

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GALAXY POWERSPORTS, LLC, d/b/a )  
JCL INTERNATIONAL, LLC, and )  
MX MOTORSPORTS, )  
)  
Petitioners, )

vs. )

Case No. 08-5865

POWER AND PLAY WAREHOUSE, INC., )  
)  
Respondent. )  

---

GALAXY POWERSPORTS, LLC, d/b/a )  
JCL INTERNATIONAL, LLC, and )  
KEB TRANS, INC., d/b/a EZ RIDER )  
SCOOTERS, )  
)  
Petitioners, )

vs. )

Case No. 08-5866

POWER AND PLAY WAREHOUSE, INC., )  
)  
Respondent. )  

---

GALAXY POWERSPORTS, LLC, d/b/a )  
JCL INTERNATIONAL, LLC, and )  
KEB TRANS, INC., d/b/a EZ RIDER )  
SCOOTERS, )  
)  
Petitioners, )

vs. )

Case No. 08-5867

POWER AND PLAY WAREHOUSE, INC., )  
)  
Respondent. )  

---

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted a hearing by videoconference in Tallahassee, Florida, on May 14, 2009. Respondent's representative, Respondent's attorney, and the court reporter participated by videoconference in Fort Lauderdale, Florida. No other person appeared at the final hearing.

APPEARANCES

For Petitioners: no appearances

For Respondent: Paul J. Lane  
2775 East Oakland Boulevard, Suite 300  
Fort Lauderdale, Florida 33306

STATEMENT OF THE ISSUES

The issues are whether Galaxy Powersports, LLC, is entitled to three licenses to establish new dealerships for the sale of motorcycles, pursuant to Sections 320.642 and 320.699, Florida Statutes (2008).

PRELIMINARY STATEMENT

As published on October 24, 2008, in the Florida Administrative Weekly, by Notice of Publication for a New Point Franchise Motor Vehicle Dealer, the Department of Highway Safety and Motor Vehicles (Department) gave notice of its intent to allow the establishment of MX Motor Toys, Inc., as a dealership

for the sale of motorcycles manufactured by Taizhou Zhongneng Motorcycle Co. Ltd. (ZHNG) at 1335 Okeechobee Road, West Palm Beach, Florida.

By letter dated November 10, 2008, Respondent filed a Notice of Protest of the establishment of the new dealership. The Notice of Protest states that Respondent sells motorcycles manufactured by ZHNG at its dealership located at 1828 North Dixie Highway, Lake Worth, Florida, and that this location is within 12.5 miles of the proposed dealership. Department transmitted the case to the Division of Administrative Hearings, where it was assigned Case No. 08-5865.

As published on October 24, 2008, in the Florida Administrative Weekly, by Notice of Publication for a New Point Franchise Motor Vehicle Dealer, Department gave notice of its intent to allow the establishment of Keb Trans, Inc., as a dealership for the sale of motorcycles manufactured by Zhejiang Taizhou Wangye Power Co., Ltd. (ZHEJ) at 7600 Wiles Road, Coral Springs, Florida.

By letter dated November 10, 2008, Respondent filed a Notice of Protest of the establishment of the new dealership. The Notice of Protest states that Respondent sells motorcycles manufactured by ZHEJ at its dealership located at 550 North Flagler Avenue, Pompano Beach, Florida, and that this dealership is within 12.5 miles of the proposed dealership. Department

transmitted the case to the Division of Administrative Hearings, where it was assigned Case No. 08-5866.

As published on October 24, 2008, in the Florida Administrative Weekly, by Notice of Publication for a New Point Franchise Motor Vehicle Dealer, Department gave notice of its intent to allow the establishment of Keb Trans, Inc., as a dealership for the sale of motorcycles manufactured by ZHNG at 7600 Wiles Road, Coral Springs, Florida.

By letter dated November 10, 2008, Respondent filed a Notice of Protest of the establishment of the new dealership. The Notice of Protest states that Respondent sells motorcycles manufactured by ZHNG at its dealership located at 550 North Flagler Avenue, Pompano Beach, Florida, and that this dealership is within 12.5 miles of the proposed dealership. Department transmitted the case to the Division of Administrative Hearings, where it was assigned Case No. 08-5867.

By Order of Consolidation entered January 20, 2009, the Administrative Law Judge consolidated these three cases.

At the hearing, no one appeared as a witness, representative, or attorney for any petitioner. Respondent called one witness and offered into evidence no exhibits. Respondent did not order a transcript.

## FINDINGS OF FACT

1. Respondent operates a dealership at 1828 North Dixie Highway, Lake Worth, Florida, at which it offers for sale the complete line of ZHNG motorcycles. The proposed dealership at 1335 Okeechobee Boulevard, West Palm Beach, Florida, is located less than six miles from Respondent's Lake Worth dealership.

2. Due to inadvertence, Respondent failed to present evidence to establish the location of its Pompano Beach dealership; the distance from the Pompano Beach dealership to the proposed dealership at 7600 Wiles Road, Coral Springs, Florida; and that the Pompano Beach dealership sells the ZHNG and ZHEJ line makes. Obviously addressing only DOAH Case No. 08-5865, counsel for Respondent moved, toward the end of the hearing, for a favorable order dismissing the case (i.e., denying applications), and the Administrative Law Judge indicated that he would enter a recommended order essentially granting the relief that Respondent sought. Only after the hearing did the Administrative Law Judge realize that Respondent had failed to present the evidence identified in the preceding paragraph.

## CONCLUSIONS OF LAW

3. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 320.699, Fla. Stat. (2008).

4. Section 320.642(1), Florida Statutes (2008), describes the process under which a licensee notifies Department of its intent to establish an additional motor vehicle dealership and Department publishes a notice of the notification received by Department and a statement that a petition or complaint by any dealer "with standing" must be filed within 30 days of the date of publication.

5. Section 320.642(2)(a), Florida Statutes (2008), states that Department shall deny the licensee's application to establish a new dealer 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.

6. Section 320.642(3)(b), Florida Statutes (2008), states:

- (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 or serviced 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

\* \* \*

7. Section 320.642(8), Florida Statutes (2008), provides:

The department shall not be obligated to determine the accuracy of any distance asserted by any party in a notice submitted to it. Any dispute concerning a distance measurement asserted by a party shall be resolved by a hearing conducted in accordance with ss. 120.569 and 120.57.

8. In the typical permit-application case, the applicant has the burden of proof and proceeds first at hearing, although the party challenging the proposed agency decision to issue the permit must allege sufficient facts to identify the areas of controversy. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). The court stressed, of course, that the first source of authority

concerning the burden of proof would be the relevant statutes and rules. 396 So. 2d at 787.

9. In Case No. 08-5865, Respondent proved its standing, and Petitioners failed to prove inadequate representation, so this application must be denied.

10. The remaining cases raise the question of the proper disposition, if no evidence is presented as to standing or the merits--essentially, as though no party appears at the final hearing. Section 320.642(2)(a), Florida Statutes (2008), states that Department shall deny an application if: 1) a dealer with standing timely files a protest and 2) the licensee fails to show inadequate representation. The statute requires merely a filing by a dealer, but proof from a licensee. The mention of standing in connection with a protesting dealer is merely descriptive of the dealer that can file a protest, but does not impose the requirement, in every case, that a protesting dealer must prove its standing. In most cases, the distance between dealer locations is indisputable, and, if the parties do not wish to contest it, the statute should not be construed to require that they do so or even enter into a stipulation on this matter.

11. To hold otherwise would be to elevate standing to subject-matter jurisdiction. The case law holds that standing is an affirmative defense that is waived, if not timely raised.



See, e.g., Krivanek v. Take Back Tampa Political Committee, 625 So. 2d 840, 842 (Fla. 1993). In the remaining cases, Respondent timely failed protests in a document that properly alleged that it was a dealer with standing, and no opposing party ever filed a pleading that could be construed as raising standing as a defense, so standing has been waived.

12. For Case Nos. 08-5866 and 08-5867, then, the absence of proof means that the applications must be denied.

RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED that the Department of Highway Safety and Motor Vehicles enter a final order denying the application in each of these three cases.

DONE AND ENTERED this 18th day of June, 2009, in Tallahassee, Leon County, Florida.



---

ROBERT E. MEALE  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of June, 2009.

COPIES FURNISHED:

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 32399-0635

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

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

Paul J. Lane, Esquire  
2755 East Oakland Park Boulevard, Suite 300  
Fort Lauderdale, Florida 33306

Rick Marabini  
MX Motor Toys, Inc., d/b/a  
MX Motorsports  
300 South Australian Avenue, No. 1507  
West Palm Beach, Florida 33401

Leo Su  
Galaxy Powersports, LLC, d/b/a  
JCL International, LLC  
2667 Northhaven Road  
Dallas, Texas 75229

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 must be filed with the agency that will issue the final order in this case.