NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
Telephone: (916) 445-2080

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of SACRAMENTO VALLEY FORD TRUCK SALES, INC., Protestant, vs. STERLING TRUCK CORPORATION, a corporation, a subsidiary of FREIGHTLINER CORPORATION, a DaimlerChrysler Company, Respondent.	Protest No. PR-1702-00

DECISION

At its regularly scheduled meeting of September 10, 2002, the Public members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 10th DAY OF SEPTEMBER 2002.

GLENN E. STEVENS
Vice President
New Motor Vehicle Board

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PROCEDURAL BACKGROUND

1. By letter dated December 17, 1999, Respondent Sterling Truck Corporation (hereafter "Sterling") notified Protestant Sacramento Valley Ford Truck Sales, Inc. (hereafter "Sacramento"), pursuant to Vehicle Code Section 3060[1], of Sterling's intent to terminate Sacramento's franchise as a Sterling dealer. A copy of the notice was also served on the Board. Sacramento timely filed a Protest pursuant to Section 3060. On June 21, 2000, Sterling filed an Amended Notice of Termination, to

[1] All statutory references are to the California Vehicle Code, unless noted otherwise.

which Sacramento timely responded with an Amended Protest.

2. Sacramento is a corporation licensed to sell new motor vehicles in West Sacramento, California. It began business in 1980, and from 1980 through 1997, it was a franchised dealer of Ford Motor Company selling and servicing medium and heavy-duty Ford trucks.

3. Sterling was created in 1997 when Freightliner Corporation purchased the assets of Ford Motor Company's heavy truck division and created a new entity to assume those assets. The name of the primary truck model acquired was the HN80, and the new entity was temporarily named the HN80 Corporation, before the Sterling name was chosen.

4. In 1997, Sterling offered an HN80 Dealer Agreement to Sacramento, and every other Ford heavy-duty truck dealer which was in good standing with Ford and was willing to meet the commitments required by Sterling. Sterling sells its medium and heavy-duty trucks through a nationwide network of dealers that are divided into four geographic regions. Sacramento is one of eleven California dealers in the Western Region.

5. On January 1, 1998, Sacramento and Sterling entered into a Dealer Sales and Service Agreement, which was the subject of the letter of termination referred to above.

6. The Protest hearing was held on March 4, 5, 6, and 7, 2002, in Sacramento, California before J. Keith McKeag, Administrative Law Judge. Protestant was represented by Timothy D. Robinett, of Manning, Leaver, Bruder & Berberich, 5750 Wilshire Boulevard, Suite 655, Los Angeles, California. Respondent was represented by Roxana E. Cook and Brian W. McGrath, of Foley & Lardner, 777 East Wisconsin Avenue, Suite 3800, Milwaukee, Wisconsin. Post-hearing briefs were submitted by the parties and the matter was submitted for decision on August 1, 2002.

THE STATUTORY STANDARD

7. When, as here, a seasonable protest has been filed in response to a notice of intention to terminate a franchise, pursuant to Section 3060, the termination cannot go forward until a hearing has been held by the Board and a determination is made that "good cause" exists for the termination. Section 3066 provides that the burden of proof to establish that there is good cause to terminate a franchise is on the franchisor.

8. Section 3061 requires the Board to consider the existing circumstances including, but not limited to, all of the following:

(A) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(B) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(C) Permanency of the investment.

(D) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(E) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(F) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(G) Extent of the franchisee's failure to comply with the terms of the franchise.

FACTUAL BACKGROUND

9. Sterling is a wholly-owned subsidiary of Freightliner Corporation ("Freightliner").

10. Sacramento, at the time it entered the Sterling franchise, had three shareholders: Ford Motor Company, Deane Bistolfo, and Steven Smith. By the time of the hearing, Mr. Smith had gone to work for Sterling and was no longer a shareholder. In March 2002, Mr. Bistolfo was scheduled to buy out Ford Motor Company's interest in the dealership. At all relevant times, Mr. Bistolfo has been the President and General Manager of Sacramento.

11. Sacramento, during its time as a Ford truck dealer, did not have any sales objectives for trucks or parts imposed on it by Ford.

12. At the time Sacramento became a Sterling dealer, Sterling did not impose any sales objectives for trucks or parts, nor did it have a method for calculating such objectives. No sales objectives were set by Sterling for 1998, its first year of operation.

13. The Dealer Sales and Service Agreement ("Agreement") imposes a duty on the dealer to: "...conscientiously and diligently promote the sale of HN80 Products and obtain and maintain a reasonable share of the market for such products in Dealer's Area of Responsibility..."

14. The Agreement also recites that the dealer has signed an "Annual Operating Requirements Addendum" ("AORA"), and will sign a revised AORA each year which shall set "certain operational requirements" for the dealership. In fact, however, no AORA existed at the time the Agreement was executed, none was signed by Sacramento, and the provision in the Agreement does not describe in any way what the "operating requirements" will be. There is, for example, no indication that the AORA will impose sales objectives. The testimony of Sterling's

representatives is also clear that at the time the Agreement was executed no effort was made by Sterling to explain to dealers how any sales objective may be calculated in the future. The first AORA sent out by Sterling to Sacramento was in 1999 which, for the first time, advised Sacramento that it had a sales objective of 79 trucks and a parts purchase objective of $829,724.

15. The 1999 AORA was not accompanied by any explanation as to how the objectives had been set. Sacramento responded by letter dated March 4, 1999, in which it advised that, based on a review of the dealership's sales history over the prior four years, it did not think that the sales objectives were reasonable. It attached a revised copy of the 1999 AORA setting forth the figures it thought could reasonably be obtained, i.e., 13 trucks and $630,000 in parts.

16. Sterling responded by rejecting Sacramento's amended sales objectives. It also went on to explain that it had not reviewed or considered Sacramento's prior sales history, but that the AORA sales objectives for each dealer in the Region had been set by assigning to each dealer a share of the "target market share" which had been imposed on the Region by Sterling. Testimony developed that the "target market share" was derived by, first, determining the total number of trucks it hoped to sell in the U.S., having in mind Sterling's production capability, deducting the number of trucks it planned to sell directly, then allocating the remainder between the four regions based on the experience and judgement of the Vice Presidents of Sales. At that point each region's market share was divided by the total truck registrations in the region to arrive at a "target market share" for the region, i.e., the truck sales which should be captured by Sterling. This share was then applied uniformly to each dealer. To determine the number of

trucks which should be sold by the dealer, an effort was made to "purify" the registration data in each dealer's Area of Responsibility ("AOR") by deducting sales made directly by Sterling, finance lease transactions, sales to major leasing companies, and the like. Sterling has never checked to determine its actual market share for 1999, in order to determine whether its "target market share" was reasonable.

17. A similar process was followed by Sterling in 2000 and 2001, and AORAs were sent to each dealer, and made a part of their Agreements. The 2000 AORA set a 87 truck sale and a $844,700 parts purchase objective for Sacramento. The 2001 AORA set a 25 truck sale and a $903,377 parts purchase objective for Sacramento.

18. The Agreement also imposed on the dealer a responsibility to have its service operations "...open for business in accordance with company's published standards and directives." In August 1997, Sacramento had agreed that if it became a Sterling dealer it would staff its service department with two shifts Monday through Friday and one shift on Saturday and Sunday, and maintain a 24-hour per day emergency service including a 24-hour toll free telephone line manned by a qualified person. The Agreement, as executed as of January 1, 1998, is silent on this subject, recites that it is the sole agreement between the parties, and states that any prior agreements are not binding on the parties. Beginning in 1999, the AORAs have repeated the August 1997 requirement.

19. A major item of contention between the parties has to do with Sterling's failure/refusal to deduct the trucks purchased by the State of California and registered in Sacramento's AOR in computing Sacramento's penetration rate and in setting its truck sales objective. The State buys 90 to 95% of the trucks it uses throughout the state in

Sacramento County. In 1999, for example, it bought 307 heavy-duty trucks which were registered in Sacramento's AOR, and these became part of the "market" against which Sacramento's sales performance was measured.

20. Sterling admits that not one Sterling truck has been sold to the State of California since Sterling went into business in 1998. Sterling argues that this is because Sterling relies entirely on its dealers to sell its trucks to the State, and if no sales have been made it is the dealers' fault. Sacramento's management testified that it had tried to sell to the State, but that for the first two years of Sterling's existence it did not manufacture trucks with the options and specifications required by the State, and for the entire time of its existence it has refused to offer pricing which would make its trucks competitive. As an example, Sacramento presented evidence that in one of its unsuccessful bid attempts, the winning bidder was Freightliner (Sterling's parent company) which was able to offer trucks responsive to the bid request at a price approximately $3,000 less per truck than Sacramento could buy a similar truck from Sterling. Sacramento's management also testified without contradiction that Sterling personnel had often stated that they did not wish to compete in the "low margin" market of governmental sales.

21. The effect of including sales to the State in Sacramento's market is significant. If the 307 registrations in 1999 had been deducted, even at Sterling's "target market share" of 15.7%, it would have reduced Sacramento's Class 7 truck sales objective from 49 trucks to 23 trucks, i.e., a 53% reduction.

22. Sacramento also presented evidence tending to show that Sterling's "purification" process had not deducted all of the sales made

in Sacramento's AOR to leasing companies and lease finance units. If all of Sacramento's adjustments had been made, even at Sterling's target market share, the 1999 sales objective would have been reduced from 79 trucks to 51 trucks.

23. In 1999, the Western Region dealers as a group achieved 85% of the assigned sales objective, but this was because of very high performance by a few dealers. Seventy-percent of the dealers did not meet their objective, even though 1999 is described by Sterling as the biggest year in truck sales history.

24. Sterling determined that it would seek to terminate all of those dealers who had started on January 1, 1998, and who had not achieved 60% of the 1999 sales objective. The 60% cutoff figure was never communicated to any dealer. Sacramento was one of the dealers who received a notice of termination.

25. Sterling furnished its dealers with an explanation of how their parts purchase objective would be calculated. Sacramento presented an analysis which showed that the 1999 parts objective calculated by Sterling, $829,724, had not been computed pursuant to the explanation, and was excessive by $227,372. The parts objective should have been $602,352. Sacramento's parts purchases of $701,782 represented a 116.5% achievement of the properly computed objective. Sterling presented no evidence in opposition to the analysis.

26. On June 1, 2000, Sterling advised that Sacramento's hours of operation were insufficient, and demanded a cure. Sacramento responded that it was only open 12 hours per day Monday through Friday, rather than the required 18 hours, and not at all on weekends, because it could not find qualified technicians, due to the nationwide shortage of technicians then in effect. It noted that it did have a sufficient

number of qualified parts personnel to be able to offer parts sales service seven days per week. By the time of the hearing, Sacramento testified that the boom time of 1999 had been followed in 2000 and 2001 by recession in the trucking industry which meant there was little customer demand for weekend service or for 18 hour weekday service. Sacramento did note that it had never refused to provide a customer with requested weekend service.

27. Sacramento conceded that it had curtailed the 24-hour telephone emergency service line in January 2002, because since its installation in 1998 it had received only one call, and that was with regard to a Ford product. The line remains open until 7:00 p.m.

28. Sterling did not send any notices to cure to any dealers as to failures to achieve sales objectives in 2000 because of the downturn in the trucking economy and because it was already involved in litigation with the dealers it sought to terminate due to 1999 performance.

ANALYSIS

Has Sacramento Transacted an Adequate Amount Of Business Compared to the Business Available?

29. Based on its prior four years sales of the same types of Ford trucks which were now being produced by Sterling, Sacramento estimated that it would be able to sell 13 trucks in 1999. In fact, it sold 21. No evidence was presented as to what Sterling's market share was in 1999 in the relevant market area, the AOR, the Region, or the United States, so no comparison can be made between Sacramento's performance and a dealer who achieved the franchisor's penetration rate in any such comparable market; the standard commonly used to test a dealer's performance. The sales objective set by Sterling was based on production capability and hopes for nationwide sales. It was expressly

not based on any dealer's past performance. It was achieved by only 30% of the dealers in the Region. It did not set a standard of adequacy of sales compared to the business available.

30. The evidence presented by Sterling is not sufficient to support a finding that the sale of 21 trucks in 1999 was inadequate compared to the amount of business available to Sacramento. Sacramento's analysis of its market, based on its prior performance selling the same trucks, in the absence of any contrary evidence exhibiting comparable sales in comparable markets, has shown that its sales were adequate.

31. Sterling's termination notice was based on sales in 1999. It did not take action against any dealer based on sales in 2000 or 2001, due to a slowdown in the trucking economy. No comparison was furnished as to Sacramento's performance against Sterling's performance in any comparable market for those periods. Sacramento did sell 31 Sterling trucks in 2000. Sterling has not sustained its burden of proving that Sacramento did not transact an adequate amount of business compared with the business available to it in the years 2000 and 2001.

32. Sacramento's 1999 parts purchases of $701,782, exceeded Sacramento's estimate based on its prior parts purchase history, were 84.6% of the parts purchase objective imposed on it by Sterling, and 116.5% of the objective if computed in the manner which Sacramento asserts would comply with the explanation given by Sterling to its dealers of how the objective was to be computed. Under any of these results, the parts purchases were adequate when compared to the business available to Sacramento in the year which formed the basis for the notice of termination.

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What Investment Has Necessarily Been Made And What Obligations Incurred by Sacramento to Perform Its Part of the Franchise?

33. The dealership sits on an almost 7-acre parcel, and is housed in buildings of 15,000-17,000 square feet, owned by Ford Land Development. Sacramento has a 15-year lease which expires on December 31, 2015, with current monthly lease obligations of $15,667. The rent increases every five years.

34. In 1996, Sacramento spent $300,000 on site improvements in the nature of paving two additional acres, installing a cement parking area for storage of loaded trailers while trucks are undergoing repairs, and installing additional utilities to the buildings.

35. The dealership facility was designed expressly as a heavy and medium-duty truck dealership and repair facility. It has 14-feet high roll-up doors and heavy-duty lifts. Four new lifts were recently installed at a cost of approximately $76,000.

36. Sacramento has a flooring line of over $1.3 million, personally guaranteed by Mr. Bistolfo.

37. Sacramento recently committed to a new computer system at an initial cost of over $50,000, and monthly payments of over $3,000 per month. It has purchased software designed for communication with Sterling at a cost of $5,000 per year, and a dedicated T-1 line at a cost of $4,000, and a monthly cost of $800, for the purpose of communication with Sterling.

38. While many of these expenditures benefit the sale of both Ford and Sterling products, they cannot be separated and are relevant to an understanding of the investment in the dealership whether considered as a Sterling or a Ford Dealership. This is the case in every proceeding involving a dealership housing multiple lines of vehicles.

Is There a Permanent Investment in the Dealership?

39. The dealership has been in operation since 1980. It has been a Sterling dealer as long as Sterling has been in business. It is obligated under a 15-year lease, with payments of over $180,000 per year. The original investment in the dealership was $556,000. It currently employs over 30 people.

40. Sacramento's net worth at the end of 2001 was $735,832 and its working capital was in excess of $970,000.

41. The original cost of Sacramento's fixed assets were in excess of $750,000. By the end of 2001, these were carried on Sacramento's balance sheet, on a depreciated basis, at approximately $220,000.

42. While much of the investment benefits both the Sterling and Ford franchises, the investment is so intertwined that no valid separation can be made. It is clear that a permanent investment has been made in the dealership, to the benefit of both lines and the dealership as a whole.

43. An analysis of the permanency of investment should not be limited to a mere examination of the amount of a dealer's fixed assets or the percentage of fixed assets to total assets. A motor vehicle dealership, by its very nature, is in business to turn over the vast majority of its assets within one year, i.e., its vehicle and parts inventories. Such a business will always show a low ratio of fixed to current assets, even though it may have been in business for many years and all indications are that it will continue in business for many more, with the dealer's investment of capital, time and energy permanently tied up in the business. The concern of section 3061(c) is not with the amount or percentage of fixed assets as defined by accounting standards, but with whether the business which is threatened with termination is

one in which the dealer has made a long-term commitment of the sort of investments which are normally made in a new motor vehicle dealership which is anticipated to remain in business for the foreseeable future.

Would it Be Injurious or Beneficial to the Public Welfare For the Business of the Franchisee to Be Terminated?

44. Sacramento asserts, and Sterling denies, that termination of the Sterling franchise will also result in the failure of the Ford medium-duty truck franchise and the closure of the entire dealership. The testimony as to the Ford portion of the business was so scanty, and the testimony as to the financial effect of the loss of the Sterling franchise so speculative, that no conclusion can be reached on that issue.

45. As to the termination of the Sterling franchise, the evidence is undisputed that if Sacramento is closed, the only Sterling dealers in California south of the Oregon border would be located in Oakland and Ceres, until such time as a replacement dealer could be established.

46. It is not clear that a replacement dealer could be established in the foreseeable future. Sterling has had open sites in Redding and Reno since its creation, and they have not been filled. Sterling could only offer assurances that it would attempt to fill the void. Since it has not spoken to any candidates for the dealership, any reference to hopes for filling the void are necessarily speculative.

47. While Sterling states that it would attempt to provide warranty work on an emergency basis, the termination of Sacramento would necessarily be injurious to owners of Sterling trucks in Northern California who need warranty work of a non-emergency nature, and would be less than fully satisfactory for many of those seeking emergency warranty work. The under-representation in that area would also have an

adverse effect on competition for the sale of new heavy-duty trucks, both inter and intra-brand.

Does Sacramento Have Adequate Sales and Service Facilities, Equipment, Parts and Service Personnel, and Has it Been Rendering Adequate Service to the Public?

48. Sterling has made no attack on Sacramento's site, or its sales and service facilities. As described above, they were designed specifically as a heavy and medium-duty truck facility.

49. Sterling does assert that Sacramento has not sent its technicians to Sterling training classes as often as they are offered, and that it has not purchased all of the special parts required of it. It also offered testimony from the District Service Manager, who deals with the five Sterling dealers in Northern California, to the effect that he received more complaints from service customers as to Sacramento than the other dealers in his district. He estimated between ten to twenty since 1998, but provided details as to only three, and conceded that two of the problems describe involved complaints about matters for which a dealer is not responsible.

50. Sacramento presented testimony that it had the equivalent to all special tools required by Sterling, except for one, since it has been working on the same trucks as a Ford dealer for years. It explained that it had not purchased a "driveline vibration tool" because it had never had a repair job which required its use.

51. Sacramento also presented testimony that it has far more service technicians than are required by Sterling (11 vs. 2) and that those technicians are well-qualified since they have attended Ford training classes which met, and in some cases exceeded, the Sterling requirements. It became Blue Oval Certified by Ford in 2001, which required lengthy training. The fact remains, however, that since

Sterling acquired the line, some changes have been made which would require Sterling training, even though the Sterling Service Manager acknowledged that Ford's training programs generally met the industry standard.

52. Sacramento is open for business five days per week, twelve hours per day to provide service and parts to Sterling customers.

53. While it should send its technicians to Sterling training courses, especially those dealing with matters relevant to only Sterling vehicles, and obtain any special tools needed to perform work on Sterling vehicles, overall it has adequate sales and service facilities, equipment, parts and qualified service personnel to reasonably provide for the needs of the consumers of the Sterling products handled by it, and is rendering adequate service to the public.

Has Sacramento Failed to Fulfill the Warranty Obligations of Sterling Which it is to Perform?

54. The question here is whether the dealer adequately performs warranty work for customers, thereby fulfilling the manufacturer's warranty obligation to the customers. Both Sterling and Sacramento presented testimony and argument about whether Sacramento has been sending in its warranty repair claim forms to Sterling in a timely manner, whether the computer system for submitting claims was adequate, and other such matters having nothing to do with the issue posed by Section 3061(f).

55. Having determined above that Sacramento has been providing adequate service to the public, and having been presented with no evidence that Sacramento has failed to adequately perform warranty work in particular, it follows that Sterling has not sustained its burden to show that Sacramento has failed to fulfill Sterling's warranty

obligations to Sterling's customers.

To What Extent Has Sacramento Failed to Comply With the Terms of the Franchise?

56. Assuming that the AORA sent by Sterling to Sacramento in 1999 was not an unauthorized modification of the franchise, it set sales objectives, parts purchase objectives and service requirements which Sterling contends were breached, and which formed the basis of the notice of termination. These objectives and requirements are set out in detail above.

57. Sterling also contends that Sacramento is in breach of a Dealer Requirements and Commitments Agreement which preceded the execution of the franchise agreement. This contention is without merit. The franchise agreement expressly provides that it is the sole agreement between the parties and that there were no other agreements in existence at the time of its execution "which shall be binding between the parties."

58. The sales objective imposed on the dealer is calculated from two major elements, i.e., the size of the total market in the dealer's AOR as to which he is deemed to have access, and the market share or percentage of that total market which the dealer is expected to achieve. It is clear that Sterling, whether by design or failure, does not compete in the market for governmental sales, and the dealer in the market where those sales are registered should not be burdened with them in the setting of its objectives. This impropriety lends credence to Sacramento's claim that other sales to finance and lease companies were also improperly included in the computation. The share or percentage of the market which Sacramento, and every other Western Region dealer, was expected to achieve was based on nation-wide sales and production

forecasts, and no subsequent comparison of that percentage to actual sales in the Region or individual AORs has been made to test its validity.

59. The Agreement anticipates that sales performance evaluation will be made by reviewing a mixture of eight or more elements, such as achieving reasonable sales objectives, customer satisfaction, comparison with other dealers' performance, the trend of the dealer's performance over a period of time, conditions affecting the truck market in the dealer's AOR, and the like. Here, the only element reviewed was the sales objective, and there is doubt as to its reasonableness. No analysis or thought was given to any of the other elements set out in the Agreement, and by an unannounced and unilateral decision the achievement of a certain percentage of the sales obligation was made the sole criterion for remaining as a Sterling dealer. Good faith and fair dealing between parties to this sort of contract require that objectives be set and enforced reasonably, and that the potential standards of evaluation set out in the contract be chosen and utilized on a fair and even-handed basis. Sterling's method of setting standards and evaluating performance has not been shown to have been reasonable or to have been chosen as utilized in a fair manner.

60. Given these defects, and having in mind that 1999 was the first time that any objective was imposed on Sacramento, and that no notice was given that any particular percentage of non-achievement would result in termination, Sterling has not sustained its burden of proving that Sacramento has breached this aspect of the Agreement in a manner or degree which would provide good cause for the termination of the franchise.

61. As discussed above, the parts purchase objective was not

breached, and does not provide any cause for termination.

62. Sacramento is not in compliance with the hours of operation requirement imposed on it beginning in the 1999 AORA. Originally because of a lack of qualified technicians, and later because of lack of demand due to a recession in the truck market, Sacramento has been open twelve rather than eighteen hours per day Monday through Friday, and not open eight hours per day on Saturday and Sunday. No evidence was presented by Sterling as to whether this has had a substantial effect on Sterling or potential Sterling customers. Sacramento asserts that the hours have not been increased because there has been no demand for service during the expanded period. Sterling conceded that its present policy, albeit not expressed in an AORA, is that no service technician need be present on weekends, as long as one is on call. It also conceded that of the five northern California dealers, only one is in compliance with the hours of operation requirement. There is no indiction that termination proceedings have been instituted against any of the other dealers who are not in compliance.

63. Sacramento is also not in compliance with the requirement that it provide 24 hour emergency service and telephone imposed on it beginning in the 1999 AORA. No evidence was offered as to the nature and extent of the effect of this noncompliance on Sterling or its potential or existing customers. Sacramento testified that the service was discontinued because of lack of demand.

64. While technically in breach of the AORA requirements regarding hours of operation, emergency service and telephone hours, Sacramento is not guilty of the sort of material, substantial breach which would constitute good cause to terminate its franchise. Absent proof to the contrary, the uncontradicted testimony is that Sacramento has been able

to adequately meet its customers service requirements within its present hours of operation and methods of operation.

Issues Which Need Not Be Determined

65. Having determined that the requirements of the AORAs have not resulted in any breach which would give good cause for termination of Sacramento's franchise, the issue of whether the imposition of the AORA requirements constitutes a modification of the franchise agreement subject to the restrictions of Section 3060(b) need not be determined at this time.

66. Similarly, having determined that no good cause exists for termination of the franchise, the issues raised by Sacramento in the nature of affirmative defenses need not be determined at this time. These issues, in summary, assert Sterling's unfair treatment of Sacramento through refusal to provide the Acterra line or to allow Sacramento to participate in a parts return program due to the pendency of this action, and that the true reason for the termination is to get rid of a dual facility with Ford and/or obtain the site from Ford when this dealership closes as a result of losing the Sterling franchise. They are not needed as defenses to this proceeding due to the decisions reached above. If affirmative relief is to be sought as to these matters they are more properly subjects of a Petition under Section 3050, or court action, depending on the nature of the relief sought.

DETERMINATION OF ISSUES

67. Sacramento has conducted a sufficient amount of business, as compared to the business available to it.

68. Sacramento has made significant investment and incurred significant obligations to perform its part of the franchise.

69. Sacramento has made a significant permanent investment.

70. It would be injurious to the public welfare if the franchise were to be terminated and not replaced in a reasonably short time.

71. Sacramento has adequate sales and service facilities, equipment, vehicles and qualified service personnel to reasonably provide for the needs of the consumers for the Sterling trucks handled by it, and is rendering adequate service to the public.

72. Sacramento has not failed to fulfill the warranty obligations of Sterling to be performed by Sacramento.

73. Sacramento has failed to comply with some terms of the franchise, but they are not of such significance that they constitute a substantial or material breach of the agreement or constitute good cause to terminate the franchise.

74. Sterling has not established that good cause exists to terminate the franchise.

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PROPOSED DECISION

The protest of Sacramento is sustained. Respondent has not established that there is good cause to terminate Protestant's franchise.

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

Dated: August 15, 2002

By__________________________
J. KEITH MCKEAG
Administrative Law Judge

Steven Gourley, Director, DMV
Terri Thurlow, Chief,
Licensing Branch, DMV