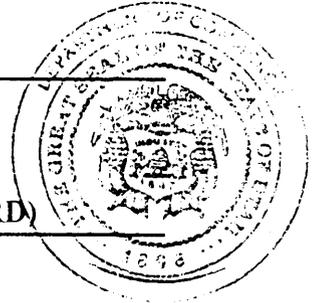

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH
(UTAH MOTOR VEHICLE FRANCHISE ADVISORY BOARD)



IN THE MATTER OF	:	
A PROTEST REGARDING PROPOSED	:	
RELOCATION OF FRANCHISE	:	
Intermountain, Inc. dba	:	FINDINGS OF FACT,
Intermountain Hyundai,	:	CONCLUSIONS OF LAW,
	:	and RECOMMENDED ORDER
Protestor,	:	
	:	
vs.	:	Case No. NMVFA-2003-002
	:	
Hyundai Motor America,	:	
	:	
Respondent.	:	
	:	
Ketech, L.L.C. dba Riverton Hyundai,	:	
	:	
Intervenor.	:	

INTRODUCTION

This matter came on for hearing before the Utah Motor Vehicle Franchise Advisory Board (“Board”) upon a protest by Intermountain, Inc. d/b/a Intermountain Hyundai (“Intermountain”). Intermountain protested a proposal from Hyundai Motor America (“HMA”) to relocate the Hyundai franchise owned by Ketech, LLC d/b/a Riverton Hyundai (“Riverton”), to a location within 10 miles of Intermountain’s current franchise dealership. Riverton intervened in the proceeding.

A hearing was held on May 22, 2003. The parties were represented by counsel as follows: Intermountain was represented by Bryan Fishburn; James Hermsen represented HMA; and Riverton was represented by Mike Spence and Rod Andreason. Members of

the board present for the hearing, were: Klare Bachman, Deputy Director of the Department of Commerce and Board Chair; Jewel Lee Kenley; Craig Jensen; Ted Barnes; Tim Dahle; Steve Doxey; and David Ibarra.

The Board members had reviewed the pleadings and exhibits submitted by the parties prior to the hearing. After hearing evidence, reviewing exhibits and observing counsel arguments, the Board members were fully advised in the premises and considered themselves sufficiently informed to make a recommendation to the Executive Director of the Department of Commerce.

The Board acknowledged that a letter dated January 30, 2003 from Riverton's counsel to Intermountain's owner was submitted into evidence. The letter contains a statement that should Intermountain wish to file a request for a hearing before the Board protesting Riverton's relocation, Riverton would seek to file a civil lawsuit against the owner "for tortious interference with economic relations, among other claims, seeking substantial monetary damages," and would, "likely seek a temporary restraining order and a preliminary injunction permitting the relocation notwithstanding [the] protest." (Intermountain Exhibit 2). The Board recognized that the letter was not relevant or probative to the issues of good cause in this proceeding, and that the letter should not have been received into evidence. Nevertheless, the Board expressed concern that such questionable practice by Riverton could operate to chill a franchisee's right to file a protest under the New Automobile Franchise Act.

BY THE BOARD:

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

FINDINGS OF FACT

1. Ken Garff Hyundai (“Garff”) was the first Hyundai franchise in the Salt Lake Metro area. It is located at 198 East 500 South in Salt Lake City, Utah.
2. Intermountain received a Hyundai franchise in 1996. Intermountain is located at 3711 South State Street in Salt Lake City.
3. Beus Auto Sales obtained a Hyundai franchise in 1998. Riverton purchased the franchise from Beus Auto Sales in December 2001, and has been operating at 14403 South Minuteman Road in Draper, Utah. This location is approximately 14 miles south of Intermountain’s location.
4. By letter dated January 23, 2003, HMA informed Intermountain of its intent to relocate the Riverton franchise to the South Towne Auto Mall (“Auto Mall”) in Sandy, Utah. This site is 9.3 miles south of Intermountain’s location, but still within Riverton’s primary market area (“PMA”).¹
5. On March 7, 2003, Intermountain filed a request for a hearing, protesting the relocation of Riverton to the Auto Mall.

¹ While Utah Code Ann. § 13-14-306 speaks of the “relevant market area,” much of the evidence presented by the parties was measured in terms of the various dealers’ primary market areas. A primary market area is the geographic area assigned by HMA to a particular dealer, and is commonly used in the automotive industry to measure market share in terms of vehicle registration and sales effectiveness. Because primary market area data is commonly used in the industry, it is found probative to the relevant market area issues in Section 13-14-306.

6. Intermountain's sales have steadily declined since 1999 when it sold 429 new Hyundai vehicles, to 2002 when it sold 208 vehicles in the first nine months. (HMA Exhibit 11). Also, Intermountain has been outsold by Garff and Riverton in its own PMA in Murray, Utah. During the first nine months of calendar year 2002, Intermountain sold 90 vehicles in its PMA, compared to Garff's 131, and Riverton's 96 vehicles sold in the same PMA in 2002. (HMA Exhibit 10). Thus, of total sales in the Murray PMA, Intermountain sales comprise 27%, Garff 39%, and Riverton 29%.²

7. In calendar year 2002, Riverton sold 456 new Hyundai vehicles. (Intermountain Exhibit 11). Data collected by the end of September 2002 indicates that Riverton sold 163 vehicles within its PMA in Draper, Utah, out of total PMA sales of 316. This means that 52% of Riverton sales are within the Draper PMA.³

8. The "Orem standard" used by HMA's expert witness as a benchmark by which to measure market penetration and adequacy of Hyundai representation in the Salt Lake City Metro area was not realistic or helpful in that it represents a higher standard than a regional or national standard, and the Orem PMA is different demographically than the Salt Lake area.

9. Intermountain's franchise agreement with HMA, executed on July 1, 1996, required Intermountain to construct a building and showroom exclusively for the display of Hyundai vehicles. (Intermountain Exhibit 4). The building was completed in 1997 at a cost of \$614,432. (Intermountain Exhibit 7). The building and the land upon which it was constructed were the property of the T. and S. Watkins Family, LLC.

² Intermountain contributed 25 out of a total 193 sales into the Salt Lake City PMA, and 53 out of a total 316 sales into the Draper PMA. (HMA Exhibit 10).

³ Riverton also sold 30 out of 193 vehicles sold in the Salt Lake City PMA, 16% of the sales in that market; and sold 96 out of 332 in the Murray PMA, 29% of the sales in that market. (HMA Exhibit 10).

(Intermountain Exhibit 6). Through a common business practice, the LLC leased the properties to Intermountain Inc., another entity owned by the Watkins Family. (HMA Exhibit 27). Additional start-up expenses incurred by Intermountain equaled approximately \$60,570. (Intermountain Exhibit 8).

10. Riverton's future at its current location is uncertain. Three separate parcels of land are currently subject to foreclosure proceedings. (Riverton Exhibit 20). Riverton, however, has an option to purchase the land as provided in its lease agreement with Beus Properties L.C. (Riverton Exhibit 5).

11. In May 2002, construction started on a State liquor store in Draper situated slightly northwest of Riverton's current location. Construction was completed in January 2003, resulting in a partial impediment to Riverton's storefront visibility from northbound traffic on I-15. The construction of the State liquor store has caused some confusion and access problems for Riverton's customers.

12. Notwithstanding the liquor store, Riverton's new Hyundai vehicle sales continue to remain high. It was the third highest seller of Hyundai vehicles in its district for calendar year 2002 and has maintained the third highest seller status through April 2003. (Intermountain Exhibits 11 and 12). However, Riverton has experienced operating losses for all but one month from August 2002 to April 2003. (Intermountain Exhibits 11 and 12, Riverton Exhibit 21).

13. Ketech, LLC, Riverton's parent company, purchased a Suzuki franchise in June 2002 and sold that line on the same premises with Hyundai vehicles until March 2003 when Suzuki was moved to the Auto Mall site.

14. Riverton's current lease on the Draper site is for a two-year term at a monthly rate of \$17,500. It has an option to renew the lease and an option to purchase the property. Riverton has also made investments in equipment, signage, and other fixtures at the Draper site. (Riverton Exhibits 5 and 19).

15. Riverton, in order to preserve its opportunity to relocate to the Auto Mall, entered into a lease with 107 South, LLC on December 30, 2002, and has since relocated its Suzuki franchise to this new site. The lease is for a term of two years and includes an option to renew and an option to purchase. The cost of the lease for the first year is \$22,500 per month, plus \$50 per unit sold. During the second year the cost increases to \$27,500 per month plus \$50 per unit sold. The base cost of the lease increases over the third and fourth year until it peaks at \$40,000 per month from the fifth year on. If Riverton exercises its option to purchase, it must retroactively make up the difference between the rent paid and \$40,000 per month. (Riverton Exhibits 17 and 22).

16. As part of HMA's approval of the relocation, Riverton must complete renovations on the Auto Mall site, including the completion of adequately sized parts and service departments and related fixtures. Riverton must also invest in and install proper signage and maintain other HMA standard requirements. (HMA Exhibit 14 and Riverton Exhibit 22).

17. The Auto Mall and surrounding area includes several different dealerships selling approximately fourteen different line makes. (HMA Exhibit 18). Additionally, the South Towne shopping center is within walking distance of the Auto Mall. Riverton intends to supply a free shuttle service to the South Towne Shopping Center and to the Trax light rail line located a few blocks north of the Auto Mall. (Riverton Exhibit 29).

18. During calendar year 2002, Riverton sold 62 new Hyundai vehicles out of 361 total units sold in the PMA in Orem, Utah. Thus, one out of 5.8 cars sold in 2002 into the Orem PMA came from Riverton. Those sales accounted for 15% of Riverton's total sales in calendar year 2002. (HMA Exhibit 16, page 6).

19. Intermountain's sales and service scores, measured by the Hyundai Purchase Index ("HPI") and Hyundai Service Index ("HSI") respectively, were below regional and national averages for both 2001 and 2002. However, Intermountain appears to have improved with an increasing trend in sales and service scores through April 2003. For example, in 2002, Intermountain's HSI and HPI scores were 49 and 78 respectively, compared to district averages of 81 and 87, regional averages of 78 and 83, and national averages of 81 and 87. In late 2002, Intermountain hired a new service manager and instituted new compensation terms. Through April 2003, Intermountain's three-month average HSI and HPI scores improved to 99 and 73 respectively. (HMA Exhibits 4, 5, and 24; Intermountain Exhibits 17 and 18). The April 2003 service data represents the responses of only five customers. (HMA Exhibit 24).

20. At the conclusion of the hearing, a majority of the Board determined that even though this is a close case, HMA and Riverton established good cause to relocate the franchise. Therefore, it was determined that the Board recommends denial of Intermountain's protest and approval of the relocation.

CONCLUSIONS OF LAW

1. In determining whether HMA has proven that there is good cause to relocate Riverton to the Auto Mall, the Board is required to consider the following evidence:

- (1) the amount of business transacted by other franchisees of the same line-make in that relevant market area, as compared to business available to the franchisees;
- (2) the investment necessarily made and obligations incurred by other franchisees of the same line-make in that relevant market area in the performance of their part of their franchisee agreements;
- (3) the permanency of the existing and proposed investment;
- (4) whether it is injurious or beneficial to the public welfare or public interest for an additional franchise to be established; and
- (5) whether the franchisees of the same line-make in that relevant market area are providing adequate service to consumers for the motor vehicles of the line-make, which shall include the adequacy of the motor vehicle sale and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

Utah Code Ann. § 13-14-306.

2. A comparison of sales by other same line-make franchisees in the relevant market area reveals that there is business available for sale and service of Hyundai vehicles within the Salt Lake City Metro area. Intermountain has not been as effective in its own PMA as Garff and Riverton have been in their assigned PMAs. Additionally, Garff and Riverton appear to be cross selling significantly into Intermountain's PMA. Although the "Orem standard" employed by HMA's expert witness is an unfairly high standard for comparison purposes, the Board concluded pursuant to Section 13-14-306(1), that it appears Intermountain has failed to capitalize on opportunity within its own PMA.

3. An assessment of the second provision of Section 13-14-306 leads to the conclusion that Intermountain has made significant investments and incurred obligations in the performance of its franchise agreements. The required construction of

Intermountain's exclusive Hyundai showroom, at a cost of \$614,432, was the primary and most important investment. Additional start-up costs of approximately \$60,570 were also considered in the analysis of Intermountain's investment as well as the use of the land on which the dealership was located. Although the land and the building are owned by the T. and S. Watkins Family LLC and leased to Intermountain Inc., the Board was not persuaded that the real property costs should be precluded from their consideration. The Board noted that both business entities are owned by the same principals, and that it is a common business and tax practice to organize the businesses into separate entities.

4. Riverton's investment in the current Draper location and the new Auto Mall site are also significant and indicative of permanence. Although foreclosure has been threatened on the Draper site, Riverton's ability to conduct business from that site in the future is not significantly compromised as it continues to possess an option to purchase. Even if foreclosure occurs, it is likely that the new owner would continue to lease the property to Riverton. The losses suffered by Riverton in the last few months of 2002 and early 2003 are not explained by the State liquor store construction alone, but are likely a result of a combination of issues, including Riverton's advertising choices, its addition of the Suzuki line, and several economic trends.

5. Riverton's lease of the Auto Mall site is for two years and includes options to extend the lease or purchase the property. Riverton has made and will likely make further investments at the Auto Mall site in order to meet the facility requirements imposed by HMA. Comparing the relative obligations and investments of Intermountain and Riverton, the majority of the Board found that both dealers had made significant investments and they displayed substantially equal permanence. Therefore, an analysis

of the requirements of Subsections 13-14-306(2) and 306(3) neither favors nor disfavors the relocation.

6. The deciding factor in this case was the public benefit consideration. All Board members concluded that the Auto Mall location represents excellent sales potential. Inter-brand competition at this location will likely increase Hyundai sales for Riverton, and a majority of the Board expected that a certain level of “synergy” would also result in increased sales for Intermountain and Garff. Even if Intermountain’s sales do not increase, there is every likelihood that Intermountain’s service clientele will increase with Riverton’s increased vehicle sales. On balance, the public will benefit by the relocation because of the convenience of shopping for different types of vehicles in the same area. This will reduce driving time to other locations and increase public convenience. The nearby South Towne shopping center will bring more customers to see the Hyundai product, and while their cars are serviced, these customers will have a place to shop. Finally, there will be easy access for customers through the nearby Trax station and Riverton’s free shuttle service.

7. Although it is true that relocation to the Auto Mall might cause some inconvenience for Riverton’s customers who live in Draper or Orem, the data indicates that a large majority of Riverton’s customers live north of its current Draper location. The data shows that most of Riverton’s customers live in Sandy, and many live in Murray and Salt Lake City. Furthermore, the Auto Mall site is just one exit north of Riverton’s current site on I-15, at a distance of approximately four miles. The above-mentioned conveniences of the Auto Mall site outweigh any inconvenience to the customers in

Draper and Orem. The Board concluded that relocation would ultimately be beneficial to the public welfare or public interest.

8. Finally, with respect to the fifth factor in Section 13-14-306, whether the existing franchisee is adequately serving Hyundai consumers, substantial evidence demonstrated that Intermountain experienced poor sales and service performance in the past. Intermountain had, during at least 2001 and 2002, performed poorly in terms of HSI and HPI scores. However, Intermountain has taken various steps to improve that performance, and data collected for 2003 thus far indicates that Intermountain is doing quite well. Nevertheless, that data is limited to a few months of reports that are based on few consumer responses. This was not a pivotal factor in the Board's decision. However, it does appear that relocation will likely provide improved service to consumers of vehicles of the same line-make.

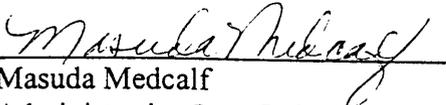
9. In summary, consideration of evidence relating to the five requirements of Utah Code Ann. § 13-14-306 preponderates in favor of relocation.

RECOMMENDED ORDER

For the foregoing reasons, the Utah Motor Vehicle Franchise Advisory Board recommends that Intermountain's protest be denied and that Riverton be permitted to relocate its Hyundai franchise to the South Towne Auto Mall.

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 Ted Boyer, Executive Director of the Utah Department of Commerce, on the 13th day of June, 2003 for his review and action.

Dated this 13th day of June, 2003.



Masuda Medcalf
Administrative Law Judge



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

IN THE MATTER OF
A PROTEST REGARDING PROPOSED
RELOCATION OF FRANCHISE

**Intermountain, Inc. dba
Intermountain Hyundai,**

Protestor,

vs.

Hyundai Motor America,

Respondent.

Ketech, L.L.C. dba Riverton Hyundai,

Intervenor.

**ORDER
DENYING PROTEST**

Case No. NMVFA-2003-002

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 ordered that Hyundai Motor America has established good cause to relocate Ketech, L.L.C. dba Riverton Hyundai ("Riverton Hyundai"). Accordingly, the protest of Intermountain, Inc. dba Intermountain Hyundai to the proposed relocation of Riverton Hyundai is hereby denied.

DATED this 13th day of June, 2003.


Ted Boyer
Executive Director

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 Denying Protest. 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 *Bourgeois 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.

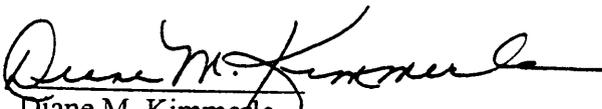
CERTIFICATE OF MAILING

I certify that on the 13th day of June, 2003, the undersigned mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order Denying Protest by certified mail and by facsimile to:

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