
**BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**



IN THE MATTER OF THE PROTEST OF :
THE ESTABLISHMENT OF AN :
ADDITIONAL FRANCHISE BY :

AMERICAN SUZUKI MOTOR :
CORPORATION :

FRANCHISOR :

BEUS AUTO SALES :

PROTESTER :

**ORDER
DENYING PROTEST**

Case No. NMVFA 00-003

ORDER

This matter came on for a hearing before the New Automobile Franchise Act Advisory Board (hereafter "Board") on September 18, 2000, upon the protest of Beus Auto Sales (hereafter "Beus") pursuant to the provisions of the Utah New Automobile Franchise Act, UTAH CODE ANN. §13-14-1 *et seq.* (hereafter "Act"), opposing the proposed grant by American Suzuki Motor Corporation (hereafter "Suzuki") of an additional Suzuki automobile franchise in West Valley City (hereafter "WVC"), a distance in excess of ten (10) miles from the location of the Beus dealership but within the confines of the county of Salt Lake County.

The hearing was conducted before the Board and its Chair, Klarice A. Bachman, appointed as acting Executive Director of the Utah Department of Commerce for the purpose of this hearing following the recusal of Douglas C. Borba, Executive Director of the Utah Department of Commerce. In addition to the Ms. Bachman, Board members present and participating were: John Mecham; Don Page; Brad Brown; Jewel Lee Kenley; and Joe Pacheco.

The remaining Board member, Michelle Mitchell, was absent.

Appearing on behalf of Beus were Leo R. Beus, Esq., Richard X. Herrera, Esq., and Stuart Hinkley, Esq. Appearing on behalf of Suzuki were Francis M. Wikstrom, Esq., J. Michael Bailey, Esq., Vanessa B. Pierce, Esq., and James M. Mulcahy, Esq.

The hearing was called to order at approximately 8:35 A.M. and, following preliminary remarks and instructions by the hearing officer and the Board chair, evidence was offered and received. The hearing concluded on September 18, 2000, at approximately 4:15 P.M., and the Board commenced its deliberation at that time. The Chair and acting Executive Director orally announced her decision at approximately 4:40 P.M. that Suzuki should be permitted to establish a new dealer point in West Valley City, based upon the recommendation of the majority of the Board and finding that:

1. The proposed WVC franchise is 14.8 aeronautical miles and 18.2 driving miles from Beus. Although exceeding the ten (10) mile relevant market area provision for protests, both Beus and WVC are within Salt Lake County, thereby bringing this issue within the jurisdiction of UTAH CODE ANN. §13-14-1 *et seq.* as defined in §13-14-102(15)(a).
2. It was obvious to the Board from the testimony that serious deficiencies and problems exist within the Suzuki organization, both locally and nationally, and that the decrease in sales experienced by Beus since the opening of WVC is attributable more to Suzuki problems than to any sales activity of WVC. Beus sales of new Suzuki vehicles are apparently down from approximately nine vehicles per month to approximately five per month since April. However, WVC sales are only approximately two and one-half per month, and could not solely account for the reduction in sales being experienced by Beus.
3. The testimony was adduced that Beus was continuing to spend the same amount for advertising that had been producing nine sales per month to sell five units. Additionally, another \$25,000 per month has been being spent for Suzuki advertising by WVC during this period of declining overall sales. The influx of new advertising dollars should have stimulated the market and produced an increase in sales rather than a decrease of one and one-half new car sales per month. The Board was of the opinion that a decline in national brand acceptance, along with allocation and distribution problems, were the proximate cause of declining sales rather than

the effect of the opening of WVC.

4. The Board was impressed with the testimony of the marked and almost geometrical increase in the overall recent sales of Hyundai vehicles, a similar line-make to Suzuki, when additional points were added in Salt Lake County. Although the Board realized that factors other than pure competition contributed to the results testified to regarding Hyundai, the effects of intrabrand competition cannot be lightly discounted. The Board was also influenced by the fact that all other competing line-makes to Suzuki have at least two, and usually three, dealer points in Salt Lake County, all of which line-makes appear to be more successful than Suzuki in penetrating this market.

5. Almost half of the population of the State of Utah resides within the statutorily defined relevant market area of Beus, yet Suzuki has managed to only sell slightly over 100 vehicles per year in this market area. A minority of the Board questioned the figures testified to by Suzuki's expert, and believed that Suzuki's expectations may not be realistic. While part of the reason for the weak sales of Suzuki can be attributed to a lack of effective support of its product, the Board was unable to say that the numbers of potential purchasers did not exist to justify a second dealer point. A majority of the Board felt that although, as a matter of fairness, it does not seem that Suzuki has treated Beus properly, Suzuki does need more representation in this market and that there is enough potential in Salt Lake County to justify another dealer in the same line-make.

6. A majority of the Board expressed doubt as to whether WVC could make it as a stand-alone Suzuki dealership, and questioned what appeared to be a desperate action of Suzuki to get another point without tremendous concern being given to the quality aspects of the new dealer point. It was apparent from the testimony of the majority owner of the WVC location that he has only limited knowledge of its operations, and the minority owner has largely been absent or otherwise distracted from daily management of the franchise. A minority of the Board was of the opinion that the proposed new point would eventually result in WVC succeeding and Beus failing.

7. The entire Board recognized the investment made by Beus in its new facility to house its Suzuki and Hyundai franchises, compared to the comparatively small investment in

infrastructure made by WVC. However, the Board also recognized that this investment was not solely - or even primarily - for the advancement of its Suzuki franchise, which represents only ten to twelve percent of its gross profit.

8. Beus argued that customers are willing to drive 20 miles for service, but the Board found that with only one franchise in Salt Lake County it was probably not willingness but rather necessity and lack of alternative that occasioned the long drives. The majority of the Board determined that it would be more convenient for residents of Salt Lake County to have more than one location available at which to obtain service on Suzuki vehicles, and that a location in the already heavily developed central valley area as well as one in the rapidly developing south valley area would be beneficial to the public. While a minority of the Board felt that WVC would eventually drive Beus out of its Suzuki franchise, even this unlikely event would leave a centrally located point in Salt Lake County for servicing Suzuki vehicles.

9. The Board discounted the testimony of Steven Beus, principal of Beus, insofar as it related an alleged promise by Suzuki of exclusivity in Salt Lake County, both for factual and legal reasons. The oral representations of Suzuki, if as stated, were vague, ambiguous and capable of various interpretations, only one of which would be the one attributed by Mr. Beus. The franchise agreement contains no clause indicative of any intent to grant Beus the sole right to sell Suzuki vehicles in Salt Lake County, but rather reads to the contrary. Additionally, there was no ratification of the alleged promise, either oral or express, subsequent to the execution of the franchise agreement which could be contended by Beus to have amended the contract, or which would have permitted admissibility of parol evidence of the alleged earlier agreement which had not been incorporated into the contract.

10. The testimony fully supported a finding that Beus has done an outstanding job in operating its Suzuki franchise and, while not necessarily convenient to all of its customers, is capable of providing adequate service to Suzuki vehicle owners. Although a question was raised regarding the ability of the WVC location to provide adequate services, there was no substantial evidence presented of any inability of WVC to provide such services.

11. The Board was required by UTAH CODE ANN. § 13-14-306 to consider evidence in five areas in order to determine whether good cause exists for the establishment of another

Suzuki franchise in the Beus relevant market area:

- (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.

12. Beus is the only Suzuki line-make franchisee in Salt Lake County, so in considering item one the Board could only compare the Beus sales against the amount of business available in Salt Lake County. Even disregarding the expert testimony offered by Suzuki that Salt Lake County is readily capable of supporting over 200 new sales a year, we can look at the actual figures as was urged by Beus at the hearing. In the past, Beus has averaged sales of nine new Suzuki vehicles per month, and the actual figures are that the county will support sales of at least 108 vehicles per year. Currently Beus and WVC combined are selling only seven and one-half vehicles per month, or approximately 90 annually. Based upon the actual past sales figures of Beus, there are at least 18 additional sales per year available. Although the figures of the Suzuki expert were questioned by a minority of the Board, the majority of the Board was of the opinion that there is sufficient business available to support a second dealer point in Salt Lake County, with which opinion the acting Executive Director concurs.

13. The second consideration of the Board was the "investment **necessarily** made . . . in performance . . . of their franchisee agreements" (emphasis added). There is no question that Beus has invested heavily and has developed an outstanding location for its three product lines. However, the testimony was that Beus sells about six times as many Hyundai vehicles from the facility shared with its Suzuki franchise as it does Suzuki vehicles. The franchise agreement,

which speaks for itself, did not require Beus to make the major investment it undertook. Although asserting varying reasons for their decision, the majority of the Board determined that the portion of the Beus investment in its facility dedicated to Suzuki was not sufficient to justify it the exclusive right to represent Suzuki in Salt Lake County.

14. The issue of permanency of the existing and proposed franchise created some concern within the Board, as set out above. However, the consensus was that both franchises should be able to succeed, and that even if one or the other should fail, it would create no lasting harm to the public. The fact that Suzuki was willing to risk incurring the ire of one of its outstanding dealers to put in another point in Salt Lake County indicates its dedication to creating a successful, and therefore permanent, centrally located franchise. The acting Executive Director is of the opinion that there is no question of the permanency of the Beus investment, and that the WVC investment is sufficient to give it a good chance of permanency.

15. There was no issue created in the minds of the Board that two successful Suzuki franchises in Salt Lake County would be anything other than beneficial to the public interest and welfare. Looking at the issue strictly from the public interest viewpoint, there is no downside in a second dealership. Should both franchises succeed, the public will be given a choice for both purchasing and servicing of their Suzuki vehicles. Should the Beus franchise fold, the public will be left with a central location for sales and service. Should WVC fail, the public will be no worse off since they will still have Beus for sales and service. The acting Executive Director agrees that the addition of a new dealer point would benefit the public.

16. The final issue to be considered is really not an issue. Beus is a good Suzuki dealer and provides more than adequate service to its customers, and meets the criteria set out by the statute to be considered. However, taking "adequate service" in a more general term (*e.g.* convenience) would leave it open to question whether customers at the far north end of Salt Lake County are being adequately served by a dealership in the far south end of Salt Lake County.

AND THE ACTING EXECUTIVE DIRECTOR having found as set out above, it is, therefore

ORDERED that the protest filed by Beus Auto Sales against the establishment by

American Suzuki Motor Corporation of a new franchisee at 3146 West 3500 South, West Valley City, Utah, should be and is hereby denied, and American Suzuki Motor Corporation is authorized to proceed with the establishment of the additional franchise. It is further

ORDERED that the Order to Cease and Desist heretofore entered by the acting Executive Director on September 8, 2000, should be and is hereby dissolved and held for naught.

SO ORDERED this the 20th day of September, 2000.

Klarice A. Bachman

KLARICE A. BACHMAN, Acting Executive Director
Utah 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 on Review. 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.

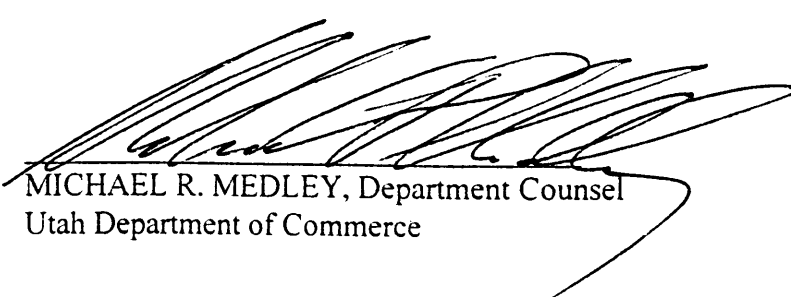
CERTIFICATE OF MAILING

I certify that on the 20th day of September, 2000, 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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