JURISDICTION:	**OKLAHOMA TAX COMMISSION DECISION**
CITE:	**2008-09-30-05 / NON-PRECEDENTIAL**
ID:	**SJ-08-005-H**
DATE:	**SEPTEMBER 30, 2008**
DISPOSITION:	**PROTEST DENIED/APPLICATION GRANTED**
TAX TYPE:	**APPLICATION FOR BOAT/MOTOR DEALER LICENSE**
APPEAL:	**NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

APPLICANT ("Applicant") appears through ATTORNEY, LAW FIRM. PROTESTANT ("Protestant") appears through PROTESTANT'S ATTORNEY, LAW FIRM 2. The Taxpayer Assistance Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On July 16, 2008, the show cause file was received by this office for further proceedings consistent with the *Uniform Tax Procedure Code*[1] and the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*.[2] On July 22, 2008, a Notice of Hearing was sent by Certified Mail to the parties stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number SJ-08-005-H. The notice advised the parties a hearing was set for August 7, 2008, at 9:30 a.m. "…to determine whether the referenced application should be denied because the proposed business location is within a relevant market area where the same product line is currently represented."[3]

On August 7, 2008, at 9:30 a.m., the show cause hearing was held as scheduled, with all parties in attendance. The Division called one (1) witness, REPRESENTATIVE, Taxpayer Assistance Division, Oklahoma Tax Commission, who testified on the Division's behalf and as custodian of the Division's records. The Division's Exhibits A through C were identified, offered, and admitted into evidence.

The Applicant called one (1) witness, APPLICANT OWNER, Co-Owner and General Manager of the Applicant. The Applicant's Exhibits 1 through 5 were identified, offered, and admitted into evidence. The Protestant called one (1) witness, PROTESTANT OWNER, Owner and General Manager of the Protestant. The Protestant did not offer any exhibits to be identified, offered, and admitted into evidence.

Upon conclusion of the show cause hearing, the record was closed and the case submitted for decision on August 7, 2008.

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[1] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[2] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[3] On July 25, 2008, the signed Certified Mail "green cards" were filed with the ALJ's office.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings and the exhibits received into evidence, the undersigned finds:

1. The Applicant's new and used boat and motor dealership is located at APPLICANT ADDRESS.[4] The Applicant's business hours during the "Boating Season" (approximately April 1st through August 31st) are Monday through Friday from 9:00 a.m. to 6:00 p.m. and Saturday from 10:00 a.m. to 5:00 p.m. The Applicant is closed on Sundays year round. The Applicant's business hours during the "Off Season" (approximately September 1st through March 31st) are Monday through Friday from 9:00 a.m. to 6:00 p.m. The Applicant is closed during the "Off Season" on Saturdays.

2. According to the records of the Oklahoma Secretary of State, the Applicant registered with the Secretary of State on June 16, 2006.[5]

3. The Tax Commission issued the Applicant's Sales Tax Permit No. XXX, with an effective date of September 27, 2006, and expiration date of September 27, 2009.[6]

4. The Tax Commission issued the Applicant's current New/Used Boat and Motor Dealer License No. YYY, with an effective date of January 1, 2008, and expiration date of December 31, 2008, for the following lines of vessels and motors,[7] to-wit:

Trade Name	Manufacturer	Vessels	Motor
Tigé	Tigé	Yes	No
Landau	C.R.C. Development	Yes	No[8]
Suzuzki	Suzuzki	No	Yes

5. On June 25, 2008, the Applicant notified the Division and Protestant by letter it intended "…to establish a new Mercury outboard dealership at APPLICANT ADDRESS."[9]

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[4] Division's Exhibit B.

[5] The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State's website to complete the factual details and background of this matter. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 1996). *See* https://www.sooneraccess.state.ok.us (Last visited August 11, 2008). APPLICANT OWNER is listed as the Registered Agent for the Applicant.

[6] Applicant's Exhibit 1. *See* Division's Exhibit B.

[7] *See* Note 6.

[8] The manufacturer of the Landau specifies the brand of engines which can be packaged with the Landau. Currently, the only "outboard" engine the Applicant is licensed to package with the Landau is a Suzuzki "outboard," but if the Applicant can become a Mercury "outboard" dealer, the Landau can be packaged with a Mercury "outboard" engine. APPLICANT OWNER testified that because most customers want to buy packages, if they request a Landau with a Mercury "outboard," the Applicant looses the sale.

6. The Protestant is the only authorized Mercury Powered Boat Package dealership ("Mercury outboards") within a fifteen (15) mile radius of the Applicant.[10]

7. On July 7, 2008, the Division received a copy of the Protestant's letter dated June 27, 2008, objecting to the Applicant's intent of "establishing a new Mercury outboard dealership."[11]

8. The Applicant's dealership is located on one (1) acre of land, with 150 foot frontage facing HIGHWAY. The building contains approximately 6000 sq. ft. The outdoor display area consists of a fenced-in area ("Secured Area") around the building of approximately 9000 sq. ft., an "Unsecured Area" and "Frontage Area" consisting of approximately 20,000 sq. ft. Approximately twenty (20) vessels can be displayed in the "Secured Area." Approximately forty (40) vessels can be displayed in the "Unsecured Area" and another ten (10) vessels can be displayed in the "Frontage Area."[12]

The indoor display area consists of a retail sales area of approximately 1250 sq. ft., with displays, including but not exclusive of wakeboards, skis, life vests, clothing, stereo equipment, tow ropes, etc., and sales offices. The service, maintenance, and inventory area contains approximately 4200 sq. ft. During the "Off-Season," approximately twenty (20) vessels can be displayed indoors in service and maintenance areas with climate controlled conditions.[13]

9. From January 1, 2008, through July 31, 2008, the Applicant's sales of "new" and "used" vessels[14] consisted of the following:

New Vessels	
Landau:	18
Tigé:	7
	25
Used Vessels:	3
Total	28

10. The Applicant projects the sale of another 15 new vessels for the remainder of the year for total sales of forty (40) new vessels during 2008.[15]

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[9] Division's Exhibit B. The notice was sent by Certified Mail. On June 26, 2008, the Protestant's "green card" was signed by PROTESTANT OWNER.

[10] Applicant's Exhibit 5. According to Applicant's Exhibit 5, there are four (4) Mercury "outboard" dealerships, including Protestant, within a fifty (50) mile radius. Three (3) other Mercury "outboard" dealerships are approximately 41.09 miles to 49.55 miles from the Protestant's location.

[11] Division's Exhibit C.

[12] Testimony of APPLICANT OWNER.

[13] Applicant's Exhibit 3. Testimony of APPLICANT OWNER.

[14] Testimony of APPLICANT OWNER.

11. The Applicant's building has signage identifying it as a boat and motor dealership. The Applicant shares a double-sided billboard, with two (2) other businesses, advertising its dealership.[16] The Applicant advertises in phone books identifying it as a boat and motor dealer for CITY 1, CITY 2, CITY 3, CITY 4, and CITY 5. The Applicant advertises in newspapers in CITY 6,[17] CITY 3, CITY 4, and CITY 5. The Applicant has a billboard along INTERSTATE around Mile Marker No. AAA, web advertising (both paid and unpaid), and banners and specials displayed across the Frontage Area.[18]

12. The Applicant participates in two (2) major boat shows each year, in CITY 3 and CITY 7, which is a major source of advertising.[19]

13. The Applicant's investment in the dealership is approximately $400,000.00.[20]

14. The Applicant has nine (9) employees. Five (5) employees are salesmen, two (2) employees are financial, and two (2) employees are technicians. One (1) of the technicians is Mercury trained.[21]

15. The Protestant's new and used boat and motor dealership is located at PROTESTANT'S ADDRESS, approximately one (1) mile from the Applicant's dealership.[22] The Protestant has been in business for thirty-five (35) years and has been an authorized Mercury "outboard" dealership for approximately twelve (12) years. PROTESTANT OWNER purchased the Protestant January 7, 2008. PROTESTANT OWNER does not own or operate any other boat and motor dealerships.[23]

16. On January 17, 2007, the Protestant's Dealer License No. ZZZ was renewed by the Tax Commission for the following lines of vessels and motors, to-wit:

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[15] Testimony of APPLICANT OWNER.

[16] Applicant's Exhibit 2, which is a photograph of the Applicant's dealership. Testimony of APPLICANT OWNER.

[17] Applicant's Exhibit 4.

[18] Testimony of APPLICANT OWNER.

[19] Division's Exhibit A. Testimony of APPLICANT OWNER.

[20] Testimony of APPLICANT OWNER.

[21] Testimony of APPLICANT OWNER.

[22] Division's Exhibit A. Testimony of PROTESTANT OWNER.

[23] Testimony of PROTESTANT OWNER.

Trade Name	Manufacturer	Vessel	Motor
Godfrey	[Blank]	Yes	No
Honda	[Blank]	No	Yes
Mercury	[Blank]	No	Yes
Evinrude	[Blank]	No	Yes
Ranger	[Blank]	Yes	No
Yamaha	[Blank]	No	Yes

17. Approximately twenty-nine percent (29%) of the Protestant's "outboard" engine sales are Mercury "outboard" engines. The remaining seventy-one percent (71%) of the Protestant's "outboard" engine sales are from other dealer product lines. Approximately forty to fifty percent (40-50%) of the Protestant's sales are local (CITY 4).[24]

18. For 2009, the Protestant has purchased the full line of Mercury products and has dropped the Honda line of products.[25]

19. The establishment of a second Mercury "outboard" dealership within the fifteen (15) mile radius of the Protestant will be beneficial to the retail new vessel or new motor business and the consuming public in the relevant market area by increasing competition and providing other combinations of dealer product lines of new boat and motors, which are not currently available, and provide a second Mercury factory authorized choice for service, maintenance, and repairs.

20. No evidence has been produced that a second Mercury "outboard" dealership in the relevant market area will be injurious to the public welfare.[26]

ISSUES

Whether the Applicant has sustained its burden of proof that good cause exists for permitting the Applicant to establish a second Mercury "outboard" dealership within the relevant market area.

Whether the Applicant has sustained its burden of proof that no good cause exists for denying the application to establish a second Mercury "outboard" dealership within the relevant market area.

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[24] Testimony of PROTESTANT OWNER.

[25] Testimony of PROTESTANT OWNER.

[26] PROTESTANT OWNER testified that he did not have any problems with competition, but two (2) Mercury "outboard" dealerships were too many for the relevant market area, particularly a small community like Stillwater. PROTESTANT OWNER was unable to articulate reasons for his position or produce any evidence to support his objection to the Applicant's intent to establish a second Mercury "outboard" dealership within the relevant market area.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[27]

2. In the event that a dealer (Applicant) seeks to establish a new vessel or new motor dealership within or into a relevant market area where the same product line is then represented, the dealer shall notify the Tax Commission and each new vessel or new motor dealer of such product line (Protestant) in the relevant market area of the intention to establish or relocate a dealership within or into that market area. The relevant market area is the area within a radius of fifteen (15) miles of the site of the proposed new vessel or new motor dealership.[28]

3. Within fifteen (15) days of receiving such notice such new vessel or new motor dealer may file with the Commission a protest to the establishing or relocating of the proposed new vessel or new motor dealership.[29]

4. When such a protest is filed, the Commission shall inform the dealer that a timely protest has been filed, and that the dealer shall not establish or relocate the proposed new vessel or new motor dealership until the Commission has held a hearing, nor thereafter, if the Commission has determined that there is good cause for not permitting such new vessel or new motor dealership.[30]

5. The manufacturer or factory representative of the same product line may obtain a waiver of protest from each new vessel or new motor dealer of the same product line within that relevant market area. If a waiver of protest from each dealer within the relevant market area is not attached to the application for the new dealer seeking to establish, the Commission shall render a final decision no later than sixty (60) days after the Commission's receipt of the notice of protest.[31]

6. In any hearing held pursuant to this section on additional dealerships, the new dealer or existing dealer relocating shall have the burden of proof.[32]

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[27] OKLA. STAT. ANN. tit. 63, § 4037.1 (West 2001).

[28] *See* Note 27.

[29] *See* Note 27.

[30] *See* Note 27.

[31] *See* Note 27.

[32] *See* Note 27. *See also* OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), which provides in pertinent part:

> . . . "preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

7. In determining whether good cause has been established for not entering into or relocating an additional dealership for the same product line, the Tax Commission shall take into consideration the existing circumstances, including, but not limited to:

1. Permanency of the investment of the proposed dealership;
2. Effect on the retail new vessel or new motor business and the consuming public in the relevant market area;
3. Whether it is injurious to the public welfare for an additional new vessel or new motor dealership to be established;
4. Whether the new vessel or new motor dealers of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the new vessel or new motor and service facilities, equipment, supply of new vessel or new motor parts, and qualified service personnel; and
5. Whether the establishment of an additional new vessel or new motor dealership would increase competition, and therefore be in the public interest.

8. Based upon a review of the record, the Applicant has sustained its burden of proof that good cause exists for permitting the Applicant to establish a second Mercury "outboard" dealership within the relevant market area.

9. Applicant has also sustained its burden of proof that no good cause exists for denying the filing of the application to amend its current New/Used Boat and Motor Dealer License No. YYY to establish a second Mercury "outboard" dealership within the relevant market area.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, that the protest should be denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.