

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

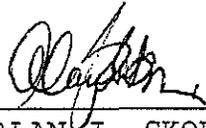
In the Matter of the Protest of)
)
IRVINE CENTRAL MOTORS INC., a) **Protest No. PR-1501-95**
California corporation, dba)
IRVINE MAZDA,)
)
Protestant,)
)
vs.)
)
MAZDA MOTOR OF AMERICA, INC.,)
)
Respondent.)
_____)

DECISION

The attached Proposed Decision of the Administrative Law Judge was considered by the Public members of the New Motor Vehicle Board at its general meeting of October 22, 1996. After such consideration, the Public members of the Board adopted the Proposed Decision as its Decision in the above entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 24 day of October 1996.



ALAN J. SKOBIN
President
New Motor Vehicle Board

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10 IRVINE CENTRAL MOTORS, INC. dba)
IRVINE MAZDA)
11) Protest No. PR-1501-95
Protestant,)
12)
vs.)
13)
MAZDA MOTOR OF AMERICA, INC.,) PROPOSED DECISION
14)
Respondent .)
15

16 PROCEDURAL BACKGROUND

17 1. By letter dated October 19, 1995, Mazda Motor of
18 America, Inc. ("Mazda") gave notice to Irvine Central Motors,
19 Inc., dba Irvine Mazda ("Irvine"), pursuant to Vehicle Code
20 Section 3062¹, of Mazda's intention to re-establish a dealership
21 in the Tustin Auto Mall.

22 2. Irvine is a licensed new motor vehicle dealer
23 enfranchised to sell Mazda vehicles. Irvine is located at 11
24 Auto Center Drive, Irvine, California.

25 3. Mazda is a manufacturer and distributor of new motor

26 _____
27 ¹ All statutory references are to the Vehicle Code unless
otherwise noted.

1 vehicles in California.

2 4. Irvine filed a protest on November 2, 1995 with the New
3 Motor Vehicle Board ("Board"), pursuant to § 3062. The Board
4 assigned protest number PR-1501-95.

5 5. An eight (8) day hearing was held before Douglas H.
6 Drake, Administrative Law Judge, commencing on May 13, 1996 and
7 ending on June 24, 1996.

8 6. An Order dated July 19, 1996, permitted into evidence
9 marked portions of the deposition of Gary Draudt, Exhibit 314.

10 7. Protestant was represented by Brian A. Sun, Esq. and
11 Robert L. Meylan, Esq. of O'Neill, Lysaght & Sun, 100 Wilshire
12 Boulevard, Suite 700, Santa Monica, California.

13 8. Respondent was represented by Maurice Sanchez, Esq. and
14 Christopher M. Leo, Esq. of Alvarado, Smith, Villa & Sanchez,
15 4695 MacArthur Court, Suite 800, Newport Beach, California.

16 **CONTENTIONS OF THE PARTIES**

17 9. Protestant contends there is not good cause to open a
18 new dealership in Tustin given: (1) the severe product,
19 advertising, and image problems Mazda faces; (2) the disastrous
20 effect the new dealership would have on the existing Orange
21 County dealerships, especially Irvine; and (3) the strong
22 competition amongst the existing Mazda dealerships which is due
23 in large part to an interlocking freeway network and the close
24 proximity of several existing Mazda dealerships.

25 10. Furthermore, Protestant contends there cannot be good
26 cause to open the Tustin dealership in an area where, since 1990,
27 five (5) of ten (10) dealerships have been forced to close

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1 because of lack of profitability.

2 11. Irvine has, from the beginning, been against the
3 appointment of a dealership in Tustin. Its principals wrote a
4 letter to Mazda Japan, dated February 12, 1991, five (5) months
5 after Irvine's opening, stating that, "[i]t is very important to
6 the success of Indomobil (America's) Irvine Mazda Dealership that
7 a Tustin Mazda dealership never be installed."

8 12. Lastly, Protestant contends that the Board should take
9 into consideration as an "existing circumstance" Mazda's conduct
10 surrounding its decision to establish the Tustin dealership which
11 includes the following: (1) Mazda's decision to enter the
12 Tustin market several days after it first learned of Irvine's
13 intention to add the KIA franchise to its facility; and (2) in
14 the event Mazda elects to appoint another dealer, the Mazda
15 Dealer Agreement obligated Mazda to provide sixty (60) days
16 written notice to discuss whether there exist any mutually
17 agreeable alternatives to the proposed action.

18 13. Respondent contends Irvine has not presented facts to
19 show (a) that their investment in Mazda was permanent; (b) that
20 the Tustin dealership will have a negative impact on the motor
21 vehicle business in Orange County; (c) that the Tustin
22 dealership will injure the public; (d) that the surrounding
23 dealers have not met the needs of the relevant market area; and
24 (e) that the Tustin dealership will decrease competition.

25 14. Respondent further contends Irvine breached the Mazda
26 Dealer Agreement by failing to give Mazda sixty (60) days prior
27 written notice of Irvine's intention to add the Kia line to its

28

1 facility.

2 15. Lastly, Respondent contends it complied with the terms
3 of the Mazda Dealer Agreement provision requiring sixty (60) days
4 prior written notice of the appointment of Joseph MacPherson
5 ("MacPherson") in the Tustin Auto Mall.

6 ISSUES PRESENTED

7 16. Section 3066 imposes upon Protestant the burden of
8 proving that there is good cause not to enter into a franchise
9 establishing a Mazda dealership in the Tustin Auto Mall.

10 17. In determining whether good cause has been established
11 for not entering into or relocating an additional franchise for
12 the same line-make, Section 3063 requires the Board to take into
13 consideration the existing circumstances, including but not
14 limited to the following:

15 (a) Permanency of the investment.

16 (b) Effect on the retail motor vehicle business and the
17 consuming public in the relevant market area².

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

20 (d) Whether the franchisees of the same line-make in that
21 relevant market area are providing adequate competition
22 and convenient consumer care for the motor vehicles of
23 the line-make in the market area which shall include
24 the adequacy of motor vehicle sales and service

25
26 ² Vehicle Code Section 507 defines "relevant market area"
27 as any area within a radius of 10 miles from the site of a
28 potential new dealership.

1 facilities, equipment, supply of vehicle parts, and
2 qualified service personnel.

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

6 18. Was there a breach of the Mazda Dealer Agreement?

7 **FINDINGS OF FACT**³

8 a. Facts relating to permanency of the investment.
9 (§ 3063(a))

10 19. Mazda discussed awarding the Irvine point to Indomobil⁴
11 in 1988. In 1988, Mazda had its best sales year in its history
12 to that point.

13 20. Prior to investing in the Irvine Auto Mall, Mazda
14 advised Indomobil that it would likely incur substantial losses
15 for several years before the dealership would become profitable.
16 Indomobil was willing to make a long-term investment in Mazda and
17 in the Irvine dealership.

18 21. On or about May 2, 1988, Benny Burns⁵ ("Burns"), while
19 still at Mazda, discussed with Indomobil representatives, Mr.
20 Zacharia and Mr. Hermawan, the potential losses which would be
21 incurred while establishing a dealership in Irvine. Burns

22 _____
23 ³ Findings of facts are grouped in the most logical
24 category and have been considered for each of the good cause
25 factors and the "existing circumstances."

26 ⁴ Indomobil is an Indonesian-owned holding company that was
27 set up for the purpose of purchasing and managing automobile
28 dealerships.

⁵ Presently, Burns is the Executive Vice-President of
Indomobil America.

1 projected those losses to be in excess of double what Indomobil
2 expected, which was \$142,213. The Indomobil representatives
3 responded that they felt the real estate investment would
4 equalize the business potentials.

5 22. Prior to the opening of Irvine, Mazda informed
6 Indomobil that it expected a protest from David J. Phillips Mazda
7 ("Phillips Mazda"), located approximately 2.8 miles to the south.
8 Ossa Tirta ("Tirta"), a representative of Indomobil, sought
9 advice from Mazda's regional manager regarding a solution. Mazda
10 advised Tirta that cash settlements were common in such
11 situations.

12 23. Indomobil ultimately paid David J. Phillips
13 ("Phillips") \$500,000 in exchange for the relinquishment of his
14 right to protest under § § 3062 and 3063.

15 24. The site chosen by Irvine in the Irvine Auto Mall was
16 only 2.6 air miles from Phillips Mazda in Laguna Hills. Phillips
17 Mazda is not in an auto mall and does not have freeway
18 visibility.

19 25. Once Irvine went in, there was a high probability that
20 Phillips Mazda or Santa Ana would not be able to stay in
21 existence, and the \$500,000 was money compensating Phillips for
22 his anticipated losses. Phillips Mazda never went out of business
23 and is still in business at the same location today.

24 26. At the time Irvine opened, there were eight (8) Mazda
25 dealers in business in Orange County.

26 27. Irvine Mazda is located in the city of Irvine which had
27 a population of 127,200 as of January 1, 1996. Irvine is within
28

1 five (5) miles of the cities of Mission Viejo (population
2 89,900), Laguna Hills (population 25,000) and Lake Forest
3 (population 57,600). Other than Phillips Mazda, there is not
4 another Mazda dealer south of Irvine and north of San Diego
5 County. See Attachment 1. This includes, the cities of Laguna
6 Beach (population 23,800), Laguna Niguel (population 55,600), San
7 Clemente (population 46,600), Dana Point (population 36,000) and
8 San Juan Capistrano (population 28,950).

9 28. Indomobil invested approximately \$10.0 million into the
10 Irvine facility. In 1990, it was the largest Mazda facility in
11 the United States. A large portion of the investment related to
12 the acquisition of the land. The facility is located on
13 approximately 3.2 acres.

14 29. Irvine exceeded Mazda's facility guidelines. When
15 Irvine proposed to build such a large facility, Mazda's Senior
16 Vice President, Western Area, Richard Colliver, expressed concern
17 about the 2,000 new unit break-even point.

18 30. Mazda officials designed the plans for the dealership.
19 The dealership is a large, state-of-the-art, attractive facility
20 with an impressive parts and service department.

21 31. In its November 1994 market study, the Mazda Dealer
22 Development Department described Irvine as follows:

23 "Irvine Mazda is located in the Irvine Auto Center in
24 Irvine. The location is very competitive as the Irvine Auto
25 Center is the largest auto mall in the Orange County market
26 and one of the largest in the greater Los Angeles market.
The auto center benefits from a high degree of visibility
from the San Diego Freeway (I-5), just south of the
Interstate 5/405 interchanges."

27 32. The addition of Oldsmobile/GMC Truck in a separate
28

1 showroom did not detract from the visibility of the Mazda
2 showroom. There is a clear separation between the facilities in
3 terms of parking and vehicle display.

4 33. Since opening in September 1990, Irvine has made a
5 substantial investment in advertising. In 1990 alone, Irvine
6 spent approximately \$750,000 on advertising. Since 1990, Irvine
7 has spent higher amounts on advertising than any other Orange
8 County Mazda dealership. On a cumulative basis, Irvine spent on
9 average approximately \$5,000 per month more than any other Orange
10 County Mazda dealership.

11 34. Irvine spent the following amounts on advertising for
12 Mazda:

<u>Year</u>	<u>Amount</u>	<u>Monthly Average</u>
1991	\$715,396	\$59,616
1992	\$557,401	\$46,450
1993	\$541,193	\$45,099
1994	\$451,841	\$37,653
1995	\$326,294	\$27,191
Total	<u>\$2,592,125</u>	

21 35. Irvine's advertising expenditures have been declining
22 since they opened in 1990.

23 36. Irvine maintains a \$500,000 parts inventory. This
24 inventory is the largest in Southern California.

25 37. Irvine's rounded overall financial results since 1990
26 were as follows:

27 ///

1	<u>Year</u>	<u>Profit (Loss)</u>
2	1990	\$(1,200,000)
3	1991	(1,725,278)
4	1992	(741,048)
5	1993	(276,654)
6	1994	4,540
7	1995	(366,732)
8	1996*	200,000* projected

9

10 38. The above is the chart Irvine shows to its shareholders
11 in Jakarta. Despite the large losses, the shareholders have
12 remained committed to Mazda.

13 39. Indomobil has maintained its investment in its Irvine
14 dealership during the same time that five other Mazda dealers in
15 Orange County closed down their operations, including: (1) Santa
16 Ana Mazda, (2) Garden Grove Mazda, (3) Campbell Mazda, (4) La
17 Habra Mazda, and (5) Buena Park Mazda.

18 40. Irvine has lost, on an cumulative basis, \$4.3 million
19 dollars since opening.

20 41. Irvine has duplicative management layers and too many
21 employees in top management given the number of sales.

22 42. Irvine has salaries that are slightly higher than
23 average.

24 43. Irvine's rent is \$65,000 a month, which is too high for
25 the number of units they are selling.

26 44. Overhead absorption is defined as the amount of fixed
27 overhead which can be absorbed by the different departments of a

1 dealership. Typically, absorption is analyzed, department by
2 department in the following order: service and parts; used car
3 sales; and new car sales. For example, if all the fixed overhead
4 is absorbed by parts and service, then every car sold, whether
5 new or used is profit.

6 45. With a fixed overhead of \$4 million dollars, \$1.5
7 million higher than any other Orange County dealer, Irvine would
8 have had to sell 4,000 new cars in 1993 to absorb their fixed
9 overhead (new car break-even units.) In 1994, that figure was
10 3,500 new cars. In 1995, that figure was 2,500 new cars. In
11 1991, Irvine sold approximately 1,500 cars and lost \$2 million
12 dollars. Irvine's losses have continued for the past five (5)
13 years and the sales per year have continued to decline.

14 46. The following factors all contribute to high overhead,
15 which is why Irvine is not making money: rent; property taxes;
16 insurance; repairs and maintenance; utilities; and supervision
17 salaries.

18 47. In 1994-1995, the other Orange County dealers,
19 excluding Irvine, had operating profits.

20 48. Unless Irvine makes some drastic changes, Irvine will
21 not be in business much longer.

22 b. Facts relating to the effect on the retail motor
23 vehicle business and the consuming public in the
relevant market area. (§ 3063(b))

24 49. The proposed dealer will be Joseph MacPherson and the
25 dealership will be in the Tustin Auto Mall in one of two
26 facilities under MacPherson's control. The facility and
27 personnel will meet all of Mazda's requirements as outlined in

1 the Letter of Intent ("LOI") dated September 18, 1995. The Tustin
2 facility will be an exclusive Mazda dealership.

3 50. The proposed location in the Tustin Auto Mall is 7.8
4 miles from the Irvine Auto Mall. In 1990, the Santa Ana Auto
5 Mall was 9.7 miles from the Irvine Auto Mall. Mazda is moving
6 the point 2.5 miles closer to Irvine.

7 51. Since 1992, Mazda penetration rates have declined in
8 the import car and MPV market:

9

<u>Period</u>	<u>Orange County</u>	<u>LA/OC Metro</u>	<u>Western Region</u>
10 92	7.75%	7.13%	7.19%
11 6/93 YTD	7.28	6.56	6.69
12 93	7.22	6.72	6.72
13 6/94 YTD	6.62	6.19	6.41

15

16 52. Retail registration efficiency (sales penetration)
17 expressed in percentages comparing sales against national
18 penetration adjusted for local segment popularity in the RMA are
19 as follows:

20

<u>Period</u>	<u>Actual</u>	<u>Expected</u>	<u>Efficiency</u>
21 1992	6.63%	5.57%	119.0%
22 1993	5.68%	5.34%	106.4%
23 1994	4.67%	4.68%	99.8%
24 1995	3.39%	4.07%	83.3%

25
26 There was no evidence for 1996.

27 53. This shows a continual decline in penetration. However

28

1 for 1993 through 1994, the dealers in the Orange County/Los
2 Angeles Metro area were selling into the RMA at a rate greater
3 than or nearly equal to national average.

4 54. Based upon the bar charts prepared by John Frith
5 ("Frith"), Western Regional Manager, Urban Science Applications,
6 Inc. ("USAI"), Irvine is able to penetrate its market eight-to-
7 twelve-miles from the dealership at a higher rate than the
8 average of all dealers in Orange County.

9 55. In a June 10, 1996 article in the Los Angeles Times,
10 entitled "Sales Drop Spurs Change in Mazda's U.S. Management,"
11 the Times reported that:

- 12 • "Mazda Motor Corp. said it is reshuffling top managers
13 in its U.S. sales and marketing unit to try to boost
revenue and improve relations with dealers."
- 14 • "In the U.S., Mazda's largest market outside Japan,
15 1995 sales fell to 283,745 units from 375,416 the year
16 before. Sales in the first five months of 1996 were
down 14% at 113,855 from the year-ago period."

17 56. Sales per Mazda dealership have declined from 415 units
18 in 1994 to 314 in 1995 -- a decline of 25%. Mazda's sales per
19 dealership are substantially below other Japanese imports, as set
20 forth below:

21	<u>Franchise</u>	<u>No. of Dealers - 95</u>	<u>Sales/Dealer - 95</u>
22	Toyota	1363	843
	Honda	1279	700
23	Nissan	1247	652
	Mitsubishi	511	391
24	Mazda	904	314

25
26 57. In 1989, Mazda had 759 dealers and sold approximately
27 400,000 cars. In 1995, Mazda had 896 dealers and sold less than

1 285,000 cars.

2 58. As a result of Mazda's deteriorating sales per
3 dealership, Mazda needs to reduce, not increase, the size of its
4 dealer body. Indeed, in a recent interview with Automotive News,
5 entitled "Mazda's U.S. goal: More sales, fewer dealers," Henry
6 Wallace, the former Ford Motor Co. manager who recently became
7 the President of Mazda Motor Co., stated that:

- 8 ● "We have more than 900 dealers in the United States.
9 But a lot of our dealers are dualed and a lot don't
10 sell many vehicles. So, we probably have 300 or 400
11 core dealers who are selling in good volume."
12
- 13 ● "Now, I don't think we should be down to 300 or 400,
14 but we don't necessarily need to be at 900 or 950,
15 either. We've got to find a balance, to strengthen our
16 dealers and focus them more on Mazda products. I think
17 it's going to be somewhere between that 300 to 400, and
18 900."

19 59. Irvine's annual Mazda sales are as follows:

- 20 ● 1991, 1,606.
- 21 ● 1992, 1,181, a drop of 425 units.
- 22 ● 1993, 1,006, a drop of 175 units.
- 23 ● 1994, 843, a drop of 163 units.
- 24 ● 1995, 319, a drop of 524 units.

25 60. In 1992, Irvine had the second highest sales volume in
26 the Western Region which is comprised of 214 dealerships. Irvine
27 also had the second highest sales volume in the Western Region in
28 1993 with 992 new car sales. Campbell Mazda, which introduced a
one-price, no dicker pricing strategy of low price, high volume
sales, was next with 978 sales.

61. Irvine's sales have fallen approximately 80% from 1991

1 to 1995.

2 62. From 1992 to 1994, Mazda retail car and light truck
3 sales nationwide remained relatively flat. In 1995, that figure
4 dropped almost 25%. In 1995, Irvine's Mazda sales dropped 59.5%.
5 Truck sales have never been a substantial part of Irvine's
6 business.

7 63. The national average benchmark for used cars sold to
8 new cars sold is 80%. Irvine's used cars to new cars sold ratio
9 is 30%. Irvine had only ten (10) spots for used cars which is
10 not enough space.

11 64. In late 1992 or early 1993, Campbell Mazda instituted a
12 "no dicker price" pricing system which greatly reduced its gross
13 margin per new car sales. Campbell's new pricing strategy led to
14 a "substantial" increase in its sales in Orange County. This
15 pricing strategy, however, caused declines in the other Orange
16 County Mazda dealers' gross margins and unit sales.

17 65. During 1993 and 1994, all of the other Orange County
18 Mazda dealerships came to John Morris ("Morris"), former Mazda
19 District Sales Manager, Western Region, and expressed concern
20 about Campbell's pricing strategy. In fact, on several
21 occasions, Morris was so concerned about Campbell's pricing
22 strategy that he personally went to Campbell's management to
23 encourage them to increase their gross margins because he wanted
24 everyone to make more money.

25 66. Buena Park Mazda closed in 1995. Mazda searched for a
26 replacement candidate, but was unable to find an acceptable
27 candidate. Mazda is still attempting to find a suitable
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1 replacement candidate. Prior to closing the dealership, the
2 owner of Buena Park Mazda did not attempt to sell the dealership.
3 William Goetze ("Goetze"), Mazda Vice-President/General Manager,
4 Southeast Region, acknowledged that the reason Mazda is having
5 some difficulty finding new dealer candidates to fill open points
6 is because of its product identification and sales difficulties.

7 67. Approximately four (4) or five (5) years ago, Mazda
8 opened a new dealer point in Gardena. The Gardena dealership was
9 owned by Dai Chong, a large Hong Kong holding company. The
10 dealership closed in less than six months.

11 68. In 1995, at the time Mazda made its decision to go
12 forward with the Tustin/Santa Ana point, Goetze acknowledged that
13 it was difficult for Mazda to determine whether the other Orange
14 County Mazda dealerships were making or losing money from their
15 Mazda operations.

16 69. John Altstadt ("Altstadt"), C.P.A., Mazda's financial
17 expert, did not analyze the Orange County Mazda dealerships to
18 determine whether their Mazda operations, dualled or segregated,
19 are currently profitable.

20 70. Altstadt audited several Orange County Mazda
21 dealerships during 1989 to 1991. Campbell Mazda in Buena Park
22 closed because they were unprofitable. During the time Altstadt
23 audited Campbell Mazda in Costa Mesa, the dealership was only
24 marginally profitable. Similarly, during his audits of Garden
25 Grove, he determined that the dealership was not profitable.

26 71. Starting in 1994, several Orange County Mazda
27 dealerships, including Anaheim Mazda and Phillips Mazda, began to

1 decline inventory Mazda offered to them.

2 72. Frith has been retained 25 to 30 times as an expert
3 witness in manufacturer-dealer litigation regarding "add-point"
4 cases. In each case, Frith has been retained by the
5 manufacturer. In each case, Frith reached the conclusion that a
6 new dealership was warranted.

7 73. In selecting a standard upon which to determine whether
8 a new dealership is warranted, Frith always selects the highest
9 penetration rate from among the manufacturer's: (1) national; (2)
10 state; or (3) local penetration rates.

11 74. The basis (the "standard") upon which Frith conducted
12 his analysis of Mazda's performance in the Orange County
13 automobile market was "competitive group industry retail car and
14 truck penetration rates" (National adjusted for local segment
15 popularity.) Frith used this penetration standard throughout his
16 report. Frith's purpose in selecting a penetration standard was
17 to "find a reasonable standard by which to measure performance in
18 the relevant market area."

19 75. Mazda, itself, does not consider national penetration
20 rates because other manufacturers, including Toyota, Nissan and
21 Honda, committed a much greater amount of their resources to the
22 California market than Mazda. Mazda regional dealer
23 representatives and district managers focused upon local area
24 standards, such as metro, zone or district, to evaluate markets.

25 76. During Burns' eleven-years with Mazda, including five
26 years as the Dealer Development Manager (1985 - 1990), Burns was
27 involved in opening approximately 24 new Mazda dealerships. In
28

1 deciding whether to open a new point, Mazda did not base that
2 decision upon national penetration rates.

3 77. The use of a total imports penetration standard to
4 evaluate Mazda's performance is consistent with Irvine's expert,
5 Dr. John Hemphill's ("Hemphill"), experience with J.D. Power &
6 Associates and most of the Japanese manufacturers he has dealt
7 with. In Hemphill's experience, Japanese manufacturers,
8 especially in the Southern California market, focus on import
9 penetration rates.

10 78. The Orange County auto market is "highly competitive."

11 79. From follow-up telephone surveys with its parts and
12 service customers, Irvine has determined that approximately 46.5%
13 of its total service business comes from the northern direction,
14 i.e., in the direction of the proposed Tustin dealership. See
15 Attachment 1.

16 80. In 1993 and 1994, Mazda became heavily involved in
17 fleet and leasing programs. There will be a number of fleet and
18 leased cars returning to the market in 1996 and 1997. These cars
19 represent a significant potential source of parts and service
20 revenues for existing Mazda dealerships, such as Irvine.

21 81. Based on the relationship of Irvine's new car sales to
22 parts and service revenues, Irvine could lose \$232,946 in parts
23 and service revenues to the proposed Tustin dealership.

24 82. The effect of the loss of customer sales to Irvine will
25 cause the dealership to also lose repeat sales.

26 83. Establishment of the proposed Tustin dealership would
27 have the effect of driving Irvine's gross profit margins down. In
28

1 his prior experience, Altstadt is aware of situations where the
2 addition of a dealership of the same line-make within a few miles
3 of an existing dealership caused the existing dealership's gross
4 margins to decline.

5 c. Facts pertaining to the injury to public welfare.
6 (3063(c))

7 84. Irvine is active in the community. It holds parties
8 for local school children at Halloween and Easter. It
9 participates in the Mothers Against Drunk Driving ("MADD")
10 program. It assists in anti-drug activities with local law
11 enforcement organizations. It recently finished a promotion with
12 local law enforcement involving the raffling of a Miata for a
13 drug-free high school graduation night.

14 85. MacPherson is a prominent and good dealer in the Orange
15 County area. He currently owns several dealerships in Orange
16 County, including Ford, Chevrolet and Toyota. The amount of
17 marketing the MacPherson organization does is quite aggressive.
18 Through the "Help Our Schools" campaign, MacPherson also donates
19 money to local schools for each car he retails.

20 d. Facts relating to whether the franchisees of the same
21 line-make in that relevant market area are providing
22 adequate competition and convenient consumer care for
23 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. (§ 3063(d))

24 86. The proposed Tustin dealer will be located adjacent to
25 Interstate 5 in the Tustin Auto Mall. See Attachment 1. The
26 optimal location for a new Mazda dealership, based on giving "the
27 very best customer convenience," is a point just south of the 5

1 Freeway.

2 87. The Tustin Auto Mall is centrally located. It has a
3 very positive reputation in the community. The Tustin and Irvine
4 Auto Malls are the most significant locations in the market.

5 88. The freeway system in Orange County, specifically the
6 405 and 5 freeways, create a mobile and competitive market for
7 customers. It is not difficult for consumers to travel along the
8 freeways to shop multiple dealerships. There are currently three
9 Mazda dealerships located in close proximity to the freeway
10 system: Anaheim Mazda; Irvine; and Phillips Mazda. See
11 Attachment 1. This degree of mobility and competition is
12 reflected by the high degree of in-sells in the Orange County
13 Market. In-sells are a reflection that consumers are currently
14 shopping at different Mazda dealerships away from their homes and
15 places of employment. As the prices of new vehicles have
16 increased faster than family incomes, people have been willing to
17 travel greater distances to shop for the product and price.

18 89. There are 15 line-makes in at least two of the auto
19 malls: Irvine; Santa Ana; or Tustin. Mazda primarily competes
20 with Honda, Toyota, and Nissan. Honda is in Irvine and Santa
21 Ana; Toyota and Nissan are in Tustin and Irvine.

22 90. The Orange County market is intensely competitive.

23 91. The proposed Tustin dealership will reduce the average
24 air distance between the closest Mazda dealership in the RMA to
25 potential customers by one-half (1/2) mile.

26 92. Of the 33 manufacturers whom Frith analyzed, currently
27 18 of those 33 manufacturers have an average distance between

28

1 their closest dealership and potential customers which is greater
2 than Mazda's current average without the proposed Tustin
3 dealership.

4 93. In the Tustin SOA ⁶, over 26 different line-makes
5 provide better customer convenience than Mazda. Mazda is at a
6 competitive disadvantage by being almost six (6) miles away from
7 the customer in the Tustin SOA. Most of the competition is about
8 three (3) to three and a half (3.5) miles away. By adding the
9 dealer in Tustin, Mazda moves to three (3) miles average distance
10 from its customers in the SOA.

11 94. A decrease of one-half (1/2) mile in the average air
12 distance between the closest Mazda dealership and potential
13 customers in the Tustin RMA will have at most a marginal or
14 insignificant impact on customer convenience.

15 95. On average, based upon four tests made at different
16 times on different dates, the driving time between the proposed
17 Tustin dealership and Irvine is 12 minutes.

18 96. It can take anywhere from 10 to 45 minutes depending on
19 the time of day to drive from Phillips Mazda to Irvine.

20 97. Sellers, Mazda Pacific Zone Manager⁷, Western Region,
21

22 ⁶ Mazda has divided the market into Statistical Observation
23 Areas ("SOA'S") which are made up of census tracts or zip codes
24 which are closer and more convenient to dealers to whom the area
is assigned, than to other dealers of the same line-make. Each
dealer or proposed dealer is assigned its own SOA.

25 ⁷ Prior to assuming his current position, Sellers was the
26 Market Representation Manager at the Mazda corporate office in
27 Irvine from 1988 to 1995. For approximately ten (10) months,
Sellers was the Dealer Development Manager for the Western
Region.

1 believed the best thing for Mazda was to add a point in
2 Tustin/Santa Ana, add a point in Irvine, and move Phillips Mazda
3 south to another location. Sellers is not aware of any efforts
4 to approach Phillips about moving his dealership south.

5 98. The 1989 and 1994 market studies, conducted by Mazda's
6 Dealer Development Department, recommended that the Phillips
7 Mazda dealership be moved to the south of its current location.
8 In the November 1994 market study, the Dealer Development
9 Department stated that:

10 "The best long-term recommendation for the Orange County
11 market is to move [Phillips Mazda] further south giving it
12 greater separation from the dealer in Irvine."

13 99. In performing its market studies, Mazda did not
14 consider the CSI (customer satisfaction index) or CARE⁸ rankings
15 of its existing Orange County dealers. Similarly, Mazda did not
16 consider whether the existing dealers were adequately meeting the
17 retail publics' parts and service needs.

18 100. In 1993, Irvine's Overall Customer Satisfaction ranking
19 was higher than all dealers in its group. In the fourth quarter
20 of 1993, 74% of Irvine's customers indicated that they were
21 "totally satisfied" or "very satisfied" with its performance.

22 101. For the first quarter of 1995, in the Western Region,
23 Irvine had the third highest overall CARE ranking among the ten
24 (10) dealerships in its group. Similarly, Campbell/Costa Mesa
25 Mazda ranked second for the same time period.

26 ⁸ CARE is Mazda's program to survey existing customers and
27 measure how they felt about their experiences at a given Mazda
28 dealership. CARE rankings is Mazda's customer satisfaction
index.

1 102. The twelve (12) month CSI ranking is more important
2 than the rolling three (3) month average, because the rolling
3 twelve (12) month average is the fundamental index of where a
4 dealer stands in total versus the other dealers in the region.

5 103. In terms of total twelve (12) month ranking⁹ of dealers
6 in the region for overall dealer satisfaction, Irvine ranked
7 number 61 out of approximately 186 dealers.

8 104. In terms of total twelve (12) month ranking for dealers
9 in terms of sales and delivery, Irvine ranked number 137 out of
10 200 dealers in the Western region.

11 105. In terms of total twelve (12) month ranking for dealers
12 in terms of new vehicle delivery, Irvine ranked number 190 out of
13 201.

14 106. In terms of total twelve (12) month ranking for service
15 and parts, Irvine ranked number 34 out of 190 dealers in the
16 region.

17 107. As for customer relations, Irvine has the sixth (6th)
18 highest complaint ratio to sales out of the approximately 200
19 dealers in the Western region.

20 108. On May 9, 1996, Goetze sent a letter to all Western
21 Region Mazda Dealers entitled "Passion for CARE" Dealer
22 Satisfaction CARE Rankings. In the letter, Goetze congratulated
23 Irvine for ranking number one among the dealerships in its group.
24 Goetze also congratulated Anaheim Mazda for ranking number one
25 among the dealerships in its group.

26
27 ⁹ The twelve (12) month rolling average referenced in
28 Exhibit 29 encompasses March of 1995 through February of 1996.

1 109. Mazda gave "Guild" awards to Irvine's parts and
2 service managers in recognition of their outstanding performance.
3 The "Guild" awards are especially unique for large metro
4 dealerships such as Irvine.

5 110. Goetze described Irvine's parts and service operations
6 as "one of their better operated departments." He stated that
7 the facility is "very competitive in the market place."

8 111. Irvine's sales staff has substandard product knowledge
9 and Irvine needs to institute more frequent product training.

10 112. Irvine's problems are a dramatic sales decline over the
11 past several years, overall customer satisfaction indexes in
12 terms of vehicle delivery and new car department, submission of
13 financial statements, and not wanting to discuss the Dealer
14 Review Action Plan ("DRAP")/Planning for Quality and Profit
15 ("PFQP") which is a program set up by Mazda to review the
16 dealer's overall operations in terms of goals, objectives,
17 performance, and lack of performance.

18 e. Facts pertaining to whether the establishment of an
19 additional franchise would increase competition and
therefore be in the public interest. (§ 3063(e))

20 113. The name "MacPherson Mazda" would create a positive
21 image because of the owner's background in the marketplace.

22 114. By adding the dealer in Tustin, Mazda gives the
23 consumer the convenience of being able to shop all line-makes and
24 to make comparisons between competitors in one place.

25 115. Currently, Mazda is not in Tustin nor Santa Ana, which
26 makes them one of the few manufacturers of any major significance
27 that is not represented.

1 116. No other Orange County dealer, other than Irvine has
2 expressed an objection or dissatisfaction with respect to the
3 appointment of a Mazda dealership in Tustin. The other two (2)
4 dealers who could have protested, Anaheim and Costa Mesa, view
5 MacPherson as a strong dealer and both indicated they would not
6 protest his appointment. Phillips, the dealer in Laguna Hills,
7 is supportive of the appointment of a Tustin dealership and
8 stated that MacPherson would be a good competitor.

9 117. With the addition of Tustin, four (4) out of the six
10 (6) dealers will be on the freeway in Orange County and that
11 makes for a convenient and competitive situation for the public.
12 See Attachment 1.

13 118. In a metro area, dealers are close to each other for
14 many different brands. The proximity of dealerships in a metro
15 area makes it common to have two (2) or three (3) dealers close
16 to each other. For example, there are seven (7) Honda dealers
17 within a ten (10) mile RMA ring in Orange County.

18 119. The four (4) dealers in one moderate stretch of the
19 freeway, will be convenient for the consuming public, allow them
20 to comparison shop and will increase competition. However, this
21 will also decrease gross profit margins.

22 f. Facts pertaining to Mazda's conduct in adding the
23 Tustin dealership and appointing Joseph MacPherson as
the dealer principal.

24 120. In December 1992, Mazda held a meeting with the Orange
25 County dealer body to discuss whether Mazda should open a
26 dealership in Tustin or Santa Ana. Prior to the meeting, Mazda's
27 Dealer Development Department, headed by Sellers, conducted a
28

1 market study and recommended that Mazda open a dealership in
2 Tustin/Santa Ana.

3 121. Fred Wallace, Mazda's Manager for the Western Region,
4 engaged the dealer body in an open dialogue regarding Mazda's
5 performance in Orange County. At the conclusion of the meeting,
6 Mr. Wallace concluded that because the Orange County Mazda
7 dealerships were not profitable, Mazda would not appoint a dealer
8 in Santa Ana for at least twelve (12) to eighteen months (18).

9 122. In December 1992, the Orange County Mazda dealers, on a
10 collective basis were not profitable.

11 123. In the eighteen (18) month to two year period following
12 December 1992, the sales of the Orange County Mazda dealers
13 continued to decline, as had Mazda's sales on a national,
14 regional and statewide basis.

15 124. Goetze made the final decision to open the Tustin
16 dealership sometime in the summer of 1995. In approximately
17 March or April of 1995, Goetze verbally instructed Sellers to
18 locate candidates for the Tustin dealership.

19 125. At the time of Mazda's decision, it did not have
20 available any 1995 sales data, not even for the first quarter of
21 1995. Instead, Mazda based its decision solely on 1990-1994
22 sales data.

23 126. Mazda acknowledged that it has had "a very contentious
24 relationship with Irvine Mazda."

25 127. Irvine expressed some "concerns" to Morris regarding
26 the DRAP program. Irvine believed that the DRAP program, which
27 establishes much of the working relationship between the

28

1 manufacturer and dealer, should be based upon actual data and not
2 projections.

3 128. Goetze, Mazda's Vice President and head of the Western
4 Region from February 1993 until June 1996, acknowledged that the
5 DRAP program was "poorly perceived" among Mazda's dealer body.
6 The Orange County dealer body expressed numerous criticisms and a
7 broad level of complaints regarding the DRAP program in a meeting
8 prior to December 1992.

9 129. The employees in Mazda's Western Region were upset with
10 Irvine's direct communications with Mazda's corporate and
11 Japanese officials. Goetze wanted Irvine to discuss issues with
12 his regional staff, rather than raising those issues with Mazda's
13 corporate offices. Additionally, Gary Draudt, the Zone Sales
14 Manager in Orange County, informed Morris that he was bothered by
15 Burns' (and Irvine's) direct line of communications to Mazda's
16 corporate offices.

17 130. In 1994, Mazda's expected penetration rate in the
18 Tustin RMA was 4.68%, as compared to its actual penetration rate
19 of 4.67%. If Mazda had sold 3.8 more cars in the Tustin RMA it
20 would have achieved the expected penetration rate.

21 131. Similarly, again using Mr. Frith's national industry
22 penetration rates for purposes of argument, Mazda needed only 54
23 additional sales in the Tustin SOA in 1994 to reach its zone
24 market share; it needed only 14 additional units to reach its
25 zone level in 1995.

26 132. Although Mazda's sales declined throughout the Western
27 Region by 15-20% since Goetze came to the Region in February

28

1 1993, Mazda has added only two new dealerships in the Western
2 Region. Both new dealerships were added in Arizona. Mazda has
3 not added a single new dealership in California with the
4 exception of the proposed Tustin point.

5 133. Since coming to the Western Region, Goetze is not aware
6 of any other markets in California or the Los Angeles Metro
7 region in which Mazda even considered adding a new dealership.

8 134. Mazda's warranty department in Corporate Headquarters
9 makes the decision on whether or not to audit a dealer. The
10 region has no say so in whether or not a dealer will be the
11 subject of a warranty audit. The region can and does help in
12 reducing the amount owed by a dealer after the warranty
13 department conducts an audit. Goetze assisted Irvine in reducing
14 the amount owed after its 1995 warranty audit. The audit of
15 Irvine had nothing to do with the addition of Kia to its
16 facility.

17 135. Morris was asked to leave the first time he visited
18 Burns. But he continued to call on the dealer every month, from
19 1 to 3 times a week.

20 136. When Irvine added Kia, Morris tried to get Burns to
21 complete the necessary paperwork, but Burns refused.

22 g. Facts pertaining to whether there was a breach of the
23 Mazda Dealer Agreement.

24 137. The Mazda Dealer Agreement ("Agreement") was, and
25 remains, the operative written agreement defining the business
26 relationship, expectations and obligations between Mazda and its
27 dealers. The Agreement also defines the business relationship

1 between Mazda and Irvine.

2 138. Section VI of the Agreement, entitled "REASONABLE
3 EXPECTATIONS OF DEALER AND MAZDA" contains Subsection 2, entitled
4 "Acknowledgments," and provides in pertinent part that:

5 "(iii) if MAZDA determines it would be in the best
6 interests of customers or MAZDA to do so, MAZDA may elect to
7 appoint another dealer to promote, sell and service MAZDA
8 Products near DEALER'S Approved Location. DEALER and MAZDA
9 shall give each other at least sixty days' written notice
10 prior to taking any of the foregoing actions, for the
11 purpose of enabling the parties to discuss whether there
12 exist any mutually agreeable alternatives to the proposed
13 action. To the extent any consent is required from a party,
14 such party will not unreasonably withhold its consent to any
15 of the foregoing actions by the other."

16 139. Irvine promised Mazda in its letter of intent, that the
17 facility in Irvine would be an exclusive Mazda dealership.

18 140. Irvine added Oldsmobile and GMC Truck to its facility
19 at the end of 1991, and provided written notice to Mazda. By
20 adding Oldsmobile and GMC Truck, Irvine cut down on its space for
21 used cars.

22 141. Mazda officials in the Western Region chose not to
23 inform the surrounding Mazda dealers of their intent to appoint a
24 dealership in Tustin until after a viable dealer candidate had
25 been found. Mazda did so because it anticipated a protest by one
26 or more of the surrounding dealers.

27 142. Mazda's Western Region officials withheld information
28 regarding Mazda's approach to the Tustin Auto Mall from Morris.

143. The reason Mazda withheld information regarding its
intention to open the Tustin dealership was so that when Morris
talked to the Orange County dealers, he could "tell them that he

1 did not know what was happening and be speaking the truth."

2 144. On September 18, 1995, Mazda entered into a LOI with
3 MacPherson regarding the Tustin dealership.

4 145. Prior to entering into an LOI with a dealer candidate,
5 Mazda undertakes a lengthy process of information gathering and
6 negotiation with the dealer candidate.

7 146. Between March 1994 and October 19, 1995, no Mazda
8 employee ever communicated to Burns that Mazda intended to
9 establish a dealership in the Tustin RMA.

10 147. Between March 1994 and October 19, 1995, no Mazda
11 employee ever discussed add points or possible alternatives to
12 improve Mazda's market share in the Tustin RMA with Burns.

13 148. Mazda's Western Region officials did not internally
14 consider any possible alternative steps the company could take to
15 improve its performance in the Orange County market, other than
16 opening another dealership in the Tustin/Santa Ana RMA.

17 149. Without the sixty (60) days' prior written notice to
18 Mazda as required by the Agreement for the addition of product
19 lines to the Mazda dealership facility, Irvine added Kia in May
20 of 1994.

21 **DETERMINATION OF ISSUES**

22 1. Good Cause Factors:

23 (a) Permanency of the investment.

24 150. Irvine has sustained its burden of proof on permanency
25 of its investment. Irvine has invested over \$10,000,000 in the
26 facility, over \$2,500,000 in advertising, and \$500,000 to prevent
27 a protest of its establishment from David J. Phillips. While

1 most of the facility costs could be recouped upon sale and thus
2 are not a permanent investment, due to the downturn in the
3 Southern California real estate market it would be expected that
4 Irvine would suffer a partial loss of its investment in the
5 facility. The advertising costs and protest payment are not
6 recoverable and are permanent. Irvine could lose as much as
7 \$232,946 in parts and service revenues to the new dealer.

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

10 151. The effect of establishment of the Tustin point on the
11 retail motor vehicle business will be to reduce gross profits per
12 vehicle among all the Orange County dealerships due to the high
13 competition and easy freeway access. A marginal dealer, like
14 Irvine, or any other marginally profitable Mazda dealer, that
15 sells into the RMA may not be able to withstand the increased
16 competition and reduced gross profits, and could go out of
17 business.

18 152. The effect on the consuming public will be to add more
19 competition for the prospective buyer, both in intra-brand and
20 inter-brand competition with slightly reduced prices. [Prices
21 could never be reduced below the total cost of the vehicle
22 without the dealer's failing.] In addition, there would be
23 increased competition for parts and service business, and an
24 increase in vehicle availability and selection for the consumer.

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

27 153. The establishment of MacPherson as a dealer in Tustin
28 would not be injurious to the public welfare in that it would

1 establish a prominent and good dealer in the Orange County area.
2 Only if Irvine goes out of business would there be any harm to
3 the public in that there would be a decrease in the social
4 benefits Irvine contributes to the community, such as
5 participation in MADD programs, anti-drug activities and the
6 like. The establishment of a strong dealer like MacPherson may
7 result in Irvine's termination of business, but then the public
8 will benefit by the replacement of a weak dealer (Irvine) with a
9 strong, aggressive dealer (MacPherson).

10 (d) Whether the franchisees of the same line-make in
11 that relevant market area are providing adequate
12 competition and convenient consumer care for the
13 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.

14 154. The Mazda dealers in the Orange County and Los Angeles
15 Metro area have consistently had sales penetration rates greater
16 than or equal to Western Regional average in the RMA, with the
17 exception of 1995. While penetration rates have consistently
18 declined in the RMA since 1992, only in 1995 were they less than
19 national average adjusted for local segment popularity. No
20 evidence was presented for 1996 and it would be speculative to
21 conclude that there was a continuation in the decline for that
22 year to date.

23 155. Unless the dealers in an RMA have the highest
24 penetration rate in the nation, the state or the region in the
25 particular market Urban Sciences Application, Inc. [USAI], is
26 analyzing, its approach will by necessity cause it to conclude
27 that a new dealership is warranted. USAI always uses the highest
28

1 penetration rate of either the nation, the state or the region in
2 creating its standard against which the dealers selling into the
3 RMA are compared. Therefore, if the dealers selling into the RMA
4 in question do not sell at the highest of these several
5 penetration rates, USAI will conclude that these dealers are not
6 efficient when compared against this highest standard.
7 Nevertheless, some standard must be applied to measure the
8 efficiency of sales penetration into the RMA and it is not
9 unreasonable to use the national average, the state average, or
10 the regional average depending upon the circumstances of the
11 case.

12 156. Sales both in gross amounts and in terms of percentage
13 of the industry and the import car market in Orange County have
14 been steadily declining, reflecting Mazda's competitive
15 disadvantage against the other import car manufacturers. The
16 current dealers have been unable to service the market adequately
17 even as the number of dealers have declined from 8 to 5 during
18 Irvine's existence.

19 157. As to sales and service facilities, there are currently
20 adequate facilities in Orange County that customers in the RMA
21 can use.

22 158. There was no evidence of lack of equipment, and Irvine
23 has the largest parts inventory in Southern California. The
24 customer satisfaction indices show that consumers are generally
25 satisfied with the sales and service experience of the dealers
26 selling and servicing consumers in the Orange County area which
27 includes the RMA.

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

4 159. The establishment of MacPherson in the Tustin RMA would
5 increase competition in the RMA by the addition of a strong,
6 aggressive dealer. Should Irvine cease doing business because of
7 either (1) the increased competition and reduced gross profit
8 margins due to the addition of a strong dealer in the RMA, or
9 (2) the continuation of Irvine's management problems and loss of
10 money that it has suffered since its inception, the establishment
11 of MacPherson will replace a weak dealer (Irvine) with a strong
12 dealer, and will thus be in the public interest.

13 2. Breach of the Mazda Dealer Agreement and Mazda's
14 conduct in establishing the Tustin dealership.

15 160. Mazda breached the terms of the Mazda Dealer Agreement
16 because it failed to provide sixty (60) days notice prior to the
17 appointment of the Tustin dealership. Furthermore, no
18 opportunity was granted to discuss whether alternatives existed
19 to this proposed action.

20 161. Irvine breached the terms of the Mazda Dealer Agreement
21 because it failed to provide Mazda sixty (60) days notice prior
22 to the addition of the Kia franchise.

23 162. Both of these breaches of the franchise agreement are
24 inconsequential and while indicative of the contentious
25 relationship conceded by Mazda in its opening statement to the
26 Administrative Law Judge, it is unlikely and improbable that the
27 decisions made by either Protestant or Respondent giving rise to
28 this protest were influenced to any considerable degree by these

1 minor breaches. Therefore, the Board declines to consider these
2 breaches as major factors in its decision.

3 CONCLUSION

4 163. Based on the analysis of all of the good cause factors
5 described above, and weighing them against each other, Mazda
6 should be allowed to establish a dealership in Tustin. At best,
7 this would allow the addition of a strong dealer into the RMA and
8 Orange County that would increase competition among all the
9 dealers for the benefit of the dealers and the consuming public.
10 At worst, the increased competition would allow Irvine to fail
11 and then there would be a substitution of a weak dealer (Irvine)
12 with a strong dealer (MacPherson) which would increase
13 competition in the RMA, increase sales and penetration in the
14 RMA, and generally benefit the consuming public in the RMA.

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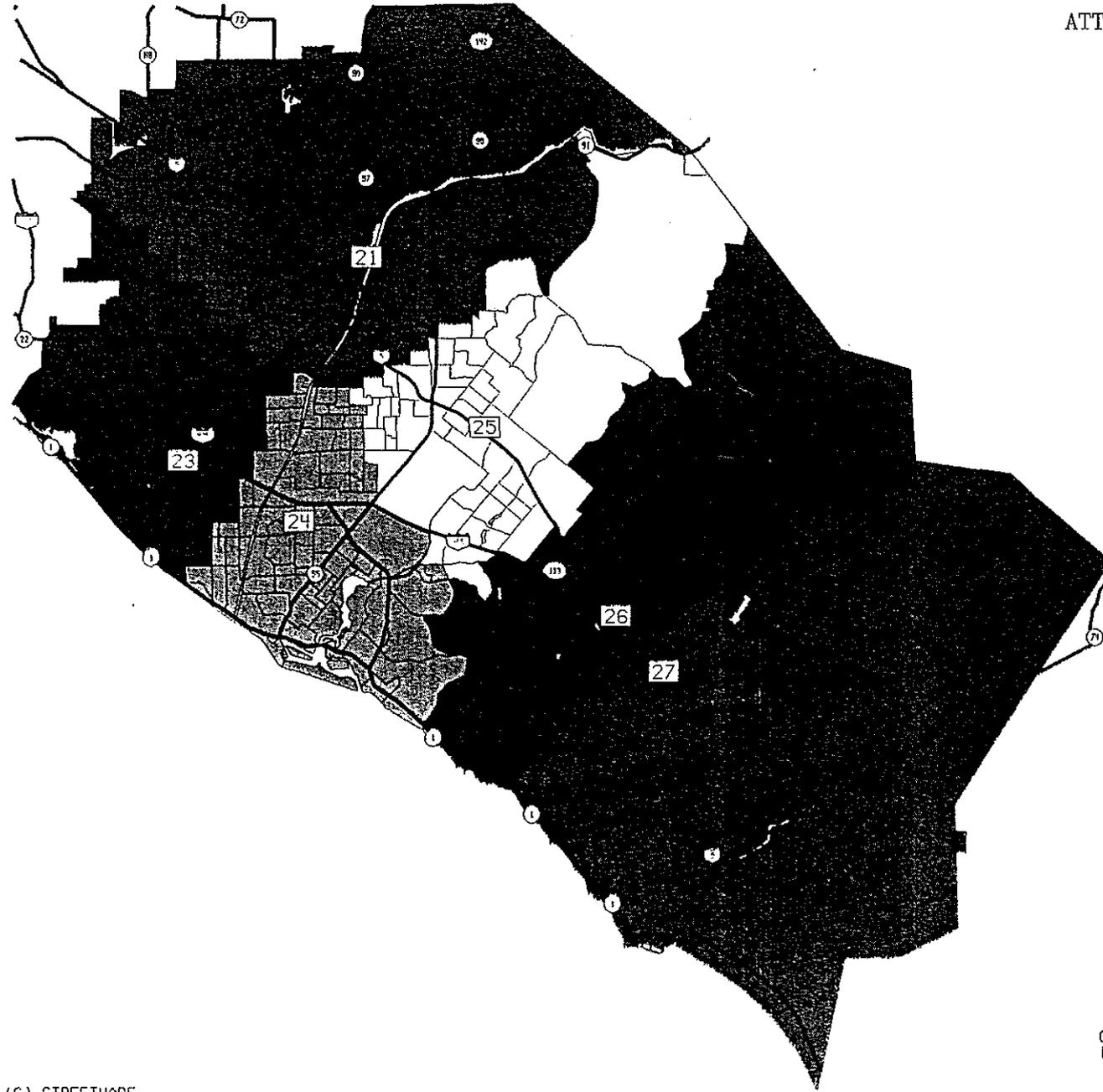
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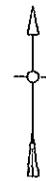
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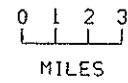


21	ANAHEIM MAZDA	ANAHEIM
23	BEACH MAZDA	HUNTINGTON BCH
24	ORANGE COAST	COSTA MESA
25	TUSTIN OP	TUSTIN
26	IRVINE MAZDA	IRVINE
27	PHILLIPS MAZDA	LAGUNA HILLS

N



LA-ORANGE COUNTY, CA
 SOA MAP
 AIR DISTANCED



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URBAN SCIENCE APPLICATIONS, INC.
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