

NEW MOTOR VEHICLE BOARD  
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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

WALTER TIMMONS ENTERPRISES, INC., dba  
TIMMONS VOLKSWAGEN,

Protestant,

v.

VOLKSWAGEN GROUP OF AMERICA, INC.,

Respondent.

**Protest No. PR-2146-09**

DECISION

At its regularly scheduled meeting of December 10, 2009, 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 10<sup>th</sup> DAY OF DECEMBER 2009.

  
ROBERT T. (TOM) FLESH  
Vice President  
New Motor Vehicle Board

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9 NEW MOTOR VEHICLE BOARD  
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11 In the Matter of the Protest of

12 WALTER TIMMONS ENTERPRISES, INC., dba  
13 TIMMONS VOLKSWAGEN,

14 Protestant,

15 v.

16 VOLKSWAGEN GROUP OF AMERICA, INC.,

17 Respondent.  
18

**Protest No. PR-2146-09**

**PROPOSED DECISION**

19 **PROCEDURAL BACKGROUND**

20 **Statement of the Case**

21 1. By letter dated February 2, 2009, Volkswagen Group of America, Inc. gave notice to  
22 Walter Timmons Enterprises, Inc. pursuant to California Vehicle Code section 3062<sup>1</sup> of its intention to  
23 relocate McKenna Volkswagen, a Volkswagen dealership currently located in Norwalk, California, to the  
24 Cerritos Auto Square. Timmons Volkswagen is located within the relevant market area (“RMA”) of the

25 ///

26 ///

27 \_\_\_\_\_  
28 <sup>1</sup> Unless otherwise indicated, all statutory references are to the California Vehicle Code.

1 proposed relocating dealer.<sup>2</sup> The New Motor Vehicle Board received the notice on February 4, 2009.

2 2. On February 9, 2009, Timmons Volkswagen filed a timely protest.

3 3. A hearing on the merits of Protest No. PR-2146-09 was held June 29 through July 3,  
4 2009, and July 6 through July 9, 2009, before Administrative Law Judge Diana Woodward Hagle.

5 4. During the hearing, Respondent's motion for a protective order in regard to testimony  
6 and documentary evidence concerning the content of a Relocation Agreement between Volkswagen  
7 Group of America, Inc. and Daniel J. McKenna, III (the owner of the proposed relocating dealer) was  
8 granted.

9 5. Following the hearing, Protestant's motion to re-open the record to provide evidence of  
10 dealership closures in the Cerritos Auto Square was granted.

11 6. The matter was submitted on October 23, 2009.

12 **Parties and Counsel**

13 7. Protestant Walter Timmons Enterprises, Inc. dba Timmons Volkswagen (herein  
14 "Timmons Volkswagen" or "Protestant") is a Volkswagen dealership located at 3940 Cherry Avenue in  
15 Long Beach, California. It is a corporation owned by Greg Timmons and Erika Timmons. Protestant is  
16 a "franchisee" within the meaning of sections 331.1 and 3062(a)(1).

17 8. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J.  
18 Flanagan, Esquire, and Gavin M. Hughes, Esquire, 2277 Fair Oaks Boulevard, Suite 450, Sacramento,  
19 California.

20 9. Respondent Volkswagen Group of America, Inc. (herein "Volkswagen" or  
21 "Respondent") is a "franchisor" within the meaning of sections 331.2 and 3062(a)(1).

22 10. Respondent is represented by Jeffer, Mangels, Butler & Marmaro LLP, by Allen Resnick,  
23 Esquire, and Amy Lerner Hill, Esquire, 1900 Avenue of the Stars, Seventh Floor, Los Angeles,  
24 California.

25 11. Daniel J. ("Danny") McKenna, III (not a party to this proceeding) is "...the president and

26 ///

27 \_\_\_\_\_  
28 <sup>2</sup> Such notice is required whenever a franchisor seeks to relocate an existing motor vehicle dealership if there is a dealership of the same line-make within a radius of 10 miles from the site of the proposed new location. [Sections 3062(a)(1) and 507]

1 owner of McKenna Porsche, BMW, Volkswagen and Audi in Norwalk...".<sup>3</sup> He is represented by  
2 Venable LLP, by Aaron H. Jacoby, Esquire. The McKenna Volkswagen dealership in Norwalk  
3 (hereafter, "McKenna VW-Norwalk") is located at 10850 Firestone Boulevard, Norwalk, California.

4 **Summary of Witnesses' Testimony and Exhibits Introduced at Hearing**<sup>4</sup>

5 *Protestant's Witnesses' Testimony and Exhibits*

6 12. Greg Timmons (President and General Manager of Protestant Walter Timmons  
7 Enterprises, Inc., which includes Timmons Volkswagen and Timmons Subaru) testified to the ownership  
8 and history of Timmons Volkswagen, a description of the facilities, and the effect of a competing dealer  
9 in the Cerritos Auto Square.

10 13. April Somers (General Sales Manager for Timmons Volkswagen) testified about  
11 Protestant's sales campaigns and budget.

12 14. Danny McKenna, the dealer principal of McKenna VW-Norwalk, testified about his  
13 dealership and events leading to his purchase of the former Volvo site in the Cerritos Auto Square,  
14 including the negotiation of a Relocation Agreement with Volkswagen Group of America.

15 15. Pursuant to Evidence Code section 776<sup>5</sup>, Protestant called as witnesses Volkswagen  
16 employees Steven Mears (Director for the Western Region) and Malcolm R. ("Randy") Pressgrove  
17 (General Manager for Network Development), both of whom testified about the events surrounding the  
18 decision to relocate McKenna VW-Norwalk in the Cerritos Auto Square.

19 16. Pursuant to a stipulation by the parties, Protestant submitted portions of the deposition  
20 testimony of Steven Smith (Sales Operations Manager for Volkswagen's Area 52), who testified about  
21 the facilities and sales performances of the two McKenna Volkswagen dealerships, Norwalk and  
22 Huntington Beach. (Exhs. F, 113)

23  
24 <sup>3</sup> The phrase in quotes appears at IV:102. Actually, "McKenna Motor Company, Inc. ...[is] the company under which  
25 [Danny McKenna] operate[s] the Volkswagen franchise in Norwalk along with [his] other lines." (IV:156-157)

26 <sup>4</sup> Since most exhibits were marked for identification by the parties prior to the hearing, they were not offered or introduced  
27 in numerical order; also, some pre-marked items may not have been used in the hearing at all, so there may be numerical gaps  
28 in the Exhibit List, which includes Exhibits A through F and 1 through 394. Finally, because of the large number of exhibits,  
several single exhibit numbers may contain many different, but related, documents.

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

<sup>5</sup> Evidence Code section 776 permits a party (here, Protestant) to call as a witness an employee of an adverse party (here,  
Respondent) and to examine the witness as if under cross-examination, i.e., to use leading questions in its direct examination.

1 17. Protestant's expert witness was Joseph Roesner, Vice President, The Fontana Group.  
2 (Exh. 107)

3 Respondent's Witnesses' Testimony and Exhibits

4 18. The following Volkswagen employees were called as witnesses and testified as to the  
5 organization of Volkswagen management, relationships with and assessments of the performances of  
6 dealer principals Greg Timmons and Danny McKenna, and the desirability of Volkswagen having a  
7 presence in the Cerritos Auto Square: Steven Mears; Malcolm R. "Randy" Pressgrove; Anthony Ray  
8 (Network Development Manager for the Western Region); Bob Martin (Fixed Operations Manager for  
9 Volkswagen's Area 53); and Kevin Sellers (former Sales Operations Manager for Area 53). Jennifer  
10 Miner (Sales Operations Manager for Area 53), also testified concerning her development of a  
11 performance assessment report format she called "octagon reports".

12 19. Danny McKenna testified to the operation of McKenna Volkswagen of Norwalk; his  
13 development of the BMW, Porsche and Audi franchises in Norwalk and his Marketplace Volkswagen  
14 store in Huntington Beach; and his efforts to conform the Norwalk store to Volkswagen's Marketplace  
15 standards. He testified that, in his opinion, the Cerritos Auto Square and Long Beach---where Timmons  
16 Volkswagen is located---are two separate markets (they are "freeway markets") and, if he is allowed to  
17 relocate, Timmons Volkswagen would be strengthened by the competition he would provide.

18 20. Pursuant to a stipulation by the parties, Volkswagen submitted portions of the deposition  
19 testimony of Thomas Summers (Protestant's Controller), who testified that he charged to business  
20 accounts \$4,000/month for the Timmons' boat. (Exhs. F, 394)

21 21. John Frith, Vice President, Urban Science Applications, Inc., was called as Respondent's  
22 expert witness. (Exh. 379)

23 Post-Hearing Request to Re-Open Record

24 22. Protestant's post-hearing request to re-open the record was granted to provide additional  
25 evidence about dealership closures in the Cerritos Auto Square. Protestant submitted declarations of  
26 Greg Timmons, Chuck Moore (Sales Manager of Timmons Subaru), and Mike Alusick (Service  
27 Manager of Timmons Volkswagen and Timmons Subaru); Respondent submitted declarations of Dave  
28 Conant, (the owner of the former Subaru franchise in the Cerritos Auto Square) and Danny McKenna.

1 **ISSUE PRESENTED**

2 23. The following issue is presented in this protest: Did Protestant (a dealership within the  
3 ten mile radius of the proposed relocation site) sustain its burden of proof of showing "good cause" to  
4 preclude Respondent from relocating a dealership?

5 24. Under Section 3062(a)(1), when a timely protest has been filed, a franchisor is not  
6 permitted to relocate an existing motor vehicle dealership until a hearing has been held before the Board,  
7 nor thereafter if Protestant establishes at the hearing that there is good cause not to permit the relocation.  
8 (Section 3066)

9 25. In determining whether there is good cause for not relocating a franchise for the same  
10 line-make, section 3063 requires the New Motor Vehicle Board to take into consideration the existing  
11 circumstances including, but not limited to, all of the following:

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

23 **PROTESTANT'S CONTENTIONS**

24 26. The decision to relocate McKenna VW-Norwalk was "hasty", not supported by market  
25 studies or evaluations or any analysis of the likely negative impact to Timmons Volkswagen or the  
26 consuming public. The consequent proposed reduction of the Primary Area of Influence ("PAI")  
27 assigned to Timmons Volkswagen was similarly made without a market study or consideration of the  
28 impact on Timmons Volkswagen.



1 caused by the two major dealerships in the RMA: Timmons Volkswagen, which has shown an  
2 unwillingness or inability to invest in its business and provide a better experience for its customers; and  
3 McKenna VW-Norwalk, which does not have a proper facility. There is a substantial amount of room  
4 for growth within the RMA and the relocation of McKenna Volkswagen from Norwalk to Cerritos will  
5 help achieve better results.

6 36. Although McKenna VW-Norwalk is an underperformer, its dealer principal Danny  
7 McKenna is the ideal choice to relocate his dealership to the Cerritos Auto Square. He is "aggressive"  
8 and has built a Volkswagen dealership in Huntington Beach "with all the bells and whistles", which has  
9 been a highly successful showcase for the brand. Danny McKenna is committed to providing a  
10 Marketplace dealership in the auto mall, a stand-alone facility with dedicated staff and technicians,  
11 which will effectively serve the public and the Volkswagen brand. If he is permitted to relocate  
12 McKenna VW-Norwalk and realize his potential, there would be a positive effect on competition and the  
13 consuming public because prices would tend to go down.

14 37. McKenna VW-Norwalk will be relocating within its own current PAI; the new location  
15 would be a short drive from the current location and only a few minutes closer to Timmons Volkswagen.

16 38. Even though the two dealerships would only be 4.6 miles from each other, that fact, taken  
17 in isolation, is misleading. It is difficult to traverse the two locations via surface streets and, more  
18 importantly, they are accessed by two different freeway systems, the 405 and the 605. These are two  
19 separate and distinct "freeway markets": Timmons Volkswagen's market in Long Beach is along the  
20 405 Freeway corridor and McKenna's market in Norwalk and Cerritos is along the 605 Freeway  
21 corridor.

22 39. Timmons Volkswagen's current PAI is too large for it to handle; with the relocation  
23 approved, Timmons Volkswagen's PAI will be "right-sized" to a more realistic level which, in turn, will  
24 result in more attainable bonuses.

25 40. Relocating the McKenna dealership will not harm Timmons Volkswagen and will, most  
26 likely, benefit Protestant by increasing brand awareness and putting more Volkswagen vehicles in  
27 operation. If Timmons Volkswagen does lose sales because of the relocation, it is because of its  
28 "complacent" competitive attitude, as shown by its inadequate advertising and marketing strategies,

1 failure to offer competitive prices, poor customer service, and weak Internet sales. As evidence of  
2 Timmons Volkswagen's lackluster performance, it failed to capture the market left behind when Circle  
3 Volkswagen relocated to Garden Grove.

4 **FINDINGS OF FACT**<sup>6</sup>

5 **Preliminary Findings**

6 41. Volkswagen Group of America, Inc. is proposing to relocate a Volkswagen franchise  
7 ("McKenna VW-Norwalk") to the Cerritos Auto Square. The proposed site, a former Volvo dealership,  
8 was purchased sometime after April 2009 by the owner of the franchise, Daniel J. ("Danny") McKenna,  
9 III, with substantial financial assistance from Volkswagen. Even if the relocation is approved, Danny  
10 McKenna will retain ownership of the property in Norwalk where his Volkswagen dealership is  
11 currently located, part of a large complex which includes his BMW, Audi, and Porsche franchises. The  
12 impetus to relocate the McKenna VW-Norwalk dealership is Danny McKenna's decision to purchase  
13 the site in the auto mall. The proposed site is within the current Primary Area of Influence ("PAI")<sup>7</sup> of  
14 McKenna VW-Norwalk, albeit in a census tract on its southwest edge which borders the PAI of  
15 Timmons Volkswagen, the protesting dealer. (Exhs. B; 90; 379 at A-2, A-4)<sup>8</sup>

16 42. Although Volkswagen had long expressed interest in locating a dealer in the Cerritos  
17 Auto Square, it had not conducted a market study or analysis of the auto mall to assess feasibility and  
18 impact on other dealers and the competition until after the instant Protest was filed. The proposed  
19 relocation site is not an open point.

20 43. The Cerritos Auto Square is the largest volume auto mall in the country. It is a  
21 "destination" auto mall and dealerships located there have enjoyed a competitive advantage because  
22 consumers may compare brands easily. Historically, it has been a desirable place to locate a dealership.  
23 However, the historical desirability of having a dealer in the Cerritos Auto Square, if measured by the  
24

25 <sup>6</sup> References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding  
26 and are not intended to be all-inclusive.

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

<sup>7</sup> "Primary Areas of Influence" or "PAI's" are discussed *infra*.

<sup>8</sup> References herein to Roman Numerals are to transcripts of the proceedings. References to "Exh." are to Exhibits.

1 former difficulty of obtaining a site in the auto mall, is now questionable, as there are two other now-  
2 vacant lots available for sale there. Only new-vehicle dealers are allowed in the auto mall, per use  
3 permits issued by the City of Cerritos. (Exhs. 104; 391 at p. 3; IV:210-211)

4 44. The proposed site of the McKenna Volkswagen dealership in the "Cerritos Auto Square"  
5 is 4.6 miles from Timmons Volkswagen. Currently, the distance between Timmons Volkswagen and  
6 McKenna VW-Norwalk is 7.5 miles. McKenna VW-Norwalk would be moving south approximately  
7 four miles down the 605 Freeway, variously described as between a four to ten minute drive. (Exhs. 107  
8 Tab 2 pp. 9, 10; 379 at A-4)

9 45. The Relevant Market Area ("RMA") is the area within a radius of ten miles centered on  
10 the proposed relocation site in Cerritos. (Exhs. C; 107 Tab 2 pp. 2, 3)

11 46. The RMA is significantly different from Volkswagen's "Los Angeles Market" (discussed  
12 below); the RMA extends well beyond the southern boundary of the "Los Angeles Market". Two  
13 dealerships, Timmons Volkswagen and McKenna VW-Norwalk, are located in the RMA. Volkswagen  
14 of Garden Grove is only a short distance (1.4 miles) outside the RMA to the southeast. The RMA  
15 covers a substantial portion of the PAI of VW of Garden Grove as well as a handful of census tracts of  
16 the PAI of McKenna VW-Huntington Beach (also owned by Danny McKenna). (Exhs. 107 Tab 2, p. 9;  
17 379 at A-7)<sup>9</sup>

18 47. Volkswagen began selling cars in the United States in 1955. It plans to spend about a  
19 billion dollars building a new factory in Chattanooga, Tennessee, which will be rolling out new  
20 Volkswagen vehicles in 2011. It will be introducing five new models in the next three to five years,  
21 including a new "green" car. (III:16)

22 48. Volkswagen's primary competitors are Nissan, Honda, Toyota and Mazda. (Exhs. 108;  
23 379 at A-11; II:144, 201; V:244-5)

24 49. Timmons Volkswagen, McKenna VW-Norwalk and the proposed site in the Cerritos  
25 Auto Square are in the southeasterly part of a larger urban region which Volkswagen, for marketing

26 \_\_\_\_\_  
27 <sup>9</sup> The record does not include a map of the current PAI's in the area with the RMA circle imposed on the page. Instead, one  
28 must refer to Exhibit 107 at Tab 19, p. 1 and Exhibit 379 at A-7 to get that information.

1 purposes, has designated the "Los Angeles Market". (Exh. 379 at p. A-2)

2 50. For a variety of corporate purposes (e.g., marketing, dealer evaluations and incentives),  
3 Volkswagen has also designated smaller geographical areas---each composed of a set of census tracts---  
4 that it calls "Primary Areas of Influence" or "PAI's". Volkswagen assigns to each dealer a "PAI", the  
5 territory generally surrounding the dealership, in which the dealer has a geographic, and hence a  
6 presumably competitive advantage over other Volkswagen dealers. The PAI defines the area where  
7 Volkswagen expects the dealer to influence the market. PAI's are also assigned around locations where  
8 Volkswagen contemplates that a dealership may be added in the future; these PAI's are called "open  
9 points". A dealer may, of course, sell to customers living outside its assigned PAI ("pump-outs") and,  
10 conversely, another Volkswagen dealership may sell to a customer residing inside the dealer's PIA  
11 ("pump-ins"). (Exh. 379 at A-1, A-3; V:243-244; VIII:85-87)

12 51. Volkswagen's "Los Angeles Market Area" is currently composed of twelve PAIs (ten  
13 active VW dealers and two "open points"): Pacific VW (Hawthorn), VW Pasadena, Bozzani Motors  
14 (Covina), VW of Downtown (Los Angeles), VW Santa Monica, Livingston VW (Woodland Hills), VW  
15 of Van Nuys, New Century VW (Glendale), Timmons VW (Long Beach) and McKenna VW (Norwalk),  
16 as well as the City of Industry Open Point and the Alhambra Open Point. (Exh. 379 at A-2)

17 52. The area assigned to Timmons Volkswagen is called the "Timmons PAI", the "Long  
18 Beach PAI" or "PAI 516". It is on the southeast edge of the "Los Angeles Market", bordering the PAI  
19 assigned to McKenna VW-Norwalk. (Exh. 379 at A-2)

20 53. Also on the southeast edge of the "Los Angeles Market" is the area now assigned to  
21 McKenna VW-Norwalk, the "McKenna Norwalk PAI" or "PAI 567". Cerritos Auto Square is in the  
22 "McKenna Norwalk PAI", but just barely; it is right on the edge of the PAI border with the "Timmons  
23 PAI". (Exhs. 107, p. 3; 379 at A-2.)

24 54. If the relocation is allowed, Volkswagen would change the boundaries of the PAI  
25 currently assigned to McKenna VW-Norwalk and would call it the "Cerritos PAI". The proposed  
26 revision would increase the number of census tracts assigned to the McKenna Volkswagen dealership in  
27 the Cerritos Auto Square, mainly at the expense of the Timmons PAI, which will be substantially  
28 reduced. Other adjacent PAI's would be impacted as well, with the "Cerritos PAI" shifting significantly

1 southward from the present "McKenna Norwalk PAI". (Exh. 107 at Tab 19, p. 1)

2 55. Volkswagen did not conduct a market study or analysis in regard to the revision of the  
3 PAI boundaries caused by the deletion of the "McKenna Norwalk PAI" and the creation of the "Cerritos  
4 PAI" until after the instant Protest was filed.

5 56. Volkswagen has a dealer incentive program called Business Performance Bonus (BPB),  
6 which rewards dealers for meeting or exceeding sales targets which Volkswagen establishes, based upon  
7 each dealer's PAI---dealers get increasingly larger bonuses the more cars they sell within their PAIs.  
8 (V:237-240; VI:69, 71, 87-89)

9 57. Volkswagen's Marketplace Facility program involves building or upgrading a dealership  
10 facility to meet Volkswagen's corporate design and architectural standards. The program includes a range  
11 of facility levels with Marketplace A being the highest standard and Marketplace D being the lowest. The  
12 Marketplace requirements are optional for dealers who do not relocate or sell their business, but are  
13 mandatory for new or relocating dealers. In Southern California, 65% to 70% of Volkswagen dealers have  
14 Marketplace facilities. (I:93; III:81-83; V:101-06, 160-162)

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

16 **Protestant Walter Timmons Enterprises, Inc. dba Timmons Volkswagen**

17 58. In 1977, Walter Timmons (father of Greg Timmons, the current dealer principal) bought  
18 the Bill Barry Volkswagen dealership (excluding the real estate) at 3940 Cherry Avenue in Long Beach  
19 for \$350,000, plus approximately \$100,000 for signage, tools and equipment. This remains the current  
20 location of the dealership. Timmons Volkswagen leased the land until 2006, when Greg Timmons took  
21 over Bill Barry Corp. (the lessor), then dissolved it. Timmons Volkswagen now has a 20-year lease  
22 (until 2026) with Timmons Properties II, LLC, owned in equal shares by Greg Timmons and Erika  
23 Timmons. (II:70-71)

24 59. Greg Timmons "grew up in the business" and has worked at the dealership since the age  
25 of 16. Now, as general manager, he runs the day-to-day operations; he is 49% owner and his mother  
26 Erika (widow of Walter, who died in 1990) owns 51% of the business. (II:58)

27 60. Around 1993, Timmons acquired a Subaru franchise. The split of business between the  
28 two brands is roughly 80% Volkswagen and 20% Subaru. (I:90, 97)

1           61.     For several years after acquiring the Subaru franchise, Timmons Volkswagen and  
2 Timmons Subaru were located on the same lot. In 2000, Volkswagen encouraged Timmons  
3 Volkswagen to upgrade its facility to Marketplace standards, which meant separating the showrooms of  
4 the two franchises. Greg Timmons bought an adjacent half-acre parcel and built a separate 2,000  
5 square-foot showroom for Subaru, spending about \$850,000 and receiving \$100,000 from Subaru for the  
6 project. (Earlier, in 1992, pursuant to VW's "Slice Facility Program", Timmons Volkswagen had  
7 remodeled, buying new furniture, installing tile flooring and painting the facility the Volkswagen color  
8 scheme of the time.) (I:92-95; II:28; III:8)

9           62.     Timmons Volkswagen spent around \$800,000 to upgrade its facility to a Volkswagen  
10 Marketplace "C" level, and was reimbursed \$250,000 by Volkswagen. In addition to the \$550,000 that  
11 Timmons Volkswagen spent on the Marketplace upgrade, it paid an additional \$45,000 to \$50,000 for a  
12 new Volkswagen sign. The project was completed in 2002. (Exh. 105; I:93-96)

13           63.     The Timmons complex has 27,000 square feet "under-roof", most of which is dedicated  
14 to Volkswagen. In this building are located the Volkswagen showroom (the Subaru showroom is next  
15 door in a separate building) and the combined Volkswagen-Subaru service department. Greg Timmons  
16 recently leased, for \$100,000 over a five-year period, a new ADP accounting and management system.  
17 (I:104-106)

18           64.     The Timmons Volkswagen showroom is large enough to display four vehicles and meets  
19 all Volkswagen requirements (mural image in the back, portal entrance, and Volkswagen tile, colors and  
20 lighting). The customer lounge area is several hundred square feet and has a new flat-screen TV, new  
21 furniture and offers free Wi-Fi and coffee. (Exh. 105; I:103-104, 115-116)

22           65.     The size of the service department is 12,000 square feet, 2,000 of which is devoted to a  
23 "unit room" for special machinery tools and warranty car parts storage. There are a total of 20 hoists  
24 (service bays) in the shop, 17 of which are dedicated to Volkswagen. Of the 17 service technicians  
25 employed by the Timmons dealerships, 14 are "trained Volkswagen technicians". (Exh. 105; I:98, 105-  
26 108; III:8)

27           66.     Recent upgrades in the service department include the installation of six large air  
28 ventilators, improved lighting, new benches, toolboxes which hang on the walls, as well as repainting

1 the building inside and out. A new tire changing machine balancer cost \$10,000. Greg Timmons has  
2 purchased Electronic Repair Order from ADP for \$40,000; this makes service more efficient by  
3 generating repair orders to technicians and simultaneously alerting the rear parts counter men of parts  
4 needed for the repairs. (I:98, 104-108; III:8)

5 67. Timmons Volkswagen meets the manufacturer's requirements for special tools and  
6 equipment. When new models come out, Greg Timmons purchases whatever tooling requirements that  
7 Volkswagen requires; in the last six months, Timmons Volkswagen has upgraded to all the latest  
8 alignment rack requirements. (I:104, 113-114)

9 68. Timmons' parts department is almost 5,000 square feet, on two levels, serving both  
10 Volkswagen and Subaru. Because of recent growth in inventory, the dealership built a separate sheet  
11 metal garage of about 1,000 square feet housing large parts, tires, engines and transmissions. The  
12 average value of the parts and accessories inventory is \$330,000. Timmons makes parts deliveries  
13 throughout Los Angeles. (I:114-115)

14 69. The two Timmons dealerships employ approximately 70 people with a 2008 annual  
15 payroll of \$3.3 million. Many of Timmons' employees have worked there a long time. There are four  
16 departments: Sales, Service, Parts and Business. Two of the three sales managers are dedicated to  
17 Volkswagen, one is 80% Subaru. The employees whose functions apply to both brands split their time  
18 80% Volkswagen and 20% Subaru, reflecting the business split between the two line-makes. (I:97-98)

19 70. For many years and to the present time, Timmons Volkswagen has been undercapitalized  
20 by Volkswagen standards, although it meets all other minimum financial requirements. Volkswagen,  
21 however, has never requested that Timmons Volkswagen bring its capitalization up to minimum  
22 standards. (Exh. 304; III:20-23)

23 Current McKenna Volkswagen-Norwalk Dealership

24 71. Danny McKenna's "small auto mall" (his words) on Firestone Boulevard in Norwalk is  
25 impressive. An aerial view of the complex (Exh. 391, p.1) reveals the vast extent of the operation, as  
26 well as its proximity to the 605 Freeway. It consists of four dealerships: three premium line-makes---  
27 BMW, Porsche and Audi---and Volkswagen. It boasts a separate large parking structure serving all  
28 brands. This extremely desirable location attracts prospective buyers to the premium brands. Since it is

1 at or near the junction of several freeways and major arterials and lots of other freeways cross the 605  
2 Freeway, it is convenient to drive to via freeway; 60 per cent of McKenna's business is repeat  
3 customers, who come from all over, not just close by. Danny McKenna believes his success with those  
4 premium brands is because of his dealerships' positioning near the "freeway system". (Exhs. B; 77; 379  
5 at A-7; 107 at Tab 2 p. 2; 391; IV:239)

6 72. In 1998, at a time when Danny McKenna (and his father before him) had owned the  
7 dealerships and the real estate in Norwalk for several decades, he undertook a massive construction and  
8 expansion project, acquiring additional property to do so. He followed a timetable of building new  
9 stand-alone dealership facilities by brand, with the premium brands first in line. (Exh. 77)

10 73. Danny McKenna wanted to sell his Volkswagen franchise in 2004, but nothing came of  
11 it. In late 2005, when his new Audi dealership was completed, he used it to house his Volkswagen  
12 dealership, on a temporary basis, since he still wanted to sell the Volkswagen franchise; "dualing" of the  
13 two brands made both Volkswagen and Audi "unhappy". (Exh. 77; IV: 115-122)

14 74. Any buyer of the McKenna Volkswagen franchise in Norwalk would have to find a new  
15 location for it, since it is embedded in the McKenna complex. The new location would not have to be in  
16 the Cerritos Auto Square. Although Danny McKenna and Volkswagen discussed the possibility of a  
17 buyer of the McKenna VW franchise moving it to the Cerritos Auto Square, Volkswagen did not  
18 conduct a market study or analysis in regard to the auto mall (or any other site) as a possible location for  
19 McKenna's Volkswagen dealership until after the instant Protest was filed.

20 75. In or before May of 2006, Danny McKenna's plan for Volkswagen apparently changed:  
21 he decided to build a stand-alone Volkswagen dealership across Firestone Boulevard, on property he  
22 owned on which used cars were being stored (the used cars would move to the parking structure). He  
23 assured Volkswagen that "the Volkswagen project" would start in March or April of 2007. This  
24 promise has not been fulfilled, and Volkswagen remains in McKenna-Audi's building. (Exhs. 77, 78)

25 76. McKenna Volkswagen has a low profile, since it is housed in the Audi store; there is  
26 minimal Volkswagen signage on the building and few, if any, Volkswagen vehicles are displayed in  
27 either the showroom or around the building. The facility is "adequate, but not ideal"; one of the  
28 detriments of the facility is the displaying of new Volkswagen vehicles on a paved lot across the street

1 from the dealership. (Exhs. F, 113)

2 77. Establishing a better Volkswagen facility than the present one on the McKenna complex  
3 is feasible, since Danny McKenna promised just that over a period of several years and Volkswagen  
4 representatives accepted the promises.

5 Proposed McKenna Location in Cerritos Auto Square

6 78. The proposed location in the Cerritos Auto Square is just under three acres, with a 34,000  
7 square foot building. The former site of a Volvo store, it is located on a corner lot with eighteen service  
8 bays. (Exhs. 104; Exh. 391, p. 3; IV:240)

9 79. Since 2008, Danny McKenna had been looking for a new site for his Volkswagen  
10 dealership. He made a "cold call" to AutoNation which, after negotiations, sold the property to him for  
11 \$6.8 million. Escrow closed on an unknown date sometime after April 16, 2009. A substantial portion  
12 of the payment was made by Volkswagen Group of America. (Exh. 90)

13 80. Danny McKenna is using the lot to sell used cars under a temporary permit issued by the  
14 City of Cerritos, which does not want the auto mall to look "dark", as at least two other dealerships have  
15 vacated. The lot is unsalable, because of the vacancies. (IV:211, 269-270)

16 81. Danny McKenna intends to establish a freestanding Marketplace Volkswagen dealership  
17 on the lot, with a dedicated staff and service department. (IV:204)

18 Findings Relating to Effect on the Retail Motor Vehicle Business and

19 The Consuming Public in the Relevant Market Area [Section 3063(b)]

20 82. Dealerships in the RMA other than Volkswagen are generally clustered; the largest  
21 cluster, of course, is the Cerritos Auto Square. The second largest cluster is the Long Beach-Signal Hill  
22 area, where Timmons VW is located at the north end of the group. Other clusters are in Buena Park,  
23 South Gate, Carson and Norwalk (where McKenna VW is located). (Exh. 379 at A-7, A-78)

24 83. Inevitably, a relocation means that a geographical area has been abandoned. The  
25 relocation of McKenna VW-Norwalk out of the area would have the following effects on Norwalk:

26 A. McKenna VW is moving away from a cluster of McKenna-owned dealerships (a "small  
27 auto mall") which, while not primary competitors to Volkswagen, attract prospective car buyers to a  
28 desirable "destination";

1 B. Even though moving to the Cerritos Auto Square puts Volkswagen in the same auto mall  
2 as its primary competitors, it leaves behind dealerships of the same primary competitors;

3 C. A significant number of prospective Volkswagen customers, with incomes over \$80,000,  
4 living in the northeast part of the RMA, would need to travel greater distances to reach a Volkswagen  
5 dealer---since there are two open points northeast of the current McKenna VW-Norwalk, that dealership  
6 has a geographical monopoly on the territory until Volkswagen fills the open points.

7 D. There is a substantial amount of actual and potential service business in the Norwalk  
8 area, as measured by Units in Operation (UIO)<sup>10</sup>; Volkswagen owners would have to travel farther for  
9 service, thereby reducing consumer convenience and making the Volkswagen brand less attractive to  
10 prospective buyers.<sup>11</sup>

11 E. McKenna VW would be moving away from many of its own customers. (Exh. 379 at A-  
12 7, A-33, A-54)

13 84. The location of McKenna VW in Norwalk is not the problem with any real or perceived  
14 underperformance in its PAI or in the RMA. There was no evidence or argument that the allegedly poor  
15 sales performance in the RMA was due to Volkswagen's lack of representation in the Cerritos auto mall.  
16 In fact, one of the "optimal" locations for McKenna's dealership would be in the "Norwalk (Firestone  
17 Blvd/I-605)" cluster---exactly where it is now. (Exh. 379 at A-77, A-78; IX:137-139)

18 85. The new "Cerritos PAI" expands the McKenna PAI into census tracts in the south  
19 formerly assigned to the Timmons PAI, thereby eliminating the former PAI boundary shared by  
20 Timmons and Garden Grove. Creation of the "Cerritos PAI" would also mean that the two McKenna  
21 PAIs (Cerritos and Huntington Beach) would border each other, for a small distance. Configuration of  
22 PAIs reflects not only geographic, but also competitive, considerations; an intra-brand effect of a  
23 relocation would be that Timmons Volkswagen (already a competitor with Huntington Beach if the  
24 "freeway market" argument is followed) would be competing against two McKenna dealerships. (Exh.  
25 107 at Tab 3, pp. 1, 2)

26  
27 <sup>10</sup> Units in Operation (UIO) are "any Volkswagen registrations ...that [are] still out and operating on the road". (VI:219)  
UIO represents the potential for service and parts business.

28 <sup>11</sup> Although not raised at the hearing, Volkswagen could remedy this problem by entering into a franchise establishing a  
"satellite warranty facility" in Norwalk to service existing Volkswagen customers. [Vehicle Code section 3062(a)(2)]

1 86. Since dealers sell and service most to customers close to them, moving the McKenna  
2 dealership would adversely affect Timmons' sales and service (Protestant's expert witness estimated a  
3 loss of between 10-20% of sales and 5-15% of service business, resulting in losses of \$167,000-  
4 \$400,000 per year, while Respondent's expert witness disputed the basis of the loss calculations).  
5 (Exhs. 9; 107 at Tab 29; VII:65-69, 186, 192-212)

6 87. If there is no improvement in McKenna's "sales effectiveness" in the Cerritos Auto Mall,  
7 any increase in sales will be small. Only if it improves its sales effectiveness would it sell more cars and  
8 this would depend, in part, on its building of a Marketplace dealership and an improved economy.

9 88. Customer convenience will not be enhanced by a move to the auto mall, as the average  
10 distance for consumers to drive to a Volkswagen dealership would remain at 4.5 miles. (Exh. 379, pp.  
11 A-76, A-79)

12 89. Timmons Volkswagen has a wholesale parts business which accounts for about 25% of  
13 its parts sales volume. Since Timmons Volkswagen delivers to its customers the wholesale parts it sells,  
14 a relocation of McKenna VW-Norwalk will not affect that aspect of its business. (I:114-115)

15 90. Any lingering bad press from the District Attorney's consumer action will be attached to  
16 the McKenna name, whether in Norwalk or at the Cerritos Auto Square.<sup>12</sup>

17 **Findings Relating to Whether it is Injurious to the Public Welfare for an**

18 **Additional Franchise to be Established [Section 3063(c)]**

19 91. Any tax or revenue loss to Norwalk by a relocation of the McKenna dealership will be  
20 balanced by the gain to the City of Cerritos. Cerritos' concern about revenues is shown by its  
21 willingness to waive enforcement of its ordinance requiring only new vehicles to be offered for sale in  
22 the Cerritos Auto Square. Besides, the McKenna complex will remain in Norwalk and continue to pay  
23 taxes there.

24 92. If built to Marketplace standards, a new Volkswagen dealership in the Cerritos Auto  
25 Square will enhance the area, putting to use a formerly vacant automobile dealership. This will clearly  
26

27 <sup>12</sup> The civil consumer protection lawsuit filed against Danny McKenna by the Los Angeles District Attorney's Office is  
28 entitled to no weight. Although he agreed to a fine and an injunction in the stipulated judgment, Danny McKenna made no  
admissions of the truth of any of the allegations of the complaint.

1 benefit the public welfare. Danny McKenna established, in Huntington Beach, a top-of-the-line  
2 Volkswagen dealership which enjoys great success, and there is no reason to doubt that he is not capable  
3 of upgrading the facility in the Cerritos Auto Square to Volkswagen's Marketplace standards.  
4 Volkswagen did have reservations about him after promises were made, but not kept, to upgrade his  
5 Norwalk store, but have since resolved the differences. (Exhs. 104; 391, p. 3; IV:210-211)

6 **Findings Relating to Whether Franchisees of the Same Line-Make in the Relevant**  
7 **Market Area are Providing Adequate Competition and Convenient Consumer Care for**  
8 **Volkswagen Vehicles in the Market Area, Including Adequate Sales and Service Facilities,**  
9 **Equipment, Supply of Parts, and Qualified Service Personnel [Section 3063(d)]**

10 93. This inquiry looks at the sales and service performances of Volkswagen dealers "in" the  
11 relevant market area to see if they are providing "adequate" inter-brand competition and "convenient"  
12 consumer care. The task is difficult in this relocation case, for the following reasons:

13 A. There is no open point here. An open point is a PAI with a defined geographical area  
14 which the manufacturer has established with designated census tracts. (Some relocations are to open  
15 points---Circle Volkswagen's relocation was to an open point in Garden Grove, for example.) Lacking  
16 an open point, there is no defined geography which may form the basis for assessing performance in the  
17 target area (the area where relocation is contemplated) with accuracy. The dealer's current PAI cannot  
18 substitute for an open point in this analysis, nor can a newly-minted PAI (here, the "Cerritos PAI").

19 B. Moreover, using the "Cerritos PAI" in this analysis is flawed, leading to inconclusive  
20 results. The area is currently the shared responsibility of two dealers and one---McKenna VW-Norwalk-  
21 ---called a poor performer, is the dealer proposed to be relocated into the area. Also, although the  
22 "Cerritos PAI" gains a substantial number of census tracts from Timmons' PAI, there was no evidence  
23 presented regarding the number of sales or other information about those census tracts.<sup>13</sup>

24 C. Confining the inquiry to just McKenna VW-Norwalk and Timmons Volkswagen (the  
25 only other Volkswagen dealer in the RMA) fails to examine performance in the entire geographical area  
26 of the RMA. The RMA encompasses five PAI's: all of McKenna-Norwalk's PAI; roughly two-thirds of

27  
28 <sup>13</sup> The "Cerritos PAI" was created by Urban Science for Volkswagen at an unknown time but presumably after the protest  
had been filed and the company had been retained to provide an expert witness in this case. (VIII:85-86)

1 Timmons' PAI; about 40% of Garden Grove's PAI; and census tracts in the PAI's of VW of Downtown,  
2 McKenna-Huntington Beach, and Pacific VW, as well as the City of Industry Open Point and the  
3 Alhambra Open Point. Failing to include these dealers' performances in the RMA (and to assess the  
4 impact of the open points) leads to data which may be inaccurate or misleading. (Exhs. 107 at Tab19, p.  
5 1; 379, p. A-7)<sup>14</sup>

6 94. Assuming arguendo that Volkswagen sales and service performance is poor in the RMA,  
7 the dealership most responsible for the poor performance would be McKenna VW-Norwalk, which has  
8 the only PAI entirely within the RMA. If allowed to relocate, it would be because, in large part, its own  
9 poor showing pulled the performance statistics down. There is also an inference that it would import its  
10 prior poor performance into the Cerritos Auto Square.

11 95. Bad economic times make assessments and predictions difficult---prior statistics are no  
12 longer reliable indicators of present or future performance. As an example, Volkswagen changed its  
13 usual yearly projections for purposes of BPB bonuses to month-by-month ones, since the economy has  
14 been so unpredictable.

15 96. Evidence and expert testimony at this hearing was filled with data, statistics and  
16 percentages based on several different (often overlapping) geographical areas, all artificial constructs.  
17 This mélange of information makes analysis difficult: (1) Data relating to the RMA generally omits  
18 information from three PAI's and two open points (discussed above); (2) Volkswagen's "Los Angeles  
19 Market" extends miles to the north of Cerritos, but ignores portions of southern Los Angeles County and  
20 Orange County close to Cerritos; (3) Volkswagen groups dealers into "Areas", with Timmons  
21 Volkswagen in Area 53, and both McKenna dealerships, Norwalk and Huntington Beach, in a totally  
22 separate Area 52, thereby defying easy comparison; (4) The "Cerritos PAI" territory gains a  
23 substantial number of census tracts from Timmons' PAI, but evidence was lacking about those census  
24 tracts (discussed above); and (5) Some 2007 and 2008 data is ambiguous, because Circle Volkswagen  
25 was still doing business in the RMA until late 2007, and its service facility remained in the RMA until  
26 late 2008.

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27  
28 <sup>14</sup> To illustrate the problem, there is nowhere in the record a map of the current PAI's in the area with the RMA circle imposed on the page. Instead, one must refer to the two Exhibits referenced to get that basic information.

Volkswagen's Inter-Brand Competitiveness

97. Volkswagen currently offers eleven car models. To assess each model's popularity, Volkswagen "segments" them into descriptive categories, identifies competitive makes and models in each segment, then compares sales performances.<sup>15</sup> (Exh. 379, pp. A-11, A-12) This "segmentation analysis" takes all registrations in a particular segment in a defined geographical area as a denominator and Volkswagen's sales of the model as a numerator and comes up with Volkswagen's "market share" in each segment, or "penetration". (Exh. 379 at A-10, A-13; IX:41-42) Volkswagen considers its primary competitors to be Nissan, Honda, Toyota and Mazda. (Exhs. 108; 379, p. A-11; II:144, 201; V:244-245)

98. In the years 2006 to 2008, Volkswagen's "market shares" in various markets have been the following:

**PENETRATION (MARKET SHARE) PERCENTAGE OF VOLKSWAGEN SALES:**

	2006	2007	2008
<b>California</b>	4.43%	4.81%	4.40%
<b>Western Region</b>	4.81%	5.20%	4.41%
<b>National</b>	5.09%	4.72%	3.79%

(Exh. 379, p. A-9)

99. A dealer's "sales effectiveness" is measured by its deviations from an actual percentage of brand sales, such as those in the table above. Such actual percentages may be modified by a variety of factors (model popularity, unique demographic characteristics of each area, as examples) with the result that a dealer's performance is measured by its ability to reach an "expected" or attainable market share of sales.

**"Adequate" Competition and "Convenient" Consumer Care**

100. Here, because of the ambiguities and complexities of this relocation case (discussed above), a better analysis of whether "adequate" competition is being provided in the RMA may be made by looking at primary data, as follows:

<sup>15</sup> Thus, the Volkswagen Tiguan is a Small SUV which competes with 20 different models from 19 manufacturers.

National Sales	2006	2007	2008
Timmons VW	357	499	550
McKenna VW-Norwalk	659	715	549

(Exhs. 379, pp. A-54, A-68; 380, pp. 121, 124, 127; 381, pp. R-8, R-9)

101. McKenna VW-Norwalk's 549 VW sales in 2008 were scattered fairly evenly throughout its PAI, with a discernable concentration of sales to the northwest of the dealership (underscoring the conclusion that by moving south, McKenna is moving away from its own customers). McKenna VW-Norwalk also sells throughout the Los Angeles area, again with a fairly even distribution of sales. (Exh. 379 at A-54)

102. Timmons Volkswagen's 550 Volkswagen sales in 2008 were somewhat clustered throughout its PAI, with a concentration of sales south along the coast, then another cluster of sales roughly around the Long Beach Airport. There was a fairly uniform scattering of sales to the west of the dealership, with fewer sales than McKenna VW-Norwalk's throughout the Los Angeles area. (Exh. 107 at Tab 15 and at Tab 19, p. 4)

103. Units in Operation ("UIO") are vehicles---any Volkswagen registration---which are still out and operating on the road. UIO's represent potential for service and parts business. Timmons Volkswagen's service vehicles show a concentration of service vehicles around the dealership and in the south along the coast. (Exhs. 107 at Tabs 14, p. 1; 15; and 19, p.4; 379 at A-68; VI:219)

104. A 2008 year-end Volkswagen sales report showed Timmons Volkswagen "maintaining a double-digit YOY (year-over-year) new car sales increase" from 2007 to 2008 of 14%, the second highest of a group of ten dealers in Area 53, whose average was 2%. In the first quarter of 2009, Timmons Volkswagen's new car sales totaled 189, a decline of 19% from first quarter 2008, but every dealer in the 10-dealer group showed fewer sales in 2009, with an average decline of 11%. Interestingly, for the same time period, every dealer but one showed tremendous percentage increases in used car sales, with Timmons Volkswagen showing an 18% gain. (Exhs. 343, 345)

105. Volkswagen nationally was hard hit in February 2009, with U.S. sales at 13,660 (a 17.5% decrease from February 2008). However, the industry decrease was 41.4%. February 2009 "was one of

///

1 the toughest months in the automotive industry in the course of history”,<sup>16</sup> with Volkswagen sales  
2 nationally down 17.5% from February 2008 figures; January 2009 sales figures had also declined from a  
3 year earlier, by 11.6%. (Exhs. F, 113, 341)

4 106. In regard to Volkswagen’s performance assessment tool based upon “Areas”---the  
5 “octagon reports”---Timmons Volkswagen performed better than McKenna VW-Norwalk, although  
6 both had lackluster ratings in comparison to other Volkswagen dealers. In 2008, McKenna VW-  
7 Norwalk placed fifth out of the nine dealers, or “average” in its sales performance. In each of the first  
8 two months of 2009, McKenna VW-Norwalk placed last---ninth out nine dealers---in sales performance.  
9 Timmons Volkswagen’s highest “octagon report” rating was second place in its overall score for one  
10 quarter in 2008, but it consistently beat all other dealers in its parts business. Other than failing to meet  
11 Volkswagen’s minimum capitalization figures, Timmons Volkswagen met all of Volkswagen’s  
12 standards in an exhaustive review performed in March 2009. (Exhs. F, 113, 322-328, 389, 392; Exh.  
13 304)

14 107. Although Timmons Volkswagen was undercapitalized according to a March 2009  
15 evaluation of the dealership by Volkswagen (its actual net working capital was \$1,429,000 and the  
16 Volkswagen minimum standards requirement was \$1,818,000), there is no evidence that Volkswagen  
17 demanded additional working capital or that Timmons Volkswagen was incapable of meeting the  
18 Volkswagen standard. Significantly, the same evaluation found that Timmons Volkswagen met all of  
19 Volkswagen’s requirements in regard to facility standards, new and used car sales standards, services  
20 standards, parts/inventory standards, training, human resources, technology standards, and operations.  
21 (Exh. 304)

22 108. Volkswagen argues that Timmons Volkswagen failed to capture Circle Volkswagen’s  
23 business after it relocated to Garden Grove, while Protestant argues that it had already captured many of  
24 Circle Volkswagen’s customers before the move since that dealership had been concentrating on its  
25 Porsche/Audi sales. Although the record is inconclusive to resolve this dispute, Timmons Volkswagen  
26 could have done a better job if it had purchased Circle Volkswagen’s customer list, but that dealer had

27  
28 <sup>16</sup> The quote is found at pages 47-48 of the deposition transcript of Steven Smith, Volkswagen’s sales operations manager for Area 52. (Exh. 113)

1 priced the list too high, in Greg Timmons' opinion.

2 109. As described above, Timmons Volkswagen has a Marketplace Volkswagen store, with  
3 modern and continuously updated sales and service facilities; adequate equipment, including both  
4 regular and heavy-duty hoists; and qualified service technicians. Its parts department, housed in a  
5 separate structure, supplies automotive parts throughout the area.

6 110. The average distance to the nearest Volkswagen dealership is 4.5 air miles. (Exh. 379 at  
7 A-76; IX:248-259)

8 **Findings Relating to Whether the Relocation of an Additional Franchise**  
9 **Would Increase Competition and Therefore be in the Public Interest**

10 **[Section 3063(e)]**

11 111. Establishing a Volkswagen dealership in the Cerritos Auto Mall---especially if a dealer  
12 were to build a new facility to Marketplace standards---would certainly benefit Volkswagen. The brand  
13 would be showcased in a high-traffic and attractive venue, generating interest in the brand and  
14 promoting sales. However, Volkswagen's interest must be balanced against dealers' interests in  
15 maintaining viable businesses, as well as the public's interest in adequate competition and convenient  
16 service.

17 112. Timmons Volkswagen and McKenna VW-Norwalk currently are competitors. They are  
18 only 7.5 miles apart and their 2008 national Volkswagen sales are identical: 550 for Timmons and 549  
19 for McKenna. Each has competitive strengths and weaknesses: McKenna is in a small auto mall next to  
20 a freeway, which visibility Timmons lacks, but the McKenna facility is poor while Timmons' is  
21 substantial; McKenna, with two Volkswagen dealerships, may use whatever economies which having  
22 multiple dealerships offers, while Timmons, which distributes substantial sums to its owners, enjoys a  
23 measure of financial flexibility; and while McKenna is located next to two open points, Timmons'  
24 current PAI is geographically larger. Both are second-generation family operations, each bearing the  
25 family names.

26 113. The move is being proposed in one of the toughest economic times in the history of the  
27 automotive industry. Nationwide Volkswagen sales plummeted 17.5 per cent from February 2008 to  
28 February 2009 (and down 14.9 per cent from 2008 to 2009). The distressed and uncertain economy has

1 caused Volkswagen to alter its method of projecting sales targets, from yearly to monthly projections.  
2 Anecdotal evidence (i.e., Greg Timmons' testimony that a nearby Boeing plant had closed) gives a face  
3 to statistical data reporting the economic slowdown. Compounding the problem in the Los Angeles area  
4 is the flat-line growth of car sales, population and households, as well as job creation. In such poor  
5 economic times, a market study is all the more necessary before a decision is made to relocate a  
6 dealership. (Exh. 113; II: 89)

7 114. If relocation is allowed, the two dealerships will be 4.6 miles apart, closer than any other  
8 two Volkswagen dealers in Los Angeles and environs, although the drive time between them (if one  
9 takes the freeways) will be longer than the drive times between other Volkswagen dealerships. (Exh.  
10 106, pp. 1, 4)

11 115. Since dealers make more sales in the areas close to them, there is a "proximity  
12 advantage" in every location. A dealer's "sales effectiveness" (its ability to penetrate the market)  
13 declines with distance. If McKenna VW-Norwalk moves south, not only will Timmons Volkswagen  
14 lose its proximity advantage in the area surrounding it, but McKenna VW-Norwalk will also lose its  
15 proximity advantage in the Norwalk area. (Exh. 107 at Tab 11 and Tab 19, p. 1; Exh. 379, pp. A-55, A-  
16 69, A-74; VI:141, 197-198, 212, 220; VIII:14-16)

17 116. If the relocation is allowed, both dealers will be competing for the same customers, since  
18 McKenna VW-Norwalk will be moving into a position of influencing the market in Timmons  
19 Volkswagen's backyard (i.e., close to its PAI). Volkswagen's creation of the "Cerritos PAI"  
20 acknowledges this shift of influence, calling the impact on Timmons Volkswagen's PAI "right sizing".  
21 Timmons Volkswagen's PAI will be substantially reduced (the only dealership with a reduction in its  
22 PAI), with the dealership itself located not in the PAI's roughly geographical center, but rather  
23 significantly to the east of center. (Exh. 107 at Tab 3, pp. 1, 2 and Tab 19, p. 2; VI:168, 171, 174)

24 117. It may be appropriate, in a different situation, to reduce the PAI assigned to Timmons  
25 Volkswagen. Here, however, the reduction in its PAI is dictated by the proposed move of McKenna  
26 VW-Norwalk to Cerritos and simply emphasizes the competitive closeness of the two dealerships. It is  
27 not "right-sizing" and benefits neither Timmons Volkswagen nor Volkswagen. Although Timmons  
28 Volkswagen's "sales effectiveness" numbers may improve, its actual sales may decline because of the

1 loss to McKenna of its “proximity advantage”. Moreover, Timmons Volkswagen’s chances of realizing  
2 bonuses through the BPB program are elusive, even though its sales goals have been lowered (because a  
3 smaller PAI yields fewer sales opportunities), a competitive obstacle to making more sales has been  
4 introduced, a new dealership in close proximity.

5 118. In two important measures of a dealer’s performance---Sales Satisfaction Index (SSI)  
6 and Customer Satisfaction Index (CSI)---Timmons Volkswagen has done poorly in comparison with the  
7 nine other dealers in Area 53, as shown by Volkswagen’s “octagon reports”. Placing another  
8 Volkswagen dealer in close proximity would provide Timmons Volkswagen with a powerful incentive  
9 to improve its performance in these critical aspects of its business. (Exhs. 322-328, 389, 392; V:24; 69,  
10 180, 226-229, 231)

11 119. This field of competition is decidedly not a “level playing field”. Danny McKenna has  
12 received a substantial amount of money from Volkswagen to go to Cerritos as part of a Relocation  
13 Agreement, placing Timmons Volkswagen at a substantial competitive disadvantage. (Exh. 90)

14 120. McKenna’s competitive position would be multiplied by the move---in Cerritos, it will be  
15 closer to McKenna VW-Huntington Beach, with the result that Timmons Volkswagen’s closest  
16 competitor and one of its “freeway market” competitors would be two McKenna Volkswagen  
17 dealerships. (The McKenna VW-Huntington Beach has been the “largest volume store” in Area 52,  
18 placing first in sales in the first two months of 2009.) (Exhs. F, 113)

19 121. McKenna would be moving closer not only to Timmons Volkswagen, but also closer to  
20 Volkswagen of Garden Grove, which would also be competing against two McKenna Volkswagen  
21 dealerships, one in the Cerritos Auto Mall 11.4 miles away and one in Huntington Beach, 6.0 miles  
22 away. (Exh. 107, Tab 2 at p. 9 and Tab 3 at pp. 1, 2; Exh. 379 at A-5)

23 122. In 2008, Subaru established a dealership at an open point in the Cerritos Auto Square.  
24 Timmons Subaru saw its usual sales---roughly 30 per month---cut in half, with the new dealer selling  
25 about the same number of cars. The market was split, but there was no growth in sales. (The Subaru

26 ///

27 ///

28 ///

1 dealer in the auto mall has since closed the dealership for a better business opportunity.<sup>17</sup>) (III:32-34)

2 123. Volkswagen's argument that Timmons Volkswagen and McKenna (both in Norwalk and  
3 Cerritos) are in two separate markets defined by the 405 and 605 Freeways---and therefore the  
4 competition inherent in proximity will be avoided or mitigated---is appealing. However, actual  
5 registrations of sales made by the two dealerships do not support the argument. (Exh. 107 at Tab 9, pp.  
6 1, 2; Exh. 379, pp. A-54, A-68)

7 124. Reductions in car prices could be just as likely dictated by economic considerations  
8 beyond the dealers' control, rather than resulting from dealers making competitive business decisions in  
9 a healthy economy. Moving McKenna VW-Norwalk into the Cerritos Auto Square would create either  
10 a net result of a reduction in sales for both dealers, or substantial financial losses for both dealers, as  
11 they are forced to compete in even closer proximity than previously, in some of the toughest economic  
12 times faced by auto dealers. (III:12)

### 13 ANALYSIS

#### 14 *Permanency of the Investment [Vehicle Code section 3063(a)]*

15 125. Protestant Timmons Volkswagen has established permanency of its investment by the  
16 following: the longevity of the family-owned dealership at the same location since 1977; the upgrading  
17 to a Marketplace facility at substantial cost; and the financial outlays over the years to modernize and  
18 maintain the dealership's building and equipment.

#### 19 *Effect on the Retail Motor Vehicle Business and the Consuming Public*

#### 20 *In the Relevant Market Area [Vehicle Code section 3063(b)]*

21 126. The attributes of auto malls, most especially the Cerritos Auto Square, make them very  
22 desirable places for dealerships to locate. However, being located in an auto mall considered to be a  
23 premium place to do business---taken by itself---does not end the "good cause" analysis required by  
24 Vehicle Code section 3063, it is just a starting point.

25 127. If there are deficiencies in McKenna VW's performance in Norwalk, the problem is not

26  
27 <sup>17</sup> Dave Conant, the dealer principal, stated that his decision to close the Subaru store in the auto mall was because he needed  
28 to make room for his Hyundai franchise and "not because of the economy". (Declaration of Dave Conant). At the hearing,  
Danny McKenna opined that it was "exactly" because of the economy that two dealerships had closed in the Cerritos Auto  
Square---including the Subaru franchise. (IV:269-270)

1 the dealership location. Relocating the business to Cerritos Auto Square would not only abandon  
2 Volkswagen vehicle owners and consumers, there would be little offsetting benefit to Cerritos.

3 **Whether it is Injurious to the Public Welfare for an**

4 **Additional Franchise to be Established [Vehicle Code section 3063(c)]**

5 128. Protestant has failed to establish that the public welfare would be injured by the  
6 additional of a new dealership in the area. In fact, public welfare would be enhanced by the utilization  
7 of a previously vacant auto dealership.

8 **Whether Volkswagen Franchisees are Providing Adequate Competition and Convenient**

9 **Consumer Care for Volkswagen Vehicles in the Relevant Market Area, which shall include the**  
10 **Adequacy of Motor Vehicle Sales and Service Facilities, Equipment, Supply of Vehicle Parts, and**

11 **Qualified Service Personnel [Vehicle Code section 3063(d)]**

12 129. Performance of inter-brand competition in the relevant market area was difficult to assess  
13 for a number of reasons, including the poor economy and the variety of geographical areas and groups  
14 used as reference points. Nonetheless, the RMA is being “adequately” served by the major players,  
15 McKenna VW-Norwalk and Timmons Volkswagen, and consumer care in the RMA is “convenient”.

16 **Whether the Establishment of an Additional Dealership would Increase**

17 **Competition and Therefore be in the Public Interest**

18 **[Vehicle Code section 3063(e)]**

19 130. Relocating the McKenna VW-Norwalk dealership 4.6 miles from Timmons Volkswagen  
20 will not increase competition, but rather would put the two dealers in a competitive struggle for the same  
21 customers in a very bad economy. The public interest will not be served in this situation where, in all  
22 likelihood, sales and profits of both dealers will fall.

23 **DETERMINATION OF ISSUES**

24 131. Protestant has sustained its burden of proof of establishing the permanency of its  
25 investment. [Section 3063(a)]

26 132. Protestant has sustained its burden of proof of showing an adverse effect on the retail  
27 motor vehicle business and the consuming public in the relevant market area. [Section 3063(b)]

28 133. Protestant has not proved that it would be injurious to the public welfare for the

1 McKenna dealership to be relocated. [Section 3063(c)]

2 134. Protestant has sustained its burden of proof of establishing that Volkswagen franchisees  
3 are providing adequate competition and convenient consumer care for Volkswagen vehicles in the  
4 relevant market area, taking into consideration the adequacy of motor vehicle sales and service facilities.  
5 Protestant has sustained its burden of proof of showing its adequacy of equipment, supply of vehicle  
6 parts, and qualified service personnel. [Section 3063(d)]

7 135. Protestant has sustained its burden of proof of proving that competition would not  
8 increase if the relocation was allowed and the public interest would therefore not be served. [Section  
9 3063(e)]

10 **PROPOSED DECISION**

11 Protest No. PR-2146-09 is sustained. Protestant Timmons Volkswagen has established its  
12 burden of proof under Vehicle Code section 3066(b) that there is good cause not to relocate McKenna  
13 Volkswagen-Norwalk to the Cerritos Auto Square. Respondent Volkswagen Group of America, Inc.  
14 shall not be permitted to proceed with the relocation of McKenna VW-Norwalk at the proposed location  
15 in Cerritos.

16  
17 I hereby submit the foregoing which constitutes my  
18 Proposed Decision in the above-entitled matter, as  
19 the result of a hearing before me, and I recommend  
20 this Proposed Decision be adopted as the decision of  
21 the New Motor Vehicle Board.

22 DATED: November 23, 2009

23 *Diana Woodward Hagle*

24 By: \_\_\_\_\_  
25 DIANA WOODWARD HAGLE  
26 Administrative Law Judge

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