

NEW MOTOR VEHICLE BOARD  
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

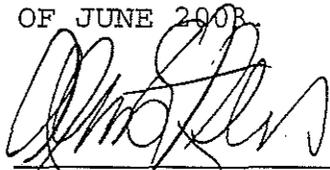
In the Matter of the Protest of )  
 )  
MICHAEL CADILLAC, INC. dba ) **Protest No. PR-1819-02**  
MICHAEL VOLKSWAGEN, )  
 )  
 ) Protestant, )  
 )  
 ) v. )  
 )  
VOLKSWAGEN OF AMERICA, INC., )  
 )  
 ) Respondent. )  
\_\_\_\_\_ )

DECISION

At its regularly scheduled meeting of June 17, 2003, 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 17<sup>th</sup> DAY OF JUNE 2003



\_\_\_\_\_  
GLENN E. STEVENS  
President  
New Motor Vehicle Board

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11 In the Matter of the Protest of )  
12 MICHAEL CADILLAC, INC. dba ) **Protest No. PR-1819-02**  
MICHAEL VOLKSWAGEN, )  
13 Protestant, )  
14 v. ) **PROPOSED DECISION**  
15 VOLKSWAGEN OF AMERICA, INC., )  
16 Respondent. )  
17  
18

19  
20 PROCEDURAL BACKGROUND

21 1. By letter dated August 8, 2002, Respondent Volkswagen of  
22 America, Inc. ("VWOA" or "Respondent") notified Protestant Michael  
23 Cadillac, Inc. dba Michael Volkswagen ("Michael" or "Protestant") of its  
24 intention to establish an additional Volkswagen franchise in Clovis,  
25 California, which is within ten miles of Protestant. The proposed new  
26 dealership would be owned and managed by Roberto Santos Zamora, a  
27 current Volkswagen dealer in Stockton, California (or his designee).

28 2. Protestant filed a Protest pursuant to California Vehicle Code

1 section 3062<sup>1</sup> on August 27, 2002.

2 3. VWOA is a distributor of new motor vehicles headquartered in  
3 Auburn Hills, Michigan, and is licensed by the California Department of  
4 Motor Vehicles. Protestant is a licensed new motor vehicle dealer and a  
5 Volkswagen franchisee doing business at 6061 North Blackstone Avenue,  
6 Fresno, California.

7 4. A hearing on the merits of the Protest was held on January 21,  
8 2003, through January 24, 2003, and January 27, 2003, through January  
9 29, 2003, before the Honorable J. Keith McKeag, Administrative Law  
10 Judge. Michael J. Flanagan of the Law Offices of Michael J. Flanagan,  
11 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California, appeared  
12 for Protestant, and Neil C. Erickson and Allen S. Resnick of Jeffer,  
13 Mangels, Butler & Marmaro LLP, 1900 Avenue of the Stars, Seventh Floor,  
14 Los Angeles, California, appeared on behalf of Respondent.

15 5. Michael Cadillac presented the testimony of six witnesses:  
16 Scott Sniffin, General Sales Manager for the Import Divisions of  
17 Protestant; Michael Rosvold, dealer principal of Protestant; Joseph F.  
18 Roesner, with The Fontana Group ("Fontana"), an automobile industry  
19 consulting firm; Ronald Friend, Service Director for Protestant; Jeffrey  
20 Moore, Controller for Protestant; and, as an adverse witness, Mal  
21 Domser, Fixed Operations Manager for Respondent.

22 6. VWOA presented the testimony of five witnesses: Vincent S.  
23 Schardt, Area Executive for VWOA's Area 45; Roberto Santos Zamora,  
24 dealer principal of Zamora Auto Group and candidate for the proposed new  
25 dealership in Clovis, California; Randy Pressgrove, Dealer Franchise  
26 Manager for VWOA; Robert Michael Catanzarite, with Urban Science

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27  
28 1/ All statutory references are to the California Vehicle Code, unless  
noted otherwise.

1 Applications, Inc. ("Urban Science"), an automobile industry consulting  
2 firm; and John Frith, also with Urban Science.

3 7. Following the hearing, a briefing schedule was set, post-  
4 hearing briefs were filed and the matter was submitted for decision on  
5 April 18, 2003.

6 **ISSUES PRESENTED**

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

14 9. In determining whether there is good cause for the  
15 establishment of an additional franchise, Section 3063 requires the  
16 Board to consider the existing circumstances, including but not limited  
17 to:

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

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

3 **FINDINGS OF FACT**

4 **General Findings**

5 10. VWOA divides its markets into "Regions" and then further  
6 subdivides the Regions into "Areas." Each Area contains a number of  
7 Volkswagen dealers, and each dealer has a primary area of influence  
8 ("PAI"). VWOA's Western Region is comprised of eight Areas throughout  
9 California, and parts of Arizona, Nevada and Hawaii. Protestant's  
10 dealership in Fresno is located within Area 45 of VWOA's Western Region.  
11 During the time involved herein, Area 45 included approximately 13  
12 Volkswagen dealers located in the Central Valley. Area 45 includes  
13 Protestant in Fresno, the proposed relocation site in Clovis, and the  
14 Stockton dealership owned by the proposed dealer candidate.

15 11. The relevant market area<sup>2</sup> ("RMA") involved in this proceeding  
16 is located in Fresno/Clovis, which is part of VWOA's Area 45.  
17 Presently, there is one authorized Volkswagen dealer within the RMA,  
18 which is Protestant. Respondent's August 8, 2002, letter proposes the  
19 establishment of a second Volkswagen dealership within the RMA.

20 12. Protestant operates nine dealerships located on three  
21 contiguous parcels at North Blackstone and West Bullard in Fresno.  
22 Cadillac, Chevrolet, Oldsmobile, and Hummer are sited on approximately .8  
23 acres. Toyota sales and service, a body shop and service facilities for  
24 Volkswagen, Porsche, Audi, and Kia are sited on 8 ½ acres and sales  
25 facilities for Volkswagen, Porsche, Audi, and Kia are on a .65 acre

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26  
27 2/ The term "relevant market area" is defined at section 507 as "...  
28 any area within a radius of 10 miles from the site of a potential new  
dealership."

1 parcel.

2 13. Michael Rosvold is the 100% owner of Michael Cadillac, Inc.,  
3 which is the owner of all nine dealerships. The corporation maintains  
4 consolidated financial records for the whole operation, with no separate  
5 financial statements or books maintained for the individual dealerships.

6 14. VWOA's principal measure of market performance is to look to  
7 its penetration rate within what it considers to be its primary  
8 competitive group of vehicles. These are referred to as the "foreign  
9 make competitive group" or "foreign marque competitive group" ("FMCG"),  
10 and in particular it measures its performance against the "top group" of  
11 the FMCG with the highest penetration rates, consisting of Toyota,  
12 Honda, Nissan and Volkswagen. Within the Fresno market area there are  
13 five Toyota dealers, three Honda dealers, three Nissan dealers and one  
14 Volkswagen dealer.

15 **Findings Relating to Permanency of Investment**

16 15. Michael Rosvold first became involved with Protestant in  
17 October 1985 when he went into partnership with Larry Van Tuyl to  
18 purchase two corporations that operated Cadillac, Volkswagen, and  
19 Porsche-Audi franchises in Fresno. Mr. Rosvold originally owned 15% of  
20 the stock and purchased an additional 30% over 10 years, at which time  
21 he purchased the remaining 55% ownership interest. His initial stock  
22 investment was \$142,500, with an ultimate total investment of  
23 approximately \$7 million.

24 16. In 1996, Protestant constructed a new Volkswagen, Porsche-Audi  
25 and Kia facility. The new Volkswagen, Porsche-Audi and Kia showroom  
26 facility is located at 6061 Blackstone Avenue, Fresno, California. The  
27 cost of the real property was \$531,100.07 while construction costs were  
28 \$358,109.

1 17. A service and parts facility for Protestant's Volkswagen,  
2 Porsche-Audi, Kia and Toyota franchises was built in 1990 at a total  
3 cost of in excess of \$6 million. Protestant recently added square  
4 footage for additional parts storage at a cost of between \$35,000 to  
5 \$45,000.

6 18. Protestant has also recently built a reconditioning center in  
7 its domestic vehicle facility which freed up some space in the foreign  
8 vehicle service facility, and built a new body shop. Both of these  
9 actions indirectly benefit the Volkswagen dealership.

10 19. Mr. Rosvold puts his total investment in the corporation at  
11 \$6.9 million, and computes the VWoA portion of his investment at a  
12 little over \$1.5 million.

13 20. Because of the consolidated accounting system maintained by  
14 the corporation, it is difficult to break out investments and expenses  
15 allocable to the individual dealerships with any certainty. Respondent  
16 concedes, however, that Protestant appears to have made a substantial  
17 investment in the dealership. Suffice it to say, the Volkswagen  
18 dealership is a part of a very substantial operation which is well  
19 capitalized, housed in substantial and modern facilities, and which has  
20 operated for many years with a substantial staff for both sales and  
21 service. It is not a "fly-by-night" operation, but a long-term,  
22 successful business operation which has every appearance of continuing  
23 in operation for the foreseeable future.

24 **Findings Relating to the Effect of Establishing a**  
25 **New Dealership on the Retail Motor Vehicle**  
26 **Business and the Consuming Public**

27 21. VWoA's dealer-candidate for the proposed new dealership in  
28 Clovis, Mr. Zamora, is the president of Zamora Auto Group. Mr. Zamora  
is the current dealer principal of Hammer Lane Volkswagen in Stockton,

1 California, within VWOA's Area 45. Zamora Auto Group owns and operates  
2 12 franchises of various line-makes located in the Central Valley of  
3 California. Mr. Zamora and a partner also own four franchises in the  
4 Los Angeles market and one in Reno, Nevada.

5 22. The proposed new Volkswagen dealership in Clovis would be  
6 located at the junction of State Highway 168 and Herndon Avenue. The  
7 proposed location is 4.8 air miles from Protestant's existing Volkswagen  
8 showroom on Blackstone Avenue, near Bullard Avenue in Fresno. Driving  
9 distance is approximately five miles in each direction between  
10 Protestant's existing dealership and the proposed new location. Weekend  
11 drive time between the two locations is approximately 9 to 10 minutes in  
12 one direction.

13 23. Protestant is located in an "auto row" with other line-make  
14 franchises established along Blackstone Avenue. There is another "auto  
15 row" in the RMA just off of State Highway 168 on Shaw Avenue in Fresno.  
16 Honda and Nissan have new dealership points on Herndon Avenue within  
17 blocks of the proposed new Volkswagen dealership, which constitute the  
18 beginnings of a new "auto row" in that area of Clovis.

19 24. Several competitive line-makes which VWOA considers to be its  
20 primary competitors have multiple dealers within the RMA. Specifically,  
21 Honda, Toyota and Nissan are each represented by two dealerships in the  
22 RMA. The air distance and drive time between these competing pairs of  
23 dealerships is shorter than the air distance and drive time between  
24 Protestant and the proposed new Volkswagen dealership in Clovis. Other  
25 line-makes are likewise represented by multiple dealerships within the  
26 RMA, including Chevrolet and Ford. Protestant is the owner of Toyota  
27 and Chevrolet dealerships located on Blackstone Avenue which compete  
28 with other Toyota and Chevrolet dealerships located within the RMA.

1           25. Within VWOA's Western Region, six other pairs of Volkswagen  
2 dealers are located in proximity similar to that proposed here for  
3 Protestant and the Clovis site, albeit in larger markets. These six  
4 pairs performed at from 89% to 149% of the average California Volkswagen  
5 penetration rate, with four of the six above the average.

6           26. Expert witnesses for both parties used essentially similar  
7 methodology to assess the performance which has been obtained by  
8 Protestant. This is a comparison of the penetration rate in the  
9 dealer's market, referred to as its Primary Area of Influence or PAI,  
10 to a reasonable standard, such as the average penetration rate achieved  
11 by some grouping of dealers, e.g., to a national, state, regional, or  
12 area average. The penetration rate in each case is based on the number  
13 of vehicles of a certain type which are registered in that area, no  
14 matter who the selling dealer may have been, i.e., it is not a  
15 comparison of the local dealer's sales in its PAI to sales by a group of  
16 dealers, but of the registrations in that PAI to registrations in the  
17 PAIs of other dealers in a larger geographic area. Of course, the local  
18 dealer will in almost every case sell the majority of the vehicles  
19 registered in its PAI because of its proximity to the buyers who are  
20 registering the vehicles, so the local dealer has a definite effect on  
21 the penetration rate in its own PAI, and the penetration rate in a  
22 dealer's PAI is a valid measurement of that dealer's sales performance.

23           27. Protestant's expert witness offered comparisons between the  
24 penetration rate in the Fresno market and average penetration rates for  
25 California, Area 45, the Western Region and the U.S. His exhibit KK,  
26 tab 13 shows, for example, that in the Fresno market Volkswagen has the  
27 lowest penetration rate, as compared to the average California rate and  
28 the average U.S. rate of any vehicle in the FMCG for 2001 and 2002

1 through October. In fact, every comparison made by the expert,  
2 comprising over one hundred penetration models, shows Volkswagen's  
3 penetration rate in the Fresno market to be lower than the measuring  
4 standard. Exhibit KK at tab 11 reveals an equally important fact: If  
5 the penetration rate in the Fresno market were to equal just average  
6 penetration rates (using any of the standards referred to above) the  
7 increase in Volkswagen registrations would provide Michael with an  
8 opportunity to increase its sales, even after the establishment of the  
9 proposed new dealer in Clovis.

10 28. The Michael PAI, in 2000, had the highest registration of FMCG  
11 vehicles of any PAI in Area 45. In 2001, it had the second highest such  
12 registration. This shows that the area is a fruitful market for that  
13 type of vehicle. In those same years, however, Michael had the lowest  
14 penetration rate in its PAI of any of the 13 Volkswagen dealers in Area  
15 45. This means that Michael had a large market available to it, yet  
16 performed at the lowest level of penetration of any dealer in Area 45.  
17 Again, this means that if Michael improves its performance and reaps a  
18 greater percentage of the sales available in the Fresno market, it will  
19 be able to increase its sales or at least hold its own even in the face  
20 of a new Volkswagen dealer in the market. Michael contends that its low  
21 performance is due to the fact that the Fresno median income level is  
22 lower than that of the typical Volkswagen buyer, i.e., around \$35,000  
23 per year versus \$60,000 per year or higher. The proposed new dealer,  
24 however, testified convincingly that his Stockton market has income  
25 levels in the \$39,000-\$40,000 range and his Volkswagen dealership has a  
26 penetration rate which is at the Area 45 average. More important,  
27 however, is the fact that Protestant's argument assumes that only  
28 "average" or "median" buyers purchase cars of a certain type or price

1 range. It totally ignores the fact that the average or median is made  
2 up of a whole range of income levels, and those at the high end can  
3 afford Volkswagens and even more expensive vehicles. For example, in  
4 2001, the median annual income was \$35,000 and the average was \$48,933  
5 for Fresno, but those numbers included over 85,000 households with  
6 incomes greater than \$50,000 and over 12,000 households with incomes of  
7 \$100,000 to \$150,000. This is why Protestant's operation can sell  
8 expensive brands such as Cadillac, Hummer, Porsche and Audi, as well as  
9 lower priced lines such as Chevrolet, Oldsmobile, Toyota, and Kia. It  
10 also can, and does, sell Volkswagens in that same market. Protestant's  
11 argument erroneously tries to equate the "typical" Volkswagen buyer with  
12 the "median" Fresno household, and uses that as a justification for poor  
13 penetration and the basis for predicting "ruinous competition" if a new  
14 dealer enters the market.

15 29. Respondent's expert witness presented an analysis involving  
16 segment adjustment to account for demographic differences between  
17 markets, i.e., by adjusting the registration figures to take into  
18 account the types or segments of vehicles purchased within the brand or  
19 line of vehicle, the demographic variables which cause those preferences  
20 are taken into account. For example, a market with a high percentage of  
21 young, low income buyers may show more of a preference to one segment of  
22 the models offered by manufacturers, while a market with a higher  
23 percentage of older, more affluent buyers may show a preference for  
24 another segment, but adjusting for the numbers of those types of models  
25 actually purchased takes those demographic differences into account.  
26 Protestant argues that this adjustment is not fine enough, i.e., that  
27 the segments of vehicles are so big that they do not adequately account  
28 for demographic variables. While it may be true that income levels, for

1 example, may influence buyers' decisions within a segment, as well as  
2 decisions as to which segment of vehicle should be considered at all, it  
3 remains the case that the buyers within a segment have a range of  
4 incomes, and other demographic characteristics, not just a "median"  
5 character. The segment adjustment methodology does appear to adequately  
6 take demographic differences between markets into account when those  
7 markets are compared for the purpose of judging performance or  
8 estimating the future performance which could be obtained.

9 30. Through the use of segment adjustment, Respondent's expert  
10 compared the Fresno PAI to a market in the Concord-Walnut Creek area in  
11 which two Volkswagen dealers are located approximately five miles apart,  
12 following the addition of one of the dealers to the market, i.e., the  
13 distance which would exist here between the Protestant and the proposed  
14 Clovis site. That study concluded that the market shortfall in the  
15 Fresno PAI, as had been the case in the study area, was due to under-  
16 representation because the market is simply too big for one Volkswagen  
17 dealer to adequately penetrate. This conclusion was supported by the  
18 fact that Toyota, Honda and Nissan each have two dealers in the Fresno  
19 PAI, and the evidence produced by both sides showing growth trends in  
20 the area for population, households and employment. The study also  
21 showed that when one of the two dealers in the study area was placed in  
22 the new, five-mile location, the overall market penetration for the two  
23 dealers improved, and insell from dealers outside the market was  
24 reduced. This corresponded with other evidence presented by VWoA that  
25 other closely paired Volkswagen dealers in California all maintained  
26 profitable operations.

27 31. Protestant's expert conceded that the Fresno market had  
28 reached a size that would support two Volkswagen dealers, if located

1 correctly. He then presented evidence which showed that, looking just  
2 to the distance (measured in air miles) which would be traveled by the  
3 average consumer in the greater Fresno market, covering the area from  
4 Merced to Visalia, the "optimum" location for a new Volkswagen dealer  
5 would be in Selma, California, almost twenty miles to the south of  
6 Protestant. The problem with this analysis is that it does not take  
7 into consideration existing shopping patterns, the location of  
8 dealerships of inter-brand competitors, where the new dealer is willing  
9 to buy land, or any other element which might make up a part of the  
10 decision-making process for the location of a new dealership in the  
11 market.

12 32. Given that the Fresno market has grown to the point that it  
13 can support a second Volkswagen dealer, the question presented here is  
14 not where that dealership should be located for the optimum consumer  
15 convenience. Rather, the question is whether good cause has been shown  
16 to disallow the opening of a dealership at the location chosen by  
17 Volkswagen and the potential new dealer.

18 33. Mr. Zamora, the proposed new dealer, is very experienced with  
19 the auto industry in the Central Valley. He testified convincingly that  
20 from his experience and his analysis of the Fresno market, he is willing  
21 to commit the \$4 to \$5 million it will take to acquire and build the new  
22 facility in Clovis, but he would not do so in Selma. He based this on  
23 his opinion that Selma was too far away from the center of the market  
24 and was somewhat "seedy", as well as his appreciation of the quality of  
25 the location in Clovis. He also based his opinion on the long-term,  
26 successful competition which has gone on between the other same line-  
27 competitors in Fresno and Clovis, such as Toyota and Honda.

28 34. As discussed above, if the Fresno dealers can only achieve

1 average penetration of the market, there will be sufficient business  
2 available for both dealers to be profitable, and even increase their  
3 sales. It would, thus, appear that the effect on the retail motor  
4 vehicle business will be to increase competition, and the effect on  
5 these two dealers should be to increase Volkswagen's share of a market  
6 in which it has been under-represented, to the benefit of both dealers.

7 Findings Relating to Whether it Will Be Injurious  
8 To the Public Welfare for an Additional  
9 Franchise to Be Established

10 35. Mr. Zamora, the proposed dealer principal of the new  
11 Volkswagen franchise in Clovis, has been in the automotive business  
12 since 1973. From 1981 to the present, Mr. Zamora has acquired franchise  
13 rights and built (from the ground up) motor vehicle dealership  
14 facilities for Honda, Toyota, Acura, Hyundai and Volkswagen.

15 36. Mr. Zamora has entered into a contract binding him to purchase  
16 the five acre parcel in Clovis where the proposed new Volkswagen  
17 dealership would be built, and Mr. Zamora testified that his plan is to  
18 construct a state-of-the-art Volkswagen Marketplace Facility that  
19 provides easy access to consumers. Development of the proposed new  
20 facility will generate revenues for the community consisting of the land  
21 purchase price of \$2 million to \$2.5 million, and construction costs of  
22 approximately the same amount. In making his decision to pursue the  
23 proposed new dealership in Clovis, Mr. Zamora investigated the community  
24 by looking at demographic information, population, growth, income  
25 averages per household and other information provided to him by a local  
26 realtor. Mr. Zamora also physically inspected the market and was  
27 astounded to see that there is only one Volkswagen dealership, given the  
28 development and population growth. When compared to the roughly 400,000  
residents in Mr. Zamora's existing market in Stockton and surrounding

1 areas, which has two competitive dealerships representing virtually  
2 every major line-make approximately six miles apart, Mr. Zamora  
3 testified that the 800,000 to 900,000 residents in the Fresno market  
4 would easily support two Volkswagen dealers.

5 37. The initial Planning Volume for the proposed new dealership is  
6 400 units. Given the large FMCG registrations in the Fresno market, an  
7 average penetration rate by the dealers should easily achieve this goal,  
8 and allow Protestant to increase its past sales history.

9 38. As described above, several other brands have two dealers in  
10 the same RMA, all closer together than the proposed location will be to  
11 Protestant, and there has not been ruinous competition between them.

12 39. Protestant raised the concern that the new dealership would  
13 not be able to hire adequately trained service technicians, and as a  
14 result the Volkswagen image would be tarnished and consumers would  
15 receive bad service. However, Mr. Zamora has experience in establishing  
16 new dealerships with sales and service departments, and he described his  
17 plans for the proposed new dealership in Clovis. Specifically, Mr.  
18 Zamora has two employees who oversee his dealership parts and service  
19 operations, who will be involved in hiring, training and developing the  
20 service department in the proposed new dealership. Mr. Zamora also  
21 plans to hire service personnel from the pool of trained technicians  
22 available from the "VASTT Program" through the UTI technician institute.  
23 Respondent supports this program nationally, which provides student  
24 technicians with a 43-week general course, and further specialized  
25 training in individual franchises. Respondent pays the additional cost  
26 for UTI graduates to specialize as Volkswagen technicians. When the  
27 Volkswagen specialists graduate from UTI, a list of graduates goes out  
28 to Volkswagen dealers. The dealers can then interview graduates at the

1 institute and hire them. Respondent spends over \$1 million per year to  
2 support this program so that new dealerships will have a sufficient pool  
3 of authorized Volkswagen technicians from which to hire. Mr. Zamora  
4 testified that he has no intention of seeking to hire away Protestant's  
5 technicians, which he views as a way to inherit problems. He has not  
6 done so in developing his other dealerships.

7 40. A new, state-of-the-art facility in a location with easy  
8 freeway access will be of benefit to the public in that it will provide  
9 increased availability for sales and service, and increased competition  
10 both inter- and intra-brand. The market is sufficiently large to  
11 support two dealers, and the history of competition between other  
12 dealers in the same proximity does away with the fear that the  
13 competition will be ruinous. The past experience of the proposed new  
14 dealer in obtaining trained technicians presents convincing evidence  
15 that the public will receive proper care.

16 Findings Relating to Whether the Existing Franchise Is  
17 Providing Adequate Competition and Convenient Consumer  
18 Care for Volkswagen Vehicles in the Market, Including  
19 The Adequacy of Motor Vehicle Sales and Service Facilities,  
20 Equipment, Supply of Vehicle Parts and  
21 Qualified Service Personnel

22 41. Protestant has been a Volkswagen dealer in Fresno for 17  
23 years. The dealership is operated as a part of a large multi-line  
24 automotive facility. Most other lines are represented in other  
25 dealerships in the vicinity. The current sales facility was built in  
26 1996, with VWOA's approval, and is clearly adequate.

27 42. Protestant's service facility is combined with other lines,  
28 but twelve service stalls and eight technicians are devoted to the  
Volkswagen line, which satisfies VWOA's guideline of 1-1/2 stalls per  
technician. Ninety-one percent (91%) of Protestant's service

1 technicians are certified. The service facility and staff are adequate,  
2 and could handle an additional 20-25% of work. Protestant's Service  
3 Director acknowledged that an increase in new Volkswagen sales would  
4 increase work for the service department.

5 43. Protestant's parts department is housed in approximately 3,000  
6 square feet. VWoA has expressed no concerns to Protestant as to its  
7 parts department.

8 44. As described above, Protestant's penetration rate has been  
9 below average. This means that Protestant has not been providing full  
10 competition against the other line-makers, to the detriment of consumers.  
11 Protestant asserts that it has not achieved higher penetration rates  
12 because of the nature of VWoA's allocation system. Protestant does not  
13 contend, however, that the allocation system is not applied uniformly to  
14 all dealers. Since the adequacy of penetration is measured against an  
15 average rate, and that average is set by a group of Volkswagen dealers  
16 all using the same allocation system, a failure to achieve the average  
17 rate does reflect an inadequate sales effort, and a less than full  
18 competitive effort. If VWoA's allocation system is faulty, it may hurt  
19 the ability of all Volkswagen dealers to compete with other lines, but  
20 this is not the issue here. Since it is applied uniformly to all  
21 Volkswagen dealers, it cannot furnish an explanation for the failure of  
22 any one dealer to achieve the average penetration rate of a group of  
23 Volkswagen dealers who are equally burdened by the allocation system.

24 Findings Relating to Whether the Establishment of  
25 An Additional Volkswagen Franchise Would Increase  
26 Competition And, Thus, Be in the Public Interest

27 45. There is no doubt that the establishment of the proposed new  
28 dealer will increase competition in the Fresno market, both inter- and  
intra-brand. In fact, Protestant's fear is that it will be increased to

1 such an extent that the existing dealership will be damaged.

2 46. As described above, there is sufficient lost opportunity in  
3 the market to allow both dealers to have adequate sales through average  
4 penetration rates, i.e., by taking sales away from other lines, not by  
5 merely splitting the existing market between the two dealers.

6 47. Protestant's Volkswagen dealership financial statements,  
7 submitted by Protestant to Respondent for 1999, 2000, 2001, and November  
8 2002 year-to-date, include Protestant's gross profit on new vehicle  
9 sales, both for Volkswagen vehicles and for all of Protestant's other  
10 brands combined. During that period of time, from 1999 through November  
11 2002, Protestant reported the following gross profit on new Volkswagen  
12 unit sales versus sales of all other brands of new vehicles sold by  
13 Protestant, expressed as a percentage of new vehicle sales dollars:

14 **Michael Volkswagen New Vehicle Department**

15 **Gross Profit Analysis: Volkswagen v. All Other Brands**

16

17 Year	VWoA Gross Profit as % of VWoA Sales	Other Brand Gross Profit as % of Other Brand Sales	VWoA Gross Profit Per Vehicle (\$)	Other Brand Gross Profit Per Vehicle (\$)
18 1999	9.73%	4.56%	2090	1074
19 2000	7.23%	4.60%	1552	1130
20 2001	7.15%	4.47%	1563	1164
21 Nov. '02	7.20%	4.69%	1571	1450

22  
23  
24

25 48. Malcolm Randolph Pressgrove, Respondent's Dealer Franchise  
26 Manager, testified that Protestant's gross profit on new Volkswagen  
27 vehicles was considerably higher than other Volkswagen dealers, not only  
28 in Area 45 but around the United States. Mr. Pressgrove testified that

1 the high gross profits on Protestant's Volkswagen vehicle sales indicate  
2 a strong, aggressive dealer oriented to gross profits, who is able to  
3 command higher prices from consumers due to a lack of competitive  
4 pricing in the market. Mr. Pressgrove pointed out that many of the  
5 other brands of new vehicles sold by Protestant have a second dealership  
6 in the Fresno market or the RMA. The lower gross profit margins on  
7 Protestant's other vehicle sales reflect intra-brand competition,  
8 resulting in an overall lower purchase price paid by consumers. Mr.  
9 Pressgrove testified that, based on his experience, if the proposed new  
10 Volkswagen dealership in Clovis were to be established, he would expect  
11 competitive pressure on Protestant's gross profit, with benefit to the  
12 consuming public in the form of lower purchase prices.

13 49. Two Volkswagen dealers in Fresno will also create competition  
14 within the Fresno metropolitan area for authorized service and warranty  
15 work. Presently, consumers have no choice for authorized Volkswagen  
16 warranty service in Fresno because Protestant is the only Volkswagen  
17 dealer authorized to perform warranty work. Establishment of the  
18 proposed new dealership in Clovis will generate competition for  
19 authorized service and warranty work, which benefits the public.

20 **Facts Relating to Additional Issues Raised by Protestant**

21 50. Issues raised as to the demographics of the Fresno area and  
22 the VWOA allocation system are discussed above with regard to the  
23 statutory issues to which they pertain.

24 51. Protestant presented testimony that prior to giving notice  
25 that it intended to establish a dealership in Clovis, Respondent tried  
26 to talk Protestant into constructing a stand-alone "marketplace"  
27 facility for the Volkswagen dealership, but that Protestant declined  
28 because it had built a new joint use facility in 1996 which is still

1 very adequate. Thereafter Protestant gave notice of the new Clovis  
2 dealer. The proposed new dealer plans to build a stand-alone  
3 "marketplace" facility. Respondent presented testimony that no such  
4 conversation occurred.

5 52. Based on Protestant's rendition of the facts, Protestant's  
6 owner, Mr. Rosvold, is "under the impression that the decision to  
7 propose a new dealership in Clovis was motivated by Volkswagen's desire  
8 for a stand-alone facility." Protestant's Post-hearing Opening Brief,  
9 paragraph 142. Protestant then argues that this "raises a strong  
10 inference that the decision was not motivated by market or public  
11 welfare considerations." Protestant's Post-hearing Reply brief, page  
12 20:1-4.

13 53. An "impression" and an "inference" do not constitute the sort  
14 of evidence which would support a finding that good cause exists to deny  
15 the establishment of a new franchise. Even assuming that a request to  
16 build a stand-alone facility was made, no evidence was presented to  
17 support the claim that the rejection of the request had anything to do  
18 with the decision to establish a new dealer in Clovis, and it must be  
19 disregarded.

20 **DETERMINATION OF ISSUES**

21 54. Protestant has made a substantial permanent investment in its  
22 dealership.

23 55. The establishment of an additional franchise in the relevant  
24 market area will not have an adverse effect on the retail motor vehicle  
25 business in the area, and will be to the benefit of the consuming public  
26 in the area.

27 56. It will not be injurious to the public welfare for an  
28 additional franchise to be established.

1 57. There is only one line-make dealer in the relevant market  
2 area, therefore there is no intra-brand competition between franchisees  
3 of the same line-make in the market area. While the existing dealer has  
4 an adequate sales and service facility, equipment, supply of vehicle  
5 parts and qualified service personnel, the addition of another dealer  
6 having these same attributes will increase consumer convenience in the  
7 market.

8 58. The establishment of the additional franchise will increase  
9 competition and be in the public interest.

10 59. There was no showing made that there was any improper reason  
11 for establishing the additional dealership in the relevant market area.

12 **PROPOSED DECISION**

13 Protestant has not met its burden of proof under Vehicle Code  
14 Section 3066(b) to establish that there is good cause not to enter into  
15 a franchise establishing an additional new motor vehicle dealership in  
16 the relevant market area. The protest is overruled. Respondent shall  
17 be permitted to establish the proposed Volkswagen franchise in Clovis,  
18 California.

19 I hereby submit the foregoing which  
20 constitutes my proposed decision in  
21 the above-entitled matter, as a  
22 result of a hearing before me on the  
23 above dates and recommend the  
24 adoption of this proposed decision as  
25 the decision of the New Motor Vehicle  
26 Board.

27 Dated: May 19, 2003

28 By   
J. KEITH MCKEAG  
Administrative Law Judge

29 Steven Gourley, Director, DMV  
30 Terri Thurlow, Chief,  
31 Licensing Branch, DMV