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 in part from and concur in part with the Commission's decision. I dissent in part because in 27 markets I disagree with the Commission's conclusion that there is reason to believe the proposed transaction violates the Clayton Act.

The record evidence includes a quantitative measure of the value of diverted sales as well as various forms of qualitative evidence. The value of diverted sales is typically measured as the product of the diversion ratio between the merging parties' products – the diversion ratio between two products is the percentage of unit sales lost by one product when its price rises, that are captured by the second product – and the profit margin of the second product. When the value of diverted sales is measured in proportion to "the lost revenues attributable to the reduction in unit sales resulting from the price increase,"[1] it is the "gross upward pricing pressure index," or "GUPPI." The GUPPI is an economic tool used to score or rank the incentives for potential unilateral price effects. In the markets where I depart from the Commission's decision the GUPPI is below 5 percent, indicating insignificant upward pricing pressure even before efficiencies or entry are taken into account, and weak incentives for unilateral price increases. In my view, the available quantitative and qualitative evidence are insufficient to support a reason to believe the proposed transaction will harm competition in these markets. I write separately to explain more fully the basis for my dissent in these markets.

I also write to address an important merger policy issue implicated by today's decision – that is, whether the FTC should adopt a safe harbor in unilateral effects merger investigations by defining a GUPPI threshold below which it is presumed competitive

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[1] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 n.11 (2010) [hereinafter MERGER GUIDELINES].

harm is unlikely. The *Merger Guidelines* clearly contemplate such a safe harbor. The *Merger Guidelines* explain that "[i]f the value of diverted sales is *proportionately small*, significant unilateral price effects are unlikely."[2] In other words, the *Merger Guidelines* recognize that if the GUPPI is small, significant unilateral price effects are unlikely.

Without more, one might reasonably conclude it is unclear whether the *Merger Guidelines* merely offer a truism about the relationship between the GUPPI and likely unilateral price effects or invite the agencies to take on the task of identifying a safe harbor of general applicability across cases. But there is more. A principal drafter of the *Merger Guidelines* has explained the *Merger Guidelines*' reference to a "proportionately small" value of diverted sales was intended to establish a GUPPI safe harbor. The Department of Justice's Antitrust Division ("Division"), consistent with this interpretation of the *Merger Guidelines*, publicly announced precisely such a safe harbor when the GUPPI is less than 5 percent.[3] Further, there is significant intellectual support for a GUPPI-based safe harbor among economists[4] – once again including the principal drafters of the *Merger Guidelines*.[5] The Commission, however, has rejected the safe harbor approach both in practice – indeed, the Commission has recently entered into another consent involving divestitures in markets with GUPPI scores below 5 percent[6] – and as a matter of the policy announced in the Commission's statement today.[7]

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[2] *Id.* § 6.1 (emphasis added); *see* Steven C. Salop, Serge X. Moresi & John Woodbury, CRA Competition Memo, Scoring Unilateral Effects with the GUPPI: The Approach of the New Horizontal Merger Guidelines 2 (Aug. 31, 2010), *available at* http://crai.com/sites/default/files/publications/Commentary-on-the-GUPPI_0.pdf.

[3] Carl Shapiro, Deputy Ass't Att'y Gen. for Econ., Antitrust Div., U.S. Dep't of Justice, Update from the Antitrust Division, Remarks as Prepared for the ABA Antitrust Law Fall Forum 24 (Nov. 18 2010).

[4] *See, e.g.*, Salop, Moresi & Woodbury, *supra* note 2, at 2 (explaining that "a GUPPI of less than 5% would be reasonably treated as evidence that 'the value of diverted sales is proportionately small' and hence that the proposed merger is unlikely to raise unilateral effects concerns").

[5] *See* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON. 1 (2010).

[6] *See* Cerberus Institutional Partners V, L.P., FTC File No. 141-0108 (July 2, 2015). There, though one could not possibly infer this from the public-facing documents in the case, the Commission applied a diversion ratio threshold to identify stores for divestiture. To be accurate, a GUPPI threshold could be implied from the Commission's analysis and, as algebraically mindful readers will note, setting a diversion ratio threshold given profit margin data and a predicted price increase is not analytically distinguishable from the analysis in this matter. The Commission rightly points out that I voted in favor of the consent in *Cerberus*. As to whether I am merely being inconsistent in my views on the role of GUPPIs in merger analysis or, alternatively, there is some other more reasonable explanation for my votes, I can provide the explanation and let readers decide. In *Cerberus*, I voted for the consent on the basis that the use of diversion or GUPPI-based analysis was a step forward relative to relying exclusively upon structural analysis. The

This is unfortunate. The legal, economic, and policy case for the GUPPI-based safe harbor contemplated by the *Merger Guidelines* is strong.[8] There are a number of reasons why such a safe harbor might be desirable as a matter of antitrust policy if sufficiently supported by economic theory and evidence. Efficient resource allocation – expending agency resources on the transactions most likely to raise serious competitive concerns and quickly dispensing with those that do not – is one such goal.

A second reason a safe harbor for proportionately small diversion might be desirable antitrust policy is to compensate for the sources of downward pricing pressure not measured by the GUPPI but expected with most transactions, including efficiencies, entry, or repositioning. Some have argued that – as a GUPPI attempts a rough measure of upward pricing pressure without a full blown analysis – a symmetrical approach would include a standard efficiencies deduction which would be applied to account for the downward pricing pressure from the marginal-cost efficiencies that can typically be

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fact that there were stores identified for divestiture with implied GUPPIs less than 5 percent was unique. It is now a trend reinforced by a Commission decision to reject a GUPPI-based safe harbor – a decision I do not believe is in the public interest.

Regarding *Cerberus*, it is worth pointing out further that even a careful reader of the public documents in that case would come away with the impression that the Commission's analysis was largely structural, and concluded a number of six-to-five mergers were presumptively anticompetitive. *See* Analysis of Agreement Containing Consent Order to Aid Public Comment Exhibit A, *id.* An ancillary benefit of the transparency reluctantly generated by today's Commission statement is that the antitrust community is now on notice that more sophisticated economic tools were used in that matter, how they were used, and that the potential structural policy change signaled by those public documents does not appear to describe accurately the Commission's complete analysis in that case.

[7] Statement of the Federal Trade Commission at 3, Dollar Tree, Inc., FTC File No. 141-0207 (July 13, 2015) [hereinafter Majority Statement] ("[A] GUPPI-based safe harbor is . . . inappropriate.").

[8] A second question is whether a presumption of competitive harm should follow, as a matter of economic theory and empirical evidence, from a demonstration of a GUPPI above a certain threshold value. There appears to be a consensus that the answer to this question, at this point, is no. I agree. *See, e.g.*, Thomas A. Lambert, *Respecting the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies* 13 (Heritage Foundation Legal Memorandum No. 144, Jan. 28, 2015) (the GUPPI "has not been empirically verified as a means of identifying anticompetitive mergers"); Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* 40-41 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1304/ ("The 2010 Merger Guidelines do not adopt an anticompetitive enforcement presumption based on high values of the GUPPI score. This was a practical policy decision at this time because the use of the *GUPPI* was new to much of the defense bar and the courts.").

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 GUPPI-based safe harbor, the Commission must weigh the cost of reducing its own flexibility and prosecutorial discretion. This begs the question: how likely are mergers within the proposed safe harbor to be anticompetitive? The benefits of this flexibility are proportional to the probability that the Commission's economic analysis leads them to conclude that mergers with a GUPPI of less than 5 percent are anticompetitive. I am not aware of any transactions since the *Merger Guidelines* were adopted other than the two already mentioned that meet these criteria. The domain in which flexibility would be reduced with adoption of a reasonable safe harbor is small and the costs of doing so correspondingly low.

The Commission rejects a GUPPI safe harbor on the grounds that such an approach "ignores the reality that merger analysis is inherently fact-specific."[14] The

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[9] Farrell & Shapiro, *supra* note 5, at 10-12.

[10] *See id.* at 12.

[11] James A. Keyte & Kenneth B. Schwartz, *"Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines*, 7 ANTITRUST L.J. 587, 628 (2010) ("an uncalibrated tool cannot have predictive value as a screen if it always indicates postmerger price pressure").

[12] Shapiro, *supra* note 3, at 24. Shapiro further cautioned that, although a GUPPI analysis "can be highly informative, the Agencies understand full well that measuring upward pricing pressure . . . typically is not the end of the story . . . . Repositioning, entry, innovation, and efficiencies must also be considered." *Id.* at 26.

[13] *Id.* at 24. Others have interpreted this speech as clearly announcing Division policy. *See* Salop, *supra* note 8, at 43 & n.105 ("In a speech while he was Deputy AAG, Carl Shapiro also specified a GUPPI safe harbor of 5%. As a speech by the Deputy AAG, this statement appeared to reflect DOJ policy." (citing Shapiro, *supra* note 3)). Other economists agree that a GUPPI safe harbor should apply. *E.g.*, Farrell & Shapiro, *supra* note 5, at 10; Salop, Moresi & Woodbury, *supra* note 2, at 2.

[14] Majority Statement, *supra* note 7, at 3.

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 yet still conclude that the optimal legal test from a consumer welfare perspective is a rule rather than a standard. This is a basic insight of decision theory, which provides a lens through which economists and legal scholars have long evaluated antitrust legal rules, burdens, and presumptions.[15] The Commission's assertion that the mere possibility of false negatives undermines in the slightest the case for a safe harbor reveals a misunderstanding of the economic analysis of legal rules. The relevant question is not which legal rule drives false positives or false negatives to zero, but rather which legal rule minimizes the sum of the welfare costs associated with false negatives, false positives, and the costs of obtaining evidence and otherwise administering the law.

Existing antitrust law regularly embraces bright-line rules and presumptions – rejecting the flexibility of a case-by-case standard taking full account of facts that vary across industries and firms. A simple example is the application of *per se* rules in price-fixing cases.[16] This presumption of illegality is not based upon a belief that it is impossible for a horizontal restraint among competitors to increase welfare. Rather, the *per se* prohibition on naked price fixing "reflects a judgment that the costs of identifying exceptions to the general rule so far outweigh the costs of occasionally condemning conduct that might upon further inspection prove to be acceptable, that it is preferable not to entertain defenses to the conduct at all."[17] Similar decision-theoretic logic explains,

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[15] *See, e.g.*, C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 27 (2005); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153 (2010).

[16] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979) ("More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on . . . whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.").

[17] Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 104-05 (2d ed. 2008); *see* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) ("Rules that seek to embody every economic complexity and qualification may

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-price) 'birds in the bush.' To do so opens the door to similar speculative claims that might seek to legitimate even the most settled unlawful practices.").

[19] The Commission asserts that a GUPPI safe harbor cannot be justified by economic theory and evidence unless a presumption of liability can also be supported. I appreciate the Commission clarifying its view, but I believe it to be based upon a false equivalence. The Commission appears to misunderstand the difference between evidence sufficient to conclude harm is *likely* and evidence sufficient to conclude harm is *unlikely*. These are two very different economic propositions and it should not be surprising that one might be substantiated while the other is not. For example, one might rationally be uncomfortable pointing to the economic literature for support that mergers above a certain level of concentration are sufficiently likely to harm competition to support a presumption of antitrust liability, but also recognize the same body of economic theory and evidence would indeed support a safe harbor for mergers involving markets with thousands of competitors. To the extent the Commission appeals to academics who have raised concerns with GUPPI-based merger screens, my view clearly differs from the Commission. The Commission's more important dispute, in my view, is with the *Merger Guidelines* and its principal drafters, who clearly contemplated such a safe harbor.

[20] Deals is a separate banner under which Dollar Tree operates. *See* Majority Statement, *supra* note 7, at 1.

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 "mischaracterize[]" 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 otherwise. One might reasonably hypothesize that further consideration and analysis of "numerous sources of information" should result in both the identification of some stores *above* the GUPPI threshold that were ultimately determined unlikely to harm competition as well as some stores with GUPPIs *below* the threshold that nonetheless did create competitive problems – that is, further scrutiny might reveal both false negatives and false positives.

The number of stores with GUPPIs exceeding the identified threshold that, after evaluation in conjunction with the qualitative and other evidence described by the Commission, were not slated for divestiture is nearly zero. This outcome is indistinguishable from the application of a presumption of competitive harm. The additional stores with GUPPIs below the threshold that were then identified for divestiture based upon additional qualitative factors included a significant number of stores with GUPPIs below 5 percent. The ratio of stores falling below the GUPPI threshold but deemed problematic after further qualitative evidence is taken into account to stores with GUPPIs above the threshold but deemed not to raise competitive problems after qualitative evidence is accounted for is unusual and remarkably high. It is difficult to conceive of a distribution of qualitative and other evidence occurring in real-world markets that would result in this ratio. Qualitative evidence should not be a one-way ratchet confirming the Commission's conclusion of likely anticompetitive effects when GUPPIs are high and providing an independent basis for the same conclusion when GUPPIs are low.

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[21] *Id.* at 2.
[22] *Id.*

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: whether there exists a GUPPI threshold below which the Commission should presumptively conclude a proposed transaction is unlikely to violate the antitrust laws.

The FTC has not publicly endorsed a GUPPI-based safe harbor of 5 percent and disappointingly, has rejected the concept in its statement today. The Commission's interpretation is that what is a "proportionately small" value of diverted sales should vary according to the industry – and even the individual firms – in a given investigation.[25] As discussed, I believe this interpretation contradicts the letter and spirit of the *Merger*

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[23] Joseph J. Simons & Malcolm B. Coate, *Upward Pressure on Price Analysis: Issues and Implications for Merger Policy*, 6 EUR. COMPETITION J. 377, 389 (2010) (the upward pricing pressure screen "identifies as potentially problematic far more mergers than would be challenged or even investigated under the enforcement standards that have existed for more than twenty years"); Lambert, *supra* note 8, at 13 ("In the end, the agencies' reliance on the difficult-to-administer, empirically unverified, and inherently biased GUPPI is likely to generate many false condemnations of mergers that are, on the whole, beneficial.").

[24] *See* Dennis W. Carlton, *Revising the Horizontal Merger Guidelines*, 10 J. COMPETITION L. & ECON. 1, 7 (2010) ("Perhaps most importantly, UPP [as described in the 2010 *Merger Guidelines*] is new and little empirical analysis has been performed to validate its predictive value in assessing the competitive effects of mergers."); Keyte & Schwartz, *supra* note 11, at 590 (discussing the 2010 *Merger Guidelines*' inclusion of the GUPPI and opining that "in light of the [its] extremely light judicial record, as well as the absence of demonstrated reliability in predicting real-world competitive effects, we think it is premature, at best, to embrace [it] as a screening tool for merger review"); Simons & Coate, *supra* note 23 ("Because screening mechanisms [such as the GUPPI] purport to highlight general results, they need empirical support to show the methodology actually predicts concerns relatively well. This empirical support is not available at this time."); Lambert, *supra* note 8, at 13 (the GUPPI "has not been empirically verified as a means of identifying anticompetitive mergers").

[25] Majority Statement, *supra* note 7, at 3.

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.

[27] For example, the Commission regularly applies such presumptions of liability involving the number of firms in a market, or presumptions based upon increased market concentration as articulated by the *Merger Guidelines* or the courts. *See, e.g.*, Statement of the Federal Trade Commission, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015) (finding liability based upon, alternatively, changes in concentration and number of firms pre- and post-merger); Statement of the Federal Trade Commission, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 8, 2015) (finding liability based upon number of firms pre- and post-merger); Mem. in Supp. of Pl. Federal Trade Commission's Mot. for T.R.O. and Prelim. Inj. at 23, FTC, v. Sysco Corp., 2015 WL 1501608, No. 1:15-cv-00256 (D.D.C. 2015) (arguing that the proposed merger was presumptively unlawful based upon the holding of *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963)). That the Commission's tolerance of presumptions that that satisfy its own *prima facie* burden does not extend to safe harbors raises basic questions about the symmetry of the burdens applied in its antitrust analysis. *See* Dissenting Statement of Commissioner Joshua D. Wright 6, Ardagh Group S.A., FTC File No. 131-0087 (June 18, 2014) ("[S]ymmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.").

[28] Move the Island, *LOST – Move the Island,* YOUTUBE (Nov. 17, 2008), https://www.youtube.com/watch?v=Fa57rVkLal4.

[29] I do not take a position as to how the Division currently uses the GUPPI analysis. *But see* Majority Statement, *supra* note 7, at 4 n.12. However, public statements by the Division and the Commission – the only sources upon which business firms and the antitrust bar can rely – suggest there are material differences. *Compare id.* at 3 ("[W]hether the value of diverted sales is considered 'proportionately small' compared to lost revenues will vary from industry to industry and firm to firm.") *with* Shapiro, *supra* note 3, at 24 ("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.").

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 here is more consistent with the latter than the former.