Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 34, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

Dated: November 3, 2014.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2014–26435 Filed 11–6–14; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 2014–26081) published on pages 65213 and 65214 of the issue for Monday, November 3, 2014.

Under the Federal Reserve Bank of Kansas City heading, the entry for *Otten Holdings, LLC and FEO Investments, Inc.,* is revised to read as follows:

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Otten Holdings, LLC and FEO Investments, Inc.,* both in Norfolk, Nebraska; to acquire 100 percent of the voting shares of First National Agency, Inc., and thereby indirectly acquire First Nebraska Bank of Wayne, both in Wayne, Nebraska.

Comments on this application must be received by November 28, 2014.

Board of Governors of the Federal Reserve System, November 4, 2014.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2014–26485 Filed 11–6–14; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[Docket No. 9360]

Ferrellgas Partners, L.P.; Ferrellgas, L.P., Also Doing Business as Blue Rhino; AmeriGas Partners, L.P., Also Doing Business as AmeriGas Cylinder Exchange; and UGI Corporation; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreements.

SUMMARY: The consent agreements in this matter settle alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the administrative complaint issued by the Commission and the terms of the consent orders—embodied in the consent agreements—that would settle these allegations.

DATES: Comments must be received on or before December 2, 2014.

ADDRESSES: Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/amerigasbluerhinoconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''In the Matter of AmeriGas and Blue Rhino—Consent Agreement; Docket No. 9360'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/amerigasbluerhinoconsent* by following the instructions on the web-based form. If you prefer to file your comment on paper, write ''In the Matter of AmeriGas and Blue Rhino—Consent Agreement; Docket No. 9360'' on your comment and on the envelope, and mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Eric Edmondson, FTC Western Region, San Francisco, (415–848–5179), 901 Market Street, Suite 570, San Francisco, CA 94103.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 3.25(f), 16 CFR 3.25(f), notice is hereby given that the above-captioned consent agreements containing consent orders to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, have been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreements, and the allegations in the complaint. An electronic copy of the full text of each consent agreement package can be obtained from the FTC Home Page (for October 31, 2014), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before December 2, 2014. Write ''In the Matter of AmeriGas and Blue Rhino—Consent Agreement; Docket No. 9360'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which . . . is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the

Continued

confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/amerigasbluerhinoconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''In the Matter of AmeriGas and Blue Rhino—Consent Agreement; Docket No. 9360'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before December 2, 2014. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing 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 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.

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.[2] 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 Walmart

comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[2] 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.

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.[3]

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 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.

By direction of the Commission, Commissioner Ohlhausen dissenting, and Commissioner McSweeny not participating.

Donald S. Clark,

Secretary.

Statement of Chairwoman Edith Ramiez 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.

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]

[3] *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).

[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.*

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 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 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, *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 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

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[2] Complaint ¶ 50.

[3] *Id.*

[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-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.

[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).

[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).

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.

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 the parties agreed on either their propane output levels [10] 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 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

[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).

[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 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/2013/06/130605aderansregiscmpt.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.

[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.

Continued

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 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.

Concurring 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.

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 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 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

Oct. 6, 2011) (settlement with Blue Rhino granted final approval on May 31, 2012).

[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.

[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.*

[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'').

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 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 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.

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[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.

[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 section 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.

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0013; Docket 2014–0055; Sequence 21]

Submission for OMB Review; Federal Acquisition Regulation; Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB information collection.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data. A notice was published in the **Federal Register** at 79 FR 51168 on August 27, 2014. No comments were received.

DATES: Submit comments on or before December 8, 2014.

ADDRESSES: Submit comments identified by Information Collection 9000–0013, Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number 9000–0013. Select the link that corresponds with ''Information Collection 9000–0013, Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''Information Collection 9000–0013, Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data'', on your attached document.
- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: Ms. Flowers/IC 9000–0013, Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data.