

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GENERAL MOTORS CORPORATION AND)
BUDDY FOSTER CHEVROLET, INC.,)
)
Petitioners,)
)
vs.) Case Nos. 03-4083
) 03-4084
ROGER WHITLEY CHEVROLET, INC.,)
d/b/a UNIVERSITY CHEVROLET^{1/})
AND GORDON STEWART CHEVROLET,)
INC.,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, Administrative Law Judge Don W. Davis of the Division of Administrative Hearings (DOAH) conducted a final hearing in this case on October 25-29, in Tallahassee, Florida.

APPEARANCES

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For Respondent Roger Whitley Chevrolet, Inc.:

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For Respondent Gordon Stewart Chevrolet, Inc.:

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STATEMENT OF THE ISSUE

The issue in this case is whether Section 320.642(2)(a), Florida Statutes, permits the relocation by Petitioner General Motors Corporation (GM) of the dealership of Petitioner Buddy Foster Chevrolet, Inc. (Foster), from its present location to a new proposed location for the sale of certain line-makes of Chevrolet vehicles. In order to make that determination, the question arises as to whether Respondent Roger Whitley Chevrolet, Inc. (University), and Respondent Gordon Stewart Chevrolet, Inc. (Stewart), are already providing adequate representation for sale of the subject Chevrolet vehicles in the community or territory of the proposed Foster relocation point.

PRELIMINARY STATEMENT

Respondents University and Stewart both timely protested proposed relocation of the Foster dealership to the state agency

charged by statute with regulation of such matters, the Florida Department of Highway Safety and Motor Vehicles (Department). By letters dated October 30 and November 3, 2004, the Department forwarded the protests of University and Stewart, respectively, to DOAH with the specific directive that an administrative law judge determine the propriety of the protest issues within the purview of Section 320.642, Florida Statutes.

The final hearing was originally set for June 14-18, 2004. On May 5, 2004, the parties jointly moved for a continuance of the final hearing. The final hearing was continued until July 19-23, 2004. On July 2, 2004, Respondents filed a second motion to continue the final hearing. After consideration, that motion was granted and the case was continued until October 25-29, 2004.

Prior to commencement of the final hearing, University purchased the stock of Roger Whitley Chevrolet, Inc., and changed the dealership name to University Chevrolet.

The parties filed an amended pre-hearing stipulation on October 22, 2004.

At the final hearing, GM presented the testimony of the following witnesses: Sharif Farhat, Director of Network Analysis for North America for Urban Science Applications, Inc. (who was accepted as an expert in dealer network analysis); James P. Gurley, Zone Manager for GM's Tampa Zone; and Victor

David Nelawake, Certified Public Accountant (who presented opinion testimony in the area of dealership accounting).

Foster presented the testimony of Harry M. Foster, dealership owner; and Sharif Farhat, Director of Network Analysis for North America for Urban Science Applications, Inc.

Stewart presented the testimony of Gordon L. Stewart, President of Stewart Management Group; Arthur J. Smith, Vice-President and General Manager of Stewart; and Ernest Harry Manuel, Jr., Ph.D., President of The Fontana Group, Inc. (who was accepted as an expert in economics, statistics, and local retail automobile industry analysis). University also adopted the testimony of Manuel.

Also submitted and received into evidence were the transcripts and exhibits of the following depositions: Arthur J. Smith, Vice-President and General Manager of Stewart; Gordon Stewart, President of Stewart Management Group; Marvin E. Beaupre, Dealer Network Development Regional Manager for the Southeast Region for GM; William E.L. Powell, Vice-President of Industry Dealer Affairs for GM; Douglas J. Chandler, Assistant Marketing Manager for GM; Cynthia E. Ritchie, Area Manager for Dealer Network Development for Central and South Florida, Puerto Rico, and the U.S. Virgin Islands for GM; Kevin Scott Brodsky, General Manager and Partner of University; Michael Rodger Whitley, former Dealer-Operator, General Manager, and President

of Roger Whitley Chevrolet, Inc.; Vernon Gale Buchanan, Owner of University; and Dennis Bruce Slater, Corporate Controller for Buchanan Automotive Group and University.

Petitioners' exhibits number 1, 1-A, 4 through 12, 17, 19, 20, 21, 30, 33, 40, 42, and 44 through 49 were admitted into evidence. Pages A-87 and A-88 of Petitioners' exhibit 1 and Petitioners' exhibit 46 were admitted over objection. Pages R-34 and R-48 of Petitioners' exhibit 49 were not admitted into evidence, but were proffered, along with related testimony, for the record.

Respondents' exhibits 1 through 5, 7 through 9, 18, 21 through 23, 25 through 30, and 32 through 38 were admitted into evidence. Respondents' exhibit 28 was admitted over objection. Respondents' exhibits 6, 31, and Tabs 32 and 44 of exhibit 27 were offered but not admitted into evidence. Foster exhibits 1 through 11 were admitted into evidence.

By stipulation of the parties, post-hearing submittals were due within 30 days of the filing of the completed transcript. The transcript was filed December 13, 2004. On January 5, 2005, University filed a Motion for Extension of Time to file post-hearing submissions. By Order, the deadline for filing post-hearing submissions was extended until

January 19, 2004. All parties timely filed Proposed Recommended Orders which have been reviewed and utilized in part in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2004 Florida Statutes.

FINDINGS OF FACT

Parties

1. GM is a "licensee" and "manufacturer" as defined by Sections 320.60(8) and (9), Florida Statutes.

2. Foster, Stewart, and University are "motor vehicle dealers" as defined by Section 320.60(11)(a)(1), Florida Statutes.

Notice and Standing

3. On October 3, 2003, notice of GM's intent to permit the relocation of Foster (the Proposed Relocation) from its current location at 36822 Highway 54 West, Zephyrhills, Florida (Existing Location) to a proposed location at Interstate 75 and State Road 56 in the Wesley Chapel Area (Relocation Site) was published in the *Florida Administrative Weekly*, Volume 29, Number 40, page 3964. Both the Existing Location and the Relocation Site are in Pasco County, Florida.

4. Stewart is an existing franchised Chevrolet dealer who timely protested the proposed relocation of Foster. Stewart has standing to maintain that protest.

5. University is an existing franchised Chevrolet dealer. After Roger Whitley Chevrolet, Inc., timely protested the proposed relocation of Foster, University purchased the stock of Roger Whitley Chevrolet, Inc., and changed the name of the dealership to University Chevrolet. University acquired the rights of Roger Whitley Chevrolet, Inc., to protest the proposed relocation, and has standing to maintain that protest.

The Community or Territory and Recent Modifications to the Chevrolet Dealer Network

6. The Community or Territory (Comm/Terr) relevant to this proceeding is the area defined by GM as the Tampa Multiple Dealer Area (Tampa MDA) plus the Wesley Chapel and Plant City markets.^{2/}

7. There are currently four Chevrolet dealers in the Tampa MDA: Stewart, University, Ferman Chevrolet, and Autoway Chevrolet. There are currently five Chevrolet dealers in the Comm/Terr, the four Tampa MDA dealers plus Bill Heard Chevrolet (Bill Heard) in Plant City.

8. Foster is not currently in the Tampa MDA or the Comm/Terr. The area currently assigned to Foster as its Area of Primary Responsibility pursuant to its GM franchise agreement is referred to as a Single Dealer Area (SDA), meaning that Foster is the only dealer assigned to the APR.

9. The Proposed Relocation would add Foster as a fifth Chevrolet dealer in the Tampa MDA and a sixth Chevrolet dealer in the Comm/Terr. The Comm/Terr currently contains four full line Ford dealerships and one light-truck only Ford dealership. All other line-makes currently have four or fewer dealers in the Comm/Terr.

10. In 2004 there were two significant changes in the Chevrolet dealer network within the Comm/Terr. In May of 2004, Bill Heard relocated to a new facility adjacent to Interstate 4, placing Bill Heard in a better position to sell into the Tampa MDA along with the expectation of both a significant increase in Bill Heard's new vehicle sales and Chevrolet's level of performance in the Comm/Terr.^{3/}

11. In June of 2004 University purchased Roger Whitley Chevrolet, changed managers, expanded business hours, and tripled advertising expenditures. The recent ownership change is expected to result in increased new vehicle sales from the dealership and an increased level of Chevrolet performance in the Comm/Terr.^{4/}

Proposed Relocation

12. In the Fall of 2002, the owner of Foster, Harry M. Foster, requested that GM grant him an additional Chevrolet location in the Wesley Chapel, Florida, area. Subsequently, GM conducted a market study to determine whether it was appropriate

to add a Chevrolet location in Wesley Chapel. Marvin Beaupre was assigned the task of analyzing the Wesley Chapel market and determining whether an additional Chevrolet location was justified. Beaupre's subsequent market study revealed that Chevrolet had historically received an adequate level of representation from existing dealers in the area currently assigned to Foster in its GM franchise agreement (the dealership's APR). Beaupre concluded that although there appeared to be a deficiency in Chevrolet performance in the Tampa MDA, the deficiency was not significant enough to justify the addition of a new dealership in Wesley Chapel.

13. When Foster learned of GM's decision not to add a new Chevrolet dealership in Wesley Chapel, he requested the opportunity to relocate his existing dealership in Zephyrhills, Florida, to the Wesley Chapel area. GM agreed to allow the Proposed Relocation on the basis of growth in the Wesley Chapel and New Tampa area.

14. Currently, Foster is located in approximately the center of its APR/SDA. The Proposed Relocation would place Foster in the furthest southwestern portion of its APR/SDA, with a location immediately adjacent to the AGSSAs assigned to Stewart and University.

15. As a result of the Proposed Relocation and the addition of Foster to the Tampa MDA, Stewart and University

would be assigned new AGSSAs considerably smaller (in both geography and population) than their existing AGSSAs.

16. The new AGSSA that would be assigned to Foster as a result of the Proposed Relocation would be larger in terms of population and sale opportunity than its existing APR/SDA. Those portions of the current Foster APR/SDA which would not be included in the AGSSA assigned to Foster after the relocation would be reassigned to the dealership immediately to the north of Foster, Dade City Chevrolet, increasing the geography, population, and sale opportunity of the Dade City Chevrolet APR/SDA. Harry M. Foster owns both Foster and Dade City Chevrolet.

Is Current Representation Adequate

17. As a result of the Proposed Relocation, certain consumers would suffer a negative impact, although some consumers would have more convenient access to a Chevrolet dealer. Consumers in the new AGSSA that would be assigned to Foster would experience an average decrease in distance to a Chevrolet dealer of 3.7 straight-line miles.^{5/} Contrarily, consumers in the existing APR/SDA assigned to Foster would experience an average increase in distance to a Chevrolet dealer of 4.0 driving miles, and those same consumers would experience an average increase in distance to Foster of 6.0 driving miles.

18. Throughout the Comm/Terr, the Proposed Relocation

would only result in an average decrease in the distance from a consumer to a Chevrolet dealer of .4 straight-line miles. Other than convenience, there is a second factor arising from the Proposed Relocation that could impact consumers. There will be a greater number of consumers located between Foster and Dade City Chevrolet. Consumers previously located between Foster and Stewart or University (with easier access to cross-shop between Foster and Stewart or University) would be located between Foster and Dade City Chevrolet after the relocation with convenience lying in the cross-shop between Foster and Dade City Chevrolet. Since both Foster and Dade City Chevrolet are owned and operated by the same individual, it is possible that the Proposed Relocation could result in a decrease of competition among Chevrolet dealers as it relates to some consumers, a negative impact on those consumers and on the public interest.

19. In terms of competition between two Chevrolet dealers, convenience to the customer is the most critical factor. The Proposed Relocation would move Foster significantly closer to both Stewart and University, and to consumers served by those dealerships. In terms of straight-line distance, the Proposed Relocation would be a move of 10.7 miles. Currently, Foster is 20 straight-line miles from Stewart and 19.6 straight-line miles from University. After the relocation, Foster would be 9.7 straight-line miles from Gordon Stewart and 10.8 straight-line

miles from its old location. In terms of driving time, Foster is currently 37.7 minutes from Stewart and 33.5 minutes from University. After the relocation, Foster would be 18.4 minutes from Stewart and 14.1 minutes from University.

20. As a result of the Proposed Relocation, Foster would be significantly closer to many consumers now closer to either Stewart or University. Additionally, Foster would be significantly closer (both in straight-line distance and drive time) to a large percentage of the existing new vehicle, used vehicle, and service customers of both Stewart and University. In 2002 and 2003, Stewart and University made 40% of the sales registered in the area to which Foster would gain a convenience advantage as a result of the Proposed Relocation.

21. There exists a statistical correlation between the size of a dealer's AGSSA and the number of new vehicle sales made by the dealer. As the size of a dealer's AGSSA decreases the number of sales made by the dealer will typically decrease.

22. In this instance, based on the relative change that would result in the increased convenience of Foster to those consumers who currently find it more convenient to shop at Stewart or University and the decrease in the area in which Stewart or University would have a competitive advantage based on convenience (i.e. a decrease in each dealer's AGSSA), a reasonable estimate of impact to Stewart from the Proposed

Relocation is a loss of approximately 17% of new vehicle sales and 15% of used vehicle sales and service business.^{6/} A reasonable estimate of impact to University from the Proposed

Relocation is a loss of approximately 16% of new vehicle sales and 15% of used vehicle sales and service business.^{7/}

23. Based on Stewart's performance in 2003, the financial losses incurred by Stewart as a result of the Proposed Relocation would be in the range of \$600,000 per year. Based on the *pro forma* financial statement submitted to GM by University at the time of its purchase of Roger Whitley Chevrolet, Inc., the financial losses incurred by University as a result of the Proposed Relocation would be in the range of \$750,000 per year.^{8/}

24. The Proposed Relocation could have a significant short-term negative impact on existing dealers, including a significant financial impact on Stewart and University. GM's expert classified short-term as up to a year, and indicated that after that period the market could adjust and existing dealers re-establish their pre-relocation level of performance.

However, that dealership growth would, at least in part, be a result of general growth in the market and does not indicate that existing dealers will regain their pre-relocation level of performance in an economic sense (because they have been denied the opportunity to capture the growth that would have resulted

from general market expansion).

25. Significantly, the financial loss expected for both Stewart and University could, because of the "turn and earn" system employed by GM to determine vehicle allocation, result in a circumstance known in the automobile industry as a "death spiral," where the dealer cannot earn vehicles because of a slow turn rate and cannot turn vehicles because it has not earned them. As the name implies, the "death spiral" results in a dealer either going out of business or having to sell the dealership.

Impact on GM

26. GM would not significantly benefit from the Proposed Relocation. Although it is clear that there has been recent growth in the Wesley Chapel area and that other manufacturers have, or plan to, establish locations in that general area, the evidence establishes that existing Chevrolet dealers are actively pursuing sales and service business in the Wesley Chapel area (including producing a significant amount of advertising for Chevrolet products) and, as noted above, that Chevrolet currently has an adequate level of convenience to customers in Wesley Chapel. The evidence does not establish that GM will enjoy increased sales or overall increased customer convenience as a result of the Proposed Relocation.^{9/} Existing Chevrolet dealers have historically provided an adequate level

of customer satisfaction performance and have adequate facilities to serve the Comm/Terr.^{10/}

27. Short-term competition between Chevrolet dealers for customers in the Comm/Terr could increase after the Proposed Relocation. The likelihood, however, that competing Chevrolet dealers will not be as successful as they have been in the past in making sales into the Wesley Chapel area if Foster is relocated, makes it highly probable that competition among Chevrolet dealers for customers in that area will actually decrease in the long-term. Existing dealers will focus their marketing efforts on areas other than Wesley Chapel.

Investment of Existing Dealers

28. The owners of Stewart and University have invested significant dollar amounts to perform their obligations under their respective GM franchise agreements. The owners of Stewart invested approximately \$9,000,000 in purchasing land and constructing facilities for the dealership. The owners of University recently purchased the stock of Roger Whitley Chevrolet, Inc., and have an investment of \$12,000,000 to \$14,000,000 in the dealership. The Proposed Relocation would put the investment of the owners of Stewart and University at significant risk.

Market Penetration

29. A line-make's market penetration is measured by

dividing the number of that line-make's new vehicles registered in a particular area by the total number of competitive new vehicles registered by all line-makes in the same area.

30. In determining whether Chevrolet is currently achieving a reasonably expected level of market penetration in the Comm/Terr a reasonable standard or benchmark must first be established against which Chevrolet's performance is compared which is neither too high nor too low.

31. Chevrolet's national average market penetration as a standard against which to judge Chevrolet's current performance in the Comm/Terr is not reasonable.^{11/} There are several reasons why use of the national average is not appropriate to test Chevrolet's current market penetration in the Comm/Terr. First, the national average represents a very large area (the nation), which is demographically very diverse in terms of culture, economy, politics, climate, terrain, etc. The Comm/Terr, or for that matter the State of Florida as a whole, does not share that same level of diversity.^{12/}

32. Second, most manufacturers have rejected national average as a reasonable standard for evaluating dealer performance. Indeed, GM uses state average when evaluating the performance of its Chevrolet dealers.^{13/} The deposition testimony of William E.L. Powell, the former Zone Manager responsible for approving network changes such the Proposed

Relocation, establishes that, although national average is considered, state average is the focus of GM's analysis of whether a particular line-make as a whole is being under represented in a market.

33. Third, the national average includes areas that are heavily influenced by special purchasing plans provided to GM employees, those employees' family members, and employees of GM suppliers. Those plans provide participants an incentive to purchase GM products by establishing a standard price (only slightly above dealer cost) at which the participant may purchase a vehicle from any dealer in the country. It is telling that those states in which Chevrolet's average penetration meets or exceeds what is expected based on national average are almost exclusively found in the "heartland" of America. Those states, which are the traditional home to manufacturing in this country, are also the states in which Chevrolet's penetration performance is most likely to be positively influenced by GM's employee and supplier purchase plans.

34. Use by GM of the national average as a standard to judge Chevrolet's performance in the Comm/Terr overlooks the fact that the only Florida MDA in which Chevrolet's market penetration meets or exceeds what is expected based on national average is Pensacola, Florida. In all of the 10 other Florida

MDAs, Chevrolet falls short of the expected penetration based on national average. The markets in Florida where Chevrolet does achieve the expected level of market penetration based on national average are significantly different from the Comm/Terr which is the subject of this proceeding. They tend to be more rural in location than this Comm/Terr and significantly smaller in terms of automobile retail activity.^{14/} In these more rural areas, the market penetration of what are traditionally considered domestic brands, such as Chevrolet, tends to be higher than in urban areas because throughout the rural areas there is a lack of representation of what are traditionally considered import brands.

35. The appropriate standard against which to measure Chevrolet's performance in the Comm/Terr, when judging the performance of a line-make in a Florida market, is to use that line-make's performance in the State of Florida as a whole as the standard. Although there exist differences in the demographic, geographic, economic, and political make-up of the various communities throughout the State, Florida as a whole is much more representative of the Comm/Terr than is the Nation as a whole.^{15/}

36. Chevrolet's performance in the Comm/Terr has historically been either above or essentially at the expected level of penetration based on Florida average. In 2001,

Chevrolet performed at 102.8% of the expected level. In 2002, Chevrolet performed at 99.6% of the expected level, and, in 2003, at 99% of the expected level. In those years where Chevrolet was below the expected level, the shortfall was insignificant (32 out of 7,292 expected units in 2002, and 80 out of 7,517 units in 2003).^{16/}

37. More importantly, the statistics presented regarding Chevrolet's performance during previous years do not reflect the performance of the currently *existing* dealer network.^{17/} Rather, if a reasonable level of increased performance is attributed to Bill Heard as a result of that dealership's relocation in May of 2004 (note 3 *supra*), it is unquestionable that Chevrolet does now achieve its expected level of penetration in the Comm/Terr based on Florida average.

38. As for the AGSSA that would be assigned to Foster if it relocated, Chevrolet's level of penetration in that market has historically been slightly under its expected penetration based on Florida average. In 2001, Chevrolet performed at 94.3% of the expected level, in 2002 Chevrolet performed at 91.1% of the expected level, and in 2003 Chevrolet performed at 91.9% of the expected level. Again, the shortfall in terms of number of retail units sold was not substantial (50 out of 883 expected in 2001; 82 out of 916 expected in 2002; and 83 out of 1,018 expected in 2003).

39. As with the Comm/Terr, if the impact of changes in the dealer network, which occurred in 2004, are considered (notes 3 & 4 *supra*), the shortfall in performance within the relocated Foster AGSSA disappears or becomes statistically insignificant. Thus, under the *currently existing* dealer network, Chevrolet's present penetration in the relocated Foster AGSSA does not fall significantly below the Florida average. The minimal shortfall that may exist in the relocated Foster AGSSA relates to the fact that Chevrolet products do not perform as well in higher income markets as in markets with more modest incomes. This phenomenon is a factor beyond the control of the dealers within the Comm/Terr. Because Wesley Chapel is a higher income area, Chevrolet cannot be expected to perform as well in that market as in the Comm/Terr as a whole.

GM Denial Of Growth Opportunity to Existing Dealers

40. The owners of Stewart established the dealership in 1991. The dealership was established as an additional dealership location granted by GM, and GM established the exact location of the dealership. Prior to agreeing to open the dealership, Gordon Stewart, the principal owner, expressed to GM his concern that the dealership was to be located in a sparsely populated area north of Tampa. In response to Mr. Stewart's concerns, GM reassured him that it had conducted a market study and determined that the location they had chosen was the optimal

location for the dealership based on future market growth GM reasonably expected to occur north of Tampa.

41. Based on GM's assurances, Mr. Stewart and his partner, Arthur Smith, made considerable investment in constructing and equipping the dealership, with what they believed to be a reasonable expectation of selling approximately 2,500 new vehicles each year. The growth, however, that GM expected north of Tampa did not materialize, except for in the Wesley Chapel area. Nor has Stewart reached its projection of 2,500 new units sold per year, achieving instead only half as many sales. Because of the number of competitive dealers located south of Stewart, the dealership has had to rely on growth in the Wesley Chapel area as the basis for a significant portion of its profits and for future growth potential of the dealership, particularly as areas immediately surrounding the dealership have begun to decline.

42. As discussed above, the Proposed Relocation would have a significant negative financial impact on Stewart and University. Additionally, the Proposed Relocation would deny Stewart the opportunity to serve the North Tampa market, which was the original purpose for establishing the dealership.

43. GM's approval of the Proposed Relocation would deny Stewart the reasonable opportunity for expansion and growth of its business that GM indicated would be available when

Mr. Stewart and Mr. Smith agreed to invest in the dealership.

Coercion of Existing Dealers

44. There have been no efforts by GM to coerce existing dealers to consent to the proposed relocation.

Distance and Accessibility

45. Distance and travel time, between Foster and Stewart and Foster and University would be reduced by half if the Proposed Relocation were to occur. There, however, is no indication that consumers in the Comm/Terr do not already have easy access to existing Chevrolet dealers in the Comm/Terr. At present, Chevrolet currently enjoys the second lowest average distance to consumer measurement of all the line-makes represented in the Comm/Terr. The Proposed Relocation would not add any significant improvement to the ability of customers in the Comm/Terr to access a Chevrolet dealer.

Benefits to Consumers Obtained by Geographic or Demographic Changes

46. Rather than providing benefits to consumers that are not likely to be obtained by geographic or demographic changes in the Comm/Terr, the Proposed Relocation may result in a negative impact to consumers.

Protesting Dealers And Dealer Agreements Compliance

47. Stewart and University are in compliance with the terms of their dealer agreements.

Adequacy of Interbrand and Intrabrand Competition and Consumer Care

48. The high level of market penetration being achieved by Chevrolet in the Comm/Terr and the increase in that market penetration that will occur as a result of the recent dealer network changes, indicates that there is adequate intrabrand and interbrand competition in the Comm/Terr. (notes 3 & 4 *supra*.) As previously noted, Chevrolet's level of convenient consumer care is among the best in the Comm/Terr.

49. As for existing dealership facilities, the existing Chevrolet dealers in the Comm/Terr have facilities which are adequate to service the market.

Relocation Justification Based on Economic and Marketing Conditions

50. There are no economic or marketing conditions to justify the Proposed Relocation. The recent changes in the dealer network (the Bill Heard relocation and the change of ownership at University) have made this even more emphatic.

Volume of Existing Dealers Registrations and Service Business

51. The existing Chevrolet dealers are transacting a significant level of service and sales business in the Comm/Terr. In terms of retail sales volume, in 2003 Chevrolet ranked second in passenger vehicle sales and second in light-truck sales registered within the Comm/Terr.

CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 120.569, Fla. Stat.

53. Respondents have standing to protest the proposed relocation.

54. Chapter 320, Florida Statutes, governs this matter. Section 320.642, Florida Statutes, exists, within that chapter, for the purpose of protecting existing motor vehicle dealers from unnecessary and potentially harmful changes to a manufacturer's dealer network in a particular market. Bill Kelley Chevrolet, Inc. v. Calvin, 322 So. 2d (Fla. 1st DCA 1975).

55. Accordingly, a dealer network change (i.e. the addition of a new dealership or relocation of an existing dealership) should be made only if its existing dealers in the market in question are not adequately representing the manufacturer.

§ 320.642(2)(a)2., Fla. Stat. In making the determination that a manufacturer is not being adequately represented in a market, it is not enough to simply conclude that the existing dealers could do a better job, or that the proposed dealer network change will improve the manufacturer's performance in the market. Hess Marine, Inc. v. Calvin, 296 So. 2d 114, 115 (Fla. 1st DCA 1974).

While, however, one must not forget the famous words of Louise Heath Leber that "[t] here's always room for improvement, you know—it's the biggest room in the house,"^{18/} that sentiment does

not equate to inadequate representation. The real focus of proceedings brought under Section 320.642 is whether the existing dealers are doing enough.

56. In making the determination of whether Chevrolet is being adequately represented in the relevant Comm/Terr in this case, Section 320.642 calls for a balancing of factors. In essence, the decision-maker must balance any deficiency in Chevrolet's performance within the Comm/Terr and the degree to which that deficiency will be addressed by the proposed relocation, along with the impact that the relocation will have upon the other existing dealers and consumers. Petitioner, GM, bears the burden of establishing that the existing franchised Chevrolet dealers are not providing adequate representation of Chevrolet in the Comm/Terr. § 320.642(2)(a)(2), Fla. Stat.

57. With respect to whether or not a proposal to relocate an existing dealer may be approved following a protest, Section 320.642(2)(a), Florida Statutes, provides:

(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.

58. The statute goes on to provide the following salient criteria in Section 620.642(2)(b)1.-11., to be utilized in determining whether existing representation is adequate, as follows:

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 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.

These criteria are summarized in tag lines in the Findings of Fact.

59. The relevant Comm/Terr in this matter is the Tampa MDA, as defined by GM, plus the Wesley Chapel and Plant City markets.

60. There is no evidence that the Proposed Relocation will provide benefit to consumers or is in the public interest. Rather, it appears that the Proposed Relocation could result in a negative impact to consumers and the public interest.

61. GM's reliance upon Chevrolet's national average market penetration as the appropriate standard against which to judge the line-make's performance in the Comm/Terr, is misplaced. The Florida average is the appropriate standard for judging Chevrolet's performance in the Comm/Terr. Using the Florida average as the standard, the existing Chevrolet dealer network is providing a reasonable level of market penetration in the Comm/Terr and in the AGSSA that would be assigned to Foster after the relocation.

62. The Proposed Relocation will have a significant adverse impact on existing dealers, including a significant negative financial impact on Stewart and University.

63. In this case, on balance, the evidence relating to the eleven statutory factors outlined in Section 320.642(2)(a), Florida Statutes, weighs in favor of Respondents and establishes

that GM has failed to meet its burden of proving that current Chevrolet dealers are not providing adequate representation. Mitsubishi Motor Sales of America, Inc., et al. v. King Motor Co. of Coconut Creek LTD, et al., Final Order No.: HSMV-00-740-FOF-DMV (Dept. of Highway Safety & Motor Vehicles, December 12, 2000). Further, GM presented only minimal evidence, primarily in the form of estimations, regarding the adequacy of Chevrolet's representation in the Comm/Terr after significant changes in the dealer network occurred in 2004 (in particular the relocation of Bill Heard).

64. All parties agree that changes occurring in the Comm/Terr since 2003 (the date of the most recent data presented by GM), will positively impact Chevrolet's performance in the Comm/Terr. However, no party was able to precisely quantify that impact such that a determination can be made as to the level of representation being provided to Chevrolet by the current dealer network. The *Mitsubishi* decision requires that once a manufacturer has implemented a dealer network change in a community or territory (such as the Bill Heard relocation) the manufacturer must wait until the effect of that change on the line-make's level of representation can be determined before seeking to implement a second change in the dealer network within the community or territory.

65. In this case, the relocation of Bill Heard took place in May of 2004. That relocation was approved and supported by GM. That relocation represented a change to the Chevrolet dealer network within the Comm/Terr. The impact of that relocation, as well as the expected increase in University's sales, on Chevrolet's representation and market penetration in the Comm/Terr cannot yet be determined and therefore, makes it impossible to determine if there is currently inadequate representation. GM has failed to satisfy its burden of proof that the currently existing dealer network is providing inadequate representation and should be prohibited from implementing the dealer network change that is proposed in this proceeding.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, and the candor and demeanor of the witnesses, it is

RECOMMENDED:

That a final order be entered determining that Petitioner, General Motors Corporation, has failed to satisfy its burden of establishing that existing Chevrolet dealers are not currently providing adequate representation to the Chevrolet line-make within the community or territory of the proposed relocation, and denying the application to relocate Foster from its current

location to the proposed location at I-75 and State Road 56.

DONE AND ENTERED this 16th day of February, 2005 in
Tallahassee, Leon County, Florida.



DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2005.

ENDNOTES

1/ Respondent University, an existing franchised Chevrolet dealer, purchased the stock of Roger Whitley Chevrolet dealership, changed the name to University and has continued the protest which is the subject of this proceeding.

2/ An MDA, as the name suggests, is a market containing more than one Chevrolet dealer. The dealers in an MDA are assigned by GM an Area of Primary Responsibility ("APR"), which is equal to the geography of the whole MDA. Each dealer within the MDA is also assigned an Area of Geographic Sales and Service Advantage ("AGSSA") which contains those areas within the APR that are closer to that dealer than to any other MDA dealer (i.e. the area in which the dealer has a sales advantage over other dealers simply because of proximity). (T: 93-94.)

3/ It is difficult to predict the precise impact that the Bill Heard relocation will have upon Chevrolet's performance in

the Comm/Terr. However, at the final hearing evidence was presented which supports a reasonable conclusion that Bill Heard's new vehicle sales will increase in the range of between 60% to 100%. (T:196-197; T:224-230; T:302-303; T:429-432; T:544-545; T:850-858; Pet. Ex. 47.)

4/ Again, it is difficult to predict the precise impact that the ownership change will have upon Chevrolet's performance in the Comm/Terr. However, evidence was presented at the final hearing which supports a reasonable conclusion that the dealership's new vehicle sales will increase in the range of between 10% to 40%. (T:199-202; T:429-432; T:454-455; T:855-858; Pet. Ex. 1 at R-74; Pet. Ex. 47.)

5/ Currently in the AGSSA that would be assigned to Foster after the relocation, Chevrolet has a better level of convenience to consumers than every line-make other than Kia and Ford. (T:339-340; Pet. Ex. 1 at A-72.)

6/ Both co-owners of Stewart testified that Marvin Beaupre admitted to them that he expected the dealership would have losses of 20% as a result of the relocation. (T:694-695; T:767-768.)

7/ There was significant evidence presented in the form of "real world" examples to support the conclusion that losses will result to existing dealers as a result of the Proposed Relocation. (T:904-925; Res. Ex. 27 at Tabs 27, 27A, and 31A.)

8/ University presented evidence that indicated that the financial losses incurred by University as a result of the Proposed relocation would be in the range of One Million and Two Hundred Thousand Dollars (\$1,200,000) to One Million Four Hundred and Forty Thousand Dollars (\$1,440,000) per year. (Brotsky at 15; Slader at 33.)

9/ The evidence actually establishes that customer convenience is not an important factor in competition between dealers of competing line-makes (interbrand competitors). (T:884-885; Res. Ex. 27 at Tab 36.)

10/ Indeed, Foster recently completed a Two Million Dollar (\$2,000,000) upgrade on its existing facility. (T:435; T:594-595; Res. Exs. 1-4.)

11/ GM also presented the Clearwater/St. Petersburg average market penetration as a second possible standard for comparison.

(T:148-150; Pet. Ex. 1 at A-28 to A-31.1.) Because it is apparent that the State of Florida average is the appropriate standard to apply in this matter, it is not necessary to further discuss use of the Clearwater/St. Petersburg average.

12/ Although GM's expert testified that his use of a segment adjustment process accounts for all such variables and differences between the nation and the Comm/Terr, it would be mathematically impossible to control the hundreds of variables that exist by simply running an analysis that considers only 30 or so product segments. (T:840-41.)

13/ Prior to 1999 GM did use national average to evaluate dealer performance. (T:271-272; T:840-844; Res. Ex. 12 at 8.) However, after establishing a committee to study the matter, GM adopted the state average as the appropriate standard for dealer evaluations. A representative of GM's expert served on that committee and suggested that GM use the higher of either national, state, or another more local area as the standard for evaluating dealer performance. That suggestion was rejected by GM. (T:271-272.)

14/ By way of example, based on the national average the Comm/Terr was expected to have 7,528 retail Chevrolet registrations through September of 2003. Every Florida market in which Chevrolet met or exceeded its expected level of penetration based on national average through September of 2003 had less than 2,000 expected retail registrations. Only two of those markets had more than 1,000 expected retail registrations. (T:290-292; Res. Ex. 1 at App-63 & App-64.)

15/ Although Stewart and University did present the average performance of Chevrolet in the Florida MDAs as another reasonable standard against which to judge the Comm/Terr (T:858-860), it is not necessary to discuss that analysis as it is apparent that the Comm/Terr meets or exceeds the Florida average with the currently existing dealer network.

16/ In fact, any shortfall is within the margin of error that one would expect to see in this type of statistical measurement. Therefore, it would be mathematically impossible to state that in 2002 and 2003 the Comm/Terr was not performing at the expected level. (T:847-849; Res. Ex. 27 at Tab 9.)

17/ Indeed, that is another failing of GM's analysis, which also does not consider the impact of recent changes in the dealer network, such as the Bill Heard relocation. (T:237-238.)

18/ On being chosen Mother of the Year, NY Post 14 May 61.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.