

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

**Docket No. 23-01109**

HOLY ORDER of MOTHER EARTH  
*Petitioners,*

*-and-*

TRANSNATIONAL GAS PIPELINES, LLC  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION  
*Respondent.*

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ON PETITION FOR REVIEW OF ORDERS ISSUED BY  
FEDERAL ENERGY REGULATORY COMMISSION

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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## **STATEMENT OF JURISDICTION**

On May 19, 2023, FERC issued an Order denying petitions for rehearing on certain issues with the Certificate of Public Convenience and Necessity (“CPCN”). On June 1, 2023, both HOME and TGP filed timely Petitions for Review of the CPCN Order and Rehearing Order (the “FERC Orders”) with this Court pursuant to Fed. R. App. P. 4. The United States Court of Appeals for the Twelfth Circuit has subject-matter jurisdiction over this issue pursuant to 5 U.S.C. § 702 (appeals of agency action), 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1296, which provides courts of appeals jurisdiction over a petition for review of a final decision of a government agency.

## **STATEMENT OF ISSUES PRESENTED**

1. Whether the Commission reasonably balanced the impacts on the environment, landowners, and surrounding communities with the need for the AFP interstate pipeline consistent with the Natural Gas Act and Commission Policy Statements.
2. Did FERC violate the RFRA when it allowed the AFP to be routed over HOME property despite DOME’s religious objections?
3. Was the Appellate Court correct in ruling that GHG conditions imposed by FERC were within its authority under the NGA?
4. Was the Appellate Court correct in ruling that FERC’s decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts not arbitrary and capricious?

## **STATEMENT OF THE CASE**

### **I. Statutory and Regulatory Background**

### A. Natural Gas Act

The Natural Gas Act (“NGA” or “Act”), 15 U.S.C. §§ 717 to 717z, is a federal statute regulating natural gas pipelines and facilities in the United States. The principal purpose of the NGA is to “encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices.” *NAACP v. FPC*, 425 U.S. 662, 669-670 (1976). The Act grants the Federal Energy Regulatory Commission (“FERC” or “Commission”) the authority to regulate the transportation and sale of natural gas in interstate commerce. 15 U.S.C. § 717b, 717c; see also *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 101 (2014).

Under section 7(c) of the NGA, the Commission reviews applications for the construction, operation, or abandonment of interstate pipeline facilities or extensions. 15 U.S.C. § 717f. To construct and operate a natural gas facility, natural gas companies must obtain a certificate of public convenience and necessity (“CPCN” or “Certificate”) from the Commission and “comply with all other federal, state, and local regulations not preempted by the NGA.” *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). The Commission has the power to attach “reasonable terms and conditions as the public convenience and necessity may require” when issuing a Certificate. 15 U.S.C. § 717f(e).

The Commission's Certificate Policy Statement provides the analytical framework for reviewing applications for the construction and operation of natural gas pipelines. See *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (1999 Policy Statement).

### B. National Environmental Policy Act

When the Commission considers an application for a certificate or public convenience and necessity, an environmental review under the National Environmental Policy Act (“NEPA”), 42

U.S.C. §§ 4321, *et seq.*, is triggered. NEPA requires Federal agencies to “fully consider the environmental effects of proposed major actions, including actions that an agency permits, such as pipeline construction.” *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309 (D.C. Cir. 2014). “The Commission is therefore responsible for the NEPA review associated with natural gas pipeline construction.” *Id.* Section 102(2)(C) of NEPA requires the Commission to prepare either an environmental assessment (“EA”), if the agency finds no significant impact, or an environmental Impact Statements (“EISs”) for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment” 42 U.S.C. § 4332(2)(C).

## **II. The Commission’s Review of the Project**

### **A. American Freedom Pipeline**

Transnational Gas Pipeline, LLC (“TGP”), a limited liability company organized under the laws of the State of New Union, applied for a section 7 Certificate for the American Freedom Pipeline (“AFP”) project.

The AFP will involve the construction of the following facilities: (1) approximately 99 miles of 30-inch-diameter pipeline 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; (2) a receipt meter station located in Jordan County, Old Union (Main Road M&R Station); (3) a receipt tap located in Jordan County, Old Union; a meter, regulation, and delivery station located at Burden County, New Union (Broadway Road M&R Station); a mainline valve assemblies at 8 locations along the TGP Pipeline; a pig launcher/receiver facilities and pig trap valves at the Main Road M&R Station and the Broadway Road M&R Station; and cathodic protection and other related appurtenant facilities.

By TGP estimates, the AFP will cost approximately \$599 million. On March 12, 2020, TGP held an open season for service on the project from February 21 through March 12, 2020. As a result, TGP entered into binding precedent agreements with two firm transportation service companies: International Oil & Gas Corporation (“International”) for 450,000 dekatherms (Dth) per day and New Union Gas Energy Services Company (“NUG”) for 50,000 Dth per day. Hayes Fracking Field (“HFF”) in Old Union will produce the liquified natural gas (“LNG”) to be transported by the AFP pipeline. TGP acknowledges that the full production of natural gas at HFF is currently transported by the Southway Pipeline to states to the east of Old Union. Based upon the precedent agreements with International and NUG, approximately 35% of the production at HFF will be rerouted through the AFP rather than the Southway Pipeline.

The LNG purchased by International will be diverted at the Burden Road M&R Station to the existing NorthWay Pipeline, which is not currently at full capacity. The NorthWay Pipeline will carry the LNG into the New Union City M&R Station, which is located at the Port of New Union on Lake Williams. Lake Williams connects via the White Industrial Canal to the Atlantic Ocean, and the LNG is to be loaded onto LNG tankers at the Port of New Union for export to Brazil by International.

#### B. Challenged FERC Orders

On April 1, 2023, the Commission issued a conditional CPCN to TGP for construction of the AFP project. On April 20, 2023, a religious organization owning land along the proposed route of the pipeline, the Holy Order of Mother Earth (“HOME”), requested rehearing from FERC on certain issues in the CPCN. On April 22, 2023, TGP also requested rehearing from FERC on certain conditions imposed in the CPCN. On May 19, 2023, FERC denied the petitions for rehearing and affirmed the CPCN as originally issued (the “Rehearing Order”).

On June 1, 2023, both HOME and TGP filed Petitions for Review of the CPCN Order and Rehearing Order (the “FERC Orders”). The court consolidated the HOME Action and TGP Action.

Concerning claims made by HOME, the Commission disputes that it (1) erred in balancing the public benefits against the adverse effects of the AFP, an interstate pipeline primarily for export; (2) violated the Religious Freedom and Restoration Act (“RFRA”) by routing the pipeline across HOME property; and (3) violated NEPA by failing to mitigate upstream and downstream greenhouse gas impacts (the “GHG Conditions”) of the AFP. The Commission also disputes the claims made by TGP that the conditions in the CPCN Order addressing mitigation of the GHG Conditions are beyond FERC’s authority under the NGA.

### **SUMMARY OF THE ARGUMENT**

U.S. natural gas exports are essential to maintaining and expanding domestic LNG production. The NGA grants the Commission the power to regulate in the public interest when it makes a section 7 determination for interstate natural gas pipeline facilities. 15 U.S.C. § 717f. Courts of appeal have consistently upheld the Commission’s broad statutory authority to regulate and define the scope and meaning of “public convenience and necessity” for pipelines in interstate and foreign commerce. Here, the Commission reasonably relied on substantial evidence provided by TGP to support its finding of market need consistent with the Natural Gas Act and Policy Statements.

Courts have also consistently held that precedent agreements are significant evidence of market demand under the section 7 of the NGA. *See City of Oberlin, Ohio v. FERC*, 39 F.4th 719, (D.C. Cir. 2022); and *Myersville Citizens for a Rural Cmty., Inc., v. FERC*, 783 F.3d 1303, 1311 (D.C. Cir. 2015); This principal is consistent with the Commission’s Certificate Policy Statements, which assert precedent agreements are always significant evidence of demand for a

project, even though they are not required. *See* 88 FERC at 61,748; and *Myersville*, 783 F.3d at 1311. FERC reasonably balanced the public benefits and the adverse effects of the AFP project when it concluded that the pipeline was not inconsistent with the public interest.

Moreover, FERC's decision to route the AFP over HOME property despite religious objections was not a violation of the RFRA. The RFRA prohibits government action that places a "substantial burden" on an one's right to exercise their faith. The chosen route of the AFP does not present a substantial burden on HOME's exercises of the Solstice Sojourn, because it does not coerce participants from violating their faith in order to receive government benefits or under threat of civil or criminal sanctions. Even if the decision is found to have a substantial burden on HOME, the route should be permitted as maintaining a coherent natural gas pipeline permitting system is the least restrictive means of furthering the various benefits provided by the AFP.

FERC has authority under the NGA to impose GHG conditions it created alongside TPG's CPCN. FERC's authority to apply these GHG mitigation measures should not be called into question due to the Major Questions Doctrine (MQD), which is only triggered if an agency preforms an action it has never done before and that action has significant economic and political impacts. *West Virginia v. Environmental Protection Agency* 142 S. Ct. 2587, 2595 (2022); *Biden v. Nebraska*, 143 S. Ct. 2355, (2023) FERC has imposed environmental mitigation measures before and the current mitigation measures will only impact TPG, not the entire political and economic framework of the gas industry. *See Marysville Hydro Partners*, 63 FERC ¶ 61,271 (1993); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 966 (D.C. Cir. 2000). The only framework that would be appropriate to challenge FERC's authority would be through the arbitrary capricious tests. *See Florida Gas Transmission Co. v. FERC*, 876 F.2d 42 (5th Cir. 1989) (Johnson, dissenting); *Florida Power & Light Co. v. FERC*, 598 F.2d 370, 380 (5th Cir. 1979) Under both a broad and narrow version of the arbitrary and capricious tests, FERC still has

the authority to impose the GHG conditions listed in the record. *See Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*, 103 S.Ct. 2856 (1983); *Burlington Truck Lines, Inc. v. United States*, 83 S. Ct. 239, 246 (1962); *Florida Power & Light Co.* 598 F.2d 370. In addition, even though FERC's conditions here do not concern natural gas rates, FERC has the authority under the NGA to impose conditions on all factors that might affect public interest, including GHG emissions. *Transcon. Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 191 (5<sup>th</sup> Cir. 1979).

Lastly, FERC's decision does not include GHG conditions alongside TPG's CPCN that concern upstream and downstream emissions is not arbitrary and capricious. Under the broader arbitrary and capricious, agency actions are not arbitrary and capricious if the action is connected to facts in front of the agency. *Burlington Truck Lines, Inc. v. United States*, 83 S. Ct. 239, 246 (1962); *Florida Power & Light Co.* 598 F.2d at 380. Here, while FERC knew from an EIS that a project would produce upstream and downstream GHG emissions, it did not have a completely accurate way of measuring them or determining if they needed to be mitigated. It is possible if FERC even made mitigation measures at this point, their lack of information might not allow them to effectively mitigate these upstream or downstream emissions. Based on these facts in front of FERC, the agency decided to not impose downstream or upstream mitigation measures. In addition, FERC's decision would not be considered arbitrary and capricious under the narrower State Farm Test, as it did not rely on factors for which Congress did not intend it to, did not fail to consider important aspects of the problem the agency was supposed to address, provide an explanation that runs counter to the evidence in front of it, or do something so implausible that it could not be ascribed to a different in view or the product of agency expertise. *State Farm*, 103 S.Ct. at, 2866-7. So under both the broad and narrow arbitrary and capricious test, FERC not imposing upstream and downstream conditions was not arbitrary and capricious.

## STANDARD OF REVIEW

The standard for setting aside final agency action is that the reviewing court has “found [the action] to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” among other possibilities. 5 U.S.C. § 706(2); *e.g.*, *Dep’t of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1901 (2020) (stating “we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated”). The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under this standard, a court must find a “rational connection between the facts found and the choice made.” *Id.* The court must decide whether the agency considered the relevant factors and whether there has been a clear error of judgment; see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

## ARGUMENT

### **I. The Commission’s Determination That the Project Will Serve the Public Convenience and Necessity Is Supported by Substantial Evidence.**

#### **A. The Commission Evaluated Project Need Consistent with The Natural Gas Act and the Commission’s Policy Statements.**

##### **1. The Commission’s determination that LNG produced in the United States and exported serves the public interest is consistent with the Natural Gas Act.**

NGA section 7, 15 U.S.C. 717f(e), authorizes the Commission to promote the public interest by issuing a certificate to any qualified applicant for the construction and operation of a natural gas facility that is needed for the “present or future public convenience and necessity.” Generally, section 7 applies to projects engaged in selling and transporting natural gas in



interstate commerce. *See* 15 U.S.C. 717(b). Yet the Act also provides that the Commission’s authority includes “the importation or exportation of natural gas in foreign commerce.” *Id.*

The proposed pipeline will run between states from Old Union to New Union. The AFP is a pipeline transporting gas in interstate commerce for export to Brazil in accordance with Section 7 of the NGA. *See Maryland v. Louisiana*, 451 U.S. 725, 755 (1981) (“Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.”)

HOME first argues that the NGA is a domestic statute; thus, project need must be interpreted as domestic. This argument ignores the language of the NGA as written and enacted by Congress, where the Commission’s power to regulate in the public interest is broad and extends well beyond interstate commerce and domestic need.

Consider Section 3 of the NGA, 15 U.S.C. 717b(a), authorizing natural gas exports, including LNG to foreign nations. Here, the Act mandates that the Commission “shall” issue an order authorizing the import and export of natural gas with a foreign country unless the proposed project is not “consistent with the public interest.” *See* 15 U.S.C. 717b(a). Under section 3, courts even extend a “general presumption favoring [export] authorization.” *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017). Although the CPCN falls under section 7 of the NGA, the Commission does not find this distinction meaningful, nor does the Commission place significant weight on the end use of the LNG. Whether an NGA section 3 authorization or a section 7(c) certificate order, the statute extends the Commission’s public interest obligations to include interstate and foreign commerce.

Importantly, the NGA does not define “public convenience and necessity,” and so Congress left defining the phrase to the discretion of the agency. For instance, in *FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961), the Supreme Court designated the

Commission as “the guardian of the public interest” to make section 7 convenience and necessity determinations. The Court reasoned that the Commission has a “wide range of discretionary authority” under the NGA. *Id.* Under Section 7 of the NGA, the Commission’s authority is described as a “power 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.” *See* 15 U.S.C. 717f(e). For these reasons, the scope and meaning of “public necessity and convenience” is primarily the role of the Commission to determine.

As demonstrated, HOME misinterprets the agency’s delegated responsibility under the NGA, and so the proposition that project need is limited to domestic need is overbroad and unsupported.

**2. The Commission’s reliance in part on precedent agreements as evidence of market need is consistent with Commission Policy Statements.**

The Commission’s Certificate Policy Statements provides the analytical framework for determining whether to grant a Section 7 certificate for the construction of an interstate natural gas facility. *See* 90 FERC at 61,128. The Policy Statement guides the agency’s evaluation of project need and whether, “on balance, the project will serve in the public interest.” 88 FERC at 61,737. To evaluate the public benefits of a proposed pipeline, the Commission may consider several factors as evidence of market need. Relevant here is the existence of precedent agreements, of which Commission policy recognizes as always significant evidence of demand for a project, though not required. 88 FERC at 61,748; and *Myersville*, 783 F.3d at 1311.

TGP entered into binding precedent agreements with two shippers, International and NUG, for the project’s full capacity. Precedent agreements for 100% of design capacity constitute significant evidence of market demand for a project. *See* 88 FERC ¶ 61,227, at 61,748 (explaining that “precedent agreements for the capacity . . . constitute significant evidence of

demand for the project”); *see also Myersville*, 783 F.3d at 1311 (suggesting that in some cases precedent agreements may demonstrate both market need and benefits).

HOME claims that under the Commission Policy Statement, precedent agreements are insufficient to demonstrate public necessity, distinguishing the outcome in *City of Oberlin* from the present case as support. In *Oberlin*, the D.C. Circuit considered FERC’s issuance of a section 7 certificate to NEXUS Gas Transmission, LLC (“Nexus”), a pipeline company, for a project that would transport natural gas in interstate commerce for export to Canada. The petitioners challenged the agency’s denial of a rehearing order asserting that precedent agreements servicing a foreign market could not be evidence of market demand under the section 7 convenience and necessity standard.

Unlike the Nexus pipeline, the direct benefits to domestic consumers flowing from the AFP will outweigh the indirect benefits to foreign consumers. For example, the AFP will function as a new pipeline interconnection for the Southway Pipeline by transmitting natural gas intended for regions east of Old Union to new domestic consumers. *See* 88 FERC at 61,748 (stating new pipeline interconnects that improve the interstate grid are an indicator of public benefits). Notably, HOME does not contest TGP’s finding that reducing transportation on the Southway Pipeline would not lead to gas shortages. This demonstrates how the precedent agreements serving a foreign market will provide direct benefits to domestic consumer. There are also several direct public benefits to domestic consumers such as potential job growth and expansion for natural gas production in the United States.

**3. The Commission reasonably found that the proposed project was not inconsistent with the public interest.**

The Commission can consider a wide array of indicators of public benefit when certifying a new interstate natural gas pipeline. Among the factors considered are “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.” 90 FERC at 61,48. The Commission also considers existing pipelines, their customers, and the interests of landowners and surrounding communities. *Id.* Here, the Commission evaluated market need by considering the substantial evidence of public benefits originating from the project and concluded that the AFP is needed and not inconsistent with the public interest.

Nonetheless, HOME maintains that TGP failed to demonstrate market need for the proposed project on two grounds: (1) they assert the AFP does not serve a domestic need, and (2) if the project does serve a domestic need, the benefits are minimal. This argument ignores established Commission precedent that does not require a finding of need to be based on anything more than precedent agreements. *Myersville*, 783 F.3d at 1309-11. Even discounting the precedent agreements, HOME’s claims fail to recognize the substantial evidence of domestic benefits flowing directly or indirectly from the pipeline that support the Commission’s public need determination.

First, the project serves a domestic public need by increasing gas supplies to areas currently without access within New Union. The AFP will deliver up to 500,000 Dth daily of natural gas to the interconnection with the NUG terminal and the NorthWay Pipeline. As a result, the AFP will (1) expand access to sources of natural gas supply across the New Union and the United States and (2) fill additional capacity at the NUG City M&R Station. (*See* 88 FERC at 61,743, where providing competitive alternatives and serving increasing demands are considered to further the goals and objectives of the Commission’s certificate policy.)

Likewise, evidence shows that LNG demands in regions served by the Southwest Pipeline are declining, and so, rerouting LNG through the AFP would better serve domestic market needs. The pipeline will also provide critical transportation of domestically produced gas from

production areas to domestic consumers. This arrangement indicates that the AFP will transmit natural gas that may or may not be purchased in the future.

Finally, the AFP will optimize the existing systems to benefit current and new customers by creating a more competitive market. Providing competitive supplies and creating greater competition are positive public benefits consistent with the Commission's Policy Statements. *See* 90 FERC at 61,397. Therefore, the Commission demonstrated substantial evidence of public benefits and thus reasonably authorized the project—designed to transport natural gas for export—consistent with the Natural Gas Act and Certificate Policy Statements. For these reasons, HOME's challenge to the Commission's determination of an existing domestic need fails.

**B. The Commission Reasonably Balanced the Adverse Effects and Public Benefits of The Project**

Balancing the public benefits and the adverse impacts of a project is “essentially an economic test.” *See Mountain Valley Pipeline, LLC*, 171 FERC ¶ 62,635 (2020); 88 FERC at 61,745). Generally, the threshold requirement for authorizing a new pipeline is whether the project can proceed without subsidies from existing customers. 88 FERC at 61,745. However, the party do not dispute that TGP can financially support the project without subsidization from its existing customers. Nor do the parties dispute that the determination that there are no adverse impacts on existing customers of the pipeline applicant. The ‘public convenience and necessity’ standard requires the Commission to approve an application for a certificate only if the public benefits from the project outweigh any adverse effect.” *See* 90 FERC ¶ 61,389.

Under the Natural Gas Act, the Commission has broad discretionary authority to make public interest determinations. *See Transcon. Gas Pipeline Corp.*, 365 U.S. at 7. The Commission recognizes that TGP has been unable to reach easement agreements with some landowners, including HOME; however, TGP has taken sufficient steps to eliminate or minimize

any adverse effects the project might have on landowners and surrounding communities. To formalize these easement agreements, TGP changed 30% of the original pipeline design to address landowner concerns. Equally important, the Commission took adequate steps to minimize adverse impacts to HOME property specifically. Three points demonstrate this:

First, the Commission acknowledges that the pipeline right-of-way will require vegetation removal on HOME property, including the loss of approximately 2,200 trees. TGP designed a site-specific restoration plan to restore the pipeline's route to its original state by planting an equal number of trees as those removed during project construction. These measures suggest that any environmental impacts from the construction process would be temporary or short-term, undermining HOME's claim that adverse impacts far outweigh the benefits of the pipeline.

Second, to ensure that HOME's property rights are respected, the Commission agreed to have the pipeline buried through the entirety of its passage through the petitioner's land to minimize adverse impacts to the landowners. By burying the pipeline, HOME will continue to have undisrupted use of the 2-mile stretch of property. TGP also agreed to expedite construction "to the extent feasible" across HOME property, accelerating project completion to approximately four months. TGP has provided ample evidence to support the Commission's conclusion that sufficient steps were taken to minimize adverse impacts on the environment, surrounding landowners, and to HOME specifically.

Further, TGP weighed the environmental impacts of the alternate route through Misty Top Mountain and concluded that the original proposed route is the most reasonable design for the project. When evaluating the proposed route, the Commission considered whether the alternative would involve additional costs or adversely impact the environment and surrounding communities. The Commission determined, and HOME does not contest, that the Alternate

Route would add over \$51 million in construction costs and necessarily cause more objective environmental harm. By rerouting the pipeline through the Alternate Route, the pipeline would travel an additional three miles, potentially disrupting sensitive environmental ecosystems in the mountains. Because the Alternate Route would cause significant adverse impacts, the Commission reasonably concluded that circumventing HOME property through Misty Top Mountain is not feasible or in the public interest.

The property interest at issue involve less than half of the affected landowners and surrounding community. TGP secured easement agreements with more than 50% of private landowners whose property would be affected by the proposed project. Even if TGP is unable to acquire the use of the remaining property, 15 U.S.C. 717f(h) provides the right of eminent domain for construction and operation of interstate pipelines over privately held property. If TGP must resort to eminent domain, it would do so for less than 50% of the land needed to construct and operate the pipeline. The Commission's determination that the proposed project will have minimal adverse impacts on landowners and surrounding communities is reasonable.

Finally, HOME, a religious order, argues that the Commission should consider religious land use under the "public convenience and necessity" standard. HOME ignores the considerable mitigation measures proposed by TGP that sufficiently minimize adverse impacts to landowners and nearby property. Nor does the Certificate Policy Statements mandate or even suggest that the Commission should give greater weight to environmental harms or uses on specific properties when making a section 7 determination. Any preference for one landowner's religion would lead to unjust results for all landowners affected by new natural gas pipeline facilities. The Commission's decision to not apply "extra" weight to religious land use under the section 7 analysis is reasonable and just.

## **II. Despite religious objections from HOME, FERC's decision to route the AFP over HOME property did not violate the RFRA.**

### **A. FERC's decision to route the AFP over HOME property did not substantially burden a person's exercise of religion.**

The RFRA only applies to circumstances in which the government “substantially burdens a person's exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb–1(a). A person who brings a challenge under RFRA bears the initial burden of proving that (1) the Government's policy or action implicates their religious exercise, (2) the relevant religious exercise is grounded in a sincerely held religious belief, and (3) the policy or action substantially burdens that exercise. *See Holt v. Hobbs*, 574 U.S. 352, 361 (2015). Although neither the RFRA and the Supreme Court have defined a “substantial burden”, the Ninth Circuit and D.C Circuit have seen a burden to be substantial when “government action puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *See, e.g., Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 (9th Cir. 2008) (citing *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 708 (1981)). This “substantial pressure” can appear when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Navajo Nation*, at 1070. The burden must also be more than an “inconvenience” to be considered substantial. *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 277 F.3d 1110, 1121 (9th Cir. 2000).

The defense concedes that FERC's action of routing the AFP over HOME property implicates their religious exercise of the Solstice Sojourn and that the Solstice Sojourn is a relevant religious exercise grounded in HOME's sincerely held religious beliefs. The courts give great deference to an individual or organization in the sincerity of particular beliefs or



practices to a faith. *Kay v. Bemis*, 500 F.3d 1214, 1219 (10th Cir. 2007) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”).

### **1. Government Benefits**

The first method of finding a substantial burden to be present is to determine if individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit. *Navajo Nation*, 535 F.3d at 1069. Nontrivial economic worth is the clear identifier of whether a governmental benefit is at stake such as tax exemptions, unemployment benefits, welfare payments, and public employment. *See Autor v. Blank*, 892 F.Supp.2d 264, 275 (D.C. 2012) (citing *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). In *Thomas*, a substantial burden was found when Indiana denied unemployment benefits to an individual who quit their job because their religious tenets did not allow them to produce weapons. 450 U.S. at 708. In *Sherbert v. Verner*, the Supreme Court held that withholding unemployment benefits from an individual whose employment was terminated due to religious beliefs prohibiting her to work on Saturday, was a substantial burden. 374 U.S. 398, 399-400 (1963). However, while economic worth is helpful in finding a governmental benefit, it is not required. *See Perry*, 408 U.S. at 597. A governmental benefit may be found if the benefit is in some way “valuable,” such that its deprivation would burden the exercise of one’s First Amendment rights. *Id.* In *Singh v. Mchugh*, admission into the ROTC and the leadership training course offered within, was found to be a governmental benefit that was withheld due to a request for religious accommodation. 185 F.Supp.3d 201, 216-17 (D.C. 2016). The significance of the benefit does not have much persuasion as to the requirement, as in *Hyland v. Wonder*, where the learning experience and personal satisfaction of a volunteer position has been found to be a governmental benefit. 972 F.2d 1129, 36 (9th Cir. 1992). While the AFP

may provide a governmental benefit to the people of HOME, its route under their property does not condition that benefit on the organization's ability to perform the Solstice Sojourn. Home is being provided the benefits regardless of HOME's choice to practice their faith.

## **2. Civil or Criminal Sanctions**

The second identifier of a substantial burden is when individuals are coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. *Navajo Nation*, 535 F.3d at 1069. In *Wisconsin v. Yoder*, defendants, who were members of the Amish religion, were convicted of violating a Wisconsin law that required their children to attend school until the children reached the age of sixteen, under the threat of criminal sanctions for the parents. 406 U.S. 205, 234 (1972). The Supreme Court reversed the defendants' convictions, finding that the Wisconsin law "compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218. The Sixth Circuit has upheld criminal sanctions when enforcing the registration for the Selective Service due to the minimal burden placed on an individual compared to the interests of the government to deploy a military. *See U.S. v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987). In no way does FERC's decision to route the AFP over HOME property, coerce HOME into violating the tenants of their faith under threat of criminal or civil sanctions. The organization is free to practice the solstice sojourn as they see fit without fear of prosecution.

## **3. Physical Barrier**

Although it is not explicitly stated in the supreme court precedent, there is a physical intrusion aspect to the analysis of finding a substantial burden. *See Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 708 (1981) (stating that a substantial burden exists when the government puts "substantial pressure on an adherent to modify his behavior and

to violate his beliefs”). The Supreme Court precedent to this genre of issue is *Lyng v. Northwest Indian Cemetery Protective Association*. 485 U.S. 439, 458 (1988). In *Lyng*, American Indians alleged that the United States Forest Service's decision to build a six-mile segment of paved road and permit significant timber harvesting in a government-owned area considered sacred by several tribes would “diminish the sacredness of the area in question” and interfere with tribal members' use of sites there for religious practice. *Id.* at 448. Although the Supreme Court acknowledged that the decision would “interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs.”, it concluded that the government's actions did not “coerce[ ]” the affected individuals “into violating their religious beliefs” or “penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.” and therefore did not violate the right to free exercise of religion. *Id.* at 449. In *Navajo Nation*, American Indians ask the Ninth Circuit to prohibit the federal government from allowing the use of artificial snow for skiing on a portion of a public mountain sacred in their religion because the use of the snow would “spiritually contaminate the entire mountain and devalue their religious exercises.” 535 F.3d at 1063. The Ninth Circuit held that a substantial burden was not present as “no religious ceremonies that would be physically affected” by the use of artificial snow and no places of worship were made physically “inaccessible.” *Id.* The court admitted that “the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain.” *Id.* at 1063. The court’s ruling leaned heavily on the subjective spiritual experience stating that “Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a

“substantial burden”—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion.” *Id.* at 1063. The Supreme Court in *Lyng* supports this holding as they state that the 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. 485 U.S. 458 (1988). In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, American Indians claim that a natural gas pipeline running under a lake would substantially burden their religious activities as the crude oil fulfilled a prophecy of a “Black Snake that would be coiled in the Tribe's homeland and which would harm ... [and] devour the people.” and would thereby “desecrate those waters and render them unsuitable for use in their religious sacraments.” 239 F.Supp.3d 77, 82 (D.D. Cir. 2017). There, the District Court held “although the Tribe's members may feel unable to use the water from Lake Oahe in their religious ceremonies once the pipeline is operational, there [was] no specific ban on their religious exercise, nor does performance of their sacraments trigger a sanction, loss of a government benefit, or other collateral harm.” *Id.* at 95.

Following the controlling case law on the issue of a violation under RFRA, FERC's decision to route the AFP over HOME property did not substantially burden a person's exercise of religion. The conditions included in the CPCN adequately reduce any burden placed on HOME, substantial or not. Similar to the Tribe in *Lyng*, HOME is not being coerced to violate their religious beliefs in exchange for a governmental benefit nor under threat of sanction. Like in *Lyng*, *Navajo Nation*, and *Standing Rock*, although the route of the AFP may devalue the spiritual experience for HOME's members, HOME's property is not being “physically” impacted so as to make the land inaccessible for the Solstice Sojourn.

See 485 U.S. at 458; 535 F.3d at 1069; 239 F.Supp.3d at 82. The CPNC has a condition in place to build and bury the AFP in between solstices, with an estimated construction time of four months, eliminating any physical interference with the religious practice. This narrows the impact to HOME's subjective spiritual experience and does not impede the group's access to practice their beliefs. The ruling in *Navajo* supports the conclusion that this subjective spiritual experience was not enough to show a substantial burden as there is nothing physically prohibiting the practice and no coercion to act contrary to their religion through conditioning the receipt of public benefits and the threat of civil or criminal sanctions. *Id.* at 1071-73. The Tribe in *Standing Rock* was found to not have a claim under the RFRA because the impact on their religious activity was subjectively spiritual and in no way banned them from exercising their faith. HOME may nonetheless practice the Solstice Sojourn even with the decrease in spiritual satisfaction brought on by the AFP's presence. Contrast to *Yoder*, where government law prohibited a religious practice and *Singh*, where government benefits were withheld or denied with religious prejudice, FERC's choice to route the AFP under HOME's property does not coerce individuals into violating their faith or face legal consequences and disadvantages. The only effect on HOME is subjectively spiritual and is allowed under the RFRA and controlling case law. Because the AFP route over HOME's property does not ban the practice of the Solstice Sojourn under threat withholding government benefits or sanction and does not physically prevent individuals from practicing their faith, there is no substantial burden present. Finding a substantial burden to exist in case where only the individual subjective spiritual experience is affected would go against common law precedent and expose the courts to a volume of frivolous claims. The CPCN, which itself provides a number of religious accommodations, give effect to the RFRA's intent by providing protection to one's right to practice their faith. Such

an interpretation would also be consistent with the common law's bright line rule of inquiry. Accordingly, this Court should hold that the FERC's decision to route the AFP over HOME property did not impose a substantial burden on HOME's exercise of religion and therefore, does not violate the RFRA.

B. If FERC's decision to route the AFP over HOME property is found to have created a substantial burden on HOME's exercise of religion, the decision is justified as it is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.

Pursuant to the RFRA, if a substantial burden on one's exercise of religion is found to be present, that burden may be permitted if it (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(b).

A compelling government interest has been found to be one of the "highest order" and "overrides" the interest claiming protection under the RFRA. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Where the government restricts only conduct protected by the First Amendment and fails to enact measures to restrict other conduct producing substantial harm of the same sort, the interest given in justification of the restriction is not compelling. *City of Hialeah*, 508 U.S. 546. In *United States v. Indianapolis Baptist Temple*, maintaining a sound and efficient tax system was found to be a compelling government interest in enforcing federal taxes on a religious organization. 224 F.3d 627, 630 (7th Cir. 2000). In *Schmucker*, the government's ability to amass and deploy a military force efficiently was found to be a compelling interest in enforcing the Selective Service registration dispute religious objections.. See *Schmucker*, 815 F.2d 413, 417. The unique factors in each case will be determinative of whether the interest asserted by the government is compelling. See *Ave*

*Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 967 (E.D. Mich. 2014). For example, in *Ave Maria Found.*, public health and gender equality were not found to be compelling government interests for uniformly applying a Human Resources and Service Administration mandate that requires employers to supply methods of contraception to employees because the mandate had built in exceptions for religious organizations. *Id.* The court found that although the interests themselves may be compelling, the multiple exceptions undermine their strength and therefore do not pass as compelling enough to permit a substantial burden on one's religious exercise. In *Thomas v. Review Bd. of Indiana Employment Sec. Division*, avoiding widespread unemployment was not viewed as a compelling government interest because there was no evidence that the number of people who may find themselves in the substantial burden is large enough to create that level of unemployment." 450 U.S. 707, 719 (1981).

Once a substantial burden is found, the government carries the burden to also prove the means used to further the compelling interest is the "least restrictive". 42 U.S.C. § 2000bb-1(b). Under the RFRA, the least restrictive means inquiry involves "comparing the cost to the government of altering its activity to continue unimpeded versus the cost to the religious interest imposed by the government activity." *E.g., Ave Maria Found.*, 991 F. Supp. 2d at 967. The court in *Schmucker* found that the minimal burden placed on an individual's exercise of religion by registering for the Selective Service was outweighed by the government's ability "to institute conscription quickly should it prove necessary." *See Schmucker*, 815 F.2d 413, 417. The Seventh Circuit has held that maintaining a sound and efficient tax system was a compelling government interest, and a uniformly applicable tax system was the least restrictive means of furthering that interest, showing no RFRA

violation in applying federal employment tax laws to a church despite religious objections. See *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000).

Even if FERC's decision is found to have a substantial burden on HOME's exercise of religion, the CPCN should nonetheless be upheld as it employs the least restrictive means of furthering a compelling government interest. Various public benefits from economic to environmental present a compelling government interest in support of the CPCN. The AFP will deliver up to 500,000 Dth per day, expanding U.S. sources of natural gas and access to natural gas services to areas within the New Union. The AFP will create a more competitive energy market by efficiently distributing gas in areas of low demand to the benefit of both current and new customers. This expansion of access to LNG provides opportunities to improve regional air quality by using cleaner-burning natural gas in place of more harmful fossil fuels. While a portion of the AFP's capacity is to be exported, the NGA supports the claim that U.S. produced LNG that is later exported serves a public interest. 15 U.S.C. § 717b(c). The AFP will effectively optimize the entire LNG pipeline system in both the Old Union and New Union including all current stations and pipelines. While these benefits show a compelling governmental interest, maintaining a coherent natural gas pipeline permitting system is the least restrictive means of furthering that interest. The impacts that would arise from rerouting the AFP to avoid HOME property would outweigh any burden placed on HOME's exercise of faith. Deferring to the alternate route would add \$51 million in construction costs and cause more environmental harm by traveling an additional three miles and running through more environmentally sensitive ecosystems in the mountains. The impact of the AFPs route on HOME's exercise of religion, if any, is permitted due to the efficient system used to provide a wide range of public benefits. If a substantial burden is



found in the AFP's route, this court should nonetheless uphold FERC's decision as it furthers a compelling government interest within the least restrictive means.

### **III. FERC has authority under the NGA to impose the GHG conditions alongside TPG's Certificate of Public Convenience and Necessity (CPCN).**

Since the passage of the Administrative Procedures Act in 1946, courts have determined if agency actions are appropriate based on the arbitrary and capricious standard. 5 USC § 706(2); *see also, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 844 (1984). Recently though, many agency actions have come under scrutiny of the Supreme Court's (SCOTUS) new judicial framework called the Major Questions Doctrine (MDQ), which seeks to determine if Congress intended agencies take actions based on vague passages of law. *See, e.g., West Virginia v. Environmental Protection Agency* 142 S. Ct.; *Biden v. Nebraska*, 143 S. Ct.. As will be shown below, the MDQ is not applicable in judging if FERC had authority to impose GHG conditions in a CPCN. In addition, FERC's interpretation that the Natural Gas Act (NGA) gives itself the authority to impose GHG mitigations measures should be upheld since the action is not arbitrary, capricious, or against the law.

- A. FERC GHG conditions are not subject to the MDQ because FERC imposed environmental conditions on CPCNs before and their requirement would not have a major political or economic effect.

FERC's GHG conditions do not warrant the need to consider a MDQ analysis. As opined in *West Virginia v. Environmental Protection Agency*, a major doctrines question is only triggered when both an agency performs an action it has not done before and the action imposes significant effects on politics and the economy. *West Virginia v* 142 S. Ct. at 2595. If a court finds an agency action fulfills these prerequisites, the agency then must show clear congressional authorization that supports Congress intended to delegate authority to commit the action. *Id.* at 2609. In that same case, SCOTUS decided it needed to use the MQD to examine

if EPA had the power to administer the Clean Power Plan (CPP) using the Clean Water Act (CWA). *Id.* at 2592. This was because the CPA would have required fossil fuel producers to transition to renewable energy, which was an action EPA had never done before. *Id.* at 2610-3. In addition, this transition would have significant economic and political effects, as it would have led to the transformation of an entire industry. *See Id.* at 2612. Based on this, SCOTUS decided to use the MQD to analyze if Congress delegated the authority to create a program like the CPP to EPA in the Clean Water Act. *Id.* at 2610-3.

Similarly in *Biden v. Nebraska*, the SCOTUS also invoked the MQD because they identified an agency action that were unusual and had significant economic and political effects. *Biden*, 143 S. Ct. at 2373. Here, the Department of Education had planned to alleviate a large amount of student debt using the HEROES Act. *Id.* at 2373. SCOTUS found that the Department of Education's plan to alleviate such a large amount of student debt using the HEROES Act had never been done. *Id.* In addition, alleviating so much debt would also have significant economic and political effects. *Id.* Therefore, the court decided to use the MQD to analyze if Congress had delegated the power to forgive such a large amount of student debt to the Department of Education in the HEROS Act. Both *West Virginia v. Environmental Protection Agency* and *Biden v. Nebraska* demonstrate that agency actions only trigger a MDQ if the action is unprecedented and can lead to a significant political and economic impact.

Here though, FERC's GHG conditions do not triggered the MQD. For one, FERC has a history of imposing environmental conditions with CPCNs. For example, FERC imposed environmental mitigation measures on the Fall River Hydroelectric Project as part of CPCN in 1993. *Marysville Hydro Partners*, 63 FERC ¶ 61,271 (1993). FERC also did so with the North Alabama Pipeline Project as part of its CPCN in 2000. *Midcoast Interstate Transmission, Inc.*, 198 F.3d at 966. FERC's actions are not like those of the EPA or DOE, where both were

performing actions that an agency had not done before. See *Biden* 143 S. Ct. at 2373; *West Virginia*, 142 S. Ct. at 2610-3.

In addition, FERC's GHG conditions would not lead to significant economic or political effects. FERC's GHG mitigation measures only require TGP to plant trees to replace those removed during construction, preferably use electrical equipment when practical, use green pipelines produced by net zero manufactures, and purchase electricity from renewable sources when available. These conditions will not radically transform the economy or politics of natural gas industry since they only affect TGP. Even at a smaller scale, they will likely not lead TGP to go bankrupt or force it to change leadership. This is not comparable to what SCOTUS considered in *West Virginia v. EPA* or *Biden v. Nebraska*, where the EPA's CPP would have transformed the fossil fuel industry and the DOE's debt program would have significantly affected the economy. *Biden* 143 S. Ct. at 2373; *West Virginia* 142 S. Ct. at 2612. FERC's GHG conditions only affect one company, and to a small extent at that. Since FERC's GHG conditions are not unprecedented and do not create significant political or economic impacts, the MQD is not applicable to this situation, and therefore does not take FERC's authority away under the NGA to impose these GHG conditions.

B. FERC should be given deference in determining that NGA 15 USC § 717f(e) gives itself the power to impose GHG conditions alongside a CPCN.

Many courts have recognized that NGA empowers FERC to impose GHG conditions on the approval of a CPCN. See, e.g., *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). Specifically, they have cited 15 U.S.C. § 717f(e) as granting that power:

The Commission shall have the power 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 USC § 717f(e); See also *Sierra Club* 867 F.3d at 1374.

The primary item of importance here is what consists of a condition that fulfills “public convenience and necessity.” While there is no exact definition for public convenience necessity, the precedent shows that courts have deferred to FERC on determination of what constitutes these factors. *See, e.g., Atlantic Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959); *FPC v. Transcon. Gas Pipeline Co.*, 365 U.S. 1, 7 (1961).

Courts have largely given FERC “extremely broad authority” in determining what constitutes a condition that fulfills public convenience and necessity. *E.g., Transcon. Gas Pipe Line Corp.*, 589 F.2d at; *ANR Pipeline Co. v. FERC*, 876 F.2d 124 (D.C. Cir. 1989) (quoting *Transcon. Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979)). While many of these courts have not mentioned how broad that authority is, they have generally allowed FERC to determine what constitutes a condition that fulfills public convenience and necessity if the decision is not arbitrary, capricious, or against the law. *Florida Gas Transmission Co.* 876 F.2d 42 (Johnson, dissenting); *Florida Power & Light Co.*, 598 F.2d 380. Essentially, under a broader test, this means that a court defers to agency interpretations of ambiguous statutes if the judge finds the interpretation is reasonable<sup>1</sup> and not against the law.

### **1. Broad Test**

An example of a court deferring to FERC on what constitutes a condition that fulfills public convenience and necessity under the NGA occurred in *Florida Power & Light Co. v. FERC*. *Florida Power & Light Co.* 598 F.2d at 380. Here, FERC approved the cooperation Amoco’s transportation of gas from offshore wells to onshore terminals under a CPCN but imposed a condition to prohibit Amoco from using the gas for a

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<sup>1</sup> Reasonableness is determined if there is a connection between the facts in front of an agency and the action the agency takes based on those facts. (*Burlington Truck Lines, Inc. v. United States*, 83 S. Ct. 239, 246 (1962).

contract with Florida Power & Light that was to use gas primarily for boiler fuel. *Id.* at 372-3. This was because at the time, the US was undergoing a fuel shortage, and FEC identified that providing gas for boiler fuel was seen as a lower priority than supplying it the local population. *Id.* at 380. The DC Circuit found that FERC based this decision on a reasonable determination that supplying gas to boiler fuel was a low priority than supplying gas to other customers during a time of fuel shortages. *Id.* Therefore, FERC's conditions were not arbitrary and capricious, and therefore could be interpreted by FERC as helping to fulfill public convenience and necessity. *Id.* This shows that when agencies demonstrate their actions based on interpretations of a law are connected to the facts in front of the agency, courts will generally allow the agency to interpret a law to justify that action.

Here, FERC's decision to interpret NGA 15 U.S.C. § 717f(e) to consider the GHG mitigation measures imposed on TPG as conditions that helps fulfill public convenience and necessity should be given deference since the interpretation is not arbitrary, capricious, or unlawful. For one, there is nothing to indicate that FERC's mitigation measures were unlawful. In addition, FERC decision to impose GHG mitigation measures reasonable because this action is consistent with the facts before the agency. Facts provided by an EIS to FERC suggested that construction of the AFP project could create between 88,340-104,100 metric tons of CO<sub>2</sub> emissions. In addition, guidance provided by the Council on Environmental Quality states that the "United States faces a profound climate crisis [caused by increased GHG emissions] and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory." National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1197 (Jan. 9, 2023).

FERC believes there is a rational basis behind this finding, as natural disasters caused by climate change have inflicted damage to America's environment and economy in recent years. *E.g.*, *Climate Change Science: Impacts of Climate Change*, United States Environmental Protection Agency, (Dec. 30, 2022) <https://www.epa.gov/climatechange-science/impacts-climate-change>. This is similar to *Florida Power & Light Co.*, where a court upheld FERC's interpretation of the NGA as giving itself, the authority imposes a condition on a CPCN because the facts in front of FERC were connected with the agency's action. *Florida Power & Light Co.* 598 F.2d at 380. Here, the facts in front of FERC show that GHG emissions, like the ones that will be emitted directly from the construction of AFP, are damaging to the public. These facts support FERC's reasonable decision that GHG emissions are against public convenience and necessity, and therefore in that interest should be mitigated through CPCN conditions in projects like AFP.

## **2. Narrow Test**

FERC's GHG conditions here would also be not found arbitrary and capricious under the narrower State Farm Test. SCOTUS established a narrower test on what actions are considered arbitrary and capricious in *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.* See *State Farm.*, 463 U.S. 29 (1983). Here, the National Highway Traffic Safety Administration (NHTSA) revoked a rule requiring car manufacturers to place airbags or passive seatbelts in automobiles. *Id.* at 2861-2. After SCOTUS decided Congress had not spoken to the issue, the court decided to judge if the NHTSA's action was arbitrary and capricious based if agency action was based on a reasonable construction of the statute. *Id.* at 2866. Similarly, to broader arbitrary and capricious test, this requires a connection between the facts and agency found and the decisions it ultimately made. *Id.* SCOTUS listed four factors in determining this, including: 1) the agency's reliance on factors which congress has not intended to consider to create a regulation, 2) the agency's possible failure to consider

an important aspect of the problem the regulation is supposed to address, 3) any agency explanation for its decision that runs counter to the evidence before the agency, 4) the regulation was so implausible that it could not be ascribed to a different in view or the product of agency expertise. *Id.* at 2866-7. NHTSA did not consider if airbag technology would be required if they modified the standards and too quickly dismissed safety benefits of automatic seatbelts, failing the second factor, so the court declared their action arbitrary and capricious. *Id.* at 2868-74.

Here, FERC's decision to interpret the GHG mitigation measures on TPG as conditions that help fulfill public convenience and necessity is not arbitrary nor capricious under the stricter State Farm Test. First, there is no indication that FERC used factors which Congress did not consider in not creating downstream and upstream GHG conditions. To the contrary, FERC used information from an EIS to create this mitigation measures, which Congress intended that agencies use as a source of information for these efforts. *See* 42 USC § 4321. Second, FERC did not fail to consider important aspects of the problem. In *State Farm*, NHTSA simply did not consider factors considering airbag technology and the safety benefits of seatbelts. *State Farm* 463 U.S. at 2868-74. Unlike NHTSA, FERC here considered the positive economic and negative environmental effects of this project and used those considerations in deciding to implement GHG mitigation measures. Third, as already stated earlier, the evidence in front of FERC showed that GHG emissions contribute to climate change, which damages the US's economy and environment. *E.g.*, *Climate Change Science: Impacts of Climate Change*, United States Environmental Protection Agency, (Dec. 30,2022) <https://www.epa.gov/climatechange-science/impacts-climate-change>. Limiting their emissions through these GHG conditions is a logical outgrowth of that information. Finally, there is no to indication that FERC's decision was so implausible that it could not be ascribed to a different in view or the product of agency

expertise. So even under the stricter State Farm test, FERC's interpretation that the NGA gives itself the authority to impose the GHG conditions listed in TPG CPCN is not arbitrary and capricious.

As demonstrated by applying the looser and stricter State Farm arbitrary and capricious test, FERC's decision to interpret the NGA granting it the authority to impose the GHG conditions in the TGP CPCN is not arbitrary nor capricious. Therefore, the court should defer to FERC's interpretation of the NGA as giving the agency authority to impose these GHG conditions.

C. FERC's conditions for CPCN's can be considered subject areas other than natural gas rates.

It does not matter that FERC's conditions here did not concern natural gas rates. In *Transcon. Gas Pipe Line Corp. v. FERC*, FERC was able to impose conditions within its CPRN that were related to efficiency, not rates. *Transcon. Gas Pipe Line Corp.* 589 F.2d at 191. This was because SCOTUS had previously noted that 5 U.S.C. § 717f(e) requires FERC to examine all factors that might affect the public interest when considering to impose conditions. *Id.* Here, FERC also considered all factors that might affect public interest, which includes GHG emissions. Since FERC identified that GHG emissions would affect the public interest, it decided to impose conditions.

**IV. FERC decision to not impose any GHG Conditions addressing downstream and upstream GHG impacts is not arbitrary and capricious**

FERC's decision not to include GHG conditions related to downstream and upstream impacts is not arbitrary and capricious based on the various test for determining if agency action is arbitrary and capricious. As already shown in Section VI, have been known to use both broad and narrow test as demonstrated in *Florida Power & Light Co.* and *State Farm*. See generally *Florida Power & Light Co.* 598 F.2d; *State Farm* 463 U.S.



A. FERC's decision not to impose GHG conditions addressing downstream and upstream GHG impacts is not arbitrary and capricious based on a broad arbitrary and capricious test.

As discussed in Section VI, one way that courts tell if an agency has taken an arbitrary and capricious action is by simply looking if that action reasonable, determined simply by if there is a connection between the facts in front of an agency and the action the agency takes based on those facts. *See, e.g., Burlington Truck Lines, Inc. v. 83 S. Ct. at 246.* This was demonstrated in the *Florida Power & Light Co.* case, where The DC Circuit upheld FERC decision to impose condition on a CPCN banning gas sales to boiler fuel companies was reasonable based on a reasonable determination that supplying gas to boiler fuel was a low priority than supplying gas to other customers during a time of fuel shortages, and therefore not arbitrary and capricious. *Florida Power & Light Co. at 380.*

Here, FERC's decision to not include GHG mitigation measures addressing downstream and upstream emissions in the CPCN condition is not arbitrary and capricious. As noted in the record, the EIS that FERC relied for imposing GHG conditions had difficulty in accurately measuring the downstream and upstream GHG emissions that could be created by approving the AFP project. This could create difficulty in making effective measures to combat these emissions. In addition, FERC's is still in the drafting process for creating standardized regulations on addressing what qualifies as substantial emissions in need of mitigation. While the facts in front of FERC do show that downstream and upstream GHG emissions will result from the project, it does not have a accurate way to determine if any mitigation measures on downstream and upstream GHG emissions would be effective or are even necessary. Based on this fact, FERC has decided to not impose GHG downstream or upstream conditions on the AFP project. This is like *Florida Power & Light Co.*, as in that case and here FERC made decisions on whether to impose or not impose CPCN conditions based on a connection with the

facts in front of the agency. *Florida Power & Light Co.* at 380. Therefore, since FERC decided not to impose upstream and downstream CPCN conditions base on a connection with facts in front of the agency, its actions were not arbitrary and capricious.

B. FERC's decision not to impose GHG conditions addressing downstream and upstream GHG impacts is not arbitrary and capricious based on a narrow arbitrary and capricious test.

Like the broader test, courts using the narrow arbitrary and capricious test determine if an agency action is arbitrary and capricious if the agency actions do not align with the facts in front of an agency. *State Farm* 463 U.S. at 2861-2. This is determined based on four factors, including 1) the agency's reliance on factors which congress has not intended to consider to create a regulation, 2) the agency's possible failure to consider an important aspect of the problem the regulation is supposed to address, 3) any agency explanation for its decision that runs counter to the evidence before the agency, 4) the regulation was so implausible that it could not be ascribed to a different in view or the product of agency expertise. *Id.*

Using the narrower test, FERC's decision to not include GHG Conditions addressing downstream and upstream GHG impacts is not arbitrary and capricious. From the facts of this case, there is no indication that FERC used factors which Congress did not consider in not creating downstream and upstream GHG conditions. In addition, FERC did not fail to consider important aspects of the problem. In *State Farm*, NHTSA simply did not consider factors considering airbag technology and the safety benefits of seatbelts. *State Farm* 463 U.S. at 2868-74. Unlike NHTSA, FERC did consider the impact of downstream and upstream GHGs but chose not to impose any conditions relating to it because it has difficulty measuring them is still finalizing regulations on how to address them. Applying conditions related to downstream and upstream may not be necessary at this point or could lead to ineffective mitigation measures. Since FERC currently is unable to determine if downstream or upstream GHG impacts are

significant or insignificant, its decision not to apply conditions does not run contrary to evidence before FERC that downstream or upstream GHG impacts are significant or insignificant problem that require conditions. Lastly, there is nothing to indicate that FERC's decision was so implausible that it could not be ascribed to a different in view or the product of agency expertise. Even using the narrower test, FERC's decision not to include GHG conditions related to upstream and downstream emissions is not arbitrary and capricious.

### **CONCLUSION**

For the foregoing reasons, the petitions for review should be denied, and the orders should be upheld in all respects.