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.

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 prese

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