

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

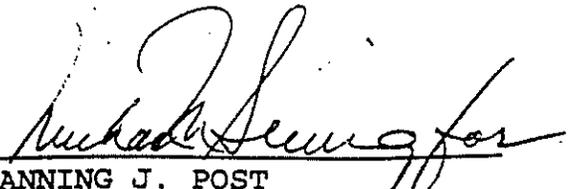
In the Matter of the Protest of)
)
RAY FLADEBOE LINCOLN-MERCURY,) **Protest No. PR-1462-95**
INC.,)
)
)
Protestant,)
)
)
vs.)
)
)
FORD MOTOR COMPANY, LINCOLN-)
MERCURY DIVISION,)
)
)
Respondent.)
)
_____)

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 11th day of June 1996.


MANNING J. POST
President
New Motor Vehicle Board

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6 STATE OF CALIFORNIA
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8 In the Matter of the Protest and)
9 Petition of)
10 RAY FLADEBOE LINCOLN-MERCURY,)
INC.,)
11 Protestant)
12 vs.)
13 FORD MOTOR COMPANY, LINCOLN-)
14 MERCURY DIVISION,)
15 Respondent.)

Protest No. PR-1462-95

PROPOSED DECISION

16
17 PROCEDURAL BACKGROUND

18 1. By letter dated August 15, 1994, Ford Motor Company,
19 Lincoln-Mercury Division (hereinafter "Lincoln-Mercury") gave
20 notice to Ray Fladeboe Lincoln-Mercury (hereinafter "Fladeboe"),
21 pursuant to Vehicle Code Section 3060¹, of Lincoln-Mercury's
22 intention to terminate the Lincoln-Mercury franchise held by
23 Fladeboe. The notice of termination was received by the Board on
24 March 8, 1995.

25 2. Fladeboe is a licensed new motor vehicle dealer
26 enfranchised to sell Lincoln-Mercury vehicles. Fladeboe is

27
28 ¹ All statutory references are to the Vehicle Code unless otherwise noted.

1 located at 16-18 Auto Center Drive, Irvine, California.

2 3. Ray Fladeboe is the dealer principal of Fladeboe.

3 4. Lincoln-Mercury is a manufacturer and distributor of
4 new motor vehicles in California.

5 5. Fladeboe filed a protest on April 8, 1995 with the
6 Board, pursuant to § 3060.² The Board assigned Protest Number
7 PR-1462-95.

8 6. Fladeboe filed a petition on October 13, 1995 with the
9 Board, pursuant to §§ 3050 and 11713.3. The Board assigned
10 Petition Number P-344-95.

11 7. On October 27, 1995, Protestant filed a Motion to
12 Change Place of Hearing from Sacramento to Los Angeles.

13 8. On October 30, 1995, the Board ordered the protest and
14 petition consolidated for purposes of hearing.

15 9. On October 31, 1995, the Board denied the motion to
16 change the place of hearing from Sacramento to Los Angeles.

17 10. On November 9, 1995, Protestant filed with the Orange
18 County Superior Court a Peremptory Writ of Mandate seeking to
19 compel the Board to set aside its decision denying Protestant's
20 motion to change the place of hearing from Sacramento to Los
21 Angeles. Protestant concurrently filed an Ex Parte Application
22 for an Order Staying the Hearing Before the New Motor Vehicle
23 Board in the Matter of Ray Fladeboe Lincoln-Mercury vs. Ford
24 Motor Company, Lincoln-Mercury Division.

25
26 ² Fladeboe's protest was originally received by the Board
27 on February 24, 1995. Lincoln-Mercury failed to serve a copy of
28 the notice of termination on the Board. This defect was cured by
stipulation of the parties and the action was deemed filed on
April 8, 1995.

1 11. On November 15, 1995, the Court denied Protestant's ex
2 parte application for a stay of the administrative hearing before
3 the Board.

4 12. On November 29, 1995, Protestant filed with the Board a
5 Motion in Limine to Change Place of Hearing From Sacramento to
6 Los Angeles or Orange County. The motion sought to move the
7 place of the hearing or to at least conduct that part of the
8 hearing involving witnesses from Southern California in either
9 Los Angeles or Orange County.

10 13. Administrative Law Judge Drake issued an Order on
11 November 29, 1995, granting Protestant's motion to have
12 witnesses' testimony taken in Orange County on the condition
13 Protestant pay the expenses of the Board. The motion was granted
14 for the convenience of non-expert and non-employee witnesses.

15 14. The hearing on the Peremptory Writ of Mandate was
16 continued to November 29, 1995 before the Honorable Francisco F.
17 Firmat. The peremptory writ of mandate was denied and
18 Administrative Law Judge Drake's ruling on the motion to take
19 witness testimony in Los Angeles was determined to be "well-
20 reasoned and not an abuse of discretion."

21 15. A fifteen (15) day hearing was held before Douglas H.
22 Drake, Administrative Law Judge, commencing on November 29, 1995
23 and ending on January 11, 1996.

24 16. Protestant was represented by A. Albert Spar, Esq. and
25 Paige E. Budd, Esq. of Parker, Milliken, Clark & O'Hara, 333
26 South Hope Street, 27th Floor, Los Angeles, California.

27 17. Lincoln-Mercury was represented by J. Keith McKeag,
28 Esq. of Downey, Brand, Seymour & Rohwer, 555 Capitol Mall, 10th

1 Floor, Sacramento, California.

2 18. Lincoln-Mercury was also represented by David R.
3 Kelleher, Esq., Office of the General Counsel, Ford Motor
4 Company, 1500 Park Lane Towers West, 3 Park Lane Boulevard,
5 Dearborn, Michigan.

6 19. Currently, there are two public member vacancies on the
7 Board. There is not a quorum to conduct business with respect to
8 petitions. Separate proposed decisions for the protest and
9 petition were drafted to accommodate this. The proposed decision
10 on the petition will be withheld until such time as the Board can
11 meet with a quorum of members as required by section 3010.

12 CONTENTIONS OF THE PARTIES

13 20. Fladeboe contends Lincoln-Mercury offered no evidence
14 as to Fladeboe's performance under subparagraph 2(a) of the Sales
15 and Service Agreement and failed to meet its burden of proof,
16 i.e., good cause for termination has not been established.
17 Furthermore, Lincoln-Mercury sought to introduce evidence by
18 Forrest Brown, James Anderson, and Kathy Anderson as to grounds
19 and causes for termination not specified in either the Notice of
20 Termination or in the Lincoln-Mercury Sales and Service
21 Agreements.

22 21. Lincoln-Mercury contends the evidence presented by it
23 fully supports the Notice of Termination issued to Fladeboe, and
24 good cause has been established to terminate the Sales and
25 Service Agreements. Furthermore, Fladeboe was "obligated to
26 obtain a reasonable share of sales at retail in the dealer's
27 locality." The methodologies utilized by Lincoln-Mercury's
28 expert, James Anderson, show that "Fladeboe failed to obtain a

1 reasonable share of retail sales, . . . [and] Fladeboe was the
2 worst-performing dealer in terms of retail sales in the entire
3 Southern California market area."

4 ISSUES PRESENTED

5 22. Section 3066 imposes upon Lincoln-Mercury the burden of
6 establishing the existence of good cause to terminate or refuse
7 to continue the franchise of Fladeboe.

8 23. In determining whether good cause has been established
9 for terminating or refusing to continue a franchise, section 3061
10 requires the Board to take into consideration the existing
11 circumstances, including but not limited to:

- 12 (a) Amount of business transacted by the franchisee, as
13 compared to the business available to the franchisee.
14 (b) Investment necessarily made and obligations incurred by
15 the franchisee to perform its part of the franchise.
16 (c) Permanency of the investment.
17 (d) Whether it is injurious or beneficial to the public
18 welfare for the franchise to be modified or replaced or
19 the business of the franchisee disrupted.
20 (e) Whether the franchisee . . . has been and is rendering
21 adequate service to the public.
22 (f) . . .
23 (g) Extent of franchisee's failure to comply with the terms
24 of the franchise.³

25 ///

26 ///

27
28 ³ The parties stipulated to consider only the above-
referenced good cause factors. IV:1:7-5:1.

1 FINDINGS OF FACT

2 a. Facts relating to the amount of business transacted by
3 the franchisee, as compared to the business available
4 to the franchisee. (§ 3061(a))

5 24. A Primary market area (PMA) is a grouping of
6 geographical areas of census tracts around a dealer. James
7 Anderson, President of Urban Science Applications, Inc., defined
8 a PMA as "the area where a Lincoln-Mercury dealer like Fladeboe
9 maintains a competitive edge due solely to its geographic
10 location over all other Lincoln-Mercury dealers in the Orange
11 County area. Basically, it's that territory that's most
12 convenient or more convenient to Fladeboe than to any other
13 Lincoln-Mercury dealer in Orange County."

14 25. The number of households is growing in Orange County.
15 The number of households in Fladeboe's PMA is increasing compared
16 to the rest of the Orange County Multiple Point ("OCMP").

17 26. There are three to four dealers within a 5 to 20 minute
18 drive of the Fladeboe location.

19 27. Orange County is a good growth market in the automobile
20 business.

21 28. Population is growing in Fladeboe's area at the expense
22 of other dealers' areas in Orange County.

23 29. Population of households increased in Orange County in
24 1980-1990 and is expected to increase through 1997 at a rate
25 faster than the national average.

26 30. Fladeboe's location meets three chief criteria of
27 marketing: (1) auto rows; (2) highways; and (3) shopping
28 centers. It is in a good location and is in a major growth area
of Orange County.

1 31. Household incomes were highest in Fladeboe's market
2 area for 1990 and projected to stay the highest.

3 32. Planning area is not used for dealer performance.
4 Planning volume is not used to evaluate dealer sales performance.

5 33. Based on Lincoln-Mercury's 1993 Market Study, Fladeboe
6 is responsible for selling 15.7% of Mercury units and 17.9% of
7 Lincoln units in the Orange County area.

8 34. Competition within the dealer body is healthy, improves
9 customer satisfaction and relationships between dealers and
10 customers.

11 35. Fladeboe's expert witness, Terry Munoz, contends in
12 terms of expected sales for calendar year 1994, Fladeboe would be
13 expected to sell 479 units; it sold 299.

14 36. Fladeboe is performing within 60.2% to 72.8%
15 effectiveness in comparing Fladeboe business to the business
16 available to it.

17 37. According to James Anderson, even if you add fleet
18 sales into the above analysis, Fladeboe's sales effectiveness is
19 only 40% of average in Orange County for 1994 based on Fladeboe's
20 shares of responsibility as set by Lincoln-Mercury.

21 38. However, the 40% is a meaningless number. It does not
22 mean Fladeboe had higher sales effectiveness until you also
23 adjust the fleet opportunity within the OCMP and assign that
24 share to this particular dealer. Furthermore, the other dealers
25 in the multiple point were not ranked.

26 39. From 1977 through August 1995, Fladeboe's efforts to
27 achieve regional average were only realized once, in 1989. In
28 1989, Fladeboe's market share equaled or exceeded the average

1 market share achieved by dealers in the OCMP. Since 1990,
2 Fladeboe's sales and penetration performance were between 53% and
3 76% of regional average penetration.

4 40. **FLADEBOE SALES PERFORMANCE**

5 **AS A PERCENTAGE OF OPPORTUNITY AVAILABLE**

6 <u>Year</u>	<u>National</u>	<u>West Region</u>	<u>California</u>	<u>Orange**</u>	<u>Irvine</u>
7 <u>PMA</u> 1992	32%	56%	57%	58%	65%
8 1993	35%	53%	54%	63%	60%
9 1994	33%	48%	49%	55%	56%
10 6/1995 CYTD*	45%	63%	***	77%	72%

11 NOTE: 1992 includes Fladeboe Villager sales but not Villager
12 expectation.

13 Adjusted For Local Product Popularity

14 * Annualized

15 ** Orange County Multiple-Point represented PMAs less the Irvine
16 PMA

17 *** Six months of 1995 data for the State of California were not
18 available when Mr. Anderson did his study so he was not able
19 to look at that one extra bar.

20 41. Sales effectiveness was less for 15 months in 1993 and
21 1994, due to I-5 construction that modified Auto Center Drive.

22 42. The reason Santa Ana Lincoln-Mercury sells more cars
23 than Fladeboe is that fifteen (15) years ago its started a
24 successful lease program and Ray Fladeboe did not.

25 43. Sales by other dealers to resellers and exporters for
26 which these dealers report to Lincoln-Mercury and the Department
27 of Motor Vehicles as retail sales inflate the retail sales of
28 other dealers and result in a lower percentage of sales reflected
in Fladeboe's sales effectiveness.

1 44. Elimination of Fladeboe will result in the same number
2 of dealers in Orange County as the last several years because the
3 San Juan Capistrano point only became operational in November of
4 1995.

5 45. If Fladeboe is terminated, a new dealer will be
6 appointed to Fladeboe's location in a short period of time.

7 b. Facts relating to investment necessarily made and
8 obligations incurred by the franchisee to perform its
9 part of the franchise. (§ 3061(b))

10 46. Ray Fladeboe has been a Lincoln-Mercury dealer since
11 1961. Mr. Fladeboe's first Lincoln-Mercury dealership was
12 located in Bellflower, California. Since 1977, Fladeboe has been
13 located in Irvine, California.

14 47. The Fladeboe facility in Irvine is located on 5.5
15 acres. Three (3) separate showrooms house Lincoln-Mercury-Isuzu,
16 Honda, and Volkswagen-Hyundai. One service drive accommodates
17 Lincoln-Mercury and Isuzu. The other service drive is used by
18 Honda, Hyundai, and Volkswagen. Approximately 24 service bays
19 are dedicated to the Lincoln-Mercury franchise. Certain areas of
20 the facility are specified for certain franchises, but other
21 areas can be changed depending on the type of customer flow into
22 the service drive and how many specialized technicians are
23 required for a particular franchise.

24 c. Facts relating to permanency of the investment.
25 (§ 3061(c))

26 48. Ron Secko, Fladeboe's Certified Public Accountant,
27 determined an allocated estimate of the permanency of the
28 investment for the Lincoln-Mercury franchise as follows:

///

1	Parts and Equipment	\$252,465
	Fixtures	\$679,260
2	Retained earnings	\$324,451
	Computer	\$ 71,963
3		
4	TOTAL	<u>\$1,328,140</u>

5 49. Fladeboe would lose the value of his goodwill if he is
6 terminated.

7 d. Facts relating to whether it is injurious or beneficial
8 to the public welfare for the franchise to be modified
9 or replaced or the business of the franchisee
10 disrupted. (§ 3061(d))

11 50. Ray Fladeboe is a good, reputable dealer. Ray Fladeboe
12 is an honorable, good businessman.

13 51. The average air distance Fladeboe's actual customers
14 currently are to the nearest Lincoln-Mercury dealer if Fladeboe
15 was not in the network is 6.4 miles.

16 52. The average consumer, if Fladeboe is terminated, would
17 have to travel 8.1 miles to a dealer rather than 7.3 miles to
18 Fladeboe.

19 53. Fladeboe has an adequate sales structure.

20 54. Fladeboe employs from 18 to 50 people who work
21 exclusively for the Lincoln-Mercury franchise. These include
22 specialized technicians.

23 55. John Mecke, the Los Angeles Regional Manager, believes
24 a more aggressive dealer and competitive dealer would treat
25 customers better.

26 56. Non-warranty work could be done at San Juan Capistrano
27 Lincoln-Mercury, Santa Ana Lincoln-Mercury, or Tuttle Click Ford.
28 Emergency warranty work could be done at Tuttle Click Ford.

57. Warranty work for Fladeboe customers could be done at
San Juan Capistrano Lincoln-Mercury, only 14-15 minutes away, or

1 Santa Ana Lincoln-Mercury, only 12 minutes away.

2 e. Facts relating to whether the franchisee has been and
3 is rendering adequate service to the public.
(§ 3061(e))

4 58. Lincoln-Mercury conducts surveys of Quality Commitment
5 Performance (QCP) monthly.⁴

6 59. QCP scores are determined by a statistically correct
7 method.

8 60. Lincoln-Mercury measures QCP by sending questionnaires
9 to customers and measuring not only the response, but also the
10 non-response to questions to determine that the pattern of
11 response for non-responders is similar to that of responders.

12 61. According to John Mecke, Fladeboe is not rendering
13 adequate service to the public as measured by the consumers and
14 its service customers' feedback contained in the QCP surveys.

15 62. Fladeboe's history of QCP ranking is as follows:

	<u>1991</u>	<u>1992</u>	<u>1993</u>
16 Fladeboe's QCP Score	7.31	7.86	7.59
17 Fladeboe's Rank in Group	18 of 19	15 of 17	60 of 63
18 Group QCP Score	8.01	8.39	8.32

19 63. Prior to 1991, Fladeboe's QCP scores were as follows:

	<u>1988</u>	<u>1989</u>	<u>1990</u>
20 Fladeboe QCP Score	5.68	5.68	6.62
21 Fladeboe's Rank in Group	20 of 21	22 of 24	17 of 18

22 ///

23 ///

24

25 _____
26 ⁴ CSI which stands for Consumer Satisfaction Index is used
27 by other franchisors as a measure of the public service provided
28 by a particular franchise. Lincoln-Mercury calls this measure
QCP.

1 64. Fladeboe QCP responses are as follows:

	<u>1991</u>	<u>1992</u>	<u>1993</u>
3 QCP Score	7.31	7.86	7.59
4 Fladeboe Aver. Customer Response	Very Satisfied (Lower 50%)	Very Satisfied (Upper 50%)	Very Satisfied (Upper 50%)
6 Lincoln-Mercury Aver. Customer Response	Very Satisfied (Upper 50%)	Very Satisfied (Upper 50%)	Very Satisfied (Upper 50%)

8 The Consuming public is very satisfied with Fladeboe's
9 performance.

10 65. For the period September 1994 to August 1995, the
11 customers at Fladeboe were predominately very satisfied or
12 completely satisfied with the overall purchase experience.

13 66. For the period September 1994 to August 1995, the
14 customers at Fladeboe were predominately completely satisfied
15 with the preparation of vehicles.

16 67. For the period September 1994 to August 1995, the
17 customers at Fladeboe were predominately completely satisfied
18 with the service.

19 68. For the period September 1994 to August 1995, the
20 customers at Fladeboe would definitely recommend Fladeboe.

21 69. Fladeboe sales personnel are put through a 21-day
22 training program and for the first 60 days are paid a salary plus
23 commission.

24 70. Incentives and bonuses are available for sales
25 personnel, service writers and technicians, and other personnel
26 for improving QCP.

27 71. Fladeboe holds QCP training programs at least one time
28 per week, and a department head calls every customer with a

1 problem to make sure the customer is happy and satisfied.

2 72. The Sandy Corporation is an outside consulting firm
3 which holds courses that Ford Motor Company offers to help
4 dealers improve their QCP scores. Michael Nadolson, Parts and
5 Service Director, utilizes the Sandy Corporation's methods and
6 procedures to try to obtain the goals set by Lincoln-Mercury.
7 Mr. Nadolson is of the opinion that the methods instituted at the
8 Sandy Corporation's behest have not increased Fladeboe's QCP
9 scores.

10 73. Ray Fladeboe maintained a "Silver Shoes" program,
11 instituted originally by Ford back in the 1960's, whereby the
12 employee puts himself/herself in the customers shoes to assure
13 customer satisfaction. All personnel meeting the public wear the
14 Silver Shoe emblem.

15 74. Ray Fladeboe encourages employees to attend the Sandy
16 Corporation meetings and to attend all training offered by
17 Lincoln-Mercury.

18 75. Fladeboe's service hours are from 7:00 a.m. to 7:00
19 p.m., Monday through Friday, and 8:00 a.m. to 5:00 p.m. on
20 Saturday.

21 76. Fladeboe maintains two buses and two drivers to pick-up
22 and deliver customers, without charge.

23 77. If Fladeboe is terminated as a Lincoln-Mercury dealer,
24 it would have to terminate the employment of 11 technicians, 5 to
25 6 lot porters, 1 to 2 service advisors, 2 to 3 parts people, and
26 various others in sales and management.

27 ///

28 ///

1 f. Facts relating to the extent of franchisee's failure to
2 comply with the terms of the franchise. (§ 3061(g))

3 78. There are six (6) primary multiple points which make up
4 the greater metropolitan area as Lincoln-Mercury views its dealer
5 representation throughout the Southern California area.

6 79. A multiple point "is an area where it has been
7 determined through ongoing market studies that are conducted
8 every three to five years that the area where our customer base
9 lives has a tendency to shop more than just one dealer, whether
10 that's a Ford dealer, a Lincoln-Mercury dealer, or a competitive
11 dealer. And that, in fact, that geographical area is an area
12 where there is either a need or already exists two or more
13 dealers that actually vie and compete and market their goods and
14 services to that greater geographical area."

15 80. Paragraph 2(a) of the Lincoln-Mercury Sales and Service
16 Agreement specifically provides in pertinent part that the
17 Dealer's performance of his sales responsibilities for cars shall
18 specifically be measured by:

19 RESPONSIBILITIES WITH RESPECT TO VEHICLES

20 2(a) Sales. The Dealer shall promote vigorously and
21 aggressively the sale at retail (and, if the Dealer
22 elects, the leasing and rental) of **VEHICLES to private
23 and fleet customers within the DEALER'S LOCALITY**, and
24 shall develop energetically and satisfactorily the
25 potentials for such sales and obtain a reasonable share
26 thereof; but the Dealer shall not be limited to the
27 DEALER'S LOCALITY in making sales. To this end, the
28 Dealer shall develop, maintain and direct a trained,
quality vehicle sales organization and shall conduct
throughout each model year aggressive advertising and
sales promotion programs relating to VEHICLES.

The Dealer's performance of his sales
responsibility for VEHICLES shall be measured by such
reasonable criteria as the Company may develop from
time to time, including:

1 (1) The Dealer's sales of VEHICLES to private and
2 fleet users located in the DEALER'S LOCALITY as a
percentage of:

3 (i) all private and all fleet registrations
4 of VEHICLES in the DEALER'S LOCALITY,

5 (ii) all private and all fleet registrations
of COMPETITIVE VEHICLES in the DEALER'S LOCALITY,

6 (iii) all private and all fleet
7 registrations of INDUSTRY VEHICLES in the DEALER'S
LOCALITY, and

8 (iv) the private and fleet sales objective
9 for VEHICLES established by the Company for the Dealer
from time to time.

10 (2) If the Dealer is not the only authorized
11 dealer in VEHICLES in the DEALER'S LOCALITY, the
following factors shall be used in computing
12 percentages pursuant to 2(a)(1) above:

13 (i) The Dealer's sales of VEHICLES to users
located in the DEALER'S LOCALITY **shall be deemed to be**
14 **the total registrations thereof in the DEALER'S**
LOCALITY multiplied by the Dealer's percent of sales of
15 all VEHICLES made by all authorized [Lincoln-Mercury]
dealers located in the DEALER'S LOCALITY unless the
16 dealer or the Company shows that the Dealer actually
has made a different number of such sales,

17 (ii) The registrations of VEHICLES and
18 COMPETITIVE and INDUSTRY VEHICLES in the DEALER'S
LOCALITY against which the Dealer shall be measured
19 shall be the total thereof multiplied by the Dealer's
PERCENT RESPONSIBILITY, and

20 (iii) The Dealer's objectives for
21 VEHICLES shall be the total objectives thereof of all
authorized [Lincoln-Mercury] dealers in the DEALER'S
22 LOCALITY multiplied by the Dealer's PERCENT
RESPONSIBILITY.

23 (3) A comparison of each such percentage with
24 percentages similarly obtained for all other authorized
[Lincoln-Mercury] dealers combined in the Company's
25 sales zone and district in which the Dealer is located,
and where subparagraph 2(a)(2) applies, for all other
26 authorized [Lincoln-Mercury] dealers combined in the
DEALER'S LOCALITY.

27 (4) In evaluating any comparisons provided for in
28 subparagraph 2(a)(3) above, the Company shall give
consideration to the availability of VEHICLES to the

1 Dealer and other authorized [Lincoln-Mercury] dealers
2 and any special local marketing conditions that might
3 affect the Dealer's sales performance differently from
4 the sales performance of COMPETITIVE or INDUSTRY
5 VEHICLE dealers or other authorized [Lincoln-Mercury]
6 dealers.

7 (5) The sales and registration data referred to
8 in this subparagraph 2(a) shall include sales to and
9 registrations in the name of leasing and daily rental
10 operations and shall be those utilized in the Company's
11 records or in reports furnished to the Company by
12 independent sources selected by it and generally
13 available for such purpose in the automotive industry.
14 In the event such reports of the registrations and/or
15 sales of INDUSTRY or COMPETITIVE VEHICLES in the
16 DEALER'S LOCALITY are not generally available, the
17 evaluation of the Dealer's sales performance shall be
18 based on such registrations and/or sales or purchase
19 data as can be reasonably obtained by the Company.

20 The Company will provide to the Dealer an evaluation of
21 his performance under this subparagraph 2(a) from time
22 to time as initiated by the Company, or not more than
23 once a month upon the written request of the Dealer
24 (emphasis added).

25 81. The term locality, as it applies to Fladeboe, refers to
26 the Orange County Multiple Point ("OCMP"). Fladeboe is located
27 in the OCMP, which is substantially coextensive with the
28 boundaries of Orange County, along with six other Lincoln-Mercury
dealers. Fladeboe is located in the southern half of the OCMP,
in an auto mall fronting on Interstate 5 in the city of Irvine.
The nearest Lincoln-Mercury dealer to the north is Santa Ana
Lincoln-Mercury, located in an auto mall fronting on Interstate 5
in the city of Tustin. The nearest Lincoln-Mercury dealer to the
south as of 1995 is San Juan Lincoln-Mercury in the city of San
Juan Capistrano.

82. The notice of termination was issued because "of
Fladeboe's continued failure to fulfill its responsibilities of
achieving satisfactory sales and penetration performance under

1 subparagraph 2(a) [of the Lincoln-Mercury Sales and Service
2 Agreement]."

3 83. A franchisor may not assert "good cause" for a
4 franchise termination at the hearing on any ground not asserted
5 in its notice of termination. British Motor Car Distributor,
6 Ltd. v. New Motor Vehicle Board 194 Cal. App. 3d 81, citing
7 American Isuzu Motors, Inc. v. New Motor Vehicle Board 186 Cal.
8 App. 3d at p. 477.

9 84. Lincoln-Mercury has been dissatisfied with Fladeboe's
10 sales performance compared to regional average for the past ten
11 (10) years. There is a long-term, consistent pattern of poor
12 performance in the area of market share and a contributing poor
13 performance in the area of customer satisfaction when compared to
14 all of Lincoln-Mercury's normal standards of comparison.
15 Fladeboe has repeatedly been one of the worst performing dealers
16 in terms of market share and customer satisfaction.

17 85. Fladeboe consistently performed in the lower quartile
18 within its assigned dealer grouping.

19 86. James Anderson concedes that it is practically
20 impossible to identify a unique geographic area that would
21 contain most of the sales of a dealer like Fladeboe or any of the
22 other Lincoln-Mercury dealers in that county and, at the same
23 time, be the principal source of Lincoln-Mercury vehicles to the
24 consumers in that area. Consumers migrate throughout the Orange
25 County area and shop at two or three different Lincoln-Mercury
26 dealers before they end up purchasing that vehicle. That kind of
27 phenomena is what Mr. Anderson calls "cross-sell."

28 87. In his analysis, Mr. Anderson elected to use average

1 dealer performance throughout the United States instead of
2 measuring performance by the Orange County Multiple Point, i.e.
3 the dealer's locality.

4 88. Both California and the Western Region area fell short
5 of the national average in penetration so Mr. Anderson used the
6 national average as his baseline even though the Dealer Sales
7 and Service Agreements measure sales performance based on the
8 dealer's locality.

9 89. Fladeboe spends approximately \$25,000 per month in
10 advertising for the Lincoln-Mercury franchise. It advertises on
11 local television, in the Orange County Register, the Los Angeles
12 Times, and local trade papers, such as, the Pennysaver and the
13 Shopper.

14 90. Advertising monies were increased in 1994 and 1995 to
15 offset the road construction which impeded access to Fladeboe.
16 The construction of Interstate 5 resulted in the loss of
17 approximately 70 parking spaces.

18 91. Presently, Fladeboe is working on a strong leasing
19 program by tracking and trailing its customers. Ray Fladeboe
20 anticipates a substantial increase in sales when the lease
21 returnees come back to Fladeboe after the lease term expires.

22 92. The Board determined in Kon Tiki Motorcycle v. Kawasaki
23 Motors Corporation, USA, Protest No. PR-179-78 that "the amount
24 of (retail sales) business transacted by Kon Tiki has been low as
25 compared to the business available to it. This, however, is
26 insufficient in itself to meet the burden of proof imposed upon
27 the franchisor by section 3066 to show good cause as set forth in
28 section 3061 to terminate the franchise."

1 g. Facts relating to whether the franchisee has adequate
2 motor vehicle sales and service facilities, equipment,
3 vehicle parts, and qualified service personnel to
4 reasonably provide for the needs of the consumers for
5 the motor vehicles handled by the franchisee.
6 (§ 3061(e))

7 93. There is a failure of proof on any inadequacy in these
8 areas. Lincoln-Mercury concedes that there are adequate
9 facilities, parts, equipment and employees.

10 **DETERMINATION OF ISSUES**

11 94. Lincoln-Mercury failed to establish good cause to
12 terminate the franchise of Fladeboe in that:

13 a) Lincoln-Mercury established that Fladeboe is not
14 transacting an adequate amount of business as compared to the
15 business available to it.

16 b) Lincoln-Mercury failed to establish that the
17 investment necessarily made and the obligations incurred by the
18 franchisee were insufficient to enable it to perform its part of
19 the franchise.

20 c) Lincoln-Mercury failed to establish that
21 Fladeboe's investment was not permanent.

22 d) Lincoln-Mercury failed to establish that it would
23 be injurious to the public welfare for the franchise to be
24 modified or replaced or the business of the franchise disrupted.

25 e) There is a failure of proof that the franchisee
26 did not have adequate motor vehicle sales and service facilities,
27 equipment, vehicle parts, and qualified service personnel to
28 reasonably provide for the needs of the consumers for the motor
vehicles handled by the franchisee. Lincoln-Mercury failed to
establish that the franchisee has not been rendering adequate

1 services to the public.

2 f) Lincoln-Mercury failed to establish that the franchisee
3 failed to fulfill the warranty obligations of the franchisor to
4 be performed by the franchisee.

5 g) Lincoln-Mercury failed to establish that the franchisee
6 failed to comply with the terms of the franchise.

7 95. Lincoln-Mercury offered no evidence as to Fladeboe's
8 performance under subparagraph 2(a) of the Sales and Service
9 Agreements, and failed to meet its burden of proof as imposed by
10 §§ 3060 and 3066, but sought to introduce evidence by Forrest
11 Brown, James Anderson, and Kathy Anderson as to grounds and
12 causes not specified either in the Notice of Termination or in
13 Paragraph 2(a) of the Lincoln-Mercury Sales and Service
14 Agreements.

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PROPOSED DECISION

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2 1. The franchise of Fladeboe shall not be terminated. The
3 protest is sustained.
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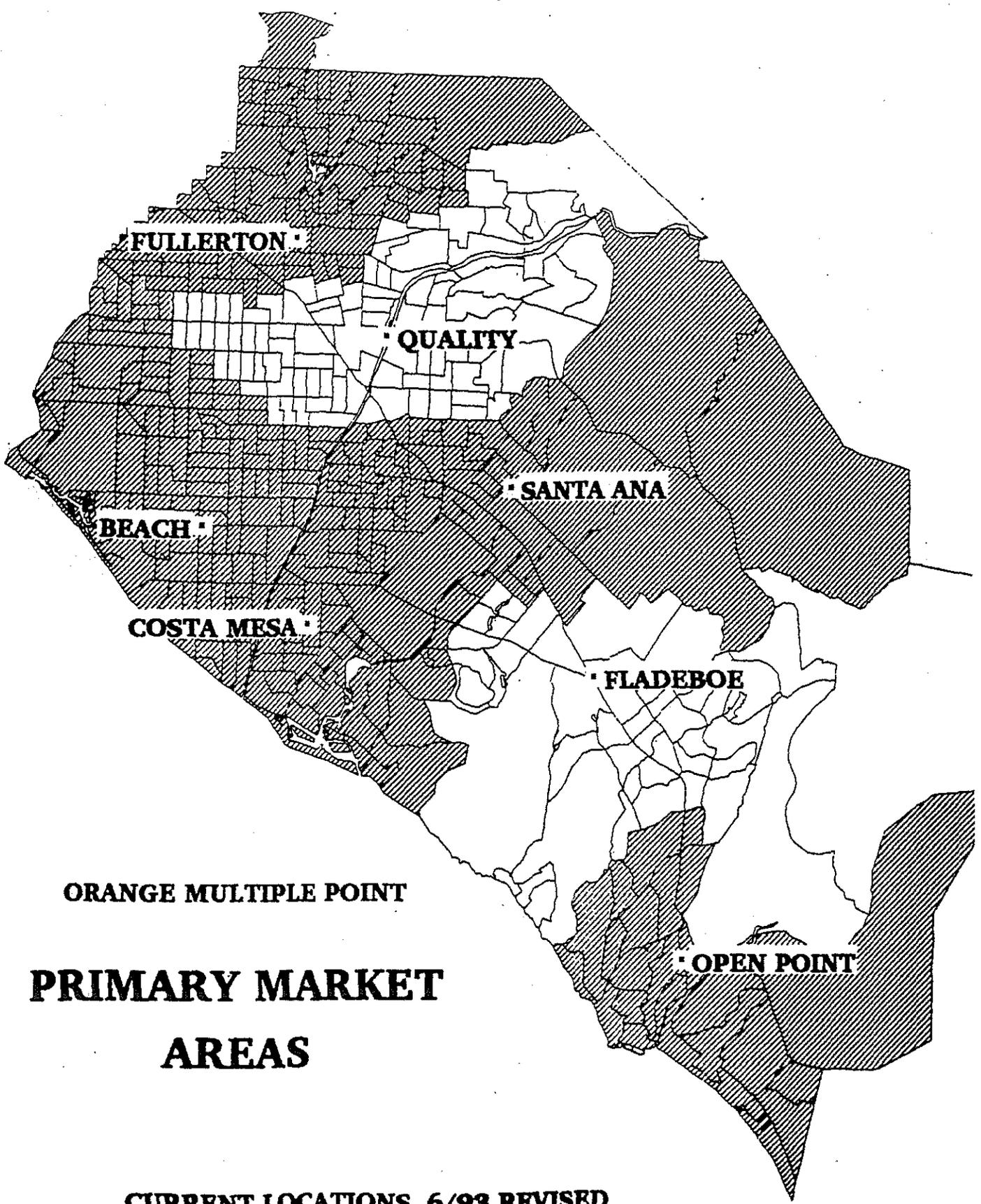
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6 I hereby submit the foregoing
7 which constitutes my proposed
8 decision in the above-entitled
9 matter, as a result of a
10 hearing before me on the above
11 dates and recommend the
12 adoption of this proposed
13 decision as the decision of
14 the New Motor Vehicle Board.

15 DATED: May 29, 1996

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BY 

DOUGLAS H. DRAKE
Administrative Law Judge



ORANGE MULTIPLE POINT
**PRIMARY MARKET
AREAS**

1 NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
2 Sacramento, California 95814
Telephone: (916) 445-1888
3
4
5

6 STATE OF CALIFORNIA
7 NEW MOTOR VEHICLE BOARD

8 In the Matter of the Protest and)
9 Petition of)

10 RAY FLADEBOE LINCOLN-MERCURY,)
11 INC.,)

Protest No. PR-1462-95

12 Protestant)

CONCURRING OPINION

13 vs.)

14 FORD MOTOR COMPANY, LINCOLN-)
MERCURY DIVISION,)

15 Respondent.)
16

17 1. I concur with the result reached in the majority
18 opinion.

19 2. Respondent in its Sales and Service Agreement set forth
20 detailed criteria upon which to measure Protestant's sales
21 performance, but in its presentation largely ignored such
22 criteria and thereby failed to sustain the burden of proof that
23 good cause existed for the termination of Protestant's franchise.

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