

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

POWER AND PLAY WAREHOUSE, INC.    )  
  )  
    Petitioner,                        )  
  )  
vs.                                        )    Case No. 11-4921  
  )  
GORILLA MOTOR WORKDS, LLC AND    )  
JAB MOTORSPORTS, D/B/A MOTOR    )  
SCOOTERS N MORE,                    )  
  )  
    Respondents.                     )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice a hearing was conducted on November 14, 2011, in Fort Lauderdale, Florida, before Claude B. Arrington, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner:    Paul J. Lane, Esquire  
                          Paul J. Lane, Attorney at Law  
                          7880 North University Drive, Suite 200  
                          Tamarac, Florida 33321

For Respondents:  Auerilo Silva  
                          Jab Motorsports Corp.  
                          188 North Federal Highway  
                          Deerfield Beach, Florida 33441

STATEMENT OF THE ISSUE

Whether Gorilla Motor Works, LLC (Gorilla) should be permitted over Petitioner's protest to establish an additional dealership for the sale of motorcycles manufactured by Taizhou

Zhongneng Motorcycle Co. Ltd. (ZHNG) at 188 North Federal Highway, Deerfield Beach, Florida 33441 (the proposed location).

PRELIMINARY STATEMENT

On August 26, 2011, a notice was published in the Florida Administrative Weekly that unless a timely protest was filed, Gorilla "intends to allow establishment of Jab Motorsports Corp., d/b/a Motor Scooters N More as a dealership for the sale of motorcycles manufactured by [ZHNG] at [the proposed location]." Thereafter, Petitioner timely protested the establishment of this additional dealership pursuant to the provisions of section 340.642(2)(A)(1), Florida Statutes (2011).<sup>1</sup> On September 21, 2011, the matter was referred to DOAH, and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of Thomas McMahon (Petitioner's president and owner) and offered two exhibits, both of which were admitted into evidence without objection. Auerilo Silva, the sales manager for Jab Motorsports Corporation, testified on behalf of Respondents. Respondents offered no exhibits and no other witnesses. Mr. Silva offered no evidence as to whether Petitioner was adequately representing ZHNG.

No transcript of the proceeding was filed. The parties were granted ten days from the hearing date within which to file proposed recommended orders. Petitioner filed a Proposed

Recommended Order (PRO), but Respondents did not. Petitioner's PRO has been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an existing franchised dealer of ZHNG Motorcycles.
2. Petitioner's dealership is located at 550 North Flagler Avenue, Pompano Beach, Florida.
3. Petitioner's dealership is approximately 7.2 miles from the proposed location.
4. Respondents offered no evidence that Petitioner has failed to adequately represent ZHNG.

CONCLUSIONS OF LAW

5. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 120.569, and 120.57(1), Fla. Stat.

6. Section 320.605 provides:

It is the intent of the Legislature to protect the public health, safety, and welfare of the citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers.

7. Section 320.642 provides, 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 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.

\* \* \*

(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. . . .

8. Petitioner established as a matter of law that it has standing to protest the proposed location. Petitioner's protest was timely.

9. Respondents presented no evidence that Respondent has failed to provide adequate representation of ZHNG.

10. Mr. Silva testified that the ZHNG motorcycles Respondents would sell at the proposed location may not be identical to those sold by Petitioner because Respondents would obtain the ZHNG motorcycles they intend to sell at the proposed location from a different distributor used by Petitioner. Respondents argued that the different distributors may or may not modify the motorcycles they obtain from ZHNG before delivering the motorcycles to the respective retail sellers. Mr. Silva acknowledged that Petitioner and Respondents would nevertheless be selling motorcycles manufactured by ZHNG, which is all the above-quoted statute requires to protect Petitioner from the dealership Respondents want to open at the proposed location.

11. Respondents failed to meet their burden of proof. Consequently, the approval Respondents are seeking to establish

the proposed location should be denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Department of Highway Safety and Motor Vehicles enter a Final Order denying the request to establish a new ZHNG dealership at the proposed location.

DONE AND ENTERED this 7th day of December, 2011, in Tallahassee, Leon County, Florida.



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CLAUDE B. ARRINGTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of December, 2011.

ENDNOTE

1/ All statutory references are to Florida Statutes (2011).

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.