant was “reasonable and reasonably explained.” *FCC v. Prometheus Radio Project*, 141 S. Ct. at 1158. Again, while the Commission did not label downstream emissions as significant, it is justified in finding a “weak connection between the TGP Project and any increased upstream or downstream GHG impacts.” *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 100.

In addition, the Commission declined to impose mitigation measures on upstream emissions in part because of the issues in calculating these emissions. The Commission explained that these types of emissions “can be difficult to quantify . . . due to unknown factors, including the location of the supply source and whether transported gas will come from new or existing production.” *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 74. It is reasonable for an agency to decline to conduct an extensive analysis due to difficulty in calculating emissions. For example, the D.C. Circuit Court of Appeals held that the Department of Energy did not act arbitrarily and capriciously when it declined to conduct an analysis because the analysis would result in too much speculation: “given the many uncertainties in modeling such market dynamics, the analysis would be ‘too speculative to inform the public interest determination.’ . . . In addition to foreseeability limitations, ‘practical considerations of feasibility might well necessitate restricting the scope’ of an agency’s analysis.” *Sierra Club v. United States DOE*, 867 F.3d at 198 (citing Auth. Order at 93, J.A. 1033; *Sierra Club v. FERC*, 827 F.3d 36, 50 (D.C. Cir. 2016)). Further, the Commission reasonably discerned that there would be no “foreseeable significant upstream consequence of [its] approval of the TGP project” because the “[Hayes Fracking Field]

gas is already in production, but just being transported, in part, to different destinations.” *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 74. It is therefore not arbitrary and capricious to decline to analyze some measures if there are foreseeability issues with the data, or if the analysis will be too speculative. In the case at hand, the Commission reasonably forecasted that upstream emissions would have a “weak connection between the TGP Project and any increased . . . GHG impact.” *Id.* at para. 100. So, their determination that further analyses were not beneficial was reasonable.

Second, the Commission is not required by NEPA to impose mitigation measures, but it is required to take a “hard look” at environmental impacts. *Sierra Club v. FERC*, 867 F.3d at 1367 (citing 42 U.S.C. § 4332(2)(C)(iii)) (stating that an EIS “forces the agency to take a ‘hard look’ at the environmental consequences of its actions . . .”). An agency conducts this “hard look” of the environmental impacts via an EIS, and the agency “enjoys latitude when preparing an EIS” because NEPA is procedural in nature. *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1181 (D.C. Cir. 2023). The Commission has taken a “‘hard look’ at potential impacts . . . through the EIS.” *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) at para. 97. The Commission has fulfilled its procedural requirement with respect to NEPA, and thus acted reasonably in deciding not to implement mitigation measures for upstream and downstream GHG impacts.

Third, the Commission was justified to take into account practical considerations associated with implementing mitigation measures for upstream and downstream GHG impacts. In particular, the Commission chose to wait and not label a project’s upstream or downstream GHG impacts as significant or insignificant until there is a singular guidance document issued from the agency. *Id.* at para. 96. In the past, the Supreme Court has emphasized the importance of allowing the Commission “to create a comprehensive and effective regulatory scheme.” *Atl. Ref.*

CO. v. PSC of N.Y., 360 U.S. 378, 392 (1959) (citing *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507, 520 (1947)) (stating that “Section 7 procedures [of the NGA] in such situations thus act to *hold the line* awaiting adjudication of a just and reasonable rate.”) (emphasis added). The Commission is therefore not required to mitigate upstream or downstream GHG impacts, but only to reasonably consider them. The Commission has reasonably considered such impacts in the present case, and it is entitled to wait for further guidance to classify these impacts as significant.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for review and affirm the challenged order.