

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



PUBLIC

Docket No. 9360

**In the Matter of**

**FERRELLGAS PARTNERS, L.P., a limited partnership, and**

**FERRELLGAS, L.P., a limited partnership, also doing business as BLUE RHINO, and**

**AMERIGAS PARTNERS, L.P., a limited partnership, also doing business as AMERIGAS CYLINDER EXCHANGE, and**

**UGI CORPORATION, a corporation.**

**ANSWER OF RESPONDENTS FERRELLGAS PARTNERS, L.P. AND FERRELLGAS, L.P. TO THE FEDERAL TRADE COMMISSION'S ADMINISTRATIVE COMPLAINT**

Respondents Ferrellgas Partners, L.P. and Ferrellgas, L.P., also doing business as Blue Rhino ("Blue Rhino") through its undersigned counsel, answers the Administrative Complaint (the "Complaint") filed by the Federal Trade Commission ("FTC") as follows. Except to the extent specifically admitted herein, Blue Rhino denies each and every allegation contained in the Complaint, including all allegations contained in headings or otherwise not contained in one of the Complaint's 61 numbered paragraphs. Specifically, Blue Rhino denies that it has engaged in conduct that violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and denies that this proceeding is in any way in the public interest.

1. Blue Rhino admits that in 2008 Blue Rhino and AmeriGas each reduced "the amount of propane contained in propane exchange tanks from 17 pounds to 15 pounds (the 'fill reduction')," but denies the remaining allegations in paragraph 1. To the extent the allegations

in paragraph 1 are legal conclusions, no response is required.

2. Blue Rhino admits that “[a]t all times relevant” to the complaint it and AmeriGas were “the two largest suppliers of propane exchange tanks in the United States.” Blue Rhino denies that it “controlled approximately 50 percent of the United States wholesale propane exchange tank market,” but admits that its share of wholesale sales of propane tank exchanges was approximately 50 percent. Blue Rhino lacks sufficient knowledge to admit or deny the allegations regarding the market share of AmeriGas or “other competitors” and therefore denies them. Blue Rhino further avers, on information and belief, that “other competitors” (in addition to Respondents) were “capable of servicing large national retailers such as Wal-Mart, Lowe’s HIW, Inc., and the Home Depot, Inc.” on more than a “limited basis.” Blue Rhino denies the remaining allegations in paragraph 2.

3. Blue Rhino admits that in spring 2008 it decided to reduce “the amount of propane contained in its exchange tanks from 17 pounds to 15 pounds,” but denies the remaining allegations in paragraph 3.

4. Blue Rhino admits that “[d]uring the spring and summer 2008, Blue Rhino informed ... certain retail customers that it intended to implement the fill reduction.” Blue Rhino also admits that after the process of informing customers had begun, and in the context of its co-packing relationship with AmeriGas, it informed AmeriGas of its intention to implement a fill reduction. Blue Rhino denies the allegation that AmeriGas “likewise” decided to “reduce its exchange tanks from 17 pounds to 15 pounds without a corresponding price decrease,” to the extent that implies that AmeriGas implemented an identical (i.e., “like”) fill reduction program. Blue Rhino admits that AmeriGas decided to “reduce its exchange tanks from 17 pounds to 15 pounds.”

5. Blue Rhino admits at various times during the summer of 2008, Blue Rhino and AmeriGas each implemented their respective fill reduction programs, but otherwise denies the allegations of Paragraph 5.

6. Blue Rhino denies the allegations in Paragraph 6.

7. The allegations of Paragraph 7 that purport to describe the object of the alleged conspiracy are unintelligible, making it impossible for anyone to admit or deny them. It makes no sense to conspire to not “deviate from” independent conduct. That said, Blue Rhino denies that it colluded with AmeriGas (a) at all, (b) with respect to not deviating from its own fill reduction program, or (c) “to push Walmart” in any way.

8. Blue Rhino denies the allegations in Paragraph 8.

9. Blue Rhino denies the allegations in Paragraph 9.

10. Blue Rhino admits the allegations contained in Paragraph 10.

11. Blue Rhino admits the allegations contained in Paragraph 11.

12. Blue Rhino accepts the definition contained in Paragraph 12.

13. Blue Rhino admits that it is a limited partnership. To the extent the allegations are legal conclusions, no response is required.

14. Blue Rhino admits that it sells propane exchange tanks in interstate commerce. To the extent the allegations are legal conclusions, no response is required.

15. Blue Rhino admits that AmeriGas is “engaged in the marketing and sale of propane and propane supply related services, including the distribution and supply of bulk propane to residential, commercial, and agricultural customers, and the preparing, filling, distributing, marketing, and sale of propane exchange tanks,” but otherwise lacks sufficient knowledge to admit or deny the remaining allegations and therefore denies them.

16. Blue Rhino lacks sufficient knowledge to admit or deny the allegations in Paragraph 16 and therefore denies them.

17. Blue Rhino accepts the definition contained in paragraph 17.

18. Blue Rhino lacks sufficient knowledge to admit or deny the allegations in Paragraph 18 and therefore denies them.

19. Blue Rhino lacks sufficient knowledge to admit or deny the allegations in Paragraph 19 and therefore denies them.

20. Blue Rhino admits the allegations contained in paragraph 20.

21. Blue Rhino admits the allegations contained in paragraph 21 to the extent they relate to it. Blue Rhino lacks sufficient knowledge to admit or deny the allegations regarding whether AmeriGas or any of Blue Rhino's "competitors" "adopted the custom of filling the propane exchange tanks with 17 or 17.5 pounds of propane" following the National Fire Protection Association's creation of the overfilling protection device in 2002 and therefore denies them.

22. Blue Rhino admits that "[p]ropane exchange tanks sold in the United States are highly standardized products consisting of a standardized tank and a standardized valve system." Blue Rhino denies the remaining allegations contained in paragraph 22.

23. Blue Rhino admits that propane exchange tanks are sold to consumers through "home improvement stores, hardware stores, mass merchandisers, supermarkets, convenience stores and gas stations." Blue Rhino lacks sufficient knowledge to admit or deny the remaining allegations in paragraph 23 and therefore denies them.

24. Blue Rhino admits that propane cylinders used in tank exchange are standardized, such that "[c]onsumers can exchange any propane exchange tank at any store

that carries propane exchange tanks without regard for which company supplied the tank to be exchanged.” To the extent that the first sentence of paragraph 24 alleges anything more than that, Blue Rhino denies those allegations.

25. Blue Rhino admits the allegations contained in paragraph 25 to the extent they relate to it. Blue Rhino lacks sufficient knowledge to admit or deny the allegations regarding whether AmeriGas’s or Blue Rhino’s “competitors” “need access to refurbishing and refilling facilities” in order to serve retail outlets and therefore denies them.

26. To the extent the allegations in paragraph 26 are legal conclusions, no response is required. Blue Rhino denies the allegations in Paragraph 26.

27. To the extent the allegations in paragraph 27 are legal conclusions, no response is required. Blue Rhino denies the allegations in paragraph 27.

28. To the extent the allegations in paragraph 28 are legal conclusions, no response is required. Blue Rhino denies the allegations in Paragraph 28.

29. Blue Rhino admits the allegations contained in paragraph 29, except that Blue Rhino lacks sufficient knowledge to admit or deny the allegations regarding whether “each Respondent processes slightly less than ten percent of the other company’s used, empty tanks pursuant to co-packing agreements.”

30. Blue Rhino admits the allegations in paragraph 30.

31. Blue Rhino lacks sufficient knowledge to admit or deny the allegations in Paragraph 31 and therefore denies them.

32. Blue Rhino admits that in April 2008 its management independently conceived and approved a proposal to reduce the fill level in its propane exchange tanks from the 17 pounds to 15 pounds to offset the increased input costs, as an alternative to a further increase in

the wholesale price on 17 pound tanks. Blue Rhino specifically denies any claim or implication that real prices for tank exchanges (i.e., the price per pound of propane) would not have gone up but for the fill reduction. Blue Rhino further admits that its implementation plan accounted for the need to notify AmeriGas of the fill reduction in the context of their co-packing agreements. Blue Rhino denies that its plan included asking AmeriGas “in advance whether their co-packing facilities could handle the proposed fill reduction.”

33. Blue Rhino denies the allegations in paragraph 33.

34. Blue Rhino denies the allegations in paragraph 34.

35. Blue Rhino admits that Walmart is the largest propane exchange tank retailer in the United States and that Blue Rhino services “approximately 60% of Walmart locations nationwide.” Blue Rhino lacks sufficient knowledge to admit or deny the allegations in paragraph 35 regarding AmeriGas or Ozark and therefore denies them.

36. Blue Rhino denies the allegations in paragraph 36.

37. Blue Rhino denies the allegations in paragraph 37. The decision to inform Walmart of its fill reduction plan was made by Blue Rhino before April 22, 2008.

38. Blue Rhino admits that its Director of Strategic Accounts met with the Walmart buyer on April 28, 2008 to inform Walmart of its intention to reduce the fill in its propane exchange tanks. Blue Rhino denies the remaining allegations in paragraph 38.

39. Blue Rhino admits that a senior Blue Rhino manager informed Blue Rhino production managers to “stand down” on implementation of the fill reduction, but denies the remaining allegations in paragraph 39, including but not limited to any implication that Blue Rhino actually “stood down” on the fill reduction. It did not.

40. The allegations in paragraph 40 are unintelligible and senseless (e.g., Blue

Rhino could not have “informed AmeriGas” of anything “[s]tarting with Blue Rhino’s [internal] communication plan in April 2008”). Blue Rhino denies the allegations in paragraph 40, including but not limited to any implied claim that Blue Rhino advised AmeriGas of its intention to reduce fill levels in April 2008.

41. Blue Rhino admits that “Blue Rhino proposed the fill reduction to Lowe’s,” its largest tank exchange customer, but denies that occurred on May 29, 2008. Blue Rhino admits that Lowe’s accepted the fill reduction, but otherwise denies the allegations in paragraph 41.

42. Blue Rhino admits that phone records produced by the FTC indicate that Blue Rhino’s President and AmeriGas’s Director of National Accounts called each other seven times on June 18, 2008 and June 19, 2008. Blue Rhino denies the remaining allegations in paragraph 42, including but not limited to any implication that the telephone calls lacked a legitimate, non-collusive business purpose.

43. Blue Rhino lacks sufficient knowledge to admit or deny the allegations in paragraph 43 and therefore denies them.

44. Blue Rhino denies the allegations contained in paragraph 44, which contradict earlier allegations in the Complaint.

45. Blue Rhino admits that “[a]fter learning that Blue Rhino planned to reduce the fill level of its exchange tanks, AmeriGas reconsidered its earlier decision,” if, but only if, the “earlier decision” refers to AmeriGas’ already-announced and implemented traditional price increase. Blue Rhino lacks sufficient knowledge to otherwise admit or deny the allegations in paragraph 45 and therefore denies them.

46. Blue Rhino denies the allegations in paragraph 46.

47. Blue Rhino denies the allegations in paragraph 47, including but not limited to

the implication that in June 2008 (the timeframe implied by paragraph 47) Lowe's had put any conditions on its acceptance of the fill reduction.

48. Blue Rhino denies the allegations in paragraph 48, including but not limited to (a) any contention that Blue Rhino could not "sustain" the fill reduction unless Walmart accepted it; (b) the implied contention that Blue Rhino and AmeriGas made some joint proposal ("their proposal") to Walmart, which they did not; (c) any contention that the parties agreed not to "deviate" from some course of action; or (d) any contention that the parties agreed to "push Walmart" in any respect.

49. Blue Rhino denies the "existence" of or any implication of "a united front" with AmeriGas. Blue Rhino lacks sufficient knowledge to admit or deny the remaining allegations in paragraph 49 and therefore denies them.

50. The allegations in paragraph 50 are unintelligible because it cannot be determined whether the claim is that the alleged communications are in aid of an agreement made on or before July 10, 2008, or at some later time during the alleged string of communications. In all events, Blue Rhino denies the allegations in paragraph 50.

- a. Blue Rhino denies the allegations in subparagraph a.
- b. Blue Rhino denies the allegations in subparagraph b.
- c. Blue Rhino denies the allegations in subparagraph c.
- d. Blue Rhino denies the allegations in subparagraph d.
- e. Blue Rhino denies the allegations in subparagraph e.
- f. Blue Rhino denies the allegations in subparagraph f.
- g. Blue Rhino denies the allegations in subparagraph g.
- h. Blue Rhino admits that phone records produced by the FTC indicate that



Blue Rhino's Vice President of Sales and AmeriGas's Director of National Accounts spoke by telephone on September 15 and September 22, 2008.

i. Blue Rhino denies the allegations in subparagraph i.

51. Blue Rhino admits that on October 6, 2008, it received emails from Lowe's complaining that Walmart continued to sell 17 pound tanks. Blue Rhino otherwise denies the allegations in paragraph 51.

52. Blue Rhino denies the allegations in paragraph 52.

53. Blue Rhino denies the allegations in paragraph 53.

54. Blue Rhino admits that it emailed Walmart on October 6, 2008, but denies the email contained—or was construed by Walmart to contain—any kind of demand. Blue Rhino denies the remaining allegations in paragraph 54.

55. Blue Rhino denies the allegations in paragraph 55.

56. Blue Rhino denies the allegations in paragraph 56.

57. Blue Rhino denies the allegations in paragraph 57.

58. Blue Rhino denies the allegations in paragraph 58.

59. Blue Rhino denies the allegations in paragraph 59.

60. Blue Rhino incorporates its responses to paragraphs 1-59.

61. Blue Rhino denies the allegations in paragraph 61. The Complaint concedes the fill reduction was independently conceived by Blue Rhino, and that AmeriGas followed based on its independent decision. There was no real threat that resistance by Walmart would cause the fill reduction to fail. Walmart signaled to Blue Rhino throughout the Summer of 2008 that it would accept the fill reduction after Labor Day and when Blue Rhino had satisfactorily resolved various logistical and legal issues. Walmart never made any efforts to

try to foil the fill reduction, for example by offering AmeriGas more business if it stayed at 17 pound tanks. Walmart's buyer has testified under oath to the reasons for Walmart's eventual decision to accept the fill reduction, and those reasons have nothing to do with being "pushed" by Blue Rhino and AmeriGas.

### ***AFFIRMATIVE DEFENSES***

#### **FIRST DEFENSE**

1. The Complaint fails to state a claim upon which relief can be granted.

#### **SECOND DEFENSE**

2. Neither the filing of this administrative action nor the contemplated relief are in the public interest, pursuant to § 15 U.S.C. 45.

#### **THIRD DEFENSE**

3. The alleged conduct has substantial pro-competitive justifications and benefits the consumers and the public interest.

#### **FOURTH DEFENSE**

4. The cause of action alleged in the Complaint is barred by mootness on its face, because the allegations stemmed from alleged conduct that ceased more than five years ago in October 2008 and the Complaint fails to allege any facts that this conduct is likely to recur.

## OTHER DEFENSES

5. Blue Rhino reserves the right to assert other defenses as discovery proceeds. Blue Rhino also reserves the right to adopt any affirmative defenses set forth by Respondent AmeriGas.

Ferrellgas, L.P. respectfully requests that the Administrative Law Judge (i) deny the FTC's contemplated relief, (ii) dismiss the Complaint in its entirety with prejudice, (iii) award Ferrellgas, L.P. its costs of suit, and (iv) award such other and further relief as the Administrative Law Judge may deem proper.

Dated: April 21, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

I also certify that I delivered via Federal Express overnight delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: April 21, 2014

By: s/ Jesse B. McKeithen  
Attorney