

No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH
Petitioner,

TRANSNATIONAL GAS PIPELINES, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

Brief of Respondent, FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF JURISDICTION

On May 19, 2023, The Federal Energy Regulatory Commission (hereinafter “FERC” or “the Commission”) denied rehearings sought by the Holy Order of Mother Earth (“HOME”) and Transnational Gas Pipelines, LLC (“TGP”) on issues related to the Certificate of Public Convenience and Necessity (“CPCN”) for the American Freedom Pipeline (“AFP”). Having properly exhausted their administrative options in accordance with the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(a), HOME and TGP filed Petitions for Review of the CPCN Order and Rehearing Order, which were consolidated under Docket Number 23-01109. The Twelfth Circuit Court of Appeals has jurisdiction over the consolidated petition under 15 U.S.C. § 717r(b) because the disputed CPCN order was issued to TGP, a natural-gas company located in this circuit. *See City of Oberlin v. FERC*, 937 F.3d 599, 604 (D.C. Cir. 2019) (*Oberlin I*).

STATEMENT OF THE 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 need 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 Religious Freedom Restoration Act (“RFRA”)?
- IV. Were the greenhouse gas (“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. TGP seeks certification of proposed American Freedom Pipeline.

The proposed AFP is designed to connect existing natural gas facilities at distribution points in the states of Old Union and New Union. Order at 4. A 99-mile-long, 30-inch diameter interstate pipeline, the AFP would transport up to 500,000 dekatherms (Dth) per day from Hayes Fracking Field (“HFF”) in Old Union to the Northway pipeline in New Union. *Id.* The estimated cost of construction is \$599 million. *Id.* at 6.

After an open season for service from February 21 to March 12, 2020, TGP—the future operator of the AFP—executed binding precedent agreements with two corporations accounting for the full design capacity: (1) International Oil & Gas Corporation (“International”) for 450,000 Dth per day of firm transportation service, and (2) New Union Gas and Energy Service Company (“NUG”) for 50,000 Dth per day. *Id.*

The natural gas that will supply the AFP is currently produced at HFF and transported by the Southway pipeline as liquefied natural gas (“LNG”). *Id.* 35% of the existing production at HFF will be routed through the AFP upon its completion. The LNG will be transported through the AFP to the Northway pipeline, which is currently operating at partial capacity. *Id.* From here, 10% of the total amount will be supplied to NUG for distribution in New Union, and the remaining 90% will be transported to the New Union City M&R station operated by International for export to Brazil. *Id.* As a result, the Northway pipeline will provide LNG access to customers in New Union currently without natural gas service. *Id.* at 8. TGP has evidence to conclude that the corresponding reduction of LNG in the Southway pipeline will not create gas shortages for existing customers in the states east of Old Union, where demand for LNG has declined in response to population shifts, efficiency improvements, and increased electrification of heating. *Id.* at 6.

II. FERC issues a CPCN with conditions to mitigate the environmental impacts of the AFP.

On June 13, 2022, in accordance with section 7(c) of the NGA, TGP applied for a CPCN to receive authorization to construct the AFP, an interstate pipeline that TGP will operate under the jurisdiction of FERC. Order at 4-5. FERC determined that TGP demonstrated a public need for the AFP and, on April 1, 2023, issued a CPCN Order to approve the project with conditions for greenhouse gas mitigation. *Id.* at 2. FERC imposed the GHG conditions to alleviate the adverse effects of pipeline construction as identified in TGP’s Environmental Impact Assessment (EIS). Based on the EIS, the environmental impacts from the AFP construction project will be reduced to “less-than-significant” levels with the implementation of the conditions in the CPCN Order. *Id.* at 4. Conditions include:

- (1) TGP shall plant or cause to be planted an equal number of trees as those removed in the construction of the TGP Project;
- (2) TGP shall utilize, wherever practical, electric-powered equipment in the construction of the TGP Project, including, without limitation:
 - a. Electric chainsaws and other removal equipment, where available;
 - b. Electric powered vehicles, where available;
- (3) TGP shall purchase only “green” steel pipeline segments produced by net-zero steel manufacturers; and
- (4) TGP shall purchase all electricity used in construction from renewable sources where such sources are available.

Id. at 4, 14.

III. TGP objects to the GHG conditions of the CPCN Order.

The commission imposed the GHG conditions pursuant to its customary practice of following the climate guidance published by the Council of Environmental Quality (“CEQ”). *Id.* at 14. Published on January 9, 2023, CEQ’s climate guidance urges government agencies to address the future catastrophic risk of climate change through the framework of the National Environmental Policy Act (“NEPA”) in order to mitigate GHG emissions associated with

proposed actions “to the greatest extent possible.” Order at 14. FERC estimates that, without mitigation, the AFP will result in an average annual emissions rate of 104,100 metric tons of CO₂e over the four-year construction period. *Id.* at 15. With the mitigation effort required by the CPCN Order, however, the estimated GHG emissions are significantly lower: 88,340 metric tons per year. *Id.* Nevertheless, TGP remains opposed to the GHG conditions, arguing that FERC has exceeded its authority under the NGA by imposing requirements that address a “major question” compared to traditional mitigation efforts like recovering for tree loss. *Id.* at 16.

IV. HOME objects to the CPCN Order on environmental grounds.

The proposed AFP route will cross over property owned by HOME, a not-for-profit religious organization based in New Union and whose headquarters building lies to the west of the pipeline route. *Id.* at 5. Out of 15,500 acres, only two miles of HOME property will be impacted by the AFP construction. *Id.* at 10. TGP will make a 1:1 replacement of the estimated 2,200 trees removed from HOME’s land—one of the conditions of the CPCN Order. *Id.*

HOME objects to the chosen route and the propriety of exercising eminent domain to complete the project. *Id.* at 5, 10. According to HOME, the finding of public convenience and necessity was unfounded because the environmental harm of the AFP outweighs the public benefits. *Id.* at 7-8. As evidence of harm, HOME references the fact that TGP has not secured easement agreements with 40% of the landowners along the AFP route. *Id.* at 10. TGP has interacted with the community affected by the AFP since the pre-filing stages of the pipeline approval process, and, in the interest of resolving landowner concerns, modified over 30% of the proposed route to achieve acceptable easement terms without resorting to eminent domain. *Id.* at 10.

To minimize the disruption for HOME specifically, TGP has also agreed to bury the entire two-mile section of pipeline across the HOME property and to complete this portion of the project on an accelerated, four-month timeline. Order at 10. TGP also considered an alternate route proposed by HOME to avoid its property but concluded that running the pipeline through the Misty Top Mountain range, as suggested, would add over \$51 million to the project cost and create greater environmental harm to a sensitive ecosystem. *Id.* at 10-11, 21.

HOME also objects to FERC's decision not to impose GHG conditions based on the upstream and downstream impacts of the AFP. *Id.* at 15. FERC concluded that there are no reasonably foreseeable significant upstream consequences of approving the AFP because it will not require new gas production. *Id.* The Commission acknowledged that downstream effects of the AFP could, in the worst-case scenario, amount to 9.7 million metric tons of CO₂e per year. *Id.* However, FERC has cautioned that an upper bound estimate is not a reliable indication of the downstream effects that will actually occur. *Id.* An upper bound estimate ignores realistic variations in pipeline transport volume over time and it requires a dubious assumption that, but for the AFP, a similar quantity of gas or other fuel would not be delivered by other means and combusted with the same or greater effect. *Id.*

Additionally, FERC is currently in the process of conducting a proceeding to identify the best practices for determining the significance of GHG emissions with respect to future pipeline projects. *Id.* at 16. Until that process is complete, the Commission does not assume the authority to impose upstream and downstream GHG conditions because it invokes a broader issue and FERC does not purport to represent the government's stance on tackling climate change in general. *Id.* at 16-17.

V. HOME objects to the CPCN Order on religious grounds.

HOME has also stated religious objections to the AFP. Order at 11. HOME was founded in 1903 in response to the impact of industrialization and capitalism on the environment. Order at 11. Members believe the natural world is sacred and that humans should do “everything in their power” to protect nature above all else, especially economic interests. *Id.*

Every summer and winter solstice since 1935, HOME members make a ceremonial journey (the “Solstice Sojourn”) from a temple at the western border of their property to one of the foothills of the Misty Top Mountains, following a path that would intersect the AFP. *Id.* at 11. The Solstice Sojourn concludes with a sacred ceremony conducted for HOME children who have recently turned 15 years old. *Id.* HOME contends that the proposed pipeline route creates an interference with its religious practice that is contrary to the RFRA. *Id.* at 12. In response, FERC encouraged TGP to propose burying the section of the pipeline over the HOME property to avoid creating a “substantial burden” on HOME’s religious freedom. *Id.* Though trees would not be replanted along the AFP route, TGP can also avoid any further disruption to HOME’s ceremonial grounds by timing construction to occur between the two solstice dates. *Id.* at 13.

Despite such efforts, HOME remains opposed to the AFP because it considers any use of its property to transport LNG in defiance of HOME’s religious principles, which condemn the practices of fracking and burning fossil fuels. *Id.* at 11. FERC rejects the claim that the pipeline itself is a violation of RFRA because, even if it poses a substantial burden to HOME, it is the least restrictive means of furthering a government interest—to uphold a coherent system for certifying natural gas projects—while avoiding the greater environmental effects of rerouting the pipeline. *Id.* at 13.

SUMMARY OF THE ARGUMENT

The Commission acted properly in affirming the CPCN Order and denying the rehearing petitions. During each step of preparing the CPCN Order, the Commission operated within its discretion to authorize the AFP under section 7 of the NGA. First, the Commission reasonably supported its finding of public convenience and necessity based on substantial evidence that the AFP provides a public benefit. The Commission implemented reasonable terms to reduce the adverse effects of the project on HOME's environmental interests such that the benefits of the AFP outweighed the harms. Second, the Commission considered the effects of the AFP on HOME's religious practice and found it posed no substantial burden on the freedom of religious expression. Finally, the Commission imposed GHG conditions that were commensurate with its statutory authority and appropriately tailored to the circumstances of the project.

I. The Commission determined that the AFP serves a demonstrated public need based on multiple indications it will produce domestic benefits.

The project is secured by 100 percent precedent agreements with two unaffiliated shippers, which demonstrates it was properly sized and serves a legitimate demand. Additionally, the AFP will improve the distribution of existing LNG resources, creating access for new customers without affecting the service of existing users. In doing so, it will also help ensure greater supply competition in the fuel market, which will lead to more advantageous prices for non-fossil fuel options. The public need finding is also supported by the economic benefits that the AFP is poised to generate due to the revenue and jobs associated with transporting LNG for International and NUG. Moreover, the international end use that will occur upon AFP's completion does not refute those domestic benefits or the NGA-enabled right for TGP to exercise eminent domain.

II. In addition to ensuring the economic viability of the AFP, the Commission properly weighed the social and environmental factors associated with the pipeline.

The totality of factors weighed in TGP's favor because of the company's commitment to working with landowners affected by the AFP and minimizing the adverse effects they may experience. Where possible, TGP made accommodations to landowners by reworking a substantial portion of the proposed pipeline route. In all cases, TGP attempted to negotiate favorable terms with landowners and resorted to eminent domain only when parties were not receptive to making an agreement. The Commission found that TGP objectively evaluated the circumstances when HOME posed an alternative route but reasonably could not accept a less environmentally friendly and physically impracticable option.

TGP also considered HOME's religious beliefs but did not place them at a premium compared to other factors because the CPCN balancing test does not allow preferential treatment of one interest over another. Additionally, because the CPCN requires environmental mitigation, and environmentalism is the driving tenet of HOME's religion, it was reasonable for the Commission to conclude that HOME's religious concerns were adequately considered.

III. The Commission properly certified the AFP despite HOME's contention that it violates HOME's religious freedom under RFRA.

The AFP did not strip HOME of religious freedom or force it to make a choice between its religion and a government benefit. HOME can continue to practice its valued religious ceremony with only incidental effects to the surrounding vegetation, which the Commission has assured will be replanted for HOME's enjoyment elsewhere on the property. Additionally, even if the AFP posed a substantial burden to HOME's religious practice, it does not qualify as a RFRA violation. The Commission has a compelling interest in maintaining a pipeline certification

process that universally applies to all natural gas projects without conforming to individualized interests that may arise.

IV. The Commission was well within the bounds of its statutory authority under the NGA to impose GHG conditions on TGP.

The NGA grants exclusive authority to the Commission to determine the suitable conditions for certifying a project. Via the grant of power in the NGA to the Commission, Congress affords great latitude to the Commission to use discretionary authority to impose conditions on TGP to address significant impacts. Climate change is a significant impact of natural gas projects like the AFP because of the measurable GHG effects.

The Commission does not attempt to address a “major question” through the CPCN Order. The GHG Conditions are narrowly tailored and reflect traditional mitigation measures that have been imposed in prior projects. Further, the impact of the AFP does not rise to a level of “magnitude or consequence” that only Congress can decide because FERC does not attempt to transform an entire industry, but merely to address the direct environmental impacts of the AFP construction.

V. The GHG conditions in the CPCN Order should be upheld without a finding of arbitrary and capricious.

All environmental impacts that are “reasonably foreseeable” were addressed by the Commission. While the Commission has imposed GHG conditions to address the significant impacts from onsite construction of the AFP, such conditions are not appropriate for addressing potential downstream and upstream impacts. For downstream impacts, there is no identifiable means for determining the consequences of the AFP on GHG emissions without conflating the effects of a new pipeline with the continuing use of alternatives to LNG conveyed downstream by other modes of transport. For upstream impacts, the AFP will be utilizing gas that is already in

production, so there is no anticipated change in demand that must be addressed. To impose GHG conditions on TGP to address downstream and upstream impacts would, in fact, be a major question that would impact the larger LNG industry and require more thoughtful rulemaking.

STANDARD OF REVIEW

This Court reviews Commission actions under the Administrative Procedure Act’s “arbitrary and capricious” standard. 5 U.S.C. § 706(2)(A). The Commission is expected to examine the relevant considerations of an NGA project but is not compelled to prove the superiority of its final choice over possible alternatives. *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292 (2016). Accordingly, deference is given to Commission orders that are supported by substantial evidence. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (defining “substantial” evidence as “more than a scintilla” but “less than a preponderance” of evidence). Review by a Court of Appeals is not intended to supplant the policymaking judgment of the Commission but to verify that its decision reasonably considered all significant impacts and was not a “clear error of judgment.” *North Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980); *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002).

A comparatively heightened standard of review is required for challenges to government decisions based on RFRA. Here, the court considers whether the government has acted to “substantially burden” an individual’s religious practice. 42 U.S.C. § 2000bb-1(a). The substantial burden test asks whether the decision has constrained an individual’s expression or conduct in connection with the practice of his or her sincerely held religious beliefs. *Weir v. Nix*, 114 F.3d 817 (8th Cir. 1997). If the court finds a substantial burden is present, the Commission must show that the project furthers a compelling governmental interest via the least restrictive means available. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

ARGUMENT

I. FERC'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY WAS NOT ARBITRARY AND CAPRICIOUS; FERC HAD AMPLE GROUNDS FOR CLAIMING THE AFP SERVES A PUBLIC NEED BASED ON FORESEEABLE DOMESTIC BENEFITS FROM THE SALE AND TRANSPORT OF LNG.

In deciding whether to issue a certificate of public convenience and necessity for the interstate transport of natural gas, FERC weighs the present or future project benefits against its adverse effects. *See* NGA section 7, 15 U.S.C. § 717f. FERC considers the most important benefit to be the public need served by the project. 178 FERC ¶ 61,107, at 61,686 (2022). Certification is therefore substantially based on the Commission's evaluation of "all relevant factors bearing on the need for a project." *Id.* In this case, the commission has found a public need for the AFP because evidence indicates that it will serve new demand and improve the domestic economy.

A. Precedent agreements are significant evidence for the demand of a project, particularly at full pipeline capacity with unaffiliated shippers.

Courts have upheld the issuance of a certificate of public convenience and necessity where a natural gas company obtains binding precedent agreements for firm transportation service at 100 percent of new capacity because such contracts signify market demand for the project. *See Twp. of Bordentown v. FERC*, 903 F.3d 234, 262 (3d Cir. 2018). While not expressly required by FERC, major precedent agreements (i.e., for a high percentage of pipeline capacity) suggest that the pipeline serves "new demand," and, as factored into the public need analysis, minimizes the negative effect that would otherwise be counted as the risk of overbuilding. 178 FERC at 61,689.

Conversely, courts are skeptical of precedent agreements between pipeline developers and a single affiliated shipper because they present a greater likelihood of self-dealing that could

compromise the public need analysis. *Env'tl. Def. Fund v. FERC*, 2 F.4th 953, 964 (D.C. Cir. 2021) (finding that a transportation agreement with a single partner was shielded from a “truly competitive market”). This decision aligns with the latest Commission guidance, which states that precedent agreements remain important evidence of project need, but do not wholly justify project approval. *See* 178 FERC at 61,686. (“Although precedent agreements remain important evidence of need . . . the existence of precedent agreements may not be sufficient in and of themselves to establish need for the project.”). FERC will also consider factors related to the fair and open nature of the contracting. *See* 178 FERC at 61,687 (stating that the Commission will consider “whether the agreements were entered into before or after an open season”).

In this case, the “market need” facially demonstrated by TGP’s binding precedent agreements is not undercut by questions of self-dealing or fairness. There are two different contracts with unaffiliated shippers, and each was executed after an open season of 21 days. Additionally, the precedent agreements provide assurance that the AFP is not overbuilt because they require full-scale operation at 100 percent of pipeline capacity. Therefore, TGP’s precedent agreements with International and NUG are valid evidence of a public need.

B. Redirection of LNG from a saturated market was appropriately included as a benefit despite a lack of new production.

Public benefits are linked to a variety of project features and “can 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.’” *Minisink Residents for Env’t Pres. and Safety v. FERC*, 762 F.3d 97, 102 (D.C. Cir. 2014) (quoting 90 FERC ¶ 61,128, at 61,396 (2000)). For example, where a new pipeline is expected to increase supply competition,

cost projections are favorable to consumers and thus evidence of a public need. *See* 178 FERC at 61,687.

All of the above benefits cited by the D.C. Court of Appeals are characteristic of the AFP. By diverting 35 percent of the LNG currently destined for customers east of Old Union whose usage rates are trending downward, the AFP will avoid potential future “bottlenecks” in the Southway pipeline. 90 FERC at 61,396. By rerouting this portion of the LNG supply through New Union, the AFP will make it available to new customers as an alternative to dirtier fossil fuels, thus “advancing clean air objectives.” *Id.* From this reallocation of potential surplus to supply an unserved area, it follows that – even without new production – there will be a stabilizing effect in the fuel market that creates competitively priced options for customers. Finally, by providing a connection between the Northway and Southway pipelines, and filling unsubscribed capacity in the Northway pipeline, the AFP “[improves] the interstate grid.” *Id.* Considering its numerous benefits, redirection of LNG from Old Union through the AFP was properly counted in the balance of factors for determining public need.

C. Exportation of 90 percent does not counteract domestic benefits or thwart TGP’s authority to exercise eminent domain for AFP construction.

The holder of a section 7 certificate of public convenience and necessity is permitted to exercise the right of eminent domain under 15 U.S.C. § 717f. FERC authorization of projects for the exportation of natural gas to a foreign country, without further interstate transportation, does not carry the right of eminent domain. *See* NGA section 3, 15 U.S.C. § 717b. Where a proposed pipeline will move natural gas in interstate commerce, it is appropriately analyzed under section 7 of the NGA whether or not the fuel is ultimately bound for exportation. *City of Oberlin v. FERC*, 39 F.4th 719, 725-56 (D.C. Cir. 2022) (*Oberlin II*).

In cases where an interstate pipeline will also support international exportation of LNG, courts have rejected the notion that a specified proportion of project capacity must be fulfilled by domestic end use to justify a finding of public need. *Oberlin II* at 730 (“there is no floor on the subscription rate needed to find a pipeline is or will be in the public convenience and necessity”); *see also Oberlin I* at 603 (project need finding was not discounted though 41% of pipeline capacity would be unsubscribed).

Furthermore, transportation of LNG provides an economic benefit whether it is exported or retained for domestic use. The Commission explains that LNG production for sale abroad expands the U.S. economy because it “supports domestic jobs in gas production, transportation, and distribution.” *NEXUS Gas Transmission, LLC*, 172 FERC ¶ 61,199, at 62,299 (2020). FERC advanced this argument in defense of the NEXUS pipeline, in which a portion of the LNG transported from Ohio to Michigan would be exported to Canada, and it was upheld by the D.C. Court of Appeals as valid support for a public need finding. *See Oberlin II* at 727.

Here, TGP is authorized to exercise eminent domain to complete the AFP, given a finding of public necessity and convenience, because the AFP is an interstate pipeline subject to 15 U.S.C. § 717f. The benefits expounded in support of that finding are not undermined by the 9-to-1 ratio of international to domestic end use because there is no fixed standard for claiming that 10 percent is a deficient amount to demonstrate a public need. Additionally, there are domestic benefits embodied in the 90 percent of LNG designated for exportation because sales to International will generate revenue for the domestic economy, and delivery of the product across the 99-mile AFP will create local employment opportunities. Considering the numerous underlying domestic benefits associated with the AFP, the Commission had substantial evidence to support a finding of public need.

II. FERC CORRECTLY FOUND THE BENEFITS FROM THE AFP OUTWEIGHED THE ADVERSE EFFECTS AND WAS NOT ARBITRARY AND CAPRICIOUS IN ITS DECISION MAKING.

The Commission conducted a meaningful analysis that balanced all relevant factors and interests as prescribed by the Certificate Policy Statement. 15 U.S.C. § 717f(e) requires that FERC “evaluate *all factors* bearing on the public interest” when considering the issuance of a CPCN Order. *Atl. Refin. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959) (emphasis added). In its Certificate Policy Statement (“CPS”) on the certification of new interstate natural gas facilities, FERC outlines an analysis that identifies the relevant factors in the evaluation of new construction proposals: interested parties, potential benefits, and adverse effects. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999). The Commission uses a balancing test and “will approve an application for a certificate *only if* the public benefits from the project outweigh any adverse effects.” 88 FERC at 61,750 (emphasis added).

Prior to the analysis and balancing test, there is a threshold requirement where “the pipeline company must be prepared to financially support the project.” *Id.* at 61,746. In this case, all parties agree that TGP has met this requirement for the AFP. Order at 7.

The three major interests to be considered in the CPCN balancing test are the applicant’s existing customers; competing existing pipelines and their captive customers; and the landowners and surrounding communities. 88 FERC at 61,745. The adverse effects to be considered include economic interests such as property rights, societal factors like religious beliefs, and environmental impacts. *See, e.g., Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309, 1315 (D.C. Cir. 2015) (property rights); *Adorers of the Blood of*

Christ United States Province v. Transcontinental Gas Pipe Line Co., 53 F.4th 56, 58 (3d Cir. 2022) (religious beliefs); *Env't Def. Fund v. FERC*, 2 F.4th at 960-961 (environmental impacts).

The policy objective of the CPCN balancing test is to “minimize the adverse impacts on each of the relevant interests.” 88 FERC at 61,747. While it is understood that the “elimination of all adverse effects will not be possible in every instance,” the process allows for the careful consideration of a wide range of potential impacts and seeks to minimize their weight so as to maximize the public benefit of the project. *Id.*

Satisfying the CPCN balancing test, the Commission weighed the adverse effects of the AFP against the benefits measured in the determination of public need. It is agreed by all parties that “there are no adverse impacts on TGP’s existing customers, existing pipelines in the market and their captive customers.” Order at 7. As to landowners and the surrounding community, FERC found that the public necessity outweighed the residual impacts of the project if implemented per the conditions of the CPCN Order.

A. The social and environmental harms were thoroughly evaluated and TGP has made efforts to minimize adverse effects.

1. TGP attempted good faith negotiations with HOME and other landowners to avoid the use of eminent domain.

The Natural Gas Act grants the holder of a CPCN Order the authority to exercise eminent domain to acquire property rights needed to complete a pipeline when they are otherwise unable to reach agreements with landowners. 15 U.S.C. § 717f(h). The approach prevents a minority of landowners from blocking development that serves the public interest while recognizing that such a powerful authority should be used judiciously. 88 FERC at 61,749; *Env't Def. Fund*, 2 F.4th at 961 (“And there is good reason for the thoroughness and caution mandated by this approach.”).

Many federal courts have also imposed an additional requirement of “good faith negotiations” though it is not expressly required by the statute. *See generally Kansas Pipeline Co. v. 200 Foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253, 1257 (D. Kan. 2002) (reviewing the history of the “good faith” requirement applied in federal courts). The standard for “good faith negotiations” by the project applicant in acquiring property rights is very low. *Texas Gas Transmission Corp. v. Pierce*, 192 So. 2d 561, 565 (La. Ct. App. 1966) (holding that as little as a single offer may satisfy the requirement of “good faith negotiations”); *Millennium Pipeline Co. v. Acres of Land, Inc.*, 107 F. Supp. 3d 249, 251 (W.D.N.Y. 2014) (arguing “extensive discussions over a proposed easement [agreement]” constituted negotiations); *Transcontinental Gas Pipe Line Corp. v. 118 Acres of Land*, 745 F. Supp. 366, 369 (E.D. La. 1990) (finding that the mere existence of a lawsuit showed that an agreement could not be reached through negotiations).

In this case, the strict application of the NGA means that TGP was entitled to the easement rights by virtue of having been issued a CPCN Order, rendering HOME’s argument on the point of agreements moot. Even if the higher standard of “good faith negotiations” were applied, TGP meets that obligation as evidenced by the project modifications following extensive pre-filing negotiations with landowners. Similarly, the inability to reach an agreement with HOME is representative of a good faith attempt to obtain landowner consent. Thus, HOME’s argument that a failure to reach easement agreements with 40% of landowners tips the balance in favor of project harms does not accurately reflect how the project was planned with a good faith approach to acquiring land for the pipeline route.

- 2. HOME’s religious beliefs were thoroughly and thoughtfully considered by TGP and FERC, and impacts were minimized through efforts by the applicant.**

Under the CPS, applicants use the balancing test to analyze and minimize adverse effects without being required to eliminate the effects entirely. 88 FERC at 61,745. Adverse effects can be minimized or mitigated by the applicant through efforts that the Commission can adopt as conditions of the CPCN Order. *Id. See, e.g., Adorers of the Blood of Christ*, 53 F.4th at 58 (participation in pre-filing process); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101 (D.D.C. 2017) (consideration of alternative route) (*Standing Rock*); *Twp. of Bordentown v. FERC*, 903 F.3d at 254 (minimize environmental disruption through design) (*Bordentown*). FERC will also take into account the cumulative effect of adverse impacts, viewing them “as a whole” to determine how they compare to project benefits. 178 FERC ¶ 61,107, at 61,694.

HOME objects to the CPCN Order arguing that its religious views were not adequately considered in the balancing test. HOME asserts that the AFP is in diametric opposition to its fundamental beliefs—a harm that they claim cannot be quantified and therefore should outweigh any benefits. The Commission cannot accept HOME’s argument that the adverse impacts of the AFP on its religious practice are unequivocally higher than other factors in the balancing test. HOME has not provided support for why this factor transcends any other consideration and cannot be evaluated according to FERC requirements to determine the effects of all adverse effects “as a whole.” Furthermore, in response to the concerns raised by HOME, TGP has made multiple changes to its project to mitigate the impacts to HOME’s religious practices, including contemplation and evaluation of an alternative route proposed by HOME (*Standing Rock*); selecting the route that is least impactful to sensitive ecosystems and replacing removed trees (*Bordentown*); and minimizing disruption to religious beliefs and practices by expediting the construction and burying the pipeline on HOME property.

The record therefore indicates that the Commission has properly considered HOME's religious views to the extent possible because the environmental concerns underpinning HOME's belief system have been addressed through project modifications and mitigation efforts.

3. The Commission environmental impacts of the AFP were identified and alternatives were evaluated in the EIS as required by NEPA.

The National Environmental Policy Act ("NEPA") requires all federal agencies to prepare Environmental Impact Statements ("EIS") for "major [f]ederal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). The Court of Appeals has repeatedly held that the issuance of a CPCN Order for an interstate pipeline constitutes a major federal action under NEPA. *See Oberlin I* at 602 (requires the preparation of an EIS). § 4332(C) sets out rigorous criteria for the EIS and is intended to force federal agencies to "take a 'hard look' at the environmental consequences of its actions." *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017) (*Sierra Club*). The EIS also serves to create a record of all the factors and alternatives considered to provide "a clear basis for choice among options by the decisionmaker." *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004).

The very premise of an EIS is that completion of the analysis through the document subsumes a consideration of all adverse effects to the environment of a proposed project. HOME argues that the environmental impacts of the AFP far outweigh the benefits, but the Commission believes that TGP has successfully modified its project plan to sufficiently reduce the impacts such that they are outweighed by the benefits of the AFP. Furthermore, HOME argues that the "Alternative Route" should have been selected to minimize environmental impacts; however, the information gathered in the generation of the EIS clearly showed that this route would cause more objective environmental harm. Thus, FERC adequately considered all potential

environmental impacts and correctly identified the version of the project that would minimize adverse effects and strengthen the benefits of the AFP.

B. The Commission made a rational decision informed by an evaluation of all relevant factors; it was not arbitrary and capricious.

FERCs finding that the benefits from the AFP outweighed the adverse effects was not arbitrary and capricious. Under the Administrative Procedure Act (“APA”), the “arbitrary and capricious” standard is narrow and allows for agency action that is “rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). *See also Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (agency action is not arbitrary and capricious when it “examine[s] the relevant data and articulate[s] a satisfactory explanation . . . including a rational connection between the facts found and the choice made.”).

FERC’s application review and issuance of the CPCN Order for the AFP was not “arbitrary and capricious.” The analysis summarized in the record, conditions applied to the CPCN Order, and the completion of the rigorous EIS all indicate a methodical and robust consideration of factors relevant to the decision to issue the CPCN Order. Furthermore, despite the particular objections of interested parties, the agency decision to allow the project is rationally based on the facts and explanations identified in the Order.

III. THE DECISION TO ROUTE THE AFP OVER HOME PROPERTY DESPITE HOME’S RELIGIOUS OBJECTIONS WAS NOT IN VIOLATION OF RFRA.

Under the Religious Freedom Restoration Act (“RFRA”), the government is prohibited from imposing a substantial burden on the free exercise of religion. 42 U.S.C. § 2000bb-1(a). The statute provides a clear exception: “Government may substantially burden a person's

exercise of religion only if it demonstrates that application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). The government is only required to show a “compelling interest” and the use of “least restrictive means” *after* there is proven to be a “substantial burden” on religious exercise. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068-69 (9th Cir. 2008).

The court in *Navajo Nation* established a two-part test for the substantial burden element of a RFRA claim. *Id.* at 1068. Both parts must be satisfied to find a RFRA violation. *Id.* First, the activities alleged to be burdened by the government action must constitute “exercise of religion.” *Id.* In this case, the first part of the test is satisfied, as TGP and FERC do not deny that HOME’s opposition to the AFP is based on religious objections. Second, the exercise of the religion must be “substantially burden[ed]” by the action. *Id.* In this case, HOME fails to establish a “substantial burden.” Even if the court determines a “substantial burden” was present, the RFRA claim nevertheless fails because there is not a “less restrictive means” than the plan proposed by TGP.

A. HOME is not substantially burdened by the AFP because the pipeline will not prevent HOME from exercising its religious practices.

The Supreme Court held that “substantial burden” under RFRA is *only* found when “individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).” *Navajo Nation*, 535 F.3d at 1070 (emphasis added) (citing *Sherbert v. Verner* (“*Sherbert*”), 374 U.S. 398 (1963); *Wisconsin v. Yoder* (“*Yoder*”), 406 U.S. 205 (1972)).

In *Sherbert*, a woman was denied unemployment for refusing to work on Saturdays because that violated her religion's day of rest. *Sherbert*, 374 U.S. at 398. The Supreme Court has also found it unconstitutional to force an individual to choose between their religious beliefs and a government benefit of unemployment. See *Navajo Nation*, 535 F.3d at 1070. In *Yoder*, parents of children in an Amish community were threatened with criminal charges for not abiding by state laws mandating school attendance to the age of sixteen, which was contradictory to the community's established lifestyle, and guided by their religious beliefs. *Yoder*, 406 U.S. at 205. The Supreme Court held that forcing the parents to "perform acts undeniably at odds with fundamental tenets of their religious beliefs" only to avoid criminal sanctions was unconstitutional. *Id.* at 1079. In contrast, RFRA does not apply to "situations in which the Government took some action which *incidentally* affected the quality of an individual's religious experience." *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1220 n.3 (9th Cir. 2008) (emphasis added).

HOME has neither been forced to choose between its religious beliefs and a government benefit (*Sherbert*); nor have they been forced to violate its religious beliefs to avoid civil or criminal sanctions (*Yoder*). Furthermore, while HOME objects on the basis that the quality of its religious experience will be impacted by the AFP, it has not shown that the pipeline will hinder its free exercise of religion in a fundamental way. Like in *Snoqualmie*, the AFP creates an "incidental" effect on the quality of HOME's religious practices. The only lingering effect of the AFP on HOME's religious practices – the removal of vegetation from the Solstice Sojourn path – does not impede HOME from performing its rituals, but only affects the surrounding nature. Thus, having failed to show a "substantial burden," HOME fails to establish a RFRA violation.

B. Even if HOME faced a substantial burden, the RFRA claim fails because the AFP route is the “least restrictive means” proposed.

If a “substantial burden” is present, the government must show the proposed plan is the “least restrictive means” of furthering a “compelling governmental interest.” *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Supreme Court makes clear that the government cannot merely state it does not have other means of achieving its compelling governmental interest. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. at 728 (finding that the HHS contraceptive mandate was not the “least restrictive means” of furthering the compelling governmental interest of cost-free access to contraceptives because the government could have assumed the cost); see also *Holt v. Hobbs*, 574 U.S. 352 (2015) (ruling that the prison’s grooming policy was not the least restrictive means available to advance the compelling governmental interests of locating contraband because a comb could also accomplish the same purpose).

The installation of the AFP along the chosen route is the least restrictive means of furthering the compelling governmental interest of increasing LNG energy supply. The government interest is compelling given the shifts in population demands necessitating the AFP. As TGP correctly pointed out, the Alternative Route proposed by HOME is objectively more harmful to the environment and “excessively expensive.” Order at 10-11, 21. The proposed alternative means would cost \$51 million more dollars than the current plan and would create greater environmental harm to a sensitive ecosystem. *Id.* Additionally, if the Commission were to acquiesce to every individual preference in the permit application process, it would undermine the objectives of a “coherent natural gas pipeline permitting system”—likely becoming less efficient, more tedious, and more expensive. See, e.g., *Ave Maria Found. V. Sebelius*, 991 F. Supp.2d 957 (E.D. Mich. 2014). Therefore, even if it was found that the AFP created a

“substantial burden” on HOME’s exercise of religion, FERC was correct in maintaining the original route as the least restrictive means of the project.

IV. THE GHG CONDITIONS IMPOSED BY THE COMMISSION ARE WELL WITHIN ITS AUTHORITY CONFERRED BY THE NGA AND DO NOT ADDRESS A MAJOR QUESTION DUE TO THE NARROWLY TAILORED MITIGATION STRATEGY.

Once a finding of public convenience and necessity has been issued, the NGA statute grants broad authority upon the Commission to impose mitigation strategies. *FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961); *see also Twp. of Bordentown v. FERC*, 903 F.3d at 234 (3d Cir. 2018) (finding the Commission has ample authority under the NGA to enforce any mitigation strategies). Once a finding of public convenience and necessity has been issued, the NGA statute grants similar authority upon the Commission to impose mitigation strategies. *Transcon. Gas Pipeline Corp.*, 365 U.S. at 7. As “the guardian of public interest,” the Commission is entrusted significant discretionary authority. *Id.* The NGA explicitly confers upon the Commission exclusive authority to determine the suitable conditions for certifying a project. *See* 15 U.S.C. § 717f(e). Given the wide range of discretionary authority given to the Commission, the carefully prescribed GHG conditions imposed on TGP are within FERC’s reach.

A. The Commission has statutory authority to impose GHG conditions because of the significant latitude consistently afforded to the Commission.

The Commission has broad authority to “fashion equitable remedies in a variety of settings.” *Columbia Gas Transmission Co. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984). The broad authority given to the Commission is necessary due to Congress’s recognition that “the Commission, not the courts, was best suited to make such determinations in light of its detailed knowledge of industry conditions.” *Id.* Failure to impose any GHG conditions would be

“arbitrary and capricious,” as such an omission would be in complete disregard of the Commission’s own regulations. *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 872 (D.C. Cir. 1993).

1. The public has a significant interest in the GHG conditions imposed on TGP.

The public has a history of expressing significant interest in mitigating environmental harms from construction developments. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 833 F.3d 1274, 1277 (11th Cir. 2016) (concerns over construction impacts raised by two environmental groups). Under NEPA, all relevant information must be made publicly available so citizens are given an opportunity to weigh in; this long tradition of public input in environmental decisions continues today. *Lowman v. FAA*, 83 F.4th 1345, 1350 (11th Cir. 2023). As public policy and research on climate change increases, public concern over the effects of greenhouse gases elevates. *W. Virginia v. EPA*, 142 S. Ct. 2587, 2602 (2022) (*W. Virginia*). Given the public’s established interest in addressing climate impacts, FERC has the responsibility to impose GHG conditions.

2. Direct GHG emissions that are reasonably foreseeable impacts of AFP must be addressed through the imposed conditions.

All environmental impacts that are “reasonably foreseeable” must be addressed by the Commission. *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (a modification project to a pre-existing pipeline required direct GHG mitigation though it was built “within the footprint of the existing” and it had “relatively small environmental issues) (*EarthReports*). Where a construction project is *bound to* create GHG emissions, the Commission has legal authority to require mitigation. *Sierra Club*, 867 F.3d at 1374 (emphasis added) (on-site impacts of GHG emissions from LNG project required evaluation because the GHG effects were

reasonably foreseeable). On January 9, 2023, CEQ's interim guidance indirectly reinforced *Sierra Club* by defining GHG mitigation as a climate change solution in the context of NEPA. Order at 14.

The Commission is empowered to mitigate GHG emissions stemming directly from TGP's natural gas construction project. As analyzed by the Commission, construction of AFP is estimated to result in "an average of 88,340 metric tons per year of CO₂e over the four-year duration of the construction." Order at 15. Prior section 7 proceedings concluded similarly to *Sierra Club* to find GHG emissions were direct impacts of LNG construction projects. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021) (finding fault lied with FERC for failing to address the GHG effects from the project at issue).

In this case, the Commission must address the direct environmental impacts of AFP construction. AFP is a 99-mile long, 30-inch diameter, interstate pipeline designed to produce up to 500,000 Dth per day. In contrast to the *EarthReports* pipeline, AFP is a new construction that covers a larger footprint, so the mitigation measures for AFP are even more warranted. In concert with the Commission's generous statutory authority to mitigate environmental impacts, the heightened effects of a new construction project on GHG emissions and climate change warrant the conditions imposed.

- B. The GHG conditions imposed by the Commission are owed substantial deference under the NGA because the magnitude and consequence of the Order does not rise to the level of a major question.

The specific measures in the CPCN Order do not constitute a major federal action. Issues of economic and political significance are considered major questions of a "magnitude or consequence" that only Congress can decide. *W. Virginia* at 2616 (finding EPA's regulation of CO₂ through a nationwide Clean Power Plan was too major of a question to be addressed

without explicit Congressional authorization). Thus, if agency actions relate to a major question, the agency must then point to clear congressional authorization for the power it claims. *W. Virginia* at 2616. Major questions only appear in “extraordinary” cases that give “reason to hesitate” before granting vast power to a federal agency. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (FDA was not given *explicit* authorization over the regulation of tobacco advertising).

1. GHG conditions imposed in the CPCN do not constitute a major question because they are narrowly tailored to solely focus on mitigating construction impacts.

There is no major question when the Commission acts in accordance with historical precedent. *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022) (a nationwide vaccine mandate against COVID-19 would be a new grant of power never before used). There is no major question when an agency’s actions are narrowly tailored and thus do not result in sweeping political or economic significance. *N. Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023) (holding there was a major question due to the potentially significant political impacts on federalism from the agency action).

In contrast, there is a major question when a new regulation will transform an industry by exerting increased federal authority. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159. For example, there is a major question when a Secretary of Education attempts to forgive 43 million student loans for the first time in the nation’s history. *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). There is a major question when the EPA crafts a novel regulation to aggressively transform the domestic energy industry. *W. Virginia* at 2595.

Here, there is no major question because the terms are narrowly tailored to the project, ensuring the economic and political ripple effects are minimized. Unlike in *Nebraska* where

loan-forgiveness had never been attempted by a state agency without explicit congressional action, here, the Commission is merely exercising an authority to establish GHG conditions that has been upheld in prior certification rulings. *See Sierra Club* at 47. Additionally, the mitigating measures in the CPCN Order are aimed squarely at addressing the single AFP pipeline, not an entire industry. Thus, there is no novel assertion of authority as the Commission has previously imposed GHG conditions on construction projects.

2. Because there is no major question present, the Commission is entitled to substantial deference when it speaks with the force of law.

An agency's statutory interpretation is owed substantial deference if "it appears Congress delegated authority to the agency generally to make rules that carry the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Applying *Mead*, the Commission's actions carry the force of law because Part 157 of the Commission's regulations went through notice-and-comment rulemaking, so the courts must defer to the FERC's interpretations if reasonable.

If Congress has spoken to the question at issue, the courts must give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). If the statute is silent or ambiguous, courts should defer to the agency's interpretation if reasonable. *Id.* Moreover, the Commission's decisions based on its expert evaluation of scientific data must be afforded "an extreme degree of deference." *Myersville Citizens for a Rural Cmty*, 783 F.3d at 1308.

In the CPCN Order, the Commission is entitled to substantial deference over the GHG conditions imposed in the Order under the Natural Gas Act. When Congress enacted the NGA, it granted implicit discretionary authority to the Commission to regulate interstate LNG pipelines.

15 U.S.C. § 717. Like in *Myersville* where the Commission’s use of agency experts to craft regulation was afforded “extreme degree of deference,” the GHG conditions for the AFP project are also created based on evaluation by experts with specialized expertise in the natural gas sector, so the Commission is best suited to determine the necessary mitigation efforts. Thus, the Court must evaluate the GHG conditions with an extreme degree of deference to the agency.

V. FERC JUSTIFIABLY REFRAINED FROM IMPOSING GHG CONDITIONS ADDRESSING DOWNSTREAM AND UPSTREAM GHG IMPACTS BECAUSE IT IS NOT ARBITRARY AND CAPRICIOUS TO LIMIT SPECULATION OVER INDIRECT EFFECTS.

FERC is only required to address effects that are “reasonably foreseeable”; it is not required to engage in “speculation or contemplation” when there is a lack of certainty regarding the impacts. Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, 46 Fed. Reg. 18,026, 18,031 (March 23, 1981). Moreover, FERC acts in a reasonable manner when it declines to impose measures related to the indirect effects of energy use. *EarthReports*, 828 F.3d at 955 (D.C. Cir. 2016) (finding FERC acted reasonably when it declined to consider upstream domestic LNG production in NEPA review of indirect effects due to lack of established criteria).

A. FERC does not impose conditions on reasonably unforeseeable effects.

The Commission can only impose conditions on the “reasonably foreseeable” impacts of a project. *U.S. DOT. v. Public Citizen*, 541 U.S. 752, 770 (2004). The Commission is not required to impose conditions on GHG effects that cannot be reasonably forecasted to be “significant.” *Id.* There is no significant effect for the Commission to act upon if the activity and the indirect emissions bear no “reasonably close causal relationship akin to proximate cause.” *Id.* (holding that a decision by the agency to not regulate the cross-border emissions from Mexican trucks was not “arbitrary and capricious” because “the connection between enforcement of motor carrier safety and the environmental harms alleged in this case is also tenuous at best”). If the

Commission has no ability to measure the incidental effects that may be associated with a project, it cannot direct GHG conditions on those effects. *Public Citizen*, 541 U.S. at 770.

The CPCN Order does not recommend mitigation measures for upstream or downstream GHG impacts because these impacts have not been characterized as “significant.” Regarding upstream impacts, the EIS concluded there are no reasonably foreseeable upstream consequences of approving the AFP because there is no new gas production. Unlike the direct effects of pipeline construction, downstream impacts are not easily quantifiable. Such attempts to quantify downstream impacts require forming assumptions on the effects of the AFP that are currently unknown. For example, LNG transported by the AFP may displace fuel that would be otherwise transported through different means, potentially resulting in a net-zero impact. Thus, the Commission properly distinguished between indirect GHG effects and onsite GHG effects because only the latter can be properly addressed with the information available.

B. Even after taking a “hard look” at all potential impacts through the EIS, FERC acted properly when it denied GHG conditions addressing upstream and downstream impacts.

The Commission should take a “hard look” at potential environmental impacts of a project by analyzing the EIS. *EarthReports*, 828 F.3d at 955 (NEPA requires a “hard look” review of the Commission’s compliance to consider and disclose all consequences). However, FERC is not required to consider “everything” for which a project could conceivably be a “but-for” cause. *Id.* Rather, in order to satisfy NEPA, the Commission only needs to consider effects that are sufficiently likely. *Sierra Club*, 827 F.3d at 46. FERC does not act in an arbitrary and capricious manner when it does not address indirect impacts that are attenuated. *EarthReports*, 828 F.3d at 954. Upstream and downstream conditions may not be “reasonably foreseeable consequences” that must be included within the scope of NEPA. *Id.*

Courts conduct a narrow review of FERC's actions with respect to NEPA compliance, including its decisions about GHG conditions. The court reviews whether FERC took a "hard look" at the environmental risks or construction or acted in a manner that is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004). When the agency's decision is well-considered and full informed, the Commission is owed judicial deference and a finding of no "arbitrary and capricious." *Balt. Gas & Elec. Co. v. NRDC, Inc.*, 462 U.S. 87, 97–98 (1983).

HOME's attempt to include GHG conditions for upstream and downstream effects resemble previous attempts rejected by the courts. Like in *Sierra Club*, where it was "impossible" for the court to determine whether the project would result in increased emissions or produce a zero net effect, here, it remains unclear whether any significant increase in emissions will result from the AFP. Because the impact on downstream effects remains unclear, FERC is not mandated to address the downstream impacts. For upstream impacts, the HFF gas is already in production and merely being redirected to different destinations, such as in *Birckhead* where upstream effects were not significant because there was no anticipated change in demand or emissions. *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019).

Finally, to impose downstream and upstream GHG conditions would constitute a "major question" because of the large-scale industry impact such a decision would entail. To impose upstream and downstream GHG conditions would be an unprecedented and novel assertion of power that would require FERC to make a decision that will broadly affect the fuel industry. Here, FERC only seeks to impose direct conditions of the AFP construction's GHG impacts, rather than effects that are uncertain and difficult to measure. With a lack of consensus and definitive rulemaking on how to craft upstream and downstream GHG conditions, imposing such

terms for the AFP would, at this time, be arbitrary and capricious. Without clear causation and measurable impact, FERC was not required to mitigate any potential downstream and upstream GHG impacts in the CPCN Order.

CONCLUSION

For the foregoing reasons, this Court should deny HOME and TGP's petitions for rehearings and affirm the CPCN Order as issued by the Commission.