

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SEACREST CADILLAC, INC., and)
CADILLAC MOTOR CAR DIVISION/)
GENERAL MOTORS CORPORATION,)
)
Petitioners,)
)
vs.) CASE NO. 88-2252
)
LARRY DIMMITT CADILLAC, INC.,)
and THE DEPARTMENT OF HIGHWAY)
SAFETY AND MOTOR VEHICLES,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A hearing was held in Tallahassee, Florida on November 28 - December 1, 1988 before Arnold H. Pollock, Hearing Officer. The issue for consideration is whether Petitioner, Seacrest Cadillac, Inc., should be issued a motor vehicle dealership license to establish and operate a Cadillac motor car dealership on U.S. Highway 19 in Port Richey, Florida.

APPEARANCES

For Petitioner: Dean Bunch, Esquire
General Motors 101 North Monroe Street, Suite 900
Corp. Tallahassee, Florida 32301

and

Edward Risko, Esquire
General Motors Legal Staff
New Center One Building
3031 W. Grand Boulevard
P.O. Box 33122
Detroit, Michigan 48232

Seacrest Michael A. Fogarty, Esquire
Cadillac P.O. Box 3333
Inc. Tampa, Florida 33601

For Respondent: Daniel D. Myers, Esquire
Larry Dimmitt 1353A East Lafayette Street
Cadillac Tallahassee, Florida 32301

Department of Was not present and was not represented.
Highway Safety
and Motor Vehicles

BACKGROUND INFORMATION

On or about March 8, 1988, Seacrest Cadillac, Inc., (Seacrest), submitted an application for a license as a motor vehicle dealer to the Respondent, Department of Highway Safety and Motor Vehicles, (Department). Thereafter, on April 26, 1988, counsel for Larry Dimmitt, Cadillac, Inc., (Dimmitt), in a letter to the Department Director, protested the granting of a dealership license to Seacrest for the proposed facility and requested a formal hearing. On April 29, 1988, the file was forwarded to the Division of Administrative Hearings for the appointment of a hearing officer and after preliminary matters were disposed of, on June 6, 1988, the undersigned set the case for hearing in Tallahassee during the period September 26 - 30, 1988. However, on August 26, 1988, upon Dimmitt's Motion to Continue with a representation that the parties had agreed thereto, the case was continued to November 28, 1988 at which time hearing was begun as scheduled.

At the hearing, Petitioners presented the testimony of James A. Anderson, a consultant in the field of motor vehicle retail sales, and Dr. Richard L. Moss, Associate Professor of Economics at the University of Tampa, and introduced Petitioners Exhibits 1 through 122. Dimmitt presented the testimony of Kenneth Booker, service director for Dimmitt Cadillac; Robert F. Symons, service manager at Dimmitt; Richard R. Dimmitt, Vice president of Larry Dimmitt Cadillac; and Dr. Richard W. Mizerski, an expert in the area of economics, marketing, and advertising. Dimmitt also introduced Respondent's Exhibits 1 through 101.

Subsequent to the proceedings, both Cadillac Motor Car Division and Larry Dimmitt Cadillac, Inc. submitted Proposed Findings of Fact which have been ruled upon in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. On March 8, 1988, Seacrest Cadillac, Inc., filed an application with the Department for a motor vehicle dealer license to establish a new Cadillac dealership in Port Richey, Florida on U.S. Highway 19. Port Richey is located in Pasco County. Thereafter, pursuant to the provisions of Section 320.642, Florida Statutes, Larry Dimmitt Cadillac, Inc., a Cadillac dealer currently operating in Clearwater, Florida, filed a protest to the application with the Department and requested formal hearing.

2. The general geographic area pertinent to the issue herein is the Cadillac, Tampa Multiple Dealer Area, (MDA). An MDA is an area in which more than one dealer of a line-make shares a contractual Area of Primary Responsibility, (APR), with one or more other dealers of the same line-make. The MDA is defined by contractual agreement between the manufacturer and its dealers: in this case Cadillac Motor Division of General Motors Corporation and the relevant Cadillac dealers within the area.

3. The Cadillac, Tampa MDA is comprised of Hillsborough, Pinellas, Pasco and Hernando Counties. Three existing Cadillac dealers are in operation in this area. Dimmitt is located on U.S. Highway 19 north of State Road 60 in the Countryside Mall area of Clearwater in Pinellas County 21 miles south of the proposed Seacrest location and approximately 40 minutes driving time away. Dew Cadillac is located in downtown St. Petersburg, also Pinellas County, at Third Avenue South and Third Street, 40 miles south of the proposed Seacrest location and approximately 1 hour and 19 minutes driving time away. Morse Cadillac, (previously Bay Cadillac), is located in Tampa, Hillsborough County, at the

intersection of Florida and Fletcher Avenues, 35 miles and approximately 58 minutes driving time away.

4. There are also Cadillac dealers in Lakeland, Lake Wales, and Bradenton, but these dealerships are not included in the Cadillac, Tampa MDA and based upon sales and registration information concerned with Cadillac consumer behavior, these dealers and the areas they serve are not a part of the community or territory relevant to this hearing.

5. The Cadillac, Tampa MDA is broken down into 5 separate Areas of Geographic Sales and Service Advantage (AGSSA). Each AGSSA represents an area wherein a dealer enjoys a competitive advantage over other dealers of the same line-make because of his geographic location. The 5 AGSSAs relevant here are:

1. Northern Tampa plus eastern Pasco and Hernando Counties. (Morse)
2. Southern Pinellas County (Dew)
3. Northern Pinellas County (Dimmitt)
4. Western Pasco and Hernando Counties.. (proposed for Seacrest)
5. Eastern Tampa near Brandon (no dealership within)

AGSSAs comprised of U.S. census tracts or otherwise well accepted geographic descriptions, are determined by the manufacturer who assigns each geographic piece to its nearest dealer or proposed dealer location unless there is some overriding consideration such as a natural or man made barrier, (Tampa Bay), or a demonstrated unwillingness by consumers to travel from one area to another. AGSSA sizes and the geographic areas are flexible and can be changed over time on the basis of changing population patterns and purposes. The geographic definition of AGSSA 4 has changed from time to time and may well change in the future. The greatest growth in Pinellas County is in the northern portion contiguous to Pasco County which, itself, can be expected to experience a substantial growth in the future.

6. AGSSA 4 consists of census tracts and geographical pieces which are closer to the proposed Seacrest location than to any other existing Cadillac dealer or which, utilizing sound business judgement, should be assigned to AGSSA 4.

7. Consumer research indicates that within the Cadillac, Tampa MDA there are two separate market areas generally separated by Tampa Bay. Those east of the bay, (AGSSAs 1 and 5, covering Tampa and Brandon), constitute one of the market areas. The area west and northwest of the bay, (AGSSAs 2, 3, and 4, consisting of St. Petersburg, Clearwater and Port Richey, respectively), constitutes the other. The eastern market area, made up of AGSSAs 1 and 5, are not only geographically but by consumer behavior, separated from the other three and do not constitute a part of the community or territory relevant to the issues herein.

8. A Cadillac dealership is not currently located in Port Richey. For that reason, a determination whether AGSSAs 2, 3, and 4 comprise a single community or territory, or whether AGSSA 4 is separate and distinct is not easy to make. Indications are that it is a single community or territory and that the establishment of a dealership in Port Richey would not change this.

9. Clearly there are two and Petitioner contends three separate auto shopping areas for high group or prestige/luxury cars along U.S. Highway 19 within the AGSSA 2, 3, 4 community or territory. One of these surrounds Dew Cadillac in St. Petersburg; one is in the area of Dimmitt Cadillac in Clearwater; and the third, if it exists as Petitioner claims, would be located near Port Richey in the area of the proposed Seacrest location.

10. Numbers of people alone, however, do not necessarily determine the market for a particular brand of automobile. A demographic profile is often helpful in evaluating market potential and can play a significant part in the evaluation of adequacy of representation, the basic issue involved in this case.

11. Studies run by and for General Motors Corporation indicate that 63% of Cadillac buyers are 55 years of age or older and over 60% of Cadillac buyers have household income in excess of \$55,000.00.

12. Survey statistics reflect that a large percentage of the population in AGSSAs 2, 3 and 4 are 65 and older. More than half the population in AGSSA 4 is over 55 and more people 65 or over reside in AGSSA 4 than in the other two AGSSAs within the community or territory.

13. Age alone is not the determining factor, however. While older individuals generally have more disposable income than younger people who have other needs for their money, the percentage of household income which is "disposable" is not necessarily indicative of the individual's ability to purchase a high group/luxury vehicle.

14. Studies reveal that a higher percentage of people residing in AGSSA 4 have lower income levels than in the Florida zone. However, average household wealth in AGSSA 4 is about the same as in the 2,3,4 community or territory and only slightly lower than in the state as a whole. From this it might be inferred that because of the lower number of "well to do" people in AGSSA 4, the popularity of high group or luxury cars, when compared to all cars sold, may be lower than average. However, income does not have an overriding effect on Cadillac's share of the domestic high group market.

15. The high group includes the Cadillac, the top of the line Buicks and Oldsmobiles, the Lincoln Town Car, the top of the Chrysler line, and several imports.

16. General Motors Corporation's quarterly CAMIP report which relates to average household income, marital status, sex, and education of purchase decision-makers, recognizes that even within the high group, certain vehicles do not compete. Within the high group, there are three competitive subgroups which, because of size, price, style, or image, compete more directly against one another. The three categories are the large luxury, the El Dorado/Mark, and the Seville/Continental. In the first are primarily the passenger sedans and coupes and included are three Cadillacs, (deVille, Fleetwood and Brougham); the upper line of Oldsmobile and Buick; the Lincoln Town Car; and the Chrysler Fifth Avenue. The "sport division" includes such vehicles as the El Dorado, the Mark VII, the Corvette, the Porsches and the Jaguars, and the third subcategory includes the Seville, the Continental, the Mercedes, the BMW and the upper line Volvos.

17. Compared with both the Florida and the AGSSA 2,3,4 community or territory, more purchasers in AGSSA 4 selected cars from the large luxury subcategory and fewer from the other two.

18. Since Cadillac generally dominates the large luxury group, it is appropriate, in an analysis of market penetration, to look at that sub group independent of the others. Market statistics indicate that during 1987, 1,309 high group cars were registered in AGSSA 4. Of this number, 76.5% were in the large luxury segment. This compares to 52.4% in the Florida zone. Within that Florida zone, Cadillac garners 46.3% of the large luxury segment, 11.73% of the ElDorado group segment, and 6.31% of the Seville group. When these percentages are applied to the 1,309 unit sales in the AGSSA 4 high group market, Cadillac could reasonably expect to sell 464 large luxury cars, 17 cars in the ElDorado group, and 9 cars in the Seville group for a total of 490 units. When the three segments are combined to reflect a single market share for Cadillac in AGSSA 4, an expectation of 38.3% share results.

19. As it was, however, in 1987, Cadillac sold a total of only 333 in AGSSA 4 which represented a loss of 162 cars in the large luxury group and a combined gain of 5 from the other two for a net loss of 157 cars from expectation. In other words, Cadillac achieved 68.7% of what it could reasonably expect to have achieved in AGSSA 4. On the other hand, in AGSSAs 2 and 3, Cadillac met or exceeded 100% of its estimated large luxury group share. It should also be noted that almost every other domestic high group manufacturer represented in the large luxury group in AGSSA 4 also achieved better than 100% of its expectation for that segment. Further, the West Palm Beach, Miami, and Jacksonville Cadillac MDAs also met or exceeded 100% of their expected penetration.

20. While the domestic high group models did well in AGSSA 4, the other high group manufacturers not represented by dealers in AGSSA 4 did not do as well. BMW, Mercedes, Volvo, and Acura all were below 100% as was Cadillac, and it is interesting to note that BMW, Mercedes and Volvo, with 83, 77 and 71% of expectation respectively, exceeded Cadillac's performance in AGSSA 4, (68.7%). From this, Petitioners claim it is obvious that Cadillac is under-represented in AGSSA 4 and that if it is to achieve its fair market share, it must be represented by a dealership within the AGSSA. This is not as certain as Petitioners would urge, however, since factors other than mere presence within the district contribute to the number of cars of a particular brand sold.

21. Another factor to consider in analyzing Cadillac's adequacy of representation in the area is the ratio of Cadillac registrations in AGSSA 4 to registration of its legitimate competitors and to compare this ratio to the Florida zone and AGSSAs 2 and 3. Cadillac outsells Lincoln in the Florida zone by 160% and in AGSSAs 2 and 3 by 178%. However, in AGSSA 4, Cadillac sells only 87% of the number of cars that Lincoln does. The same relative comparison holds true for Cadillac's competitors among the large luxury cars. Almost without exception, Cadillac registrations in AGSSA 4 would have to increase two or three fold to equal its registration performance in the Florida zone and in AGSSAs 2 and 3.

22. Another factor for consideration deals with the ability of the customer to secure competent service in a reasonable period of time at a convenient location. In the early 1980s, population figures showed the majority of people in the Pinellas/Pasco County areas were located in St. Petersburg, (Dew), Clearwater, (Dimmitt), and to a lesser degree, Port Richey. Between 1970 and 1988, the population defined not only by individual but by households has increased significantly in the Clearwater AGSSA and in the Port Richey AGSSAs, but not as much in the St. Petersburg area. People and households in the AGSSA

2,3,4 community or territory more than doubled. In AGSSA 4, alone, both individuals and households quintupled.

23. It is generally accepted that vehicle registrations correspond to population density with registrations in the community or territory being concentrated primarily in the areas surrounding St. Petersburg, Clearwater and Port Richey, the three separate high group auto shopping areas identified herein previously. Cadillac has no representation in AGSSA 4.

24. While population has increased radically, however, the number of Cadillac dealers in the community or territory has not increased at all. The two who were in business in 1940 are still operating. In 1970, Cadillac was represented by only two dealers, Dew and Dimmitt. Now, with the population increased between two and five times, Cadillac remains represented by only two dealers and is the only domestic high group manufacturer not represented in AGSSA 4. Pasco County, located in AGSSA 4, is the only county in Florida with a population over 100,000 that does not have a Cadillac dealer. This fact is meaningless, however, unless it relates to a lack of competition in sales or a lack of ability to provide service once a sale has been made.

25. In that regard, at the present time, Cadillac owners in AGSSA 4 must travel an average of 28.4 miles to get to the nearest Cadillac dealer for service as compared to 7.4 miles average for other domestic high group brands. In AGSSA 2 and 3, the average distance for a Cadillac owner to get to the nearest dealer is 7 miles or less. This substantial difference between 28.4 miles and 7.4 miles is significant as it clearly impacts upon brand selection at purchase time.

26. This is not to say that either Dimmitt or Dew are not providing quality service in a timely fashion to area Cadillac owners. To the contrary, the evidence present by Dimmitt establishes that it operates a quality service program with innovative and creative customer service benefits and no evidence was presented to indicate service quality or accessibility, at least as to Dimmitt, is lacking.

27. A nationwide survey conducted in 1983 reflected that at least 36% of Cadillac buyers visited a dealer of at least one other brand before buying their Cadillac. Petitioner contends, and it appears reasonable, that this indicates that not all Cadillac buyers start out intending to buy a Cadillac and if a Cadillac dealer is not readily available, potential Cadillac customers may well select a competing brand rather than expend the extra effort to examine the Cadillac. The same survey also indicated that more than half of those who ultimately bought Cadillacs visited at least one other Cadillac dealership before making their purchase. Consequently, if a potential Cadillac buyer in AGSSA 4 desired to comparative shop among Cadillac dealers, he would have to travel on the average more than 85 miles to do so. This is significantly higher than for other domestic high group brands.

28. Petitioner also contends that the community or territory has now outgrown a two dealer network located in the lower third of the geographical area involved. In light of the increasing population growth in AGSSA 4 and the fact that the lower disposable income situation there may well not remain static, there is some substance to Petitioner's argument.

29. "Market share" and "sales penetration" are reliable measures of dealer representation. "Market share" measures a manufacturer's percentage of a given market based upon registration data obtained by R. L. Polk from the various

states, and recorded monthly on a county-by-county, state-by-state, and national basis. "Sales penetration" measures actual unit sales compared with total sales potential using manufacturer warranty data, whether or not the vehicle is registered.

30. The issue of "expected penetration" discussed previously, reflected that for the AGSSA 2,3 4 community or territory, Cadillac incurred a gross registration loss of 320 vehicles, that is, vehicle registrations shy of the expected number of registrations within the area. This shortfall, Petitioner contends, is compounded by an additional 484 vehicles registered in the AGSSA 2,3,4 community or territory which were sold to residents by Cadillac dealers from outside the community or territory. The total shortfall, then, is 804 vehicles.

31. If it is assumed that a new dealer in Port Richey would penetrate the market at the same rate as the currently existing dealers in the community or territory, it should register 350 units which equates to 43% of the shortfall, leaving 454 units to Dew and Dimmitt to compete for. If the 804 shortfall figure is accurate, it would appear that adding another dealer to the community or territory would result in increased competition among the existing dealers for the shortfall sales which should, according to Petitioner, result in more sales and a reduction in shortfall. No evidence was introduced to show where the extra-community or territory vehicles were originally sold however. It well may be they were sold by Morse in Tampa, within the MDA, or by dealers from out of the MDA or the zone. How many of them could be recaptured is speculative.

32. Throughout this discussion so far a distinction has been made between AGSSAs 2,3 and 4 and AGSSAs 1 and 5, considering them basically as independent sections within the Cadillac Tampa MDA. Respondent contends this is improper and prohibited by established case law. Respondent has not, however, shown that a consideration of the entire MDA as the community or territory, as it suggests, with AGSSA 4 as an identifiable plot, would result in a different conclusion.

33. Respondent contests Petitioner's analysis of market representation with a thrust of its own asserting that AGSSA 4 has exceeded most of the established indicators or standards for the period 1985 - 1988 and when compared to the United States as a whole, has consistently outperformed the nation while currently exceeding the Florida zone average. Review of Respondent's own statistics, however, reveals that while AGSSA 4 has outperformed the national average, with the exception of the first six months of 1988, it has consistently trailed the Florida zone by several percentage points and the Tampa MDA by a narrower margin. In this one regard, Respondent's point of view is extremely short sighted. Comparison against a national average carries far less weight, considering the demographics, than does a comparison with a more localized and comparable population base. 34. Respondent further contends that while nationally Cadillac's registration penetration of high group vehicles has declined almost 10% during that period, AGSSA 4 has shown an increase of almost 5%. It is important to note as well that while the other comparables have been decreasing in percentage of penetration, with the exception of 1986, AGSSA 4's record has improved.

35. Comparing AGSSA 4 with other AGSSAs in the Tampa MDA shows that AGSSA 4 has, during the last two years, shown a substantial gain in market share joined in gain only but to a lesser degree by AGSSA 2.

36. It should be noted that these statistics are based on vehicle registrations, not sales. During she past two years, both Dimmitt in Clearwater

and Morse in Tampa have relocated further north toward the area of AGSSA 4 and Morse underwent a change in ownership during the same period. Respondent asserts that these changes in dealership location and ownership "have had a profound impact in terms of what has and will happen in AGSSA 4." A review of Cadillac registrations in AGSSA 4 for the period 1985 through June, 1988 reflect that Morse increased its penetration from just over 10% to 25% within the AGSSA and this factor, when coupled with Dimmitt registrations in the AGSSA, make up approximately 87% of all Cadillacs registered in the AGSSA. While improvement has been shown, it is clear that those two dealerships, neither one of which is located within the AGSSA, account for a preponderance of Cadillac sales within the AGSSA. The fact remains that Cadillac sales within the AGSSA are still far below expected penetration. The fact that Cadillac's performance in AGSSA 4 would rank it 40th out of 148 markets nationwide, if it were an MDA in its own right, is not dispositive of any issue here. The question is not whether Cadillac is selling cars but whether Cadillac is selling the number of cars it should be selling. Comparing AGSSA 4 as it currently exists as a part of the Tampa MDA with other MDA's is invalid.

37. Respondent presents evidence to indicate that based on 1988 registration data AGSSA 4 meets or exceeds in its Cadillac market share the performance of the Tampa MDA, the Tampa District, the Florida zone, the nation as a whole, and the median MDA average and that only AGSSA 2 and 3 in the Tampa MDA have performed as well as AGSSA 4. This is meaningless, however, if market conditions in the area indicate a substantially higher potential than is being achieved. If so, then the representation is inadequate.

38. Accepting as accurate Respondent's assertion that many manufacturer's use 85% of a "standard" as the criteria to determine a dealer's acceptable efficiency or adequacy, and recognizing that AGSSA 4 achieves a Cadillac market penetration in excess of 85% of "the national average, the Florida zone, the Tampa District, and the Tampa MDA for 87 and 88," that figure, as well, is meaningless unless it is accompanied by an explanation of the "standard" applied by the manufacturer. Here, General Motors Corporation, by its intention to award a dealership within the geographical AGSSA 4 to Seacrest, is apparently not satisfied that its market share in AGSSA 4 is acceptable regardless of the fact that registrations within the AGSSA exceed 85% of the registrations in other geographic entities.

39. Respondent suggests another test be used to evaluate the adequacy of representation of Cadillac in the AGSSA 4 area. This is based on gain/loss registrations compared to accepted retail penetration standards and is the difference between actual Cadillac retail registrations in an area and the number of registrations that would have occurred had it achieved the average penetration within that area be it national, zone, district, MDA or AGSSA. These analyses are theoretical and are based on percentages unadjusted to reflect reasonable expectations for the demographic makeup in the market. If adjusted for demography, Respondent contends, AGSSA 4 would reflect a lower penetration because of its relatively low household income.

40. Utilizing this suggested analysis reflects that in each year between 1985 and 1987, when compared against the Florida zone, the Tampa District, or the Tampa MDA, AGSSA 4 lost sales. The maximum number occurred in 1986 when, as compared against the Florida zone, AGSSA 4 would have lost 69 sales. In each year, however, as compared to the national average, AGSSA 4 exceeded the national standard and in 1988, it exceeded not only the national figure but the other three categories as well. Since the number is so small, and since the trend is upward, Respondent urges, there is no justification to support a new

single line Cadillac dealership and establishment of such a dealership would cannibalize the surrounding dealers. This argument is not persuasive, however, as it appears based on a less than adequate methodology. While comparisons against standards are used not only by automobile manufacturers but also by other product and service vendors, and while both General Motors and USAI regularly use comparisons against the nation, zone, and MDA, those elements which make up the parts of the analysis must be supportable and those utilized here do not so appear.

41. As was stated previously, Dimmitt has shown an increase in its sales in the AGSSA 4 area since its move to its current location closer to the boundary of the AGSSA. Part of the increase is undoubtedly related to the move but another part also may be related to the fact that it has substantially increased its advertising in the area.

42. Dimmitt asserts it is one of the largest Cadillac facilities in the Florida zone and was built with a view toward servicing an increasing market. No doubt this is so.

43. On balance, however, it would appear that with the increasing population in the Pasco County area of AGSSA 4, which is spreading to the north, away from Dimmitt rather than closer to the AGSSA 3 boundary, and considering the fluctuation in household income due to the attraction of different income groups by the construction of related residential areas, and the basic statistics which show that at the current time, AGSSA 4 is not achieving a reasonable potential expected of it, it would appear that AGSSA 4 is not adequately served by the existing dealerships in AGSSA 1, 2 and 3. This is due primarily to the distance factor and not the caliber of service rendered by the existing dealers. Convenience to the customer, remembering that Cadillac customers are, for the most part, older citizens, is an important consideration and with the aforementioned expected population surge, it is considered unlikely that the establishment of a new dealership in AGSSA 4 would have a permanent or long lasting adverse effect on the dealers not serving the area.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. Section 120.57(1), Florida Statutes.

45. The standard for issuance of a motor vehicle dealer license in Florida is found in Section 320.642, Florida Statutes, which states:

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

46. In the instant case, the burden of proof falls upon General Motors Corporation to establish that its currently licensed dealers in the "community or territory" are not providing adequate representation therein. Neither

General Motors Corporation nor Seacrest contends that the existing Cadillac dealers have not complied with their dealer sales and service agreements. To the contrary, the evidence clearly establishes that the currently existing dealers within the territory of the Cadillac Tampa MDA are in full compliance with said agreements.

47. The purpose of Section 320.642 is to prevent manufacturers from establishing more dealerships than a market can support. *Plantation Datsun, Inc. v. Calvin*, 275 So.2d (Fla. 1st DCA 1973). Here, the evidence shows that with the current and projected population increase in AGSSA 4, far above that within the MDA as a whole, the market has outgrown Cadillac's existing dealer network in the MDA and the community or territory.

48. The basic issue of fact and of law relates to the definition of the term "community or territory" and the governing statute does not provide this definition. The courts, however, have provided some guidance indicating that the "community or territory" is an "identifiable plot not yet cultivated, which could be expected to flourish if given the attention which the others in their turns received." *Bill Kelley Chevrolet, Inc. v. Calvin*, 322 So.2d 50, (Fla. 1st DCA 1975).

49. In this case, Respondent, Larry Dimmitt Cadillac, Inc. contends that the "community or territory" consists of the entire Cadillac Tampa MDA. Petitioners, on the other hand, contend that the "community or territory" consists of that identifiable portion of the Tampa MDA consisting of Pinellas and parts of Pasco and Hernando Counties which it has identified as AGSSAs 2, 3, and 4.

50. For the purposes of this case, the relevant community or territory is AGSSAs 2, 3, and 4 which consists of Pinellas and parts of Pasco and Hernando Counties. Further, the evidence establishes that AGSSAs 2, 3, and 4 constitute an identifiable and distinct retail marketing area.

51. Cadillac has sustained the burden of proof placed upon it by Section 320.642 and has demonstrated that the existing Cadillac dealers, none of whom are located within AGSSA 4, are providing inadequate representation in the community or territory as a whole, in terms of market penetration in AGSSA 4. The Tampa MDA is geographically different from the norm since there are two individual buying areas separated by a natural barrier plus the extended distance from the northernmost dealer to a large percentage of the public in the western area.

52. There is currently no Cadillac dealership in AGSSA 4 though Respondent, Larry Dimmitt's, dealership is located close to the southern boundary thereof on US Highway 19. Larry Dimmitt and Morse Cadillac, located in Tampa (AGSSA 1), are the two Cadillac dealerships which sell the most cars in AGSSA 4.

53. The evidence of record clearly shows that Cadillac is underproducing in AGSSA 4 by achieving only 68% of its "expected penetration" in that "community or territory." Respondent contends that AGSSA 4 does well against the national average, the Florida zone average, and the Tampa MDA average as well as the Tampa district but adequate representation is not necessarily dependent upon a comparison with other areas. Adequate representation relates to the area in question and when the evidence indicates that a particular brand of vehicle is not adequately performing within a properly identified "community

or territory," the conclusion which reasonably follows is that the existing representation is inadequate.

54. Examining the statistics presented by Petitioners indicates that Cadillac is either meeting or exceeding its "expected penetration" standard in both AGSSAs 2 and 3. In fact, in AGSSA 3, immediately south of AGSSA 4, the expected penetration standard is exceeded. Petitioner also has established that Cadillac's most likely domestic competitors, Lincoln Town Car and Chrysler Fifth Avenue, have exceeded their expected penetration standard in AGSSA 4 where each has a dealer representing it. It can be seen, therefore, that Cadillac, which normally outsells its competitors, is not competing properly in AGSSA 4 where it has no dealer. The reason for this is the subject of dispute.

55. It is significant that Cadillac customers in AGSSA 4 have to travel an average distance of 28.4 miles to the nearest Cadillac dealer but only 7.4 miles or less for other domestic brands. In addition, in AGSSA 2 and 3, Cadillac customers have to travel only an average of 7 miles or less to the nearest Cadillac dealer, and when the additional factors involving dealer visitation prior to purchase is included, it becomes clear that Cadillac suffers a decided disadvantage without a dealership in AGSSA 4.

56. The low penetration, the significant net registration losses, and the rapidly growing market show an additional dealership is needed. Cadillac has produced current statistics on market penetration which is a primary factor in determining adequacy of representation. See *Art Moran Palm Beach Pontiac-GMC, Inc. v. Stewart Pontiac Company, Inc., etc.*, DOAH Case No. 86-0289 (Florida Division of Motor Vehicles 1987), decision affirmed on appeal in *Stewart Pontiac v. State Department of Highway Safety and Motor Vehicles*, 511 So.2d 660 (Fla. 4th DCA 1987).

57. Therefore, it becomes evident that considering all the factors, a breakdown by AGSSA within the Tampa MDA is an appropriate method of defining a "community or territory"; that AGSSA 4, currently without a Cadillac dealership is underserved and not adequately represented; but that lack of adequate representation does not relate to the caliber or quality of service or effort demonstrated and displayed by the currently existing Cadillac dealerships.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore:

RECOMMENDED that the application of Seacrest Cadillac, Inc. to establish a Cadillac dealership in the vicinity of AGSSA 4, (Port Richey), be granted.

RECOMMENDED in Tallahassee, Florida this 13th day of March, 1989.

ARNOLD H. POLLOCK, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of March, 1989.

APPENDIX TO RECOMMENDED ORDER
IN CASE NO. 88-2252

The following constitutes my specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties to this case.

FOR THE PETITIONERS:

1. & 2. Accepted and incorporated herein
3. - 5. Accepted and incorporated herein
6. - 15. Accepted and incorporated herein
16. Accepted and incorporated herein
17. Accepted and incorporated herein
18. Accepted and incorporated herein
19. Accepted and incorporated herein
20. & 21. Accepted and incorporated herein
22. Accepted and incorporated herein
23. Accepted
24. - 26. Accepted and incorporated herein
27. Accepted and incorporated herein
28. Accepted and incorporated herein
29. Accepted
30. Accepted and incorporated herein as pertinent
31. - 33. Accepted and incorporated herein
34. - 36. Accepted and incorporated herein
37. Accepted and incorporated herein
38. - 41. Accepted and incorporated herein
42. Not a Finding of Fact but a comment on the evidence
43. - 45. Not a Finding of Fact but a comment on the evidence
46. Accepted but not relevant
47. Not a Finding of Fact but a comment on the evidence

BY RESPONDENT DIMMITT:

1. Accepted and incorporated herein
2. Accepted and incorporated herein
3. - 5. Accepted and incorporated herein
6. & 7. Accepted
8. - 10. Accepted and incorporated herein
11. & 12. Accepted and incorporated herein

13. Accepted
14. Accepted and partially incorporated herein
15. & 16. Accepted and incorporated herein
17. Accepted and incorporated herein
18. Accepted
19. & 20. Accepted and incorporated herein
21. Accepted but qualified by the possibility of change in demographics.
22. - 27. Accepted and incorporated herein
28. Accepted
29. & 30. Accepted
31. Accepted
32. Accepted and incorporated herein
33. - 35. Not totally supported by the evidence. Accepted in part and rejected in part.
36. & 37. Accepted and incorporated herein
38. Accepted
39. Accepted and incorporated herein
40. Accepted
41. Accepted
42. & 43. Accepted and incorporated herein
44. Accepted
45. & 46. Accepted and incorporated herein
47. Accepted and incorporated herein
48. - 50. Accepted
51. Rejected as contra to the weight of the evidence
52. & 53. Accepted but given limited weight due to questionable relevance
54. Accepted and incorporated herein
55. Accepted and incorporated herein
56. Accepted and incorporated herein
57. Accepted
58. Repetitive of Findings of Fact 36. & 37.
59. - 61. Accepted and incorporated herein but not an issue. Dimmitt's performance of service and customer satisfaction was not questioned.

COPIES FURNISHED:

Dean Bunch, Esquire
101 North Monroe Street, Suite 900
Tallahassee, Florida 32301

Edward Risko, Esquire
Office of the General Counsel
General Motors Corporation
New Center One Building
3031 West Grand Blvd.
Detroit, Michigan 48232

Michael A. Fogarty, Esquire
Post Office Box 3333
Tampa, Florida 33601

Daniel D. Myers, Esquire
402 N. Office Plaza Drive
Suite B
Tallahassee, Florida 32301

Michael J. Alderman, Esquire
Office of General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
Tallahassee, Florida 32399-0500