

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

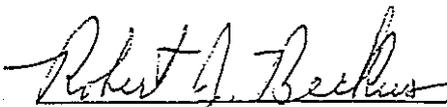
In the Matter of the Protests of:)
MCCLELLAN BUICK, INC.,) PROTEST NO. PR-1117-89
SEASIDE BUICK, INC.,) PROTEST NO. PR-1118-89
Protestants,)
vs.)
BUICK MOTOR DIVISION,)
GENERAL MOTORS CORPORATION)
Respondent.)

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above-entitled matter.

This decision shall become effective forthwith

IT IS SO ORDERED THIS 3RD day of APRIL, 1990.


ROBERT J. BECKUS
Board Member
New Motor Vehicle Board

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SEASIDE BUICK, INC.,) PROTEST NO. PR-1118-89
Protestants,) PROPOSED DECISION
vs.)
BUICK MOTOR DIVISION,)
GENERAL MOTORS CORPORATION)
Respondent.)

PROCEDURAL BACKGROUND

1. By separate letters dated August 1, 1989, Buick Motor Division, General Motors Corporation ("Buick"), 515 Marin Street, Suite 205, Post Office Box 5003, Thousand Oaks, CA, gave notice pursuant to California Vehicle Code section 3062^{1/} to McClellan Buick, Inc. ("McClellan"), 7675 University Avenue, La Mesa, CA, and to Seaside Buick, Inc. ("Seaside"), 6050 Balboa Avenue, San Diego, CA, of Buick's intention to establish Buick representation (with Marvin K. Brown Cadillac, Sterling, GMC

1. All statutory references are to the California Vehicle Code.

Trucks) in the vicinity of Interstate 8 and Mission Center Road, San Diego ("Mission Valley"). The notices stated that the establishment was to replace Buick representation (the former Peck Buick-Jeep-Eagle) at 3005 Midway Drive, San Diego, CA, ("Point Loma"). The notices were received by the New Motor Vehicle Board ("Board") on August 21, 1989.

2. On August 18, 1989, McClellan and Seaside filed separate protests. On September 7, 1989, the protests were consolidated for hearing.

3. The hearing was held before Robert S. Kendall, Administrative Law Judge of the Board, on November 6, 7, 8, 9, 15, 16 and 17 at San Diego.

4. Buick was represented by Wallace M. Allan, Esq., O'Melveny & Meyers, 400 South Hope Street, Los Angeles, CA, and L. Joseph Lines, III, Esq., General Motors Corporate Staff, New Center One Building, 3031 West Grand Boulevard, P.O. Box 33122, Detroit, MI.

5. McClellan and Seaside were represented by George John Murfey, Esq., 4180 La Jolla Village Drive, Suite 240, La Jolla, CA.

ISSUES PRESENTED

6. McClellan and Seaside allege that good cause exists for not permitting the establishment of the proposed dealership in Mission Valley for the following reasons:^{2/}

2. Section 3066 provides that Protestants have the burden of proving that there is good cause not to enter a franchise establishing an additional dealership.

a. Protestants' investments are permanent, and will be adversely affected {Section 3063(a)};

b. Such establishment will have an adverse affect on the retail motor vehicle business and the consuming public in the relevant market area {Section 3063(b)};

c. Such establishment will be injurious to the public welfare {Section 3063(c)};

d. The current Buick franchisees in the relevant market area are providing adequate competition and convenient consumer care for the owners of Buick vehicles in the market area, including adequate motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel {Section 3063(d)}; and

e. Such establishment will not increase competition and therefore will not be in the public interest {Section 3063(e)}.

FINDINGS OF FACT

Facts Relating To The Permanency Of The Investment

{Section 3063(a)}

7. McClellan was established in 1921 and has been selling Buicks at its present location since 1937. The present owner is Walter Edwin McClellan ("Walter McClellan"), the son of the founder. Walter McClellan was appointed the dealer principal in 1968, and in 1970 purchased the stock of the dealership for \$60,000. He is the president and 100% shareholder of McClellan and does not operate any other business nor sell any other brand name of automobiles.

8. McClellan has total assets of \$2,052,572. Of this, \$1,841,987 consists of liquid assets. The remainder, \$210,585, of the total assets, are less liquid. McClellan has total liabilities of \$1,605,681. Thus, if McClellan were liquidated, Walter McClellan could expect to receive a net profit of \$236,306 (liquid assets less liabilities) plus the amount he could realize on McClellan's illiquid assets.

9. Another asset of McClellan is its leasehold interest in the dealership premises. McClellan leases the land and improvements from the Walter McClellan family trust. The lease payments are \$7,570 per month.

10. Seaside was established in 1972 by Charles B. McLean ("McLean") who utilized a \$350,000 Small Business Administration loan and his personal resources to locate, construct, and commence operation of Seaside. McLean is the president and 100% shareholder of Seaside. Seaside is McLean's only business and he sells only Buick automobiles.

11. Seaside has total assets of \$4,420,236. Of this, \$4,048,246 consists of liquid assets. The remaining \$371,990 of the assets are less liquid. Seaside has total liabilities of \$2,694,594. Of that amount \$540,079 is owed to McLean as an accrued bonus and \$2,144,510 is owed to third parties. Thus, if Seaside were liquidated, McLean could expect to receive approximately \$1,900,000 (liquid assets less liabilities, exclusive of the accrued bonus), plus the amount he could realize on Seaside's illiquid assets.

12. Another asset of Seaside is its leasehold interest in the dealership premises. Seaside has a lease with a third

party. The lease expires in 2007, and the lease payments are \$9,397 per month.

13. The proposed new dealer is Marvin K. Brown ("Brown"). At Buick's suggestion, Brown, in 1988, attempted to purchase the assets of the Buick dealer in Point Loma, Peck Buick-Jeep-Eagle ("Peck"), but was rebuffed in his attempts. Peck and Buick negotiated an agreement in which Buick agreed to forego a termination of the franchise, and to buy Peck's assets for \$105,000 in exchange for Peck's relinquishment of the franchise. Subsequently, Buick and Brown agreed that if and when Brown became a Buick dealer, Brown would reimburse Buick for the \$105,000 it had paid Peck under the settlement agreement.

14. Brown, is the operator of Marvin K. Brown Cadillac, Sterling, and GMC Trucks ("Brown Cadillac"). Brown Cadillac has been in business since 1950. Brown plans to renovate and expand his Mission Valley dealership at an estimated cost of 1.5 to 2 million dollars. Although not all of this work will be solely for the benefit of Buick, it includes a new showroom for Buick, and alterations to the service facilities to physically separate Cadillac, Buick and GMC.

15. Brown operates his franchises on leased land. The lease expires in 2019.

Facts Pertaining To The Effect
On The Retail Motor Vehicle
Business and The Consuming Public
in The Relevant Market Area

[Section 3063(b)]

16. Buick has divided the San Diego Multiple Dealer Area ("MDA") into Areas of Geographic Sales and Service Advantage (AGSSA). An AGSSA is made up of census tracts or geographic areas which are closer and more convenient to the dealer in that AGSSA than other dealers of the same line-make. Each dealer or proposed dealer point in the MDA is assigned its own AGSSA. McClellan Buick is in AGSSA 4, Seaside Buick is in AGSSA 1 and Peck Buick was in AGSSA 2. Brown Cadillac would be assigned AGSSA 2. Except for variations resulting from the location of Brown Cadillac in Mission Valley and Peck in Point Loma, Brown Cadillac's AGSSA is the same as the AGSSA that previously existed for Peck.

17. The Peck location in Point Loma is a difficult area from which to market Buicks, because it is boxed in by Mission Bay, the airport and a number of military reservations. The site is not visible from Interstate 5. Peck's sales effectiveness had steadily declined for several years prior to its termination.

18. The greatest concentration of dealers in AGSSA 2 is in Mission Valley where 20 line-makes are represented. Nineteen of the 20, including Brown Cadillac, are in an "auto row."

19. Population and household growth in Mission Valley substantially exceeded growth in Point Loma between 1980 and 1989, and is projected to do so between 1989 and 1994. There will be no significant population growth in the Point Loma area, due to the existence of a park, the ocean, a cemetery, an airport and a Marine Corp depot. There is a greater household density around and near the proposed Mission Valley site than there is around the former Peck site.

20. The straight-line distances from Buick sites are as follows:

	Straight-Line Miles			Proposed Point
	Peck	Seaside	McClellan	
Peck	0	5.2	10.7	3.2
Seaside	5.2	0	9.6	4.0
McClellan	10.7	9.6	0	7.6
Proposed Point	3.2	4.0	7.6	0

21. The drive times and miles between the Buick sites are as follows:

	The Proposed Point		Peck Buick-Jeep-Eagle	
	Driving Miles	Driving Time	Driving Miles	Driving Time
McClellan	8.7	11 min. 39 sec.	12.2	16 min. 58 sec.
Seaside	6.1	10 min. 21 sec.	13.4	17 min. 31sec.

Differences Between Peck & Brown

	Driving Miles	Driving Time
McClellan	3.5 miles closer	5 min. 19 sec. less
Seaside	7.3 miles closer	7 min. 10 sec. less

22. Buick's sales performance in AGSSA 2 is well below its sales performance in the rest of the relevant market area ("RMA").^{3/} Below are the Buick market penetration figures for Buick in the RMA and AGSSA 2:

Area	1988		1989 (YTD 6/89)	
	Expected	Actual	Expected	Actual
RMA	3.87%	3.71	4.05%	4.15
AGSSA 2	3.40%	2.68	3.72%	2.85

Despite the fact that McClellan and Seaside are excellent dealers using their best efforts, they are not adequately serving AGSSA 2. Neither McClellan nor Seaside sell a significant number of cars into AGSSA 2. In the first six months of 1989, McClellan and Seaside sold 15 and 45 new vehicles, respectively, in AGSSA 2.

23. Other brands offer greater consumer convenience in terms of the average distance to the nearest dealer. The census tracts in which Buick's market penetration in San Diego exceed the national average are located primarily near existing Buick dealers, indicating that convenience is very important to achieving market penetration. Each existing San Diego Buick dealer's penetration is at its highest in the area within 4 miles of the dealership.

3. Vehicle Code section 507 defines "relevant market area" as any area within a radius of 10 miles from the site of a potential new dealership.

24. Population growth in the RMA has been substantial between 1970 and 1989 and is projected to increase further as indicated below:

Year	RMA Households	Total Population
1970	286,647	898,608
1980	387,299	1,044,276
1989	487,629	1,260,515
1994(projected)	547,134	1,394,659

25. Population growth in AGSSA 2 has also been strong.

Year	AGSSA 2 Households	Total Population
1970	100,794	269,712
1980	121,128	284,833
1989	151,432	334,674
1994(projected)	169,609	366,968

26. McClellan and Seaside submitted varying estimates of the sales they will lose if the establishment of the proposed dealership is permitted. Walter McClellan's estimate is 150 to 300 sales per year. McLean's estimate is 13% of Seaside's sales. Neither of these estimates is supported by the evidence. Although Protestants sell into AGSSA 2 as well as in all the other AGSSAs, the protestants tend to over-estimate how many new unit sales they have had in AGSSA 2. (See paragraph 22)

27. The addition of the proposed dealer is likely to stimulate the market for Buicks in San Diego. Of Buick buyers, 65.7% have shopped at other dealerships for other brands prior to purchasing a Buick. The location of the proposed dealer will make comparison shopping convenient and will stimulate competition for sales from other nearby dealers of competitive makes. In addition, the proposed dealer is likely to increase sales for all Buick dealers. Of Buick buyers, 58% have shopped at more than one Buick dealer prior to purchasing a Buick. Buick buyers may gain their first exposure to Buick at the proposed dealer, yet may make their actual purchase at protestants' dealerships. So long as protestants remain quality dealers offering competitive prices and service, they will have the opportunity of maintaining or increasing sales after the proposed dealer opens for business. This should not be a problem since both McClellan and Seaside are excellent dealers.

28. Both Walter McClellan and McLean admitted that they are not concerned about the establishment of an additional dealership as such but are concerned about the competitiveness

that will result if Brown becomes a Buick dealer. (See paragraph 30.)

Facts Pertaining To The Injury To Public Welfare

{Section 3063(c)}

29. The proposed dealer is located near a principal east-west freeway. While zoning restrictions prohibit the construction of a new automobile dealership in Mission Valley, the addition of a franchise to an existing dealership is permissible. The dealership expansion planned by the proposed dealer will meet General Motors' dealership guidelines. The proposed dealer will have separate sales facilities and sales staffs for each of his General Motors product lines. As a result, employment opportunities will initially be provided for 15 to 30 people. The improvements being made to the proposed site include off-street space for the loading and unloading of vehicle transporters. This will help avoid congestion in and around the dealership.

30. Brown is an aggressive dealer who will provide strong competition. In February 1988, Brown received from Cadillac the "Dewars Trophy", a customer satisfaction award. For 1988, Cadillac's evaluation of Brown Cadillac's sales performance compared to district registration performance was 154.32% and 141.50% compared to national registration. Based on purchases from March through September 1989, Brown Cadillac's Customer Satisfaction Index ("CSI") is 11th nationally of all Cadillac dealers.

31. Based on General Motors truck purchases through January 1989, surveyed through July 1989, Brown Cadillac's CSI ranking

showed a score 85, compared to a zone average of 83.

Facts Relating to Whether the Franchisees of the Same Line-Make in That Relevant Market Area Are Providing Adequate Competition and Convenient Consumer Care for the Motor Vehicles of the Line-Make in the Market Area Which Shall Include the Adequacy of Motor Vehicle Sales and Service Facilities, Equipment, Supply of Vehicle Parts, and Qualified Service Personnel

{Section 3063(d)}

32. Protestants introduced no specific evidence as to whether the existing Buick franchisees in the RMA are above or below the standards established by Buick, based on their assigned planning potential or their combined planning potential for the MDA in regard to the adequacy of facilities, equipment, parts, and qualified service personnel.

33. The proposed dealership will provide convenient access for the public. A new driveway/fire lane/service entrance is presently being constructed as is a used car pavilion. The second phase of construction will consist of remodeling the existing Cadillac showroom, the main building, and the construction of a service entrance for GMC trucks. Phase three will entail the construction of a showroom/sales pavilion for Buick and GMC trucks. The existing service drive will be expanded. A parts and apparel boutique will also be added.

34. The proposed dealership will provide the public with easy freeway accessibility, fine representation for service, and certain other benefits for the consumer such as roadside service, limousine service, restaurant facilities and a free car wash to service customers. Many of these benefits are presently being provided by the existing dealers, but the lack of Buick

penetration in AGSSA 2 indicates that such efforts are not inuring to the benefit of the consumers residing in that AGSSA.

35. The proposed dealership will share two parcels; consisting of a total of 7.45 usable acres, leased until 2019.

36. Buick utilized their facilities guide in examining the Brown site. Brown Cadillac has a planning potential of 1600 Buicks. Buick concluded that Brown will have sufficient showroom space, service stalls and will be able to accommodate all four line-makes and still meet the facilities guide. While Buick did not specifically review Brown's planned new car storage space, Brown would be able to arrange for off site storage of new cars if additional space is needed.

Facts Pertaining To Whether The Establishment
Of An Additional Franchise Would Increase
Competition And Therefore Be In
The Public Interest

{Section 3063(e).}

37. In the RMA, there are 4 distinct shopping areas or concentrations of dealerships: 1) Mission Valley (site of the proposed dealership); 2) National City (site of Harrison Buick^{4/}); 3) La Jolla (site of Seaside); 4) La Mesa-El Cajon (site of McClellan).

38. The high cost of real estate in Mission Valley precludes the possibility of building a stand-alone Buick dealership in that area. In addition, the zoning restrictions in Mission Valley prevent the construction of any new dealerships in that area.

4. Harrison Buick is also in the RMA, filed a protest but withdrew.

39. The following chart indicates the effectiveness of the protestants based upon sales:

	<u>McClellan</u>	<u>Seaside</u>
Dealers Sales Performance Compared to:		
State Registration	209.09%	143.51%
Zone/Branch Registration	191.67%	131.55%
National Registration	116.04%	79.64%

40. The following chart indicates the sales rank of the three Buick dealers in the RMA among all the Buick dealers in the Los Angeles Zone and includes the number of vehicles sold by each.

LOS ANGELES ZONE
RETAIL AND FLEET SALE RANKING

Rank	Dealer	Deliveries	Memo Fleet
1-1-85 through 12-31-85 (based on 60 dealers)			
8	Seaside	1398	639
21	Harrison	659	23
39	McClellan	492	1
1-1-86 through 12-31-86			
9	McClellan	1127	538
12	Harrison	1016	41
14	Seaside	826	97
1-1-87 through 12-31-87			
3	McClellan	1332	943
8	Harrison	1042	17
14	Seaside	572	30
1-1-88 through 12-31-88 (based on 65 dealers)			
6	McClellan	1358	812
12	Harrison	1136	not available
18	Seaside	723	87
1-1-89 through 9-30-89 (based on 66 dealers)			
6	McClellan	1111	773
9	Harrison	908	24
18	Seaside	518	18

41. Although the demographics indicate that some of the areas in the San Diego MDA would not support a Buick dealership, this is not the case. Buicks are being sold into areas of San Diego the residents of which do not fit the profile of the average Buick buyer.

42. In 1988, the average gross profits per new unit retailed by McClellan and Seaside were above the national average. The national average is \$1,212 per new unit retailed. McClellan averages \$1,514 and Seaside averages \$1,581 gross profit per new unit retailed.

43. Buick's share of the national market dropped from 9.2% in 1983 to 5.5% in 1988. However, the decline in the market share in the San Diego MDA was not as great as the decline in the national market. In 1989, Buick retained 97% of the 1985 MDA penetration.

	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
<u>Area</u>					
MDA	4.0	4.3	3.6	3.5	3.9
L.A.					
Zone	5.3	4.3	3.1	3.4	Not Available
National	7.9	6.8	5.5	5.5	Not Available

44. McClellan and Seaside belong to a multi-dealer advertising association which collectively spends money on county-wide advertising for Buick products. Brown will join the multi-dealer advertising association, thereby giving the association additional funding and increasing Buick's exposure in the marketplace.

Determination Of The Issues

The protestants have failed to prove there is good cause for not establishing the additional dealership in that:

1. Protestants established that their investments are permanent but failed to establish that their investments would be adversely affected {Section 3063(a)};

2. Protestants failed to prove that the establishment would have an adverse effect on the retail motor vehicle business and the consuming public in the relevant market area {Section 3063(b)};

3. Protestants failed to prove that the establishment would be injurious to the public welfare {Section 3063(c)};

4. Protestants failed to prove that there is adequate sales and service facilities, equipment, supply of vehicle parts and qualified service personnel {Section 3063(d)};

5. Protestants failed to prove that the establishment would not increase competition, and therefore would not be in the public interest {Section 3063(e)}.

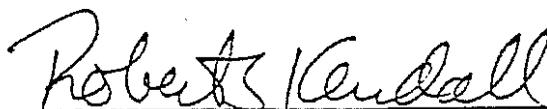
Proposed Decision

The following proposed decision is respectfully submitted:

The protests are overruled. Buick shall be permitted to establish the proposed dealership at 1441 Camino Del Rio South, San Diego, California.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing held before me on the above dates and recommend adoption of this proposed decision as the decision of the New Motor Vehicle Board.

Dated: March 9, 1990



ROBERT S. KENDALL
Administrative Law Judge
New Motor Vehicle Board