

NEW MOTOR VEHICLE BOARD
1507 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-2080

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

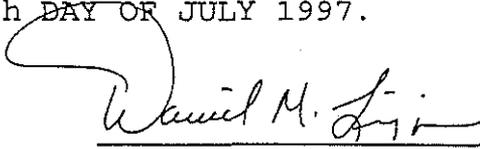
In the Matter of the Protest of)
)
IRVINE CENTRAL MOTORS, INC., dba) PROTEST NO. PR-1501-95
IRVINE MAZDA,)
)
Protestant,)
)
vs.)
)
MAZDA MOTOR OF AMERICA, INC.,)
)
Respondent.)
_____)

DECISION

At its regularly scheduled meeting of July 17, 1997, 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 17th DAY OF JULY 1997.



DANIEL M. LIVINGSTON
President
New Motor Vehicle Board

1 NEW MOTOR VEHICLE BOARD
1507 21st Street, Suite 330
2 Sacramento, California 95814
Telephone (916) 445-2080
3
4
5

6 STATE OF CALIFORNIA
7 NEW MOTOR VEHICLE BOARD

8 In the Matter of the Protest of)
9 IRVINE CENTRAL MOTORS, INC. dba)
10 IRVINE MAZDA,)
11 Protestant,) **Protest No. PR-1501-95**
12 vs.)
13 MAZDA MOTOR OF AMERICA, INC.,) **PROPOSED DECISION**
14 Respondent.) **AFTER REMAND**
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 9. On October 24, 1996, the Board issued its decision
17 overruling Protestant's protest to Mazda's establishment of a
18 dealership in the Tustin Auto Mall. On December 8, 1996,
19 Protestant filed a Petition for Writ of Administrative Mandate in
20 the Orange County Superior Court and the matter was heard on
21 April 24, 1997. Following the hearing, the Superior Court ruled
22 that factual findings contained in the Decision were inadequate
23 and remanded the matter to the Board, ordering the Board "to
24 prepare concise factual findings, pursuant to Vehicle Code
25 section 3062, regarding among other things, the competitive
26 impact of the proposed MacPherson dealership, as a replacement
27 dealer, on Irvine Mazda and other Orange County Mazda dealers."

28

1 The parties were given an opportunity for further briefing and
2 the record was reviewed by Administrative Law Judge Douglas H.
3 Drake and additional concise findings were made, incorporated
4 herein, in conformity with the Superior Court's mandate.

5 CONTENTIONS OF THE PARTIES

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

14 11. Furthermore, Protestant contends there cannot be good
15 cause to open the Tustin dealership in an area where, since 1990,
16 five (5) of ten (10) dealerships have been forced to close
17 because of lack of profitability.

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

24 13. Lastly, Protestant contends that the Board should take
25 into consideration as an "existing circumstance" Mazda's conduct
26 surrounding its decision to establish the Tustin dealership which
27 includes the following: (1) Mazda's decision to enter the

1 Tustin market several days after it first learned of Irvine's
2 intention to add the KIA franchise to its facility; and (2) in
3 the event Mazda elects to appoint another dealer, the Mazda
4 Dealer Agreement obligated Mazda to provide sixty (60) days
5 written notice to discuss whether there exist any mutually
6 agreeable alternatives to the proposed action.

7 14. Respondent contends Irvine has not presented facts to
8 show (a) that their investment in Mazda was permanent; (b) that
9 the Tustin dealership will have a negative impact on the motor
10 vehicle business in Orange County; (c) that the Tustin
11 dealership will injure the public; (d) that the surrounding
12 dealers have not met the needs of the relevant market area; and
13 (e) that the Tustin dealership will decrease competition.

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

18 16. Respondent contends it complied with the terms of the
19 Mazda Dealer Agreement provision requiring sixty (60) days prior
20 written notice of the appointment of Joseph MacPherson
21 ("MacPherson") in the Tustin Auto Mall.

22 17. Before the Superior Court, Protestant contended the
23 Board failed properly to evaluate two factors: (1) the effect on
24 the public welfare; and (2) the effect on competition, and that
25 its analysis of these factors is not supported by the factual
26 findings.

27 ///

1 ISSUES PRESENTED

2 18. Section 3066 imposes upon Protestant the burden of
3 proving that there is good cause not to enter into a franchise
4 establishing a Mazda dealership in the Tustin Auto Mall.

5 19. In determining whether good cause has been established
6 for not entering into or relocating an additional franchise for
7 the same line-make, Section 3063 requires the Board to take into
8 consideration the existing circumstances, including but not
9 limited to the following:

- 10 (a) Permanency of the investment.
- 11 (b) Effect on the retail motor vehicle business and the
12 consuming public in the relevant market area².
- 13 (c) Whether it is injurious to the public welfare for an
14 additional franchise to be established.
- 15 (d) Whether the franchisees of the same line-make in that
16 relevant market area are providing adequate competition
17 and convenient consumer care for the motor vehicles of
18 the line-make in the market area which shall include
19 the adequacy of motor vehicle sales and service
20 facilities, equipment, supply of vehicle parts, and
21 qualified service personnel.
- 22 (e) Whether the establishment of an additional franchise
23 would increase competition and therefore be in the
24 public interest.

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 20. Was there a breach of the Mazda Dealer Agreement?

2 FINDINGS OF FACT³

3 a. Facts relating to permanency of the investment.
4 (\$ 3063(a))

5 21. Mazda discussed awarding the Irvine point to Indomobil⁴
6 in 1988. Exhibits 13 and 16. In 1988, Mazda had its best sales
7 year in its history to that point.

8 22. Prior to investing in the Irvine Auto Mall, Mazda
9 advised Indomobil that it would likely incur substantial losses
10 for several years before the dealership would become profitable.
11 Indomobil was willing to make a long-term investment in Mazda and
12 in the Irvine dealership.

13 23. On or about May 2, 1988, Benny Burns⁵ ("Burns"), while
14 still at Mazda, discussed with Indomobil representatives, Mr.
15 Zacharia and Mr. Hermawan, the potential losses which would be
16 incurred while establishing a dealership in Irvine. Burns
17 projected those losses to be in excess of double what Indomobil
18 expected, which was \$142,213. The Indomobil representatives
19 responded that they felt the real estate investment would
20 equalize the business potentials.

21 24. Prior to the opening of Irvine, Mazda informed

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

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

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

1 Indomobil that it expected a protest from David J. Phillips Mazda
2 ("Phillips Mazda"), located approximately 2.8 miles to the south.
3 Ossy Tirta ("Tirta"), a representative of Indomobil, sought
4 advice from Mazda's regional manager regarding a solution. Mazda
5 advised Tirta that cash settlements were common in such
6 situations.

7 25. Indomobil ultimately paid David J. Phillips
8 ("Phillips") \$500,000 in exchange for the relinquishment of his
9 right to protest under §§ 3062 and 3063.

10 26. The site chosen by Irvine in the Irvine Auto Mall was
11 only 2.6 air miles from Phillips Mazda in Laguna Hills. Exhibit
12 1, "Area" section, serial nos. 14470 and 14471. Phillips Mazda
13 is not in an auto mall and does not have freeway visibility.

14 27. Once Irvine went in, there was a high probability that
15 Phillips Mazda or Santa Ana would not be able to stay in
16 existence, and the \$500,000 was money compensating Phillips for
17 his anticipated losses. Phillips Mazda never went out of
18 business and is still in business at the same location today.

19 28. At the time Irvine opened, there were eight (8) Mazda
20 dealers in business in Orange County.

21 29. Irvine Mazda is located in the city of Irvine which had
22 a population of 127,200 as of January 1, 1996. Irvine is within
23 five (5) miles of the cities of Mission Viejo (population
24 89,900), Laguna Hills (population 25,000) and Lake Forest
25 (population 57,600). Other than Phillips Mazda, there is not
26 another Mazda dealer south of Irvine and north of San Diego
27 County. This includes, the cities of Laguna Beach (population

28

1 23,800), Laguna Niguel (population 55,600), San Clemente
2 (population 46,600), Dana Point (population 36,000) and San Juan
3 Capistrano (population 28,950).

4 30. Indomobil invested approximately \$10.0 million into the
5 Irvine facility. In 1990, it was the largest Mazda facility in
6 the United States. A large portion of the investment related to
7 the acquisition of the land. The facility is located on
8 approximately 3.2 acres.

9 31. Irvine exceeded Mazda's facility guidelines. When
10 Irvine proposed to build such a large facility, Mazda's Senior
11 Vice President, Western Area, Richard Colliver, expressed concern
12 about the 2,000 new unit break-even point and wanted to make
13 certain that Irvine was aware that this was an unrealistic goal
14 for Irvine.

15 32. Mazda officials designed the plans for the dealership.
16 The dealership is a large, state-of-the-art, attractive facility
17 with an impressive parts and service department.

18 33. In its November 1994 market study, the Mazda Dealer
19 Development Department described Irvine as follows:

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

27 34. The addition of Oldsmobile/GMC Truck in a separate
28 showroom did not detract from the visibility of the Mazda
29 showroom. There is a clear separation between the facilities in
30 terms of parking and vehicle display.

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

8 36. Irvine spent the following amounts on advertising for
9 Mazda:

10	<u>Year</u>	<u>Amount</u>	<u>Monthly Average</u>
11	1991	\$715,396	\$59,616
12	1992	\$557,401	\$46,450
13	1993	\$541,193	\$45,099
14	1994	\$451,841	\$37,653
15	1995	\$326,294	\$27,191
16	Total	<u>\$2,592,125</u>	

17 37. Irvine's advertising expenditures have been declining
18 since they opened in 1990. This helps explain the drop in car
19 sales over the same period.

20 38. Merely spending large amounts of money on advertising
21 does not necessarily mean that a dealership will generate the
22 sales volume required for the market. Increased advertising
23 should draw customer traffic. It is up to the individual
24 management of the dealership as to how successful they are in
25 "closing" the sales on new vehicles.

26 39. Irvine has a poor new vehicle sales training program
27 and a sales force that has the worst product knowledge of any

1 Mazda dealer in Orange County.

2 40. Irvine's variable profit per car is lower than the rest
3 of the Orange County dealers as the following chart reveals:

4	<u>Year</u>	<u>Irvine</u>	<u>Other Orange County Dealers</u>
5	1993	\$375	\$650
6	1994	\$300	\$840
7	1995	\$375	\$780

8 41. Irvine maintains a \$500,000 parts inventory. This
9 inventory is the largest in Southern California.

10 42. Irvine's rounded overall financial results since 1990
11 were as follows:

12	<u>Year</u>	<u>Profit (Loss)</u>
13	1990	\$(1,200,000)
14	1991	(1,725,278)
15	1992	(741,048)
16	1993	(276,654)
17	1994	4,540
18	1995	(366,732)
19	1996*	200,000* projected

20 43. The above is the chart Irvine shows to its shareholders
21 in Jakarta. Despite the large losses, the shareholders have
22 remained committed to Mazda.

23 44. Indomobil has maintained its investment in its Irvine
24 dealership during the same time that five other Mazda dealers in
25 Orange County closed down their operations, including: (1) Santa
26 Ana Mazda, (2) Garden Grove Mazda, (3) Campbell Mazda, (4) La
27 Habra Mazda, and (5) Buena Park Mazda.

1 45. Irvine has lost, on an cumulative basis, \$4.3 million
2 dollars since opening.

3 46. Irvine has duplicative management layers and too many
4 employees in top management given the number of sales.

5 47. Irvine has salaries that are slightly higher than
6 average.

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

9 49. Overhead absorption is defined as the amount of fixed
10 overhead which can be absorbed by the different departments of a
11 dealership. Typically, absorption is analyzed, department by
12 department in the following order: service and parts; used car
13 sales; and new car sales. For example, if all the fixed overhead
14 is absorbed by parts and service, then every car sold, whether
15 new or used is profit.

16 50. With a fixed overhead of \$4 million dollars, \$1.5
17 million higher than any other Orange County dealer, Irvine would
18 have had to sell 4,000 new cars in 1993 to absorb their fixed
19 overhead (new car break-even units.) In 1994, that figure was
20 3,500 new cars. In 1995, that figure was 2,500 new cars. In
21 1991, Irvine sold approximately 1,500 cars and lost \$2 million
22 dollars. Irvine's losses have continued for the past five (5)
23 years and the sales per year have continued to decline.

24 51. The following factors all contribute to high overhead,
25 which is why Irvine is not making money: rent; property taxes;
26 insurance; repairs and maintenance; utilities; and supervision
27 salaries.

1 52. In 1994-1995, the other Orange County dealers,
2 excluding Irvine, had operating profits.

3 53. Unless Irvine makes some drastic changes, Irvine will
4 not be in business much longer.

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

8 54. The proposed dealer will be Joseph MacPherson and the
9 dealership will be in the Tustin Auto Mall in one of two
10 facilities under MacPherson's control. The facility and personnel
11 will meet all of Mazda's requirements as outlined in the Letter
12 of Intent ("LOI") dated September 18, 1995. The Tustin facility
13 will be an exclusive Mazda dealership.

14 55. The proposed location in the Tustin Auto Mall is 7.8
15 miles from the Irvine Auto Mall. In 1990, the Santa Ana Auto
16 Mall was 9.7 miles from the Irvine Auto Mall. Mazda is moving
17 the point 2.5 miles closer to Irvine.

18 56. Urban Sciences Applications, Inc., ("USAI") represents
19 eighteen manufacturers, fifteen import and three domestic, in
20 analyzing data and conducting market studies. Mazda's market
21 analyst, John Frith, is USAI's Western Regional Manager. He has
22 told the manufacturer that if USAI's advice is not followed, he
23 would not testify for the manufacturer in any subsequent
24 litigation. He has, in the past, recommended that a dealer not
25 be appointed.

26 57. The relevant market area ("RMA") is a circle with a ten
27 mile radius placed around the Tustin add point as defined by the
28 Vehicle Code.

58. In the RMA surrounding the proposed Tustin dealership there are three Mazda dealers. In Orange County, there are currently five total Mazda dealers.

59. To assess the adequacy of dealer network, it is necessary to establish a reasonable standard for penetration. The national average penetration rate is an extremely conservative standard which takes into account poorly performing areas, areas which do well, and areas with no Mazda dealers. The national average is a "C" average. Such a standard is arrived at by calculating the popularity of each car and light truck segment nationally and adjusting that figure to reflect consumer preferences in the local market.

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

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

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

<u>Period</u>	<u>Actual</u>	<u>Expected</u>	<u>Efficiency</u>
1992	6.63%	5.57%	119.0%
1993	5.68%	5.34%	106.4%
1994	4.67%	4.68%	99.8%

1 1995 3.39% 4.07% 83.3%

2 There was no evidence for 1996.

3 62. This shows a continual decline in penetration. However
4 for 1993 through 1994, the dealers in the Orange County/Los
5 Angeles Metro area were selling into the RMA at a rate greater
6 than or nearly equal to national average.

7 63. From 1992-1994, Mazda's penetration rate in the Tustin
8 RMA has exceeded its national penetration rate. This rate
9 reinforces the idea that the national standard is a very
10 conservative rate.

11 64. Mazda has divided the RMA into statistical observation
12 areas ("SOAs"). An SOA is made up of census tracts or zip codes
13 which are closer or more convenient to dealers to whom the area
14 is assigned rather than to other dealers of the same line-make.
15 Each dealer or proposed dealer is assigned its own SOA.

16 65. In 1995, Mazda achieved a market penetration rate of
17 3.96% for all new retail car and light truck registrations
18 nationwide.

19 66. After unique consumer preferences in the RMA are taken
20 into consideration, the expected market penetration rate for
21 Mazda in 1995 was 4.07% for the RMA. Actual penetration rate was
22 3.39%, which was below national average.

23 67. For the Tustin SOA in 1995, which is a much smaller
24 area than the RMA, the *expected* penetration rate using the same
25 formula is even higher, at 4.11%.

26 68. But the *actual* penetration rate in the Tustin SOA is
27 much lower at 2.92% for penetration rates of the retail car and

28

1 truck competition group registrations.

2 69. The actual penetration rates decline more steeply, as
3 the geography surrounding the proposed Tustin dealership narrows.
4 They are lowest in the SOA and lower in the RMA than in the
5 nation.

6 70. The following chart sets forth the actual and expected
7 penetration rates for the time period and geographic areas
8 indicated:

9 Tustin RMA Penetration

10 <u>Year</u>	<u>Actual</u>	<u>Expected</u>	<u>Efficiency</u>
11 1992	6.63%	5.57%	119.03%
12 1993	5.68%	5.34%	106.37%
13 1994	4.67%	4.68%	99.79%
14 1995	3.39%	4.07%	83.29%

15 Tustin SOA

16 <u>Year</u>	<u>Actual</u>	<u>Expected</u>	<u>Efficiency</u>
17 1992	6.27%	5.53%	113.38%
18 1993	5.75%	5.48%	104.93%
19 1994	4.54%	4.72%	96.19%
20 1995	2.92%	4.11%	71.05%

21 71. Frith also performed a study based upon a California
22 (rather than national) penetration standard in 1995, and found
23 that even under that standard, the actual penetration rate in the
24 RMA was below the expected penetration rate. The same held true
25 for the actual penetration rate in the Tustin SOA which was
26 2.92%, while the expected penetration rate was 3.57%.

27 72. Several Mazda dealerships in Orange County have closed

28

1 over the past five years. Santa Ana, a high volume dealer,
2 closed in November of 1990, less than three months after Irvine
3 opened because of financial problems. As a result of the
4 deteriorating area, Beach Mazda and Garden Grove Mazda, which had
5 common ownership, decided to consolidate operations at the Beach
6 Mazda location in August of 1993. The Garden Grove facility was
7 closed. The dealership in Buena Park was closed in June of 1995.
8 Mazda is looking for representation in Buena Park, but has not
9 been able to find a candidate with a suitable facility.

10 73. During 1992, Mazda had seven dealers in Orange County.
11 In 1993-94, Mazda had six dealers. In 1995, Mazda's dealer count
12 in Orange County dropped to five. There appears to be a
13 correlation between the drop in actual penetration achieved by
14 Mazda in Orange County measured against expected penetration
15 based on national average penetration and the decline in Mazda's
16 dealer count from 1992 through 1995.

17 74. In 1992, the RMA was at 119% of the national expected
18 average. In 1993, it dropped to 106% when Garden Grove
19 consolidated with Beach Mazda. In 1994, the RMA dropped below
20 expected and in 1995 it was at 83% of expected when Buena Park
21 closed. This is 83% of the "C" grade for national penetration.
22 The RMA has done much better than national average in the past.

23 75. In 1992, the Tustin SOA was above expected penetration
24 at 113.4%. In 1993, it dropped to 104.9%. In 1994, penetration
25 dropped to 94% of expected and in 1995 the penetration rate
26 dropped to 71%.

27 76. There has been substantial population growth in the
28

1 Tustin RMA between 1980-1995, and the growth is projected to
 2 continue to the year 2000. The following chart sets forth the
 3 total population and households in the RMA for the time period:

4	<u>Year</u>	<u>Total Population</u>	<u>RMA Households</u>
5	1980	1,035,558	361,748
6	1990	1,332,656	437,469
7	1995	1,406,568	464,992
8	2000 (projected)	1,471,378	487,860

9 77. Mazda has been very sensitive to the possibility of
 10 over-dealering the market. In addition, Mazda has been very
 11 cautious in appointing dealers. "The senior management at Mazda
 12 has been very cautious relative to not wanting to rush into any
 13 decision that would possibly create unrest among dealers." In
 14 the case of Tustin, Mazda waited five years to go back into the
 15 market, which is extremely cautious.

16 78. Population growth in the Tustin SOA has been strong,
 17 increasing 64% between 1980 and 1995. In that same period, the
 18 number of households has increased 68%. The following sets forth
 19 the total population and households in the Tustin SOA for the
 20 time period indicated:

21	<u>TUSTIN SOA</u>		
22	<u>Year</u>	<u>Total Population</u>	<u>Households</u>
23	1980	192,981	66,445
24	1990	280,020	89,470
25	1995	302,650	98,170
26	2000 (projected)	321,515	105,018

27 79. Growth coupled with higher than average income

1 contributes greatly to increased market potential for the sale of
2 products like cars and trucks. Between 1983 and 1994, employment
3 increased from 1,264,200 to 1,342,100. There is a preponderance
4 of upper income households earning over \$35,000 per year in the
5 RMA. In the Tustin SOA, there also is a large concentration of
6 households with average income over \$50,000.

7 80. The market opportunity for Mazda in the Orange County
8 Metro area is much larger per dealer than nationwide. There is
9 ample opportunity from a total size point of view for this market
10 to support an additional dealer. The total market for new car
11 sales nationwide is 5,785,377 for 907 dealers. The average
12 opportunity per dealer is 6,379. In the Orange County Metro
13 area, the market size is 65,880. This rough measure would result
14 in Mazda needing ten dealers to match national average for this
15 size market. Mazda seeks to appoint one more dealer.

16 81. Another calculation of lost opportunity in a market is
17 "gross loss" not "net loss". Gross loss is calculated by taking
18 the below average areas and bringing them to average and the
19 other areas, which are above average, should continue to perform
20 better than average. Net loss is calculated by balancing off the
21 below average areas and the above average areas. It is
22 unrealistic to expect Mazda to be competitive by using a net loss
23 goal.

24 82. Lost opportunity is measured by adding "insell" to
25 "gross registration loss".

26 83. In 1995, sales of Mazda vehicles into the Orange County
27 market by Mazda dealers outside the market ("insell") was 275.

1 In the same year, the gross registration loss was 373. Thus, the
2 lost opportunity in the RMA in the year 1995, was 648 units.

3 84. The projected retail registrations for the proposed
4 Tustin dealer is 238. Had MacPherson gone into business and
5 achieved that sales level, he would have absorbed 36.7% of the
6 lost opportunity in the RMA. Since the total lost opportunity
7 for all existing dealers is 648 sales, there would still exist a
8 large lost opportunity for Protestant Irvine and the other
9 existing Mazda dealers to pick up and increase their retail
10 sales, even if the proposed dealership were established and was
11 as successful as projected.

12 85. Based upon the bar charts prepared by John Frith
13 ("Frith"), Western Regional Manager, Urban Science Applications,
14 Inc. ("USAI"), Irvine is able to penetrate its market eight-to-
15 twelve-miles from the dealership at a higher rate than the
16 average of all dealers in Orange County.

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

- 20 • "Mazda Motor Corp. said it is reshuffling top managers
21 in its U.S. sales and marketing unit to try to boost
revenue and improve relations with dealers."
- 22 • "In the U.S., Mazda's largest market outside Japan,
23 1995 sales fell to 283,745 units from 375,416 the year
before. Sales in the first five months of 1996 were
24 down 14% at 113,855 from the year-ago period."

25 87. Sales per Mazda dealership have declined from 415 units
26 in 1994 to 314 in 1995 -- a decline of 25%. Mazda's sales per
27 dealership are substantially below other Japanese imports, as set

1 forth below:

2	<u>Franchise</u>	<u>No. of Dealers - 95</u>	<u>Sales/Dealer - 95</u>
3	Toyota	1363	843
	Honda	1279	700
4	Nissan	1247	652
	Mitsubishi	511	391
5	Mazda	904	314

6
7 88. In 1989, Mazda had 759 dealers and sold approximately
8 400,000 cars. In 1995, Mazda had 896 dealers and sold less than
9 285,000 cars.

10 89. As a result of Mazda's deteriorating sales per
11 dealership, Mazda needs to reduce, not increase, the size of its
12 dealer body. Indeed, in a recent interview with Automotive News,
13 entitled "Mazda's U.S. goal: More sales, fewer dealers," Henry
14 Wallace, the former Ford Motor Co. manager who recently became
15 the President of Mazda Motor Co., stated that:

- 16 • "We have more than 900 dealers in the United States.
17 But a lot of our dealers are dualed and a lot don't
sell many vehicles. So, we probably have 300 or 400
core dealers who are selling in good volume."
- 18 • "Now, I don't think we should be down to 300 or 400,
19 but we don't necessarily need to be at 900 or 950,
20 either. We've got to find a balance, to strengthen our
dealers and focus them more on Mazda products. I think
21 it's going to be somewhere between that 300 to 400, and
22 900."

23 90. Irvine's annual Mazda sales are as follows:

- 24 • 1991, 1,606.
- 25 • 1992, 1,181, a drop of 425 units.
- 26 • 1993, 1,006, a drop of 175 units.
- 27 • 1994, 843, a drop of 163 units.
- 28 • 1995, 319, a drop of 524 units.

1 91. In 1992, Irvine had the second highest sales volume in
2 the Western Region which is comprised of 214 dealerships. Irvine
3 also had the second highest sales volume in the Western Region in
4 1993 with 992 new car sales. Campbell Mazda, which introduced a
5 one-price, no dicker pricing strategy of low price, high volume
6 sales, was next with 978 sales.

7 92. Irvine's sales have fallen approximately 80% from 1991
8 to 1995.

9 93. From 1992 to 1994, Mazda retail car and light truck
10 sales nationwide remained relatively flat. In 1995, that figure
11 dropped almost 25%. In 1995, Irvine's Mazda sales dropped 59.5%.
12 Truck sales have never been a substantial part of Irvine's
13 business.

14 94. The national average benchmark for used cars sold to
15 new cars sold is 80%. Irvine's used cars to new cars sold ratio
16 is 30%. Irvine had only ten (10) spots for used cars which is
17 not enough space.

18 95. In late 1992 or early 1993, Campbell Mazda instituted a
19 "no dicker price" pricing system which greatly reduced its gross
20 margin per new car sales. Campbell's new pricing strategy led to
21 a "substantial" increase in its sales in Orange County. This
22 pricing strategy, however, caused declines in the other Orange
23 County Mazda dealers' gross margins and unit sales.

24 96. During 1993 and 1994, all of the other Orange County
25 Mazda dealerships came to John Morris ("Morris"), former Mazda
26 District Sales Manager, Western Region, and expressed concern
27 about Campbell's pricing strategy. In fact, on several

1 occasions, Morris was so concerned about Campbell's pricing
2 strategy that he personally went to Campbell's management to
3 encourage them to increase their gross margins because he wanted
4 everyone to make more money.

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

14 98. Approximately four (4) or five (5) years ago, Mazda
15 opened a new dealer point in Gardena. The Gardena dealership was
16 owned by Dai Chong, a large Hong Kong holding company. The
17 dealership closed in less than six months.

18 99. In 1995, at the time Mazda made its decision to go
19 forward with the Tustin/Santa Ana point, Goetze acknowledged that
20 it was difficult for Mazda to determine whether the other Orange
21 County Mazda dealerships were making or losing money from their
22 Mazda operations.

23 100. John Altstadt ("Altstadt"), C.P.A., Mazda's financial
24 expert, did not analyze the Orange County Mazda dealerships to
25 determine whether their Mazda operations, dualled or segregated,
26 are currently profitable.

27 101. Altstadt audited several Orange County Mazda
28

1 dealerships during 1989 to 1991. Campbell Mazda in Buena Park
2 closed because they were unprofitable. During the time Altstadt
3 audited Campbell Mazda in Costa Mesa, the dealership was only
4 marginally profitable. Similarly, during his audits of Garden
5 Grove, he determined that the dealership was not profitable.

6 102. Starting in 1994, several Orange County Mazda
7 dealerships, including Anaheim Mazda and Phillips Mazda, began to
8 decline inventory Mazda offered to them.

9 103. Frith has been retained 25 to 30 times as an expert
10 witness in manufacturer-dealer litigation regarding "add-point"
11 cases. In each case, Frith has been retained by the
12 manufacturer. In each case, Frith reached the conclusion that a
13 new dealership was warranted.

14 104. In selecting a standard upon which to determine whether
15 a new dealership is warranted, Frith always selects the highest
16 penetration rate from among the manufacturer's: (1) national; (2)
17 state; or (3) local penetration rates.

18 105. The basis (the "standard") upon which Frith conducted
19 his analysis of Mazda's performance in the Orange County
20 automobile market was "competitive group industry retail car and
21 truck penetration rates" (National adjusted for local segment
22 popularity.) Frith used this penetration standard throughout his
23 report. Frith's purpose in selecting a penetration standard was
24 to "find a reasonable standard by which to measure performance in
25 the relevant market area."

26 106. Mazda, itself, does not consider national penetration
27 rates because other manufacturers, including Toyota, Nissan and
28

1 Honda, committed a much greater amount of their resources to the
2 California market than Mazda. Mazda regional dealer
3 representatives and district managers focused upon local area
4 standards, such as metro, zone or district, to evaluate markets.

5 107. During Burns' eleven-years with Mazda, including five
6 years as the Dealer Development Manager (1985 - 1990), Burns was
7 involved in opening approximately 24 new Mazda dealerships. In
8 deciding whether to open a new point, Mazda did not base that
9 decision upon national penetration rates.

10 108. The use of a total imports penetration standard to
11 evaluate Mazda's performance is consistent with Irvine's expert,
12 Dr. John Hemphill's ("Hemphill"), experience with J.D. Power &
13 Associates and most of the Japanese manufacturers he has dealt
14 with. In Hemphill's experience, Japanese manufacturers,
15 especially in the Southern California market, focus on import
16 penetration rates.

17 109. The Orange County auto market is "highly competitive."

18 110. From follow-up telephone surveys with its parts and
19 service customers, Irvine has determined that approximately 46.5%
20 of its total service business comes from the northern direction,
21 i.e., in the direction of the proposed Tustin dealership. See
22 Attachment 1.

23 111. In 1993 and 1994, Mazda became heavily involved in
24 fleet and leasing programs. There will be a number of fleet and
25 leased cars returning to the market in 1996 and 1997. These cars
26 represent a significant potential source of parts and service
27 revenues for existing Mazda dealerships, such as Irvine.

1 112. Based on the relationship of Irvine's new car sales to
2 parts and service revenues, Irvine could lose \$232,946 in parts
3 and service revenues to the proposed Tustin dealership.

4 113. The effect of the loss of customer sales to Irvine will
5 cause the dealership to also lose repeat sales.

6 114. Establishment of the proposed Tustin dealership would
7 have the effect of driving Irvine's gross profit margins down.
8 In his prior experience, Altstadt is aware of situations where
9 the addition of a dealership of the same line-make within a few
10 miles of an existing dealership caused the existing dealership's
11 gross margins to decline.

12 c. Facts pertaining to the injury to public welfare.
13 (3063(c))

14 115. Irvine is active in the community. It holds parties
15 for local school children at Halloween and Easter. It
16 participates in the Mothers Against Drunk Driving ("MADD")
17 program. It assists in anti-drug activities with local law
18 enforcement organizations. It recently finished a promotion with
19 local law enforcement involving the raffling of a Miata for a
20 drug-free high school graduation night.

21 116. MacPherson is a prominent and good dealer in the Orange
22 County area. He currently owns several dealerships in Orange
23 County, including Ford, Chevrolet and Toyota. The amount of
24 marketing the MacPherson organization does is quite aggressive.
25 Through the "Help Our Schools" campaign, MacPherson also donates
26 money to local schools for each car he retails.

27 117. The proposed Tustin dealer will be located adjacent to
28

1 busy Interstate 5 in the Tustin Auto Mall. The optimal location
2 for a new Mazda dealership, based solely on customer convenience,
3 is a point near the proposed actual location, and is actually
4 south of the proposed location and closer to Irvine.

5 118. Freeway accessibility and an auto mall location with
6 an existing facility favor the proposed location in Tustin as the
7 optimal location.

8 119. Both parties agree that MacPherson is a prominent and
9 well respected dealer. He currently owns in Orange County six
10 dealerships, including Ford, Chevrolet, and Toyota. MacPherson
11 does a substantial amount of advertising and is also aggressive
12 at marketing. Tustin Mazda in the Tustin Auto Mall will be
13 centrally located.

14 120. The population and high demographics seem to reveal a
15 migration from North Orange County to South Orange County.
16 Tustin is well situated to take advantage of this.

17 d. Facts relating to whether the franchisees of the same
18 line-make in that relevant market area are providing
19 adequate competition and convenient consumer care for
20 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))

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

26 122. The Tustin Auto Mall is centrally located. It has a
27 very positive reputation in the community. The Tustin and Irvine

1 Auto Malls are the most significant locations in the market.

2 123. The freeway system in Orange County, specifically the
3 405 and 5 freeways, create a mobile and competitive market for
4 customers. It is not difficult for consumers to travel along the
5 freeways to shop multiple dealerships. There are currently three
6 Mazda dealerships located in close proximity to the freeway
7 system: Anaheim Mazda; Irvine; and Phillips Mazda. See
8 Attachment 1. This degree of mobility and competition is
9 reflected by the high degree of in-sells in the Orange County
10 Market. In-sells are a reflection that consumers are currently
11 shopping at different Mazda dealerships away from their homes and
12 places of employment. As the prices of new vehicles have
13 increased faster than family incomes, people have been willing to
14 travel greater distances to shop for the product and price.

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

19 125. The Orange County market is intensely competitive.

20 126. The proposed Tustin dealership will reduce the average
21 air distance between the closest Mazda dealership in the RMA to
22 potential customers by one-half (1/2) mile.

23 127. Of the 33 manufacturers whom Frith analyzed, currently
24 18 of those 33 manufacturers have an average distance between
25 their closest dealership and potential customers which is greater
26 than Mazda's current average without the proposed Tustin
27 dealership.

1 128. In the Tustin SOA⁶, over 26 different line-makes
2 provide better customer convenience than Mazda. Mazda is at a
3 competitive disadvantage by being almost six (6) miles away from
4 the customer in the Tustin SOA. Most of the competition is about
5 three (3) to three and a half (3.5) miles away. By adding the
6 dealer in Tustin, Mazda moves to three (3) miles average distance
7 from its customers in the SOA.

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

12 130. On average, based upon four tests made at different
13 times on different dates, the driving time between the proposed
14 Tustin dealership and Irvine is 12 minutes.

15 131. It can take anywhere from 10 to 45 minutes depending on
16 the time of day to drive from Phillips Mazda to Irvine.

17 132. Sellers, Mazda Pacific Zone Manager⁷, Western Region,
18 believed the best thing for Mazda was to add a point in
19 Tustin/Santa Ana, add a point in Irvine, and move Phillips Mazda
20 south to another location. Sellers is not aware of any efforts
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 to approach Phillips about moving his dealership south.

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

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

10 134. In performing its market studies, Mazda did not
11 consider the CSI (customer satisfaction index) or CARE⁸ rankings
12 of its existing Orange County dealers. Similarly, Mazda did not
13 consider whether the existing dealers were adequately meeting the
14 retail public's parts and service needs.

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

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

23 137. The twelve (12) month CSI ranking is more important
24 than the rolling three (3) month average, because the rolling
25 twelve (12) month average is the fundamental index of where a

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 dealer stands in total versus the other dealers in the region.

2 138. In terms of total twelve (12) month ranking⁹ of dealers
3 in the region for overall dealer satisfaction, Irvine ranked
4 number 61 out of approximately 186 dealers.

5 139. In terms of total twelve (12) month ranking for dealers
6 in terms of sales and delivery, Irvine ranked number 137 out of
7 200 dealers in the Western region.

8 140. In terms of total twelve (12) month ranking for dealers
9 in terms of new vehicle delivery, Irvine ranked number 190 out of
10 201.

11 141. In terms of total twelve (12) month ranking for service
12 and parts, Irvine ranked number 34 out of 190 dealers in the
13 region.

14 142. As for customer relations, Irvine has the sixth (6th)
15 highest complaint ratio to sales out of the approximately 200
16 dealers in the Western region.

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

23 144. Mazda gave "Guild" awards to Irvine's parts and
24 service managers in recognition of their outstanding performance.
25 The "Guild" awards are especially unique for large metro

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

1 dealerships such as Irvine.

2 145. Goetze described Irvine's parts and service operations
3 as "one of their better operated departments." He stated that
4 the facility is "very competitive in the market place."

5 146. Irvine's sales staff has substandard product knowledge
6 and Irvine needs to institute more frequent product training.

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

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

17 148. The name "MacPherson Mazda" would create a positive
18 image because of the owner's background in the marketplace.

19 149. By adding the dealer in Tustin, Mazda gives the
20 consumer the convenience of being able to shop all line-makes and
21 to make comparisons between competitors in one place.

22 150. Currently, Mazda is not in Tustin nor Santa Ana, which
23 makes them one of the few manufacturers of any major significance
24 that is not represented.

25 151. No other Orange County dealer, other than Irvine has
26 expressed an objection or dissatisfaction with respect to the
27 appointment of a Mazda dealership in Tustin. The other two (2)

1 dealers who could have protested, Anaheim and Costa Mesa, view
2 MacPherson as a strong dealer and both indicated they would not
3 protest his appointment. Phillips, the dealer in Laguna Hills,
4 is supportive of the appointment of a Tustin dealership and
5 stated that MacPherson would be a good competitor.

6 152. With the addition of Tustin, four (4) out of the six
7 (6) dealers will be on the freeway in Orange County and that
8 makes for a convenient and competitive situation for the public.

9 See Attachment 1.

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

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

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

22 155. In December 1992, Mazda held a meeting with the Orange
23 County dealer body to discuss whether Mazda should open a
24 dealership in Tustin or Santa Ana. Prior to the meeting, Mazda's
25 Dealer Development Department, headed by Sellers, conducted a
26 market study and recommended that Mazda open a dealership in
27 Tustin/Santa Ana.

28 156. Fred Wallace, Mazda's Manager for the Western Region,

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

6 157. The Region wanted to give the dealers the opportunity
7 to improve their sales and sell back into the Tustin SOA, perhaps
8 negating the need to go back in the market. But the point was
9 never closed, abandoned, or not viable.

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

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

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

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

24 162. Mazda began looking for a candidate for Tustin in late
25 summer of 1995.

26 163. Mazda acknowledged that it has had "a very contentious
27 relationship with Irvine Mazda."

1 164. Irvine expressed some "concerns" to Morris regarding
2 the DRAP program. Irvine believed that the DRAP program, which
3 establishes much of the working relationship between the
4 manufacturer and dealer, should be based upon actual data and not
5 projections.

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

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

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

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

1 zone level in 1995.

2 169. Although Mazda's sales declined throughout the Western
3 Region by 15-20% since Goetze came to the Region in February
4 1993, Mazda has added only two new dealerships in the Western
5 Region. Both new dealerships were added in Arizona. Mazda has
6 not added a single new dealership in California with the
7 exception of the proposed Tustin point.

8 170. Since coming to the Western Region, Goetze is not aware
9 of any other markets in California or the Los Angeles Metro
10 region in which Mazda even considered adding a new dealership.

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

20 172. Morris was asked to leave the first time he visited
21 Burns. But he continued to call on the dealer every month, from
22 1 to 3 times a week.

23 173. When Irvine added Kia, Morris tried to get Burns to
24 complete the necessary paperwork, but Burns refused.

25 g. Facts pertaining to whether there was a breach of the
26 Mazda Dealer Agreement.

27 174. The Mazda Dealer Agreement ("Agreement") was, and
28

1 remains, the operative written agreement defining the business
2 relationship, expectations and obligations between Mazda and its
3 dealers. The Agreement also defines the business relationship
4 between Mazda and Irvine.

5 175. Section VI of the Agreement, entitled "REASONABLE
6 EXPECTATIONS OF DEALER AND MAZDA" contains Subsection 2, entitled
7 "Acknowledgments," and provides in pertinent part that:

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

19 176. Irvine promised Mazda in its letter of intent, that the
20 facility in Irvine would be an exclusive Mazda dealership.

21 177. Irvine added Oldsmobile and GMC Truck to its facility
22 at the end of 1991, and provided written notice to Mazda. By
23 adding Oldsmobile and GMC Truck, Irvine cut down on its space for
24 used cars.

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

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

180. The reason Mazda withheld information regarding its

1 intention to open the Tustin dealership was so that when Morris
2 talked to the Orange County dealers, he could "tell them that he
3 did not know what was happening and be speaking the truth."

4 181. On September 18, 1995, Mazda entered into a LOI with
5 MacPherson regarding the Tustin dealership.

6 182. Prior to entering into an LOI with a dealer candidate,
7 Mazda undertakes a lengthy process of information gathering and
8 negotiation with the dealer candidate.

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

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

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

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

23 DETERMINATION OF ISSUES

24 1. Good Cause Factors:

25 (a) Permanency of the investment.

26 187. Irvine has sustained its burden of proof on permanency
27 of its investment. Irvine has invested over \$10,000,000 in the
28

1 facility, over \$2,500,000 in advertising, and \$500,000 to prevent
2 a protest of its establishment from David J. Phillips. While
3 most of the facility costs could be recouped upon sale and thus
4 are not a permanent investment, due to the downturn in the
5 Southern California real estate market it would be expected that
6 Irvine would suffer a partial loss of its investment in the
7 facility. The advertising costs and protest payment are not
8 recoverable and are permanent. Irvine could lose as much as
9 \$232,946 in parts and service revenues to the new dealer.
10 However, by adding Oldsmobile, GMC and KIA, Irvine has allocated
11 most of its permanent investment in facility depreciation among
12 three other line-makes as well as Mazda. Thus, the permanency of
13 investment factor is not one so overwhelming as to be
14 determinative on the establishment of the Tustin Auto Mall point.

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

17 188. Irvine did not meet its burden of proof. The effect of
18 establishment of the Tustin point on the retail motor vehicle
19 business will be to reduce gross profits per vehicle among all
20 the Orange County dealerships due to the high competition and
21 easy freeway access. A marginal dealer, like Irvine, or any
22 other marginally profitable Mazda dealer, that sells into the RMA
23 may not be able to withstand the increased competition and
24 reduced gross profits, and could go out of business. However,
25 Irvine may go out of business in any event, whether or not
26 MacPherson is in business.

27 189. The effect on the consuming public will be to add more
28

1 competition for the prospective buyer, both in intra-brand and
2 inter-brand competition with slightly reduced prices. [Prices
3 could never be reduced below the total cost of the vehicle
4 without the dealer's failing.] In addition, there would be
5 increased competition for parts and service business, and an
6 increase in vehicle availability and selection for the consumer.

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

9 190. Irvine did not meet its burden of proof. The
10 establishment of MacPherson as a dealer in Tustin would not be
11 injurious to the public welfare in that it would establish a
12 prominent and good dealer in the Orange County area. Only if
13 Irvine goes out of business would there be any harm to the public
14 in that there would be a decrease in the social benefits Irvine
15 contributes to the community, such as participation in MADD
16 programs, anti-drug activities and the like. If Irvine goes out
17 of business for any reason, David J. Phillips Mazda, only 2.3
18 miles south of Irvine, could serve the public until a new Mazda
19 dealer could be appointed in Irvine.

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

24 191. Irvine did not meet its burden of proof on providing
25 adequate competition. Irvine did meet its burden on adequacy of
26 motor vehicles sales and service facilities, equipment, supply of
27 vehicle parts, and qualified service personnel.

1 vehicles.

2 194. Sales both in gross amounts and in terms of percentage
3 of the industry and the import car market in Orange County have
4 been steadily declining, reflecting Mazda's competitive
5 disadvantage against the other car manufacturers. The current
6 dealers have been unable to service the market adequately even as
7 the number of dealers have declined from 8 to 5 during Irvine's
8 existence.

9 195. As to sales and service facilities, there are currently
10 adequate facilities in Orange County that customers in the RMA
11 can use.

12 196. There was no evidence of lack of equipment, and Irvine
13 has the largest parts inventory in Southern California. The
14 customer satisfaction indices show that consumers are generally
15 satisfied with the sales and service experience of the dealers
16 selling and servicing consumers in the Orange County area which
17 includes the RMA.

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

20 197. Irvine failed to meet its burden of proof. The
21 establishment of MacPherson in the Tustin RMA would increase
22 competition in the RMA by the addition of a strong, aggressive
23 dealer. The decline in Mazda sales in Orange County appears to
24 correlate to not only the drop in national sales rates, but also
25 the decline in sales by Irvine, the decline in advertising money
26 expended by Irvine on Mazdas, and the increase in the number of
27 other manufacturers represented by Irvine. There was no evidence

28

1 presented that these latter factors instigated by Irvine, the
2 decline in Mazda sales, the decline in advertising, and the
3 dilution of resources of Irvine's by the addition of other
4 manufacturers, would ever be ameliorated in the foreseeable
5 future by any conduct of Irvine. On the other hand, Mazda
6 appears to be taking steps to increase its sales both nationally
7 and by the appointment of a replacement dealer in Tustin, in
8 Orange County.

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

11 198. Mazda breached the terms of the Mazda Dealer Agreement
12 because it failed to provide sixty (60) days notice prior to the
13 appointment of the Tustin dealership. Furthermore, no
14 opportunity was granted to discuss whether alternatives existed
15 to this proposed action.

16 199. Irvine breached the terms of the Mazda Dealer Agreement
17 because it failed to provide Mazda sixty (60) days notice prior
18 to the addition of the Kia franchise.

19 200. Both of these breaches of the franchise agreement are
20 inconsequential and while indicative of the contentious
21 relationship conceded by Mazda in its opening statement to the
22 Administrative Law Judge, it is unlikely and improbable that the
23 decisions made by either Protestant or Respondent giving rise to
24 this protest were influenced to any considerable degree by these
25 minor breaches. Therefore, the Board declines to consider these
26 breaches as major factors in its decision.

27 ///

1 CONCLUSION

2 201. Based on the analysis of all of the good cause factors
3 described above, and weighing them against each other, Mazda
4 should be allowed to establish a dealership in Tustin. This
5 would allow the addition of a strong dealer into the RMA and
6 Orange County that would increase competition among all the
7 dealers for the benefit of the dealers and the consuming public.

8 PROPOSED DECISION

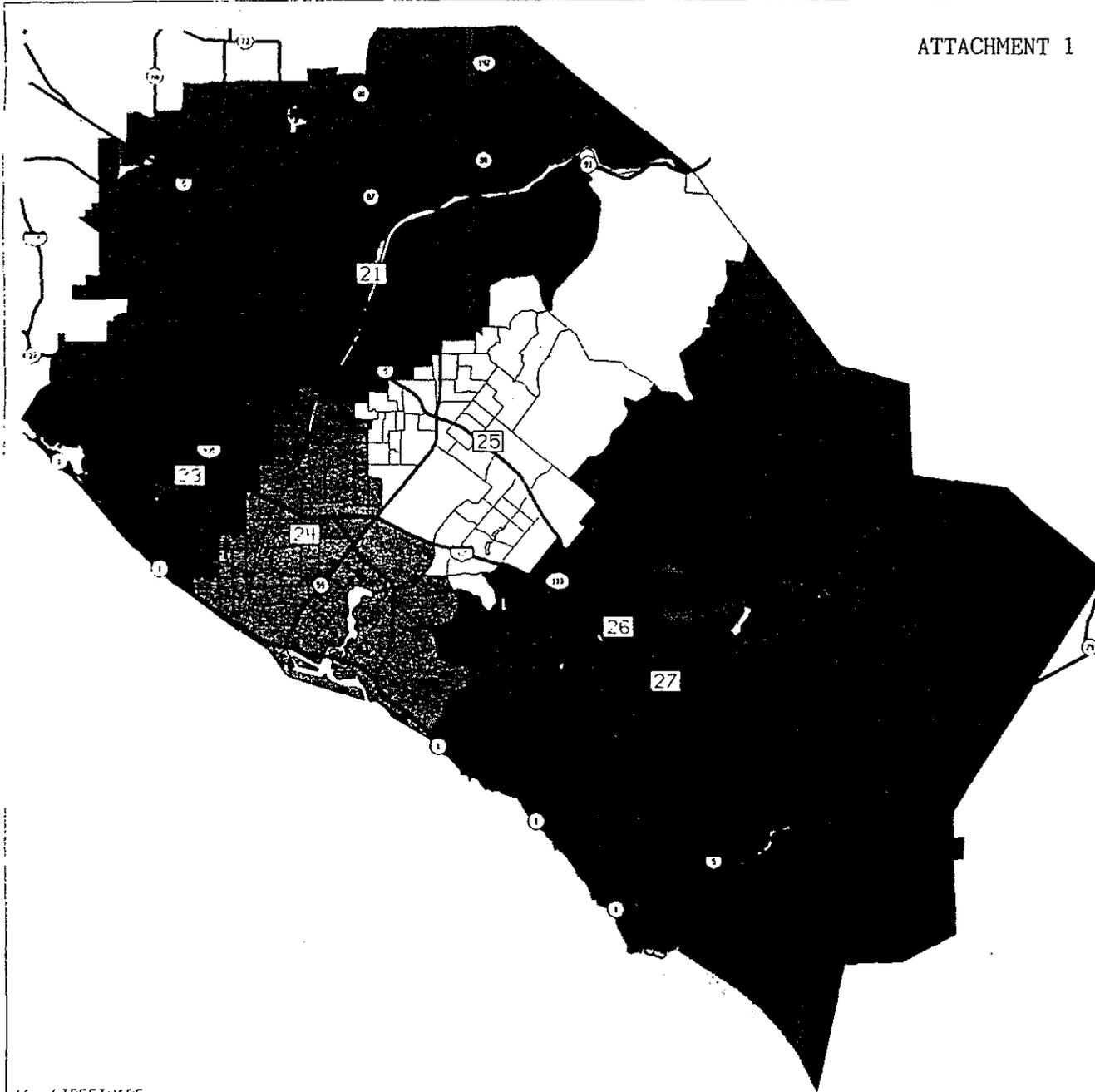
9 1. The Protest is overruled. Mazda shall be allowed to
10 establish a dealership in the Tustin Auto Mall.

11
12
13 I hereby submit the foregoing
14 which constitutes my proposed
15 decision in the above-entitled
16 matter, as a result of a
17 hearing before me on the above
18 dates and the Ruling on Irvine
19 Central Motors, Inc.'s
20 Petition for Writ of Mandamus
21 which remanded the matter to
22 the Board, and recommend the
23 adoption of this proposed
24 decision as the decision of
25 the New Motor Vehicle Board.

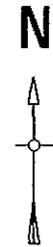
26 DATED: 7-9-97

27 By 
28 DOUGLAS H. DRAKE
Administrative Law Judge

ATTACHMENT 1



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



LA-ORANGE COUNTY, CA
SOA MAP
AIR DISTANCED

0 1 2 3
MILES

GEOG REF: H-LA-ORANGE-AIR

(C) STREETWARE

COPYRIGHT 1993 USA!
SERIAL: 10139

MAZDA MOTOR OF AMERICA

URBAN SCIENCE APPLICATIONS, INC.
LONG BEACH, CA