

Case No. 23-01109

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

THE HOLY ORDER OF MOTHER EARTH
Petitioner

-and-

TRANSNATIONAL GAS PIPELINES, LLC.
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

Petition for Review of FERC's Order denying rehearing in consolidated
case nos. 23-01109 and 23-01110, Judge Delilah Dolman.

Brief of Petitioner, HOLY ORDER OF MOTHER EARTH

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JURISDICTIONAL STATEMENT

Under the Natural Gas Act (“NGA”), the Holy Order of Mother Earth (“HOME”) and Transnational Gas Pipelines, LLC (“TGP”) petitioned this Court for review of the final order of the Federal Energy Regulatory Commission (“FERC”) granting TGP a Certificate of Public Convenience and Necessity (“CPCN”).

On April 1, 2023, FERC granted TGP a CPCN for construction of the American Freedom Pipeline (“AFP”). Order Den. Reh’g (“R.”) at 1. FERC had jurisdiction to issue the CPCN under 15 U.S.C. § 717r(f) and to grant or deny any request for rehearing under § 717r(a). A party aggrieved by the CPCN may seek rehearing within 30 days of FERC issuing its final order. 15 U.S.C. § 717r(a). Landowners, like HOME, who are “forced to choose between selling to a FERC-certified developer and undergoing eminent domain proceedings,” are aggrieved within the meaning of the NGA. *See e.g., Sierra Club v. FERC*, 867 F.3d 1357, 1365 (D.C. Cir. 2017). HOME and TGP timely sought rehearing, and on May 19, 2023, FERC denied both requests. R. at 2.

On June 1, 2023, TGP and HOME timely filed Petitions for Review in the Twelfth Circuit, which has proper jurisdiction because it is the United States Circuit Court wherein TGP has its principal place of business. R. at 5; 28 U.S.C. § 1332. These petitions were consolidated under Case No. 23-01109. R. at 1. This Court has jurisdiction to affirm, modify, or set aside FERC’s order under the NGA pursuant to 15 U.S.C. § 717r(b).

STATEMENT OF THE ISSUES

- I. Did FERC act in an arbitrary and capricious manner when it granted TGP a CPCN for the AFP considering FERC did not conduct an analysis and balancing of interests

- pursuant to its own 1999 Certification of New Interstate Natural Gas Pipeline Facilities policy statement?
- II. Did FERC act in an arbitrary and capricious manner when it determined that the AFP is needed considering 90% of the AFP's gas will be exported to Brazil, a country which does not have a free trade agreement with the U.S. and considering it failed to provide substantial evidence in support of that determination?
 - III. Did FERC's decision to grant the CPCN violate the Religious Freedom Restoration Act ("RFRA") considering the AFP's route through HOME land substantially burdens HOME's religious practices and considering FERC's decision does not survive strict scrutiny?
 - IV. Did FERC act within its authority under the NGA when it imposed GHG Conditions on the CPCN, considering that the NGA provides clear Congressional authorization for FERC to do so?
 - V. Did FERC act in an arbitrary and capricious manner when it failed to impose any GHG Conditions addressing downstream and upstream GHG impacts despite having the authority to do so?

STATEMENT OF THE CASE

I. Factual Background

HOME is a non-profit religious organization facing imminent, permanent destruction of their long-held sacred religious practice by the construction of the so-called "American Freedom Pipeline." R. at 5, 11.

(A) HOME's History and Religious Practice

HOME organized in 1903 around the principle that nature should be worshiped and respected. R. at 11. The organization formed in response to the harmful environmental effects of industrialization and widespread use of fossil fuels. *Id.* HOME owns a 15,500-acre property in Burden County, New Union. R. at 5. HOME's headquarters is located on its western border near Lake Williams, and its eastern border is at the base of the Misty Top Mountain range. *Id.*

Since at least 1935, HOME congregants have engaged in a semi-annual religious practice (i.e., ceremonial journey) known as the Solstice Sojourn. R. at 11. Solstice Sojourners traverse their entire property from a temple at HOME's western border to a sacred hill in the foothills of the Misty Top Mountains. *Id.* At the hill, all children in the Order that have reached the age of fifteen in the prior six months undergo a sacred religious ceremony before returning to headquarters along a different route. *Id.*

(B) TGP and the Pipeline

TGP is a limited liability company that, if FERC's Order is approved, will become a natural gas company within the meaning of Section 2(6) of the NGA. R. at 4. On April 1, 2023, TGP filed an application to FERC pursuant to Section 7(c) of the NGA and Part 157 of FERC's regulations for authorization to construct and operate the AFP. R. at 4. The AFP project is a 99-mile-long, 30-inch diameter interstate pipeline with related facilities extending from Jordan County, Old Union, to a proposed interconnection with an existing TGP transmission facility in Burden County, New Union. *Id.* TGP estimates the total cost of the AFP to be \$599 million. R. at 6.

Ninety percent of the natural gas transported by the AFP will be exported to Brazil. *Id.* TGP executed binding precedent agreements with International Oil & Gas Corporation and with

New Union Gas and Energy Services Company, which together equal the full design capacity of the AFP project (500,000 dekatherms [Dth] per day). *Id.* According to TGP's analysis, if the full capacity of the AFP is sent to combustion end uses, downstream end-use could emit about 9.7 million metric tons of CO₂e per year. R. at 15. Without any mitigation measures, construction of the AFP is estimated to result in an average of 104,100 metric tons of CO₂e per year. *Id.*

TGP has not signed easement agreements with HOME or with 40% of the other landowners along the route for the use and permanent destruction of their property. R. at 10. The proposed AFP route would cross through the middle of HOME's land, intercepting the Solstice Sojourn path in both directions. R. at 11. The construction of the AFP will destroy, among other things, approximately 2,200 trees and many other forms of vegetation on HOME property, a vast majority of which cannot be regrown along the AFP route. R. at 10.

II. Procedural History

On April 1, 2023, FERC granted TGP a CPCN for construction of the AFP (Docket No. TG21-616-000). R. at 1. Recognizing the impending destruction of their sacred land, HOME timely sought rehearing from FERC on certain issues in the CPCN. R. at 2. TGP then timely sought rehearing from FERC on one issue related to the CPCN. On May 19, 2023, FERC denied these requests for rehearing. R. at 2; *See* 15 U.S.C. § 717r(a). HOME and TGP correctly and timely filed Petitions for Review with this Court. R. at 2. Their petitions were consolidated into the above-captioned matter. This Court ordered the parties—HOME, TGP, and FERC—to brief the Court on the five issues related to the routing of the AFP across HOME land, the issuance of the CPCN to TGP, and the conditions imposed on TGP by the CPCN.

SUMMARY OF THE ARGUMENT

This Court should set aside FERC's CPCN and permanently enjoin FERC from approving any natural gas pipeline route which cuts through HOME's property in New Burden because any CPCN which routes the AFP over HOME property despite HOME's religious objections violates RFRA. Consistent with the United States' principles of Free Exercise of Religion and bolstered by Congress' intent to broadly protect religious liberty under RFRA, this issue is dispositive.

Even if the AFP's CPCN does not fail under RFRA's strict scrutiny, this Court should set aside FERC's decision to grant the AFP CPCN because it was arbitrary and capricious under the NGA.

First, FERC's determination that the AFP was needed, even though 90% of the gas would be exported to a country with no free trade agreement with the U.S., was arbitrary and capricious and not supported by substantial evidence. FERC failed to substantiate why a precedent agreement serving Brazilian customers and Brazilian needs demonstrates that the AFP is needed, especially in light of 15 U.S.C. § 717b(c), clear Congressional intent, and *City of Oberlin*. FERC also failed to provide substantial evidence supporting the AFP's overall need. No information is provided on why the existing pipelines cannot support domestic needs or how decreasing the U.S. supplies of natural gas by 450,000 Dth per day supports the intent of the NGA.

Second, FERC's determination that the benefits of the AFP outweigh the environmental and social harms was arbitrary and capricious. FERC's analysis did not consider all interests and alternatives. FERC failed to adequately consider HOME's free exercise of religion interest and failed to amply consider alternatives. Even if FERC considered all interests and alternatives, FERC's issuance of the CPCN was arbitrary and capricious because the AFP's proposed benefits

are not proportional to either the project's adverse effects or to the proposed eminent domain proceedings.

If FERC's issuance of the CPCN was valid, this Court should affirm FERC's authority under the NGA to impose GHG Conditions. The imposition of GHG Conditions does not present a major question, and when no major question is implicated, a reviewing court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's jurisdiction. Even if this case is an extraordinary one where the major questions doctrine is properly implicated, FERC can point to clear congressional authorization for the authority it claims. The consideration and approval of interstate natural gas pipelines is the core of FERC's regulatory authority, and the imposition of GHG conditions is but one essential part of that congressionally authorized process.

FERC has broad authority to determine reasonable terms and conditions for CPCNs, but its authority and discretion is not limitless. FERC violated NEPA and its associated CEQ regulations when it failed to impose conditions that address the downstream and upstream emissions created by the AFP. FERC failed to take a hard look at both the downstream and upstream GHG emissions that will result from its approval of the AFP. Approval of the AFP cannot be said to be in the public interest and necessity without GHG Conditions that mitigate the AFP's upstream and downstream GHG emissions. This Court should require FERC to modify its final order to include GHG Conditions that address upstream and downstream GHG emissions.

STANDARDS OF REVIEW

This Court must address the following issues using different standards of review. Under all issues, FERC's findings of fact are conclusive, if supported by substantial evidence. 15 U.S.C. § 717r(b).

Issue 3 centers on a pure question of law under RFRA. All parties agree that HOME's religious beliefs are sincere and that HOME owns the land through which the AFP will be routed. R. at 5, 12. This Court undertakes *de novo* review on the question of whether the AFP route through HOME property substantially burdens HOME's religious practices and, if so, whether the route through HOME property fails strict scrutiny. *See e.g., Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996).

Issues 1, 2, 4, and 5 relate to FERC's interpretation of the NGA and NEPA under which it is the administering or lead agency. While a reviewing court gives deference to an agency's interpretation of a statute under which it is the administering or lead agency, deference is given only when the statute is ambiguous. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). If the statute is not ambiguous, then the Court does not even reach the agency's interpretation. *Id.* Although the standard of review for an agency's statutory interpretation is deferential, it should also be critical. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43–44 (1983).

This Court must set aside AFP's CPCN if it finds FERC's action to be arbitrary and capricious or otherwise contrary to law or not supported by substantial evidence. *See* 5 U.S.C. § 706; *see also Chevron*, 467 U.S. at 842–43. For example, this Court should set aside FERC's decision if the court finds the decision was not based on reasoned and principled decision-making or on consideration of all relevant factors. *Env't. Def. Fund v. FERC*, 2 F.4th 953, 960

(D.C. Cir. 2021). If FERC’s explanation is “lacking or inadequate, it will not survive judicial review.” *Id.* at 968.

ARGUMENT

I. FERC VIOLATED RFRA WHEN IT DECIDED TO ROUTE THE AFP OVER HOME PROPERTY (ISSUE 3)

This Court should set aside FERC’s decision to grant the AFP a CPCN because that decision violates RFRA. Congress enacted RFRA in direct response to the Supreme Court’s attempt to restrict religious freedom in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878–82 (1990). Under *Smith*, the Supreme Court held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment. *Id.* Congress responded with RFRA, providing greater protection for religious exercise than is available under the First Amendment. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014) (concluding that “RFRA was designed to provide very broad protection for religious liberty...far beyond what is constitutionally required”); *see also Holt v. Hobbs*, 574 U.S. 352 (2015).

Under RFRA, the federal government may not impose a substantial burden on religious exercise unless imposing that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1(a)–(b). This Court should set aside FERC’s issuance of a CPCN to TGP for two reasons: (1) the proposed pipeline imposes a substantial burden on HOME’s religious exercise; and (2) FERC’s issuance of a CPCN does not survive strict scrutiny.

(A) The proposed pipeline imposes a substantial burden on HOME’s religious exercise.

This Court should find that FERC substantially burdened HOME’s religious exercise when it routed the AFP through HOME property. RFRA does not define “substantial burden.”

See 42 U.S.C. § 2000bb. When a statute does not define a statutory phrase, courts must “turn to the phrase’s plain meaning at the time of enactment.” *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (interpreting the phrase “appropriate relief” in RFRA under its plain meaning); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (interpreting “substantial burden” under RFRA’s sister statute, RLUIPA, to be “in accordance with its plain meaning”). Only when ambiguity exists, or when an absurd connection results, should a court go beyond the plain meaning of a term. *San Jose Christian Coll.*, 360 F.3d at 1034.

This Court should find that FERC substantially burdened the HOME religion by routing the AFP through HOME property because it comports with the plain ordinary meaning of “substantial burden” and finding otherwise would be contrary to Congress’ intent when it enacted RFRA.

1. The proposed pipeline imposes a substantial burden on HOME under the term’s plain, ordinary meaning.

Under its plain, ordinary meaning a “substantial burden” on religious exercise imposes a “significantly great restriction or onus upon such exercise.” *San Jose Christian Coll.*, 360 F.3d at 1034. To be substantial, a burden does not have to be “complete, total, or in-superable.” *Thai Meditation Assoc. of Ala v. City of Mobile*, 980 F.3d 821, 830 (11th Cir. 2020) (finding a “substantial burden” is akin to significant pressure that directly coerces the religious adherent to conform his or her behavior). A substantial burden results when a religious congregant is presented with a choice in which he or she faces considerable pressure to abandon the religious exercise at issue. See e.g., *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014). Similarly, a substantial burden results when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Routing the AFP through HOME property significantly restricts HOME's religious exercise, and the routing compels HOME congregants to act contrary to their beliefs. The HOME religion centers on the preservation of nature, but AFP construction will "require the removal of *inter alia*, approximately 2,200 trees and many other forms of vegetation from HOME property," the vast majority of which cannot be replanted. R. at 10. This degradation of land will ruin an essential, longstanding religious practice undertaken by HOME on a consistent, semi-annual basis. R. at 11. For nearly 100 years, HOME congregants have undertaken a ceremonial journey from a temple at the western border of the property to a sacred hill on the eastern border at the foothills of the Misty Top Mountains. *Id.* The AFP's route cuts directly through the path of this ceremonial journey. *Id.* Even if this ceremonial journey is not completely impeded, its symbolic significance will never be the same. The condition that TGP bury the AFP under HOME's property does not render the impacts on HOME "not substantial or significant," as FERC claims. R. at 12. Though the barren mound covering the AFP may be physically traversable, walking over it would be "unimaginable" for HOME congregants, and it would destroy their longstanding religious practice. *Id.*

Further, the routing compels HOME congregants to act contrary to their core religious principles by forcing them to choose between their faith and a government benefit (i.e., compensation). A core tenet of HOME's belief is that it must "promote natural preservation over all other interests, especially economic interests." R. at 11. Even under an eminent domain proceeding, routing the AFP through HOME's property will require TGP to provide HOME compensation. Compelling HOME to accept compensation for the degradation of their land would compel HOME to accept an economic interest and thereby act contrary to a core religious

tenet. R. at 11. For these reasons, the proposed pipeline imposes a substantial burden on HOME under the term's plain, ordinary meaning.

2. This Court would act contrary to RFRA's intent by using a more restrictive interpretation of "substantial burden."

A restrictive definition of "substantial burden," as proposed by TGP and FERC, is contrary to the intent and purposes of RFRA. RFRA codified the compelling interest test used in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and guaranteed its application in *all* cases where free exercise of religion is substantially burdened. 42 U.S.C. § 2000bb-(b)(1)–(2). This codification indicates Congress' clear intent to push back against the restrictive interpretations of substantial burden in the cases leading up to *Smith*. See e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 845 U.S. 439, 454 (1988) (concluding that where the government interferes with religious exercise on its own lands, it need not provide a compelling justification). "RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty." *Burwell*, 573 U.S. at 706.

FERC and TGP interpret the term "substantial burden" in a manner that is far more restrictive than the phrase's plain meaning and in a manner that is contrary to the intent of RFRA. FERC and TGP contend that because the pipeline would "create no physical barrier to HOME's religious practices," it "therefore creates no substantial burden." R. at 13. They point to the Ninth Circuit's restrictive interpretation of substantial burden in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008). R. at 12.

However, *Navajo Nation* is easily distinguished from the facts present here. *Navajo Nation* involved an American Indian tribe that argued government action on land that the government owned would impede the Navajo Nation's sacred practices. See *id.* Unlike *Navajo Nation*, the government action here is not occurring on government land—the AFP is crossing

land *owned by HOME*. R. at 13 (emphasis added). HOME is burdened by a direct, physical intrusion onto their land, and this physical intrusion is affecting HOME's sacred practices. *Id.* Further, in *Navajo Nation*, "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies...would be physically affected" by the government action. *Id.* at 1064. Here, however, AFP construction will require the removal of 2,200 trees and many other forms of vegetation and will lead to the indirect removal of animals that rely on those habitats. R. at 10. The AFP will ruin HOME's sacred ceremonial journey, compel HOME to support the transportation of fossil fuels on property HOME rightfully owns and dedicates to Mother Earth, and disrupt and permanently destroy plant life on HOME's land. R. at 12–13.

The Court should find that FERC substantially burdened the HOME religion by routing the AFP through HOME property because that interpretation comports with the plain ordinary meaning of "substantial burden" and finding otherwise would be contrary to Congress' intent when it enacted RFRA. Because the CPCN imposes a substantial burden on HOME's religion, this Court must evaluate FERC's action under the heightened strict scrutiny standard.

(B) FERC's issuance of the CPCN does not survive strict scrutiny.

When a court has found the exercise of religion has been substantially burdened by government action, that government action can only survive if it is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Under the compelling interest test, RFRA mandates consideration of exceptions to rules of general applicability to protect religious liberty. *See generally Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). "Where a need for [rule] uniformity precludes the recognition of [religious] exceptions,"

the government must prove that it has a compelling interest by offering evidence that religious exceptions “would seriously compromise” the government’s abilities. *O Centro*, 546 U.S. at 421.

FERC’s issuance of a CPCN does not survive strict scrutiny because there is no compelling governmental interest at stake here, and even if there were a compelling governmental interest, the CPCN does not meet the exceptionally demanding least restrictive means standard.

1. There is no compelling governmental interest at stake here.

Because HOME’s exercise of religion is being substantially burdened, RFRA requires that FERC demonstrate that it has a compelling governmental interest that supports such a burden. *See e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). Courts have found a compelling governmental interest in uniform application of a particular program when the government offers “evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.” *Id.* at 435; *See United States v. Lee*, 455 U.S. 252, 260 (1982) (finding the “tax system could not function if [religious] denominations were allowed to challenge tax payments”). In *Gonzales*, however, the Court found the government failed to demonstrate compelling interest in uniform application of the Controlled Substances Act that would preclude consideration of individualized exceptions under RFRA. 546 U.S. at 420–22.

TGP asserts that FERC’s compelling interest is to maintain a “coherent natural gas pipeline permitting system, not one that would bend unreasonably to the desired exceptions of any religion.” R. at 13. As support for this assertion, TGP points to *United States v. Indianapolis Baptist Temple*, which found that “maintaining a sound and efficient tax system was a compelling governmental interest.” 224 F.3d 627, 630 (7th Cir. 2000). The *Baptist Temple* court

relied on the precedent that exceptions would make it “difficult, if not impossible, to administer” the U.S. tax code. *United States v. Lee*, 455 U.S. at 260. The holdings in *Baptist Temple* and *Lee* should be narrowly read because the Courts “did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise.” *O Centro*, 546 U.S. at 421. Instead, they held that religious exemptions to the U.S. tax code could not be accommodated. *Id.*

The administration of a natural gas pipeline permitting system, which works on a case-by-case basis under Section 7 of the NGA, is distinguishable from the singular U.S. tax code applied to hundreds of millions of people. Neither TGP nor FERC offers any evidence that the natural gas permitting system must be administered without exceptions for legitimate RFRA claims. In fact, in light of RFRA, its sister statute RLUIPA, the First Amendment, and U.S. Supreme Court precedent, the more compelling governmental interest is in protecting HOME’s religious liberty and the religious practices HOME undertakes on its own land. Even if FERC identified a compelling governmental interest, the proposed AFP route is not the least restrictive means of achieving a “coherent natural gas pipeline permitting system.” R. at 13.

2. Even if FERC asserted a compelling interest, the government does not meet the “exceptionally demanding” least restrictive means standard.

“[T]he least restrictive-means standard is exceptionally demanding” and largely requires that the government show it lacks any other means of achieving its desired goal without imposing a substantial burden on the objecting parties. *Hobby Lobby*, 573 U.S. at 728. Congress’ “broad protection of religious exercise...may require [the] government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.” *Holt v. Hobbs*, 574 U.S. 352, 358 (2015) (quoting RLUIPA, § 2000cc–3(c)). When examining restrictiveness, the Court’s duty is not to inquire “into the merit of the plaintiff’s religious beliefs” or “interpret his

religion for him.” *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014). “Instead, the inquiry focuses only on the coercive impact of the government’s actions.” *Id.*

TGP offers no explanation for how denying religious exception in this case for HOME “is the least restrictive means of furthering [its] compelling governmental interest.” 42 U.S.C. § 2000bb-1(b)(2). Though TGP calls the Alternative Route “excessively expensive,” it would only increase the cost by 8.5%, and that cost is completely borne by the private party, TGP, not the government. R. at 6, 11. Further, in comparison to the “unimaginable” burden on HOME’s religious practice, the extra cost is minimal. TGP also claims that it may be more violative of HOME’s core beliefs to build the pipeline along the alternate route. R. at 11. However, it is not the Court’s role to interpret the HOME religion for HOME. Whether the Alternate Route would have greater environmental impacts is not relevant to the Court’s consideration of the coercive nature of routing the AFP through HOME property.

For all these reasons, FERC violated RFRA when it decided to route the AFP over HOME property. This Court should set aside FERC’s issuance of the CPCN to TGP for the AFP.

II. FERC’S DECISION TO GRANT TGP A CPCN FOR THE AFP WAS ARBITRARY AND CAPRICIOUS (ISSUES 1 & 2)

Even if the AFP’s CPCN does not fail under RFRA’s strict scrutiny, this Court should set aside FERC’s decision to grant the AFP CPCN because that decision was arbitrary and capricious under the NGA. Congress enacted the NGA, in part, to “protect consumers against exploitation at the [hands] of natural gas companies” by creating “an agency for regulating the wholesale distribution...of natural gas moving interstate.” *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 609–10 (1944). FERC administers the NGA. *See* 42 U.S.C. § 7171; 15 U.S.C. § 717(c). FERC’s administrative authority includes the power to approve all construction and extension of interstate natural gas pipelines. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S.

Ct. 2244, 2252 (2021). FERC approves the pipelines by issuing a CPCN to each natural gas company. A natural gas company must receive a CPCN to construct or extend any of its facilities. 15 U.S.C. § 717f(c)(1)(A). A CPCN is granted if, among other things, the pipeline “will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). FERC’s CPCN application and approval process aims to certify projects that “foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts.” *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227 at 61,743 (1999).

This Court should set aside FERC’s issuance of a CPCN to TGP for two reasons: (1) FERC’s determination that the AFP was needed, even though 90% of the gas would be exported to a country with no free trade agreement with the U.S., was arbitrary and capricious and not supported by substantial evidence (Issue 1); and (2) FERC’s finding that the benefits of the AFP outweigh the residual environmental and social harms was arbitrary and capricious (Issue 2).

(A) FERC’s determination that TGP demonstrated a public need for the AFP was arbitrary and capricious and not supported by substantial evidence (ISSUE 1)

FERC must determine whether there is a public need (or market need) for the proposed project. 88 FERC ¶ 61,227 at 61,747. FERC determines the need for a project by considering all relevant factors, including but not limited to, “precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.” *Id.* Though precedent agreements provide strong evidence of public need, they are only sometimes sufficient by themselves in establishing need. *See Minisink Residents for Env’t Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014); *City of Oberlin v. FERC*, 937 F.3d 599, 605–06 (D.C. Cir. 2019). FERC’s findings of fact

must be supported by *substantial* evidence. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (emphasis added).

FERC's determination that TGP demonstrated a public need for the AFP was arbitrary and capricious because gas exports to Brazil are almost certainly not in the public interest, and even if they are in the public interest, FERC's determination that the AFP was needed lacked substantial evidence.

1. The precedent agreement with the Brazilian company does not demonstrate public need under the NGA.

Congress did not intend for precedent agreements with countries with which there is no free trade agreement to demonstrate public need under the NGA. Under the NGA, only interstate commerce and a narrow subset of foreign commerce are in the public interest. *See* 15 U.S.C. § 717a(7); *see also* 15 U.S.C. § 717b(c). Only natural gas exports to countries with which the U.S. has a free trade agreement may be in the public interest. 15 U.S.C. § 717b(c). Congress narrowed public interest further by explicitly stating that it is found only when the free trade agreement requires “national treatment for trade in natural gas.” *See id.* Courts have generally found that a precedent agreement must be in the public interest for it to demonstrate public need. *See generally, City of Oberlin*, 937 F.3d at 606–09. If a precedent agreement is not considered in the public interest, it cannot demonstrate public need under the NGA. *Id.*

In *City of Oberlin, Ohio v. FERC*, the District of Columbia Circuit questioned whether FERC could consider foreign precedent agreements when reviewing a CPCN application. *Id.* at 606–07. That case involved the issuance of a CPCN for an interstate pipeline that had precedent agreements with northern Ohio, southeastern Michigan, and Ontario, Canada. *Id.* at 603. Precedent export agreements with the Canadian companies represented 17.3% of the new natural gas pipeline's total capacity. *Id.* In its decision, FERC failed to substantiate why the agreements

with Canada can demonstrate project need, considering the NGA focuses on interstate, not foreign, commerce. *Id.* at 608–09. The Court remanded the case back to FERC for an explanation of why “precedent agreements with foreign shippers serving foreign customers [can demonstrate] that an interstate pipeline is required.” *Id.* at 608–09. Upon remand, FERC successfully argued that the North American Free Trade Agreement between Canada and the U.S. means exports to Canada are in the public interest pursuant to 15 U.S.C. § 717b(c) and thus can demonstrate project need. NEXUS Gas Transmission, LLC Texas E. Transmission, LP DTE Gas Co. Vector Pipeline, L.P., 172 FERC ¶ 61,199 at 62,297 (2020).

However, unlike *City of Oberlin*, Brazil does not have a free trade agreement with the U.S. that requires national treatment for trade in natural gas. Brazil does not have a free trade agreement with the U.S. at all. R. at 9. FERC failed to substantiate why a precedent agreement serving Brazilian customers and Brazilian needs demonstrates that the AFP is needed. FERC’s finding that Brazil’s lack of a free trade agreement is not “meaningful” was arbitrary and capricious in light of 15 U.S.C. § 717b(c), clear Congressional intent, and *City of Oberlin*. See R. at 9. Congress almost certainly intended for FERC to exclude agreements with Brazil from demonstrating public need. Congress identified only a narrow subset of foreign commerce that can be in the public’s interest. It follows that Congress intended to exclude other foreign commerce, including exports to countries without a free trade agreement, as is the case here. FERC acted arbitrarily and capriciously under the NGA when it determined that the Brazilian precedent agreements demonstrate public need.

2. FERC’s finding that the AFP is needed was not supported by substantial evidence.

When reviewing an agency’s justifications for its actions, the reviewing courts must insist that those actions are substantiated with evidence. *City of Oberlin*, 937 F.3d at 601. The

evidence must specifically provide “reference to the facts and circumstances of each given case.” In the Matter of Kansas Pipe Line & Gas Company and North Dakota Consumers Gas Company, 2 F.P.C. 29 at 56 (1939). Precedent agreements, especially agreements with many new customers, can “constitute significant evidence of [need]” for a project. 88 FERC ¶ 61,227 at 61,748. A showing that “regional demand for pipeline capacity could not be met by existing pipelines” may demonstrate need. Brief for Respondent at 16, *City of Oberlin, Ohio v. FERC*, 937 F.3d 599 (D.C. Cir. 2019) (No. 20-1492). Projects that enhance natural gas reliability and supply security may also demonstrate need. *See Env’t. Def. Fund v. FERC*, 2 F.4th 953, 961 (D.C. Cir. 2021). However, a project’s need cannot be based on precedent agreements that provide only questionable evidence of market need. *See id.* Conclusory findings that have no support are not sufficient. *Atl. Ref. Co. v. Pub. Serv. Comm’n of State of N.Y.*, 360 U.S. 378, 392–93 (1959).

FERC’s finding that the AFP is needed was not supported by substantial evidence. No information is provided on the duration of the precedent agreements, and even though the full capacity of the AFP is accounted for in precedent agreements, the vast majority of gas from the AFP (90%) will be dedicated to one customer in foreign commerce. While FERC concluded that population and energy use have been steadily declining east of Old Union (*see* R. at. 6), no information is provided related to population growth or energy demand within Old Union, within New Union, or in areas farther west. If there exists any demand in these areas, supplying the natural gas to Brazil as opposed to these areas may lead to gas shortages. Further, the Northway Pipeline is not at full capacity. *See id.* The full capacity of the Northway pipeline, whether full capacity could be reached, and whether fulfilling that capacity would serve current domestic needs are not addressed.

TGP's contentions that the AFP serves multiple domestic needs are questionable. R. at 8. Thirty-five percent of the natural gas (equaling 500,000 Dth per day) that is traditionally transported by the Southway Pipeline will be diverted to the AFP. R. at 6. All gas in the AFP will be diverted gas. *Id.* TGP contends and FERC appears to accept that AFP gas will support a domestic need, but only 10% of that gas is slated for domestic use. *See* R. at 8. TGP contends that the AFP will expand access to natural gas. However, access to natural gas in the U.S. will overall be decreased because production at the HFF will not change. R. at 6. Therefore, overall domestic supply in the United States will decrease by 450,000 Dth per day. Such a decrease degrades, rather than enhances, natural gas reliability and supply security.

For all these reasons, FERC's determination that the AFP is needed was arbitrary and capricious and not supported by substantial evidence. This Court should set aside FERC's determination that the AFP is needed.

(B) Even if the AFP is needed, FERC's determination that the benefits of the AFP outweigh the environmental and social harms was plainly erroneous (ISSUE 2)

FERC's determination that the benefits of the AFP outweigh the environmental and social harms was plainly erroneous because FERC failed to conduct the proper analysis outlined in its own policy statement. A CPCN is granted if, among other things, the pipeline "will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The NGA does not define public convenience and necessity; however, FERC finds public convenience and necessity when it determines that the public benefits of the project outweigh any residual adverse effects. *Certification of New Interstate Nat. Gas Pipeline Facilities*, 90 FERC ¶ 61,128 at 61,389 (2000). A finding of public convenience and necessity must be based on sufficient evidence, and the potential for a CPCN to result in the taking of property under

eminent domain mandates FERC proceed with “thoroughness and caution.” *Env’t Def. Fund*, 2 F.4th at 961; *Atl. Ref. Co.*, 360 U.S. at 385.

This Court must set aside FERC’s issuance of the CPCN under the arbitrary and capricious standard if it finds that FERC conducted only a cursory balancing of public benefits and adverse impacts. *Env’t Def. Fund*, 2 F.4th at 976. A “passing reference to relevant factors...is not sufficient.” *Id.* at 968. FERC may also not “casually [ignore]” its own prior policies and standards or fail “to seriously and thoroughly conduct” the balancing of interests required by its own policy statements. *See generally California v. F.C.C.*, 4 F.3d 1505, 1511 (9th Cir. 1993); *see also Env’t Def. Fund*, 2 F.4th at 960. Further, if this Court finds the CPCN “on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest,” this Court should set aside the issuance of the CPCN. *Atl. Ref. Co.*, 360 U.S. at 391.

FERC’s determination that the benefits of the AFP outweigh the environmental and social harms was arbitrary and capricious because FERC’s analysis did not consider all interests and alternatives, and even if FERC considered all interests and alternatives, the proposed benefits of the AFP are not proportional to the project’s adverse effects or proposed eminent domain procedures.

1. FERC’s analysis did not consider all interests and alternatives.

When assessing public benefits and adverse effects, FERC must “evaluate all factors bearing on the public interest.” *Id.* FERC must consider “the interests of the applicant’s existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities.” 88 FERC ¶ 61,227 at 61,747. Public benefits may include the project’s ability to meet unserved demand, eliminate bottlenecks,

provide access to new supplies, lower costs to consumers, provide new interconnections that improve the interstate grid, provide competitive alternatives, increase electric reliability, or advance clean air objectives. 90 FERC ¶ 61,128, at 61,396. The analysis must also “amply consider alternatives” to the proposed project location, including the serious consideration of alternatives that is required by the NGA. *Minisink*, 762 F.3d at 106, 116. While the balancing of interests and benefits will “largely focus on economic interests,” economic interests are not the only interests to be considered. 88 FERC ¶ 61,227 at 61,749. FERC considers all affected interests, including general societal interests. *Id.* at 61,747.

FERC’s analysis fell short of considering all interests. The greatest societal interest relates to the First Amendment’s religious protections. A core tenet of HOME’s belief is that it must “promote natural preservation over all other interests, especially economic interests.” R. at 11. Even under an eminent domain proceeding, routing the AFP through HOME’s property will require TGP to provide HOME compensation. Compelling HOME to accept compensation for the degradation of their land would compel HOME to act directly contrary to its core religious tenet. R. at 11. FERC fails to consider HOME’s interest in not accepting anything of economic value from TGP. FERC also does not discuss the domestic interests of reducing natural gas costs and increasing natural gas reliability and how these interests are not served by a reduction of natural gas supply in the U.S. by 450,000 Dth per day. FERC failed to consider the impacts of transporting the gas along the White Industrial Canal, and how those impacts might affect the interests of other transporters on the canal and communities along the canal.

FERC also failed to conduct a proper analysis under the NGA because it failed to seriously consider all alternatives. No information is provided on why the gas had to be diverted to the International New Union City M&R stations as opposed to shipped from the end of the

Southway Pipeline or why the AFP could not travel south along the southern base of the Misty Top Mountain range. No information is provided on Northway Pipeline's capacity, on the fracking site associated with the Northway pipeline, or whether an increase in fracking at that site could be used to fulfill the Northway Pipeline's capacity, all of which may avoid the AFP. Because FERC's analysis did not consider all interests and alternatives, FERC's issuance of the CPCN to TGP for the AFP was arbitrary and capricious.

2. Even if FERC considered all interests and alternatives, the AFP's proposed benefits are not proportional to the Project's significant adverse effects or the proposed eminent domain proceedings.

FERC conducts a "sliding scale approach to balance public benefits with adverse effects," meaning FERC finds public convenience and necessity when the project's public benefits are proportional to the project's adverse effects. 88 FERC ¶ 61,227 at 61,743, 61,748. For example, a project with significant adverse effects would require public benefits that are even more significant, while a project with very few adverse effects might require a much smaller showing of public benefit. *Id.* at 61,749. Here, the AFP's benefits do not reach the proportionality required by the adverse religious and eminent domain effects of the proposed project.

For some congregants, a way of living is not "merely a matter of personal preference, but one of deep religious conviction." *See Wisconsin v. Yoder*, 406 U.S. 205, 216–18 (1972). When a government agency's action disrupts that way of life and causes those congregants to live at "odds with [the] fundamental tenets of their religious beliefs," the government has infringed on the congregants' First Amendment rights. *Id.* The AFP's adverse effects extend far beyond the proposed construction timeline that aims to avoid HOME's ceremonial journey. The HOME religion has been established for 120 years. R. at 11. Every congregant of the HOME religion

travels to the property in New Union to undertake the ceremonial journey between the HOME temple and the sacred hill at the base of the Misty Mountain Range. R. at 11. The path is spiritual because the land along the path is completely untouched by human development. Even if HOME's ceremonial journey is not completely impeded, its symbolic significance will never be the same.

Further, FERC has “long expressed a preference for minimizing the need for certificate holders to resort to eminent domain to acquire land for a given project.” *Birckhead v. FERC*, 925 F.3d 510, 516 (D.C. Cir. 2019). Therefore, FERC also requires that the project's public benefits be “proportional to the applicant's proposed exercise of eminent domain procedures.” 88 FERC ¶ 61,227 at 61,749. TGP has secured only 60% of the AFP's required land through contractual agreement with landowners; therefore, TGP will be required to exercise eminent domain procedures on nearly half of the land needed for the AFP. R. at 10. According to FERC policy, this amount of eminent domain procedures directly affects the strength of the benefits that would be needed to support the project. FERC's statement that “the lack of easement agreements is not significant to [their] consideration” (R. at 11) directly contradicts and ignores their own policy. FERC offers no reasonable analysis or explanation for why it failed to consider the lack of easement agreements significant to their consideration.

For all these reasons, FERC's determination that the benefits of the AFP outweigh the environmental and social harms was arbitrary and capricious. This Court should set aside FERC's issuance of a CPCN to TGP for the AFP.

III. FERC HAS THE AUTHORITY TO IMPOSE GHG CONDITIONS UNDER THE NGA (ISSUE 4)

If FERC's issuance of the CPCN was valid, this Court should affirm FERC's authority under the NGA to impose GHG Conditions. The issue of whether the NGA authorizes FERC to

impose GHG Conditions turns on whether such an imposition addresses a major question and, if so, whether the NGA provides clear statutory authority.

The major questions doctrine relates to “extraordinary cases” in which “the history and breadth of the authority that (the agency) has asserted” and “the economic and political significance” of that assertion provide “a reason to hesitate before concluding that Congress meant to confer such authority.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000). The underlying premise of the major questions doctrine is that Congress does not delegate decisions of great economic and political significance to an agency in cryptic fashion. *Id.* at 150.

This Court should affirm FERC’s authority under the NGA to impose the GHG Conditions for two reasons: (1) the GHG Conditions do not address a major question and therefore FERC should be afforded *Chevron* deference; and (2) even if the imposition of GHG Conditions on the AFP is a major question, the NGA includes clear Congressional authorization for FERC to impose GHG Conditions when approving interstate LNG pipelines.

(A) The GHG Conditions do not address a major question and therefore FERC should be afforded *Chevron* deference.

The general indicia of a major question are not present here. Major questions are typically characterized by novelty and notoriety. *West Virginia v. EPA*, 142 S.Ct. 2587, 2596 (2022). For example, a major question may exist where an agency claims to discover an “unheralded power” that represents a transformative expansion of its regulatory authority in the vague language of a long-extant but rarely used statute. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *see generally id.* Similarly, the major questions doctrine might apply to an agency’s claim of regulatory power over a “significant portion of the American economy.” *Util. Air*, 573 U.S. at 324. When no major question is implicated, a reviewing court must defer under

Chevron to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's jurisdiction. *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013).

The GHG Conditions imposed by FERC do not represent a major question. GHGs are not a novel issue. Attaching conditions to a Section 7 permit is also not novel. The GHG Conditions imposed on the AFP will not affect a significant portion of the U.S. economy. FERC imposed the GHG Conditions pursuant to its statutorily required public interest review under the NGA, a frequently used statute that does not operate as a gap-filler. FERC's public interest review is the touchstone of its approval process for interstate LNG pipelines. While FERC does not have statutory authority to impose GHG Conditions on downstream users, FERC has the authority to impose these conditions on a CPCN. The consideration and approval of interstate natural gas pipelines is the core of FERC's regulatory authority, and the imposition of GHG conditions is but one essential part of that congressionally authorized process.

(B) Even if the imposition of GHG Conditions is a major question, FERC has the authority to impose GHG Conditions under the NGA.

Even if this case is an extraordinary one where the major questions doctrine is properly implicated, FERC can point to clear congressional authorization for the authority it claims. *Util. Air*, 573 U.S. at 324. Section 7 of the NGA requires FERC to act as the "guardian" of the public interest. *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961). Under the NGA, FERC only approves a project if it is or will be required by the present or future public convenience and necessity. 15 U.S.C. § 717f(c), (e). The NGA also grants FERC broad authority to attach reasonable terms and conditions to CPCNs. *See* 15 U.S.C. § 717b(e)(3)(A). CPCNs may be approved "in whole or in part, with such modifications and upon such terms and conditions as FERC finds necessary or appropriate." *Id.*

FERC's imposition of the GHG Conditions was valid under its congressionally-granted authority of the NGA to attach reasonable terms and conditions to the CPCN. The GHG Conditions are reasonable because they relate to a subsidiary purpose of the NGA and because GHG Conditions have historically been imposed by FERC and other agencies.

The NGA unambiguously authorizes FERC to consider all factors bearing on the public interest. 15 U.S.C. § 717b(3)(A). The NGA also unambiguously delegates to FERC the authority to determine the terms and conditions that are necessary or appropriate to attach to a given CPCN. *Id.* In addition to the NGA's main objectives, legislative history indicates that the passage of the NGA was intended to serve several subsidiary purposes, including "conservation, environmental, and antitrust issues." *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990). Therefore, federal courts have repeatedly found that terms and conditions related to environmental issues may permissibly include environmental mitigation measures. *See e.g. South Coast Air Quality Management Dist. v. FERC*, 621 F.3d 1085 (9th Cir. 2010).

The text of the NGA is unambiguous: Congress empowered FERC to set specific terms and conditions when granting CPCNs for interstate natural gas pipelines. In the context of the larger statutory scheme and congressional purpose, FERC has the authority to impose GHG Conditions on proposed pipeline projects.

Further, FERC has consistently exercised its NGA authority to attach conditions to CPCNs designed to mitigate the adverse environmental impacts of a proposed project. FERC may utilize its authority to require a project sponsor to mitigate all, or a portion of, the impacts related to a proposed project's GHG emissions. FERC Docket No. PL21-3-000 ¶ 98. FERC has historically considered GHG impacts and imposed GHG Conditions. *See e.g. South Coast Air Quality Management Dist. v. FERC*, 621 F.3d 1085 (9th Cir. 2010) (finding FERC adequately

considered the environmental impacts of the proposed pipeline and appropriately imposed GHG conditions). TGP's contention that any action by FERC placing GHG Conditions represents an unstated change in agency practice is unfounded. *See* R. at 16. The GHG Conditions contemplated by this CPCN Order are intended to address the emissions that are a proximate result of the AFP's construction and operation.

TGP argued that this CPCN Order evidences an unstated change in agency practice overall in an attempt to liken FERC's actions to EPA's impermissible actions in *West Virginia v. EPA*. R. at 16. FERC's mitigation requirements in this CPCN Order are readily distinguishable from EPA's actions in *West Virginia v. EPA* for three reasons, and thus TGP's argument fails.

First, the Supreme Court's major questions doctrine has precluded agency action where a court finds an agency acting pursuant to an ancillary statute which has only been used a handful of times since the enactment of the statute. *See West Virginia*, 142 S.Ct. at 2602. In *West Virginia v. EPA*, the Court found that EPA had only used Section 111(d) a handful of times since its enactment, yet EPA purported to rely on that section in order to accomplish the goals of its new Clean Power Plan. *Id.* at 2593. Here, FERC has acted pursuant to NGA Section 3(a), which FERC applies every time it considers a proposed interstate LNG project. Therefore, this CPCN Order is the opposite of an agency acting pursuant to an ancillary statute that has only been used a handful of times since its enactment.

Second, the Supreme Court has applied its major questions analysis to an agency's claim of regulatory power over a "significant portion of the American economy." *See Brown & Williamson*, 529 U.S. at 159. The Supreme Court has held that regulating tobacco products, eliminating rate regulation in the telecommunications industry, subjecting private homes to Clean Air Act restrictions, and suspending local housing laws and regulations can sometimes

check this box. *West Virginia*, 142 S.Ct. at 2622. In *Utility Air*, the Court struck down EPA’s interpretation of the term “air pollutant” in the Clean Air Act to cover greenhouse gases. 573 U.S. at 310. The Court reasoned that EPA’s interpretation would have granted it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. *Id.* at 310. Here, FERC seeks to require project sponsors to mitigate the GHG emissions resulting from their proposed pipelines. This is within FERC’s regulatory jurisdiction and is consistent with other environmental mitigation conditions FERC has requested of project sponsors in the past.

Third, the Supreme Court has rejected agency use of elliptical language to empower the agency to make a “radical or fundamental change” to a statutory scheme. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 281, 229 (1994). In *West Virginia v. EPA*, the Court found that EPA’s view of its authority was unprecedented and effected a “fundamental revision of the statute, changing it from one sort of scheme of... regulation into an entirely different kind.” *West Virginia*, 142 S.Ct. at 2596 (quoting *MCI Telecomms. Corp.*, 512 U.S. 281 (1994)). In his concurring opinion, Justice Gorsuch argued that EPA’s proposed rule would effect an aggressive transformation of the electricity sector through transition to zero-carbon renewable energy sources. *West Virginia*, 142 S.Ct. at 2622. By placing GHG Conditions on the approval of an LNG pipeline, FERC is not attempting any such radical or aggressive transformation of its agency authority. The GHG Conditions contemplated by this CPCN Order are intended to address the emissions which are a proximate result of the AFP’s construction and operation.

Conditions that address upstream and downstream GHG emissions are focused on only those emissions that result from the project proposed before FERC. It is within FERC’s exclusive jurisdiction to make the required full and informed consideration of the production,

transportation, and eventual use of the LNG in a proposed pipeline. In passing the NGA, Congress authorized FERC to consider these factors. The imposition of GHG conditions on an individual pipeline is not an attempt by FERC to “address climate change as a whole.” *See* R. at 17. Rather, FERC has the authority to impose GHG conditions on an individual pipeline where doing so is justified by the public convenience and necessity.

IV. FERC’S FAILURE TO IMPOSE CONDITIONS THAT ADDRESS DOWNSTREAM AND UPSTREAM GHG EMISSIONS WAS ARBITRARY AND CAPRICIOUS (ISSUE 5)

FERC has broad authority to determine reasonable terms and conditions for CPCNs, but its authority and discretion is not limitless. FERC violated NEPA and its associated CEQ regulations when it failed to impose conditions that address the downstream and upstream emissions created by the AFP.

NEPA establishes a national policy to “encourage productive and enjoyable harmony between man and the environment” and was intended to promote the “understanding of the ecological systems and natural resources important to the” United States. 42 U.S.C. § 4321. NEPA has a twofold purpose: (1) to ensure agencies that propose major federal actions will have available, and will carefully consider, detailed information concerning significant environmental impacts; and (2) to guarantee that relevant information will be made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *see* 42 U.S.C. § 4332(2)(C). Therefore, federal agencies have a legal obligation to adequately adhere to NEPA’s procedural requirement to undertake a statutorily defined analysis of environmental impacts. *Robertson*, 490 U.S. at 349–50.

NEPA and CEQ regulations implementing NEPA require federal agencies to “consider not only the direct effects, but also the indirect environmental effects, of the project under

consideration.” 40 C.F.R. § 1502.16(b). All effects or impacts that “are reasonably foreseeable and have a reasonably close causal relationship to the proposed action” must be considered. 40 C.F.R. § 1508.1(g). Reasonably foreseeable effects include “those effects that occur at the same time and place as the proposed action” as well as those “effects that are later in time or farther removed in distance from the proposed action.” *Id.* Federal courts have consistently held that an effect is “reasonably foreseeable” when it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” *EarthReports, Inc. v. FERC*, 828 F.3d 944, 949 (D.C. Cir. 2016).

Related to GHG emissions in particular, “it would be absurd to even contemplate NEPA not applying to the most significant environmental issue of our time.” *Southeast Connection, LLC.*, 162 FERC ¶ 61,233 at *17 (Mar. 14, 2018) (LaFleur, Comm’r, dissenting in part) (referring to the need for FERC to evaluate the impact of its agency actions on climate change). GHG emissions are an indirect effect of FERC’s approval of gas pipelines and therefore FERC must consider these emissions in a manner that is not arbitrary and capricious. *See Sierra Club v. FERC (Sabal Trail)*, 867 F.3d 1357 (D.C. Cir. 2017); *see also* 5 U.S.C. § 706.

This Court should modify FERC’s order by imposing conditions that address downstream and upstream GHG emissions for two reasons: (1) FERC failed to take the requisite “hard look” at the AFP’s upstream and downstream emissions; and (2) because the AFP will emit more than 100,000 metric tons per year of CO₂e, FERC must impose conditions that address the AFP’s upstream and downstream emissions.

(A) FERC failed to take the requisite “hard look” at the AFP’s upstream and downstream GHG emissions.

FERC is required under NEPA to take a “hard look” at the environmental impacts of each natural gas pipeline it approves. *See Sabal Trail*, 867 F.3d at 1367; *see also Illinois Com.*

Comm’n v. Interstate Com. Comm’n, 848 F.2d 1246, 1258 (D.C. Cir. 1988) (finding it is FERC’s responsibility to independently investigate and assess the environmental impacts of the proposal before it). The mere possibility that a project’s overall emissions calculation will be favorable because of an “offset... elsewhere” does not excuse FERC from this responsibility. *See Birckhead*, 925 F.3d at 519. FERC must attempt to obtain the information necessary to fulfill its statutory responsibilities under NEPA. *See Delaware Riverkeeper Network v. FERC*, 45 F.4th 104 (D.C. Cir. 2022). FERC failed in its responsibilities under NEPA to take a hard look at both the downstream and upstream GHG emissions of the proposed AFP.

Downstream emissions from the use of transported gas are an indirect, reasonably foreseeable effect of a proposed pipeline. *Sabal Trail*, 867 F.3d at 1374; *Allegheny Defense Project v. FERC*, 932 F.3d 940, 945–46 (D.C. Cir. 2019) (finding downstream emissions are an indirect effect that was appropriately estimated and quantified). The transported gas need not be burned at specifically identifiable destinations for the downstream emissions of a pipeline to be a foreseeable effect. *Birckhead*, 925 F.3d at 519.

With regard to downstream emissions, FERC makes only bare assumptions without supporting evidence or which run counter to the evidence presented. FERC states that “some gas may displace other fuels, which could lower total CO₂e emissions” and that “it may also displace gas that otherwise would be transported via a different means, resulting in no change in CO₂e emissions.” R. at 15. However, FERC offers no estimates or quantifiable predictions to substantiate these claims, which would be relevant to public knowledge. FERC’s EIS included a full-burn emissions estimate for downstream emissions, but then FERC dismissed this impact as not significant. R. at 19. FERC did not find the full-burn emissions insignificant for any scientific reason; rather, FERC found them insignificant only because FERC’s GHG guidance

has not yet been finalized. *Id.* Similarly, FERC admits that combustion of the gas to be transported by the AFP will result in a staggering amount of GHG emissions: about 9.7 million metric tons of CO₂e may be emitted per year the AFP operates. R. at 15. FERC likewise dismisses this emissions figure by relying on bare assumptions. *Id.*

FERC also failed to take the requisite hard look at the upstream emissions that will result as a reasonably foreseeable indirect effect of its approval of the AFP. Indirect effects include “growth inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate,” as well as the economic and environmental impacts that an agency must consider. *See* 40 C.F.R. § 1508.8(b). Taking a hard look at these effects requires following “generally applicable economic principles” that outline the relationship between the price of a good and its production and consumption. *Airlines for Am. v. Transp. Sec. Admin.*, 780 F.3d 409, 410–11 (D.C. Cir. 2015). These principles are “sufficiently self-evident” for their consideration under NEPA, and FERC has historically used economic principles in considering upstream GHG emissions of proposed pipelines. *Id.*; *see Birkhead*, 925 F.3d at 516–18.

FERC’s failure to take a hard look at the upstream emissions in this case was arbitrary and capricious. Upstream emissions resulting from production activities of the AFP are a reasonably foreseeable and causally connected result of the proposed project. TGP claims that the precedent agreements do not contemplate additional natural gas production at the HFF and would instead reroute approximately 35% of the production at the HFF through the proposed AFP from the Southway Pipeline. R. at 6. Given generally applicable economic principles, upstream production at the HFF is likely to increase by up to 35% to account for the aggregate increased capacity of the AFP and Southway Pipeline. Similarly, it is foreseeable that the

approval of new infrastructure that could transport more gas from the HFF will result in the transport of more gas from the HFF. *Id.*

FERC states that it does not find upstream emissions to be “relevant here” (R. at 15), but when an agency approves infrastructure that will increase demand, NEPA does not allow that agency to ignore the effects of that increased demand. FERC violated NEPA when it failed to take a hard look at both the downstream and upstream GHG emissions that will result from its approval of the AFP.

(B) The AFP will emit more than 100,000 metric tons per year of CO₂e, and therefore FERC must impose GHG conditions to mitigate the AFP’s downstream and upstream GHG emissions.

Projects with estimated emissions of more than 100,000 metric tons per year of CO₂e or greater are presumed to have a significant effect on the environment unless evidence in the record refutes that presumption. FERC Docket No. PL21-3-000 at ¶ 81. The 100,000 metric ton presumption serves as a guidepost for FERC to facilitate a transparent, predictable analysis of a proposed project’s contributions to climate change.

The AFP will almost certainly emit GHGs in excess of 100,000 metric tons of CO₂e per year, and therefore, mitigation is appropriate to address these significant impacts on the environment. Even if TGP adheres to the GHG Conditions that mitigate construction emissions, AFP construction alone will result in an average of over 88,340 metric tons of CO₂e per year over the four-year duration of construction. R. at 15. Additionally, at least some of the natural gas will be put to use and combusted. *Id.* Therefore, at the outset, the AFP will almost certainly annually emit GHGs in excess of the significance threshold established by FERC.

The combined upstream, construction, operation, and downstream GHG emissions will exceed FERC’s 100,000 metric tons per year of CO₂e significance threshold. Approval of the

AFP will result in an unquestionably significant environmental impact. Thus, the approval of the AFP cannot be said to be in the public interest and necessity without GHG Conditions that mitigate the AFP's upstream and downstream GHG emissions. FERC's authorization for Section 7 projects such as the AFP is rightfully treated as the "legally relevant cause" of any emissions the project will create. *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). Unlike Section 3 projects, there is no independent decision such as DOE authorization that "breaks the NEPA causal chain" in a FERC Section 7 authorization. *Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016).

For all these reasons, FERC's failure to impose conditions that address the AFP's upstream and downstream GHG emissions was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, this Court should set aside TGP's CPCN and permanently enjoin FERC from approving any other natural gas pipeline route that cuts through HOME's property. Otherwise, this Court should set aside FERC's final order that granted the CPCN under the NGA. In the alternative, this Court should affirm FERC's authority to impose GHG Conditions on the CPCN and modify FERC's final order to include GHG Conditions that mitigate upstream and downstream GHG emissions.