

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



IN THE MATTER OF A REQUEST FOR
AGENCY ACTION REGARDING

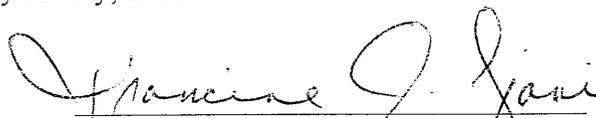
**ACCESS MOTORSPORTS, LLC dba
THE EDGE POWERSPORTS**

**ORDER DENYING REQUEST
FOR EMERGENCY ORDER**

Case No. Powersport-2006-003

The Findings of Fact, Conclusions of Law and Recommended Order in this matter are ratified and adopted by the Executive Director of the Department of Commerce. It is therefore ordered that the request for an emergency order by Access Motorsports, LLC dba The Edge Powersports (allowing it to continue to sell new Suzuki powersport vehicles, Suzuki parts and accessories, and to perform warranty work at its new location pending a final determination as to whether good cause has been established for relocation in Case No. Powersport-2006-001) is denied.

DATED this 7th day of July, 2006.


Francine A. Gian, Executive Director
Department of Commerce

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order Denying Protest. 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 on Review pursuant to Section 63-46b-13.

CERTIFICATE OF MAILING

I certify that on the 10 day of July, 2006, the undersigned mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order Denying Request for Emergency Order by certified mail and by facsimile to:

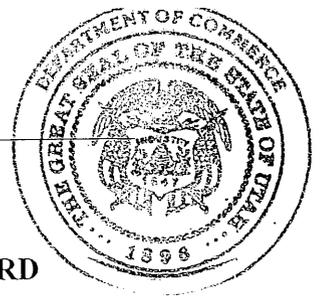
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**ACCESS MOTORSPORTS, LLC dba
THE EDGE POWERSPORTS**

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

Case No. Powersport-2006-003

INTRODUCTION

On June 27, 2006, the Executive Director of the Department of Commerce and the Utah Powersport Vehicle Franchise Advisory Board (hereafter collectively referred to as “the Agency”) received a document from Access Motorsports, L.L.C. dba The Edge Powersports (“Access”) which the Agency determined to treat as a Request for Agency Action. That Request for Agency Action requested an emergency order allowing Access to sell at its new location Suzuki vehicles, Suzuki parts and accessories and to perform warranty work on Suzuki equipment, on a limited basis, pending a determination by the Agency regarding the relocation protest filed by Continental Sales Corporation, dba Honda-Suzuki of Salt Lake (“Continental”).¹ Access also requested an expedited hearing and decision. Access claimed that it was forced out of its prior location, and that irreparable harm would result if immediate action was not taken.

On July 5, 2006, an expedited evidentiary hearing was held before the undersigned, who was designated by the Executive Director as substitute presiding officer to conduct the hearing and to issue findings of fact, conclusions of law and a

¹ Case No. Powersport-2006-001.

recommended order. Access was represented by Peter Barlow; Continental was represented by James McIntyre; and James Mulcahy represented American Suzuki Motor Corporation (“Suzuki”).

After reviewing Access’ Request and attached documentation, hearing the evidence, reviewing the exhibits and observing arguments of counsel, the undersigned makes the following recommendation to the Executive Director of the Department of Commerce.

FINDINGS OF FACT

1. Jess Aylett dba Act Investments (hereafter, “Aylett”) has owned the property located at 13200 South 48 East, Draper, Utah since September 14, 2001.² This 48 East property contains three separate buildings.
2. In approximately September 2001, the Point Powersports began operations of a Suzuki dealership at one of the three buildings on the 48 East property. The Point Powersports entered into a five-year lease with Aylett to begin September 2001 and end August 2006. In November 2003, Access replaced the Point Powersports as the official Suzuki dealer at this location.
3. In addition to its Suzuki line of powersport vehicles, Access carries the lines of Sea-Doo, ski-doo, Bombardier, and KTM. The Suzuki line makes up 50-75% of Access’ business.
4. Based upon pressure from the brands it carries, beginning in November 2003 when Access first began its dealership, Access has been considering obtaining a bigger facility. The need became more apparent when Access took on the KTM brand in 2005.

² This building is hereafter referred to as the “48 East property.”

5. Meanwhile, Aylett was also looking to sell the 48 East property. Aylett notified Access in late 2005 of his intention to sell the 48 East property.

6. Access looked into various options for a new location, including purchasing the 48 East property from Aylett and moving to other facilities within one mile of the 48 East property. However, no acceptable price or arrangement was reached.

7. As Access was looking to move and Aylett was looking to sell the 48 East property, even though the lease between Access and Aylett did not legally terminate until August 2006, they verbally entered into a gentleman's agreement to give each other as much notice as possible about their efforts to accomplish their individual goals.

8. Access knew that it was required by its dealer agreement to notify Suzuki of any intent to relocate its dealership.

9. In October 2005, during a Dealer Expo, Access notified Suzuki representatives of its intent to relocate to 14301 South Minuteman Drive in Draper.³ By November 2005, Access had followed through with appropriate paperwork to notify Suzuki in writing of its intentions.

10. In late 2005, Aylett entered into an "earnest money agreement" with Millennium Auto Sales, another of Aylett's tenants on the 48 East property, by which Millennium agreed to buy the entire property, including the building leased to Access. However, the closing on the earnest money agreement will not occur until September 2006.

11. Aylett verbally notified Access of the pending sale to Millennium. Thereafter, Access understood that its lease with Aylett became a month-to-month lease.

12. In February 2006, Suzuki notified Access that it intended to approve the

³ This location is hereafter referred to as "the Minuteman property."

relocation. Suzuki's February 2, 2006 notification to this Agency of its intent to approve the relocation (with an attached notification to Continental) was among the items of correspondence Access received from Suzuki in February 2006.

13. However, on January 1, 2006, prior to Suzuki's February notification of its intent to approve the relocation, Access entered into a five-year lease agreement and option to purchase with the owner of the Minuteman property. The property was leased for \$12,000 a month. Pending the outcome of the potential protest by Continental, Access agreed with its Minuteman property landlord that Access could begin renovations on the property but did not have to pay the \$12,000/month lease for two months.

14. Access has invested approximately \$500,000 in renovating the Minuteman property. If the Agency determined that there was not good cause for relocation to the Minuteman property, Access has three other brands that it could move to the Minuteman property.

15. At some point, while Aylett's sale of the 48 East property to Millennium was going through, Aylett offered the specific building leased by Access to others and immediately got a new tenant for the building, Pioneer Motors.

16. Pioneer Motors needed to move to the building no later than June 1, 2006. As a result, Aylett notified Access verbally that it must move by May 1, 2006, but that there was a grace period until May 31, 2006. Aylett prepared no written notification to that effect until June 22, 2006. Aylett did not provide the June 22, 2006 written notification to Access until July 5, 2006.

17. Access began moving its dealership to the Minuteman property in May 2006, but the move was not completed until mid June 2006.

18. At no time did Aylett issue an eviction notice to Access.
19. At no time did Access receive any notice from Suzuki approving its plan to move.
20. Access claims that it will suffer irreparable damage in lost sales and services that could total \$400,000 each month until a final decision is issued as to the relocation protest. It also expresses concern for the financial welfare of its sixteen employees. Finally, it states that the public will be harmed by losing the sales and services offered by one of only two Suzuki dealers in Salt Lake County.
21. The hearing in the relocation protest filed by Continental, Case No. Powersport-2006-001, is scheduled to be held on August 17, 2006.

CONCLUSIONS OF LAW

A franchisor who wishes to relocate a powersport vehicle dealership must first give notice to each affected franchised dealership in the same relevant market as the dealership that is to be relocated. Utah Code Ann. § 13-35-302(1)(a) and (b). An affected franchisee has 45 days within which to file a protest with the Agency to challenge the relocation. Subsection 13-35-302(1)(c). When a protest is timely filed, the Agency notifies the franchisor that a timely protest has been filed, that a hearing must be held, and that the franchisor may not relocate the dealership at issue until a hearing and a final determination by the Agency that good cause has been established for the relocation.

Id.

Although the above provisions indicate that a franchised dealership may not be relocated until a final determination by the Agency that relocation is appropriate, Access' request for an emergency order permitting to sell Suzuki products and to provide

warranty services at the new location is based upon Utah Code Ann. § 13-35-106(3), which provides in pertinent part:

In addition to the grounds for issuing an order on an *emergency* basis listed in Subsection 63-46b-20(1), the executive director may issue an order on an emergency basis if the executive director determines that *irreparable damage* is likely to occur if immediate action is not taken.

(Emphasis added). Thus, pursuant to Utah Admin. Code R151-46b-10(10), Access had the burden of proof in its request for agency action and request for an emergency order, to establish that the facts underlying its premature move to the Minuteman property constitute an emergency, and that irreparable damage will result if the Agency does not take immediate action.

Access has failed to meet its burden of showing that an emergency exists. Here, Access could reasonably have foreseen its current predicament. Access has been anticipating a move to a bigger location since it first became a Suzuki dealer in November 2003. It notified Suzuki in October 2005 of its intent to move to the Minuteman location. Access also began discussions in late 2005 with Aylett about its need to find a bigger location, and Aylett indicated his desire to sell the property. Before receiving Suzuki's notice of its intent to approve the relocation, Access entered into a five-year lease and option to purchase the Minuteman property. Continental subsequently filed a protest and an August 17, 2006 hearing was scheduled before the Agency. As a result, Access never received any permission or authorization from Suzuki to relocate to the Minuteman property.

Access claims that it was forced out of the 48 East property through no fault of its own. However, Access' lease with Aylett will not terminate until August 2006.

Therefore, Access may have had a legal right to stay at the 48 East property if it wished

to pursue those rights. Rather than operating pursuant to the contractual lease agreement, however, Access agreed to go along with Aylett's notice that a new tenant (Pioneer Motors) was found who needed to move in by June 1, 2006 and Aylett's request that Access move by May 31, 2006. Although Bryan Green of Access testified that he believed the lease with Aylett became a month-to-month tenancy due to Aylett's pending sale to Millennium, there was insufficient evidence presented that the original lease agreement had been legally modified. In addition, Access failed to demonstrate that the pending sale to Millennium, which did not close until September 2006, had any bearing on the situation. Under these circumstances, it is difficult to conclude that Access was forced to move out of the 48 East property through no fault of its own or that the situation was an emergency. Certainly, no eviction notice was issued by Aylett. Moreover, considering that Access entered into a long term lease on the Minuteman property before obtaining Suzuki's approval, it appears that the situation was entirely foreseeable.

Because Access has not shown that an emergency situation exists, it is not necessary to consider whether irreparable damage has been proven. Even if irreparable damage were a relevant issue under the circumstances, Access failed to meet its burden of proving that irreparable damage will result. By entering into the lease agreement on the Minuteman property before receiving Suzuki's notice of intent to approve the relocation, Access took several risks: (a) the risk that Suzuki would not approve the relocation, (b) the risk that Continental would protest the relocation, (c) the risk that the Agency would not ultimately permit the relocation, and (d) the risk of moving pending a relocation despite Section 13-35-302's prohibition against moving pending a relocation

protest.⁴ Particularly telling is that when asked about that assumption of risk, Mr. Green testified that Access had other lines to move to the new facility, and if necessary based upon an adverse decision from the Agency, Access would have to do without the Suzuki line. Thus, if Access was willing to take the risk that a final decision from the Agency could result in a permanent loss of the Suzuki line, then its inability to sell and service Suzuki products during the temporary time period until the protest hearing and a final decision from the Agency cannot be deemed to result in irreparable damage. Any loss of financial income to Access and to Access employees, as well as the public's loss of a second Suzuki dealer, is a result of the risk that Access was willing to take in January 2006 when it entered into the five-year lease on the Minuteman property.

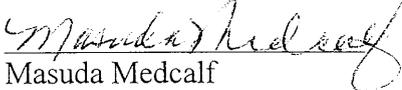
⁴ Access claims it was not notified until after its move to the Minuteman property that it could not relocate its Suzuki dealership while the protest proceeding was still pending before the Agency. Whether or not Access was ever thus notified, however, is not relevant to the analysis of its request for an emergency order. Once a protest of the relocation of a franchise is filed, the restriction on the right to relocate that franchise pending a protest proceeding exists by operation of law, namely, Utah Code Annotated Section 13-35-302(1)(c)(iii) and (iv). That statute requires the Department to inform the franchisor that the franchisor may not relocate the dealership until after the protest is heard by the Board and decided by the Executive Director. The Agency duly notified Suzuki as is required by the statute. Even if Access did not receive a separate notice, Access must necessarily be charged with knowing the legal and procedural requirements pertaining to the regulation of its franchise in Utah, including Utah Code Annotated Section 13-35-302, the very section that governs relocation of existing franchises.

RECOMMENDED ORDER

Access has failed to show that an emergency exists or that immediate action must be taken to prevent irreparable damage. Therefore, it is recommended that the Executive Director deny Access' request for an emergency order.

I hereby certify the foregoing Findings of Facts, Conclusions of Law and Recommended Order were submitted to Francine A. Giani, Executive Director of the Utah Department of Commerce, on the 7th day of July, 2006 for her review and action.

Dated this 7th day of July, 2006.


Masuda Medcalf
Administrative Law Judge