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CERTIFIED MAIL

PR-1004-88

7 STATE OF CALIFORNIA
8 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of)
12 D. C. TERRY BUICK, INC.,)
13 Protestant,)
14 vs.)
15 BUICK MOTOR DIVISION,)
16 GENERAL MOTORS CORPORATION, et al.,)
17 Respondent.)

Protest No. PR-1004-88

DECISION

18
19 The New Motor Vehicle Board, acting through its public
20 members at its meeting of June 22, 1989, adopted pages one (1)
21 through paragraph A.1.g) of page twenty-five (25) of the
22 attached proposed decision of Administrative Law Judge Robert S.
23 Kendall.

24 The remainder of the proposed decision is not adopted as a
25 part of this decision.

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SACRAMENTO, CALIFORNIA 95814
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

D. C. TERRY BUICK, INC.,)	
)	
Protestant,)	Protest Number PR-1004-88
)	Petition Number P-179-88
vs.)	
)	
BUICK MOTOR DIVISION, GENERAL)	PROPOSED DECISION AND ORDER
MOTORS CORPORATION)	
)	
Respondent.)	
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PROTEST PROCEDURAL BACKGROUND

1. By letter dated October 17, 1988, Buick Motor Division, General Motors Corporation ("Buick"), 515 Marin Street, Suite 205, P.O. Box 5003, Thousand Oaks, California, gave notice pursuant to California Vehicle Code section 3060¹ to D.C. Terry Buick, Inc., ("Terry"), 122 Fifth Street, Huntington Beach, California, of Buick's intention to terminate Terry's franchise. Notice was received by the New Motor Vehicle Board ("Board") on October 20, 1988.

^{1/} All references are to the California Vehicle Code unless otherwise stated.

2. On November 15, 1988, Terry filed a protest with the Board pursuant to section 3060. (Protest Number PR-1004-88) The protest was filed against Buick's decision to terminate Terry's franchise.

3. On December 19, 1988, Terry filed an amended protest incorporating the allegations contained in the petition (Petition Number P-179-88) filed by Terry against Buick.

4. A hearing was held before Robert Kendall, Administrative Law Judge of the Board, in Los Angeles on January 23, 24, 25, 26, 27, and 31, 1989. Protestant was represented by A. Albert Spar of the law offices of Pilot, Spar and Siegler. Respondent was represented by Wallace M. Allan of the law firm of O'Melveny and Myers, and by Keith U. Landenberger of the General Motors Corporation Legal Staff.

PETITION PROCEDURAL BACKGROUND

5. On November 21, 1988, the Board received a document purporting to be a petition submitted pursuant to section 3050(c) by Terry and the city of Huntington Beach. The petition was not accepted for filing because both Terry and the city of Huntington Beach were named as petitioners. On December 27, 1988, Terry filed an amended petition with the Board. There has been no subsequent petition filed by the city of Huntington Beach. The petition named Buick and two Buick dealers as respondents. The Buick dealers are McCarthy Buick ("McCarthy") and Nabers Cadillac, Buick, Sterling ("Nabers"). The petition

alleged that Buick had unreasonably denied Terry's request for relocation to 19601 Beach Boulevard, Huntington Beach, California. Terry declared that McCarthy and Nabers were both located in the relevant market area and were indispensable parties to the proceedings.

6. On April 10, 1989, Terry, McCarthy, Nabers and Buick stipulated that the issues raised by the petition would be decided based on the evidence considered in the protest proceedings. The stipulation further provides "that section 3062 protest rights, if any, of Nabers and McCarthy concerning Terry's relocation shall not be affected in any way. In the event of a determination favorable to Petitioner as to its rights to relocate as prayed for in the Petition, a new hearing date shall be scheduled to afford the parties an opportunity to present evidence on the impact of such relocation on Nabers and McCarthy."

ISSUES RAISED BY THE PROTEST AND PETITION

7. In both the protest and petition, Terry asserts the following:

- a) Buick has unreasonably denied Terry's request for relocation.
- b) Any of Terry's deficiencies in sales and service are due primarily to its location and Buick's refusal to permit Terry's relocation.

- c) Terry has sustained damages as a result of Buick's long-term refusal to allow Terry's relocation.

8. Buick contends that good cause exists to terminate Terry's franchise and that Buick's refusal to permit Terry's relocation has been reasonable.

9. Terry has the burden of proof to establish that Buick has unreasonably withheld its consent to Terry's relocation requests and that Terry has sustained damages as a result thereof.

10. Pursuant to section 3066, Buick has the burden of proof to establish good cause to terminate the franchise.

11. In determining whether good cause exists for terminating a franchise, section 3061 requires the Board to take into consideration the existing circumstances, including, but not limited to the following:

- a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
(section 3061(a))
- b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
(section 3061(b))
- c) Permanency of the investment. (section 3061(c))

- 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. (section 3061(d))
- 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. (section 3061(e))
- f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. (section 3061(f))
- g) Extent of franchisee's failure to comply with the terms of the franchise. (section 3061(g))

FINDINGS OF FACT

I. FINDINGS PERTAINING TO TERRY'S RELOCATION ATTEMPTS

12. Terry was first franchised by Buick in 1935, at which time the principal was Daniel C. Terry. The dealership has been at the same address at 122 Fifth Street, Huntington Beach, California, since it was first franchised.

13. Robert C. Terry, the son of Daniel C. Terry, began working in the dealership as a young boy, and became dealer operator on the death of his father in 1967. He has been President and sole shareholder since 1967.

14. In the mid-1960s, the city of Huntington Beach began to undertake a redevelopment program for the downtown Main Street area in which Terry is located.

15. In 1967, Terry requested permission to relocate to Beach Boulevard. A majority of the other automobile dealers had previously moved out of the downtown area and had relocated to Beach Boulevard. Buick was aware of the city's redevelopment program and recognized the need to establish additional dealer representation in the rapidly growing Westminster area. Buick nonetheless denied Terry's request to relocate. Instead, Buick revealed plans to establish a new dealership at 15550 Beach Boulevard in Westminster, only a few hundred feet from the Huntington Beach city limits. This dealership was eventually established as McCarthy.

16. During the period between 1969 and 1979, the redevelopment agency's plans were to convert the property of Terry, along with the other properties in the Main Street area, into parking lots. Although the city of Huntington Beach had not yet moved to purchase the properties involved, it would not have made economic sense for the property owners to expand or develop knowing of the city's plans.

17. From the mid-1960s there has been a deterioration of the Main Street area resulting in the loss of many reputable businesses. A number of vacant lots have replaced once viable stores and an unsavory element has entered the neighborhood raising concerns about safety. It was not until 1983 that the city of Huntington Beach formally adopted the Main Street Project Area ("Project Area") redevelopment plan.

18. From 1967 to 1986, Terry continuously but unsuccessfully sought Buick's approval to relocate. Many of these requests were informal and were based on the continuing deterioration of the Project Area. Buick responded to each of these requests, whether formal or informal, by denying permission to relocate.

19. In 1978, Robert C. Terry, along with a partner, purchased land at 19000 Beach Boulevard, Huntington Beach, and submitted a formal relocation request to Buick. Buick denied the relocation request because, in its opinion, the relocation would have resulted in an uneconomically high rent factor for the dealership. The proposed relocation site was subsequently sold to a Honda dealer who built and still operates a dealership at that location.

20. In 1986, Terry submitted a formal request to relocate to 19300 Beach Boulevard, Huntington Beach. This request was approved by Buick on February 6, 1987, but not without internal disagreement. Buick's Dealer Organization Department.

recommended that the relocation request be denied, and that Terry's franchise be terminated as soon as the city of Huntington Beach acquired Terry's property. Buick's records revealed many requests by Terry to relocate, dating from the late 1960s. They also revealed that Buick had recommended that it no longer be represented in the city of Huntington Beach but that such recommendations "to discontinue dealer representation in Huntington Beach were never officially established with this dealer".

21. The recommendation referred to above was submitted to Buick, General Motors Customer Sales and Service Staff, Dealer Network Planning-MDA. This part of Buick's organization responded on January 12, 1987, as follows:

- Based on our review we recommend that D. C. Terry Buick be permitted to relocate as planned. We do not concur with Buick's request to disapprove of the relocation and to take a Stay-With-You-Discontinue position with this dealer for the following reasons:
 - o We believe that the operational difficulties of this dealership can be attributed, for the most part, to its poor location.
 - o The strong demographic growth of this AGSSA. Households grew 94% between 1970 and 1980 and 11% from 1980 to 1986.
 - o The increase in planning potential to 380 units, according to your hold file ANAHEIM/SA.
 - o The minimal impact on McCarthy and none on Bauer. Based on your holdfile, McCarthy would drop from a revised planning potential of 1060 to a proposed of 1000. Given that McCarthy's 1985 total Buick sales were 707 units, it would appear that significant opportunity exists within his own AGSSA to more than offset any impact from the relocation of D. C. Terry Buick. Further, while no file was created to determine the new planning potential distribution with the discontinuation of

D. C. Terry Buick, it is logical to assume that the majority of the 325 unassigned units of planning potential would accrue to McCarthy. This would result in McCarthy's sales effectiveness dropping further than the already unacceptable level of 64.4% to Zone. (Based on 9 months 1986 data).

- o This MDA was only 84% effective to Zone in 1985. The D. C. Terry AGSSA was only 74% effective.
- o Both McCarthy and Bauer have been historically quite profitable.

Your reference to a 1974 survey recommendation does not state the planning potential in effect in 1974, nevertheless we agree that generally a 380 planning potential does not justify a new facility, especially in the Los Angeles area. But this dealer has a plan that may work. We believe that he should be given the opportunity to relocate with our concerns well noted in the letter of approval. Accordingly, we recommend that Buick coordinate the necessary notifications with Mr. Fromm and approve this relocation.

22. Buick's February 6, 1987, approval was subject to many conditions, six of which are summarized as follows:

- a) The land would be acquired within 90 days of the date of the letter of approval and evidence of its purchase was to be submitted to Buick in writing.
- b) The move from 5th Street to the new location would be completed within one year. The completion date would be extended by Buick only if requested in writing at least 30 days before expiration of the one-year period.
- c) The premises would be appropriate for automobile dealership purposes and meet Buick's guides for a

dealership with a planning potential of 380 new motor vehicles.

- d) The final building plans would be subject to approval by Buick prior to awarding of any actual construction contracts and, thereafter, substantial changes would not be made without prior consent by Buick.
- e) The resulting annual rent equivalent expense would not be an amount that would be burdensome and place Terry in a noncompetitive position when compared to other General Motors' dealerships of like planning potential.
- f) Should the relocation result in a protest, Buick would not defend Terry's relocation before the Board or in court.

23. As a result of Buick's conditional approval of Terry's relocation, Robert C. Terry, on April 13, 1987, obtained an option to purchase the property at 19300 Beach Boulevard. The agreed purchase price for the property was \$1,900,000. A deposit of \$110,000 was placed in an escrow account which was to close August 28, 1987.

24. On March 17, 1987, McCarthy filed a protest with the Board, (Protest Number PR-877-87), protesting the proposed relocation of Terry.

25. Buick, whose approval for relocation was conditioned upon no other dealer protesting Terry's proposed move, refused to defend against the action brought by McCarthy. Terry thereupon obtained its own counsel to contest McCarthy's protest and filed a petition (Petition Number P-148-87) naming McCarthy and Buick as respondents.

26. Robert C. Terry, uncertain of the outcome of McCarthy's protest against the proposed relocation, was hesitant to close escrow on the 19300 Huntington Beach property on the scheduled date of August 28, 1987. Terry obtained, at a total cost of \$23,300, three extensions of the time in which to close escrow. These extensions were obtained in an effort to maintain the availability of the property pending resolution of the McCarthy protest. Despite the extensions, the escrow was not closed and Robert C. Terry forfeited his deposit of \$110,000 and lost the \$23,300 paid for the extensions of the option right.

27. Robert C. Terry continued to negotiate for the property at 19300 Beach Boulevard after the collapse of escrow, but was unable to negotiate a price and conditions that were acceptable to both parties. While trying to purchase the 19300 Huntington Beach property during this period, Robert C. Terry was negotiating with the city regarding another piece of land located at 19601 Beach Boulevard. This property is owned by the State of California, Department of Transportation ("Cal Trans"). The city of Huntington Beach has been negotiating with Cal Trans for several years in an effort to obtain the property

with the intention of making it available to Terry for its relocation.

28. The protest filed by McCarthy against Terry's relocation to 19300 Beach Boulevard and the petition filed by Terry were settled between the parties and dismissed by the Board on March 9, 1988.

29. In February 1988, the city of Huntington Beach had finally completed acquisition of Terry's dealership property at 122 5th Street for a price of \$1.45 million plus a relocation allowance not to exceed \$150,000. Subsequently, the city purchased Terry's property at 214 5th Street for \$315,000. The city plans to demolish Terry's facilities at the 5th Street locations as soon as Terry has vacated the premises.

30. Terry presently remains in possession of the property under a lease with the city of Huntington Beach at an agreed rent of approximately \$9,000 per month. As part of the acquisition agreement, the city waived the rent on the property for the first six months. Mr. Terry then requested and was granted a waiver of the rent for an additional three months.

31. The Cal Trans property at 19601 Beach Boulevard is adjacent to property currently owned and occupied by Terry Leasing, a wholly owned subsidiary of Terry.

32. The city of Huntington Beach and Cal Trans have reached an agreement, the results of which are as follows:

- a) The city is to purchase the Cal Trans property for fair market value at the time of sale.
- b) The city is currently leasing from Cal Trans the northern portion of the property adjacent to Terry Leasing and is subleasing it to Terry.
- c) The city intends to sell all of the Cal Trans property to Terry when it is acquired from Cal Trans.

33. On July 6, 1988, Terry gave Buick written notice of the change in its proposed relocation from 19300 to 19601 Beach Boulevard. Buick refused to approve the relocation to 19601 Beach Boulevard because Terry had failed to comply with the conditions enumerated in Buick's letter of February 6, 1987.

34. Beach Boulevard is an auto-row on which are located many dealers of various line makes. Many manufacturers and distributors are represented by dealerships in both Huntington Beach and Westminster. Buick appointed McCarthy in Westminster knowing that it was necessary for Terry to relocate. Buick also knew that the only viable alternative for Terry, in Huntington Beach, would be the Beach Boulevard auto-row on which all the car dealers in Huntington Beach are located. Buick now contends that, because McCarthy is on the northern portion of Beach

Boulevard, Terry will not be viable if allowed to relocate to the southern end of Beach Boulevard.

35. The proximity of Terry and McCarthy is the result of Buick's own planning in establishing McCarthy on Beach Boulevard very close to the Huntington Beach city limits. Buick's contention that the relocation should not be allowed because there is insufficient market for Terry to be viable is directly contrary to the fact that Buick approved Terry's relocation to 19300 Beach Boulevard and the presently proposed location is only three blocks away.

36. On October 17, 1988, Buick gave Terry notice of its intention to terminate Terry's franchise.

II. FINDINGS PERTAINING TO DAMAGES SUSTAINED BY TERRY AS A RESULT OF BUICK'S REFUSAL TO ALLOW TERRY'S RELOCATION

37. Although Terry alleged that it sustained a loss of five million dollars in profits over the last ten years due to Buick's refusal to permit relocation, no evidence was submitted sufficient to establish either causation or amount of such damages.

III. FINDINGS PERTAINING TO GOOD CAUSE TO TERMINATE THE FRANCHISE

A. Amount of Business Transacted By the Franchisee, as Compared to the Business Available to the Franchisee (section 3061(a))

38. Terry's sales performance is set out in the chart below:

<u>YEAR</u>	<u>BUICK SALES BY TERRY</u>
1983	215
1984	162
1985	135
1986	63
1987	17
1988	8

39. In addition to the above, Terry Leasing leased or sold 260 vehicles during 1987 and 168 vehicles during 1988 through July 31. These were new vehicles of various line-makes that were purchased by Terry Leasing and then leased or resold.

40. General Motors measures a dealer's sales efficiency by evaluating the dealer's penetration of its market area and comparing it to the sales penetration of other Buick dealers in the zone and in the nation. The chart below represents the average performance of Buick dealers in the Los Angeles zone and in the nation. A rating of 100% would indicate that the dealer has achieved average performance as compared to other Buick dealerships. Buick considers a rating of 85% to be the minimum rating a dealer must achieve to be considered "sales effective".

TERRY SALES EFFICIENCY AS COMPARED TO ZONE AND NATION

<u>YEAR</u>	<u>ZONE</u>	<u>NATION</u>
1983	63.8	40.2
1984	45.8	29.7
1985	33.3	22.8
1986	20.9	13.2
1987	8.4	4.7
1988	2.0	1.3

41. Buick identifies for each of its dealers an area denominated as their Area of Geographic Sales and Service Advantage (AGSSA). A dealer's AGSSA is determined by the location of the dealership and the distance and driving time from the dealership to the surrounding Buick dealerships. It is used to identify that area where the dealer would enjoy a competitive advantage over all other dealers of the same line-make within the multiple-dealer area based solely on geographic location.

42. In 1987, there were a total of 121 new Buicks registered in Terry's AGSSA. Of these, only eight (6.5% of the 121 registered) were sold by Terry. The average Buick dealer accounts for 50.6% of the Buick registrations in its AGSSA.

B. Investments Necessarily Made and Obligations Incurred by the Franchisee to Perform Its Part of the Franchise (section 3061(b))

43. Robert C. Terry inherited the dealership, including property and buildings, after the death of his father in 1967. Robert C. Terry produced no evidence as to the investment in the original acquisition of property, construction costs, improvements, or lease obligations.

44. Although Robert C. Terry testified that his investment in the dealership amounted to \$1.4 million, as reflected on the Terry financial statement of November 1988, the actual amount of the investment was not substantiated.

45. Terry is one of the oldest businesses in the city of Huntington Beach and has been a Buick franchisee at its original location since 1935.

46. Because of the planned redevelopment of Huntington Beach, which had its inception in the mid-1960s and continued for a period of over 20 years, Terry did not attempt to expand or improve the dealership facilities. Rather, Terry attempted to obtain Buick's approval to relocate to the Beach Boulevard auto row as have all other dealers.

C. Permanency of the Investment (section 3061(c))

47. The city of Huntington Beach paid \$1.7 million for the property on which Terry was located. Terry no longer has any assets in which there is a permanent financial investment.

48. The absence of permanency of financial investment is due to the acquisition of the property by the city of Huntington Beach, and Buick's refusal to consent to Terry's relocation.

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 (section 3061(d))

49. If Terry were terminated, the average distance a retail customer in Terry's AGSSA would have to travel to a Buick dealership would increase from 2.19 to 3.36 miles. This is based on 1987 Retail Registrations. With Terry in operation, a retail customer residing in the Orange County area (Multiple Dealer Area, or MDA), would on the average be 3.57

miles from the nearest Buick dealer. Without Terry the distance would be 3.63 miles.

50. In the event Terry is terminated, the average distance a Buick customer residing in the MDA, would have to travel to a Buick dealer would increase .06 miles, from 3.37 miles to 3.42 miles.

51. The following chart compares the average distances to a Buick dealership, with and without Terry, to average distances potential customers would have to travel to dealerships of some of the other line makes within the Anaheim-Santa Ana MDA.

AGSSA NAME	BUICK WITH TERRY AVG. MILES	BUICK W/OUT TERRY AVG. MILES	CHRYSLER	CHEV.	DODGE	FORD	HONDA
Fullerton	3.30	3.30	5.87	1.88	3.57	1.78	2.76
Anaheim	2.91	2.91	2.77	2.12	2.69	1.98	2.73
Santa Ana	3.15	3.15	2.68	2.74	3.20	3.76	2.75
Westminster	3.43	3.43	3.19	2.53	3.11	2.25	3.09
Costa Mesa	3.90	3.90	3.45	3.00	3.17	3.55	3.51
Huntington Beach	2.19	3.36	3.09	2.19	3.19	2.10	1.80
Yorba Linda	2.90	2.90	7.68	3.51	7.63	2.99	7.53
Laguna Hills	5.08	5.08	6.43	6.35	3.34	4.34	3.62
TOTALS	3.57	3.63	4.30	3.18	3.48	2.94	3.35

52. The above chart shows that with or without Terry Buick, the levels of customer convenience offered by Buick are commensurate with the levels offered in other AGSSAs in the area.

53. The minimal impact upon the distance potential customers will be from a Buick dealer in the event of termination of Terry is due to the fact that Buick established McCarthy in Westminster in close proximity to Terry.

54. If Terry is terminated, the city of Huntington Beach will lose between \$150,000 to \$200,000 a year in revenue.

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 (section 3061(e))

55. There is no dispute that the sales and service facilities from which Terry has been operating are inadequate. Terry had known for years that it had to relocate and that its property would be acquired by the city of Huntington Beach. The property has been acquired by the city, but Terry continues to occupy the premises under a lease from the city, the express term of which has expired. Prior to the sale to the city, Terry's poor location in the deteriorated downtown area of Huntington Beach resulted in poor sales performance and little demand for service.

56. Since May 13, 1988, Terry has been on a "cash on delivery" basis with Buick for the purchase of parts. No evidence was introduced to show any customer dissatisfaction with Terry's ability to supply service or parts.

57. Terry employs one full-time service person and one part-time technician. The full-time employee also serves as service manager and parts manager. Neither of the two service employees have had Buick-sponsored service training within the last three years.

58. Terry employs three sales employees who spend much of their time at Terry Leasing and work at Terry Buick as the need arises.

F. Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee (section 3061(f))

59. Terry's warranty work declined from \$90,000 in 1985 to \$1,800 for the first 11 months of 1988. No evidence was introduced to show any customer dissatisfaction with Terry's ability to fulfill warranty obligations.

60. During 1988, the average Buick dealer in the Los Angeles zone performed \$38,022 per month of warranty work in 1988 compared to Terry's average warranty work per month of \$1,603.

G. Extent of Franchisee's Failure to Comply with the Terms of the Franchise (section 3061 (g))

61. The General Motors Sales and Service Agreement ("Agreement") states the following:

2.3 Sales Performance

Section 2.3.1 Dealer is responsible in Dealer's Area of Primary Responsibility for:

- (a) actively and effectively selling and, if Dealer elects, renting and leasing new Motor Vehicles; and

(b) actively and effectively promoting, through Dealer's own advertising and sales promotion activities, the purchase and use of new Motor Vehicles.

62. As previously found, Terry has a 2% sales efficiency rating as compared to the other Buick dealers in the Los Angeles zone.

63. In 1988, Terry's advertising budget was \$370 per month compared to an average expenditure of \$27,067 per Buick dealer in the Los Angeles zone.

64. Section 2.6 of the Agreement obligates Terry to maintain at least \$104,000 in working capital. Since 1982, in every year except 1988, Terry has maintained a negative net working capital. Terry's most recent operating report shows net working capital of \$99,000.

65. Since 1982, Terry has consistently reported financial losses. As of November 1988, Terry's total cash available was \$200.

66. In July of 1985 General Motors Acceptance Corporation ("GMAC") suspended Terry's wholesale financing until Terry reduced its inventory. To date GMAC has not reinstated the financing other than on a "car by car" basis, with each purchase requiring prior approval by GMAC. In an attempt to obtain vehicles from Buick more quickly, Terry purchased vehicles on a cash basis with payments made by cashier's checks. However,

even after the vehicles had been received by the Los Angeles zone, Terry would not receive the vehicles from Buick for as long as 7 weeks after payment. As an alternative, Terry bought Buicks from other dealers and thus did not receive credit on its sales efficiency report.

67. In September of 1988, Terry requested that the Independence Bank of Encino be approved as Terry's new financing source. Buick refused to approve the Independence Bank and neither Terry nor the bank were given any reason for the rejection.

DETERMINATION OF ISSUES

A. Protest

1. It is determined that:

- a) Buick has established that Terry does not transact an adequate amount of business compared to the business available to it. (section 3061(a)) However, Terry has established that its inability to transact business was substantially attributable to Terry's poor location, the impending acquisition of Terry's property by the city of Huntington Beach, and Buick's refusal to approve Terry's relocation requests.
- b) Buick has established that Terry has not incurred the necessary investment and obligations to perform its part of the franchise. (section 3061(b)) However, Terry has established that its absence of investment and obligations was substantially attributable to Terry's poor location, the impending acquisition of Terry's property by the city of Huntington Beach, and Buick's refusal to approve Terry's relocation requests.

- c) Buick has established that Terry has no permanency of investment. (section 3061(c)) However, Terry has established that its absence of permanency of investment was substantially attributable to Terry's poor location, the impending acquisition of Terry's property by the city of Huntington Beach, and Buick's refusal to approve Terry's relocation requests.
- d) Buick has failed to establish that it would not be injurious or that it would be beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted. (section 3061(d))
- e) Buick has established that Terry does not have 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 Terry and that Terry has not been and is not rendering adequate services to the public. (section 3061(e)) However, Terry has established that its inability to provide adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers was substantially attributable to Terry's poor location, the impending acquisition

of Terry's property by the city of Huntington Beach, and Buick's refusal to approve Terry's relocation requests.

f) Buick has failed to establish that Terry has failed to fulfill the warranty obligations of Buick. (section 3061(f))

g) Buick has established that Terry has failed to comply with certain terms of the franchise. (section 3061(g)) However, Terry has established that its failure to comply with certain terms of the franchise was substantially attributable to Terry's poor location, the impending acquisition of Terry's property by the city of Huntington Beach, and Buick's refusal to approve Terry's relocation requests.

B. Petition

1. It is determined that:

a) Buick's course of conduct over the years in denying Terry's relocation requests was unreasonable.

b) Terry did not establish the existence of any damages caused by the refusal of Buick to allow Terry to relocate.

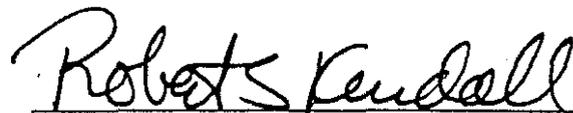
The following decision is respectfully submitted:

1. Buick shall permit Terry to relocate to the property at 19601 Beach Boulevard, Huntington Beach.
2. Within 30 days of the date of this decision, Buick shall give notice pursuant to Vehicle Code section 3062 of Buick's intention to allow Terry to relocate.
3. Terry shall be permitted and is required to commence operation at that location as soon as it is practical for Terry to do so, subject to the limitations of Vehicle Code section 3062.
4. Within one year of the date of this decision, or one year after resolution by the Board of any protests against such relocation, or within one year after the land at 19601 Beach Boulevard becomes available for use by Terry for the Buick franchise, whichever of these dates is latest, Terry shall provide facilities which comply with Buick's standards and Terry shall meet all other requirements of Buick for a franchise at that location.

5. The protest is conditionally sustained. Buick shall not be permitted to terminate the franchise of Terry unless Terry fails substantially to comply with the requirements of paragraphs 3 and 4 above. If Terry does fail substantially to comply with paragraphs 3 and 4 above, Buick shall be permitted to terminate the franchise of Terry.
6. The prayer in the petition for monetary damages is denied.
7. The Board shall retain jurisdiction over this matter for the purpose of determining the parties' compliance with the terms hereof and the extent of occurrence of any of the conditions herein.

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

DATED: June 12, 1989



ROBERT S. KENDALL
Administrative Law Judge
New Motor Vehicle Board

