

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERRY FORD COMPANY and)
FORD MOTOR COMPANY,)
)
Petitioners,)
vs.) CASE NO. 94-0402
)
HOLLYWOOD FORD, INC., and)
DEPARTMENT OF HIGHWAY SAFETY)
AND MOTOR VEHICLES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to written notice, a formal hearing was held in this case before Errol H. Powell, a duly designated Hearing Officer of the Division of Administrative Hearings on December 19-22, 1994, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Dean Bunch, Esquire
FORD MOTOR Cabannis & Burke, P.A.
COMPANY 909 East Park Avenue
Tallahassee, Florida 32301

For Respondent: Joseph S. Geller, Esquire
HOLLYWOOD Peggy Fisher, Esquire
FORD, INC. Geller, Geller, Burton & Garfinkel
1815 Griffin Road, Suite 403
Dania, Florida 33004

STATEMENT OF THE ISSUE

The issue for determination is whether the requirements of Section 320.642, Florida Statutes, are satisfied regarding the protest to the relocation of an existing Ford dealer.

PRELIMINARY STATEMENT

By Notice of Publication in December 1993, Hollywood Ford, Inc. (Respondent Hollywood Ford), was notified of the intent by Ford Motor Company (Petitioner Ford) to relocate Terry Ford Company (Terry Ford). By letter dated January 18, 1994, Respondent Hollywood Ford notified the Department of Highway Safety and Motor Vehicles (DHSMV) of its protest against the relocation of Terry Ford on the grounds that:

1. The proposed relocation would be within 12.5 miles of Respondent Hollywood Ford;

2. At least 25 percent of Respondent Hollywood Ford's retail sales have been to persons within 12.5 miles of the proposed relocation during any 12-month period of the 36-month period immediately preceding December 1993;

3. The proposed relocation is farthest from the present location of Terry Ford than from the present location of Respondent Hollywood Ford; and

4. Even though Petitioner Ford promised the prior owner of Respondent Hollywood Ford that his dealership should be relocated to the proposed relocation, this same promise/offer was not made to the current dealer operator of Respondent Hollywood Ford because the current dealer operator is a minority [Black/African-American].

On January 21, 1994, this matter was referred by the DHSMV to the Division of Administrative Hearings. A formal hearing was scheduled on December 19-22, 1994, pursuant to notice.

At the hearing, Petitioner Ford presented the testimony of two witnesses and entered one composite exhibit into evidence. 1/ Respondent Hollywood Ford presented the testimony of two witnesses (one by telephone testimony) and entered six exhibits into evidence.

A transcript of the formal hearing was ordered. At the request of the parties, the time for filing posthearing submissions was set for more than ten days following the filing of the hearing transcript. Several extensions of time were granted beyond the time originally set for posthearing submissions. The parties submitted proposed findings of fact which have been addressed in the appendix to this recommended order.

FINDINGS OF FACT

1. Terry Ford Company (Terry Ford) is an existing dealer of Ford Motor Company (Petitioner Ford), selling Ford cars and light trucks. Terry Ford is presently located at 1000 North Federal Highway, Pompano Beach, Broward County, Florida.

2. Hollywood Ford, Inc. (Respondent Hollywood Ford), is also an existing dealer of Petitioner Ford, selling Ford cars and light trucks. Respondent Hollywood Ford is presently located at 1200 North Federal Highway, Hollywood, Broward County, Florida.

3. Terry Ford and Respondent Hollywood Ford sell the same line-make motor vehicles.

4. In December 1993, Petitioner Ford notified the Department of Highway Safety and Motor Vehicles of its intent to relocate Terry Ford to the northeast corner of the intersection of Sunrise Boulevard and the Sawgrass Expressway in Broward County, referred to as the Sawgrass location. In December 1993, a notice of Petitioner Ford's proposed relocation of Terry Ford was published.

STANDING

5. The population of Broward County is more than 300,000.

6. The distance from Respondent Hollywood Ford to the proposed relocation at Sawgrass is 14.9 miles, measured in air distance, and 18 miles, measured in driving distance. The measured distance is greater than 12.5 miles.

7. Respondent Hollywood Ford maintains the names and addresses of retail sales customers who purchase new vehicles from it. The addresses are referred to as registered addresses, and they indicate the address of the purchaser even though the vehicle may be registered elsewhere. For any 12-month period of the 36-month period prior to the month in which the notice of the proposed relocation was published, Respondent Hollywood Ford did not make 25 percent of its retail sales of new vehicles to customers within 12.5 miles of the proposed Sawgrass location. 2/

COMMUNITY OR TERRITORY

8. Section 320.642, Florida Statutes, does not provide specific criteria for geographically defining community or territory. Consumer behavior data are utilized in making decisions concerning the definition of community or territory.

9. The existing dealers are contractually assigned areas of responsibility by Petitioner Ford. The area of responsibility designated for Terry Ford and Respondent Hollywood Ford is the Fort Lauderdale Multiple Point (MP). The MP is comprised of Broward County. There are six existing dealers in Broward County.

10. Petitioner Ford assigns the six existing dealers in Broward County a primary marketing area (PMA). A PMA is an area, or identifiable plot, in which an existing or proposed resident dealer has or should have a competitive advantage over same line-make dealers by virtue of the resident dealer's location. Unless there is some overriding consideration, 3/ a census tract or other geographic description, such as zip codes, where census tracts cannot be used, defines PMAs. Petitioner Ford designates the collection of census tracts within Broward County closest to each of the six existing dealers and the proposed Sawgrass dealership as the closest dealer's PMAs.

11. Respondent Hollywood Ford's PMA is the area in which it is located and has a geographic advantage.

12. The Sawgrass PMA is the area in which the proposed Terry Ford dealership would have an advantage upon relocation. Currently, no dealers of any line-make are in the Sawgrass PMA.

13. The sales patterns of the existing dealers show that the sales to consumers residing in six census tracts to the northwest of the MP are dominated by these dealers. Whereas, the sales patterns of non-MP dealers in Dade and Palm Beach Counties to the north and south of Broward have very minimal intrusion into the Fort Lauderdale MP. Accordingly, insufficient cross-sell exists to warrant inclusion of the non-MP dealers in the community or territory.

14. Cross-sell is a dealer selling to customers not within its community or territory.

15. Broward County, plus the six census tracts northwest of Broward County, is a single interconnected market. The cross-sell data show that at least 30 percent of the customers in each PMA purchase Fords from Ford dealers within the community or territory, but outside the PMA where they reside, and that at least 30 percent of the sales of each of the dealers go to customers living outside the dealer's PMA but within the community or territory. There is sufficient cross-sell among the PMAs but a limited amount of cross-sell to the adjacent areas outside the MP.

16. For this case, the community or territory is Broward County, plus the six census tracts northwest of Broward County. It is hereafter referred to as the Broward Community or Territory.

ADEQUACY OF REPRESENTATION BY EXISTING DEALERS

17. A determination then must be made whether the existing franchise dealers in the Broward Community or Territory are providing "adequate representation" in the Broward Community or Territory. Section 320.642, Florida Statutes, specifies eleven factors which may be considered in making such a determination.

A. Development of a Reasonable Standard

Factor Number 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.

18. Market penetration or share is a measure of the performance of a dealer network in the community or territory as a whole, or in an identifiable plot within the community or territory such as the Sawgrass PMA. Registration data of all brands of vehicles are used.

19. Measuring market penetration in the identifiable plot or within the community or territory requires first a determination of the appropriate market as the standard for comparison. Historically, Petitioner Ford and other automobile manufactures examine state and national average penetration, as well as any local adjacent areas of adequate penetration, in making such a determination.

20. In this case, the appropriate market to be used as the standard for comparison is an adjacent local market area where Petitioner Ford is achieving market share higher than the national and state share. For the Sawgrass PMA, the appropriate market for the standard of comparison is what Petitioner Ford refers to as the Mullinax PMA.

21. Petitioner Ford categories its vehicles of retail cars and light trucks into seven segments: basic large, basic small, lower middle, luxury, middle special, small special, and upper middle. Measuring Petitioner Ford's penetration in each segment of the Mullinax PMA compared to the industry

available (retail cars and light trucks) in each corresponding segment in the Sawgrass PMA establishes an appropriate standard for what the Sawgrass PMA should expect if it (Sawgrass PMA) was receiving adequate representation. Measuring the penetration in this manner takes into account differences in consumer preferences, i.e., product popularity, between the two markets of what Petitioner Ford's penetration within the Sawgrass PMA should be as a whole.

22. For the Broward Community or Territory, the appropriate market to be used as the standard for comparison is the adjacent local market area referred to by Petitioner Ford as the West Palm Beach Community or Territory. Again, using the segment analysis, the reasonably expected market share for Petitioner Ford in the Broward Community or Territory is 20.8 percent which is a reasonable minimum standard for the Broward Community or Territory.

23. The reasonably expected market share for Petitioner Ford in the Sawgrass PMA, using this segment analysis, is 21 percent of the retail car and light truck industry, which is a reasonable minimum standard for the Sawgrass PMA.

24. Other demographic data of age and income characteristics reveal no extraordinary differences in the demographic characteristics of the Sawgrass PMA population versus the Mullinax PMA, or of the Broward Community or Territory versus the West Palm Beach Community or Territory.

25. Furthermore, in numerous census tracts within the Broward Community or Territory, Petitioner Ford is achieving the minimum standards expressed for the Mullinax PMA and the Broward Community or Territory.

B. Performance of the Dealer Network in Comparison to the Standard.

Factor Number 11

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

26. Using the Mullinax PMA as the standard, adjusting for local segment popularity, in 1992, 1993 and the first six months of 1994 (annualized), Petitioner Ford's penetration in the Sawgrass PMA, as compared with its expected market share, was between 85.4 percent and 90.1 percent effective.

27. Using the West Palm Beach Community or Territory as the standard, adjusting for local segment popularity, in 1992, 1993, and the first six months of 1994 (annualized), Petitioner Ford's penetration in the Broward County Community or Territory was as expected in 1992, but fell to between 89.1 percent and 91.1 percent of what was expected for 1993 and the first half of 1994 (annualized), respectively.

28. Translating the percentages into the number of units required to be registered in order to bring the Sawgrass PMA and the Broward Community or Territory to the expected level, the 1993 and 1994 (annualized) shortfall for Sawgrass was 413 units and 324 units, respectively, and for the Broward Community or Territory as a whole was 2007 units and 1842 units, respectively.

29. Petitioner Ford's penetration was well below expected levels in 1992, 1993, and the first six months of 1994. The existing dealers are not providing adequate inter-brand competition.

C. Likely Cause of the Inadequacy of Representation.

30. A point of inquiry now is the likely cause of the inadequate representation being provided in the Sawgrass PMA and the Broward Community or Territory by the existing dealers. For this purpose, economic and marketing data are considered.

Factor Number 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.

31. Both the Sawgrass PMA and Broward County have experienced substantial growth in population and household trends, including driving age and new car household purchase increases, from 1980 to 1994. This increase in population and household trends is expected to continue through 1999.

32. The Sawgrass PMA contains a reasonable mix of upper and middle income areas. The expected range of household income of the average or median new car buyer, including a Ford buyer, is around \$50,000, with most new vehicle purchasers of any brand having household incomes greater than \$15,000. These demographic factors indicate that the Sawgrass PMA is conducive to selling new motor vehicles.

33. In Broward County between 1980 and 1994, average annual employment increased by approximately 160,000 jobs indicating a generally healthy economy and substantial growth.

34. Increased population results in increased utilization of roads and increased road congestion leading to greater travel time to get between dealerships, which results in convenience having a greater impact in the minds of consumers. The impact of convenience means an increased opportunity for the Sawgrass PMA.

35. All of the changes and the reasonably expected future changes indicate that the inadequate representation is the result of substantial and reasonably expected continued growth. Furthermore, these factors indicate that representation in the Sawgrass PMA is needed.

Factors Number 6 and 9

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.

Whether there is adequate interbrand and intrabrand 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.

36. Petitioner Ford's ability to achieve a reasonable and adequate level of representation is directly related to how well the size of its dealer network keeps pace with expanding sales opportunities. In West Palm Beach, where Petitioner Ford is receiving adequate representation, Petitioner Ford has 7.2 percent of the franchises; whereas, in Broward County, Petitioner Ford has 6.3 percent of the franchises. In order to have the same share of the franchises in Broward County as in West Palm Beach, Petitioner Ford must have 6.8 dealerships in Broward. Presently, Petitioner Ford has 6 dealerships in Broward and proposes to relocate a dealership, Terry Ford, instead of adding a new dealership.

37. Based on the size of the market, measured in comparison to West Palm Beach and the number of Ford dealers and competitors located there, relocating Terry Ford within the Sawgrass PMA would provide greater convenience to customers. Relocation would offer the levels of customer convenience which are necessary for Petitioner Ford to achieve reasonably expected market penetration.

38. In comparison to West Palm Beach where Petitioner Ford's representation is adequate, without a dealer in the Sawgrass PMA, consumers in the Sawgrass PMA would be 7.4 miles on average from the nearest Ford dealer; whereas, in West Palm Beach, consumers are 4.6 miles from the nearest Ford dealer. However, with a dealer in the Sawgrass PMA, consumers would be 4.4 miles on average from the nearest Ford dealer which is on par with West Palm Beach.

39. As for the Broward Community or Territory, relocating to the Sawgrass PMA would maximize customer convenience there.

40. Also, distance and proximity have an effect on the ability of all Petitioner Ford's dealers in the Broward Community or Territory to adequately represent Petitioner Ford. The market share of each dealer decreases as the distance from the dealership location increases.

41. Relocating the existing Petitioner Ford dealer would provide increased interbrand and intrabrand competition. Such action would also provide greater convenient consumer care.

D. Impact of the Relocation of the Proposed Dealer.

Factor Number 1

The impact of the establishment of the proposed or relocated 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.

42. Relocation to the Sawgrass PMA will provide consumers in that area with a more convenient location for access to new vehicles by Petitioner Ford and with more convenient Petitioner Ford locations.

43. Presently, Terry Ford and Respondent Hollywood Ford are not that competitive and the relocation would not alter their competitive situation. As to distance, the air distance from Respondent Hollywood Ford to the Sawgrass location is 14.9 miles and from Respondent Hollywood Ford to Terry Ford is 15.5 miles; the driving distance is 18 miles and 19 miles, respectively, and the driving time is 22 minutes and 25 minutes, respectively.

44. A large untapped opportunity for Petitioner Ford exists in the Broward Community or Territory, and especially in the Sawgrass PMA. Relocating Terry Ford would not decrease the sales of Respondent Hollywood Ford, but should increase the sales opportunities of Respondent Hollywood Ford.

45. In 1993, there were a total of 4,845 units of lost opportunity to Petitioner Ford dealers in Broward County. These units would be available to Petitioner Ford dealers, including Respondent Hollywood Ford. Of this total, 2,375 units were gross registration loss in the Broward Community or Territory, as measured in the census tracts which did not reach the reasonably expected market penetration. Also, of the total units, 2,470 units were insell, i.e., units of Petitioner Ford sold by dealers outside Broward County (outside the market) to customers inside Broward County (inside the market).

46. If Terry Ford performs at the relocation as it currently does at its present location, Terry Ford will sell as many units as it presently does and would, therefore, have no impact on the existing dealers, including Respondent Hollywood Ford. However, if Terry Ford performs as does the average Broward County dealer and increases its sales because of increased customer convenience, using 1993 registration totals, Terry Ford would reasonably expect to sell 1,895 cars and light trucks. This expected number of sales would be an increase of 689 sales over its current level.

47. The projected 689 additional sales would come from the loss opportunity which Petitioner Ford and its dealers are now experiencing because of the mislocation of its dealers in the market. Using the total loss opportunity (4,845 units), comprised of losses to Petitioner Ford because of the failure of existing dealers to achieve the minimum expected market penetration plus losses to the Broward County dealers because of insell from outside the market, the additional sales of Terry Ford would be only 14.2 percent of the existing opportunity.

48. As to Respondent Hollywood Ford specifically, Petitioner Ford has offered Respondent Hollywood Ford the opportunity to relocate to the Pompano PMA. If Respondent Hollywood Ford relocates to Pompano and performs like the average dealer in Broward County, it would have an additional 1,448 sales over what it currently does. Combining these additional sales with the projected incremental sales of Terry Ford, performing as an average dealer, produces a total increase of 2,137 sales, or 44 percent of the lost opportunity. The remainder of the loss opportunity, consisting of over 2,000 units, would be available for Petitioner Ford's other dealers, using more effective interbrand competition.

49. There is no evidence to suggest a negative impact on Petitioner Ford's existing dealers.

E. Investment of the Existing Dealers

Factor Number 2

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

50. There is no evidence to suggest that Respondent Hollywood Ford's facility is inadequate.

51. However, the inadequate market penetration by Petitioner Ford in the Sawgrass PMA shows that Petitioner Ford's dealers are not appropriately located to serve the Sawgrass PMA.

F. Manufacturer's (Licensee's) Actions Regarding Opportunities for Growth
Factor Number 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.

52. Petitioner Ford performed a market survey which recommended adding a seventh dealer instead of relocating a dealer. Petitioner Ford's Regional Sales Manager for the Orlando Region which includes Florida and parts of Alabama and Georgia, decided to relocate a dealership in an effort to fulfill Petitioner Ford's goal of working with the existing dealership, rather than adding representation to fill the needs of the consuming public, before deciding to seek additional representation. The Regional Manager's decision would allow the current dealers the opportunity to fill the need for obtaining adequate and convenient representation.

53. Neither Petitioner Ford nor Respondent Hollywood Ford dispute the advantage to the decision of relocating a dealership in the Sawgrass PMA, rather than adding a seventh dealership. However, Respondent Hollywood Ford contends that it, rather than Terry Ford, should be relocated to the Sawgrass PMA.

54. In deciding which dealer to relocate, Petitioner Ford considered the risk, in addition to the opportunity, for the relocated dealership. Typically, in a green field site a dealer sustains losses for approximately two years before building up parts and service business to affect the losses so it can become profitable. A green field site is an area where there has not been a dealer previously and there is no customer base established.

55. Terry Ford's dealership has the capacity, experience, capabilities and proven successful track record for relocation which makes it a prime candidate for relocation to the Sawgrass PMA. Moreover, Terry Ford has the financial capacity to sustain anticipated start-up losses for the approximate two-year start-up period.

56. Respondent Hollywood Ford's situation is much different. It is a Dealer Development Corporation in Petitioner Ford's minority dealer program of the Dealer Development Program (Program). In the Program, a dealership is started with the majority of the capitalization being provided by Petitioner

Ford and becomes a Dealer Development Corporation. The owner becomes a shareholder in the Dealer Development Corporation and becomes the Dealer Development operator of the dealership. The Dealer Development operator has an opportunity to buy out the Dealer Development Corporation when profits will allow, which is usually within five years. This Program is one method by which Petitioner Ford increases its minority dealerships.

57. The operator of Respondent Hollywood Ford is a minority, i.e., Black/African-American. He purchased his interest in the dealership in 1990. Petitioner Ford's Regional Manager recruited him due to Petitioner Ford's commitment to its minority dealer program of the Dealer Development Program.

58. Petitioner Ford's Regional Manager did not consider Respondent Hollywood Ford as a likely candidate for relocation to the Sawgrass PMA. His decision was based on the substantial need for capital in a start-up area and the significant risk associated with relocation to a start-up area.

59. From 1991, which is the first full year of Respondent Hollywood Ford's operation under the minority operator, through the first six months of 1994, the total opportunity for sales increased for Respondent Hollywood Ford. The total number of retail cars and light trucks registered to persons living in the Hollywood PMA, which represents the total opportunity available to Respondent Hollywood Ford, grew from 3,555 to an annualized rate of 5,708, which was an increase of 60.5 percent. This rate of growth was faster than that experienced by the Broward Community or Territory which was 56 percent.

60. In 1993, Petitioner Ford performed a market study which showed that Respondent Hollywood Ford's market was in decline and was the smallest PMA, i.e., offering the smallest sales opportunity in the market. Respondent Hollywood Ford's market share of the total retail registrations available was consistently lower, in virtually every distance ring moving away from the dealership, than Petitioner Ford's other five dealers in the Broward Community or Territory.

61. Out of the six existing Petitioner Ford dealerships in the Broward Community or Territory, Respondent Hollywood Ford is the lowest performing dealer. Respondent Hollywood Ford's performance has been the lowest even though its operator has managed to make it a somewhat profitable dealership since he became its operator.

62. Terry Ford has been profitable and has had outstanding customer satisfaction which means that Petitioner Ford's image is strong and a customer-base exists in Terry Ford's area. Terry Ford's growing market is projected to continue to grow through 1999. Relocating Terry Ford to the Sawgrass PMA would open an opportunity to replace Terry Ford in the Pompano PMA with another dealer.

63. Petitioner Ford proposes to place Respondent Hollywood Ford in the Pompano PMA, replacing Terry Ford. In comparison to sales potential, as measured by total industry registrations of new retail cars and light trucks, the Pompano PMA has been more than twice the size of the Hollywood PMA (6,027 registrations vs. 2,854 registrations, respectively). Petitioner Ford has offered Respondent Hollywood Ford to relocate from the Hollywood PMA to the Pompano PMA, but Respondent Hollywood Ford has rejected the offer.

64. Respondent Hollywood Ford contends that it, instead of Terry Ford, should be offered to relocate to the Sawgrass PMA based upon Petitioner Ford

promising the previous owner of Respondent Hollywood Ford that he (the previous owner) would get the Sawgrass PMA for the relocation of his Hollywood Ford dealership. This offer was not made to the minority operator of Respondent Hollywood Ford. Moreover, Respondent Hollywood Ford contends that Petitioner Ford did not make the offer because the operator of Respondent Hollywood Ford is a minority.

65. Respondent Hollywood Ford has failed to produce sufficient evidence to support its position that the former owner of Respondent Hollywood Ford was promised the Sawgrass PMA by Petitioner Ford for the relocation of his dealership. Furthermore, Respondent Hollywood Ford has failed to produce sufficient evidence that Petitioner Ford refused or failed to make the offer to the operator of Respondent Hollywood Ford because the operator is a minority.

G. Coercion of the Dealers

Factor Number 5

Any attempts by the licensee to coerce the existing dealer or dealers into consenting to additional or relocated franchises of the same line-make in the community or territory.

66. No evidence was presented to show that Petitioner Ford coerced any of the existing dealers to consent to the relocation of Terry Ford to the Sawgrass PMA.

67. However, Petitioner Ford's Regional Manager did inform the operator of Respondent Hollywood Ford that the failure of Respondent Hollywood Ford to accept the offer to relocate to the Pompano PMA would cause him (the Regional Manager) to consider recommending to Petitioner Ford that his (operator of Respondent Hollywood Ford) dealer operator contract be terminated. The Regional Manager considered the relocation of Respondent Hollywood Ford to the Pompano PMA as presenting significant sales and profit opportunity. For Respondent Hollywood Ford to reject such relocation was considered by the Regional Manager to not be in the best interest of either Respondent Hollywood Ford or Petitioner Ford. The operator of Respondent Hollywood Ford rejected the offer to relocate to the Pompano PMA, which caused the Regional Manager to consider the operator to not be a team player. The Regional Manager recommended the termination of Respondent Hollywood Ford's dealer operator contract. However, the Regional Manager subsequently came to the conclusion that the operator's rejection was a business decision by the operator even though it was a decision with which he (the Regional Manager) did not agree. No evidence was presented to show that the Regional Manager's conduct was a threat to the operator of Respondent Hollywood Ford in an effort to force the operator to consent to Terry Ford relocating to the Sawgrass PMA.

H. Other Concerns

Factor Number 7

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

Factor Number 8

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

68. No evidence was presented by either party regarding Factors 7 and 8.

CONCLUSIONS OF LAW

69. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Section 120.57(1), Florida Statutes. The parties were duly noticed for the formal hearing.

STANDING

70. Section 320.642, Florida Statutes, provides in pertinent part:

(3) An existing franchised motor vehicle dealer or dealers shall have standing to protest a proposed additional or relocated motor vehicle dealer where the existing motor vehicle dealer or dealers have a franchise agreement for the same line-make vehicle to be sold by the proposed additional or relocated motor vehicle dealer and are physically located so as to meet or satisfy any of the following requirements or conditions:

* * *

(b) If the proposed additional or relocated motor vehicle dealer is to be located in a county with a population of more than 300,000 according to the most recent data of the United States Census Bureau or the data of the Bureau of Economic and Business Research of the University of Florida:

1. Any existing motor vehicle dealer or dealers of the same line-make have a licensed franchise location within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer; or

2. Any existing motor vehicle dealer or dealers of the same line-make can establish that during any 12-month period of the 36-month period preceding the filing of the licensee's application for the proposed dealership, such dealer or its predecessor made 25 percent of its retail sales of new motor vehicles to persons whose registered household addresses were located within a radius of 12.5 miles of the location of the proposed additional or relocated motor vehicle dealer; provided such existing dealer is located in the same county or any county contiguous to the county where the additional or relocated dealer is proposed to be located.

71. It is undisputed that Respondent Hollywood Ford is an existing dealer of Petitioner Ford and has the same line-make vehicle to be sold by the proposed relocated dealer, i.e., Terry Ford. Also, it is undisputed that Broward County, which is the county in which the proposed relocated dealer will be located, has a population in excess of 300,000.

72. However, Respondent Hollywood Ford has failed to demonstrate that it has standing pursuant to Subsection 320.642(3)(b)1 or 2, Florida Statutes. Respondent Hollywood Ford failed to show either that it was located within a radius of 12.5 miles of the proposed relocation of Terry Ford or that, for any 12-month period of the 36-month period prior to November 1993, it made 25 percent of its retail sales to customers within a radius of 12.5 miles of the proposed relocation of Terry Ford.

ADEQUACY OF REPRESENTATION OF EXISTING DEALERS IN THE COMMUNITY OR TERRITORY

73. Assuming that Respondent Hollywood Ford has demonstrated that it has standing, the next step is to examine the adequacy of representation by the existing dealers of Petitioner Ford in the community or territory. Petitioner Ford has the burden of demonstrating that the existing dealers provide inadequate representation. Subsection 320.642(2)(a)2., Florida Statutes.

74. Subsection 320.642(2), Florida Statutes, provides in pertinent part:

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

1. A timely protest is filed by a presently existing franchised motor vehicle dealer with standing to protest as defined in subsection (3); and

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.

(b) In determining whether the existing franchised motor vehicle dealer or dealers are providing adequate representation in the community or territory for the line-make, the department may consider evidence which may include, but is not limited to:

1. The impact of the establishment of the proposed or relocated 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.

2. The size and permanency of investment reasonably made and reasonable obligations incurred by the existing dealer or dealers to

perform their obligations under the dealer agreement.

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.

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.

5. Any attempts by the licensee to coerce the existing dealer or dealers into consenting to additional or relocated franchises of the same line-make in the community or territory.

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.

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

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

9. Whether there is adequate interbrand and intrabrand 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.

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.

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

75. Section 320.642, provides no definition for "community or territory". The community or territory is determined by the facts presented in each individual case. *Larry Dimmit Cadillac v. Seacrest Cadillac, Inc.*, 558 So.2d 136, 138 (Fla. 1st DCA 1990). A dealer's contractual area in the franchise

agreement is a material fact and entitled to great weight but is not conclusive of what constitutes community or territory. Larry Dimmit Cadillac, supra. Moreover, where exceptional circumstances exist, there may be a showing that a separate market area exists within the contractual area and that the separate market area is the community or territory. Larry Dimmit Cadillac, Supra.

76. Petitioner Ford has demonstrated that, based on consumer behavior and cross-sell patterns, Broward County, plus the six census tracts northwest of Broward County, constitutes the community or territory. Broward County forms a well connected market, separate and distinct from the remainder of the South Florida area to the north in Palm Beach County and the south in Dade County.

77. Petitioner Ford has met its burden in establishing that its existing dealers are not providing adequate representation in the Broward Community or Territory.

78. Regarding Respondent Hollywood Ford's argument that, because of the legislative intent found in Section 320.605, Florida Statutes, 4/ and because Respondent Hollywood Ford's operator is a minority, it should be relocated to the Sawgrass PMA, instead of Terry Ford, the argument is not persuasive.

RECOMMENDATION

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

RECOMMENDED that the Department of Highway Safety and Motor Vehicles enter a final order approving the application of Terry Ford, Inc., to relocate its ford dealership to the northeast corner of the intersection of Sunrise Boulevard and the Sawgrass Expressway in Broward County, Florida.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 13th day of June 1995.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of June 1995

ENDNOTES

1/ The composite exhibit was the basis for the testimony by Petitioner Ford's expert witness and consisted of 73 pages and an appendix.

2/ Respondent Hollywood Ford failed to produce credible evidence of registered addresses within the prescribed percentage, distance and time period.

3/ An example of an overriding consideration is a natural or man-made barrier or demonstrated consumer unwillingness to travel from one area to another as verified by consumer behavior data.

4/ Section 320.605, Florida Statutes, provides:

320.605 Legislative intent.--It is the intent of the Legislature to protect the public health, safety, and welfare of the citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers. (Emphasis added).

APPENDIX

The following rulings are made on the parties' proposed findings of fact:

Petitioner Ford Motor Company

1. Partially accepted in findings of fact 4 and 1.
2. Partially accepted in finding of fact 2. Also, see Preliminary Statement.
3. See Preliminary Statement.
4. Partially accepted in finding of fact 5.
5. Partially accepted in finding of fact 6.
6. Partially accepted in finding of fact 7.
- 7-9, 22, 23, 35 and 40. Rejected as being argument, or conclusion of law.
10. Partially accepted in finding of fact 17.
- 11 and 12. Partially accepted in finding of fact 8.
13. Partially accepted in finding of fact 9.
- 14-16. Partially accepted in finding of fact 13.
- 17 and 20. Partially accepted in finding of fact 15.
18. Partially accepted in finding of fact 10.
19. Partially accepted in findings of fact 10, 11 and 12.
21. Partially accepted in findings of fact 15 and 16.
24. Partially accepted in finding of fact 17.
- 25, 32, 38, 48, 55 and 66-70. Rejected as being subordinate.
26. Partially accepted in finding of fact 18.
27. Partially accepted in finding of fact 19.
28. Partially accepted in finding of fact 20.
29. Partially accepted in finding of fact 21.
30. Partially accepted in finding of fact 23.
31. Partially accepted in finding of fact 22.
33. Partially accepted in finding of fact 24.
34. Partially accepted in finding of fact 25.
36. Partially accepted in findings of fact 26 and 27.
37. Partially accepted in finding of fact 28.
39. Partially accepted in finding of fact 29.
41. Partially accepted in finding of fact 30.
- 42 and 43. Partially accepted in finding of fact 31.
44. Partially accepted in finding of fact 34.
45. Partially accepted in finding of fact 32.
46. Partially accepted in finding of fact 33.
47. Partially accepted in finding of fact 35.
- 49 and 50. Partially accepted in finding of fact 36.
51. Partially accepted in finding of fact 37.
- 52 and 53. Partially accepted in finding of fact 38.

- 54. Partially accepted in finding of fact 39.
- 56. Partially accepted in finding of fact 40.
- 57. Partially accepted in finding of fact 41.
- 58. Partially accepted in finding of fact 42.
- 59. Partially accepted in finding of fact 43.
- 60. Partially accepted in finding of fact 44.
- 61. Partially accepted in finding of fact 45.
- 62 and 63. Partially accepted in finding of fact 46.
- 64. Partially accepted in finding of fact 47.
- 65. Partially accepted in finding of fact 48.
- 71. Partially accepted in finding of fact 49.
- 72. Partially accepted in findings of fact 50 and 51.
- 73. Partially accepted in finding of fact 53.
- 74. Partially accepted in finding of fact 64. Also, see Preliminary Statement.
- 75. Partially accepted in finding of fact 65.
- 76. Partially accepted in findings of fact 52, 54, and 57.
- 77. Partially accepted in finding of fact 52.
- 78. Partially accepted in finding of fact 54.
- 79. Partially accepted in finding of fact 55.
- 80. Partially accepted in findings of fact 56, 57 and 58.
- 81. Partially accepted in finding of fact 59.
- 82. Partially accepted in finding of fact 60.
- 83. Partially accepted in finding of fact 62.
- 84. Partially accepted in findings of fact 62 and 63.
- 85. Partially accepted in findings of fact 61 and 63.
- 86. Rejected as subordinate, argument, or conclusion of law.
- 87-90. Partially accepted in findings of fact 66 and 67.

Respondent Hollywood Ford, Inc.

- 1-4, 6, 12, 16-19, 25, 27-31, 40, 50-56, 59, 63, 65-69, 80, 83, 85, 89, 105-107, 110, 123, 125, 138, 139, 145-147 and 150. Rejected as being subordinate.
- 5 and 90. Partially accepted in findings of fact 56 and 57.
- 7. Partially accepted in finding of fact 4.
- 8 and 9. See Preliminary Statement.
- 10. See Statement of the Issue.
- 11. Partially accepted in finding of fact 52.
- 13-15, 23, 32-39, 41-48, 71, 72, 97, 99-101, 103, 104, 115, 116 and 118-120. Rejected as being irrelevant, or unnecessary.
- 20-22, 24 and 26. Partially accepted in finding of fact 56.
- 49. Partially accepted in finding of fact 57.
- 57 and 58. Partially accepted in finding of fact 62.
- 60, 70, 78, 79, 82, 84, 86-88, 92, 95, 96, 124, 143 and 152-160. Rejected as being argument, or conclusion of law.
- 61, 111 and 112. Partially accepted in finding of fact 67.
- 62. Partially accepted in findings of fact 55 and 61.
- 64. Partially accepted in findings of fact 9 and 10.
- 73, 75 and 76. Partially accepted in finding of fact 60.
- 74, 98 and 135. Rejected as being irrelevant, unnecessary, argument, or conclusion of law.
- 77. Rejected as being subordinate, irrelevant, or unnecessary.
- 81, 113 and 126-133. Rejected as not supported by the more credible evidence.
- 91. Partially accepted in finding of fact 55.
- 93 and 94. Partially accepted in finding of fact 58.

- 102 and 134. Partially accepted in finding of fact 46.
108. Partially accepted in findings of fact 37, 39 and 41.
109. Partially accepted in finding of fact 12.
114. Partially accepted in findings of fact 31, 48, 63 and 67.
117. Rejected as argument, not supported by the more credible evidence, or conclusion of law.
121. Partially accepted in finding of fact 31.
122. Partially accepted in findings of fact 62 and 63.
136. Partially accepted in findings of fact 20 and 22.
137. Partially accepted in findings of fact 18-25 and 45-48.
140. Partially accepted in finding of fact 20.
141. Partially accepted in finding of fact 13.
142. Partially accepted in findings of fact 18-29, 36-39 and 45-48.
144. Partially accepted in findings of fact 36-39.
148. Partially accepted in finding of fact 38.
149 and 151. Partially accepted in findings of fact 36-38.

NOTE: Where a proposed finding of fact has been partially accepted, the remainder has been rejected as being irrelevant, unnecessary, cumulative, not supported by the more credible evidence, argument, or a conclusion of law.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.