DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN
In the Matter of AmeriGas and Blue Rhino
FTC Docket No. 9360
October 31, 2014

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 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

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[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).

[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).

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

[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").

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

[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.

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 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.

[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).