

CONCURRING STATEMENT OF COMMISSIONER ORSON SWINDLE

in *Novartis Corp., et al.*, Dkt. No. 9279

...for a stay pending appeal, review of
IV of the Order. I have voted in favor of
separately to explain the differences
and those of the majority.

The Commission has granted Novartis's petition for the corrective advertising provision contained in Part IV of the Order. However, I am writing separately to explain the differences between my reasons for granting the petition and those of the majority.

When deciding whether to grant a stay, I consider: 1) the likelihood of the applicant's success on appeal; 2) whether the applicant will suffer irreparable harm if the stay is granted; 3) whether there are other factors that weigh in favor of or against the stay; and 4) whether the stay is in the public interest.

The Commission considers four factors when deciding whether to grant a stay: 1) the likelihood of the applicant's success on appeal; 2) whether the applicant will suffer irreparable harm if the stay is granted; 3) whether there are other factors that weigh in favor of or against the stay; and 4) whether the stay is in the public interest.

In this case, I will discuss each factor in turn. First, regarding the likelihood of success on appeal, the Commission has already ruled in *Novartis Corp., et al.*, Dkt. No. 9279, that the corrective advertising provision is valid. I am not aware of any authority that would suggest that the Commission's decision is likely to be reversed. Second, regarding irreparable harm, the Commission has already ruled that the corrective advertising provision is necessary to protect the public interest. I am not aware of any authority that would suggest that the Commission's decision is likely to be reversed. Third, regarding other factors, the Commission has already ruled that the corrective advertising provision is necessary to protect the public interest. I am not aware of any authority that would suggest that the Commission's decision is likely to be reversed. Fourth, regarding the public interest, the Commission has already ruled that the corrective advertising provision is necessary to protect the public interest. I am not aware of any authority that would suggest that the Commission's decision is likely to be reversed.

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therefore postponed, consumers are unlikely to suffer harm because there was insufficient

the majority, I do not believe that the record shows any lingering effect, it follows that there is no consumer injury if the Commission grants a stay. Finally, I conclude that the stay is in the public interest because it prevents a possible injury to consumers.

My determination that all four factors to be evaluated under Rule 37 of granting a stay is a logical outgrowth of the conclusions that I reached just ago in dissenting from the imposition of a corrective advertising requirement. I agree that the appropriate result there is to stay the corrective advertising portion

In contrast, the logical outgrowth of everything that the majority has

advertising requirement imposed with any evidence in the record.² Rather than rehash and belaboring these issues, however, I instead leave it to the Court of Appeals for the District of Columbia Circuit to determine whether the corrective advertising provision can be sustained notwithstanding these clear discrepancies.