

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH
UTAH POWERSPORT VEHICLE FRANCHISE ADVISORY BOARD



IN THE MATTER OF
A PROTEST REGARDING
RELOCATION OF FRANCHISE

**Continental Sales Corporation, dba
Honda-Suzuki of Salt Lake**

Protestor,

vs.

American Suzuki Motor Corporation,

Respondent.

**Access Recreation, L.L.C., dba The Edge
Motorsports,**

Intervenor.

**FINAL ORDER
DENYING PROTEST**

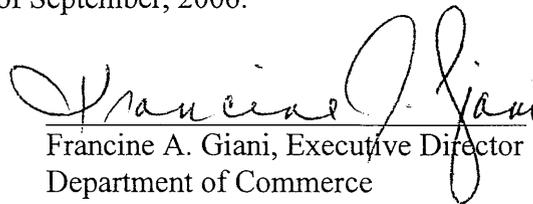
Case No. Powersport-2006-001

The Findings of Fact, Conclusions of Law and Final Recommended Order of the Board in this matter are ratified and adopted by the Executive Director of the Department of Commerce. It is therefore ordered that American Suzuki Motor Corporation has established good cause to relocate Access Recreation, L.L.C. dba The Edge Motorsports. Accordingly, the protest of Continental Sales Corporation, dba Honda-Suzuki of Salt Lake to the proposed relocation of Access is hereby denied, and Suzuki is granted permission to relocate the Access franchise dealership.

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Final Order Denying Protest may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeois v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order pursuant to Section 63-46b-13.

DATED this 15th day of September, 2006.


Francine A. Giani, Executive Director
Department of Commerce

CERTIFICATE OF MAILING

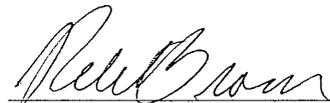
I certify that on the 16 day of September, 2006, the undersigned served a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Final Recommended Order of the Board along with the Final Order Denying Protest by certified mail and facsimile to:

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW
and
FINAL RECOMMENDED ORDER**

Case No. Powersport-2006-001

This matter came before the Executive Director of the Department of Commerce, Ms. Francine A. Giani, and the Utah Powersport Vehicle Franchise Advisory Board ("Board") upon a protest by Continental Sales Corporation, dba Honda-Suzuki of Salt Lake. Continental protested a proposal from American Suzuki Motor Corporation to relocate the Suzuki franchise owned by Access Recreation, L.L.C., dba the Edge Motorsports from its original location in Draper, Utah, to a location approximately 1.5 miles further south in Draper and farther away from Continental. Access intervened in the proceeding.

A hearing was held on August 17, 2006. The parties were represented by counsel.

Board members present for the hearing were Thad LeVar, Glen Zumwalt, Bruce Steadman, Paul Weller, Rich Poll, Anneli Smith and Don Wood.

The Board members had reviewed the pleadings and exhibits submitted by the parties prior to the hearing. The Board heard the evidence, reviewed exhibits, observed counsel arguments, and deliberated subsequent to the hearing. Thus, the Board members were fully advised in the premises and consider themselves sufficiently informed to make a recommendation to Ms. Giani.

BY THE BOARD:

On August 18, 2006, the Board entered its Interim Recommendation. The Board now enters its Findings of Fact, Conclusions of Law and Final Recommended Order for review and action by the Executive Director of the Department of Commerce.

FINDINGS OF FACT

1. On February 27, 1989, Continental entered into a franchise dealer agreement with Suzuki. Continental is located at 2354 South State Street in Salt Lake City.
2. The Dealer Development Requirements issued by Suzuki to Continental include a minimum facility size of 5,000 square feet (in which Continental can display all its product lines), signage of 3' x 12' or 4' by 18', and display of Suzuki products equal to other product lines carried by Continental. In addition to Suzuki, Continental carries Honda, Polaris, and Artic Cat powersport vehicles. Continental requested a larger sign than required. Suzuki agreed and contributed to the cost of the larger sign.

3. In 2001, a second Suzuki franchise dealership was established at 48 East 13200 South, in Draper, Utah (hereafter, “Original Location”). Access purchased this second franchise in 2003.

4. On March 9, 2006, Suzuki notified Continental of its intent to approve the relocation of Access to a new location at 14301 South Minuteman Drive in Draper (hereafter, “New Location”).

5. The Original Location was 14.38 miles south of Continental’s dealership, while the New Location is 15.88 miles south of Continental. Thus, the New Location is approximately 1.5 miles farther away from Continental.

6. On March 16, 2006, Continental filed a request for a hearing, protesting the relocation of the Access franchise dealership. By notice issued on March 22, 2006, the Department Administrative Law Judge notified Suzuki that a protest had been filed, and that Suzuki could not relocate Access until the Board held a hearing and the Executive Director determined that good cause was established.

7. Continental is the top seller of Suzuki powersport vehicles in Utah, while Access is the fourth best seller of Suzuki powersport vehicles.

8. The evidence indicates that a significant population growth is expected in the area between southern Salt Lake County and northern Utah County (hereafter, the “Southern Corridor”). In the next five years, growth projections indicate that approximately 15,000 people will be moving into the Southern Corridor.

9. In the state of Utah, Suzuki is in fourth place in the industry for sales of powersport vehicles. It achieves 11.4% of the market share across the state. However, it achieves only 6% of the market share in the Southern Corridor.

10. The New Location facility is larger than that of the Original Location, newly renovated, and is more visible from Interstate 15 than the Original Location.

11. Although no actual data was presented, pictures of the Continental dealership facility indicate a significant investment by Continental over the years in its business.

12. There was no evidence of poor sales or service performance for either Continental or Access.

13. In June 2006, after Continental filed its protest and the matter was scheduled for a hearing, the Access dealership was moved to the New Location before a hearing by the Board and a final determination from the Executive Director. Access has entered into a five-year lease and an option to purchase the New Location. Access has invested approximately \$500,000 to renovate the New Location facility.

14. As a result of Access' move to the New Location, Continental filed various requests for relief, including a Request for Cease and Desist Order. In response, Suzuki issued a Notice of Temporary Suspension to Access, demanding that Access cease any and all activity associated directly or indirectly with new Suzuki products.

15. The evidence indicates that Access employees sold two new Suzuki powersport vehicles after Suzuki's Notice of Temporary Suspension had been issued and before the Board hearing in this matter.

CONCLUSIONS OF LAW

1. Under the Powersport Vehicle Franchise Act (“Act”), in determining whether Suzuki has proven that there is good cause to relocate Access, the Board is required to consider the following evidence:

- (1) the amount of business transacted by other franchisees of the same line-make in that relevant market area, as compared to business available to the franchisees;
- (2) the investment necessarily made and obligations incurred by other franchisees of the same line-make in that relevant market area in the performance of their part of their franchisee agreements;
- (3) the permanency of the existing and proposed investment;
- (4) whether it is injurious or beneficial to the public welfare or public interest for an additional franchise to be established; and
- (5) whether the franchisees of the same line-make in that relevant market area are providing adequate service to consumers for the powersport vehicles of the line-make, which shall include the adequacy of:
 - (a) the powersport vehicle sale and service facilities;
 - (b) equipment;
 - (c) supply of vehicle parts; and
 - (d) qualified service personnel.

Utah Code Ann. § 13-35-306.

2. Growth projections for the Southern Corridor, coupled with data regarding Suzuki’s low market share in the area (6% as opposed to the 11.4% market share in Utah overall), indicate that there is available market share to be captured by Suzuki and its franchise dealers. Together, Continental and Access have yet to capture all the business available to them. Reducing the market to just one Suzuki dealer in Salt Lake County would likely reduce Suzuki’s market penetration in the powersport industry. Moreover, Access is moving only 1.5 miles and farther away. It is difficult to fathom how such a move could possibly saturate the market. Thus, the Board found that the first factor in Section 13-35-306 favors relocation.

3. An assessment of the second provision of Section 13-35-306 leads to the conclusion that Continental has made significant investments and incurred obligations in

the performance of its franchise agreements for Suzuki. Although there was no data submitted by the parties, pictures of Continental's dealership facility revealed significant investments in its showroom, parts, services, and signage. The Board noted, however, that much of Continental's investment was at its own initiative, that Suzuki shared in the costs of increased signage requested by Continental, that Continental's other lines benefited from its investments as well as Suzuki, and that the investments were just part of doing business and promoting one's products. The Board concluded that although Continental's investment was significant, it was not jeopardized by the relocation. Therefore, the second factor in Section 13-35-306 was also found to favor the relocation of the Access Suzuki franchise.

4. The parties argued that the third factor in Section 13-35-306 requires a comparison of the relative obligations and investments of Continental and Access. Making such a comparison, the majority of the Board found that both dealers had made significant investments and they displayed substantially equal permanence. Although Continental owns its property, Access has entered into a long-term lease and an option to buy the property at the New Location. Access has thus far spent \$500,000 to renovate its new facility and will likely make further investments. The Board concluded that such equal permanence for the existing and proposed investment favored the relocation of Access.¹

5. A compelling factor in this case was the public benefit consideration. Current and future Suzuki customers in the Southern Corridor will benefit from a

¹ If the third factor were interpreted to require a comparison of the permanency of Access' Original Location (existing investment) and New Location (proposed investment), this factor would still favor relocation. The Original Location is apparently leased to a new tenant, and the property is now owned by a new landlord. Because the Original Location is no longer available to Access, it has no permanence, while a five-year lease and an option to purchase gives Access permanency in the New Location.

relocation of the Suzuki line to the New Location, as well Draper residents in general. This closer, newer and more visible facility will provide greater access to the Suzuki product line such that the public will discover Suzuki as an option in the powersport industry. The convenience and discovery of an option in the industry will itself be a benefit to the public. In addition, Draper residents will receive increased sales tax revenues from increased Suzuki product sales, as well as from revenue generated by other businesses which become attracted to the area merely because of the new Access facility. Thus, the Board concluded that relocation would be beneficial to the public welfare or public interest.

6. With respect to the fifth factor in Section 13-35-306, whether the existing franchisees are adequately serving Suzuki consumers, the Board concluded that both Continental and Access were good performers for Suzuki. However, there is more business available in the market. Because of the closer, newer and more visible New Location for Access, Suzuki will be able to better penetrate the powersport vehicle market. Continental is not expected to suffer any adverse results from the Access relocation. Rather, the Board believes that Continental's sales and services of Suzuki products have the potential to increase due to the increased Suzuki presence in the Southern Corridor. Thus, the Board concluded that the final factor also favored the relocation of Access.

7. Finally, the Board concluded that the premature relocation of Access' Suzuki franchise was relevant to a determination of good cause. Pursuant to Utah Code Ann. §13-35-302, the Utah Legislature established the standard and the process for relocation of a franchised dealership, namely that such dealership may not be relocated until a Board hearing and final determination by the Executive Director that good cause

has been established. Under the Act, Suzuki (as the franchisor) receives the agency's notice that a protest has been filed and that relocation cannot occur until completion of the good cause determination. It is also Suzuki that is ultimately responsible for any violation of the Act. The record shows that the agency duly notified Suzuki that Access could not be relocated until completion of the protest proceeding. However, there was a lack of evidence presented showing that Suzuki promptly notified Access that it could not yet relocate. This caused the Board deep concern.

8. Nevertheless, the Board concluded that the premature relocation of the Access Suzuki franchise did not overcome the five factors in Section 13-35-306, all of which established good cause for relocation as discussed above.

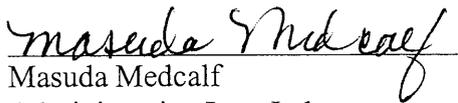
9. In summary, consideration of evidence relating to the five factors in Utah Code Ann. § 13-35-306 preponderates in favor of relocation. While the premature relocation was a concern to the Board, it did not obviate the good cause factors. The Board members felt that Suzuki's responsibility for the premature relocation should be addressed in a separate enforcement proceeding.

FINAL RECOMMENDED ORDER

For the foregoing reasons, the Utah Powersport Vehicle Franchise Advisory Board recommends that Continental's protest be denied and that Access be permitted to relocate its Suzuki franchise to the New Location in Draper. This Final Recommended Order supersedes the one issued on behalf of the Board on August 18, 2006.

On behalf of the Utah Powersport Vehicle Franchise Advisory Board, I hereby certify the foregoing final recommendation of the Board was submitted to Francine A. Giani, Executive Director of the Utah Department of Commerce, on the 15th day of September, 2006 for her review and action.

Dated this 15th day of September, 2006.


Masuda Medcalf
Administrative Law Judge