

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RIDE GREEN FLORIDA, LLC,)
)
 Petitioner,)
)
 vs.) Case Nos. 11-3649
) 11-4337
 PUMA CYCLES CORPORATION AND)
 WILD HOGS SCOOTERS AND)
 MOTORSPORTS, LLC,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

On January 24, 2012, an administrative hearing in these cases was conducted in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: R. Craig Spickard, Esquire
John W. Forehand, Esquire
Kurkin Forehand Brandes, LLP
800 North Calhoun Street, Suite 1B
Tallahassee, Florida 32303

For Respondents: (No appearance)

STATEMENT OF THE ISSUE

The issue in these cases is whether two applications for new point franchise motor vehicle dealerships filed by Puma Cycles Corporation and Wild Hogs Scooters and Motorsports, LLC (Respondents), should be approved.

PRELIMINARY STATEMENT

By Notice published in the Florida Administrative Weekly (Volume 37, Number 24; June 17, 2011), the Department of Highway Safety and Motor Vehicles (Department) gave notice that Puma Cycles Corporation (Puma) intended to establish a new point franchise motor vehicle dealership at Wild Hogs Scooters and Motorsports, LLC (Wild Hogs), located at 3311 West Lake Mary Boulevard, Units 1-2, Lake Mary, Seminole County, Florida 32746, for the sale of motorcycles manufactured by Foshan City Fosti Motorcycle Manufacturing Co. Ltd. (line-make FSTI). Ride Green Florida, LLC (Petitioner), filed a challenge to the establishment of the Lake Mary dealership and requested an administrative hearing. By letter dated July 21, 2011, the Department forwarded the request to DOAH, which designated the hearing request as Case No. 11-3649. An Initial Order was entered to which the Petitioner filed a response. Based on the response, on August 2, 2011, a Notice of Hearing was issued wherein the hearing was scheduled for January 24 through 26, 2012.

By Notice published in the Florida Administrative Weekly (Volume 37, Number 30; July 29, 2011), the Department gave notice that Puma intended to establish a new point franchise motor vehicle dealership at the Wild Hogs location at 1805 West Fairbanks Avenue, Winter Park, Orange County, Florida 32789, for

the sale of motorcycles manufactured by Foshan City Fosti Motorcycle Manufacturing Co. Ltd. (line-make FSTI).

The Petitioner filed a challenge to the establishment of the Winter Park dealership and requested an administrative hearing. By letter dated August 22, 2011, the Department forwarded the request to DOAH, which designated the hearing request as Case No. 11-4337. An Initial Order was entered to which the Petitioner filed a response. Based on the response, the two cases were consolidated on August 31, 2011.

The consolidated cases were transferred to the undersigned ALJ on January 18, 2012.

The hearing commenced as scheduled on January 24, 2012, at which time no representative appeared on behalf of the Respondents.

The Petitioner presented the testimony of one witness, the owner of Ride Green Florida, LLC. There being no further witnesses, and with no appearance on behalf of the Respondents, the record was closed and the hearing concluded.

Immediately after the hearing had concluded, an individual attending the hearing on behalf of Puma entered the hearing room and advised that he had been waiting outside the hearing room pursuant to the instructions of a security officer.

As set forth in the Notice of Hearing, all parties have the right to be represented by counsel or other qualified

representative, in accordance with Florida Administrative Code Rule 28-106.106. Following a discussion with the individual attending on behalf of Puma, the hearing was reconvened, at which time the ALJ determined that the individual was not a Florida-licensed attorney and could not meet the requirements to serve as a qualified representative during the hearing, and the record was closed.

No transcript of the hearing was filed. Neither party filed a proposed recommended order.

FINDING OF FACTS

1. The Petitioner has a franchise agreement to sell line-make FSTI motor vehicles, the line-make proposed to be sold at the two Wild Hogs locations at issue in these cases.

2. The location of the Petitioner's dealership at 700 West Fairbanks Avenue, Winter Park, Florida, is within 12.5 miles of both Wild Hogs locations.

3. There was no evidence presented at the hearing to establish that the Petitioner is not providing adequate representation of line-make FSTI motor vehicles.

CONCLUSIONS OF LAW

4. DOAH has jurisdiction over the parties to and subject matter of this proceeding. See §§ 120.569 and 120.57, Fla. Stat. (2011).^{1/}

5. Section 320.642, Florida Statutes, provides, in relevant part, as follows:

320.642 Dealer licenses in areas previously served; procedure.--

(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 to the department. The notice must 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 and 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 the notice the department shall cause a notice to be published in the Florida Administrative Weekly. The published notice must state that a petition or complaint by any dealer with standing to protest pursuant to subsection (3) must be filed within 30 days following the date of publication of the notice in the

Florida Administrative Weekly. The published notice must 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). The licensee shall pay a fee of \$75 and a service charge of \$2.50 for each publication. Proceeds from the fee and service charge shall be deposited into the Highway Safety Operating Trust Fund.

(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 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 when 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:

(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:

1. The proposed additional or relocated motor vehicle dealer is to be located in the area designated or described as the area of

responsibility, or such similarly designated area, including the entire area designated as a multiple-point area, in the franchise agreement or in any related document or commitment with the existing motor vehicle dealer or dealers of the same line-make as such agreement existed upon October 1, 1988;

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;
or

3. 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, the 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 20 miles of the location of the proposed additional or relocated motor vehicle dealer; provided the 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.

(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.

(4) The department's decision to deny issuance of a license under this section shall remain in effect for a period of 12 months. The department shall not issue a license for the proposed additional or relocated motor vehicle dealer until a final decision by the department is rendered determining that the application for the motor vehicle dealer's license should be granted. (emphasis added).

6. The Respondents in these cases are the licensees. See §§ 320.60(8) and 320.61, Fla. Stat.

7. By location within 12.5 miles of the proposed Wild Hogs locations, the Petitioner is an existing franchised motor vehicle dealer with standing to protest the establishment of the new point franchise motor vehicle dealerships at issue in these consolidated cases.

8. The Respondents presented no evidence that the Petitioner is not providing adequate sales representation within the community or territory of the line-make FSTI motor vehicles.

RECOMMENDATION

Based on the foregoing Finding of Facts and Conclusions of Law, it is RECOMMENDED that the Department of Highway Safety and Motor Vehicles enter a final order denying the two applications filed by the Respondents to establish new point franchise motor vehicle dealerships at Wild Hogs Scooters and Motorsports, LLC, for the sale of line-make FSTI motorcycles.

DONE AND ENTERED this 22nd day of February, 2012, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of February, 2012.

ENDNOTE

^{1/} All references to Florida Statutes are to the 2011 version, unless otherwise indicated.

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.