

ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

*In the Matter of AmeriGas Propane, L.P., AmeriGas Propane, Inc.,
Energy Transfer Partners, L.P., and Energy Transfer Partners GP, L.P.
FTC File No. 121-0022, Docket No. C-4346*

I. Overview

The Federal Trade Commission has accepted an Agreement Containing Consent Order (“Proposed Order”) with AmeriGas Propane, L.P. (“AmeriGas”), AmeriGas Propane, Inc., Energy Transfer Partners, L.P. (“ETP”), and Energy Transfer Partners GP, L.P. (“ETP GP”), which is designed to guard against possible anticompetitive effects that would likely result from the transaction as originally proposed.

On October 15, 2011, AmeriGas entered into an agreement with ETP and ETP GP in which AmeriGas proposed to acquire ETP’s Heritage Propane business through the approximately \$2.9 billion acquisition of four entities owned by ETP, Heritage Operating, L.P., Heritage GP, LLC, Titan Energy Partner, L.P., and Titan Energy GP, L.L.C. ETP’s Heritage Propane business includes Heritage Propane Express, an entity that is engaged in the business of preparing, filling, distributing and selling portable cylinders prefilled with propane commonly used for barbeque grills (referred to herein as “propane exchange cylinders”). The AmeriGas Cylinder Exchange or “ACE” division is also engaged in the business of preparing, filling, distributing and selling exchange cylinders, and is the second largest provider of propane exchange cylinders in the United States. In response to competitive concerns raised by Commission staff regarding AmeriGas’s purchase of the Heritage Propane Express Business, the parties subsequently proposed a modified transaction that excludes those assets. The Order, as accepted by the Commission, settles charges that the acquisition, as originally proposed, may have substantially lessened competition in the market for preparing, filling, distributing and selling propane exchange cylinders in the United States and in certain regional areas within the United States.

II. The Parties

AmeriGas, a limited partnership, is the largest propane distribution company in the United States. Its ACE division supplies prefilled propane exchange cylinders to retailers who then sell those cylinders to consumers. AmeriGas is the second largest supplier and marketer of propane exchange cylinders.

ETP GP is a publicly traded partnership and the general partner of ETP, which is also a publicly traded partnership. ETP is engaged in the business of supplying propane exchange cylinders through its Heritage Propane Express division. Heritage Propane Express is the third largest supplier and marketer of propane exchange cylinders in the country with operations in 37 states.

III. The Products and the Structure of the Market

Propane exchange cylinders, often referred to as 20 pound DOT cylinders,¹ are small, portable tanks that can be filled with propane, and that are used primarily for barbecue grills, patio heaters, and mosquito magnets. At one time, the only option for consumers who needed to purchase propane for these uses was to purchase empty cylinders and take them to locations where they could have the cylinders filled. Starting in the 1990's cylinder exchange became popular. This option allows consumers to purchase a prefilled cylinder which can then be exchanged for a clean prefilled cylinder when the fuel in the first cylinder has been used. The consumer exchanging an empty cylinder for a full one typically pays only for the propane. Exchange cylinders are available for purchase and exchange at various locations, including grocery stores, home improvement stores, hardware stores, big box stores, conveniences stores, and gas stations. Although consumers have the option of refilling these cylinders, many prefer the convenience of purchasing prefilled exchange cylinders that have been cleaned and safety tested by the supplier before they are sold. Many retailers also prefer the convenience and possible safety benefits of selling prefilled exchange cylinders rather than arranging to have large propane tanks on their premises and training employees to perform refilling services. For these reasons, the use of propane exchange cylinders has grown, and the refilling of cylinders has declined over the last ten years. As a consequence of these changes in demand, refilling cylinders does not provide a competitive constraint on the price of propane cylinder exchange services.

Companies that distribute and sell propane exchange cylinders typically provide the following services, either directly or indirectly: cylinder preparation (including cleaning, rust removal, repainting and valve repairs for the cylinders); refilling with a designated amount of propane; marketing and distribution (including delivery and retrieval of cylinders, and placement and maintenance of cages that display and dispense exchange cylinders at retail locations); and sale of exchange cylinders.

IV. The Complaint

The Complaint alleges that the market for propane exchange cylinder services that can serve large multi-state chain retailers is highly concentrated. Large multi-state retail chains generally require that their propane exchange cylinder suppliers have the scale and geographic scope of coverage to handle significant portions of their business. These retailers also require that their propane exchange cylinder suppliers offer "just in time" deliveries to ensure that cages are continuously stocked with prefilled cylinders, particularly during peak holiday periods and weekends. Currently, there are only three suppliers that can provide propane exchange cylinder services to such retailers: Ferrellgas Partners, L.P.'s "Blue Rhino" division, the largest provider of propane exchange cylinder services on a national and regional basis; AmeriGas's ACE, the second largest provider of propane exchange cylinder services; and ETP's Heritage Propane

¹ The metal cylinders can hold approximately 25 pounds of propane, but for safety reasons, can only be filled to 80% capacity, or approximately 20 pounds. In the marketplace at this point in time, most exchange cylinders are only filled with 15 to 17 or so pounds of propane. The reference in this Analysis is intended as a description of the size and type of cylinder, and is not a reference to actual fill levels.

Express, the third largest provider of these services. The Complaint alleges that AmeriGas's acquisition of the Heritage Propane Exchange assets, as originally proposed, would have reduced the number of companies that can supply these services to multi-state retail chains from three to two.

The Complaint further alleges that Heritage Propane Express played the role of a disruptive "maverick," offering lower prices and better terms and conditions than the other two large players. In addition, the Complaint alleges that entry into the market for supply of propane exchange cylinder services to large multi-state chain retailers is not likely to be timely or sufficient to defeat a price increase due to the large scale of entry needed to service large national or regional retailers requiring reliable distribution services in many locations.

The Complaint alleges that the effect of the acquisition, as originally proposed, may be to substantially lessen competition by, *inter alia*, increasing the likelihood of collusion or coordinated interaction among the remaining two large competitors by removing Heritage Propane Express, a disruptive force in the marketplace.

V. The Modified Transaction

AmeriGas, AmeriGas Propane, Inc., ETP and ETP GP have now entered into an amendment to their original agreement. Pursuant to this amendment ("Amendment 2"), AmeriGas will not acquire the Heritage Propane Express assets. Rather, they will continue to be operated by ETP through a new subsidiary, Heritage Propane Express, LLC, until such time as ETP decides to sell those assets. However, because Heritage Propane Express, LLC will no longer have access to certain back office and propane supply services that will be transferred to AmeriGas, AmeriGas is required to make such services available to Heritage Propane Express, LLC at cost for a specified period of time. This provision will allow Heritage Propane Express, LLC to continue to function as a viable entity. Amendment 2 contains a number of other provisions addressing the provision of transition services that are likely to be needed. Because Amendment 2 contains competitively sensitive information, the details of the transition services are not publicly available.

VI. The Order

The Order remedies the Commission's competitive concerns raised by the original transaction, as proposed.

The Order incorporates Amendment 2, described above, into the Order and requires the Respondents to comply with all the terms of that document, including all terms pertaining to the provision of transition services by AmeriGas to Heritage Propane Express, LLC until such time as Heritage Propane Express, LLC is sold to another entity, or, barring a sale, for a period of one year. The specified transition services include access to propane supply under specified terms.

Section II.C of the Order requires that, for a period of two years, ETP cannot sell the Heritage Propane Express assets without prior written approval of the Commission. This ensures that the Commission will have an opportunity to review a future sale of these assets, particularly

if the assets would not be reportable under the Hart-Scott-Rodino Antitrust Improvements Act. Section II.D requires ETP to provide prior notification to the Commission before acquiring any other cylinder exchange businesses for the next 10 years. Section II.E similarly requires AmeriGas to provide prior notification to the Commission before acquiring any other cylinder exchange businesses for the next 10 years. Both II.D and II.E provide that prior notification is not necessary for transactions that fall under a certain threshold in terms of the annual sales of propane exchange cylinders by any company that they propose to acquire.

Section II.F addresses the availability of the transition services outlined in Amendment 2. It requires that AmeriGas make these transition and supply services available to ETP for up to one year, so that Heritage Propane Express, LLC can be operated as a viable entity. If that company is sold within one year, Section II.F requires that AmeriGas provide transition and propane supply services to Heritage Propane Express's buyer for a period of six months, with an option to extend the arrangement for another six months. These provisions are designed to ensure that the Heritage Propane Express assets will continue to be viable as a stand-alone propane exchange cylinder business and that any new purchaser will have the necessary services and supply for a short transition period. Section II.G requires ETP to operate the Heritage Propane Express assets in a manner that maintains their economic viability for a period of two years or until ETP no longer holds an interest in the assets.

The remaining Order provisions are standard reporting requirements to allow the Commission to determine on-going compliance with the provisions of the Order.

VII. Opportunity for Public Comment²

The Final Order has been placed on the public record for 30 days to receive comments from interested parties. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and determine whether to take further action. The purpose of this analysis is to facilitate comment on the Consent Agreement and Order. This analysis does not constitute an official interpretation of the Consent Agreement or Order, nor does it modify its terms in any way. The Consent Agreement does not constitute an admission by AmeriGas, ETP or ETP GP that they have violated the law or that the facts as alleged in the Complaint, other than the jurisdictional facts, are true.

² The Commission normally will issue an order for public comment but not issue a final order until it considers all comments received during the comment period. Here, however, consistent with Commission Rule 2.34(c), 16 C.F.R. § 2.34(c), the Commission has issued the Final Order in advance of the comment period. The Commission took this step to avoid any unnecessary and potentially costly delay to the larger underlying transaction involving the sale of ETP's bulk propane business, which is not the subject of the Order, and is a highly seasonal business; that is, the market for bulk propane and related services is greatest during the winter and early spring. After the public comment period, the Commission will have the option to initiate a proceeding to reopen and modify the Decision and Order or commence a new administrative proceeding if the public comments lead it to believe that such action is appropriate.