

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

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

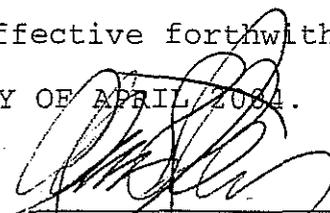
In the Matter of the Protest of )  
)  
FREMONT AUTOMOBILE DEALERSHIP, ) **Protest No. PR-1844-03**  
LLC dba FREMONT TOYOTA, )  
)  
Protestant, )  
)  
v. )  
)  
TOYOTA MOTOR SALES, U.S.A., INC. )  
)  
Respondent. )  
\_\_\_\_\_ )

DECISION

At its regularly scheduled meeting of April 22, 2004, 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 22<sup>nd</sup> DAY OF APRIL 2004.

  
\_\_\_\_\_  
GLENN E. STEVENS  
President

New Motor Vehicle Board

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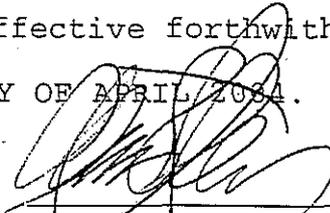
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11 In the Matter of the Protest of )  
12 FREMONT AUTOMOBILE DEALERSHIP, ) Protest No. PR-1844-03  
13 LLC dba FREMONT TOYOTA, )  
14 Protestant, ) PROPOSED DECISION  
15 v. )  
16 TOYOTA MOTOR SALES, U.S.A., INC., )  
17 Respondent. )

18 PROCEDURAL BACKGROUND

19 1. By letter dated January 29, 2003, Toyota Motor Sales,  
20 U.S.A., Inc., (hereinafter "Toyota" or "Respondent") gave notice  
21 pursuant to Vehicle Code section 3062<sup>1</sup> to Fremont Automobile  
22 Dealership, LLC, dba Fremont Toyota (hereinafter "Fremont Toyota" or  
23 "Protestant") of Toyota's intent to relocate the existing dealership,  
24 Piercey Toyota (hereinafter "Piercey"), to Milpitas, California at a  
25 point within ten miles of Fremont Toyota.

26 2. Toyota is a manufacturer and distributor of new motor  
27 vehicles under licenses issued by the State of California.  
28

<sup>1</sup> Statutory references are to the California Vehicle Code, unless stated otherwise.

1           3.    Fremont Toyota is a new motor vehicle dealer in Fremont,  
2 California, operating under license issued by the State of California  
3 and is a franchisee of Toyota.

4           4.    Piercey is also a California dealer licensee and franchisee  
5 of Toyota presently located in San Jose, California.

6           5.    The Protestant filed this protest on February 18, 2003, and  
7 the hearing commenced by order of the New Motor Vehicle Board  
8 (hereinafter "Board") before Administrative Law Judge, Kenneth B.  
9 Wilson, on October 24, 2003. In consideration of the requests and  
10 supporting affidavits of the parties, the hearing was thereupon  
11 continued to January 12, 2004. The presentation of testimony and  
12 evidence was concluded on January 19, 2004. The matter was submitted  
13 for decision by the Board upon the filing of the closing reply briefs  
14 of the parties on March 5, 2004.

15           6.    Protestant was represented by the Law Offices of Michael J.  
16 Flanagan, Michael J. Flanagan, Esq., Christopher J. Gill, Esq., and  
17 Gary L. Baldwin, Esq., 2277 Fair Oaks Boulevard, Suite 450,  
18 Sacramento, California 95825.

19           7.    Respondent was represented by Bingham McCutchen, Robert L.  
20 Ebe, Esq. and Todd A. Williams, Esq., 3 Embarcadero Center, San  
21 Francisco, California 94111, and by Deborah J. Goldman, Esq.,  
22 Managing Counsel, Toyota Motor Sales, U.S.A., Inc., 19001 South  
23 Western Avenue, A107, Torrance, California 90509.

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1 ISSUES PRESENTED

2 8. Under Section 3062(a)(1) a franchisor is not permitted to  
3 relocate an existing motor vehicle dealership, where a timely protest  
4 has been filed, until there has been a finding of whether or not good  
5 cause exists for precluding the relocation. Under Section 3066(b),  
6 the franchisee has the burden of proof to establish that there is  
7 good cause not to relocate the existing motor vehicle dealership.

8 9. In determining whether there is good cause for the  
9 relocation of an existing franchise, Section 3063 requires the Board  
10 to consider the existing circumstances, including but not limited to:

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

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1                    OVERVIEW OF THE TESTIMONY AND EVIDENCE PRESENTED

2            10. Protestant and Respondent each presented the testimony of  
3 three witnesses. The parties offered 57 evidentiary exhibits, 55 of  
4 which were admitted into the record.<sup>2</sup>

5                    Protestant's Witnesses

6            11. Protestant's first witness was Henry Khachaturian, (aka,  
7 Hank Torian), the dealer principal of Fremont Toyota. Mr. Torian's  
8 career in the retail new motor vehicle industry began in 1960, in the  
9 course of which he has owned more than 22 dealerships. He currently  
10 owns the Fremont Auto Mall in which Fremont Toyota is located. Mr.  
11 Torian's testimony concerned the history and operation of Fremont  
12 Toyota and the facts and circumstances of this protest.

13            12. Protestant's next witness<sup>3</sup> was Jorge Haimovich, designated  
14 General Manager for Fremont Toyota since May 2003. Mr. Haimovich has  
15 held several management positions with other dealerships prior to his  
16 employment with Fremont Toyota. His testimony concerned Fremont  
17 Toyota's present operations and facilities.

18            13. Protestant's expert witness was Mr. Joseph Roesner, Vice  
19 President of The Fontana Group, a consulting firm in Tucson, Arizona,  
20 specializing in the automotive industry. Mr. Roesner is a Certified  
21 Public Accountant and has a Masters Degree in Business  
22 Administration. He has testified in more than a dozen cases  
23 involving the industry.

24            14. Mr. Roesner prepared and presented an expert witness report  
25 which was admitted at the hearing as Exhibits 17A and 17B. The  
26

27 <sup>2</sup> Two of the exhibits (the land use elements of the general plans of Fremont and  
28 Milpitas) were the subject of official notice by the Administrative Law Judge.

<sup>3</sup> The testimony described here is not necessarily in the order in which it was  
presented at the hearing.

1 report began with a general analysis of the sales and service  
2 performance of Toyota and other line-makers for the Relevant Market  
3 Area<sup>4</sup> (RMA) and other geographic areas of relevance, concluding that  
4 there were no substantial issues arising from registration data with  
5 the current dealer network in place. The remainder of the report  
6 dealt with the possible impact of the proposed relocation on Fremont  
7 Toyota.

8 15. Mr. Roesner's impact analysis began with a consideration of  
9 the relative change in convenient access for Fremont Toyota and  
10 Piercey customers that could result from the proposed relocation. He  
11 next prepared a profit contribution analysis in which he purported to  
12 show the profit loss per marginal vehicle sales lost for Fremont  
13 Toyota, with corresponding analysis for used vehicle, and parts and  
14 service sales. Based on these analyses, Mr. Roesner's report  
15 concluded with an assessment of the adequacy of Fremont Toyota's  
16 operations and facilities and with a follow-up of a relocation case  
17 in the State of Florida where a protesting dealer's sales declined  
18 after the relocation was established. On the basis of the testimony  
19 he presented, Mr. Roesner opined that the relocation could result in  
20 lost sales with concomitant lost profits for Fremont Toyota.

21 Respondent's Witnesses

22 16. Respondent's first witness was Mr. Paul Holdridge, General  
23 Manager for Toyota's San Francisco Region.<sup>5</sup> Mr. Holdridge has been  
24 associated with Toyota since 1982.

25  
26  
27 <sup>4</sup> The term "relevant market area" is defined at Section 507 as "... any area within  
a radius of ten miles from the site of a potential new dealership."

28 <sup>5</sup> The San Francisco Region is one of 10 Toyota regions in the United States. It  
encompasses all of California north of Visalia, and includes 14 district  
subdivisions and 60 Toyota dealerships.

1           17. Mr. Holdridge's testimony began with facts and  
2 circumstances leading to Toyota's decision to approve the proposed  
3 relocation, including the process followed and Toyota's written  
4 analyses of the proposal. Next, he testified concerning Toyota's  
5 Vision 2010 program setting forth Toyota's nationwide sales  
6 development objectives. He concluded with an analysis of the  
7 inadequacies of the existing Piercey facilities and location, as well  
8 as the potential benefits of the proposed location.

9           18. Respondent's second witness was Mr. William R. Piercey,  
10 dealer principal of Piercey Toyota. Mr. Piercey has been in the  
11 retail new motor vehicle industry since the mid-1970s and currently  
12 owns five dealerships, including Piercey Toyota, which he acquired in  
13 1987. Mr. Piercey's testimony concerned the details of his current  
14 facilities and location, the background of his proposal to relocate,  
15 and a description of the proposed facilities for the relocation.

16           19. Respondent's expert witness was Mr. John Frith, Vice  
17 President of Urban Science Applications, Inc., located in Detroit,  
18 Michigan. Mr. Frith is a civil engineer with a Masters Degree in  
19 Business Administration and has been associated with Urban Science  
20 Applications for over twenty years. His firm provides software and  
21 consulting services worldwide, principally to manufacturers in the  
22 automotive industry. Mr. Frith has appeared as an expert witness in  
23 approximately 40 cases.

24           20. Mr. Frith's testimony was based on his expert witness  
25 report, which was introduced at the hearing and admitted into  
26 evidence as Exhibit 29. Mr. Frith's analysis employed a standard  
27 methodology, which his firm uses for both its market analysis and  
28 litigation services. First, Mr. Frith examined the performance of

1 Toyota's dealer network in the area of concern by evaluating vehicle  
2 registration data against a benchmark performance level based on a  
3 comparable market area. As did Mr. Roesner, Mr. Frith concluded that  
4 the performance of the dealer network is adequate. Next, Mr. Frith  
5 proceeded to evaluate the potential impact of the proposed  
6 relocation.

7 21. Mr. Frith's impact analysis, in essence, sought to  
8 determine whether there is potential additional sales opportunity in  
9 the subject market to accommodate any increase in sales by Piercey  
10 Toyota resulting from the relocation. He determined this "lost  
11 opportunity" exists in parts of the area served by Piercey where its  
12 sales are now below the performance benchmark (gross sales loss) and  
13 from sales now being made by Toyota dealers outside the local market  
14 (in-sell). It was Mr. Frith's opinion that Piercey, at the proposed  
15 new location, would likely experience a near-term loss in sales or,  
16 at best, a very modest gain.

#### 17 FACTUAL BACKGROUND

#### 18 The Proposed Relocation

19 22. The principal predicate for the proposed relocation is the  
20 condition of Piercey's present facility and location. Both Fremont  
21 Toyota and Piercey perform well above all applicable performance  
22 standards, and Protestant is the highest volume dealer in the San  
23 Francisco Bay Area.

24 23. Piercey Toyota is presently located at 2108 North 1<sup>st</sup> Street  
25 in the City of San Jose, California. The immediate vicinity is of  
26 downtown commercial character, primarily consisting of office  
27 buildings with very little retail commercial activity and no other  
28 dealerships nearby. Piercey is situated four-tenths of a mile from

1 the 101 Freeway and about one mile from the I-880 Freeway, but it can  
2 neither be seen nor conveniently accessed from these corridors. The  
3 facility was constructed in the late 1960s and occupies approximately  
4 five and one-half acres on two contiguous leased parcels and two  
5 other parcels located more than a mile away. Despite the investment  
6 of more than \$3 million in facility upgrades, Toyota and Mr. Piercey  
7 consider the facilities and location inadequate and obsolete.

8 24. Mr. Piercey purchased the dealership during its bankruptcy  
9 in 1987, and in spite of its limitations, has managed to make it  
10 profitable every year since the first. At the same time, he has been  
11 actively seeking a new location since 1990. It was not until  
12 September 2002 that Mr. Piercey found a suitable relocation site and  
13 initiated the move.<sup>6</sup>

14 25. The proposed site is located 2.8 straight-line miles to the  
15 north and slightly east of Piercey's present location. The proposed  
16 site consists of a 10-acre portion of a 60-acre development project  
17 owned by the County of Santa Clara. It is situated in the City of  
18 Milpitas, on the northeast quadrant of the Great Mall Parkway and the  
19 I-880 Freeway interchange, near the largest outlet shopping center in  
20 Northern California. A Chevrolet dealership is situated on I-880,  
21 opposite the site, and at least one other line-make is contemplating  
22 moving to the project. Mr. Piercey believes the relocation is  
23 imperative notwithstanding the increase in land and building costs,  
24 and regardless of whether the move may not produce increased profits  
25 in the near term. Mr. Piercey plans to construct a new, \$6 million,  
26 state-of-the art Toyota facility under a multi-year lease from the

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27  
28 <sup>6</sup> Aware of both Piercey's deficiencies and Mr. Piercey's desire to move, Toyota has refrained from demanding that Piercey relocate.

1 County.

2 26. While Piercey has been able to achieve top level  
3 performance despite its facility and location shortcomings, both  
4 Piercey and Toyota are concerned that Piercey will be unable to  
5 compete effectively in the future.

6 27. Since the 1970's, Toyota sales in the United States have  
7 increased, with Toyota having arrived in 2000 as the number one  
8 selling brand in the United States and a nationwide market share of  
9 10 percent in 2002. Toyota has been particularly successful in the  
10 San Francisco Region where, in 2002, it obtained a 16.8 percent  
11 market penetration.

12 28. In 1999, after nationwide Toyota sales reached 1.3 million  
13 vehicles, Toyota announced its Vision 2010 objective of reaching  
14 sales of 1.8 million by 2010.<sup>7</sup> A major part of Vision 2010 is the  
15 introduction of new models such as "Scion" and a full size light  
16 truck to be manufactured in Texas, as well as new hybrid technology  
17 models such as "Prius".

18 29. Toyota's sales growth has led to a concomitant increase in  
19 units in operation (UIO) which in combination with the introduction  
20 of new models and hybrid technology, altogether, are expected to  
21 generate increases in dealer furnished facilities as reflected by  
22 recent changes to Toyota's facilities guide. Toyota's concern as to  
23 Piercey Toyota is that it will be unable to provide the additional  
24 facilities at its present location.

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26 ///

27 \_\_\_\_\_

28 <sup>7</sup> Having approached that goal more quickly than anticipated, the outlook was revised to 2.2 million by 2009.



1 Freeway. The RMA is situated in the southeastern part of the San  
2 Francisco Bay Area. It encompasses all of the cities of Milpitas,  
3 San Jose, Santa Clara, and Sunnyvale, and a portion of the City of  
4 Fremont. (See Exhibit 17, Tab 2, Page 1, incorporated hereto as  
5 Attachment 1.)

6 35. For marketing purposes, Toyota has divided the San  
7 Francisco Bay Area into contiguous markets or "metros" generally  
8 corresponding to San Francisco, Oakland, and San Jose. Each metro is  
9 further subdivided into Primary Market Areas (PMAs) for each of its  
10 dealers within a metro. A PMA generally consists of a collection of  
11 census tracts<sup>8</sup> that Toyota assigns to a particular dealership on the  
12 basis of proximity to that dealer and other factors.<sup>9</sup> The Piercey RMA  
13 overlies the boundary between the San Jose Metro and the Oakland  
14 Metro to the north. The RMA also covers all or portions of the PMAs  
15 for six Toyota dealerships, including Fremont Toyota and Piercey.  
16 (See Exhibit 17A, Tab 4, Page 1, incorporated herein as Attachment  
17 2.) For purposes of this protest, the parties have assembled the PMA  
18 census tracts such that all data can be reported specifically for the  
19 RMA as well as for metros and PMAs.

20 36. The RMA had a 2002 estimated population of 1,386,929 and  
21 450,512 households, most heavily concentrated in the southwest, along  
22 the 101 Freeway and in a belt running northwest along the parallel I-  
23 880 and I-680 corridors. The population distribution is further  
24 marked by low densities in much of the northwest quadrant and east of  
25 the I-880/I-680 corridor, reflecting limitations imposed by the

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26  
27 <sup>8</sup> Census tracts are geographic zones by which data are collected for the US Census.  
Toyota and other manufacturers make use of them for the purpose of linking motor  
vehicle registrations and other data to specific geographic areas.

28 <sup>9</sup> The proposed relocation would not change the census tracts included in Fremont  
Toyota's PMA. The Piercey PMA would gain one tract from the Sunnyvale PMA.

1 extent of the San Francisco Bay marshes and the mountainous Sunol  
2 Ridge, respectively. More locally, these topographic factors produce  
3 a pronounced narrowing or "pinch" along the I-880/I-680 corridor  
4 about midway between Fremont and Milpitas. This constraint on  
5 development is recognized in the Land Use Elements of the General  
6 Plans of both Fremont and Milpitas.

7 37. Households in the RMA increased by about 37,000 during 1990  
8 to 2000, and are projected to increase by an additional 41,500 by  
9 2007. This trend is present in both the Piercey and Fremont Toyota  
10 PMAs, with Milpitas increasing somewhat more than Fremont. Average  
11 annual employment in Alameda and Santa Clara Counties increased  
12 during 1995-2000 and has declined somewhat thereafter, possibly  
13 reflecting national and regional economic trends. Retail industry  
14 car and light truck registrations in the RMA, as shown by R.L. Polk  
15 data, indicate a substantial decline (nearly 30,000 units) during  
16 2000-2002.

17 38. The distribution of industry retail vehicle registrations  
18 within the RMA corresponds closely with that of the population and  
19 households. The bulk of registrations are concentrated along the  
20 Freeway 101 corridor in the southwest and between and along the I-  
21 880/I-680 corridor. As with the population distribution, retail  
22 registrations in the area between Fremont Toyota and Piercey "pinches  
23 down" from the west and east to a narrow strip between I-880 and I-  
24 680. (See Exhibit 17A, Tab 6, Page 8, attached hereto as Attachment  
25 3.) The distribution of Retail registration by Toyota and  
26 competitive line-makes also follow this pattern.

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28 ///



1 a neighborhood of commercial offices.

2 42. More severe, however, is the problem of its tenancy. In  
3 struggling to keep up with its market, Piercey found it necessary to  
4 lease an adjacent parcel and to enter into two other leases on a  
5 remote parcel from two different lessors. As a result Piercey rests  
6 upon four parcels under four leases from three different lessors.  
7 The lease for the two remote parcels is month-to-month. Of the two  
8 adjacent leases (for the sales and service buildings), Piercey found  
9 it necessary to purchase (and subsequently demolish) the former  
10 tenant's machine shop in order to negotiate a lease on the underlying  
11 property through 2010 with a further 10-year option. The other lease  
12 expires in 2005 with one five-year option and no prospect of further  
13 renewal. Thus Piercey must find a new location in time to build a  
14 facility on it within six and one-half years.<sup>11</sup>

15 43. As to the proposed relocation, Piercey envisions a large,  
16 modern facility constructed on 10 acres at a cost of \$6 million under  
17 a term of at least 20 years. In addition, Piercey would be in a  
18 modern mall retail area with Santa Clara County as the sole lessor.

19 FINDINGS AS TO THE ADEQUACY OF COMPETITION  
20 AND CONVENIENT CONSUMER CARE  
21 [Section 3063(d)]

22 Competition in the Relevant Market Area

23 44. The RMA is served by 75 line-make franchises. Of these,  
24 five are Toyota accounting for 7.5 percent of the industry total.  
25 The RMA falls near the middle of the distribution of registrations  
26 per dealer, both for total industry and Toyota only, in Toyota's San  
27 Francisco (Northern California) Region. This indicates that the RMA

28 <sup>11</sup> Piercey cannot enjoy the luxury of waiting until the lease on its showroom parcel expires because of the lack of available and suitable land and the lead times for engineering and governmental approval.

1 dealer network has neither too few dealers making too many sales nor  
2 too many dealers making too few sales.

3 45. Toyota's interbrand competitiveness is indicated by its  
4 market share (penetration) of RMA registrations compared to  
5 California and the nation. Year 2002 registration data shows that  
6 Toyota's penetration nationally was 10.28 percent, for California it  
7 was higher at 17.23 percent, and in the RMA, higher yet at 19.36  
8 percent.

9 46. Respondent's expert witness developed an additional  
10 performance standard using the performance of the San Francisco  
11 Metro.<sup>12</sup> Toyota's performance in the RMA exceeded the benchmark  
12 during the three years, 2000 to 2003. In its PMA, Piercey exceeded  
13 the comparison for each of those years, while Fremont Toyota exceeded  
14 it in 2000 and performed very slightly below it in 2001 and 2002.  
15 These comparisons show that the RMA dealers are performing well, and  
16 that, at least up to the present, penetration performance is not a  
17 major issue.<sup>13</sup>

18 47. Honda is the leading passenger car brand in all PMAs in  
19 both the San Jose and Oakland Metros. At the census tract level,  
20 both Honda and General Motors (GM) are dominant in most of the census  
21 tracts immediately north and northwest of Fremont Toyota. For light  
22 truck registrations, GM is dominant in the census tracts surrounding  
23 Fremont Toyota north and west. These factors indicate that there is  
24 additional interbrand competitive opportunity for Fremont Toyota in  
25 the area to its north.

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27 <sup>12</sup> San Francisco was selected for comparison purposes because it shares the general  
28 locality, but excludes the RMA dealers in order to avoid "self comparison".

<sup>13</sup> That is not to say, however, that higher penetration levels are not possible or  
not desirable.



1           51. At time of the hearing, Toyota was in the process of  
2 revising its Minimum Facility Standards<sup>15</sup> for its franchisees. The  
3 revision will result in an increase in most requirements in  
4 conformance with Toyota's Vision 2010 program. Piercey's facility  
5 fails the old standard for sales office and showroom display area,  
6 and for used vehicle and employee parking. Piercey meets the  
7 standard for service stalls, but the stalls are not all located in  
8 the main showroom and service buildings. More importantly, from  
9 Toyota's viewpoint, and from Piercey's as well, Piercey has no direct  
10 control over the property due to the several separate leaseholds  
11 involved.

12           52. Under the new facilities standards, Piercey's deficiency  
13 for sales office and display would double. Piercey would not meet  
14 the requirements for retail parts at all. The service facility would  
15 be deficient by 9 stalls and 7,650 square feet of floor area.  
16 Parking would be deficient in all areas except new vehicle parking.

17           53. Apart from minimum standards, the physical layout of the  
18 dealership suffers from difficult access for vehicles entering the  
19 service area, and the need to shuttle them to the service stalls off-  
20 site. The lack of adequate customer waiting areas is an additional  
21 inconvenience to service customers.

22           54. The automotive industry uses service retention indexes as a  
23 standard for evaluating dealer service performance. The standard  
24 that the industry refers to as "SSSI" is based on the potential  
25 service work indicated by units in operation and the actual number of  
26 repair hours worked. The second standard referred to as "SMSI" is

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27  
28 <sup>15</sup> Minimum facilities are determined by anticipated sales volume and the number of  
line-make units in operation for a PMA.

1 based on the potential for customer service and the actual repair  
2 orders done. Piercey has consistently fallen below the performance  
3 levels for both standards for the San Francisco Region and the nation  
4 every year during 1999 to 2002. Piercey's scores for SSSI were much  
5 lower than for SMSI, indicating a problem reaching potential  
6 customers who were not its sales customers. This is attributable in  
7 some part to deficiencies in Piercey's service facilities.

8 Fremont Toyota

9 55. There is no contested issue as to the adequacy of Fremont  
10 Toyota's facilities or location. Fremont Toyota's facilities are  
11 among the largest and most modern in the San Francisco Bay area and  
12 Northern California as well. The location is considered excellent,  
13 being situated in an auto-mall with dedicated freeway off-ramp  
14 signage.

15 56. In terms of customer satisfaction, on the other hand,  
16 Fremont Toyota has a long history of poor performance. Fremont  
17 Toyota was advised by Toyota in 1996, shortly after it relocated to  
18 the Fremont Auto Mall, that its CSI was among the lowest 50 dealers  
19 in the nation. Fremont Toyota's SSS scores remained below average  
20 from 1998 to 2002. At present, Fremont Toyota ranks 58<sup>th</sup> out of 60  
21 dealerships in the San Francisco Region. Fremont Toyota has also had  
22 a history of frequent management turnover, which may have contributed  
23 to its low CSI scores.

24 FINDINGS ON THE EFFECT ON THE RETAIL  
25 MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC  
26 [Section 3063(b)]

27 Effects on Fremont Toyota Retail Business

28 57. The proposed relocation envisions only the moving of  
Piercey Toyota from its present location to a new facility located

1 2.8 miles away. The number of competing Toyota dealerships in the  
2 RMA will remain the same. Accordingly, the only effects requiring  
3 consideration are those that involve the relative change in the  
4 attractiveness of Fremont Toyota and Piercey to the consuming public.  
5 This attractiveness, in pertinent respects, is composed of the  
6 proximity of the dealerships to their customers and the quality of  
7 the facilities and services offered.

8 58. The term "proximity" as used above involves the relative  
9 ease of travel for customers going from their residence to a  
10 dealership.<sup>16</sup> Straight-line distance gives some indication of  
11 proximity. However, customers are constrained to travel on the  
12 existing network of streets and highways, which virtually never  
13 follow a straight-line path for such trips. Travel time sometimes  
14 gives a better indication of proximity but such data for large  
15 numbers of customers is not commonly available.<sup>17</sup>

16 59. Retail registration mapping is a technique that allows the  
17 geographic distribution of a dealership's customers to be graphically  
18 represented with great accuracy. Since each retail registration  
19 represents at least one actual customer-to-dealer trip, taken  
20 altogether, they provide a useful view of where a given dealer's  
21 actual market is, because they implicitly include the effects of  
22 actual distance and dealer attractiveness. Both parties made  
23 extensive use of this technique in the testimony of their expert  
24 witnesses.

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26 <sup>16</sup> The theoretical underpinning here is that customers will, all other things being  
27 equal, seek to minimize their expenditure of time and costs in traveling to a  
28 dealership, such that they will be more likely to visit a dealership that is  
closer.

<sup>17</sup> Such information is becoming readily and economically available from Internet  
based sources.

1           60. Fremont Toyota's total sales in 2002 were 3,758, of which  
2 1,402 (37 percent) were in the RMA, and of those, 363 (9.7 percent)  
3 were in the Piercey PMA. The geographic distribution of Fremont  
4 Toyota's RMA sales was presented on Exhibit 29, Page A-55.1. (See  
5 also Attachment 3 hereto). This exhibit shows the heaviest  
6 concentration of sales lying immediately to the north of Fremont  
7 Toyota. A second concentration lies in the narrow corridor between  
8 I-880 and I-680 and extending southward roughly six miles to the 237  
9 Freeway. Fremont Toyota's remaining RMA sales are scattered more  
10 thinly throughout the southwest quadrant of the RMA.

11           61. Dealer attractiveness remains generally constant, but since  
12 proximity decreases with distance, the sales effectiveness or ability  
13 to capture sales falls off as distance from the dealership increases.  
14 Fremont Toyota's sales effectiveness by distance was presented in  
15 Exhibit 29, Page A-56. This exhibit shows that Fremont Toyota's  
16 effectiveness declines gradually from 40.9 percent to 33.3 percent  
17 over the first six miles. It drops sharply at 6-8 miles and at 8-10  
18 miles and tails off very gradually after that. Beyond eight miles  
19 distance the sales effectiveness falls to 10.1 percent.

20           62. Piercey, in 2002, had total sales of 3,334, of which 2,069  
21 (62 percent) were made within the RMA and 751 (22.5 percent) in the  
22 Piercey PMA. Piercey's sales into Fremont Toyota's PMA were 205 (6  
23 percent).

24           63. The pattern of Piercey's sales effectiveness with distance  
25 differs from that of Fremont Toyota in that it declines from 30.7  
26 percent to 18.3 percent within the first four miles, and remains at  
27 that level out to eight miles. Beyond eight miles the effectiveness  
28 tails off fairly constantly, declining about three percent every two

1 miles.

2 64. These data show that Fremont Toyota sells more vehicles in  
3 Piercey's PMA than Piercey does in Fremont Toyota's PMA, possibly due  
4 at least in part, to the attractiveness of Fremont Toyota's facility  
5 and its freeway location. The sales effectiveness graphs of both  
6 dealerships show that the bulk of their sales are made within 6-8  
7 miles, beyond which Piercey's falls off more steeply than Fremont  
8 Toyota's.

9 65. Protestant's expert witness, Mr. Roesner, prepared a *logit*  
10 *analysis*<sup>18</sup> of the effects of the change in Piercey's location on  
11 Fremont Toyota's sales. The model used the change in drive times  
12 from each census tract in the San Jose and Oakland Metros that would  
13 result from the relocation to re-allocate the sales between Piercey  
14 and Fremont Toyota. The model indicated a loss of 111 sales. The  
15 accuracy of this approach, however, is limited by the model's very  
16 low correlation coefficient<sup>19</sup> and by the fact that drive time explains  
17 only a small part of a consumer's purchase decision. In fact, the  
18 111 figure does not represent lost sales *per se* but only that the  
19 addresses of some of Fremont Toyota's 2002 customers would be closer

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25 <sup>18</sup> Logit is a statistical technique similar to linear regression analysis. Logit  
26 differs here in that it constrains the dependent variable such that it can have  
27 only two values. This results in allocating retail sales either to Piercey or  
28 Fremont Toyota (the dependent variable) as relative distance (the independent  
variable) changes.

<sup>19</sup> The R<sup>2</sup> value in this instance was 0.2074, indicating that the change in relative  
distance could only explain about 20 percent of the change in Fremont's share of  
the sales.

1 to Piercey after the relocation than before.<sup>20</sup>

2 66. Mr. Roesner also considered the fact that the proposed  
3 location will provide Piercey with something it has never before had:  
4 visibility. At present, virtually no one traveling to Fremont Toyota  
5 from any point in the RMA would notice Piercey Toyota. With the  
6 change in location to I-880, however, anyone traveling to Fremont  
7 Toyota via I-880 south of the I-880 interchange with the 237 Freeway  
8 would drive by the proposed location. Using a computer program  
9 matching the addresses of Fremont Toyota's customers during the first  
10 half of 2002 to the most direct route to Fremont Toyota, Mr. Roesner  
11 found that 1,010 of 5,433 or 18.59 percent of Fremont Toyota's new  
12 vehicle customers and 691 or 7.95 percent of its service customers  
13 would have an opportunity to notice Piercey. These figures represent  
14 an increased probability, unquantified, that some Fremont Toyota  
15 customers might switch once Piercey comes into view from the freeway.

16 67. Respondent's expert witness, Mr. Frith, also analyzed the  
17 effects of the relocation on sales using a "lost opportunity"  
18 analysis. Respondent's approach proceeded in two steps. First the  
19 RMA census tracts were reallocated to the proposed relocation site,  
20 and three penetration-by-distance profiles were applied. If after  
21 the relocation, Piercey's penetration profile were the same as the  
22 average Toyota dealer in the RMA, Piercey would actually lose 191

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23  
24 <sup>20</sup> Protestant repeatedly argued in closing briefs that the relocation will move  
25 Piercey further from its existing customers and closer to census tracts where  
26 Toyota is presently performing well. The argument is unpersuasive in that the  
27 relocation is not being made strictly for the purpose of increasing Toyota  
28 performance in particular census tracts, but rather, to obtain a modern facility at  
a more permanent site. In any case, the relocation site is in the general  
direction of the constrained optimal site and closer to the portion of the RMA  
where the bulk of Toyota customers reside. Furthermore, the actual increase in  
distance between the Piercey relocation and the census tracts where Toyota is  
performing below the expected average is small and could be overcome by better  
freeway accessibility and improved facilities.

1 sales. If the profile remained the same as at Piercey's present  
2 location, Piercey would lose 65 sales. If Piercey's profile were the  
3 same as Fremont Toyota's is now, Piercey would gain 317 sales. The  
4 same analysis using census tracts for the San Jose Metro plus the  
5 Fremont Toyota PMA resulted in a loss of 544 sales with the average  
6 dealer profile, a loss of 217 sales with Piercey's profile, and a  
7 gain of only 33 sales using Fremont Toyota's profile.

8 68. Mr. Frith opined that the most probable outcome of the  
9 relocation is indicated by using the census tract registration data  
10 for the San Jose Metro plus Fremont Toyota PMA and the Fremont Toyota  
11 penetration profile. This would better reflect the behavior of a  
12 larger, more realistic population of consumers and the fact that  
13 Piercey, in its new location would be more like Fremont Toyota since  
14 it would have a modern facility and a freeway location. On the basis  
15 of this, Mr. Frith concluded that Piercey's sales would most likely  
16 be a gain of 34 sales or somewhat more, but any increase would be  
17 very modest.

18 69. The second step in Mr. Frith's analysis was to consider  
19 whether any increase in Piercey's sales could come from sales in the  
20 RMA that are presently being missed by the RMA dealers, rather than  
21 from Fremont Toyota. He determined that if each census tract in the  
22 RMA performed as well as the average census tract in the comparable  
23 San Francisco Metro, Toyota would achieve an increase of 954  
24 additional sales. Next he computed the total "in-sell", or Toyota  
25 sales in the RMA by Toyota dealers not located in the RMA as 1,940.  
26 These combined represented 2,984 sales available to the RMA dealers.

27 70. Mr. Frith's lost opportunity analysis cannot be used to  
28 quantify any change in dealer sales resulting from a change in the

1 dealer network. Rather it merely shows that there are, as there  
2 always are, sales that could be made in a given market that are not  
3 being made now. In addition, the method used will nearly always  
4 overstate the true extent of lost sales that might be gained. This  
5 is so as to the gross sales loss component because, as in the present  
6 case, it measures the difference between each *individual census tract*  
7 *in the RMA against the average of all census tracts in the comparable*  
8 *market* (here, the San Francisco Metro). This approach ignores the  
9 fact that census tracts, having as they do diverse populations and  
10 land uses, cannot reasonably be expected to perform at the average  
11 expected penetration in every case. For Toyota dealers in the RMA to  
12 capture all 954 lost sales would require the RMA to do what even the  
13 comparable area itself does not, i.e., to achieve sales of average or  
14 better in every census tract.

15 71. Mr. Frith's in-sell analysis likewise cannot be taken to  
16 mean that any possibility exists that the RMA dealers might capture  
17 all 1,940 sales now being made by dealers outside the RMA. The RMA  
18 is not a retail market, but a "relevant" market established by the  
19 legislature in defining the Board's jurisdiction. In a multiple  
20 market urban region such as the San Francisco Bay Area, consumer-  
21 shopping opportunities exist such that it would be unreasonable to  
22 expect any dealer, including the RMA dealers to capture more than  
23 some fraction of the total potential sales in a PMA.<sup>21</sup>

24 72. Mr. Roesner extended his analysis of the impact of the  
25 proposed relocation on Fremont Toyota by preparing a marginal  
26

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27  
28 <sup>21</sup> In this protest, where Piercey would be merely relocating a short distance and Fremont would not change at all, it is difficult to see how any change in in-sell rates would necessarily change.

1 contribution to profit analysis.<sup>22</sup> In general, marginal contribution  
2 analysis attempts to reflect the fact that it is only those last, or  
3 incremental, sales after fixed costs are covered that contribute to  
4 profits. Using Fremont Toyota 2003 sales and variable cost data for  
5 Fremont Toyota's retail sales, used car sales and service  
6 departments, Mr. Roesner determined that each retail vehicle sale  
7 contributes \$1,399, each used car sale contributes \$1,119, and each  
8 \$1,000 of service and parts contributed \$343 and \$172, respectively.  
9 Mr. Roesner attempted to apply this analysis by assuming a five  
10 percent reduction in sales across all departments, and calculating a  
11 loss in revenues thereby of \$465,437.

12 73. The probative value of this analysis is weakened by its low  
13 correlation coefficients, particularly for new vehicle sales. On  
14 cross examination, Respondent demonstrated that by making different  
15 assumptions at each step in Mr. Roesner's work, the resulting impact  
16 on Fremont Toyota's revenues could also be much less significant.<sup>23</sup>  
17 More particularly, Mr. Roesner's assumption of a five percent loss of  
18 sales in all departments is illustrative only and not based on any  
19 formal analysis of resulting sales losses. In any case, Mr. Roesner  
20 did not believe that even a hypothetical five percent loss in sales  
21 would make Fremont Toyota unprofitable or go out-of-business.

22 74. Both parties offered evidence of anecdotal relocation cases  
23 from areas outside the San Francisco Region. Not surprisingly,  
24 Protestant's anecdote, a case in Florida, showed that the protesting  
25

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26 <sup>22</sup> Mr. Roesner prepared a set of regression analyses to determine the statistical  
27 relationship between sales and profits. Except for used car sales and to a lesser  
28 extent, service and new vehicle sales, the statistical relationship for Fremont  
Toyota was weaker than for the average U.S. Dealer during the same time period.

<sup>23</sup> For example, Mr. Roesner chose sales and costs data for 2002, a year in which  
Fremont Toyota's profits were unusually high.

1 dealer there was harmed, and Respondent's anecdote from the Los  
2 Angeles area showed that sales for both the protesting and relocating  
3 dealers increased. Anecdotal evidence such of this must be accorded  
4 virtually no weight in that the circumstances of such cases are  
5 invariably different from the existing circumstances in the subject  
6 RMA that Section 3063 requires the Board to consider.

7 75. The evidence and testimony presented by both parties falls  
8 far short of providing any quantitative assessment of the effect of  
9 the proposed relocation on Fremont Toyota. Taken together, however,  
10 the evidence shows that the impact on Fremont Toyota, if any, would  
11 be slight, and will certainly not result in Fremont Toyota closing or  
12 becoming unprofitable.

#### 13 Effects on the Consuming Public

14 76. There is little controversy that the consuming public will  
15 benefit from the proposed new facilities Piercey intends to  
16 construct. Protestant however maintains that the proposed location  
17 is not "optimal" for Piercey's customers.

18 77. Both parties offered evidence of computer analyses that  
19 compute the shortest straight-line distances from the centroids of  
20 each census tract in the study area. Mr. Roesner presented five  
21 analyses with varying registration data sets and constraints on the  
22 dealer network. These consistently placed the optimal point a few  
23 miles east of Piercey's present location and along I-680.<sup>24</sup>

24 78. Using the same computer based technique, but constraining  
25 the optimal location to only sites where an existing dealer is  
26 located, Mr. Frith determined the optimal location would be just east

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27  
28 <sup>24</sup> The single exception was the analysis that assumed no dealers in the network.  
In this instance, the optimal location was about two miles south of Piercey's  
current location.

1 of Piercey's current location and a few miles south of the proposed  
2 location on I-880 at the location of an existing Ford dealer. Mr.  
3 Frith testified that unlike Protestant's models that are free to  
4 place the optimal location anywhere regardless of existing land uses,  
5 Mr. Frith's is more realistic in that it searches for a point where a  
6 dealership already exists such that zoning and other land use factors  
7 are likely to be favorable.

8 79. In virtually every instance, the optimal location for  
9 customer convenience was found to be a short distance east of  
10 Piercey's present location and either on I-680 or I-880. That the  
11 proposed location is a few miles to the north would not be  
12 substantially less convenient to customers since it would still be on  
13 the I-880 and reachable at freeway speeds by either the I-880 or the  
14 I-680 via the east-west links between the two provided by the 237  
15 Freeway and the Montague Expressway. In any event, Toyota presently  
16 ranks first along with Ford in average customer-to-dealer distance  
17 among the 25 line-makes represented in the RMA, and would do so even  
18 after the proposed relocation.

19 FINDINGS ON INJURY TO THE PUBLIC WELFARE  
20 [Section 3063(c)]

21 80. None of the evidence or testimony presented at the hearing  
22 tended to show that the proposed relocation would cause injury to the  
23 public welfare.<sup>25</sup> Since Piercey proposes to move from a tenancy on  
24 private land to a publicly owned land development project, the public  
25

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26 <sup>25</sup> The term "public welfare" is not expressly defined in Section 3063. The context  
27 in which the term is used implies a broader concern than with market and consumer  
28 issues since these are expressly addressed in Section 3063(b). Accordingly,  
Protestant's argument that the public welfare would be harmed because Piercey would  
be moving away from most of its present customers is considered elsewhere in this  
decision.

1 welfare of Santa Clara County may benefit directly from the rents  
2 Piercey will pay. The City of Milpitas may also benefit from  
3 additional sales tax revenue generated by the proposed  
4 location.

5 FINDINGS ON WHETHER THE RELOCATION WOULD INCREASE  
6 COMPETITION AND THEREFORE BE IN THE PUBLIC INTEREST  
7 [Section 3063(e)]

8 Intrabrand competition

9 81. Competition among Toyota dealers in the RMA generally would  
10 be increased to the extent that the proposed relocation would  
11 increase Piercey's attractiveness by way of the improved facilities,  
12 and a more visible and accessible freeway location. As to  
13 competition between Protestant and Piercey, competition would also be  
14 increased to the extent that the dealers would be 2.8 miles closer to  
15 each other and would have comparable facilities.

16 82. Both expert witnesses and Toyota's own studies of the  
17 relocation concluded that the increased competition would not be  
18 significantly harmful to Protestant. The relocation would not  
19 provide Piercey with facility and site advantages over Fremont  
20 Toyota, but rather would set Piercey on a more equal footing with  
21 Fremont Toyota than presently exists.

22 83. The 2.8-mile reduction in distance between Fremont Toyota  
23 and Piercey would have, if any, minimal effects on competition  
24 between the two. In the Bay Area<sup>26</sup>, there are 30 Toyota dealers  
25 closer than ten miles, with 22 of those closer than Piercey would be  
26 after the relocation. The majority of Fremont Toyota's sales now  
27 come from the area north of Fremont Toyota, while most of Piercey's  
28 customers are located to the south and east of both the present and

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<sup>26</sup> This includes the San Francisco, Oakland and San Jose Metros.

1 proposed location. With the relocation, Fremont Toyota and Piercey  
2 would be separated by about the same distance at which Fremont  
3 Toyota's penetration effectiveness substantially falls off. The  
4 population in the area between Fremont Toyota and the proposed  
5 location is confined in the main, to eight census tracts, all but two  
6 of which are already, and would remain, closer to Piercey than to  
7 Fremont Toyota.

#### 8 Interbrand Competition

9 84. Toyota dealers in the RMA have met or exceeded reasonably  
10 expected market penetration during 2000-2002. Although Toyota  
11 outsells Honda, Toyota's main passenger car competitor at the state  
12 and national level, Honda outsells Toyota in all three metros in the  
13 Bay Area. Honda presently outsells Piercey in its PMA, even without  
14 a facing Honda dealer there.

15 85. As explained above, Piercey's present facilities cannot  
16 meet the standards associated with Toyota's vision 2010 program. The  
17 relocation would contribute to the plan by offering improved  
18 facilities for increased UIO and new model display. The proposed new  
19 site has traffic volumes of 145,000 per day, more than double that at  
20 Piercey's present location. This would undoubtedly enhance Toyota's  
21 presence in the RMA.

#### 22 DETERMINATION OF ISSUES

23 86. The investment of Fremont Toyota is found to be permanent.  
24 The proposed relocation represents an investment that is as similar  
25 to that of Fremont Toyota as it is different from Piercey's present  
26 one, and in consideration of these facts, Piercey's investment is  
27 found to be permanent.

28

1 87. There is sufficient competitive opportunity to sustain the  
2 relocation. Consumer care in the RMA is inadequate in that Piercey  
3 Toyota's facilities and location will not sustain the demands of  
4 further growth in Toyota sales, and that Fremont Toyota is providing  
5 a low level of customer satisfaction.

6 88. The effect of the relocation on Fremont Toyota would be  
7 either none, or, at worst, a very small near term competitive loss of  
8 sales to Fremont Toyota. Fremont Toyota would not, however become  
9 unprofitable. The effect on the consuming public would be an  
10 increase in convenience and increased customer satisfaction.

11 89. The proposed relocation would not be injurious to the  
12 public welfare.

13 90. The proposed relocation would increase competition and  
14 therefore, be in the Public interest.

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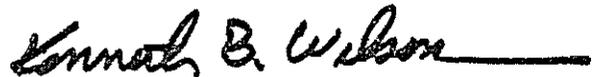
28 ///

1 CONCLUSION

2 In consideration of the evidence and testimony adduced and the  
3 arguments presented at the hearing in this matter, Protestant has  
4 failed to establish that there is good cause for not relocating  
5 Piercey Toyota. Accordingly, the protest should be and is herewith  
6 OVERRULED. Respondent may proceed with the proposed relocation  
7 without further action by the Board.

8  
9  
10 I hereby submit the foregoing  
11 which constitutes my proposed  
12 decision in the above-entitled  
13 matter, as the result of a hearing  
14 before me and I recommend this  
15 proposed decision be adopted as  
16 the decision of the New Motor  
17 Vehicle Board.

18 DATED: April 2, 2004

19 

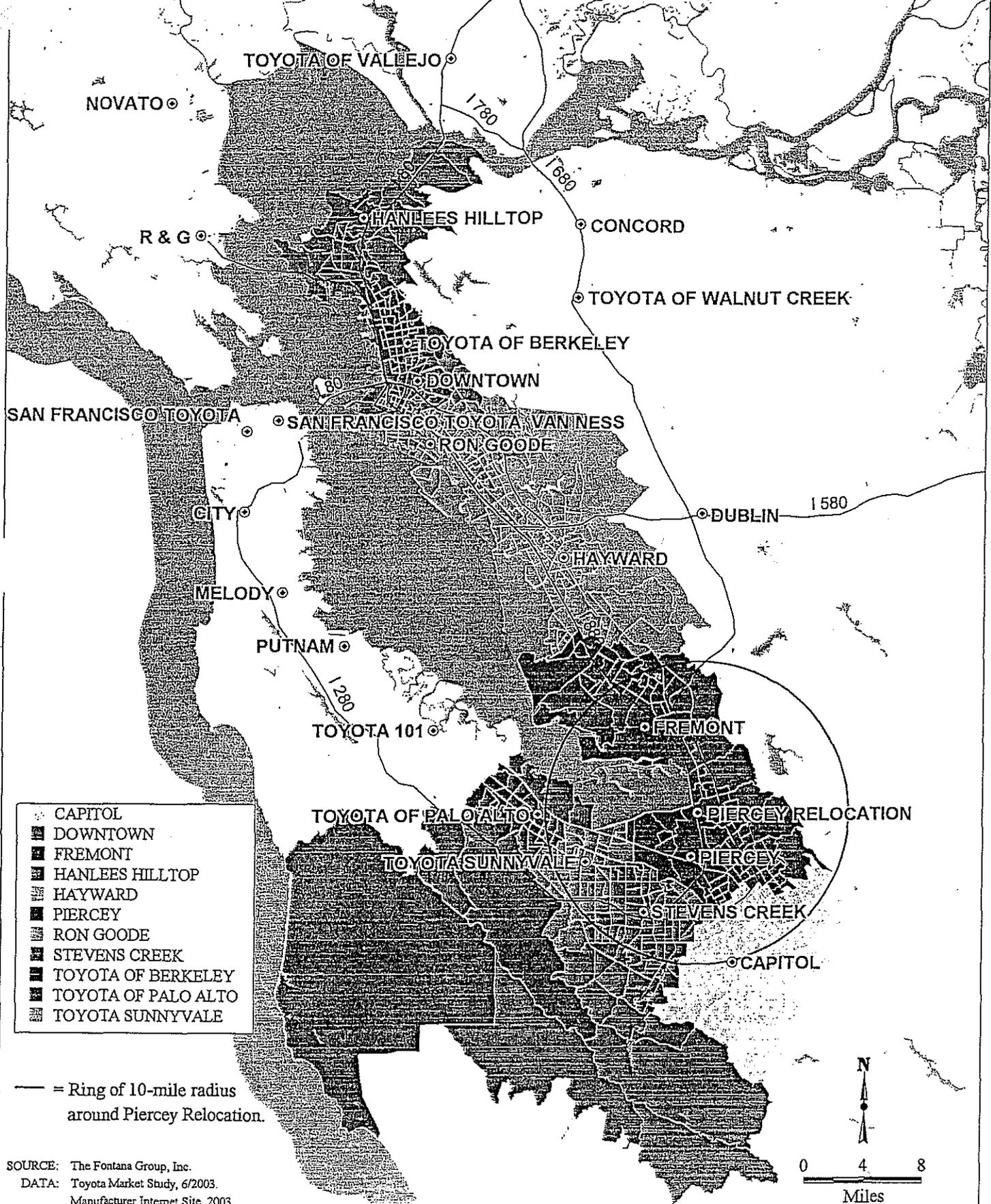
20 By: \_\_\_\_\_  
21 KENNETH B. WILSON  
22 Administrative Law Judge  
23  
24

25 Attachments

26  
27 Chon Gutierrez, Director, DMV  
28 Mary Garcia, Manager  
Occupational Licensing, DMV  
I:/Board/04board/April.22.General/1844 Proposed Decision

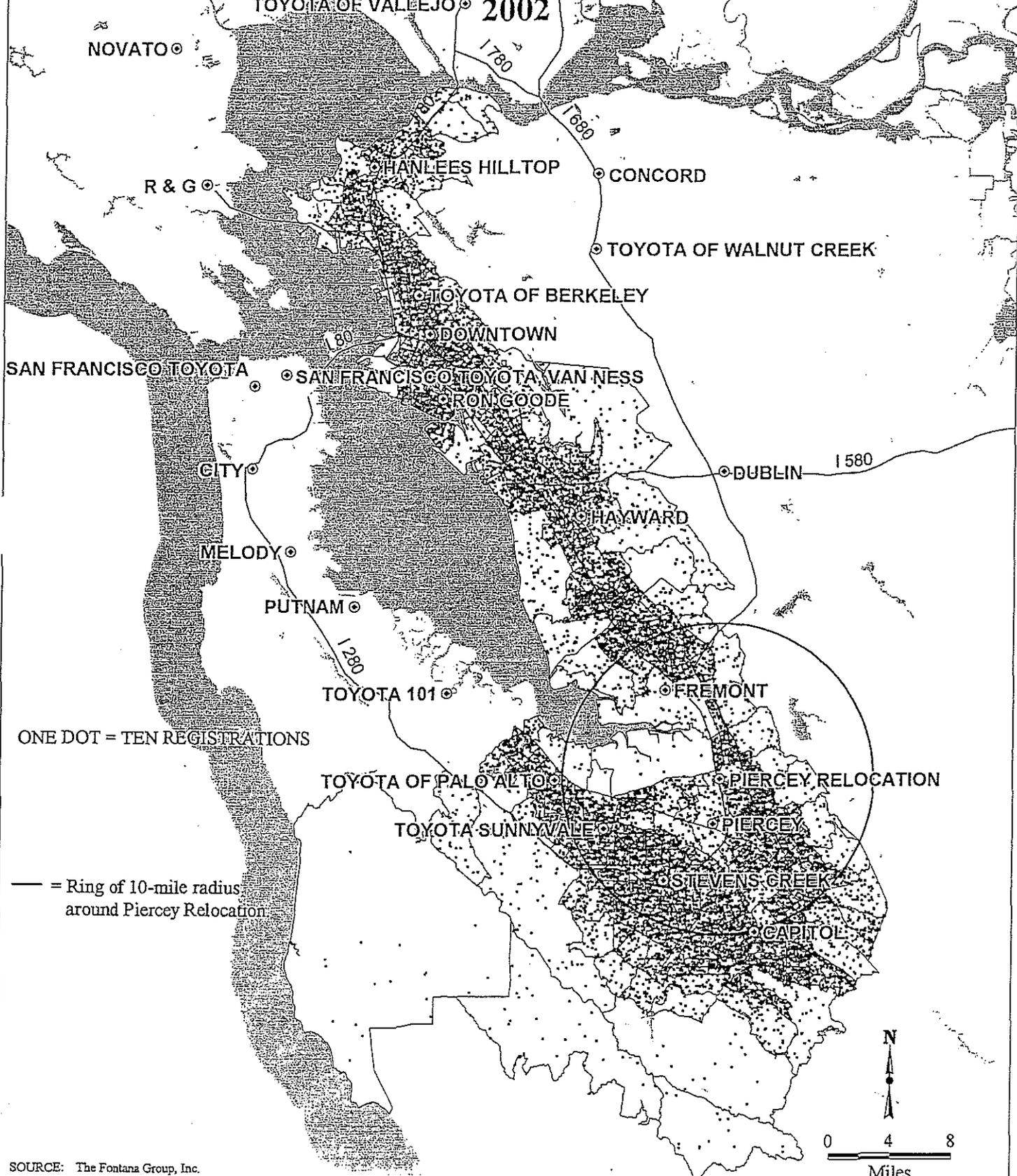


# TOYOTA PMAs OAKLAND AND SAN JOSE METROS BY CENSUS TRACT



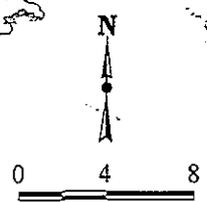
# NEW INDUSTRY RETAIL CAR + LIGHT TRUCK REGISTRATIONS OAKLAND AND SAN JOSE METROS BY CENSUS TRACT

TOYOTA OF VALLEJO 2002



ONE DOT = TEN REGISTRATIONS

— = Ring of 10-mile radius around Piercey Relocation.



SOURCE: The Fontana Group, Inc.  
DATA: Manufacturer Registration Data File (Magnetic Media), 2002.