In the United States Court of Appeals
for the Twelfth Circuit

THE HOLY ORDER OF MOTHER EARTH, AND

TRANSNATIONAL GAS PIPELINES, LLC

Petitioners - Appellants,

v.

FEDERAL ENERGY REGULATORY COMMISSION

Respondent - Appellee.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

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JURISDICTIONAL STATEMENT

This is a consolidated Petition for Review from a final agency action by Federal Energy and Regulatory Commission ("FERC" or the "Commission"). The Commission granted a Certificate of Public Convenience and Necessity on April 1, 2023, to Transnational Gas Pipelines, LLC ("TGP") pursuant to its authority under Section 7(c) of the Natural Gas Act ("NGA") and Part 157 of the Commissions regulation to construct and operate an interstate pipeline. Holy Order of Mother Earth ("HOME") filed timely Petition for Review of the CPCN Order and Rehearing Order, and was docketed as 23-01109. TGP filed timely Petitions for Review of the CPCN Order and Order Denying Rehearing, and was docketed as 23-01110, and was consolidated with docket 23-01109. The Petitions for Review are timely pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure. The United State Court of Appeals for the Twelfth Circuit has jurisdiction over these Petitions for Review under 15 USCA §717r(b), and 28 U.S.C § 1331 because the Order Denying Rehearing, entered on June 1, 2023, was final federal agency action.

STATEMENT OF ISSUES PRESENTED

1. Did FERC err when determining its finding of public convenience and necessity for the AFP arbitrary and capricious or not supported by substantial evidence for a project where 90% of natural gas transported through the pipeline is to be exported?
2. Did FERC err when determining its finding of benefits from the AFP outweighed the environmental and social harms being arbitrary and capricious?
3. Did FERC err when determining its decision to route the AFP over HOME property despite HOME's religious objections in violation of RFRA?
4. Did the FERC err in finding the GHG Conditions it imposed were within its authority under the NGA?

5. Did FERC err in finding its decision to not impose any GHG Conditions addressing downstream and upstream GHG was reasonable?

STATEMENT OF THE CASE

The Proposed Pipeline Project

Transnational Gas Pipelines, LLC ("TGP") is a limited liability company governed by the laws of the State of New Union. TGP filed an application on June 13, 2022, seeking authorization to construct and operate an interstate pipeline. *Order Denying Rehearing*, 199 FERC ¶ 72,201 (2023) ("FERC Order"), ¶ 1. The TGP Project will cost an estimated $599 million and will transport up to 500,000 dekatherms (Dth) per day. *Id.* at ¶¶ 1, 10. TGP's proposed pipeline will stretch across approximately 99 miles, connecting facilities in Jordan County, Old Union to an established gas transmission facility run by TGP into Burden County, New Union (the "TGP Project"). *Id.* at ¶ 10 . TGP has signed binding precedent agreements with International Oil & Gas Corporation ("International") and New Union Gas and Energy Services Company ("NUG") to transport liquified natural gas ("LNG"). *Id.* at ¶ 11. Hayes Fracking Field ("HFF") in Old Union produces natural gas and processes it into LNG for transport by the AFP. *Id.* at ¶ 12. The AFP will transport 35% of the LNG from HFF, while the Southway Pipeline will transport the remaining LNG to states east of Old Union. *Id.* International's portion of LNG will begin at its M&R Station located at the shore of Lake Williams in New Union City (the "New Union City M&R Station) and divert to the Burden Road M&R Station. *Id.* at ¶ 14. The NorthWay Pipeline will receive the LNG and transport it to the New Union City M&R station at the Port of New Union on Lake Williams. *Id*. International will then transport its share of about 90% of the LNG, about 450,000 Dth per day, to a country the United States does not have a free trade agreement with, Brazil. *Id.* at ¶¶ 11,14, 24, 33.

Need for the Pipeline

TGP conducted an open season before applying for the CPCN to gauge the interest from outside parties who may want to utilize the AFP. *Id.* at ¶ 11. During the open season, TGP entered into binding precedent agreements with International and NUG to transport a combined total of 500,000 Dth per day, which is the TGP Project's full design capacity. *Id.* The LNG routed through the AFP would be rerouted from LNG previously rerouted to the eastern states, where demand is declining, and transport LNG instead to areas that are more reliant on natural gas. *See id.* at ¶ 13. The AFP would also expand LNG availability to areas in New Union that currently do not have access to natural gas. *Id.* at ¶ 27. The AFP construction will also help optimize existing natural gas systems, which will benefit new and current customers by making the market more competitive. *Id.* Finally, the expansion of natural gas availability in the United States will provide opportunities for an improvement in regional air quality since natural gas burns cleaner than fossil fuels. *Id.*

Pipeline Approval

The requirements for constructing and managing a new natural gas pipeline are set out in the Certificate Policy Statement. *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC 61,227 (1999) ("Certificate Policy Statement"); FERC Order at ¶ 17. This criterion requires a need for the proposed project to be established and for that need to serve the public interest. *Id.* In addition, pipeline companies are required to fund the project without existing customers subsidizing the project. *Id.* at ¶ 19. When the company's goal is to be approved for new construction, potential adverse consequences must be balanced against the public benefit. *Id.* Through balancing, the Commission aims to consider overbuilding, competitive transportation alternatives, existing customer subsidization, unnecessary environmental disruption, eminent domain, and the responsibility unsubscribed capacity brings to the applicant. *Id.*

After the Commission conducts a balancing test, it evaluates the project using an economic test. *Id.* at ¶ 20. It is the applicant's responsibility to minimize or eliminate any adverse effects the new pipeline will have on existing pipelines, existing pipeline customers, and landowners and community members who will be affected by the new pipeline's route. *Id.* If the applicant fails to eliminate all adverse effects towards the impacted parties, the Commission must evaluate the adverse impacts against the public benefits. *Id.* This evaluation yields an environmental analysis, which is used to determine if the proposed projects' beneficial economic interest outweighs any adverse effects. *Id. at* ¶ 20.

In terms of public convenience and necessity, downstream greenhouse gas ("GHG") emissions are to be taken into consideration in the context of an environmental analysis. *Id.* at ¶ 72. For the GHG emissions to be given proper consideration, they are considered with current GHG Conditions though an Environmental Impact Statement ("EIS"). *Id.* During TGP's evaluation of GHG impacts through an EIS it concluded that about 9.7 million metric tons of CO2e would be emitted downstream per year. *Id.* The estimated amount of CO2e falls into the upper bound for CO2e emissions resulting from end-use gas combustion transported through the pipeline project. *Id.* Since the estimate reflects a maximum capacity for gas to be transported in a 365-day period, although maximums are rarely reached, actual project emissions are likely to be lower than estimated. *Id.* Throughout transportation and use of other fuels, CO2e emissions are also likely to be lower than predicted. *Id.*

Based on the FERC's calculations, the AFP is estimated to have an average CO2e of 88,340 metric tons per year over the predicted four-year construction period. *Id.* at ¶ 73. Outside of GHG Conditions, FERC estimates construction emissions to average 104,100 metric tons per year of CO2e. *Id.* Upstream emissions have been evaluated on a case-by-case basis and are difficult to

quantify; they are not relevant for this Pipeline Project approval. *Id.* at ¶ 74. There are no official guidelines outlining how to determine if downstream and upstream GHG impacts constitute substantial impacts. *Id.* As of February 2022, a draft about downstream and upstream emissions was released, but it has yet to be finalized. *Id.* at ¶ 81. The Commission has implemented multiple mitigation measures to address some of these impacts. *Id.* at ¶¶ 6, 67, 82.

Mitigation Measures

TGP has tried to mitigate adverse impacts by planning to replant 2,200 in a safe location to replace the exact amount that had to be removed, creating an alternate route that lessens the impact on landowner property, and planning the construction around a group of landowners. *Id.* at ¶ 38, 41, 60. TGP has agreed to reroute over 30% of the AFP to address landowner concerns, and to negotiate easement agreements with almost 60% of impacted landowners. *Id.* at ¶ 41, 42. One group of landowners is a religious group called Holy Order of Mother Earth ("HOME"). *Id*. at ¶¶ 1, 9. HOME values the natural world to be sacred and believes nature should be respected and worshiped as a deity. *Id.* at ¶ 40. One of HOME's primary tenants is to put the preservation of nature over economic interests. *Id.* at ¶ 47.

The AFP is routed to pass through about two miles of property owned by HOME. *Id.* at ¶ 38. The AFP that passes over HOMEs land will be used to transport LNG, some of which has been obtained through fracking. *Id.* at ¶ 49. For the AFP to be routed through the property, around 2,200 trees will need to be removed along with other forms of vegetation. *Id.* Since the trees which are to be removed along the AFP route cannot be replaced for safety reasons, an equal number of trees will be replanted in a safe location. *Id.* If TGP were to use an alternative route that does not cross into HOME's land by going through the Misty Top Mountains, construction costs would increase by over $51 million. *Id.* at ¶ 44. The alternative route would extend the AFP by three miles, crossing into the Misty Top Mountains' sensitive ecosystems. *Id.*

With the AFP not being rerouted to the alternative route, HOME believes it will be forced to support the burning, transportation, and production of fossil fuels. *Id.* at ¶ 50. For HOME, these impacts are "invaluable", and the effects caused below ground will not outweigh the benefits the AFP will bring. *Id.* HOME is particularly concerned about the AFP disturbing its annual ritual, known as the Solstice Sojourn, which it has conducted along the same route since 1935. *Id.* Every winter and summer solstice, HOME members travel from a temple located on the western border of HOME's property and journey to sacred foothills of the Misty Top Mountains on the eastern border of the property. *Id.* During this sacred time, HOME children who have turned 15 years old in the past six months travel the Solstice Sojourn across the property. *Id.* TGP is mitigating impacts to the Solstice Sojourn by constructing the pipeline in-between solstices, and burying the pipeline, so HOME members can continue to cross over the land for their journey. *Id.* at ¶ 60. Constructing the AFP over the proposed route will not prevent HOME from conducting its ritual activities. *Id.* at ¶ 48.

Along with the specific mitigation measures that TGP is undertaking to ensure HOME is minimally impacted, mitigation measures have also been imposed by the Commission. *Id.* at ¶ 67. The construction process of the AFP impacts the level of GHG emissions. *Id.* In order for TGP to mitigate additional GHG emissions from the construction process, the Commission has required for the construction to be done mindfully, in regard to the equipment, products, and source of energy. *Id.* TGP has been directed to exclusively purchase "green" steel pipeline segments that come from net-zero steel manufacturers and purchase electricity from renewable sources when available. *Id.* During the actual construction of the AFP, TGP has been further instructed to use electric-powered equipment such as chainsaws and additional removal equipment in addition to utilizing electric vehicles when available. *Id.* After the pipeline project is completed, TGP will be

required to plant an equal number of trees to the ones it removed. *Id.* The Commission extensively analyzed the EIS and imposed mitigation measures, as it has historically done, to address potential adverse effects. *Id.* at ¶ 72, 79.

Procedural History

On April 1, 2023, the Commission authorized TGP to construct and operate the AFP following the conditions set forth in the Certificate of Public Convenience and Necessity (the "CPCN"). *Id.* at ¶ 2. On approval of its application, TGP became a natural gas company subject to FERC jurisdiction as defined in NGA section 2(6). *Id.* at ¶ 8. On April 20, 2023, HOME sought rehearing from the Commission on certain concerns it had about the CPCN. *The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, No. 23-01109 (Jun. 1, 2023). April 22, 2023, TGP also sought rehearing from the Commission with certain concerns it had about the CPCN. *Id.* The Commission denied both HOME's, and TGP's petitions, affirmed the CPCN, and issued an Order Denying Rehearing. *Id.* "On June 1, 2023, both HOME and TGP filed Petitions for Review of the CPCN Order and Rehearing Order" with the United States Twelfth Circuit Court of Appeals. *Id.*

SUMMARY OF THE ARGUMENT

FERC followed procedure, and acted reasonably when it granted the CPCN, and denied HOME's and TGP's petitions for rehearing. As a federal administrative agency FERC has been granted authority from federal statute, specifically from the Natural Gas Act ("NGA"), to ensure the United States economy prospers, without hindering the public interest. As a federal agency FERC is also required to comply with the National Environmental Policy Act ("NEPA"), as it has done so here.

FERC ensured that a comprehensive EIS was prepared, and it extensively analyzed the EIS before approving the construction of the AFP. During this period of analysis FERC also considered the public convenience and necessity, and the potential adverse environmental effects, weighed against the public interest, as required by the NGA. FERC first ensured there was adequate evidence of a public need for the proposed pipeline. Upon a finding of public need FERC then analyzed whether any potential adverse effects from the project did not outweigh the benefits of the project. FERC determined that although there will be some adverse effects, the overall economic and environmental benefit far outweighs any potential harms. FERC considered all relevant factors in its decisionmaking process, and under the authority of the NGA it granted the CPCN and approved the construction of the AFP.

Beyond just considering the potential adverse effects, and the public broadly, FERC also imposed mitigation measures on TGP to ensure that the public that will be directly impacted by the construction, such as HOME, will be impacted in the least adverse way possible. FERC considered alternatives, and upon determining that the best route was over HOMEs property, it imposed mitigation measures on TGP to address the adverse effects to HOME. While HOME does use the land for religious purposes, FERC has done everything within its power under the NGA to ensure HOME's ability to practice its religion has not been hindered.

FERC also included mitigation measures as conditions of the CPCN, as it historically has, to counter any adverse environmental effects by the construction of the pipeline. FERC has the discretion to decide what mitigation measures to impose, it is not obligated to impose mitigation measures for all GHG emissions. During this entire process FERC has used its authority under the NGA to ensure that any adverse impacts from the construction of the pipeline are mitigated. The Commission has acted as required by statute, to ensure that the public is not

only well informed about the construction of the pipeline, but that its construction was in the best interest of them. FERC has complied with NEPA, and the NGA from the moment the pipeline was proposed.

STANDARD OF REVIEW

Courts use the Administrative Procedures Act's arbitrary and capricious standard to review FERC's granting of a CPCN and vacate a CPCN only where FERC has acted arbitrarily and capriciously in granting that CPCN. 5 U.S.C. § 706(2)(A); *See also Env't Def. Fund v. FERC*, 2 F.4th 953, 967 (D.C. Cir. 2021); *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (vacating FERC orders that were based partially on incomplete information and therefore were arbitrary and capricious). Arbitrary and capricious conclusions reflect a "clear error of judgment" where an agency does not use "reasoned decisionmaking" or offer any "rational explanation" for its decisions. Williams Gas, 475 F.3d at 326; *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

FERC's power to issue a CPCN "is limited to the scope of the authority Congress has delegated to it" under the NGA. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005). However, FERC's decision whether to grant a CPCN falls "peculiarly within the discretion of the Commission," and courts defer heavily to FERC's judgment in making that decision. Okla. Natural Gas Co. v. Fed. Power Comm'n, 257 F.2d 634, 639 (D.C.Cir.1958); *see* Nat'l Comm. for the New River v. FERC, 373 F.3d 1323, 1327 (D.C.Cir.2004); *see also* Washington Gas Light Co. v. FERC, 532 F.3d 928, 930 (D.C.Cir.2008).

Because issuing a CPCN is a federal agency action, FERC must also comply with NEPA when issuing a CPCN. Courts apply "a 'rule of reason' to an agency's NEPA analysis and ha[ve] repeatedly refused to 'flyspeck' the agency's findings in search of 'any deficiency no matter how

minor.'" *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322–23 (D.C. Cir. 2015) (citations omitted).

ARGUMENT

I. The Commissions finding that the AFP responded to a public need was not arbitrary and capricious because it was supported by substantial evidence.

The Commission's finding of public convenience and necessity was reasonable as there was sufficient evidence to demonstrate a public necessity for the AFP. FERC has broad discretion in its determinations whether to issue CPCNs, subject only to the condition that its decision must consider relevant factors. See *Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 262 (3d Cir. 2018). The Commission's issuance of a CPCN is reviewable under the Administrative Procedures Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A); See also *Env't Def. Fund v. FERC*, 2 F.4th at 967. Where the Commission has issued a CPCN based on reasoning that is arbitrary and capricious, the CPCN must be vacated. *Williams Gas,* 475 F.3d at 326. FERC is required to determine that a proposed project "is or will be required by present or future public convenience and necessity," before it may grant a Certificate of Public Convenience and Necessity ("CPCN"). 15 USC § 717f(e). A public necessity for natural gas is not quantified by the percentage of LNG involved in interstate commerce but rather the domestic needs that the LNG satisfies. For a project to be approved, the Commission must determine "whether the project can proceed without subsidies from [the applicant's] existing customers." *Myersville*, 783 F.3d at 1309 (quoting Certificate Policy Statement at ¶ 61,745). To determine public necessity, FERC is required to "consider all relevant factors reflecting on the need for the project," which may include export precedent agreements. Certificate Policy Statement at ¶ 61, 747; *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 726 (D.C. Cir. 2022). FERC considered the appropriate

factors and based its finding of public necessity on substantial evidence when it granted the CPCN for the TGP.

In *Minisink Residents for Env't Pres. & Safety v. FERC*, Millennium Pipeline Company ("Millennium") sought to expand service capacity for the natural gas pipeline system it owned and operated. 762 F.3d 97, 102 (D.C. Cir. 2014). Millennium's project aimed to increase the amount of natural gas delivered "to its eastern interconnection by about 225,000 additional dekatherms per day" and construct a compressor which "would enable bi-directional gas flow on an existing segment of Millennium's pipeline." *Id.* The court in *Minisink* found the project would serve public interest and necessity, which means it satisfied a public, domestic need. *Id.* at 116. In *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, a regional natural gas company, Dominion Transmission, Inc. ("Dominion"), obtained precedent agreements that had to be amended, and Dominion only provided a summary of the amended precedent agreements as evidence of market need. 783 F.3d 1301 at 1310. Dominion's proposed project required two compressor stations to be built which would compress gas and move it through the pipeline system at high speeds. *Id.* at 1307. The construction of compressor stations was necessary for the pipeline to maintain the required gas flow rates. *Id.* at 1312. The compressor stations were also needed to "periods of peak demand" in Myersville. *Id.* at 1314. The court found that FERC's decision to grant a CPCN was supported by substantial evidence because FERC considered the precedent agreements and provided explanations for why the compressor stations were necessary and not overbuilt. *See id.*

In *City of Oberlin, Ohio v. FERC*, NEXUS Gas Transmission, LLC ("Nexus") was granted a CPCN "to construct and operate a natural gas pipeline from Ohio to Michigan", along with four compressor stations. 39 F.4th at 721. The court found that even though the project was a Section

7 domestic project, obtaining foreign precedent agreements to secure an increase in natural gas transportation capacity constituted substantial evidence to show there was a domestic public necessity for the project. *Oberlin,* 39 F.4th at 729. Nexus was able to secure eight precedent agreements that made up 59% of the total capacity for the pipeline. *Id.* 17% of the 59% would be from Canadian companies, a country which the US has a free trade agreement with for gas. *Id.* While the court did say that the fact that a free trade agreement for gas constitutes dispositive evidence of public interest for Section 3 approvals, it is only one of many factors to consider for Section 7 approvals. *Id.* at 727. The court upheld FERC's decision that a 42% subscription from precedent agreements for the Nexus pipeline would justify a domestic need through public convenience and necessity. *Id.* at 729.

Here, like Nexus, TGP was able to secure binding precedent agreements with International and NUG. FERC Order at ¶ 12. However, while Nexus was only able to provide precedent agreements accounting for 59% of the total capacity of the pipeline, TGP has obtained precedent agreements accounting for "100% of the design capacity" of its project. FERC Order at ¶ 26. Like the project in Oberlin, the project here is a Section 7 domestic project, thus FERC is only required to consider the fact that United States has a free trade agreement with the country the precedent agreements are with, as one relevant factor, and not as dispositive evidence either way. See FERC Order at ¶ 2. TGP will not directly transport LNG to Brazil though the AFP. *Id.* at ¶¶ 14, 33. FERC recognized the LNG being exported to Brazil would be produced, transported, and sold domestically before International would place it in tankers and export it. *Id.* at ¶¶ 11-12, 14.

The AFP will also expand access to natural gas in the United States' domestic market by transporting 500,000 Dth of LNG within the United States each day. FERC Order at ¶ 27. In *Minisink*, a domestic need was shown by Millennium's expanded service capacity of 225,000

dekatherms per day. 762 F.3d at 102. Therefore, the fact that the AFP will transport 500,000 Dth of LNG each day is sufficient to demonstrate domestic need. *See id.* Domestic need may also be demonstrated through precedent agreements, even if those precedent agreements result in exportation of the transported LNG. *Cf. Myersville*, 783 F.3d at 1310. Transporting gas in domestic and international markets creates a need for domestic natural gas production and sales occur which result in domestic economic growth and supports domestic jobs. *Oberlin*, 39 F.4th at 726. The AFP will transport all LNG sold domestically and to Brazil through interstate commerce, increasing the demand for domestic LNG production, transportation, and sales using domestic employees. FERC Order at ¶ 12.

By executing signed precedent certificates, proving natural gas to areas that do not receive LNG, and transporting LNG through interstate commerce, FERC has relied on substantial evidence, such as precedent certificates and LNG demand in underserviced areas, to demonstrate a domestic public need for the AFP. FERC Order at ¶¶ 12, 27.

II. The Commissions finding that the benefits from the AFP outweigh the environmental and social harms was not arbitrary and capricious.

FERC offered a rational explanation for its conclusion that the AFP's benefits outweighed its harms, therefore its determination that the AFP's benefits outweigh its adverse impacts was not arbitrary and capricious. Before granting a CPCN, FERC must weigh a proposed project's economic and environmental benefits against its adverse economic and environmental impacts. Certificate Policy Statement at ¶ 61,747. A project's economic and environmental benefits include, but are not limited to, satisfying an economic or social need or displacing other, less environmentally friendly power sources. *Id.* at ¶ 61,748. Adverse impacts may include (a) harms to the applicant's existing customers; (b) effects on existing pipelines already serving the market

in which the applicant seeks to construct a pipeline; and (c) effects on nearby landowners and communities. *Id.* at ¶ 61,748. FERC's inquiry into these benefits and adverse impacts also includes considering the extent to which mitigating adverse impacts is possible. *Id.* at ¶ 61,744. Courts apply the arbitrary and capricious standard to FERC's NGA analysis and will find that FERC has not acted arbitrarily and capriciously if it demonstrates reasoned decisionmaking. *Williams Gas*, 475 F.3d at 326; *Del. Riverkeeper Network*, 753 F.3d at 1313.

In *Environmental Defense Fund v. FERC*, the D.C. Circuit held that FERC's orders granting a CPCN for a new natural gas pipeline and denying rehearing were arbitrary and capricious because, it "the Commission failed to adequately balance public benefits and adverse impacts." 2 F.4th at 973-74. Furthermore, the court was unable to identify any facts or law other than a single precedent agreement that demonstrated the need for and benefits of the pipeline. *Id.* Rather than treating a precedent agreement as a factor in its analysis, the Commission treated the agreement as though it was dispositive. *Id.* at 973. The Commission did not find that the pipeline would reduce costs or meet any additional energy demands. *Id.* In its order granting the CPCN, the Commission cited no concrete evidence supporting its assertion that the pipeline's market benefits would outweigh its adverse effects. *Id. Environmental Defense Fund v. FERC* demonstrates that FERC acts arbitrarily and capriciously when it issues a CPCN without a significant factual and legal basis to do so. *See id.*

In another D.C. Circuit case, the court upheld the Commission's issuance of a CPCN against a claim that FERC's analysis did not satisfy the NGA's requirements. *Minisink*, 762 F.3d 97. Plaintiff residents of Minisin**k,** NY alleged, *inter alia*, that FERC's order granting a CPCN for the construction of a natural gas compressor in their town violated the NGA by failing to duly consider an alternative site for the compressor. *Id.* at 100-01. The court held that the Commission

had satisfied its obligation to consider the alternate site because, in its order, FERC outlined the possibility of the alternate site and concluded that it was a less preferable option because it had more significant environmental impacts. Moreover, FERC went out of its way to invite feedback regarding the proposed alternative. *Id.* at 107.

Here, FERC's conclusion that the benefits of issuing a CPCN for TGP to construct the AFP outweighed the adverse impacts was logically and legally sound and properly considered all relevant information, including mitigation strategies and alternate proposals. In its Order Denying Rehearing, FERC points to specific facts and law to explain why the benefits of the AFP outweigh the adverse impacts. *See* FERC Order. The June 1, 2023 order explains why the exportation of the LNG being transported falls into the benefit category, how TGP has mitigated the AFP's impact on landowners and communities, why the TGP's inability to secure easements with local landowners does not hinder the project's legality, and why FERC cannot consider HOME's religious objections as part of its inquiry under the NGA. *Id.* at ¶¶ 26, 30, 41, 43, 51-52. As part of its inquiry, FERC was not required to consider environmental rights created under New Union state law because the NGA "confers on the Commission 'exclusive jurisdiction' over transportation and sale, as well as over the rates and facilities of natural gas companies engaged in transportation and sale," thereby preempting state law. *Myersville,* 783 F.3d at 1306 (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306–08 (1988)). FERC considered ways the harmful impacts of the AFP can be mitigated and has included mitigation measures as conditions in the CPCN. FERC Order at ¶¶ 66-67. Finally, FERC has given due attention to project alternatives and rejected the alternate route based on reasonable considerations such as the proposed alternate route's increased environmental impact and added cost of $51 million. FERC Order at ¶ 44; Exhibit A.

Rather than concluding based on a single factor that the benefits of the AFP outweighed its adverse impacts, like in *Environmental Defense Fund v. FERC*, here FERC considered all of the relevant factors, such as the project's impacts on surrounding landowners, the project's cost, property law issues, and market LNG demand. *See* FERC Order at ¶¶ 3, 26, 41-43, 44; *see also Env't Def. Fund v. FERC*, 2 F.4th. FERC also properly attached mitigating conditions to the CPCN order and reasonably determined that proposed alternate proposals would have been more harmful. *See* FERC Order. at ¶¶ 41, 44, 62; *cf. Minisink*, 762 F.3d at 107. Therefore, FERC's analysis that the AFP's benefits outweighed its harms was based on reasoned judgment and facts and was not arbitrary and capricious.

III. The Commission's decision to route the AFP over HOME property despite HOME's religious objections did not violate RFRA.

The Religious Freedom Restoration Act ("RFRA") prohibits the government from "substantially burden[ing]" any person's exercise of religion, except where that burden passes strict scrutiny. 42 U.S.C. § 2000bb–1. RFRA only prohibits government action that affirmatively pressures persons to violate their sincerely held religious beliefs. *Ave Maria Found. v. Sebelius*, 991 F. Supp. 2d 957, 964 (E.D. Mich. 2014). Internal government procedures and "management of public property" are not included in this category. *Id.*

FERC's order granting TGP a CPCN to construct and operate the AFP did not violate RFRA. The AFP will not substantially burden HOME's exercise of religion. *See* 42 U.S.C. § 2000bb–1. Even if the AFP did substantially violate HOME's exercise of religion, the CPCN still does not violate RFRA because the CPCN is the least restrictive means of achieving a compelling government interest and will thus pass the strict scrutiny standard. *See id.*

A. The Commission's Order Granting the CPCN did not substantially burden any exercise of religion.

The issue under HOME's RFRA claim is whether FERC's approval of the pipeline substantially burdens HOME's use of its land for religious purposes; That HOME's use of its land is an exercise of religion is not in dispute. *See* FERC Order at ¶ 46; *see also* 42 U.S.C. § 2000b-2(4) (defining "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including "the use . . . of real property for the purpose of religious exercise").

Each judicial circuit defines "substantial burden" differently and with varying degrees of latitude. The Ninth Circuit defines the term most narrowly. In *Navajo Nation v. U.S. Forest Service*, a Native American tribe claimed that, because recycled wastewater "contains 0.0001% human waste," the use of snow made from recycled wastewater on land the tribe held sacred would violate RFRA. 535 F.3d 1058, 1062 (9th Cir. 2008). The Ninth Circuit defined "substantial burden" as action that would "coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions," or "condition a governmental benefit upon conduct that would violate their religious belief." *Id.* at 1067. The court found no substantial burden because (1) the artificial snow would only cover one percent of the contested land; (2) the plaintiff tribe would still have full access to the land for religious purposes; and (3) the tribe would not face sanctions for practicing its religion on the land. *Id.* at 1070. Furthermore, the court noted that the use of the artificial snow would only affect the tribe members' "subjective, emotional religious experience," and that "the diminishment of spiritual fulfillment—serious though it may be—is not a "substantial burden" on the free exercise of religion." *Id.*

Other circuits define "substantial burden" more loosely as a "substantial pressure" from the government to modify behavior and violate some religious belief. *See, e.g.*, *Mack v. Warden*

Loretto FCI, 839 F.3d 286, 304 (3d Cir. 2016) (a substantial burden exists where (1) a follower must choose between following his or her religion and receiving an otherwise available government benefit; or (2) the government substantially pressures a religious adherent "to substantially modify his behavior and to violate his beliefs."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (defining "substantial burden" as "more than an inconvenience" and "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly").

While the Ninth Circuit's definition of "substantial burden" as articulated in *Navajo Nation* is stricter than other circuits, all circuits' definitions of "substantial burden" require that the government has coerced or pressured a person into some affirmative modification of behavior. For example, the D.C. Circuit stated in *Kaemmerling v. Lappin* that a substantial burden exists only where the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs." 553 F.3d 669, 678 (D.C. Cir. 2008) (incorporating into the RFRA context the Supreme Court's test for "substantial burden" in the Free Exercise context as articulated in *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981)).

Another recent D.C. Circuit case employed the definition of "substantial burden" from *Kaemmerling* where a Native American tribe, filing suit under RFRA, sought to enjoin the U.S. Army Corps of Engineers from granting an easement which would allow a domestic oil pipeline to transport oil beneath a lake to which the tribe ascribed religious significance. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F.Supp.3d 77 (D.D.C. 2017). The court held that the easement would not substantially burden the tribe's exercise of religion because it did not pressure the tribe's members to violate their religious beliefs or cease any religious exercise. *See id.* at 91-92. The court in *Standing Rock*, despite applying a different definition of "substantial

burden," agrees with the logic in *Navajo Nation* and clarifies that the emotional and spiritual effects of a government action do not signify coercion to change some aspect of a person's religious practice. *Standing Rock*, 239 F.Supp.3d at 96.

FERC's decision to route the AFP over HOME's property has not substantially burdened HOME's exercise of religion under either definition of "substantial burden." Placement of the AFP over HOME's land does not substantially burden the Solstice Sojourn, nor does it substantially burden HOME's ability to devote its property to Mother Earth. Routing the pipeline under HOME's land will not substantially burden HOME's exercise of religion by "significantly impact[ing] or entirely prevent[ing] the Solstice Sojourn." *See* FERC Order at ¶ 57. Like in *Navajo Nation*, HOME will still have full access to the land to complete the Solstice Sojourn and will not face any sanctions for doing so. *See Navajo Nation*, 535 F.3d at 1070. HOME will not be physically, legally, or financially prevented from embarking on the Solstice Sojourn, or have to modify the ritual, therefore routing the AFP under HOME's land will not substantially burden HOME's religious exercise of the Solstice Sojourn. *See* FERC Order at ¶¶ 56, 59, 60; *see also Kaemmerling*, 553 F.3d at 678.

Likewise, the placement of the AFP beneath part of HOME's land does not compel HOME "to support the production, transportation, and burning of fossil fuels." *See* FERC Order at ¶ 58. HOME is not compelled to speak about fossil fuels, to use fossil fuels, or to engage in the transportation of fossil fuels. Because TGP has agreed to bury the pipeline where it would cross HOME's land, HOME is not even compelled to see the pipeline at all. *See id.* at ¶¶ 41, 56. Like the pipeline in *Standing Rock*, the AFP will not significantly burden any exercise of HOME's religion because the only impacts HOME alleges the AFP will have on HOME's exercise of religion are solely emotional and spiritual and therefore do not constitute a substantial burden in

violation of RFRA. *See Navajo Nation*, 535 F.3d at 1070; *see also Standing Rock*, 239 F.Supp.3d at 96. Therefore, FERC has not placed any substantial burden on HOME's exercise of religion by granting a CPCN for the AFP.

B. Even if the Commission's Order Granting the CPCN did substantially burden an exercise of religions, the action survives strict scrutiny.

Where a government action substantially burdens an adherent's exercise of religion, that action may still be lawful under RFRA if it is the least restrictive means of achieving a compelling governmental interest. 42 U.S.C. § 2000bb–1. A compelling governmental interest should not be "broadly formulated," but rather, should be sufficiently important that serving that interest outweighs the burden to "the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 420, 431 (2006) By granting TFP a CPCN to construct and operate the AFP, FERC has addressed a compelling government interest by the least restrictive means possible.

The AFP satisfies a compelling government interest in the transportation and sale of natural gas. The NGA itself states that transporting and selling natural gas for public distribution is in the public interest. 15 U.S.C.A. § 717(a). Moreover, the NGA emphasizes the public necessity of selling natural gas in both interstate and foreign commerce. *Id.* Historically, courts have agreed that the transport and sale of energy resources is a substantial government interest. *See, e.g.*, *Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres*, No. 17-715, 2017 WL 3624250 at *10 (3d Cir. Oct. 30, 2018) (allowing a gas company to condemn property to build and operate a gas pipeline was in the public interest because it would provide gas supplies to homes in the area). For example, in *Inupiat Community of the Arctic Slope v. United States*, a Native tribe in Alaska sought quiet title to a parcel of land, arguing, *inter alia*, that it had a right to the land because of its religious beliefs that were deeply intertwined with that land. 548 F. Supp. 182 (D.

Alaska 1982). The court held that the government's interest in developing the land outweighed the "alleged interference with the plaintiffs' religious beliefs" because "[t]he federal government has a significant economic stake in the development of energy resources within its borders." *Id.* at 188.

RFRA's least restrictive means test requires that there be no other available method to achieve the compelling government interest that would place a lesser burden on religious interests than the action the agency took. *See Burwell v. Hobby Lobby*, 573 U.S. 682, 691-92 (2014) (holding that federal regulations violated RFRA insofar as they required a closely-held-corporation to "provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners"). Although RFRA sometimes requires the federal Government "to expend additional funds to accommodate citizens' religious beliefs," cost is still an "important factor in the least restrictive means analysis." *Id.* at 30; 42 U.S.C. § 2000cc-3(c) ("Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government . . . but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.")

The AFP serves a compelling governmental interest by providing natural gas resources to those who need them in New Union, and by honoring TGP's precedent agreements. FERC Order at ¶¶ 26, 27, 33. By granting TGP a CPCN to construct and operate the AFP, FERC has satisfied the federal government's compelling interest in transporting energy resources via the least restrictive means available. The only alternative means to transport LNG through New Union and satisfy the precedent agreements would be to reroute the AFP through the Misty Top Mountains. *Id.* at ¶ 39; Exhibit A. This alternative route would cost an additional $51 million and would cause more environmental harm than the original route. *Id.* at ¶ 44. Routing the AFP underneath HOME's property is the least restrictive means, both financially and environmentally, of providing natural

gas to the region. It also infringes less on HOME's belief system by causing less environmental damage. *See id.* Finally, by adding into the CPCN the condition that TGP must bury the pipeline as it runs through HOME's land, FERC has diminished the AFP's impact on HOME's religious exercise almost completely. *See id.* at ¶ 56. Thanks to these efforts, the AFP will meet New Union's compelling energy needs and satisfy TGP's precedent agreements in the least restrictive means possible. Even if the construction of the pipeline was found to be a substantial burden on HOMEs religious practices, the approval would survive strict scrutiny.

IV. The Commission has direct statutory authority from the NGA to impose GHG Conditions.

The Commission acted within its statutory and regulatory authority when it imposed GHG conditions on TGP within the CPCN Order. The Court typically applies Chevron deference to interpret ambiguous statutes that grant authority to a federal agency, but in some "extraordinary cases" it will apply the Major Question Doctrine ("MQD"). *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2608 (2022). The MQD limits administrative agencies' authority when it will affect a "significant portion of the American economy" without "clear congressional authorization." *Id*. at 2600. The MQD has not been applied uniformly across cases, but when determining whether the MQD has been triggered, courts generally consider (1) whether the agency has a "history . . . of the authority they asserted," and (2) whether the agency action is one that "addresses nationwide issues that require specified authorization from Congress." *Id*. at 2595, 2608 (citations omitted). Generally, if a federal agency claims the power to resolve a matter of great "political significance," or end an "earnest and profound debate across the country" the MQD has been triggered. *Id*. at 2595. Here, the Commission claims power that it has historically claimed, and the action does not rise to the level of national concern. The Commission acted within its statutory authority when it imposed GHG Conditions on TGP.

A. The Commission has a history of imposing GHG Conditions within the granting of a CPCN Order.

The Commission has a history of imposing conditions to address GHG emissions, especially when those emissions are a direct result of the project it is approving. TheThe Court is wary of allowing an administrative agency to invoke power that has not been previously evoked. *W. Virginia*, 142 S. Ct. at 2610. In *W. Virginia*, the EPA planned to implement the Clean Power Plan, based on ambiguous authority from the Clean Air Act. 142 S. Ct. at 2595. The Court in *W. Virginia* found that the EPA was trying to assert an "unheralded power" that had not previously been claimed, and allowing the EPA to do so would be a "transformative expansion of their regulatory authority." *Id*. at 2610 (citing *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 324 (2014)). In the Clean Power Plan, the EPA attempted to create nationwide regulations that would "shift polluting activity 'from dirtier to cleaner sources.'" *Id*. (citing 80 Fed. Reg. 64726 (Oct. 23, 2015)). This was the first time the EPA attempted to use its power under the Clean Air Act to create a shifting regulation. *Id*. Before the Clean Power Plan, the EPA generally created regulations requiring facilities to implement measures that would make them operate cleaner. *Id*. In *W. Virginia*, the Court found that the EPA did not have the power to implement a shifting regulation under the Clean Air Act, as it violated the MQD. *Id*. at 2615.

Here, the Commission is not relying on a small ambiguous part of a statute as evidence that it has the authority to impose GHG Conditions, rather it has direct authority from the NGA, and that authority is further supported by guidance from the Council of Environmental Quality ("CEQ"). Under the NGA, FERC has the authority to impose "reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). The CEQ was established by NEPA, and it has the authority to issue regulations interpreting NEPA. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004). The proposed CEQ Climate Guidance

published on January 9, 2023 "encourages agencies to mitigate GHG emissions associated with their proposed actions." *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023). The Commission "has addressed climate change in some fashion in its NEPA analysis for at least a decade." 178 FERC 61, 108 P 8 (2022) ("Interim Policy Statement"); 15 U.S.C. § 717f(e). The language of 15 U.S.C. § 717f(e) has historically been understood to give the Commission the authority to impose mitigation measures when granting CPCN Orders. FERC Order at ¶ 71. Unlike the EPA in *W. Virginia v. Env't Prot. Agency*, the Commission is not attempting to implement novel conditions, but is only implementing mitigation measures as is its responsibility under the NGA to protect "public convenience and necessity." 15 U.S.C. § 717f(e). When the Commission decided to grant the CPCN Order, with mitigation measures addressing GHG emissions, it was acting consistently with how it has in the past.

B. The granting of the CPCN does not have vast national impact and is not the type of action that typically triggers the MQD.

When an administrative agency asserts authority that has "vast economic and political significance" clear Congressional authorization is usually required. *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 324 (2014). In *W. Virginia v. Env't Prot. Agency*, the EPA was attempting to implement the Clean Power Plan, and the Court found that due to the MQD, it was beyond EPA's authority under the Clean Air Act. 142 S. Ct. at 2615. The Clean Power Plan was a national regulation that would impact every state of the country. *Id.* at 2604. In *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.* the FDA attempted to assert a regulatory power that would impact the entire American economy, which resulted in the court applying the MQD. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159 (2000)

(analyzing the question of whether the FDA had this regulatory power because it would have such a major national impact if allowed).

Here, the Commission has imposed GHG Conditions for the construction of a single pipeline, the AFP. FERC Order at ¶ 67. While addressing climate change broadly is a major question, the Commission has only imposed mitigation measures that address the construction of the TGP directly. FERC Order at ¶ 88. The "conditions imposed here are project-specific . . . and do not address or regulate broader GHG emission concerns across the entire natural gas sector or beyond." FERC Order at ¶ 89. Unlike both the EPA in *W. Virginia*, and the FDA in *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.* the Commission is not attempting to implement GHG Conditions that will impact the entire country, rather it has imposed mitigation measures that deal locally and directly with the AFP.

The Commission has statutory, and regulatory authority to implement the GHG Conditions it chose to implement in the CPCN Order. It has a history of implementing similar conditions, and this administrative act does not rise to the level of triggering the MQD.

V. The Commission's decision to not impose any GHG Conditions addressing downstream and upstream GHG impacts was not arbitrary and capricious.

The Commission did not act in an arbitrary or capricious manner when it decided not to impose GHG Conditions addressing downstream and upstream GHG impacts. Under the Administrative Procedures Act a court must hold "unlawful and set aside agency action . . . found to be arbitrary, [and] capricious." 5 U.S.C. § 706(2)(A). "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." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Generally, a court will find that a federal agency action survives the arbitrary and capricious standard if it "relied on factors which Congress . . . intended it to consider." *Id.*

Here, the Commission relied on the factors Congress set forth in NEPA and the NGA. Under NEPA, Congress has directed the Commission to take a "hard look" at the environmental impacts through an information-gathering process, rather than requiring a specific result. *Sierra Club v. FERC*, 867 F.3d 1357, 1376 (D.C. Cir. 2017). Under the NGA, the Commission is required to consider factors relevant to the public convenience and necessity when deciding to approve or not approve an action, and when deciding what, if any, mitigation measures to impose. 15 U.S.C. § 717f(e). The Commission acted reasonably because it relied on relevant factors, as required by Congress, when it decided to impose some GHG conditions, and not others in the CPCN Order.

A. The Commission complied with NEPA when it considered downstream impacts of the proposed project, and chose not to implement conditions for them.

The Commission complied with NEPA when it chose not to impose GHG Conditions addressing downstream GHG impacts. Courts review federal agencies' NEPA analyses under an arbitrary and capricious standard. *Sierra Club v. FERC*, 867 F.3d at 1367. Generally, when applying the arbitrary and capricious standard to NEPA, a court will find that a federal agency has not satisfied NEPA only when an EIS is deficient, and the "deficiencies are significant enough to undermine informed public comment and informed decision making." *Id.* When a court reviews whether a federal agency has satisfied NEPA, the court cannot "second-guess substantive decisions," and "where an issue 'requires a high level of technical expertise,' [the court] 'defer[s] to the informed discretion of the Commission.'" *Del. Riverkeeper Network,* 753 F.3d at 1313 (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)). By complying with the requirements of NEPA, the Commission acted reasonably, and its decision to not impose GHG conditions addressing potential downstream impacts was not arbitrary or capricious.

Under NEPA a federal agency is required to consider direct, indirect, and cumulative environmental effects of proposed actions. *Sierra Club v. FERC*, 867 F.3d at 1373. NEPA requires federal agencies to take a "hard look" at these effects but does not require a certain result. *Id.* At 1376. Downstream emissions (impacts from additional consumption) are considered indirect effects that should be considered pursuant to NEPA. *Id.* at 1373-74 (holding that downstream GHG emissions do fall under indirect effects and are required to be considered by the Commission as part of its NEPA analysis). While the court in *Sierra Club v. FERC* found that downstream GHG emissions do need to be considered under NEPA, the Commission is only required to quantify the downstream GHG emissions if doing so is feasible, and if it is not feasible, it only needs to include in its analysis a specific explanation why quantification was not possible. *Id.* at 374. In *Sierra Club v. FERC*, the Commission did quantify downstream GHG emissions in its EIS, and the court found this was sufficient to satisfy NEPA. *Id.* at 1375.

Here, the Commission included downstream GHG impacts in its EIS and extensively analyzed the EIS before deciding to grant the CPCN Order. FERC Order at ¶ 72. As the Commission did in *Sierra Club v. FERC* (Sabal Trail), it has included an estimated quantification of downstream impacts in its EIS, finding that "downstream end-use could result in around 9.7 million metric tons of CO2e per year." FERC Order at ¶ 72. The Commission has taken a "hard look" at the downstream GHG impacts as NEPA requires. FERC Order at ¶ 97. It was not arbitrary or capricious for FERC to not impose conditions for downstream GHG impacts, as FERC acted reasonably by complying with NEPA.

B. The Commission was not required to consider the upstream GHG emissions in its EIS because they are not direct, or indirect effects of the construction of the pipeline.

The upstream GHG emissions at issue are not direct effects of the pipeline's construction, and NEPA only requires them to be considered if they qualify as direct or indirect effects. *Sierra*

Club v. FERC, 867 F.3d at 1371. To determine if an environmental effect falls within the parameters of an indirect effect of a proposed action, courts consider: (1) if the environmental effect will be caused by the action, and (2) whether the environmental effect is reasonably foreseeable and can be controlled by the agency. 40 C.F.R. § 1508.8(b) (2017); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. at 772; *Sierra Club v. FERC*, 867 F.3d at 1371. Neither element is sufficient on its own to make an effect qualify as an indirect effect that must be considered under NEPA. *Pub. Citizen*, 541 U.S. at 772.

The Commission is only required to consider the environmental effects which it has legal authority to act on. *Sierra Club v. FERC*, 867 F.3d at 1372. The primary role of the construction of the TGP is not to increase production of gas, but rather is mainly rerouting gas that is already in production. FERC Order at ¶ 12. The Commission does not have control of additional production (upstream GHG emissions) effects that results from the exportation of gas to Brazil, so it was not required to consider them. The upstream GHG emissions are not caused by the pipeline, are not within the Commissions control, and are not reasonably foreseeable by the Commission, therefore the Commission is not required to consider them under NEPA.

1. Upstream GHG emissions are not the cause of the approval of TGP, and thus do not need to be considered pursuant to NEPA.

The Commission's decision to not consider upstream GHG emissions is well within the bounds of NEPA, as the approval of the pipeline will not "cause" upstream GHG emissions. Under NEPA causation is usually only satisfied if something closer to tort proximate cause is met, and "but for cause" is usually not sufficient. *Pub. Citizen*, 541 U.S. at 767. Where a federal agency does not have authority or discretion to "practicably control or maintain control" the indirect impacts, the causation element is not satisfied, and NEPA does not require them to be considered. *Pub. Citizen*, 541 U.S. at 772. In *Birckhead v. FERC*, the Commission reasoned that

when the proposed project is "the only way to get additional gas 'from a specified production area into the interstate pipeline system'" upstream emissions are not the "cause" of the proposed project. *Birckhead v. FERC*, 925 F.3d 510, 517 (D.C. Cir. 2019) (citing omitted). The court agreed with FERC, that because the record was "devoid of the information necessary to establish [a] causal relationship" the Commission acted reasonably when it declined to consider upstream GHG emissions. *Birckhead,* 925 F.3d at 520.

Here, the proposed AFP includes rerouting a portion of production that is currently being routed through another pipeline. FERC Order at ¶ 12. The AFP is not the only pipeline the gas will be transported through, and is instead acting in conjunction with other pipelines to transport gas from an already existing production site HFF. FERC Order at ¶ 12-14. As in *Birckhead*, the record here does not include information necessary to establish "whether the TGP Project will cause any significant increase" in upstream emissions. FERC Order at ¶ 100. The upstream GHG emissions will not be caused by the construction of the pipeline, and FERC was not required to consider them pursuant to NEPA.

2. Upstream GHG emissions are not reasonably foreseeable, and thus do not need to be considered pursuant to NEPA.

The upstream GHG emissions from the construction of the pipeline are not reasonably foreseeable because the emissions associated with additional production from the construction of TGP will mostly take place outside of the United States, and the Commission is not required to consider them under NEPA. Federal agencies are not required to consider every possible potential effect of a proposed action. Rather, under NEPA they are required to consider only reasonably foreseeable effects. *Del. Riverkeeper Network*, 753 F.3d at 1309. Reasonably foreseeable does not mean that an agency can avoid all forecasting, but it does create a limit as to what effects a federal agency must consider to satisfy NEPA. *Sierra Club v. FERC*, 867 F.3d at

1374. While reasonableness is not an element that courts have been able to concretely identify, when evaluating whether an effect is reasonably foreseeable courts have considered the "usefulness of any new potential information to the decision-making process." *Pub. Citizen*, 541 U.S. at 754. While FERC does sometimes consider upstream GHG emissions on a case-by-case basis, the necessary information to make such an analysis is not always available. Interim Policy Statement at ¶ 42.

In *Birckhead v. Federal Energy Regulatory Commission*, the District court found that the Commission satisfied the requirements of NEPA when it did not consider upstream GHG emissions partly because they were not reasonably foreseeable. 925 F.3d at 518. Cir. FERC reasoned that when "the source area for the gas to be transported is ill-defined" and "the number or location of any additional wells are a matter of speculation" any information provided regarding upstream GHG emissions is merely speculation, and thus not reasonably foreseeable. *Id*. at 517.

Here, the gas is already in production, and since the approval of the construction of the TGP will not significantly alter the production of the gas, any upstream emissions are not reasonably foreseeable. FERC Order at ¶ 74. The construction of TGP will not drastically change production, as the project is mainly just moving gas already in production to different destinations. *Id.* Even if the Commission were to attempt to quantify unforeseeable upstream GHG emissions, it would be unable to determine if any upstream impacts were significant, because of a lack of official guidance. *Id.* at ¶ 99. The Commission was not required to "foresee the unforeseeable" and consider upstream GHG emissions from the pipeline in order to satisfy NEPA. *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)

Even if a foreseeable causal relationship between the proposed project and upstream GHG emissions is able to be established, the Commission still will be unable to determine the significance of the impact, and it will still be within its discretion under NEPA to not impose mitigation measures addressing such emissions. Interim Policy Statement at ¶ 27.

C. The NGA does not require the Commission to impose mitigation measures addressing downstream and upstream GHG emissions.

The Commission is required to determine that a proposed project "is or will be required by present or future public convenience and necessity," before it may grant a certificate of public convenience. 15 U.S.C. § 717f(e). The Commission is required to consider: 1) whether a project meets a market need, and if that is satisfied, it is then required to 2) "balance the benefits and harms of the project." *Sierra Club v. FERC*, 867 F.3d at 1379. The Commission may only grant a CPCN if it finds that the benefits of the proposed project outweigh the harms. *Sierra Club v. FERC*, 867 F.3d at 1379. The Commission is given discretion in making these findings, and as long as the first prong is supported by "substantial evidence," and the second prong is "based on consideration of the relevant factors" and not a result of 'a clear error or judgment," the Commissions decisions will be considered reasonable. *Twp. of Bordentown,* 903 F.3d at 262 (citing *Myersville*, 783 F.3d at 1308). When the arbitrary and capricious standard is applied to the Commission's decision making under the NGA, if the Commission's decision is based on reasoned decision making, its action will be found to pass the arbitrary and capricious standard. *Id.*

The overall policy goal of the NGA is to encourage the development of natural gas pipelines while also ensuring that the public is protected from gas companies. *City of Clarksville, Tenn. v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018). Some argue that upstream and downstream GHG impacts are not within the Commissions jurisdiction because "the breadth of the subject

matters that inform . . . [its decision making] must be informed by the limits of [its] jurisdiction." *Certificate of New Interstate Nat. Gas. Facilities*, 178 FERC ¶ 61, 197, P 16 (2022) (dissent). When making decisions pursuant to the NGA it is within the Commissions responsibility to act consistent with the overall policy goal of the NGA, which may include imposing mitigation measures for downstream and upstream GHG emissions. However, under the NGA the Commission has the discretion to impose mitigation measures it finds are necessary. 15 U.S.C. § 717f(e).

Here, the Commission has based its decision to include some mitigating measures, and not others, on substantial evidence, and relevant factors. The Commission did not impose conditions addressing upstream and downstream GHG impacts because, although it is in its discretion to do so, it is currently drafting guidelines to ensure consistent policy. FERC Order at ¶ 99. The Commission's decision to not include mitigation measures for upstream and downstream GHG impacts was not arbitrary and capricious, but rather was based on reasoned decisionmaking.

CONCLUSION

For these reasons, this Court should deny the petitions for review, and affirm the Commission's Order Denying Rehearing.