ORDER DENYING REQUEST FOR REHEARING

(Issued August 30, 2018)

1. On September 29, 2017, Texas Gas Transmission, LLC (Texas Gas) submitted a comprehensive contractual restructuring package (Restructuring Package) with SWN Energy Services Company, LLC (Southwestern) comprised of (i) a Master Agreement together with a series of firm transportation agreements on Texas Gas’ Fayetteville and Greenville Laterals (Laterals) and associated negotiated rate agreements; and (ii) a tariff provision that would allow Texas Gas and any other customer on the Laterals to mutually terminate and/or modify firm service agreements if the customer meets certain requirements.

2. On October 31, 2017, the Commission issued an order approving the Restructuring Package and the tariff provision effective November 1, 2017, subject to Texas Gas’ revising several provisions not at issue in this rehearing.

3. On November 30, 2017, Fayetteville Express Pipeline LLC (Fayetteville Express) and Trunkline Gas Company, LLC (Trunkline) filed a request for rehearing (Request for Rehearing).

4. For the reasons discussed below, the Request for Rehearing is denied.

I. Background

5. The Fayetteville Lateral is located primarily in Arkansas and was designed to bring new gas supplies from the Fayetteville Shale production area to Texas Gas’ system. The Greenville Lateral is located in Mississippi and was designed to provide access from Texas Gas’ mainline to new markets along that lateral. Southwestern currently holds

1 Texas Gas Transmission, LLC, 161 FERC ¶ 61,121 (2017) (October Order).
firm capacity on both Laterals, under service agreements that will begin to expire as early as March of 2019. Texas Gas stated that development of the Fayetteville Shale was part of the shale boom of the mid-2000s; however, the volumes transported on the Fayetteville Lateral peaked in 2014 and have since been in a state of decline as production economics have changed over time.

6. In Texas Gas’ September 29, 2017 submission, Texas Gas stated that the Restructuring Package would terminate and modify certain existing firm transportation agreements with Southwestern on the Laterals and create a series of new firm transportation agreements that extend beyond the termination date of the existing firm transportation agreement. The Restructuring Package also added a new section to the tariff that allowed Texas Gas and any customer on Texas Gas’ Laterals to mutually terminate and/or modify firm service agreements if the customer met certain requirements. Texas Gas stated that the Restructuring Package will result in the temporary reduction of Southwestern’s existing firm capacity on the Fayetteville Lateral but will ensure that Southwestern continues to hold firm transportation capacity on the Laterals through December 31, 2030.

7. Among other changes, the Restructuring Package included several negotiated rate contracts between Texas Gas and Southwestern that have low or zero reservation charges and a higher usage charge. One of those contracts (FT Base Volumetric Contract 36591) includes a new negotiated volumetric commitment charge (Volumetric Commitment Charge). Under this Volumetric Commitment Charge, Southwestern agreed to pay Texas Gas $0.05 per million British thermal units (MMBtu) of “Other Production.” Other Production is defined as the difference between (i) all gas produced by Southwestern from a defined commitment area (Commitment Area) in northern Arkansas and (ii) the aggregate volumes transported on all of Southwestern’s firm Fayetteville Lateral agreements. Texas Gas stated that the Volumetric Commitment Charge was necessary for it to agree to the Restructuring Package. Texas Gas stated the charge ensures Texas Gas is paid if Southwestern is producing gas committed to Texas Gas, while also providing Southwestern with reservation charge relief when committed gas is not delivered to Texas Gas. Texas Gas stated that this unique negotiated rate provision recognizes the now-existing, special market conditions that Southwestern faces in the Fayetteville Shale production area, including the collapse of natural gas pricing three years ago, and the slow rebound of production activity that has followed.

8. Fayetteville Express and Trunkline² objected to the Volumetric Commitment Charge component of the Restructuring Package, claiming it was anticompetitive and

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² Fayetteville Express is a direct competitor of Texas Gas, operating a pipeline that parallels Texas Gas’ Fayetteville Lateral starting in the Fayetteville Shale production area and continuing to Mississippi. Trunkline is an affiliate of one of Fayetteville Express’
operates as a penalty that would effectively shut out non-Texas Gas pipelines from serving the basin for any current or new gas production business from Southwestern’s committed properties.

9. In the October Order, the Commission generally approved the Restructuring Package subject to revisions not at issue here. With respect to the Volumetric Commitment Charge specifically, and in response to Fayetteville Express and Trunkline’s concerns, the Commission found that the provisions were not anticompetitive and were designed to support the unique volumetric-based contracts Texas Gas negotiated with Southwestern.

10. The Commission explained that in the past it had approved pipelines’ offering discounts and negotiated rates in exchange for a shipper’s committing to transport specified reserves. The Commission stated that Southwestern similarly agreed to commit specified reserves to Texas Gas’ system in exchange for revised transportation agreements that contained negotiated volumetric rates, rather than reservation charges. The Commission stated further that the Volumetric Commitment Charge also allows Southwestern some flexibility to ship committed reserves on other pipelines, but requires compensation to Texas Gas in such an event and only to the extent Southwestern has firm transportation capacity reserved on the Fayetteville Lateral.

11. While the Commission acknowledged that during the term of Southwestern’s contractual arrangements with Texas Gas, Southwestern would be less likely to ship its natural gas production from the Commitment Area on pipelines other than Texas Gas, the Commission did not find this arrangement inherently anticompetitive. Rather, the Commission stated that “[t]hese are the types of choices that consumers are constantly

upstream owners and transports substantial volumes of Fayetteville Express gas to downstream markets.

3 October Order, 161 FERC ¶ 61,121 at P 12.

4 Id. PP 17-21.

5 Id. P 17 (citing ANR Pipeline Co., 101 FERC ¶ 61,257, at P 5 (2002) (approving a negotiated rate agreement that included a lease dedication agreement)).

6 Id. P 18.

7 Id. P 19.
required to make in a competitive marketplace.”

The Commission stated that a shipper has a choice between paying recourse rates or committing its reserves to be transported on the pipeline in return for paying rates that shift fixed costs to the usage charge, and could weigh whether the advantages of obtaining a volumetric rate outweigh the limits on transportation choices for a given length of time.

12. Here, the Commission found Southwestern had a choice whether to enter into its contractual arrangements with Texas Gas given that Southwestern approached both Texas Gas and Fayetteville Express pipelines with the opportunity to compete for Southwestern’s business going forward. After significant negotiation with both pipelines, Southwestern determined that Texas Gas best met its needs. Thus, the Commission concluded that the Volumetric Commitment Charge was not anti-competitive.

13. Responding to Fayetteville Express’ concerns, the Commission distinguished LSP-Cottage Grove L.P. v. Northern Natural Gas Co. In LSP-Cottage Grove, the shipper had discounted recourse rate contracts for firm service in the pipeline’s Market Area and interruptible service in the pipeline’s Field Area. The pipeline was also billing the shipper a five-cent interruptible transportation charge for all of the volumes the shipper transported in the Market Area, even if the shipper did not transport those volumes in the Field Area. In the October Order, the Commission distinguished LSP-Cottage Grove on the ground that it involved violations of the Commission’s regulations and policies concerning recourse rates for interruptible service, whereas this case only involves negotiated rates for firm service. For example, the 5 cent interruptible transportation charge for all Market Area volumes, regardless of whether interruptible service occurred in the Field Area, violated section 284.10(c)(1) of the Commission’s regulations, requiring that a pipeline charge a volumetric rate for interruptible service and only charge that rate when the service is actually used. In addition, requiring the shipper to pay for Field Area interruptible service, regardless of whether the shipper used that service, improperly bundled the pipeline’s interruptible Field Area transportation service with its firm Market Area service.

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8 Id. P 20 (quoting Transcontinental Gas Pipe Line Corp., Opinion No. 405, 76 FERC ¶ 61,021, at 61,060 (1996)).

9 Id. P 21.


11 October Order, 161 FERC ¶ 61,121 at PP 23-24.

12 LSP-Cottage Grove, 109 FERC ¶ 61,390 at P 30.
14. By contrast, the Commission found that the Volumetric Commitment Charge is part of Southwestern’s negotiated rate for firm service. It will not be assessed on volumes flowing on Texas Gas through other rate schedules, and thus, unlike the rate at issue in *LSP-Cottage Grove*, does not result in Texas Gas improperly bundling its firm service with some other service. Rather, the Commission explained, the Volumetric Commitment Charge is imposed when production from the Commitment Properties is transported on another pipeline. In this manner, it helps implement the Lease Dedication Agreement, while nevertheless giving Southwestern some flexibility to ship gas from the Committed Properties.

15. Nor did the Commission accept the argument that the charge contravened the Commission’s capacity release policies. The Commission explained that, while Southwestern may be subject to paying the Volumetric Commitment Charge during the term of the release, capacity release credits could be used to offset that cost – an outcome that was not substantively different from the circumstances present when a recourse rate shipper releases capacity.13

16. Finally, the Commission also found that the fact that the Volumetric Commitment Charge may be included in a contract permanently released by Southwestern in a future asset sale did not constitute an unlawful tying arrangement under the Commission’s capacity release regulations.14

II. Rehearing Request

17. Fayetteville Express and Trunkline’s Request for Rehearing asserts that the Commission erred by (1) summarily concluding that the Volumetric Commitment Charge will not suppress or damage competition; (2) improperly relying on the fact that the Volumetric Commitment Charge is a negotiated rate provision; and (3) failing to sufficiently respond to Fayetteville Express’ argument that the Volumetric Commitment Charge results in unlawful tying in violation of Commission regulations.15

18. Fayetteville Express and Trunkline argue that, contrary to the Commission’s decision, the Volumetric Commitment Charge is harmful to competition. They assert that Southwestern is an anchor shipper of Fayetteville Express, representing about 60 percent of the capacity on Fayetteville Express’ system.16 Fayetteville Express and Trunkline state that the impact of the Volumetric Commitment Charge on this usage

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13 October Order, 161 FERC ¶ 61,121 at P 26.

14 *Id.* P 27.

15 Request for Rehearing at 5.

16 *Id.* at 7.
will be dramatic given that the production subject to that commitment could be up to 800,000 MMBtu per day and the charge will also apply to Southwestern affiliates, successors, assigns and replacement shippers.\textsuperscript{17} They claim that the charge serves as a penalty. Further, Fayetteville Express and Trunkline argue that the Volumetric Commitment Charge will distort price signals because Southwestern or other parties subject to the charge who wish to use a separate transportation service must pay another pipeline’s transportation costs plus the 5 cent Volumetric Commitment Charge. Fayetteville Express and Trunkline claim that the Commission did not adequately weigh this harm against the benefits of allowing the charge.\textsuperscript{18} Similarly, they argue that the uniqueness of the collapse of the economics of gas production industry in the subject area does not justify approving the Volumetric Commitment Charge given that all the other pipelines and producers in the area are dealing with the same market conditions.\textsuperscript{19}

Fayetteville Express and Trunkline also argue that the Commission did not adequately consider the broader impact of allowing charges such as the Volumetric Commitment Charge, including the impact of broad adoption of such charges on competition.\textsuperscript{20}

Fayetteville Express and Trunkline claim that the Commission’s reliance on Board of Trade of City of Chicago v. United States\textsuperscript{21} for the proposition that anticompetitive impacts will result from any business dealing is misplaced because it is too broad a proposition and because the facts of that case were distinguishable.\textsuperscript{22}

Additionally, Fayetteville Express and Trunkline argue that the Commission’s reliance on the fact that the Volumetric Commitment Charge was part of a negotiated rate should not be given the weight that the Commission gave it and should not insulate the rate from antitrust scrutiny.\textsuperscript{23}

Finally, Fayetteville Express and Trunkline argue that the Commission insufficiently explained how the capacity release provisions did not constitute illegal

\begin{itemize}
\item \textsuperscript{17} Id. at 8.
\item \textsuperscript{18} Id. at 6-10.
\item \textsuperscript{19} Id. at 14-15.
\item \textsuperscript{20} Id. at 10-12.
\item \textsuperscript{21} 246 U.S. 231 (1918).
\item \textsuperscript{22} Request for Rehearing at 12-14.
\item \textsuperscript{23} Id. at 14-15.
\end{itemize}
tying and did not refute their contention that a replacement shipper would need to accept the Volumetric Commitment Charge for the capacity to be released.  

III. Commission Decision

23. We deny Fayetteville Express and Trunkline’s Request for Rehearing, which reiterates arguments that they previously made in this proceeding, and which the Commission rejected in the October Order.

24. We affirm the finding in the October Order that the Volumetric Commitment Charge was not anti-competitive and was designed to support unique volumetric-based contracts negotiated with Southwestern.

25. Fayetteville Express and Trunkline’s argument that the Commission should have applied a stricter or more thorough rule of reason antitrust analysis misunderstood the nature of the Commission’s antitrust analysis. As an initial matter, the Supreme Court’s decision in Board of Trade of City of Chicago appropriately sets the stage for the Commission’s analysis, with its pragmatic recognition that all agreements restrain trade in some manner, but not all agreements are unlawfully anticompetitive. Generally, the Commission’s analysis reflects that “[c]oncerns underlying antitrust jurisprudence regarding competitive restraints in general . . . are complementary to the concerns underlying the Commission’s broad regulatory policy.” Thus, while the Commission is not charged with enforcing antitrust laws, “antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give understandable content

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24 Id. at 16-18.

25 Id. at 6.

26 October Order, 161 FERC ¶ 61,121 at P 19 (citing Board of Trade of City of Chicago, 246 U.S. at 231). See also Transwestern Pipeline Co. v. FERC, 820 F.2d 733, 740-41 (5th Cir. 1987) (affirming Commission where it employed “the very same ‘rule of reason’ analysis articulated by Justice Brandeis in” Board of Trade of City of Chicago).

27 ANR Pipeline Co. v. Transcontinental Gas Pipe Line Corp., 93 FERC ¶ 61,277, at P 7 (2000); see also Transwestern Pipeline Co., 820 F.2d at 741 (“The Commission’s authority to declare a practice unlawful and to prescribe an appropriate remedy stems from §§ 4 and 5 of the NGA. The fact that the Commission may employ a “rule of reason” analysis similar to that developed by courts in antitrust cases does not subject its determination to a court rebalancing of the factors it deemed relevant. When we review the Commission’s actions we are not free to apply antitrust standards.”).
to the broad statutory concept of public interest.” 28 In doing so, the Commission “has a responsibility to ‘consider, in appropriate circumstances, the anticompetitive effects of regulated’” behavior. 29

26. Consistent with that approach, the Commission here considered and analyzed the full range of potential competitive effects flowing from the Volumetric Commitment Charge and the overall Restructuring Package. The Commission found that during the term of the subject contracts “Southwestern will be less likely to ship its natural gas production” from within the Commitment Area on competitor pipelines. 30 Although other pipelines, including Fayetteville Express, may potentially lose business as a result of the Restructuring Package, this is not the end of the analysis, as the antitrust laws were enacted for “the protection of competition, not competitors.” 31

27. To that end, the Commission counterbalanced the pro-competitive benefits to competition created by allowing the restructuring arrangement against the potential harm to competition caused through potential harm to competitors. According to Texas Gas, market conditions in the area are such that transportation volumes have dropped dramatically since 2014 as production economics have changed, and more takeaway capacity exists than current production within the Fayetteville Shale. 32 This environment created uncertainty for Southwestern regarding the expected volumes of production at the Commitment Area facilities that are subject to the Restructuring Package. In light of this, Southwestern requested rate relief options that would help it manage the risk of this uncertainty. 33 By the parties’ calculation, approving the Restructuring Package will

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29 New York Indep. Sys. Operator, Inc., 127 FERC ¶ 61,136 (2009); see also Transwestern Pipeline, 820 F.2d at 741 (“Only if on balance the term causes more harm than is warranted in light of the term’s objectives and the available alternatives, can we find the term to be an unreasonable restraint of trade.”) (quoting Transwestern Pipeline Co., Opinion No. 238-A, 36 FERC ¶ 61,175, at 61,439 (1986)).

30 October Order, 161 FERC ¶ 61,121 at P 19.


32 Texas Gas Tariff Filing at 4-6 (Sept. 29, 2017).

33 Southwestern Answer and Comments in Support of Texas Gas at 3 (Oct. 13, 2017) (Southwestern Answer) (noting that given the decline in production and drilling in the area, the Restructuring Package provides “short-term rate relief and a long-term incentive to develop in the Fayetteville Shale”).
provide requested reservation charge relief to Southwestern’s gas transportation costs, “secure long-term firm utilization of the Laterals as market conditions continue to change in the underlying supply basins,” benefit end consumers, in addition to the parties, through the supply of gas, and do so in a manner that no competing shippers have protested.

28. Further, the Commission finds Fayetteville Express and Trunkline’s assertion that the Volumetric Commitment Charge is likely to dramatically close off competition in the market is overstated. As discussed in the October Order, the Volumetric Commitment Charge will only be charged to the extent Southwestern has firm transportation capacity reserved on the Fayetteville Lateral, which will total 800,000 MMBtu per day when the Restructuring Package becomes effective in 2021. This is the same amount of firm transportation that Southwestern held on Texas Gas before the Restructuring Package, undermining the suggestion that this agreement will shut out other pipelines from the basin.

29. More broadly, as discussed in the October Order, the Commission has previously permitted pipelines and shippers to agree to volumetric and similar commitments in exchange for lower rates. The Volumetric Commitment Charge is less restrictive

34 Id. at 2.

35 Request for Rehearing at 10-12.

36 October Order, 161 FERC ¶ 61,121 at P 17 (discussing ANR Pipeline Co., 101 FERC ¶ 61,257 at P 5 and noting the Commission found in ANR Pipeline Co. “that ‘the Lease Dedication Agreement may be approved as part of a negotiated rate, since the agreement is in the nature of a volumetric commitment in exchange for a lower rate’”).

than some alternatives in that Southwestern may still use other pipelines subject to the 5 cent charge.

30. We reject Fayetteville Express and Trunkline’s repeated assertion that the Volumetric Commitment Charge is not a legitimate part of a transportation rate but rather an anticompetitive penalty. We find that the Volumetric Commitment Charge functions as a replacement for a demand charge rather than a penalty. The Restructuring Package contains firm transportation agreements rather than interruptible service agreements. Commission rules permit reservation fees for firm, but not interruptible services. Firm transportation agreements often require reservation charges that a shipper is required to pay, regardless of use, in exchange for the reservation of capacity on a given pipeline.

31. Here, Southwestern would face much higher reservation charges by entering into firm transportation contracts under recourse rates for service than under the Restructuring Package. For example, at current recourse rates, Southwestern would be charged a reservation charge of $0.3474 per MMBtu per day for comparable firm transportation on the Fayetteville Lateral. Under the Restructuring Package’s volumetric contracts, Southwestern will pay only a one cent demand charge or none at all.

32. By offering a Volumetric Commitment Charge instead of a reservation charge, Texas Gas provided Southwestern with rate relief in the form of avoided reservation charges in the event Southwestern does not produce sufficient gas to flow under the agreements, while providing Texas Gas some assurance that it will be able to recover costs related to providing the capacity so long as Southwestern is producing gas. Fayetteville Express and Trunkline’s assertions that Southwestern was under “economic duress” that compromised its choice lack any record support. As noted in the October

38 Request for Rehearing at 4-19.

39 Compare 18 C.F.R. § 284.7(e) (permitting reservation fees for firm service) with 18 C.F.R. § 284.9(c) (prohibiting reservation fees for interruptible service).

40 See Currently Effective Maximum Incremental Transportation Rates, Section 4.16.

41 See Texas Gas Tariffs, Negotiated Rate and Non-Conforming Service Agreements, Section 2.64, Negotiated Rate Agmts-SWN 36592 (zero demand charge on the Fayetteville Lateral); Texas Gas Tariffs, Negotiated Rate and Non-Conforming Service Agreements, Section 2.64, Negotiated Rate Agmts-SWN 36591 (1 cent per MMBtu per day demand charge).

42 Request for Rehearing at 6.
Order, Southwestern chose to restructure its transportation contracts in this way. Southwestern states that it initiated the engagements with both Texas Gas and Fayetteville Express, giving them both an opportunity to compete for its business going forward, and that both Texas Gas and Fayetteville Express knew they were competing against each other for creative solutions that would provide rate relief. Thus, the Restructuring Package and Volumetric Commitment Charge were creative solutions to economic challenges reached through a competitive process in which other pipelines, including Fayetteville Express, actively participated.

33. Fayetteville Express and Trunkline’s concerns that other pipelines and producers in the area are also dealing with the same market conditions, and that others may agree to similar volumetric commitment charges, are overstated. Undoubtedly pipelines and producers faced with similar uncertainties and economics will pursue creative solutions to those challenges. The Commission can weigh such solutions and their competitive impact on a case-by-case basis.

34. Nor do we agree with Fayetteville Express and Trunkline’s assertion that the Commission gave undue weight to the fact that the Volumetric Commitment Charge is part of a negotiated rate rather than a recourse rate. Shippers cannot be forced to enter into negotiated rate agreements, and Texas Gas is required to provide transportation service at recourse rates if a shipper does not wish to enter into a negotiated rate agreement. In fact, a key driving policy purpose behind permitting negotiated rates was to allow pipelines and shippers to agree to “flexible, efficient pricing” tailored to specific needs while protecting shippers by preserving the recourse option. While negotiated

43 October Order, 161 FERC ¶ 61,121 at P 20 (“The Commission sees nothing anticompetitive with a shipper owning natural gas reserves being presented with a choice, when it contracts for transportation service, between (1) paying the pipeline’s recourse rates or (2) committing its reserves to be transported on the pipeline in return for paying rates that shift fixed costs to the usage charge. . . . ‘These are the types of choices that consumers are constantly required to make in a competitive marketplace.’” (quoting Transcontinental Gas Pipe Line Corp., Opinion No. 405, 76 FERC ¶ 61,021, at 61,060 (1996)).

44 Southwestern Answer at 4.

45 Request for Rehearing at 14-15.

46 Id. at 14-15.

47 Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, 74 FERC ¶ 61,076, at 61,240 (1996) (noting “the availability of a recourse service would prevent pipelines from exercising market power by assuring that the
rates are not “insulated” from review by the Commission for anticompetitive concerns, this factor, along with others discussed above, collectively suggest that the negotiated rate and related Volumetric Commitment Charge were part of a competitive negotiation process, rather than an anti-competitive penalty imposed by Texas Gas.

35. Further, the Commission rejects Fayetteville Express and Trunkline’s contention that the provisions in the Restructuring Package concerning permanent capacity releases constitute an illegal tying arrangement requiring rejection of the Restructuring Package.48

A tying arrangement is ‘an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier,’ and is illegal under the Sherman Act if the seller has ‘appreciable economic power’ in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.49

36. Fayetteville Express and Trunkline argue that tying occurs in this case because in the event of a permanent capacity release a replacement shipper’s production would be subject to the Volumetric Commitment Charge.50 In arguing that this constitutes improper tying, Fayetteville Express and Trunkline rely on language in Cajun stating that “if a company can charge a former customer for the fixed cost of its product whether or not the customer wants that product, and can tie this cost to the delivery of a bottleneck monopoly product that the customer must purchase, the products are as effectively tied as they would be in a traditional tying arrangement.”51 Relying on this, Fayetteville Express and Trunkline suggest that it is improper for a replacement shipper’s production to be

48 Request for Rehearing at 16-18.

49 Cajun Elec. Power Co-op., Inc. v. FERC, 28 F.3d 173, 176 (D.C. Cir. 1994) (Cajun) (quoting Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 461-62 (1992)) (deferring to FERC’s determination that the “anticompetitive effects of stranded cost recovery were both a necessary and acceptable consequence of the transition to competition”).

50 Request for Rehearing at 16.

51 Id. at 17 (quoting Cajun, 28 F.3d at 178).
included in the production subject to the Volumetric Commitment Charge, which they claim would increase Texas Gas’ market share.\(^{52}\)

37. We first clarify that, if Southwestern sought to permanently release transportation capacity together with selling some of its reserves and subjecting the replacement shipper to the volumetric commitment charge, Southwestern would be required to request a waiver of the capacity release regulations and the prohibition on tying.\(^{53}\) In other words, the Commission’s approval of the negotiated rate agreements at issue does not constitute preapproval of such waivers. At that time, the Commission can consider any issues that might be raised by such a request, including any alleged anticompetitive impacts.

38. Nevertheless, we find that the inclusion of the provisions concerning permanent capacity releases in the Restructuring Package is reasonable. In a permanent capacity release, the pipeline agrees to terminate the releasing shipper’s contract for the subject capacity early, thus relieving the releasing shipper from any further liability for that capacity.\(^{54}\) Accordingly, “the Commission does not require a pipeline to agree to a permanent capacity release, unless it will be financially indifferent to the release.”\(^{55}\) The provisions of the Restructuring Package concerning capacity release, including the provision requiring the replacement shipper be subject to the Volumetric Commitment Charge, reasonably set forth the conditions that must be met before Texas Gas will find that it is financially indifferent and thus will agree to the permanent release. If the replacement shipper was not subject to the Volumetric Commitment Charge, then Texas Gas could reasonably determine that it would not be financially indifferent to the transfer and would be within its rights to refuse to agree to a permanent release regardless of asset transfer provisions in the Restructuring Package. These provisions provide

\(^{52}\) Id. at 16.


notice to Southwestern as to what conditions must be satisfied if it desires to make a permanent release.

39. Further, similar permanent capacity release conditions have been included in other pipeline tariffs approved by the Commission. For example, High Island Offshore System, L.L.C. offers volumetric rates in exchange for reserve commitments, and restricts permanent capacity releases to situations where replacement shippers have acquired the subject reserves, and agree to be subject the reserve commitment and transportation agreement.\(^{56}\)

40. Even if a replacement shipper were to agree to the terms of the Restructuring Package, any anticompetitive impact caused by such a shift in ownership is likely to be minimal. By the Restructuring Package’s terms, the commitment does not apply to all the replacement shipper’s production properties. Rather, the Volumetric Commitment Charge will only be charged to the extent a shipper has firm transportation capacity reserved on the Fayetteville Lateral and “is physically capable of being received by Texas Gas for transportation pursuant to any firm transportation agreement with primary receipt point on the Fayetteville Lateral between Customer and Texas Gas.”\(^{57}\) Thus, the production amounts subject to the Volumetric Commitment Charge would be limited to the amounts provided in existing firm transportation agreements and production accessible to the Fayetteville Lateral. Further, Texas Gas states it is only capable of transporting 1.3 Bcf per day and any production in excess of that capacity would not be subject to the Volumetric Commitment Charge.\(^{58}\)

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\(^{56}\) See High Island Offshore System, L.L.C./Natural Gas Tariffs Part III, Sec. 17, Capacity Release, 2.0.0, at P 13.2(d) (providing that for capacity release to be valid replacement shipper must have “succeeded to, or otherwise acquired, that portion of the gas reserves that are committed under the Reserve Commitment Agreement that corresponds to the amount of capacity being released”); High Island Offshore System, L.L.C./Natural Gas Tariffs Part IV, Sec. 8, Reserve Commitment Agreement, 1.0.0, at P 2.2(a)(ii) (providing that assignees must agree to terms of reserve commitment agreement); High Island Offshore Sys., L.L.C., 88 FERC ¶ 61,266, at 61,831 (1999) (approving Reserve Commitment Agreement).

\(^{57}\) See Texas Gas Tariffs, Negotiated Rate and Non-Conforming Service Agreements, Section 2.64, Negotiated Rate Agmts-SWN 36591, at Ex. A, P 1.

\(^{58}\) Motion to Answer and Answer of Texas Gas at 14-15 (Oct. 18, 2017).
The Commission orders:

Fayetteville Express and Trunkline’s Request for Rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,
Secretary.