Concurring Statement of Commissioner Mozelle W. Thompson

RJ Reynolds Tobacco Holdings, Inc./British American Tobacco p.l.c.
File No. 041 0017

The Commission today voted to close its investigation of R.J. Reynolds Tobacco's ("RJR") merger with British American Tobacco's wholly owned subsidiary Brown & Williamson. I join in today's decision albeit with some reservation. I write separately today to share these concerns.

The proposed merger would combine the number two and number three manufacturers of cigarettes sold in the United States in a market dominated by four players. The combined company would have a market share of 30% of all cigarettes sold in the U.S. and over $10 billion in annual sales at the retail level. The top three competitors in the post-merger market will control somewhat below 90% of all cigarette sales in the United States.

Although I agree with most of what is contained in the statement issued by my colleagues, I hold a greater concern that the relevant market is susceptible to coordination than they have expressed. In addition to the high post-merger concentration levels, there is evidence that members of the Big Four in the past have reacted in parallel fashion to price increases by Philip Morris, and that failure to follow Philip Morris's lead in increasing price has led to disciplinary action.[1] This market history indicates to me that it may indeed be possible for market participants to reach, monitor, and enforce a hypothetical agreement as to price.

For this reason, I remain somewhat troubled about the possible effect of removing a Big Four competitor from a market with these conditions present. While Brown & Williamson's relative strength as a competitor may be subject to debate, some question remains in my mind as to whether the company indeed may have provided a destabilizing force.

I recognize that the market dynamics changed significantly in 1998 with the issuance of the Master Settlement Agreement, and that the Commission has not found persuasive evidence upon which the Commission could make a confident determination that the proposed merger is likely to facilitate coordination in the relevant market. Accordingly, I join the majority today in voting to close the investigation.

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[1]In particular, in 1993 Philip Morris drastically reduced the price of its leading "Marlboro" brand after fellow Big Four competitors failed to follow its price increases for its discount brands. This event, widely known as "Marlboro Friday", led to a $5 billion loss in industry profits. <u>See e.g.</u>, *Williamson Oil Co. v. Philip Morris*, 346 F.3d 1287, 1291-92 (11th Cir. 2003).