Concurring Statement of Commissioner Joshua D. Wright
In the Matter of Ferrellgas Partners, L.P.
Docket No. 9360
FTC File No. 111 0195

October 31, 2014

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

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[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.

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,

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[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

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 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

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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").

[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

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

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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 § 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.

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.