STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ART MORAN PALM BEACH PONTIAC-GMC, INC. and GENERAL MOTORS CORPORATION,

Petitioners,

vs. CASE NO. 86-0289

STEWART PONTIAC COMPANY, INC., and DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondents.

RECOMMENDED ORDER

The Division of Administrative Hearings, by its duly designated Hearing Officer James E. Bradwell, held a public hearing in this case from June 30 through July 3, 1986, in West Palm Beach, Florida.

APPEARANCES

For Petitioner Art Moran Palm Beach Pontiac-GMC, Inc.:	John L. Bryan, Jr., Esquire SCOTT, ROYCE, HARRIS & BRYAN, P.A. 450 Royal Palm Way Post Office Box 2664 Palm Beach, Florida 33480
For Petitioner General Motors Corp.:	Dean Bunch, Esquire ERVIN, VARN, JACOBS, ODOM & KITCHEN 305 South Gadsden Street Tallahassee, Florida 32302 Dennis J. Helfman, Esquire and Judith L. Collier, Esquire Office of General Counsel General Motors Corporation New Center One Building 3031 West Grand Boulevard Post Office Box 33122 Detroit, Michigan 48232
For Respondent Stewart Pontiac Co.:	James D. Adams, Esquire QUINTON, LUMMUS, DUNWODY & ADAMS, P.A. 186 S.W. 13th St. (Coral Way) Miami, Florida 33130
For Respondent Department of Highway Safety & Motor Vehicles:	No appearance

BACKGROUND

This action began when Petitioner, Art Moran Palm Beach Pontiac-GMC, Inc. ("Art Moran"), filed an application with Respondent, Department of Highway Safety and Motor Vehicles, Division of Motor Vehicles ("Department"), for licensure as a dealer of Pontiac automobiles in West Palm Beach, Florida. Stewart Pontiac Company ("Stewart") filed a letter of protest requesting a formal hearing pursuant to Section 320.642, Florida Statutes, contesting the application of Art Moran. The matter was forwarded by the Department to the Division of Administrative Hearings with the request that a Hearing Officer be assigned to conduct a formal hearing under the terms of Section 320.642, Florida Statutes.

At the hearing, General Motors Corporation ("GM") presented the testimony of John A. Ford, an expert in market research and demographics; Ray Caspary, national survey manager for the Pontiac Motor Division of GM; James Gahrs, Jacksonville zone manager for Pontiac; James A. Anderson, president of Urban Science Applications, Inc., an expert in dealer network planning and in dealer location analysis; and Patrick T. Martin, manager of Customer Satisfaction Research and an expert in market research and customer satisfaction analysis. GM offered GM Exhibits 1-66 and 58A which were received in evidence, and GM Exhibits 67 and 68 which were marked for identification. Art Moran offered Moran Exhibit 1 which was received into evidence.

Respondent Stewart presented the testimony of Clyde Thomas Montgomery, District Manager for Pontiac (by deposition); Earl Stewart, Vice President and General Manager of Stewart; Dr. Lyman Ostlund, President of the Fontana Group and an expert in adequacy of representation and statistics and James Gahrs. Stewart offered Stewart Exhibits AA, A through Q, S, T, U, W and X, all of which were received in evidence and Stewart Exhibit R and BB which were marked for identification.

The transcript of the hearing, consisting of four volumes and 974 pages was filed on July 16, 1986. Proposed findings of fact and conclusions of law were filed by Art Moran, GM and Stewart on July 28-29, 1986, and have been considered by me in preparation of this Recommended Order. By letter dated July 31, 1986, Stewart submitted corrected copies of pages 6, 7 and 8, which were inserted in its Final Argument. All proposed findings have been addressed either directly or indirectly in this Recommended Order and proposed findings of fact which are not incorporated herein are the subject of specific rulings set forth in an appendix to this Recommended Order.

ISSUE PRESENTED

The issue presented for determination herein is whether or not the existing Pontiac dealers serving the West Palm Beach area are providing inadequate representation.

FINDINGS OF FACT

1. Art Moran filed an application with the Department seeking licensure as a franchised Pontiac-GMC motor vehicles dealer. The GMC license is not at issue herein. By its application, it sought the issuance of a license to operate a new Pontiac dealership in Palm Beach County on Northlake Boulevard (stipulation of the parties).

2. A letter of protest to the application was timely filed by Stewart pursuant to Section 320.642, Florida Statutes. (stipulation of the parties)

THE MARKET AREA

3. The relevant market area for purposes of Section 320.642 is the West Palm Beach multiple dealer area (MDA). 1/ The West Palm Beach MDA consists of the densely populated portion of eastern Palm Beach County (Exhibits 9-10).

4. The West Palm Beach MDA has been divided into three smaller markets known as areas of geographic sales and service advantage ("AGSSA") (GM Exhibit 6-7). AGSSA's are developed by GM as a dealer network planning tool. (I-92, 100, 103). Each AGSSA consists of those census tracts closest to a proposed or existing dealer and identifies an area of shopping convenience for consumers in that AGSSA. (GM Exhibits 19 and 20) Each AGSSA represents the area in which an existing or proposed resident dealer has or would have an advantage over the same line make dealer(s) in the MDA by virtue of the resident dealer's location. (I-103).

5. AGSSA I is that portion of eastern Palm Beach County generally lying between 45th Street and Lantana Road. AGSSA II is south of AGSSA I and essentially surrounds the Delray Beach area. AGSSA III is the area of Palm Beach County north of 45th Street where Art Moran has proposed to be located. (GM Exhibit 6, 7).

6. Stewart offered no alternative market definition for performing a registration penetration analysis of the West Palm Beach community.

MARKET PENETRATION

I. IN THE WEST PALM BEACH MDA

7. General Motors conducts periodic analyses of market penetration in each MDA by reviewing registration data provided by R. L. Polk and Company ("Polk") at both the county and census tract levels (GM Exhibit 8). The registration data provided by Polk includes every vehicle registered to an address within a particular area of geography (county or census tract) regardless of the selling dealer. Stewart raised an issue during the hearing respecting the reliability of certain market penetration data gleaned from the Polk figures for 1985. This issue was raised based on the parties' inability to affirmatively state whether certain transactions calculated by Polk were fleet or retail transactions. Both parties relied on the Polk data and it is the industry standard for tracking automobile registrations. The Polk data is reliable for the purposes introduced by GM.

8. Adequacy of representation is primarily determined by using retail registration data. The Polk data includes the components of retail and fleet as well as total registrations. (GM Exhibits 25-27). Both parties have used Polk retail registration data to analyze market penetration. (GM Exhibits 25-35, Stewart Exhibits I-N).

9. Retail market penetration is a relative concept that compares the retail registration of one line make with all industry registrations in a particular geographic area. For example, 7.02 percent of all the vehicles registered in the Jacksonville zone for retail use were Pontiac in 1985. Thus, Pontiac's market penetration in the zone was 7.02 percent. (I- 107; GM Exhibit 17). Correspondingly, 5.32 percent of all retail vehicles registered in the West Palm Beach MDA in 1985 were Pontiacs for an MDA average of 5.32 percent, or 1.70 percent below zone average. (GM Exhibits 34 and 35).

10. Market penetration compares total industry retail registrations in an area to the retail registrations of a particular line make in that area. An individual dealer's sales records are not helpful when evaluating market penetration.

11. Retail registration efficiency to Jacksonville's zone average is the percentage relationship between retail penetration in a geographic area and zone penetration. In 1985, the retail registration efficiency of the West Palm Beach MDA to zone areas was 75.8 percent, the lowest penetration in the Jacksonville zone. (GM Exhibit 3).

12. Retail registration efficiency in the West Palm Beach MDA has steadily declined since 1985. (I-154, 155, 157; GM Exhibit 27 utilizing the Polk community registration reports).

MDA Retail Reg:

	1981	1982	1983	1984	1985	March, 1986 annualized
INDUSTRY	31,845	31,328	39,273	42,247	43,797	41,128
PONTIAC	2,356	2,220	2,590	2,639	2,460	2,152
PONTIAC percent OF INDUSTRY	7.4	7.1	6.6	6.4	5.6	5.2

Zone Retail Reg:

	1981	1982	1983	1984	1985	March, 1986 annualized
PONTIAC percent OF INDUSTRY	8.5	7.4	7.4	7.2	7.0	7.6

13. Further, from 1981 to 1985, industry retail registrations in the MDA have increased 11,952 vehicles or 38 percent while Pontiac retail registrations increased only 104 units or 4 percent (GM Exhibits 27 and 28). Stewart's sales increased only 41 units or 3 percent in the same time period. (I-159).

14. The sales performance of the West Palm Beach dealers has declined 10 percent from 1984 to 1985. Stewart's sales were also down in 1985 (I-159). Perhaps a contributing factor to Stewart's sales performance is his practice of putting supplemental dealer price stickers averaging $800 extra on each car. According to Mr. Stewart, such additional charges make cars more difficult to sell (GM Exhibit 66, p. 345).

15. In 1985, the Pontiac West Palm Beach MDA ranked 123rd in retail penetration when compared with the 159 largest Pontiac markets in the United States. (I-95; GM Exhibit 4). Based on retail penetration, the West Palm Beach MDA has been the worst MDA in Pontiac's Jacksonville zone since 1983 (GM Exhibits 30, 32 and 34)

II. In AGSSA III

16. The most current registration data available at the AGSSA level is year-end 1985 data. This data was available to both parties prior to the hearing. The parties agree that the most current data is required to do market research. In this regard, Stewart relied on outdated data in a number of its exhibits (see, for example, Stewart Exhibits D, J, O, P and W.)

17. The West Palm Beach MDA retail penetration has been consistently below zone and national retail penetration. (GM Exhibit 27). AGSSA III has repeatedly had the worst penetration in the MDA (GM Exhibit 35).

18. For the years 1983, 1984 and 1985, Pontiac's retail penetration figures nationally in the Jacksonville zone, in the West Palm Beach MDA and in the three AGSSA's were as follows-utilizing census tract reports:

	Zone	National	West Palm Beach MDA	AGSSA 1 (middle)	AGSSA II (south)	AGSSA III (north)
1983	7.42	6.13	6.86	7.8	6.3	6.2
1984	7.15	6.00	6.41	6.8	6.3	5.9
1985	7.02	6.99	5.32	5.6	5.4	4.7

19. Recognizing the growth in northern Palm Beach County, Pontiac established AGSSA III as a study area--an area set aside to determine the potential for representation--as early as 1978. Due to the growth, the decline in market penetration, and other factors, the study was converted to a proposed additional point. An additional dealer in an area tends to increase market penetration in its line make to the benefit of the existing same line make dealers. (GM Exhibits 49, 50, 54, 55 and 57).

20. The parties agreed that size class is a factor that may be considered in addressing market penetration. (GM Exhibits 38 through 40; Stewart Exhibits I through Q). Mr. Gahrs testified that model mix is not as significant as line make. Pontiac competes with the full line of vehicles offered by Ford, Chevrolet and the imports (I-168).

LOST OPPORTUNITIES

21. "Lost opportunities" is the difference between actual Pontiac retail registrations in an area and the number of registrations that would have occurred had a given norm (i.e. zone average penetration) been achieved. The number of lost opportunities represents the number of registrations available to the Pontiac dealers in the MDA had zone average penetration been attained. (GM Exhibits 30, 32, 34, 39 and 40). The parties agree that lost opportunities exist in AGSSA III and that those losses are increasing:

LOST OPPORTUNITIES COMPARED TO ZONE RETAIL PENETRATION

	1983	1984	1985
Zone Penetration	7.42	7.15	7.02
MDA	(241)	(312)	(733)
AGSSA I	no loss	(54)	(227)
AGSSA II	(182)	(164)	(320)
AGSSA III	(84)	(95)	(187)

The above graphically portrayed the poor market penetration in the West Palm Beach MDA and AGSSA III. (GM Exhibits 30 through 35). Stewart also recognizes the theory of lost opportunity but calculates the loss by comparing the MDA to itself. The car loss which has almost doubled from 1984 to 1985 appears to be growing, based upon the first three months of 1986. Annualized for 1986, the MDA car loss will be 976 (GM Exhibit 27).

22. The lost opportunity in the MDA when adjusted for product popularity drops slightly. However, when the high level of in-sells (cars sold by dealers outside an area but registered in an area in the West Palm Beach MDA) is considered (GM Exhibit 21), the lost opportunity to the dealers doubles from 733 to 1,524 (GM Exhibits 22, 34 and 35).

23. The parties agree that high levels of in-sells can be caused by deficient dealer performance or inadequate representation. The parties also agree that there is a shortfall in registration performance in AGSSA III and that lost opportunities exist in AGSSA III. (GM Exhibit 34; Stewart Exhibit Q, last two pages).

CUSTOMER CONVENIENCE

24. The parties also agree that if a manufacturer offers better convenience, better penetration will result. According to Mr. Stewart, the closer the people are to his dealership, the higher the penetration. (GM Exhibit 66, page 332). In fact, there is a high concentration of retail registrations surrounding each Pontiac MDA dealer. (GM Exhibits 19 and 20).

25. Stewart, the Pontiac dealer with the best level of convenience (4.5 miles) has the highest level of sales (1,391 sales) and the highest level of penetration in the MDA (5.6 percent). (Stewart Exhibit E, weighted average distance by dealer, by AGSSA; GM Exhibit 35).

26. In AGSSA III, where Pontiac has its lowest level of customer convenience in the MDA, Pontiac retail penetration is also lowest. (GM Exhibits 35 and 45). Potential buyers in AGSSA's I and II enjoy far greater convenience to the nearest Pontiac dealer than does a potential buyer living in AGSSA III. (GM Exhibit 45; Stewart Exhibit E, Section 2, page 2).

27. All manufacturers represented in AGSSA I and AGSSA II offer similar levels of convenience. On the other hand, the average consumer must travel almost twice as far from his residence in AGSSA III to reach a Pontiac dealer than to reach a Chevrolet, Honda, Ford, Nissan, Volkswagen or Toyota dealer. Correspondingly, Chevrolet, Honda, Ford, Nissan and Volkswagen have higher penetration in AGSSA III than their MDA average. (GM Exhibits 43 and 44).

28. Easy access to a dealer can help improve penetration for a manufacturer. Similarly, an improper location can result in low penetration. (GM Exhibit 43).

29. The sales and service facilities offered by the existing Pontiac dealers in AGSSA's I and II are or soon will be adequate. However, even expanding, optimally located facilities cannot adequately serve a large and growing market. Facilities expansion will not, standing alone, result in increased sales, improved penetration or higher rates of registrations. The West Palm Beach market has simply outgrown the existing 2-dealer network for Pontiac.

30. Proximity is the distance between the home address of a customer or prospective customer of an automobile and the location of the selling dealer. The parties agree that proximity relates to intra-brand competition--competition among dealers of the same line make, and inter-brand competition--competition among dealers of different line makes.

31. The parties also agree that proximity affects intra-brand competition. Seventy-five percent of Pontiac buyers in West Palm Beach travel to the closest Pontiac dealer to purchase a Pontiac. Nationally, sixty percent of purchasers buy from the nearest dealer. (Stewart Exhibit F, Power's Study). The majority of Pontiac purchasers in West Palm Beach are proximity sensitive.

32. Proximity affects inter-brand competition. Manufacturers providing convenience to customers in AGSSA III have a greater opportunity to enjoy above-average penetration performance than manufacturers that do not offer similar levels of convenience. (GM Exhibits 43 and 44; Stewart Exhibit S). Further, Dr. Ostlund admits that the addition of a different line make dealer in AGSSA III could adversely affect Pontiac if it is not represented in AGSSA III, but he cannot determine the degree of the impact.

33. Further indication that proximity affects inter-brand competition is a 1980 Power's Study of Pontiac purchases. That study showed that 72.4 percent of Pontiac purchasers nationwide visited one or more different line make dealerships before buying a Pontiac. The availability of a Pontiac dealership to proximity sensitive buyers is therefore very important. The Power's Study, deemed reliable by Stewart, contradicts the 1958 Ford study offered by Dr. Ostlund. (Stewart Exhibit F, Ford study). The Cort Dissertation, another source recognized by Stewart as reliable, also cautioned against broad use of the Ford results due to the methodology employed therein.

34. Proximity only becomes a factor for Pontiac, however, when the competition offers relatively better level of proximity in comparison to Pontiac. The addition of a Pontiac dealer in AGSSA III would provide Pontiac customers convenience commensurate with the convenience offered by competitive line makes. Further, the customer convenience offered by Pontiac in AGSSA III would be twice as good as the convenience currently offered by Pontiac in AGSSA III and would be consistent with its convenience offered (by Pontiac) in AGSSA's I and II. (GM Exhibits 44 and 45).

35. The proposed Pontiac location in AGSSA III will be 8.1 air miles from its nearest same line make competitor in AGSSA I. That distance is greater than the distance between the Ford, Toyota, Nissan, Volkswagen and Chevrolet dealers in AGSSA III and their nearest same line make competitor. Thus, the distance of the proposed Pontiac dealer from Stewart is consistent with the respective distances between nearest same line make dealers in the MDA. (GM Exhibit 46).

36. Measured by the shortest route in non-rush hour traffic, drive time from the proposed Art Moran location to the Stewart location is long when compared to the convenience levels offered by other line makes. The drive time between the two locations range from 12:50 minutes (Stewart Exhibit C, second to last page) to 14:30 minutes (GM Exhibit 1, page 35) via Interstate 95. The

drive time between the proposed location and Stewart's location via US 1 is over 23 minutes (GM Exhibit 1, page 34). A consumer living in a typical residential area in AGSSA III, such as Old Port Cove traveling to Art Moran would travel less than half the time now required to reach Stewart and drive less than one-fourth of the distance (GM Exhibit 1, pages 34 and 35)

37. Pontiac's lack of competitive convenience in AGSSA III is a significant factor in its inadequate retail market penetration. Stewart offered no current data or objective, quantifiable evidence to rebut GM's evidence that customer convenience is directly related to retail market penetration.

THE STANDARD

38. Pontiac's zone average penetration, 7.02 percent, is a reasonable norm to use in evaluating the West Palm Beach MDA for five reasons:

A. All Florida markets exceeded national average in 1983, and three of those markets exceeded zone average. In West Palm Beach, AGSSA I exceeded both the zone and national average. (GM Exhibits 30 and 31).
B. Pontiac's penetration in Jacksonville and Pensacola exceeded both zone and national average in 1984. In West Palm Beach, AGSSA I was virtually at national average. (GM Exhibits 32 and 33).
C. Adjusting for product popularity, the MDA should be attaining a penetration level of 95 percent of zone average (GM Exhibits 39 and 40).
D. The demographic characteristics of the community approach national average. (GM Exhibits 36 and 37).
E. Some census tracts in the West Palm Beach MDA are currently attaining or exceeding zone and national average penetration. (GM Exhibits 17 and 18).

39. To develop a reasonable norm, it is necessary to determine what level of penetration an MDA can attain. Selecting a market which is inadequate to develop a standard of adequacy is not proper. Nor is it proper to compare an MDA with a level it is achieving in a given year and contend that it has achieved its full potential. Zone or national average penetration is the proper level of performance for an MDA that is performing at substandard levels.

40. Compared to the 1985 zone average of 7.02 percent, only 5.32 percent of the vehicles registered in the MDA were Pontiacs, and in AGSSA III only 4.66 percent of the vehicles registered were Pontiacs. That deficiency results in a penetration shortfall of 733 units in the MDA compared to zone average (GM Exhibits 34 and 35). That lost opportunity is even more significant in AGSSA III where the lost units amount to 187 in an area where only 369 Pontiacs were registered in 1985 (GM Exhibits 34 and 35).

THE NEED FOR MARKET REPRESENTATION

41. Pontiac is not achieving adequate levels of penetration in either the West Palm Beach MDA or in AGSSA III. The cause of that inadequacy is that the market has outgrown the existing 2-dealer network for Pontiac. Since 1950, population in the MDA has increased seven-fold, but the number of dealers has remained at two (GM Exhibit 42).

42. In Florida, the ratio of population to approved Pontiac dealer points is approximately 250,000 to 1 (GM Exhibit 42). The ratio of registrations per approved dealer point is approximately 10,000 to 1 (GM Exhibit 41). Based on the size of the market alone, West Palm Beach could support at least one additional dealer.

43. The relative levels of convenience in the MDA also support additional Pontiac representation in AGSSA III. Six manufacturers offer higher levels of relative convenience to AGSSA III buyers than does Pontiac: Volkswagen, Honda, Chevrolet, Ford, Nissan and Toyota (GM Exhibit 44). Those manufacturers have a competitive advantage over Pontiac in AGSSA III.

44. The most recent data available supports the proposition that, in order to have an opportunity to achieve areas of better than average penetration in an area, a manufacturer must be represented in that area (GM Exhibits 43 and 44). Of the 13 major line makes represented in the MDA, only those manufacturers represented in AGSSA III exceed their MDA average in that AGSSA (GM Exhibit 43).

45. Convenience is not an issue in AGSSA's I and II where relative proximity is provided by all manufacturers. However, in AGSSA III, the prospective Pontiac purchaser must travel twice as far than other Pontiac purchasers in the MDA (GM Exhibit 45), and twice as far as purchasers of vehicles from manufacturers represented in AGSSA III to purchase a vehicle (GM Exhibit 44).

46. The distance between the proposed Art Moran site and Stewart is consistent with the distance between dealers in AGSSA's III and the closest same line make dealer in AGSSA I (GM Exhibit 46).

47. Lack of proximity was one factor influencing those individuals in AGSSA III who desired a Pontiac, but who did not purchase Pontiacs since seventy-five percent of Pontiac purchasers in the MDA are proximity-sensitive.

48. Pontiac cannot be adequately represented in AGSSA III without establishing an additional dealership in AGSSA III. In 1985, the AGSSA I dealer placed 24 percent of its retail sales in AGSSA III (GM Exhibit 47) and the AGSSA II dealer placed less than five percent making it an insignificant factor in AGSSA III (GM Exhibit 22). To correct the penetration shortfall in AGSSA III, the AGSSA I dealer would have to sell over 750 additional units, an 80 percent sales increase (GM Exhibits 27, 28). This is highly unlikely given the historically flat sales performance of Stewart (GM Exhibit 27).

49. It is industry practice to place a dealer in a market where market penetration is lowest. In order to achieve above-average penetration, a manufacturer must be represented (GM Exhibits 43, 47, 49, 50, 54-57). The combined efforts of the new dealer in an area coupled with those of the next closest dealer are usually required (GM Exhibit 47).

50. Dealer additions in other markets have resulted in a consistent pattern (GM Exhibits 49, 50, 54-57):

1. The existing dealers improve their sales performance;
2. Penetration efficiency increases; and
3. The distribution pattern of the dealer adjacent to the new point remains constant, despite addition of a dealer.

GROWTH OF THE WEST PALM BEACH AREA

51. Since 1950, the population of the area as a whole has increased more than sevenfold. The metropolitan area is expected to be the fastest growing in the nation by the turn of the century. (Moran Exhibit 1, Florida Forecast, January 1, 1986) There has been no change in the Pontiac dealer count in the last 36 years (GM Exhibit 43).

52. Palm Beach County's 1985 population was 713,253, a 23.6 percent increase over the 1980 population of 576,863. (GM Exhibit 1, Table 1) As significant as that increase is, it is less than the 1980-85 increase experienced in AGSSA III, which went from 111,228 to 140,007 or a 26.1 percent increase (GM Exhibit 1, Tables 30 and 31). Dealers are usually added in growing areas.

53. Palm Beach County has become economically diversified and its population is heterogeneous. AGSSA III mirrors these patterns.

54. Consistent with these trends in population are increases in households, construction, employment, which are all growing rapidly for Palm Beach County as a whole and even faster for AGSSA III. (GM Exhibit 1, Tables 27 and 28)

55. Per capita income, as well as the average household income, remains high in Palm Beach County and in AGSSA III. (GM Exhibits 12, 13 and 14) Moreover, in 1985 all but one of the census tracts in AGSSA III had a median household income higher than the county median. (GM Exhibit 1, Table 34) Most of the people of driving age in the market can afford automobiles. In fact, people in the country spend more on their automotive needs, in the aggregate, than on food.

56. Similarly, all measures of residential and industrial commercial growth indicate substantial growth for Palm Beach County as a whole and even more growth in AGSSA III (GM Exhibit 1, Tables 2-7, and GM Exhibit 2).

57. Building permit valuations have increased 700 percent from 1975 to 1985. Residential construction, either underway or approved, reflects the actual and anticipated growth of population in Palm Beach County.

58. Retail sales in Palm Beach County increased 47 percent from 4.5 million dollars in 1980 to 6.6 million dollars in 1985.

59. From 1984 to 1985, the civilian labor force increased by more than 3 percent, employment increased 4.6 percent and unemployment decreased 15.2 percent (GM Exhibit 1, Table 14). Large industrial and commercial firms such as IBM and Pratt and Whitney have located in AGSSA III.

60. Traffic counts near the proposed point more than doubled from 1976 to 1984. (GM Exhibit 1, Table 35) Traffic volume is 5 times greater on I-95 near the location of the proposed dealer than on US-1 where Stewart is located.

61. The "explosive" growth in the northern part of the West Palm Beach MDA has attracted extensive public and media attention. Research conducted by Mr. Stewart revealed a special section in the Palm Beach Post headline "Horizon Bright for North County." (Moran Exhibit 1, Palm Beach Post, July 21, 1985) As stated by the mayor of Palm Beach Gardens, "We are ready to explode. This is the hot spot for development."

62. A regional mall is being constructed on PGA Boulevard in AGSSA III. The distance between this new mall and its nearest competitor to the south is similar to the distance between Moran's proposed location and Stewart. This mall, located in Palm Beach Gardens, "is actually a downtown. . . The 322 million dollar project combines residential, commercial and retail uses on property on the north side of PGA Boulevard between US-1 and Alternate A1A." (Moran Exhibit 1, Palm Beach Post, July 21, 1985, p. F-4)

63. In addition to the development in the northern section of the county (essentially AGSSA III), development in the central section of Palm Beach County is also significant. Stewart, located in AGSSA I just east of the central section of Palm Beach County, is in a position to take advantage of this growth. Growth in the areas near the existing and proposed dealerships is strong.

DEMOGRAPHICS

64. Growth has led to demographic diversity in Palm Beach County. While the very wealthy remain, they have become less important as the middle and upper middle income groups have grown. Palm Beach County has become more like other urbanized counties in Florida.

65. The entire MDA, in AGSSA III in particular, show heavy concentrations of household annual incomes between 15 and 40 thousand dollars and at levels above 40 thousand dollars (GM Exhibits 36 and 37). As of 1985, there were no census tracts in AGSSA III where the average household income was less than 15 thousand dollars. West Palm Beach and AGSSA III have residents in every age group. (GM Exhibit 36)

66. Stewart has not performed any study which demonstrates a link or relationship between demographics and market penetration.

ALLOCATION

67. The Pontiac allocation system is based upon the number of sales reported by a dealer. The more cars sold by the dealer, the more car the dealer earns from the factory. Stewart Pontiac has had a history of not reporting sales promptly.

68. Earl D. Stewart recognized the benefits of the Pontiac allocation system when he testified in the Fischer-Mazda case in 1980. In discussing the Phoenix, a hot or popular car that year (a car easy to sell), he compared the Pontiac system to that of Mazda. (GM Exhibit 66, pages 311-312):

> I would say that the Phoenix shortage compares most closely of any car I have in the line with the Mazda problem. However, the interesting thing

> with the Phoenix is that through sales efforts there is a direct correlation between selling more cars and earning more cars. . . With the Phoenix I have started out with a relatively small number of cars, and through my rates of sales, I have earned additional cars. So my experience, since the new X-body came out, I have earned additional products.

69. Stewart maintains a large number of vehicle orders to ensure sufficient numbers of vehicles to sell. While Mr. Stewart suspects that other Pontiac dealers have a greater supply of popular vehicles and estimates that other manufacturers have more new cars at model introduction, he admitted that "my total inventory compares equitably with other Pontiac dealers in the zone. . ." (III-51)

CUSTOMER SATISFACTION

70. Both Pontiac and its dealers strive to satisfy the ultimate customer--the automobile purchaser. Both the manufacturer and dealer must provide a level of satisfaction the customers expect. The customer is the best judge of whether satisfaction has been achieved.

71. Customer satisfaction is measured through an involved market research procedure. General Motors measure customer satisfaction with both the product and the selling dealer. Overall experience with the selling dealer measures the customer satisfaction with the dealer's sales staff, delivery condition of the vehicle, and warranty service. 2/ Most dealers with low CSI ratings usually offer customers poor service (Montgomery deposition, pages 4 and 5).

72. Responses from consumers regarding overall satisfaction are verified and evaluated. The parties agree that higher CSI scores are preferable.

73. CSI results are used as a management tool. CSI assist the zone office and the dealer to identify problems in the dealership and allows the dealer an opportunity to correct noted deficiencies.

74. Zone average is the minimum level of satisfaction acceptable to General Motors. Zone average is sales weighted, which tends to reduce the standard below the average of all consumer responses in the zone.

75. A dealer whose CSI rating is below zone average is not providing the levels of satisfaction expected by either GM or the customer. Stewart Pontiac is significantly below zone average and does not provide adequate representation of GM relative to the other zone dealers.

76. Over the past six quarters, Stewart Pontiac's CSI has declined from 6 points below zone average to 10 points below zone average:

Quarter	Zone Average CSI	Stewart Pontiac CSI	Difference
4th-1984	75	69	(6)
1st-1985	76	69	(7)
2nd-1985	77	71	(6)
3rd-1985	77	69	(8)
4th-1985	77	67	(10)

While other dealers have improved their CSI during this period of time, Stewart has consistently been one of the worst performing dealers in the zone. The other Pontiac dealers in the MDA are performing at zone average.

77. As of March, 1986, Stewart Pontiac is 13 points below national average and 10 points below zone average, a statistically significant difference. Moreover, developing a comparison with certain sub-groups of dealers, Stewart Pontiac is significantly below those averages. Utilizing GM's methodology, the parties agree that there is a significant difference between Stewart and any other sub-group or combination thereof (GM Exhibit 67).

78. Comparing all GM dealers in West Palm Beach, the ratings range from 67 to 90. Stewart Pontiac is at67, six points below the nearest automobile dealer (GM Exhibit 59). Stewart Pontiac is the lowest rated dealer in West Palm Beach. Indeed, in terms of product evaluation, Cadillac is rated lower than Pontiac, yet the Cadillac dealers in West Palm Beach are able to perform at higher levels of satisfaction for their customers.

CUSTOMER SERVICE PROVIDED BY STEWART PONTIAC

79. Stewart Pontiac receives the same products as other Pontiac dealers. The Pontiac zone office has sent personnel over to Stewart Pontiac in order to assist the dealership in improving its CSI rating. About the same time as the protest was filed, Stewart Pontiac commenced improvement efforts (GM Exhibit 65).

80. Stewart's CSI improvement program was necessitated by the absence of any such program at the dealership (Montgomery deposition, pages 15-17).

81. The attitude of the dealer and desire of its management to improve CSI will have a greater impact on CSI performance than the mere spending of substantial sums as a means to correct a CSI problem. Clyde Montgomery, Pontiac's district manager, is familiar with the CSI for Stewart Pontiac. Montgomery has discussed the improvement programs with Stewart's dealership personnel and expects Stewart's CSI to increase.

82. Montgomery noted that there were numerous attitude problems at the dealership which needed attention to include the following:

a. Customer relations manager, recently hired and has little authority;
b. Service manager is not consumer oriented;
c. Earl D. Stewart does not appear to have a sufficient interest in the service department;
d. The dealership has not properly implemented a number of programs suggested.

To improve a CSI rating, the dealership must be attentive and a positive attitude must be sustained to earn the approval of its customers.

IMPACT OF SERVICE ON PENETRATION

83. Dealers with higher sales rates usually have lower CSI ratings. However, there are major exceptions to that rule. Three of the top ten dealers in the Jacksonville zone have high CSI ratings. Both parties agree that good service leads to customer retention and increased sales while poor service means lost sales.

84. As Dr. Ostlund stated (IV-215, 216):

> There is no question that people are more likely to buy a car from their nearest Pontiac dealer, but that is not something that is axiomatic. They will buy a car from other dealers if there are reasons that prompted that condition, such as. they may buy from a dealer who is known to have a good service operation . . .

85. Convenience of service is extremely important to a dealer after the warranty expires. (GM Exhibit 66, page 292) The proposed Art Moran dealership would provide prospective purchasers a high level of convenience and increased market penetration.

86. Service convenience is an important factor in establishing a dealership. Convenience for service returns is at least if not more important to a customer than convenience for purchasing. If a dealer is too far, a consumer may not return to the dealer but have work done elsewhere. AGSSA III customers must drive longer distances for both sales and service than the average customer in the MDA.

CONCLUSIONS OF LAW

87. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding. Section 120.57(1), Florida Statutes.

88. The parties were duly noticed pursuant to the notice provisions of Chapter 120, Florida Statutes.

89. Section 320.642, Florida Statutes, prescribes the standards for the issuance and denial of motor vehicle dealers licenses:

> The Department shall deny an application for a motor vehicle dealer license in any community or territory where the licensees presently licensed motor vehicle dealer or dealers have complied with licensees agreements and are providing representation in the community or territory for such licensee. The burden of proof in showing inadequate representation shall be on the licensee.

90. Since no issue has been raised concerning whether Pontiac's present dealers have complied with their franchise agreements, the sole issue is whether such dealers are providing "adequate representation" of Pontiac in the "community or territory" involved.

91. The purpose of Section 320.642 is to prevent a manufacturer from taking unfair advantage of a dealer by overloading a market area with more dealers than can be justified by the legitimate of the manufacturer and its dealers, existing and prospective. Bill Kelly Chevrolet, Inc. v. Calvin, 322 So.2d 50 (Fla. 1st DCA 1975); Plantation Datsun, Inc. v. Calvin, 275 So.2d 26 (Fla. 1st DCA 1973).

92. The standard of adequate representation may be considered in relation to the community or territory as a whole, or if inadequate representation in the community cannot be shown, the manufacturer may show the existence of an "identifiable plot not yet cultivated" within the community or territory to demonstrate inadequate representation. Bill Kelly Chevrolet, supra.

93. For the purpose of this case, the territory or community is the West Palm Beach multiple dealer area which consists of the eastern portion of Palm Beach County. The evidence establishes that the West Palm Beach MDA constitutes an identifiable and distinct retail marketing area.

94. Pontiac has sustained the burden of proof placed upon it my Section 320.642, Florida Statutes. It has demonstrated that the existing Pontiac dealers are now providing inadequate representation, in terms of retail market penetration, in the community or territory as a whole. Pontiac has further demonstrated that there exists an identifiable plot not yet cultivated where the applicant dealer seeks to locate, in which representation (in terms of both retail market penetration and customer satisfaction) is even more inadequate than in the territory or community as a whole. The West Palm Beach MDA has simply outgrown the existing 2-dealer network for Pontiac. The West Palm Beach MDA is growing rapidly by any measure. Northern Palm Beach County (AGSSA III), where the proposed dealership is to be located is also growing. The low penetration, resulting from lost opportunities, "explosive" expansion of the market and the less than adequate customer satisfaction by the dealers currently serving the identifiable plot demonstrate that an additional dealer is needed. The West Palm Beach MDA does not have a Pontiac dealer that is as conveniently located to that growing population (AGSSA III) as any of the other major manufacturers. Additionally, and perhaps because of the lack of a dealer in AGSSA III, Pontiac retail penetration in the West Palm Beach MDA has been below both the zone and national averages for the preceding two years. Since no inherent reason has been advanced relative to Pontiac's inability to achieve average national or zone penetration in the MDA or AGSSA III, it must be concluded that Pontiac is not receiving adequate representation in AGSSA III. Without question, GM produced the most current statistics on Pontiac retail market penetration and that retail market penetration is a primary factor in determining adequacy of representation. Based on that data, Pontiac should be allowed to establish the proposed new dealership as applied for by Art Moran Pontiac.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Art Moran Palm Beach Pontiac-GMC Inc., application for a motor vehicle dealer license as a Pontiac dealer be GRANTED.

RECOMMENDED this 5th day of September, 1986 in Tallahassee,, Florida.

____
JAMES E. BRADWELL
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of September, 1986.

ENDNOTES

1/ An MDA is an automobile marketing area consisting of contiguous communities and is a demographic or geographic area that is too large to be served by one dealer. (GM Exhibits 3 and 5)

2/ The result of the survey is called the customer satisfaction index (CSI).

APPENDIX TO RECOMMENDED ORDER IN CASE NO. 86-0289

General Motors Proposed Findings	Ruling
Paragraph 7	Accepted in substance. Modified due to issue raised respecting Polk's treatment of lease transactions.
Paragraph 38	Accepted as modified in subparagraph E.
Paragraph 53	Rejected - Irrelevant to issues posed.

Stewart's Proposed Findings	Ruling
Paragraph 5	Substantially adopted. Last sentence rejected by contrary findings - RO paragraphs 24, 26, 27, 31, 33, 34, 35-37.
Paragraph 6	Accepted in substance. Last paragraph rejected as irrelevant as there

	was not a sufficient nexus adduced to establish the basis for the number of points for Ford, Chevrolet and the imports.
Paragraph 7	Rejected based on other contrary findings. RO paragraphs 38 through 44.
Paragraph 8	Rejected based on contrary findings. RO paragraphs 7 and 38(A) through (E).
Paragraph 9	Rejected - Contrary to other findings. RO paragraphs 41, 43, 44, 45, 47 through 50.
Paragraph 10	Rejected - Contrary to other findings. RO paragraphs 41, 43, 44, 45, 47 through'50.
Paragraph 11	Accepted as modified. RO paragraph 29.
Paragraph 12	Rejected. Contrary to findings. RO paragraphs 30 through 37.
Paragraph 13	Rejected by contrary findings. RD paragraphs 76 through 79.

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