

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CHUANL MOTORCYCLE USA CO., )  
LTD., AND USA WHOLESALE )  
SCOOTERS, INC., )  
 )  
Petitioners, )  
 )  
vs. )  
 ) Case No. 08-1600  
POWER & PLAY WAREHOUSE, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on June 10, 2008, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner USA Wholesale Scooters, Inc.:

Noel Farbman, pro se  
USA Wholesale Scooters, Inc.  
2902 East Sunrise Boulevard  
Fort Lauderdale, Florida 33304

For Petitioner Chuanl Motorcycle USA Co. Ltd.:

No Appearance

For Respondent: Thomas McMahon, pro se  
Power & Play Warehouse, Inc.  
550 North Flagler Avenue  
Pompano Beach, Florida 33060

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioners' proposed motorcycle dealership would serve a community or territory in which Respondent's dealership is not presently providing adequate representation of the same line-make vehicles that Petitioners would offer.

PRELIMINARY STATEMENT

On March 14, 2008, an advertisement was published in the Florida Administrative Weekly, which gave notice that, unless a protest were timely filed, the Department of Highway Safety and Motor Vehicles would approve the application of Petitioner USA Wholesale Scooters, Inc. for a license to establish a new dealership at 2902 East Sunrise Boulevard, Fort Lauderdale, Florida, where motorcycles manufactured by Petitioner Chuanl Motorcycle USA, Ltd. would be offered for sale. On March 27, 2008, Respondent Power & Play Warehouse, Inc. filed a written complaint with the Department, protesting Petitioner's application. The Department immediately forwarded Respondent's complaint to the Division of Administrative Hearings ("DOAH") for a hearing.

The final hearing took place on June 10, 2008, as scheduled, with both parties present. Noel Farbman, who is an owner of Petitioner, testified on his company's behalf. Petitioner presented no other evidence. Thomas McMahon

testified on behalf of Respondent, of which he is the owner. In addition, Respondent's Exhibits 1 and 2 were admitted into evidence without objection.

The final hearing transcript was filed with DOAH on August 15, 2008. The parties were instructed to submit their respective Proposed Recommended Orders on or before August 25, 2008, which they did.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 Florida Statutes.

#### FINDINGS OF FACT

1. On March 14, 2008, an advertisement was published in the Florida Administrative Weekly, which gave notice that, unless a protest were timely filed, the Department of Highway Safety and Motor Vehicles ("Department") intended to approve the application of Petitioner USA Wholesale Scooters, Inc. ("Wholesale Scooters") for a license to establish a new dealership at 2902 East Sunrise Boulevard, Fort Lauderdale, Florida (the "Proposed New Point"), where motorcycles manufactured by Petitioner Chuanl Motorcycle USA, Ltd. ("Chuanl") would be offered for sale.

2. Respondent Power & Play Warehouse, Inc. ("Power & Play"), which is licensed to operate a dealership, under a franchise agreement, for the sale of Chuanl motorcycles in Pompano Beach, Florida (the "Existing Dealership"), timely filed

a written complaint with the Department, protesting the intended approval of the Proposed New Point.

3. The Proposed New Point and the Existing Dealership are both situated in Broward County, Florida. It is undisputed that the population of Broward County exceeds 300,000.

4. At the final hearing, the parties stipulated that the Proposed New Point would be located within 12.5 miles of the Existing Dealership.

5. Wholesale Scooters failed to present persuasive evidence demonstrating that the Existing Dealership is not providing adequate representation of Chuanl motorcycles in Fort Lauderdale, Pompano Beach, Broward County, or any other conceivably relevant community or territory.

#### CONCLUSIONS OF LAW

6. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

7. Section 320.642, Florida Statutes, provides as follows:

(2)(a) An application [for a license to establish an additional motor vehicle dealership within a community or territory where the same line-make vehicle is presently represented by a franchised motor vehicle dealership] 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[, that is, the applicant].

(Emphasis added.)

8. An existing franchised dealer has standing to protest an application to establish a new dealership if (a) the proposed dealership would sell or service the same line-make vehicles for which the existing dealer has a franchise agreement and (b) at least one other requirement or condition is met. See § 320.642(3), Fla. Stat. One such additional condition is that the "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" new dealership. See 320.642(3)(b)1., Fla. Stat. An existing dealer which satisfies this particular condition, as does Power & Play, shall have standing to bring a protest against the proposed dealership, provided "the proposed additional . . . motor vehicle dealer is to be located," as here, "in a county with a population of more than 300,000." Id.

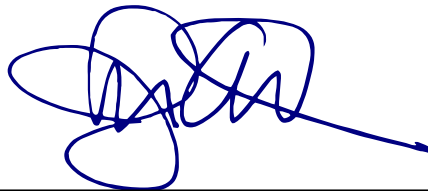
9. Power & Play meets the foregoing conditions and thus has standing to protest.

10. Because Wholesale Scooters failed to prove inadequate representation, Power & Play's protest effectively blocks the establishment of the Proposed New Point. The Department must deny Wholesale Scooters' application.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order denying Wholesale Scooters' application for a license to operate a new dealership at 2902 East Sunrise Boulevard, Fort Lauderdale, Florida, where Chuanl motorcycles would be offered for sale.

DONE AND ENTERED this 3rd day of September, 2008, in Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of September, 2008.

COPIES FURNISHED:

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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.