
BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE PROTEST OF
THE ESTABLISHMENT OF AN
ADDITIONAL SUZUKI MOTORCYCLE
FRANCHISE IN SALT LAKE COUNTY

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

AMERICAN SUZUKI MOTOR
CORPORATION, Respondent

:
: Case No. RV99-001
:

CONTINENTAL SALES
CORPORATION, Protestor

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:

ORDER

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 and it is, therefore

ORDERED that the protest of Continental Sales Corporation to the proposal of American Suzuki Motor Corporation to grant a new franchise within its relevant market area is well taken and should be sustained and American Suzuki Motor Corporation should be and is hereby denied permission to establish such additional franchise at 8825 South Sandy Parkway, Sandy, Utah.

SO ORDERED this the 3rd day of November, 1999.



DOUGLAS C. BORBA, Executive Director
Utah Department of Commerce

CERTIFICATE OF MAILING

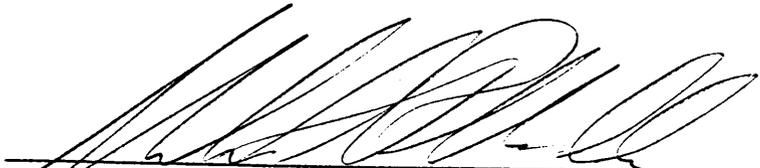
I certify that on the 3rd day of November, 1999, the undersigned mailed a true and correct copy of the foregoing Order on Review by certified mail, properly addressed, postage prepaid, to:

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INTRODUCTION

This matter came on for hearing on September 27, 1999 upon the protest of Continental Sales Corporation (hereafter "Continental") pursuant to the provisions of the Utah New Automobile Franchise Act, UTAH CODE ANN. §13-14-1 *et seq.*, opposing the grant by American Suzuki Motor Corporation (hereafter "Suzuki") of an additional Suzuki motorcycle franchise within ten (10) miles from the location of the dealership owned and operated by the protestant.

The hearing was conducted before Michael R. Medley, Department Counsel for the Utah Department of Commerce (hereafter "hearing officer"), and the Utah Motor Vehicle Franchise Advisory Board (hereafter "Board"). Board members present were: Klarice A. Bachman, chair and designee of the Executive Director of the Utah Department of Commerce; John Mecham; Don Page; and Brad Brown. The remaining Board member, Michelle Mitchell, was absent.

Appearing on behalf of Continental was James A. McIntyre, Esq. Appearing on behalf of Suzuki were Bruce L. Ishimatsu, Esq. and James M. Mulcahy, Esq.

The hearing was called to order at approximately 10:00 A.M. and following opening remarks and instructions by the hearing officer and the Board chair the attorney for Continental was questioned about and clarified the protest as encompassing only a ten (10) mile radius and not the entire area of Salt Lake County. Thereafter, evidence was offered and received. The hearing concluded on September 27, 1999 and the Board commenced their deliberations at that time.

Following its deliberations, the Board, being fully advised in the premises, authorized the hearing officer to prepare and present to the Executive Director of the Department of Commerce its advisory Findings of Fact, Conclusions of Law, and Recommended Order for his review and action.

ISSUES REVIEWED

1. Whether Suzuki Motor Corporation sufficiently established good cause pursuant to UTAH CODE ANN. §13-14-306 for establishing a new franchised dealership of the same line-make within the relevant market area of Continental Sales Corporation.

FINDINGS OF FACT

1. Continental has been in the business of the sale of motorcycles, off road vehicles, snowmobiles, and personal watercraft at its location at 2354 South State Street, Salt Lake City, Utah. Continental has been a Suzuki franchisee since 1988.

2. In response to a national ad run by Suzuki to attract applicants for possible new franchises, an inquiry was received regarding the establishment of a Suzuki franchise in a building owned by the proposed new dealer located at 8825 South Sandy Parkway, Sandy, Utah. Although there was some disagreement by the parties as to the unit of measurement used to determine the distance between Continental and the proposed new franchisee, all parties were agreed that the proposed new dealership was within Continental's ten (10) mile relevant market area regardless of the unit of measurement utilized.

3. A manager for Suzuki testified that Suzuki had been considering placing another

dealer in Salt Lake County for a period of two and one-half to three years, as Suzuki was concerned that its sales were not keeping pace with the growth taking place in Salt Lake County.

Suzuki gave the prospective new dealer an application which was received back by Suzuki in December, 1998. Upon receipt of the application Suzuki caused a credit check to be run on the proposed new dealer and the Suzuki manager also visited its business location in Sandy. Suzuki determined that the applicant had both an extraordinary location and good credit.

4. Suzuki approved the recommendation of its manager for the establishment of a new franchised dealer in the Sandy location and within Continental's relevant marketing area. The decision was based in part upon the income demographics in the south valley area of Salt Lake County as well as the population growth in that area. Suzuki also testified to a need it perceived for a sales point and maintenance facility in the south valley area and away from the downtown vicinity where Continental was located. Suzuki claimed to have further taken into consideration its belief that in most cases the addition of a new dealer stimulates overall sales and is beneficial to both its new and old franchisees.

5. There was conflicting testimony presented as to whether Continental was offered the opportunity to open a new dealership in the Sandy area before it was offered to the proposed new dealer, but it was not necessary for the Board to resolve this conflicting testimony in order to reach a recommendation in this matter.

6. Although testimony on the issue was offered to be presented by Suzuki, the Board declined to consider evidence of the financial stability of the proposed new dealer. The Board indicated that it was satisfied that the proposed dealer was financially strong enough to maintain a franchise and found that the qualification procedure for a franchisee applicant would have been more than adequate to establish its financial health.

7. Suzuki presented testimony and evidence that although Salt Lake County is growing, Suzuki is not keeping up with the growth and that while Suzuki has a twelve percent share of the market nationally, its Utah share is only seven percent. Suzuki further offered that nationally it has the smallest dealership network of the big four Japanese manufacturers and that locally it has only Continental as a dealer in Salt Lake County while Kawasaki has two dealerships, Yamaha three dealerships, and Honda has three (including Continental).

8. Suzuki testified that there is a national boom in motorcycle sales but Suzuki is continuing to lose market share nationally, and in Salt Lake County the sales of Continental are flat, although this was disputed by evidence that Continental's sale of Suzuki motorcycles has surged in 1999. Suzuki agreed that Continental is easily meeting its sales goal set by Suzuki for sales in 1999 and has been a top 40 Suzuki dealer each year since 1990.

9. All of the witnesses for Suzuki testified that Continental was a good, solid franchisee and not deficient in any respect other than failure to obtain additional market penetration desired by Suzuki. There have been no substantial complaints from customers about any area of the Continental operation, and its performance was not an issue in Suzuki's decision to grant an additional franchise.

10. At the time of the hearing Continental was the 1999 sales leader for Suzuki motorcycles among the 28 dealers comprising the district in which it is placed in Suzuki's hierarchy. Although allotted 104 motorcycles by Suzuki, Continental did not order any new product for 2000.

11. Suzuki testified it believes that the proposed new dealer is viable as a franchisee because it is a watercraft dealer in a declining market and would be a single line dealer carrying only the Suzuki motorcycle line, unlike Continental which also sells the Honda line. The facility of the proposed new dealer is considered adequate for its purpose by Suzuki with a large display floor and service area. Suzuki considers that it is not lacking in any of the requirements to become a successful franchisee.

12. Suzuki was not responsive when questioned about what efforts it had made to increase its penetration in the south end of the valley beyond setting sales goals for Continental, which Continental met. Although questioned, Suzuki did not offer any testimony as to any attempts it is making or has made to increase its market share in the south valley beyond seeking an additional franchisee.

13. The evidence established that Suzuki is the only big four Japanese manufacturer (Honda, Yamaha, Kawasaki, Suzuki) not to have placed a yellow pages ad advertising its dealers in the Salt Lake Valley. Although a portion of payments to Suzuki from Continental are available to Continental for partial payment of such an ad, under the Suzuki policy Continental

would have to pay for the advertisement and include all other metro area Suzuki dealers for free.

14. The proposed new dealer testified that it lost its Kawasaki personal watercraft franchise when it moved to its present location in Sandy and considers a full line Suzuki franchise as being a good fit with the Sea Doo personal watercraft, which is the only product it currently sells.

15. Continental testified that the reason it has not yet ordered new product this year for sales in 2000 is because of the uncertainty in its future created by Suzuki 's intent to put a new dealer into its marketing area. Continental testified that its 2000 allocation was set by Suzuki at 104 units which is well under what it sold in 1999 and well under what it would order for sale in 2000 if it were not for the question of the effect of the proposed new dealer in its market area and the bonus "hot" product that such a new dealer is allocated by Suzuki.

16. There was conflicting testimony presented to the Board concerning what would be the effect of Continental's failure to order product at the yearly show, but the most reasonable interpretation of the testimony is that product will continue to be available for Continental despite its failure to order and that the reason Continental chose not to order at the show was uncertainty as to the outcome of this proceeding and the potential impact an adverse ruling could have upon Continental's sales for the year 2000.

17. The Board was also presented with conflicting testimony from each party alleging that either Continental or the proposed new dealer was attempting to sell its business. The Board was of the opinion that it should accept the testimony of the officers of both companies that neither is actively attempting to sell its business.

18. Continental presented testimony of having expended a considerable amount of money in improvement of its facility, approximately \$81,000 of which could be attributed to its Suzuki franchise line.

19. It was apparent to the Board from the testimony and documentation that an underlying issue in this case is the sale of all terrain vehicles, and nothing to do with motorcycle sales. However, ATVs are not covered by the act and the Board therefore determined that testimony and evidence concerning ATV sales was not relevant to the issue before the Board which was limited to motorcycles.

CONCLUSIONS OF LAW

1. The threshold question in this matter of whether Continental has standing under the statute to protest the grant of a new franchise by Suzuki under the provisions of UTAH CODE ANN. §13-14-302 is not in dispute as the parties are agreed that the proposed new dealership is within the relevant marketing area of Continental as defined in UTAH CODE ANN. §13-14-102(14)(a).

2. The matters which are required by law to be considered by the Board at a hearing on the issue of the establishment of a new franchise are set out in UTAH CODE ANN. §13-14-306:

In determining whether a franchiser has established good cause for relocating an existing franchisee or establishing a new franchised dealership for the same line-make in a given relevant market area, the board shall consider:

(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 motor vehicles of the line-make, which shall include the adequacy of the motor vehicle sale and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

3. Continental is the only Suzuki franchisee in the relevant market area and therefore a consideration of §13-14-306(1) was not required of the Board.

4. Suzuki stipulated that there are no performance issues with Continental thereby deleting as an issue for consideration the question of whether Continental was providing adequate service to consumers pursuant to §13-14-306(5).

5. A consideration of the permanency of both Continental and the proposed new

dealer under UTAH CODE ANN. §13-14-306(3) gives no help in determining whether a new franchise should or should not be authorized. On the one hand, Continental has been a top Suzuki dealer for over a decade and Suzuki does not question its servicing of customers. On the other hand, the Board determined that the proposed new dealer was financially stable enough to adequately maintain a Suzuki franchise.

6. Pursuant to UTAH CODE ANN. §13-14-306(2), Continental claims to have expended approximately \$450,000 for capital improvements since the enactment of the act in 1996. Based upon the proportion of business derived by Continental from its Suzuki line, approximately \$81,000 of the improvements could be attributed to investments on the Suzuki line. However, this figure takes into consideration all of the Suzuki line and not just the motorcycle portion covered by the act. Additionally, Continental carries other lines which utilize the same facilities and which could possibly expand into such facilities allotted at the present time to Suzuki should Continental cease to function as a Suzuki dealer.

7. If the investment made by Continental to capital improvements at its business facility attributable to Suzuki was the determinative factor in this consideration, the Board would be hard pressed to find that the investment made by Continental for the Suzuki motorcycle line was significant enough to deny the grant of another Suzuki franchise in Salt Lake County.

8. The pivotal area for consideration in this matter is UTAH CODE ANN. §13-14-306(4), whether an additional Suzuki franchise would be injurious or beneficial to the public welfare and/or interest. In its notice of intent to establish a new franchise, Suzuki set out three objectives intended to be achieved by the placement of an additional franchisee in Salt Lake County:

- a. Increase convenient consumer care by providing an additional outlet for service, warranty, vehicles, parts and accessories;
- b. Increase market penetration and representation of Suzuki products;
- c. Increase competition to benefit the public.

9. A review of the sales distribution records of Continental for October 1, 1998, through September 16, 1999, covering sales for the year immediately preceding the hearing shows that Continental's sales area extend throughout the Intermountain West with sales to

customers in Arizona, Colorado, Wyoming, Idaho, and Nevada as well as throughout the State of Utah. It is interesting to note that Continental sold as many Suzuki motorcycles to Nevada citizens as it did to Sandy residents. Within the State of Utah the sales pattern covers the entire state from north to south and east to west, with a large number of sales coming from areas within the relevant market area of other Suzuki dealers.

10. The Board found a great deal of truth in the statement made at the hearing that motorcycles are considered by purchasers as recreational vehicles rather than as necessities such as automobiles, and the evidence bears out that customers are more than willing to travel outside of their immediate vicinity to make a purchase. However, the ten mile radius and county of the statute which applies to automobiles is also the standard set by the legislature for use in determining the relevant market area of motorcycle franchises.

11. The majority of the presentation made by Suzuki at the hearing dealt with the desire of Suzuki to increase its local and national market share and deepen its penetration of the Utah market. While such a goal is understandable, it is not an element for consideration by the Board in determining whether a new franchise should be allowed when properly protested under the act. It matters not one whit under the applicable statute whether Suzuki ever sells another motorcycle in the State of Utah so long as service continues to be available for Utahns owning Suzuki motorcycles. In any event, it is difficult to see - based upon actual sales distribution - how placing two Suzuki dealerships within ten miles of each other will increase penetration within a *de facto* sales area encompassing the entire Intermountain West.

12. Suzuki argued that an additional dealer in Sandy would be justified as a convenience and service to customers in the Sandy area and would prevent their having to travel downtown for purchasing or services. The witnesses for Suzuki testified that their demographic data was based upon where potential customers resided and did not take into consideration where they worked. One need only glance at the map produced by either side to determine that one living in Sandy and working in downtown Salt Lake City would by necessity pass within a few blocks of Continental's location twice a day.

13. Suzuki witnesses testified that they have received no complaints from customers concerning the services of Continental, and offered only surmise, conjecture, and a highly

suspect "survey" conducted by the proposed new dealer, to support a contention that there exists the need for an additional Suzuki outlet in the south valley area.

14. The element of consideration upon which this matter must be resolved is a weighing of the potential benefit to the public of an additional dealer balanced on one side with the potential injury to the public of such a placement on the other side. There can be no question that competition creates lower prices to the public. This would probably explain the reason why ten people came all the way from Las Vegas to buy Suzuki motorcycles from Continental in the year preceding the hearing, and why people traveled up to several hundred miles within the state to purchase from Continental, and why almost ten percent of its Suzuki sales have been made to non-residents of the State of Utah.

15. Lesser price alone of a consumer commodity does not constitute an overall benefit to the public if it is ultimately injurious to the public. One of the principal arguments used by its legislative proponents in urging passage of this act was a perceived need to prevent the public from being harmed by the loss of local franchises which would thereby decrease the ability of the public to obtain services and warranty work on their vehicles. Although specifically dealing with franchise terminations, this sentiment is reflected by the enacted law in UTAH CODE ANN. §13-14-101(2)(b)(ii).

16. The Suzuki witnesses testified - anecdotally and without offering any supporting statistics - that placing a new dealer within the relevant marketing area of an existing dealer in the same line-make generally results in increased sales for both. This was also the general unscientific opinion of the Board and the actual experience of at least one Board member.

17. Suzuki testified that it expected the proposed new dealer to initially sell only a relatively few units in comparison to those being sold by Continental, but Suzuki could not unequivocally state that placement of an additional dealer would not lessen the sales of Continental and damage Continental's franchise. The testimony further established that Continental far outsold the goal set for it by Suzuki for 1999, which appeared to the Board to have answered to a degree the concerns of Suzuki with sales keeping up with population growth and meeting the expectations of Suzuki.

18. The Board was thus presented with an equation in which the known factor of a top

Suzuki dealer with a solid record for repairs and service was on one side with the other side being occupied by an experienced watercraft dealer possessing a large facility underutilized and in need of a new line of recreational vehicles to compliment its current recreational line after the loss of its Kawasaki franchise.

19. The Board was further presented with an existing Suzuki franchisee, Continental, which also owns an even older franchise for the top selling Japanese motorcycle line, Honda, which assures the maintenance of adequate motorcycle repair and service facilities regardless of the future of Suzuki in Utah. On the other side of the scale is the proposed new dealer which would constitute a stand-alone Suzuki dealer with a fall-back position as a watercraft dealer and with no incentive to maintain a motorcycle service and repair facility should their Suzuki experiment prove unsuccessful or in conflict with their primary business.

20. The Board in its deliberations ultimately determined that there were two questions which had to be answered in the affirmative in order for Suzuki to prevail. First, has Suzuki satisfactorily met the statutory burden of proof required in order to be permitted to establish an additional Suzuki motorcycle franchise within the relevant market area of Continental? Second, if Suzuki has proven the need for an additional franchise, is its proposed new dealer the proper party to be granted such franchise with sufficient assurance that the public will be adequately protected?

21. Although the Board was of mixed personal opinion as to whether an additional Suzuki franchise in Salt Lake County is needed, Continental had limited its objection to the ten mile radius of its location and it was the unanimous opinion of the Board that there had been no substantial and sufficient evidence adduced by Suzuki to persuade the Board that it was necessary or would be of any substantive benefit to the public to place an additional dealership within ten miles of Continental's location, which will represent only five minutes of drive time when the interstate construction is completed in 2001.

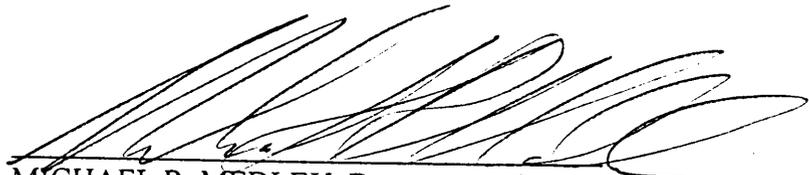
22. Assuming, *arguendo*, that the Board had been of the opinion that an additional Suzuki dealer should be placed within ten miles of Continental's location, the Board was of the opinion that the proposed new dealer was not a suitable candidate since the risk of injury to the public if it should fail would be exceeded by any possible benefit derived from lower prices.

23. It appeared to the Board in this matter that Suzuki has wholly failed to explore other means to increase its market share without turning to the simplistic solution of granting more dealerships - and then with the only real criteria for a new dealer appearing to be a willingness to accept a dealership and a good credit rating.

RECOMMENDED ORDER

ORDERED that the protest of Continental Sales Corporation to the proposal of American Suzuki Motor Corporation to establish a new franchise within its relevant market area is well taken and should be sustained, and American Suzuki Motor Corporation should be and is hereby denied permission to grant such additional franchise at 8825 South Sandy Parkway, Sandy, Utah.

Dated this the 3rd day of November, 1999.



MICHAEL R. MEDLEY, Department Counsel
Utah Department of Commerce