Statement of Commissioner Joshua D. Wright
Dissenting in Part and Concurring in Part

In the Matter of Dollar Tree, Inc.
and Family Dollar Stores, Inc.
FTC File No. 141 0207

July 13, 2015

The Commission has voted to issue a Complaint and a Decision & Order against Dollar Tree, Inc. ("Dollar Tree") and Family Dollar Stores, Inc. ("Family Dollar") to remedy the allegedly anticompetitive effects of the proposed acquisition by Dollar Tree of Family Dollar. I dissent

expected to result from transactions.[9] This approach would permit the identification of a gross-upward-pricing-pressure threshold that triggers additional scrutiny.[10]

Yet a third reason a safe harbor might be desirable is to compensate the well-known feature of GUPPI-based scoring methods to predict harm for any positive diversion ratio – that is, even for distant substitutes – by distinguishing de minimis GUPPI levels from those that warrant additional scrutiny.[11] The Merger Guidelines contemplate a "safe harbor" because it "reflects that a small amount of upward pricing pressure is unlikely . . . to correspond to any actual post-merger price increase."[12] Carl Shapiro explained shortly after adoption of the Merger Guidelines, on behalf of the Division, that "Current Division practice is to treat the value of diverted sales as proportionately small if it is no more than 5% of the lost revenues."[13]

Against these benefits of adopting a safe harbor [illegible]

Commission appears especially concerned that a GUPPI-based safe harbor might result in a false negative – that is, it is possible that a merger with a GUPPI less than 5 percent harms competition. This objection to safe harbors and bright-line rules and presumptions is both conceptually misguided and is in significant tension with antitrust doctrine and agency practice. Merger analysis is, of course, inherently fact specific. One can accept that reality, as well as the reality that evidence is both imperfect and can be costly to obtain, and

for example, the presumption that above-cost prices are lawful.[18] A GUPPI-based presumption would be based upon the same economic logic – not that small-GUPPI mergers can never result in anticompetitive effects, but rather that mergers involving small GUPPIs are sufficiently unlikely to result in unilateral price increases such that incurring the costs of identifying exceptions to the safe harbor is less efficient than simply allowing mergers within the safe harbor to move forward.[19]

Whether the Commission should adopt a GUPPI-based safe harbor is particularly relevant in the instant matter, as the FTC had data sufficient to calculate GUPPIs for Dollar Tree, Deals,[20] and Family Dollar stores. The sheer number of stores owned and operated by the parties rendered individualized, in-depth analysis of the competitive

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well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. Thus, despite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing, are economically justified, the courts have held them unlawful per se, concluding the administrative virtues of simplicity outweigh the occasional 'economic' loss."); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE PRINCIPLE AND EXECUTION 50 (2005) ("[N]ot every anticompetitive practice can be condemned."); Thomas A. Lambert, Book Review, Tweaking Antitrust's Business Model, 85 TEX. L. REV. 153, 172 (2006) ("Hovenkamp's discussion of predatory and limit pricing reflects a key theme that runs throughout The Antitrust Enterprise: that antitrust rules should be easily administrable, even if that means they must permit some anticompetitive practices to go unpunished.").

[18] See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993); see also Barry Wright Corp., 724 F.2d at 234 ("Conversely, we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition. . . . [A] price cut that ends up with a price exceeding total cost—in all likelihood a cut made by a firm with market power—is almost certainly moving price in the 'right' direction (towards the level that would be set in a competitive marketplace). The antitrust laws very rarely reject such 'birds in hand' for the sake of more speculative (future low-

nuances of each and every market difficult, if not impossible, to conduct. GUPPI calculations provided an efficient and workable alternative to identifying the small fraction of markets in which the transaction may be anticompetitive. This was a tremendous amount of work and I want to commend staff on taking this approach. Staff identified a GUPPI threshold such that stores with GUPPIs greater than the threshold were identified for divestiture. About half of the 330 stores divested as part of the Commission's Order were identified through this process.

What about the other stores? The Commission asserts I "mischaracterized" its use of GUPPIs and that "GUPPIs were not used as a rigid presumption of harm."[21] It claims that GUPPIs were used only as "an initial screen" to identify markets for further analysis, and that the Commission "proceeded to consider the results of the GUPPI analysis in conjunction with numerous other sources of information."[22] The evidence suggests

I applaud the FTC for taking important initial steps in applying more sophisticated economic tools in conducting merger analysis where the data are available to do so. Scoring metrics for evaluating incentives for unilateral price increases are no doubt a significant improvement over simply counting the number of firms in markets pre- and post-transaction. To be clear, it bears repeating that I agree that a GUPPI-based presumption of competitive harm is inappropriate at this stage of economic learning.[23] There is no empirical evidence to support the use of GUPPI calculations in merger analysis on a standalone basis, let alone the use of a particular GUPPI threshold to predict whether a transaction is likely to substantially harm competition.[24] I also agree that in the context of a full-scale evaluation of whether a proposed transaction is likely to harm competition, GUPPI-based analysis can and should be interpreted in conjunction with all other available quantitative and qualitative evidence. The relevant policy question is a narrow one:

Guidelines.[26] Moreover, the Commission's apparent discomfort with safe harbors on the grounds that they are not sufficiently flexible to take into account the fact-intensive nature of antitrust analysis in any specific matter is difficult to reconcile with its ready acceptance of presumptions and bright-line rules that trigger liability.[27]

Once it is understood that a safe harbor should apply, it becomes obvious that, for the safe harbor to be effective, the threshold should not move. As the plane crash survivors in LOST can attest, a harbor on an island that cannot be found and that can be moved at will is hardly "safe."[28]

In my view, the Commission should adopt a GUPPI-based safe harbor in unilateral effects investigations where data are available. While reasonable minds can and should debate the optimal definition of a "small" GUPPI, my own view is that 5 percent is a reasonable starting point for discussion. Furthermore, failure to adopt a safe harbor could raise concerns about the potential for divergence between Commission and Division policy in unilateral effects merger investigations.[29] What would be most

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[26] See supra text accompanying note 12.

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problematic, however, is if, rather than moving toward a GUPPI-based safe harbor, the FTC were to use GUPPI thresholds to employ a presumption of competitive harm.[30]

For these reasons, I dissent in part from and concur in part with the Commission's decision.

[30] A GUPPI-based safe harbor of the type endorsed by the Merger Guidelines implies a GUPPI above the threshold is necessary but not sufficient for liability. A GUPPI-based presumption of harm implies a GUPPI above the threshold is sufficient but not necessary for liability. Unfortunately, the use of GUPPIs