

23-01109

UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH  
*Plaintiff-Appellant-Cross-Appellee*

v.

FEDERAL ENERGY REGULATORY COMMISSION  
*Defendant-Appellee-Cross-Appellant*

On Appeal to the United States Court of Appeals for the Twelfth Circuit consolidated  
agency no: TG21-616-000, Chief Judge Delilah Dolman

Brief of Appellant, THE HOLY ORDER OF MOTHER EARTH

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## **JURISDICTIONAL STATEMENT**

The Federal Energy Regulatory Commission (“FERC”) issued an order granting a Certificate of Public Convenience and Necessity (“CPCN”) to Transnational Gas Pipelines, LLC (“TGP”) for the construction of the American Freedom Pipeline (“AFP”), which contained several conditions upon its approval. After seeking rehearing from FERC regarding some issues about its CPCN Order for the Holy Order of Mother Earth (“HOME”) and TGP, FERC issued an Order denying the petitions for rehearing and affirming the CPCN Order as initially issued (the “Rehearing Order”) on May 19, 2023. Accordingly, both HOME and TGP timely filed Petitions for Review of the CPCN Order and Rehearing Order (the “FERC Orders”) with the United States Court of Appeals for the Twelfth Circuit of New Union on June 1, 2023. The United States Court of Appeals for the Twelfth Circuit of New Union examines the Petitions for Review filed by HOME docketed as 23-01109, and a Petition for Review filed by TGP, docketed as 23-01110, consolidating it under Docket 23-01109. This Court has jurisdiction over the Petitions of Review brought by the petitioners against an agency pursuant to 28 U.S.C. § 2347.

## **STATEMENT OF ISSUES PRESENTED**

- I. Was FERC’s finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project needed where 90% of the gas transported by that pipeline was for export?
- II. Was FERC’s finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?

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

## **STATEMENT OF THE CASE**

### **I. Parties to the Case**

Transnational Gas Pipelines ("TGP") is a limited liability company governed under the laws of the State of New Union. The company seeks to construct a pipeline that transports natural gas from the State of Old Union through the State of New Union. If TGP were to commence its American Freedom Pipeline ("AFP") operations proposed in its applications to FERC, it would become a natural gas company, and FERC would have jurisdiction over the project. The Holy Order of Mother Earth ("HOME"), a not-for-profit religious organization dedicated to the actuation of its religious practices, challenges the construction of the AFP as it has headquarters located near the western end of a 15,500-acre property in Burden County, New Union, that it owns. The AFP route would cross through HOME's property east of the headquarters.

### **II. The Project**

The TGP AFP project will incorporate the construction of approximately 99 miles of 30-inch-diameter pipeline extending from a receipt point in Jordan County, Old Union, to a suggested interconnection with an existing TGP gas transmission facility in Burden County, New Union. With other provisions for the project plans, such as implementing mainline valve

assemblies at eight locations along the pipeline, along with pig launcher/receiver facilities, TGP estimates that its proposed AFP project would cost approximately \$599 million.

### **III. Services of the Project**

TGP held an open season for the service of the AFP project. Ultimately, TGP executed binding precedent agreements with International Oil & Gas Corporation (International) for 450,000 dekatherms (Dth) per day of firm transportation service and New Union Gas and Energy Services Company (NUG) for 50,000 Dth per day of firm transportation service, completing the full design capacity of the TGP Project.

### **IV. The Project Plan**

According to TGP project plans, Hayes Fracking Field (HFF) in Old Union will be transporting about 35% of its natural gas, Liquidated Natural Gas (“LNG”), from the Southway Pipeline through the proposed AFP. International will divert the LNG to the NorthWay Pipeline into the New Union City M&R Station, located at the Port of New Union on Lake Williams. The LNG would then be loaded up on LNG tankers for export to Brazil by International. With such plans in place, TGP filed for a CPCN Order from FERC to initiate the construction of the AFP project.

### **V. Substantive History**

On April 1, 2023, FERC administered an Order giving a Certificate of Public Convenience and Necessity (“CPCN”) to TGP for the construction of the AFP, which contained certain Greenhouse Gas (“GHG”) mitigation conditions. These GHG mitigation conditions did not propose to prevent GHG emissions for upstream and downstream impacts. FERC is the commission in place in charge of granting certification to the AFP.

On April 20, 2023, HOME wanted a rehearing of FERC's CPCN Order. HOME engages in religious activities such as observation of the solstices (the summer and winter solstices). HOME performs sacred religious ceremonies every six months for children over the age of fifteen years along the Solstice Sojourn path. All children who have reached the age of fifteen in the prior six months along the path undergo a sacred religious ritual by HOME.

This ritual performed by HOME is called the Solstice Sojourn. This religious ritual is intended to initiate children as a coming-of-age ceremony into HOME, and to adopt its customs and practices. HOME believes that nature should be pure, and that all of their land should be organic and whole. Furthermore, HOME is against the mixture of nature with any pollutants or man-made toxants, such as GHG emissions. HOME views the pollution of their land as a sacrilege to the sanctity of land. They have expressed their religious standpoint to FERC and TGP prior to the approval of the AFP. They have told FERC and TGP that approval of the AFP would violate their religious beliefs. Nonetheless, if the CPCN Order were to stand, FERC would approve TGP to proceed with the AFP project despite HOME's reasonable objections.

Notwithstanding HOME's objections, FERC approved TGP's plans to build and institute the AFP, which would impact parts of HOME's land including the upstream and downstream impacts. Furthermore, 90% of the AFP will be transported to Brazil. TGP's submission for approval of the AFP to FERC was on a public necessity basis. FERC approved it by citing the public necessity of the project.

## **VI. Procedural History**

The parties, HOME and TGP, argued before FERC in an administrative hearing with FERC as the final arbiter of those proceedings. FERC issued an order of approval for TGP's AFP project. HOME has appealed against the approval of the AFP project by FERC, on ground

that the approval of the project is arbitrary and capricious as to finding a public necessity. FERC's CPCN Order administering TGP to construct the AFP project is based on FERC's assertion that the project is warranted and that certain conditions they have in place for TGP are necessary. HOME appeals FERC's CPCN's order on three aspects.

The first aspect is whether the project necessity found by FERC was arbitrary and capricious. Furthermore, the first aspect is whether such a project was supported by substantial evidence. The second aspect is whether the benefits of the AFP outweighed the environmental and social harms rendering the AFP arbitrary and capricious. The third aspect is whether FERC's decision to route the AFP over HOME property despite HOME's objection is in violation of the Religious Freedom and Restoration Act (RFRA).

HOME will argue that the answer as to all three aspects together is that the AFP project was not warranted and that certain conditions, they have for TGP are not necessary. HOME's argument below addresses how FERC's final order approving the AFP was clearly erroneous.

### **SUMMARY OF THE ARGUMENT**

The Constitution of the United States of America ("the Constitution") is the supreme law of the land. *U.S. Const.* Art. VI., Sec. 1, cl. 2. The Necessary and Proper Clause of the Constitution delegates power to Congress to grant authority. Such authority under the Necessary and Proper Clause in this case is given to environmental agencies to set Codes of Federal Regulations. In this case, the regulation is 18 C.F.R. § 157. 18 C.F.R. § 157. An agency is allowed to impose regulatory guidance for environmental projects under this regulation. 18 C.F.R. § 157. Such authority has been given deference by the Supreme Court of the United States of America ("the Supreme Court") known as the Chevron deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, (1984). Chevron deference is not absolute

deference. *Id.* at 844. Deference is given to the administrative agency in charge of setting forth the regulation unless such decision is clearly erroneous or constitutes an abuse of discretion. *Id.* The clearly erroneous standard applies to FERC's decision, as no reasonable agency would have approved the AFP pipeline for construction. FERC's finding of public necessity and convenience for construction of the AFP was arbitrary and capricious, where 90% of the gas transported was for export. For a CPCN Order, there must be a showing of a public necessity. A project can only be considered a public necessity if it serves a local interest. Since 90% of the natural gas transported from the AFP is for export to Brazil, this precludes finding that the project would serve a local interest. Therefore, although FERC argues that TGP's AFP project meets public necessity and convenience for local landowners and businesses, the exportation of 90% of the gas from the pipeline to Brazil weakens FERC's argument.

FERC's finding that the benefits of the AFP outweighed the social and environmental harms was arbitrary and capricious. The social and environmental harm the AFP project brings to HOME's land is immense as 2,200 trees along the proposed AFP route must be removed and cannot be fully replaced along its original location. Furthermore, GHG emissions deriving from the construction of the pipeline further accentuates and propels the environmental harm the pipeline would bring. The social harms are also great as the pipeline hinders HOME's ability to continue its fervent religious practices.

Furthermore, FERC's decision to reroute the AFP over HOME's property despite the religious objections of HOME was in violation of the RFRA. The construction of the AFP along HOME's property would significantly disrupt and hinder HOME's freedom to initiate its religious practices. The construction of the AFP would cause major disruption to religious ceremonial observances, such as the biannual ritual of admitting children over the age of fifteen

into HOME. FERC decided that these religious objections were insignificant, against the weight of the evidence, and that the AFP was compliant with the RFRA. However, the deleterious religious effects of the pipeline on HOME property remains prevalent and significant as HOME's beliefs and rituals with nature, especially with land would be affected. Such reasons further prove that FERC's decision to reroute the pipeline over HOME's property violated the RFRA.

GHG emissions are prevalent in natural gas projects like the AFP project. Under the Natural Gas Act ("NGA"), FERC has the authority to implement GHG mitigation conditions in natural gas projects. Furthermore, such powers from FERC extend greatly to encompass anything it finds as necessary and reasonable to mitigate such GHG emissions. TGP incorrectly assessed that FERC overstepped its authority in the implementation of GHG mitigation measures in the AFP project as certain actions taken by TGP in the construction project, such as removing trees on HOME property and delivering up to 500,000 Dth per day of natural gas through the pipeline, warrant mitigation measure in place to stifle and mitigate GHG emissions.

Nonetheless, FERC's decision to not extend its authority in implementing GHG conditions to upstream and downstream areas is equally wrong as its inaction is arbitrary and capricious. The short and the long-term effects of the AFP project relating to GHG emissions is great even in upstream and downstream areas of the project. Although FERC's argument that they are implementing a new guidance system that determines the significant GHG effects of upstream and downstream areas in projects such as the AFP, concluding that it can not determine the GHG impact of those areas within the project, there is still GHG emissions on upstream and downstream areas. FERC must reasonably assess GHG emissions in implementing GHG conditions. By ignoring the GHG emissions in upstream and downstream areas the project may

bring, FERC is not properly administering its authority under the NGA and therefore, is acting in an arbitrary and capricious manner.

Presently, the construction of the AFP causes several issues and violates acts, such as the RFRA. FERC's refusal to review its CPCN Order is clearly erroneous. Therefore, this Court must find that FERC acted outside of the scope of its authority and remand this matter back to the agency for further proceedings.

### **STANDARD OF REVIEW**

Under the Federal Rules of Civil Procedure ("FRCP"), an appellate court can review a case under clearly erroneous, de novo, or abuse of discretion standards. Fed. R. Civ. P. According to the FRCP, Rule 52(a), Appellate Courts' findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility. Fed. R. Civ. P. 52(a). Here, in our case the trial court's opportunity expounded in the statute is FERC. This appeal is governed under a clearly erroneous standard of review because no reasonable trier of fact would have issued a CPCN Order to TGP for the construction of the AFP.

### **ARGUMENT**

#### **The Constitution of the United States of America ("the U.S. Constitution")**

The U.S. Constitution is the supreme law of the land. *U.S. Const.* Art. VI., Sec. 1, cl. 2. All other laws throughout the United States are subordinate to the U.S. Constitution. *Id.* Laws may differ, but not conflict with the U.S. Constitution. *Id.* The First Amendment grants certain freedoms and liberties, including freedom of expression, of the press, and freedom of speech. *U.S. Const.* at Amendment 1. With freedom of speech comes the freedom to express one's viewpoints without fear of retaliation, or prosecution by the State and/or the Federal

Government. *Id.* Freedom of speech can never be stymied by any law by any State or the Federal Government. *Id.* With these freedoms comes the right to amend the U.S. Constitution and grant powers to Congress. One of these fundamental powers given to Congress is the right to direct and control commerce both within states (intrastate) and between states (interstate). *U.S. Const.* Article IV, Sec. 8, cl. 3. The Commerce Clause is how Congress is enabled to regulate trade amongst the different states. *Id.* at Article IV, Sec. 8, cl. 3.

The Tenth Amendment of the U.S. Constitution grants States their own sovereign authority and power. *U.S. Const.* at Amendment 10. Congress may enact laws that become Federal law, but the States function as their own government and have their own laws as well as a general police power. *Id.* at Amendment 10. The Tenth Amendment is a grant that divides Federal authority from State power and is essentially how States operate independent of the Federal Government. *Id.* Overall, not only does the Tenth Amendment define the balance between the State and Federal governments, but it ensures that States have the flexibility to discern and act rightfully on cases that affect the people within the State. *Id.* Article 1 of the Constitution establishes the legislative branch and powers in the federal government. *U.S. Const.* at Article I. Article I, Section 8, Clause 18, the Necessary and Proper Clause, expresses one the powers the legislative branch possesses. *U.S. Const.* Article I, Section 8, Clause 18. The Necessary and Proper Clause states:

[The Congress shall have Power . . . ] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. *U.S. Const.* Article I, Section 8, Clause 18.

According to the Necessary and Proper Clause, Congress has the power to make laws they deem as necessary and proper in executing their expressed powers granted in Article I. *Id.*

The Supreme Court, in deciding conflicts between federal agencies and individuals, establishes the legal test, Chevron deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984). Chevron deference gives deference to agencies' actions if Congress has not spoken on such actions. *Id.* at 843. Furthermore, agencies' actions must be reasonable to meet the deference. *Id.* That is, there is room for contesting the actions of agencies if they are not reasonable. *Id.*

**I. FERC'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR THE AFP WAS ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE THE HARMS OF THE AFP OUTWEIGH THE BENEFITS UNDER THE NGA.**

**A. FERC's finding of public convenience and necessity for the AFP was arbitrary and capricious.**

FERC's finding of public convenience and necessity for the AFP was arbitrary and capricious. Public necessity is a fundamental assessment of arbitrary and capricious, and the test is whether the proposed or perceived benefits will outweigh harm to the community, for public necessity. 15 U.S.C. § 717f(e). Public convenience and necessity is defined as a potential project that is of such significance and benefit to a community as to justify such environmental or nature-related risks and consequences. *Id.* The statute asserts that public convenience and necessity pertains to natural and artificial gas in a community. *Id.* Although an environmentally relevant project may cause some short or long-term damage to a community's natural environment, the benefits outweigh the risks and

consequences. *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959). The impacted community must have an opportunity to provide input as to any natural gas project, and final authority is given to the regulatory agency. *Id.* at 391. Provided there is a showing of a public convenience and necessity for the construction of a natural and artificial gas project, then the regulatory agency may approve. When the benefit of the project is solely economic gain for the contractor then the project is considered arbitrary and capricious. *Id.*; *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260 (2016). Furthermore, if it is approved solely on this basis then there are grounds for arguing that it is arbitrary and capricious. *Alt. Refin. Co.* 360 U.S. at. 394.; *FERC* 577 U.S. at 292. *In F.E.R.C. v. Electric Power Supply Association*, the standard was defined not as whether a regulatory holding was the best or whether it was better, but if the court made relevant considerations between the facts and the holding. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260 (2016). The scope of the arbitrary and capricious standard is narrow. *American Methyl Corp. v. The Motor Vehicle Manufactures. Association*, 23. 1985. For an agency to clear the arbitrary and capricious bar, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S., 23. (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). If the agency fails, such a reasonable standard then its actions are arbitrary and capricious.

In *Atlantic Refining Co. v. Public Service Com'n of State of N.Y.* (1959), the question presented concerned the Federal Power Commission's ("the Commission") authority to approve certificates of public convenience and necessity. The Commission agreed to proceed with the certification of public necessity and convenience, on grounds

that counsel allegedly testified that gas would be moved elsewhere than Tennessee Gas and interstate. *Id.* at 389. Price is but one factor of public convenience and necessity, although it may be of high importance. *Id.*

In the *Atlantic Refinery Company* case, price was important as the rates of commercial gas were crucial to the s7 proceedings but did not overcome all other factors as to public convenience and necessity. *Id.* at 389. The fact finder, the Commission, was still to consider additional factors including facial appearance or other evidence that the project would not constitute public necessity. *Id.* The United States Supreme Court held that where 90% of commercial gas moving interstate would only be profitable interstate, then the Commission must continue with proceedings. *Id.* That is, the preliminary issuing of the certificates of public necessity and convenience was not appropriate.

Here, the issue is that 90% of the gas for the project that TGP has proposed for the AFP pipeline is *not* needed. R. at 2. The gas that would be produced by the AFP would end up traveling through Brazil. *Id.* at 6. Having 90% of the commercial gas that the AFP would produce travel to Brazil, which is not an intended destination, defeats an argument as to any public convenience and necessity. Neither TGP nor FERC should be able to hold an argument that 90% of the gas for their project to transport natural gas internationally is a necessity.

The clear finding should be that having determined where most of the natural gas is projected to end up, the benefits of the AFP will outweigh the risks and consequences. Like the Federal Power Commission in *The Atlantic Refinery Corporation Case*, FERC does not have a valid argument that it was a public convenience and necessity for the AFP. *Alt. Refin. Co.* 360 U.S. at. 394. There is no evidence that the gas that will be exported

over to Brazil is outweighed by the benefits of the AFP, to justify a public convenience and necessity under the NGA. The exported LNG over to Brazil does not serve a project need, but a more generalized Brazilian need. R. at 10. Therefore, for these reasons FERC's finding of public convenience and necessity for the AFP was arbitrary and capricious.

**B. FERC's finding of public convenience and necessity for the AFP was not supported by substantial evidence.**

Under the NGA, a company or person which will be a natural gas company upon completion of any proposed construction or extension can engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction, unless there is a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. 15 U.S.C. § 717f(c)(1)(A). Furthermore, the NGA mandates the Commission to evaluate all factors bearing on the public interest. 15 U.S.C. § 717f(e). Therefore, according to the NGA, it remains the Commission's discretion to evaluate the construction and transportation of gas and its effects on public interest and impact on adverse environmental and social harms. *Id.*

Substantial evidence is established when a project rationally relates to public convenience and necessity. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260 (2016). Here, the issue is FERC's authorization of the CPCN order to TGP on the basis of the project being of public convenience and necessity. Here, we disagree with FERC's argument.

FERC's argument evaluates the Certificate Policy Statement, the potential benefits the AFP may bring to essential parts of New Union that lack natural gas as evidence to prove that the project is of public convenience and necessity. R. at 7. Furthermore, FERC

cites TGP's efforts to eliminate or minimize adverse effects on the project. *Id.* FERC also cites TGP's efforts in addressing landowners' concerns and questions about the construction of the AFP and its overhauling changes of 30% of its initial plans to address concerns to negotiate acceptable easement agreements, to justify why such efforts minimize adverse environmental and social harms of the project. R. at 10.

However, such evaluations by FERC and TGP are insufficient to determine that such a project is of public convenience and necessity. First, FERC's assertion that according to the Certificate Policy Statement, precedent agreements will always be important, significant evidence of demand for a project is misleading. *Id.* at 9. The Certificate Policy Statement proposes whether a facility may receive a certificate for public convenience and necessity. *Id.* To determine whether a facility's project is of public convenience and necessity, the "threshold" question the Commission must consider is whether the project can proceed without subsidies from [the applicant's] existing customers. *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 (D.C. Cir. 2015). However, there's more the Commission must do, in order to render or deem a project as one of public necessity. The Commission must also examine evidence of adverse environmental effects that would come from the project. *Id.* at 784. The adverse environmental effects may include increased rates for pre-existing customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property. *Id.*

Here, FERC does not fully rationalize and ignores the adverse environmental impact of the AFP project. The AFP project passes through two miles of HOME's property and requires the removal of approximately 2,200 trees and other forms of vegetation from their property. R. at 10. Furthermore, the trees along the route of the pipeline cannot be replaced. This is significantly detrimental to the environment. FERC and TGP argue that TGP's efforts to bury the AFP

through its passage through HOME property and its agreement to expedite construction across HOME property show the limitation of adverse environmental impact of the project. Such rationale is based on the notion that burying the pipeline through the property and expediting the construction reduces harm. However, such a notion is inaccurate as environmental harm is not mitigated or stopped even if the pipeline is underground and the construction is expedited.

Furthermore, 90% of the gas that will be exported by the AFP will move to Brazil. R. at 8. Such a large number of gasses exported combined with the deleterious effects of the project, therefore isn't supported by substantial evidence to show that the AFP is of public convenience and necessity. In conclusion, FERC's finding of public convenience and necessity for the AFP was not supported by substantial evidence.

## **II. FERC'S FINDING THAT THE BENEFITS FROM THE AFP OUTWEIGHED THE ENVIRONMENTAL AND SOCIAL HARMS WAS ARBITRARY AND CAPRICIOUS.**

It is entirely possible for a project's benefits to outweigh the environmental and social harms that it will have on the community. *Alt Refin Co.* 360 U.S. at 394. In deciding whether a project's benefits outweigh the environmental and social harms that the project may cause, the regulatory commission will consider the public importance of such a project. *Id.* If the benefits outweigh the environmental and social harms of the project, then the project may proceed despite the lasting environmental and social harm the project produces. *Id.*

In *Atlantic Refinery Company*, price was important as the rates of commercial gas were crucial to the s7 proceedings but did not overcome all other factors as to public convenience and necessity. *Id.* Price, then, was considered on the benefits that outweighed the harm. *Id.* The Supreme Court held that where 90% of commercial gas moving interstate would only be profitable interstate, then the Commission must continue with proceedings. *Id.* What this finding

meant for *Alt Refin Co.* is that the profit made from commercial gas was of such a nature that the environmental harms and social harms were outweighed. *Id.*

Here, the issue is that there is no such parallel to *Alt Refin Co.*, and the gas that will be exported by the AFP will move to Brazil (a territory that did not consent to this gas). R. at 8. The AFP will have no benefit there (in Brazil). It is plain on its face that 90% of the gas from an environmental project is not going towards a project.

Further, there is nothing in the record to support the AFP's benefit to the 10% of the community where the gas serves as a project necessity to justify the export. TGP cannot make a rational argument that the AFP is going to serve the needs of the community. Much less, they cannot argue that the "benefits" of the project will outweigh the environmental and social harms. Only 10% of the gas that is transported through the AFP will reach a destination that has a project necessity for it. Most of the gas is being transported to serve a Brazilian need unrelated to a project necessity. R. at 8.

Only where there is substantial evidence of a project need should it be sustained. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 (D.C. Cir. 2015). Unlike the court in *Myersville*, who found that the record had substantial support, there is no such support in the instant matter. *Id.* The instant matter falls more in line with *Alt Refin Co.* which found no substantial support for a project need. *Alt Refin Co.* 360 U.S. at 394.

FERC argues that because 90% of the gas that is transported to Brazil will serve a local necessity that it constitutes a public necessity. R. at 9. However, such reasoning is inaccurate. In order to constitute a project needed, FERC would need to show that at least a majority of its project will actually be serving a project necessity. To serve a project need, there needs to be a demonstrable domestic need, and it is undisputed the project largely serves a foreign purpose.

The gas that will be exported to Brazil is being exported for the sole purpose of bringing in LNG to International, who will again, export the gas. R. at 8. The LNG that will leave from the United States en route to Brazil does not serve a project needed there and will simply be collected and exported by another company (International). *Id.* This is not a project need and can even be said to not serve a “Brazilian need” in the sense that the community itself will not benefit from the LNG.

International, like AFP, is in the business of exporting and delivering LNG. *Id.* International is not consigning with AFP’s purported public necessity for the pipeline to export 90% of its gas to Brazil. International is going to export the LNG once it receives it from its importer, AFP. *Id.* The gas that is received by International is going towards the Port of Union City in Brazil. *Id.* The gas that will be transported to Brazil only serves a Brazilian need, and not a project needs under the NGA. R. at 8.

Furthermore, FERC justifying why the AFP outweighs environmental and social harm asserts that the gas demands from the Southway Pipeline are diminishing, and therefore the AFP will transmit gas in that area that may or may not otherwise be purchased in the future. *Id.* at 9. According to FERC, such potential benefit that the AFP could have on the local Southway Pipeline with its transportation of gas further shows the necessity and benefit of the project. *Id.* However, such an inference by FERC is misleading, as the construction of the AFP does produce deleterious environmental effects even within the area where the Southway Pipeline remains. Moreover, such an argument from FERC is merely a projection of what the potential benefits of AFP could bring. FERC does not have substantial facts nor evidence to back such claims.

In conclusion, FERC’s finding that the benefits from the AFP outweighed the environmental and social harms was arbitrary and capricious.

### **III. FERC’S DECISION TO ROUTE THE AFP OVER HOME’S PROPERTY DESPITE HOME’S RELIGIOUS OBJECTIONS WAS IN VIOLATION OF THE RFRA.**

The RFRA, 42 U.S.C. § 2000bb–1(a), applies to government actions that significantly undermine a person’s expression or exercise of religion. 42 U.S.C. § 2000bb–1(a). According to the statute, a person or a group is entitled to exercise their religion, and government actions, such as in the form of environmental projects, cannot undermine such exercise. *Id.* Furthermore, under the RFRA standard a substantial burden must exist when government action puts substantial pressure on an adherent to modify the person’s behavior and violates their beliefs. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 n.11 (9th Cir. 2008).

In *Navajo Nation v. U.S. Forest Serv.* (2008) the issue at hand was the application of the RFRA. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 n.11 (9th Cir. 2008). In that case, the court held that there was no substantial burden to the Navajos exercise of religion, as the wastewater only covered one percent of the Peaks. *Navajo Nation* 535 F.3d at 1070. The substantial burden test established in *Navajo Nation*, was whether there is such a burden so as to prevent the exercise of religion. *Id.* In using the substantial burden test, the Court asserted that prevention would include having to choose between “the tenets of one’s religion or government benefits”. *Id.* The effects of the wastewater in Navajo were, at best, marginal or miniscule. *Id.*

However, unlike the holding in *Navajo Nation v. U.S. Forest Serv* (2008), there is more than just a very marginal effect to HOME’s property at issue in the instant matter. The impact of the LNG that TGP wants to transport via the AFP would have a substantial impact on the exercise of religion by HOME. R. at 10. Over 40% of the landowners along the route would be impacted; this is far beyond the mere one percent of land affected in *Navajo Nation*. *Id.*; *Navajo Nation* 535 F.3d at 1070. Also, actual landowners would be affected rather than just a very small sliver of land itself. R. at 10; *Navajo Nation* 535 F.3d at 1070.

If a substantial number of the landowners at issue here cannot exercise their religious tenets due to the construction of the AFP, then there is a substantial burden no less. R. at 10. It is clear, then, that the benefits of the project do not and cannot outweigh the religious impacts to affected landowners of the AFP. *Id.*

The benefits of the AFP serve a primarily *Brazilian*, rather than a *project* need. *Id.* at 8. As such, the AFP benefits should not be considered under the NGA. R. at 8; *Alt Refin Co.* 360 U.S. at 394. Under the NGA, the benefits considered for a project must serve a local need, not a foreign need. R. at 8; *Alt Refin Co.* 360 U.S. at 394. Even if the “benefits” of the AFP were considered, it does not make sense that LNG which is traveling to another country, and affecting 40% of landowners, outweighs this harm.

FERC does not contest that it is anathema to HOME’s religious beliefs to allow the land to be used for the transport of LNG. R. at 11. How FERC could concede this point, but still find that there is no substantial burden to HOME’s exercise of its religious beliefs is not consistent. If LNG is going to substantially hinder the beliefs and practices of HOME due to the impact on the land, then there is no argument to be made, by TGP or FERC, that HOME’s exercise of religion has not been impacted. *Id.* It is inconsistent that FERC has found that “these beliefs alone are insufficient to require rerouting of the AFP”. R. at 12.

FERC’s decision to route the AFP over HOME’s property despite HOME’s religious objections was in violation of the RFRA. HOME clearly objected on the grounds that the purity of the land would be compromised, and other observations could not be observed. Ceremonial rituals of children over the age of fifteen for induction into HOME would be disrupted by the AFP.

There is no reasonable comparison to the Navajo Nation case that FERC cites for its justification of TGP's argument that FERC will not be prevented from exercising its religious beliefs. *Id.* By FERC's own admission, many landowners will experience an anathema from exercising their religious beliefs in earnest. *Id.* at 11.

Furthermore, we cannot underestimate and gloss over HOME's fervent religious beliefs and practices in accordance with such beliefs. FERC argues that the lack of physical barriers and restraints on the land from the AFP project further shows how the pipeline does not substantially affect HOME's religious practices. Such an assertion by FERC is inaccurate. First, HOME's religious beliefs and practices relate to the sanctity and holiness of land. *R.* at 11. For example, HOME's Solstice Sojourn relies on the sacredness of the foothills on the land that celebrate religious ceremonies dating back to 1935. *Id.* A pipeline-built underneath parts of HOME's land would undermine and destroy the significance and importance of the Solstice Sojourn as it bucks the idea of the sanctification of the land. Therefore, physical, and noticeable barriers are not indicative of eliminating violations of religious freedoms. They are, in fact, the opposite in the sense that they violate the sacredness of the land.

FERC may argue that there are exceptions to when the Government may substantially burden a person's exercise of religion. They could do that by asserting if their action is in furtherance of a compelling governmental interest; and if it is the least restrictive means of furthering that compelling governmental interest. *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir. 1996). Although there may be exceptions, such exceptions are not binding since such exceptions derived from a 10th circuit case. Nonetheless, in evaluating such exceptions FERC does not fit under such criteria. The AFP project directs about 90% of gasses to Brazil and therefore cannot be classified as compelling governmental interest. Furthermore, such AFP project proposed to be

built on HOME's land is not the least restrictive means to further the project as TGP can use alternative routes other than HOME's land to build the pipeline.

In conclusion, FERC's decision to route the AFP over HOME property despite the HOME's religious objection was in violation of RFRA.

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

The NGA mandates the Commission to evaluate all factors bearing on the public interest. 15 U.S.C. § 717f(e). Furthermore, the Commission has the power to ensure reasonable terms and conditions as the public convenience and necessity may require. *Id.* Therefore, a vital part of the Commission's role and power is to impose conditions on the applicant to ensure that public convenience and necessity is met. Although there aren't set conditions in which the Commission may follow, since it is up to their discretion to determine conditions that satisfy public convenience and necessity, past practices and precedents of the Commission are essential to determine whether conditions imposed by the Commission is within their authority under the NGA.

Here in this case, FERC, in analyzing Greenhouse Gases, typically use the CEQ Climate Guidance which recognizes that the "United States faces a profound climate crisis and encourages agencies, such as FERC to mitigate GHG emissions associated with their proposed actions to the greatest extent possible, consistent with national, science based GHG reduction policies established to avoid the worst impacts of climate change. R. at 14. According to FERC, its GHG conditions were the result of their "extensive" evaluation of TGP's Environmental Impact Statement (EIS). *Id.* at 15.

According to FERC, the construction of the American Freedom Pipeline could result in 500,000 Dth per day if sent to combustion end uses, and downstream end-use could result in

about 9.7 million metric tons of CO<sub>2</sub>e per year. R. at 15. Moreover, FERC argues that the construction of the AFP may result in an average of 88,340 metric tons per year of CO<sub>2</sub>e over the four-year duration of construction. *Id.* FERC uses such CO<sub>2</sub> factors from the project to determine its GHG conditions. *Id.* Although all parties in this case do not contend or dispute such numerical analysis expounded by FERC, we do take issue with FERC's failure to require any mitigation measures for the upstream or downstream GHG impacts. *Id.*

In addressing TGP's argument, we agree with FERC that its GHG Conditions were within their authority under the NGA. TGP mistakenly argues that FERC's conditions all address "major questions," and therefore require more precise statutory authorization. *Id.* at 16. According to TGP, the Supreme Court has defined the major-questions doctrine (MQD), asserting that the GHG Conditions imposed by the Commission require interpretation of the NGA to venture beyond plain meaning. *Id.* For TGP, such GHG conditions imposed in the AFP project addresses major-questions and therefore, such authorization is beyond the authority of FERC as it is up to Congress' interpretations to dictate the correct GHG conditions to mitigate the effects of Greenhouse Gases.

Overall, TGP's argument relies on the assertion that FERC's GHG conditions in the AFP project address major questions that's beyond its jurisdiction. However, such an assertion by TGP is incorrect. In *Sierra Club v. FERC*, the Court ruled that greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. *Sierra Club v. FERC*, 754 F.2d 1506 (9th Cir. 1985); *See also* 15 U.S.C. § 717f(e).

The Court's rationale for such a decision was that the Greenhouse gas emissions could have an indirect effect on a project, and FERC must have the authority to mitigate such effects

since they are the ones that have the authority to approve it. *Sierra Club v. FERC*, 754 F.2d 1506 (9th Cir. 1985). Furthermore, FERC correctly analyzed its authority with the matter of its role of imposing its GHG conditions. FERC properly distinguishes the AFP project and broad projects that have major impacts on the environment. For projects such as the AFP project, the GHG conditions are addressing effects within the bounds of the project, not expansive GHG effects on the environment. Such distinction is important because it does not address an industry wide mandate on its GHG conditions to TGP. The conditions will directly impact the boundary of TGP. Therefore, in conclusion, the GHG Conditions imposed by FERC are not beyond FERC's authority under the NGA.

Since it is established that FERC has the authority to implement GHG conditions, FERC should impose mitigation measures for downstream and upstream GHG impacts. FERC argues that the reason why they are not implementing mitigation measures for downstream and upstream is because they have the discretion to determine when and how to implement GHG conditions. Accordingly, FERC justifies such rationale by asserting that the AFP project solely needs the conditions they have in place that exclude downstream and upstream impact. R. at 18. FERC is mistaken in this regard. Although FERC has the discretion to implement GHG measures, they can't do it arbitrarily. Such inaction and rationale by FERC are erroneous. The GHG conditions that may be brought by the AFP project on upstream and downstream are significant. As FERC asserted, the GHG emissions from the AFP project are great as there is 500,000 Dth per day and 9.7 million metric tons of CO<sub>2</sub>e per year that is projected from the project. R. at 15. Such emissions significantly affect downstream and upstream conditions, and therefore should be mitigated. FERC is wrong to assume that GHG mitigation measures are not necessary for downstream and upstream conditions.

**V. FERC’S DECISION OF NOT IMPOSING GHG CONDITIONS ADDRESSING DOWNSTREAM AND UPSTREAM GHG IMPACTS ARE ARBITRARY AND CAPRICIOUS.**

Although FERC’s mitigation measures were appropriate for implementing GHG conditions in the American Freedom Pipeline project, it failed in its decision of not imposing such measures addressing downstream and upstream GHG impacts.

The NGA grants FERC the power to evaluate all factors bearing on the public interest. 15 U.S.C. § 717f(e); *Alt. Refin. Co.* 360 U.S. at. 394. FERC has the power to ensure reasonable terms and conditions as public convenience and necessity may require. 15 U.S.C. § 717f(e). To achieve this, the Commission, which in this case is FERC, can grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate. R. at 18. According to the U.S.C. § 717f(e) of the NGA, the Commission has the power to grant its GHG condition the reasonable way they see fit to ensure that a project meets the criteria of public convenience and necessity. U.S.C. § 717f(e).

FERC asserts that such powers granted to them under the NGA and from precedent court decisions grants them the authority of not imposing GHG Conditions addressing downstream and upstream GHG impacts. FERC’s rationale for such an assertion is that they are not required to implement GHG Conditions on downstream and upstream GHG impacts. R. at 19. For FERC, according to NEPA, they can only take a “hard look” at potential impacts but are not mandated to implement any specific mitigation measures. *Id.* According to NEPA, the “hard look” taken by the commission, which in this case is FERC, derives from the commission’s discretion. *Id.* Nonetheless, the commission must actively or significantly take steps to evaluate potential environmental impact of a given project. FERC argues that the GHG impacts on downstream and upstream from the AFP project are not significant enough for them to analyze the GHG impacts

according to NEPA and therefore, it is within their discretion to not impose GHG Conditions. R. at 19. FERC is mistaken on their assertion.

First, the GHG impacts on downstream and upstream areas from the AFP project is significant and warrants FERC to follow NEPA's guidelines in steps to mitigate environmental impacts. Similar to FERC recognizing that the GHG impacts from the AFP would affect parts of HOME's land and that they were justified to implement mitigation conditions on TGP, here, FERC should expand such mitigation conditions to TGP on downstream and upstream impact. Once again in the record, FERC lists undisputed facts of the GHG impacts of the AFP project on HOME's land. GHG emissions from the AFP project are great as there is 500,000 Dth per day and 9.7 million metric tons of CO<sub>2</sub>e per year that is projected from the project. R. at 15. Furthermore, the AFP project could result in an average of 88,340 metric tons per year of CO<sub>2</sub>e over the four-year duration of construction. *Id.*

FERC's arbitrary claim of not considering the downstream and upstream impact because they are in the process of drafting a new guidance system that would determine significance of downstream and upstream emissions on a case-by-case basis, is not sufficient enough to warrant their inaction. Although FERC has the ultimate discretion to determine GHG mitigation conditions on projects such as the AFP, they must implement and dispel such conditions in a reasonable manner. U.S.C. § 717f(e). Therefore, FERC can't simply pick and choose where to implement such conditions if the impact of GHG emissions on certain parts of the land is clear or likely.

FERC asserts in the record that unknown factors including the location of the supply source and whether transported gas will come from new or existing production, justify why they can't grant mitigation conditions to the upstream and downstream areas. R. at 15. However,

through FERC's detailed evaluation on GHG impacts of the project overall, combined with the likelihood of the transported gas coming from new or existing production, it is reasonable to ascertain that there is more than likely going to be GHG emissions from upstream and downstream areas that warrants mitigation conditions from FERC to TGP for upstream and downstream areas. FERC can't simply ignore the potential GHG impact that may result in upstream and downstream areas and are required to act to mitigate such deleterious results according to the NGA. For these reasons, FERC's decision of not imposing GHG conditions addressing downstream and upstream impacts was arbitrary and capricious. In conclusion, FERC's decision to not impose GHG Conditions addressing downstream and upstream GHG impacts are arbitrary and capricious.

### **CONCLUSION**

For the foregoing reasons, HOME respectfully requests that this Court reverse and remand the case back to FERC for further proceedings.