NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of KENNEDY CADILLAC, INC., Protestant, vs. GENERAL MOTORS CORPORATION, CADILLAC MOTOR CAR DIVISION, Respondent.	**Protest No. PR-1705-00**

DECISION

The attached "Ruling on Motion for Reconsideration" of the Administrative Law Judge was considered by the Public members of the New Motor Vehicle Board at its General meeting of May 25, 2000. After such consideration, the Public members of the Board adopted the Ruling on Motion for Reconsideration as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 25th DAY OF MAY 2000.

ROBERT T. (TOM) FLESH
President
New Motor Vehicle Board

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CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of KENNEDY CADILLAC, INC., Protestant, vs. GENERAL MOTORS CORPORATION, CADILLAC MOTOR CAR DIVISION, Respondent.	**Protest No. PR-1705-00** **RULING ON MOTION FOR RECONSIDERATION**

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PROCEDURAL MATTERS

1. Protestant, Kennedy Cadillac, Inc., filed this protest under Vehicle Code § 3060 on February 14, 2000, in response to the proposal of Respondent, General Motors Corporation, Cadillac Motor Car Division (*GM* or *Division*, herein) to establish an additional Cadillac franchise and to modify the geography of Protestant's Area of Primary Responsibility (APR).[1] Respondent filed a Motion to Dismiss the Protest on February 29, 2000. The parties submitted written argument pursuant to order of the Board dated March 8, 2000, and the matter was brought before Administrative Law Judge (ALJ) Kenneth B. Wilson for hearing on March 28, 2000. On April 6, 2000, the ALJ filed his ruling denying the motion.

2. On April 14, 2000, eight days subsequent to the ruling of the ALJ, Respondent filed a Motion for Reconsideration of the ruling denying the prior Motion to Dismiss, alleging new and different circumstances that were not in existence at the time of the prior hearing. A telephonic conference of the parties and the ALJ was held on April 20, 2000, during which the parties agreed to waive additional briefing and proceed to an expedited telephonic hearing on the Motion for Reconsideration on April 24, 2000. O'Melveny & Myers LLP, Lawrence M. Hadley, Esq., 400 South Hope Street, Los Angeles, California, appeared on behalf of GM. Protestant was represented by the Law Offices of Michael J. Flanagan, Michael J. Flanagan, Esq. of 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California.

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[1]All citations to statutes herein are in reference to the California Vehicle Code unless otherwise indicated.

FACTUAL OVERVIEW

3. Protestant is an exclusive Cadillac franchisee doing business at 1400 South Camino Real in San Bernardino, California, under a GM Dealer Sales and Service Agreement (DSSA) initially entered into in September 1995. For purposes of dealer network administration, GM establishes geographic APRs with one or more Cadillac dealerships in each, and within which each dealer is responsible for effectively selling, servicing and otherwise representing GM products. GM uses the APR to evaluate its market performance and to measure the dealers' sales and service performance. (Declaration of Gardiner S. Glenn, February 25, 2000)

4. The DSSA provides, in pertinent part, that GM reserves the right to modify the APRs and to establish additional franchises therein but will not do so without first analyzing dealer network planning considerations and providing notice and opportunity to comment to the APR dealers. (DSSA Article 4.2 and 4.3) Network planning considerations include the objective of a network of dealers appropriate in number, located properly, and having proper facilities to represent GM and to permit each dealer to achieve a reasonable return on investment. (DSSA Article 4.1).

5. An addendum to the DSSA assigned to Kennedy Cadillac the APR comprised of the vicinities and surrounds of Riverside and San Bernardino, and containing in addition to Kennedy Cadillac in San Bernardino, Dutton Cadillac in Riverside.

6. In mid 1999, GM began considering whether it should establish an additional dealership in Ontario, California, some 19 miles to the west of Protestant's location in San Bernardino. At that time Ontario was a vacant dealer point in the Pasadena/Ontario APR. That APR

included the eastern portion of Los Angeles County and was occupied by three existing Cadillac dealerships. GM compiled and analyzed new vehicle registration and demographic data and potential market opportunity in the subject area. GM then determined to establish an additional Cadillac dealership in Ontario based on the factors of (1) the absence of any Cadillac dealers within 15 miles of the proposed location, (2) the resulting adverse impact on customer convenience, (3) loss of market share in the study area, (4) increased household population, (5) the availability of market opportunity indicated by Cadillac's market penetration statistics for the state and the nation and, (6) the addition of major competing brand dealerships in the Ontario area. (Declaration of Glenn, idem., para. 7)

7. By letter dated September 27, 1999, GM advised Kennedy Cadillac of its tentative decision to establish an additional Cadillac dealership in Ontario and to modify Kennedy Cadillac's APR by combining it with the Pasadena/Ontario APR. The letter solicited relevant information or data from Kennedy Cadillac within thirty days for GM's consideration. (Declaration of Glenn, idem., Exhibit 3) On or about October 18, 1999, Kennedy Cadillac responded to GM with a six page letter opposing the additional dealership in several particulars based on recent sales trends and the potential adverse impact on existing Cadillac dealers, and asking for copies of GM's data and analysis. (Declaration of Jack Kennedy, Exhibit A) On November 23, 1999, GM announced its final decision to proceed with the proposed establishment and the changes to the geography of Kennedy Cadillac's APR. (Declaration of Glenn, idem., Exhibit 5)

8. Following the ALJ's denial of Respondent's Motion to Dismiss, GM notified Protestant on April 4, 2000, that it had rescinded its

decision to combine the Pasadena/Ontario APR and the San Bernardino/Riverside APR and had restored them to their original configurations. (Declaration of Glen, April 13, 2000, Exhibit 3) Although GM intends to proceed with the establishment of the additional dealership in Ontario, that location is no longer included in Protestant's APR as restored. It is the fact that Protestant's APR is no longer being modified that forms the basis for Respondent's motion.

ANALYSIS OF THE ISSUES PRESENTED

9. The April 6, 2000, ruling of the ALJ determined that questions of fact existed as to whether GM had adequately considered market conditions and network objectives as required by the DSSA before proceeding to modify the geography of Protestant's APR to establish an additional franchise therein. (Ruling of the ALJ, April 6, 2000, p. 7) The effect, in essence, of GM's decision to withdraw the combining of the Pasadena/Ontario and San Bernardino/Riverside APR is (1) that the geography of Protestant's APR is not modified, and (2) that the proposed additional franchise in Ontario is outside Protestant's APR.

10. Protestant contended at hearing on the Motion for Reconsideration that Article 4.3 of the DSSA requires GM to consider market conditions and dealer network objectives prior to establishing the additional franchise in Ontario even though Ontario is *outside* Protestant's APR.[2]

11. In determining the effect of Article 4.3, the Board must look first to the actual language of the DSSA. (*BMW of North America v. New*

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[2]It was established at the hearing on the Motion to dismiss that GM did perform some analysis of network planning considerations prior to its decision to combine the APRs and to add the Ontario dealership. The issue there was the adequacy of the analysis and whether it had been conducted in good faith.

Motor Vehicle Bd., 162 Cal.App.3d 980, 991) Article 4.3 states in full:

> Division reserves the right to appoint additional dealers but Division will not exercise this right without first analyzing dealer network planning consideration. Prior to establishing an additional dealer within Dealer's Area of Primary Responsibility, Division will advise Dealer in writing and will give Dealer thirty days to present relevant information before Division makes a final decision. Division will advise Dealer of the final decision, which will be made solely by Division pursuant to its business judgement. Nothing in this agreement is intended to require Dealer's consent to the establishment of an additional dealer.

12. Thus, by its own terms, Article 4.3 limits dealer notice and opportunity to comment to the appointment of additional dealers *within* a dealer's APR. Although Division may in all cases be required to first analyze dealer network planning considerations, the analysis would necessarily be focused upon the APR in which the additional dealership is to be added.

13. Carried to its logical extreme, Protestant's reading of Article 4.3 would require the Division to analyze network planning considerations in Protestant's APR for any additional dealer in any APR in the dealer network wherever located.[3] Such a result would not only be impracticable, it would be rendered ineffectual in that the requirement of dealer notice and opportunity to comment is expressly limited to appointments of additional dealers *within Protestant's APR.*

14. Clearly, Article 4.3 is not reasonably susceptible to Protestant's interpretation, and does not therefore require GM to analyze network planning considerations in Protestant's APR prior to

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[3]Protestant does not specifically argue that all other APRs must be analyzed, but does not explain why its particular APR should be analyzed if the others are not. In any case, the adequacy and good faith of GM's analysis of network planning considerations in an APR other than Protestant's APR are not contractual requirements arising from Protestant's DSSA.

establishing an additional dealer in the Pasadena/Ontario APR. Accordingly, the establishment of an additional dealer in Ontario cannot result in a modification of Protestant's franchise.

15. In consideration of the above and the evidence and argument presented, there being no further issues of fact to be resolved, it is the ruling of the ALJ that the Motion for Reconsideration should be and therefore, is hereby GRANTED. It is the recommendation of the ALJ to the Board that the Protest be dismissed without prejudice.

SO ORDERED.

DATED: April 26, 2000

NEW MOTOR VEHICLE BOARD

By Kenneth B. Wilson
KENNETH B. WILSON
Administrative Law Judge

Steven Gourley, Director, DMV
Tom Novi, Chief,
Occupational Licensing Branch, DMV