

**ANALYSIS OF AGREEMENTS CONTAINING CONSENT ORDERS
TO AID PUBLIC COMMENT**
*In the Matter of 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*
Docket No. 9360

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.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 Walmart when faced with resistance from Walmart, and their combined efforts to push Walmart 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.

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 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.

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).

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.