

Concurring Statement of Commissioner Mozelle W. Thompson

AmeriSource Health Corporation/Bergen Brunswick Corporation

File No. 011-0122

The Commission voted today to close the investigation of AmeriSource's merger with Bergen Brunswick. While I concurred in this decision, I remain concerned that this merger could harm consumers in the \$100 billion prescription drug wholesaling market.

Competition among drug wholesalers has brought efficiencies to the market and directly benefitted consumers. In fact, over the past 13 years, the Commission's successful challenges of three attempted mergers in this market have provided consumers significant cost savings through competition.¹ There is some risk that the AmeriSource/Bergen Brunswick merger could threaten those benefits.

Price coordination² among the remaining three similarly sized national firms could slow the ongoing decline in prices following the merger.³ Or some customers – especially those in the hospital and independent pharmacy segments where the merging parties are more significant distributors – might lose one of what otherwise would have been the two lowest bids for their business due to the combination of AmeriSource and Bergen Brunswick.

This case also poses a real challenge to the Commission in deciding whether the merger could actually provide a stronger third competitor that would offer benefits to consumers. For example, the antitrust agencies recognize that a timing advantage may constitute a cognizable efficiency.⁴ In this market, AmeriSource or Bergen Brunswick could become a stronger and more efficient third competitor through more aggressive competition and internal expansion; however, it might well take longer for consumers to benefit than if the two wholesalers combined their sales

¹ See *FTC v. Cardinal Health, Inc. et al.*, 12 F. Supp. 2d 34, 65 (D.D.C. 1998) (In the ten years following McKesson's abandoned acquisition of AmeriSource, "fierce competition among the four [national firms] has led to falling prices.").

² *Cf. Id.* at 65 (The court "is persuaded that in the event of a merger [among two of the four national competitors], the [remaining three national firms] would likely have an increased ability to coordinate their pricing practices.")

³ *Cf. Id.* at 64 ("The Court can only conclude . . . that the intended consolidations after the mergers would likely curb downward pricing pressures and adversely affect competition in the market.")

⁴ "If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency." U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* § 4 at n.35 (Issued April 2, 1992, Revised April 8, 1997).

volumes immediately.

In summary, the investigation has discovered many facts and the Commission has reviewed detailed analyses. Based on this information, I believe the question of whether anticompetitive or procompetitive effects would in fact result from this merger is exceedingly close. Forecasts about how well the market might ultimately perform with (as opposed to without) the merger, are not sufficiently developed to give me full comfort that the Commission is making the right call. While some could argue that it is possible that this merger would pass on to consumers benefits (*e.g.*, lower prices and/or better services) that outweigh any potential harm to competition, experience shows that such transactions occur infrequently and, based on the evidence in this case, I doubt that this merger will emerge as one of those rare white tigers.⁵

Notwithstanding my concerns, I do not believe that the Commission has uncovered sufficient evidence to sustain our burden of proof to challenge the transaction in a preliminary injunction case. Accordingly, I find it prudent to close the investigation at this time and allow the merger to pass.

⁵ In fact, the Commission's statement indicates that my colleagues did not conduct a weighing of efficiencies against effects because they believe that the evidence simply does not support the possible theories of anticompetitive harm.