

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 2015, TO JUNE 30, 2015

IN THE MATTER OF

**FERRELLGAS PARTNERS, L.P., FERRELLGAS,
L.P. D/B/A BLUE RHINO, AMERIGAS PARTNERS,
L.P., D/B/A AMERIGAS CYNLINDER EXCHANGE,
AND UGI CORPORATION**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. 9360; File No. 111 0195
Complaint, March 27, 2014 – Decision, January 7, 2015*

This consent order addresses illegal collusion by two leading suppliers of propane exchange tanks to push a key supplier to accept a reduction in the amount of propane in exchange tanks. The complaint alleges that Blue Rhino and AmeriGas Cylinder Exchange each decided to implement a price increase by reducing the amount of propane in their exchange tanks from 17 pounds to 15 pounds, without a corresponding reduction in the wholesale price. AmeriGas and Blue Rhino then colluded to pressure Walmart, a key customer, to accept a reduction in the amount of propane in the propane exchange tanks each sold to Walmart, in violation of Section 5 of the Federal Trade Commission Act. Under the terms of the orders, AmeriGas and Blue Rhino are prohibited from agreeing with any competitor in the propane tank exchange business to modify fill levels or otherwise fix the prices of exchange tanks, or to coordinate communications with customers. Each is also required to maintain an antitrust compliance program.

Participants

For the Commission: *Kenneth H. Abbe, Thomas H. Brock, Susan S. DeSanti, Eric D. Edmondson, Edward D. Hassi, Amanda G. Lewis, David M. Newman, Austin A.B. Ownbey, Jacob Snow, Mark Taylor, John P. Wiegand, Erika Wodinsky, and Boris Yankilovich.*

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For the *Respondents: Melinda Levitt, Jay Varon, and Lacey Withington, Foley & Lardner LLP; and Niall E. Lynch, Jesse B. McKellen, and Daniel M. Wall, Latham & Watkins LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P., also doing business as Blue Rhino (“Blue Rhino”), and UGI Corporation and AmeriGas Partners, L.P., and, also doing business as AmeriGas Cylinder Exchange (collectively “AmeriGas”), have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

THE NATURE OF THE CASE

1. This action concerns anticompetitive conduct by Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P. (doing business as Blue Rhino) and UGI Corporation and AmeriGas Partners, L.P. (doing business as AmeriGas Cylinder Exchange) in the distribution and sale of exchangeable portable steel tanks containing propane gas commonly referred to as “propane exchange tanks.” In 2008, Blue Rhino and AmeriGas increased prices by reducing the amount of propane contained in propane exchange tanks from 17 pounds to 15 pounds (the “fill reduction”). Faced with resistance from their common customer Walmart Stores, Inc. (“Walmart”), Blue Rhino and AmeriGas colluded by secretly agreeing to maintain a united front to push their joint customer, Walmart, to accept the fill reduction.

2. In the United States, consumers typically use propane exchange tanks to fuel barbecue grills and patio heaters. At all times relevant to this complaint, Respondents were the two largest suppliers of propane exchange tanks in the United States. Blue Rhino controlled approximately 50 percent of the United States wholesale propane exchange tank market; AmeriGas controlled

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approximately 30 percent of the market. No other competitor served more than nine percent of the market. No other competitor was capable of servicing large national retailers, such as Walmart, Lowe's HIW, Inc. ("Lowe's") and The Home Depot, Inc. ("The Home Depot"), except on a limited basis.

3. In spring 2008, Blue Rhino decided to increase margins by reducing the amount of propane contained in its exchange tanks from 17 pounds to 15 pounds. Blue Rhino planned to reduce the fill level in its exchange tanks without a corresponding reduction in the wholesale price. This would have the effect of raising the price per pound of propane to retail customers and likely to the ultimate consumers.

4. During spring and summer 2008, Blue Rhino informed AmeriGas and certain retail customers that it intended to implement the fill reduction. AmeriGas likewise decided to reduce its exchange tanks from 17 pounds to 15 pounds without a corresponding price decrease.

5. In summer 2008, Blue Rhino and AmeriGas each began to implement the fill reduction.

6. Some customers resisted the fill reduction. Walmart, which purchased tanks from both Blue Rhino and AmeriGas, refused to accept the fill reduction. Blue Rhino's customer Lowe's accepted the fill reduction only on the condition that all of Blue Rhino's other customers – including Walmart – also accept the fill reduction within a short period of time.

7. Faced with resistance from Walmart, Blue Rhino and AmeriGas colluded by secretly agreeing that neither would deviate from their proposal to reduce the fill level to Walmart. They worked together to take the steps necessary to push Walmart to promptly accept the fill reduction.

8. This concerted action had the purpose and effect of raising the effective wholesale prices at which Blue Rhino and AmeriGas sold propane exchange tanks to Walmart, as well as to other customers in the United States.

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9. Respondents' conduct has restrained price competition and led to higher prices for sales of propane exchange tanks in the United States.

THE RESPONDENTS

10. Respondent Ferrellgas Partners, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas. It maintains a nearly complete interest in and conducts its business activities primarily through Respondent Ferrellgas, L.P.

11. Respondent Ferrellgas, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas. Ferrellgas, L.P., doing business as Blue Rhino, operates a national propane distribution business, and owns or has access to distribution locations nationwide. Its business includes the filling, refilling, refurbishing, sale and distribution of propane exchange tanks under the Blue Rhino name.

12. For the purposes of this complaint, "Blue Rhino" shall refer to Ferrellgas Partners, L.P., and Ferrellgas, L.P., collectively.

13. At all times relevant hereto, Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P. have been, and are now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

14. The acts and practices of Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P., including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

15. Respondent AmeriGas Partners, L.P., is a publicly traded master limited partnership, organized, existing, and doing business, under, and by virtue of, the laws of the State of

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Delaware, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. AmeriGas Partners, L.P., operates a national propane distribution business through its subsidiary, AmeriGas Propane, L.P. Respondent AmeriGas Partners, L.P., through AmeriGas Propane, L.P., is engaged in the marketing and sale of propane and propane supply related services, including the distribution and supply of bulk propane to residential, commercial, and agricultural customers, and the preparing, filling, distributing, marketing, and sale of propane exchange tanks. AmeriGas Propane, L.P. often does business as AmeriGas Cylinder Exchange when preparing, filling, distributing, marketing, or selling propane exchange tanks.

16. Respondent UGI Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. UGI Corporation is the parent and sole owner of AmeriGas Propane, Inc. AmeriGas Propane, Inc. is the general partner of Respondent AmeriGas Partners, L.P., and is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania.

17. For the purposes of this complaint, “AmeriGas” shall refer to AmeriGas Partners, L.P., and UGI Corporation, collectively.

18. At all times relevant hereto, AmeriGas Partners, L.P., and UGI Corporation have been, and are now, corporations as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

19. The acts and practices of Respondents AmeriGas Partners, L.P. and UGI Corporation, including the acts and practices alleged herein, are in or affect commerce in the United States, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

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THE PROPANE EXCHANGE TANK INDUSTRY

20. Propane exchange tanks are portable steel tanks, prefilled with propane, and used for supplying fuel for propane barbecue grills and patio heaters, among other things. These tanks are commonly called “20-pound tanks” (regardless of the amount of fuel they contain).

21. Propane exchange tanks have a maximum capacity of 25 pounds, but safety regulations have limited the filling of such tanks to 80 percent of their capacity, i.e., 20 pounds. Beginning in 2002, the National Fire Protection Association modified its standards to require that propane exchange tanks be equipped with an overfilling protection device (“OPD”). Following the creation of the OPD standard, Respondents and their competitors adopted the custom of filling their propane exchange tanks with 17 or 17.5 pounds of propane.

22. Propane exchange tanks sold in the United States are highly standardized products consisting of a standardized tank and a standardized valve system. Propane and propane exchange tanks are homogeneous products.

23. Propane exchange tanks are typically sold to consumers through home improvement stores, hardware stores, mass merchandisers, supermarkets, convenience stores and gas stations. Retailers who sell propane exchange tanks usually offer consumers the option of purchasing a prefilled tank in exchange for an empty tank, or, for a higher price, a prefilled tank without returning an empty tank.

24. Propane exchange tanks sold in the United States are functionally interchangeable, and the Respondents, their competitors and the retailers who sell them treat them as such. Consumers can exchange any propane exchange tank at any store that carries propane exchange tanks without regard for which company supplied the tank to be exchanged.

25. To serve retail outlets that sell propane exchange tanks, Respondents and their competitors need access to refurbishing

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and refilling facilities, where empty tanks can be cleaned, refurbished, repainted and refilled.

THE RELEVANT MARKETS

26. The relevant product market in which to evaluate Respondents' conduct is the wholesale marketing and sale of propane exchange tanks.

27. There are no widely used substitutes for propane exchange tanks that provide a similar ease of use. No other product significantly constrains the prices of propane exchange tanks.

28. The relevant geographic market is the United States. To compete effectively for sales to national retailers, including Walmart, The Home Depot and Lowe's, propane exchange tank manufacturers need access to refilling and refurbishing facilities located throughout the United States. Propane exchange tank suppliers that lack nationwide access to such assets are unable to constrain the prices of propane exchange tanks suppliers that have nationwide access to such assets.

29. Beginning in or about 2006, Respondents entered into a series of "co-packing agreements." Pursuant to these agreements, each company agreed to refurbish and refill propane exchange tanks for the other company at certain of each company's facilities. Today, each Respondent processes slightly less than ten percent of the other company's used, empty tanks pursuant to co-packing agreements. Blue Rhino refurbishes and refills exchange tanks for AmeriGas at Blue Rhino facilities in Florida, Colorado, Washington and Missouri. AmeriGas refurbishes and refills exchange tanks for Blue Rhino at AmeriGas facilities in California and New Hampshire.

RESPONDENTS INCREASE PRICES BY REDUCING THE FILL LEVEL

30. In early 2008, Respondents faced rapid increases in propane exchange tank input costs. These inputs included propane, steel for the tanks and diesel fuel for delivery trucks.

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31. In or about January 2008, Respondent AmeriGas considered a plan to recoup its rising input costs by reducing the fill level in its propane exchange tanks. AmeriGas decided not to pursue the fill reduction plan because, among other reasons, AmeriGas believed it could be competitively disadvantaged if other companies in the industry did not follow AmeriGas's lead by also reducing the fill level in their propane exchange tanks.

32. In April 2008, Blue Rhino management approved a proposal to reduce the fill level in the company's propane exchange tanks from the then-standard 17 pounds to 15 pounds, without a corresponding price reduction, to offset the increased input costs. The Blue Rhino proposal included a plan to ask AmeriGas in advance whether their co-packing facilities could handle the proposed fill reduction.

33. This reduction in fill level was in effect a 13% increase in the price of the propane.

34. Blue Rhino understood that unilaterally reducing the fill level in its exchange tanks risked putting the company at a competitive disadvantage if its principal competitor, AmeriGas, did not also reduce fill levels. Blue Rhino was particularly concerned about its competitive standing with its second-largest customer, Walmart, because Walmart purchased tanks from both Blue Rhino and AmeriGas.

35. Walmart is the largest propane exchange tank retailer in the United States. Blue Rhino services approximately 60 percent of the Walmart locations nationwide, while AmeriGas services approximately 35 percent. Ozark Mountain Propane Company ("Ozark"), a smaller regional propane supplier, services the remaining Walmart locations.

36. The Blue Rhino Director of Strategic Accounts responsible for Walmart reported to his manager that the fill reduction could put Blue Rhino at a competitive disadvantage to AmeriGas. He stated: "[I]n my mind the 'watch out' is the competitive difference between [Blue Rhino, AmeriGas] and Ozark. We are offering less product vs. [Walmart's] other 2 suppliers. . . . Once we explain this is a done deal (and that we are

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not asking for [Walmart's] input or letting him decide), he may become resentful and threaten to take states. . . . Then, we need to pray that [AmeriGas] takes a similar move as soon as possible. If [AmeriGas] doesn't move, we will have a BIG issue." He elaborated: "The only thing that can make this go away is if Amerigas goes to 15 as well, but it has to happen very soon after us to legitimize our move."

37. On or about April 22, 2008, Blue Rhino decided to inform Walmart of its fill reduction plan.

38. On or about April 28, 2008, Blue Rhino's Director of Strategic Accounts met with the Walmart buyer and announced Blue Rhino's intention to reduce the fill in its propane exchange tanks. Walmart rejected the proposed fill reduction. Walmart's buyer told the Blue Rhino Director of Strategic Accounts that the fill reduction was a price increase to which Walmart would not agree. He also told Blue Rhino's Director of Strategic Accounts that Walmart did not want to carry propane exchange tanks with different fill levels—that is, tanks at 15 pounds in stores serviced by Blue Rhino and tanks at 17 pounds in stores serviced by AmeriGas and Ozark.

39. On or about April 29, 2008, a senior Blue Rhino manager ordered production managers to "stand down" on implementation of the fill reduction because "[t]he call with WalMart did not go according to plan."

40. Starting with Blue Rhino's communication plan in April 2008, which revealed Blue Rhino's intention to let AmeriGas know "well in advance" about the fill reduction, and continuing through a series of communications through June 2008, Blue Rhino informed AmeriGas of its plan to raise prices by reducing the fill level in their exchange tanks from 17 to 15 pounds without a corresponding price decrease.

41. On May 29, 2008, Blue Rhino proposed the fill reduction to Lowe's, Blue Rhino's largest retail customer. Approximately two weeks later, Lowe's agreed to accept 15-pound exchange tanks on the condition that Blue Rhino convert all of its customers, including Walmart, to 15-pound tanks within 30 days.

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42. On June 18, 2008, Blue Rhino's President telephoned AmeriGas's Director of National Accounts. The two men called each other six more times over the next 30 hours. The following day, Blue Rhino account executives again discussed the fill reduction with Walmart. Following the last of these calls, Blue Rhino's President reported, "I've continued to have a lot of inquiries from [AmeriGas] regarding the lower fuel fill due to their need to adjust production. I've been told that it would be very challenging to produce two different size products long-term . . . once again, messaging that they'll follow closely behind us in the market."

43. On June 20, 2008, AmeriGas management produced a draft budget with a plan for reducing the fill level of AmeriGas's exchange tanks from 17 to 15 pounds.

44. On June 25, 2008, Blue Rhino began notifying its customers of its plans to reduce the fill level in its propane exchange tanks effective July 21, 2008.

45. As alleged in paragraph 31, AmeriGas considered and rejected a plan to unilaterally reduce the fill level in its propane exchange tanks. AmeriGas believed it could be competitively disadvantaged if other companies in the industry did not also reduce the fill level in their propane exchange tanks. After learning that Blue Rhino planned to reduce the fill level of its exchange tanks, AmeriGas reconsidered its earlier decision.

46. Blue Rhino was concerned that, if Walmart rejected the fill reduction, other major retailers would also reject the fill reduction on the ground that they would be at a competitive disadvantage if the propane exchange tanks they sold contained less fuel than otherwise identical exchange tanks sold at Walmart.

47. In particular, Lowe's, Blue Rhino's largest customer, agreed to accept the fill reduction only on the express condition that all Blue Rhino customers would also convert to 15-pound tanks within 30 days of Lowe's converting to 15-pound tanks.

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RESPONDENTS COLLUDE TO PUSH WALMART ON THE
FILL REDUCTION

48. For one or all of the reasons set forth above, Blue Rhino and AmeriGas understood they could not sustain the fill reduction unless it was accepted by Walmart. Therefore, when faced with resistance from Walmart, the two companies agreed that neither would deviate from their proposal to Walmart. They worked together to take the steps necessary to push Walmart to promptly accept the fill reduction.

49. AmeriGas announced the existence of a united front with Blue Rhino by couching its fill reduction plan as an “industry standard.” For example, on July 10, 2008, AmeriGas’s Director of National Accounts emailed Walmart’s buyer to inform him that “the cylinder exchange industry is planning a move to a standard weight of propane in a tank from 17 lbs. net to 15 lbs. net.”

50. On or about July 10, 2008, and continuing for three months thereafter, sales executives from the two Respondents communicated repeatedly by telephone and email to apprise each other of the status of their discussions with Walmart and to encourage each other to hold firm to convince Walmart to accept the reduction in fill.

- a. On or about July 11, 2008, Blue Rhino’s Vice President of Sales called AmeriGas’s Director of National Accounts. The two sales executives spoke at length by telephone. Internal Blue Rhino documents confirm that AmeriGas and Blue Rhino sales executives discussed Walmart’s rejection of AmeriGas’s proposal to begin shipping 15-pound exchange tanks.
- b. On or about July 21 and 22, Blue Rhino’s Vice President of Sales and AmeriGas’s Director of National Accounts spoke at length by telephone. Blue Rhino internal documents confirm that the AmeriGas and Blue Rhino sales executives discussed AmeriGas’s plans for responding to Walmart’s rejection of the fill reduction.

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- c. On or about August 11, 2008, the AmeriGas Director of National Accounts, who was responsible for dealing with Walmart, called Blue Rhino's Vice President of Sales and told him that he was having trouble getting in touch with Walmart to discuss the reduction in fill levels.
- d. On or about August 13, 2008, the Blue Rhino sales executives responsible for dealing with Walmart discussed plans for advising AmeriGas of the need to ensure that The Home Depot, AmeriGas's largest retail customer, was supplied with 15-pound, not 17-pound, tanks, because Walmart would be more likely to accept the fill reduction if it knew that The Home Depot had already accepted it.
- e. On August 21, 2008, the Blue Rhino and AmeriGas sales executives spoke several times by telephone, and shortly after these communications, the AmeriGas sales executive and AmeriGas's operations manager directed their colleagues to ensure that The Home Depot store in Rogers, Arkansas (near Walmart's Bentonville headquarters) carried only 15-pound tanks.
- f. On September 2, 2008, Blue Rhino's Vice President of Sales and AmeriGas Director of National Accounts spoke by telephone again. They discussed the status of their respective efforts to convert their customers to 15-pound tanks, as well as the current retail pricing of tanks at Lowe's.
- g. On September 12, 2008, Blue Rhino's Vice President of Sales and AmeriGas's Director of National Accounts spoke by telephone again. They discussed the status of their negotiations with Walmart. Expressing frustration at Walmart's intransigence, AmeriGas's Director of National Accounts suggested that it was time to issue an ultimatum to Walmart. Blue Rhino's Vice President of Sales responded by telling him that Blue Rhino was continuing to work

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with Walmart and that AmeriGas should “hang in there.”

- h. On September 15 and 22, 2008, Blue Rhino’s Vice President of Sales and AmeriGas’ Director of National Accounts spoke again by telephone.
- i. On September 30, 2008, the AmeriGas Director of National Accounts emailed Blue Rhino’s Vice President of Sales and informed him that Walmart management was meeting the following day to discuss the proposed fill reduction.

51. On October 6, 2008, the Lowe’s buyer emailed his Blue Rhino sales executive with an ultimatum. Lowe’s had agreed to accept 15-pound tanks on the condition that all other Blue Rhino customers would be converted within 30 days. Lowe’s observed that Walmart was still selling 17-pound tanks and that Lowe’s was therefore at a competitive disadvantage. The Lowe’s buyer demanded that either all of Blue Rhino’s customers must be at 15 pounds or Lowe’s be converted back to 17-pound tanks at the same price it was paying for the 15-pound tanks.

52. The Lowe’s demand confirmed to Blue Rhino that it needed Walmart to accept the fill reduction or risk the fill reduction unraveling. It also highlighted the need for Blue Rhino and AmeriGas to continue to push Walmart to accept the fill reduction.

53. On October 6, 2008, Blue Rhino’s President forwarded the Lowe’s email to his Vice President of Sales and directed him to finalize Walmart’s acceptance of the fill reduction that day. Within a half hour, the Blue Rhino Vice President of Sales called his counterpart at AmeriGas. The two talked for 16 minutes.

54. Following his 16-minute conversation with the AmeriGas Director of National Accounts, the Blue Rhino Vice President of Sales emailed Walmart to demand that it accept the fill reduction.

55. Early the following morning, the AmeriGas Director of National Accounts, using language similar to Blue Rhino’s

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communication, emailed Walmart urging it to implement the fill reduction.

56. On October 10, 2008, believing it had no alternative to the fill reduction, Walmart agreed to accept propane exchange tanks filled to 15 pounds from both Blue Rhino and AmeriGas.

57. The secret agreement between Blue Rhino and AmeriGas that neither would deviate from their proposal to Walmart when faced with resistance from Walmart, and their combined efforts to push Walmart to promptly accept the fill reduction had the effect of raising the price per pound of propane to Walmart and likely to the ultimate consumers.

58. The acts and practices of Respondents, as alleged herein, have the purpose, capacity, tendency and effect of restricting or eliminating competition in the wholesale sale of propane exchange tanks.

59. There are no legitimate, procompetitive efficiencies that justify the conduct of Respondents, as alleged herein, or that outweigh its anticompetitive effects.

VIOLATION
ALLEGED RESTRAINT OF TRADE

60. Paragraphs 1 to 59 above are re-alleged as if fully set forth herein.

61. When faced with Walmart's resistance to their plans to reduce the fill level of their propane exchange tanks, Respondents colluded by secretly agreeing that neither would deviate from the planned fill reduction to Walmart. They worked together to take the steps necessary to push Walmart to promptly accept the price increase they each implemented through the fill reduction. Their concerted actions unreasonably restrained trade and constituted unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

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NOTICE

Notice is hereby given to Respondents that the second day of December, 2014, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted. If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

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The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by the last answering Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of the last answering Respondent, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Section 5 of the FTC Act, as amended, as alleged in the Complaint, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Respondents to cease and desist from the conduct alleged in the Complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondents.
2. Prohibiting Respondents from agreeing with any competitor to fix prices or to allocate customers or markets, or from soliciting any competitor to enter into such an agreement.
3. Prohibiting Respondents from agreeing with any competitor to exchange competitively sensitive information unless that information exchange meets sufficient criteria to assure that the information exchange will not facilitate collusion among Respondents and their competitors, such conditions to be determined by the

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Commission, or soliciting any competitor to enter into such an agreement.

4. Prohibiting Respondents from internally using or disclosing confidential information obtained from a competitor pursuant to a co-production agreement, joint venture or legitimate business arrangement except as necessary to further said co-production agreement, joint venture or business arrangement.
5. Requiring that Respondents' compliance with the order shall be monitored at its expense by an independent monitor, for a term to be determined by the Commission.
6. Requiring that Respondents file periodic compliance reports with the Commission.
7. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipency of any or all of the conduct alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of March, 2014, issues its complaint against Respondents.

By the Commission, Commissioner Ohlhausen dissenting.

Decision and Order

**DECISION AND ORDER
AS TO AMERIGAS PARTNERS L.P.
AND UGI CORPORATION**

The Federal Trade Commission (“Commission”), having heretofore issued its complaint charging AmeriGas Partners, L.P. and UGI Corporation (hereinafter referred to as “ACE Respondents”) and Ferrellgas Partners, L.P. and Ferrellgas L.P. with violations of Section 5 of the Federal Trade Commission Act, as amended, and ACE Respondents having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

ACE Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), an admission by ACE Respondents of all the jurisdictional facts set forth in the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by ACE Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with §3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent AmeriGas Partners, L.P., is a publicly traded master limited partnership, organized, existing, and doing business, under, and by virtue of, the laws of

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the State of Delaware, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. AmeriGas Partners, L.P.'s subsidiary AmeriGas Propane, L.P. operates a Propane Tank Exchange Business known as the AmeriGas Cylinder Exchange program.

2. Respondent UGI Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania. UGI Corporation is the parent and sole owner of AmeriGas Inc., which is the sole owner of AmeriGas Propane, Inc. AmeriGas Propane, Inc. is the general partner of Respondent AmeriGas Partners, L.P., and is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the ACE Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "ACE Respondents" means UGI Corporation and AmeriGas Partners, L.P. and the directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each, together with joint ventures, subsidiaries, divisions, groups, and affiliates controlled by each, including AmeriGas Propane L.P. and AmeriGas Propane, Inc., and the directors,

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officers, employees, agents, representatives, successors, and assigns of each.

- B. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the Clayton Act, 15 U.S.C. §12 *et seq.*
- C. “Communicate” means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, e-mail, notice, or memorandum. This definition applies to all tenses and forms of the word “communicate,” including, but not limited to, “communicating,” “communicated” and “communication.”
- D. “Competitively Sensitive Non-Public Information” means proprietary or confidential information relating to the Propane Tank Exchange Business regarding the pricing, pricing strategies, Fill Level strategies, costs, revenues, margins, output, business and strategic plans, marketing, customer information and Communications with customers, advertising, promotion or research and development, *provided, however,* that “Competitively Sensitive Non-Public Information” shall not include (1) information that is publicly available or has been widely Communicated to customers or investors through methods such as website postings, analyst conference calls, press releases, and widely disseminated faxes, letters, electronic mailings and phone calls; nor (2) information required to be publicly disclosed under Federal Securities Laws, as that term is defined in §3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.
- E. “Competitor” means any other Person other than ACE Respondents that participates in the Propane Tank Exchange Business in the United States.

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- F. “Fill Level” means the weight of propane ACE Respondents put in their Propane Tanks. As of the date this Order is issued the Fill Level identified on ACE Respondents’ Propane Tanks is 15 pounds.
- G. “Person” means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.
- H. “Propane Tanks” means portable steel tanks marketed and sold prefilled with propane, and used for supplying fuel for propane barbeque grills and patio heaters, among other things. These tanks are commonly called “grill cylinders” or “20 pound tanks” regardless of their Fill Level. Propane Tanks include prefilled propane tanks sold as exchange tanks and as spare tanks.
- I. “Propane Tank Employees and Representatives” means employees, officers and agents whose duties primarily relate to a Propane Tank Exchange Business or whose duties include, in whole or part, determining the Fill Level for, or the sales, marketing or pricing of, Propane Tanks for a Propane Tank Exchange Business.
- J. “Propane Tank Exchange Business” means the business of marketing, selling, filling and Refilling Propane Tanks for sale to customers who sell the Propane Tanks to, or exchange them with, end users for a fee.
- K. “Propane Refilling Agreement” means an agreement to (i) Refill Propane Tanks on behalf of a Competitor, or (ii) have a Competitor Refill Propane Tanks on behalf of ACE Respondents. A Propane Refilling Agreement may include ancillary transportation services; however, an agreement that includes goods and services in addition to Refilling and ancillary

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transportation services is not a Propane Refilling Agreement.

- L. “Refill” or “Refilling” means preparing and filling Propane Tanks that have been returned by an end user so that the cylinders can be reused. Refilling includes, but is not limited to, cleaning, refurbishing, repainting and/or filling the cylinders.
- M. “Restricted Employees” means employees, officers or agents whose duties include, in whole or part, determining the Fill Level for, or the sales, marketing or pricing of, Propane Tanks for a Propane Tank Exchange Business.

II.

IT IS FURTHER ORDERED that in connection with ACE Respondents’ Propane Tank Exchange Business in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, ACE Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device:

- A. Entering into, attempting to enter into, adhering to, participating in, maintaining, organizing, implementing, enforcing, inviting, offering or soliciting any combination, conspiracy, agreement, or understanding between or among ACE Respondents and any Competitor to raise, fix, maintain, or stabilize prices or price levels of Propane Tanks through any means, including modifying the Fill Level contained in Propane Tanks sold by ACE Respondents and/or its Competitors, or coordinating Communications to customers of ACE Respondents and/or their Competitors.
- B. Communicating Competitively Sensitive Non-Public Information to any Competitor, or requesting, encouraging or facilitating the Communication of Competitively Sensitive Non-Public Information from

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any Competitor, *provided, however*, it shall not be a violation of this Paragraph to:

1. Negotiate and fulfill the terms of a Propane Refilling Agreement so long as
 - a. Competitively Sensitive Non-Public Information is Communicated only as reasonably necessary to negotiate and fulfill the terms of the relevant Propane Refilling Agreement, and
 - b. no Competitively Sensitive Non-Public Information is Communicated regarding pricing to customers, pricing strategies, changes in Fill Level, Fill Level strategies, revenues, or business and strategic plans, and
 - c. prospective Competitively Sensitive Non-Public Information, such as information regarding a Competitor's future volume needs or advance production requests, is not Communicated to any Restricted Employee of ACE Respondents, except that such data may be included in ACE Respondents' total production volume or the total production volume at a particular facility;
2. Disclose Competitively Sensitive Non-Public Information to a Competitor if such disclosure is reasonably necessary to engage in legally supervised due diligence for a potential sale, acquisition or joint venture, or to participate in a joint venture, *so long as* ACE Respondents require such Competitor to agree not to disclose current or prospective Competitively Sensitive Non-Public Information to a Restricted Employee of the Competitor; except that Restricted Employees of the Competitor may receive financial modeling, generalized segment data, transition plans and other due diligence documents and information to be used solely for the assessment and approval of a sale, acquisition or joint venture, provided that the following Competitively Sensitive Non-Public

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Information is not Communicated and cannot be derived from the documents and information that are Communicated: individual and non-aggregated customer data (e.g. costs, margins, prices or strategies by customer); non-aggregated costs, margins, sales and pricing data; current or prospective pricing strategies; marketing plans; and strategic plans;

3. Solicit or receive Competitively Sensitive Non-Public Information from a Competitor if doing so is reasonably necessary to engage in legally supervised due diligence for a potential sale, acquisition, or joint venture, or to participate in a joint venture, *so long as* ACE Respondents take all reasonable steps to ensure that none of the Competitor's current or prospective Competitively Sensitive Non-Public Information is disclosed to any of ACE Respondents' Restricted Employees; except that Restricted Employees may receive financial modeling, generalized segment data, transition plans and other due diligence documents and information to be used solely for the assessment and approval of a sale, acquisition or joint venture, provided that the following Competitively Sensitive Non-Public Information is not Communicated and cannot be derived from the documents and information that are Communicated: individual and non-aggregated customer data (e.g. costs, margins, prices or strategies by customer); non-aggregated costs, margins, sales and pricing data; current or prospective pricing strategies; marketing plans; and strategic plans;
4. Respond to health, safety, emergency or regulatory matters so long as ACE Respondents disclose Competitively Sensitive Non-Public Information in the course of responding to such matters only to the extent reasonably necessary; and

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5. Participate in industry-wide data exchange or market research so long as i) neither ACE Respondents nor Competitors participate in collecting or aggregating Competitively Sensitive Non-Public Information; ii) ACE Respondents only provide Competitively Sensitive Non-Public Information that is at least three (3) months old; and iii) no Competitively Sensitive Non-Public Information is Communicated to ACE Respondents or any Competitor except as part of aggregated industry-wide data collected from at least five (5) firms, none of whose data accounts for more than 25% of the total data collected and Communicated.

III.

IT IS FURTHER ORDERED that, within five (5) days of issuance of this Order:

- A. ACE Respondents shall establish and maintain an antitrust compliance program for their Propane Tank Exchange Business in the United States that sets forth the policies and procedures ACE Respondents have implemented to comply with the requirements of this Order and with the Antitrust Laws.
- B. As part of establishing and maintaining an antitrust compliance program under this Paragraph ACE Respondents shall:
 1. Appoint and retain for the duration of the Order an antitrust compliance officer to supervise ACE Respondents' antitrust compliance program. ACE Respondents may appoint successive antitrust compliance officers, but each must be an employee or officer of, or antitrust counsel for, ACE Respondents;
 2. Provide training regarding ACE Respondents' obligations under this Order and the Antitrust Laws

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as applied to ACE Respondents' Propane Tank Exchange Business in the United States

- a. at least annually to all Propane Tank Employees and Representatives of ACE Respondents, and
- b. within thirty (30) days after an individual first becomes a Propane Tank Employee or Representative of ACE Respondents,

Provided, however, that the antitrust training obligations in this Paragraph III.B.2 shall not apply to (i) non-management production and transportation employees and representatives who (x) do not have access to ACE Respondents' Competitively Sensitive Non-Public Information and (y) do not, in the course of their employment or representation, Communicate with any Competitors; and (ii) employees and representatives who are not involved in ACE Respondents' Propane Tank Exchange Business in the United States;

3. Enable Propane Tank Employees and Representatives of ACE Respondents to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;
4. Discipline Propane Tank Employees and Representatives of ACE Respondents for failure to comply with this Order and the Antitrust Laws; and
5. Maintain records showing that ACE Respondents have complied with and are complying with the provisions of the antitrust compliance program, including but not limited to, records showing that Propane Tank Employees and Representatives have received all trainings required under this Order during the preceding two (2) years.

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IV.**IT IS FURTHER ORDERED** that

A. ACE Respondents shall submit to the Commission a verified written report:

1. within thirty (30) days after the date this Order is issued; and
2. one (1) year after the date this Order is issued, and annually for four (4) years thereafter,

which report shall set forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order, and shall, *inter alia*, identify the antitrust compliance officer and describe the antitrust compliance program required by Paragraph III of this Order, and, to the extent not included in a prior report, provide the following information regarding each agreement or circumstance pursuant to which an ACE Respondent Communicated Competitively Sensitive Non-Public Information with or among Competitors: i) the nature of such agreement or circumstance; ii) the Competitor or Competitors with whom Competitively Sensitive Non-Public Information was Communicated; and iii) the Propane Tank Employees and Representatives of ACE Respondents, or categories of Propane Tank Employees and Representatives of ACE Respondents, involved in Communicating such Competitively Sensitive Non-Public Information.

B. For purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any ACE Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference,

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permit any duly authorized representative of the Commission:

1. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of the that Respondent; and
2. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

V.

IT IS FURTHER ORDERED that ACE Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of an ACE Respondent; or
- B. any proposed acquisition, merger or consolidation of an ACE Respondent; or
- C. any other change in an ACE Respondent, including without limitation, assignment and the creation, sale or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on January 7, 2035.

By the Commission, Commissioner Ohlhausen dissenting and Commissioner McSweeney not participating.

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**DECISION AND ORDER AS TO FERRELLGAS
PARTNERS, L.P. AND FERRELLGAS L.P.**

The Federal Trade Commission (“Commission”), having heretofore issued its complaint charging Ferrellgas Partners, L.P. and Ferrellgas L.P. (hereinafter referred to as “Blue Rhino Respondents”) and AmeriGas Partners, L.P. and UGI Corporation, with violations of Section 5 of the Federal Trade Commission Act, as amended, and Blue Rhino Respondents having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

Blue Rhino Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), an admission by Blue Rhino Respondents of all the jurisdictional facts set forth in the Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Blue Rhino Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with §3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Ferrellgas Partners, L.P., is a limited partnership organized, existing and doing business

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under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas.

2. Respondent Ferrellgas, L.P., is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 7500 College Boulevard, Overland Park, Kansas. Respondent Ferrellgas, L.P., doing business as Blue Rhino, operates a Propane Tank Exchange Business.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Blue Rhino Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Blue Rhino Respondents” means Ferrellgas Partners L.P. and Ferrellgas L.P. and the directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each, together with joint ventures, subsidiaries, divisions, groups, and affiliates controlled by each.
- B. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the Clayton Act, 15 U.S.C. §12 *et seq.*
- C. “Communicate” means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, e-mail, notice, or memorandum. This definition applies to all tenses and forms of the word

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“communicate,” including, but not limited to, “communicating,” “communicated” and “communication.”

- D. “Competitively Sensitive Non-Public Information” means proprietary or confidential information relating to the Propane Tank Exchange Business regarding the pricing, pricing strategies, Fill Level strategies, costs, revenues, margins, output, business and strategic plans, marketing, customer information and Communications with customers, advertising, promotion or research and development, *provided, however,* that “Competitively Sensitive Non-Public Information” shall not include (1) information that is publicly available or has been widely Communicated to customers or investors through methods such as website postings, analyst conference calls, press releases, and widely disseminated faxes, letters, electronic mailings and phone calls; nor (2) information required to be publicly disclosed under Federal Securities Laws, as that term is defined in §3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. §78c(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.
- E. “Competitor” means any other Person other than Blue Rhino Respondents that participates in the Propane Tank Exchange Business in the United States.
- F. “Fill Level” means the weight of propane Blue Rhino Respondents put in their Propane Tanks. As of the date this Order is issued the Fill Level identified on Blue Rhino Respondents’ Propane Tanks is 15 pounds.
- G. “Person” means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.

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- H. “Propane Tanks” means portable steel tanks marketed and sold prefilled with propane, and used for supplying fuel for propane barbeque grills and patio heaters, among other things. These tanks are commonly called “grill cylinders” or “20 pound tanks” regardless of their Fill Level. Propane Tanks include prefilled propane tanks sold as exchange tanks and as spare tanks.
- I. “Propane Tank Employees and Representatives” means employees, officers and agents whose duties primarily relate to a Propane Tank Exchange Business or whose duties include, in whole or part, determining the Fill Level for, or the sales, marketing or pricing of, Propane Tanks for a Propane Tank Exchange Business.
- J. “Propane Tank Exchange Business” means the business of marketing, selling, filling and Refilling Propane Tanks for sale to customers who sell the Propane Tanks to, or exchange them with, end users for a fee.
- K. “Propane Refilling Agreement” means an agreement to (i) Refill Propane Tanks on behalf of a Competitor, or (ii) have a Competitor Refill Propane Tanks on behalf of Blue Rhino Respondents. A Propane Refilling Agreement may include ancillary transportation services; however, an agreement that includes goods and services in addition to Refilling and ancillary transportation services is not a Propane Refilling Agreement.
- L. “Refill” or “Refilling” means preparing and filling Propane Tanks that have been returned by an end user so that the cylinders can be reused. Refilling includes, but is not limited to, cleaning, refurbishing, repainting and/or filling the cylinders.

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- M. “Restricted Employees” means employees, officers or agents whose duties include, in whole or part, determining the Fill Level for, or the sales, marketing or pricing of, Propane Tanks for a Propane Tank Exchange Business.

II.

IT IS FURTHER ORDERED that in connection with Blue Rhino Respondents’ Propane Tank Exchange Business in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Blue Rhino Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device:

- A. Entering into, attempting to enter into, adhering to, participating in, maintaining, organizing, implementing, enforcing, inviting, offering or soliciting any combination, conspiracy, agreement, or understanding between or among Blue Rhino Respondents and any Competitor to raise, fix, maintain, or stabilize prices or price levels of Propane Tanks through any means, including modifying the Fill Level contained in Propane Tanks sold by Blue Rhino Respondents and/or its Competitors, or coordinating Communications to customers of Blue Rhino Respondents and/or their Competitors.
- B. Communicating Competitively Sensitive Non-Public Information to any Competitor, or requesting, encouraging or facilitating the Communication of Competitively Sensitive Non-Public Information from any Competitor, *provided, however*, it shall not be a violation of this Paragraph to:
1. Negotiate and fulfill the terms of a Propane Refilling Agreement so long as
 - a. Competitively Sensitive Non-Public Information is Communicated only as reasonably necessary to negotiate and fulfill the

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terms of the relevant Propane Refilling Agreement, and

- b. no Competitively Sensitive Non-Public Information is Communicated regarding pricing to customers, pricing strategies, changes in Fill Level, Fill Level strategies, revenues, or business and strategic plans, and
 - c. prospective Competitively Sensitive Non-Public Information, such as information regarding a Competitor's future volume needs or advance production requests, is not Communicated to any Restricted Employee of Blue Rhino Respondents, except that such data may be included in Blue Rhino Respondents' total production volume or the total production volume at a particular facility;
2. Disclose Competitively Sensitive Non-Public Information to a Competitor if such disclosure is reasonably necessary to engage in legally supervised due diligence for a potential sale, acquisition or joint venture, or to participate in a joint venture, so long as Blue Rhino Respondents require such Competitor to agree not to disclose current or prospective Competitively Sensitive Non-Public Information to a Restricted Employee of the Competitor; except that Restricted Employees of the Competitor may receive financial modeling, generalized segment data, transition plans and other due diligence documents and information to be used solely for the assessment and approval of a sale, acquisition or joint venture, provided that the following Competitively Sensitive Non-Public Information is not Communicated and cannot be derived from the documents and information that are Communicated: individual and non-aggregated customer data (*e.g.* costs, margins, prices or strategies by customer); non-aggregated costs,

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margins, sales and pricing data; current or prospective pricing strategies; marketing plans; and strategic plans;

3. Solicit or receive Competitively Sensitive Non-Public Information from a Competitor if doing so is reasonably necessary to engage in legally supervised due diligence for a potential sale, acquisition, or joint venture, or to participate in a joint venture, so long as Blue Rhino Respondents take all reasonable steps to ensure that none of the Competitor's current or prospective Competitively Sensitive Non-Public Information is disclosed to any of Blue Rhino Respondents' Restricted Employees; except that Restricted Employees may receive financial modeling, generalized segment data, transition plans and other due diligence documents and information to be used solely for the assessment and approval of a sale, acquisition or joint venture, provided that the following Competitively Sensitive Non-Public Information is not Communicated and cannot be derived from the documents and information that are Communicated: individual and non-aggregated customer data (e.g. costs, margins, prices or strategies by customer); non-aggregated costs, margins, sales and pricing data; current or prospective pricing strategies; marketing plans; and strategic plans;
4. Respond to health, safety, emergency or regulatory matters so long as Blue Rhino Respondents disclose Competitively Sensitive Non-Public Information in the course of responding to such matters only to the extent reasonably necessary; and
5. Participate in industry-wide data exchange or market research so long as i) neither Blue Rhino Respondents nor Competitors participate in collecting or aggregating Competitively Sensitive

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Non-Public Information; ii) Blue Rhino Respondents only provide Competitively Sensitive Non-Public Information that is at least three (3) months old; and iii) no Competitively Sensitive Non-Public Information is Communicated to Blue Rhino Respondents or any Competitor except as part of aggregated industry-wide data collected from at least five (5) firms, none of whose data accounts for more than 25% of the total data collected and Communicated.

III.

IT IS FURTHER ORDERED that, within five (5) days of issuance of this Order:

- A. Blue Rhino Respondents shall establish and maintain an antitrust compliance program for their Propane Tank Exchange Business in the United States that sets forth the policies and procedures Blue Rhino Respondents have implemented to comply with the requirements of this Order and with the Antitrust Laws.
- B. As part of establishing and maintaining an antitrust compliance program under this Paragraph Blue Rhino Respondents shall:
 - 1. Appoint and retain for the duration of the Order an antitrust compliance officer to supervise Blue Rhino Respondents' antitrust compliance program. Blue Rhino Respondents may appoint successive antitrust compliance officers, but each must be an employee or officer of, or antitrust counsel for, Blue Rhino Respondents;
 - 2. Provide training regarding Blue Rhino Respondents' obligations under this Order and the Antitrust Laws as applied to Blue Rhino Respondents' Propane Tank Exchange Business in the United States

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- a. at least annually to all Propane Tank Employees and Representatives of Blue Rhino Respondents, and
- b. within thirty (30) days after an individual first becomes a Propane Tank Employee or Representative of Blue Rhino,

Provided, however, that the antitrust training obligations in this Paragraph III.B.2 shall not apply to (i) non-management production and transportation employees and representatives who (x) do not have access to Blue Rhino Respondents' Competitively Sensitive Non-Public Information and (y) do not, in the course of their employment or representation, Communicate with any Competitors; and (ii) employees and representatives who are not involved in Blue Rhino Respondents' Propane Tank Exchange Business in the United States;

- 3. Enable Propane Tank Employees and Representatives of Blue Rhino Respondents to ask questions about, and report violations of, this Order and the Antitrust Laws confidentially and without fear of retaliation of any kind;
- 4. Discipline Propane Tank Employees and Representatives of Blue Rhino Respondents for failure to comply with this Order and the Antitrust Laws; and
- 5. Maintain records showing that Blue Rhino Respondents have complied with and are complying with the provisions of the antitrust compliance program, including but not limited to, records showing that Propane Tank Employees and Representatives have received all trainings required under this Order during the preceding two (2) years.

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IV.**IT IS FURTHER ORDERED** that

- A. Blue Rhino Respondents shall submit to the Commission a verified written report:
1. within thirty (30) days after the date this Order is issued; and
 2. one (1) year after the date this Order is issued, and annually for four (4) years thereafter, which report shall set forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order, and shall, *inter alia*, identify the antitrust compliance officer and describe the antitrust compliance program required by Paragraph III of this Order, and, to the extent not included in a prior report, provide the following information regarding each agreement or circumstance pursuant to which a Blue Rhino Respondent Communicated Competitively Sensitive Non-Public Information with or among Competitors: i) the nature of such agreement or circumstance; ii) the Competitor or Competitors with whom Competitively Sensitive Non-Public Information was Communicated; and iii) the Propane Tank Employees and Representatives of Blue Rhino Respondents, or categories of Propane Tank Employees and Representatives of Blue Rhino Respondents, involved in Communicating such Competitively Sensitive Non-Public Information.
- B. For purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to any Blue Rhino Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, that Respondent shall, without restraint or interference,

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permit any duly authorized representative of the Commission:

1. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of the that Respondent; and
2. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

V.

IT IS FURTHER ORDERED that Blue Rhino Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of a Blue Rhino Respondent; or
- B. any proposed acquisition, merger or consolidation of a Blue Rhino Respondent; or
- C. any other change in a Blue Rhino Respondent, including without limitation, assignment and the creation, sale or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

Analysis to Aid Public Comment

VI.

IT IS FURTHER ORDERED that this Order shall terminate on January 7, 2035.

By the Commission, Commissioner Ohlhausen dissenting and Commissioner McSweeney not participating.

**ANALYSIS OF CONSENT ORDERS TO AID PUBLIC
COMMENT**

I. Introduction

The Federal Trade Commission (“Commission” or “FTC”) has accepted, subject to final approval, agreements containing proposed consent orders (“Consent Agreements”) resolving an administrative complaint issued by the Commission on March 27, 2014. The FTC accepted a consent agreement from Respondents AmeriGas Partners, L.P., also doing business as AmeriGas Cylinder Exchange, and UGI Corporation (collectively “AmeriGas”) and a separate consent agreement from “Blue Rhino” Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P., also doing business as Blue Rhino (collectively “Blue Rhino”). AmeriGas and Blue Rhino are referred to collectively herein as “Respondents.” The complaint charges that AmeriGas and Blue Rhino violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by colluding to push Walmart, a key customer, to accept a reduction in the amount of propane in the propane exchange tanks each sold to Walmart.

Under the terms of the Consent Agreements, AmeriGas and Blue Rhino are prohibited from agreeing with any competitor in the propane tank exchange business to modify fill levels or otherwise fix the prices of exchange tanks, or to coordinate

Analysis to Aid Public Comment

communications with customers. Each is also required to maintain an antitrust compliance program.

The Commission believes that the terms of the proposed orders contained in the Consent Agreements will resolve the competitive issues described in the complaint. The Consent Agreements have been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Consent Agreements and any comments received, and will decide whether it should withdraw from the Consent Agreements or make final the proposed orders contained in the Consent Agreements.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed orders. It is not intended to constitute an official interpretation of the proposed Consent Agreements and the accompanying proposed orders or in any way to modify their terms.

The Consent Agreements are for settlement purposes only and do not constitute an admission by either Respondent that it has violated the law, or that the facts alleged in the complaint, other than the jurisdictional facts, are true.

II. The Complaint

The following allegations are taken from the complaint and publicly available information.

A. Background

Blue Rhino and AmeriGas control approximately 80 percent of the market for propane exchange tanks. These tanks are portable, steel tanks, prefilled with propane, primarily used for propane barbeque grills and patio heaters. There are no widely used substitutes for exchange tanks that provide a similar ease of use. Consumers typically purchase these prefilled tanks at home improvement stores, hardware stores, mass merchandisers, supermarkets, convenience stores, and gas stations.

Analysis to Aid Public Comment

To compete effectively to serve national retailers, including mass merchandisers such as Walmart, The Home Depot, and Lowe's, propane exchange tank manufacturers must have access to refurbishing and refilling facilities located throughout the United States.¹ AmeriGas and Blue Rhino are the only manufacturers who can supply exchange tanks to large national retailers, except on a limited basis.

B. Challenged Conduct

In 2008, Blue Rhino and AmeriGas each decided to implement a price increase by reducing the amount of propane in their exchange tanks from 17 pounds to 15 pounds, without a corresponding decrease in the wholesale price. Blue Rhino publicly announced its fill reduction plan on June 25, 2008. AmeriGas publicly announced its fill reduction plan on July 10, 2008. The FTC's complaint does not allege that Respondents' initial decision to reduce fill levels to 15 pounds was the result of an agreement between the parties.

Walmart purchases tanks from both Blue Rhino and AmeriGas and initially refused to accept the planned fill reduction. Blue Rhino and AmeriGas understood they could not sustain the fill reduction unless it was accepted by Walmart. Blue Rhino's customer Lowe's accepted the fill reduction only on the condition that all of Blue Rhino's other customers, including Walmart, also accept the fill reduction within a short period of time. Faced with resistance from Walmart, Blue Rhino and AmeriGas colluded by secretly agreeing that neither would deviate from their proposal to reduce the fill level to Walmart.

On or about July 10, 2008, and continuing for three months thereafter, Blue Rhino and AmeriGas sales executives communicated repeatedly with each other regarding the status of their respective efforts to persuade Walmart to accept the fill reduction. The secret agreement between Blue Rhino and AmeriGas that neither would deviate from their proposal to

¹ As described in the complaint, Respondents have entered into a number of "co-packing" agreements, pursuant to which one of the Respondents processes and refills propane exchange tanks for the other Respondent at certain of their processing plants.

Analysis to Aid Public Comment

Walmart when faced with resistance from Walmart, and their combined efforts to push Walmart to promptly accept the fill reduction had the effect of raising the price per pound of propane to Walmart and likely to the ultimate consumers.

The Complaint alleges that this agreement violated Section 5 of the FTC Act by unreasonably restraining trade and constituting an unfair method of competition. The agreement alleged in the Complaint is *per se* unlawful.²

III. The Proposed Orders

The proposed orders are designed to remedy the unlawful conduct charged against the Respondents in the complaint and to prevent future unlawful conduct. The proposed orders, although entered into separately with AmeriGas and Blue Rhino, are identical in all material respects. Paragraph II of the proposed orders contains two key prohibitions. The first, contained in Paragraph II.A., bars Respondents from soliciting, offering, participating in, or entering into any type of agreement with any competitor in the propane exchange business to modify the fill level, or maintain, stabilize, or otherwise fix the price of propane exchange tanks. In addition, it prohibits Respondents from coordinating communications to customers or competitors.

The second, contained in Paragraph II.B., prevents Respondents from sharing competitively sensitive non-public information with competitors except in identified circumstances. Respondents may exchange limited information needed to

² See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24, n.59 (1940) (agreements among horizontal competitors to buy surplus gasoline on spot market to prevent prices from falling sharply held *per se* illegal, even though there was no agreement on price to be maintained; agreements to raise, lower, stabilize, or otherwise restrain price competition are summarily condemned as *per se* illegal under Section 1 of the Sherman Act.); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*) (agreement among horizontal competitors to eliminate a form of short-term credit was tantamount to an agreement to eliminate discounts and held *per se* illegal as price fixing); *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 65 F.T.C. 583, 612 (1964), *enforced*, 345 F.2d 421 (7th Cir. 1965) (agreement between competitors to reduce the percentage of more expensive and higher quality durum wheat and increase the percentage of less expensive and lower quality farina wheat for pasta held *per se* illegal).

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negotiate and fulfill the terms of refilling agreements. The proposed orders allow this information sharing because transporting exchange tanks is a significant expense and co-packing agreements may lower the cost of serving customers located farther away from filling facilities.

The proposed orders also allow Respondents to share information with competitors as part of legally supervised due diligence or to participate in a joint venture. However, Respondents are prohibited from sharing highly sensitive information, such as future pricing and marketing plans, with employees whose duties include pricing, sales and marketing of exchange tanks. Further, Respondents are permitted to share confidential information with competitors to respond to health, safety, emergency or regulatory matters. Finally, Respondents can participate in industry-wide data exchange or market research so long as a third party collects the data and only disseminates data that are at least three months old and aggregated from a significant portion of the propane exchange industry.

Paragraph III of the proposed orders requires that Respondents establish and maintain antitrust compliance programs for their propane tank exchange business in the United States and identifies the requirements for that program. The remaining provisions of the proposed orders contain reporting and compliance requirements commonly found in FTC competition orders.

Pursuant to FTC policy regarding the term for competition orders, the proposed orders will expire in 20 years.

Concurring Statement

**STATEMENT OF CHAIRWOMAN EDITH RAMIREZ AND
COMMISSIONER JULIE BRILL**

The Commission is issuing for public comment two identical proposed Orders that would resolve allegations that AmeriGas and Blue Rhino entered into an unlawful agreement that neither would deviate from its plan to reduce the amount of propane in prefilled propane exchange tanks sold to Walmart. The Commission commenced administrative litigation in this matter on March 27, 2014; AmeriGas and Blue Rhino have now agreed to settle the case. The proposed Orders will prevent the parties from engaging in collusive conduct with rivals in the future. Each respondent is prohibited from agreeing with any competitor in the propane tank exchange business to modify fill levels or otherwise to fix the price of exchange tanks, or to exchange competitively sensitive information. In addition, each respondent is required to maintain an antitrust compliance program.

Propane exchange tanks are a staple in the backyards of American consumers. The collusive agreement, as alleged, was facially anticompetitive and had the effect of raising the price per pound of propane exchange tanks to Walmart and likely ultimate consumers in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Our action today thus provides important relief to American consumers and sends a clear signal to the marketplace that anticompetitive collusion will not be tolerated.

AmeriGas and Blue Rhino are the two largest suppliers of propane exchange tanks in the United States, together controlling approximately 80 percent of the market. No other competitor serves more than nine percent of the market or is capable of serving large national retailers, such as Walmart and Lowe's. As detailed in the Commission's Complaint, in 2008, AmeriGas and Blue Rhino faced rapidly increasing input costs. To offset these rising costs, AmeriGas and Blue Rhino each decided to reduce the fill level in their propane exchange tanks from 17 to 15 pounds – without a corresponding price decrease. This effectively increased the per unit price of the propane by 13 percent.

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Walmart rejected proposals from both AmeriGas and Blue Rhino to reduce the propane fill levels; Walmart's buyer viewed each proposal as a price increase to which Walmart was not willing to agree. Although Blue Rhino's largest customer, Lowe's, accepted the fill reduction, it did so on the express condition that all of Blue Rhino's customers (including Walmart) also accept the fill reduction promptly. Blue Rhino and AmeriGas understood that they could not sustain the fill reduction across the industry unless it was accepted by Walmart.

The Commission's Complaint does not allege that the Respondents' initial decisions to reduce fill levels to 15 pounds were the result of an agreement. However, the Complaint alleges that thereafter, in light of Walmart's continued resistance to the reduction, and the risk that other customers would also demand to return to 17-pound tanks, AmeriGas and Blue Rhino agreed that neither would accede to pressure from Walmart. Faced with this united front, Walmart capitulated to the sellers' demand. This subsequent agreement to act in concert in negotiations with Walmart is the basis for the Commission's challenge.

The investigation revealed ample evidence to provide us with a reason to believe that AmeriGas and Blue Rhino entered into an unlawful agreement.¹ For example, AmeriGas and Blue Rhino executives spoke frequently in the days leading up to Walmart's decision to accept the fill reductions, and at one point a frustrated AmeriGas Director of National Accounts suggested to Blue Rhino that it was time for them to issue an ultimatum to Walmart.² Blue Rhino's Vice President of Sales responded by urging AmeriGas to "hang in there" as Blue Rhino continued to negotiate with Walmart.³

Reducing the volume of propane gas in a tank while keeping the price constant is equivalent to a per unit price increase. Indeed, that is how Walmart understood the fill reduction. The

¹ In the Matter of Ferrellgas Partners, L.P., et al., FTC Docket No. 9360, Complaint (Mar. 27, 2014), available at www.ftc.gov/system/files/documents/cases/140401amerigascomplaint.pdf.

² Complaint ¶ 50.

³ *Id.*

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joint strategy therefore entails a restriction on price competition and does not present any new or novel theory of liability.⁴ It does not matter that the Complaint does not allege that AmeriGas and Blue Rhino agreed to keep their respective prices to Walmart constant, or that Walmart may have been free to negotiate prices with the parties, as noted in Commissioner Ohlhausen's dissent. The law is clear that price fixing agreements "may or may not be aimed at complete elimination of price competition"⁵ and are unlawful in either instance because of the enormous threat they pose to the free market.⁶ There is also no reasonable procompetitive justification for the alleged agreement, particularly since it was directed to a significant customer whose refusal to accept the proposal had the potential to cause the firms' fill reduction plans to unravel. The agreement thus amounts to a *per se* unlawful naked restraint on price competition.⁷ As Judge

⁴ Cf. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (*per curiam*) (agreement among horizontal competitors to eliminate a form of short-term credit was tantamount to an agreement to eliminate discounts and held *per se* illegal as price fixing even though there was no agreement on actual price); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24, n.59 (1940) (agreements among horizontal competitors to buy surplus gasoline on spot market to prevent prices from falling sharply held *per se* illegal, even though there was no agreement on price to be maintained).

⁵ *Socony-Vacuum Oil*, 310 U.S. at 224 n.59. See also *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1980) (noting that constriction of supply is the essence of price-fixing, whether it be accomplished by agreement upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered).

⁶ As noted in *Socony-Vacuum*, 310 U.S. at 224 n. 59: "[w]hatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." See also *NCAA v. Board Of Regents*, 468 U.S. 85, 100 (1983) ("Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" citing [*Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 \(1979\)](#)).

⁷ See FED. TRADE COMM'N & DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at: http://www.ftc.gov/sites/default/files/documents/public_events/joint-

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Posner explained in *In re Sulfuric Acid Antitrust Litigation*, “[t]he *per se* rule is designed for cases in which experience has convinced the judiciary that a particular type of business practice has no (or trivial) redeeming benefits ever.”⁸

Whether the initial decision to reduce fill levels was the result of independent decision-making has no bearing on the unlawfulness of the parties’ subsequent agreement to maintain a united front with respect to Walmart.⁹ In addition, Walmart’s position as the “largest propane exchange tank retailer in the United States”¹⁰ does not protect it from coercion. Even a power buyer like Walmart is vulnerable when its only two suppliers for a product have secretly agreed not to deviate from a proposed price increase.

We continue to believe that pursuing this case was in the public interest. Contrary to Commissioner Ohlhausen’s dissent, the private settlements that Blue Rhino and AmeriGas entered into resulted in very little benefit to consumers. While the settlement amounts in the private litigation noted by Commissioner Ohlhausen may superficially sound impressive, the vast majority of the *actual* funds distributed covered Plaintiffs’ attorneys’ fees,

[venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](#) (“Certain types of agreements are so likely to harm competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. Once identified, such agreements are challenged as *per se* unlawful.”).

⁸ 703 F.3d 1004, 1011-12 (7th Cir. 2012) (rejecting *per se* treatment of agreements on the ground there were reasonable procompetitive justifications for the alleged agreement); *see also* National Macaroni Mfrs. Ass’n v. FTC, 65 F.T.C. 583, 612 (1964), *enforced*, 345 F.2d 421 (7th Cir. 1965) (agreement between competitors to reduce the percentage of more expensive and higher quality durum wheat and increase the percentage of less expensive and lower quality farina wheat for pasta held *per se* illegal).

⁹ *Cf.* Sugar Institute v. United States, 297 U.S. 553, 601 (1936) (agreement to adhere to previously announced prices and terms of sale held *per se* illegal, even though the previously announced prices and terms were unilaterally determined).

¹⁰ Complaint ¶ 35.

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cy *pres* payments and administrative fees and expenses, with only a trivial amount disbursed to consumers. The proposed Orders will benefit consumers by prohibiting conduct that could lead to future agreements on price or other competitive terms.

**DISSENTING STATEMENT OF COMMISSIONER
MAUREEN K. OHLHAUSEN**

I voted against the issuance of the Part III complaint against AmeriGas and Blue Rhino last March, and I now dissent from the consent agreement proposed by the Commission. I write briefly to explain my opposition to the majority's pursuit and now settlement of this novel, unwarranted enforcement action.

Neither the theory advanced by the staff and ultimately adopted by the Commission nor the evidence offered in support thereof convinced me that there was reason to believe the parties had restrained competition in violation of Section 5 of the FTC Act. In my view, the allegations in this case – that the parties “colluded by secretly agreeing to maintain a united front to push their joint customer, Walmart, to accept the [propane tank] fill reduction”¹ – fit poorly, at best, in the Section 1 case law. I am not aware of any Section 1 case that involved an alleged agreement among competitors to coerce a single customer to accept a decrease in product size that the competitors had pursued independently and that in no way precluded independent negotiation of the product's price between each competitor and the customer. I simply “have never seen or heard of an antitrust case quite like this.”²

One of my several concerns at the time the complaint issued was that the Walmart-as-lynchpin theory would effectively collapse into one in which the Commission was challenging the

¹ *In re Ferrellgas Partners, L.P.*, FTC Dkt. No. 9360, Complaint, at 2 (Mar. 27, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140401amerigascomplaint.pdf>.

² *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1011 (7th Cir. 2012) (Posner, J.) (rejecting *per se* treatment for agreements among competitors to shut down certain of their plants and abide by exclusive territorial restrictions).

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independently decided fill reduction.³ The Commission, however, obviously did not have sufficient evidence to pursue that more direct case.

Even more troubling, the majority's treatment of the alleged conduct as per se unlawful depends on an unfounded assertion that the parties agreed to keep their prices fixed. Chairwoman Ramirez and Commissioner Brill are certainly correct that "[r]educing the volume of propane gas in a tank while keeping the price constant is equivalent to a per unit price increase."⁴ The problem for the majority's position is that the complaint in this matter did not allege an agreement between AmeriGas and Blue Rhino to keep their respective prices to Walmart constant. There was no allegation in the complaint that the parties agreed in any way on the pricing of the lesser-filled propane tanks. Walmart was free to negotiate prices or any other price element with the parties. Yet, there is no allegation that Walmart tried but was unable to re-negotiate the price of the tanks with each of the parties. Thus, neither the majority's assertion that the parties "secretly agreed not to deviate from a proposed *price increase*"⁵ nor their characterization of the alleged agreement as "a per se unlawful naked restraint on *price competition*"⁶ find any support in the complaint or the evidence presented to the Commission.

³ See, e.g., *In re Ferrellgas Partners, L.P.*, FTC Dkt. No. 9360, Concurring Statement of Commissioner Joshua D. Wright, at 3 (Oct. 31, 2014) (referring to "the collusion between AmeriGas and Blue Rhino to reduce the amount of propane in tanks sold to Walmart"); *Roundtable Conference with Enforcement Officials*, ANTITRUST SOURCE, June 2014, at 4 ("Just yesterday, we announced that the Commission voted to issue an administrative complaint against AmeriGas and Blue Rhino. . . . We have alleged that the two rivals illegally coordinated on reducing the amount of propane in the tanks that were sold to a key customer.") (Chairwoman Ramirez).

⁴ *In re Ferrellgas Partners, L.P.*, FTC Dkt. No. 9360, Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill, at 2 (Oct. 31, 2014). See also Concurring Statement of Commissioner Joshua D. Wright, at 3 ("Here, it is self-evident that AmeriGas and Blue Rhino's agreement to reduce the amount of propane in tanks sold to Walmart has the economic effect of increasing the per unit price *if prices are held constant*.") (emphasis added).

⁵ *Id.* at 3 (emphasis added).

⁶ *Id.* at 2 (emphasis added).

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Try as the majority may to fit this case into the per se category of price and output restrictions among competitors, it simply does not belong in that category. As a result, the cases and other support cited by the majority – including *Catalano*, *Sugar Institute*, and commentary addressing agreements on various elements of price – are inapposite.⁷ In fact, none of the cases cited by Commissioners Ramirez, Brill, and Wright even remotely resembles the alleged facts in this case. The lack of judicial experience with the unique conduct alleged in this case further counsels against application of the per se rule, as well as any abbreviated rule of reason treatment, for that matter.⁸

The majority's attempt to fit the alleged conduct into the per se category – done in large part through a mischaracterization of the allegations actually levied in the complaint – runs contrary to the now decades-long evolution in antitrust doctrine away from per se treatment of benign or even procompetitive business conduct, as well as the more sophisticated economic analysis that animates modern antitrust law.⁹ The majority did not allege that

⁷ See Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill, at 2 & 3 nn.4 & 9 (citing, among other cases, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *Sugar Institute v. United States*, 297 U.S. 553 (1936)); Concurring Statement of Commissioner Joshua D. Wright, at 3 n.14 (citing *Catalano*; and citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶2022a, at 174 (3d ed. 2012), for the proposition that agreements to fix various “price elements” are per se unlawful); *id.* at 2-3 n.13 (discussing “bid-rigging or auction collusion”).

⁸ See, e.g., Timothy J. Muris & Brady P.P. Cummins, *Tools of Reason: Truncation through Judicial Experience and Economic Learning*, *ANTITRUST*, Summer 2014, at 46 (arguing that the antitrust agencies should apply a truncated rule of reason analysis only “to restraints whose effect on competition is clear based on ‘judicial experience and current economic learning’”) (quoting *In re Polygram Holding Inc.*, 136 F.T.C. 310, 344-45 (2003), *aff’d sub nom.* *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005)).

⁹ See, e.g., Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 *ANTITRUST L.J.* 147, 152-53 (2012) (“One result of the incorporation of economics into antitrust law has been the widespread rejection of broad rules of per se illegality. Over three decades, the Supreme Court abandoned most per se rules, leaving only naked horizontal price fixing and market division, plus a modified per se rule for tie-ins, under per se treatment.”) (footnotes omitted); Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, 3 *COMPETITION POL’Y INT’L* 1, 3 (2007) (arguing “that

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the parties agreed on either their propane output levels¹⁰ or the prices that they would charge Walmart (or any other customer). In my view, that takes the alleged agreement outside the scope of classic *per se* prohibitions of price and output restrictions, including joint conduct aimed at a single customer, such as bid rigging. At this point in the development of the antitrust laws, if anything, we should be continuing to move categories of conduct out of the *per se* category – not trying to squeeze conduct that we rarely encounter into the otherwise shrinking *per se* box.¹¹

Even assuming a valid theory under Section 1, the evidence presented to the Commission failed to convince me that the parties had reached an agreement to do anything. In my view, notwithstanding the alleged communications between the parties relating to Walmart,¹² the evidence did not provide reason to

the U.S. Supreme Court . . . is methodically re-working antitrust doctrine to bring it into alignment with modern economic understanding”).

¹⁰ The majority alleged neither an agreement as to each party’s output level nor an agreement on reducing the amount of the propane in each firm’s tanks. While the former agreement, if reached, would clearly be *per se* unlawful, the latter would not necessarily be *per se* unlawful, in my view. The parties had contracted to fill each other’s propane tanks in certain areas of the country where one of the firms did not have refilling and refurbishing facilities. See Compl. ¶ 29. As a result, there would have been an efficiency justification – the need for uniform fill levels across the two suppliers – for any agreement on the fill level, and such agreement, had one been reached, would have been appropriately evaluated under the rule of reason. I take no position here on the legality of that hypothetical agreement. Again, there was no allegation in the complaint that the parties agreed on the fill levels in their tanks.

¹¹ I would have voted against this case, even if it had been pursued under the rule of reason because the evidence did not provide a reason to believe that the alleged conduct had an adverse impact on competition in the market for propane exchange tanks.

¹² Commissioner Wright fairly notes that no antitrust practitioner would counsel a client to engage in the direct competitor communications that were alleged to have happened here. See Concurring Statement of Commissioner Joshua D. Wright, at 2. One might even consider bringing a standalone Section 5 case against competitors that have engaged in the sharing of nonpublic, competitively sensitive information. See, e.g., *In re Bosley, Inc.*, FTC Dkt. No. C-4404, Complaint (June 5, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/06/130605aderansregiscmt.pdf>. However, the (largely one-way) communications at issue here are a far cry from the categories of conduct that are properly deemed *per se* unlawful.

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believe the parties had reached an agreement on how they would “push” Walmart, which, as the complaint notes, is “the largest propane exchange tank retailer in the United States.”¹³ The evidence simply did not support the allegations that Walmart (the quintessential power buyer) was susceptible to pressure, that the parties were actually coercing Walmart, that the fill reductions pursued (separately) by the parties were going to unravel, or that the parties would have returned to the higher fill levels – as opposed to, for example, Walmart accepting the lower fill levels in exchange for a lower price.

Further, even assuming a valid theory and sufficient evidence to support a Section 1 violation (both of which were lacking), I was not convinced that bringing this case was in the public interest. The alleged conduct had occurred nearly six years before the complaint was issued. More importantly, the respondents had settled private litigation that included antitrust claims (as well as other, consumer protection claims), with AmeriGas and Blue Rhino agreeing to pay up to \$10 million and \$25 million, respectively, to settle the private claims.¹⁴ As part of that settlement, one of the parties, Blue Rhino, also agreed to provide additional antitrust compliance training to relevant company personnel. One can only assume that AmeriGas took comparable steps following the settlement. In light of these considerations and others, scarce Commission resources would have been better spent pursuing other, more worthwhile matters.

Although the Commission may have discovered some smoke, there clearly was no fire in this case – whether fueled by propane or otherwise. In short, there was very weak evidence supporting what I saw as, at best, a novel Section 1 case. I therefore did not have reason to believe that the parties had committed a Section 1

¹³ Compl. ¶ 35.

¹⁴ See Plaintiffs’ Motion for Preliminary Approval of Amended Class Settlement, *In re* Pre-Filled Propane Tank Marketing and Sales Practices Litig., MDL No. 2086, No. 4:09-cv-00465 (W.D. Mo. Apr. 29, 2010) (settlement with AmeriGas granted final approval on Oct. 4, 2010); Plaintiffs’ Motion for Preliminary Approval of Class Settlement, *In re* Pre-Filled Propane Tank Marketing and Sales Practices Litig., MDL No. 2086, No. 4:09-md-2086 (W.D. Mo. Oct. 6, 2011) (settlement with Blue Rhino granted final approval on May 31, 2012).

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violation. Nor did I think that it was in the public interest to pursue this enforcement action. For these reasons, I cannot vote for a consent agreement grounded on the same theory and evidence that was presented to me when the complaint originally issued.

**DISSENTING STATEMENT OF COMMISSIONER
JOSHUA D. WRIGHT**

The Commission has voted to accept proposed Consent Agreements to remedy allegations that AmeriGas and Blue Rhino restrained competition by colluding to reduce the amount of propane in tanks sold to Walmart. I voted in favor of issuing the Complaint and accepting the proposed Consent Agreements because the evidence is sufficient to provide reason to believe that AmeriGas and Blue Rhino engaged in conduct that is unlawful under the antitrust laws and the proposed settlements will improve consumer welfare by preventing the parties from engaging in anticompetitive conduct in the future.¹ I write separately to explain my support for this enforcement action and the proposed settlements.

The alleged conspiracy would establish a relatively straightforward violation of the antitrust laws. In 2008, AmeriGas and Blue Rhino each independently reduced the amount of propane contained in their tanks from 17 pounds to 15 pounds.² The fill reductions had the effect of a 13 percent increase in the price of propane because neither AmeriGas nor Blue Rhino implemented a corresponding decrease in price.³ If the story had ended there, with merely unilateral action and no agreement between AmeriGas and Blue Rhino, there would be no violation of the antitrust laws and the Commission would not have pursued an enforcement action.

¹ 15 U.S.C. § 45(b) (2012) (authorizing the Commission to initiate an enforcement action when it has “reason to believe” a party has engaged in an unfair method of competition).

² In re Ferrellgas Partners, L.P., FTC Docket No. 9360, Complaint at ¶¶ 1, 5, 32, 43 (Mar. 27, 2014), *available at* <http://www.ftc.gov/system/files/documents/cases/140401amerigascomplaint.pdf>.

³ *Id.* at ¶¶ 1, 33.

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However, the story did not end there. Walmart, the largest propane exchange tank retailer in the United States, resisted the fill reductions.⁴ Other retailers agreed to the fill reductions, but only on the condition that Walmart also would accept the fill reductions within a short period of time.⁵ Faced with resistance from Walmart, Blue Rhino and AmeriGas encountered the very real prospect that their fill reductions could unravel and the market would return to costlier and thus less profitable 17-pound tanks. To avoid this result, AmeriGas and Blue Rhino colluded in their negotiations with Walmart to ensure it quickly accepted the fill reductions.⁶ That collusion provides the basis for the Commission's complaint and proposed Consent Agreements.

More specifically, AmeriGas and Blue Rhino executives spoke frequently in the days and weeks leading up to Walmart's decision to accept the fill reductions in order to coordinate their negotiations and encourage one another not to give in to Walmart's opposition.⁷ For instance, AmeriGas and Blue Rhino executives worked together to ensure that retailers near Walmart's headquarters in Bentonville, Arkansas, only carried 15-pound tanks in hopes of convincing Walmart to accept the fill reductions as the new industry standard.⁸ AmeriGas and Blue Rhino executives also discussed the status of their negotiations and coordinated emails using similar language to urge Walmart to accept the fill reductions.⁹ Indeed, a frustrated AmeriGas's Director of National Accounts at one point suggested to Blue Rhino that it was time for them to issue an ultimatum to Walmart.¹⁰ Blue Rhino's Vice President of Sales responded by urging AmeriGas to "hang in there" as Blue Rhino continued to negotiate with Walmart.¹¹ Faced with unyielding demands from

⁴ *Id.* at ¶¶ 1, 6, 38.

⁵ *Id.* at ¶¶ 6, 41, 47.

⁶ *Id.* at ¶¶ 1, 7, 48.

⁷ *Id.* at ¶¶ 42, 50.

⁸ *Id.* at ¶ 50.

⁹ *Id.* at ¶¶ 50, 54, 55.

¹⁰ *Id.* at ¶ 50.

¹¹ *Id.*

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its two primary propane suppliers and no viable outside option, Walmart finally conceded and agreed to accept propane tanks filled to 15 pounds.¹²

No antitrust practitioner would counsel his or her client to engage in the direct competitor communications and concerted actions that are alleged to have occurred between Blue Rhino and AmeriGas. This is with good reason: such conduct is plainly anticompetitive and unlawful under Section 1 of the Sherman Act.¹³ It is well understood that collusion among suppliers regarding price, quantity, and other competitive terms negotiated with purchasers can harm consumers by impeding the competitive process.¹⁴ Here, it is self-evident that AmeriGas and Blue Rhino's agreement to reduce the amount of propane in tanks sold

¹² *Id.* at ¶¶ 56.

¹³ Collusion by suppliers in negotiations with a single purchaser has long been accepted as a valid theory of harm under the antitrust laws. Over a century ago, collusion in negotiations by employees (i.e., suppliers of labor) with employers was challenged successfully under the Sherman Act. *See, e.g.,* *Loewe v. Lawlor*, 208 U.S. 274 (1908). The theory was so viable that Congress created a new labor exemption by passing Sections 6 and 20 of the Clayton Act. *See* 29 U.S.C. §§ 52, 101-115 (2012). In its most egregious form, collusion by suppliers in negotiations with a single purchaser can be challenged as bid-rigging or auction collusion, the harms of which are well documented in the economic literature and which represent one of the most common violations prosecuted by the Department of Justice's Antitrust Division. *See, e.g.,* Robert C. Marshall & Michael J. Meurer, *The Economics of Auctions and Bidder Collusion*, in *GAME THEORY AND BUSINESS APPLICATIONS* 339 (Kalyan Chatterjee & William F. Samuelson eds., 2001); Paul Klemperer, *What Really Matters in Auction Design*, 16 J. ECON. PERSP. 169, 169 (Winter 2002); Luke Froeb, Robert Koyak, & Gregory Werden, *What is the Effect of Bid-rigging on Prices?*, 42 ECONOMICS LETTERS 419 (1993). It is therefore unclear why, if one concedes it would be unlawful for AmeriGas and Blue Rhino to collude to reduce the amount of propane in tanks sold to all purchasers, it also would not be unlawful for the parties to collude in imposing such a fill reduction on a single, unwilling purchaser.

¹⁴ *See, e.g.,* *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam) (agreement by competitors to terminate certain credit terms held unlawful); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶2022a, at 174 (3d ed. 2012) (explaining “the per se rule generally governs not only explicit price fixing but agreements to fix a ‘price element,’ which broadly includes “any term of sale that can be regarded as affecting the price that the customer must pay or any mechanism such as a formula by which the price maybe computed”).

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to Walmart has the economic effect of increasing the per unit price if prices are held constant. The mere fact that AmeriGas and Blue Rhino's agreement did not preclude the possibility that they would continue to compete on price or other terms is of little consequence for antitrust analysis. Indeed, if such competition were enough to absolve otherwise anticompetitive concerted action, even a conspiracy to fix nominal prices would be lawful so long as the colluding rivals continued to compete on quality or quantity. Fortunately, antitrust law requires a different and more economically sensible result.¹⁵

It also is worth noting that no one—including but not limited to the parties—has presented a plausible efficiency justification that might suggest the collusion between AmeriGas and Blue Rhino to reduce the amount of propane in tanks sold to Walmart was somehow procompetitive.¹⁶ This enforcement action therefore simply does not implicate traditional concerns over false positives and the fear that the Commission might inadvertently

¹⁵ See, e.g., AREEDA & HOVENKAMP, *supra* note 14, ¶2022a, at 175 (“For example, firms could presumably agree to insist on cash at the time of delivery but nevertheless compete vigorously on the price they charge. But to make much of this fact distorts the relative importance of the various terms of any transaction. The explicit ‘price’ of any good or service is a function not only of the nominal price but also for the credit terms, applicable discounts, rebates, terms of delivery, and the like. Firms might also agree about the nominal price but continue to compete by offering increasingly longer time periods before payment is due. The fact that such competition continues to exist does not serve to make the price-fixing agreement reasonable.”).

¹⁶ Although the argument that AmeriGas and Blue Rhino's co-filling arrangement offers an efficiency justification for the parties' concerted action against Walmart has some superficial appeal, it can be dispensed with relatively easily. First, if we are to take seriously the claim that identical propane fill levels are necessary for the efficient operation of AmeriGas's and Blue Rhino's businesses, we would expect the parties to have agreed on the initial move from 17-pound to 15-pound tanks. They did not. In fact, after a lengthy investigation, the Commission concluded the parties independently reduced the amount of propane contained in their tanks and only colluded in subsequent negotiations with Walmart. Second, it would be a curious thing for two companies attempting to achieve an efficiency benefit—one that would reduce the costs passed on to purchasers—to seek to achieve that benefit by coordinating secretly rather than explaining to purchasers the costs of maintaining divergent fill-levels for their propane tanks.

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chill procompetitive behavior.¹⁷ In addition, while much has been written about the important shift away from per se rules in favor of a more effects-based rule of reason analysis under modern antitrust doctrine, the benefits of this shift unsurprisingly accrue only where the challenged conduct potentially offers some procompetitive benefits.¹⁸ Again, that is not the case here. The record is devoid of evidence supporting a plausible efficiency justification for the challenged agreement.

Moreover, the Supreme Court's shift toward the rule of reason has always left room for an appropriately truncated review for conduct that is likely to harm competition and without efficiency justification. The Court has made clear that attempting to place antitrust analysis into fixed categories is overly simplistic.¹⁹ The Court has recognized that "there is often no bright line separating per se from Rule of Reason analysis"²⁰ and that determining whether a "challenged restraint enhances competition" requires "an enquiry meet for the case."²¹

The alleged coordination between AmeriGas and Blue Rhino bears a "close family resemblance" to conduct long since "convicted in the court of consumer welfare" based upon "economic learning and market experience" that demonstrates such restraints are likely to harm consumers.²² Where, as here, the two principal suppliers in an industry have colluded in their

¹⁷ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15-17 (1984).

¹⁸ See, e.g., Joshua D. Wright, Comm'r, Fed. Trade Comm'n, *The Economics of Resale Price Maintenance & Implications for Competition Law and Policy*, Remarks before the British Institute of International and Comparative Law (Apr. 9, 2014), available at http://www.ftc.gov/system/files/documents/public_statements/302501/140409rpm.pdf.

¹⁹ See, e.g., *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34-35 (D.C. Cir. 2005) (explaining usefully how the "Supreme Court's approach to evaluating a § 1 claim has gone through a transition over the last twenty-five years, from a categorical approach to a more nuanced and case-specific inquiry").

²⁰ *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 779 (1999) (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.26 (1983)).

²¹ *Id.* at 779-81.

²² *Polygram*, 416 F.3d 29 at 36-37.

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negotiations with a major distributor to impose contractual terms the distributor initially resisted, and there are no plausible efficiency justifications suggesting the conduct may have been procompetitive, that enquiry is appropriately brief. Enforcement actions to prevent anticompetitive conduct with no plausible efficiency are a wise use of agency resources and should be a focus of the Commission's competition mission because they bring immediate benefits for consumers with little risk of chilling procompetitive conduct.

For all of these reasons, I voted in favor of issuing the Complaint and accepting the proposed Consent Agreements in this matter.

Complaint

IN THE MATTER OF

MICHAEL C. HUGHESCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4502; File No. 132 3088
Complaint, January 9, 2015 – Decision, January 9, 2015

This consent order addresses deceptive acts and practices regarding the collection of consumers' sensitive health information from third parties. The respondent, Michael C. Hughes, served as CEO of a company that operated a website that enabled consumers to pay their medical bills. The complaint alleges Mr. Hughes misled thousands of consumers who signed up for the online billing portal by failing to adequately inform consumers that the company would use their information to obtain access to highly detailed medical information from pharmacies, medical labs and insurance companies. The consent order requires Mr. Hughes to destroy any collected information. In addition, Mr. Hughes is banned from deceiving consumers about the way information is collected and used, including how such information might be shared with or collected from a third party. Further, Mr. Hughes must obtain consumers' affirmative express consent before collecting health information about a consumer from a third party. The Commission entered a similar order against Mr. Hughes' company, Payments MD, LLC. *See* 159 F.T.C. 241.

Participants

For the Commission: Jacqueline Connor, David Lincicum, and Kevin Moriarty.

For the Respondent: Lisa J. Sotto, Hunton & Williams LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Michael C. Hughes ("Respondent"), individually, through his direction, control, and ownership of PaymentsMD, LLC ("PaymentsMD") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Michael C. Hughes was the Chief Executive Officer, sole employee, and part owner of PaymentsMD, a Georgia limited liability company, until July 2014. Individually