

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GATOR MOTO, LLC AND GATOR MOTO,)
LLC,)
)
Petitioners,)
)
vs.) Case Nos. 08-2735
) 08-2736
AUSTIN GLOBAL ENTERPRISES,)
LLC,d/b/a NEW SCOOTERS 4 LESS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on February 9, 2009, in Gainesville, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: No Appearance

For Respondent: Collin Austin
Austin Global Enterprise, LLC
118 Northwest 14th Avenue, Suite D
Gainesville, Florida 32601

STATEMENT OF THE ISSUE

The issue is whether Petitioner's applications to establish new dealerships for the sale of motorcycles manufactured by Shanghai Motorcycle Co., Ltd. (JMSTAR), and Shanghai Shenke Motorcycle Co., Ltd. (SHEN), should be granted.

PRELIMINARY STATEMENT

In the Florida Administrative Weekly, Volume 34, Number 21, May 23, 2008, the Department of Highway Safety and Motor Vehicles (DHSMV) published two Notices of Publication for a New Point Franchise Motor Vehicle Dealer in a County of Less than 300,000 Population. Said notices advised that Petitioner Gator Moto, LLC and Gator Moto, LLC (Petitioner) intended to establish new dealerships for the sale of motorcycles manufactured by Shanghai Motorcycle Co., Ltd. (JMSTAR), and Shanghai Shenke Motorcycle Co., Ltd. (SHEN).

On or about June 3, 2008, Respondent Austin Global Enterprises, LLC, d/b/a New Scooters 4 Less (Respondent) filed two complaints with DHSMV about the proposed new motorcycle dealerships. DHSMV referred both complaints to the Division of Administrative Hearings on June 10, 2008.

On July 2, 2008, Respondent filed its Compliance with Initial Order.

On July 7, 2008, Petitioner filed Petitioner's Compliance with Initial Order Division of Administrative Hearings (DOAH) Case Nos. 08-2735 and 08-2736. This is the only communication that DOAH has received from Petitioner.

On July 23, 2008, Administrative Law Judge Barbara J. Staros entered an Order of Consolidation for DOAH Case Nos. 08-2735 and 08-2736. On July 24, 2008, Judge Staros issued a

Notice of Hearing, scheduling a final hearing on December 4, 2008.

On November 26, 2008, Respondent filed its Compliance with Pre-hearing Instructions. Petitioner did not respond to the Order of Pre-hearing Instructions.

On December 1, 2008, Judge Staros issued an Amended Notice of Hearing. The amended notice only changed the commencement time for the hearing.

DOAH subsequently transferred these consolidated cases to the undersigned. On the morning of the December 4, 2008, hearing, DHSMV advised the undersigned's office that DHSMV had failed to arrange for the appearance of a court reporter at the hearing. Accordingly, the undersigned issued an Order Granting Continuance and requiring the parties to confer and provide DOAH with mutually-agreeable dates for re-scheduling the hearing.

On December 17, 2008, Respondent filed its unilateral Compliance with Order Granting Continuance. Respondent filed this pleading after an unsuccessful attempt to confer with Petitioner.

On December 18, 2008, the undersigned issued a Notice of Hearing and Order of Pre-hearing Instruction. The notice scheduled the hearing for February 9, 2008.

On February 3, 2007, Respondent filed its unilateral Compliance with Order of Pre-hearing Instructions. Petitioner

did not file a response to the Order of Pre-hearing Instructions.

When the hearing commenced, Petitioner did not make an appearance. Respondent made an appearance and presented the testimony of Colin Austin, Respondent's Managing Member. Respondent did not offer any exhibits.

The hearing transcript was not filed with DOAH. Neither party filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent has standing to protest Petitioner's applications pursuant to Section 320.642(3)(a)2., Florida Statutes (2008).

2. According to DHSMV's published notice, Petitioner intended to establish two new motorcycle dealerships at 2106 Northwest 67th Place, Suite 15, Gainesville, Florida, on or after May 9, 2008. This location is only 4.5 miles from Respondent's place of business.

3. At some point in time, Petitioner relocated its business to 7065 Northwest 22nd Street, Suite A, Gainesville, Florida. This location is only 5.3 miles from Respondent's place of business.

4. Petitioner's application indicated that Petitioner intended to establish itself as a dealer of SHEN and JMSTAR

motorcycles. Currently, Respondent sells those motorcycles under License No. VF/1020597/1.

5. Respondent currently supplies itself with SHEN and JMSTAR products from a United States distributor. Respondent has a good faith belief that Petitioner intends to import the motorcycles and related products directly from the Chinese manufacturers. In that case, Petitioner would be able to sell the products at a lower price than Respondent and thereby deny Respondent the opportunity for reasonable growth.

6. Petitioner did not notify DOAH about a change of address. DOAH's notices and orders directed to Petitioner at its address of record have not been returned. Petitioner has not communicated with DOAH since filing a response to the Initial Order. Petitioner did not make an appearance at the hearing. Apparently, Petitioner has abandoned its applications to establish the new dealerships.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 320.699, 120.569, and 120.57(1), Florida Statutes (2008).

8. Section 320.642, Florida Statutes (2008), sets forth the procedure for establishing proposed motor vehicle

dealerships or permitting the relocations of such dealerships as follows in pertinent part:

(1) Any licensee who proposes to establish an additional motor vehicle dealership or permit the relocation of an existing dealer to a location within a community or territory where the same line-make vehicle is presently represented by a franchised motor vehicle dealer or dealers shall give written notice of its intention by certified mail to the department. Such notice shall state:

(a) The specific location at which the additional or relocated motor vehicle dealership will be established.

(b) The date on or after which the licensee intends to be engaged in business with the additional or relocated motor vehicle dealer at the proposed location.

(c) The identity of all motor vehicle dealers who are franchised to sell the same line-make vehicle with licensed locations in the county or any contiguous county to the county where the additional or relocated motor vehicle dealer is proposed to be located.

(d) The names and addresses of the dealer-operator and principal investors in the proposed additional or relocated motor vehicle dealership.

Immediately upon receipt of such notice the department shall cause a notice to be published in the Florida Administrative Weekly. The published notice shall state that a petition or complaint by any dealer with standing to protest pursuant to subsection (3) must be filed not more than 30 days from the date of publication of the notice in the Florida Administrative Weekly. The published notice shall describe and identify the proposed dealership sought to be licensed, and the department shall cause a copy of the notice to be mailed to those

dealers identified in the licensee's notice under paragraph (c).

(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 licensee 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.

(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:

(a) If the proposed additional or relocated motor vehicle dealer is to be located in a county with a population of less 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:

* * *

2. The existing motor vehicle dealer or dealers of the same line-make have a licensed franchise location within a radius of 20 miles of the location of the proposed additional or relocated motor vehicle dealer;

9. Respondent met its burden of proving that it had standing to protest Petitioner's applications. On the other hand, Petitioner has not met its burden of establishing that Respondent is not providing adequate representation for the JMSTAR and SHEN motorcycles. See § 320.642(2)(a)2., Fla. Stat. (2008).

RECOMMENDATION

Based on the forgoing Findings of Fact and Conclusions of Law, it is

ORDERED:

That the Department of Highway Safety and Motor Vehicles enter a final order denying Petitioner's applications.

DONE AND ENTERED this 16th day of February, 2009, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2009.

COPIES FURNISHED:

Michael James Alderman, Esquire
Department of Highway Safety and
Motor Vehicles
Neil Kirkman Building, Room A-432
2900 Apalachee Parkway
Tallahassee, Florida 32344

Collin Austin
Austin Global Enterprise, LLC
118 Northwest 14th Avenue, Suite D
Gainesville, Florida 32601

Justin Jackrel
Gator Moto, LLC
4337 Northwest 35th Terrace
Gainesville, Florida 32605

Justin Jackrel
Gator Moto, LLC
2106 Northwest 67th Place, Suite 15
Gainesville, Florida 32653

Carl A. Ford, Director
Division of Motor Vehicles
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, Room B-439
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

Robin Lotane, General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building
2900 Apalachee Parkway
Tallahassee, Florida 32399-0500

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.