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

IN THE MATTER OF
PROTESTS REGARDING
ESTABLISHMENT OF FRANCHISES

Cycle City, Inc., dba Honda World,

Protestor,

vs.

American Honda Motor Co., Inc.,

Respondent.

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

**Case No. PVFA-2013-001, CIP Cycles of
Utah, Inc., dba Honda-Suzuki of Salt Lake**

**Case No. PVFA-2013-002, Soil Water
Snow, LLC, dba Plaza Cycle**

INTRODUCTION

On March 25, 2013, American Honda Motor Co., Inc. (Respondent) notified the Utah Department of Commerce (Department) of its intent to establish as Honda Multipurpose Utility Vehicle (MUV¹) dealerships CIP Cycles of Utah, Inc. dba Honda-Suzuki of Salt Lake (Honda-Suzuki) and Soil Water Snow, LLC, dba Plaza Cycle (Plaza Cycle). On April 12, 2013, Cycle City, Inc., dba Honda World (Protestor) timely filed protests to Respondents' notices, thus initiating this adjudicative proceeding.

On August 6, 2013, a hearing in this matter took place before the Utah Powersport Vehicle Franchise Board (Board) with Thomas A. Brady chairing the Board and with Board Members Paul Weller, Dennis Jorgensen, Russell B. Steadman, Robert D. Lewis, and Mark Benson in attendance. Protestor was present and represented by Brady Gibbs. Respondent was present and represented by Billy Donley.

¹ Throughout the record, the MUV line-make is also referred to by the parties as the "side-by-side" line-make. For purposes of this order, the term "MUV" is used exclusively.

BY THE BOARD:

The issue before the Board is the whether the statutory considerations are met to demonstrate good cause for Respondent to establish two new franchised dealerships for sale of the MUV product line-make. On that issue, the Board now enters the following findings of fact, conclusions of law, and recommended order for review and action by the Executive Director of the Department of Commerce.

FINDINGS OF FACT

1. Protestor, which has been franchised as a Honda dealer since 1979, does business at 10764 South, 300 West, South Jordan, Utah. Protestor established this location in 2005 with Respondent's permission and financial assistance. Prior to 2005, Protestor operated from 3900 S. Highland Drive, Salt Lake City, Utah.
2. Pursuant to Utah Code § 13-35-102(13), a franchised dealer's relevant market area is comprised of both the county in which the dealer is located and the 15-mile radius around the dealer's business site.
3. At all relevant times, the Honda-Suzuki dealership (at 2354 S. State Street, Salt Lake City, Utah) and the Plaza Cycle dealership (at 1379 West 3300 South, West Valley, Utah) have both been located within Protestor's relevant market area. All three dealerships are within Salt Lake County. Prior to Protestor's relocation to South Jordan, Protestor was located 4.3 road miles from Honda-Suzuki and 6.3 road miles from Plaza Cycle. Currently, Protestor is located 12.6 road miles from Honda-Suzuki and 13.2 road miles from Plaza Cycle.
4. Under Utah Code § 13-35 et seq (the Act), a franchisor may not establish a new franchised dealership within an existing dealer's relevant market area without

giving the existing dealer notice and an opportunity to protest.² Respondent has complied with this statutory notice requirement.

5. Since May of 2008, Protestor has been a franchised dealer for the Honda MUV line-make. At all relevant times, Protestor has been the only dealership franchised for the Honda MUV line-make within its relevant market area
6. At all relevant times, Respondent has had one MUV model available; specifically, the Big Red. Historically, the Big Red has not sold as well as competing brands. From January 2010 through May 2013, six Honda Big Red MUVs were registered by consumers living within the Salt Lake City metropolitan area.³ In contrast, 1,633 Polaris MUVs; 220 Can-Am MUVs; 202 Arctic Cat MUVs; 135 Kawasaki MUVs; 37 Yamaha MUVs; and 10 John Deere MUVs were registered.⁴
7. The Salt Lake City metropolitan area is the most heavily populated area within the state of Utah.
8. Within the Salt Lake City metropolitan area, Polaris has 11 dealerships franchised for the MUV; Yamaha has nine; Kawasaki has eight; Honda has five; Can-Am and Arctic Cat each have four; and John Deere has one.

² Pursuant to Utah Code § 63G-4-206, the Board takes notice of the fact that the Act was created by the Utah State Legislature in 2002. All three dealerships at issue were established in Salt Lake County and within 15 miles of one another at that time. Therefore, they were grandfathered as to their existing franchise agreements, and the three dealerships have historically competed with each other on some Honda products and line-makes. However, the Act is triggered whenever a franchisor proposes to enter into a new franchise agreement that would require an existing dealer to compete with other dealers on a specific line-make within the relevant market area. Such is the case here.

³ The term "metropolitan area" is not defined in the Act. The term "Salt Lake metropolitan area" is used by the parties in their stipulation of fact to refer to the area of relatively dense population along the Interstate 15 corridor through Salt Lake County and at least partially into Davis and Utah Counties. It is also referred to as the "three-county area" in the parties' stipulation.

⁴ At hearing, Respondent explained that Honda's MUV sales are generally about double the registrations, suggesting that the same would likely be true for other manufacturers. Respondent's data indicates that other Honda line-makes are more competitive in the marketplace than is the Big Red MUV.

9. Analyzing the market areas immediately proximate to each existing Honda dealership demonstrates the following:
- a. Consumers who live in the census tracts more proximate to Honda-Suzuki than to any other Honda dealership must drive an average of 18 road miles to get to a Honda MUV franchise. All competitors other than John Deere are, on average, more proximate.
 - b. Consumers who live in the census tracts more proximate to Plaza Cycle than to any other Honda dealership must drive an average of 12.4 road miles to get to a Honda MUV franchise. All competitors other than John Deere are, on average, more proximate.
 - c. Consumers who live in the census tracts more proximate to Protestor than to any other Honda dealership must drive an average of 7.7 road miles to get to a Honda MUV franchise. Only Kawasaki is, on average, more proximate, at 7.3 miles.
10. To date, Protestor has always been able to meet consumer demand for the Big Red MUV within its relevant market area. Protestor has never had to backorder a product, nor has a consumer been required to wait for inventory to ship or to become available. Protestor's sales of the Big Red MUV currently rank the store as one of the top Honda MUV dealers in a sales district comprised of five adjoining states.
11. Protestor has always performed as expected and required under its franchise agreement. It has a demonstration track where consumers can experience the

MUV in a real-life setting. It dedicates approximately 20% of its advertising budget to the MUV and sponsors publicity events.

12. Protestor is franchised exclusively with Honda.
13. Protestor has no plans to terminate its franchise agreement, to move its dealership location, or to close its business.
14. Respondent has discontinued production of the Big Red MUV. It has invested significant resources to relocate production of its MUV line-make from Mexico to America and is ready to launch a new model, the Pioneer. Respondent anticipates that the Pioneer has the design, performance, and accessories to compete meaningfully with other brands, particularly Polaris. Ultimately, Respondent hopes to capture approximately 20% of the MUV market—that being the approximate market share it captures in other sport vehicle segments.
15. Protestor's dealership is capable of handling additional MUV inventory should consumer demand increase with the launch of the Pioneer model.
16. Protestor's sales and service staff have been appropriately trained regarding the Honda MUV line-make. Protestor has never had a consumer complaint about its knowledge of the product or its ability to service it.

CONCLUSIONS OF LAW

17. Where a franchisee protests a franchisor's proposal to enter into an agreement that would allow another dealership to compete on a specific line-make within the franchisee's relevant market area, the franchisor is required to demonstrate good cause for the proposal in order to proceed. Utah Code § 13-35-302(1)(b)(ii)(A).

18. Utah Code § 13-35-306 outlines the evidence that the Board is required to consider in determining whether a franchisor has met its burden to demonstrate good cause, as follows:

- a. 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;
- b. 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;
- c. the permanency of the existing and proposed investment;
- d. whether it is injurious or beneficial to the public welfare or public interest for an additional franchise to be established; and
- e. 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, including the adequacy of the powersport vehicle sale and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

19. Respondent has not argued that Protestor's investment or performance under its franchise agreement is insufficient. Nor has Respondent challenged Protestor's claim that its dealership is permanent and has an excellent record for consumer service. Therefore, the first and fourth statutory considerations are most relevant to the question of whether Respondent has demonstrated good cause for its proposed MUV franchises.

20. As to the first statutory consideration, there is no evidence of any current imbalance between the business transacted by Protestor on the Big Red product and the amount of business available within Protestor's relevant market area. Historically, Protestor has had ample supply to meet consumer demand for the Big Red, never experiencing a backorder or a shortage in inventory.

21. Respondent appears to argue that the sales historically captured by its competitors constitute the amount of business available within the relevant market area. Protestor has never captured approximately 20% of those sales, and Respondent argues that its unsatisfactory market share in the MUV line-make is due, at least in large part, to Protestor's being geographically more distant from the majority of the consumers as compared to competing manufacturers.
22. Respondent's market data does not support this conclusion.
23. In the census tracts that are most proximate to Honda-Suzuki and Plaza Cycle, Protestor is closer to consumers, on average, than the nearest John Deere dealership. Yet sales of John Deere MUVs still outpace sales of the Big Red.
24. In the census tracts that are most proximate to Protestor, consumers are, on average, closer to Protestor than they are to a Yamaha, Arctic Cat, John Deere, Polaris, or Can-Am dealership. Even so, the Big Red sales lag behind the sales of these competitors.
25. Although it sounds logical to argue that proximity to consumers results in better sales, the data itself demonstrates otherwise. If proximity were the only factor—or even the most important factor—then the Big Red would be the top seller in the census tracts most proximate to Protestor's dealership. However, this is not the case. The data demonstrates that consumers who live nearest to Protestor's dealership are nevertheless bypassing it and driving farther from their homes in order to purchase the competitors' MUVs.
26. In sum, it appears that factors other than dealership proximity account for the disparity in sales between the Big Red and competing MUVs. Where this is the

case, the Board cannot fairly conclude that Respondent would capture the sales currently realized by its competitors if only it had additional sales locations in the Salt Lake City metropolitan area. Nor can the Board fairly conclude that sales realized by Respondent's competitors constitute the business available to Honda MUV franchisees.

27. To date, Protestor has successfully handled consumer demand for the Honda MUV. Therefore, good cause for additional franchises does not exist under the first statutory consideration.
28. The Board notes that Respondent anticipates the Pioneer MUV to be more competitive in the marketplace than the Big Red has been. Should that prove to be the case, it is possible that Protestor might become unable to meet consumer demand. In such circumstances, there might be good cause for additional franchises. However, any conclusion to that effect would be speculative and unsupported at this time.
29. As to the fourth statutory consideration, Respondent argued at hearing that competition benefits consumers. The Board agrees, but notes that the Act does not entirely relieve Protestor from competing for consumers and sales. Within Protestor's relevant market area, consumers have MUVs from many competing manufacturers available to them. Just outside Protestor's relevant market area, consumers can find competition for the Honda MUV itself. If these circumstances nevertheless constitute a monopoly that is harmful to the public, then the Act itself is insupportable. The Board declines to draw such a conclusion.

30. Respondent emphasized at hearing that Protestor, Honda-Suzuki, and Plaza Cycle are all located in the most heavily populated area of Utah. Respondent appears to consider that a relevant market area should not be defined solely by geography, but should take into account population base as well, since dealerships that happen to be located in more heavily populated areas have—at least in theory—more potential sales. If this is Respondent's argument, it must make it to the Legislature. The Board declines to modify the statutory definition of the term "relevant market area" in this order. Therefore, good cause for additional franchises does not exist under the fourth statutory consideration.

31. In addition to addressing at hearing the two statutory considerations outlined above, Respondent emphasized that, to date, Protestor's MUV sales have constituted up to 2% of its total business. Respondent argued that, in these circumstances, Protestor would not be hurt meaningfully if the establishment of additional franchises reduced or even eliminated Protestor's MUV sales. The Board does not consider this argument to be relevant under the statute, which does not contemplate that good cause for additional franchises should be found to exist if it appears that any harm that might inure to an existing franchisee would be minimal.

32. Finally, Respondent argued that the establishment of additional franchises would be more likely to increase Protestor's MUV sales than to decrease them. Respondent theorizes that better overall product visibility will generate consumer interest, resulting in better sales for all. Again, the Board does not find this argument to be relevant under the statute. If Respondent's argument can be

demonstrated in other market areas, Protestor might be convinced to withdraw its protests. But it is not for the Board to second-guess the wisdom of Protestor's position. As the case stands, Protestor opposes Respondent's proposal to franchise two additional dealerships for the MUV line-make within the relevant market area, and Respondent has failed to demonstrate good cause for the franchises pursuant to the statutory considerations.

RECOMMENDED ORDER

Given the foregoing findings of fact and conclusions of law, the Utah Powersport Vehicle Franchise Board recommends that the Executive Director deny Respondent's proposals to enter into franchise agreements through which two dealerships within Protestor's relevant market area would be franchised to deal in the Honda MUV line-make.

On behalf of the Utah Powersport Vehicle Franchise Board, 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 27th day of August, 2013 for her review and action.

Dated this 27th day of August, 2013.


Jennie T. Jonsson
Administrative Law Judge

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Case No. PVFA-2013-002, Soil Water Snow, LLC, dba Plaza Cycle

BY THE EXECUTIVE DIRECTOR:

Francine A. Giani, Executive Director of the Utah Department of Commerce, has reviewed the August 27, 2013 findings of fact, conclusions of law, and recommended order of the Utah Powersport Vehicle Franchise Board in this matter and hereby adopts the recommendation in its entirety.

ORDER

The proposal of American Honda Motor Co., Inc. to enter into franchise agreements through which two dealerships within Cycle City, Inc., dba Honda World's relevant market area would be franchised to deal in the Honda MUV line-make is denied.

This order shall be effective on the signature date below.

DATED this 27th day of August, 2013.

UTAH DEPARTMENT OF COMMERCE


Francine A. Gian
Executive Director

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the Court of Appeals 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-16, 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.

CERTIFICATE OF DELIVERY

I certify that on the 27th day of August, 2013, the undersigned provided a true and correct copy of the foregoing Order by first-class mail, postage prepaid to:

Cycle City, Inc., dba Honda World
c/o Brady T. Gibbs, Esq.
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