

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

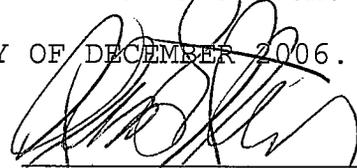
In the Matter of the Protest of)
FRONTIER INFINITI,) **Protest No. PR-1969-05**
Protestant,)
v.)
NISSAN NORTH AMERICA, INC.,)
INFINITI DIVISION,)
Respondent.)

DECISION

At its regularly scheduled meeting of December 13, 2006, the Public Members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 13th DAY OF DECEMBER 2006.



GLENN E. STEVENS
Presiding Public Member
New Motor Vehicle Board

1 Regional Manager, Infiniti West Region) and Jerome Thomas Foley (former Regional Vice President,
2 Infiniti West Region).

3 10. Protestant's expert witness was Robert Bruce Dilmore, Sr., Chairman and Chief Executive
4 Officer of Management Performance Groups, Inc.

5 11. Respondent called the following witnesses: Jack Wilkerson (former Regional Vice
6 President, Infiniti West Region), Kathleen Rose Gleason (Assistant Regional Manager, Infiniti West
7 Region), Eric Vincent Lewin (former Dealer Operations Manager, Infiniti Division, Nissan North
8 America, Northern California), Joseph Patrick Garrow (Account Executive, Urban Science Applications,
9 Inc.), Nanci Klein (Manager of Corporate Outreach, Office of Economic Development, City of San Jose),
10 and Ray Beshoff (proposed dealer principal).

11 12. Respondent's expert witnesses were John Frith, Vice President of Operations, Urban
12 Science Applications, Inc., Detroit; and Robert A. Sherwin, Managing Principal and Vice President of
13 Analysis Group, Los Angeles.

14 Summary of Witnesses' Testimony and Exhibits Introduced at Hearing⁶

15 Protestant's Witnesses' Testimony and Exhibits

16 13. Robert Ricks, who (as Executive Manager and co-owner of Frontier Infiniti) runs the day-
17 to-day operations of the dealership, described in his testimony the history, ownership and management of
18 Frontier Infiniti, as well as the sales and service performance of the dealership. He described Frontier's
19 location on Stevens Creek Boulevard (a Santa Clara "auto row"), and his efforts to overcome limitations
20 of the property, including renegotiating a ground lease for the business which expires in March of 2007.
21 He testified to his personal accomplishments, experience and leadership in the automotive industry.
22 Furthermore, he testified that if Respondent established a new dealership in San Jose, the negative impact
23 on Frontier Infiniti's business would be profound citing, among other things, the loss of sales suffered by
24

25 ⁶ Since most exhibits were marked for identification by the parties prior to the hearing, they were not offered or introduced in
26 numerical order; also, some pre-marked items may not have been used in the hearing at all, so there may be numerical gaps in
27 the final Exhibit List, which begins with PR-1 and ends with PR-416. Finally, because of the large number of exhibits, several
28 single exhibit numbers contain many different, but related, documents.

This Summary does not refer to all exhibits in the record, nor does it include all matters testified to by the witnesses.

1 a neighboring dealership, Smythe European Mercedes-Benz, when the same individual (Ray Beshoff) had
2 established a new state-of-the art Mercedes-Benz dealership in East San Jose. (I:70-174; III:1-244; IV-1-
3 69; XII:112-168)⁷

4 14. James Landes, a one-third owner of Frontier, testified to his experience in the automotive
5 industry, the establishment of Frontier Infiniti, improvements to the dealership, financial outlays to
6 upgrade the dealership and the negative impact on its profitability if Respondent established an additional
7 Infiniti dealership in East San Jose. (IV:70-97)

8 15. Protestant's expert witness, Robert Bruce Dilmore, Sr., testified that the establishment of
9 an additional Infiniti dealership in such close proximity to Frontier Infiniti would have a profoundly
10 negative effect on the existing dealership's business and profitability. He testified that the market could
11 not accommodate two dealerships and would produce a "cannibalization effect" whereby neither Infiniti
12 dealership would be profitable enough to remain in business. Mr. Dilmore estimated that Frontier's
13 business "will be in a high risk scenario, possibly losing 35 – 40% of their new and used vehicle sales and
14 40 – 45% of their customer service and parts sales." (II:2-196; XII:42-111, 168-170; PR-43 at pp 3,10)

15 16. Kathleen Gleason testified regarding the composition and changes to the marketing region
16 which Infiniti calls the "San Francisco Metro Region" from February 2004, when she assumed the
17 position of Assistant Regional Manager at the Infiniti West Regional Office. In 2004, the Region was
18 divided into eight Primary Market Areas ("PMA's") containing six active Infiniti dealerships⁸, one
19 dealership under construction in Oakland and one "open point" in Fremont. Ms. Gleason testified
20 concerning the market study conducted by Urban Science Applications, Inc., (hereinafter "Urban
21 Science") which prompted Respondent to shift the "open point" in Fremont to East San Jose and she
22 testified about meetings with Ray Beshoff, the proposed dealer principal. Ms. Gleason also testified to
23 Respondent's sales projections which, among other things, predicted a decline in Infiniti sales for 2006.
24 (V:2-62; V:123-223)

25 17. Jerome Thomas Foley testified to the following events during his tenure as Regional Vice
26

27 ⁷ References herein to Roman Numerals are to the transcripts of the proceedings. References to "PR" are to Exhibits.

28 ⁸ The active dealerships were Infiniti of Marin (San Rafael), Infiniti of Serramonte (Colma), Peninsula Infiniti (Redwood City), Frontier Infiniti (Santa Clara), Infiniti of Concord, and Infiniti of Pleasanton. (PR-383 at NNA 01108)

1 President of Infiniti West from March 2001 to February 2004: that Respondent contracted with the
2 Hendricks Group, a well-financed business and the owner of the Pleasanton Infiniti dealership, to fill the
3 Oakland “open point” and, as part of the negotiations, agreed to hold off filling the Fremont “open point”
4 with a new dealership until 12 months after the Oakland dealership became operational. (XI:2-28)

5 *Respondent’s Witnesses’ Testimony and Exhibits*

6 18. The testimony of Jack Wilkerson, Regional Vice President for the Infiniti West Region
7 from February 2004 to April 2006, covered many areas. Among other things, he testified to the methods,
8 tools and calculations used by Respondent to collect and analyze data in order to evaluate the following:
9 level of success in marketing the Infiniti line-make, primarily measured against other luxury vehicle
10 manufacturers; dealer effectiveness in sales, service and consumer satisfaction; establishment of
11 marketing areas and new dealerships; and projections of future sales and consumer markets. He testified
12 to Respondent’s programs and policies concerning dealers including size, design and adequacy of dealer
13 facilities. Additionally, he testified that although he was surprised by the recommendation of the Urban
14 Science market study to shift the “open point” from Fremont to San Jose, he studied the proposal and
15 approved the shift as well as the designation of Ray Beshoff as the dealer principal for the new dealership.
16 (VI:2-228, VII:1-228, VIII:1-137)

17 19. Kathleen Rose Gleason testified that Frontier Infiniti was currently “under guide” in all
18 facilities categories. Using Infiniti’s guidelines for facilities to meet expected consumer demand for sales
19 and service, she testified that, as examples, Frontier’s sales and parts and service buildings were 46% of
20 the guideline figure and the number of service bays was 55% of the guideline figure (17 actual versus 31
21 guide). (X:81-114; PR-400)

22 20. Eric Vincent Lewin testified that, as Infiniti “Dealer Operations Manager” (DOM) in the
23 “San Francisco Metro Region” from late 2001 to late 2004, he was the primary contact between dealers
24 and Respondent. His responsibility was dealer support and communication to dealers of Infiniti policies,
25 programs, and procedures with the goal of boosting sales. He testified that he visited Frontier Infiniti
26 several times a month, and was in almost daily telephone contact with the dealership; he had a “very
27 positive working relationship” with Bob Ricks, meeting with him about 75% of the times he called on
28 Frontier. Respondent required him to prepare the following reports concerning dealers, which were not

1 generally given to dealers: "Dealer Operations Reports" and "DOM Contact Reports", which were
2 prepared after each visit (and at least monthly). Mr. Lewin noted that Frontier was a 2002 "Award of
3 Excellence" winner---although the dealership's performance has slipped since then, Mr. Lewin testified
4 that Frontier could again be a winner and would benefit from the establishment of a new Infiniti
5 dealership in the area, citing his observations of enhanced sales for area Infiniti dealers when the Marin
6 County and Fairfield Infiniti dealerships were established. He testified that he met with Ray Beshoff,
7 who told him he wanted an Infiniti dealership in East San Jose, across the street from his Mercedes-Benz
8 dealership. (X:1-81)

9 21. Nanci Klein, Manager of Corporate Outreach, City of San Jose, testified that a new Infiniti
10 dealership would generate badly-needed sales tax revenue for the city and would provide other civic
11 benefits. She testified that on the east side of San Jose (the proposed dealership location), over 3,000
12 residential units either have just been built or are near completion, that 5,300 additional units are planned,
13 and that another 50,000 units are contemplated in the next 10 years. (V:63-120)

14 22. Ray Beshoff testified to his plans to build and open a state-of-the-art Infiniti dealership in
15 East San Jose, kitty-corner from the Mercedes-Benz dealership he developed in 2002. He testified to the
16 planned specifications and amenities of the dealership, with a description of the neighborhood and the
17 benefits that a new dealership would bring to the area. (XIII:162-280)

18 23. Urban Science is an automotive consulting firm advising vehicle manufacturers in regard
19 to optimum "dealership network planning" and providing software tools to help dealers improve
20 performance. Two Urban Science employees testified for Respondent: Joseph Patrick Garrow, the
21 Nissan/Infiniti Account Executive; and John Frith, Vice President of Operations, who testified as an
22 expert.

23 24. Joseph Patrick Garrow's testimony described three software programs that Urban Science
24 has developed. "Market Smarts" is a 20-year-old "dealer network planning program" containing a
25 database used internally at Nissan North America by five individuals. (IV:119) "Market Master" is a
26 "dealer tool" generating reports that may be purchased by dealers to identify sales opportunities. (IV:117;
27 PR-355) "Service Smarts" is also a "dealer tool" produced to assist dealers to identify "customer pay"

28 ///

1 service opportunities.⁹ (IV:119-122, 130-131; PR-356-359) Mr. Garrow testified that the market study
2 powered by “Market Smarts” recommended the shift of the Fremont “open point” to San Jose. The
3 “Market Smarts” analysis included, among other things, Infiniti’s “penetration” of the luxury-vehicle
4 market; customer convenience, measured by miles to the nearest dealership; and service opportunities.
5 Mr. Garrow further testified that, in two meetings with Infiniti representatives in late July 2004, Urban
6 Science personnel presented the “dealer network analysis” recommending the shift. (IV:98-296; VIII:138-
7 162, 249-252)

8 25. John Frith testified that he had prepared for this litigation a set of maps and charts (“USAI
9 2006 Expert Report”, PR-385) to illustrate the methodology used by Urban Science to assess the optimal
10 number and locations of Infiniti dealers in the San Francisco Metro Region. Among other data, vehicle
11 registrations and demographic information give Urban Science the ability to measure “registration
12 effectiveness” (how well the brand is doing) and “sales effectiveness” (how well the dealer is doing) as a
13 basis for its recommendations. An integral part of this methodology was the use of the “Contra Costa
14 standard”, which factored in a high-performing area to measure dealer effectiveness. He testified that the
15 analysis showed that the market for Infiniti vehicles in the region may have grown too large and that an
16 additional dealership needed to be established to optimize sales and service potential and to enhance
17 customer convenience. Even with the establishment of a new dealership in San Jose, he testified, the
18 marketing area for Frontier Infiniti was still the largest in the “San Francisco Metro Region”. (IX:1-212;
19 XII:2-40; PR-383)

20 26. Robert A. Sherwin, Managing Principal and Vice President of Analysis Group, an expert
21 witness for Respondent, testified that he had prepared a report (“Expert Report of Robert A. Sherwin”,
22 PR-387) which, among other things, compared financial, profitability and sales data of Frontier Infiniti
23 with other Infiniti dealerships. From his analysis, Mr. Sherwin testified that Frontier Infiniti was a
24 financially strong business which could continue to be viable even with a new Infiniti dealership
25 established in the area, disputing the conclusion of Protestant’s expert that business would decline by
26 40%. (XI:28-162)

27 ⁹ “Customer pay” describes parts and service which are not covered by the manufacturer’s original warranty. (IV:130-131)
28

1 ISSUE PRESENTED

2 27. The following issue is presented in this Protest: Did Protestant Frontier Infiniti sustain its
3 burden of proof of showing "good cause" to preclude Respondent from establishing an additional Infiniti
4 dealership within Protestant's relevant market area?

5 28. Under section 3062(a)(1), a franchisor is not permitted to establish an additional motor
6 vehicle dealership, where a timely protest has been filed, until there has been a finding of whether or not
7 good cause exists for not permitting the establishment. Under section 3066(b), the franchisee has the
8 burden of proof to establish that there is good cause not to enter into a franchise establishing an additional
9 motor vehicle dealership.

10 29. In determining whether there is good cause for the establishment of an additional franchise,
11 section 3063 requires the Board to take into consideration the existing circumstances, including, but not
12 limited to, all of the following:

- 13 (a) Permanency of the investment.
- 14 (b) Effect on the retail motor vehicle business and the consuming public in the relevant
15 market area.
- 16 (c) Whether it is injurious to the public welfare for an additional franchise to be
17 established.
- 18 (d) Whether the franchisees of the same line-make in that relevant market area are
19 providing adequate competition and convenient consumer care for the motor
20 vehicles of the line-make in the market area which shall include the adequacy of
21 motor vehicle sales and service facilities, equipment, supply of vehicle parts, and
22 qualified service personnel.
- 23 (e) Whether the establishment of an additional franchise would increase competition
24 and therefore be in the public interest.

25 PROTESTANT'S CONTENTIONS

26 30. Protestant's primary contention is that the establishment of a new franchise will have a
27 negative financial effect on its retail motor vehicle business, substantial enough to jeopardize its very
28 financial survivability. Protestant projects its profitability would decline by 40%-45%. Protestant argues

1 that the establishment of a new dealership would “cannibalize” the market, i.e., cause intrabrand
2 competition which would be destructive to both Protestant and to a new dealership, would be injurious to
3 the public welfare and would not be in the public interest. Protestant further argues that Smythe European
4 Mercedes-Benz, its neighboring dealer on Stevens Creek Boulevard’s “auto row”, suffered financial
5 reverses when Ray Beshoff established a new Mercedes-Benz dealership in East San Jose. Protestant
6 notes that existing Infiniti dealers in the San Francisco Metro Region are now “evenly spaced”
7 geographically and the 9.2 miles between Frontier and the new dealership would be closer than any other
8 two dealerships.

9 31. Moreover, Protestant contends that, based upon any industry-recognized standards of
10 review of its performance in motor vehicle sales and service, facilities, equipment, supply of vehicle parts,
11 and qualified service personnel, Protestant is providing adequate competition and convenient consumer
12 care and argues that Respondent’s studies of Frontier’s performance in these areas are flawed.
13 Specifically, Protestant points to Respondent’s use of the unrealistically high-performing “Contra Costa
14 Standard” as an impermissible measure of its performance.

15 32. Finally, Protestant contends that “existing circumstances” support its position, pointing to
16 the history of Frontier Infiniti and Respondent’s decision to shift the “open point” to a location much
17 closer to Protestant’s dealership. Protestant asserts that the shifting of the “open point” from Fremont to
18 San Jose (which was the first step in establishing the East San Jose dealership) was made because of
19 Respondent’s deal with the Hendricks Group to hold off developing a dealership in Fremont, and was
20 unsupported by relevant market data.

21 RESPONDENT’S CONTENTIONS

22 33. Respondent contends that there is a sufficient market for Infiniti luxury vehicles in the
23 Santa Clara-San Jose area to support two dealerships and return to each a reasonable profit. Respondent
24 points to the area’s economic upturn as further support for this contention.

25 34. Respondent further argues that the financial impact of a new dealership on Protestant
26 would not be significant, since there is an “underserved market” for Infiniti vehicles which can be filled
27 by establishing a new dealership. Moreover, Respondent contends that a new Infiniti dealership would
28 stimulate sales of the line-make and inure to the benefit of Protestant.

1 35. Respondent contends that Protestant's Primary Market Area (PMA) is the largest in the
2 San Francisco Metro Region, with the greatest potential for sales of all the PMA's. Respondent argues
3 that Frontier is not taking advantage of this large area, since its sales and service performance is below
4 par, although it has, in the past, been one of the top dealerships in the nation. Protestant, according to
5 Respondent, has not been adequately servicing its customers.

6 36. Respondent argues that Frontier is a valued and well-established Infiniti dealer which has
7 returned a large profit to its owners, but could realize enhanced profitability by renewing its focus on
8 customer service and revitalizing its facility.

9 37. Respondent advances the argument that public welfare would benefit because the City of
10 San Jose would realize enhanced sales tax revenues.

11 FINDINGS OF FACT¹⁰

12 Preliminary Findings

13 38. The Infiniti line-make of luxury vehicles was launched by Nissan in 1989-1990. (VI:24)

14 39. Protestant Frontier Infiniti was one of the first Infiniti dealerships, and has been
15 continuously doing business at the same location on an "auto row" on Stevens Creek Boulevard in Santa
16 Clara since it opened in 1990. It is a "partnership of personal corporations" owned by Robert Ricks,
17 James Landes and Hal Arnon. Robert Ricks is Frontier's Executive Manager, in charge of the
18 dealership's day-to-day operations. (I:72-74, 92; IV:72)

19 40. The proposed new dealership, with Ray Beshoff as dealer principal, would be built 9.2
20 miles from Frontier's location, in the eastern part of the City of San Jose. It would be developed on 6.6
21 acres of unimproved land at the corner of East Tully Road and Capitol Expressway, adjacent to the
22 Eastridge Mall and kitty-corner from Mr. Beshoff's existing Mercedes-Benz dealership, Beshoff Motor
23 Cars. (PR-366, 367-4)

24 41. Santa Clara County (the county in which both Frontier and the proposed new dealership
25

26 ¹⁰ References herein 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.

27 Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the
28 particular topic under which they appear, but rather may apply to any of the "existing circumstances" or "good cause" factors
of section 3063.

1 are located) is in the heart of Silicon Valley, a high-cost, heavily populated area which is the home of
2 many technology companies. Because the area's economy is so closely tied to the technology industry, it
3 has gone through "boom and bust" cycles. Until 2000, Silicon Valley's economy (wages, housing prices,
4 population) soared, then plummeted; it is now recovering steadily, if not spectacularly, and household
5 income, property values and educational level of the population are among the highest in the nation.
6 (V:63-119; IX:86-90; PR-383 at PH-28 to PH-40; PR-393, 395, 396)

7 42. Santa Clara County is in the southern part of a larger urban region surrounding San
8 Francisco Bay which Infiniti, for marketing purposes, designates the "San Francisco Metro Area". (PR-
9 385 at PH-1)

10 43. For a variety of corporate purposes (e.g., marketing, dealer evaluations), Infiniti has also
11 identified smaller geographical areas---each composed of a set of census tracts and ZIP codes---that it
12 calls "Primary Market Areas", or "PMA's". Each Infiniti dealer is assigned a "PMA", the territory
13 surrounding the dealership¹¹, in which the dealer has a geographic, and hence a presumably competitive,
14 advantage over other Infiniti dealers. A dealer may, of course, sell to customers living outside its
15 assigned PMA ("Out-sells") and, conversely, another Infiniti dealership may sell to a customer residing
16 inside the dealer's PMA ("In-sells"). (IX:118; PR-385 at PH-1)

17 44. Infiniti's "San Francisco Metro Area" is currently composed of eight PMA's (seven active
18 Infiniti dealerships¹² and one "open point") and covers all or a portion of the following Bay Area
19 counties: Marin, Contra Costa, Alameda, Santa Clara, San Mateo, and City and County of San Francisco.
20 Since they are corporate creations, the PMA's do not follow county boundaries. (PR-385 at PH-1)

21 45. Currently, the "open point" is the proposed location in East San Jose of the new dealership;
22 the map of the "San Francisco Metro Region" depicting the eight current PMA's of the region is found at
23 PR-385 at PH-1.

24 46. Infiniti's 2004 shift of the "open point" from Fremont to East San Jose is part of Frontier's
25 complaint; the map depicting the eight regional PMA's prior to the shift is found at PR-383 at NNA

27 ¹¹ Not only existing dealerships, but PMA's are also assigned around locations where Infiniti contemplates a dealership may
be added in the future; these are called "open points".

28 ¹² Infiniti of Oakland opened in May of 2005. (VIII:18)

1 01108.

2 47. Infiniti receives information (such as vehicle registrations and demographic data) from
3 data reporting agencies such as R.L. Polk and a vendor called Axiom, which information Infiniti uses in
4 various ways. In order to define a dealer's minimum facilities guidelines and assess and evaluate dealer
5 performance, Infiniti organizes the information received according to the PMA which generated the data
6 and identifies it by reference to the dealer assigned to that PMA; hence, "Frontier's PMA", for example.
7 (VIII:142-152)

8 48. The information (vehicle registrations and demographics, as examples) generated from the
9 PMA's is not static.

10 49. Infiniti may change or revise the geographical boundaries of PMA's. When Infiniti
11 establishes an "open point", the boundaries of adjacent (and possibly area) PMA's will also change.
12 (IX:97)

13 50. It is Infiniti's policy to change or revise the geographical boundaries of PMA's only when
14 supported by a market study conducted by an independent research firm. Similarly, it is Infiniti's policy
15 to establish an "open point" only when supported by a market study conducted by an independent
16 research firm. The establishment of an "open point" will, of necessity, change the PMA boundaries of
17 one or more area dealerships. (IX: 42-52, 97)

18 51. Infiniti has delegated the task of performing the above-described market studies to Urban
19 Science, although they used to do it themselves. (IV:169)

20 52. Urban Science developed a software program called "Market Smarts", which is a 20-year-
21 old "dealer network planning program" containing a database used internally at Nissan North America by
22 five individuals. (IV:119)

23 53. Infiniti's practice in filling an open point is to notify dealers in the area and solicit
24 proposals "focus[ing] on three areas: facility, capital and management". (XI:6-7) The executive manager
25 is "something that is very important" to Infiniti---the executive manager is the individual at the dealership
26 who (with the dealer principal) has the most operational control. (VIII:58-59)

27 54. Infiniti line-make vehicles are in what is known as the "luxury segment" of the automotive
28 market; "direct competitor" brands identified by Infiniti are generally Mercedes-Benz, Lexus and BMW.

1 Calculating “brand penetration” (comparing its sales against those of Mercedes-Benz, Lexus and BMW,
2 using data from PMA’s) is one way to measure market performance. Using the “brand penetration”
3 calculation, Infiniti has the smallest market share of the four luxury line-makes in the “San Francisco
4 Metro Region”, 11.4% in 2005. (VI:48; PR-204 at NNA 00915)

5 55. Marketing success depends not only on factors within the individual dealer’s control, but
6 also upon consumer acceptance of new models, time of release of models (both Infiniti’s models and
7 those of competitors), the economy and other factors. Information gathered from the Internet by
8 prospective vehicle buyers is becoming more and more important in marketing success. (XII:109, 119)

9 56. Urban Science has developed a software program called “Market Master”, which is a
10 “dealer tool” which generates reports which may be purchased by dealers to identify sales opportunities.
11 (IV:117; PR-355)

12 57. Urban Science has developed a software program called “Service Smarts”, which is a
13 “dealer tool” produced to assist dealers to identify “customer pay” service opportunities. (IV:119-122,
14 130-131; PR-356, 359)

15 58. Infiniti, by contract, imposes facility requirements on its dealers. Recently, it instituted
16 the Infiniti Retail Environment Design Initiative (“IREDI”) facility design program, which requires
17 dealers to remodel the exterior architecture of their buildings or build new facilities to IREDI
18 specifications. (VI:138; PR-215-217)

19 59. Infiniti uses a program called “Total Ownership Survey”, which asks new vehicle purchase
20 customers and service customers for information and feedback about their experiences with the Infiniti
21 dealer with which they did business. The answers are organized into two components: the Infiniti
22 Purchase Index (IPI) and the Infiniti Service Index (ISI). The IPI and ISI are consolidated into a total
23 Customer Satisfaction Index (CSI). (VII:4-43; PR-401) Survey results are periodically tabulated and
24 scored and dealers’ performances are assigned a CSI rating and are ranked by Region. Infiniti uses this
25 data for, among other things, recognizing dealers and awarding incentives. (VI:204-213; PR-224, 226-
26 228)

27 60. On the east side of San Jose (the proposed dealership location), over 3,000 residential units
28 either have just been built or are near completion, 5,300 additional units are planned, and another 50,000

1 units are contemplated in the next 10 years. (V:87-88)

2 Findings Relating to Permanency of Investment [Section 3063(a)]

3 Protestant Frontier Infiniti

4 61. In 1989, James Landes (then general manager of Frontier Ford in Santa Clara, one of the
5 top-selling Ford dealerships at the time) was approached by a Nissan representative who asked him to be
6 a dealer for a new line of luxury vehicles called Infiniti. Finding an appropriate location for a luxury auto
7 dealership was difficult. The goal of Respondent was to locate the new dealership in the "auto row" on
8 Stevens Creek Boulevard in Santa Clara. Mr. Landes eventually negotiated a sublease (which had
9 approximately 10 years to go) of the real estate at 4355 Stevens Creek Boulevard, which was then a
10 Porsche dealership. Frontier Infiniti opened in February or March 1990. (I:91, IV:72-75; PR-1)

11 62. Before opening, Frontier renovated the building on the property to conform to Infiniti's
12 facility standards of the time, modifying the exterior, the showroom and adding furniture and an Infiniti
13 sign. (IV:95)

14 63. Frontier is situated with twenty other dealerships in a well-established "auto row" on
15 Stevens Creek Boulevard in Santa Clara, which is home to other luxury vehicle dealerships (Mercedes-
16 Benz, BMW, Lexus). (I:77)

17 64. In connection with an Infiniti national showroom upgrade in 2002 (the first since the
18 launch of the brand), Frontier Infiniti's owners spent \$144,489. (I:137-142; IV:5:PR-33)

19 65. Bob Ricks is in charge of the day-to-day operations of Frontier Infiniti and spends 85% of
20 his time managing the business. (I:72-74)

21 66. By contract, Frontier must have written approval from Respondent for any changes in the
22 dealership location, facilities or their usage. (PR-1)

23 67. The physical constraints of the facility have, from the beginning of the dealership, been a
24 problem. Over the years, Bob Ricks sought ways to overcome the limitations posed by the property,
25 suggesting to Respondent, inter alia, that a service facility be located in Los Gatos and that property be
26 purchased by Respondent on Stevens Creek Boulevard and leased back to Frontier. His suggestions were
27 not in accord with Respondent's corporate policies and were rejected. I:117, 122-125; IV:18; VII:209-
28 215)

1 68. In 2003, Frontier leased an additional 15,120 square foot lot with a warehouse as an off-
2 site vehicle storage location in order to comply with Infiniti's facility requirements. (I:114-117; PR-32)

3 69. The real estate on which Frontier Infiniti sits is owned by a family trust, which has been a
4 difficult landlord. Frontier makes monthly lease payments. The lease ends in March of 2007; no new
5 lease beyond that date has been negotiated. (I:104-105, 108-109)

6 70. For each year from 1990 through 1994, Frontier was either unprofitable or (in 1993) only
7 made a modest profit; the three owners did not take draws or distributions from the dealership during
8 these first five years of operation. The dealership continued in business only because Jim Landes made a
9 \$200,000 loan to Frontier in 1994. January of 1995 was a profitable month, as has been each successive
10 month to the present. (I:76, 77)

11 71. Since 1995, each of Frontier's three owners has received quarterly cash distributions from
12 the company, although they do maintain working capital in Frontier's account. (I:77-79)

13 72. James Landes has been offered "roughly \$12,000,000" for the dealership. (IV:84)

14 73. In 2000, the owners of Frontier bought Peninsula Infiniti in Redwood City, purchasing the
15 franchise---at least in part---from retained capital in Frontier's account. Peninsula Infiniti is located in the
16 PMA immediately adjacent to the north to that of Frontier Infiniti. Peninsula Infiniti was an existing
17 Infiniti franchise whose dealer principal had committed suicide. (I:74)

18 74. In 2003, Infiniti awarded Frontier an "Award of Excellence" for performance in 2002.
19 (PR-4) The same year, Bob Ricks served on Infiniti's "National Dealer Product Committee"/"National
20 Dealer Advisory Board". (PR-5-8)

21 75. No remodeling has been done pursuant to the IREDI program.

22 Findings Relating to Effect on the Retail Motor Vehicle Business and
23 The Consuming Public in the Relevant Market Area [Section 3063(b)]

24 Proposed East San Jose (Beshoff Motors) Infiniti Site

25 76. The proposed new dealership will be located 9.2 miles from Frontier Infiniti on the corner
26 of Tully Road and Capitol Expressway in the City of San Jose. Both Tully Road and Capitol Expressway
27 are multi-lane streets, heavily trafficked. The proposed site is undeveloped land, with freeway access
28 nearby. A shopping center, Eastridge Mall, is near the proposed site; although the mall had "gone down

1 hill”, investors have recently refurbished it and it is attracting more desirable tenants. (VIII:163-280;
2 PR-368, PR-381)

3 77. The dealer principal of the proposed new Infiniti dealership will be Ray Beshoff. The
4 proposed site is kitty-corner from Beshoff Motor Cars Mercedes-Benz, also owned by Ray Beshoff.
5 There are no other vehicle dealerships in the immediate area. (PR-368)

6 78. Mr. Beshoff proposes to construct the new Infiniti dealership to the highest IREDI
7 standards. It will be similar, if not the same, as the Mercedes-Benz dealership he constructed in 2002.
8 (VIII:163-280; PR-368, PR-381)

9 79. The proposed facility will be luxurious and modern in appearance. The main building will
10 consist of a 2-story building with a showroom, customer rooms, offices, and a conference room. Service
11 will be in a separate building. Mr. Beshoff’s plan is to follow the template of the Mercedes-Benz
12 dealership, with morale-boosters for employees (a newsletter, a cafeteria, family outings), plus
13 community events to be held at the dealership. (PR-368)

14 80. The proposed executive manager named in the application, Bernard Kuhnt, is no longer
15 part of Beshoff Motors and there is no replacement. (VIII:61-62; PR-361)

16 81. The population of the area is expected to increase. New residential units are being built
17 and, within the next ten years, 50,000 more residential units are contemplated. (V:87)

18 Retail Motor Vehicle Business and Consuming Public in Relevant Market Area

19 82. Within the Relevant Market Area (RMA) are two clustered “auto rows”: Stevens Creek
20 Boulevard in Santa Clara, and Capitol Expressway in San Jose. (PR-385 at PH-4)

21 83. No adverse effect on the business of the two “auto row” dealerships within the RMA has
22 been shown.

23 84. The RMA is close to the middle of a burgeoning population growth area. By offering a
24 state-of-the-art dealership and vehicle service facility, the consuming public will benefit.

25 Findings Relating to Whether it is Injurious to the Public Welfare for an
26 Additional Franchise to be Established [Section 3063(c)]

27 85. The new dealership, if built as described, will enhance the East San Jose area, providing
28 the community an opportunity for new jobs and tax revenues. The location of a state-of-the-art newly

1 built business on previously undeveloped land will upgrade the area and compliment the shopping center
2 located nearby. There has been no showing that the addition of a dealership in the area would be
3 injurious to the public welfare.

4 Findings Relating to Whether Protestant Frontier Infiniti is
5 Providing Adequate Competition and Convenient Consumer Care for
6 Infiniti Vehicles in the Market Area, Including Adequate Motor Vehicle Sales and
7 Service Facilities, Equipment, Supply of Vehicle Parts, and
8 Qualified Service Personnel [Section 3063(d)]

9 *Adequacy of Frontier Infiniti's Facility and Personnel*

10 86. Both the "Infiniti Dealer Sales and Service Agreement", whereby Jim Landes (for Frontier
11 Infiniti) accepted appointment as an "Authorized Infiniti Dealer", and a two-page "Infiniti Dealership
12 Facilities Addendum" recite an effective date of March 31st, 1990. (PR-1) The "Infiniti Dealership
13 Facilities Addendum" (hereinafter "Addendum") describes "the Dealership Location and Dealership
14 Facilities" and contains "the current Guides for such facilities based on the Planning Volumes stated
15 herein." Infiniti reserves the right to change the "Guides...when deemed necessary by Infiniti". (PR-1)

16 87. Frontier disclosed the following information in the March 31st, 1990 "Addendum": that the
17 dealership would be located at "4355 Stevens Creek Blvd."; that the lot totaled 83,694 square feet (66,761
18 square feet in land, 16,933 square feet in improvements); that improvements were a "New Vehicle Sales
19 Building" (4,563 square feet), a "Service Building" (9,710 square feet), and a "Parts Building" (2,660
20 square feet); that there were 17 "Service Bays"; and that certain square footage areas were dedicated to
21 "New Vehicle Sales-Land", "Used Vehicle Sales-Land", "Service-Land" and "Parts-Land".¹³ (PR-1)

22 88. Although Frontier's Stevens Creek Boulevard facility was remodeled during the 2002
23 showroom upgrades (in which Frontier's owners spent \$144,489), this did not add square footage to the
24 facility. (I:137-142; IV:5, 95; PR-33)

25 89. In 2003, Frontier leased an off-site vehicle storage warehouse of 15,120 square feet at 2005
26 Grant Street in Santa Clara. The warehouse holds 100 or so new cars. (I:114-117; PR-32) .

27 90. Frontier's current facility specifications at its Stevens Creek Boulevard location are the
28 same as those of 1990, with the addition of the off-site vehicle storage lot of 15,120 square feet on Grant

¹³ Frontier also disclosed in the March 31st, 1990 "Addendum" that the dealership real estate was being sub-leased (until January 2000) at a net monthly cost of \$34,000, which was subject to an "Index Adjustment after 5.0 years". (PR-1)

1 Street. (I:137-142; IV:5:PR-33)

2 91. Facility specifications of dealerships are used by Infiniti to assess a dealer's level of
3 compliance (using percentages) with the manufacturer's determination of "minimum dealership facility
4 and capital requirements". Infiniti calculates a "planning volume" number of new cars for each dealer,¹⁴
5 then compares it to the dealer's actual facility specifications. The "planning volume" is a tool the
6 manufacturer uses to forecast the appropriate size of facilities to accommodate anticipated business.¹⁵

7 (I:83-87; PR-305)

8 92. Another facilities planning concept---related to "planning volume"---is "Units in
9 Operation" ("UIO"), which is the number of Infiniti vehicles sold in the last five years in service and
10 registered in the dealer's PMA. (I:83-87; PR-305)

11 93. In 1990, at its opening, Frontier generally had very high facility compliance percentages:
12 for example, it was 170% compliant in service bays (Frontier had 17, Infiniti required a minimum of only
13 10), 127% in Parts-Building and 135% in service building, 96% in total building and land, but only 54%
14 compliant in new vehicle sales building. (PR-1)¹⁶ Since Infiniti was just starting production of
15 automobiles, there were no historical sales figures nor were there actual figures for previously-sold
16 Infiniti vehicles.

17 94. Both "planning volume" numbers assigned to each dealer and UIO's in each dealer's
18 marketing area are dependent on the data generated from each dealer's geographic PMA.

19 95. In making its current calculation for minimum facility standards guidelines for Frontier,
20 Infiniti used information from both the Stevens Creek Boulevard facility and the Grant Street storage lot.
21 (PR-221, PR-305)

22 96. Infiniti's current "planning volume"/UIO calculation for Frontier is 2145/4378. (PR-221,
23 PR-305) Using these numbers, Infiniti concludes that Frontier Infiniti's facilities are "severely deficient",

24
25 ¹⁴ "Planning volume" as explained by Infiniti, "is a tool used to determine minimum dealership facility and capital
26 requirements based on assigned Primary Market Area (PMA). It is not intended and cannot be used as a sales target or vehicle
27 sales commitment, and has no relevance as sales performance standard. A dealer's actual sales may be larger or smaller than
28 the calculated PV [planning volume], as a variety of other factors determine a specific dealer's actual sales performance." (PR-
305)

¹⁵ The complex formula by which Infiniti arrives at "planning volume" numbers is in PR-305.

¹⁶ Different figures appear in PR-222, but the parties agree that Frontier's facility was compliant with Infiniti's guidelines in 1990.

1 with compliance ratios (actual facility/Infiniti's minimum facility recommendation) of roughly 41% in
2 total building and acreage size, 55% in service bays (Frontier has 17, Infiniti's minimum would be 31),
3 53% for parking spaces and 42% for showroom/office space. Of the 16 ratio categories, Frontier scores
4 the highest at 90% with "technician storage" and the lowest at 19% for "used vehicle spaces". (PR-221)

5 97. Infiniti's method of calculation for guidelines for minimum facility standards for dealers
6 (which incorporates, at a minimum, registration and demographic data of the area) is reasonable. The
7 results of the calculation are an accurate reflection and predictor of minimum facility requirements to
8 meet actual and anticipated business.

9 98. Frontier Infiniti's facilities (building size, land size and service bays) do not adequately
10 meet consumer demands for sales and service of Infiniti vehicles.

11 99. Infiniti's Consumer Satisfaction Index ("CSI") shows that Frontier currently lags behind
12 other Infiniti dealers in satisfactorily servicing existing customers. (III:212-213; VI:192; VII:47-48, 76)

13 100. Frontier has not participated in Infiniti's new facilities upgrade program, called IREDI.

14 101. Infiniti awarded Frontier its "Award of Excellence" for 2002. Frontier was only one of
15 four dealerships in the Western Region to receive this award, which is given to dealerships "excel[ing] in
16 sales and customer satisfaction". (III:62-64; PR-4).

17 102. Currently, Frontier employs 53.5 people, including 4 Infiniti-certified service consultants
18 and 10 Infiniti-certified sales consultants. (III:62; PR-43:12)

19 103. In 2004, Frontier installed new computers on every sales desk in the dealership and added
20 wireless connectivity. Frontier also worked to improve its sales team: it sent its General Sales Manager to
21 a "20 Group" course in Phoenix to "upgrade his performance" and enrolled all sales consultants in a
22 course to improve their phone skills. (III:60-62; PR-12)

23 *The Adequacy of Frontier's Competitiveness in Marketing and Servicing Infiniti Vehicles*

24 104. Infiniti tracks sales performance for many purposes (e.g., to monitor the success of the
25 line-make or of a particular model, to evaluate individual dealers and dealers of an area or region)
26 utilizing sales and registration data, organized by each of the eight product groups ("segments") it
27 manufactures. Currently, the eight Infiniti "segments"---all luxury vehicles---are the following:
28 "Premium Luxury", "Near Luxury", "Near Luxury-Sedan", "Utility Luxury", "Utility Luxury-Large",

1 “Luxury Coupe”, “CrossOver Luxury”, and “Mid Luxury”. For each segment, Infiniti compares its
2 registrations against those of comparable models of the other luxury vehicle manufacturers, coming up
3 with “brand penetration”, measured in percentages. (PR-385 at PH-9)

4 105. Similarly, Infiniti measures the size of a particular market by counting the total combined
5 number of registrations in a PMA, including Infiniti registrations, in each of the eight “segments” in
6 which Infiniti competes. The result, called a “competitive set”, represents the total available opportunity
7 in a given market based on actual registrations. As an example, a PMA with a 10,000 vehicle
8 “competitive set” is a larger market than a PMA with a 5,000 vehicle “competitive set”, regardless of the
9 square miles covered by either PMA.

10 106. Since “competitive set” figures define the size of the available customer base, Infiniti uses
11 “competitive set” data in a formula to measure an individual dealer’s sales performance, factoring in the
12 dealer’s unit sales, because that comparison evaluates a dealer’s actual sales relative to the opportunity
13 available to it. As an example, if Infiniti’s average market share is 50% of the “competitive set”, a dealer
14 with a “competitive set” of 1,000 vehicles has to sell 500 units to be “sales effective” (i.e., meet the
15 average market share), while a dealer with a “competitive set” of 2,000 vehicles has to sell 1,000 units---
16 twice as many---to be “sales effective”. Thus, the size of the PMA affects the dealer’s “sales
17 effectiveness” ratings. (VII: 52-53; IX: 16-17)

18 107. Considering the Fremont “open point” still in place, Frontier’s PMA had a 2005
19 “competitive set” of 17,606 vehicles, the largest of any Infiniti dealer in the San Francisco Metro market,
20 nearly double the size of the next largest PMA. Even after the shift of the “open point” to San Jose, thus
21 reducing Frontier’s PMA, its “competitive set” of 10,221 vehicles remains the largest “competitive set” in
22 the San Francisco Metro Region. (PR-385, PH-48; IX:96-97)

23 ///

24 ///

25 ///

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28 ///

108. Frontier Infiniti's sales have been the following:

Year	Infiniti New Unit Sales	Used Units Retail
2000	1,040	468
2001	782	316
2002	878	230
2003	1,145	240
2004	908	216
2005	974	198

(PR-43 at p.8)

109. Infiniti measures a dealer's sales effectiveness using the dealer's actual sales---it compares and indexes the dealer's sales penetration to the region's sales penetration average. Since 2003, Infiniti considered Frontier's sales effectiveness to be deficient and below the "expected average". In March of 2005, Infiniti sent Frontier a letter referenced "Notice of Unsatisfactory Performance", citing a regional sales penetration average of 9.58% compared to Frontier's 6.00% sales penetration. (VII:53-54; PR-11; PR-324; PR-385 at PH-49; PR-385 at PH-16 to PH-19)

110. Using the foregoing "sales effectiveness" data, Infiniti concluded that Frontier was "unable to cover the market" because of the growth of the market. (VII:61, 63-65; PR-49, PR-50) Frontier's low "sales effectiveness" scores did not mean that Frontier was doing a bad job; rather, the deficiencies indicated that "the area...is too large for the dealer". (IX:99) "[T]hey're not covering that area. It's too big." (IX:100)

111. With the shift of the "open point" to San Jose and the establishment of the proposed new dealership, Frontier's PMA becomes smaller and it becomes statistically "sales effective". (IX:100, 184; PR-385 at PH-50)

112. Before the shift of the Fremont "open point" to San Jose, Frontier had the largest PMA of all Infiniti dealers in the "San Francisco Metro Region", with a large potential customer base. Since the Fremont "open point" (the PMA adjacent to Frontier to the northeast) was not filled with a dealer, Frontier's market opportunities were significant. Frontier's sales, when compared with other Infiniti dealers in the Region, had fallen behind other dealers. (VII:53-54; PR-11; PR-324; PR-385 at PH-49;

1 PR-385 at PH-16 to PH-19)

2 113. Although Infiniti had used the "Contra Costa" standard to measure Frontier's performance
3 (thereby including in survey data the statistics of three high-performing dealerships, each having different
4 geographic and competitive environments from Frontier), Infiniti's conclusion that Frontier lacked sales
5 effectiveness was not without basis, recognizing the large size, population growth and increasing
6 affluence of the residents in Frontier's PMA.

7 114. In regard to sales of new Infiniti vehicles, there is an unmet sales need which Frontier is
8 not fulfilling.

9 115. Year-to-date in 2006, Infiniti sales have been down roughly 11% in comparison to 2005
10 sales. (II:50-51; III:105-106; V:211-212; PR-204)

11 116. In 2005, according to the "Service Smarts" program, there were 1,153 Infiniti vehicles in
12 Frontier's PMA that were sold by Frontier, but were not being serviced by Frontier or by any other Infiniti
13 dealer. These vehicles made up 27% of all Infiniti vehicles "residing" in the PMA. (PR-359 at 28) An
14 additional 382 vehicles "reside" in Frontier's PMA that were not sold by Frontier which are not being
15 serviced by any Infiniti dealer. The two numbers total 1,535 vehicles. (IV: 161)

16 117. Generally, "customer pay" vehicles are older models not owned by the original buyers
17 where the manufacturer warranties have expired, and whose owners seek service at places they perceive
18 to be cheaper than at an Infiniti dealership. Although some of those vehicles represent lost business
19 opportunities which may be captured by dealers, the percentage is probably not great.

20 *The Convenience of Consumer Care Offered by Frontier Infiniti*

21 118. Currently, in the Santa Clara County area, the average distance a customer must travel to
22 arrive at an Infiniti dealership is 11.9 miles, a greater distance than all other luxury brands. If the
23 proposed dealership is established in East San Jose, travel distance would be reduced to 7.6 miles and
24 Infiniti would move ahead of BMW, Acura, Lexus and Cadillac, and to within .2 miles of Mercedes-
25 Benz, which would enhance convenience for Infiniti customers. (IX:126; PR-385 at PH-52 and PH-91)

26 119. The Consumer Satisfaction Index (CSI) shows that Frontier currently underperforms most
27 other Infiniti dealers in the Region in satisfying customers, although Frontier was consistently above
28 average---and sometimes significantly above average in service satisfaction---during much of 2004.

1 (PR-224, 226-228)

2 Findings Relating to Whether the Establishment of an Additional Franchise
3 Would Increase Competition and Therefore be in the Public Interest [Section 3063(e)]

4 120. Currently, the seven Infiniti dealerships in the San Francisco Metro Region (ignoring the
5 “open point” in San Jose) are spaced at mileage intervals from each other of between 17.6 miles apart
6 (Niello in Concord to Oakland) to 26.7 miles apart (Frontier to Pleasanton). If the new dealership is
7 established, the 9.2-mile distance between it and Frontier will be the closest distance between two
8 adjacent Infiniti dealers. (PR-43 at Exh. NNA 01135; PR-383 at 01135; PR-385 at PH-1)

9 121. The establishment of the new dealership, especially if done in the manner testified to by
10 Mr. Beshoff, will enhance customer interest in Infiniti as a luxury brand of automobile. This, in turn, will
11 stimulate sales of Infiniti vehicles.

12 122. Infiniti currently has a “brand penetration” among luxury vehicles of 11.4%. If built as
13 designed, the new dealership’s high-profile status may increase the percentage of “brand penetration” of
14 Infiniti vehicles and therefore inure to the benefit of other Infiniti dealers, including Frontier Infiniti.

15 123. The establishment of a new Infiniti dealership in East San Jose will increase competition.

16 124. The City of San Jose is expecting a housing and population boom in the area in proximity
17 to both Frontier Infiniti and the proposed new dealership. Both Frontier and the new dealership will reap
18 the benefits of this population increase.

19 125. Frontier’s expert (Dilmore) predicted a 40% reduction of new and used vehicle sales and a
20 45% reduction in service and parts income if the new dealership were to be established and calculated that
21 certain fixed costs of doing business could not be cut, even with reduced business. The result, in his
22 opinion, would be an operating loss of over \$1,000,000 in a year. (PR-43 at 10-11)

23 126. Infiniti’s expert (Sherwin) assumed a 20% and a 30% loss in both categories (new and
24 used vehicle sales/service and parts income) and used Dilmore’s 40% to 45% loss figures to predict
25 Frontier’s profitability if the new dealership were to be established. (PR-413) He disputed Dilmore’s
26 calculation that certain fixed costs of doing business could not be cut. Sherwin opined that under any of
27 his three assumptions, Frontier would remain profitable: at 20% loss of business, its profits would be
28 \$930,000 in a year; at 30%, \$700,000; and at Dilmore’s 40% to 45%, it would have a \$412,000 profit.

1 (XI:100, 124-128; PR-413)

2 127. Smythe European Motors (the established Mercedes-Benz dealership on Stevens Creek
3 Boulevard's "auto row") suffered a loss of business after Mr. Beshoff opened a new state-of-the-art
4 Mercedes-Benz dealership in East San Jose. (PR-43 at p. 15)

5 128. In 2003, the Sacramento Infiniti dealership sold 809 new vehicles. The next year, a
6 competitor (Elk Grove Infiniti) opened in the area and Sacramento Infiniti's sales total for 2004 dropped
7 to 742, but the total sales of new cars between the two dealerships rose to 1,179. In 2005, the combined
8 sales figures remained constant (1,186), with the two dealerships splitting the number of sales equally;
9 Sacramento Infiniti's 2005 sales (594) were larger than its 2001 sales (361) and its 2000 sales (389) and
10 almost on a par with its 2002 sales (612). (PR-43: Exh. 33)

11 129. In 2004, Pleasanton Infiniti sold 900 new cars and Niello Infiniti sold 849 new cars, for a
12 total of 1,749 vehicles. The next year, a competitor (Oakland Infiniti) opened and Pleasanton's sales total
13 for 2005 dropped to 835 and Niello's dropped to 690, with total sales of new cars for the three dealerships
14 rising slightly to 1,770 (Oakland selling 245). Even though Pleasanton suffered a drop in sales of 65 cars
15 the year after the Oakland dealership opened, its sales still exceeded its 2003 figure (744), its 2002 figure
16 (625), its 2001 figure (439) and its 2000 figure (579). The Niello 2005 sales figure of 690 was lower
17 than its sales figures for the two years preceding, but was higher than each of the years 2002, 2001 and
18 2000, when there was no competition from the Oakland dealership. Total Infiniti sales in the area
19 consistently rose each year: 1,060 in 2000, 868 in 2001, 1,288 in 2002, 1,458 in 2003, 1,749 in 2004 and
20 1,770 in 2005. (PR-43 at Exh.33)

21 130. Infiniti's "planning volume"/UIO calculation for Frontier---using PMA data without the
22 proposed East San Jose dealership---is 2145/4378. Infiniti has also calculated a second "planning
23 volume"/UIO for Frontier---with the addition of the proposed dealership in the PMA data---which is
24 1386/2961. Infiniti's reduction of both numbers acknowledges that Frontier's sales and service business
25 will be lower if the new dealership is established. (VI:179-180; VII:111-112; PR-407)

26 131. If the proposed dealership opens in East San Jose, Frontier Infiniti will experience a loss of
27 new car sales business and a loss of business in "customer pay" service.

28 132. If the proposed dealership opens in East San Jose, Frontier's PMA will be reduced in size

1 and one or more of its PMA boundaries would change. This would, in turn, do at least two things: (1)
2 Change UIO numbers assigned to Frontier's PMA which would change "planning volume" and facilities
3 requirements which would bring Frontier's facility into greater percentage compliance with Infiniti's
4 facilities requirements; and (2) Change the number of registrations in Frontier's PMA, which would
5 improve Frontier's "sales effectiveness" statistics. (VI:179-180)

6 Findings in Regard to Protestant's "Existing Circumstances" Argument [Section 3063]

7 133. Protestant's first argument, which raises the "history" of Frontier Infiniti, is decided supra
8 in the "permanency of investment" portion of the Proposed Decision.

9 134. Protestant has not sustained its burden of proof in regard to its second argument regarding
10 the shift of the Fremont "open point" to San Jose. It is a legitimate corporate decision to allow a new
11 dealership (here, the Oakland Infiniti dealership) a period of time to establish itself and to limit
12 competition. The shift of the "open point" was further justified by market data analysis. (IV:182-
13 188,192-215VII:80-84; VIII:17-24; PR383 at NNA 01145 to 01149, NNA 01173)

14 ANALYSIS

15 Permanency of the Investment [Vehicle Code section 3063(a)]

16 135. Protestant Frontier Infiniti has established permanency of its investment by the following:
17 the longevity of the dealership at the same location; the dedication to the Infiniti line-make from the
18 inception of the brand to the present, through the initial unprofitable years to the present, more profitable
19 ones; the financial outlays, both initially and through the years; and its creative efforts to overcome
20 facility problems, whether successful or not. Having found that Frontier has sustained its burden of proof
21 on this issue, it is not necessary to reach Infiniti's argument regarding liquid/illiquid assets, nor to address
22 the proposed capitalization and plans of the new dealership.

23 Effect on the Retail Motor Vehicle Business and the Consuming Public
24 in the Relevant Market Area [Vehicle Code section 3063(b)]

25 136. Frontier has not sustained its burden of proof in this regard because the effect on the retail
26 motor vehicle business of the dealers clustered along the two "auto rows" (Stevens Creek Boulevard and
27 Capitol Expressway) within the relevant market area of the proposed new dealership has not been shown
28 to be negative. Similarly, the fact that the consuming public within the RMA will simply have more

1 dealership choices has not been shown to be negative.

2 Whether it is Injurious to the Public Welfare for an
3 Additional Franchise to be Established [Vehicle Code section 3063(c)]

4 137. Frontier has not sustained its burden of proof in this regard because the establishment of a
5 new state-of-the-art dealership selling luxury cars, developed on previously unimproved land, near a
6 newly-refurbished shopping mall, close to planned residential neighborhoods, with the potential of
7 creating job opportunities and tax revenues, has not been shown to be injurious to the public welfare.

8 Whether Frontier Infiniti is Providing Adequate Competition and Convenient Consumer
9 Care, Taking Into Consideration Facilities and Personnel [Vehicle Code section 3063(d)]

10 138. Frontier has not sustained its burden of proof for this factor. While Silicon Valley has
11 grown and prospered since 1990, Frontier Infiniti has not met the increased market demand for luxury
12 automobiles, despite enjoying little or no competition from other Infiniti dealers in the City of San Jose
13 and Santa Clara County.

14 139. Frontier's facility, while modestly improved and expanded during its 16 years of operation,
15 is much the same as it was in 1990, lacking an adequate number of service bays, square footage and
16 upgrades. There have been lost opportunities for sales and service in the area and, even acknowledging a
17 downturn in demand and sales of Infiniti vehicles in 2005 and 2006, there is sufficient business to support
18 two viable Infiniti dealers.

19 140. Infiniti's use of the "Contra Costa" standard produced statistics which were less probative
20 in analyzing Frontier's sales performance, since the inclusion in their calculations of high-performing, but
21 geographically remote, dealerships did not directly bear on Frontier's situation. However, other evidence
22 establishes the lack of adequacy of Frontier's sales efforts in light of the fact that since the Fremont "open
23 point" was not filled with a dealer, Frontier had a virtual monopoly as an Infiniti dealership in San
24 Jose/Santa Clara County, i.e., one of Frontier's adjacent competitors had been vacant (the Fremont "open
25 point"), and the other adjacent competitor (Peninsula Infiniti) shared ownership with Frontier.

26 Whether the Establishment of a New Dealership would Increase
27 Competition and Therefore be in the Public Interest [Vehicle Code section 3063(e)]

28 141. Inevitably, the addition of a new dealership does increase competition. Here, the public

1 interest is served because competition---even if it results in lower sales figures and service receipts---
2 would not be ruinous to Frontier Infiniti, since there is a sufficient “underserved” market to support two
3 competing dealerships. Infiniti has the lowest market share of competing luxury brands; possibly, a new
4 Infiniti dealership will generate more consumer interest in the brand and that total Infiniti sales in the area
5 will increase, as has happened elsewhere. Increased competition may prompt Frontier to make changes to
6 boost its relatively low consumer satisfaction ratings of recent years.

7 142. It is not possible to draw useful comparisons between the establishment of Beshoff Motor
8 Cars Mercedes-Benz in competition with the well-established Smythe European Mercedes-Benz,
9 Frontier’s neighbor on Stevens Creek Boulevard, except to note that Smythe is still in business, despite
10 smaller sales.

11 CONCLUSIONS OF LAW

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

14 2. Protestant has not proved an adverse effect on the retail motor vehicle business and
15 the consuming public in the relevant market area and therefore has not sustained its burden of proof in this
16 respect. [Section 3063(b)]

17 3. Protestant has not proved that it would be injurious to the public welfare for an
18 additional Infiniti dealership to be established. [Section 3063(c)]

19 4. Protestant has not sustained its burden of proof of establishing that it is providing
20 adequate competition and convenient consumer care for Infiniti vehicles in the relevant market area,
21 taking into consideration the adequacy of motor vehicle sales and service facilities. Protestant has,
22 however, sustained its burden of proof of showing its adequacy of equipment, supply of vehicle parts, and
23 qualified service personnel. [Section 3063(d)]

24 5. The establishment of a new Infiniti dealership would increase competition and
25 therefore be in the public interest; Protestant has therefore not sustained its burden of proof in this regard.
26 [Section 3063(e)]

27 ///

28 ///

PROPOSED DECISION

Protest No. PR-1969-05 is overruled.

I hereby submit this Proposed Decision, made as a result of a hearing before me in the above-entitled matter. I recommend that it be adopted as the Decision of the New Motor Vehicle Board.

DATED: October 17, 2006

By 
DIANA WOODWARD HAGLE
Administrative Law Judge

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