Non-Measuring Brief

In the UNITED STATES COURT OF APPEALS
for the TWELFTH CIRCUIT

Docket No. 23-01109

HOLY ORDER OF MOTHER EARTH,
Petitioner-Appellant-Cross-Appellee.

and

TRANSNATIONAL GAS PIPELINES, LLC,
Petitioners-Appellants-Cross Appellees.

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON APPEAL FROM FERC'S ORDER DENYING REHEARING

Brief of Petitioner-Appellant,
HOLY ORDER OF MOTHER EARTH

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review a Federal Energy Regulatory Committee ("FERC") order pursuant to the Natural Gas Act ("NGA"). 15 U.S.C § 717r(b). Under the NGA, any party to a proceeding who is "aggrieved" by a FERC may file a petition for review of that order in the U.S. Court of Appeals for any circuit where the natural gas company to which the order relates is located or has its principal place of business. *Id*. at § 717r(a)-(b). Alternatively, the petitioners may file in the U.S. Court of Appeals for the District of Columbia. *Id*. In either case, the petitioner must have first sought rehearing before FERC. *Id*.

Here, the Holy Order of Mother Earth ("HOME") and Transnational Gas Pipelines, LLC ("TGP") are the "aggrieved parties." R. at 2.[1] Both filed timely requests for rehearing after FERC granted TGP a certificate of public convenience and necessity under the NGA. *Id*. FERC denied those requests. *Id*. This Court, the U.S. Court of Appeals for the Twelfth Circuit, presides over the State of New Union. *Id*. Since TGP is located in New Union, both TGP and HOME filed timely petitions in this Court for review of FERC's Order Denying Rehearing. R. at 2.

STANDARD OF REVIEW

Issues one, two, and five all involve the arbitrary and capricious nature of FERC's determinations in the CPCN Order. As such, the issues are reviewed under a clear error standard to determine "whether the decision[s were] based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[1] For purposes of clarity, the cite "R. at #" will refer to the underlying record in this case. This record includes this Court's Docketing Notice in Docket # 23-01109 with the attached FERC Order Denying Rehearing. The page number will correspond to the same. The full cite for FERC's Order Denying Rehearing is Transnational Gas Pipelines, LLC 199 FERC ¶ 72,201 (2023).

Issue three involves a question under the Religious Freedom and Restoration Act ("RFRA"). As such, the issue is reviewed under strict scrutiny to determine: (1) whether a substantial burden exists, (2) whether the government action is furthering a compelling government interest, and (3) whether the action is narrowly tailored to the least restrictive means of furthering the asserted interest. *Holt v. Hobbs*, 574 U.S. 352, 357 (2015).

Issue four involves a question of statutory interpretation. As such, the issue is reviewed under the current standard for an agency's interpretation of a statute it is tasked with enforcing. While, historically, this review would have been conducted by a Chevron Doctrine analysis, the Supreme Court's decision last year shifted the appropriate review to the Major Question Doctrine analysis. *See generally W. Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

STATEMENT OF ISSUES PRESENTED

I. Is FERC's finding of public convenience and necessity for the pipeline arbitrary and capricious insofar as FERC failed to explain why gas bound for a country with which the U.S. has no free trade agreement is in the public interest?

II. Is FERC's finding that the alleged benefits of the pipeline outweigh the harms arbitrary and capricious since the explanation of that finding contradicts FERC's own policy statement and fails to engage with HOME's arguments?

III. Does the burden the pipeline route would place on HOME reach the level of "substantial" within the meaning of RFRA; and, if so, does approval of the route survive under the strict scrutiny standard?

IV. Do the conditions FERC imposed address a major question such that they exceed FERC's authority under the NGA?

V. Is FERC's decision not to impose any mitigating conditions to address downstream and upstream greenhouse gas impacts arbitrary and capricious insofar as FERC mitigated some impacts but not others while refusing to engage in reasonable forecasting?

STATEMENT OF THE CASE

A. *The TGP Project*

TGP is a company in the state of New Union. R. at 5. The company is seeking to become a natural gas company within the meaning of the NGA with its so-called TGP Project ("TGP Project" or "the Project"). The Project calls for the construction and operation of a liquid natural gas ("LNG") pipeline and related facilities across two states. *Id*. The so-called American Freedom Pipeline ("AFP") would consist of approximately 99 miles of 30-inch diameter pipeline extending from a receipt point in Jordan County, Old Union to a proposed interconnection with an existing TGP gas transmission facility in Burden County, New Union. *Id*.

The Project is designed to provide up to 500,000 dekatherms (Dth) per day of firm transportation service for natural gas produced and liquified at Hayes Fracking Field ("HFF") in Old Union. *Id*. at 6. The full production HFF's LNG is currently transported by the Southway Pipeline to the states east of Old Union. *Id*. TGP asserts LNG demands in this eastern region have been steadily declining, such that rerouting 35% of HFF's LNG through the AFP would serve the market and would not result in shortages. *Id*. An environmental impact study ("EIS") of the project revealed that: the construction of the AFP would result in 104,100 metric tons of CO2e emissions; downstream end use would result in 9.7 million metric tons of CO2e per year; and upstream results could not be quantified. *Id*. at 15.

From February 21 until March 12, 2020, TGP held an open season for service on the project that resulted in two executed binding precedent agreements. *Id*. The first agreement is with New Union Gas and Energy Services Company for 10% of the AFP's design capacity. *Id*. The second

is with International Oil & Gas Corporation ("International"), for the remaining 90%. *Id*. International operates the New Union City M&R Station located at the Port of New Union on Lake Williams in New Union City. *Id*. Per TGP's proposal, the LNG purchased by International will be diverted at the Burden Road M&R Station to the Northway Pipeline, which is not currently at full capacity. *Id*. The LNG will then be carried by the Northway Pipeline to the New Union City M&R Station. *Id*. There it will be loaded onto LNG tankers for export by International. *Id*. Nearly all, if not all, of the LNG provided to International by the AFP will be exported to Brazil, which does not have a free trade agreement with the United States. *Id*. at 8-9.[2]

TGP estimates that the project will cost approximately $599 million. *Id*. at 6. It is undisputed that TGP can financially support the TGP Project without subsidization from its existing customers. R. at 7.

B. ***Impacts on HOME***

HOME is a not-for-profit religious organization in New Union that considers the natural world to be sacred and believes that nature itself should be worshipped and respected. *Id*. at 5, 11. HOME was organized in 1903 around these values in response to the Industrial Revolution and the harmful effects HOME's founders saw industrialization and capitalism cause to the environment. *Id*. at 11. The center of HOME's religious practice lies on a 15,500-acre property, owned by HOME, in Burden County, New Union. *Id*. at 5. The AFP route would pass through approximately two miles of that property at the exact location of their most sacred religious practice: the Solstice Sojourn. *Id*. at 11. If approved, the TGP Project would require the permanent removal of about 2,200 trees and other forms of vegetation from that location. *Id*. at 10.

[2] *See also* Free Trade Agreements, Office of the United States Trade Representative, https://ustr.gov/trade-agreements/free-trade-agreements (last visited Nov 20, 2023).

During every summer and winter solstice since 1935, members of HOME perform the Solstice Sojourn, a ceremonial journey that begins at a temple at the western border of the HOME property and ends at a sacred hill in the foothills of the Misty Top Mountains. *Id*. at 11. At the hill, all children who have turned fifteen years old in the prior six months undergo a sacred religious ceremony. *Id*. The proposed route would interrupt the Solstice Sojourn in both directions. *Id*. If approved, the TGP Project would leave HOME with the choice of relocating, if not entirely abandoning, their most sacred religious practice. *Id*. at 12. Additionally, having the pipeline on HOME's property would substantially violate HOME's religious beliefs and practices by allowing its land to be used for the transport of LNG. *Id*. at 11. The harmful environmental effects of the fracking process required to obtain LNG, the environmental destruction resulting from creating the route for the pipeline, and the detrimental climate effects of burning any fossil fuel are all counter to the founding principles of HOME's religious beliefs. *Id*.

C. *FERC and Procedural History*

Before a pipeline be constructed, the NGA requires FERC grant a Certificate of Public Convenience and Necessity ("CPCN") based on a finding that the project will serve the public interest. 15 U.S.C. at § 717f(c)(1)(a). Pursuant to that requirement, TGP submitted an application to FERC for a CPCN on June 13, 2022. R. at 4. On April 1, 2023, FERC issued an order granting the CPCN ("the CPCN Order"), thereby approving the TGP Project. *Id.* at 2. On April 20, 2023, HOME sought rehearing on certain issues in the CPCN Order. *Id.* Two days later, TGP also sought rehearing to address certain conditions imposed by the Order. *Id*. In response, on May 19, 2023, FERC issued an Order Denying Rehearing ("the Rehearing Order") and affirming the CPCN Order as issued. *Id*. HOME and TGP responded by filing the subject Petitions for review by this Court on June 1, 2023. *Id*.

SUMMARY OF THE ARGUMENT

First, FERC's finding of public convenience and necessity for the AFP was arbitrary and capricious. An agency's decision is considered "arbitrary and capricious" if the agency entirely failed to consider an important aspect of the problem. 5 U.S.C. § 706(2)(A); *see also Motor Vehicle*, 463 U.S. at 43. Congress has stated that only gas bound for countries with which the United States has a free trade agreement is entitled to a presumption that the export aligns with public interest. 15 U.S.C. § 717b(c). FERC's Rehearing Order erroneously extended this presumption to a pipeline where 90% of the gas would be exported to Brazil – a country *without* a free trade agreement. R. at 8. Further, FERC's order dismisses Congress's free trade distinction as "meaningless." *Id*. at 9. Although gas exported to countries without a free trade agreement can still be found to be in the public interest, FERC failed to explain how that was the case here. Thus, FERC entirely failed to consider an important aspect of the problem, and the CPCN Order is arbitrary and capricious.

Second, FERC's finding that the potential benefits of the pipeline outweigh the environmental and social harms was also arbitrary and capricious. In order to survive an arbitrary and capricious standard of review, an order must be principled and reasoned. *Env't Def. Fund v. FERC*, 2 F.4th 953, 960 (D.C. Cir. 2021). A FERC order does not evidence reasoned and principled decision making when it refuses to seriously engage with non-frivolous arguments and fails to thoroughly conduct the interest-balancing required by its Certificate Policy Statement ("CPS"). *Id*. FERC's Order contradicts the CPS's guidance to avoid eminent domain and fails to engage with HOME's arguments. R. at 10-11. The finding that AFP's benefits outweigh the harms is, therefore, arbitrary and capricious.

Third, FERC's decision violates RFRA since it substantially burdens HOME and fails under strict scrutiny. RFRA applies when government action substantially burdens the exercise of religion. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014). Under this standard, a government action can only be taken if it (1) is in furtherance of a compelling government interest; and (2) is narrowly tailored to the least restrictive means of furthering that interest. *Id*. at 726. HOME's exercise of religion is substantially burdened because the TGP Project and resulting AFP, as planned, would cause HOME to modify their religious behavior and violate their beliefs. R. at 11-12. The proposed route of the AFP would force HOME to modify or abandon on of their most sacred religious practices - the Solstice Sojourn. *Id*. The proposed route of the AFP will also cause HOME to violate their general tenants of their beliefs. *Id*. FERC has asserted no compelling government interest other than a broad goal of maintaining a coherent permitting system. *Id*. at 13. The agency has likewise failed to narrowly tailor the pipeline approval by refusing to approve the alternate route. *Id*. Thus, the CPCN Order violates RFRA.

Fourth, FERC's authority to impose greenhouse gas ("GHG") conditions is well established and does not violate the Major Question Doctrine. Under recent Supreme Court guidance, a reviewing court must determine whether an agency action exceeded its statutory authority by asking whether it addresses a major question Congress left unclear. *W. Virginia*, 142 S. Ct. at 2609. The GHG conditions imposed by FERC do not violate this standard since they are specific and individual measures focused on one proposed project. R. at 16. Even if this Court determines the conditions do address a major question, imposing GHG conditions is a direct exercise of FERC's authority under the NGA to attach conditions to a CPCN as public necessity may require. Thus, the action did not exceed the agency's authority.

Fifth, FERC's failure to satisfactorily explain why mitigating conditions for GHG emissions from construction of the AFP are proper while such conditions on upstream and downstream emissions are not is arbitrary and capricious. FERC has the responsibility to impose conditions to mitigate the reasonably foreseeable effects of proposed pipelines before granting CPCN orders. 15 U.S.C. § 717b(a); *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (2017). Even where such impacts may be difficult to fully articulate, the agency is required to engage in "reasonable forecasting" to properly engage in "informed decision making." *Sierra Club*, 867 F.3d at 1374. FERC dismissed the articulated upstream and downstream impacts of the TGP Project on one hand while stating the impacts were not clear on the other hand. Even assuming the later were true, FERC's Rehearing Order clearly fails to articulate a satisfactory explanation as required by the arbitrary and capricious standard.

ARGUMENT

I. FERC'S FINDING OF PUBLIC CONVENIENCE IS ARBITRARY AND CAPRICIOUS SINCE THE AGENCY FAILED TO PROPERLY CONSIDER BRAZIL'S TRADE STATUS OR OTHERWEISE JUSTIFY THE FINDING.

FERC's finding of public convenience and necessity was arbitrary and capricious because the agency found public interest without properly considering Brazil's trade status with the United States. An agency's decision is considered "arbitrary and capricious" if the agency has relied on factors Congress did not intend 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. 5 U.S.C. § 706(2)(A); *see also Motor Vehicle Mfrs.*, 463 U.S. at 43. If a reviewing court finds the agency's decision was based in any of these improper practices, the reviewing court can set the agency decision aside. 5 U.S.C. § 706(2)(A); *see also Motor Vehicle Mfrs.*, 463 U.S. at 43.

In regulating the natural gas industry, Congress promulgated the NGA to guide FERC's authority as the regulatory agency. 15 U.S.C. § 717b. With § 717b(a), Congress conferred authority on FERC to approve all foreign imports or exports of natural gas, stating that no person shall do so "without first having secured [a FERC-issued CPCN order] authorizing it to do so." *Id.* at § 717b(a). When considering whether an order would be consistent with public convenience and necessity, § 717b(c) expresses Congressional intent that FERC consider whether the gas is being exported to countries with which the United States has a free trade agreement. *Id.* at § 717b(c). Specifically, § 717b(c) guides that exportation where there is in effect a free trade agreement grants a presumption of public interest and expedites the approval process. *Id.* But, it is clear this presumption applies *only* to pipelines transporting gas bound for countries with which the United States has a free trade agreement. *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 726–27 (D.C. Cir. 2022).

In *Oberlin*, FERC considered exported gas to be in the public interest and credited gas to be exported to Canada in their CPCN analysis. *Id.* The court found FERC properly relied on the Congress's guidance in the NGA that exports to nations with which the United States has a free trade agreement for natural gas "shall be deemed to be consistent with the public interest." *Id.* at 726-27. Since the gas which was being exported to a nation with this trade status, the pipeline was found to be in the public interest *Id.*

In the present case, FERC's CPCN Order is distinguishable from *Oberlin's* and not in accordance with Congress's directive. Unlike Canada, Brazil does not have a free trade agreement with the United States for natural gas. R. at 9. Here, FERC gave the public interest presumption to a pipeline when 90% of its production will be exported to a country without a free trade agreement. *Id.* In fact, FERC expressly stated it views Congress's distinction regarding the presumption as

"meaningless" and "put no significant weight on the fact that 90% of the gas is bound for a country with which the United States does not have a free trade agreement." *Id*. While exported gas can still be in the public interest without this presumption, the Rehearing Order fails to explain why that is the case. Because there was no statutory basis for FERC to presume the exported gas is in the public interest, its failure to perform any public-interest analysis is a failure to consider an important aspect of the problem. Thus, FERC's decision is the very definition of arbitrary and capricious and the CPCN order should be set aside.

II. FERC'S INTEREST-BALANCING TEST WAS ARBITRARY AND CAPRICIOUS SINCE IT CONTRADICTED THE AGENCY'S POLICY STATEMENT AND WAS NOT PRINCIPLED AND REASONED.

Even if convenient and necessary, FERC's granting the CPCN Order is still arbitrary and capricious since the agency's interest-balancing test failed to demonstrate proper consideration of issues raised by the CPS and HOME. In determining whether to grant a CPCN order, FERC must consider the evidence of the adverse impacts and conduct a balancing test between those impacts and the public convenience. *Env't Def. Fund*, 2 F.4th at 959. This balancing test is set out in the CPS. *Id*. A CPCN order must also evidence reasoned and principled decision making. *Id.* at 960. Courts have found FERC failed to do so when the agency refuses to seriously engage with non-frivolous arguments and fails to thoroughly conduct the interest-balancing required by its own policy statement. *Id*. at 960.

In the present case, FERC contradicts their policy statement by outright dismissing the significant exercise of eminent domain that would result if this project was approved. *Id*. at 10-11. Similarly, FERC refused to seriously engage with HOME's non-frivolous arguments, especially those concerning HOME's religious beliefs. *See generally* R. at 11-12. Thus, the outcome of FERC's interest-balancing test here is arbitrary and capricious.

A. FERC'S FINDINGS CONTRADICT ITS POLICY STATEMENT SINCE THE AGENCY DISMISSED THE EMINENT DOMAIN CONCERNS.

FERC's decision to place little weight on the use of eminent domain demonstrates the arbitrary and capricious nature of the CPCN Order. In considering whether FERC's proposed outcome of the balancing test is arbitrary and capricious, a court may reference the guidance listed in its policy statement, the CPS. *Env't Def. Fund*, 2 F.4th at 960. The CPS guides that, once a finding of public need is made, FERC must then determine any adverse effects the project may have and whether the applicant has made efforts to eliminate or minimize those effects. CPS at 6-7.[3] This determination expressly includes any effects the project might have on the landowners and communities affected by the route of the new pipeline. *Id.* at 7. The CPS provides guidance for when a project adversely affects landowners through eminent domain. *Id.* at 54-55. Such guidance makes it clear that FERC is to give significant consideration to such issues when conducting the balancing test to determine if any of these issues are raised and outweigh any public benefits. *Id.*

The CPS guides that eminent domain is among the most significant actions that a government may take with regard to an individual's private property. *Id.* Further, the statement recognizes that harm to an individual from having their land condemned is one that may never be fully remedied, even in the event they receive their constitutionally required compensation. *Id.* To avoid the use of eminent domain, the CPS guides FERC to use reroutes whenever practicable in order to avoid the use of eminent domain. *Id.* at 55. Practicable means reasonably capable of being accomplished; feasible in a particular situation; capable of being used; or useable. Practicable

[3] For purposes of clarity for the reader, the cite "CPS at #" will refer to corresponding page number in the following full citation: Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61, 107 (2022).

Definition, Black's Law Dictionary (11th ed. 2019). The CPS further guides that landowners whose property is subject to eminent domain often experience intangible impacts, which cannot always be monetized. CPS at 55. Thus, the CPS cautions FERC not to look only at the economic impacts associated with eminent domain as they do not sufficiently account for the full scope of impact on landowners. *Id*. The CPS guides that this consideration of landowner impacts is based upon robust early engagement with ***all*** interested landowners and continued evaluation of landowner input during the course of any given proceeding. *Id*. at 55-56.

Here, FERC's Rehearing Order contradicts the CPS's express provisions regarding eminent domain in three ways. First, FERC states it attributes no significant consideration to the lack of easements. R. at 10-11. Secondly, FERC dismisses the alternate route without providing an adequate explanation for why the alternate route is not practicable. *Id*. at 11. Lastly, FERC refuses to give extra weight to HOME's intangible impacts – their religious concerns. *Id*. at 11-12.

As to easements, despite TGP's participation in FERC's pre-filing process alleged to address landowner and community concerns for the Project's proposed route, TGP and FERC have failed to mitigate the serious detriments to those very individuals. *See generally Id.* at 10. TGP has made menial changes, around 30%, to the proposed pipeline route. *Id*. Further, TGP has not signed easement agreements with nearly half, around 40%, of landowners along the route. *Id*. The 40% that oppose the pipeline will be forced to surrender their property rights in some regard. *Id*. Instead of giving this lack of easements proper weight as required by the CPS, FERC states that "eminent domain is common in the construction of pipelines, and the lack of easement agreements was not significant to their consideration of the environmental and social harms." *Id*. at 10-11. Thus, FERC's explanation runs counter to the agency's own policy and caselaw such as *Env't Def. Fund*.

As to the alternate route, FERC agrees with TGP's argument that rerouting the TGP Project to avoid crossing HOME property is "infeasible" because it would add over $51 million in construction costs and cause more objective harm by traveling an additional three miles through the Misty Top Mountains. *Id*. at 11. But FERC fails to elaborate on why this fractional increase of a nearly $600 million project is so unreasonable it justifies the use of eminent domain. *See generally Id*. Instead of the alternate route, FERC ordered TPG to bury the pipeline over the entire span where it would cross the HOME property and expedite construction "to the extent feasible." *Id*. at 11. But even this insufficient "accommodation" would still leave a permanent scar since the trees and vegetation could not be replaced and would leave HOME's property barren at the very location of the Solstice Sojourn. *Id*. at 10-11. Further, this does nothing to address concerns of the other 60% of landowners affected. *See generally Id*. at 10.

As to the intangible impacts, despite the CPS's guidance that a wider range of landowner impacts should be considered, FERC refused to give *any* extra weight to the AFP's adverse effects on HOME's property in light of their religious beliefs. *Id*. at 12. Burying the pipeline on HOME's land would cause significant social harm by impacting the practices and ceremony of an entire religion. *Id*. at 10-11. Further, it would force HOME to endorse the very thing their religion was founded to oppose. *Id*. at 11-12. Therefore, FERC's refusal to properly consider the ramifications of forcing HOME to allow the pipeline on their land runs counter to the agency's own policy statement and caselaw such as *Env't Def. Fund*. As such, the CPCN Order should be set aside.

B. FERC'S BALANCING TEST OUTCOME WAS UNPRINCIPLED AND UNREASONABLE SINCE THE TEST WAS NOT THOROUGHLY CONDUCTED AND FAILED TO ENGAGE HOME'S ARGUMENTS.

FERC's CPCN order should be set aside as arbitrary and capricious because FERC failed to explain how their balance of the benefits and potential harms was principled and reasoned. A

FERC order which fails to demonstrate reasoned and principled decision making does not survive under the applicable arbitrary and capricious standard of review. *Env't Def. Fund*, 2 F.4th at 960. This standard is only satisfied when FERC *thoroughly* conducts the balancing test and engages with non-frivolous arguments. *Id.*

In *Env't Def. Fund*, the court found that FERC's determination that public benefits outweighed adverse impacts was arbitrary and capricious when the benefits of the pipeline were not obvious. *Id.* at 966. In *Env't Def. Fund*, there was no new load demand for gas, and there was only one shipper for the gas. *Id.* at 973. FERC's finding of sufficient benefits consisted largely of assertions that the proposed pipeline would provide benefits to the market like enhanced access to diverse supply sources and the fostering of competitive alternatives. *Id.* at 961. FERC used these assertions to claim that the benefits outweighed the potential adverse effects, but FERC pointed to no concrete evidence to support these assertions. *Id.* at 973. FERC also failed to address concerns over whether these benefits were likely to occur at all. *Id.* at 974.

Ultimately, the court found there was no true indication the new pipeline would lead to public benefits and, thus, FERC's failure to engage with these inefficiencies did not satisfy the requirements of reasoned and principled decision making. *Id.* at 973-75. The court reasoned the challenges raised by those opposing the pipeline were more than enough to require FERC to "look behind" the precedent agreements in determining whether there was market need. *Id.* at 974. That, combined with FERC's declining to engage with arguments opposing the pipeline, led the D.C. Circuit to conclude the outcome of FERC's interest-balancing was arbitrary and capricious. *Id.* at 973-75. Just as the FERC order in *Env't Def. Fund*, FERC's CPCN Order is arbitrary and capricious because it points to no real evidence of public benefit and fails to engage with HOME's non-frivolous arguments.

As to thoroughly conducting the balancing test, FERC's interest-balancing outcome, just as it did in *Env't Def. Fund*, fails to show any real evidence of public benefit. Just as in *Env't Def. Fund*, there is no new load demand since all of the natural gas produced at HFF is already fully transported by the existing Southway Pipeline. R. at 9. Like the court in *Env't Def. Fund*, this Court should find this fact leaves no compelling argument that a new pipeline will produce public benefits. Although the Rehearing Order does list possible benefits, FERC again fails, just as it did in *Env't Def. Fund*, to reference a market study or any hard evidence at all to support their assertions. *See generally Id*. at 10-12. Instead, FERC blindly points to precedent agreements as all they need to show public need and benefits. R. at 9. This Court, just as the court in *Env't Def. Fund*, should find this blind assertion is improper. Although precedent agreements can be evidence of public need and benefit, the *Env't Def. Fund* court made clear that these agreements may not always be a pure indication of public need and benefit. In following *Env't Def. Fund's* guidance to "look behind the precedent agreements," it becomes obvious that there is no real public benefit where nearly all transported grass will be exported. *Id*. at 8.

FERC's interest-balancing test here also failed to engage with HOME's arguments on multiple fronts, as prohibited under the standard acknowledged in *Env't Def. Fund*. First, FERC disregarded the free trade agreement distinction without explaining why HOME's argument, although consistent with case law, is flawed. *Id*. at 9. Instead, FERC arbitrarily states that they are not concerned with the end use of the gas. *Id*. at 9. Next, HOME argued that 40% of the landowners along the route have not signed an easement. *Id*. at 10. But again, FERC simply dismissed the argument by asserting the lack of easements is not significant to their consideration despite express contradictions in FERC's own policy statement. *Id*. at 10-11. Next, FERC disregarded HOME's argument for the alternative route because it is more expensive. *Id*. at 11. But again, FERC never

explained how the alternative route is impracticable. *See generally Id*. Lastly, FERC refused to give greater consideration to HOME's religious concerns despite, again, contradicting guidance from the agency's own policy statement. *Id*. at 11.

FERC's failure to thoroughly conduct the balancing test and refusal to fully address any of HOME's arguments is exactly the type of unprincipled and unreasonable decision making anticipated in cases like *Env't Def. Fund*. Therefore, FERC's order should be set aside as arbitrary and capricious.

III. FERC'S APPROVAL TO ROUTE THE AFP OVER HOME'S PROPERTY VIOLATES RFRA BECAUSE IT PLACES A SUBSTANTIAL BURDEN ON HOME THAT DOES NOT SATISFY STRICT SCRUTINY.

FERC's decision to route the pipeline through HOME's land violates RFRA because the burden it places on HOME is not narrowly tailored to meet a compelling government interest. RFRA was enacted to protect religions from being infringed upon by government action. *Cutter v. Wilkinson*, 544 U.S. 709, 714–15 (2005). RFRA protects religions by subjecting government action to strict scrutiny when government action substantially burdens the exercise of religion. *Id*. Since RFRA and the Supreme Court remain silent on how to define "substantial burden" for purposes of RFRA, lower courts have relied on the Supreme Court's guidance in free exercise cases to answer the question. *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (citing *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981)). In *Thomas* the Supreme Court held that a substantial burden exists "when government action puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718. Once it has been determined a substantial burden does exist, RFRA guides that the action may be taken only 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(a).

FERC's order is subject to strict scrutiny because routing the pipeline over HOME's land substantially burdens HOME's religion by forcing them to modify their behavior and violate their beliefs. If the pipeline is buried on HOME's land, the meaning of the Solstice Sojourn will be destroyed, and HOME will be forced to either abandon or move the religious ceremony. R. at 11. Since HOME's religion is substantially burdened, RFRA's protections are in full effect and FERC's must demonstrate (1) that approval of the TRP Project furthers a compelling government interest, and (2) that its approval is narrowly tailored to furthering that interest. Since the CPCN order at issue fails to do either, the order violates RFRA. Since FERC has failed to satisfy either of those requirements, the decision to grant the CPCN Order violates RFRA.

A. FERC'S DECISION SUBSTANTIALLY BURDENS HOME'S RELIGION BY DESTROYING THE SOLSTICE SOJOURN AND MAKING A MOCKERY OF THEIR RELIGION.

HOME's members would be substantially burdened because FERC's order, if upheld, would force HOME to modify or abandon the Solstice Sojourn and live on property that violates the tenants of their beliefs. The threshold question when considering a RFRA violation is whether there is a substantial burden that is impeding religious exercise. *Hobby Lobby*, 573 U.S. at 719. To answer that question, courts ask whether "substantial pressure [is placed] on an adherent to modify his behavior and to violate his beliefs." *Kaemmerling,* 553 F.3d at 678 (citing *Thomas,* 450 U.S. at 718). In *Thomas,* the Supreme Court made it clear that even where the pressure to modify behavior or violate beliefs may be indirect, "the infringement upon free exercise [of religion] is nonetheless substantial." *Thomas,* 450 U.S. at 717-18. In RFRA cases, the Supreme Court has made clear that the question is whether one's religious exercise has been substantially burdened, ***not*** whether there are other ways to exercise the religion. *Holt,* 574 U.S. at 361-62.

First, even burying the pipeline on HOME's land would still force HOME to modify their religious behavior since the Solstice Sojourn would need to be relocated or abandoned altogether. R. at 11-12. Secondly, forcing HOME to let the pipeline be buried on their land would violate their religious beliefs because pipeline would be a mockery to the tenants of their faith. *Id*. Therefore, approval of the current AFP route would place a substantial burden on HOME within the meaning of RFRA.

(1) THE PIPELINE'S ROUTE WOULD FORCE HOME TO MODIFY THEIR RELIGIOUS BEHAVIOR BY DESTROYING THE MEANING OF THE SOLSTICE SOJOURN.

In *Holt*, the Supreme Court considered whether a prison policy which banned facial hair longer than a quarter inch violated RFRA when applied to a Muslim inmate who wished to grow a half-inch beard in accordance with his religious beliefs. *Holt*, 574 U.S. at 355. To answer this question, the Court considered both the action that would violate the man's religious exercise and the consequences if the man continued to adhere to his religion. *Id*. at 361.

As to actions, the Court found the incarcerated man had the burden of showing that his sincerely held religious beliefs were substantially burdened by the grooming policy. *Id*. Ultimately, the Court held that burden was easily met since the policy required the petitioner to shave his beard, thus "engag[ing] in conduct that seriously violated his religious beliefs." *Id*. As to consequences for continuing to adhere, the Court highlighted the fact that, if the petitioner contravened the policy and grew his beard, he would have faced serious disciplinary action. *Id*. The Court reasoned that, because the grooming policy put the petitioner to this impossible and forced choice, it substantially burdened his religious exercise. *Id*. The Court emphasized that the question under RFRA is whether an individual's religious exercise is substantially burned, not whether a person is able to engage in other forms of religious exercise. *Id*. at 361-62.

Similar to the incarcerated plaintiff in *Holt*, HOME has no real choice but to modify their religious exercise. If HOME openly defies the order, they can be assessed fines up to $1,000,000 per violation for each day it continues under 15 U.S.C. § 717t-1. This is similar to the prisoner in *Holt* who would face disciplinary action if he defied the grooming policy. If HOME cannot afford extensive fines, HOME's only option is to sit back and watch the pipeline desecrate their place of worship. Following the burying of the pipeline, HOME does have the choice to either abandon the Solstice Sojourn, and thus abandon a practice of their religion, or continue to practice a sojourn which will have lost its spiritual meaning. R. at 11-12. A sojourn which must cross above the buried pipeline would have no meaning because HOME's religion was created in opposition to industrialization and the pollution of what is natural and pure. *Id*. The plaintiff in *Holt* was allowed to grow a beard, but without the proper length it was religiously meaningless. Just as the Court found that restriction imposed a substantial burden, this Court should recognize that tainting a sacred ceremony with the very thing HOME's religion was created to resist is also a substantial burden.

(2) FORCING HOME TO ALLOW THE PIPELINE ON THEIR LAND CAUSES THEM TO VIOLATE THEIR BELIEFS BY CREATING A MOCKERY OF THEIR RELIGION.

The Supreme Court has recognized that government action that forces a person to engage in behavior that goes against their beliefs imposes a substantial burden on one's religion. *Hobby Lobby*, 573 U.S. at 720. In *Hobby Lobby*, the Supreme Court considered whether the Affordable Care Act's requirement that certain employers provide health insurance that covers contraceptive methods violates RFRA when applied to Christian business owners whose religion opposed use of contraceptives. *Id*. at 696-701. The Court again looked to the consequences of refusing to comply with the potentially burdensome law and continuing to adhere to their beliefs. *Id*. at 719-21. Under

the Act, these consequences included substantial fines. *Id*. at 720-21. These fines started at $100 per affected individual for each day the employee continued to apply and could extend to $2,000 per employee per year if the employer opted out of providing health insurance altogether. *Id*. In looking at the religious objection of the business owner, the Court found that the religious beliefs were sincere, and that the contraceptive mandate demanded that they engage in conduct that substantially burdens their religious exercises in violation of RFRA. *Id*. at 720. Further, the Court ruled that if an individual believed that a certain act or requirement would violate their sincerely held religious beliefs, it was not the Court's place to determine the plausibility or reasonableness of such a claim. *Id*. at 725.

In the present case, HOME has refused to grant an easement for the TGP Project because doing so would violate their religious beliefs. R. at 10. HOME's religion is built on preserving the environment and worshiping its purity. *Id*. at 11. Similar to how forcing Christian business owners to fund contraceptives imposes a substantial burden on religion, forcing HOME to allow a pipeline that pollutes the environment to go through their land would force HOME to violate their religion. Many Christians oppose contraception because the Bible teaches the sanctity of life. Similarly, HOME's religion focuses on the purity of the environment, which is why HOME opposes the production, transportation, and burning of fossil fuels. *Id*. at 11-12. These things fall into the category of industrialization, the exact concept HOME's religion was founded to resist. *Id*. at 11. If HOME is forced to allow the pipeline to be buried on their land, it will create a mockery of their religion by requiring them to aid what their religion calls them to stand against. *Id*. at 11-12.

FERC's Rehearing Order dismisses HOME's religious objections with the assertion the agency does not believe HOME allowing a pipeline to be buried beneath their place of worship would violate their religious beliefs. *Id*. at 10-11. However, the Supreme Court has ruled it is not

the place of the Court, and by extension FERC, to rule that sincerely held religious objections are implausible or unreasonable.

B. FERC'S ORDER VIOLATES RFRA BECAUSE THE SUBSTANTIAL BURDEN PLACED ON HOME FAILS STRICT SCRUTINY.

FERC's CPCN Order violates RFRA because the Order is neither in furtherance of a compelling government interest or the least restrictive means of furthering any alleged interests. RFRA deems religion a protected class deserving of same highest protection applied to other equal-protection classes like race and national origin. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Under these protections, for a substantial burden on religious exercise to remain in place, the restriction must be: (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that interest. *Hobby Lobby*, 573 U.S. at 726. FERC's CPCN Order satisfy neither of these requirements and, thus, violates RFRA.

(1) FERC FAILED TO ESTABLISH THE TGP PROJECT FURTHERS ANY COMPELLING GOVERNMENT INTEREST.

FERC has failed to assert any recognized, much less compelling, government interest. RFRA requires the Government to demonstrate the compelling interest test is satisfied through application of the challenged law "to the person," meaning the particular claimant whose sincere exercise of religion is being substantially burdened. 42 U.S.C. § 2000bb–1(b). This requires courts to "look beyond broadly formulated interests" and to "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

In *Gonzales,* a religious sect with origins in the Amazon Rainforest received communion by drinking a sacramental tea, which contained a hallucinogen regulated under the Controlled Substances Act. *Id*. at 423. The asserted compelling interest behind that Act was the well-

recognized government interest in public health and safety. *Id.* Yet, on challenge under RFRA, the Supreme Court still found the government interest insufficient to satisfy the compelling interest test. *Id*. at 432. In coming to the decision in *Gonzales*, the Court reasoned that the Act failed to consider the sacramental uses of the hallucinogen. *Id*. Further, the Court rationalized that the Act itself contained a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." *Id*. at 432-22. The Court also discussed an exception for peyote which had already been recognized under the Act. *Id*. at 433.

Unlike the *Gonzales* case, there is not even a clear government interest in the present case. FERC cites to broad interests in "maintaining a coherent natural gas line permitting system," to assert satisfaction of the strict scrutiny test. R. at 13. This fails to "look beyond broadly formulated interests" as required by the Supreme Court in *Gonzales*. Further, FERC has failed to show any recognized government interest for a pipeline that serves primarily foreign markets without a free trade agreement.

Even if this Court finds a government interest exists, FERC still failed to scrutinize the harms to HOME as required the Supreme Court. Instead, FERC actually refuses to consider HOME's subjective religious beliefs. *Id*. at 12-13. This is directly analogous to *Gonzales*. Just as the Act there had built in considerations for exceptions, FERC has broad authority to grant and deny the orders based on their case-by-case determination of weighing the harms against the benefits. This process is similar to the process in *Gonzales* where the Attorney General had the authority to waive the act's requirements if he/she deemed them to be consistent with the public health and safety. Another similarity between the present case and *Gonzales* is there are already exceptions to the rule. Similar to how peyote was already made an exception to the act, FERC

regularly denies certificates based on environmental and social harms. The fact that FERC can deny certificates shows FERC's failure to consider HOME's unique religious beliefs was not in furtherance of a compelling government interest. FERC can still maintain a coherent gas pipeline permitting system while also recognizing exceptions in the name of religious liberty in accordance with RFRA. Because FERC refuses to do so, the CPCN Order fails the first prong of the strict scrutiny test.

(2) FERC'S ORDER IS NOT NARROWLY TAILORED BECAUSE THERE IS A VIABLE ALTERNATIVE THAT IS LESS RESTRICTIVE OF HOME'S RELIGIOUS LIBERTY.

Even assuming the Court did find some compelling government interest, FERC's Order still fails strict scrutiny and violates RFRA because there is a less restrictive means of approving the pipeline. In *Hobby Lobby*, the Court stated that the least-restrictive-means standard is exceptionally demanding. *Hobby Lobby*, 573 U.S. at 728. This standard requires the government to show it lacks ***any other means*** of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties. *Id*. Further, the Court guided that though cost may be an important factor in the least-restrictive-means analysis, some circumstances require the government to expend additional funds to accommodate citizens' religious beliefs. *Id*. at 730. The Court opined that arguing RFRA can never require the government to spend even a small amount reflects a judgment about the importance of religious liberty which was not shared by the Congress that enacted the law. *Id*. Thus, the Court held that if there is a viable alternative that lessens the restriction on religious liberty, the proposed government action is not narrowly tailored. *Id*. 728-30.

In *Hobby Lobby*, the Supreme Court reasoned that the most straightforward way of narrowly tailoring the contraceptive mandate would be for the Government to assume

responsibility of covering the cost of providing contraceptives to any person unable to obtain them as a result of their employers' religious objections. *Id*. The Court rationalized that this would be a less restrictive burden on the plaintiffs' religious liberty, and that the government did not show any viable alternative. *Id*. While the government argued the burden of providing contraceptives would cost too much, the Court dismissed this argument since the cost of contraceptives at issue would be minor when compared with the overall cost of the $1.3 trillion program. *Id*.

In the present case, FERC's order is not narrowly tailored because they have not shown why the alternative route for the pipeline is not a viable option. *See generally* R. at 10-11. The alternative route is far less restrictive of FERC's religion because it would not affect their Solstice Sojourn in any way. *Id*. Further, although the proposed alternative route may still cause environmental harm, the pipeline's construction would not substantially burden FERC's religion. *Id*. While HOME still would not support the pipeline's construction or its environmental effects, the alternative route would not make a mockery of HOME's religion by forcing them to allow the pipeline to be buried on their sacred land or affect their ability to practice their religion. *Id*.

Although the cost of the pipeline would increase along the alternate route, as in *Hobby Lobby*, a marginal increase is not an adequate excuse to dismiss a viable alternative. The cost of the TGP Project is expected to be around $599 million. *Id*. at 6. The alternate route would add $51 million to the total cost of construction. *Id*. at 11. Just as the additional financial burden on the government in *Hobby Lobby* was minor when compared to the ACA's overall budget, the marginal increase here is minor when compared to the Project's overall cost. Thus, this Court should follow the precedent set in *Hobby Lobby* and find FERC's approval is not narrowly tailored to further a compelling government interest.

IV. FERC'S AUTHORITY TO IMPOSE GHG CONDITIONS IN A CPCN IS CLEAR AND DOES NOT VIOLATE THE MAJOR QUESTION DOCTRINE.

This Court should find that the GHG Conditions imposed here do not address a major question and are an exercise of FERC's authority under the NGA. In determining whether an agency acted beyond its' Congressionally conferred authority, the Supreme Court guides courts to follow the Major Questions Doctrine. *W. Virginia*, 142 S. Ct. at 2609. While this determination may have previously called for an analysis under the Chevron Doctrine, the Supreme Court's decision in *West Virginia*, marked a shift in this standard. *Id*. This shift is the focal point of Justice Kagan's dissent, which makes clear the Majority's intent that the Major Questions Doctrine be the new controlling test when considering whether an agency's interpretation of its Congressionally-conferred authority. *Id*. at 2635 (Kagan, J., dissenting).

The Major Questions Doctrine guides that an agency should not address major questions unless the statutory text clearly grants that agency the authority to do so. *Id*. at 2609. The Supreme Court has made clear this doctrine only applies in "extraordinary cases" when the "history and breadth of the authority that the agency has asserted," and "the economic and political significance of that assertion," gives the court "a reason to hesitate before concluding that Congress meant to confer such authority to act on the agency." *Id*. at 2608.

Whether analyzed under the Major Questions Doctrine or the Chevron Doctrine, the NGA clearly grants FERC the authority to impose conditions to address GHG emissions resulting from the natural gas industry. *See generally* 15 U.S.C. § 717f(e). NGA § 7 makes this authority clear, stating FERC holds "the power to attach to the issuance of the certificate" "such reasonable terms and conditions as the public convenience and necessity may require." *Id*. Case law also highlights FERC's authority to impose GHG conditions. *Sierra Club*, 867 F.3d at 1374. In *Sierra Club*, the D.C. Circuit made clear that where GHG emissions are an indirect effect of authorizing a pipeline

project that FERC can reasonably foresee, the agency may act on its legal authority to mitigate such effects. *Id*.

Under the Major Questions Doctrine, this Court must answer two questions. First, the Court must determine whether FERC is attempting to address a major question under the NGA. Under *West Virginia*, this means asserting extraordinarily broad authority with economic and political significance. Only if FERC is attempting to do so should the Court then reach the question of whether such authority was clearly conferred to FERC under the NGA. In doing so, it is obvious that imposing conditions on GHG emissions resulting the AFP's construction is not a major question and does not go beyond FERC's authority to regulate that industry pursuant to the NGA.

A. THE GHG CONDITIONS DO NOT ADDRESS A MAJOR QUESTION SINCE THEY ARE IMPOSED ON A SINGLE PROJECT.

This Court should find that the GHG conditions imposed here, which are specific and individual measures focused on one proposed project, cannot be seen as addressing a major question. The Major Questions Doctrine should only apply where common sense makes a court hesitate before concluding that vague statutory language empowers an agency to make a "radical or fundamental change" to a statutory scheme. *W. Virginia*, 142 S. Ct. at 2609. Specifically, the Major Questions Doctrine applies where an agency is attempting to work an "aggressive transformation" in a fundamental sector of the economy through regulation. *Id*. at 2610.

In *West Virginia*, the Supreme Court considered whether the EPA exceeded its authority in promulgating the Clean Power Plan to address carbon dioxide pollution from coal-fired power plants. *Id*. at 2607. This Plan would impose sector-wide generation shifting from coal to cleaner sources such as wind. *Id*. at 2604. The generation shift, according to EPA projections, would reduce coal's national electricity-generated share from 38% to 27% by 2030. *Id*. From these projections, the EPA established strict emissions performance rates which would have forced

existing coal plants to engage in the generation shift. *Id*. The Government projected that the Clean Power Plan would impose billions on compliance costs, raise retail electricity prices, require the retirement of dozens of coal plants, and eliminate tens of thousands of jobs. *Id*. at 2604.

The EPA argued it had the authority to promulgate this Plan, and thereby enforce a sector-wide generation shift, under § 111 of the Clean Air Act. *Id*. at 2602. Specifically, the EPA relied on § 111's statement that the agency has authority to set standards to reduce emissions "*through the application of the best system* of emissions reduction." *Id*. at 2601 (emphasis added). The Supreme Court disagreed, holding that the EPA's plan was addressing a major question by "claim[ing] to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a rarely used statute designed as a gap filler." *Id*. at 2610. The Court found that the EPA's broad interpretation of their authority to "apply a best system" would allow the EPA to deem almost anything a system and mandate the end of coal-power production altogether in the name of emissions reduction. *Id*. at 2614. The Court found Congress's use of the word "system" was not a clear grant of authority and, therefore, the Clean Power Plan violated the Major Questions Doctrine. *Id*. at 2616.

Unlike the Clean Power Plan at issue in *West Virginia*, the GHG conditions imposed here are specific and individual measures focused on one proposed project – the construction of the AFP. R. at 17. The conditions imposed here do not address broader GHG concerns across the entire natural gas sector or beyond. Thus, the conditions are not larger-scale measures that address nationwide issues requiring specific authorization from Congress as anticipated by the Court in *West Virginia*. FERC's action to mitigate the GHG emissions of the construction of AFP is not of significant economic and political consequence like the Clean Power Plan. There is a notable difference between addressing the global issues of climate change and ensuring a single pipeline

project mitigates its GHG emission impacts. The conditions here are based on factual and scientific considerations about GHG emissions and their environmental impact. *Id*. Thus, the GHG Conditions here do not address the types major questions anticipated by *West Virginia* and are not beyond FERC's authority under the NGA.

B. THE GHG CONDITIONS DO NOT EXCEED FERC'S AUTHROITY SINCE THE NGA DIRECTLY AUTHORIZES IMPOSING THEM.

Even if this Court determines the GHG conditions do address a major question, Congress expressly granted FERC the authority to do so under the NGA. FERC's authority under the NGA includes the regulation of the construction of liquid natural gas pipelines. 15 U.S.C. § 717f. As stated, NGA § 717f(e) expressly grants FERC power to "reasonable terms and conditions" to a CPCN "as the public convenience and necessity may require." *Id*. § 717f(e). Similarly, § 717b(a) states that FERC may "grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate." *Id*. at § 717b(a). Thus, the ability to impose conditions is one of FERC's primary roles in the CPCN process.

The issue of whether this authority extends to imposing conditions in a CPCN to mitigate GHG impacts has been previously addressed by case law. *Sierra Club*, 867 F.3d at 1374. In *Sierra Club*, the D.C. Circuit expressly held that when GHG emissions are a reasonably foreseeable, indirect effect of authorizing a pipeline project, FERC may act on its legal authority to mitigate such effects. *Id*. at 1374.

In *Sierra Club*, FERC's issued a CPCN for the construction and operation of three new interstate natural gas pipelines. *Id* at 1363. As required by the National Environmental Policy Act ("NEPA"), FERC completed an EIS as part of its review of the pipeline proposals. *Id*. at 1364. The EIS failed to estimate, quantitively, the downstream GHG emissions of the pipeline, leaving FERC unable to consider the full significance of the pipeline's GHG emissions. *Id*. at 1372. On

review, FERC argued that it was impossible to know exactly what quantity of GHGs would be emitted. *Id*. The D.C. Circuit disagreed, holding the resulting GHG emissions of pipeline construction are reasonably foreseeable, indirect effects of authorizing such projects. *Id*. As such, the court held that FERC had not only the legal authority to mitigate the effects, but the responsibility to do so. *Id*.

Unlike the pipeline applicant in *Sierra Club*, TGP's EIS *did* provide estimates of GHG emissions resulting from the project. R. at 15. Further, FERC exercised the legal authority recognized by the *Sierra Club* court to mitigate those reasonably foreseeable effects of constructing the TGP pipeline. *Id*. Here, the imposed conditions solely address the effects of AFP's construction as quantified in TGP's EIS. Such conditions are a direct exercise of FERC's authority under the NGA to attach reasonable conditions to a CPCN and, therefore, do not exceed FERC's authority under the NGA.

V. FERC'S DECISION TO IMPOSE MITIGATING CONDITIONS ON SOME GHG IMPACTS AND NOT OTHERS IS ARBITRARY AND CAPRICIOUS.

This Court should find FERC's explanation for refusing to mitigate upstream and downstream GHG impacts arbitrary and capricious since it was not satisfactory based on the facts before the agency. As conferred by the NGA and recognized by case law such as *Sierra Club*, FERC has the responsibility to impose conditions to mitigate reasonably foreseeable effects of proposed pipelines before granting CPCN orders. 15 U.S.C. § 717b(a); *Sierra Club*, 867 F.3d at 1374. Courts review FERC's decision not to do so under the familiar arbitrary and capricious standard. 5 U.S.C.A. § 706(2)(A); *Sierra Club*, 867 F.3d at 1367. Under this standard, the court considers "whether [FERC] examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."

Vecinos para el Bienstar de la Comunidad Costera v. FERC, 6 F.4th 1321 (D.C. Cir. 2021). The court will also ask whether FERC addressed "opposing viewpoints." *Id*.

As stated, *Sierra Club* considered FERC's authority to impose conditions on the GHG impacts resulting from approving pipeline construction and found FERC has both the authority and the responsibility to do so. *Sierra Club*, 867 F.3d at 1374. *Id*. In coming to that holding, the D.C. Circuit noted that a NEPA analysis necessarily involves some "reasonable forecasting," and that agencies may sometimes need to make educated assumptions about an uncertain future. *Id*. The court further reasoned that "the effect of such assumptions on estimates can be checked by disclosing these assumptions so that readers can take [those estimates] with the appropriate amount of salt." *Id*. The EIS at issue in *Sierra Club* needed to include a discussion of the GHG emission impacts. *Id*. The D.C. Circuit reasoned that, without such analysis, it was difficult to see how FERC could engage in "informed decision-making" with respect to the GHG effects of the project, or how "informed public comment" could be possible. *Id*. Accordingly, the court concluded that FERC's approval of the pipeline was improper and vacated the approval as arbitrary and capricious. *Id*.

The D.C. Circuit has reaffirmed *Sierra Club's* basic holding as recently as 2021 in *Vecinos*. There, the court again considered the adequacy of FERC's analysis and determination regarding a pipeline project's GHG emissions. *Vecinos*, 6 F.4th at 1328. In *Vecinos*, FERC received a pipeline application and completed an EIS that detailed the GHG effects that could result from approving the pipeline's construction. *Id*. However, FERC declined to impose mitigating conditions on those impacts, concluding in the EIS that it was "unable to determine the significance of the project's contribution to climate change." *Id*. On appeal, the D.C. Circuit considered the argument that 40 CFR § 1502.21(c) required FERC to use a generally accepted methodology to determine the

significance. *Id*. Specifically, that the CFR required "[i]f… information relevant to reasonably foreseeable significant adverse impacts cannot be obtained… because the means to obtain it are not known, the agency shall include within the [EIS]... the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.21(c).

In interpreting the statutory language, the D.C. Circuit Court held that, since FERC failed to address the significance of that regulation, its analysis was deficient under NEPA and, therefore, arbitrary and capricious. *Vecinos*, 6 F.4th at 1329. In coming to that holding, the court was careful to note that it was not *requiring* FERC to use any certain protocol, but *was* requiring FERC to explain whether the statute required using analytical framework "generally accepted in the scientific community," to determine the significance of the project's contribution to climate change. *Id*. at 1330.

Here, just as in *Sierra Club*, FERC is again refusing to address the significance of the GHG emissions and environmental effects resulting from the operation of a pipeline. R. at 16. To explain its inaction, FERC merely stated that it was in the process of drafting its own guidance to determine the significance of GHG emissions under NEPA. *Id*. In doing so, the agency failed to engage in any "reasonable forecasting," to make an educated assumption about an "uncertain future," as the court required FERC to do *Sierra Club*. Without these determinations, it is difficult to see how FERC could engage in informed decision-making concerning the TGP Project. FERC contradicts its own argument for not addressing these impacts when it argues that addressing upstream and downstream GHG impacts would not address a major question because the agency believes "these issues are properly addressed by guidance…" *Id*. at 18. If FERC believes that the issue of addressing upstream and downstream impacts is properly addressed by uncited guidance, it is

perplexing that the agency heavily relies on the lack of guidance to support its decision not to label these impacts as significant enough to mitigate. This inconsistency illustrates that FERC provides little factual support for its failure to address these impacts aside from an inadequate explanation under the arbitrary and capricious standard.

Just as FERC did for the pipeline application in *Vecinos*, TGP quantified the GHG emissions associated with the construction and operation of the AFP in the EIS. *Id*. at 15-16. That EIS estimated that downstream end use of the LNG could result in about 9.7 million metric tons of CO2e per year, and construction of the AFP could result in 104,100 metric tons of CO2e absent the mitigation conditions. *Id.* at 15. Like in *Vecinos*, FERC asserts that it is "hesitant to make a determination as to the significance of upstream and downstream impacts." *Id*. at 16. In addressing why FERC determined these impacts were not significant enough for mitigation, the agency simply stated it was in the process of drafting its own guidance to determine the significance of GHG emissions under NEPA. *Id.* at 16. Just as in *Vecinos*, FERC is again refusing to properly address why the agency cannot use a theoretical method or approach generally accepted in the community to help determine the significance of these indirect emissions. *See generally Id*. at 19. FERC repeatedly provides the excuse that it is in the process of finalizing its own guidance to support its "inability" to determine the significance. *Id*. at 14-16, 18-19. But this simply is not an adequate explanation for FERC's determination under the arbitrary and capricious standard. This is best evidenced by FERC's willingness to conclude that the estimated construction impacts of 104,100 metric tons of CO2e are significant enough to mitigate while estimated downstream emissions of 9.7 million metric tons per year not. *Id*. at 15.

The only other reason FERC provides to support the decision not to mitigate these effects is "the weak connection between the [] TPG Project and any increased upstream or downstream

GHG impacts." *Id*. at 19. But in the preceding sentence of that same paragraph, FERC states that whether the very impacts it calls "weak" are actually unclear to the agency. *Id*. These reasonings completely contradict each other and ignore the significant estimate of downstream emissions that FERC itself highlights in the Rehearing Order. Therefore, just in *Vecinos*, FERC's failure to articulate a satisfactory explanation should lead this Court to vacate the CPCN order as arbitrary and capricious.

CONCLUSION

In conclusion, this Court should vacate the CPCN Order since FERC arbitrarily and capriciously determined the TGP Project was in the public interest. Even if this interest exists, the CPCN Order should still be vacated since FERC arbitrarily and capriciously determined the benefits of the TGP Project outweighed the harms.

If the CPCN Order is found to be proper, the TGP Project should be rerouted to avoid violating RFRA. Further, the mitigating conditions imposed on GHG emissions resulting from the TGP Project should not only be found proper, but should be expanded to cover upstream and downstream impacts as well.