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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protests of )  
CONTINENTAL IMPORTS and )  
TREVELLYAN OLDSMOBILE CO., ) Protest Nos. PR-138-77  
 ) PR-139-77  
 )  
 ) Protestants, )  
 )  
 ) vs. )  
 )  
 ) Filed: February 22, 1978  
 )  
 ) SUBARU OF SOUTHERN CALIFORNIA, )  
 )  
 ) Respondent. )  
 )

DECISION

The attached Proposed Decision of the Hearing Officer is hereby adopted by the New Motor Vehicle Board as its Decision in the above entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED this 16<sup>th</sup> day of February, 1978.

  
MEMBER.  
New Motor Vehicle Board

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CONTINENTAL IMPORTS and )  
TREVELLYAN OLDSMOBILE CO., ) Protest Nos. PR-138-77  
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 ) Protestants, )  
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 ) vs. )  
 ) FILED: February 3, 1978  
 ) SUBARU OF SOUTHERN CALIFORNIA, )  
 )  
 ) Respondent. )  
 )  
 )  
 )

PROPOSED DECISION

Procedural Background

1. Respondent Subaru of Southern California ("Subaru") gave notice on June 20, 1977, pursuant to section 3062 of the Vehicle Code<sup>1/</sup> of its intention to establish an additional franchise at 5010 Kearny Mesa Road, San Diego. The proposed franchisee would be Kearny Mesa Volkswagen, Inc., dba Kearny Mesa Subaru ("proposed franchise").

2. Protests were filed with the New Motor Vehicle Board ("Board") on June 28, 1977, by Continental Imports, Inc. ("Continental") located at 4455 El Cajon Boulevard, San Diego,

1. All references are to the Vehicle Code.

California, and Trevellyan Oldsmobile, Inc. ("Trevellyan") located at 3902 Park Boulevard, San Diego, California.

3. The protests were consolidated for a hearing held pursuant to section 3066 before Anthony M. Skrocki, Hearing Officer of the New Motor Vehicle Board, in San Diego commencing on August 16, 1977. Protestants were represented by Harold C. Wright, Esq., of the law firm of Wright, Britton, Coder & Tuel. Respondent was represented by Pamela Ann Rymer, Esq., of the law firm of Toy & Rymer, and by John D. Cochran, Esq.

#### Issues Presented

4. Protestants contend that good cause exists for not establishing the proposed franchise for the following reasons:

(a) The additional franchise will jeopardize the permanent investments of Protestants. (§ 3063(1).)

(b) Protestants' earnings will be reduced necessitating reduction in service facilities and service personnel. This would have an adverse effect on the consuming public within the relevant market area.

(c) The establishment of the additional franchise would be injurious to the public welfare. (§ 3063(3).)

(d) Franchisees of the same line make in the relevant market area are providing adequate competition and convenient consumer care for Subaru vehicles. (§ 3063(4).)

(e) Establishment of an additional franchise would not increase competition but would merely redistribute the existing market which is being adequately served by Protestants. (§ 3063(5)).

(f) As a result of representations made to Continental, Respondent is estopped from establishing the additional franchise. (§ 3063.)

(g) Establishment of the additional franchise would unfairly reduce the allocation of new Subaru vehicles to Protestants. (§ 3063.)

#### Findings of Fact

##### Facts Relating to Permanency of Investment (§ 3063(1))

###### Continental

5. Continental was acquired by Vico Corporation on December 3, 1976 for \$347,000.

An additional sum of approximately \$100,000 was invested.

Charles and Viviana Polinsky each own 50% of the stock of Vico Corporation.

6. Continental is a franchised dealer for Fiat and Alfa Romeo as well as Subaru. As of June 1977, approximately 60% of Continental sales were Fiats and 40% were Subarus.<sup>2/</sup> Alfa Romeos are not kept in inventory but are sold only on an ordered basis.

7. Continental does not maintain a separate sales or service facility for Subaru.

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2. There is more gross profit available on a Fiat than on a Subaru.

8. Continental intends to expand and therefore leased additional property directly connected to its existing service and parts facility. Continental is also negotiating for increased storage space.

#### Trevellyan

9. Trevellyan is presently operated by James E. Trevellyan and is franchised to sell both Oldsmobile and Subaru vehicles. The Subaru franchise was acquired in August 1970.

10. Trevellyan has been located at its present address since 1956. The only change in the facilities since its initial construction was the relocation of the body shop in about 1971.

11. Trevellyan is located on 3/4 of an acre. The show room has room for 9 to 10 cars. The service department has 35 stalls, 11 hoists, and a total of 14,000 square feet. Trevellyan's parts department maintains an average Subaru inventory worth \$8,500.

12. A \$450,000 offer was made to purchase the land and facilities.

13. Trevellyan purchased a used Subaru sign in 1969 costing \$1,178 and spent a total of \$727.62 on Subaru tools. No other direct purchases have been made for purposes related to selling or servicing Subarus.

14. Trevellyan's gross profit on new car sales in the first six months of 1977 was \$201,076.13 with \$13,508.98 of that sum generated by sale of new Subarus. Subaru thus accounts for 6.71% of Trevellyan gross profit.

15. Trevellyan, at its present location, does not have a separate sales or service facility for Subaru.

16. Trevellyan's present location is, in its opinion, no longer desirable, and it is planning to move to a new location in the 600 block of Camino Del Rio South in Mission Valley. The proposed Trevellyan location is also within the relevant market area of the proposed franchise. General Motors has approved the relocation of Trevellyan but Subaru has denied the request.

17. In Trevellyan's opinion the effect on its business if Kearny Mesa is franchised would be the same whether Trevellyan remained at its present location or moved to its proposed location in Mission Valley.

Facts Relating to Effect on Service Facilities and Service Personnel to the Consuming Public (§ 3063(2))

18. Continental is approximately 5.6 miles from the proposed franchise..

19. Trevellyan is within five miles of the proposed franchise and would be less than four miles from it if Trevellyan moves to Mission Valley.

20. Continental employs 11 mechanics and two service writers (one full-time and one who functions as a shop foreman except when needed as a service writer).

21. Trevellyan has nine service technicians, two of whom work on Subaru when Subaru work is available.

Facts Relating to the Public Welfare (§ 3063(3))

22. The proposed franchisee is Rogue De La Fuente, a Volkswagen and Peugeot dealer. Subaru has satisfied itself that Mr. De La Fuente will meet their conditions for appointment as a franchisee.

23. Rogue De La Fuente could adequately function as a Subaru dealer.

Facts Relating to Adequate Competition and Convenient Customer Care (§ 3063(4))

24. There were, at the time of the hearing, only two Subaru dealers within the relevant market area (Protestants) and a total of four in San Diego County (Protestants, Webster Pontiac-Subaru in National City, and Oceanside Subaru).

25. Neither Protestant maintains a separate service department solely for Subaru vehicles.

Facts Relating to Whether Establishment of the Additional Franchise Would Increase Competition and Therefore Be in the Public Interest (§ 3063(5))

26. Subaru of America's import market penetration is as follows:

<u>Year</u>	<u>National</u>	<u>So. Calif.</u>	<u>San Diego Co.</u>
1976	4.5%	1.5%	2.6%
1977 thru June	4.2%	1.9% (thru May 1977)	2.8%

27. All other import makes are represented in the area of the proposed franchise with the exception of Subaru and Renault.

28. In Continental's opinion it could sell more than 50 Subarus per month if Subaru improved its marketing programs and availability of vehicles.

29. Nationally Subaru outsells Fiat but in San Diego Fiat outsells Subaru.

30. In Continental's opinion there is room in the San Diego market for an additional 100 Subarus per month.

31. From January 1, 1977, to the date of hearing Trevellyan sold approximately 400 Oldsmobiles and 64 Subarus. Trevellyan sold 60 Subarus in 1976.

32. In Trevellyan's opinion its sales at the present site should be about 20 Subarus per month and 30 per month if it moved to the proposed Mission Valley location.

Facts Relating to Whether Respondent is Estopped from Establishing the Additional Franchise

33. Prior to obtaining approval of the transfer of the franchise to its present owners, Subaru requested the present owners to sign a letter stating they understood that Subaru intended to franchise a dealer in the Kearny Mesa area. The request was refused, and the present owners indicated they would not purchase Continental if they were required to sign such a letter.

34. Subaru withdrew this requirement as a condition of transfer of the franchise.

35. There was no express communication that Subaru would not establish a franchise at Kearny Mesa.

36. The present owners were orally informed after Subaru withdrew its request for the signing of the letter, and before the franchise was purchased, that Subaru still considered Kearny Mesa an open point.

Facts Relating to Whether Establishment of the Proposed Franchise Would Unfairly Reduce Protestants Allocations of New Subaru Vehicles

37. Subaru has been able to supply sufficient vehicles to Protestants to allow them to increase their 1977 vehicle travel rate over that of 1976.

38. Continental sold 177 Subarus in 1976 and 371 in 1977.

39. Trevellyan sold 60 Subarus in 1976 and 113 from January 1, 1977, to June 30, 1977.

40. Since May of 1977, allocation of new Subaru vehicles from Subaru of America to Subaru of Southern California, and eventually to the dealers, is based upon a system which considers sales, inventory, and planning potential.

41. The number of vehicles allocated to Subaru of Southern California is increasing.<sup>3/</sup>

3. This representation at hearing is confirmed by statistics submitted by Respondent by letter in January 1978. This letter showed the total number of new vehicles delivered to Subaru of Southern California during the period August 1, 1977, to December 31, 1977, to be 3,446 (an average of 689 per month). The January 1978 allocation is 899, and the February 1978 allocation is to be 950 vehicles.

42. A total of 6,551 units were to be received by Subaru of Southern California during 1977. This exceeded the then existing dealer's current rate of travel by 2,025 vehicles.

43. Subaru of America projects that Subaru of Southern California will receive 11,900 vehicles during the 1978 year.

44. Neither Protestant would object to franchising Subaru dealers in Escondido 28 miles away, El Cajon 12 miles distant, or La Jolla 12 to 13 miles distant. Continental would encourage Subaru to establish dealers at those points.

#### Determination of Issues

1. Protestants have failed to establish that good cause exists for not establishing the proposed franchise for the following reasons:

(a) The establishment of the additional franchise will not jeopardize the permanent investments of Protestants. The capability exists for both Protestants to increase their sales volume to achieve a greater percentage of market penetration. There will also be more vehicles available to them based upon increasing allocations to Subaru of Southern California and dependent in part upon Protestant's own sales performance. (§4(a)); and

(b) Establishment of the additional franchise will not adversely effect the retail motor vehicle business and

consuming public within the relevant market area since there was no substantial evidence to show to what extent Protestants rely upon sales from the Kearny Mesa area and/or that loss of such sales would be sufficient to cause Protestants to reduce their service efficiency. (§4(b)); and

(c) There was no showing that the proposed franchisee or its proposed facilities would be inadequate to function as a Subaru dealer. (§4(c)); and

(d) The establishment of the additional franchise will give Subaru an outlet in Kearny Mesa to enable Subaru to compete with other imports which already have established dealers. (§4(d)); and

(e) The establishment of the additional franchise will result in increased competition and should result in greater market penetration for Subaru with resultant benefit to all Subaru dealers in the area and to the consuming public. (§4(2)); and

(f) Subaru is not estopped as to Continental from establishing the additional franchise. The present owners were informed before they purchased Continental that Subaru still considered Kearny Mesa an open point. (§4(f)); and

(g) There are increasing numbers of Subaru vehicles available to its dealers and their allotments will increase as their sales increase. (§4(g))

THE FOLLOWING PROPOSED DECISION is respectfully submitted:

The protests are overruled. The Respondent is entitled to establish the additional Subaru dealership in the Kearny Mesa area.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matters, as a result of a hearing had before me on the above dates at San Diego, California, and recommend its adoption as the decision of the New Motor Vehicle Board.

Dated: February 3, 1978.

*Anthony M. Skrocki*

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ANTHONY M. SKROCKI  
Hearing Officer  
New Motor Vehicle Board