

No. 23-01109

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

The Holy Order of Mother Earth

v.

Federal Energy Regulatory Commission

**On Petition for Review of an Order of the  
Federal Energy Regulatory Commission**

**Brief of Petitioner, The Holy Order of Mother Earth**

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### **STATEMENT OF JURISDICTION**

This Court has jurisdiction over the Petition for Review of the Certificate of Public Convenience and Necessity (“CPCN”) Order and Rehearing Order pursuant to 15 U.S.C. § 717r(b).

### **STATEMENT OF THE ISSUES**

1. Was The Federal Energy Regulatory Commission’s (“FERC”) finding that a pipeline constructed almost exclusively for the export of natural gas was required by the public convenience and necessity arbitrary and capricious or not supported by substantial evidence?
2. Was FERC’s finding that the public need for natural gas in New Union outweighed the environmental and social harms associated with the construction of a pipeline and the exercise of eminent domain power arbitrary and capricious or not supported by substantial evidence?
3. Did FERC violate the Religious Freedom Restoration Act (“RFRA”) by electing to route a pipeline through Holy Order of Mother Earth’s (“HOME”) sacred land despite HOME’s sincerely held religious objections, when there were alternative routes available?
4. Were the conditions attached to FERC’s approval of the American Freedom Pipeline (“AFP”) to reduce the environmental harms associated with it within FERC’s authority under the Natural Gas Act (“NGA”)?
5. Was FERC’s decision not to impose any Greenhouse Gas (“GHG”) conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

### **STATEMENT OF THE CASE**

On April 1, 2023, FERC issued an Order (the “CPCN Order”) authorizing the construction of the AFP pursuant to Section 7(c) of the NGA.<sup>1</sup> The Order authorized Transnational Gas Pipelines, LLC (“TGP”) to construct and operate the AFP, a 99-mile-long, 30-inch diameter pipeline with a total capacity of 500,000 dekatherms (Dth) per day of firm transportation service.<sup>2</sup>

TGP demonstrated local demand for one tenth of the AFP’s capacity through a precedent agreement with New Union Gas and Energy Services Company for 50,000 Dth per day of firm transportation service.<sup>3</sup> The remaining 450,000 Dth of capacity will be used for export.<sup>4</sup>

HOME is a religious organization situated on land which is on the approved route of the AFP.<sup>5</sup> The CPCN Order authorizes TGP’s exercise of eminent domain authority over HOME’s property, despite HOME’s sincerely held religious beliefs and land-based religious practices.<sup>6</sup>

Consistent with its typical practice, FERC attached four conditions to the CPCN Order to mitigate GHG emissions associated with the construction of the AFP.<sup>7</sup> FERC did not impose any conditions designed to mitigate the upstream and downstream GHG impacts of the AFP.<sup>8</sup>

On April 20, 2023, HOME sought rehearing on the approval of the CPCN. TGP filed a petition for rehearing on April 22, 2023, and FERC denied both petitions on May 19, 2023. Both parties sought review of FERC’s Rehearing Order, and this Court granted review on June 15, 2023.

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<sup>1</sup> See *Transnational Gas Pipelines, LLC*, 199 FERC ¶ 72,201, 72,202 (2023)

<sup>2</sup> See 199 FERC ¶ 72,201, at 72,201.

<sup>3</sup> See 199 FERC ¶ 72,201, at 72,211.

<sup>4</sup> See *id.*

<sup>5</sup> See 199 FERC ¶ 72,201, at 72,209.

<sup>6</sup> See 199 FERC ¶ 72,201, at 72,205, 72,246, 72,248.

<sup>7</sup> See 199 FERC ¶ 72,201, at 72,269.

<sup>8</sup> See 199 FERC ¶ 72,201, at 72,274.



### **SUMMARY OF THE ARGUMENT**

FERC's finding of public need was arbitrary and capricious because the AFP is an export facility and should have been treated as such under Section 3 of the NGA. FERC's finding of public need relied on an agreement to export natural gas and construed "public need" in a way that runs counter to the purpose of the NGA. FERC failed to demonstrate that the small amount of gas serving domestic customers was necessary for the public convenience and necessity.

FERC's finding that the public need for the AFP outweighed any negative social or environmental consequences associated with the AFP was arbitrary and capricious. FERC failed to consider the lack of easement agreements for the AFP and the negative impacts on HOME's religious beliefs and practices due to the exercise of eminent domain.

The approval of the route for the AFP over HOME's property substantially burdened HOME's ability to practice its sincerely held religious beliefs and failed to select a less burdensome alternative. FERC's determination that routing the AFP directly over HOME's property does not impose a burden on HOME's ability to practice their religion improperly imposes FERC's own judgment about what religious beliefs are reasonable.

FERC's GHG conditions do not address a major question because they do not address a question of national economic and political significance. Minor conditions on a singular project, consistent with past agency practice, do not address a major question. Even if the GHG Conditions did address a major question, FERC has clear authority to impose GHG conditions on construction activities. The statutory provision permitting FERC to impose the conditions is not ancillary or vague. FERC has expertise in the construction of Liquefied Natural Gas ("LNG") pipelines.

The decision not to impose conditions on the upstream or downstream effects of the project was arbitrary and capricious considering the project's foreseeable GHG impacts. FERC

has recognized the importance of GHG mitigation measures, and so must recognize the need for similar measures applied to other foreseeable GHG impacts from the project.

### **STANDARD OF REVIEW**

FERC's decision to grant a CPCN is reviewed under the arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A); *see also City of Oberlin v. FERC*, 39 F.4th 719, 725 (D.C. Cir. 2022). The review of FERC's interpretation of RFRA is *de novo*. *See Smith v. Berryhill*, 139 S. Ct. 1765, 1778-79 (2019).

### **ARGUMENT**

#### **I. FERC'S GRANT OF A CPCN WAS ARBITRARY AND CAPRICIOUS BECAUSE THE AFP IS AN EXPORT PIPELINE AND THERE IS INSUFFICIENT PUBLIC NEED TO APPROVE THE PROJECT**

FERC justified its grant of a CPCN on the basis that TGP had executed precedent agreements for 100% of the capacity of the AFP.<sup>9</sup> While courts have recognized that precedent agreements for exports may have probative value as evidence of public need in certain circumstances, they have never held that a pipeline built almost exclusively for the export of LNG can satisfy the public need requirement by providing a minimal percentage of its gas to local consumers. To do so would run contrary to the NGA's purpose and allow for the abuse of the eminent domain power provided under Section 7 of the NGA.

FERC's finding of public need rests almost exclusively on the export agreement. The Court should find that FERC's grant of a CPCN for the AFP was arbitrary and capricious because there is insufficient evidence supporting the existence of domestic public need for the pipeline.

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<sup>9</sup> *See* 199 FERC ¶ 72,201, at 72,226 (2023).

**A. FERC’s Authorization of The AFP Under Section 7 of The NGA Was Improper Because The AFP is an Export Pipeline**

The NGA contains two provisions for approving the transport of natural gas—one which deals with exports, and another which deals with with domestic, interstate commerce. The existence of two provisions, with two separate standards for pipeline approval, indicates that Congress intended for export pipelines to be treated under a separate standard than pipelines which were built to serve domestic need. *See* 15 U.S.C. §§ 717b, 717f. This intent for separate treatment is also shown by the fact that Section 7 of the NGA, but not Section 3, permits a natural gas company to exercise eminent domain and forcibly acquire land it deems necessary for the construction of a pipeline. *Compare* 15 U.S.C. § 717f(h) *with* 15 U.S.C. § 717b. Conflating these two standards would run afoul of the Congressional intent to treat interstate and export pipelines differently. Because the AFP is an export pipeline, Section 3, not Section 7, is applicable, and FERC’s consideration of the AFP under Section 7 was arbitrary and capricious.

**i. Section 7 Of The NGA Only Applies To Domestic, Interstate Commerce**

Section 7 of the NGA only applies to domestic, interstate commerce. Under Section 7, FERC must find a natural gas company’s project to be “required by the present or future public convenience and necessity” to grant the company a certificate authorizing any “proposed service, sale, operation, construction, extension, or acquisition.” 15 U.S.C. § 717f(e). Once issued, the certificate empowers the project operator to exercise eminent domain power to acquire any land “necessary to the proper operation of the pipeline.” 15 U.S.C. § 717f(h). Interstate commerce is limited to “commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.” 15 U.S.C. § 717a(7).

The phrase “only insofar as such commerce takes place within the United States” indicates an intent to treat domestic natural gas projects differently from export-oriented projects. *Id.*; see *Border Pipe Line Co. v. Fed. Power Comm'n*, 171 F.2d 149, 151 (D.C. Cir. 1948) (a pipeline that produces gas wholly for export must be approved under Section 3 of the NGA, not Section 7). The distinction between export-oriented pipelines and pipelines serving a domestic market is particularly important because Congress explicitly declined to extend eminent domain power to export-oriented natural gas projects pursuant to 15 U.S.C. § 717b.

Exports of LNG are dealt with under a different section of the NGA. Section 3 empowers FERC to issue orders authorizing the export of natural gas upon a finding that the export would be consistent with public interest—a lower bar than “required by the public convenience and necessity.” 15 U.S.C. § 717f(b); see *City of Oberlin v. FERC*, 39 F.4th 719, 723 (D.C. Cir. 2022). Congress would not set a lower bar to approve export facilities if it intended for those facilities to have eminent domain power under Section 7. See, e.g., *Allegheny Def. Project v. FERC*, 964 F.3d 1, 19 (D.C. Cir. 2020) (precedent agreements for domestic gas are necessary to demonstrate need sufficient to exercise eminent domain power); see also *Boerschig v. Trans-Pecos Pipeline, LLC*, 2016 U.S. Dist. LEXIS 191266, at \*3-\*5 (W.D. Tex. July 13, 2016)

This interpretation is consistent with a central purpose of the Act: to “protect consumers against exploitation at the hands of natural gas companies” by drawing a distinction between companies profiting from exports and companies benefiting domestic consumers. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). If Congress wanted to extend eminent domain authority to private companies for the export of natural gas, it could have done so already, but has deliberately chosen not to. See *Distrigas Corporation v. Federal Power Comm.*, 495 F.2d

1057, 1063 (D.C. Cir. 1974) (“Since *Border*, the Commission has asked Congress, on fourteen separate occasions, to enact legislation overruling it; each time, Congress has refused”).

**ii. The AFP is an Export Facility, So It Must Be Evaluated Under Section 3 Of The NGA**

The vast majority of the gas to be transported through the AFP is destined for consumption outside of the United States.<sup>10</sup> FERC cites *Oberlin* to support their approval of the AFP under Section 7.<sup>11</sup> While the court in *Oberlin* did hold that the presence of export agreements may be considered as one of many factors in the public need analysis, it declined to rule on whether export facilities at issue were subject to Section 7 of the NGA. *See City of Oberlin*, 39 F.4th, at 726 n.3. In fact, FERC stated that the NEXUS project at issue in *Oberlin* was “not an export facility” because there were a substantial number of the agreements were for delivery points within the U.S. and because even the international agreements had secondary delivery rights within the U.S. *NEXUS Gas Transmission, LLC*, 164 FERC ¶ 61,054, 61,317 (2018); *see Oberlin*, 39 F.4th, at 726 (“‘NEXUS’ application included six precedent agreements to transport gas from Pennsylvania and Ohio for sale across state lines.”)

The AFP is an export-oriented pipeline. The fact that there are trivial amounts of gas going to delivery points within the United States cannot be used to bring the project under Section 7. *Cf. Massachusetts by Dep’t of Public Welfare v. United States Dep’t of Health & Human Services*, 727 F. Supp. 35, 38 (D. Mass. 1989) (in categorizing mixed types of activity, Congress intends to distinguish between “minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest”). Otherwise, export projects

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<sup>10</sup> *See* 199 FERC ¶ 72,201, at 72,224 (“approximately 90% of the LNG carried by the AFP will be diverted to the Port of Union City for export by International”).

<sup>11</sup> *See* 199 FERC ¶ 72,201, at 72,230.

could routinely engage in token amounts of interstate commerce to gain eminent domain power, directly circumventing Congressional intent.

**B. FERC’s Finding That There Was “Public Need” For The AFP Was Unsupported by Substantial Evidence**

FERC’s finding of public need was predicated on the existence of precedent agreements for the full capacity of the pipeline. A finding of public need cannot be predicated on need in another country. Taken to its logical extreme, this would allow natural gas companies to establish public need by showing that need for natural gas existed anywhere in the world. To the extent that the export agreement has any probative value as evidence of public need, it is limited to the domestic benefits from gas exports. TGP has failed to present evidence that domestic benefit would result from the export of gas to Brazil. Because the export agreement does not serve as evidence of public need, FERC’s finding of public convenience and necessity must be based on the local demand for natural gas. There is insufficient evidence in the record that the U.S. citizens who would be served by the pipeline are “greatly in need of increased supplies of natural gas,” or that the current infrastructure is not qualified to serve domestic need. *Atlantic Refining Co. v. Public Service Comm’n of New York*, 360 U.S. 378, 394 (1959).

**i. The Congressional Intent Behind The NGA, And FERC’s Policy Statement, Indicate That “Public Need” Refers To Domestic Need**

Public need cannot be demonstrated exclusively by precedent agreements for the export of LNG. The purpose of the NGA is not to bolster local economies or support private natural gas corporations, but to ensure the provision of energy at reasonable prices. *See NAACP v. FPC*, 425 U.S. 662, 669-70 (1976); *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) [hereinafter *Myersville*]. FERC’s policy statement supports this understanding of the NGA’s purpose: FERC considers “how the gas to be transported by the

proposed project will ultimately be used, why the project is needed to serve that use, and the expected utilization rate of the proposed project” in a public need analysis. *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107, 61,156 (2022) This purpose should guide FERC’s understanding of “public convenience and necessity.” *See NAACP*, 425 U.S., at 669.

Because the NGA is a domestic statute and Section 7 authorizes the use of eminent domain power over U.S. citizens, “public convenience and necessity” refers to the need of U.S. citizens to have energy provided at reasonable prices. *See generally, Atlantic Refining Co.*, 360 U.S., at 392-94 (centering the “public convenience and necessity” discussion around the question of whether there was an accurate finding that there was significant local demand for more natural gas). “Public necessity” does not refer to the needs of citizens of other countries or to the incidental economic growth that may result from expansion of natural gas infrastructure. *Id.*

Where there is a legitimate challenge to the local demand for a project, FERC must “look behind” the precedent agreements to see if they support *actual* public convenience and necessity. *Env’t Def. Fund v. FERC*, 2 F.4th 953, 965 (D.C. Cir. 2021). In determining public need “there is good reason for the thoroughness and caution mandated by this approach: A Certificate-holder may exercise eminent domain against any holdouts in acquiring property rights necessary to complete the pipeline.” *Id.* at 961. In this case, the vast majority of the gas does not support the public convenience and necessity because it does not serve a domestic need.

**ii. The Export Agreement With International Oil & Gas Corporation For Ninety Percent Of The AFP’s Capacity is Not Evidence of Public Convenience And Necessity**

FERC has stated that “contracts or precedent agreements always will be important evidence of demand for a project,” but they “may not be sufficient in and of themselves to establish need for the project.” *Certification of New Interstate Natural Gas Pipeline Facilities*,

88 FERC ¶ 61,227, 61,748 (1999); *Certification of New Interstate Natural Gas Pipeline Facilities*, 178 FERC ¶ 61,107, 61,687 (2022); *Env't Def. Fund*, 2 F.4th, at 972 (“there is a difference between saying that precedent agreements are always *important* versus saying that they are always *sufficient*”). Export precedent agreements may have probative value as evidence of public necessity only in limited circumstances. *Compare City of Oberlin v. FERC*, 937 F.3d 599, 607 (D.C. Cir. 2019) (requiring FERC to explain why it was proper to credit the export precedent agreements as evidence of public necessity consistent with the NGA) *with City of Oberlin v. FERC*, 39 F.4th 719, 725 (D.C. Cir. 2022) (upholding the use of precedent agreements in a public need analysis given FERC’s explanation on remand); *cf.* 2 F.4th 953, at 973 (assigning limited probative weight as evidence of public need to a precedent agreement with an affiliate shipper). Only where exported gas will eventually be transported back to serve domestic needs do export agreements serve as evidence of public need.

FERC’s refusal to give even cursory consideration to the end use of the gas constitutes a failure to consider an important factor that Congress intended it to consider.<sup>12</sup> “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

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<sup>12</sup> 199 FERC ¶ 72,201, at 72,233 (“We do not put any significant weight on the end use of the LNG”).



The congressional intent of the NGA was not to bolster local economies or support private natural gas corporations but to ensure the provision of energy at reasonable prices—to protect *domestic* consumers. *See NAACP*, 425 U.S., at 669-70; *FPC v. Hope Natural Gas Co.*, 320 U.S., at 610. FERC itself has stated the importance of the end use of LNG; applicants are to detail “how the gas to be transported by the proposed project will ultimately be used, why the project is needed to serve that use.” 178 FERC ¶ 61,107, at 61,687 (2022).

In the *Oberlin* cases, the Court initially rejected the use of export agreements as indication of public need, holding that FERC had failed to demonstrate that its analysis was consistent with the NGA and the takings clause of the Fifth Amendment. *City of Oberlin*, 937 F.3d, at 607. In upholding FERC’s argument on remand that export agreements could be evidence of public need given the circumstances, the court pointed to three factors that gave the export precedent agreements in that case probative value. *See City of Oberlin v. FERC*, 39 F.4th, at 725. First, the precedent agreement in that case was with Canada, a country with which the U.S. has a free trade agreement. *Id.* Second, there was evidence that domestic benefits would result regardless of where the gas was ultimately consumed. *Id.* Finally, much of the gas in that case would ultimately be transported back to the United States for consumption. *Id.* None of these factors weigh in favor of TGP, and FERC has not provided any alternative reason for crediting the export agreement with International Oil & Gas Corporation (“International”) as substantial evidence of public need. FERC relies on the maxim that “precedent agreements will always be important, significant evidence of demand for a project” and does not give serious consideration to HOME’s legitimate concerns regarding a lack of domestic need.<sup>13</sup>

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<sup>13</sup> 199 FERC ¶ 72,201, at 72,226.

The first factor the *Oberlin* court pointed to was that the export agreements in that case were with Canadian companies. *Id.* Because the United States had a free trade agreement with Canada, Section 3 of the NGA established that the export agreement was *per se* consistent with the public interest. *Id.* at 725. The primary precedent agreement TGP relies on to show public demand for the AFP is with International, a Brazilian company.<sup>14</sup> The U.S. does not have a free trade agreement with Brazil, and while FERC did “not find this distinction meaningful,”<sup>15</sup> Congress, and the courts, have. 15 U.S.C. § 717b(c); *see, e.g. Oberlin*, 39 F.4th, at 727 (because export of LNG to countries with which the U.S. has a free trade agreement is *per se* in the public interest, export agreements with those countries may be relevant in a public need analysis). The lack of any consideration of this factor is also inconsistent with FERC’s regular practice. *See, e.g., Driftwood Pipeline LLC*, 183 FERC ¶ 61,049, 62,421, 61,425 (2023).

The second factor which gave the export agreements probative value was the domestic benefit which would result “regardless of where the gas was ultimately going to be consumed.” 39 F.4th, at 725. TGP and FERC contend that the export of LNG to Brazil serves domestic need based on the potential decrease in demand for LNG along the existing Southway pipeline.<sup>16</sup> This would create a surplus of gas at the Hayes Fracking Field (“HFF”) that might not otherwise be used.<sup>17</sup> Currently, the natural gas produced at the HFF is fully transmitted by the Southway pipeline.<sup>18</sup> While future necessity is an important consideration, it does not require a finding of

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<sup>14</sup> 199 FERC ¶ 72,201, at 72,214.

<sup>15</sup> 199 FERC ¶ 72,201, at 72,233.

<sup>16</sup> *See* 199 FERC ¶ 72,201, at 72,234.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

public need any time there may be more natural gas produced than demanded by the population served by existing pipelines in the future. *See Env't Def. Fund*, 2 F.4th, at 967.

Finally, the *Oberlin* court determined that the export precedent agreements had probative value in the public need inquiry because the gas was being transported to a facility close to the Canada-U.S. border that ultimately shipped gas to consumers in both the U.S. and Canada, resulting in an ultimate domestic public benefit. 39 F.4th, at 728. There is no analogy to the U.S.'s non-free trade relationship with Brazil, and there has been no claim that *any* of the gas being transported to Brazil (90% of the gas being transported by the proposed pipeline) will eventually serve U.S. consumers.<sup>19</sup>

FERC declined to consider both the lack of a free trade agreement and the end use of the natural gas in its analysis, contrary to congressional intent and FERC's own policy. This failure to consider important factors makes its decision arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc.*, 463 U.S., at 43. In the absence of any argument by TGP or FERC that the export agreement would lead to any direct domestic benefits, the only probative weight the export agreement has as evidence of public need must derive from the transport of additional, domestically consumed gas in the speculative event that a surplus arises in the future.<sup>20</sup>

In *Oberlin*, the court found that FERC had established legitimate reasons for approving the pipeline project independent of the export agreements. *Oberlin* 39 F.4th, at 729. This finding rested on a determination that existing pipelines could not transport the amount of gas required by the domestic precedent agreements. *Id.* In the present case, neither FERC nor TGP contends

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<sup>19</sup> See 199 FERC ¶ 72,201, at 72,224.

<sup>20</sup> See 199 FERC ¶ 72,201, at 72,234.

that public need for the project could be predicated on the agreement with New Union Gas and Energy Services Company alone, because there would be no need for a pipeline of the AFP's capacity to serve domestic customers, most of whom are already served by the Southway pipeline—especially considering the declining demand anticipated in the area.<sup>21</sup> *See Atlantic Refining Co.*, 360 U.S., at 394 (FERC's grant of a CPCN was arbitrary and capricious where there was not a public need for an increased supply of LNG).

## **II. FERC'S FINDING THAT THE PROJECT BENEFITS OUTWEIGHED ITS ADVERSE EFFECTS WAS ARBITRARY, CAPRICIOUS, AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE**

Under FERC's Certificate Policy Statement, public necessity is a threshold requirement. *See* 178 FERC ¶ 61,107, at 61,686. FERC then considers whether the economic benefits of the project outweigh its adverse effects, given any efforts to eliminate those effects. *Id.* Once an applicant obtains a CPCN, it has the authority to obtain land required for the construction of the project through eminent domain where it fails to obtain land via negotiations. *See* 15 U.S.C. § 717f(h). Courts have not imposed a requirement that natural gas companies engage in good faith negotiations to obtain easements after they obtain a CPCN. *See Maritimes & Northeast Pipeline, L.L.C. v. Decoulos*, 146 Fed. Appx. 495, 498 (1st Cir. 2005) (refusing to impose a requirement that the gas pipeline negotiate with landowners in good faith prior to exercising eminent domain power); *see also* 88 FERC ¶ 61,227, at 61,691 (“the Commission does not have the authority to deny or restrict the power of eminent domain in a section 7 certificate, or to oversee the acquisition of property rights through eminent domain”). The only meaningful check on the

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<sup>21</sup> 199 FERC ¶ 72,201, at 72,234.

ability of these corporations to exercise eminent domain power is in the issuance of the certificate.

Approximately 99 miles of land in New Union will be impacted by the proposed AFP, and TGP has failed to negotiate easements for over 40% of landowners along the route.<sup>22</sup> FERC has recognized that impacts of eminent domain on property owners in the area go beyond economic impacts and often include intangible losses. *See* 88 FERC ¶ 61,227, at 61,691. Because of this, consideration of the adverse impacts on landowners is “based upon robust early engagement with all interested landowners” and assesses “a wider range of landowner impacts.” *Id.* FERC’s complete failure to consider the lack of easement agreements represents a deviation from their usual policy.<sup>23</sup> *See, e.g., NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, 61,124 (2017) (dismissing eminent domain concerns because easements over 93% of the land had already been obtained); *see also Rio Grande LNG, LLC*, 170 FERC ¶ 61,046 (2020); *Mt. Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017). Although there is no requirement that a natural gas company acquire easements over a particular portion of the proposed route, the presence of those easements—or lack thereof, is still a factor in measuring the adverse impact on landowners. 88 FERC ¶ 61,227, at 61,691. The lack of easement agreements with almost half of the landowners along the AFP’s proposed route suggests an unwillingness, or at least a reluctance, of landowners in the area to abandon their property rights under the terms offered by TGP so far. The exercise of eminent domain over their property would create an adverse impact that FERC must consider.

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<sup>22</sup> 199 FERC ¶ 72,201, at 72,242.

<sup>23</sup> *See* 199 FERC ¶ 72,201, at 72,243 (“lack of easement agreements is not significant to our consideration”).

HOME would suffer particular harm if TGP used eminent domain to force them to allow the AFP to be routed underneath their property, as it would be completely offensive to their religious beliefs to support the transport of LNG given the environmental harms associated with the process. FERC refused to take into consideration the strong religious views of HOME in assessing the adverse impacts on landowners, stating that “with respect to HOME property, we do not find that HOME has demonstrated significant interests.”<sup>24</sup> This finding runs counter to the evidence before the agency. FERC itself acknowledged that it “is anathema to HOME’s religious beliefs and practices to allow its land to be used for the transport of LNG,” and does not “dispute the sincerity of HOME’s religious beliefs.”<sup>25</sup> Refusal to acknowledge that sincere religious beliefs can create a special interest for a group in a particular plot of land is contrary to FERC’s policy of assessing “a wider range of landowner impacts.” 88 FERC ¶ 61,227, at 61,691.

Given the limited probative evidence of public need established by TGP, and the reasonable inference of adverse impacts from the unwillingness of landowners to negotiate easements with TGP, FERC’s finding that the adverse impacts were outweighed by public need was arbitrary and capricious. The entire project—including all of the adverse impacts on landowners and the environment—must be justified by the economic benefits that may result from the potential that gas will eventually be created at the HFF that might not otherwise be purchased and on the 10% of the pipeline’s capacity that serves domestic customers. The idea that these speculative, marginal benefits justify the unconsidered, concrete harms associated with the project is arbitrary and capricious.

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<sup>24</sup> 199 FERC ¶ 72,201, at 72,211.

<sup>25</sup> *Id.*

### **III. FERC'S ISSUANCE OF THE CPCN IS CONTRARY TO LAW BECAUSE IT VIOLATES RFRA**

The taking of HOME's property for the construction of the AFP is contrary to law because it substantially burdens HOME's free exercise of a sincere religious belief. While there is some lack of clarity as to what constitutes a substantial burden, that standard is to be measured against the sincerely held beliefs of the religious group. *See generally Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 715 (1981). It is not disputed that the imposition of the AFP on HOME's property will require HOME to provide support to an industry that they sincerely oppose, and that the presence of the pipeline on HOME's land will make it difficult—if not impossible—to continue one of their important religious traditions.<sup>26</sup> FERC failed to demonstrate that granting the CPCN and authorizing the construction of the AFP was the least restrictive means of furthering a legitimate government interest. In fact, there was a far less restrictive alternative available, but FERC refused to require that AFP use it. Therefore, FERC's issuance of the CPCN authorizing the AFP was improper and should be remanded.

#### **A. Routing The AFP Through HOME's Property Constitutes a Substantial Burden on HOME's Religious Exercises**

Under RFRA, the government must have a compelling interest any time it imposes a substantial burden on religious exercise, and it must show that the government action was the least restrictive means of furthering that compelling interest. *See* 42 U.S.C. § 2000bb–1. The plaintiff in a litigation action, or the challenger in an administrative action, has the initial burden of establishing that the government action created a substantial burden to the exercise of a sincere, religious belief. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 705 (2014) [hereinafter *Hobby Lobby*]. The central question is whether the government action imposes a

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<sup>26</sup> *See* 199 FERC ¶ 72,201, at 72,248.

burden on the ability of a religious group to conduct business pursuant to their religious convictions, however unreasonable non-members of the group might find those convictions to be. *See id.* at 724. TGP and FERC do not dispute the sincerity of HOME's religious beliefs.<sup>27</sup> They instead contend that running the pipeline underground would eliminate any burden imposed by the use of HOME's property for transporting LNG.<sup>28</sup> But HOME's free exercise of religion would be substantially burdened by the routing of the pipeline through its land even if the pipeline is buried.

Any government action that compels conduct condemned by a religion imposes a substantial burden on its free exercise. *See Hobby Lobby*, 573 U.S., at 725-26; *Holt v. Hobbs*, 574 U.S. 352, 361 (2015); *see also Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 n.11 (9th Cir. 2008) (government pressure on a religious adherent to violate their beliefs constitutes a substantial burden). In *Hobby Lobby*, the court held that a regulation requiring corporations to provide health insurance coverage for contraception substantially burdened a corporation's free exercise of religion when it had a religious conviction that contraception is sinful. 573 U.S., at 723. HOME holds a sincere religious belief that deterioration of its sacred land is sinful and that nature itself is a deity that must be protected.<sup>29</sup> FERC would authorize the use of HOME's sacred land to promote activity to which HOME religiously objects. FERC acknowledges it would "be anathema to HOME's religious beliefs and practices to allow its land to be used for the transport of LNG," yet argues that allowing this use would not impose a substantial burden.<sup>30</sup>

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<sup>27</sup> *See* 199 FERC ¶ 72,201, at 72,249.

<sup>28</sup> *Id.* at 72,256.

<sup>29</sup> *See id.* at 72,246.

<sup>30</sup> 199 FERC ¶ 72,201, at 72,249, 72,256.



HOME maintains that one of its central religious rituals, the Solstice Sojourn, would be completely ruined by the presence of an underground pipeline because members would have to traverse over the pipeline, making the journey “unimaginable” and possibly preventing it entirely.<sup>31</sup> The fact that, if the pipeline was buried, HOME members would not be physically prevented from walking along the Solstice Sojourn does not prove a lack of a substantial burden, because it is their sincerely held belief that the presence of the pipeline would be spiritually disruptive and negatively impact their ability to practice their sacred ritual. Not only would it be spiritually disruptive, but the permanent tree line that would scar the land above the pipeline—directly along the route of the Solstice Sojourn—would create an unavoidable physical disruption to the ritual as well.<sup>32</sup>

FERC found that there would be no substantial burden on HOME’s reasonable exercise of religion despite acknowledging the sincerity of the religious convictions of HOME.<sup>33</sup> This is contrary to the general rule that the government’s role in a RFRA analysis is not in determining whether the religious beliefs held are reasonable, but instead whether they are sincere. *See Hobby Lobby*, 573 U.S., at 725 (citing *Thomas*, 450 U.S., at 715). FERC determined that HOME held sincere beliefs that (a) allowing its land to be used to transport natural gas would completely violate its value system, and (b) routing the pipeline through or under its land would make HOME’s religious rituals “unimaginable” and perhaps entirely prevent the Solstice Sojourn, an important religious tradition. FERC’s argument that burying the pipeline ameliorates both of

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<sup>31</sup> 199 FERC ¶ 72,201, at 72,257.

<sup>32</sup> Approximately 2,200 trees would be removed from HOME’s property to support construction of the AFP. *See id.* at 72,238.

<sup>33</sup> 199 FERC ¶ 72,201, at 72,255.

those concerns (against HOME's protests) improperly imposes their judgment about what religious beliefs are "reasonable."

**B. FERC Has Not Demonstrated That Eminent Domain Was The Least Restrictive Means Of Furthering a Compelling Government Interest**

Once it has been established that a substantial burden exists, the government action creating the burden is subject to strict scrutiny and can only be upheld if the action was the least restrictive means to serve a compelling government interest. *See Holt*, 574 U.S., at 360. There was no compelling government interest at issue here, and even if FERC had asserted one, there is no argument that the proposed route through HOME's property is the least restrictive means of furthering that interest. *See Kelo v. City Of New London*, 545 U.S. 469, 477 (2005) (O'Connor, J., dissenting) (use of eminent domain for a private interest, even where there is a greater "public purpose" is a drastic means).

FERC did not reach the issue of whether the granting of the CPCN would satisfy strict scrutiny. HOME's religious interests are substantially burdened by the routing of the pipeline through their property. *See supra*, Part III(A). TGP contends that the government interest at stake was in using the least expensive, least environmentally harmful route possible for their pipeline.<sup>34</sup> That is a private interest though—there is no compelling state interest in reducing the costs of a project for a private corporation, especially when the private corporation is not even purporting to serve the public at large. *See generally Kelo*, 545 U. S., 125 (the exercise of eminent domain to further a private interest was proper because it was shown to clearly further a "public purpose.") RFRA analysis involves a fundamental liberty—freedom to exercise

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<sup>34</sup> 199 FERC ¶ 72,201, at 72,263.

religion— so any government purpose for overriding it must be sufficiently compelling to withstand strict scrutiny. Reducing costs for private corporations does not satisfy that high bar.

If, however, TGP or FERC were able to demonstrate a compelling government interest, they still failed to prove that granting the CPCN was the least restrictive means of furthering the interest, especially because there was an alternative route that would burden HOME’s ability to freely practice their religion less.<sup>35</sup> TGP asserts that the CPCN and routing of the pipeline through HOME’s property was the least restrictive means of furthering the legitimate government interest in that it allowed FERC to “maintain[] a coherent natural gas pipeline permitting system, not one that would bend unreasonably to the desired exceptions of any religion.”<sup>36</sup> RFRA does not recognize this as a legitimate approach to a challenge to government action restricting free exercise of religion, because the statute itself applies to laws of general applicability. *See* 42 U.S.C. § 2000cc-1. Even if there was some merit to the idea that the government had a generally legitimate interest in maintaining a coherent permitting system, religious groups would still be entitled to protection under RFRA when the permitting system substantially burdened their ability to freely practice their religion.

#### **IV. THE GHG CONDITIONS IMPOSED BY FERC DID NOT RAISE A MAJOR QUESTION**

The GHG Conditions were within FERC’s authority because the GHG Conditions did not raise a major question. An agency action may raise a major question if it makes a decision of “vast economic and political significance,” *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022), “seeks to regulate ‘a significant portion of the American economy,’ or requires ‘billions of

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<sup>35</sup> *See* 199 FERC ¶ 72,201, at 72,239.

<sup>36</sup> 199 FERC ¶ 72,201, at 72,263.

dollars in spending’ by private persons or entities,” *Id.* at 2621 (Gorsuch, J., concurring) (citations omitted), or exceeds the “history and breadth of the authority the agency has asserted.” *Id.* at 2608. No single factor creates a major question. *See id.* at 2634 (Kagan, J., dissenting).

FERC required TGP to obey four typical conditions while constructing the AFP.<sup>37</sup> These conditions marginally reduced the projected CO<sub>2</sub>e emissions from constructing the AFP.<sup>38</sup> Because none of these conditions present the extraordinary case which characterizes a major question, the Court should find that FERC acted within its authority when it imposed them.

**A. Specific Conditions on a Single, Localized Project Do Not Address a Major Question**

Because the GHG Conditions are specific conditions on a single, localized project, they do not address a major question. The major questions doctrine requires a clear statement to authorize an agency action only in “extraordinary cases... in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.” *West Virginia*, 142 S. Ct., at 2608. In *West Virginia*, the Court cited several cases where an agency had enacted a nationwide regulatory scheme which addressed a major question. *See id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (a nationwide ban on tobacco products); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (a nationwide rescission of licenses for physicians assisting suicide); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (a nationwide classification of GHGs as air pollutants); *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S. Ct. 2485 (2021) (a nationwide moratorium on

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<sup>37</sup> While constructing the AFP, TGP must (1) plant a tree for each tree removed, (2) utilize electric-powered equipment wherever practical, (3) purchase steel pipeline segments only from GHG emissions-neutral steel manufacturers, and (4) purchase electricity from renewable sources where available. *See* 199 FERC ¶ 72,201, at 72,267.

<sup>38</sup> *See* 199 FERC ¶ 72,201, at 72,273.

evictions); *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) (*per curiam*) (a nationwide COVID-19 employee vaccination and testing requirement). In *West Virginia*, the Court found that the Clean Power Plan, intended to drive a nationwide “aggressive transformation in the domestic energy industry,” addressed a major question. *West Virginia*, 142 S. Ct., at 2604.

Since *West Virginia*, courts of appeal have continued to only find a major question where an action imposed nationwide consequences. See *Kentucky v. Biden*, 57 F.4th 545, 555 (6th Cir. 2023) (a nationwide federal contractor mandate addressed a major question); *Ga. v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022) (same); *Louisiana v. Biden*, 55 F.4th 1017, 1029 (5th Cir. 2022) (same). Indeed, where “Congress has delegated broad authority to an agency with expertise and experience within a specific industry, and the agency action is so confined, claiming no power to regulate the national economy” the court’s review is limited “to the familiar questions of whether Congress has spoken clearly, and if not, whether the implementing agency’s interpretation is reasonable.” *Loper Bright Enters. v. Raimondo*, 45 F.4th 359, 365 (D.C. Cir. 2022) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984)). Even where an agency action imposes nationwide consequences, it may still not address a major question absent an interpretation of an ambiguous statute that would transform the agency’s regulatory authority. See *Mayes v. Biden*, 67 F.4th 921, 934-35 (9th Cir. 2023).

The GHG Conditions imposed on the AFP’s construction were not a policy with nationwide economic or political significance. The GHG Conditions were imposed based on the individual features of the TGP construction project and have not been imposed nationwide on LNG projects authorized by FERC’s recent Section 7 CPCN orders.<sup>39</sup> The GHG Conditions did not impact the estimated maximum 9.7 million metric tons of CO<sub>2</sub>e emissions per year from the

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<sup>39</sup> See 199 FERC ¶ 72,201, at 72,284, 72,286.

completed pipeline, but instead focused on temporarily reducing the emissions of the construction project by less than 1% compared to a single year of projected maximum emissions.<sup>40</sup> By comparison, the Clean Power Plan at issue in *West Virginia* would have had “coal provide 27% of national electricity generation [by 2030] down from 38% in 2018... entail billions of dollars in compliance costs ... require the retirement of dozens of coal-fired power plants, and eliminate tens of thousands of jobs across various sectors.” *West Virginia*, 142 S. Ct., at 2604. The GHG conditions claimed no power to regulate the national economy. *See Raimondo*, 45 F.4th, at 365. The Court should accordingly find that the GHG Conditions on the AFP’s construction did not address a major question.

**B. FERC Has Exercised the Clear Power to Impose Similar GHG Mitigation Conditions in the Past**

FERC has historically exercised its clear power to impose environmental protection conditions like the GHG Conditions imposed on the AFP’s construction. Where the authority asserted by an agency is “unprecedented” and “[effects] a ‘fundamental revision of the statute, changing it from one sort of scheme of regulation’ into an entirely different kind” this fact weighs in favor of finding a major question. *West Virginia*, 142 S. Ct., at 2612 (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)). Courts are “more hesitant to recognize new-found powers in old statutes against a backdrop of an agency failing to invoke them previously ... and the Court has said that we should be skeptical when the asserted

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<sup>40</sup> *See* 199 FERC ¶ 72,201, at 72,272-72,273, 72,275. 104,100 metric tons per year minus 88,340 metric tons per year, times four years of pipeline construction, equals 63,040 metric tons of CO<sub>2</sub>e emissions. This is approximately 0.6% of 9.7 million metric tons of CO<sub>2</sub>e emissions, which is used as an estimated value in the absence of a more precise yearly downstream emissions estimate. *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (FERC can and must estimate foreseeable project emissions even where emissions quantities are somewhat uncertain).

authority falls outside the agency’s traditional expertise.” *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 297 (4th Cir. 2023).

FERC’s power to attach reasonable terms and conditions includes the power to mitigate direct or indirect GHG emissions which FERC could reasonably foresee. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017); *see also* 40 C.F.R. § 1508.8(b) (defining indirect effects). “Effects are reasonably foreseeable if they are ‘sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.’” *Sierra Club*, 867 F.3d at 1371 (citations omitted). In *DOT v. Public Citizen*, 541 U.S. 752 (2004), the Court held:

where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant cause of the effect. Hence... the agency need not consider these effects in its EA. *Id.* at 770 (internal quotation marks omitted).

The contrapositive must be true then that, if FERC *does* consider the effects of GHG emissions from the AFP’s construction, then FERC *does* have the statutory authority to prevent certain GHG emissions from the construction. *Cf. Ormrod v. Hubbard Broad., Inc.*, 328 F. Supp. 3d 1215, 1230 (D.N.M. 2018) (if a proposition is true, its contrapositive must also be true). FERC can and has historically considered the effects of GHG emissions, so FERC does have the statutory authority to mitigate them. *See, e.g.*, Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (considering effects of GHG emissions).

FERC has historically exercised its clear power to mitigate GHG emissions in project construction. In the past, FERC has required a CPCN applicant to “[use] buses or vans to transport workers, [limit] use of construction equipment to an as-needed basis, and [operate] vehicles in a manner consistent with EPA mobile source emission regulations.” *Millennium Pipeline Co., L.L.C.*, 157 FERC ¶ 61,096, 61,330 (2016). FERC has also previously incorporated

mitigation measures identified in Environmental Assessments as requirements in an authorization issued under Section 3 of the NGA. *See Sabine Pass Liquefaction, LLC*, 140 FERC ¶ 61,076, 61,452 (2012). FERC has historically imposed reasonable GHG mitigation requirements on pipeline project construction activities. This fact weighs against any assertion that the GHG conditions addressed a major question.

**V. EVEN IF THE GHG CONDITIONS IMPOSED BY FERC DID ADDRESS A MAJOR QUESTION, FERC HAD CLEAR AUTHORIZATION UNDER THE NGA TO IMPOSE THEM**

If the GHG Conditions present a major question, the Court should find that FERC had clear congressional authorization under the NGA to impose them. Clear congressional authorization requires more than “a colorable textual basis... ‘modest words,’ ‘vague terms,’ ‘subtle devices’ ... [or] oblique or elliptical language.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). This authorization is unlikely to come from an “ancillary provision of the [NGA],” *Id.* at 2610 (cleaned up), “vague language” in “a long-extant statute,” *id.* or a provision about which “[FERC] has no comparative expertise in making certain policy judgments.” *Id.* at 2612-13 (internal quotation marks omitted). Clear authorization may be found where “old statutes [are] written in ways that apply to new and previously unanticipated situations,” *Id.* at 2623 (Gorsuch, J., concurring).

FERC relied on Section 7(e) of the NGA to impose the GHG Conditions.<sup>41</sup> Section 7(e) is not ancillary or vague. FERC has unique and congressionally recognized expertise in environmental protection measures imposed on the construction of LNG pipelines. Indeed, Congress was so clear in its recognition of FERC’s broad expertise on these matters that it granted FERC the exclusive authority to authorize interstate LNG pipelines “upon such terms

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<sup>41</sup> 199 FERC ¶ 72,201, at 72,291.



and conditions as the Commission may find necessary or appropriate.” 15 U.S.C. § 717b(a).

Because Congress granted FERC clear authorization to impose the GHG Conditions at issue, the Court should not disturb FERC’s determination that these conditions are reasonably required for the public convenience and necessity even if they present a major question.

**A. Section 7 of the NGA is not Ancillary or Vague**

FERC’s clear authority to impose GHG conditions is found in Section 7(e) of the NGA, codified at 15 U.S.C. § 717f(e), which gives FERC discretion to impose conditions on CPCNs. “It is unlikely that Congress will make an ‘extraordinary grant of regulatory authority’ through ‘vague language’ in ‘a long-extant statute.’” *West Virginia*, 142 S. Ct., at 2623 (Gorsuch, J., concurring) (citations omitted). A statutory provision is ancillary if it is “designed to function as a gap filler and had rarely been used in the preceding decades.” *West Virginia*, 142 S. Ct., at 2610. Although 15 U.S.C. § 717f(e) is long extant, it is not ancillary or vague. *See* Natural Gas Act, amendment, ch. 49, 56 Stat. 83 (1942) (codified at 15 U.S.C. § 717f(e)).

In *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001), the Court found that Section 109(b)(1) of the Clean Air Act, codified at 42 U.S.C. § 7409(b)(1), was ancillary in response to the EPA’s assertion “that Congress would give to the EPA through ... modest words the power to determine whether implementation costs should moderate national air quality standards.” *Whitman*, 531 U.S., at 468. There, 42 U.S.C. § 7409(b)(1) specifically limited the basis for the “judgment of the Administrator” to specific “[air quality] criteria... allowing an adequate margin of safety... requisite to protect the public health.” *Id.* Put simply, “Congress... does not, one might say, hide elephants in mouseholes.” *Whitman*, 531 U.S., at 468 (citing *MCI Telecomms. Corp.*, 512 U.S., at 231; *Brown & Williamson Tobacco Corp.*, 529 U.S., at 159-60).

15 U.S.C. § 717f(e) and its analogue in Section 3 of the NGA have been used to impose environmental and GHG conditions on pipeline construction on multiple occasions in the

preceding decade alone. *See supra*, Part IV(B). Distinct from other cases where a provision has been ancillary, 15 U.S.C. § 717f(e) gives FERC the power to “attach” any “reasonable” conditions based on a broad concept of public convenience and necessity, not merely to “modify” conditions as in *MCI Telecomms. Corp*, 512 U.S., at 231, or to judge the safety of a decision based on a pre-existing list of enumerated factors as in *Brown & Williamson Tobacco Corp*, 529 U.S., at 140-41. *Compare* 15 U.S.C. § 717f(e) *with* 21 U.S.C. §§ 360(c)(a)(1)-(2).

Rather than being vague, 15 U.S.C. § 717f(e) has been written to apply to unanticipated situations. FERC has the clear authority to impose a broad range of conditions so long as they are reasonable. *See, e.g., Florida v. HHS*, 19 F.4th 1271, 1276, 1288 (11th Cir. 2021) (finding that 42 U.S.C. § 1395x(e), which allows for requirements “the Secretary finds necessary in the interest of the health and safety of individuals” is “a broad grant of authority...[which] does not require an indication that specific activities are permitted”); *see also Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (“Congress broadly instructed the agency to consider ‘the public convenience and necessity’ when evaluating applications to construct and operate interstate pipelines”). Because GHG emissions from pipeline construction impact public convenience and necessity, the Court should find that FERC has been given the broad authority by Congress to impose reasonable conditions on them as it has in the past on multiple occasions.

**B. FERC Has Comparative Expertise in GHG Mitigation Measures For LNG Pipeline Construction**

FERC has comparative expertise in mitigating GHG emissions during the construction of LNG pipelines like the pipeline proposed by TGP. “Administrative knowledge and experience largely account for the presumption that Congress delegates interpretive lawmaking power to the agency.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (cleaned up). “In interpreting statutes that divide authority... we presume here that Congress intended to invest interpretive power in the

administrative actor in the best position to develop these attributes.” *Gonzales v. Oregon*, 546 U.S. 243, 266 (2006) (quoting *Martin v. OSHRC*, 499 U.S. 144, 153 (1991)).

In *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) (*per curiam*), the Court found that grants of authority under 29 U.S.C. §§ 655(b), 655(c)(1) for the Assistant Secretary of Labor for Occupational Safety and Health to regulate “*occupational* safety and health standards” limited an agency’s expertise to workplace hazards specifically, not public health hazards more generally. *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct., at 665. However, the government is clearly authorized to maintain a terrorist watchlist because multiple government agencies have expertise in the general practices of “identifying individuals known to pose a risk of terrorism,” “preventing terrorist attacks,” and “detecting crimes against the United States.” *Kovac v. Wray*, 2023 U.S. Dist. LEXIS 39470, at \*16 (N.D. Tex. Mar. 9, 2023) (cleaned up).

FERC has clear and undivided expertise in imposing environmental conditions on the construction of LNG pipelines. “FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment.” *Sierra Club*, 867 F.3d, at 1373. No natural gas company may construct facilities for the transportation of natural gas without this certification from FERC, and no other body but FERC may issue the necessary certification. *See* 15 U.S.C. § 717f(c)(1)(a). The GHG conditions at issue apply only to the environmental impact of the pipeline construction processes, which lie at the heart of FERC’s expertise.<sup>42</sup> *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). FERC’s general, technical expertise in reviewing and mitigating foreseeable environmental impacts from pipeline construction projects indicates that FERC has been granted the clear authority to determine what

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<sup>42</sup> *See* 199 FERC ¶ 72,201, at 72,267.

reasonable conditions on a CPCN are best suited to mitigate GHG emissions and protect environmental quality. *See id.*; *see also* 15 U.S.C. § 717f(e).

## **VI. FERC’S DECISION NOT TO IMPOSE GHG CONDITIONS ON DOWNSTREAM AND UPSTREAM GHG IMPACTS WAS ARBITRARY AND CAPRICIOUS**

FERC’s decision to impose GHG mitigation measures on TGP’s construction activities, but no GHG mitigation measures on the upstream or downstream impacts of the AFP, was arbitrary and capricious considering the foreseeable impacts of the AFP on GHG emissions. “The reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Del. Riverkeeper Network*, 753 F.3d, at 1313 (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

GHG emissions are a foreseeable consequence from the operation of LNG pipelines. *See Ctr. For Biological Diversity v. United States Forest Serv.*, 444 F. Supp. 3d 832, 869 (S.D. Ohio 2020). After accepting an analysis of the downstream GHG impacts of the AFP, FERC concluded that “whether the TGP project will cause any significant *increase* in emissions upstream or downstream is not clear,” but FERC may not “forgo calculating the reasonably foreseeable GHG emissions... in light of the agencies’ apparent ability to perform such

calculations.”<sup>43</sup> *High Country Conservation Advocates v. United States Forest Serv.*, 52 F. Supp. 3d 1174, 1196 (D. Colo. 2014). Whether foreseeable GHG emissions are significant does not depend on where they come from, nor does it depend on a “consistent policy” for imposing conditions.<sup>44</sup> *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (citing *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013)). Since FERC has categorized small GHG emissions from the AFP’s construction as significant, FERC’s failure to conclude that the much greater GHG emissions from the extraction and combustion of LNG foreseeably resulting from the AFP are also significant and therefore require mitigation was arbitrary and capricious.<sup>45</sup>

**A. FERC’s Differentiation Between Direct and Indirect GHG Emissions From The TGP Project Was Arbitrary and Capricious**

FERC’s decision to differentiate between direct and indirect GHG emissions from the TGP project was arbitrary and capricious because it relied on factors of “direct[ness]” and lack of a “consistent policy” which Congress did not intend FERC to consider.<sup>46</sup> In determining whether to attach terms and conditions to the issuance of a certificate, FERC is instructed to act “as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). “The phrase ‘public convenience and necessity’ has long been used to signify... the balancing of the consequences which flow from the proposed action to all those matters of public concern which are affected by it.” *L. Singer & Sons v. Union P.R. Co.*, 311 U.S. 295, 311 (1940) (citations omitted); *see also Atl. Refin. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959) (the commission must “evaluate all factors bearing on the public interest”). “[The Court’s] responsibility is to ‘determine whether the [agency] has considered the relevant factors and articulated a rational

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<sup>43</sup> 199 FERC ¶ 72,201, at 72,272-72,273, 73,000.

<sup>44</sup> 199 FERC ¶ 72,201, at 72,299.

<sup>45</sup> *See* 199 FERC ¶ 72,201, at 72,298.

<sup>46</sup> 199 FERC ¶ 72,201, at 72,299.

connection between the facts found and the choice made.” *Sierra Club, Inc. v. United States Forest Serv.*, 897 F.3d 582, 594 (4th Cir. 2018) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983)). FERC has not balanced the consequences of upstream and downstream GHG emissions from the proposed action, but has instead relied on the fact that upstream and downstream GHG emissions are an indirect effect to decline to evaluate their significance.<sup>47</sup> In doing this, FERC has not articulated any “rational connection” between the fact that upstream and downstream GHG emissions are indirect and the decision to not evaluate their significance even in the absence of an official rule. *Sierra Club, Inc.*, 897 F.3d, at 594.

FERC has previously acknowledged its obligation to consider both direct *and* indirect cumulative impacts of the transmission of natural gas on GHG emissions when issuing a CPCN. *See NEXUS Gas Transmission, LLC*, 164 FERC ¶ 61,054, 61,326 (2018) (hereinafter *NEXUS*). In *NEXUS*, FERC concluded that GHG emissions from the downstream use of transported gas were not an indirect or cumulative impact because the impacts were not reasonably foreseeable. *Id.* However, in *NEXUS*, the environmental review referenced by FERC included “a lengthy discussion of climate change that quantified the amount of carbon that could be emitted per year from end-use combustion.” *Id.* at 61,327. Here, the record indicates no such discussion of the cumulative effects of potential emissions on climate change, only the maximum possible CO<sub>2</sub>e emissions from the operation of the AFP.<sup>48</sup> The cumulative effects of downstream emissions on climate change are foreseeable and must be considered even if, like in *NEXUS*, “the Commission lacks meaningful information about downstream use of the gas; i.e., specific information about

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<sup>47</sup> 199 FERC ¶ 72,201, at 72,299.

<sup>48</sup> 199 FERC ¶ 72,201, at 72,272.

identified and planned future power plants, storage facilities, or distribution networks.” *Id.* at 61,326; *see also* 40 C.F.R. § 1508.8(b).

If FERC adequately considered these indirect emissions and their impact on climate change, it is implausible that FERC would decline to mitigate them in light of FERC’s mitigation of much lower GHG-emitting construction activities involved in the TGP project.<sup>49</sup> When FERC asserts that these indirect emissions require no mitigation while the direct emissions from the AFP’s construction require mitigation, the public is “left to guess how or why the GHG emissions from the [indirect consequences] represent an insignificant contribution to the environmental consequences” not worthy of mitigation, but the lesser emissions of the same GHGs from construction activities somehow do not. *350 Mont. v. Haaland*, 29 F.4th 1158, 1170-71 (9th Cir. 2022). Simply put, GHG emissions are GHG emissions no matter where they come from. FERC’s distinction between types of emissions based on directness is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise” and so is arbitrary and capricious. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc.*, 463 U.S., at 43.

**B. FERC’s Refusal to Classify Upstream or Downstream Impacts as Significant Was Arbitrary and Capricious**

FERC’s failure to classify the upstream or downstream GHG impacts of the TGP project as significant was arbitrary and capricious because the decision entirely failed to consider an important aspect of the problem.”<sup>50</sup> *Del. Riverkeeper Network*, 753 F.3d, at 1313. FERC asserts that there is only a “weak connection between the TGP project and any increased upstream or downstream GHG impacts,” but establishes the need for the AFP by noting that decreasing demands for LNG in have led to a projected decreased use of LNG via the Southway Pipeline.<sup>51</sup>

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<sup>49</sup> 199 FERC ¶ 72,201, at 72,267, 72,273.

<sup>50</sup> 199 FERC ¶ 72,201, at 72,299.

<sup>51</sup> 199 FERC ¶ 72,201, at 72,212-72,213, 73,000.

The problem with this approach is that FERC cannot have its cake and eat it too. A significance analysis is based not on the difference between the current world and the world in which the proposed action takes place, but on “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *WildEarth Guardians*, 738 F.3d, at 303; *see also* 40 C.F.R. §§ 1508.7, 1508.25. Significance analysis must compare the future world where the AFP *is not* built to the world in which the AFP *is* built. *See Sierra Club*, 867 F.3d, at 1374-75. The Court should hold FERC to its position that, in the world where the TGP project is not approved, gas demands met by the Southway pipeline will decrease in the future by around 35%.<sup>52</sup> This decreased demand will lead to decreased net GHG emissions as less gas from the HFF is extracted and burned. FERC must measure the significance of the AFP’s impacts on upstream and downstream emissions against this alternate scenario.

Even if FERC does not know the exact upstream and downstream emissions from the use of LNG and leakage from the HFF, FERC must estimate these upstream and downstream GHG emissions *and* their impact on climate change before FERC summarily dismisses the notion that these effects are significant. *See High Country Conservation Advocates*, 52 F. Supp. 3d, at 1195-96. This “reasonable forecasting and speculation is... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry’” *Id.* (quoting *Scientists for Public Information, Inc. v. Atomic Energy Com.*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

### **C. The Court Should Remand and Vacate FERC’s Order Denying Rehearing**

The Court should remand and vacate FERC’s CPCN Order and Rehearing Order. FERC has adopted “contradictory rationales that sometimes appear in the course of lengthy and

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<sup>52</sup> 199 FERC ¶ 72,201, at 72,212-72,213.



complex administrative decisions.”<sup>53</sup> *Nat’l Ass’n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). Under these circumstances, “the decision to vacate depends on two factors: the likelihood that ‘deficiencies’ in an order can be redressed on remand, even if the agency reaches the same result, and the ‘disruptive consequences’ of vacatur.” *Sierra Club v. FERC*, 68 F.4th 630, 652 (D.C. Cir. 2023) (citations omitted).

On the first factor, FERC cannot redress the inconsistencies between its judgment that direct GHG emissions are significant and its judgment that indirect emissions are not significant without changing its positions on at least one of these judgments. *See supra*, Part VI(B). On the second factor, unlike in *Sierra Club*, 68 F.4th, at 652, nothing in the record indicates that the AFP has been partially or even completely completed, and work on the pipeline itself would not ameliorate the negative GHG impacts of the AFP.<sup>54</sup> “In [these] circumstances vacating the Commission’s orders would [*not*] be ‘quite disruptive.’” *Sierra Club*, 68 F.4th, at 652. The Court should exercise its discretion to remand FERC’s order denying rehearing with vacatur.

### **CONCLUSION**

For the foregoing reasons, the Court should remand and vacate the CPCN Order. TGP’s Petition for Rehearing should be denied. If the Court upholds CPCN Order, the Court should require that the AFP be constructed along the alternative proposed route through the Misty Top Mountains to comply with RFRA, and that FERC impose mitigation conditions on the upstream and downstream GHG impacts of the pipeline.

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<sup>53</sup> 199 FERC ¶ 72,201, at 72,212-72,213, 73,000.

<sup>54</sup> 199 FERC ¶ 72,201, at 72,210.