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CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of SHAYCO, INC., dba ONTARIO VOLKSWAGEN, Protestant, v. VOLKSWAGEN OF AMERICA, INC., Respondent.	**Protest No. PR-2265-10** **PROPOSED DECISION FOLLOWING REMAND**

PROCEDURAL BACKGROUND

STATEMENT OF THE CASE

1. By letter dated July 30, 2010, Volkswagen of America, Inc. gave notice to Ontario Volkswagen pursuant to California Vehicle Code section 3062[1] of its intention to establish a new dealership in Montclair, California.[2] Ontario Volkswagen is the only Volkswagen franchisee located within the relevant market area ("RMA") of the proposed new dealer.[3] The location of the proposed

[1] Unless otherwise indicated, all statutory references are to the California Vehicle Code.
[2] On January 10, 2011, the parties submitted a Joint Stipulation of Facts. RT Jan. 10, pp. 57-58; Jt. Stip. Facts 2, 5.
[3] Written notice is required whenever a franchisor seeks to establish a new motor vehicle dealership if there is a dealership of the same line-make within a radius of 10 miles from the site of the proposed new location. (Sections 507 and 3062(a)(1)); Jt. Stip. Facts 4, 8.

dealership in Montclair is between 8.65 and 8.7 air miles from Protestant's current location.[4]

2. On August 13, 2010, Ontario Volkswagen filed a timely protest.[5]

3. A hearing on the merits of Protest No. PR- 2265-10 was held January 10 through January 14, 2011, and January 18 through January 20, 2011, before Administrative Law Judge Marybelle D. Archibald.

4. Following the submission of post-hearing briefs by the parties, the matter was submitted on April 19, 2011. Administrative Law Judge Archibald prepared a Proposed Decision, which was dated May 19, 2011.

5. At a General Meeting of the New Motor Vehicle Board ("Board") on May 26, 2011, the Public Members of the Board considered the Proposed Decision. Public comments were received by the Board from counsel for Protestant and Respondent.

6. Following consideration of the administrative record and Proposed Decision, the Board issued a Corrected Order Remanding the Proposed Decision Dated May 19, 2011, ("Remand Order") with the following instructions to the Administrative Law Judge ("ALJ"):

> 1. The ALJ shall consider the evidence in the record or reopen the record as may be necessary to make additional findings of fact concerning the effect on the retail motor vehicle business and the consuming public in the relevant market area only. (Veh. Code § 3063(b))
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> 2. The ALJ shall provide additional facts on the methodology used in concluding that Protestant made 19.4% of new Volkswagen sales from the Montclair PAI in 2009. (See Jt. Exh. 42, Tab 11, p. 5)
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> 3. The ALJ shall make a determination that (assuming hypothetically) there is a 19.4% reduction in Protestant's sales due to the establishment of the proposed dealer in Montclair, where, in terms of geography, will Protestant re-capture those lost sales? The focus should not be limited to new retail sales but should also consider used vehicle sales, as well as warranty and any other customer pay services.
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> 4. The ALJ shall have discretion to order additional evidence, briefing, and/or arguments.

7. Pursuant to the Board's Remand Order the parties were given the opportunity to "present declarations, exhibits, and joint exhibits to respond to the questions presented in the remand order and/or to update information presented in the original hearing which is relevant to the questions presented on

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[4] Jt. Stip. Fact 4.
[5] Jt. Stip. Fact 6.

remand".[6]

8. Following the submission of briefs and evidence by the parties, the matter was submitted on August 23, 2011. ALJ Archibald prepared a Proposed Decision Following Remand, which was dated September 15, 2011.

PARTIES AND COUNSEL

9. Protestant Shayco, Inc. dba Ontario Volkswagen (herein "Ontario VW" or "Protestant") is an authorized Volkswagen dealership located at 701 S. Kettering Drive, Ontario, California.[7] It is owned by Gary Sherman and his wife through a family trust, referred to as Shayco, Inc.[8] Protestant is a "franchisee" within the meaning of Sections 331.1 and 3062(a)(1).

10. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J. Flanagan, Esquire, and Gavin M. Hughes, Esquire, 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California.

11. Respondent Volkswagen of America, Inc. (herein "Volkswagen" or "Respondent") is a "franchisor" within the meaning of Sections 331.2 and 3062(a)(1).

12. Respondent is represented by Jeffer Mangels Butler & Mitchell LLP, by Allen Resnick, Esquire, and Ryan S. Mauck, Esquire, 1900 Avenue of the Stars, Seventh Floor, Los Angeles, California.

Protestant's Witnesses

13. Protestant called the following witnesses: Gary Sherman, dealer principal, Ontario Volkswagen; Earl Reed, General Manager, Ontario VW; Greg Bozzani, dealer principal and managing partner of SAI Auto Group, LLC, the operator of Bozzani Volkswagen in Covina; Howard Hawkins,

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[6] Order Regarding Pre-Hearing Matters on Remand, para. 9. The opportunity to "update information" was discussed in a June 28, 2011 telephone conference between the ALJ and counsel for the parties and referred to updating statistics, such as those relating to vehicle sales and service, and general economics and demographics.

To the extent that Protestant chose not to comply with the Remand Order and to disregard the Order Regarding Pre-Hearing Matters on Remand by rearguing issues outside the narrow scope of remand, those matters have not been considered by the ALJ.

[7] Jt. Stip. Fact 1; Jt. Exh. 36.

[8] RT Jan. 10, pp. 211 – 212.

Chief Financial Officer of the Metro Autogroup, Montclair, pursuant to Evidence Code section 776.[9] Protestant's expert witness was Joseph F. Roesner, Vice President, The Fontana Group.

14. Following remand, Protestant submitted declarations from Gary Sherman, Earl Reed, Greg Bozzani, Frederick E. Hitchcock, Jr., and Joseph F. Roesner.

Respondent's Witnesses

15. Respondent called the following witnesses: Tony Ray, General Manager of Dealer Network Development, Western Region, Volkswagen; Steve Mears, a Volkswagen employee who was previously Regional Director, Western Region, Volkswagen; Edward Starr, City Manager, City of Montclair; Marilyn Staats, Director of Redevelopment and Public Works, City of Montclair; Kurt Thomas, Regional Parts and Accessories Consultant, Western Region, Volkswagen; John Hawkins, dealer principal, Metro Honda, Montclair; Steven Smith, Sales Operations Manager, Area 52, Volkswagen. Respondent's expert witness was Sharif G. Farhat, Vice President of Expert Analytical Services, Urban Science Applications, Inc.

16. Following remand, Respondent submitted declarations from Anthony Ray, Kurt Thomas, and Sharif G. Farhat.

DEPOSITION TESTIMONY

17. Pursuant to a stipulation by the parties, deposition excerpts of the following deponents were admitted: Debbie Scheline, Business Manager, Shayco, Inc.; Jack Feely, Jr., Business Improvement Manager, Volkswagen; Ron Stach, General Manager of Sales, Western Region, Volkswagen.

EVIDENTIARY ISSUES

18. The parties offered over 100 exhibits at the January 2011 hearing, and all exhibits offered were admitted into evidence. Hearsay objections were raised to newspaper and journal articles; those objections were overruled.[10]

19. During the hearing, Respondent's motion for a protective order in regard to Joint Exhibit 55, an e-mail from Tony Ray to Howard Hawkins and the accompanying Letter of Intent, was granted.

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[9] Evidence Code section 776 permits a party to call as a witness a person associated with an adverse party and to examine the witness as if under cross-examination, i.e., to use leading questions in its direct examination.

[10] Exhibits were not offered in numerical order, and some pre-marked exhibits were not used. Several single exhibit numbers may contain many different, but related, documents.

During the hearing, Respondent's motion to expand the protective order to include testimony by Steve Mears concerning Bozzani Volkswagen, was granted.

20. No request was made by Protestant to continue the hearing for the purpose of reopening discovery or submitting additional testimony.[11]

21. On remand, hearsay exhibits have been admitted and have been given the appropriate weight.

22. On remand, the batch of documents received by the Board July 29, 2011 from Protestant characterized as "additional evidence Protestant reserves the right to use as an exhibit to its brief" and numbered OVWR 0000001 through OVWR 0000252 is not admitted.

23. On remand, the Declaration of Frederick E. Hitchcock, Jr. is not admitted. The Declaration is contrary to the Board's Remand Order and contrary to the ALJ's Order Regarding Pre-Hearing Matters on Remand. The Declaration is an attempt to fill an evidentiary gap noted in the original Proposed Decision and is not relevant to the issues on remand.

24. The Supplemental Declaration of Joseph F. Roesner On Remand dated August 31, 2011, and presented by Protestant to correct an alleged misstatement in Respondent's Reply Brief is not admitted, nor is the correspondence of counsel for Protestant and Respondent concerning this offer. The concept of "radius" as presented by Mr. Roesner and argued by Respondent does not require correction.

25. On remand, the ALJ requested clarification of the Supplemental Declaration of Anthony Ray on Remand due to a real estate advertisement in the August 29, 2011 issue of *Automotive News*. The Third Declaration of Anthony Ray on Remand was submitted, and it has been considered solely for its response to the ALJ's questions. Protestant's request to exclude the Third Declaration of Anthony Ray on Remand is denied. Protestant's request to submit additional evidence regarding the status of the Redlands and Victorville open points is denied, and the arguments of Protestant's counsel in correspondence have not been considered.

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[11] Protestant states that on the last day of the hearing it became aware of "falsely reported sales" which may have corrupted the standard for measuring performance of the RMA, as well as other geographic areas of analysis. Protestant contends that it was denied the opportunity to explore this behavior. (Prot. Post-Hearing Reply Brief, p. 2: 21-28)

ISSUE PRESENTED

26. The following issue is presented by this protest: Did Ontario VW, the only dealership within the 10 mile radius of the proposed establishment site, sustain its burden of proof of showing good cause to preclude Volkswagen from establishing a dealership in Montclair?

27. Under Section 3062(a)(1), when a timely protest has been filed, a franchisor is not permitted to establish the proposed motor vehicle dealership until a hearing has been held before the Board, nor thereafter if Protestant establishes at the hearing that there is good cause not to permit the establishment.

28. In determining whether there is good cause for not entering into an additional franchise for the same line-make, Section 3063 requires the New Motor Vehicle Board to take into consideration the existing circumstances, including, but not limited to, all of the following:

(a) Permanency of the investment.

(b) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(c) Whether it is injurious to the public welfare for an additional franchise to be established.

(d) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

29. This statutory scheme is evidence that the Legislature "intended that the Board balance the dealers' interest in maintaining viable businesses, the manufacturers' interest in promoting sales, and the public's interest in adequate competition and convenient service." *Piano v. State of California ex rel. New Motor Vehicle Board* (1980) 103 Cal.App.3d 412, 417.

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PROTESTANT'S CONTENTIONS

30. Protestant contends: the Inland Empire[12] is overdealered, cannot sustain an additional Volkswagen dealership, and the additional dealership would result in ruinous competition; Volkswagen's "lost opportunity" analysis is flawed, and the accuracy of sales figures is impacted by falsely reported sales; the Inland Empire economy has suffered a more adverse impact than California or the nation; the Metro Autogroup and Messrs. John and Howard Hawkins are not the right choice to operate the new Volkswagen dealership; Ontario VW has a substantial and permanent investment which will be negatively impacted by the new dealership; the RMA is already adequately served by existing dealers and the new dealership will not benefit consumers and will harm the public; and Volkswagen's new strategic plan to increase sales is "pie in the sky".

RESPONDENT'S CONTENTIONS

31. Respondent contends: the new dealership will have a positive impact on the retail motor vehicle business and the consuming public in the RMA; establishing a dealership in Montclair will benefit the public welfare; Ontario VW is not providing adequate competition and convenient customer care in the RMA; competition will increase with an additional dealership; and Ontario VW's investments in its Volkswagen dealership are not jeopardized by a new dealership in Montclair.

FINDINGS OF FACT[13]

PRELIMINARY FINDINGS

Volkswagen's Plans for Increasing Sales in the United States

32. Sales of Volkswagen vehicles in the United States in 2010 were 260,000 vehicles, but Volkswagen expects to sell double that number within two years and increase sales to 800,000 by 2018.[14] The newly appointed head of this campaign to increase sales in the United States is Mr. Jonathan

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[12] Witnesses used this term without defining the boundaries of its geographic area; as understood from the context of the testimony, "Inland Empire" refers to Riverside and San Bernardino counties.

[13] References to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding and are not intended to be all-inclusive. Transcripts of the proceedings are referred to by date. Deposition testimony is referred to by the deponent's name. References to "Exh." are to Joint, Protestant's, or Respondent's Exhibits. To distinguish them from exhibits from the hearing, exhibits on remand are so labeled.

Findings of Fact are organized under topical headings for readability only. They are not to be considered relative to only the particular topic under which they appear, but rather may apply to any of the good cause factors of Section 3063.

[14] RT Jan. 18, pp. 109 - 110; RT Jan. 19, p. 240; Stach Depo. pp. 34, 35, 38.

Browning, President and CEO of Volkswagen of America. Volkswagen has built a plant in Tennessee to produce a new Passat in 2011, designed and priced for the American market, which is expected to compete in the midsize sedan range with vehicles like Toyota's Camry.[15] Volkswagen also plans to introduce a new Jetta, the next generation new Beetle, and a new Touareg.[16]

33. Toyota, one of Volkswagen's primary competitive groups, sold 1.3 million new vehicles in 2010.[17] Volkswagen's primary competitive groups, in addition to Toyota, include Honda, Nissan, Mazda, Hyundai, and Subaru.[18]

34. A J.D. Powers measure of sales satisfaction for 2010 ranked Volkswagen 26th, which resulted in a motivational memo to dealers from Mr. Browning.[19] Volkswagen has 582 dealers in the United States.[20]

Volkswagen in the Western Region, California, and Area 52

35. Volkswagen has four geographic regions for administrative purposes, and the Western Region, which includes California, has approximately 130 dealers.[21] Those dealers are grouped in areas convenient for Volkswagen field teams to call upon.[22]

36. Ontario VW is part of Area 52, along with two other dealers in the Inland Empire: Riverside Volkswagen and Cardinale Way Volkswagen in Corona.[23] There are 10 Volkswagen dealers in Area 52, and the proposed Montclair dealership would also be in Area 52.[24]

37. The importance of highways and freeways in Area 52 cannot be overemphasized. The I-10 Freeway, which runs east-west through Area 52 and the northern area of Montclair, continues to the Pacific Ocean. Volkswagen is extraordinarily concerned that from Indio to Santa Monica, not one

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[15] RT Jan. 18, pp. 20-23; 107-108; Resp. Exh. 65.
[16] RT Jan. 20, p. 121.
[17] RT Jan. 18, pp. 109 -110.
[18] RT Jan. 19, pp. 10, 69; Jt. Exh. 44, App.11.
[19] Prot. Exh. 106.
[20] RT Jan. 18, pp. 20, 108 - 109. Testimony and exhibits reflecting the current number of dealers varies; however, 582 is the most specific.
[21] RT Jan. 13, p.110; RT Jan. 18, p. 13.
[22] RT Jan. 18, p. 13; RT Jan. 20, p. 116.
[23] RT Jan, 20, p. 126. Protestant's allegation on remand that two additional dealerships have been "appointed" in Riverside County is not supported by the evidence. Second Declaration of Earl Reed on Remand, para. 4, P Ex. R 24.
[24] RT Jan. 18, p. 43; RT Jan. 20, pp. 116, 126.

Volkswagen dealership is on the I-10 Freeway or visible from that freeway.[25]

38. Ontario VW is on the I-15 Freeway, which runs north-south.[26] The City of Ontario is crossed by the I-15 and I-10 Freeways and Highways 60 and 210.[27]

The Montclair Open Point

39. The City of Montclair is approximately 35 miles east of Los Angeles on the western edge of San Bernardino County.[28] The city is primarily south of the I-10 Freeway.[29] Most new car dealerships are south of the I-10 Freeway, toward the north end of town.[30]

40. When Urban Science Applications, Inc., a consulting firm employed by Volkswagen, determines that a geographical area needs additional Volkswagen representation, that location is placed on the "Open Point list".[31] Placing a location on the Open Point list does not guarantee that Volkswagen will actually decide to establish a dealership at that location, and the list changes yearly.[32]

41. Montclair was placed on the Open Point list in 2006.[33] Although the National Association of Minority Automobile Dealers was notified twice about the potential Montclair Open Point, and although Volkswagen had interest from a number of parties, Volkswagen did not declare the point open and begin to accept applications until 2010 because the issue of available real estate hampered interest.[34]

42. On August 26, 2009, Tony Ray and Steve Mears of Volkswagen met with Gary Sherman and Earl Reed of Ontario VW to discuss potential open points in Montclair, San Bernardino, and Redlands.[35] At this meeting Messrs. Ray and Mears displayed graphics which they described as "scenarios", with San Bernardino and Redlands as separate, but "technically not" open points.[36]

43. At this meeting, Mr. Sherman told Messrs. Ray and Mears there was no need for an

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[25] RT Jan. 18, pp. 82 - 83; RT Jan. 19, p. 14.
[26] Jt. Exh. 42, Tab 4, p. 2, incorporated herein as Attachment 1 ("Volkswagen Dealer Locations, Census Tracts Touching 10-Mile Ring Around Add Point").
[27] RT Jan. 19, p. 186.
[28] RT Jan. 19, p. 131.
[29] RT Jan. 19, p. 132.
[30] RT Jan. 19, p. 136.
[31] RT Jan. 18, p. 16.
[32] RT Jan. 18, p. 17.
[33] RT Jan. 18, p. 29.
[34] RT Jan. 18, p. 63; RT Jan. 19, pp. 110, 158.
[35] RT Jan. 10, p. 141; RT Jan. 19, p. 9.
[36] RT Jan. 11, p. 31; RT Jan. 18, p. 36; Prot. Exhs. 86, 87.

additional dealership in Montclair, and that San Bernardino and Redlands could not support two dealerships.[37] Mr. Reed confirmed that Mr. Sherman voiced his concern that establishing a Montclair dealership would be a mistake.[38] Volkswagen claims it first became aware of Mr. Sherman's concerns in an e-mail dated May 24, 2010, after Mr. Sherman learned he had not been awarded the Montclair point.[39] The testimony of Mr. Sherman and Mr. Reed is more credible.[40]

44. The region recommends to Volkswagen's corporate office when it is time to establish a point, declare it open, and begin accepting applications.[41] On November 17, 2009, Mr. Mears mentioned to Mr. Sherman that Montclair would quite possibly be declared an open point in early 2010, and that the application period would be open soon.[42]

45. Although Mr. Sherman testified that he believed an additional Volkswagen dealership in Montclair was not necessary, Mr. Reed encouraged him to apply for the point as a defensive measure.[43] Mr. Sherman agreed that it would be better to operate the Montclair dealership, even if he took a loss for a period, rather than to have some other dealer be selected for the point.

46. Mr. Sherman had previously operated new motor vehicle dealerships in Montclair, and Shayco, Inc. still owns the property where the former dealerships were located.[44] The property is on Central Avenue, probably the busiest traffic corridor in Montclair.[45] The property is about one mile from the I-10 Freeway; it is not visible from the Freeway.[46]

47. The City of Montclair's general plan does not provide for bringing automobile dealerships

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[37] RT Jan. 11, pp. 32, 42; RT Jan. 19, p.68. After that meeting, and hoping he could convince Volkswagen that only one point was needed between San Bernardino and Redlands, Mr. Sherman began negotiations to purchase a Hyundai dealership in Loma Linda, which is on the I-10 Freeway. RT Jan. 11, p. 53; RT Jan. 20, pp. 174 – 175. The negotiations for the Loma Linda site fell through, and Mr. Sherman learned later that Volkswagen had reviewed the "scenarios" and decided that only one open point, in Redlands, was necessary. RT Jan. 11, pp. 32 – 35.

[38] RT Jan. 10, pp. 139-140.

[39] Prot. Exh. 83.

[40] There would be no reason for Mr. Sherman to voice his opinion about San Bernardino and Redlands, but remain silent about Montclair. Prior to May 24, 2010, the parties engaged in numerous e-mail communications. Volkswagen argues that none of them contains an expression of Mr. Sherman's concern over any negative impact of a Montclair dealership. Jt. Exh. 19; Resp. Exhs. 8, 11. Mr. Sherman's explanation is quite plausible: he didn't want to "get in their face" since he was applying for the Montclair point as a defensive measure. RT Jan. 11, pp. 228 – 229.

[41] RT Jan. 19, pp. 70-71.

[42] RT Jan. 19, p. 72.

[43] RT Jan. 10, pp. 143-144; RT Jan. 11, p. 46.

[44] RT Jan. 11, p. 57.

[45] RT Jan. 19, p. 141.

[46] RT Jan. 19, p. 145.

back into the Central Avenue area.[47] Nevertheless, because Mr. Sherman had a good working relationship with the City of Montclair, it agreed to a proposal by which the City of Montclair would give credit against sales tax in the amount of $1,000,000 to permit Mr. Sherman to upgrade his vacant dealership into a new Volkswagen dealership.[48]

48. Mr. Sherman believed he could make the Montclair point work by cutting overhead in the two dealerships – for example, by sharing staff. When asked by Mr. Ray during a December 8, 2009, visit to the Central Avenue property, Mr. Sherman confirmed that he was confident that he could sell 1,000 units per year from that location.[49] Mr. Sherman assured Messrs. Ray and Mears that he could maintain superior sales and service, provide an above average sales penetration in his area of responsibility, and provide good management.[50] Mr. Sherman submitted an application to become the dealer at the Montclair Open Point.[51]

49. After Mr. Ray and Mr. Mears conducted their site visits to Mr. Sherman's Central Avenue location and compared it to the Metro Autogroup site, which is on the preferred I-10 Freeway, Mr. Mears instructed Mr. Ray to offer Mr. Sherman additional time to obtain a site which was visible from the I-10 Freeway with relatively close proximity to freeway access.[52] Mr. Sherman declined the offer of additional time.

50. Three applicants were considered by Volkswagen for the Montclair Open Point: Mr. Sherman; the Penske Group; and the Metro Autogroup. All three applications were evaluated on criteria including past performance, facility, diversity, and the all-important location.[53] The Western Region made a recommendation to select the Metro Autogroup.[54]

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[47] RT Jan. 19, p. 156.
[48] Jt. Exh. 41. Mr. Sherman met with City representatives in mid-August 2010 after he filed his Protest in this matter. He failed to advise them that he had not been selected as the dealer for the Montclair Open Point, and they believed a decision had not yet been made. RT Jan. 11, pp. 211 - 213; Resp. Exh. 26. Respondent argues that this lack of candor renders Mr. Sherman's testimony questionable. However, Mr. Sherman testified truthfully at the hearing: he conceded he had not been truthful but had an explanation (that although another dealer had been selected, he thought he still could change Volkswagen's mind). This event may have impacted his relationship with the City, but does not completely taint Mr. Sherman's testimony in this hearing.
[49] RT Jan. 18, pp. 53-54.
[50] Resp. Exh. 10.
[51] Jt. Stip. Fact 7; Prot. Exh. 72.
[52] RT Jan. 19, p. 28.
[53] RT Jan. 18, pp. 81; Jan. 19, p. 96; Prot. Exh. 66.
[54] RT Jan. 19, p. 12; Prot. Exh. 66.

51. Mr. Sherman testified that he knew that his location wasn't what Volkswagen wanted, and he knew he wasn't selected because Volkswagen wanted to be on the I-10 Freeway.[55] In spite of this acknowledgement, and in spite of his admission that Mr. John Hawkins is considered a good operator, Protestant attacked the selection process. This strategy does nothing to support Protestant's burden of proof that the Montclair Open Point should not be established.

52. Protestant criticized Messrs. John and Howard Hawkins because of their financial investment in Riverside Volkswagen. The Hawkins brothers' involvement in that dealership is purely financial, and they are not involved in the day-to-day management issues.[56] Protestant cites concerns by a Volkswagen field member, Mr. Feeney, expressed in 2009.[57] Mr. Feeney mentioned training, tools, and adherence to Volkswagen policies as ongoing problems. Both Hawkins brothers testified credibly that they were not made aware of Mr. Feeney's concerns. Moreover, Mr. Thomas, who filled in for Mr. Feeney from October 2010 to January 2011, testified that the concerns expressed in 2009 were not a current problem at the Riverside dealership.[58] Protestant unsuccessfully attempts to make the case that the Hawkins brothers should have fixed these problems in 2009, and since they did not, they will not be effective dealers in Montclair. Ontario VW, like most dealerships, has also had problems in the past which have been resolved.[59]

53. Protestant complains that Metro Autogroup would pool resources of the Montclair and Riverside dealerships, thereby giving those dealerships an economic advantage over Ontario VW. Mr. John Hawkins would not anticipate any combining of the dealerships.[60] This is an especially disingenuous attack, since Protestant planned to pool resources of the Ontario dealership and the Montclair dealership, thereby providing them with an economic advantage. In addition Mr. Sherman took steps to put himself in line for the Redlands point by negotiating for a site in Loma Linda. The Redlands point is still open; however, had Protestant been awarded the point, it would have been able to pool their resources with the Ontario dealership, again providing it with an economic advantage. It is

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[55] RT Jan. 11, pp. 57; 89-90.
[56] RT Jan. 20, pp. 11, 36, 91.
[57] Prot. Exh. 71.
[58] RT Jan. 19, p. 224.
[59] RT Jan. 19, p. 215.
[60] RT Jan. 10, pp. 148 - 149; RT Jan. 20, p. 12.

unclear why this approach is acceptable for Protestant, but unacceptable (although denied) by the Metro Autogroup.

54. Finally, Protestant contends that the Metro Autogroup will be unable to build the facility on the site it owns next to its Honda dealership in the Montclair Auto Mall. The testimony of both Hawkins brothers demonstrated their extensive experience in the automobile business with their various dealerships. They were confident they could work with Volkswagen to modify a proposed facility design, to deal with parking needs, and to deal with such issues as slope and water runoff, needs of the fire department, and city requirements.[61] To quell concerns that the Montclair dealership could open earlier than 2013 or 2014, Mr. Ray assured Protestant that Volkswagen would require a standalone facility to be completed – it would not permit the Metro Autogroup to open the dealership from a temporary facility or to dual with another line-make in the mall.[62]

55. Protestant presented no evidence that the selection process was defective or that the Metro Autogroup does not have the means and experience to operate the Montclair dealership.

The Expert Opinions

56. Mr. Farhat, the expert for Volkswagen, is Vice President of Expert Services, Urban Science Applications, Inc. ("Urban Science").[63] Urban Science is a consulting company which works with the automotive industry and other industries to offer business solutions.[64]

57. Urban Science assists its clients with "dealer network planning", which determines the appropriate number of dealerships, and the appropriate location of those dealerships, as well as the "measurement of the operations" of the dealerships.[65] Mr. Farhat performed an analysis of the Montclair RMA to determine if Volkswagen had adequate representation, whether the additional dealership was necessary, and what might be the impact on Ontario VW and the consuming public if the Montclair dealership is established.[66]

58. Protestant's expert, Mr. Roesner, is the President of the Fontana Group, a consulting

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[61] RT Jan. 20, pp. 28, 43, 101; Prot. Exh. 119.
[62] RT Jan. 10, p. 154 -156; RT Jan. 18, p. 96.
[63] RT Jan. 13, p. 79; Jt. Exh. 44, Statement of Education and Experience.
[64] RT Jan. 13, p. 73.
[65] RT Jan. 13, p. 74.
[66] RT Jan. 13, p. 82.

firm that specializes in the automobile industry.[67]

59. Mr. Roesner's analysis examined the location of dealers relative to opportunities for registrations, the number of dealers in a market, where the dealers are located, and whether there is sufficient opportunity for a dealer to make a profit.[68]

60. Both experts utilized much of the same data from the same sources: 2000 Census information, Volkswagen statistics, and data purchased from private specialists, such as Polk and Claritas.[69]

61. Volkswagen dealers are assigned Primary Areas of Influence ("PAI") which are geographical areas containing census tracts nearest each dealer, but not beyond 20 miles.[70] Each census tract has approximately 4,000 people.[71] Each PAI is unique to its dealer; the Ontario PAI will not change if the Montclair dealership is established.[72] Five PAIs are in the Riverside-San Bernardino market, an area defined by Volkswagen.[73]

62. The RMA is a statutory construct – a 10 mile radius from the proposed new dealership. The RMA may contain portions of several PAIs. The Montclair RMA contains portions of the PAIs of other dealers, including Ontario VW, Cardinale Way Volkswagen in Corona, Bozzani Volkswagen in Covina, and Puente Hills.[74]

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[67] RT Jan. 12, p. 5; Jt. Exh. 42, Tab 1, Statement of Education and Experience.

[68] RT Jan. 12, pp. 7– 8.

[69] RT Jan. 13, pp. 89 – 91. At the time of his testimony, Mr. Mears was a Volkswagen employee who had been removed from his position as Regional Director, Western Region in July 2010. Protestant attempts to discredit Mr. Mears's testimony by linking evidence of false reporting of car sales to his termination; although there is a temporal link, that is insufficient to totally discredit Mr. Mears's testimony.

Mr. Mears denied being involved in any scheme to falsely report cars. (RT Jan. 19, p. 127.) His denial is, in part, contradicted by the more credible testimony of Mr. Smith.

Mr. Smith explained that "punching cars" is slang for reporting vehicle sales. (RT Jan. 20, p. 131.) A report can be "false" if real retail sales have not been made. (RT Jan. 20, pp. 133 – 134.) In June 2010, the Western Region decided to capture incentive money by reporting a number of vehicles which had not actually been sold. (RT Jan. 20, p. 134.) Area 52 had less than 20 vehicles incorrectly or "falsely" reported, and some dealers were charged back for the incentive money when the car was actually sold. (RT Jan. 20, p. 135.)

Protestant's argument, that the "false reports" corrupt the analysis of Volkswagen, is not supported. As quickly as it removed Mr. Mears from his position, Volkswagen made corrections when vehicles were actually sold, according to Mr. Smith. Moreover, any "corruption" would impact Mr. Roesner's calculations also, since he indicated he utilized Volkswagen statistics.

[70] RT Jan. 12, pp. 28, 29.

[71] RT Jan. 12, p. 21.

[72] RT Jan. 13, p. 96.

[73] Jt. Exh. 44, p. A-1, incorporated herein as Attachment 2 ("CA, Riverside-San Bernardino, PAI Map").

[74] Jt. Exh. 44, p. A-5, incorporated herein as Attachment 3 ("CA, Riverside-San Bernardino, +10 Mile RMA Census Tracts"); Declaration of Joseph F. Roesner [on Remand], Tab 22, p. 1, incorporated herein as Attachment 4.

63. Both experts considered cross-sells, which tests where dealers make the most sales and where most customers buy.[75] Ontario VW, for example, makes most of its sales in the Riverside-San Bernardino market (397 of 597), but Bozzani Volkswagen only makes 20% of its sales in the market, leading Mr. Farhat to conclude that Bozzani is not part of the Riverside-San Bernardino market.[76] This analysis is based on actual data, and Mr. Farhat concludes that the Riverside-San Bernardino market as defined by Volkswagen is a valid market.[77]

64. In order to determine if the Volkswagen brand is being adequately represented in the Montclair RMA, Mr. Farhat compared the market share of Volkswagen in the RMA with the market share of Volkswagen in California. Mr. Roesner performed a similar analysis but used the Western Region of Volkswagen, which Mr. Farhat agrees is a more conservative standard.

65. Brand representation, or market penetration, is the ratio of Volkswagen sales compared to sales of the primary competitive group brands.[78] For every 100 sales nationally, Volkswagen sales are 6.61%. For every 100 sales in California, Volkswagen sales are 7.76%. For every 100 sales in the Western Region, Volkswagen sales are 7.80%.

66. Performance standards are adjusted for consumer preferences in the local market. Segmentation analysis adjusts for these differences by separating all new vehicles sold and registered in the marketplace into segments of like vehicles. Like vehicles refer to physical and performance characteristics, as well as consumer perception and are named by size, price and function. For example, the new Volkswagen Passat and the Toyota Camry are in the midsize sedan segment.[79]

67. Mr. Farhat disagrees with the opinion of Mr. Roesner concerning segmentation. Mr. Roesner is of the opinion that factors beyond statistical segmentation, such as income and ethnicity, may be depressing Volkswagen's performance in the Montclair RMA.[80]

68. Mr. Farhat analyzed income figures, and the median household income in the Riverside-

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[75] Jt. Exh. 42, Tab 11; Jt. Exh. 44, pp. A-3, A-4.
[76] RT Jan. 13, p. 100.
[77] RT Jan. 13, 108.
[78] Jt. Exh. 44, p. A-7. Volkswagen's primary competitive groups include Toyota, Honda, Nissan, Mazda, Hyundai, and Subaru.
[79] Jt. Exh. 44, p. A-9.
[80] RT Jan. 13, pp. 125-126.

San Bernardino market is $62,000. In the Riverside-San Bernardino market, registration effectiveness is only 74.5% of the expected registrations. Other markets, such as Sacramento and Murrieta, with comparable median household incomes perform better than Riverside-San Bernardino, so Mr. Farhat concluded that income was not the cause of inadequate Volkswagen sales.[81]

69. Ontario VW's PAI is 60% Hispanic, so Mr. Farhat reviewed Hispanic populations in California and determined that Hispanic ethnicity does not explain inadequate Volkswagen sales.[82] Other areas with significant populations of Hispanic ethnicity perform better.

70. The foreclosure rate in the Riverside-San Bernardino market is the fifth highest in California.[83] However, Mr. Farhat's analysis determined this was not the cause of inadequate Volkswagen sales because the seven other California markets with comparable foreclosure rates performed better than Riverside-San Bernardino (those seven markets with comparable foreclosure rates averaged 88% of the expected registrations; the Riverside-San Bernardino market was 74.5% of the expected registrations).[84]

71. If Volkswagen is not selling new vehicles at least at the expected average, other brands will take sales. The analysis of Volkswagen's performance, not only in the Montclair RMA, but also in the Riverside-San Bernardino market, as compared to California, reveals a significant shortfall.[85] Registration effectiveness in the Riverside-San Bernardino market is only 75%, meaning Volkswagen dealers in the Riverside-San Bernardino market are 25% below the average level of performance of California Volkswagen dealers. Mr. Farhat's analysis brought him to the conclusion that there is a shortfall in registrations in the RMA; therefore, Volkswagen is not adequately represented.[86]

72. The reasons why Volkswagen is not adequately represented may be explained because existing dealers have failed to capture opportunities for sales in the Montclair RMA. Factors which might explain this failure include the number of dealers, the location of those dealers, or the effectiveness of the dealer operations. As discussed above, Mr. Farhat eliminated income, Hispanic ethnicity, and

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[81] RT Jan. 13, pp. 129 – 130; Resp. Exh. 60, p. A-34.1; Resp. Exh. 61, App.103.1.
[82] RT Jan. 13, pp. 131 – 133; Resp. Exh. 60, pp. A-34.3, A-34.4.
[83] Resp. Exh. 61, App. 103.7; Jt. Exh. 43, Supp. Tab. 47, p. 8.
[84] RT Jan. 13, p. 134; Jt. Exh. 44, App.103.7.
[85] Jt. Exh. 44, pp. A-17, A-19, A-20.
[86] RT Jan. 13, p. 141.

foreclosure rates as explanations for these lost sales opportunities.

73. One reason for lost opportunities may be related to a high population which is exposed to brands other than Volkswagen. The Montclair auto mall houses several of Volkswagen's primary competitive groups, including Honda and Nissan, and a Toyota dealer is close by on the I-10 Freeway. The City of Montclair's population is 38,500 and is projected to increase in the immediate future to 40,000.[87] Between 1990 and 2010, the Riverside-San Bernardino market had a household increase of 208,000 households.[88] The Montclair RMA is projected to grow by 16,000 households in the next five years.[89] The Ontario PAI is projected to grow by 14,000 households by 2015.[90]

74. Another factor to review is employment.[91] Rather than study unemployment figures, it is more relevant to look at employment levels, since people who purchase cars are more likely to be employed. Employment levels are increasing, and the larger the labor force, the larger the sales opportunity.[92]

75. An additional factor to consider is median income. Median income for a Volkswagen buyer is $80,000.[93] A census tract has approximately 4,000 households. Although some census tracts in the Montclair PAI will have a median income of $50,000, for example, Mr. Farhat concludes that is not necessarily a bad indicator, because there will be some households in that census tract with higher incomes.[94] Mr. Roesner expressed concern because along the I-10 corridor in Montclair and Ontario, the median income level is less than $25,000, with a number of census tracts at $50,000 to $75,000.[95]

76. Mr. Farhat and Mr. Roesner agree that the automobile industry was down as much as 50% between 2008 and 2010, but the Volkswagen brand was able to hold its own in that economy.[96] As the automobile industry revives, Mr. Roesner suggests that Volkswagen will not gain as much as other

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[87] RT Jan. 19, pp. 132, 134.
[88] RT Jan. 13, pp. 146-148; Jt. Exh. 44, p. A-25. Households may be a better indicator of potential sales because members of households often pool their financial resources to purchase cars.
[89] Jt. Exh. 44, p. A-27.
[90] Jt. Exh. 44, p. A-29.
[91] Jt. Exh. 44, p. A-31. The data in this exhibit is for the county level.
[92] RT Jan. 13, p. 154.
[93] RT Jan. 13, p. 157.
[94] RT Jan. 13, p. 158; Jt. Exh. 44, pp. A-33 [Mr. Farhat indicated this should be labeled incomes between $30,000 and $80,000], A-34.
[95] RT Jan. 12, p. 43.
[96] RT Jan. 13, p. 162.

brands, because building a plant in Tennessee to produce a new Passat will not guarantee sales at the rate Volkswagen is projecting.[97] In addition, Mr. Roesner points out that other brands are actively seeking to increase market shares. On remand Mr. Roesner notes that Volkswagen's market share rose in 2011, in part because the earthquake in Japan made it difficult for Japanese brands to provide vehicles to the United States market; however, Mr. Roesner believes this gain is short term and will not continue once Japanese brands recover.[98] This is in contrast to Mr. Farhat, who is of the opinion that Volkswagen is in a position to gain as much, or more, by its ability to keep dealers and consumers interested in its products.[99]

77. Brand visibility, by having a Volkswagen dealer on the I-10 Freeway, would significantly increase both intrabrand and interbrand competition.[100] The proposed location for the Montclair dealership is in an auto mall which has Honda and other brands which are primary competitors of Volkswagen.

78. The next analysis by Mr. Farhat involved determining that there should be 3.9 Volkswagen dealers in the Riverside-San Bernardino market to meet or exceed the California represented average.[101] Mr. Roesner's analysis indicates 4.2 dealers are necessary.[102] Although both experts agree that four Volkswagen dealers in the Riverside-San Bernardino market would meet or exceed the California represented average, Mr. Roesner believes this is not the time to establish a new dealership in the market. Mr. Farhat emphasized that this is one indicator that there are not enough dealers in the market – some markets need more dealers than average based on distance and competition from other brands.[103] Protestant argues that 4 is an absolute maximum number permitted, and that the Redlands Open Point should be established before Montclair. Protestant contends that Mr. Farhat manipulated his analysis to conclude that Montclair was the optimal open point. This misstates Mr. Farhat's testimony,

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[97] RT Jan. 13, p. 163.
[98] Reply Declaration of Joseph F. Roesner on Remand, para. 3e.
[99] RT Jan. 13, p. 163; Jt. Exh. 44, p. A-40.
[100] Intrabrand competition is where dealers of the same line-make, i.e., Volkswagen, are competing with each other. (RT Jan. 12, p. 74) Interbrand competition is where dealers of a different line-make, such as Toyota and Honda are competing with each other. (RT Jan. 14, p. 111)
[101] Jt. Exh. 44, p. A-41.
[102] Jt. Exh. 43, Supp. Tab 44, p. 2.
[103] RT Jan. 13, p. 166.

and as he explained, the computer chooses the optimal point based on the point closest to consumers. The computer does not factor in the impact on proximity to primary competitive group brands. In Mr. Farhat's opinion, it is more important to capture lost opportunity in the Montclair RMA from other brands; thus, he recommended Montclair.[104]

79. If there are insufficient dealers, this results in inconvenience for customers and insufficient competition between and among Volkswagen dealers. Mr. Farhat concluded that it is likely that the Riverside-San Bernardino market needs another dealer. Mr. Roesner provides similar exhibits but reaches a different conclusion.[105] Mr. Roesner concludes that because there are a lot of Volkswagen sales in and around Montclair, this will significantly impact Ontario VW.

80. A dealer's ability to penetrate a market is influenced by the customer's distance from the dealer, or proximity. Mr. Roesner concludes that proximity is only one factor in analyzing the effectiveness of a dealer, but in his analysis it is quite important, for the closer the customer lives to a dealership, the more likely that customer is to visit.[106] Mr. Farhat's analysis indicates that Ontario VW obtains most of its sales from 0-4 miles from its dealership.[107] After 8 miles, for whatever reason (roads, competition from other brands) a dealer cannot be expected to reach a high level of penetration.[108]

81. Customer convenience can be determined by measuring the average distance to the nearest Volkswagen dealer, or alternatively, by measuring the average time it takes to drive that distance.[109]

82. In the Montclair PAI, the average distance to the nearest Volkswagen dealer is 8.2 miles.[110]

83. By contrast, the average distance to the nearest Honda dealer and the nearest Toyota dealer is 4.4 miles; to the nearest Nissan dealer 4.5 miles.[111]

84. Mr. Roesner provides drive time in minutes between the proposed Montclair dealer and

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[104] RT Jan. 13, p. 177; RT Jan. 14, pp. 85-89; Jt. Exh. 44, p. A-54.
[105] Jt. Exh. 43, Supp. Tab 44.
[106] RT Jan. 12, p. 32.
[107] Jt. Exh. 44, p. A-43.
[108] RT Jan. 13, p. 171.
[109] Jt. Exh. 42, Tab 7, p. 2; Jt. Exh. 44, p. A-51.
[110] Jt. Exh. 44, p. A-51.
[111] Jt. Exh. 44, p. A-51.

Ontario VW; it takes between 14.8 and 16.4 minutes depending on traffic.[112]

85. Mr. Farhat concludes that the market is too big, based on convenience for the customer, and another dealer is necessary. Mr. Roesner's analysis describes the loss of territory which will eliminate Ontario VW's proximity advantage, and he concludes that an additional dealership will negatively impact Ontario VW's performance.[113]

86. If there is to be another Volkswagen dealer, it is important to analyze the impact on other Volkswagen dealers and their viability. The reason another dealership is needed in the Riverside-San Bernardino market is to capture lost sales; it would be a waste of resources and time for Volkswagen to suggest the need for another dealer location if that would simply shift sales from one dealer to another.[114]

87. Ontario VW has been in business since 1995, and evidence establishes that it is a profitable and well-managed dealership. During the economic downturn that severely impacted the automobile industry, Mr. Sherman took steps to protect his dealership by lowering some wages and rent. In 2009 Mr. Sherman was able to take a salary and a $120,000 bonus.[115]

88. Mr. Roesner provided calculations of lost profits for Ontario VW should the Montclair dealership be established. The "Low Model" of lost net profit, before tax, would be $448, 909.[116] The "High Model" would be a loss of $727,100.[117] However, Mr. Roesner agrees that a "good" dealer -- one who manages well -- can have an impact on profitability. As to the "High Model" figure, Mr. Roesner conceded that this was a worst case scenario, not what he was predicting the impact would be.[118] Mr. Roesner's analysis of loss to Ontario VW is based upon actual data, and he declined to speculate on any sales numbers which might be increased due to the new Volkswagen campaign, which he labels "pie-in-the-sky". This analysis does not take into account any additional profit Ontario VW might make as a result of the new dealership, which, for example, would stimulate sales by increasing brand awareness on the I-10 Freeway, or by increasing advertising expenditures.

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[112] Jt. Exh. 42, Tab 7, p. 1.
[113] Jt. Exh. 42, Tab 44.
[114] RT Jan. 13, p. 179.
[115] Scheline Depo. pp. 51 – 52.
[116] Jt. Exh. 42, Tab 37, p. 2.
[117] Jt. Exh. 42, Tab 37, p. 1.
[118] RT Jan. 12, pp. 140 – 141.

89. The experts disagree on their interpretation of the "fixed pie" theory. The "pie" represents the available automobile business in a market. Each dealer in the market would have a piece of the pie, and each piece would be a different size, depending upon the dealer's sales in the market. If another dealer enters the market, because there are more dealers, each is likely to have a smaller piece of the pie.

90. Mr. Farhat does not believe that in the automobile industry the "pie" is fixed. He contends that the pie increases in size because new business is available (such as a new model, the new Passat), the brand is stimulated (by having a dealer with visibility on the I-10 Freeway), and households increase, providing more opportunity.[119] Mr. Farhat and Mr. Roesner agree that if a dealer's piece of the pie gets smaller when there is additional competition, that is because the dealer failed to capture as much of the new business as they would have without the new dealer.[120]

91. Mr. Farhat contends that Mr. Roesner's analysis is faulty because he acknowledges growth in opportunity will occur, but he does not take that growth into account in his analysis.[121] Mr. Roesner has said there is a possibility of some increase in available sales in the Riverside-San Bernardino market, particularly in the Montclair PAI; however, he does not agree with the level of increases suggested by Mr. Farhat.[122]

92. Mr. Roesner places heavy reliance on the situation with Puente Hills Volkswagen in the City of Industry and Bozzani Volkswagen in Covina to support his contention that the addition of a Montclair dealership will result in cannibalization of Ontario VW's sales. This reliance is misplaced.

93. In 2006, Puente Hills Volkswagen closed.[123] That closure permitted Bozzani Volkswagen to capture sales from the Puente Hills PAI. In January of 2010, Puente Hills reopened, which, according to Mr. Roesner, caused Bozzani's sales to decrease. Mr. Roesner analogized this set of facts with what he concludes will happen if a Montclair dealership is established: the Montclair dealership will take sales from Ontario VW in the same manner as Puente Hills took sales from Bozzani. What Mr. Roesner did not consider is that Bozzani is not in the Montclair RMA, it is not in an auto mall, is not on a freeway,

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[119] RT Jan. 14, p. 17.
[120] RT Jan 13, p. 70; RT Jan. 14, p. 7.
[121] RT Jan. 14, p. 6.
[122] RT Jan. 14, pp. 184-185.
[123] No competent evidence was provided by either party to explain why the dealer voluntarily terminated the franchise.

and it is not visible from the freeway.[124] Its situation is unlike either Ontario VW or the proposed Montclair point.

94. Mr. Roesner pointed out that there are many aspects which impact dealer effectiveness and competence, and there is a wide variation in how well individual dealers perform.[125] Mr. Bozzani testified that for the past two years he has not been concentrating on his Volkswagen dealership but rather on his Kia dealership, and this has affected his ability to be the best Volkswagen dealer.[126] Mr. Roesner did not take this into account in his report.[127]

95. Although several Volkswagen employees mentioned that Mr. Sherman had "lost focus" recently, Mr. Sherman has evidenced a concern for his dealership, and management at the dealership is considered good. It is unlikely that he would permit his focus to lapse for several years if the Montclair point were established.

96. The Puente Hills and Bozzani situation is sufficiently distinct from the proposed dealership in Montclair and Ontario VW; it does not compel a finding that Ontario VW's sales will actually be cannibalized by the proposed dealer in Montclair.

97. Following his analysis of the proposal to establish a Volkswagen dealership in Montclair, Mr. Roesner concluded that it is premature to add an additional dealer at this time[128] and although Volkswagen sales and registrations will increase in the next two to three years,[129] Volkswagen's plans to increase sales in the United States by the numbers it projects is "pie in the sky".[130] Volkswagen's enthusiastic plans to increase sales may be overly optimistic; however, the establishment of an additional Volkswagen dealership on the I-10 Freeway in an auto mall with several of Volkswagen's primary competitive group brands will increase brand awareness and stimulate sales.

98. Mr. Farhat concluded that there is sufficient lost opportunity to permit establishment of the Montclair dealership without subjecting Ontario VW to ruinous competition. Ontario VW is a viable,

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[124] RT Jan. 11, p. 146.
[125] RT Jan. 12, pp. 154 – 156.
[126] RT Jan. 11, p. 143.
[127] RT Jan. 12, p. 160.
[128] RT Jan. 12, pp. 118- 119; 143.
[129] RT Jan. 12, p. 152.
[130] RT Jan. 12, pp. 121; 123.

well-managed business and will remain so after the establishment of the Montclair dealership.

FINDINGS RELATING TO PERMANENCY OF INVESTMENT [SECTION 3063(a)]

99. Mr. Sherman has been a Volkswagen dealer since 1995.[131]

100. Ontario VW is located in the Ontario Auto Center, a mall which includes Volkswagen's primary competitive brands.[132]

101. In 2003, Mr. Sherman built a Market Place Facility, Type A.[133] The property is valued at $1 million. The value of the property, facility, fixtures, furniture, equipment, flooring, and money loaned by Mr. Sherman as operating capital is approximately $11 million.[134]

102. Ontario VW had 45 active employees in September 2010; due to a decline in the economy, this is a decrease from 53.[135] In 2009, in light of the decline in the economy, most employees were required to take a pay cut, and the amount of rent was dropped.[136] In 2009, the total salary for Mr. Sherman and Mr. Reed was $238,194, and Mr. Sherman's bonus was $120,000.[137] Mr. Sherman testified that he does not, at this time, take a salary.[138] Ontario VW has been able to adjust for the downturn in the economy, and now that the Riverside-San Bernardino economy is slowly recovering and the automobile industry is recovering, the business will remain viable.

103. Ontario VW's profit for 2008 was $193,800; for 2009, $328,000; estimated profit for 2010 is $230,000 to $240,000.[139] Mr. Sherman testified that the value of Ontario VW will drop dramatically if the Montclair dealership is opened under the management of someone other than Shayco, Inc.[140] Protestant's projection of lost profits does not substantiate either dramatic lost profits or loss in the value of Ontario VW if the Montclair dealership is established.

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[131] RT Jan. 10, pp. 198, 199.
[132] RT Jan. 10, pp. 198, 199; Jt. Exh. 44, p. A-6.
[133] RT Jan. 10, p. 199; Jt. Stip. Fact 3.
[134] RT Jan. 10, pp. 108, 212, 213.
[135] RT Jan. 10, p. 207.
[136] RT Jan. 10, p. 209; RT Jan. 11, p. 218. Shayco, Inc. receives $24,000.00 per month net profit on the lease. RT Jan. 11, p. 218.
[137] Scheline Depo. p. 51, 86.
[138] RT Jan. 11, p. 218.
[139] Jt. Exhs. 12, 14, 16.
[140] RT Jan. 11, p. 70.

FINDINGS RELATING TO EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC IN THE RELEVANT MARKET AREA [SECTION 3063(b)]

104. The RMA is an area in a 10 mile radius from the proposed new Montclair dealership. An RMA may contain portions of several PAIs, and the Montclair RMA contains portions of the Ontario VW PAI, the Cardinale Way Volkswagen PAI, the Bozzani Volkswagen PAI, and the Puente Hills Volkswagen PAI.[141]

105. Each Volkswagen dealer is assigned a unique Primary Area of Influence which is a geographical area containing census tracts nearest each dealer, but not beyond 20 miles.[142] Each census tract has approximately 4,000 people.[143]

106. PAIs don't belong to the assigned dealer - any Volkswagen dealer can sell to residents in any PAI. PAIs which are open and unassigned provide Volkswagen dealers, as well as dealers of other line-makes, with additional sales opportunities.

107. The Montclair Open Point has been unassigned since 2006.

108. If the Montclair dealership is established, it will take at least 2 years to complete its new facility.[144] Therefore, it will not be ready to operate before 2014.

109. The reason another dealership is needed in the Riverside-San Bernardino market is to capture lost sales; it would be a waste of resources and time for Volkswagen to suggest the need for another dealer location if that would simply shift sales from one dealer to another.[145]

110. While Protestant's expert agrees that another dealer is needed in the Riverside-San Bernardino market, he believes this is not the correct time.[146] Protestant continues to argue that the Inland Empire is "mired in a recession" and headed for a double-dip recession.[147] Protestant also notes that experts have lowered estimates for 2011, 2012, and 2013 automobile sales, citing among other

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[141] Attachment 3 to Proposed Decision Following Remand; Attachment 4 to Proposed Decision Following Remand [Declaration of Joseph F. Roesner [on Remand], Tab 22, page 1.
[142] RT Jan. 12, pp. 28, 29.
[143] RT Jan. 12, p. 21.
[144] RT Jan. 18, pp. 91, 161.
[145] RT Jan. 13, p. 179.
[146] RT Jan. 12, pp. 118-119; 143.
[147] Declaration of Earl Reed [on Remand], para. 8; Second Declaration of Earl Reed on Remand, para. 3.

factors, weak consumer confidence.[148]

111. The analysis of Volkswagen's performance, not only in the Montclair RMA, but also in the Riverside-San Bernardino market, as compared to California, reveals a significant shortfall.[149] Registration effectiveness in the Riverside-San Bernardino market is only 75%, meaning Volkswagen dealers in the Riverside-San Bernardino market are 25% below the average level of performance of California Volkswagen dealers.

112. Brand visibility, by having a Volkswagen dealer on the I-10 Freeway, would significantly increase both intrabrand and interbrand competition.[150]

113. The proposed location for the Montclair dealership is in an auto mall which has Honda and other brands which are primary competitors of Volkswagen. "Auto shopping areas" are becoming a nationwide industry standard; they allow customers to comparison shop in one place and provide exposure to vehicle brands.[151]

114. No adverse effect on the business in the Montclair Auto Mall or to the Toyota dealership in the RMA has been shown.

115. Volkswagen dealers whose PAIs are part of the Montclair RMA have made these sales recently:

NEW VOLKSWAGEN VEHICLE SALES INTO THE MONTCLAIR RMA[152]

YEAR	ONTARIO	CARDINALE	BOZZANI	PUENTE HILLS
2009	217[153]	54	124	Not open
2010	229	60	106	73

[148] Second Declaration of Earl Reed on Remand, para. 7, Exh. 22.
[149] Jt. Exh. 44, pp. A-17, A-19, A-20.
[150] Intrabrand competition is where dealers of the same line-make, i.e., Volkswagen, are competing with each other. (RT Jan. 12, p. 74) Interbrand competition is where dealers of a different line-make, such as Toyota and Honda are competing with each other. (RT Jan. 14, p. 111)
[151] RT Jan. 13, pp. 104 –105.
[152] Declaration of Joseph F. Roesner, Remand Report, para. 11, Tab 2, page 1.
[153] Ontario VW numbers differ slightly in JEX – Remand 1 ("Jt. Exh. – Remand 1"), which was prepared by the parties at the request of the ALJ. Jt. Exh. – Remand 1 is incorporated herein as Attachment 5 to the Proposed Decision Following Remand.

116. Experts for both parties agree that "in-sell", where sales are made by a dealer whose physical location is outside an area into that area, are to be expected.[154]

ONTARIO VW

117. Ontario VW contends that establishment of the Montclair dealership will mean it will go out of business. See the discussion below concerning the Board's hypothetical evaluating the effect of a Montclair dealership on Ontario VW.

BOZZANI VOLKSWAGEN

118. According to Greg Bozzani, Bozzani Volkswagen has captured a "significant amount" of business "in the Montclair market".[155]

119. In January 2011, Mr. Bozzani testified that he hadn't analyzed how a potential Montclair dealership would affect his dealership, but he thought it would have an adverse effect on sales, service and parts.[156] On remand, Mr. Bozzani indicates that in addition to the unspecified amount of lost business in the Montclair market, he is concerned about lost sales, service and parts in the Bozzani PAI.[157]

120. Bozzani Volkswagen depends upon sales into the Montclair RMA because it feels pressured by the new Puente Hills dealership.[158] [159]

121. Mr. Bozzani testified that for the past two years he has not been concentrating on his Volkswagen dealership but rather on his Kia dealership, and this has affected his ability to be the best Volkswagen dealer.[160]

122. If the Montclair dealership is established, there will be an increase in competition in the Montclair RMA and in the contiguous PAIs'. Bozzani Volkswagen, however, has the opportunity in the two years before the Montclair dealership opens to concentrate on its Volkswagen dealership, rather than

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[154] RT Jan. 14, p. 108; Declaration of Joseph F. Roesner [on Remand], para. 51.
[155] Declaration of Greg Bozzani [on Remand], para. 6.
[156] RT Jan. 11, p. 119-120.
[157] Declaration of Greg Bozzani [on Remand], para. 6.
[158] Declaration of Greg Bozzani [on Remand], para. 5.
[159] As discussed above, Mr. Roesner's opinion that Puente Hills is cannibalizing sales from Bozzani is rejected because he omitted a material fact in his analysis - Mr. Bozzani's admitted inability to be the best Volkswagen dealer. From this flawed example, Mr. Roesner concludes that a Montclair dealership will equally impact Ontario VW; as discussed above, this conclusion is rejected because unlike Mr. Bozzani, Mr. Sherman has not been distracted by his other dealership.
[160] RT Jan. 11, p. 143.

its Kia dealership, and rely less on the Montclair RMA to make sales, service vehicles, and sell parts.

PUENTE HILLS AND CARDINALE WAY

123. Neither of these dealerships appears to have relied upon the Montclair RMA for significant parts of their business. The effect of a Montclair dealership would increase competition and would likely result in in-sell into Puente Hills and Cardinale Way PAIs by the Montclair dealership. There is no evidence of any substantial negative effect on these dealerships.

EFFECT ON CONSUMING PUBLIC

124. The Montclair RMA is projected to grow by 16,000 households in the next five years.[161] The largest growth is anticipated on the west end of the Inland Empire around Montclair.[162]

125. The average distance in the RMA to a Volkswagen dealership is 8.2 miles; if the Montclair dealership is established 8.65 to 8.7 air miles away from Protestant, it will be reduced to 4.5 miles.[163]

126. The shortest surface route in miles between Ontario VW and the proposed Montclair dealership is 10 miles; the shortest surface route in minutes is 14.8 to 16.4 minutes.[164]

127. Consumers will have increased convenience with the establishment of an additional Volkswagen dealership, especially one located in a mall with many of Volkswagen's primary competitive groups.

HYPOTHETICAL

128. On remand, the Board posed this question: "([A]ssuming hypothetically) there is a 19.4% reduction in Protestant's sales due to the establishment of the proposed dealer in Montclair, where, in terms of geography, will Protestant re-capture those lost sales? The focus should not be limited to new retail sales but should also consider used vehicle sales, as well as warranty and any other customer pay services."

129. Evidence Code section 801(b) permits hypothetical questions to be posed to experts. "Generally, an expert may base an opinion on facts set forth in a hypothetical question that asks the

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[161] Jt. Exh. 44, p. A-27.
[162] RT Jan. 19, pp. 135-136.
[163] Jt. Exh. 44, p. A-51.
[164] Jt. Exh. 42, Tab. 7, pp. 1-2.

expert to assume the truth of those facts, as long as the hypothetical question is 'rooted in facts shown by the evidence.'"[165] [166]

130. The 19.4% sales number was part of an analysis by Joseph F. Roesner, Protestant's expert.[167] As part of its Remand Order, the Board requested "additional facts on the methodology used in concluding that Protestant made 19.4% of new Volkswagen sales from the Montclair PAI in 2009."

131. Mr. Roesner offered the following explanation in his Declaration:[168]

> 1. The following explains the methodology used in Tab 11 Page 5 of my December 2010 expert report (Jt. Exh. 42). The document at issue is titled "New Volkswagen Retail Car + Light Truck Buyer Behavior Report." It includes the Primary Areas of Influence ("PAIs"), and the dealers to which the PAIs are assigned, in the Riverside - San Bernardino plus fringe area, for the year 2009. This is the area for which we received census tract level data from Volkswagen.
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> 2. The document is arranged as a matrix with dealers listed in the first column of the document and PAIs listed in the first row of the document. The order of the dealers corresponds to the order of the PAIs. For example, the second dealer listed, Cardinale Way, is located in the second PAI listed, Corona. Similarly, the third dealer listed is located in the third PAI and so on. All PAIs were defined by Respondent Volkswagen of America ("VWoA"). In some cases, the PAIs are "open points" which means that there is no Volkswagen dealer located within the PAI. The fourth PAI, Montclair, is the open point in which VWoA is seeking to add a dealer. Thus, the fourth dealer listed is designated as the "Add Point" on the document.
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> 3. All data represent retail sales made by Volkswagen dealers. In any given row, the numbers represent sales made by the dealer listed into the areas listed in each column. For example, the Ontario row shows sales made by dealer Ontario. Since the document shows 16 in the City of Industry PAI column, it means that dealer Ontario made 16 sales to customers living in the City of Industry PAI. Following along down the row, dealer Ontario made 38 sales to customers living in the Corona PAI, and so on. The final column on the document, titled "Nationwide Sales," shows the number of sales made to customers living anywhere in the country including the PAIs listed previously. As shown, dealer Ontario made 597 sales in 2009.
>
> 4. To the right of each sales number is a percentage. This represents the percentage of the dealer's nationwide sales that were made in a given PAI. In the example above, dealer Ontario made 597 nationwide sales and 16 of those sales, or 2.7% (16 / 597 = 2.7%), were made to customers in the City of Industry PAI. Thus, in the Ontario row, to the right of the 16 sales in the City of Industry column, is 2.7%. Following down the row, the document shows that 116 of dealer Ontario's sales were made in the Montclair PAI, thus 19.4% is shown to the right of the number (116 / 597 = 19.4%).

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[165] 1 Jefferson, California Evidence Benchbook (4th ed. 2011), § 30.48, citing *People v. Boyette* (2002) 29 Cal. 4th 381, 449.

[166] If the Montclair dealership is approved, the earliest it would be operational is 2014. The experts have responded to the Board's question based upon the situation as it was in 2009, and they have utilized statistics and available facts to provide opinions and conclusions for 2010 and 2011. They are unable to factor in unforeseen events (such as an earthquake impacting delivery of vehicles).

[167] Jt. Exh. 42, Tab 11, p. 5.

[168] [First] Declaration of Joseph F. Roesner, para. 2-7.

5. There are also percentages listed below each sales number. These represent the percentage of all Volkswagens purchased by customers in the PAI that were bought at a given dealer. For example, as stated above, 116 customers in the Montclair PAI purchased Volkswagens from dealer Ontario. Moving down the Montclair PAI column, one sees that zero customers bought from dealer Antelope Valley, 12 customers bought from dealer Riverside, 65 customers bought from dealers not specifically listed (listed as "Other" in the dealer row), and finally one sees in the last row (called "Sum") that a total of 287 customers residing in the Montclair PAI purchased Volkswagens in 2009. Since 116 of the 287 customers bought their vehicle at dealer Ontario, there is a 40.4% shown below the number (116 / 287).

6. The methodology I employed to create this exhibit is widely used in the automotive industry. Indeed, the same numbers discussed above are found in page APP - 24 of Mr. Farhat's December 2010 expert report. That page, which is titled "RETAIL Buyer Behavior Summary Report," is arranged slightly differently but contains the same information, although for a smaller area.

GEOGRAPHY WHERE ONTARIO CAN RE-CAPTURE THE 19.4% SALES MADE IN THE MONTCLAIR PAI

132. The evidence is overwhelming that, assuming hypothetically, the Montclair dealership is established, Ontario VW, which in 2009 sold 19.4% of its new vehicles into the Montclair PAI, could re-capture those sales in the following geographical locations:

1. The Ontario PAI; and

2. The Riverside-San Bernardino market (excluding the Montclair PAI).

Year	Ontario VW Sales into Montclair PAI	Available Sales Opportunities in Ontario PAI	Available Sales Opportunities in Riverside-San Bernardino (excluding Montclair PAI)
2009[169]	116	146 net loss method 155 gross loss method	431 net loss method 534 gross loss method
2010[170]	126	186 net loss method 191 gross loss method	468 net loss method 562 gross loss method
2011 (annualized)[171]	136	164 net loss method 208 gross loss method	496 net loss method 828 gross loss method

133. Shortfall is the difference between the number of expected registrations at California average market share and the actual registrations that occurred. Shortfall represents the additional sales

[169] Declaration of Sharif Farhat on Remand, R Ex. - Remand 1, which is incorporated herein as Attachment 6 to this Proposed Decision Following Remand.
[170] Declaration of Sharif Farhat on Remand, Remand – 2.
[171] Declaration of Sharif Farhat on Remand, Remand – 3.

opportunities, including those lost to other brands due to poor Volkswagen representation.[172]

134. Measuring shortfall by either the net loss or the gross loss methodology does not affect the conclusion that there is more than sufficient shortfall for Ontario VW to re-capture the Montclair PAI sales.[173]

135. Based upon 2009 sales and expected registrations, and using net loss, the Ontario PAI had 146 additional sales opportunities for Ontario VW to use to offset the hypothetical loss of 116 sales it made into the Montclair PAI.[174]

136. Based upon 2009 sales and expected registrations, and using gross loss, the Ontario PAI had 155 additional sales opportunities for Ontario VW to use to offset the hypothetical loss of 116 sales it made into the Montclair PAI.[175]

137. Shortfall in the Riverside-San Bernardino market, excluding the Montclair PAI, reveals an overwhelming number of opportunities for Ontario VW to re-capture the 116 sales it made into the Montclair PAI. Using the net loss method, there would have been 431 opportunities, and using the gross loss method, there would have been 534 opportunities in 2009.[176]

138. The same analysis for 2010 and 2011 reached the same conclusion: there are more than enough sales opportunities in Ontario VW's own PAI, and in the Riverside-San Bernardino market, excluding the Montclair PAI, to cover the loss of 126 sales made in 2010 into the Montclair PAI, and to cover the loss of 136 projected sales in 2011.[177]

139. Ontario VW has spent 15 years working to establish the Montclair PAI as part of its market, it depends on that market, and it contends that if the Montclair dealership is established, Ontario VW suffer serious financial peril.[178] Mr. Roesner, Protestant's expert, concludes that if the Montclair open point is filled, and either the Victorville or Redlands point is filled, Ontario VW's business will

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[172] Declaration of Sharif Farhat on Remand, para. 8.
[173] Declaration of Sharif Farhat on Remand, para. 9.
[174] Declaration of Sharif Farhat on Remand, para. 10, para. 11; Attachment 6 to the Proposed Decision Following Remand.
[175] Declaration of Sharif Farhat on Remand, para. 10, para. 11; Attachment 6.
[176] Declaration of Sharif Farhat on Remand, para. 10, para. 11; Attachment 6.
[177] Declaration of Sharif Farhat on Remand, para. 10, para. 12, para. 13; R. Ex. – Remand 2; R. Ex. – Remand 3.
[178] Jan. 11 RT, p. 77; Declaration of Gary Sherman [on Remand], para. 2, Exh. A.

decrease by more than 50%, and it will have no future opportunity to capture lost sales.[179] Therefore, Protestant argues, the Board should not permit the Montclair open point to be filled, and especially because Ontario VW will not have protest rights if the Victorville open point is filled or the Redlands open point is filled.

140. Using Protestant's logic, a franchisor would be precluded from filling an open point simply because a dealer who has sold into that open point PAI for many years files a protest. This does not meet the balancing test of *Piano v. State of California, supra.*

141. Mr. Farhat concludes that for new vehicle sales, used vehicle sales, and service business, there is more than enough opportunity in Ontario's own PAI to re-capture any loss that might occur if the Montclair dealership is established.[180]

142. In addition, Ontario VW continues to have opportunities in the remainder of the Riverside-San Bernardino market, excluding the Montclair PAI.[181]

143. Victorville is an open point.[182] Volkswagen has withdrawn its Letter of Intent with a candidate for the Victorville open point.[183] No other candidate for the Victorville open point has been identified.[184]

144. Redlands is also an open point.[185] At this time there is no candidate to fill the Redlands open point.[186] [187]

145. Protestant contends that it consistently outperforms the market and has such a high performance level that there are no areas to substantially improve to make up for the lost sales in the Montclair PAI.[188] However, Protestant's own evidence of that performance is to the contrary: from January 1, 2010 to December 31, 2010, Ontario sold 162 vehicles in its own PAI, or 56.6% of sales in the

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[179] Declaration of Joseph F. Roesner [on Remand] para. 7 (d), (e), and (f); Roesner Remand Report, para. 40, para. 41.
[180] Declaration of Sharif Farhat on Remand, para. 5, para. 14; Exhs. Remand -1 through Remand – 9.
[181] Declaration of Sharif Farhat on Remand, para. 14.
[182] Supplemental Declaration of Anthony Ray on Remand, para. 2.
[183] Supplemental Declaration of Anthony Ray on Remand, para. 2.
[184] Supplemental Declaration of Anthony Ray on Remand, para. 2.
[185] Supplemental Declaration of Anthony Ray on Remand, para. 3.
[186] Supplemental Declaration of Anthony Ray on Remand, para. 3.
[187] The opinion of Protestant's expert, Mr. Roesner, that there is a large probability that Volkswagen will fill the Victorville and Redlands open points simply because Ontario VW will not have standing to file a protest, is rejected; there is no evidence in the record to support this opinion. Roesner Remand Report, para. 57.
[188] Declaration of Earl Reed [on Remand], para. 11.

PAI, and other dealers sold 124 vehicles in the Ontario PAI, or 43.4%.[189]

146. Protestant argues such performance is due to its location in an industrial area. However, the Ontario Auto Center, where Ontario VW is located, is a destination auto mall that includes many of Volkswagen's primary competitive group dealers. It is one of the largest auto malls in the Riverside-San Bernardino market and sells more vehicles than the Redlands/Loma Linda and Montclair/Claremont auto malls combined.[190]

147. On remand, Mr. Roesner offers another reason to support Protestant's position: the coast v. inland area theory. Mr. Roesner opines that the coastal dealerships in California have higher average sales because the surrounding population has more education, which results in technology-related and white collar professional careers.[191] Inland dealerships have lower average sales because they are surrounded by a population which is less educated and holds blue collar jobs.[192] Mr. Roesner's conclusion that it is "obvious" that people on the coast are more likely to buy a Volkswagen than those in the interior of California is entitled to little weight, as it is unsupported in the record.

148. The number of new Volkswagen vehicles sold in the United States in 2010 represented a 20.3% increase over Volkswagen vehicles sold in 2009.[193] In the Western Region, in which Ontario VW and the Montclair open point are included, sales of new Volkswagen vehicles in 2010 represented a 29.7% increase over sales in 2009.[194]

149. Mr. Farhat and Mr. Roesner have differing opinions on the projected growth of Volkswagen sales. Mr. Farhat and Mr. Ray foresee increasing growth in volume, especially with the introduction of the redesigned Passat and redesigned Beetle. Mr. Roesner notes that recent Volkswagen growth can be attributed to the results of the earthquake in Japan; the lack of Toyota, Honda, and other

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[189] Declaration of Earl Reed [on Remand], Exh. 13; *see also* Jt. Exh. – Remand – 1 which is Attachment 5 to this Proposed Decision Following Remand.
[190] Supplemental Declaration of Sharif Farhat on Remand, para. 11; R. Ex –Remand 2, pp. 5 and 6.
[191] Roesner Remand Report, para. 45, Tab 16, p. 1.
[192] Roesner Remand Report, para. 45, Tab 16, p. 1.
[193] Declaration of Anthony Ray on Remand, para. 2.
[194] Declaration of Anthony Ray on Remand, para. 2.

Asian brand inventory enabled Volkswagen and other manufacturers to increase sales.[195] Mr. Roesner projects that Volkswagen sales will drop once the Asian markets have recovered.

SERVICE

150. If the Montclair dealership is approved, and assuming there are no further legal challenges, it would normally take 2 years to build the facility and open the dealership; therefore, changes in the service business most likely will not occur before 2014.

151. However, Mr. Sherman testified that it would take more than 2 years and perhaps as long as 4 to 5 years for a new dealership to come up to speed on service business.[196] Therefore, at the earliest, the Montclair dealership would take until 2016 to provide an adequate level of service and compete with Ontario VW.

152. Units in operation ("UIOs") refer to the number of Volkswagen vehicles still operating on the road, and UIOs may indicate the potential for service and parts needs.

153. Mr. Farhat analyzed the service business performed by Ontario VW in the Ontario PAI and elsewhere in the Riverside-San Bernardino market (excluding the Montclair RMA) during 2009 and 2010, and he concluded that customers tended to have their vehicles serviced at non-Volkswagen dealerships. Therefore, there are more than sufficient service opportunities in the Ontario PAI and the Riverside-San Bernardino market to offset the amount of service business Ontario VW does in the Montclair RMA.[197]

154. Future growth may also provide additional service opportunities, either through industry growth or through an increase in Volkswagen market share.[198] As Volkswagen sales increase, this will increase the number of UIOs which are available for dealers to service.[199]

155. According to Mr. Sherman, Ontario VW would lose 20-30% of its service business, and there is not sufficient service business for both Ontario VW and a Montclair dealership.[200] From July 1,

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[195] Reply Declaration of Joseph F. Roesner, para. 3a, 3b, 3c, 3d, and 3e.
[196] RT Jan. 11, p. 220.
[197] Declaration of Sharif Farhat on Remand, para. 24, 25, 26, 27, 28, Exhs. Remand 7, Remand 8, Remand 9.
[198] Declaration of Sharif Farhat on Remand, para. 38, Exhs. Remand 12, Remand 13.
[199] Declaration of Sharif Farhat on Remand, para. 38; Exhs. Remand 10, Remand 11, Remand 12, Remand 13.
[200] RT Jan. 10, p. 67; RT Jan. 11, p. 221.

2009 to June 30, 2011, Ontario VW's service market share was 39.3%.[201] This service market share is a measure of customer loyalty, and Volkswagen's goal for dealers is to be at or above 50%.

156. Mr. Sherman agrees that his dealership has the capacity to double its service business, and he attributes the drop off in service business to the economy.[202]

157. Recently, Ontario VW has not been effectively utilizing Volkswagen tools to market its service business. Service customers are requested to provide their email addresses so that Customer Experience Surveys may be sent to them, and so that Volkswagen and the individual dealer can market service business with coupons and other incentives to bring the customer into the dealership.[203]

158. Customers may "unsubscribe" to the email marketing themselves, or the dealer may unsubscribe a customer at his or her request. The nationwide unsubscribe rate from February 2011 to June 2011 is 4.68% compared to Ontario VW's unsubscribe rate of 58.88%.[204]

159. Over half of Ontario VW's customers have not been receiving marketing information which might encourage them to return to the dealership, and Mr. Sherman has agreed to have his staff trained to remedy this problem.[205]

160. Ontario VW has the opportunity within its PAI and within its organization to increase its service business to compensate for any loss from the proposed Montclair dealership.

USED VOLKSWAGENS

161. There are two types of used Volkswagen vehicles: 1) Certified Pre-Owned ("CPO"); and 2) other used Volkswagens.

162. Any Montclair dealership would not be operational before 2014.

163. Ontario VW does a lot of used car business in the Montclair PAI, and Protestant contends that establishment of the Montclair dealership will have an impact on those sales.[206]

164. Competition for used Volkswagen vehicles is intense. This is especially true since 2010,

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[201] Declaration of Earl Reed [on Remand], para. 6.
[202] RT Jan. 10, p. 102.
[203] Declaration of Kurt Thomas on Remand, para. 2.
[204] Declaration of Kurt Thomas on Remand, para. 7, para. 8, R. Ex – Remand Thomas – 1.
[205] Declaration of Kurt Thomas, para. 10, para. 11.
[206] RT Jan. 10, p. 101.

when Volkswagen changed its incentive program for CPOs, spurring some dealers to increase participation in the program.[207]

165. Volkswagen dealers receive monthly sales objectives for CPOs and for used Volkswagens.[208]

166. Competition is active, but there is no shortage of lease returns, which have a 3 year cycle of coming back into the market.[209]

167. Increased sales of new Volkswagens to current owners of Volkswagens would add to the Volkswagen used vehicle inventory. Increased sales will depend, in part, on the success of the redesigned Passat, Beetle, and Touareg.

168. Ontario VW has the opportunity to capture used vehicles sales now made by non-Volkswagen dealers.[210]

169. In 2009, Ontario VW sold 156 CPOs: 31 in the Montclair PAI, 45 in the Ontario PAI, and 88 in the Riverside-San Bernardino market, excluding Montclair.[211]

170. In 2009, Ontario VW sold 41 used vehicles in the Montclair PAI, and non-Volkswagen dealers sold 88 used Volkswagens in the Ontario PAI; 542 used Volkswagens were sold by non-Volkswagen dealers in the Riverside-San Bernardino market, excluding Montclair.[212]

WHOLESALE PARTS

171. In addition to parts sold to customers and as component of its service business, Ontario VW has a wholesale parts business. The Montclair PAI is more proximate to a significant number of Ontario VW's wholesale parts customers.[213]

172. A Montclair dealership would impact Ontario VW's wholesale parts business: Ontario VW would not lose all business in the Montclair PAI, but it would not maintain all its customers.[214]

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[207] RT Jan. 10, pp. 80-87; Prot. Exh. 103.
[208] RT Jan. 10, pp. 80-87.
[209] RT Jan. 10, p. 88.
[210] Declaration of Sharif Farhat on Remand, para. 15; Exhs. Remand - 4, Remand - 5, Remand - 6.
[211] Declaration of Sharif Farhat on Remand, para. 16; Exh. Remand – 4.
[212] Declaration of Sharif Farhat on Remand, para. 20.
[213] Roesner Remand Report, para. 39, Tab 12.
[214] Roesner Remand Report, para. 39, Tab 12.

FINDINGS RELATING TO WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN ADDITIONAL FRANCHISE TO BE ESTABLISHED [Section 3063(c)]

173. The Ontario Auto Center is a destination point.[215] Ontario is a distinct retail market from Montclair, distinguished by its outlet mall.[216]

174. Montclair's retail shops generally draw primarily from the north, and also from the west, and a little from the east and south.[217] A Volkswagen dealership in Montclair would minimize travel time for consumers and increase Volkswagen competition with its primary competitive group brands.

175. The Inland Empire is still in a depressed economic climate but has seen slight recovery.[218] A new Volkswagen dealership, anticipated to take two years to get up and running, will provide construction jobs and initially 35 jobs at the dealership, as well as new revenue for the City of Montclair.

176. No evidence leads to the conclusion that the establishment of a Volkswagen dealership in Montclair will be injurious to the public welfare.

FINDINGS RELATING TO WHETHER FRANCHISEE OF THE SAME LINE-MAKE IN THE RELEVANT MARKET AREA IS PROVIDING ADEQUATE COMPETITION AND CONVENIENT CONSUMER CARE FOR VOLKSWAGEN VEHICLES IN THE MARKET AREA, INCLUDING ADEQUATE SALES AND SERVICE FACILITIES, EQUIPMENT, SUPPLY OF PARTS, AND QUALIFIED SERVICE PERSONNEL [SECTION 3063(d)]

177. Ontario VW is a good dealership which is well-managed and does a good job serving its customer base.[219] In 2009, Ontario VW increased sales 5% over 2008, when Area 52 was down by 4%.[220] In 2010, Area 52 increased sales almost 24% over 2009; Ontario VW was up only 10%.[221]

178. There is no reason to believe that Volkswagen sales would be affected by unemployment and foreclosure statistics any differently than the primary competitive brands.[222]

179. Mr. Reed, the General Manager of Ontario VW, testified that Volkswagen never counseled the dealership to increase its sales.[223] Mr. Reed testified that sales into the Montclair area are a

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[215] RT Jan. 11, p. 43.
[216] RT Jan. 19, pp. 175-183.
[217] RT Jan. 19, pp. 138, 194.
[218] RT Jan. 19, pp. 201-202.
[219] RT Jan. 20, pp. 127, 144, 148, 154, 161.
[220] RT Jan. 20, pp. 120, 188.
[221] RT Jan. 20, pp. 128, 129.
[222] RT Jan. 20, 128 –129.
[223] RT Jan. 10, pp. 68, 71.

significant source of business for Ontario VW.[224] In 2008, Ontario sold 110 units into the proposed Montclair PAI; in 2009, it sold 116 units.[225] While the Montclair PAI has been open and not assigned to any dealer, Ontario VW has been able to sell into that area. However, in 2009 its sales were only 61.66% of expected sales, so Ontario VW has the opportunity to reach 100% or more of expected sales.[226]

180. In support of its contention that it has provided adequate sales and service in the RMA, Ontario VW points to being named as a Generation Best award winner in 2009. The Generation Best award was given to 63 of Volkswagen's 582 dealers in the United States.[227] The process was created, monitored, and administered by a Volkswagen marketing firm.[228] The 63 dealers named were only required to meet minimum Volkswagen standards.[229] Volkswagen representatives conceded that as a Generation Best dealer, Ontario VW was in an elite category.[230]

181. Ontario VW takes pride in winning the Octagon Award in the third quarter of 2009 and being tied for top honors in the fourth quarter of 2009.[231] This award is competitive within Area 52 and tracks eight standards of performance for Volkswagen dealers.

182. In spite of winning the Generation Best award and the Octagon Award in 2009, Ontario VW made only 61.66% of expected sales.[232] Winning awards for minimum or better performance is laudable, but there is always room for improvement.

183. The distance between Volkswagen dealers is not convenient.

184. Ontario VW has a more than adequate sales facility. A new Market Place facility was constructed with all necessary conveniences for customers. Mr. Reed testified that he did not recall that Volkswagen had ever counseled Ontario VW concerning sales satisfaction.[233] In October 2010, Ontario

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[224] RT Jan. 10, p. 74.
[225] Prot. Exh. 95 at 226, 228.
[226] Jt. Exh. 42, Tab 10, p. 4.
[227] RT Jan. 19, pp. 241, 249.
[228] RT Jan. 10, p. 167; RT Jan. 20, p. 123.
[229] RT Jan. 20, pp. 140, 141.
[230] RT Jan. 19, pp. 241, 249; Prot. Exh. 53.
[231] RT Jan. 10, p. 109; Prot. Exh. 2.
[232] Jt. Exh. 42, Tab 10, p. 4. Riverside Volkswagen, which did not win the Generation Best award, sold 80.98% of its expected sales. *Ibid.* Mr. Roesner could not explain, from an operational standpoint, why neighboring dealerships had such diverse results. RT Jan. 12, p. 161.
[233] RT Jan. 10, pp. 77 - 78.

VW ranked at 96% of the sales satisfaction index.[234]

185. Ontario VW has an adequate service facility with 18 service bays.[235] Service work was reduced due to the economic downturn, but the dealership has the capacity to perform 50% more service work. Ontario VW had insufficient parking for customers who would be leaving their vehicles for service.[236]

186. The dealership has invested in adequate specialized equipment necessary for work on Volkswagen automobiles.

187. Currently storage for parts is sufficient but Ontario VW would need a larger inventory of parts with space for storage in the future.[237]

188. There is no shortage of technicians qualified to work on Volkswagen vehicles.[238] Volkswagen requires a minimum of 70% of a dealership's technicians, service, and sales staff to be certified as Volkswagen trained.[239] Volkswagen offers web-based training as well as training at Volkswagen learning centers.[240]

189. Universal Technical Institute conducted a program for training Volkswagen technicians, but this program ended in 2010.[241] A new "fast track" training program was scheduled to begin in 2011.[242]

190. Due to the decline in service business, Ontario VW had lost technicians, but there is no evidence that Ontario VW does not have sufficient trained technicians.[243]

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[234] Prot. Exh. 25.
[235] RT Jan. 10, p. 103.
[236] RT Jan. 19, pp. 215, 243.
[237] RT Jan. 19, pp. 215, 241.
[238] RT Jan. 19, pp. 205, 233. Mr. Sherman expressed concern that a new Montclair dealership would hire quality technicians away from Ontario VW, thus leaving the dealership with insufficient trained technicians. Mr. John Hawkins explained that his preference is to staff a new dealership with employees from his organization and train them to Volkswagen standards. RT Jan. 20, pp. 20-21.
[239] RT Jan. 19, p. 223.
[240] RT Jan. 19, pp. 210, 212.
[241] RT Jan. 10, p. 107; RT Jan. 19, p. 205.
[242] RT Jan. 19, p. 208.
[243] RT Jan. 10, p. 62.

FINDINGS RELATING TO WHETHER THE ESTABLISHMENT OF AN ADDITIONAL FRANCHISE WOULD INCREASE COMPETITION AND THEREFORE BE IN THE PUBLIC INTEREST [SECTION 3063(e)]

191. Ontario VW must show that any negative impact upon it, caused by the proposed establishment of a Montclair dealership, outweighs the benefits to the consuming public from increased competition.

192. Volkswagen underperforms in the Montclair RMA and establishing a Volkswagen dealership in the Montclair auto mall in a new facility would benefit Volkswagen. The brand would be visible on the high-traffic I-10 Freeway in a location where several of Volkswagen's primary competitive groups are also located.[244] This would generate interest in the Volkswagen brand and promote sales. However, Volkswagen's interests must be balanced against Ontario VW's interests in maintaining a viable business, as well as public interest in adequate competition and convenient service.

193. Projected sales for the Montclair Open Point were set at 571 for 2011; 764 for 2012; 1,057 for 2013.[245] Placing a dealer in an auto mall or on the freeway would increase sales.[246] There is sufficient lost opportunity in the RMA to support the new dealership and keep Ontario VW's sales at average or better levels of effectiveness.

194. Protestant could avail itself of the expertise of Mr. Feely, Jr., the Volkswagen Business Improvement Manager, for assistance with any perceived profitability issues.[247]

ANALYSIS

PERMANENCY OF THE INVESTMENT [VEHICLE CODE SECTION 3063(a)]

195. Protestant Ontario VW has established permanency of its investment because it is a dealer with longevity, has constructed a Market Place facility in 2003 at substantial cost, and expended the financial outlays required over the years to modernize and maintain the dealership's building and equipment. Metro Autogroup has established permanency of its investment because the Hawkins brothers have over twenty years of experience in the automobile industry, Metro Autogroup owns property next to its Honda dealership in the Montclair auto mall which is available for a

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[244] RT Jan. 13, p. 107.
[245] Jt. Exh. 24.
[246] RT Jan. 11, pp. 146- 147.
[247] Feely Depo, pp. 10, 11.

Volkswagen dealership, and it is anticipated that four to five million dollars will be expended to prepare the property and to build a facility to Volkswagen standards.[248]

EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC IN THE RELEVANT MARKET AREA [VEHICLE CODE SECTION 3063(b)]

196. The Volkswagen brand has inadequate representation in the Montclair RMA. The addition of a Volkswagen dealer in an auto mall in Montclair housing several of Volkswagen's primary competitive group brands would stimulate competition. The consumer would benefit by having a shorter drive time and distance to reach a Volkswagen dealer, and by having the convenience of a dealer on the I-10 Freeway.

197. Ontario has retained, for an extended period, a geographical advantage: with the Montclair, Victorville, and Redlands open points not yet filled, Ontario has been able to sell into those areas in significant numbers. At the earliest, assuming establishment of the Montclair point is approved, Ontario still would not have competition for sales from a Montclair dealer until 2014 and would not have service competition from a Montclair dealer until 2016. The evidence is compelling that Ontario VW's own PAI has sufficient untapped sales and service to make up for any loss of business to a new Montclair dealer.

WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN ADDITIONAL FRANCHISE TO BE ESTABLISHED [VEHICLE CODE SECTION 3063(c)]

198. Protestant has failed to establish that it is injurious to the public welfare to establish a new dealership in Montclair.

WHETHER THE VOLKSWAGEN FRANCHISEE IS PROVIDING ADEQUATE COMPETITION AND CONVENIENT CONSUMER CARE FOR VOLKSWAGEN VEHICLES IN THE RELEVANT MARKET AREA, WHICH SHALL INCLUDE THE ADEQUACY OF MOTOR VEHICLE SALES AND SERVICE FACILITIES, EQUIPMENT, SUPPLY OF VEHICLE PARTS, AND QUALIFIED SERVICE PERSONNEL [VEHICLE CODE SECTION 3063(d)]

199. There are insufficient dealers in the Riverside-San Bernardino market, and establishing a new dealership in Montclair will provide additional competition for sales and convenience for customers.

200. Ontario VW's sales and service facilities were built in 2003, and they are more than

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[248] RT Jan. 20, pp. 15-17, 46, 99; Prot. Exh. 119.

adequate to provide adequate consumer care. Ontario VW has invested in the specialized equipment necessary to servicing Volkswagens. The dealership's supply of vehicle parts and storage is currently adequate. Ontario VW has sufficient qualified service technicians.

WHETHER THE ESTABLISHMENT OF AN ADDITIONAL DEALERSHIP WOULD INCREASE COMPETITION AND THEREFORE BE IN THE PUBLIC INTEREST [VEHICLE CODE SECTION 3063(e)]

201. There is available opportunity to achieve average performance, and there is no basis to conclude a negative impact on existing dealers, especially Ontario VW.

202. Protestant decries the ruinous impact upon it if the Montclair dealership is established, and states that it is just a matter of time before it goes out of business.[249] But it is imperative to remember the discrepancy between the Mr. Sherman who argues that Montclair will destroy Ontario VW, and the Mr. Sherman who confirmed to Volkswagen that he could make a Montclair dealership as good as Ontario VW.

203. Ontario VW is profitable and considered to have good management. Mr. Roesner's dramatic numbers of "loss" are not absolute proof of lost sales. A Montclair dealership and Ontario VW will be able to compete and be profitable.

DETERMINATION OF ISSUES

204. Protestant has sustained its burden of proof of establishing the permanency of its investment. [Section 3063(a)]

205. Protestant has not sustained its burden of proof of showing an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area. [Section 3063(b)]

206. Protestant has not proved that it would be injurious to the public welfare for the Montclair dealership to be established. [Section 3063(c)]

207. Protestant has not sustained its burden of proof of establishing that there is adequate competition and convenient consumer care in terms of sales and distance. Protestant has sustained its burden of proof of showing its adequacy of sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel are adequate. [Section 3063(d)]

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[249] Jt. Exh. 42, Tab 37, pp. 1, 2.

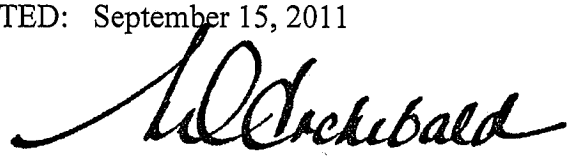
208. Protestant has not sustained its burden of proof of proving that competition would not increase if the establishment was allowed and the public interest would therefore not be served. [Section 3063(e)]

PROPOSED DECISION FOLLOWING REMAND

Protest No. PR-2265-10 is overruled. Protestant Ontario VW has not met its burden of proof under Vehicle Code section 3066(b) that there is good cause not to establish a Volkswagen dealership in Montclair. Respondent Volkswagen of America, Inc. shall be permitted to proceed with the establishment of the new franchise at the proposed location in Montclair.

I hereby submit the foregoing which constitutes my Proposed Decision Following Remand in the above-entitled matter, as the result of a hearing before me, and I recommend this Proposed Decision Following Remand be adopted as the decision of the New Motor Vehicle Board.

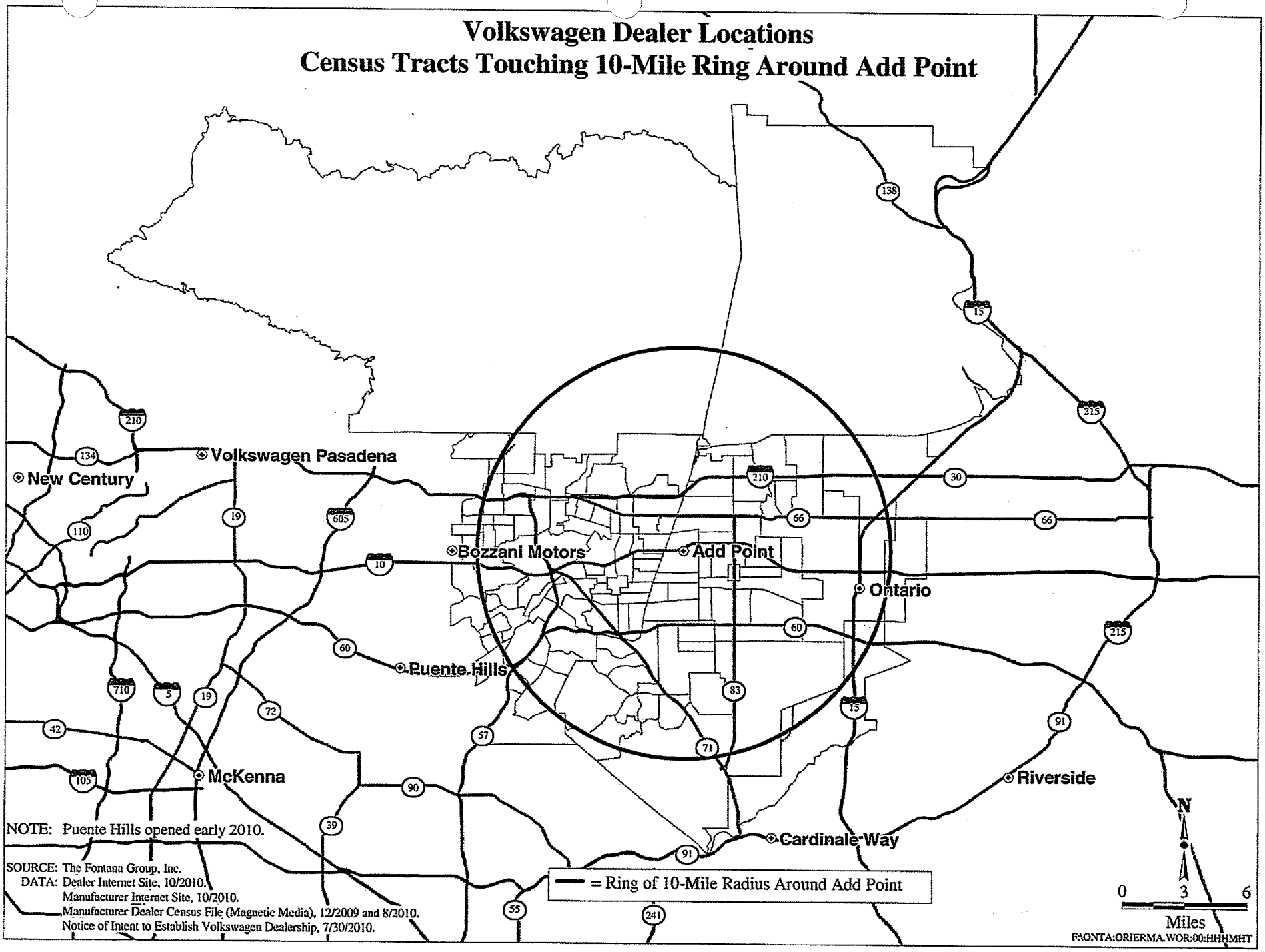
DATED: September 15, 2011

By: 
MARYBELLE D. ARCHIBALD
Administrative Law Judge

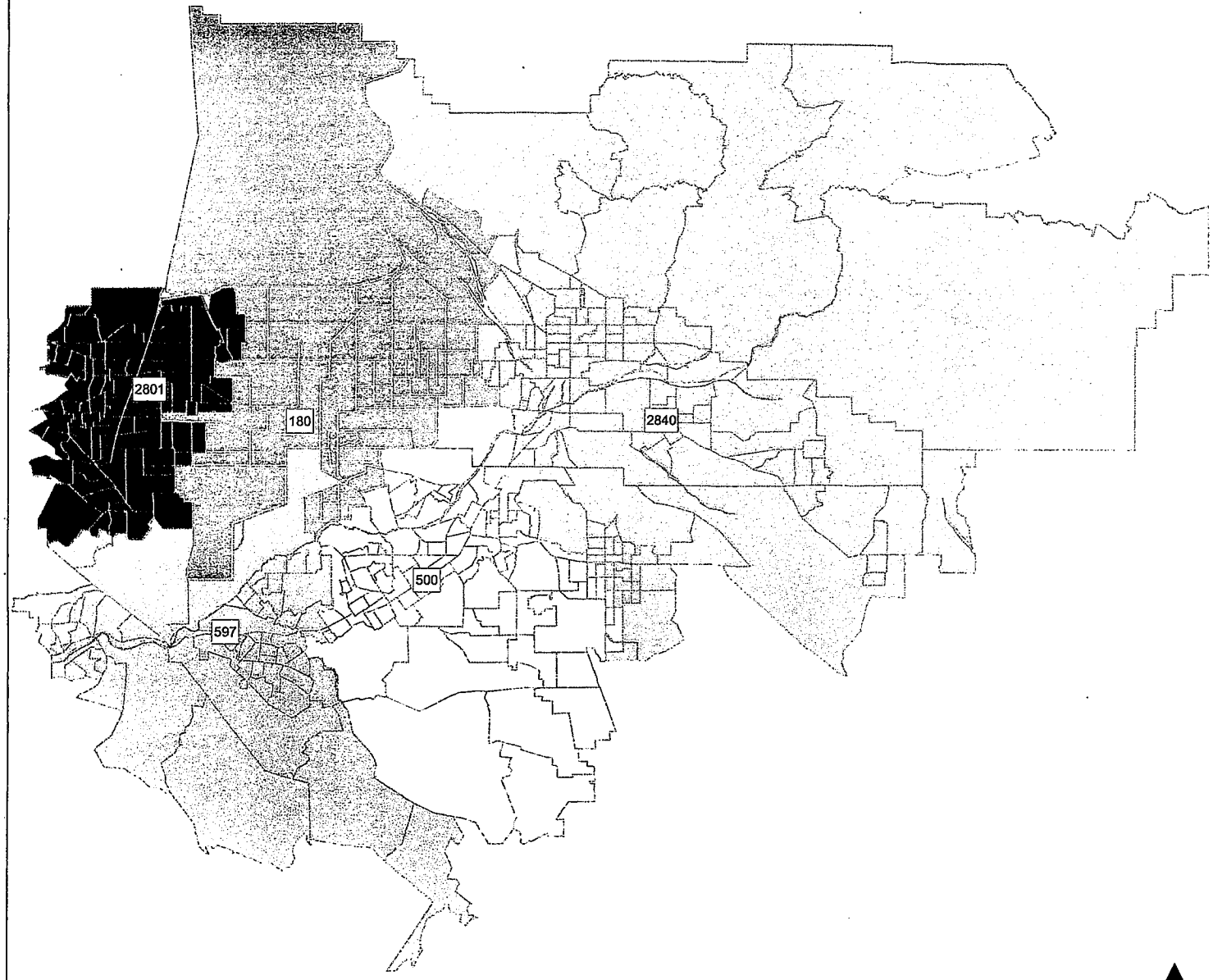
Attachments

George Valverde, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV

ATTACHMENT 1



ATTACHMENT 2



180	Ontario VW	Ontario
500	Riverside VW	Riverside
597	Cardinaleway VW	Corona
2801	Montclair OP	Montclair
2840	Redlands OP	Redlands

CA, Riverside-San Bernardino
PAI MAP

Geog Ref: H00-VW_Montclair_mkt

0 5 10 15

Miles

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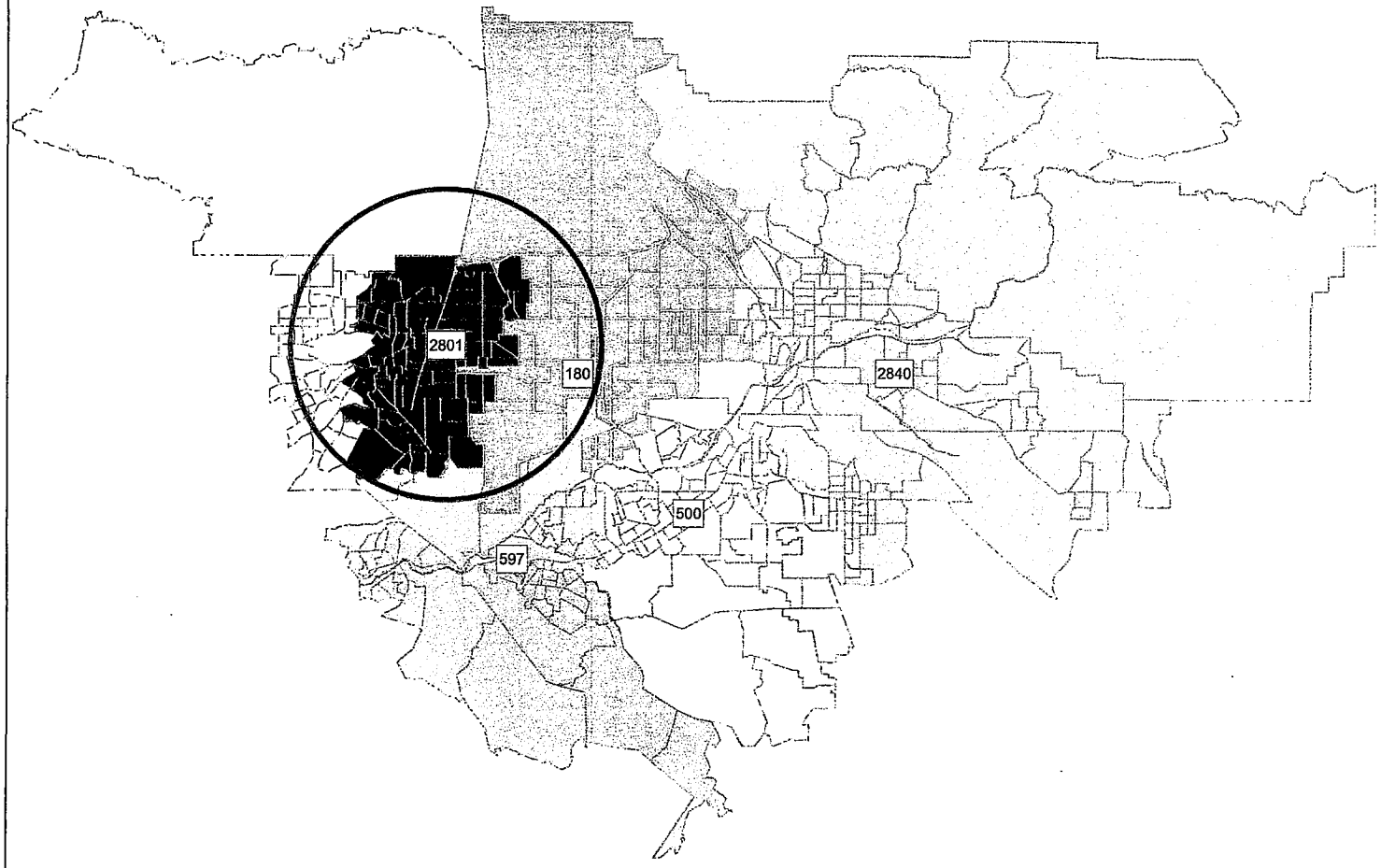
Serial number: 737638

Volkswagen of America, Inc.

Urban Science Applications, Inc.
Detroit, Michigan

ATTACHMENT 3



10 Mile RMA

180	Ontario VW	Ontario
500	Riverside VW	Riverside
597	Cardinaleway VW	Corona
2801	Montclair OP	Montclair
2840	Redlands OP	Redlands
		Bal of RMA

CA, Riverside-San Bernardino
+10 Mile RMA Census Tracts

Geog Ref: H00-VW_Montclair_RSB_RMA

0 5 10 15 20

Miles

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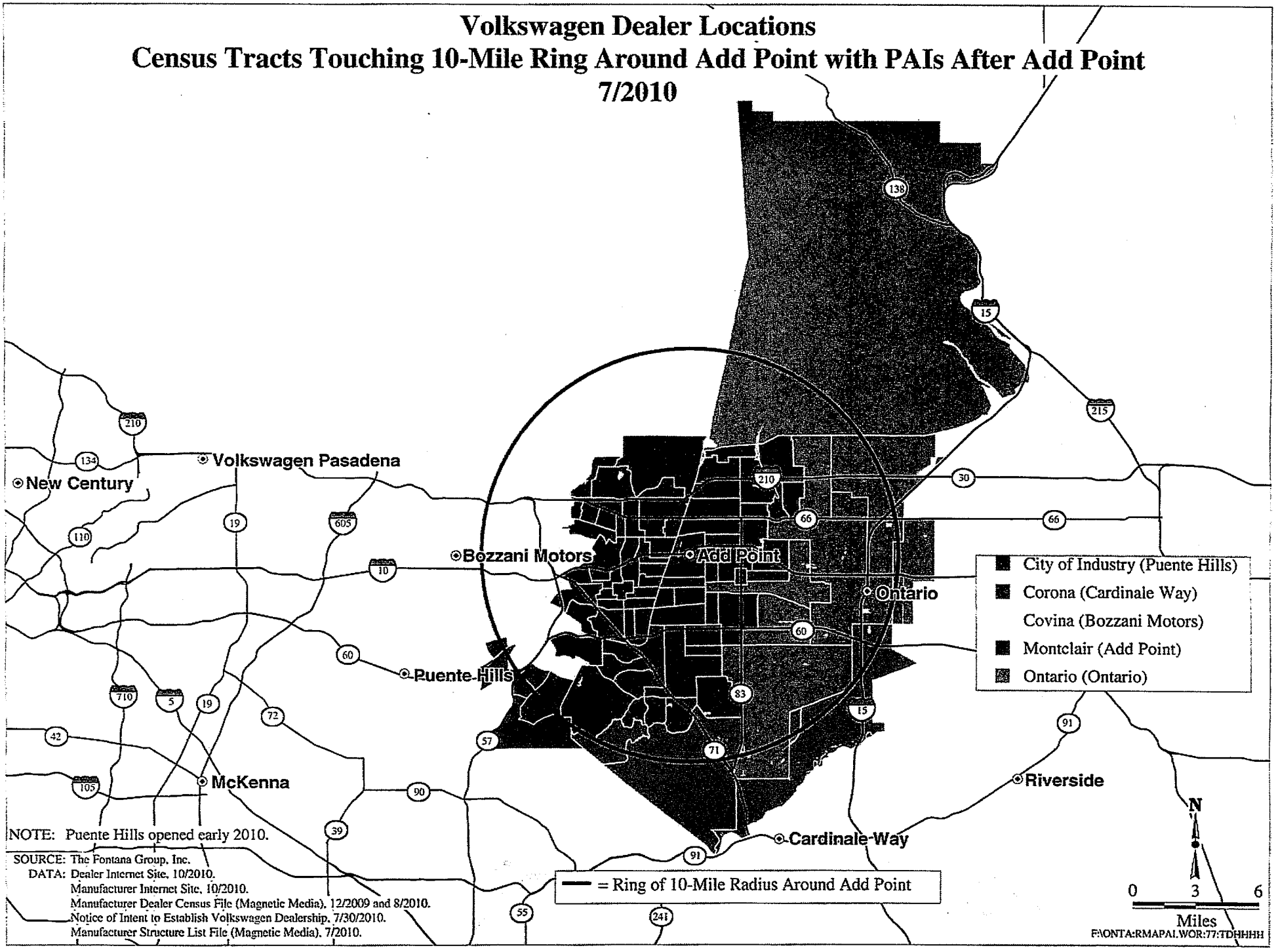
Serial number: 737657

Volkswagen of America, Inc.

Urban Science Applications, Inc.
Detroit, Michigan

Volkswagen Dealer Locations
Census Tracts Touching 10-Mile Ring Around Add Point with PAIs After Add Point
7/2010



NOTE: Puente Hills opened early 2010.

SOURCE: The Fontana Group, Inc.
DATA: Dealer Internet Site, 10/2010.
Manufacturer Internet Site, 10/2010.
Manufacturer Dealer Census File (Magnetic Media), 12/2009 and 8/2010.
Notice of Intent to Establish Volkswagen Dealership, 7/30/2010.
Manufacturer Structure List File (Magnetic Media), 7/2010.

ATTACHMENT 4

ONTARIO'S NEW VOLKSWAGEN SALES BY AREA OF REGISTRATION

	Montclair RMA*	Ontario PAI	Montclair PAI	Other California	Outside California
2009	210/217	152	116	322	7
2010	227/229	162	126	341	5
MARCH 2011 YTD	63/62	52	34	89	0

*Calculations of sales registered within the Montclair RMA differ slightly due to different methodologies used by Urban Science and The Fontana Group.
The first number in this column is the number of sales calculated by Urban Science and the second number is the number of sales calculated by The Fontana Group.

GEOG REF: H00-VW_MONTCLAIR_MKT; VW BASEFILES
SOURCE: USAI USING R.L. POLK CO. AND VW
703484

JEX - Remand 1

ATTACHMENT 5

VIA E-MAIL

RECEIVED
JUL 28 2011
NEW MOTOR VEHICLE BOARD

ATTACHMENT 6

2009 SALES ANALYSIS
ADDITIONAL VOLKSWAGEN SALES OPPORTUNITIES AT CALIFORNIA AVERAGE* FAR EXCEED HYPOTHETICAL LOST SALES BY ONTARIO VOLKSWAGEN

HYPOTHETICAL ONTARIO VW LOST SALES - 116

ADDITIONAL VW SALES OPPORTUNITIES AT CALIFORNIA AVERAGE* - 146 TO 155

ADDITIONAL VW SALES OPPORTUNITIES AT CALIFORNIA AVERAGE* - 431 TO 534

	MONTCLAIR PAI	ONTARIO PAI	RIVERSIDE - SAN BERNARDINO MARKET (EXCLUDING MONTCLAIR PAI)	TOAL RIVERSIDE - SAN BERNARDINO MARKET (INCLUDING MONTCLAIR PAI)	MONTCLAIR RMA
Ontario Volkswagen Sales	116	152	281	397	210
Other Volkswagen Dealers' Sales	171	86	791	962	317
Expected* Volkswagen Registrations	405	384	1,503	1,908	723
SHORTFALL (Net Loss)**	**118**	**146**	**431**	**549**	**196**
SHORTFALL (Gross Loss)**	**151**	**155**	**534**	**685**	**241**

NEW MOTOR VEHICLE BOARD
RECEIVED
JUL 27 2011

* California represented average adjusted for local segment popularity

** Net Loss assumes consistent Volkswagen performance throughout an area, Gross Loss takes into account actual performance variance throughout an area

R Ex. - Remand 1

GEOG REF: H00-VW_MONTCLAIR_MKT; VW BASEFILES
SOURCE: USAI USING R.L. POLK CO. AND VW
704920