

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CORAL OLDSMOBILE-GMC TRUCK, INC.,)
and GENERAL MOTORS CORPORATION,)
)
Petitioners,)
)
vs.) CASE NO. 91-0861
)
KING MOTOR COMPANY, SHEEHAN)
PONTIAC-GMC, INC., VERNON SCOTT)
MOTORS, INC., and DEPARTMENT)
OF HIGHWAY SAFETY AND MOTOR)
VEHICLES,)
)
Respondents.)
_____)

RECOMMENDED ORDER

This matter was heard by William R. Dorsey, Jr. the Hearing Officer assigned by the Division of Administrative Hearings in Tallahassee, Florida, on July 15, 1991.

APPEARANCES

For Petitioner General Motors Corporation:	Edward W. Risko, Esquire General Motors Legal Staff Post Office Box 33122 Detroit, Michigan 48232 and Robert D. Hays, Esquire King & Spalding 191 Peachtree Street Atlanta, Georgia 30303
For Petitioner Coral Oldsmobile-GMC Truck, Inc.:	No Appearance
For Respondent Sheehan Pontiac- GMC, Inc., Vernon Scott Motors, Inc., and King Motor Company:	Daniel E. Meyers, Esquire Walter E. Forehand, Esquire Meyers & Forehand Suite B 402 North Office Plaza Drive Tallahassee, Florida 32301
For Respondent Department of Highway Safety and Motor Vehicles:	No appearance

STATEMENT OF THE ISSUE

The issue is whether GMC Truck Division of General Motors Corporation is receiving adequate representation in the community or territory where General Motors proposes to add an additional dealer.

PRELIMINARY STATEMENT

A General Motors/GMC Truck Division ("GM") noticed its intention to establish a new motor vehicle dealer at 9330 West Atlantic Boulevard, Coral Springs, Florida in a notice published in the Florida Administrative Weekly on December 28, 1990. The new dealer proposed was Coral Oldsmobile-GMC Truck, Inc. Three existing GMC Truck dealers, Sheehan Pontiac-GMC, Inc. ("Sheehan"), King Motor Company of Fort Lauderdale ("King"), and Vernon Scott Motors, Inc. ("Scott"), protested this notice under the procedure found in Sections 320.642 and 320.699, Florida Statutes (1989), by making appropriate filings with the Department of Highway Safety and Motor Vehicles on January 24, 1991.

The parties presented prefiled expert testimony and the testimony of witnesses at a hearing on July 15, 1991. By stipulation, GM presented the written testimony of Dr. Stanley K. Smith and Dr. Carol Taylor West, who did not appear at the hearing. GM presented the live testimony of an economist, Dr. David R. Kamerschen; a certified public accountant, Mr. Victor D. Nelawake; and an expert in dealer network analysis, Mr. James A. Anderson. The protesting existing dealers presented the testimony of Mr. Robert B. Dilmore, an expert in dealer finances and operations, and of Dr. Richard W. Mizerski, an expert in marketing and economics.

FINDINGS OF FACT

I. The Relevant Community or Territory

1. Coral Oldsmobile-GMC Truck, Inc. ("Coral") seeks to establish a GMC dealership in the vicinity of Coral Springs, Florida. The location chosen is within an area which GM has identified as the Fort Lauderdale multiple dealer area ("MDA"). The MDA is an area of primary responsibility ("APR") assigned by GM in its Dealer Sales and Service Agreements to more than a single GMC truck dealer. The three protesting dealers, Sheehan, located at Lighthouse Point, King in Fort Lauderdale and Scott in Hollywood, already have been assigned to sell GMC trucks in the Fort Lauderdale MDA. The Fort Lauderdale MDA comprises a large portion of the land area of Broward County, and its boundaries are defined U.S. Census Tracts.

2. GMC truck dealers located in nearby APRs which touch the Fort Lauderdale MDA are known in the industry as "fringe dealers." No fringe dealer makes enough truck sales to consumers who register their vehicles in the Fort Lauderdale MDA so that any fringe dealer could be considered to fall within the community or territory at issue here.

3. Information about the addresses where new car or truck owners register vehicles is available and can then be aggregated by census tracts or other geographic designations such as zip code areas. Nationally, from 62% to 85% of the sales made by each dealer within an MDA are made to persons who register the vehicles within the MDA boundary.

4. General Motors has designated areas surrounding each dealer within an MDA as an "Area of Geographic Sales and Service Advantage" ("AGSSA"). The boundaries of each AGSSA is also defined by census tracts. For the Fort Lauderdale MDA, AGSSA 1 is located in the northeastern county, and has been assigned to Sheehan, in Lighthouse Point. AGSSA 2 is the central portion of the county, its dealer is King, in Fort Lauderdale. AGSSA 3 is in the southern portion of the county, its dealer, Scott, is in Hollywood. Each AGSSA is designed as the area in which its dealer has a convenience advantage over other dealers of the same line-make because of its proximity to consumers residing in that area.

5. The proposed AGSSA to be created for the Coral dealership in the Fort Lauderdale MDA is designated as AGSSA 10 [why this is not designated AGSSA 4 is not clear, but it is also not significant].

6. Eighty four percent (84%) of customers registering new trucks in the area to comprise AGSSA 10 purchased their GMC trucks from dealers in the Fort Lauderdale MDA. King and Sheehan sell GMC trucks that are registered throughout the MDA. A significant number of consumers go outside the Sheehan AGSSA 1 and King AGSSA 2 to purchase GMC trucks from other MDA dealers. It is undisputed that AGSSAs 1, 2 and 10 should be included within the definition of the relevant community or territory. The dispute centers on whether AGSSA 3 is also part of the community or territory.

7. Eighty-six percent (86%) of all GMC truck registrations in AGSSA 3 were attributable to sales by dealers in the Fort Lauderdale MDA, which includes sales by Scott. Of the registrations which were not generated by sales at Scott, 72% were from other Fort Lauderdale MDA dealers. Thirty-six percent (36%) of those registering GMC trucks in AGSSA 3 (the Scott AGSSA) purchased them from other Fort Lauderdale MDA dealers. AGSSA 3, therefore, does not perform like an isolated, unconnected market. Based on consumer behavior, the Fort Lauderdale MDA, including AGSSAs 1, 2, 3, and 10, perform as a large market shared by multiple dealers.

8. The test commonly used for determining whether markets are so connected as to form an appropriate community or territory to use as a unit of analysis requires that there be cross-sell of at least 30% in both directions. In other words, at least 30% of a dealer's sales should be made to consumers outside of the dealer's AGSSA but inside the MDA, as well as at least 30% of the consumers inside the dealer's AGSSA should buy from the other dealers in the MDA. The Scott dealership, in the southern portion of Broward County, does not fit this classic definition. The Scott data for the most recent year show that for Scott, 33 sales were made to persons registering vehicles in other AGSSA's within the Fort Lauderdale MDA. Scott's nationwide retail sales were 241 units, so only 13.7% of Scott's sales were to persons residing in the Fort Lauderdale MDA, but outside of the Scott AGSSA. On the other hand, as pointed out in the prior Finding, 86% of all registrations in the Scott AGSSA were attributable to dealers in the Fort Lauderdale MDA (including sales made by Scott). Scott does not sell vehicles into the other AGSSAs of the MDA very well, but the customers in the Scott AGSSA are going to other MDA dealers to buy trucks more than they were going to dealers in any other area. On balance, this evidence demonstrates that it is appropriate to include the Scott AGSSA, AGSSA No. 3, in the Fort Lauderdale MDA, and that the Fort Lauderdale MDA defines the community or territory which should be the unit of analysis here.

II. Standard of Evaluation

9. The next question is whether the existing GM dealers are providing "adequate representation" in the relevant community or territory, i.e., the Fort Lauderdale MDA. Since 1988 GMC Truck sales performance in the Fort Lauderdale MDA as a whole and in AGSSA 10 have steadily declined.

10. The most common measure for evaluating the performance of a dealer network is analysis of market penetration data. GMC Truck has a 7.41% market share nationally. National data includes markets where GM is inadequately represented, where it has no dealers at all, and markets where it is represented adequately.

11. National data is, of course, only a starting point. There are variations in consumer preferences for different types of vehicles, and even a dealership network in an area which fails to match the 7.41% market penetration for the nation as a whole may be adequately representing GM in its area, if consumers there tend to prefer different types of vehicles, something which even the most efficient dealer cannot change. Conversely, the dealer or dealership network selling at the national average may be inadequately representing GM if it reaches no more than the national average market penetration in an area where the type of vehicle under consideration is quite popular with the area's consumers.

12. Historically, GMC truck has had greater market penetration in the large pick-up truck, truck wagon and full size panel van segments of the market than in the small pick-up truck segment. In places where large pick-up trucks are popular (agricultural areas, for example, where trucks commonly are used on farms) market conditions are favorable to GM.

13. Taking into account the different popularity of distinct segments of the truck market nationally and in the Fort Lauderdale MDA, GM expects the Fort Lauderdale MDA to achieve a market penetration of 6.45%, which is somewhat lower than the national average for market penetration. Applying the same analyses to AGSSA 10 (the proposed new dealership) shows an expected market penetration of about a 6.04%, or about 80% of the National average. (Anderson testimony, at 31.) These percentages are computed by identifying demand shown by actual consumer purchases in the Fort Lauderdale MDA and in AGSSA 10 for each segment of the product category (i.e., large pick-ups, small pick-ups, and mid-size vans, panel vans, etc.) and applying to those sales the national average GM achieves for each of those segments. This produces an expected number of registrations for the dealer according to the local popularity of each product segment. This standard of comparison is useful because it takes into account unique characteristics of the local market. In 1988 AGSSA 10 achieved 95.5% of its expected penetration. Performance declined to 76.6% of expected penetration by 1990.

14. Analyzing AGSSA 10 based on age distribution of the area's population rather than on truck market segment popularity, shows that GMC truck projects a 7.59% market penetration in AGSSA 10 and in the Fort Lauderdale MDA, which is somewhat higher than the national average and the expected penetration described in Finding 13. When one takes into account income distributions in the area, GM projects a market penetration of 7.41% in the Fort Lauderdale MDA and 7.43% in AGSSA 10, which is quite close to the national average market penetration, and higher than AGSSA 10's projected market penetration based upon product segment popularity. See Finding 13, above.

15. Expected penetration calculations for other markets in Florida show that 17 areas of Florida actually exceed their expected market penetration, which is evidence that the expected penetration calculation produces a reasonable expectation, and has not been manipulated by GM to become an extreme standard which dealers could not actually meet. Sheehan, in AGSSA 1 had sales equal to almost 150% of its expected penetration in 1990. It is significant that in census tracts within the Fort Lauderdale MDA that meet or exceed the expected penetration, based on product segment popularity, the average distance of the purchasing consumer from the nearest dealer is 3.4 miles. This confirms that convenience of dealer location affects consumers' purchasing decisions in an important way. Consumers in AGSSA 10 are, on average, now 8.7 miles from the nearest GMC Truck dealer. This increased distance is a very persuasive explanatory factor for the low sales in AGSSA 10 now, which fall below expected market penetration.

16. The expert for the protesters, Dr. Mizerski, challenged GM's use of national averages to assess dealer performance in AGSSA 10 and the Fort Lauderdale MDA. Dr. Mizerski would have used as the standard for assessing the adequacy of representation of the GMC truck products by the protesting dealers market penetration in the State of Florida, on the theory that the State of Florida data more closely matches AGSSA 10 and the Fort Lauderdale MDA than national data does.

17. This theory has some initial appeal, but it fails to take into account the question of whether Florida itself has a disproportionate share of inadequately represented markets. This could come from the substantial growth in Florida in recent years. Florida falls below the national average, and below 34 states in the ratio of GMC Truck dealers to all other dealers. More than half the Florida markets have penetration below that expected based on product segment popularity, which is an indication that Florida has a disproportionate share of inadequately represented markets. There is no proof that the number of sale points (i.e., dealerships) has increased in proportion as Florida's population has increased. (See Finding 30, below, as to Broward County). If market penetration for GMC truck products in Florida is lower than the national average not because of unique characteristics of the Florida market, but because of network inadequacies, it makes no sense to use that inadequate network as the standard for evaluating the adequacy of dealer performance.

18. On balance, the expected penetration standard advocated by GM based on product segment popularity is more persuasive than the "actual penetration" standard advocated by Dr. Mizerski. The penetration achieved in AGSSA 10 in 1990 was only 4.63%, which is well below the expected penetration of 6.04%, the national average of 7.41%, the Florida average of 5.8%, and the Florida MDA average of 5%. It began to fall below expected penetration in 1988 and performance has declined since then. Performance in the Fort Lauderdale MDA as a whole was also below expected penetration in 1989 and 1990. If lease registrations are included within the definition of the retail market, the figures are essentially the same. Consumer lease transactions are not distorting performance data.

19. All Fort Lauderdale MDA dealers have not had trouble meeting expected penetration projections. The performance by Sheehan in AGSSA 1 is almost 150% of its expected penetration. Existing dealers have not been able to penetrate the market in AGSSA 10 adequately from their current locations. The most likely cause of the low penetration is the lack of a GMC Truck dealership in the geographic area.

III. Market Characteristics

20. The three existing dealers are located in what was the densely populated eastern or coastal half of Broward County in 1980. The Broward population has grown significantly from 1980 through 1990 in the western half of the Fort Lauderdale MDA, especially near the proposed location for the Coral dealership.

21. The population in AGSSA 10 rose nearly 200,000 from 1970 to 1980, and rose 129,000 from 1980 to 1990. The 1990 population of 357,958 is about nine times the 1970 population, and twice the 1980 population. There have been similar increases in the number of households and an observable increase in household density in western Broward. This population growth in AGSSA 10 should continue into the future, reaching an estimated 530,554 within the next 10 years. This growth rate is five times greater than that of Broward County as a whole, which itself is growing at twice the national rate. Despite the significant increase in population in AGSSA 10 and in the western two thirds of AGSSA 3, there is no local GMC truck dealer to serve this growing population.

22. The growth has not been limited to AGSSA 10. The entire Fort Lauderdale MDA had grown in terms of population, household and driving age population during the same period.

23. Each AGSSA in the Fort Lauderdale MDA had population increases and increases in the number of households both in absolute numbers and on a percentage basis from 1970 to 1980. AGSSA 10 had the largest percentage increases (500% in population, 600% in households), although the entire Fort Lauderdale MDA grew very significantly.

24. From 1980 to 1990 the population of AGSSA 10 grew 56.24% and households grew 66.66% and it became the second largest AGSSA in Fort Lauderdale MDA. The population of AGSSA 1 grew 10.92% and 19% in number of households during 1980-1990. AGSSA 3 increased 22.58% in population and 28.48% in households. AGSSA 2 population remained basically stable (decreasing by about 1.84%) and the number of households increased only moderately, 5.33%. The very significant growth in the Fort Lauderdale MDA and in AGSSA 10 has two implications. It has offered greater opportunities for sales of GMC trucks and also highlights the need for expansion of the dealer network so that dealers will be conveniently located to the new residents of the western areas of Broward County.

25. AGSSA 10 currently holds strong prospects for additional sales due to its household incomes. Sales potential is better predicted by a household's income than by individual income. Areas of average household incomes below \$15,000 generate few new vehicle sales, while household incomes of greater than \$15,000 have significant potential for new vehicle sales. The average household income in AGSSA 10, and throughout the entire Fort Lauderdale MDA, are predominately of middle and upper income levels. Only one census tract in AGSSA 2 and one in AGSSA 3 have household income levels of below \$15,000.

26. The employment figures in the decade from 1980 to 1990 in Broward County are consistent with its population growth. The increases in employment and real income in Broward County have been significantly higher than those of the United States as a whole, and Broward's rate of unemployment has been lower. This economic strength is predicted to continue throughout the next decade. These facts indicate that the large growth in the Fort Lauderdale MDA and in

AGSSA 10 is of a type likely to provide significant opportunities for sales of new GMC Trucks.

27. As the population increased, light truck registrations have increased too. From 1982-1990, retail light truck registrations in the Fort Lauderdale MDA increased 112%, and in AGSSA 10 increased 213%.

28. These increases in population, households, income and employment also point to an increased potential for traffic congestion in areas where current dealers are located, as individuals use the road networks to travel to and from work. Providing convenience to consumers by locating new dealerships in areas experiencing growth is important. See Findings 15 and 24.

29. Areas which experience rapid development can outgrow the ability of the dealer network to provide adequate service to potential customers. The Fort Lauderdale MDA offers more sales opportunity per existing GMC truck dealer than all but three markets in Florida. Even with the proposed additional dealer, the opportunity per dealer would remain higher than that available in 39 other Florida markets.

30. Merely to increase dealers in proportion to increases in the number of households, an additional dealer should have been added as long ago as in 1983, and another likely will be needed by 1995 in the Fort Lauderdale MDA.

31. Based on GMC's experience over the years, the existing dealer network cannot continue to expand to fulfill the needs of Broward's increased population and especially the population of the Fort Lauderdale MDA. A dealer network designed to produce more than 225 expected GMC Truck registrations per dealer fails to achieve the minimum expected registrations 86% of the time. Thus, to have a reasonable chance of meeting expected market penetration, the network should not exceed a critical size of 225 expected GMC Truck registrations per dealership. This 225 registration goal is not a measure of total sales at a dealership. GMC Trucks are sold from dealerships which also sell other GM lines. The 225 registrations applies only to GMC Truck products.

32. In the absence of the proposed new dealer in AGSSA 10, the GMC Truck network is configured to expect 365 registrations per dealer, which is much above critical optimum design capacity of 225. The Fort Lauderdale MDA simply has grown too large for a three dealer network. Appropriate planning by GM requires redesigning the network to allow for at least four and as many as five dealers.

33. Perhaps the most telling facts are those showing selling success at distances. The existing dealers' market penetration is strongest close to their dealership locations, but declines as the distance from the dealerships increase. This makes intuitive sense. Sheehan has been able to meet or exceed the expected penetration within four miles of its dealership and has only moderate impact on GMC truck sales performance at distances near the proposed location for Coral in AGSSA 10. King does not penetrate the market significantly beyond four miles from its dealership, and has even less impact on GMC truck penetration at the proposed location, which is 10 miles away from King. Scott is not penetrating the market significantly at a distance, achieving only a 3/10 of one percent of its sales at a distance equal to that of the proposed new Coral dealership.

34. Because there is no dealer in AGSSA 10, potential customers residing there are 8.7 miles from the nearest GMC truck dealer, on average. This is almost three times the average distance in AGSSA 1 (2.8 miles), twice the distance in AGSSA 2 (3.5 miles), and 2 and 1/2 miles farther than in AGSSA 3. If the proposed new dealership is established in AGSSA 10, convenience is improved to 4.1 miles on the average, which still is not as good as that provided in AGSSAs 1 and 2. Of course, the convenience GM offers to consumers residing in AGSSAs 1, 2 and 3 remains the same whether or not a new dealer is added in AGSSA 10. Other manufacturers of light trucks offer higher degrees of convenience to residents of AGSSA 10, which places GM at a competitive disadvantage.

35. Performance of GMC truck in AGSSA 10 fell below minimum expected penetration in 1988 (see Finding 13). That year a light truck competitor, Dodge, established a dealership there. GMC truck performance has continued to decline in the area as other light truck manufacturers established representation in the area in 1989 (Id.). Based upon their distance from AGSSA 10 consumers, the existing Fort Lauderdale dealers are unable to overcome the convenience disadvantage they face in attracting consumers residing in AGSSA 10, and consequently have been unable to provide adequate inter-brand competition. This is partially the result of the design of Broward County roadways, which carry traffic better north-south than east-west. The problem is inherent in the current design of the GM sales network, and the solution is to add a GMC truck dealer in AGSSA 10 to improve convenience to consumers. Based on previous experience, this improvement in convenience should result in increased efficiency and additional sales.

IV. Impact on Existing Dealers

36. GM computes a gross registration loss, which is the number of registrations which would raise each area within the MDA to the expected penetration level (see Finding 13). This is a conservative measure of possible additional sales because it is based upon the expected penetration, which is a minimum standard, not the maximum number of sales which might be achieved by effective dealers such as Sheehan. For 1990, the gross registration loss for GMC trucks in the Fort Lauderdale MDA was 295 units, which was mostly concentrated in AGSSA 10, and in the western 2/3 of AGSSA 3.

37. If the proposed Coral dealership had been operating in 1990, and if it had performed at the average of the performance levels of the existing Sheehan, King and Scott dealerships, it would have produced a total of 313 registrations within a 20 miles radius of the dealership, which includes some areas beyond the boundary of the Fort Lauderdale MDA. This is 18 registrations more than the gross registration loss in the entire Fort Lauderdale MDA. Computed on the same basis, sales to the more relevant group of persons registering vehicles in the Fort Lauderdale MDA would have been 286 sales. This shows a new dealer in AGSSA 10 could theoretically make 286 sales without supplanting a single sale from existing dealers in the MDA.

38. Moreover, in 1990 151 sales were made to persons who registered the vehicles within the Fort Lauderdale MDA from sales by dealers outside the Fort Lauderdale MDA. These sales represent additional potential sales to be captured by the three existing dealers.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over this matter. Section 120.57(1), Florida Statutes (1989). This case is governed by Section 320.642(2)(a)(2), Florida Statutes (1989). The motor vehicle manufacturer, the "licensee" under the statute, must make application to the Department of Highway Safety and Motor Vehicles to establish a new retail outlet. The statute is framed in terms of the factors which would cause the Department to deny a manufacturer a license, and says:

An application for a motor vehicle dealer license in any community or territory shall be denied when:

* * *

2. The licensee fails to show that the existing franchised dealer or dealers who register new motor vehicle retail sales or retail leases of the same line-make in the community or territory of the proposed dealership are not providing adequate representation of such line-make motor vehicles in such community or territory. The burden of proof in establishing inadequate representation shall be on the licensee. 1/

The purpose of Section 320.642 is to prevent manufactures from appointing more dealers in a market than a manufacturer's interest legitimately requires. *Bill Kelly Chevrolet, Inc. v. Calvin*, 322 So.2d 50, 52 (Fla. 1st DCA 1975). The entire statutory framework for the regulation of motor vehicle dealers is designed to provide consumer protection, fair trade, and to maintain competition in the automobile sales industry. Section 320.605, Florida Statutes (1989).

40. The statute does not define the term "community or territory" as it is used in Section 320.642(2)(a)(2), Florida Statutes (1989), and the determination of the appropriate "community or territory" is to be made based on the facts presented at the final hearing. *Anthony Abraham Chevrolet Co. v. Collection Chevrolet, Inc.*, 533 So.2d 821, 824 (Fla. 1st DCA 1988). The argument by Respondents that the community or territory required by Section 320.642 is a circle of 12.5 miles surrounding the proposed location of the new dealer is rejected.

41. Although the area assigned to a dealer by the manufacturer in the Dealer Sales and Service Agreement, here the Fort Lauderdale MDA, is not conclusive, it is entitled to great weight. *Larry Dimmitt Cadillac, Inc. v. Seacrest Cadillac, Inc.*, 558 So.2d 136, 138 (Fla. 1st DCA 1990). Whether the representation provided by dealers for a manufacturer is inadequate can be analyzed either in the community or territory as a whole, or in some identifiable area within the community or territory. *Bill Kelly Chevrolet v. Calvin*, 322 So.2d 50, 52 (Fla. 1st DCA 1975), cert. denied, 336 So.2d 1180 (Fla. 1976).

42. The evidence here shows that the three existing AGSSAs in the Fort Lauderdale MDA, and the proposed AGSSA 10, to be assigned to Coral, are interconnected markets, and form an appropriate community or territory. The significant growth from 1970 to 1980 and especially from 1980-1990 in the western part of Broward County justifies the identification of AGSSA 10 as a

district area which has not received adequate representation by the existing dealers, in large part due to the significant increase in population and households in the western part of Broward County, which has left that population without a convenient retail outlet for GMC Truck vehicles.

43. There are 11 criteria stated in Section 320.642(2)(b), Florida Statutes (1989), which may be considered in determining whether existing dealers provide a manufacturer with adequate representation, but the criteria are such that not all of them apply in every case.

44. The first criteria stated in Section 320.642(2)(b)(1), is:

1. The impact of the establishment of the proposed . . . dealer on the consumers, public interest, existing dealers, and the licensee; provided, however, that financial impact may only be considered with respect to the protesting dealer or dealers.

The evidence demonstrates that there is sufficient opportunity in the market to justify adding a GM Truck dealership. The area to comprise AGSSA 10 has had very substantial growth over the past 10 years, and the growth should continue. Expected market penetration in AGSSA 10 is sufficient because growth is sufficiently remote from the existing dealers. The addition of a dealer in the Coral Springs area will provide benefits to consumers and serve the public interest by enhancing competition, for it will provide a more convenient outlet for sales and service facilities to consumers living in AGSSA 10. The data shows sufficient additional sales opportunity in the community, so that the opening of the GM Truck line at Coral's location should have no significant adverse impact on existing dealers, but should enhance inter-brand competition.

45. The next factor to be considered is that listed in Section 320.642(2)(b)(2):

2. The size and permanency of investment reasonably made and reasonable obligations incurred by the existing . . . dealers to perform their obligations under the dealer agreement.

Each of the protesting dealers were well established before the recent growth in the "community or territory" which GM seeks to tap by adding the Coral dealership. The protestors' sales and service facilities are so far removed from the proposed Coral dealership that they do not provide adequate inter-brand competition. The opening of the Dodge and other dealerships in the area to comprise AGSSA 10 in 1988 and 1989 is some indication that other manufacturers believe that there is a substantial sales opportunity to be found by locating in that area. There was no evidence about the nature of the protesting dealers' investment in physical plant, parts or vehicle inventory to balance against GM's need to enhance its dealer network by adding a dealer in AGSSA 10. Had any existing dealer proven that it had expanded its sales and service facilities, sales staff, or otherwise invested significant capital with a specific business plan to attempt to generate sales in the area to comprise AGSSA 10 with that investment, matters might be different.

46. The next factor found in Section 320.642(2)(b)(3), Florida Statutes (1989), requires consideration of:

3. The reasonably expected market penetration of the line-make motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory.

GM has made reasonable calculations to determine expected market penetration in AGSSA 10, based upon product popularity. Sales in AGSSA 10 are well below the standards which have been proposed as measures of performance. There is a significant opportunity for additional sales which the existing dealer network is unable to exploit.

47. Section 320.642(2)(b)(4), Florida Statutes, lists as a factor for consideration:

4. Any actions by the licensees in denying its existing dealer or dealers of the same line-make the opportunity for reasonable growth, market expansion, or relocation, including the availability of line-make vehicles in keeping with the reasonable expectations of the licensee in providing an adequate number of dealers in the community or territory.

The protesting dealers did not demonstrate that GM has denied them the opportunity for reasonable growth, market expansion, or relocation. There is no evidence of any relocation attempts. The population growth, household growth, and household income levels throughout the entire Fort Lauderdale MDA are such that the existing dealers are not being denied the opportunity for reasonable growth by the establishment of the Coral GMC Truck dealership. The existing dealers are too far from the consumers in AGSSA 10 to provide adequate representation there for GM.

48. Section 320.642(2)(b)(5) does not appear to apply under the evidence submitted in this case.

49. Section 320.642(2)(b)(6) allows assessment of:

6. Distance, travel time, traffic patterns, and accessibility between the existing dealer or dealers of the same line-make and the location of the proposed additional or relocated dealer.

This is an important factor in this case. There appears to be a direct relationship between the distance of a dealership from an area and that dealership's ability to sell vehicles to residents who will register them in the area. GMC Truck offers consumers a low level of convenience, measured by

distance to nearest dealer, in AGSSA 10. The problem is exacerbated by the relative inadequacy of major traffic arteries in Broward County running east/west, which makes it more difficult for existing dealers in eastern Broward to sell cars to residents in western Broward County.

50. Section 320.642(2)(b)(7), looks at:

7. Whether benefits to consumers will likely occur from the establishment or relocation of the dealership which the protesting . . . dealers prove cannot be obtained by other geographic or demographic changes or expected changes in the community or territory.

There is no evidence that there are geographic changes or demographic changes to be expected which will relieve GM's problem in penetrating AGSSA 10 with GM's existing dealer network. The population growth and economic growth which has been continuing for the last decade will continue. Congestion in the area will remain, at best, the same. This highlights the need for a dealership in western Broward County.

51. Section 320.642(2)(b)(8) looks at:

8. Whether the protesting dealer or dealers are in substantial compliance with their dealer agreement.

There was no evidence that any existing dealers were out of compliance with their dealer agreements.

52. Section 320.642(2)(b)(9) allows assessment of:

9. Whether there is adequate inter-brand and intra-brand competition with respect to said line-make in the community or territory and adequately convenient consumer care for the motor vehicles of the line-make, including the adequacy of sales and service facilities.

There are insufficient GMC Truck dealers to stimulate effective inter-brand competition in western Broward County. This has resulted in market penetration for GMC Trucks below expected levels, which has been declining since 1988, due largely to the lack of consumer convenience which the current dealer network provides for residents in AGSSA 10. GMC Truck dealerships have not kept pace with additional inter-brand competition from other manufacturers, such as Dodge, which have already expanded into the area which GM purposes to enter with this additional dealer.

53. Section 320.642(2)(b)(10) looks at:

10. Whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes.

This factor is actually redundant of factors discussed above. The significant increase in both population and households, having middle and upper income levels and good employment rates has made western Broward County an appropriate area for expansion of the GMC Truck dealer network. Sales are below expected market penetration, and penetration has been declining since 1988. Sales of GMC Truck vehicles will in all likelihood continue to decline in the absence of the establishment of a dealership with a more convenient location to the residents of AGSSA 10.

54. Section 320.642(2)(b)(11) evaluates:

11. The volume of registrations and service business transacted by the existing . . . dealers of the same line-make in the relevant community or territory of the proposed dealership.

The existing dealers are unable to attract consumers registering their cars in AGSSA 10 in significant numbers. Sheehan is obviously a very strong competitor, but even it is not able to effectively penetrate the market at distances equal to that proposed by GM here, for Coral's location in western Broward County.

55. GM has satisfied its burden under Section 320.642, Florida Statutes (1989), to show that it is not being adequately represented in the community or territory, the western portion of the Fort Lauderdale MDA, and that its request to establish an additional GMC Truck dealership at Coral Oldsmobile should be granted.

RECOMMENDATION

It is RECOMMENDED that the application to establish the GMC Truck dealership at Coral Oldsmobile be granted.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 22nd day of October 1992.

WILLIAM R. DORSEY, JR.
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of October 1992.

ENDNOTE

1/ The statute was amended in 1988, so most case law actually interprets the previous statutory language. The change in language is not significant. The earlier version of Section 320.642 required the Department to deny a license "in any community or territory where the licensee's presently licensed . . . dealers have complied with the licensee's agreements and are providing adequate representation in the community or territory . . ."

APPENDIX

Rulings on Findings proposed by GM:

- 1-4. Adopted in Findings 1-4.
- 5. Adopted in Finding 6.
- 6. Adopted in Finding 7.
- 7. Rejected as argument.
- 8. Adopted in Finding 10.
- 9. Adopted in Finding 11.
- 10. Adopted in Finding 13.
- 11. Adopted in Finding 14.
- 12 & 13. Adopted in Finding 15.
- 14-19. Rejected as argument.
- 20 & 21. Adopted in Finding 18.
- 22. Rejected as unnecessary.
- 23. Adopted in Finding 18.
- 24. Adopted in Findings 9, 13 and 18.
- 25 & 26. Rejected as unnecessary.
- 27. First sentence adopted in Finding 19.
- 28. Rejected as unnecessary.
- 29. Adopted in Finding 20.
- 30. Rejected as unnecessary.
- 31. Generally adopted in Finding 21.
- 32. Rejected as unnecessary.
- 33. Adopted in Finding 21.
- 34. Adopted in Finding 22.
- 35. Adopted in Finding 23.
- 36 & 37. Adopted in Finding 24.
- 38. Adopted in Finding 25.
- 39. Adopted in Finding 26.
- 40 & 41. Adopted in Finding 27.
- 42. Adopted in Finding 29.
- 43. Adopted in Finding 30.
- 44. Adopted in Finding 31.
- 45. Adopted in Finding 32.
- 46. Adopted in Finding 33.
- 47 & 48. Adopted in Finding 34.
- 49. Adopted by reading together Findings 18 and 35.
- 50. Adopted in Finding 35.
- 51. Rejected as unnecessary.
- 52. Adopted in Finding 36.
- 53. Adopted in Finding 37.
- 54-65. Rejected as argument concerning the testimony of Dr. Mizerski and Mr. Dilmore. The Dilmore predictions were especially rejected for the reasons proposed by GM in Finding 63.

Rulings on Findings proposed by the protesting dealers:

1. Adopted in Finding 1.
2. Adopted in Finding 1.
3. Adopted in Finding 1.
4. Rejected as argument.
5. Rejected because the better phrasing of what constitutes a community or territory is the inter-connectedness of the market.
6. Rejected as an analysis of testimony, not a finding of fact.
7. Rejected as an analysis of testimony, not a finding of fact.
- 8-19. These findings generally set out the difference of opinion between Dr. Mizerski and Mr. Anderson. Mr. Anderson's testimony has been accepted as the more persuasive analysis. See especially Findings 7 and 8. Proposed Finding 14 is adopted in Finding 8. I acknowledge Mr. Anderson applied the 30/30 test in a prior proceeding. See proposed findings 17 and 18 of the protesting dealers.
- 20-51. These findings generally continue the analysis the evidence as interpreted by Mr. Anderson and Dr. Mizerski. The protestors argue that Dr. Mizerski's analysis ought to be accepted. For the reasons stated in the Findings of Fact, however, I believe that the national data is the better data, in large part because the use of state data simply does not account adequately for whether Florida has a substantial number of markets where GMC Truck is inadequately represented. See Finding 17. Consequently, the lynch pin of Dr. Mizerski's analysis falls, or perhaps stated in a better way, that of Mr. Anderson is more persuasive. I do not regard the expected penetration analysis of Mr. Anderson to be unreasonable, as the protestors argue in their proposed finding 51, for the reasons stated in Finding 15. Areas of Florida do actually exceed their expected market penetration. Sheehan does a particularly good job, see Findings 15 and 19.
- 52-60. These findings are rejected because Dr. Mizerski has chosen as the most appropriate measure to evaluate the performance of the existing dealers the retail average sales or the Florida MDA average sales. The use of these points of comparison has been rejected, in favor of the expected penetration analysis of Mr. Anderson.
- 61-63. Rejected because Mr. Anderson did not base his opinions solely on national data, but computed his expected penetration based on local product popularity.
- 64-71. There is insufficient evidence that existing dealers will actually lose a substantial number of sales as a result of the addition of the Coral dealer in AGSSA 10. See Finding 37. The evidence is much too thin to accept the argument that any existing dealer will go out of business if the Coral dealership is allowed to open its GMC Truck operation. None of the dealers' GMC Truck sales and service operations is the sole source

of sales; they all sell other GM lines too. For the reasons argued by GMC in its proposed findings, especially proposed Finding 63, Mr. Dilmore's analysis has not been persuasive. Lost opportunity in the market should provide the great bulk of sales at the Coral dealership.

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