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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** **ORDER CONFIRMING DECISION TO SUSTAIN PROTEST**

PROCEDURAL BACKGROUND

STATEMENT OF THE CASE

1. By letter dated July 30, 2010, Volkswagen of America, Inc. ("VWoA" or "Respondent") gave notice to Shayco, Inc., dba Ontario Volkswagen ("Ontario VW" or "Protestant") pursuant to California Vehicle Code section 3062[1] of VWoA's intention to establish a new Volkswagen dealership in Montclair, California.[2]

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[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.

2. Ontario VW is the only Volkswagen franchisee located within the relevant market area ("RMA") of the proposed new dealership.[3] The location of the proposed dealership in Montclair is between 8.65 and 8.7 air miles from Protestant's current location.[4]

3. On August 13, 2010, Ontario VW filed a timely protest with the New Motor Vehicle Board ("Board").[5]

4. A hearing on the merits of the protest was held January 10 through January 14, 2011, and January 18 through January 20, 2011, before Marybelle D. Archibald, an Administrative Law Judge ("ALJ") of the Board.

5. Following the submission of post-hearing briefs by the parties, the matter was submitted to the ALJ on April 19, 2011, who submitted her Proposed Decision to the Board on May 19, 2011.

6. A General Meeting of the Board was held on May 26, 2011, at which time the Proposed Decision was considered only by the Public Members of the Board. These members also received public comments from counsel for both parties.

7. Following consideration of the administrative record and Proposed Decision, and the comments of counsel, the Board issued a Corrected Order Remanding the Proposed Decision Dated May 19, 2011, ("Remand Order") with the following instructions to the 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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[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 the "relevant market area" which is that area 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.)

[4] Jt. Stip. Jt. Exh. 42, Tab 11, p. 5 Fact 4.

[5] Jt. Stip. Fact 6.

4. The ALJ shall have discretion to order additional evidence, briefing, and/or arguments.

8. 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 remand".

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

10. The September 15, 2011 Proposed Decision Following Remand was considered by the Public Members of the Board at the General Meeting of September 27, 2011. Following public comments by counsel for the parties, the Public Members of the Board deliberated in closed Executive Session. Thereafter, as reflected in the Board's draft minutes of September 27, 2011, "Mr. Flesh moved to reject the Administrative Law Judge's Proposed Decision with regard to the good cause factor in Vehicle Code section 3063(b), sustain the protest, and the Board in consultation with the staff will draft its own decision which will be considered at the December 7, 2011 (this date was subsequently changed to December 13) General Meeting. Mr. Obando seconded the motion. The motion carried by a four-to-zero vote with Mr. Brooks abstaining since he missed some of the presentation."

THE EFFECT OF THE BOARD ACTION ON SEPTEMBER 27, 2011

11. The Proposed Decision Following Remand (dated September 15, 2011), which recommended that the protest be overruled, was not adopted by the Board.

12. The Board, acting by and through its Public Members only, expressly decided that the protest was sustained. Sustaining the protest required that the Board conclude that Protestant had met its burden under Section 3066(b) of proving good cause not to establish the Volkswagen dealership at the proposed location in Montclair.

13. In addition to expressly sustaining the protest, the Board, acting by and through its Public Members only, also expressly rejected the Proposed Decision Following Remand "with regards to the good cause factor in Vehicle Code section 3063(b)". This portion of the statute requires that the Board

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

14. As to the other good cause factors as discussed in the Proposed Decision Following Remand, although not expressly rejected in their entirety, to the extent they are inconsistent with the decision to sustain the protest, it is implicit that any findings and conclusions in the Proposed Decision Following Remand that are inconsistent with the Board's determination to "reject the Administrative Law Judge's Proposed Decision Following Remand" or inconsistent with the decision to "sustain the protest" have also been rejected.

15. When the Board sustained the protest on September 27, 2011, it also stated it would "draft its own decision which will be considered at the December 7, 2011 General Meeting". This Order Confirming Decision is a culmination of the Board's Decision on September 27, 2011.

PARTIES AND COUNSEL

16. Protestant is an authorized Volkswagen dealership located at 701 S. Kettering Drive, Ontario, California.[6] It is owned by Gary Sherman and his wife through a family trust, referred to as Shayco, Inc.[7] Protestant is a "franchisee" within the meaning of Sections 331.1 and 3062(a)(1).

17. 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.

18. Respondent is a "franchisor" within the meaning of Sections 331.2 and 3062(a)(1).

19. 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.

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[6] Jt. Stip. Fact 1; Jt. Exh. 36.
[7] RT Jan. 10, pp. 211 – 212.

Protestant's Witnesses at the Merits Hearing[8]

20. Protestant called the following witnesses: Gary Sherman, dealer principal, Ontario VW; 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, Chief Financial Officer of the Metro Autogroup, Montclair.[9] Protestant's expert witness was Joseph F. Roesner, Vice President, The Fontana Group.

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

Respondent's Witnesses at the Merits Hearing[10]

22. Respondent called the following witnesses: Tony Ray, General Manager of Dealer Network Development, Western Region, VWoA; Steve Mears, a VWoA employee who was previously Regional Director, Western Region, VWoA; 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, VWoA; John Hawkins, dealer principal, Metro Honda, Montclair; Steven Smith, Sales Operations Manager, Area 52, VWoA. Respondent's expert witness was Sharif G. Farhat, Vice President of Expert Analytical Services, Urban Science Applications, Inc.

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

DEPOSITION TESTIMONY AT THE MERITS HEARING[11]

24. 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, VWoA; Ron Stach, General Manager of Sales, Western Region, VWoA.

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[8] Unless otherwise indicated, all testimony and other evidence referred to is evidence received at the merits hearing prior to the remand. There was no additional hearing after the remand so there would be no oral testimony after remand. But, there were declarations and exhibits after the remand.

[9] Howard Hawkins was called pursuant to Evidence Code section 776, which 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] See footnote 8.

[11] See footnote 8.

EVIDENTIARY ISSUES AT THE MERITS HEARING[12]

25. 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 by ALJ Archibald.

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

27. No request was made by Protestant to continue the hearing for the purpose of reopening discovery or submitting additional testimony.[13]

28. On remand, exhibits which constitute hearsay have been admitted and have been given the appropriate weight.

29. 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 was not admitted.

30. On remand, the Declaration of Frederick E. Hitchcock, Jr., offered by Protestant was 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.

31. 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 was not admitted, nor was 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.

32. On remand, the ALJ requested clarification of the Supplemental Declaration of Anthony

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[12] Unless otherwise indicated, all evidence referred to is evidence received at the merits hearing prior to the remand.

[13] 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)

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 considered solely for its response to the ALJ's questions. Protestant's request to exclude the Third Declaration of Anthony Ray on Remand was denied. Protestant's request to submit additional evidence regarding the status of the Redlands and Victorville open points was denied, and the arguments of Protestant's counsel in correspondence were not considered.

ISSUE PRESENTED

33. The following issue is presented by this protest: Did Ontario VW, the only Volkswagen dealership within the 10 mile radius of the proposed establishment site, sustain its burden of proving good cause to preclude VWoA from establishing the proposed dealership at the stated location in Montclair?

34. 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.

35. In determining whether there is good cause for not entering into an additional franchise for the same line-make, Section 3063 requires the 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.

36. 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

PROTESTANT'S CONTENTIONS

37. Protestant contends: the Inland Empire[14] is overdealered, cannot sustain an additional VWoA dealership, and the additional dealership would result in ruinous competition; VWoA'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 VWoA 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 VWoA's new strategic plan to increase sales is "pie in the sky."

RESPONDENT'S CONTENTIONS

38. 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 VWoA dealership are not jeopardized by a new dealership in Montclair.

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[14] 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.

FINDINGS OF FACT[15]

PRELIMINARY FINDINGS

VWoA's Plans for Increasing Sales in the United States

39. Sales of Volkswagen vehicles in the United States in 2010 were 260,000 vehicles, but VWoA expects to sell double that number within two years and increase sales to 800,000 by 2018.[16] The newly appointed head of this campaign to increase sales in the United States is Mr. Jonathan Browning, President and CEO of VWoA. VWoA has built a plant in Tennessee to produce a new Passat in 2011, designed and priced for the American market. The new Passat is expected to compete in the midsize sedan range with vehicles like Toyota's Camry.[17] VWoA also plans to introduce a new Jetta, the next generation new Beetle, and a new Touareg.[18]

40. Toyota, one of VWoA's primary competitive groups, sold 1.3 million new vehicles nationally in 2010.[19] VWoA's primary competitive groups, in addition to Toyota, include Honda, Nissan, Mazda, Hyundai, and Subaru.[20]

41. A J.D. Powers evaluation of sales satisfaction by brand for 2010 ranked VWoA 26th in the nation and resulted in a motivational memo from Mr. Browning to VWoA's 582 dealers in the United States.[21]

VWoA in the Western Region, California, and Area 52

42. VWoA has divided the United States into four geographic regions for administrative purposes. California, which has approximately 130 VWoA dealers, is in the Western Region.[22] The

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[15] 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.

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

[17] RT Jan. 18, pp. 20-23; 107-108; Resp. Exh. 65.

[18] RT Jan. 20, p. 121.

[19] RT Jan. 18, pp. 109 -110.

[20] RT Jan. 19, pp. 10, 69; Jt. Exh. 44, App.11.

[21] Prot. Exh. 106; RT Jan. 18, pp. 20, 108 - 109. Testimony and exhibits reflecting the current number of dealers varies; however, 582 is the most specific.

[22] RT Jan. 13, p.110; RT Jan. 18, p. 13.

California dealers are grouped into smaller areas by their locations, with each area given a number.[23]

43. Ontario VW is one of 10 VWoA dealers in what VWoA has designated as Area 52. The proposed Montclair dealership would also be in Area 52. Of the 10 existing VWoA dealerships in Area 52, three of them (Ontario VW, Riverside VW, and Cardinale Way VW in Corona), are in the Inland Empire.[24]

44. The importance of highways and freeways in Area 52 cannot be overemphasized. The I-10 Freeway runs east-west through Area 52 and the northern area of Montclair and continues westward to the Pacific Ocean. VWoA is extraordinarily concerned that from Indio to Santa Monica, there is not one VWoA dealership "on" the I-10 Freeway or even visible from that freeway.[25]

45. 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

46. 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]

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

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[23] RT Jan. 18, p. 13; RT Jan. 20, p. 116.
[24] RT Jan. 18, p. 43; RT Jan. 20, pp. 116, 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.
[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.

48. 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 VWoA had interest from a number of parties, VWoA did not declare the point open and begin to accept applications until 2010 because the issue of available real estate hampered interest.[34]

49. On August 26, 2009, Tony Ray and Steve Mears of VWoA 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]

50. At this August 26, 2009, meeting, Mr. Sherman told Messrs. Ray and Mears there was no need for an 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] However, VWoA claims it did not become aware of Mr. Sherman's concerns until it received 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]

51. The region recommends to VWoA'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]

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[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.
[37] RT Jan. 11, pp. 32, 42; RT Jan. 19, p.68. After that meeting, and hoping he could convince VWoA 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 VWoA 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. VWoA 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.

52. Although Mr. Sherman testified that he believed an additional VWoA 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.

53. Mr. Sherman had previously operated new motor vehicle dealerships in Montclair. 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]

54. The City of Montclair's general plan does not provide for bringing automobile dealerships 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 VWoA dealership.[48]

55. 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

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[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.
[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 VWoA'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.

dealer at the Montclair Open Point.[51]

56. 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.

57. Three applicants were considered by VWoA 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]

58. Mr. Sherman testified that he knew that his location wasn't what VWoA wanted, and he knew he wasn't selected because VWoA 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. The Board's decision to sustain the protest was not based upon whether the selection process was defective or whether the Metro Autogroup has the means and experience to operate the proposed dealership in Montclair.

The Expert Opinions

59. Mr. Farhat, the expert for VWoA, is Vice President of Expert Services, Urban Science Applications, Inc. ("Urban Science").[56] Urban Science is a consulting company which works with the automotive industry and other industries to offer business solutions.[57]

60. 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

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[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.
[55] RT Jan. 11, pp. 57; 89-90.
[56] RT Jan. 13, p. 79; Jt. Exh. 44, Statement of Education and Experience.
[57] RT Jan. 13, p. 73.

"measurement of the operations" of the dealerships.[58] Mr. Farhat performed an analysis of the Montclair RMA to determine if VWoA 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.[59]

61. Protestant's expert, Mr. Roesner, is the President of the Fontana Group, a consulting firm that specializes in the automobile industry.[60]

62. 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.[61]

63. Both experts utilized much of the same data from the same sources: 2000 Census information, VWoA statistics, and data purchased from private specialists, such as Polk and Claritas.[62]

64. VWoA dealers are assigned Primary Areas of Influence ("PAI") which are geographical areas containing census tracts nearest each dealer, but not beyond 20 miles.[63] Each census tract has approximately 4,000 people.[64] Each PAI is unique to its dealer; the Ontario PAI will not change if the

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[58] RT Jan. 13, p. 74.
[59] RT Jan. 13, p. 82.
[60] RT Jan. 12, p. 5; Jt. Exh. 42, Tab 1, Statement of Education and Experience.
[61] RT Jan. 12, pp. 7– 8.
[62] RT Jan. 13, pp. 89 – 91. At the time of his testimony, Mr. Mears was a VWoA 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 VWoA, is not supported. As quickly as it removed Mr. Mears from his position, VWoA 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 VWoA statistics.
[63] RT Jan. 12, pp. 28, 29.
[64] RT Jan. 12, p. 21.

Montclair dealership is established.[65] Five PAIs are in the Riverside-San Bernardino market, an area defined by VWoA.[66]

65. The RMA is a statutory construct - a 10 mile radius from the proposed new dealership. The RMA may contain portions of several PAIs. In this case, the Montclair RMA contains portions of the PAIs of four existing dealers plus the PAI for the proposed Montclair dealership. The four existing Volkswagen dealers are Ontario VW, Cardinale Way VW in Corona, Bozzani VW in Covina, and Puente Hills VW.[67] Although only Ontario VW is physically located within the RMA and has the right to protest, there are four existing Volkswagen dealers whose PAIs include some portion of the RMA and who have a responsibility assigned to them by VWoA for the marketing of Volkswagen vehicles in a designated portion of the RMA and for providing customer care to Volkswagen owners in a designated portion of the RMA.

66. Both experts considered cross-sells, which look to see if the address at which the vehicle is registered is within or outside of the area assigned to the selling dealer.[68] Ontario VW, for example, makes most of its sales in the Riverside-San Bernardino market (397 of 597 December 2009 YTD), but Bozzani VW only makes 20% of its sales in the market, leading Mr. Farhat to conclude that Bozzani VW is not part of the Riverside-San Bernardino market.[69] This analysis is based on actual data, and Mr. Farhat concludes that the Riverside-San Bernardino market as defined by VWoA is a valid market.[70]

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

68. Brand representation, or market penetration, is the ratio of Volkswagen vehicle sales

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[65] RT Jan. 13, p. 96.
[66] Jt. Exh. 44, p. A-1, incorporated herein as Attachment 2 ("CA, Riverside-San Bernardino, PAI Map").
[67] 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.
[68] Jt. Exh. 42, Tab 11; Jt. Exh. 44, pp. A-3, A-4.
[69] RT Jan. 13, p. 100; Jt. Exh. 44, pp. A-3.
[70] RT Jan. 13, 108.

compared to sales of the primary competitive group brands.[71] 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%.[72]

69. 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.[73]

70. 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 VWoA's performance in the Montclair RMA.[74]

71. Mr. Farhat analyzed income figures, and the median household income in the Riverside-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.[75]

72. 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.[76] Other areas with significant populations of Hispanic ethnicity perform better.

73. The foreclosure rate in the Riverside-San Bernardino market is the fifth highest in California.[77] 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

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[71] Jt. Exh. 44, p. A-7. VWoA's primary competitive groups include Toyota, Honda, Nissan, Mazda, Hyundai, and Subaru.
[72] Jt. Exh. 44, p. A-7.
[73] Jt. Exh. 44, p. A-9.
[74] RT Jan. 13, pp. 125-126.
[75] RT Jan. 13, pp. 129 – 130; Resp. Exh. 60, p. A-34.1; Resp. Exh. 61, App.103.1.
[76] RT Jan. 13, pp. 131 – 133; Resp. Exh. 60, pp. A-34.3, A-34.4.
[77] Resp. Exh. 61, App. 103.7; Jt. Exh. 43, Supp. Tab. 47, p. 8.

averaged 88% of the expected registrations; the Riverside-San Bernardino market was 74.5% of the expected registrations).[78]

74. Evidence was presented that addressed whether the shortfall in Volkswagen registrations in the Riverside-San Bernardino market (compared to the averages as computed by VWoA) was due to: lower household income; ethnicity of the population; high foreclosure rate; or high unemployment. It was undisputed that the Riverside-San Bernardino area has lower household incomes, and that a high percentage of the population is Hispanic. Also, and perhaps more important, the market also has the highest unemployment rate not only in California but in the United States as well as the highest home foreclosure rate not only in California but in the United States. The evidence presented by VWoA purported to negate several of these factors as explanations for the below-average numbers of Volkswagen sales. However, there is no doubt that these factors make the Riverside-San Bernardino market a challenging market for the sale of new vehicles. In addition, it is logical to conclude that the reasons for an area with these demographics to perform below average in sales are; low household income; a high rate of unemployment; a high home-foreclosure rate; low educational levels, etc. It is not reasonable to conclude that the "below-average" sales penetration is due solely to the absence of a dealership in the Montclair market. Further, the economic recovery in the Riverside-San Bernardino area is not progressing as rapidly (if at all) as compared to other areas of California or the country.[79]

75. If VWoA is not selling new vehicles at least at the expected average, other brands will fill the sales opportunities. The analysis of VWoA's performance, not only in the Montclair RMA, but also in the Riverside-San Bernardino market, as compared to California, reveals a significant shortfall[80] as compared to VWoA's expectations and comparisons to averages. Registration effectiveness, as measured by VWoA, in the Riverside-San Bernardino market is only 75%. This means VWoA dealers in the Riverside-San Bernardino market are 25% below the average level of performance of California VWoA dealers. Mr. Farhat's analysis brought him to the conclusion that there is a shortfall in

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[78] RT Jan. 13, p. 134; Jt. Exh. 44, App.103.7.
[79] Declaration of Joseph F. Roesner, Remand Report, Tab 16; Second Declaration of Earl Reed on Remand.
[80] Jt. Exh. 44, pp. A-17, A-19, A-20.

registrations in the RMA; therefore, VWoA is not adequately represented.[81] However, as stated above and as urged by Protestant, VWoA's use of averages for measuring performance in a market and declaring that the market is below average is not necessarily an appropriate measure for determining whether another dealership is needed or what the effect would be upon the relevant market area if an additional dealership was established.

76. One reason for lost opportunities may be related to a high population which is exposed to brands other than VWoA. The Montclair auto mall houses several of VWoA'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.[82] Between 1990 and 2010, the Riverside-San Bernardino market had an increase of 208,000 households.[83] The Montclair RMA is projected to grow by 16,000 households in the next five years.[84] The Ontario PAI is projected to grow by 14,000 households by 2015.[85] However these projections may not take place. Even if those households are added, it does not mean that an additional dealer is necessarily needed in the RMA. It may be that this growth will enable the existing four dealers whose PAIs are within the RMA to achieve greater sales and remain viable despite the economic downturns and difficulties in the Riverside-San Bernardino market.

77. Again, because of other circumstances, the employment levels in this market area are unlikely to increase as rapidly as in other areas. But, if they do there is still no need to increase the number of dealerships in the RMA.

78. An additional factor to consider is median income. Median income for a Volkswagen buyer is $80,000.[86] A census tract has approximately 4,000 households. Mr. Roesner expressed concern because along the I-10 corridor in Montclair and Ontario, the median income level is less than $25,000,

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[81] RT Jan. 13, p. 141.
[82] RT Jan. 19, pp. 132, 134.
[83] 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.
[84] Jt. Exh. 44, p. A-27.
[85] Jt. Exh. 44, p. A-29.
[86] RT Jan. 13, p. 157.

with a number of census tracts at $50,000 to $75,000.[87] Again, the lower median income is but one factor, which alone may not explain the low sales penetration. However, it is another factor which can be analogized to the "perfect storm" factors that exist in the RMA and indicate that an additional dealership in the RMA is more apt to cause economic troubles for the dealers whose PAIs are partly in the RMA. Because of these several factors, there is a stronger likelihood that the possible benefit of the additional dealership will be far outweighed by the possible harm not only to the Protestant but also the other three dealers responsible for the RMA, with the harm to them resulting in a "trickle-down" effect upon the public if any one (or more) of the existing dealers ceases to exist. It is possible that the establishment of an additional dealer will increase sales in the RMA but that the increase could be a short-term spike in sales (at least in the Montclair PAI) followed by what may be "ruinous completion" that leaves only two or three dealerships to serve the RMA. The effect of the loss of one or more profitable dealerships over the long term would then be less competition within the RMA.

79. Mr. Farhat and Mr. Roesner agree that the automobile industry was down as much as 50% between 2008 and 2010, but the VWoA brand was able to hold its own in that economy.[88] As the automobile industry revives, Mr. Roesner suggests that VWoA will not gain as much as other brands, because building a plant in Tennessee to produce a new Passat will not guarantee sales at the rate VWoA is projecting.[89] Even if there is a rise in sales as predicted by VWoA nationally, that does not mean that will be the case in the RMA at issue. In addition, Mr. Roesner points out that other brands are actively seeking to increase market shares. On remand Mr. Roesner notes that VWoA'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.[90] This is in contrast to Mr. Farhat, who is of the opinion that VWoA is in a position to gain as much, or more, by its ability to keep dealers and consumers interested in its products.[91] This opinion is speculative, and depends on an assumption that the VWoA vehicles are of

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[87] RT Jan. 12, p. 43.
[88] RT Jan. 13, p. 162.
[89] RT Jan. 13, p. 163.
[90] Reply Declaration of Joseph F. Roesner on Remand, para. 3e.
[91] RT Jan. 13, p. 163; Jt. Exh. 44, p. A-40.

better quality and more desirable than their Japanese competitors. While this may be true, it cannot be assumed one way or another. This Board reaches no conclusion about quality, thereby negating possible gains by a temporary void in the marketplace.

80. Brand visibility, by having a VWoA dealer on the I-10 Freeway, would significantly increase both intrabrand and interbrand competition.[92] The proposed location for the Montclair dealership is in an auto mall which has Honda and other brands which are primary competitors of Volkswagen. The extent to which the Honda dealership would compete against the intended Volkswagen dealership cannot be determined as, if the Volkswagen dealership is established, both dealerships would have common ownership.

81. The next analysis by Mr. Farhat involved determining that there should be 3.9 VWoA dealers in the Riverside-San Bernardino market to meet or exceed the California represented average.[93] Mr. Roesner's analysis indicates 4.2 dealers are necessary.[94] Although both experts agree that four VWoA 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.[95] Protestant argues that 4 is an absolute maximum number permitted, and that the Redlands Open Point should be established before Montclair. Although the experts seem to agree that another Volkswagen dealership is needed to raise the number in the Riverside-San Bernardino market to be between either 3.9 or 4.1 dealers, the Board is charged with considering the effect upon the retail motor vehicle business and the consuming public in the "relevant market area." The RMA currently has one Volkswagen dealer within it but it also has three other Volkswagen dealers the PAIs of which are located within the RMA. That makes four Volkswagen dealers already serving the RMA and the question is whether there should be a second Volkswagen dealership established at the proposed address in Montclair (the epicenter of the RMA)

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[92] 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)

[93] Jt. Exh. 44, p. A-41.

[94] Jt. Exh. 43, Supp. Tab 44, p. 2.

[95] RT Jan. 13, p. 166.

which would mean that there would be five Volkswagen dealerships designated by VWoA as being responsible for serving the RMA .

82. Mr. Roesner concludes that because there are a lot of Volkswagen sales in and around Montclair, this will significantly impact Ontario VW. The "dots" for registrations and the density of population as well as the household income are all clustered in or closer to the Montclair location than to the Ontario VW location.[96]

83. A dealer's ability to penetrate a market is influenced by the customer's distance from the dealer. Mr. Roesner concludes that proximity is only one factor in analyzing the effectiveness of a dealer. But in his analysis he believe that the closer the customer lives to a dealership, the more likely that customer is to visit.[97] Mr. Farhat's analysis indicates that after 8 miles, for whatever reason (roads, competition from other brands), a dealer cannot be expected to reach a high level of penetration.[98]

84. 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.[99]

85. In the Montclair PAI, the average distance to the nearest VWoA dealer is 8.2 miles.[100] 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.[101]

86. Mr. Roesner provides drive time in minutes between the proposed Montclair dealer and Ontario VW. It takes between 14.8 and 16.4 minutes depending on traffic.[102]

87. Mr. Farhat concludes that the market is too big. Based on convenience for the customer, 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.[103]

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[96] Declaration of Joseph F. Roesner, Remand Report, Tab 4, pp. 1-3, incorporated herein as Attachments 6, 7, and 8, respectively.
[97] RT Jan. 12, p. 32.
[98] RT Jan. 13, p. 171.
[99] Jt. Exh. 42, Tab 7, p. 2; Jt. Exh. 44, p. A-51.
[100] Jt. Exh. 44, p. A-51.
[101] Jt. Exh. 44, p. A-51.
[102] Jt. Exh. 42, Tab 7, p. 1.
[103] Jt. Exh. 42, Tab 44.

88. If there is to be another VWoA dealer, it is important to analyze the impact on other VWoA dealers and their viability. The reason another dealership is allegedly needed in the Riverside-San Bernardino market is to capture lost sales. It would be a waste of resources and would be harmful to the existing dealer within the RMA for VWoA to suggest the need for another dealer location if the new "add point" would simply shift sales from one dealer to another.[104] In this case, sales would be shifted from Ontario VW to the new Montclair dealership.

89. Ontario VW has been in business since 1995. The 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 reducing the number of employees, and lowering some wages and rent. In 2009, Mr. Sherman was able to take a salary and a $120,000 bonus.[105] As stated below, Mr. Sherman is no longer taking a salary.

90. 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.[106] The "High Model" would be a loss of $727,100.[107] 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.[108] 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, and by possibly increasing advertising expenditures.

91. 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

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[104] RT Jan. 13, p. 179.
[105] Scheline Depo. pp. 51 – 52.
[106] Jt. Exh. 42, Tab 37, p. 2.
[107] Jt. Exh. 42, Tab 37, p. 1.
[108] RT Jan. 12, pp. 140 – 141.

dealer enters the market, each is likely to have a smaller piece of the pie.

92. 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 the new Passat), the brand is stimulated (by having a dealer with visibility on the I-10 Freeway), and households increase, providing more opportunity.[109] 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.[110]

93. 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.[111] 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.[112]

94. 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.

95. In 2006, Puente Hills Volkswagen closed.[113] 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. In addition, although Bozzani is not physically located in the Montclair RMA, Bozzani's PAI, as assigned to it by VWoA, is partially within the Montclair RMA, and is part of the retail motor vehicle business in the area that must be considered by the Board in determining the potential effect of establishing a dealer in Montclair. Bozzani's sales were affected by the re-opening of the Puente Hills dealership and Bozzani's sales in that

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[109] RT Jan. 14, p. 17.
[110] RT Jan 13, p. 70; RT Jan. 14, p. 7.
[111] RT Jan. 14, p. 6.
[112] RT Jan. 14, pp. 184-185.
[113] No competent evidence was provided by either party to explain why the dealer voluntarily terminated the franchise.

portion of the RMA, for which VWoA holds Bozzani contractually accountable, will likely be affected by the establishment of a dealership in Montclair.

96. 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.[114] 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.[115] Mr. Roesner did not take this into account in his report.[116]

97. Although several VWoA 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.

98. 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[117] and although Volkswagen sales and registrations will increase in the next two to three years,[118] VWoA's plans to increase sales in the United States by the numbers it projects is "pie in the sky".[119] VWoA's enthusiastic plans to increase sales may be overly optimistic at least in relation to the RMA at issue.

99. 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, well-managed business.

100. There will be an adverse effect upon Ontario VW if the proposed dealership in Montclair captures significant sales within that area of the RMA. There will also be an adverse effect on Ontario VW's business because of penetration into other areas by the Montclair dealership in which both Ontario VW and the [new] Montclair dealership would be selling vehicles, and obtaining service customers. Many if not most of the Ontario VW sales registrations in the RMA are much closer to the Montclair PAI than to the Ontario PAI with the difference attributable to the much more favorable demographics in that

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[114] RT Jan. 12, pp. 154 – 156.
[115] RT Jan. 11, p. 143.
[116] RT Jan. 12, p. 160.
[117] RT Jan. 12, pp. 118- 119; 143.
[118] RT Jan. 12, p. 152.
[119] RT Jan. 12, pp. 121; 123.

portion of the RMA in which the Montclair PAI is situated.

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

101. Mr. Sherman has been a Volkswagen dealer since 1995.[120]

102. Ontario VW is located in the Ontario Auto Center, a mall which includes Volkswagen's primary competitive brands.[121]

103. In 2003, Mr. Sherman built what VWoA calls a Market Place Facility, Type A.[122] 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.[123]

104. Ontario VW had 45 employees in September 2010. Due to a decline in the economy, this is a decrease from 53 and constitutes a 15% reduction in its personnel.[124] 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 reduced.[125] In 2009, the total salary for Mr. Sherman and Mr. Reed was $238,194, and Mr. Sherman's bonus was $120,000.[126] Mr. Sherman testified that he does not, at this time, take a salary.[127] Ontario VW has been able to adjust for the downturn in the economy, and the business will likely remain viable. However, the Riverside-San Bernardino market is recovering more slowly than other areas of the nation and even more slowly than other areas in California.

105. Ontario VW's profit for 2008 was $193,800; for 2009, $328,000; estimated profit for 2010 is $230,000 to $240,000.[128] 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.[129] The investment of Ontario VW in the dealership is sizeable and permanent. Whether this investment will be negatively affected by the establishment of the proposed dealership in Montclair will depend upon the

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[120] RT Jan. 10, pp. 198, 199.
[121] RT Jan. 10, pp. 198, 199; Jt. Exh. 44, p. A-6.
[122] RT Jan. 10, p. 199; Jt. Stip. Fact 3.
[123] RT Jan. 10, pp. 108, 212, 213.
[124] RT Jan. 10, p. 207.
[125] 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.
[126] Scheline Depo. p. 51, 86.
[127] RT Jan. 11, p. 218.
[128] Jt. Exhs. 12, 14, 16.
[129] RT Jan. 11, p. 70.

extent of lost sales by Ontario VW in the RMA.

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

106. The RMA in this case has within it what VWoA has designated as Primary Areas of Influence ("PAI"). The PAI is a geographical area identified by VWoA with each dealer or open point assigned its own and unique PAI. The PAI will be made up of census tracts nearest each dealer but will not extend beyond 20 miles. [130] Each census tract has approximately 4,000 people.[131]

107. PAIs don't belong to the assigned dealer - any Volkswagen dealer can sell to residents in any PAI.

108. As indicated above, the RMA is a statutory construct, it encompasses an area within a 10 mile radius from the proposed new dealership and it is the specific area that is the focus of Section 3063(b). In this case, the Montclair RMA contains portions of the PAIs of four existing Volkswagen dealers, which are Ontario VW, Cardinale Way VW in Corona, Bozzani VW in Covina, and Puente Hills VW[132] along with what VWoA has designated as the Montclair PAI. [133] This means that, although Ontario VW is the only dealership physically located within the RMA with the right to protest, it is only one of the four dealers whose PAIs include some portion of the RMA and who have a responsibility assigned to them by VWoA. It is these four dealers who have been assigned PAIs by VWoA for the marketing of Volkswagen vehicles in a designated portion of the RMA and for providing customer care to Volkswagen owners in those designated portions of the RMA. All four of these dealers have PAIs that not only abut the Montclair PAI but also extend into and are part of the Montclair RMA.

109. Although VWoA has assigned dealers their own PAIs for various reasons, the legislature has focused upon the RMA for determining market area. Section 3063(b) states that the Board must consider the "effect on the retail motor vehicle business and the consuming public in the relevant market area". In this case, the "retail motor vehicle business… in the relevant market area" includes not only

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[130] RT Jan. 12, pp. 28, 29.
[131] RT Jan. 12, p. 21.
[132] 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.
[133] Declaration of Joseph E. Roesner, Remand Report, Tab 22, p. 1.

Ontario Volkswagen but also those other three dealers who are contractually assigned, and in various ways held responsible for, a portion of the "relevant market area" by the franchisor. Although the other three dealers have no standing to protest, their PAIs give them a "business presence" in the RMA. They also have a significant interest in the RMA because of their contractual obligation to VWoA in regard to some portions of the RMA. Therefore the other three dealers, and the customers they serve, along with Ontario VW, together comprise "the retail motor vehicle business and the consuming public in the relevant market area."

110. The RMA is already served by the four existing Volkswagen dealers, each of which are obligated by their contracts with VWoA to provide sales, service and parts to Volkswagen customers and prospective customers within the RMA. [134] Protestant captures the greatest volume of Volkswagen business in the RMA, but the other three Volkswagen dealers also depend on the RMA for a percentage of their Volkswagen business, as they provide coverage for the Volkswagen brand in the RMA and throughout the Montclair PAI. [135]

Sales within the Montclair PAI

111. By the very definition of "relevant market area" in the Vehicle Code, the address of the proposed dealership in the Montclair PAI, is the epicenter of the RMA.

112. The following are the sales made into the Montclair PAI by the four dealerships whose PAIs are within the RMA.

113. As for the Montclair PAI, in 2009, Bozzani VW made 60 sales in the Montclair PAI accounting for 12.8% of its total sales. Cardinale Way VW made 34 sales or 9.3% of its total sales in the Montclair PAI, and Protestant captured 116 sales, representing 19.4% of its total sales volume. Looked at another way, Bozzani VW, Cardinale Way VW and Protestant made more than 70% of all Volkswagen sales within the Montclair PAI. [136] What sales were made by these dealers during this time period within the entire RMA is discussed below.

114. The Volkswagen dealership in Puente Hills was reopened in January 2010 and now also

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[134] Declaration of Joseph E. Roesner, Remand Report, Tab 22, p. 1.
[135] Declaration of Joseph E. Roesner, Remand Report, Tab 1.
[136] Declaration of Joseph E. Roesner, Remand Report, Tab 1, p. 1.

serves the RMA. This reopening in 2010 resulted in the four currently-existing Volkswagen dealerships the PAIs of which are included within the Montclair RMA. [137]

115. Through July 2010 year-to-date, the four dealers in the following chart accounted for 76.8% of new Volkswagen sales in the Montclair PAI. [138] This chart illustrates the New Volkswagen Retail Car and Light Truck Buyer Behavior Report for the Riverside - San Bernardino Plus Fringe PAIs after Add Point, July 2010 year-to-date: [139]

Dealership	**Montclair PAI %**
Puente Hills	10.1% of all Volkswagen sales in the Montclair PAI
Cardinale Way	10.1% of all Volkswagen sales in the Montclair PAI
Bozzani Motors	16.7% of all Volkswagen sales in the Montclair PAI
Ontario VW	39.9% of all Volkswagen sales in the Montclair PAI

Again, what sales were made by these dealers during this time period within the entire RMA is discussed below.

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

117. If the Montclair dealership is established, it will take at least 2 years to complete its new facility.[140] Therefore, it would not be ready to operate before 2014.

118. According to Respondent, the reason another dealership is needed in the Riverside-San Bernardino market is to capture lost sales.[141]

119. While Protestant's expert agrees that another dealer is needed in the Riverside-San Bernardino market, he believes this is not the correct time.[142] Protestant continues to argue that the Inland Empire is "mired in a recession" and headed for a double-dip recession.[143] Protestant also notes that experts have lowered estimates for 2011, 2012, and 2013 automobile sales, citing among other

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[137] RT Jan. 11, p. 116.
[138] Declaration of Joseph E. Roesner, Remand Report, Tab 1, p. 2.
[139] Declaration of Joseph E. Roesner, Remand Report, Tab 1, p. 2.
[140] RT Jan. 18, pp. 91, 161.
[141] Jt. Exh. 44.
[142] RT Jan. 12, pp. 118-119; 143.
[143] Declaration of Earl Reed [on Remand], para. 8; Second Declaration of Earl Reed on Remand, para. 3.

factors, weak consumer confidence.[144]

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

New Volkswagen Vehicle Sales into the Montclair RMA[145]

Year	Ontario	%	Cardinale	%	Bozzani	%	Puente Hills	%
2009	217[146]	40.5%	54	10.1%	124	23.1%	Not open	
2010	229	35.4%	60	9.3%	106	16.4%	73	11.3%
3/2011	62	35.8%	15	8.7%	25	14.5%	22	12.7%

As can be seen, the percentage of each dealer's sales in the RMA dropped upon the re-opening of Puente Hills VW in 2010. Ontario VW went from 40.5% in 2009 to 35.4% in 2010 and 35.8% in the first quarter of 2011. Cardinale Way VW went from 10.1% to 9.3% and 8.7%. Bozzani VW, the dealer nearest to the Puente Hills location, dropped in sales and also dropped in percentages from 23.1% to 16.4% and 14.5%.[147]

121. 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.[148]

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[144] Second Declaration of Earl Reed on Remand, para. 7, Exh. 22.
[145] Declaration of Joseph F. Roesner, Remand Report, para. 11, Tab 2, page 1.
[146] 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.
[147] Declaration of Joseph F. Roesner, Remand Report, para. 11, Tab 2, page 1.
[148] RT Jan. 14, p. 108; Declaration of Joseph F. Roesner [on Remand], para. 51.

ONTARIO VW

122. The following chart illustrates Ontario VW's New Volkswagen Retail Car and Light Truck Sales Effectiveness in 2-Mile Rings around Ontario for 2009: [149]

Radius in Miles	Ontario VW's Sales	Volkswagen Registration at Average*	Volkswagen Registrations	Ontario's Sales Effectiveness
0-2	3	7	5	42.9%
2-4	30	74	51	40.5%
4-6	74	181	114	40.9%
6-8	87	214	152	40.7%
8-10	62	192	137	32.3%
10-12	31	257	187	12.1%
12-14	24	241	183	10.0%
14-16	20	234	177	8.5%
16-18	16	235	167	6.8%
18-20	19	262	180	7.3%

* Average based on Volkswagen as a Percent of Primary Competitive Group by Segment in California Represented.

123. The following chart illustrates the proximity between Ontario VW and select Volkswagen dealers:

Air Distance in Miles Between Ontario VW and Select Volkswagen Dealers[150]					
	Riverside	Cardinale Way	Bozzani Motors	Puente Hills	Montclair Add Point
Distance from Ontario	11.5	12.7	19.8	22.6	8.7
Half Distance from Ontario	5.8	6.4	9.9	11.3	4.4

Riverside, Cardinale Way, and Bozzani Motors are closer in proximity to potential customers than Ontario VW starting at 5.8 miles from Ontario VW. If the Montclair Volkswagen dealership is established it will have a proximate advantage beginning at 4.4 miles from Ontario VW. The establishment of the Montclair dealership will remove the opportunity available to Ontario VW outside of four miles. [151] Given the close proximity of Montclair to Ontario VW, and the lack of residential areas around Ontario VW, there is little sales opportunity within four miles of Ontario VW and the

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[149] Declaration of Joseph E. Roesner, Remand Report, Tab 5, p. 2.
[150] Declaration of Joseph F. Roesner, Remand Report, para. 18-22; Tab 6, p. 1
[151] Declaration of Joseph F. Roesner, Remand Report, para.23.

establishment of Montclair will diminish the opportunity outside of four miles that Ontario VW relies on.[152]

124. 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.[153] 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 decrease by more than 50%. In addition, it will have no future opportunity to capture lost sales.[154] Therefore, Protestant argues, the Board should not permit the Montclair open point to be filled. It should also be noted that Ontario VW will not have protest rights if the Victorville or Redlands open points are filled (see below).

125. 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.[155]

126. Victorville is an open point.[156] Volkswagen has withdrawn its Letter of Intent with a candidate for the Victorville open point.[157] No other candidate for the Victorville open point has been identified.[158]

127. Redlands is also an open point.[159] At this time there is no candidate to fill the Redlands open point.[160] [161]

128. 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

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[152] Declaration of Joseph F. Roesner, Remand Report, para.23.
[153] RT Jan. 11, p. 77; Declaration of Gary Sherman [on Remand], para. 2, Exh. A.
[154] Declaration of Joseph F. Roesner [on Remand] para. 7 (d), (e), and (f), and 40-41.
[155] Declaration of Sharif Farhat on Remand, para. 5, para. 14; Exhs. Remand -1 through Remand – 9.
[156] Supplemental Declaration of Anthony Ray on Remand, para. 2.
[157] Supplemental Declaration of Anthony Ray on Remand, para. 2.
[158] Supplemental Declaration of Anthony Ray on Remand, para. 2.
[159] Supplemental Declaration of Anthony Ray on Remand, para. 3.
[160] Supplemental Declaration of Anthony Ray on Remand, para. 3.
[161] 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.

Montclair PAI.[162]

129. 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.[163] Inland dealerships have lower average sales because they are surrounded by a population which is less educated and holds blue collar jobs.[164]

130. 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 earthquake in Japan, which resulted in a reduction of inventory of Toyota, Honda, and other Asian brand inventory. This enabled Volkswagen and other manufacturers to temporarily increase sales.[165] Mr. Roesner projects that Volkswagen sales will drop once the Asian markets have recovered.

BOZZANI VOLKSWAGEN

131. According to Greg Bozzani, Bozzani VW has captured a "significant amount" of business "in the Montclair market".[166]

132. 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.[167] 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 Covina PAI, which is where Bozzani VW is located.[168]

133. Bozzani VW depends upon sales into the Montclair RMA because it feels pressured by the

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[162] Declaration of Earl Reed [on Remand], para. 11.
[163] Declaration of Joseph F. Roesner, Remand Report, para. 45, Tab 16, p. 1.
[164] Declaration of Joseph F. Roesner, Remand Report, para. 45, Tab 16, p. 1.
[165] Reply Declaration of Joseph F. Roesner, para. 3a, 3b, 3c, 3d, and 3e.
[166] Declaration of Greg Bozzani [on Remand], para. 6.
[167] RT Jan. 11, p. 119-120.
[168] Declaration of Greg Bozzani [on Remand], para. 6.

new Puente Hills dealership in the City of Industry PAI.[169] [170]

134. 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.[171]

135. If the Montclair dealership is established, there will be an increase in competition in the Montclair RMA and in the contiguous PAIs'; however, this will likely occur to the detriment of all of the current Volkswagen dealers within the RMA.[172]

PUENTE HILLS VW AND CARDINALE WAY VW

136. As indicated in the chart above in paragraph 120, Cardinale Way VW sold 54 new Volkswagen vehicles into the Montclair PAI in 2009 and 60 new Volkswagen vehicles in 2010. Puente Hills VW, when it reopened, sold 73 new Volkswagen vehicles in 2010 into the Montclair PAI.

137. Although there is no evidence of any substantial negative effect on these dealerships, it is likely that some of their customers that are in the Montclair PAI or elsewhere in the RMA will be lost and it is certain that the Montclair dealership would sell into the Puente Hills and Cardinale Way PAIs.

EFFECT ON CONSUMING PUBLIC

138. The Montclair RMA is projected to grow by 16,000 households in the next five years.[173] The largest growth is anticipated on the west end of the Inland Empire around Montclair.[174]

139. The average distance in the Montclair PAI to the nearest 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 less than 4.5 miles.[175]

140. The shortest surface route in miles between Ontario VW and the proposed Montclair

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[169] Declaration of Greg Bozzani [on Remand], para. 5; Declaration of Joseph Roesner [on Remand], para. 9; Tab 1, pp. 1-2.
[170] 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.
[171] RT Jan. 11, p. 143.
[172] RT Jan 10, p. 210-211; RT Jan 11, pp. 27, 120-121.
[173] Jt. Exh. 44, p. A-27.
[174] RT Jan. 19, pp. 135-136.
[175] Jt. Exh. 44, p. A-51.

dealership is 10 miles; the shortest surface route in minutes is 14.8 to 16.4 minutes.[176]

141. Consumers would have increased convenience with the establishment of an additional Volkswagen dealership.

SERVICE

142. 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.

143. 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.[177] Therefore, at the earliest, the Montclair dealership would possibly take until 2016 to provide an adequate level of service and compete with Ontario VW.

144. 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. The following chart illustrates the number of Volkswagen vehicle owners who get their vehicles serviced by Volkswagen dealerships and demonstrates the importance of the Montclair PAI on Ontario VW:

Volkswagen Service Vehicles as a Percent of Volkswagen 7-Year UIOs for 2010[178]

Service Vehicles	Montclair PAI	%	Ontario PAI	%
Puente Hills **Service Vehicles % 7-Year UIOs**	76 3.3%	7.4%	18 0.8%	1.7%
Cardinale Way **Service Vehicles % 7-Year UIOs**	176 7.7%	7.7%	92 4.1%	4.0%
Bozzani Motors **Service Vehicles % 7-Year UIOs**	500 21.8%	18.7%	81 3.6%	3.0%
Ontario VW **Service Vehicles % 7-Year UIOs**	968 42.2%	22.5%	1,527 68.3%	35.4%

In 2010, Ontario VW had 968 Volkswagen vehicles coming from the Montclair PAI; this is more vehicles than the rest of the dealers in the market combined.[179]

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[176] Jt. Exh. 42, Tab. 7, pp. 1-2.
[177] RT Jan. 11, p. 220.
[178] Declaration of Joseph F. Roesner, Remand Report, para. 33; Tab 10, p. 1
[179] Declaration of Joseph F. Roesner, Remand Report, para. 33; Tab 10, p. 1.

145. 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.[180]

146. Future growth may also provide additional service opportunities, either through industry growth or through an increase in Volkswagen market share.[181] As Volkswagen sales increase, this will increase the number of UIOs which are available for dealers to service.[182]

147. 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.[183] From July 1, 2009 to June 30, 2011, Ontario VW's service market share was 39.3%.[184] This service market share is a measure of customer loyalty, and Volkswagen's goal for dealers is to be at or above 50%.

148. 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.[185]

149. 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.[186]

150. 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%.[187]

151. This means that more than half of Ontario VW's customers have not been receiving

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[180] Declaration of Sharif Farhat on Remand, para. 24, 25, 26, 27, 28, Exhs. Remand 7, Remand 8, Remand 9.
[181] Declaration of Sharif Farhat on Remand, para. 38, Exhs. Remand 12, Remand 13.
[182] Declaration of Sharif Farhat on Remand, para. 38; Exhs. Remand 10, Remand 11, Remand 12, Remand 13.
[183] RT Jan. 10, p. 67; RT Jan. 11, p. 221.
[184] Declaration of Earl Reed [on Remand], para. 6.
[185] RT Jan. 10, p. 102.
[186] Declaration of Kurt Thomas on Remand, para. 2.
[187] Declaration of Kurt Thomas on Remand, para. 7, para. 8, R. Ex – Remand Thomas – 1.

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.[188]

152. Ontario VW has the opportunity within its PAI and within its organization to increase its service business to compensate for at least part of any loss from the proposed Montclair dealership.

USED VOLKSWAGENS

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

154. Ontario VW does a significant amount of used car business in the Montclair PAI, and Protestant contends that establishment of the Montclair dealership will have an impact on those sales.[189] In 2010, 14.9% of Ontario VW's CPO sales came from the Montclair PAI. With 18 CPO sales into the Montclair PAI, Ontario VW sold 26.9% of all CPO Volkswagen vehicles registered in the Montclair PAI; far more than any other dealer. [190] The following chart illustrates this impact:

Certified Pre-Owned Retail Car and Light Truck Buyer Behavior Report for 2010[191]

Certified Pre-Owned Volkswagens	Montclair PAI	%	Ontario PAI	%
Puente Hills	9	9.1%	5	5.1%
% PAI Sum	13.4%		6.6%	
Cardinale Way	5	3.7%	11	8.2%
% PAI Sum	7.5%		14.5%	
Bozzani Motors	11	9.7%	8	7.1%
% PAI Sum	16.4%		10.5%	
Ontario VW	18	14.9%	23	19.0%
% PAI Sum	26.9%		30.3%	

155. Competition for used Volkswagen vehicles is intense. This is especially true since 2010, when Volkswagen changed its incentive program for CPOs, spurring some dealers to increase participation in the program.[192]

156. Volkswagen dealers receive monthly sales objectives for CPOs and for used Volkswagens.[193]

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[188] Declaration of Kurt Thomas, para. 10, para. 11.
[189] RT Jan. 10, p. 101.
[190] Declaration of Joseph F. Roesner, Remand Report, para. 27; Tab 8 p. 1.
[191] Declaration of Joseph F. Roesner, Remand Report, para. 27; Tab 8 p. 1.
[192] RT Jan. 10, pp. 80-87; Prot. Exh. 103.
[193] RT Jan. 10, pp. 80-87.

157. Competition is active, but there is no shortage of lease returns, which have a 3 year cycle of coming back into the market.[194]

158. 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.

159. Ontario VW has the opportunity to capture used vehicles sales now made by non-Volkswagen dealers.[195]

160. From 2009 to March 2011, between 29.8% and 40.5% of Ontario VW's CPO sales were to consumers located in the Montclair RMA. The Montclair area is critical to Ontario VW for vehicle sales.[196]

161. 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.[197]

162. 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.[198]

163. The establishment of the additional dealership in Montclair will likely have a negative impact upon the sale by Ontario VW of used Volkswagens, both CPO units and non-CPO units as the buyers of those vehicles will be more apt to buy from the nearer dealer which will be in Montclair.

WHOLESALE PARTS

164. In addition to parts sold to customers and as a component of its service business, Ontario VW has a wholesale parts business. The Montclair PAI is closer to a significant number of Ontario VW's wholesale parts customers.[199] The following chart illustrates this:[200]

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[194] RT Jan. 10, p. 88.
[195] Declaration of Sharif Farhat on Remand, para. 15; Exhs. Remand - 4, Remand - 5, Remand - 6.
[196] Declaration of Joseph F. Roesner, Remand Report, para. 29, Tab 8, p. 2.
[197] Declaration of Sharif Farhat on Remand, para. 16; Exh. Remand - 4.
[198] Declaration of Sharif Farhat on Remand, para. 20.
[199] Declaration of Joseph F. Roesner, Remand Report, para. 39, Tab 12.
[200] Declaration of Joseph F. Roesner, Remand Report, Tab 12.

	Air Distance	Drive Time	Drive Distance
Ontario VW's Wholesale Parts Customers Closer to Montclair Add Point than to Ontario VW	372	395	380
Ontario VW's Wholesale Parts Customers	911	911	911
Percent of Ontario VW's Wholesale Parts Customers Closer to Montclair Add Point than to Ontario VW	40.8%	43.4%	41.7%

As can be seen, the chart illustrates that in drive time, 395 of the 911 parts customers (43.4%) are located closer to the Montclair location than to Ontario VW.

165. 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.[201]

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

166. The Ontario Auto Center is a destination point.[202] Ontario is a distinct retail market from Montclair, distinguished by its outlet mall.[203]

167. Montclair's retail shops generally draw primarily from the north, and also from the west, and a little from the east and south.[204] A Volkswagen dealership in Montclair would minimize travel time for consumers and increase Volkswagen competition with its primary competitive group brands.

168. The Inland Empire is still in a depressed economic climate but has seen slight recovery.[205] 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. However, there may be a co-relative loss to the employees at Ontario VW and the City of Ontario.

169. If the Montclair dealership is established, the potential benefit to the public in the RMA

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[201] Roesner Remand Report, para. 39, Tab 12.
[202] RT Jan. 11, p. 43.
[203] RT Jan. 19, pp. 175-183.
[204] RT Jan. 19, pp. 138, 194.
[205] RT Jan. 19, pp. 201-202.

will be far outweighed by the likely loss to the public within the RMA, if the establishment negatively impacts the four existing Volkswagen dealers who are already operating in the RMA and dependent upon it for their success.

FINDINGS RELATING TO WHETHER FRANCHISEES 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)]

170. Ontario VW is a good dealership which is well-managed and does a good job serving its customer base.[206] In 2009, Ontario VW increased sales 5% over 2008, when Area 52 was down by 4%.[207] However, in 2010, Area 52 increased sales almost 24% over 2009 and Ontario VW was up only 10%.[208]

171. Mr. Reed, the General Manager of Ontario VW, testified that Volkswagen never counseled the dealership to increase its sales.[209] Mr. Reed testified that sales into the Montclair area are a significant source of business for Ontario VW.[210] In 2008, Ontario sold 110 units into the proposed Montclair PAI; in 2009, it sold 116 units.[211] 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.[212]

172. 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 only 23 of Volkswagen's 582 dealers in the United States.[213] The process was created, monitored, and administered by a Volkswagen marketing firm.[214] Volkswagen representatives conceded that as a Generation Best dealer, Ontario VW was in an elite category.[215]

173. Ontario VW takes pride in winning the Octagon Award in the third quarter of 2009 and

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[206] RT Jan. 20, pp. 127, 144, 148, 154, 161.
[207] RT Jan. 20, pp. 120, 188.
[208] RT Jan. 20, pp. 128, 129.
[209] RT Jan. 10, pp. 68, 71.
[210] RT Jan. 10, p. 74.
[211] Prot. Exh. 95 at 226, 228.
[212] Jt. Exh. 42, Tab 10, p. 4.
[213] RT Jan. 19, pp. 241, 249.
[214] RT Jan. 10, p. 167; RT Jan. 20, p. 123.
[215] RT Jan. 19, pp. 241, 249; Prot. Exh. 53.

being tied for top honors in the fourth quarter of 2009.[216] This award is competitive within Area 52 and tracks eight standards of performance for Volkswagen dealers.

174. 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.[217] In October 2010, Ontario VW ranked at 96% of the sales satisfaction index.[218]

175. Ontario VW has an adequate service facility with 18 service bays.[219] 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.[220]

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

177. Currently storage for parts is sufficient but Ontario VW would need a larger inventory of parts with space for storage in the future.[221]

178. There is no shortage of technicians qualified to work on Volkswagen vehicles.[222] Volkswagen requires a minimum of 70% of a dealership's technicians, service, and sales staff to be certified as Volkswagen trained.[223] Volkswagen offers web-based training as well as training at Volkswagen learning centers.[224]

179. Universal Technical Institute conducted a program for training Volkswagen technicians,

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[216] RT Jan. 10, p. 109; Prot. Exh. 2.
[217] RT Jan. 10, pp. 77 - 78.
[218] Prot. Exh. 25.
[219] RT Jan. 10, p. 103.
[220] RT Jan. 19, pp. 215, 243.
[221] RT Jan. 19, pp. 215, 241.
[222] 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.
[223] RT Jan. 19, p. 223.
[224] RT Jan. 19, pp. 210, 212.

but this program ended in 2010.[225] A new "fast track" training program was scheduled to begin in 2011.[226]

180. 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.[227]

181. Although the burden of proof is upon the Protestant, there was no claim by VWoA that the Protestant or that any of the other franchisees in the RMA are lacking or deficient with regards to sales and service facilities, equipment, supply of parts and qualified service personnel. Therefore, the Board draws no conclusions as to this issue.

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

182. 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 the increased competition a new dealership would bring. A concern here may be that the "over-dealering" of an area will increase competition beyond the point where it is in the public's best interest. This negative effect could occur if the increased competition causes a dealership to close because there is simply not enough business to allow all dealers in the RMA to be profitable. Given the difficult economic times that exist now, another recessionary dip could cause any number of dealerships to cease operations. It is a time when it may be better to err towards maintaining the status quo as to the number of dealers so that an existing dealership has a better opportunity to survive, preserve its investment, and continue to contribute to the public welfare than to lean towards allowing a franchisor to establish another franchisee. There is no doubt that the existing franchisee has greater risk of its capital, and investment than does the franchisor who will more than likely be looking to the prospective new franchisee for all or almost all of the capitol necessary to open the new dealership. A franchisor bears the expense of designing and manufacturing products. This cost is generally in the hundreds of millions of dollar range. It is also true that these expenses can be recovered from the entire dealer body, whereas any one existing franchisee has

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[225] RT Jan. 10, p. 107; RT Jan. 19, p. 205.
[226] RT Jan. 19, p. 208.
[227] RT Jan. 10, p. 62.

only that one location from which to protect its investment.

183. VWoA underperforms compared to other competitive line-makes in the Montclair RMA. While the Board believes that establishing a Volkswagen dealership in the Montclair auto mall in a new facility would benefit VWoA in the short term, such an event would harm Ontario VW and the public in the long run. The brand would be visible on the high-traffic I-10 Freeway in a location where several of VWoA's primary competitive groups are also located.[228] This would probably generate interest in the Volkswagen brand and promote some sales. However, VWoA'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.

184. Projected sales for the Montclair Open Point were set at 571 for 2011; 764 for 2012; 1,057 for 2013.[229] The Board believes that placing a dealer in an auto mall or on the freeway would increase sales but this would occur to the detriment of Ontario VW.[230]

CONCLUSIONS

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

185. 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 has expended the financial outlays required over the years to modernize and maintain the dealership's building and equipment. Protestant has established that it has a significant and permanent investment.

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

186. Protestant has established that there will be a significant adverse effect upon the retail motor vehicle business in the RMA if the additional dealership is established and that there would be no benefit to the public that would out-weigh this negative effect.

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[228] RT Jan. 13, p. 107.
[229] Jt. Exh. 24.
[230] RT Jan 10, p. 210-211; RT Jan 11, pp. 27, 120-121, 146- 147.

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

187. Protestant has established that it and the other dealers presently providing sales and services to the public in the RMA would more likely than not suffer a loss of business if the additional dealership were to be established. The impact upon them would cause more loss to them and indirectly to the public than would there be benefit gained by the public if an additional Volkswagen dealership were to be established at the proposed location under the current economic conditions.

WHETHER THE VOLKSWAGEN FRANCHISEES ARE 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)]

188. Ontario VW's sales and service facilities were built in 2003, and they are more than 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. There was no claim that there was a significant deficiency as to these factors as they pertain to Ontario VW or the other Volkswagen franchisees who are responsible for serving the owners of Volkswagen vehicles in the RMA.

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

189. The Board believes that there would likely be a spike in Volkswagen sales in the RMA. However, this increase would likely come from the sales opportunities available to Ontario VW and the other three Volkswagen franchisees whose PAI's comprise a part of the RMA. Although there may be an increase in competition in the RMA, it is unlikely that the increase will be of benefit to the public.

190. Ontario VW is profitable and considered to have good management. Although Mr. Roesner's dramatic numbers of "loss" are not absolute proof of lost sales or income, the Riverside-San Bernardino market (including the RMA) is still "at risk" economically and demographically, and the Board believes that the survivability of Ontario VW is tenuous under the current economic conditions. Any additional negative factors could cause havoc to the existing Volkswagen dealerships if an additional dealership were established. The establishment of an additional dealership at the location

proposed, which is in the heart of the better market when comparing the Montclair PAI to the Ontario PAI, would exacerbate the effect upon Ontario VW if such a negative event or economic downturn occurs. The "risk-benefit" analysis which must be made under these circumstances leads to the conclusion that Ontario VW has established that the adverse risk to the public is greater than the benefit that would flow from the establishment proposed.

DETERMINATION OF ISSUES

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

192. Protestant has sustained its burden of proof of showing there would be an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area if the Montclair dealership is established. [Section 3063(b)]

193. Protestant has proved that it would be injurious to the public welfare for the Montclair dealership to be established. [Section 3063(c)]

194. Protestant has 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 the adequacy of sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel. [Section 3063(d)]

195. Protestant has sustained its burden of proof of proving that competition, although it would likely increase if the establishment is allowed, would not be in the public interest. [Section 3063(e)]

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ORDER CONFIRMING DECISION TO SUSTAIN PROTEST

As indicated by a vote of the Public Members of the Board at its September 27, 2011, General Meeting, Protest No. PR-2265-10 has been sustained as of that date. Protestant Ontario VW has 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 not be permitted to proceed with the establishment of the new franchise at the proposed location in Montclair.

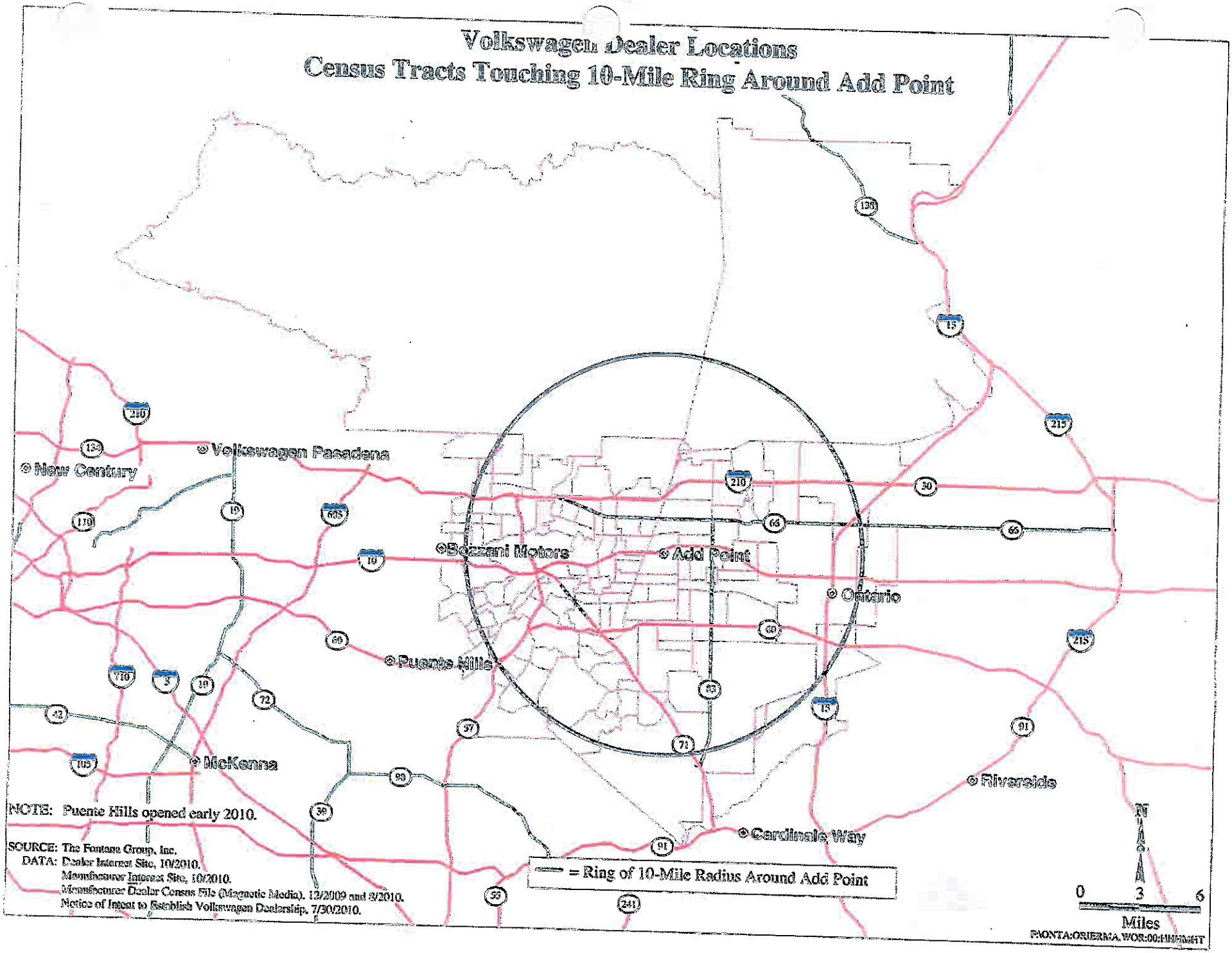
DATED: ~~November 30, 2011~~ 13 December 2011

By: _____
GLENN E. STEVENS
Vice President
New Motor Vehicle Board

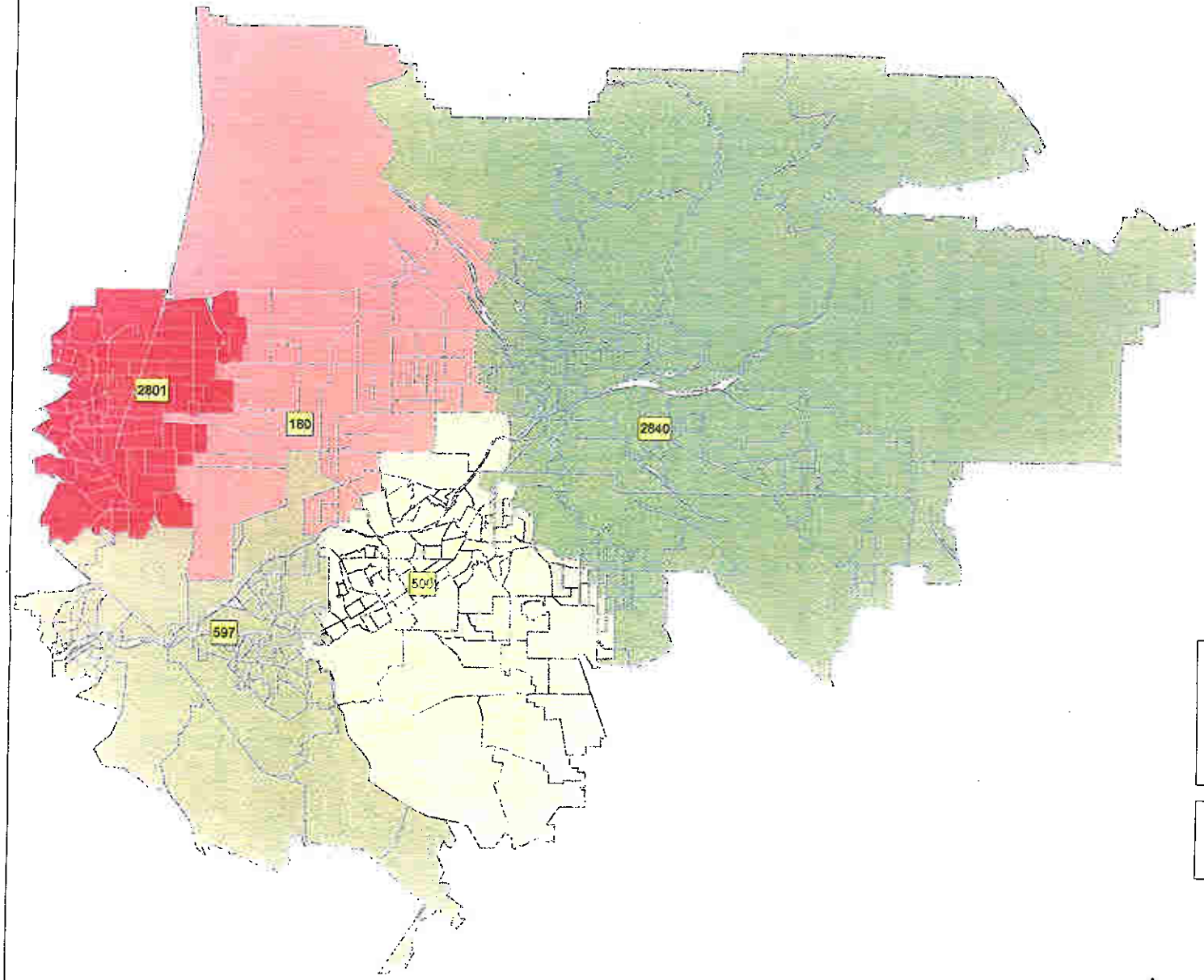
Attachments

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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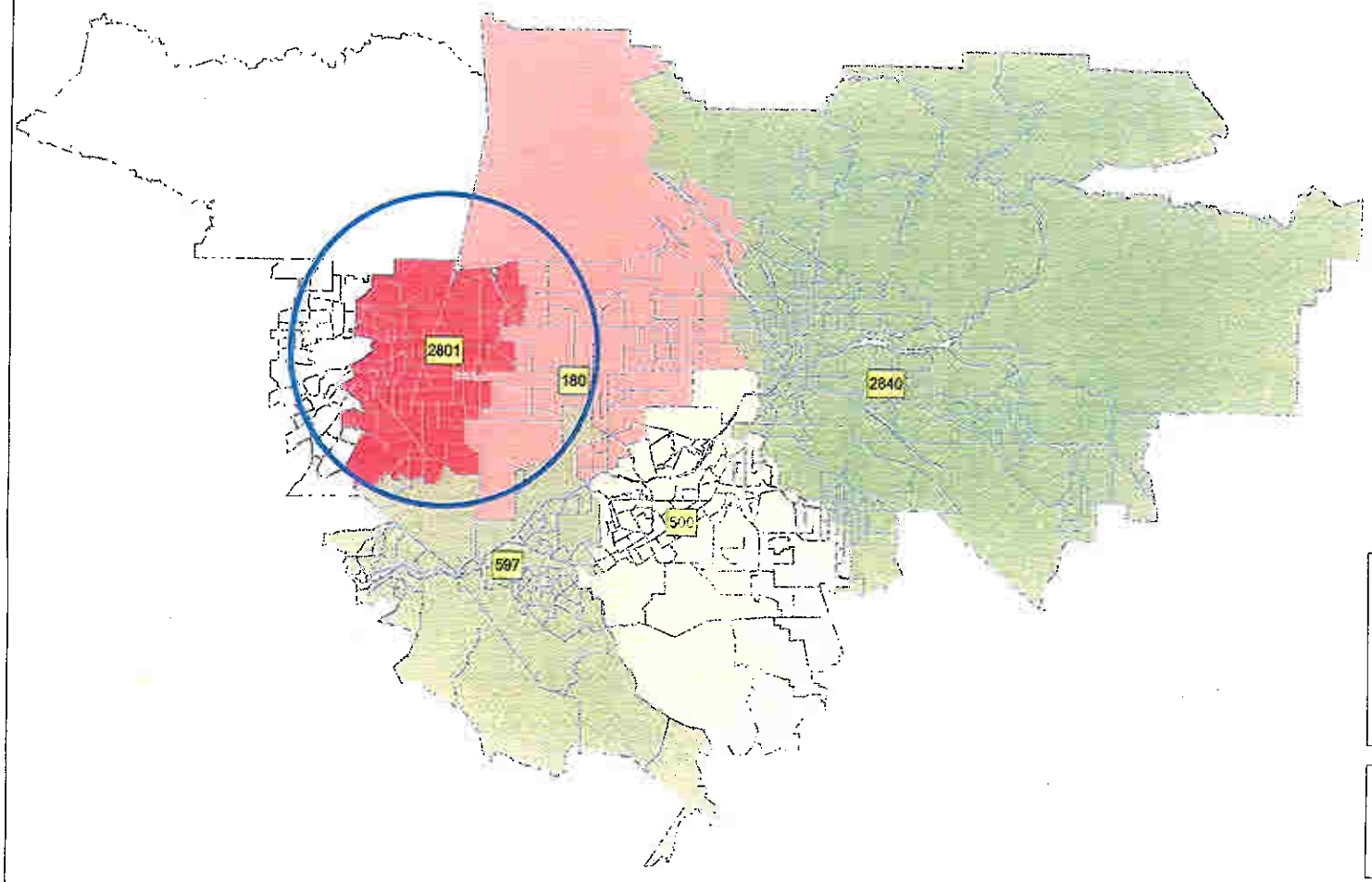
Serial number: 737638

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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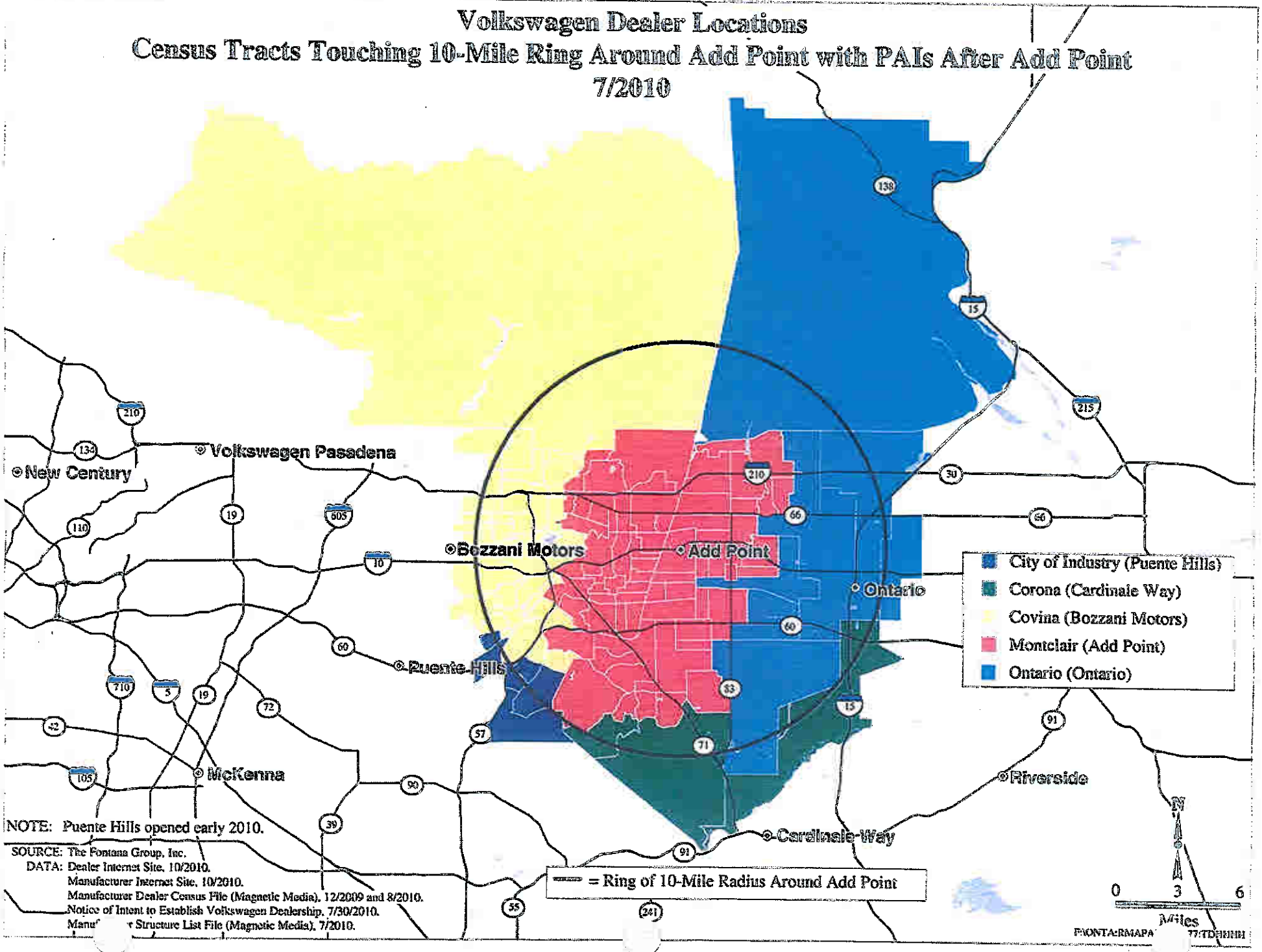
Serial number: 737657

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.
Manu[illegible]r Structure List File (Magnetic Media), 7/2010.

F:\ONTA\RMAPA[illegible]

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.

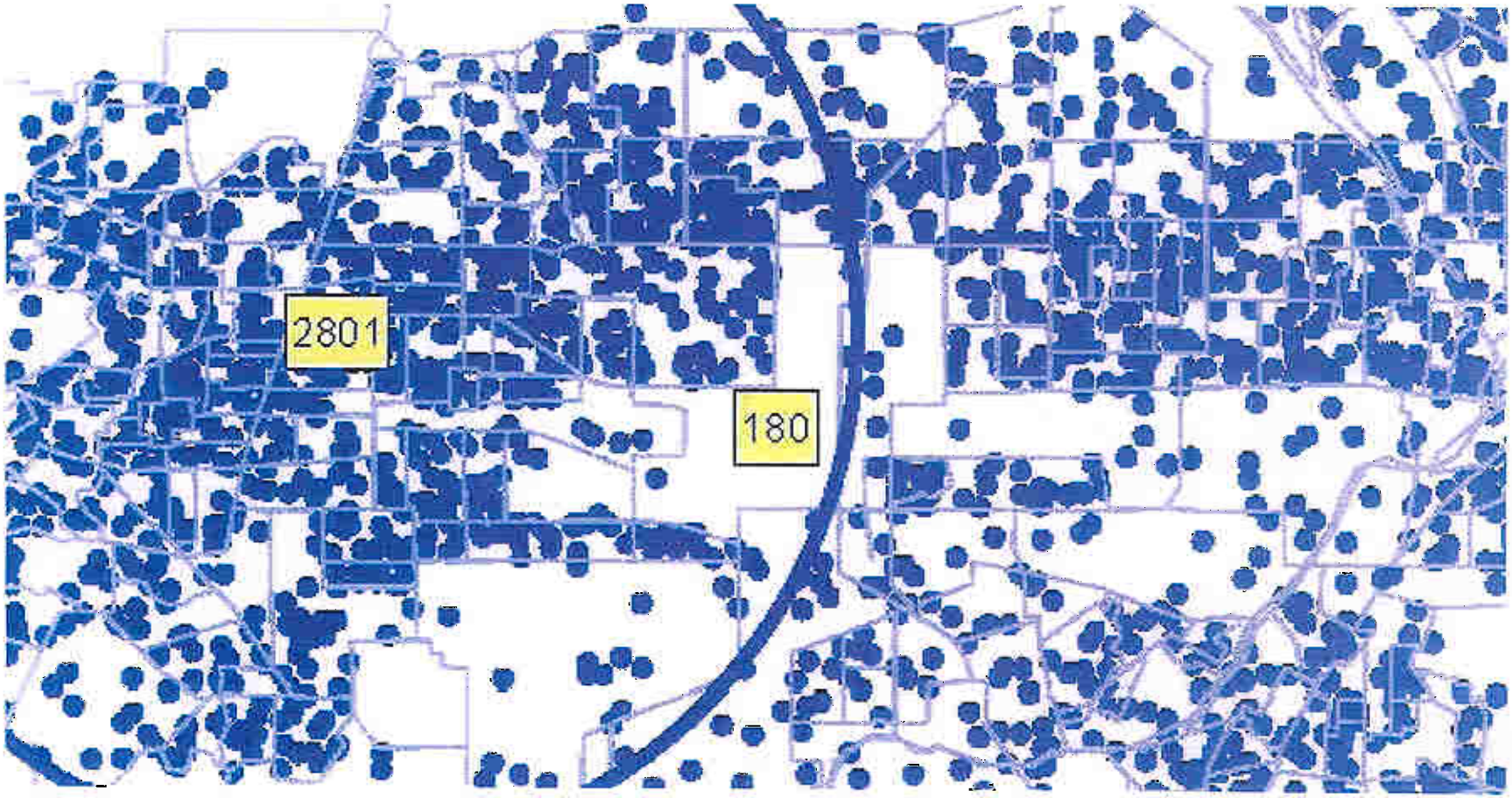
GEOG REF: H00-VW_MONTCLAIR_MKT; VW BASEFILES
SOURCE: USAI USING R.L. POLK CO. AND VW
703484

ATTACHMENT 5

VIA E-MAIL

RECEIVED
JUL 28 2011
NEW MOTOR VEHICLE BOARD

Total Households 2010
Extract of USAI Report Page A-24



180	Ontario VW
2801	Montclair Open Point

1Dot = 250 Households

ATTACHMENT 6

ATTACHMENT 7

Households Earning $80K or More
Extract from USAI Report Page A-34

No Data

Under $30,000

$30,000 - $80,000

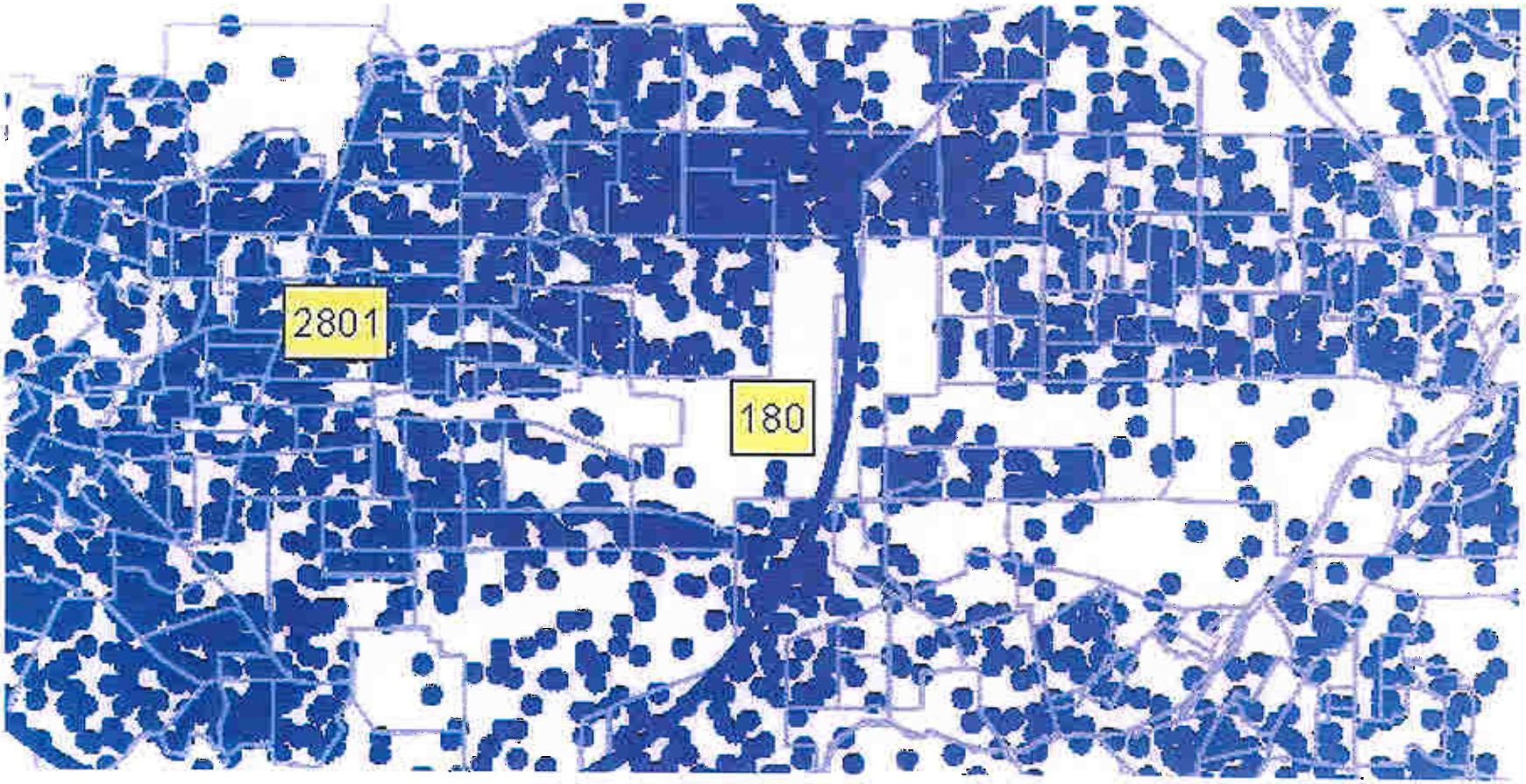
$80,000 and Above

180	Ontario VW
2801	Montclair Open Point

1 Dot = 250 Households

ATTACHMENT 8

Primary Competitive Group Retail Registrations
Extract from USAI Report Page A-35



180	Ontario VW
2801	Montclair Open Point

1 Dot = 250 Households