BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH
UTAH MOTOR VEHICLE FRANCHISE ADVISORY BOARD

IN THE MATTER OF A PROTEST REGARDING RELOCATION OF FRANCHISE **Robert H. Hinckley, Inc.** **dba Hinckley Dodge,** Protestor, vs. **DaimlerChrysler Motors Company, LLC,** Respondent.	**ORDER** **SUSTAINING PROTEST** Case No. NMVFA-2008-001

The Findings of Fact, Conclusions of Law and Recommended Order in this matter are ratified and adopted by the Executive Director of the Department of Commerce. It is therefore concluded that Respondent DaimlerChrysler Motors Company, LLC has failed to establish good cause to terminate the franchise dealership of Protestor Robert H. Hinckley, Inc. dba Hinckley Dodge. Accordingly, the protest is hereby sustained. DaimlerChrysler is thus ordered to continue Protestor's franchise dealership. Each party shall bear its own costs and attorney's fees.

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah

Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeous v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order on Review pursuant to Section 63-46b-13.

DATED this 17th day of January, 2008.

Francine A. Giani, Executive Director
Department of Commerce

CERTIFICATE OF MAILING

I certify that on the 17 day of January, 2008, the undersigned mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order Sustaining Protest by certified and electronic mail to:

Michael W. Spence, Esq.
Greggory J. Savage, Esq.
Ray, Quinney & Nebeker
36 South State Street, #1400
PO Box 45385
Salt Lake City, UT 84145-0385
mspence@rqn.com

Mark Kennedy, Esq.
Mark Clouatre, Esq.
Wheeler, Trigg & Kennedy LLP
1801 California Street, Suite 3600
Denver, CO 80202-2617
clouatre@wtklaw.com

Eric C. Olson, Esq.
Kirton & McConkie
1800 Eagle Gate Tower
60 East South Temple
P.O. Box 45120
Salt Lake City, UT 84145-0120
eolson@kmclaw.com

Rebekah Brown
Administrative Assistant

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH
UTAH MOTOR VEHICLE FRANCHISE ADVISORY BOARD

IN THE MATTER OF A PROTEST REGARDING TERMINATION OF FRANCHISE **Robert H. Hinckley, Inc.** **dba Hinckley Dodge,** Protestor, vs. **DaimlerChrysler Motors Company, LLC,** Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, and RECOMMENDED ORDER** Case No. NMVFA-2008-001

INTRODUCTION

This matter was filed with the Utah Motor Vehicle Franchise Advisory Board ("Board") within the Department of Commerce upon a protest and request for a hearing by Robert H. Hinckley, Inc. dba Hinckley Dodge,("Protestor"), challenging the termination by DaimlerChrysler Motors Company, LLC, ("Respondent"), of Protestor's franchise agreement ("Agreement").

On December 17, 2007, Respondent filed a motion to dismiss this proceeding on the grounds that the Executive Director and the Board do not have subject matter jurisdiction over the protest. Because the motion was filed just three days before the hearing scheduled for December 20, 2007, the parties agreed to go forward with the hearing and brief the jurisdictional issue subsequent to the hearing. Protestor filed its memorandum in response to the motion to dismiss on January 7, 2008, and Respondent

filed its reply memorandum on January 14, 2008. On January 16, 2008, the Administrative Law Judge assigned to this matter concluded as a matter of law that the Executive Director and the Board have subject matter jurisdiction and denied Respondent's Motion.

At the hearing, the parties were represented by counsel as follows: Protestor was represented by Michael Spence and Greggory Savage; Respondent was represented by Mark Kennedy and Mark Clouatre. Members of the Board present for the hearing were: Thad LeVar, Deputy Director of the Department of Commerce and Board Chair; Blake Strong, franchisee member; Michael Day, franchisee member alternate; C. Reed Brown, public member; and Tim Bangerter, public member alternate.

The Board members reviewed the pleading and exhibits submitted by the parties prior to the hearing. The parties presented few additional exhibits at the hearing. All exhibits presented by the parties were admitted into evidence. After hearing the evidence, reviewing the exhibits and observing the counsel arguments, the Board members were fully advised and considered themselves sufficiently informed to make a recommendation to the Executive Director of the Department of Commerce.

BY THE BOARD:

The Board now enters its Findings of Fact, Conclusions of Law, and Recommended Order for review and action by the Executive Director of the Department of Commerce.

FINDINGS OF FACT

1. Protestor owns and operates a motor vehicle dealership located in Ogden, Utah. Protestor was founded by Robert H. Hinckley in 1915, and has been selling Dodge vehicles pursuant to franchise dealer agreements with Respondent's predecessor, Chrysler Motors Corporation (also referred to hereafter as "Respondent"). Protestor also has a Dodge dealership located in Salt Lake City, Utah, but this matter relates only to the Ogden dealership.

2. The franchise agreement under which Protestor and Respondent are currently operating was titled "Direct Dealer Agreement" (hereafter, "DDA") and was executed on June 8, 1970.

3. Pursuant to Paragraph 5 of the DDA, the DDA is a perpetual agreement without an expiration date. Respondent may amend the agreement as it deems advisable, provided that it makes the same amendment in like DDAs generally. Paragraph 5 further states that an amendment must be signed by the President or Vice-President of Chrysler and is effective 35 days after delivery of the notice to the dealer. By letter dated March 17, 1976, Respondent's Vice-President notified dealers that Respondent's National Dealer Placement Manager was now authorized to execute and modify dealer agreements.

4. Paragraphs 1 and 7 of the DDA provide that Protestor has the non-exclusive right to purchase vehicles from Respondent for resale "at retail." In addition, Paragraph 7 provides that Protestor agrees to sell "at retail" the number of vehicles

necessary to fulfill its Minimum Sales Responsibility ("MSR"), "as further defined below." MSR is further defined in paragraph 7 as follows:

> From time to time, but at least once a year, DODGE will compute the ratio of the number of new DODGE passenger cars or DODGE trucks, as the case may be, registered in the most recent 12-month period for which registration figures are available in the DODGE Sales Region in which DIRECT DEALER is located to the number of all new passenger cars or trucks, as the case may be, so registered in that Region. The ratio thus obtained will be applied to the number of all new passenger cars or trucks, as the case may be, registered during the same 12-month period in DIRECT DEALER'S Sales Locality. The resulting number (and the percentage share of market that such number represents for the Sales Locality) will be DIRECT DEALER'S Minimum Sales Responsibility for this same twelve (12) month period, subject to such adjustment as described below.
>
> Where appropriate, DODGE will adjust DIRECT DEALER'S Minimum Sales Responsibility to take into account the availability of motor vehicles, local conditions, revision in DIRECT DEALER'S Sales Locality description, the recent trend in DIRECT DEALER'S sales performance, and the other factors, if any, directly affecting sales opportunity.[1]

This MSR definition does not mention retail sales or retail registration data, and makes no distinction between retail sales or fleet sales.[2]

5. Paragraph 21 of the DDA provides that Respondent may terminate the agreement if Protestor fails to meet its MSR:

> DODGE may terminate this agreement on not less than (90) days' written notice on (1) the failure of Direct Dealer to perform fully any of Direct Dealer's undertakings and obligations in Paragraphs 7 through 10 and Paragraph 14 of this agreement . . .

6. The DDA was amended on May 9, 1974 to reflect a change in Protestor's capital stock. Respondent thereafter made various amendments in the following years.

---

[1] Pursuant to the DDA, "Dodge" refers to Chrysler Motors Corporation, while "Direct Dealer" refers to Protestor.

[2] Fleet sales are sales of vehicles to large companies, anything over 10 vehicles.

In particular, on May 6, 2004, an amendment was made regarding the method of calculation of the MSR. J.W. Dimond, Respondent's National Dealer Placement Manager notified dealers as follows:

> [E]ffective with this amendment, [Respondent] will calculate Minimum Sales Responsibility based on *retail dealer sales* and *retail registration data*. Retail sales used in this calculation consist of all new sales or leases to private individuals or companies who are not registered fleet accounts. These include Type 1, Type L and Type C sales on the New Vehicle Delivery Report System.
>
> These amendments will become effective as set forth in the attached detailed amendments and will continue to accurately measure your Minimum Sales Responsibility and Customer Service Index performance.

(Emphasis added).

7. The economy in downtown Ogden began to decline in the 1960s, when the railroad went away due to the invention of the diesel locomotive. The population began to suffer from poverty; businesses migrated out of the downtown area. Although the city has begun major redevelopment projects, it is going to take several years to revive the economy. Protestor has for years been vital to Ogden's economy. The termination of Protestor's dealership is one of many factors that could have an adverse effect on the redevelopment efforts.

8. During these tough economic times, Protestor was able to find a niche for itself within the Dodge market by concentrating on fleet sales. At times, fleet sales comprised 90% of Protestor's Dodge sales.

9. By letter dated March 12, 2004 Respondent notified Protestor that its 2003 sales performance records showed Protestor was not meeting its sales requirements and performed only at 36.6 % of its MSR. The letter asks Protestor to examine its business

practices and come up with an action plan. In December 2004, Jim Hinckley Sr. traveled to Respondent's Zone offices in Denver, Colorado and met with Zone Manager to discuss problems with Ogden's economy and Protestor's MSR.

10. Respondent's sales performance records indicate that Protestor's sales have reached only 27.61% of its MSR in 2004, 23.55% in 2005, 28.75% in 2006, and 23.84% through June 2007. Protestor's dealer profile data indicates the ratio of fleet vehicles to retail vehicles Protestor sold: December 2005, 512 fleet vehicles to 134 retail; December 2006, 909 fleet to159 retail; and August 2007, 762 fleet to 106 retail.

11. By letter dated January 27, 2006, Respondent notified Protestor that it was not meeting its MSR under paragraph 21 of the DDA, and gave Protestor 180 days to cure the breach or face termination. In addition, the letter provided in pertinent part:

> The purpose of this letter is to notify Hinckley that its new vehicles sales at retail are substantially below the MSR that it agreed to in its Direct Dealer Agreement . . . Hinckley is in breach of Paragraph 7(a) of its Agreement as a result of its failure to meet and maintain its contractual MSR performance obligation . . . Additionally, DCMC will be sending monthly MSR performance update letters. These letters will begin when DCMC is in receipt of Hinckley's February 2006 MSR performance data.

12. Respondent's monthly written updates to Protestor of its continued failure to meet its MSR began with a letter dated May 4, 2006 quoting February 2006 data, and continued through the July 2006 data noted in Respondent's October 4, 2006 letter. Protestor acknowledged receipt of these monthly update letters, but no evidence was presented that Protestor responded to them.

13. On May 21, 2007, Respondent mailed Protestor a Notice of Termination declaring Respondent's intent to terminate the Dodge DDA dated June 8, 1970, as

amended, within 90 days. The reasons for the termination included in the letter are as follows:

> Paragraph 7(a) of the Agreement provides that a dealer will sell the number of new DaimlerChrysler vehicles necessary to fulfill the dealer's Minimum Sales Responsibility ("MSR"). As you have been counseled by DaimlerChrysler, Hinckley has consistently failed to even come close to meeting its MSR.
>
> Paragraph 21 of the Agreement states that DaimlerChrysler may terminate the Agreement after 90 days notice for failure of a dealer to "perform fully any of DIRECT DEALER's undertakings and obligations in Paragraphs 7 through 10" of the Agreement. As mentioned above, DaimlerChrysler has repeatedly raised concerns with Hinckley about its inability to meet its MSR, and has given ample opportunity to Hinckley for it to rectify its inadequate sales performance. Due to Hinckley's inadequate sales performance, among other things, DaimlerChrysler now provides notice that it intends to terminate the Agreement.

14. Pursuant to Protestor's request for reconsideration and clarification, Respondent sent a letter to Protestor on July 9, 2007, which states in pertinent part:

> Although we certainly appreciate your long tenure as a Dodge dealer, your customer handling scores and your fleet sales, the Minimum Sales Responsibility ("MSR") provision in your Agreement is based on retail sales and has been since September 1, 2004. We rely on our dealers to represent our produces in the retail market place, and the retail MSR performance of the dealership has been and continues to be well below acceptable levels. In fact, the MSR performance of your dealership has actually declined since my January 27, 2006 letter to you.
>
> With regard to your question on the phrase in my letter "among other things"; that phrase simply refers to Paragraph 7(a) of the Agreement wherein you agree "to sell energetically at retail" Dodge vehicles. Your poor MSR performance obviously indicates you are not energetically representing Dodge products.

15. On July 20, 2007, Protestor filed a request for agency action pursuant to the New Automobile Franchise Act ("Act"), challenging the Respondent's termination of its franchise. Protestor requested an award of attorney's fees.

16. Protestor submitted evidence with respect to its investment in the dealership, claiming approximately $5.6 million including land and improvements, vehicles and parts. Respondent questioned the amounts Protestor listed, but did not present independent evidence to show that Protestor has failed to make adequate investments in its dealership.

17. There was no evidence presented as to any consumer complaints against Protestor, the adequacy of Protestor's sales, parts or service facilities, or Protestor's compliance with warranties. According to Respondent, Protestor was decertified in 2006 from its Five Star dealer status with Respondent due to poor customer satisfaction surveys. Respondent's service index reports for 2006 and 2007, however, show that Protestor performed only slightly lower than the average in its Business Center Group. Protestor's 12-month cumulative score on all survey questions in December 2006 was 84 while 92 was the average for the Business Center Group; in November 2007, Protestor scored 88 as compared to 91 for the Business Center Group. Jim Hinckley, Sr. also testified that Protestor is outperforming other dealers in CSI scores in its competitive market area.

18. Respondent presented industry registration data, which purports to show where people buy and register vehicles, arguing that Protestor had similar opportunities to sell near its location as the vehicle dealerships near Riverdale Drive in Ogden. Respondent also provided data regarding traffic counts in 2006, showing that more traffic went by Protestor's dealership than the Riverdale Drive dealerships. However, Protestor noted that traffic counts for previous years indicated more traffic along Riverdale Drive,

and explained the decline in 2006 for the Riverdale Drive location was due to construction.

19. Protestor requested that it be permitted to relocate to a facility in South Ogden. By letter dated January 18, 2001, Respondent denied the request for relocation. The letter stated in pertinent part:

> Utah State Statutes give existing dealers within a 10 aeronautical mile range the right to protest. Layton Hills Dodge, who is within this range, has said they would protest any relocation of your dealership within the 10-mile range.
>
> The current location of Robert H. Hinckley is 10 miles North of Layton Hills Dodge. The Zone would support a relocation of your dealership as long as the minimum 10-mile distance is maintained. Prior to approval, this office must review any proposed site.

In early 2005, there was some communication between the parties about a relocation by Protestor, but Protestor did not follow through with a written proposal to Respondent and indicated it was no longer interested in relocating. There was insufficient evidence presented to determine whether Protestor had made an adequate search for other available facilities. Likewise, there was insufficient evidence presented to determine if other viable facilities existed outside the 10 mile radius of Layton Dodge Hills or within a one mile radius from Protestor's current location.

20. Respondent has adjusted the MSR calculation for Dodge dealers under certain circumstances, for example where certain vehicles sell better in a particular dealer locality, where there may be a direct competitor manufacturer that performs better in a certain location, or where road construction could affect sales.

21. Flying J, also known as Fleet Sales or TAB Leasing (hereafter, "TAB Leasing"), is located approximately four miles from Protestor and was initially one of Protestor's fleet customers. However, in July 2006, Protestor discontinued sales to TAB Leasing upon discovery that TAB Leasing was retailing Dodge fleet vehicles to the public rather than using them for its own employees. TAB Leasing's conduct adversely affected Protestor's sales as well as Protestor's reputation with consumers who believed that Protestor unfairly sold vehicles at higher prices.

22. Protestor requested that Respondent revoke TAB Leasing's VIP (Volume Incentive Account) fleet number or fleet account, which permitted TAB Leasing to purchase Dodge vehicles at reduced prices. Protestor made a written request on November 1, 2007, as its previous requests had gone unanswered. On December 4, 2007, Respondent notified Protestor that TAB Leasing's VIP account had been terminated.

23. Prior to June 2007, Protestor's Ogden and Salt Lake City Dodge dealerships were managed by Jim Hinckley, Sr. Since June 2007, Jim Hinckley, Jr. has been hired as the sole general manager of the Ogden dealership.

24. In the last two years, Respondent has terminated only one dealer in the United States due to poor sales performance. Of the remaining 2,800 Dodge dealerships in the U.S., currently 48-50% of those dealers are performing below their assigned MSR. Out of those dealers who are not meeting their MSR, only two have received an actual notice of termination.

25. At the hearing before the Board, Protestor moved for a directed verdict on the grounds that Respondent's sole basis for termination was a desire for greater sales and

market penetration, and that such was prohibited under the law. Protestor's motion was denied.

CONCLUSIONS OF LAW

1. Under the Act, a franchisor may not terminate a franchise agreement unless:

a. the franchisee has received written notice 60 days prior to the effective date of termination;
b. the franchisor has good cause for termination; and
c. the franchisor is willing and able to comply with Section 13-14-307 (regarding franchisor's repurchase obligations).

Utah Code Ann. § 13-14-301(1). In addition, prior to the expiration of the 60 days, the franchisee may apply to the Board for a hearing on the merits, and if so requested, the termination is not effective until final determination of the issues by the Executive Director and lapsing of the applicable appeal period. Subsection 13-14-301(3).

2. In determining whether a franchisor has established good cause to terminate a franchise, the Board is required to consider the following factors:

> (a) the amount of business transacted by the franchisee, as compared to business available to the franchisee;
> (b) the investment necessarily made and obligations incurred by the franchisee in the performance of the franchisee's part of the franchise agreement;
> (c) the permanency of the investment;
> (d) whether it is injurious or beneficial to the public welfare or public interest for the business of the franchisee to be 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 consumer for the new motor vehicles handled by the franchisee and has been and is rendering adequate services to the public;
> (f) whether the franchisee refuses to honor warranties of the franchisor under which the warranty service work is to be performed pursuant to the franchise agreement, if the franchisor reimburses the franchisee for the

warranty service work;
(g) failure by the franchisee to substantially comply with those requirements of the franchise agreement that are determined by the advisory board or the executive director to be:
(i) reasonable;
(ii) material; and
(iii) not in violation of this chapter;
(h) evidence of bad faith by the franchisee in complying with those terms of the franchise agreement that are determined by the advisory board or the executive director to be:
(i) reasonable;
(ii) material; and
(iii) not in violation of this chapter;
(i) prior misrepresentation by the franchisee in applying for the franchise;
(j) transfer of any ownership or interest in the franchise without first obtaining approval from the franchisor or the executive director after receipt of the advisory board's recommendation; and
(k) any other factor the advisory board or the executive director consider relevant.

Utah Code Ann. § 13-14-305(1). In addition, Subsection 13-14-305(2) provides in pertinent part:

> Notwithstanding any franchise agreement, the following do not constitute good cause, as used in this chapter for the termination or noncontinuation of a franchise:
> (a) the sole fact that the franchisor desires greater market penetration or more sales or leases of new motor vehicles . . .

3. Respondent maintains that Protestor violated the DDA by failing to meet its MSR in the last four years, which Respondent attributes to Protestor's inadequate management and ineffective advertising and marketing. According to Respondent, Protestor's "sub-par sales performance indicates that it was not transacting a reasonable, sufficient amount of business 'as compared to the business available to the franchisee.'" Respondent notes that its MSR calculation method is not unique, General Motors, Ford, Toyota and Nissan all apply the same calculation, and Respondent believes that

Protestor's concentration on fleet sales hurts its retail sales. Respondent further claims that another franchisee, Layton Hills Dodge, sells more Dodge vehicles in Protestor's relevant market area than Protestor does, and that such "insell" negatively impacts consumers who must drive to other areas to purchase their vehicles. Finally, Respondent argues that Protestor failed to correct the problem with its location by failing to relocate to a different facility as Respondent suggested in 2005.

4. In response, Protestor argues that the sole reason for termination of the franchise is Respondent's desire to achieve greater market penetration or more sales, which cannot establish good cause under Subsection 13-14-305(2)(a) of the Act. Protestor also claims that its MSR calculation is unreasonable, because Respondent eliminated fleet sales from the calculation and failed to adjust the MSR to reflect Ogden's poor economy, Respondent's failure to timely terminate TAB Leasing's fleet account, and other such factors. As to the public benefit or injury factor, Protestor attributes its insell figures to the other dealers' better accessibility to I-15, notes that it still serves the public in its relevant market area with 70% of its services on vehicles purchased outside of Ogden, and argues it is a valuable member of the Ogden community and a partner in Ogden's redevelopment project. Protestor points out that it attempted to relocate in 2001 but was denied, and that it has investigated other options but not found feasible locations. Finally, Protestor claims that because Respondent's notice of termination is in direct violation of Subsection 13-14-305(2)(a), Protestor is entitled to an award of attorney's fees under Subsection 13-14-107(2).

5. Despite Protestor's arguments to the contrary, it was apparent to the Board that the desire to obtain more sales or greater market penetration was not the sole reason for Respondent's notice of termination as is prohibited in Subsection 13-14-305(2)(a). The May 21, 2007 termination notice specifically identifies Protestor's failure to meet its obligations under the DDA as well as its inadequate sales. Moreover, Respondent's witnesses testified that they sought Protestor's compliance with its MSR and not greater market penetration, as Dodge's Ogden market share is at national levels based on vehicle registrations. Because Subsection 13-14-305(2)(a) does not apply, it is necessary to consider the factors in Subsection 13-14-305(1) to determine if Respondent has met its burden of proof that good cause exists to terminate Protestor.

6. Respondent provided little or no evidence as to the factors identified in Subsections 13-14-305(1)(b) (investment by franchisee), (c) (permanency of investment), (e) (adequate service), (f) (honoring warranties), (h) (bad faith by franchisee), (i) (prior misrepresentation in applying for franchise), and (j) (transfer of ownership without approval). Therefore, as to these factors, Respondent has failed to establish good cause to terminate Protestor's franchise.

7. Respondent has failed to establish good cause to terminate Protestor under Subsection 13-14-305(1)(a) (amount of business transacted compared to business available.) Respondent relies upon its MSR calculation for Protestor, which is based upon consumer registrations, and argues that Protestor's failure to meet the MSR indicates that it is not capturing all the potential sales available to it. First, this factor was not specifically mentioned in Respondent's notice of termination. Secondly, a

consideration of this factor requires a determination of whether under Subsection 13-14-305(g) (breach of reasonable and material terms of the franchise agreement) good cause exists to terminate the dealership.

8. Although the Board agrees that the MSR provision was material, it is not convinced that the MSR as calculated by Respondent was a reasonable provision. Even if other manufacturers use this same method of calculation, taking into consideration only retail sales, that was not how it was calculated by Respondent for nearly 34 years. The 1970 DDA initially stated that Protestor would purchase vehicles from Respondent for resale "at retail," but the MSR definition in the DDA did not mention retail sales or retail registrations. Thus, from 1970 until 2004, Respondent calculated the Protestor's MSR to include fleet sales, during which time Protestor concentrated on its fleet sales as a means of meeting its MSR in the face of Ogden's deteriorating economy. When Respondent chose to alter this calculation to eliminate fleet sales through its authority under the DDA, suddenly Protestor lost its edge and could no longer meet the MSR.

9. Prior to the fleet calculation change, Jim Hinckley, Sr. notified Respondent's Zone Manager in Denver about Ogden's poor economy and of Protestor's inability to meet its MSR, but Respondent failed to adjust Protestor's MSR to compensate for deteriorating local conditions in Ogden. Paragraph 7 of the DDA specifically provides for such adjustments based on local conditions, and Respondent has adjusted dealer MSR in certain markets, but chose not to do that for Protestor. The Board members, as Utah residents, are aware of Ogden's economic condition during the last few decades, and those conditions are not as rosy as Respondent's expert presented. The

Board is of the opinion that an adjustment of Protestor's MSR would have been appropriate, and furthermore, in light of 34 years of calculating MSR with fleet sales, Respondent has unreasonably required Protestor to immediately adjust to the new retail sales calculation.

10. The Board was pleased to learn that Respondent recently terminated TAB Leasing's unfair practice of retailing Dodge vehicles that it purchased at reduced fleet prices. The Board was concerned that Respondent did not act sooner. However, there was insufficient evidence to conclude that Protestor's MSR should have been adjusted based upon any sales by TAB Leasing in Protestor's sales locality.

11. Because the Board was not convinced that the MSR enforcement was reasonable, it does not need to reach the question of whether Protestor breached that provision to find that Respondent has failed to establish good cause under Subsection 13-14-305(1)(g).

12. As Respondent has failed to establish good cause based upon a breach of Protestor's MSR, and that breach is what Respondent relied upon to argue that there was more business available to Protestor, the Board concludes that Respondent has failed to establish good cause to terminate under Subsection 13-14-305(1)(a).

13. Respondent did not raise the public interest factor as a basis for termination in its May 2007 notice of termination. Respondent also failed to establish that insell by Layton Hills Dodge into the Ogden area inconveniences consumers so much that it would be beneficial to the public to terminate Protestor's dealership. Rather, the Board finds that Protestor is a major business whose viability affects the people and

the economy of Ogden and that it would be injurious to the public to terminate the dealership. Thus, no good cause has been established under Subsection 13-14-305(1)(d).

14. Due to lack of sufficient evidence, good cause has not been established under Subsection 13-14-305(1)(k) in Respondent's claim that Protestor chose not to relocate and thus failed to resolve concerns regarding its location.[3] The evidence presented indicates that Protestor proposed a relocation site in 2001 that was rejected by Respondent due to Layton Hill's intent to protest; discussions took place again about relocation in 2005, but those discussions fell through. There was insufficient evidence that Protestor failed to search for other facilities or that another viable facility was indeed available within the one-mile radius of Protestor's location or beyond the 10-mile radius of Layton Hills Dodge.

15. In summary, Respondent has failed to establish good cause to terminate Protestor's dealership. However, Respondent's termination notice was not in direct violation of Subsection 13-14-305(2)(a) as Protestor claims. Thus, the Board does not recommend an award of attorney's fees to Protestor. This is an unfortunate case where the communications broke down between the parties. It is clear that Protestor's sales have been down for some time, even Protestor is not happy with its sales. However, Protestor is not alone. Nearly 48-50 % of Dodge dealers are currently in violation of their MSR. Respondent had the authority under the DDA to make changes to the MSR calculation, and other manufacturers use this same method. However, Respondent did not adjust Protestor's MSR to account for Ogden's economy. In addition, given Protestor's historical reliance on fleet sales, it was unreasonable to require immediate

[3] Respondent again did not raise this factor in its notice of termination.

compliance with the new calculation method. During the pendency of these proceedings, Protestor took various steps toward improving its sales and has set forth a plan for further changes to reach its MSR once adjusted for local conditions. The Board hopes that in the future, both parties will make a concerted effort to improve communications.

RECOMMENDED ORDER

For the foregoing reasons, the Utah Motor Vehicle Franchise Advisory Board recommends that the protest be sustained, but does not recommend an award of attorney's fees to Protestor.

On behalf of the Utah Motor Vehicle Franchise Advisory Board, I hereby certify the foregoing Findings of Facts, Conclusions of Law and Recommended Order were submitted to Francine A. Giani, Executive Director of the Utah Department of Commerce, on the 17th day of January, 2008 for her review and action.

Dated this 17th day of January, 2008.

Masuda Medcalf
Administrative Law Judge