

C.A. No. 23-01109

NON - MEASURING BRIEF

UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

HOLY ORDER OF MOTHER EARTH  
*Plaintiff-Appellant*

v.

FEDERAL REGULATORY ENERGY COMMISSION  
*Defendant-Appellee*

-and-

TRANSNATIONAL GAS PIPELINES, LLC.  
*Plaintiff-Appellant*

v.

FEDERAL REGULATORY ENERGY COMMISSION  
*Defendant-Appellee*

On Appeal from FERC's Order Denying Rehearing (Docket No. TG21-616-000),  
Commissioners Jane D. Clark, Scott P. Williams, Timothy S. Child, and Wendy L. Bankman

Brief of Appellant, TRANSNATIONAL GAS PIPELINES, LLC.

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## **STATEMENT OF JURISDICTION**

In consolidated cases No. 23-01109 and 23-1110, the Federal Energy Regulatory Commission (“FERC”) denied a rehearing requested by the Holy Order of Mother Earth (“HOME”), who sought a rehearing based on FERC’s granting of a Certificate to Public Convenience and Necessity (“Certificate”) to Transnational Gas Companies, LLC (“TGP”). FERC also denied a rehearing request from TGP regarding FERC’s conditions imposed on TGP attached to the Certificate grant. Both parties sought appellate court review following FERC’s denial. Both parties all filed timely Notices of Appeal pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal under 15 U.S.C. § 717r(b), which provides an avenue to seek review of FERC decisions.

## **STATEMENT OF ISSUES PRESENTED**

- I. Was FERC’s finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence insofar as FERC found a project needed where 90% of the gas transported by that pipeline was for transport?
- 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 RFRA?
- IV. Were the GHG Conditions imposed by FERC beyond FERC’s authority under the NGA?
- V. Was FERC’s decision not to impose any GHG conditions addressing downstream and upstream GHG impacts arbitrary and capricious?

## STATEMENT OF THE CASE

### I. Open Season for Service

Between February 21 through March 12, 2020, TGP held an open season for service for a new pipeline project, the American Freedom Pipeline (“AFP” or “pipeline”). *See* Order at 6. In the liquid natural gas (“LNG”) industry, this process requires LNG projects to transparently offer transportation services to the market and third parties not involved in the project.<sup>1</sup> It also allows for information procurement about the project, acquire project sponsors, and plan for further expansion and development associated with the project<sup>2</sup>.

As a result of the open season, TGP executed binding precedent agreements with two companies – (1) International Oil and Gas Corporation for 450,000 dekatherms (Dth) per day of firm transportation service and (2) New Union Gas and Energy Services Company for 50,000 Dth of firm transportation service. *Id.* Together, they both equal to the full design of the TGP project (transporting 500,000 Dth). *Id.*

The details of the AFP project include gas being produced and later liquified at the Hayes Fracking Field in Old Union. *Id.* The plan is to reroute 35% of the production through the AFP rather than continue to utilize the existing Southway Pipeline. *Id.* TGP presented to FERC evidence that due to a population shift, efficiency improvements, and increasing electrification of heating, the LNG demands in the eastern region of Old Union have steadily decreased. *Id.* This, according to TGP, warrants rerouting LNG from the Southway pipeline to the AFP. TGP also states that this rerouting would not cause gas shortages. *Id.*

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<sup>1</sup> *Open Season*, TRANS ADRIATIC PIPELINE, <https://www.tap-ag.com/glossary/open-season#:~:text=A%20procedure%20used%20to%20improve%20access%20to%20transport%20capacity%20in%20pipeline%20projects> (last visited Nov. 20, 2023).

<sup>2</sup> *Id.*

International operates a receipt meter station on the shore of Lake Williams in New Union City. TGP plans to divert the LNG purchased from International from the Burden Road receipt meter station to the existing NorthWay Pipeline, currently not operating at full capacity. *Id.* This pipeline will carry the LNG to the New Union City receipt meter station, located at the Port of New Union on Lake Williams. *Id.* Lake Williams is connected to the Atlantic Ocean through the White Industrial Canal. *Id.* Finally, the LNG will be loaded onto LNG tankers for export (90%) to Brazil by International. *Id.*

## **II. Filing an Application to FERC**

On June 13, 2022, TGP filed an application to FERC pursuant to section 7(c) of the Natural Gas Act (NGA) and Part 157 of FERC's regulations for authorization to construct and operate an approximately 99-mile long, 30-inch diameter, \$599 million interstate pipeline (AFP) and pertinent facilities extending from a receipt point in Jordan County, Old Union to a proposed interconnection with an existing TGP gas transmission facility in Burden County, New Union. *See Order at 4.*

The proposed pipeline is to provide up to 500,000 Dth per day of transport and will include a receipt meter station and a receipt tap in Jordan County, Old Union (Main Road M&R Station); a meter, regulation, and delivery station located in Burden County, New Union (Broadway Road M&R Station); mainline valve assemblies at eight locations along the TGP pipeline; pig launcher/receiver facilities and pig trap valves at the Main Road station; and cathodic protection and related facilities. *See Order at 5.*

A receipt meter station refers to each place on a pipeline at which natural or residue gas can be received and the quantity that was received can be measured.<sup>3</sup> A pig launcher and receiver facility refers to the process where pressure containing vessels or sections of piping within a pipeline system are used for pipeline maintenance, cleaning, and inline inspection.<sup>4</sup> A launcher is located at the upstream end of the pipeline to launch the “pig” into the pipeline. *Id.* A receiver is located downstream to remove the “pig” from the pipeline. *Id.* An M&R station tracks the volume of natural gas as it is transported and distributed.<sup>5</sup> These stations also use different meters and other measuring equipment to continuously measure the flow of gas and reduce the pressure of gas (if needed) as it passes through these checkpoints. *Id.* Finally, a cathodic protection facility allows for the protection of the steel pipelines in order to prevent corrosion.<sup>6</sup>

### III. Publishing the Interim Guidance

On January 9, 2023, the Council of Environmental Quality (“CEQ”) published interim guidance addressing climate change as it relates to the National Environmental Policy Act (“NEPA”). *See* Order at 14. The council raised the alarm for a potential climate change catastrophe and encouraged agencies to mitigate Greenhouse Gas emissions (“GHG”) through the promulgation of GHG reduction policies that are designed to aver the worst of climate change implications. *Id.* (citing National Environmental Policy Act Guidance of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 8, 2023)). CEQ urged agencies enact

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<sup>3</sup> *Receipt Meter Station*, LAW INSIDER, <https://www.lawinsider.com/dictionary/receipt-meter-station> (last visited Nov. 20, 2023).

<sup>4</sup> *Pig Launchers*, ALLIED RELIABILITY, <https://www.alliedreliability.com/pig-launchers-receivers> (last visited Nov. 20, 2023).

<sup>5</sup> *Natural Gas Meter Stations*, TRANSCANADA, chrome-extension://nlacalpbmpioeidemdfedkfmglobidl/<https://www.tcenergy.com/siteassets/pdfs/discover-energy/transcanada-natural-gas-meter-stations-fact-sheet.pdf> (last visited Nov. 23, 2023).

<sup>6</sup> *Preventing Corrosion with Cathodic Protection*, TC ENERGY, chrome-extension://nlacalpbmpioeidemdfedkfmglobidl/<https://www.tcenergy.com/siteassets/pdfs/commitment/safety/pipelines-and-operations/tc-cathodic-protection.pdf> (last visited Nov. 20, 2023).

policies that are consistent with “national, science-based GHG reduction policies designed to avoid the worst impacts of climate change.” *Id.* Generally, agencies like FERC – which is an independent agency and is not required to follow CEQ rules and regulations – typically follow CEQ rules and regulations. *Id.*

#### **IV. Granting the Certificate of Public Convenience and Necessity**

On April 1, 2023, FERC issued an order that granted a Certificate of Public Convenience and Necessity (“Certificate”) to TGP. *See* Order at 2. The order contained conditions that are designed to mitigate GHG emissions that would result from the construction (heavy machinery, cutting down trees, etc.) that 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) [e]lectric chainsaws and other removal equipment, where available; and (b) [e]lectric 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.” *See* Order at 14.

#### **V. Seeking and Denying a Rehearing**

On April 20, 2023, an owner of land that the pipeline will pass through, HOME, sought a rehearing from FERC based on certain issues leading and resulting to the Certificate, including the export implications of the new pipeline, the balance between environmental and social harms versus public benefits, religious exercise violations, and the conditions imposed by FERC to TGP. *See* Order at 2

HOME is a not-for-profit religious organization. *See* Order at 5. It is a religious order that considers the natural world to be sacred. *See* Order at 11. It was established in 1903 in

response to the Industrial Revolution and the harmful effects flowing from that period, focusing on the principle that nature itself is a deity that should be worshipped and respected. *Id.* HOME asserts that its fundamental core tenet is that humans should be custodians of nature, doing anything possible to promote above all else natural preservation. *Id.* HOME asserts that its biggest religious tradition, the Solstice Sojourn, would be significantly impacted by the pipeline construction. *Id.* The Sojourn, religious followers make a ceremonial journey from a temple on the western border of the property to a sacred hill – where the children who reached the age of 15 in the prior six months to undergo a religious initiation ceremony – on the eastern border of the property at the foothills of the Misty Top Mountains, then continue the journey along a different path. *Id.*

On April 22, 2023, TGP also sought a rehearing from FERC in regard to the conditions imposed by FERC in the Certificate. *See* Order at 2. TGP asserts that FERC exceeded its regulatory authority in enacting those conditions in the Certificate. *See* Order at 14. TGP argues that it is a “major question” that exceeds Congressional intent in delegating regulatory authority to FERC. *Id.* Climate Change mitigation measures, TGP asserts, is a question that is left to Congress, not FERC. *Id.*

On May 19, 2023, FERC issued an order that denied both petitions for rehearing and ultimately affirming the Certificate as initially issued. *See* Order at 2. Amongst its arguments, FERC stated that it properly balanced the adverse impacts (such as the loss of trees, religious infringement implications, and construction effects) with the public benefits (the contents of TGP’s application) as well as mitigating adverse effects through imposing conditions onto TGP and working with HOME throughout the pipeline planning process. *See* Order at 4-19. FERC also states that the conditions imposed were not “major questions” and were within the

regulatory scope and blessing of Congress. Specifically, FERC argues that it does not seek to impose industry-wide mitigation measures, rather case-by-case “as needed” measures. On June 1, 2023, HOME and TGP filed Petitions for Review of the CPCN Order and Rehearing Order with the District Court. Finally, on June 15, 2023, FERC entered an order issued on June 1, 2023, denying a rehearing for both parties. *See* Order at 3.

### **SUMMARY OF THE ARGUMENT**

FERC did not act arbitrarily or capriciously when granting the Certificate to TNG under the NGA when 90% of the gas transported will be used for export. 15 U.S.C. § 717f(e) allows FERC to grant Certificates of Public Necessity to construct new pipelines that move in interstate commerce that “is or will be required by the present or future public convenience and necessity.” While the ultimate goal is to transport 90% of the gas to Brazil, contrary to HOME’s assertion, this is not the determinate factor that FERC should rely on when deciding to grant a certificate. Rather, courts have acknowledged that export implications are just one factor in determining whether there is a public interest when granting a certificate. *Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015). Congress nor the courts have made any distinction between a “domestic” or “foreign” need, rather grouping them all as a “public interest.” *See generally, City of Oberlin, Ohio v. FERC*, 39 F.4th 719 (D.C. Cir. 2022); *see generally*, 15 U.S.C. 717b(c).

While Brazil is not a trading partner of the United States, and thus does not enjoy a presumptive public interest designation, the mere fact that international concerns are addressed in the statute signifies that the statute should not be interpreted as only requiring a “domestic need.” Not only that, but there is still a significant public need or interest in this project, regardless of whether it is exported to Brazil or not. Not only does it increase domestic output in

the United States and serves large amounts of Americans, it also increases competition, promotes innovation, and most importantly, with exporting 90% of the gas to Brazil, the United States gains a stronger position in the international gas markets, allowing the U.S. to reap greater rewards in international trade, ultimately further benefitting American consumers. In addition, it allows for American allies to depend on the United States and not on her enemies. Thus, even in HOME's argument, this project, even if read to be a "domestic statute," primarily serves a domestic need.

FERC did not act arbitrarily or capriciously when weighing the environmental and social harms against the public benefit when granting the Certificate to TGP. FERC uses its Certificate Policy Statement to evaluate factors that would merit granting a Certificate. The statement outlines a two-part test: (1) "whether the project can proceed without subsidies from the applicant's existing customers" and (2) FERC balances the "public benefits" against the potential adverse consequences" of the proposal. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61, 128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61, 094 (July 28, 2000) (Certificate Policy Statement); 88 FERC at 61, 745. The first prong is undisputed. As for the second prong, FERC properly weighed the public benefits (increased transportation capacity, increased access to new and underserved customers, and potential economic benefits to the community and to the United States) against any perceived adverse consequences of the proposal (a barren spot on HOME's property from the cut down trees, the changes resulting from the construction project cutting through the property, and the religious implications flowing from the project). FERC and TGP mitigated those adverse impacts by FERC requiring FERC to plant around the same number of trees that were loss through the trees being cut down, and TGP agreeing to expedite the construction

process to take four months and to bury the pipeline underneath HOME property. Through an economic test, FERC properly concluded that the public benefits outweighed the residual adverse impacts.

FERC did not violate the Religious Freedom Restoration Act (“RFRA”). *See generally*, 42 U.S.C. § 2000bb-1. HOME failed to make a prima facie showing that the government posed a substantial burden. Even if HOME managed to make the prima facie showing, the government can prove that it had a compelling interest and used the least restrictive means to effectuate that interest. HOME argues that ultimately having the pipeline on their land will coerce them to act in a manner contrary to their religious beliefs, forcing them to alter their beliefs. *See, Navajo Nation v. U.S. Forest Service*, F.3d 1058 (D.C. Cir. 2008); *see, Thiry v. Carlson*, 78 F.3d 1491 (D.C. Cir. 1996). In addition, HOME argues that this construction of the pipeline will force their members from undertaking their bi-annual Solstice Sojourn. However, these are not cognizable injuries. HOME merely states aesthetic reasons in its attempt to bolster a claim of substantial burden. The government is not restricting them from carrying out their religious observances. The government is not coercing them to comply with a government benefit or a government sanction, civil or criminal. Even if HOME managed to make a prima facie showing, the government had a compelling interest (improving the national gas network interconnection and providing service to customers in two states) and narrowly tailed that interest in the least restrictive manner possible (burying the pipeline, replacing most lost trees save for one barren spot on HOME property). HOME is still free to continue their religious practices with minimal interference.

FERC exceeded its Congressional mandate when imposing the GHG conditions attached to its granting of the Certificate to TGP. Based on the proposal for building the AFP, the conditions imposed by FERC are beyond FERC’s regulatory authority under the NGA. The

Major Questions doctrine states that administrative agencies can only exercise their powers if there is a clear congressional delegation of such authority to the agency. Congress must explicitly grant extraordinary powers to an agency to act on issues of great economic and political significance. *W. Virginia v. EPA*, 142 S. Ct. 2587 (2022). The conditions imposed by FERC address “major questions” because they seek to regulate GHG emissions, which implicate issues of great economic and political significance. *Id.* Because the regulatory acts of FERC in this case implicate “major questions,” the agency has acted beyond the statutory authority intended to be given it by Congress.

Even if FERC did not exceed its Congressional mandate, FERC choosing not to impose upstream or downstream impacts in its conditions was not arbitrary or capricious. There is no need for mitigation measures designed to address upstream and downstream GHG impacts because there has not been a finding of a significant increase on the upstream and downstream GHG impacts. There is no clear connection between an increase in upstream and downstream GHG impacts and the TGP project, so FERC’s decision to not impose mitigation measures was not arbitrary and capricious.

### **STANDARD OF REVIEW**

The Court’s review of FERC’s decision is limited to determining whether the order was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

*Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (quoting 5 U.S.C. § 706(2)(A)); *see also, Minisink Residents for Env’tl. Pres. & Safety v. FERC*, 762 F.3d 97, 105-06 (D.C. Cir. 2014). The district court does not “substitute its judgment for that of the Commission.” *Nat’l Comm. For the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 1958). FERC’s decision stands and is presumed conclusive if supported by substantial evidence.

*B & J Oil & Gas v. FERC*, 353 F.3d 71,76 (D.C. Cir. 2004) (citing 15 U.S.C. § 717r(b)). The district court ensures that FERC’s “decisionmaking is reasoned, principled, and based upon the record.” *Am. Gas Ass’n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). Finally, the district court seeks to determine “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2022).

## ARGUMENT

### **I. FERC’S FINDINGS OF PUBLIC CONVENIENCE AND NECESSITY WERE NOT ARBITRARY AND CAPRICIOUS AND SUPPORTED SUBSTANTIAL EVIDENCE INsofar AS FERC FOUND A PROJECT NEEDED WHERE 90% OF THE GAS TRANSPORTED WAS FOR EXPORT.**

FERC did not act arbitrarily or capriciously when granting the Certificate of Public Necessity to TNG under the NGA. 15 U.S.C. § 717f(e) allows FERC to grant Certificates of Public Necessity to construct new pipelines that move in interstate commerce that “is or will be required by the present or future public convenience and necessity.” This statutory command directs FERC to evaluate all factors bearing on the public interest. *Atl. Refin. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

District court review of FERC’s decision is limited to determining whether the order was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1308 (2015) (quoting 5 U.S.C. § 706(2)(A)). The district court does not “substitute its judgment for that of the Commission.” *Nat’l Comm. For the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004). As a result, courts typically defer to reviewing FERC’s Certificate Policy Statement, which lays out a two-pronged test of determining (1) “whether the project can proceed

without subsidies from the applicant's existing customers" and (2) FERC balances the "public benefits" against the potential adverse consequences" of the proposal. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61, 128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61, 094 (July 28, 2000) (Certificate Policy Statement); 88 FERC at 61, 745. FERC initially seeks to inquire whether the adverse effects can be minimized or completely eliminated. *Id.* If no adverse effects would stem from the project, no balancing is required, and FERC proceeds to environmental review. *Id.* If there are any residual adverse effects, FERC balances those adverse effects with the public benefits of the project as measured by an "economic test." *Id.*

#### **A. The public benefits outweigh the adverse effects.**

FERC properly balanced adverse effects against public benefits. Factors that are included as adverse effects include increased rates for preexisting customers, degradation of service, unfair competition, or negative impact on the environment or landowners' property. 88 FERC at 61, 745. Public benefits may include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." 88 FERC at 61,748.

In this case, TGP identified in its application to FERC that it seeks to (1) increase the delivery per day (the new rate being 500,000 Dth) of natural gas, (2) provide natural gas service to areas currently without access to natural gas within New Union, (3) expand access to sources of natural gas supply in the United States, (4) optimize the existing systems for the benefit of both current and new customers by creating a more competitive market, (5) fulfill capacity in the undersubscribed NorthWay Pipeline, and (6) provide opportunities to improve regional air

quality by using cleaner-burning natural gas in lieu of dirtier fossil fuels. As explained by *Myersville*, TGP has identified in its application significant public benefits that would warrant FERC to properly grant approval of the Certificate. HOME argues that there are adverse impacts stemming from the project, and that these adverse impacts should have resulted in the denial of the Certificate. Amongst these adverse impacts include approximately 2,200 trees being cut down on the property to allow for two miles of pipeline to pass through. For safety reasons, the vast majority of trees cannot be replaced with new trees along the route, but to mitigate those losses, FERC imposed as a condition that an equal number of new trees will be planted in other locations. In addition, TGP participated in the FERC's pre-filing process and made changes to over 30% of the proposed pipeline route in order to address concerns from landowners and to negotiate mutually acceptable agreements. In HOME's case, TGP agreed to bury the pipeline entirely though its path across HOME's property and agreed to complete construction across HOME's property within four months.

Applying FERC's balancing test, the first prong is not disputed in this case. Looking at the second prong, if the Court chooses to accept HOME's tenuous argument that the loss of trees would be considered an "a potential adverse consequence," FERC and TGP properly attempted to mitigate those adverse consequences by requiring TGP to plant an equal number of trees across the property notwithstanding the pipeline path and TGP itself made concessions to HOME that would conceal the presence of the pipeline and expedite construction of the pipeline. HOME contends that barren portion would be considered a "residual adverse effect" and that TGP's concessions were insufficient, in which FERC properly proceeded to balance those residual adverse effects against the public benefit applying an economic test. FERC properly found that the precedent agreements evidenced a significant market need for the project, thus the public

benefits outweighed the “adverse effect.” This alone could justify FERC’s granting of the Certificate. However, HOME’s biggest arguments against FERC will be addressed below.

***1. Because Congress included the provision that exports sent to trading partners of the United States are considered within the public interest, this demonstrates that the statute is not based on “domestic need.”***

HOME asserts, and TGP does not object, that 90% of the liquid natural gas produced in this project will be exported to Brazil, who is not trading partner of the United States. Regardless of whether the gas will be used for export, FERC was correct in recognizing the export as a public interest. Section 3, or 15 U.S.C. § 717b(c), states that “the exportation of natural gas to a nation with which there is an effect of free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.” The Court of Appeals for the D.C. Circuit further held that “export precedent agreements are simply one input into the assessment of present and future public convenience and necessity.” *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 726 (D.C. Cir. 2022). While not the “end all, be all,” these export agreements – to trading partners or not – serve some purpose in determining public convenience and necessity.

This case is like *Oberlin* – the appellants in that case contest the construction of pipelines, citing that 17% of the natural gas was used for export. HOME similarly argues this and goes further, stating that because the NGA is a domestic statute, Congress did not intend for a “project need” to have international implications and instead the statute must be interpreted as domestic needs, not foreign needs. HOME argues that *Oberlin* is distinguishable from the instant case because only 17% of the precedent agreements in that case were for gas to be exported, some portion of the exported gas in that pipeline was expected to be imported back into the United

States, and that the company increased domestic production. HOME claims that TGP does not contribute to the domestic production and distribution of gas. However, these “novel” interpretations are incompatible with case law, the broad understanding of Section 3 of the NGA, and reflect a clear misunderstanding of TGP’s application to FERC. There is no recognized distinction between “domestic needs” and “foreign needs.” The statute states that export agreements with trading partners of the United States are to be considered to be *within the public interest of the United States*. There is no distinction between domestic and foreign needs. This is supported by *Oberlin*. Oberlin makes no distinction between domestic and foreign needs. While Brazil is not a trading partner of the United States, the fact that Congress contemplated international implications flowing from domestic gas production suggests that there is no distinction between foreign or domestic needs. Conversely, if this Court accepts HOME’s erroneous approach to distinguishing between foreign and domestic needs, TGP’s application for a Certificate to FERC clearly lays out that this project, while being tied to an international entity, will primarily serve and bolster a domestic market, first benefitting the United States, and may have a residual positive effect in Brazil.

Alternatively, even though 90% of the gas transported may serve a Brazilian market, it still has an economic benefit to the United States. The gas is being produced domestically and being sold to a foreign country, thus bolstering the United States’s position in the global energy market and contributing to job creation and growth in the United States. In addition, this growth of the United States being an international player in the international gas market provides great advantages to the United States to negotiate further trade agreements advantageous to the United States, bolster the United States’ image internationally, and allow for American allies to depend on the United States without feeling compelled to depend on adversarial nations. Thus, in either

case, domestically the United States benefits, in particular, American consumers benefit. While not serving a “traditional” or “facially” domestic need, the gas being transported to Brazil still serves a great domestic need.

Thus, FERC was properly considered that regardless of whether 90% of the gas transported was for export purposes, it still falls within the public interest category of the NGA, and thus not arbitrary nor capricious.

***2. Precedent agreements are commonly used by FERC to determine whether there is a public need for the project.***

According to FERC, a common method for applicants to substantiate a public benefit claim is to demonstrate that there is a demand for the project with precedent agreements, which are “long-term contracts with shippers who would use the pipeline to transport natural gas.” *City of Oberlin, Ohio v. FERC*, 39 F. 4th 719, 722 (D.C. Cir. 2022). Precedent agreements also signify that “all of the proposed capacity has been subscribed under long-term contracts, demonstrating a market for the project.” *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1201, 1309 (D.C. Cir. 2015) (quoting 88 FERC at 62, 748).

In the instant case, as aforementioned TGP provided FERC with binding precedent agreements for firm service using 100% of design capacity of the project. While HOME contests FERC’s determination that this is insufficient to demonstrate a market need, courts have disagreed with HOME’s position, looking at both *Oberlin* and *Myersville*, courts have deferred to FERC’s determination that companies would not enter into binding precedent agreements unless there is a financial benefit, or rather a market need for increased capacity and distribution. The need is demonstrated in TGP’s application to FERC, where TGP states that they are seeking to expand services to underserved areas and expand the gas capacity nationwide. HOME has not

provided *any* evidence to the contrary other than making allegations that precedent agreements alone are insufficient while TGP provided extensive justifications of executing these precedent agreements with both companies in its application. This demonstrates that precedent agreements evidence a market need and serve the public interest.

In sum, TGP provided FERC with ample evidence to substantiate the claim that TGP sought to serve a primarily domestic market. TGP's application supports ample reasons supporting public benefits. Notwithstanding TGP's foreign connections, much like in *Oberlin*, FERC could have issued a Certificate based on TGP's application alone and not even considered the export implications. However, while Brazil is a not trading partner to the United States and thus does not afford itself of the benefits of automatically being classified as falling "within the public interest," TGP primarily seeks to contribute and serve the United States market through upgrading its facilities and distributing more liquid natural gas from U.S. companies before being transported to Brazil. This also serves to substantiate the claim that FERC properly awarded the Certificate to TGP – defeating HOME's claim that simply because 90% of the liquid natural gas may *possibly* be exported, that it is not within the public interest. Finally, it is firmly established in case law that FERC uses precedent agreements to determine whether there is a market need – thus, demonstrating a further public benefit. Weighing all the options together, FERC properly determined that TGP be awarded a Certificate. Thus, FERC did not act outside of its established procedures, and FERC did not act arbitrarily or capriciously when awarding TGP a contract even though there is a possibility that 90% of the gas transported is for export.

## **II. FERC’S FINDINGS THAT THE BENEFITS FROM THE AMERICAN FREEDOM PIPELINE OUTWEIGHTED THE ENVIRONMENTAL AND SOCIAL HARMS WAS NOT ARBITRARY AND CAPRICIOUS.**

After completing the balancing test required by FERC’s certificate statement, FERC then proceeds to environmental review. 88 FERC at 61, 745. Much like HOME’s argument, FERC did not act arbitrarily or capriciously weighing the benefits from the pipeline against the environmental and social harms and determining that the benefits outweighed the harms. As aforementioned, 15 U.S.C. § 717f(e) allows FERC to grant Certificates of Public Necessity to construct new pipelines that move in interstate commerce that “is or will be required by the present or future public convenience and necessity.” This statutory command directs FERC to evaluate all factors bearing on the public interest. *Atl. Refin. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

Weighing the re-routing options and environmental impacts provided by HOME and balancing the public interest against adverse impacts, FERC properly concluded that the alternative proposals provided by HOME presented more adverse impacts than the original proposed pipeline. Courts have held that FERC “enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines.” *Minisink Residents for Env’t Pres. And Safety v. FERC*, 762 F.3d 97, 111 (D.C. Cir. 2014). In *Minisink*, FERC reviewed a proposed alternative (the Wagoner Alternative) provided by residents of the town to the proposed “Minisink Project.” *Id.* at 103. Under this alternative, the energy company would construct a smaller compressor station seven miles away from the town. *Id.* This alternative would also cross a river. *Id.* FERC released its Environmental Assessment several months later, along with a detailed evaluation of the project’s likely environmental impacts on water resources, vegetation and wildlife, air quality, noise, and more. *Id.* The plan also included a detailed explanation

between the initial project and the Wagoner Alternative. *Id.* Balancing the two, FERC found that the initial project was more environmentally preferable, due primarily to the negative environmental consequences that would flow from the proposed alternative. *Id.* FERC found that the initial project would bear minimal environmental impact. *Id.* The residents appealed FERC's decision, and the Court of Appeals upheld FERC's decision, reasoning that in keeping with its statutory obligations under the NGA and NEPA, FERC, in its judgment, did not think the Wagoner Alternative preferable and concluded that the initial project was more viable. *Id.* at 104.

HOME cites to *Adorers of the Blood of Christ United States Province v. Transcontinental Gas Pipe Line Co.*, 53 F.4th 56, 61 (3d Cir. 2022), arguing that much like that religious organization in the case, HOME should have had the opportunity to seek the injunctive relief that they seek ("Had the Adorers 'participated in the administrative process, FERC may have denied or modified the conditions of Transco's certificate ... [and] [u]nder these circumstances, the Adorers would have, at the very least, had the opportunity to seek the [injunctive] relief they so desire.'"). However, HOME incorrectly applies this case to the instant case. In *Adorers*, they organization chose not to participate in the administrative process and then later sought a remedy. The focus on the court was based on the participation of the organization. HOME's situation is different as HOME has participated in the process. Thus, *Adorers* is distinguished from the instant case. It is worth noting that even when looking at the language of the court, HOME was still afforded the opportunities of asking FERC to modify the certificate (which FERC responded to HOME's concerns by imposing conditions and other mitigation measures), and HOME is not denied the opportunity to seek injunctive relief.

The instant case is substantially similar to *Minisink* in that those opposed to the proposed pipeline route suggested alternatives that prove to be more harmful to the environment compared

to the original proposal. In this case, HOME provided an alternative solution to routing the pipeline through its property – rerouting the pipeline through the Misty Top Mountains and around the property, adding three extra miles of pipeline at a cost of \$51 million. Much like *Minisink*, after FERC properly balanced both proposals, the alternative proposal is more environmentally harmful as it harms sensitive ecosystems in the mountains. In addition, it would balloon the costs by \$51 million. Other than aesthetic reasons, HOME has not provided any data on the harmful environmental effects that would result in running the pipeline through the property. While HOME may argue that the loss of trees or the damages resulting from construction is enough of an environmental impact, those concerns are mitigated by TGP being required to plant an almost equal number of trees across the property. Again, HOME did not demonstrate any ecosystems affected on their property by the pipeline running through it, while FERC provided evidence of fragile ecosystems being significantly affected by the alternative route.

HOME also argues that the alternative route should have been the only route considered once introduced. However, this contravenes the longstanding policies of FERC. Interestingly, the wholesale abandoning of the initial proposal in favor of HOME’s alternative proposal *would be arbitrary and capricious* of FERC because FERC would be acting outside of its procedures of not weighing both proposals and determining which has the least environmentally damaging impacts resulting from them. HOME’s contentions that the plan should have been abandoned are without merit.

As for social harms, other than religious objections that will be mentioned further below, HOME did not provide any other evidence of social harms resulting from the construction of the

pipeline. Thus, this seems to suggest that the social harms are minimal other than for religious objections.

Weighing the environmental harms against the social harms, as mentioned above, TGP has outlined numerous public benefits (providing natural gas service to newly-served or underserved communities, expanding access to sources of natural gas supply in the United States, creating a more competitive market – including internationally – fulfilling capacity at an underutilized pipeline, and providing more environmentally friendly alternatives to energy production). These benefits far outweigh the minimal physical environmental harms and perceived aesthetic harms. Thus, FERC properly balanced the environmental and social harms against the public interest and was not arbitrary nor capricious.

### **III. FERC’S DECISION TO ROUTE THE AMERICAN FREEDOM PIPELINE OVER “HOME” PROPERTY DESPITE “HOME’S” RELIGIOUS OBJECTIONS DID NOT VIOLATE THE RELIGIOUS FREEDOM RESTORATION ACT.**

FERC did not violate the Religious Freedom Restoration Act (RFRA). RFRA, 42 USC § 2000bb-1, states in part that the “[g]overnment 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.”

The plaintiff bringing the case initially bears the burden of proof of preponderance of the evidence to allow a trier of fact to rationally find the existence of (1) the activities in question are an “exercise of religion” and (2) the governmental action “substantially burdens” the plaintiff’s exercise of religion. *Navajo Nation v. U.S. Forest Service*, 53 F.3d 1058, 1068 (D.C. Cir. 2008). If the plaintiff cannot prove either element, the RFRA claim fails; however, if the plaintiff

prevails in presenting a prima facie showing, the burden shifts to the government to prove that the challenged governmental conduct is in furtherance of a “compelling governmental interest” and is implemented by the “least restrictive means.” *Id.* at 1068-69. If the government cannot sustain this burden, courts must find that the government committed a RFRA violation. *Id.*

“Incidental effects of otherwise lawful government programs ‘which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs’ do not constitute substantial burdens on the exercise of religion.” *Thiry v. Carlson*, 78 F.3d 1491, 1495 (D.C. Cir. 1995) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988)).

The Court of Appeals for the 10th Circuit also further stated in *Werner v. McCotter*, 49 F.3d 1476, 1479 (10th Cir. 1995), government regulation

Must significantly inhibit or constrain conduct or expression that manifests some central tenet of ... [an individual’s] beliefs; must meaningfully curtail [an individual’s] ability to express adherence to his or her faith; or must deny [an individual] reasonable opportunities to engage in those activities that are fundamental to [an individual’s] religion. *Id.*

Other courts have held that a “substantial burden” is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a government benefit or coerced to act contrary to their religious beliefs under threat of civil or criminal penalties. *Navajo*, 53 F.3d at 1068. Anything short of these two categories does not fall within the meaning of “substantial burden” as applied to RFRA and does not require the introduction of the compelling interest test. *Id.*

The *Navajo* court emphasized that the “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires,” further detailing that

A broad range of government activities – from social welfare programs to foreign aid to conservation projects – will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. *Id.*

This court held that there was no “substantial burden” for the use of wastewater on a ski area that covers one percent of the peaks because this usage does not force the plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit. *Id.* at 1070. Similarly, this usage of wastewater does not coerce the plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions or not fined or penalized in any way for practicing their religion on any religious important location to the native tribe. *Id.* The court further found that the Forest Service guaranteed that religious practitioners would still have access to natural landmarks that bear a religious significance. *Id.* Finally, the court stated that the only cognizable injury the plaintiffs assert is that the wastewater usage is offensive to the plaintiffs’ religious sensibilities. *Id.* The plaintiffs assert that it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. *Id.* This could held that under the Supreme Court’s ruling in *Lyng*, the diminishment of spiritual fulfillment is not a substantial burden on the free exercise of religion. *Id.* at 1071.

Applying the test to this case, the burden initially rests on HOME to demonstrate that (1) the activities in question are an “exercise of religion” and (2) the governmental action “substantially burdens” the plaintiff’s exercise of religion. It is undisputed that HOME satisfies

the first prong. In terms of “substantial burden,” HOME must demonstrate that the activities of FERC approving the pipeline are those that either significantly restrain conduct or expression that manifests some central tenet of their beliefs; must meaningfully curtail their ability to express adherence to his or her faith; or must deny their reasonable opportunities to engage in those activities that are fundamental to their religion. Alternatively, HOME must demonstrate that they are forced to choose between following the tenets of their religion and receiving a government benefit or coerced to act contrary to their religious beliefs under threat of civil or criminal penalties.

HOME argues that the pipeline will significantly restrain their religious activities, particularly their annual Solstice Sojourn. HOME’s members have testified that walking over the pipeline and passing through the desolate land would significantly restrain their conduct or disallow them to partake in their most religious experience. In effect, they argue that they are denied reasonable opportunities to engage in this activity this is fundamental to their religion. Particularly, members of HOME stated that, while perhaps not physically prevented from undertaking their sojourn, it would “unimaginable” and would destroy the meaning of the Solstice Sojourn. Speaking about the pipeline in its entirety, HOME asserts that the entire project offends their religious practices and beliefs, and that the project is compelling HOME to support the environmental harm resulting from the project. This brings the instant case in line with *Navajo*, where the court held that the Forest Service allowing wastewater to be recycled and used on mountain peaks sacred to the Navajo (the wastewater used on the peaks was offensive to their religious beliefs) did not pose as a substantial burden on their religious beliefs or practices, thereby not violating RFRA. Much like *Navajo*, HOME does not articulate a cognizable injury.

In fact, according to HOME's own religious beliefs, nature itself should be viewed as a deity that should be worshipped and respected. HOME's proposal of redirecting the pipeline to go through a mountain and destroying the fragile ecosystems present there would seem to run even more afoul of HOME's religious beliefs as well. If nature itself is a deity, and nature is omnipresent, then *every* place containing nature would be sacred to HOME. Conversely, this would also mean that *no place* would be more sacred than others if nature is an all-present deity. This would permanently hamstring the government from undertaking *any* project of national importance. The members of the religion are not being forced to stop practicing their religion or significantly alter their religion. The members simply state that it "would not be the same" as before, even though they are still present in nature and are able to still undertake their Summer Sojourn as before. Their injuries, like the Navajo, are merely aesthetic. Much like the Supreme Court held, the mere diminution in spiritual fulfillment of the members undertaking their Solstice Sojourn is not enough to constitute a substantial burden.

Similarly, if HOME were to apply the other test for substantial burden, they are not faced with choosing between their religion and receiving a government benefit, nor are they coerced through civil or criminal liabilities to allow the project to pass. In fact, both TGP and FERC have worked with HOME to minimize impacts to the property.

However, HOME argues that the Certificate order is compelling HOME to support the production, transportation, and burning of fossil fuels, which could fall under meaningfully curtailing their ability to express adherence to their faith. While they are still likely to continue to practice their faith with no prohibition from the government, an argument can be made that this allowance of the pipeline being built on their property would force them to change behavior, running afoul of their sincerely held religious belief.

Assuming HOME can satisfy the alternative burden prong, the burden shifts to the government to state a compelling interest that is the least restrictive as possible. FERC cleared that burden. FERC and TGP both worked with HOME to craft a regime that would pose the least amount of intrusion onto HOME as possible, including burying the pipeline across the property and operating under an expedited construction timetable. In addition, the alternative route would have cost \$51 million extra, bore through a mountain, and caused irreparable damage to the fragile ecosystem in the mountains. FERC picked the least restrictive means to meet the compelling interest. The government had a compelling interest in running the pipeline, as it contributed to the national distribution network, served underserved or not-served communities, and contributed to the international economic and commercial standing of the United States. Thus, FERC satisfied its burden. This echoes what the court stated in *Navajo*: that governmental activities, wide-ranging as they are, will always upset someone's religious sensibilities. The government would absolutely be paralyzed in its function if that were the case that any action it undertook that offended someone's religious sentiments would be a RFRA violation. It is the job of the court to filter out those mere "offensive sensibilities" from "substantial burden." HOME falls into the former category.

HOME failed to state a cognizable injury and failed to demonstrate a true "substantial burden." Alternatively, if HOME did manage to meet its prima facie burden, FERC demonstrated that it implemented the least restrictive means to affect its compelling governmental interest. Thus, overwhelmingly, FERC did not violate the Religious Freedom Restoration Act.

#### **IV. FERC EXCEEDED ITS STATUTORY AUTHORITY BY IMPOSING CONDITIONS THAT WERE BEYOND THE SCOPE OF WHAT WAS CONGRESSIONALLY INTENDED WITHIN THE NGA.**

The NGA instructs to consider “the public convenience and necessity” when evaluating applications to construct and operate interstate pipelines and to “attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). Based on the proposal for building the AFP, the conditions imposed by FERC are beyond FERC’s regulatory authority under the NGA. The Major Questions doctrine states that administrative agencies can only exercise their powers if there is a clear congressional delegation of such authority to the agency.<sup>7</sup> Congress must explicitly grant extraordinary powers to an agency to act on issues of great economic and political significance. *Id.* The conditions imposed by FERC address “major questions” because they seek to regulate GHG emissions, which implicate issues of great economic and political significance. Because the regulatory acts of FERC in this case implicate “major questions,” the agency has acted beyond the statutory authority intended to be given it by Congress.

FERC argues that GHG conditions cannot be seen as addressing “major questions” because they are specific and individual measures focused on one proposed project and, therefore, don’t address a nationwide issue that requires specific authorization from Congress. However, FERC lacks the authority and expertise to make national policy judgments, and Congress has never tasked it to regulate greenhouse gas emissions.

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<sup>7</sup> CONG. RSH. SERV., LSB10745, THE SUPREME COURT’S “MAJOR QUESTIONS” DOCTRINE: BACKGROUND AND RECENT DEVELOPMENTS (2022).

For FERC to not exceed the authority granted by the NGA, the Major Questions doctrine would require more explicit congressional delegation. In the case of *West Virginia v. Environmental Protection Agency*, the EPA attempted to regulate a fundamental sector of the economy by establishing the best emissions reduction system for power plants through the Clean Air Act, which used complex formulas to determine state emission rates. *W. Virginia v. EPA*, 142 S. Ct. 2587 (2022). In 2019, the EPA repealed the new rule, stating that the formula chosen could not serve as an emissions-reduction standard. After the United States Court of Appeals for the District of Columbia vacated the EPA's repeal of the new rules and returned the case to the EPA, West Virginia filed a petition for certiorari, which the Supreme Court granted. Ultimately, the United States Supreme Court held that the EPA exceeded its authority by adopting the new emissions rule. *Id.* The Supreme Court reasoned that the EPA claimed to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of “a long-extant” but rarely used statute designed as a “gap filler.” *W. Virginia*, 142 S. Ct. at 2595. The EPA had argued that the “best system of emission reduction” identified by EPA in the Clean Power Plan was within the authority granted to the agency in the Clean Air Act. Instead, the Supreme Court found that determining emission caps was beyond their statutory authority. *Id.*

The rule in *West Virginia* established that the EPA was only tasked with balancing the many vital considerations of national policy implicated in the basic regulation of how Americans get their energy. When citing its authority to establish emission caps at a level reflecting the “best system of emission reduction that has been adequately demonstrated,” the EPA failed to point to clear congressional authorization” for it to regulate so, as required under “major questions.”<sup>8</sup> The

issues of electricity transmission, distribution, and storage are outside its traditional expertise. The Supreme Court stated that in the section of the CAA establishing the New Source Performance Standards program, Congress did not grant the EPA the authority to devise emissions caps based on the generation-shifting approach the agency took in the Clean Power Plan. The court reasoned that this view of EPA's authority was unprecedented; it affected a "fundamental revision of the statute, changing it from [one sort of] scheme of... regulation" into an entirely different kind. Under the Major Questions doctrine, the agency must point to "clear congressional authorization" for the authority it claims. *Id.* Without clear congressional authority, the agency effectively acted beyond the scope of its legislative mandate.

Similarly, in this case, Section 7 of the NGA empowers FERC to set specific terms and conditions when granting this authorization "if public convenience and necessity may require." 15 U.S.C. § 717f(e). However, when granting conditions that have a far-reaching political and economic impact, the FERC acts beyond statutory authority. Congress would have to empower FERC to do so. By imposing conditions on TGP to regulate greenhouse gas emissions when building the American Freedom Pipeline, FERC is going beyond the congressional authority that was originally intended within the plain meaning of the statute. FERC's scope does not include setting arbitrary standards to regulate GHG environmental impact. While NEPA encourages FERC to take necessary steps to reduce environmental impact, this type of regulation raises significant political and economic concerns, as it sets a new standard for greenhouse gas emissions. There is no evidence or data to support the appropriateness of these arbitrary standards, and FERC lacks the authority to establish standards for greenhouse emissions that future pipeline companies would have to meet.

FERC has yet to publish final guidance on mitigating GHG impacts, and the GHG Conditions are beyond the existing statutory and regulatory requirements. The conditions in the CPCN Order include: TGP being required to plant or cause to be planted an equal number of trees as those removed in the construction of the TGP Project; TGP being required to utilize electric-powered equipment in the construction of the TGP Project, including chainsaws and electric powered vehicles; TGP being required to purchase only “green” steel pipeline segments produced by net-zero steel manufactures; and, finally, TGP being required to purchase all electricity used in construction from renewable sources where such sources are available.

Each condition to mitigate GHG impacts of the AFP construction in the CPCN raises a major question of political and economic concern. The step to plant or cause to be planted an equal number of trees as those removed in the construction of the TGP project dictates the environmental conditions under which trees can be planted, which has economic and political implications. If trees take up a lot of space, and if other businesses have interests in using that land in a more valuable economic and political way, then planting trees may not be in the best interest of society. This raises a significant question about the agency's jurisdiction and what it is authorized to act upon.

Furthermore, the requirement to use electric-powered equipment in constructing the TGP Project, including electric chainsaws and electric-powered vehicles, even when limited by the language, “wherever practical,” has vast and serious political and economic impacts. A company that sells non-electric equipment to TGP for building pipelines may have a contract with TGP to sell over an extended period; in this case, the seller would need to modify or replace their equipment to meet the proposed electric standards. Naturally, certain companies may be favored over others, which could lead to the chilling of any non-electric tool selling and the federal

government creating an electric-tool seller monopoly in the name of energy regulation. Requiring the use of electrical equipment gives preference for government contracts to electronically operated equipment, so it economically burdens companies that sell non-electronic equipment.

Furthermore, the decision to shift towards electric vehicles carries significant political implications, as it involves a comprehensive overhaul of the nation's infrastructure. This includes revamping manufacturing processes, sourcing sustainable energy, and establishing new distribution channels. The success of such a transition depends on the company's ability to navigate the complex political landscape of regulations, subsidies, and public perception.

Thus, FERC imposed conditions beyond its regulatory authority under the NGA. The NGA requires considering the public convenience and necessity when reviewing interstate pipeline proposals. The Major Questions doctrine requires that agencies can only exercise their powers over areas of national economic and political significance if there is a clear congressional delegation of authority to the agency. Since FERC's regulatory acts in this case regulate GHG emissions, which implicate issues of great economic and political significance, it has exceeded the statutory authority intended by Congress.

**V. THE DECISION MADE BY FERC TO NOT IMPOSE ANY MITIGATION MEASURES FOR UPSTREAM AND DOWNSTREAM GHG IMPACTS WAS NOT ARBITRARY AND CAPRICIOUS.**

FERC did not act arbitrarily or capriciously when the Commission chose not to impose any mitigation measures for upstream and downstream GHG impacts. 15 U.S.C. § 717f(e) allows FERC to grant Certificates of Public Necessity to construct new pipelines that move in interstate commerce that “is or will be required by the present or future public convenience and necessity.” This statutory command directs FERC to evaluate all factors bearing on the public interest. *Atl. Refin. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

District court review of FERC's decision is limited to determining whether the order was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

*Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (quoting 5 U.S.C. § 706(2)(A)). The district court does not "substitute its judgment for that of the Commission." *Nat'l Comm. For the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

TGP agrees with FERC that there is no need for mitigation measures designed to address upstream and downstream GHG impacts because there has not been a finding of a significant increase on the upstream and downstream GHG impacts. There is no clear connection between an increase in upstream and downstream GHG impacts and the TGP project, so FERC's decision to not impose mitigation measures was not arbitrary and capricious.

Furthermore, FERC has acknowledged that, currently, there is no clear guidance on determining significant upstream and downstream GHG impacts. As a result, any decision to avoid mitigation measures would not be arbitrary and capricious, as no standard exists to find significant upstream and downstream GHG impacts.

TGP argues that, even if there was a demonstrable increase in upstream and downstream GHG impacts and there was clear guidance on how to reduce these impacts between TGP's project and the upstream and downstream GHG impacts, it's not within the agency's discretionary authority to impose mitigation measures designed to address GHG impacts. FERC does not have the tools for measuring GHG impacts, nor does it have the discretionary authority to regulate GHG impacts. Therefore, FERC's decision not to impose GHG conditions addressing downstream and upstream impacts was discretionary, and not arbitrary and capricious.

Ultimately, FERC cannot impose any mitigation measures because it cannot find any significant connection between the TGP project and an increase in upstream and downstream GHG, and because no clear guidance exists. Therefore, this decision to abstain from imposing GHG conditions was not arbitrary and capricious.

## **CONCLUSION**

For the foregoing reasons, this Court should affirm FERC's decision granting a Certificate of Public Necessity and Convenience to TGP because FERC's actions were not arbitrary and capricious and did not violate the Religious Freedom Restoration Act. This Court should also rule in favor of TGP and hold that the FERC's conditions attached to the Certificate constitute a "major question," and thus that FERC does not have the authority to attach those conditions to the Certificate. Finally, this Court should rule in favor of TGP and find that even if the conditions are within FERC's regulatory scope, FERC's actions were not arbitrary and capricious.