

1507 - 21st Street, Suite 330  
Sacramento, California 95814  
Telephone: (916) 445-1888

STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of )  
ALAN MAGNON PONTIAC, INC., dba ) Protest No. PR-727-85  
ALAN MAGNON SUBARU, )  
Protestant, )  
vs. )  
SUBARU OF SOUTHERN CALIFORNIA, )  
INC., )  
Respondent. )

---

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED this 26<sup>th</sup> day of June, 1985.

  
\_\_\_\_\_  
ROBERT J. BECKUS  
Member  
New Motor Vehicle Board

1507 - 21st Street  
Sacramento, California 95814  
Telephone: (916) 445-1888

STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of: )  
ALAN MAGNON PONTIAC, INC., dba )  
ALAN MAGNON SUBARU, ) Protest No. PR-727-85  
 )  
 )  
 ) Protestant, )  
 )  
 ) PROPOSED DECISION  
 )  
 ) vs. )  
 )  
 )  
 ) SUBARU OF SOUTHERN CALIFORNIA, )  
 ) INC., )  
 )  
 ) Respondent. )  
 )

---

Procedural Background

1. Protestant is Alan Magnon Pontiac, Inc., dba Alan Magnon Subaru (Magnon), 2840 Harbor Boulevard, Costa Mesa, California.

2. Respondent is Subaru of Southern California (Subaru), 12 Whatney Avenue, Irvine, California.

3. By letter dated December 21, 1984, Subaru notified Magnon and the New Motor Vehicle Board (Board) of Subaru's intention to "enfranchise a new Subaru dealership at the Santa Ana Auto Center to be located adjacent to the Newport (I-55) Freeway, at Edinger Avenue, Santa Ana, California, within ten (10) months of the date of this letter, but not earlier than August 1, 1985."

4. On January 2, 1985, Magnon filed a protest with the Board pursuant to Vehicle Code Section 3062.<sup>1/</sup>

5. A hearing was held on May 14, 21, June 6, 7, 1985 before Sam W. Jennings, Administrative Law Judge for the Board.

6. Magnon was represented by E. Day Carman of the firm of Carman and Mansfield. Subaru was represented by William J. Moran, Associate Corporate Counsel, Subaru of America, Inc.

#### Issues Presented

7. Section 3063 provides that in determining good cause not to establish the additional franchise, the Board shall consider the existing circumstances, including, but not limited to all of the following:

- a) Permanency of the investment; [section 3063(a)]
- b) Effect on retail motor vehicle business and the consuming public in the relevant market area;<sup>2/</sup> [section 3063(b)]
- c) Whether it is injurious to the public welfare for an additional franchise to be established; [section 3063(c)]

<sup>1/</sup>All references are to the California Vehicle Code unless otherwise indicated.

<sup>2/</sup> Vehicle Code Section 507 defines the "relevant market area" as "any area within a radius of 10 miles from the site of a potential new dealership."

d) Whether Subaru franchisees in that relevant market area are providing adequate competition and convenient consumer care for the owners of Subaru vehicles in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel; [section 3063(d)]

e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest. [section 3063(e)]

#### Findings of Fact

##### A. FACTS RELATING TO PERMANENCY OF INVESTMENT [SECTION 3063(a)]

8. Since 1980, Magnon has been a franchisee of Subaru and has been doing business at 2480 Harbor Boulevard. The majority shareholder and president is Alan Magnon.

9. Magnon constructed new facilities exclusively for Subaru which meet Subaru's requirements. Total cost of construction was approximately \$600,000.

10. The return on Magnon's investment is dependent in large part upon his ability to obtain Subaru vehicles.

11. Since the demand for Subaru vehicles exceeds their supply, Subaru allocates the vehicles to its dealers under a system which takes into account the following factors:

- a) The number of vehicles sold during the best of the dealer's three previous years;
- b) The number of vehicles sold during the sixty days preceding the date the allocation is computed; and
- c) The dealer's inventory on the date the allocation is computed.

12. Subaru, pursuant to its formula, allocates all of the vehicles it receives except for a reserve pool of vehicles that is held back from normal allocation. These vehicles, which may include up to 15% of the total number of vehicles received, are referred to as market action vehicles. Market action vehicles are normally allocated by Subaru to newly franchised dealerships, dealerships that are expanding or constructing new facilities, and dealerships that are relocating. Occasionally some of these vehicles are also allocated for the purpose of assisting dealers to increase their sales and market penetration in a particular area.

13. The vehicles received by Magnon under both the normal allocation and the market action allocation were as follows:

<u>Year</u>	<u>Number of Vehicles Allocated to Magnon</u>
1982	212
1983	91
1984	112
8 month period prior to hearing	28

14. The decline in allocation has occurred because Magnon has not sold its inventory as rapidly as some other Subaru dealers who also compete for the limited number of available vehicles.

15. Some of the vehicles received by Magnon were market action units allocated to Magnon in addition to Magnon's "earned" allocation. Despite such increases in Magnon's allocation, Magnon's sales rate did not improve and Magnon has not been able to increase its sales rate significantly.

16. Due to the relaxation of the export restrictions imposed by the Japanese government, as of April 1, 1985, the number of vehicles available to Subaru of Southern California will be increased by approximately 43.3% over the previous year.

17. In light of the increased supply of Subarus, the number available to be allocated to Magnon will not be diminished due to the establishment of the proposed dealership. The initial allocation to the proposed dealership

will come from the pool of market action vehicles. Thereafter, the new dealer's allocation will be determined in accordance with Subaru's formula. Although the total number of Subaru dealers in the distributorship will be increased from 43 to 44, the number of vehicles available for allocation will be approximately 43.3% greater.

B. FACTS RELATING TO THE EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC IN THE RELEVANT MARKET AREA [SECTION 3063(b)]

18. The following indicates distances between the proposed dealership and other Subaru dealers in the relevant market area.

<u>From Proposed Dealership</u>	<u>Approximate straight line miles</u>
To: Magnon	7 miles
Sea & Sun (Huntington Beach)	9 miles
Irvine Auto Center	9 miles
Garden Grove Subaru	5.7 miles
Anaheim Subaru	10 miles

(All dealerships listed are located in Orange County.)

19. Orange County from 1970 to 1980 has experienced the greatest population growth in Southern California, an increase of approximately 510,000 residents.

20. Of the counties in the United States with a population of over 2 million, Orange County is the sixth largest in geographic area.

21. Magnon presented no evidence to indicate that the establishment of the proposed dealer would have an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area.

C. FACTS RELATING TO WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN ADDITIONAL FRANCHISE TO BE ESTABLISHED [SECTION 3063(c)]

22. The proposed dealership is to be located in the Santa Ana Auto Mall which is currently being developed by the City of Santa Ana. The mall will encompass 44 acres and when completed will accommodate nine motor vehicle dealerships.

23. Investment in this project is expected to approach \$20,000,000, including the investments of the participating dealers and the City of Santa Ana.

24. The City of Santa Ana has already expended funds in grading, and escrow is expected to close on June 15, 1985.

25. Two dealerships planning to participate in the auto mall have since decided to locate to a similar auto mall under construction in the City of Tustin. Consequently, the City of Santa Ana and the remaining dealers have serious concerns about the viability of the entire project.

26. If the Santa Ana Auto Mall also loses the proposed Subaru dealership, the effect would be detrimental to the

project and would have serious consequences regarding the investment already made. Projected loss of revenue to the City of Santa Ana in the event the auto mall is not completed or successful could be as high as \$700,000 or \$800,000 a year.

27. Magnon presented no evidence to establish that the additional dealership would be injurious to the public welfare.

D. FACTS RELATING TO WHETHER SUBARU FRANCHISEES IN THAT RELEVANT MARKET AREA ARE PROVIDING ADEQUATE COMPETITION AND CONVENIENT CONSUMER CARE FOR THE OWNERS OF SUBARU VEHICLES IN THE MARKET AREA WHICH SHALL INCLUDE THE ADEQUACY OF MOTOR VEHICLE SALES AND SERVICE FACILITIES, EQUIPMENT, SUPPLY OF VEHICLE PARTS, AND QUALIFIED SERVICE PERSONNEL [SECTION 3063(d)]

28. Magnon presented no evidence relating to the facilities of other Subaru dealers within the relevant market area. Although some evidence was introduced as to the size of Magnon's facility, number of personnel, etc., no evidence of an industry standard was introduced in order to determine whether Magnon and the other Subaru dealers in the area are adequately meeting the existing needs of the relevant market area.

E. FACTS RELATING TO WHETHER THE ESTABLISHMENT OF AN ADDITIONAL FRANCHISE WOULD INCREASE COMPETITION AND THEREFORE BE IN THE PUBLIC INTEREST [SECTION 3063(e)]

29. The proposed location for the additional dealership is the Santa Ana Auto Mall. Subaru assigns to each of its dealers a geographic area which Subaru labels an Area of Responsibility (AOR). Subaru's decision to establish the proposed dealership was based in part upon a decline in Subaru's penetration and sales in the proposed Santa Ana AOR. This decline by Subaru occurred despite an increase in population and an increase in new vehicle registrations in the Santa Ana AOR, as indicated in the chart below.

SANTA ANA AOR

Calendar Years	<u>1982</u>	<u>1983</u>	<u>1984</u>
Total Industry Registrations	12,247	14,338	15,058
Total Import Registrations	6,262	7,641	7,480
Japanese Import Registrations	4,959	6,175	5,891
Subaru Registrations	238	192	143
Subaru % of Total Imports	3.8%	2.5%	1.9%
Subaru % of Japanese Imports	4.8%	3.1%	2.4%

30. Magnon presented no evidence to establish that the additional dealership would not increase competition and would therefore not be in the public interest.

DETERMINATION OF ISSUES

Protestant has failed to prove that there is good cause for not establishing the additional dealership in the Santa Ana Auto Mall in that:

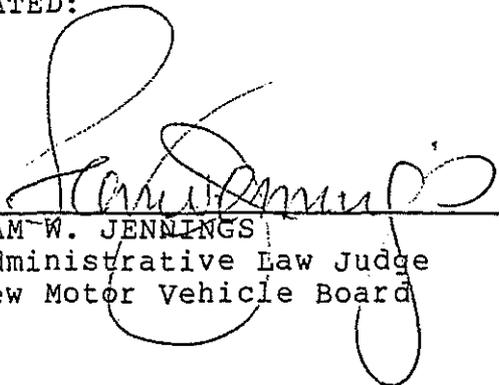
- (a) Protestant failed to prove that its investment will be adversely affected by the establishment [3063(a)];
- (b) Protestant failed to prove that the establishment will have an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area. [3063(b)];
- (c) Protestant failed to prove that the establishment will be injurious to the public welfare [3063(c)];
- (d) Protestant failed to prove that there is adequate competition and convenient consumer care for the owners of Subaru vehicles in the relevant market area, including adequate motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel [3063(d)];
- (e) Protestant failed to prove that the establishment would not increase competition and that therefore the establishment would not be in the public interest [3063(e)].

The following proposed decision is respectfully submitted:

The Protest is overruled. Respondent is permitted to establish the additional dealership in the Santa Ana Auto Mall.

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

DATED:



SAM W. JENNINGS  
Administrative Law Judge  
New Motor Vehicle Board