

**In the United States Court of  
Appeals for the Twelfth Circuit**

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HOLY ORDER OF MOTHER EARTH,  
*Plaintiffs-Petitioners,*

*v.*

TRANSNATIONAL GAS PIPELINES, LLC,  
*Defendants-Petitioners.*

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On Appeal from the Federal  
Energy Regulatory Commission

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**BRIEF OF PETITIONER**

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Transnational Gas Pipelines, LLC

**BRIEF 2 NON-MEASURING**

**STATEMENT REGARDING ORAL ARGUMENT**

Defendant-Appellant Transnational Gas Pipelines, LLC (“TGP”) requests oral argument as it believes it could significantly aid the decisional process in this case.

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### **JURISDICTIONAL STATEMENT**

This Court has jurisdiction over this petition because it is a petition for review of an agency order from the Federal Energy Regulatory Commission on May 19, 2023. Transnational Gas Pipelines, LLC timely petitioned for review within 30 days on June 1, 2023.

## **ISSUES PRESENTED**

This brief addresses questions regarding the scope of FERC's findings and FERC's authority to impose greenhouse gas impacts ("GHG conditions") upon the Petitioner.

- 1. Was FERC's finding of public convenience and necessity for the AFP arbitrary and capricious and supported by substantial evidence insofar as:**
  - a. FERC found a project needed where 90% of the gas transported by that pipeline was for export.**
  - b. FERC found that the project benefits outweighed the adverse environmental and social harms under the NGA.**
- 2. Was FERC's finding that the benefits from the AFP outweighed the environmental and social harms arbitrary and capricious?**
- 3. Was FERC's decision to route the AFP over HOME property despite HOME's religious objections in violation of RFRA?**
- 4. Were the GHG Conditions imposed by FERC beyond FERC's authority under the NGA?**
- 5. Was FERC's decision not to impose any GHG Conditions addressing downstream and upstream GHG impacts arbitrary and capricious?**

## STATEMENT OF THE CASE

The Federal Energy Regulatory Commission (“FERC”) is responsible for evaluating proposals for certifying new construction and for granting certificates to construct new pipeline where the pipeline “is or will be required by the present or future public convenience and necessity.”<sup>1</sup> FERC follows the Certificate Policy Statement guidance and NGA requirements when determining whether a proposed project will serve the public interest.<sup>2</sup> FERC is also in the process of developing guidance for addressing GHG impacts including upstream and downstream.<sup>3</sup> On April 1, 2023, FERC issued an Order granting a Certificate of Public Convenience and Necessity (the “CPCN”) to Transnational Gas Pipelines, LLC (“TGP”) for construction of the American Freedom Pipeline (“AFP”), which included certain conditions on the approval.<sup>4</sup>

Transnational Gas Pipelines, LLC (“TGP”), a limited liability company existing under the laws of the State of the new Union, will become a natural gas company subject to the authority of the NGA.<sup>5</sup> On June 13, 2022, TGP filed an application for the construction of several facilities including 99 miles stretch of

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<sup>1</sup> Order Den. Reh’g, *The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, 199 FERC ¶ 72,201, ¶16–17.

<sup>2</sup> *Id.* at ¶17; ¶19.

<sup>3</sup> *Id.* at ¶93.

<sup>4</sup> *Id.* at ¶2.

<sup>5</sup> *Id.* at ¶8.



pipeline extending from a receipt point in Jordan, County to an existing TGP gas transmission facility in Burden County, New Union.<sup>6</sup> Additionally, the project will consist of (1) a receipt meter station, and a receipt tap located in Jordan County, Old Union; (2) a meter, regulation, and delivery station in Burden County, New Union; (3) mainline valve assemblies at 8 locations along the TGP pipeline; and (4) pig launcher/receiver facilities at the M&R station.<sup>7</sup> The total cost of the proposed project is \$599 million.<sup>8</sup> TGP can financially support the project without subsidization from its existing customers and no adverse impacts were noted on TGP's existing customers, pipelines in the market and captive customers.<sup>9</sup> From February through March 2020, TGP held an open season for service on the TGP Project and executed binding agreements with two corporations for a collective 500,000 Dth per day equal to the full design capacity of the project.<sup>10</sup> The full production of the natural gas at the Hayes Fracking Field (HFF) is transported by the Southway Pipeline to states east of the Old Union, and approximately 35% of the production would be rerouted at HFF through the AFP.<sup>11</sup> TGP has provided evidence

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<sup>6</sup> Order Den. Reh'g, *The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, 199 FERC ¶ 72,201, ¶1; ¶10.

<sup>7</sup> *Id.* at ¶10.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at ¶21.

<sup>10</sup> *Id.* at ¶11.

<sup>11</sup> Order Den. Reh'g, *The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, 199 FERC ¶ 72,201, ¶12.

demonstrating LNG demands steadily declined in the regions east of Old Union due to population shifts, efficiency improvement, and increased electrification of heating in those states.<sup>12</sup> LNG purchased by International from TGP will be diverted to the existing Northway Pipeline that is not at full capacity and the LNG will be subsequently loaded onto LNG tankers to be exported to Brazil by International.<sup>13</sup> The Holy Order of Mother Earth (“HOME”), a non-for-profit religious organization under the laws of the State of New Union and is headquartered towards the western end of a 15,500-acre property in Burden County, New Union that HOME directly owns.<sup>14</sup> HOME is a religious order whose members view the natural world as sacred and make ceremonial journeys annually.<sup>15</sup> The proposed AFP route crosses only two miles of HOME’s property east of the headquarters.<sup>16</sup> Approximately 2,200 trees will need to be removed for the AFP.<sup>17</sup> TGP agreed to plant an equal number of trees in a different location.<sup>18</sup> Both TGP and HOME agreed that re-routing the AFP away from HOME’s property would amount to over \$51 million in construction costs and adverse environmental harm.<sup>19</sup>

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<sup>12</sup> *Id.* at ¶13.

<sup>13</sup> *Id.* at ¶14.

<sup>14</sup> *Id.* at ¶9.

<sup>15</sup> Order Den. Reh’g, *The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, 199 FERC ¶ 72,201, ¶46; ¶48.

<sup>16</sup> *Id.* at ¶9; ¶38.

<sup>17</sup> *Id.* at ¶38.

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

<sup>19</sup> *Id.* at ¶44.

In reviewing the AFP, FERC found strong evidence of public benefits despite the AFP primarily serving “Brazilian need” for LNG.<sup>20</sup> TGP executed binding precedent agreement using 100% of the project’s design capacity.<sup>21</sup> TGP participated in the Commission’s pre-filing process and has made changes to over 30% of the proposed pipeline route in efforts to address concerns from landowners and negotiate acceptable easement agreements.<sup>22</sup> TGP agree to expedite construction on HOME’s property down to four months to minimize disruption.<sup>23</sup> At least 40% of homeowner easement agreements have not been signed by TGP.<sup>24</sup> In reviewing TGP’s pipeline request, four conditions were placed in the CPCN order of which three TGP challenged on the grounds that FERC exceeded its authority.<sup>25</sup> Likewise, HOME also challenged FERC’s conditions on the grounds that HOME did not believe FERC’s decision did not adequately address mitigation measures for upstream and downstream GHG impacts. Both TGP and HOME sought rehearing by FERC and were denied on June 1, 2023.<sup>26</sup> HOME sought rehearing on three aspects of the CPCN order including the CPCN order was unjustified, insufficient “public necessity” to

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<sup>20</sup> Order Den. Reh’g, *The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, 199 FERC ¶ 72,201, ¶25–¶26.

<sup>21</sup> *Id.* at ¶26.

<sup>22</sup> *Id.* at ¶41.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at ¶42.

<sup>25</sup> Order Den. Reh’g, *The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, 199 FERC ¶ 72,201, ¶67.

<sup>26</sup> *Id.* at ¶5.

exercise eminent domain, and the negative environmental impacts outweigh the benefits, and the decision to route the AFP over HOME's property violated the Religious Freedom and Restoration Act.<sup>27</sup> TGP on the other hand sought rehearing for three of the four conditions attached to the CPCN specifically related to GHG mitigation measures.<sup>28</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at ¶67.

## **SUMMARY OF THE ARGUMENT**

FERC has the authority and evidentiary support to lawfully deny rehearing of the final order approving TGP's LNG pipeline through HOME property. Granting of the CPCN for the AFP pipeline was not in violation of any constitutional or state law and we ask the Twelfth Circuit to affirm the agency denial of rehearing on the issues.

**FERC's finding of public convenience and necessity for the AFP was not arbitrary and capricious and was supported by substantial evidence insofar as:**

- a. FERC found a project needed where 90% of the gas transported by that pipeline was for export.**

FERC's decision to approve the AFP was not only because of the public need but if it were, relying on the precedent agreements that the companies had prior to the approval is supported by case law and has been previously found to be sufficient to determine the evidence of a market need within the calculation of public need.

- b. FERC found that the project benefits outweighed the adverse environmental and social harms under the NGA.**

Under the broad discretion Congress laid out to FERC to consider the public convenience and necessity and to balance that with the benefits against the adverse effects of the project. Because FERC has shown evidence that it has complied with

this rule, the decision made by FERC would neither be arbitrary nor capricious.

**FERC's Finding that Benefits From The AFP Outweighed the Environmental and Social Harms was not Arbitrary and Capricious because the Finding was Supported by Substantial Evidence.**

An agency decision is arbitrary and capricious when it is not supported by substantial evidence. FERC's finding that the benefits from building the AFP outweigh the environmental and social harms is not an arbitrary and capricious decision because it is supported by more than one precedent agreement and cognizable rationales under the National Gas Act (NGA). Since FERC may grant a CPCN where the agency deems there is a need for the pipeline as long as the reasoning is not unsupported or inadequate, then the decision is not arbitrary and capricious. FERC clearly states multiple reasons such as geographic expansion of LNG access, reduced adverse environmental affects from lessening the use of other dirtier fossil fuels, and strengthening LNG infrastructure already in place. Combined, FERC's reasoning to grant TGP the CPCN easily surmounts a threshold of arbitrary and capricious because it is supported by substantial evidence.

**FERC's Routing of the AFP over HOME property despite HOME's religious objections does not violate the Freedom And Restoration Act (RFRA) because there is no substantial burden and the Order survives strict scrutiny.**

FERC's decision affirming the route of the AFP over HOME property

despite HOME's religious objections is not an example of an agency placing substantial burdens on an individual's right to exercise their religion freely because no physical barrier will prevent HOME's Solstice Sojourns. Additionally, even if the Court may find that there was a substantial burden placed on HOME's right to freely exercise their religion through approval of the CPCN survives a strict scrutiny analysis. Routing the AFP through HOME property serves a compelling governmental interest of furthering LNG access, developing temporary and permanent employment, and reducing use of dirtier fossil fuels. Second, approving the pipeline to be buried underground is the least restrictive means and narrowly tailored to achieve the government's interests. Approving the pipeline route does not target HOME as a religiously affiliated group. Instead, TGP agreed to conditions by which accommodation for HOME's practices may be respected. Last, the environmental effects of approving an alternate route for the pipeline would further cause environmental degradation. In the end, even if there is a substantial burden on HOME's religious practices, the AFP approved route would serve a compelling and necessary government interest through narrowly-tailored and least restrictive means.

**FERC WAS CORRECT IN DENYING TGP'S REHEARING REQUEST  
BECAUSE FERC WAS WITHIN ITS JURISDICTION TO INCLUDE GHG  
CONDITIONS ON A CPCN ORDER.**

FERC was correct in denying TGP's rehearing request as FERC has jurisdiction

under the NGA to approve or deny the construction of interstate natural gas pipelines and has the power to attach to the issuance of the certificate reasonable terms and conditions as the public convenience and necessity requires. FERC's compliance with the National Environmental Policy Act (NEPA) is limited to ensuring that the agency has adequately considered and disclosed the environmental impact of its actions and that its decisions are not arbitrary or capricious. Since TGP will become a natural gas company and will be the operator of a new proposed pipeline, TGP is subject to FERC's jurisdiction and is responsible for meeting conditions attached to CPCNs issued by FERC prior to approval. FERC adequately disclosed the environmental impact of its actions to apply conditions to the CPCN for the construction portion of the project. Furthermore, TGP failed to include recommendations of mitigation measures for the Environmental Impact Statement (EIS), which FERC then reasonably exercised its authority to attach conditions to the CPCN to mitigate GHG emission impacts as a means to balance the public benefits against adverse environmental effects.

**FERC WAS CORRECT IN DENYING HOME'S REHEARING REQUEST FOR IMPOSING GHG MITIGATION MEASURES BECAUSE FERC'S DECISIONING FOR NOT IMPOSING SUCH MEASURES WAS NEITHER ARBITRARY nor CAPRICIOUS.**

FERC was correct in denying HOME's rehearing because under NEPA, agencies are not obligated to select the course of action that best serves environmental



justice. FERC is responsible for providing an assessment that is reasonably and adequately explained and that is neither arbitrary nor capricious. In FERC's assessment the agency reasonably and adequately explained the reasons for not imposing GHG mitigating measures based on its assessment and prior experience that there was no reasonably foreseeable significant consequence from the FERC Approval due to the HFF gas already in production and the gas only being transported in part to different destinations.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

A court reviews the Federal Energy Regulatory Commission's (FERC) orders under the arbitrary and capricious standard and upholds FERC's factual findings if supported by substantial evidence.<sup>29</sup>

### **II. FERC'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY FOR THE AMERICAN FREEDOM PIPELINE WAS NOT ARBITRARY AND CAPRICIOUS AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.**

**FERC found a project needed where 90% of the gas transported by that pipeline was for export.**

When FERC grants a certificate of public convenience and necessity under the NGA, that grant must be seen as sufficient rather than merely important or the sole evidence supporting a finding that the grant was not arbitrary and capricious.<sup>30</sup>

In *Baltimore Gas and Elec. Co. v. Nat. Resources Def. Council, Inc.*, the Supreme Court held that a court's only task when looking at an agency's decision is to consider if the commission reviewed the "relevant factors and articulated a rational connection between the facts and the choice made."<sup>31</sup>

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<sup>29</sup> 5 U.S.C.S. § 706(2); 15 U.S.C. § 717(b).

<sup>30</sup> *Env't Def. Fund v. FERC*, 2 F.4th 953, 972 (D.C. Cir. 2021), *cert. denied sub nom. Spire Missouri Inc. v. Env't Def. Fund*, 142 S. Ct. 1668 (2022).

<sup>31</sup> 462 U.S. 87 (1983).

In a similarly situated case to the present issue, where precedent agreements were 76% of the pipeline's transportation services, the commission determined that this was enough evidence to show market need.<sup>32</sup> The court here, the District of Columbia Circuit, held that the decision by the commission was not flawed by their reliance on the precedent agreements because of a previous ruling that determined that “precedent agreements are important, and sometimes sufficient, evidence of market need for a pipeline project.”<sup>33</sup> Because TGP has precedent agreements with 100% of the pipeline usage being accounted for.

In *City of Oberlin*, the District of Columbia Circuit upheld FERC’s decision in part because it was assisting energy flow in the region.<sup>34</sup> Here, TGP has shown evidence that the market needs are better served by routing the LNG through the AFP due to a population shift, efficiency improvements, and increasing electrification of heating in regions east of Old Union and because of the evidence showing that the market will be positively impacted by the proposed changes, FERC’s decision was not arbitrary or capricious because there is clearly articulated evidence to support the decision.

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<sup>32</sup> *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 458, 354 (D.C. Cir. 2022).

<sup>33</sup> *Minisink Residents for Env’t Preservation and Safety v. FERC*, 762 F.3d 97, n.10 (D.C. Cir. 2014); *City of Oberlin v. FERC*, 937 F.3d 599, 605–06 (D.C. Cir. 2019).

<sup>34</sup> *City of Oberlin*, 937 F.3d, at 605–06.

**FERC found that the project benefits outweighed the adverse environmental and social harms under the NGA.**

In *Sierra Club v. FERC*, the Court held that FERC is broadly instructed by Congress to consider “the public convenience and necessity” and to balance this with “the public benefits against the adverse effects of the project.”<sup>35</sup> The court further indicates here that because FERC is a “legally relevant cause” of environmental effects of the pipelines, it is not excused from considering indirect effects of the pipeline.<sup>36</sup>

Here, FERC has considered both direct and indirect consequences to the pipeline. In the property at issue for HOME specifically, the pipeline will traverse just over two miles of the 15,500 acres (about the area of Cleveland, Ohio) of HOME property and looking to the option of another route through the mountains around the property would cost the project another \$51 million in construction costs, not a reasonable or balanced expectation. In addition to the cost of this alternate route, the environmental impact would be greater because FERC has taken the time to review the alternatives specific to the case at issue, it has done as directed by Congress and weighed the public benefits of the AFP to the possible adverse effects of the AFP.

**III. FERC’S FINDING THAT BENEFITS FROM THE AFP OUTWEIGHED THE ENVIRONMENTAL AND SOCIAL HARMS WAS NOT ARBITRARY AND**

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<sup>35</sup> 867 F.3d 1357 (D.C. Cir. 2017).

<sup>36</sup> *Id.*

**CAPRICIOUS BECAUSE THE FINDING WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.**

FERC's analysis that benefits resulting from the AFP outweigh the potential was not arbitrary and capricious because FERC's finding did not rest on infirm ground as described under the Administrative Procedures Act. "Infirm ground" must not be a mere guess as to what the agency's underlying theory was nor may the Court provide a reasoned basis for the agency action not mentioned by the agency itself.<sup>37</sup>

An agency decision is arbitrary and capricious if

[T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>38</sup>

Essentially, the Court will find a decision arbitrary and capricious when an agency decision runs afoul of and reasonable interpretation of either its authority or rationale for such a decision. However, when even a "single cognizable rationale" supports an agency decision, then the Court will deny a petition to review it under the

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<sup>37</sup> *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006) (citing *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 387 (D.C. Cir. 2006); *AT & T Corp. v. FCC*, 236 F.3d 729, 734–35 (D.C. Cir. 2001); and *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856 (1983)).

<sup>38</sup> *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 293 (4th Cir. 2018).

arbitrary-and-capricious rule.<sup>39</sup> Additionally, review of an agency decision under the Administrative Procedure Act must occur in conjunction with another statute.<sup>40</sup> To be found arbitrary and capricious, the Court will look at whether an agency “overlooked an important aspect of the problem” depends on what a relevant substantive statute makes important.<sup>41</sup> However, “In law...there is nothing which is necessarily important or relevant.”<sup>42</sup> Thus the concept of an “important” part of a statute for the purposes of agency interpretation remains subjective. In fact, even amongst a reasonable and adequately explained analytical methodology, an agency’s decision is “entitled to deference.”<sup>43</sup> Therefore, unless an agency decision interpreting a statute depends on unimportant factors, is entirely unreasonable, or depends on inadequately explained analytics, the decision easily surmounts a threshold of arbitrary and capricious.

In this case, TGP and FERC provide substantial evidence and reasoning as to why the benefits of AFP outweigh the social and environmental harms, transcending the threshold required to prove that FERC’s interpretation of the NGA and issuance

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<sup>39</sup> *Const. Pipeline Co., LLC v. New York State Dep't of Env't Conservation*, 868 F.3d 87, 102 (2d Cir. 2017) (citing *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141 (2d Cir. 2008)).

<sup>40</sup> *Oregon Nat. Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004).

of CPCN Order was not arbitrary and capricious. First, the Commission correctly found that public convenience and necessity establishes “need” for a liquid natural gas (LNG) pipeline such as the AFP under the NGA. In addition to delivering the 500,000 Dth per day of natural gas domestically, expanding natural gas services, optimizing the current system, fulfilling capacity for the NorthWay Pipeline and providing opportunities to improve regional air quality, the AFP will provide employment opportunities and strengthen the natural gas infrastructure already in place.<sup>44</sup> While FERC acknowledges that some trees will be removed from HOME property and will not be replaced along the pipeline, the same number of trees will be replaced in another area in accordance with GHG mitigation conditions.<sup>45</sup> Given the substantial benefits offered by construction of the AFP, in contrast, FERC’s finding that removal and replacement of 2,200 trees does not outweigh those benefits is not an arbitrary and capricious finding.

Furthermore, after the Commission establishes market need for a pipeline and issues a CPCN, then it will balance adverse effects such as social and environmental harms with all relevant factors that reflect a need for the project.<sup>46</sup> In *Environmental Defense Fund v. FERC*, the Court found that relying solely on one precedent

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<sup>44</sup> Order Den. Reh’g, *The Holy Order of Mother Earth v. Federal Energy Regulatory Commission*, 199 FERC ¶ 72,201, ¶27.

<sup>45</sup> *Id.* at ¶38.

<sup>46</sup> *Env’tl. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021), *cert. denied sub nom. Spire Missouri Inc. v. Env’tl. Def. Fund*, 142 S. Ct. 1668 (2022).

agreement meant that the public benefits could not offset the adverse impacts and as such, granting the CPCN was arbitrary and capricious.<sup>47</sup> The Court concluded that without a new load demand and only one affiliated shipper, the balance of costs and benefits should have been resolved in favor of the appellant.<sup>48</sup> In the instant case, TGP signed binding precedent agreements with two non-affiliated companies resulting in demand for the full design capacity of the AFP and justifying FERC's finding that the benefits of such capacity outweigh the harms.<sup>49</sup> Moreover, while the AFP may cross the path of HOME's Solstice Sojourn, it does not prevent HOME participants from creating an alternate route for such a sojourn or negotiate crossing of the pipeline through construction of an overpass or some other feature allowing the sojourn to continue uninterrupted. In fact, the CPCN states that TGP "needs to bury the pipeline over the entire span where it would cross HOME's property, including the two intersections with the path of the Solstice Sojourn."<sup>50</sup> Finding that a buried pipeline would most likely cause little to no social harm with regard to their pilgrimage is reasonable. HOME contends that burying the AFP would still significantly impact their ability to complete the journey in a sacred manner.<sup>51</sup> However, to re-route the pipeline out of HOME lands would cost \$51

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<sup>47</sup> *Id.* at 973.

<sup>48</sup> *Id.* at 974.

<sup>49</sup> Order Den. Reh'g, 199 FERC ¶ 72,201, at ¶11.

<sup>50</sup> *Id.* at ¶56.

<sup>51</sup> *Id.* at ¶57.



million; when compared with the simple action of walking over a bare spot of land, it is not an insignificant amount.<sup>52</sup> Therefore, because the environmental harms are minimal and the social harms may be mitigated, FERC's conclusion that the vast benefits outweigh the harms was not an arbitrary and capricious finding for the purposes of issuing the CPCN.

**IV. FERC'S ROUTING OF THE AFP OVER HOME PROPERTY DESPITE HOME'S RELIGIOUS OBJECTIONS DOES NOT VIOLATE THE FREEDOM AND RESTORATION ACT (RFRA) BECAUSE THERE IS NO SUBSTANTIAL BURDEN AND THE ORDER SURVIVES STRICT SCRUTINY.**

*A. Routing of the AFP does not violate the RFRA because there is no substantial burden on HOME religious practices.*

Notwithstanding that the Supreme Court concluded the RFRA to exceed Congress's § 5 powers under the Fourteenth Amendment in 1997,<sup>53</sup> the AFP does not violate the RFRA because the Act provides relief from burden on religious exercise only if that burden is substantial; it does not provide relief from any and all government burdens.<sup>54</sup> Courts consistently determine the matter of whether a burden is substantial under the RFRA remains a matter of law.<sup>55</sup> Without coercion, there is no substantial burden on an individual's religious beliefs. In simply

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<sup>52</sup> *Id.* at ¶44.

<sup>53</sup> *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

<sup>54</sup> *U.S. v. King*, 646 F. Supp. 3d 603 (E.D. Pa. 2022) (citing *Real Alts., Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 357 (3d Cir. 2017)).

<sup>55</sup> *Id.*

allowing a liquid natural gas pipeline to be buried underground on HOME property, FERC is not affirmatively coercing HOME members to take any action that impinges upon their ability to FERC's grant of the CPCN does not substantially burden HOME members because construction of the AFP through HOME property does not constitute compelled support for beliefs that are contrary to HOME's religious principles.

First, FERC's granting of AFP to be routed over HOME property does not substantially burden HOME members' religious beliefs. For a burden to be "substantial," there must be pressure significant enough to constitute an affirmative action on the part of the religious individuals that specifically violates their religious beliefs. The Court will not find that there was a "substantial burden" where the government did not "coerce the individuals to violate their religious beliefs . . . even if 'the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs.'"<sup>56</sup> Since the pipeline will be buried underground, it will be not exposed to sight and will allow members on Solstice Sojourn to walk over the pipeline en route to the Misty Top Mountains. While HOME contests that even walking across the buried pipeline would be "unimaginable" and destroys the

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<sup>56</sup> *Id.* (citing *Real Alts., Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, at 357).

meaning of the Solstice Sojourn because of HOME beliefs against burning and using fossil fuels, no physical barrier will prevent the free exercise of the Sojourn.<sup>57</sup> Therefore, the government, and FERC, are not coercing HOME members into taking any affirmative action, but rather, inconveniencing members for the time of the pipeline construction after which it will barely be noticeable. As the benefits of transporting LNG via the AFP far outweigh the perceived impact of walking over the pipeline, there a substantial burden upon the beliefs does not exist.

Second, for the Court to find a substantial burden, the proposed coerced violation must interfere with an important privilege afforded to the citizen. That is, if the citizen does not comply with the action putting a substantial burden on his religious beliefs, a right or privilege may be denied to him because of his noncompliance. For example, in *Quaring v. Peterson*, the plaintiff argued that the requirement of taking her photograph for the purposes of applying for a driver's license substantially burdened her religious beliefs that she never be photographed.<sup>58</sup> The Court engaged in a lengthy balancing of interests analysis such as the government's requirements as set forth in *Wisconsin v. Yoder* that specifically the "interests of the highest order" may overbalance legitimate claims

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<sup>57</sup> Order Den. Reh'g, 199 FERC ¶ 72,201, at ¶57–59.

<sup>58</sup> *Quaring v. Peterson*, 728 F.2d 1121, 1125 (8th Cir. 1984), *aff'd sub nom. Jensen v. Quaring*, 105 S. Ct. 3492 (1985).

of exercising one's religion.<sup>59</sup>

Here, there is no specific privilege or right enumerated upon which approval of the CPCN and AFP route will infringe aside from potentially the free exercise of religion. HOME members will not be prevented from exercising their religion or be coerced into taking any affirmative action that may violate their religion merely by owning land which may have an LNG pipeline running underground.

Furthermore, should the Court prioritize HOME's opposition to the use of fossil fuels and allow that belief to dictate where a pipeline may run, then in future cases, a Court may have to recognize other obstructions to general utilities which may impact an exponential amount of the population. Thus, the Court should affirm the Order Denying Rehearing because the proposed AFP route does not violate the RFRA because there is no substantial burden placed upon HOME's religious beliefs.

*B. Even if the Court finds the AFP substantially infringes upon HOME's religious practices, the CPCN Order still survives strict scrutiny.*

Should the Court disagree and find that placement of the LNG pipeline substantially burdens HOME's religious beliefs and thus, is subject to strict scrutiny standard of review under the Natural Gas Act, the CPCN still survives

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<sup>59</sup> *Id.* at 1125 (citing *Wisconsin v. Yoder*, 406 U.S. at 215, 92 S. Ct., 1526, 1533 (1972)).

such an analysis. Strict scrutiny of the CPCN Order requires that the government adopt the least restrictive means of achieving a compelling state interest.<sup>60</sup> In other words, the restriction must be narrowly-tailored and necessary to achieve the government's goal to justify impinging upon an individual's constitutional right to the free exercise of religion.

*i. Compelling Government Interest*

First, building the AFP is a compelling governmental interest because of the expanded access to LGN which will be afforded via AFP where it does not exist now, probable reduction in emissions from burning dirtier fossil fuels, and the proposed route will provide temporary and permanent employment.<sup>61</sup> Although the court has not identified one description of a compelling governmental interest enough to overcome a claim for violation to a citizen's freedom to exercise religion, the Court generally describes it as an interest that is essential to protect citizen health,<sup>62</sup> protect the rights of federally-recognized cultural entities,<sup>63</sup> and protect the rights of individuals compelled to take affirmative action where

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<sup>60</sup> *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021).

<sup>61</sup> Order Den. Reh'g, 199 FERC ¶ 72,201, at ¶27.

<sup>62</sup> *Env't'l. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 589 (D.C. Cir. 1971) (explaining the importance of using a pesticide because it is essential to human health in preventing disease transmission).

<sup>63</sup> *U.S. v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011).

employment violates their religion.<sup>64</sup> A compelling interest, then, is one that the government protects because it is vitally important to the health, existence, or freedom of domestic citizens.

Here, while 90% of the LGN will be transported internationally to Brazil, construction and maintenance of the pipeline will create new jobs in an area of New Union experiencing a steady decline in population.<sup>65</sup> The government has a compelling interest in creating jobs and supplying resources to domestic areas which do not currently have access to those resources. Ensuring that all areas of the United States may access resources such as LNG as well as providing means for employment are all compelling interests vital to the success of the republic.

*ii. Narrowly-tailored and Least Restrictive Means*

For a restriction on freedom to exercise religion to survive a strict scrutiny analysis, the restriction must be narrowly-tailored and necessary to achieving the compelling government interest. If the law regulates only religious conduct and fails to regulate secular conduct that is equally harmful to the compelling interest, then despite being facially neutral, the restriction will not survive strict scrutiny.<sup>66</sup>

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<sup>64</sup> See *Sherbert v. Verner*, 83 S. Ct. 1790 (1963) (holding that an individual could not be denied unemployment benefits when the religious beliefs she held prevented her from employment due to employer's requirement that the individual work on Saturdays).

<sup>65</sup> *Id.* at ¶13.

<sup>66</sup> *Soos v. Cuomo*, 470 F. Supp. 3d 268 (N.D.N.Y. 2020).

Here, the CPCN would be granted regardless of land ownership. The NGA does not contemplate religious land ownership as different than secular land ownership when it comes to eminent domain or building pipelines. Therefore, there is no distinction carved out to target religious practices through the CPCN. Additionally, conditioning the pipeline to be buried underground makes it narrowly-tailored enough that it only burdens HOME property with the least amount of inconvenience and creates the least restrictive means of furthering the compelling interest of the government. Rerouting the pipeline in the alternative would not only create a carveout for the specific religion to which HOME adheres, it would further discriminate against other religions. Therefore, while strict scrutiny is unnecessary, even if applied, the CPCN Order as it complies with the NGA would survive such an analysis. Routing the AFP over HOME land thus does not violate the RFRA because there is no substantial burden and even if there is, the compelling government interest overrides any disruption experienced by HOME members.

**V. FERC WAS CORRECT IN DENYING TGP'S REHEARING REQUEST BECAUSE FERC WAS WITHIN ITS JURISDICTION TO INCLUDE GHG CONDITIONS ON A CPCN ORDER.**

FERC relied on 15 U.S.C. § 717 of the Natural Gas Act (NGA) as its basis for authority to enforce conditions to be completed by TGP to obtain approval for a CPCN. Under Section 7 of the NGA, FERC has the jurisdiction to approve or deny

the construction of interstate natural gas pipelines and has the power to attach to the issuance of the certificate reasonable terms and conditions as the public convenience and necessity requires.<sup>67</sup> Here, TGP will become a natural gas company and will be the operator of a newly proposed pipeline that extends from Jordan County, New Union to Burden County, New Union (approximately 99 miles), and therefore is subject to FERC's jurisdiction and is responsible for meeting conditions attached to CPCNs issued by FERC prior to approval.

- i. *FERC properly balanced public benefits against adverse environmental effects by attaching reasonable terms and conditions to the CPCN issued to TGP.*

Federal Agencies are tasked with analyzing reasonable alternatives, including those that will reduce GHG emissions relative to baseline conditions, and identifying available mitigation measures to minimize or compensate climate effects.<sup>68</sup> Since FERC is a legally relevant cause of the direct and indirect environmental effects of pipeline it approves, FERC is responsible for balancing the public benefits against the adverse effects of the project which also includes adverse environmental effects.<sup>69</sup> The court's role in reviewing agency compliance with NEPA is limited to ensuring that the agency has adequately considered and disclosed the environmental

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<sup>67</sup> 15 U.S.C. § 717(f)(2)(e).

<sup>68</sup> *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 FED. REG. 1196 (Jan. 9, 2023).

<sup>69</sup> *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017).



impact of its actions and that its decisions are not arbitrary or capricious.<sup>70</sup> Here, TGP completed an Environmental Impact Statement (EIS) where FERC concluded that downstream end-use could result in upper bounds of 9.7 million metric tons of CO<sub>2</sub>e per year if all 500,000 Dth per day are sent to combustion end uses. In the EIS, TGP failed to include recommendations for mitigation measures associated with the GHG impacts. As such, FERC was within its rights to exercise its authority to attach conditions to the CPCN to mitigate GHG emission impacts to balance the public benefits against adverse environmental effects. FERC adequately disclosed the environmental impact of its actions to apply conditions to the CPCN for the construction portion of the project (mitigation measures to reduce TGP's climate effects result in a 15,760 metric tons reduction per year of CO<sub>2</sub>e over the four-year period of the construction if TGP adheres to the GHG conditions). Accordingly, the conditions added to the CNCP are reasonable and within FERC's authority therefore the Court should affirm FERC's decision in denying TGP's rehearing request.

- ii. *The GHG conditions imposed by FERC are narrow and specific to the TGP Project and do not address major national issues requiring authorization by Congress.*

The conditions attached to the CNCP do not fall under the category of being overbroad nor address major issues requiring congressional approval because the

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<sup>70</sup> *Wildearth Guardians v. Jewell*, 738 F.3d, 308 (D.C. Cir. 2013).

conditions made by FERC are within scope of the NGA and are narrowly tailored to mitigate construction impacts. Under the major questions doctrine, a clear statement is necessary for a court to conclude that Congress intended to delegate authority to executive agencies for issues of major political or economic significance.<sup>71</sup> 15 U.S.C.S. §717 grants Agencies the power to attach to the issuance of the certificate and to exercise of the rights granted thereunder reasonable terms and conditions as the public convenience and necessity may require.<sup>72</sup> Here, FERC attached conditions to the CNCP that require (1) TGP to plant or caused to be planted an equal number of trees to those removed in the construction of the TGP Project; (2) TGP to use electric-powered equipment during the construction of the TGP Project when practical; (3) purchase only “green” steel pipeline segments produced by net-zero steel manufacturers; and (4) purchase electricity used in construction from renewable sources where available. The conditions to the CPCN apply to the construction impacts of one project. Since FERC does not broadly mandate industry-wide mitigation practices through regulations the court should affirm FERC’s decision in denying TGP’s request for rehearing.

**A. FERC WAS CORRECT IN DENYING HOME’S REHEARING REQUEST FOR IMPOSING GHG MITIGATION MEASURES BECAUSE FERC’S DECISIONING FOR NOT IMPOSING SUCH MEASURES WAS NEITHER ARBITRARY NOR CAPRICIOUS.**

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<sup>71</sup> *W. Virginia v. EPA*, 142 S. Ct. 2594 (2022); 15 U.S.C. § 717.

<sup>72</sup> 15 U.S.C. § 717(e).

FERC relied on the National Environmental Policy Act (“NEPA”) guidance and prior court precedence as its basis for denying HOME’s rehearing request to impose mitigation measures for both upstream and downstream GHG impacts. Federal agencies must prepare environmental impact statements when they contemplate “major Federal actions significantly affecting the quality of the human environment” and must discuss among other things alternatives to the proposed action.<sup>73</sup> NEPA is primarily information-forcing in that it directs agencies to only look firmly at the environmental effects of their decisions, and not take one type of action or another.<sup>74</sup>

- i. FERC’S decision not to impose GHG upstream and downstream mitigation measures was not arbitrary or capricious.*

FERC is not obligated to select the course of action that best serves environmental justice, only to take a “hard look” at environmental justice issues.<sup>75</sup> The analysis must be “reasonable and adequately explained,” but the agency’s “choice among reasonable analytical methodologies is entitled to deference.”<sup>76</sup>

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<sup>73</sup> National Environmental Policy Act § 102(2)(C); 42 U.S.C. § 4332(2)(C). *See also Sierra Club v. FERC*, 867 F.3d 1364 (D.C. Cir. 2017).

<sup>74</sup> *Sierra Club v. FERC*, 867 F.3d 1367 (D.C. Cir. 2017); *See also Citizens Against Burlington Inc. v. Busey*, 938 F.2d 194 (D.C. Cir. 1991).

<sup>75</sup> *Id.* at 1367.

<sup>76</sup> *Id.* at 1368.

NEPA allows agencies to determine based on their experiences and expertise, consideration for environmental effect and prepare an analysis based on the available information.<sup>77</sup> The court's role in reviewing agency compliance with NEPA is limited to ensuring that the agency has adequately considered and disclosed the environmental impact of its actions and that its decisions are not arbitrary or capricious.<sup>78</sup> Here, FERC is not obligated to take a course of action. FERC is responsible for reasonably and adequately explaining its assessment and actions taken. In this case, FERC completed a detailed EIS assessment which took into consideration GHG impact on the project as whole in line with NEPA requirements. In FERC's assessment the agency reasonably and adequately explained the reasons for taking or not taking mitigating measures. The agency noted that it was likely that emissions would be lower than the estimated amount stated within the EIS (9.7 million metric tons of CO<sub>2</sub>e downstream end-use per year). FERC concluded based on its assessment and prior experience that even though upstream emissions can be challenging to quantify, there were no reasonably foreseeable significant consequence from the FERC Approval because the HFF gas was already in production and the gas was only being transported in part to different destinations; two factors that are taken into consideration when reviewing GHG upstream

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<sup>77</sup> *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 FED. REG. 1199 (Jan. 9, 2023).

<sup>78</sup> *Wildearth Guardians v. Jewell*, 738 F.3d 308 (D.C. Cir. 2013).

consequences. Since FERC was able to reasonably and adequately explain its assessment and actions taken, the court should affirm FERC's decision in denying HOME's request for rehearing because FERC's decision to not impose any decision for addressing downstream/upstream GHG impact was neither arbitrary nor capricious.

### **CONCLUSION**

This Court should affirm FERC's order in denying both TGP's and HOME's rehearing requests because FERC's finding of public convenience and necessity for TGP's pipeline project outweighed was not arbitrary and capricious, used its authority appropriately when attaching conditions to the CPCN,

Respectfully submitted,

## **CERTIFICATE OF SERVICE**

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on February 5, 2020, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

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## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(A)(7)(B) because:
    - this brief contains 12,882 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).
  2. This brief also complies with the typeface requirements of FED. R. APP. P. 32(A)(5) and the type requirements of FED. R. APP. P. 32(A)(6) because:
    - this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with a 14 point font named Times New Roman.
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