15-1170
TAX TYPE: DEALER LICENSE DENIAL
TAX YEAR: 2015
DATE SIGNED: 8-28-2015
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. MOTOR VEHICLE ENFORCEMENT DIVISION, UTAH STATE TAX COMMISSION, Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** Appeal No. 15-1170 Account No. ##### Type: Dealer License Denial Judge: Phan

Presiding:
John Valentine, Commission Chair
Michael Cragun, Commissioner
Robert Pero, Commissioner
Rebecca Rockwell, Commissioner
Jane Phan, Administrative Law Judge

Appearances:
For Petitioner: REPRESENTATIVE-1 FOR PETITIONER, Attorney at Law
REPRESENTATIVE-2 FOR PETITIONER, Attorney at Law
REPRESENTATIVE-3 FOR PETITIONER, Attorney at Law
REPRESENTATIVE-4 FOR PETITIONER, Vice President Business Development, PETITIONER

For Respondent: REPRESENTATIVE-1 FOR RESPONDENT , Assistant Attorney General
REPRESENTATIVE-2 FOR RESPONDENT, Assistant Attorney General
RESPONDENT, Assistant Director, Motor Vehicle Enforcement Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on August 14, 2015, in accordance with Utah Code §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT[1]

1. On February 12, 2015, PETITIONER ("PETITIONER") filed an application for a new motor vehicle dealer's license (the "February Application").[2]

2. In letters dated February 26, 2015 and March 2, 2015, Assistant Attorney General REPRESENTATIVE-1 FOR PETITIONER notified PETITIONER that the Respondent, Motor Vehicle Enforcement Division ("MVED"), would deny PETITIONER'S new motor vehicle dealer's license application.[3]

3. On March 4, 2015, PETITIONER submitted a letter to the MVED and REPRESENTATIVE-1 FOR PETITIONER responding to REPRESENTATIVE-1 FOR PETITIONER letters of February 26, 2015 and March 2, 2015.[4]

4. On April 13, 2015, PETITIONER submitted a second application to the MVED for a new motor vehicle dealer's license (the "April Application").[5]

5. On May 11, 2015, PETITIONER submitted a letter to the Utah Attorney General's office supporting PETITIONER'S April Application.[6]

6. On May 14, 2015, REPRESENTATIVE-1 FOR PETITIONER submitted a letter to the MVED recommending the denial of PETITIONER'S April Application for a new motor vehicle dealer's license.[7]

7. On May 21, 2015, the MVED formally denied PETITIONER'S application, stating that PETITIONER does not meet the relevant provisions of the Motor Vehicle Business Regulation Act and New Automobile Franchise Act.[8]

8. RESPONDENT, Assistant Director of the Motor Vehicle Enforcement Division, testified it was his understanding of the law in effect when he reviewed the application that in order to hold a new motor vehicle dealer license, the dealer had to have a franchise. After review of PETITIONER'S February Application he requested legal counsel for MVED to review the matter.

9. CORPORATION ("CORPORATION") is the manufacturer of VEHICLE TYPE.

[1] Findings of Fact, Nos. 1-7 are from a Stipulation of Facts entered into between the parties on August 4, 2015, and received into the Formal Hearing record.
[2] Exhibit 1.
[3] Exhibit 2.
[4] Exhibit 3.
[5] Exhibit 4.
[6] Exhibit 5.
[7] Exhibit 6.
[8] Exhibit 7.

PETITIONER is a wholly owned subsidiary of CORPORATION.[9] CORPORATION had incorporated and registered PETITIONER with the State of Utah Department of Commerce on January 6, 2015.[10]

10. CORPORATION manufactures all-(X) vehicles using technology that is relatively new to perspective purchasers of these vehicles. CORPORATION'S vehicles have won awards such as (WORDS REMOVED). CORPORATION'S sales and service operations have also received top marks from Consumer Reports.[11]

11. CORPORATION does not sell the vehicles it manufactures through independent franchise dealers anywhere in the world. CORPORATION sells its vehicles using a direct sales and distribution model through retail locations owned by CORPORATION or wholly owned subsidiaries of CORPORATION, via its internet website or over the telephone. CORPORATION currently has ##### stores in the United States.[12] CORPORATION had incorporated PETITIONER, a wholly owned subsidiary to operate and sell vehicles from the Utah retail and service location.

12. On November 15, 2014, CORPORATION entered into an agreement to lease property at ADDRESS-1, in CITY-1, Utah. The lease provided a five year term at a rate of $$$$$ per month and options for renewal. The lease did have some provisions for termination by CORPORATION if it was unable to obtain certain licenses or approvals.[13]

13. CORPORATION incurred significant expense in setting up its retail store location at this address.[14] Photographs submitted of the ADDRESS-1 location indicate that the site has a showroom. There is also a charging station and service center at this location.[15]

14. On the Bonded Motor Vehicle Business Application, dated January 15, 2015, to obtain a new motor vehicle dealer license, PETITIONER listed the business address for the vehicle dealership to be ADDRESS-1, CITY-1.[16]

15. The retail store portion has had to remain shuttered due to MVED's denial to issue the license.[17]

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[9] Exhibit 1, Letter dated February 10, 2015, from NAME-3, CORPORATION Deputy General Counsel, and Exhibit 3.
[10] Exhibit 1.
[11] Testimony of REPRESENTATIVE-4 FOR PETITIONER, Vice President for Business Development, PETITIONER
[12] Testimony of REPRESENTATIVE-4 FOR PETITIONER.
[13] Exhibit 1, Lease between PETITIONER and ADDRESS-1 BUSINESS. The termination provisions are at Sec. 1.2.3 of the Lease. This order makes no conclusions and offers no opinion regarding whether CORPORATION may terminate the lease under these provisions.
[14] Testimony of REPRESENTATIVE-4 FOR PETITIONER.
[15] Exhibit 1.
[16] Exhibit 1.
[17] Testimony of REPRESENTATIVE-4 FOR PETITIONER, Exhibit 1.

16. Effective April 13, 2015, CORPORATION and PETITIONER entered into a "Dealer Agreement" which provided that CORPORATION would sell VEHICLE TYPE and parts to PETITIONER and PETITIONER would sell the vehicles and parts and provide customer services on behalf of the owners and prospective owners of these products.[18] PETITIONER is referred to as "Dealer" in the Dealer Agreement, which contains in pertinent part the following provisions:

> . . .
> 2. OBLIGATIONS OF CORPORATION. CORPORATION agrees to sell and deliver VEHICLE PRODUCT to Dealer in accordance with the terms and conditions of this Agreement.
> . . .
>
> 3.1 CORPORATION agrees to allocate and sell VEHICLE TYPE to Dealer in conformity with CORPORATION sale practices, as determined by CORPORATION from time to time.
> 3.2 Payment to CORPORATION for VEHICLE TYPE is due and will be made by Dealer upon presentation of CORPORATION'S invoice for said VEHICLE TYPE to Dealer or by such other method as CORPORATION may from time to time adopt. Title and ownership to VEHICLE TYPE will remain with CORPORATION until payment in full for such vehicles has actually been received by CORPORATION.
> . . .
>
> 6.2 Throughout the term of this Agreement, Dealer will keep its Dealership Facilities open for business during, and for not less than, the customary business hours of the trade in Dealer's area.
> . . .
> 6.5 Dealer will use its best efforts to comply with all reasonable directives and suggestions of CORPORATION in the marketing and sale of VEHICLE TYPE, the sale of VEHICLE PARTS and the performance of customer services.
> . . .
>
> 7.1 Dealer will use its best efforts to actively promote the sale of PRODUCT TYPE through systematic contacts with existing and potential owners of VEHICLE TYPE and through such other reasonable means as CORPORATION may from time to time suggest. Unless otherwise approved in writing by CORPORATION, Dealer shall offer PRODUCT TYPE for retail sale at the manufacturer's suggested retail price established by CORPORATION.
> . . .
>
> 10.1 Dealer may not use CORPORATION'S trade name, trademark, service mark, or related characteristic (collectively, "CORPORATION TRADEMARK") for any purpose or in any manner.
> 10.2 Dealer acknowledges the exclusive ownership by CORPORATION of, and the validity of, the CORPORATION TRADEMARK and all registrations thereof.
> 10.3 Dealer and CORPORATION hereby agree that nothing in this Agreement shall constitute a grant of a license by CORPORATION to Dealer of CORPORATION

[18] Exhibit 4.

> TRADEMARK. All CORPORATION TRADEMARK are the sole and exclusive property of CORPORATION and no license or other right to such CORPORATION TRADEMARK is granted or implied hereby.
> . . .
>
> 16.1 Dealer is an independent contractor and is not an agent, servant, employee, legal representative, partner or joint venture of CORPORATION. In addition, Dealer hereby agrees that this Agreement does not form a franchise relationship between Dealer and CORPORATION, and Dealer further agrees that it is not a franchisee (as such term may be defend under UCA 1953 Sec. 13-14-102). CORPORATION hereby agrees that this Agreement does not form a franchise between Dealer and CORPORATION, and CORPORATION further agrees that it is not a franchisor (as such term may be defined under UCA 1953 Sec. 13-14-102).

17. The Dealer Agreement does not provide for the arrangement between CORPORATION and PETITIONER regarding PETITIONER'S use of the premises leased by CORPORATION at ADDRESS-1. However, the agreement does note it is "between PETITIONER, a STATE-1 corporation having its headquarters offices at ADDRESS-2, CITY-2, STATE-2 ZIP CODE ("CORPORATION"), and PETITIONER a STATE-1 corporation and wholly owned subsidiary of CORPORATION, having its principal place of business at ADDRESS-1, CITY-1, Utah ZIP CODE." The CORPORATION name and logo are on the building at ADDRESS-1.[19]

18. PETITIONER'S retail operations are based on a direct sales business model, which, based on the testimony of CORPORATION'S Vice President of Business Development, REPRESENTATIVE-4 FOR PETITIONER,[20] is the model that CORPORATION has chosen to utilize to sell its vehicles. REPRESENTATIVE-4 FOR PETITIONER testified that CORPORATION does not sell vehicles through independent franchisees anywhere in the world. REPRESENTATIVE-4 FOR PETITIONER testified a factor in using this model is that CORPORATION wanted to encourage the adoption and ownership of (X) vehicles, and that there was a "huge education requirement" in introducing this new technology. He testified that they have optimized a sales and service model for education, and that it takes roughly 25 days from first contact with a customer to a purchase. Prospective purchasers must first learn about (X) vehicle technology in general, then about CORPORATION'S product, and then they may decide to purchase.[21]

19. REPRESENTATIVE-4 FOR PETITIONER testified that the price for the vehicles, "is transparent and consistent across all markets" and that "the MODEL TYPE is - - and its various options are the same price everywhere in the world." He goes on to note for example that a MODEL TYPE in

[19] Exhibit 1.
[20] REPRESENTATIVE-4 FOR PETITIONER testimony is found at pages 33-74 of the hearing transcript.
[21] Hearing Transcript, pg. 50.

FOREIGN COUNTRY would be the same price as in the U.S., but they would add on transportation and duty costs.[22] Another factor in CORPORATION'S sales model that is different is that their retail locations may have only one vehicle in the showroom and only a couple vehicles there available for test drives. The vehicles are generally custom built to buyers' specifications once the buyer has purchased the vehicle. About 95% of its vehicles are custom built in this manner. He testified the CORPORATION salespeople are not incentivized to "up-sell folks" "into options and features that they may or may not want."[23] Additionally, he states the service department is not operated as a profit center and their successful performance is based on "customer happiness."[24] Another difference he noted between traditional manufacturers is that CORPORATION does not engage in paid advertisements for their vehicles. Additionally, CORPORATION does not buy trade-ins. If a customer wants to trade in another manufacturer's vehicle, they will help facilitate the customer making a contact with a third party business that buys the trade-in.

20. One factor noted at the hearing was the relatively small number of vehicles that CORPORATION manufactured. For example, CORPORATION'S first generation product was the VEHICLE TYPE-1. CORPORATION produced roughly ##### of these vehicles per year from 2008 to 2011. Then CORPORATION developed the VEHICLE TYPE-2, a mid-volume, mid-price sedan, which it launched mid 2012. REPRESENTATIVE-4 FOR PETITIONER testified that CORPORATION produced ##### of these vehicles in 2012 and he noted, "To fast forward to this year where we will be producing and delivering #####, at least ##### vehicles to the market."[25]

21. PETITIONER presented expert witness testimony of NAME-1.[26] NAME-1 testified that she had reviewed relevant Utah statutes, the Utah Constitution, publically available information concerning CORPORATION and this dispute, research on retail sales, the dealership model, consumer preferences in the industry, reports that examine the economics of automobile distribution and the impact of franchise laws that restrict distribution. It was NAME-1 expert opinion that CORPORATION business model, which she referred to as a vertically integrated sales model, was highly effective for a firm producing a new and novel product and a lower-cost alternative to the traditional franchised dealer model. She stated that the manufacturer should be able to choose the business model it uses to sell its vehicles and the free market would let us know if it was a good choice. When asked, she did acknowledge that it was possible for CORPORATION to use a model where it sold vehicles through third party dealers,

[22] Hearing Transcript, pg. 52.
[23] Hearing Transcript, pg. 55.
[24] Hearing Transcript, pg. 58.
[25] Hearing Transcript, pg. 41.
[26] NAME-1 Testimony is found at pages 74-120 of the Hearing Transcript.

stating, "If CORPORATION wanted to do something like that, it – it could. The fact that it's choosing not to and that we're here explaining why it really wants to sell through its own stores suggests to me that there are good reasons why it wants to sell through its own stores."[27]

22. It was NAME-1 opinion that prohibiting CORPORATION from selling new vehicles directly to consumers in Utah harms Utah consumers and Utah's economy. She states prohibiting this is anti-competitive, will mean a loss of jobs in Utah, does not benefit the public, and will cause more pollution.

23. NAME-1 testified that because this was a young firm, it had to be concerned with brand building. It also was attempting to build its brand without paid advertisements. For this reason, CORPORATION had to set up its stores and make the customer service exactly how it wanted it to be done. It was her opinion that CORPORATION vertically integrated sales model eliminated double marginalization, where both the manufacturer and the dealer add a mark-up. She testified double marginalization may increase the price the consumer pays for the vehicle. She also noted that there were cost effective savings in CORPORATION'S brand building approach. CORPORATION had a cost savings because it did not pay for advertisement. There was also a savings to CORPORATION because of its inventory. CORPORATION did not fill up lots with cars in hope they would sell, they instead built the cars that the customers wanted and the vehicles are not constructed until they are purchased, so there is better cash flow.

24. NAME-1 testified that the traditional franchised dealer model, where a manufacturer sells its vehicles through numerous franchised dealers, leads to intrabrand competition. The various franchised dealers of a single brand may compete against each other for sales. There is also interbrand competition, or competition between brands. She noted that CORPORATION'S vertically integrated sales model would still lead to interbrand competition. NAME-1 testified in her opinion that the state did not have an interest in requiring a manufacturer to sell through franchised dealers, but did acknowledge the state had an interest in protecting dealers who are currently in the dealership format from predatory actions on the part of their own manufacturers.[28] NAME-1 was asked during the hearing, "So it's your testimony then that there is a state interest in protecting dealers once you have a dealer and franchise arrangement. But if you always stay as a company store and never go to the franchise model, that's where you then say . . . there is a lack of state interest in protecting that particular model." In response NAME-1 testified, "I think there's a state interest in protecting that model, in allowing it to enter, but I don't think there's any

[27] Hearing Transcript, pg. 108.
[28] Hearing Transcript, pg, 110.

entity within the CORPORATION column that needs protecting."[29] To further clarify NAME-1 was asked if CORPORATION grew in size to the point where franchising became important, if it would be "important to prohibit them from owning company-owned stores," NAME-1 stated in part . . . "As I said, there is some controversy about how much dealers need to be protected. . . But if CORPORATION were to grow and decide it wanted this traditional franchise model, then I think under Utah law, the franchise laws would apply to that – that – if CORPORATION created third-party independent stores that were dealers that were selling its product, then you already have a law in place for regulating that."[30]

25. PETITIONER presented an Expert Witness Statement from NAME-2, MBA, BBA, SPA, and CFE, which was received into the record at the Formal Hearing.[31] NAME-2 had 25 years of experience in the automotive industry, most of which was focused on automotive retail. In his written testimony he described the retail operations of independent franchise dealerships and compared that to CORPORATION direct sales model. It was his testimony that the "traditional dealerships are massive operations, relative to a CORPORATION store, with high overhead, requiring a high volume of fast-paced vehicle sales and service work to remain profitable."[32] He also states that, "traditional dealerships derive significant profits from sales of service and parts, used vehicles, financing, insurance products and other 'ad-ons.'" He notes that "traditional dealerships rely on manufacturers to fund advertising and incentive programs."[33] He explains that CORPORATION'S direct sales model relies on much smaller facilities with low overhead. He states, "Because CORPORATION cars are custom manufactured for each purchaser, CORPORATION stores generally have only one or two VEHICLE TYPE on-site for test drives and education purposes."[34] He also indicated that the sales pace is slower in the CORPORATION stores stating, "The public is often skeptical of (X) vehicle technology because it is new and unfamiliar to them. The sale of a CORPORATION car requires significant time and a low-pressure environment to teach consumers about the operation and benefits of (X) vehicles."[35] His written testimony is that traditional dealerships have other profit centers, like the sale of used vehicles, financing or sales of insurance as well as a service and parts department. He notes in contrast that "CORPORATION derives the vast majority of its profits from the sale of new CORPORATION cars. CORPORATION operations are not based on profits derived from servicing CORPORATION cars, used vehicle sales, financing or

[29] Hearing Transcript, pg. 114.
[30] Hearing Transcript, pg. 115.
[31] Exhibit 11.
[32] Exhibit 11, pg. 2, lines 23-24.
[33] Exhibit 11, pg. 3.
[34] Exhibit 11, pgs. 11-12.
[35] Exhibit 11, pg. 12.

sales of insurance products."[36] It was NAME-2 opinion "that it would not be viable for CORPORATION to sell its cars to consumers through independent franchised dealerships in Utah."[37]

APPLICABLE LAW

Utah law requires a person to obtain a license from MVED before they can sell new or used vehicles in this state. Utah Code Sec. 41-3-201(2) provides:

> A person may not act as any of the following without having procured a license issued by the administrator: (a) a dealer; . . .

For purposes of Utah Code Sec. 41-3-201(2) "dealer" is defined at Utah Code 41-3-102(8) to be:

> (a) "Dealer" means a person: (i) whose business in whole or in part involves selling new, used or new and used motor vehicles or off-highway vehicles; and (ii) who sells, displays for sale, or offers for sale or exchange three or more new or used vehicles or off-highway vehicles in any 12-month period.

Utah Code Sec. 41-3-202(1) of the Motor Vehicle Business Regulation Act provides the actions a new motor vehicle dealer license permits a dealer to lawfully perform in this state as follows:

> (1) A new motor vehicle dealer's license permits the licensee to:
> (a) offer for sale, sell, or exchange new motor vehicles if the licensee possesses a franchise from the manufacturer for the motor vehicle offered for sale, sold or exchanged by the licensee;
> (b) offer for sale, sell or exchange used motor vehicles;
> (c) operate as a body shop; and
> (d) dismantle motor vehicles.

Utah Code Sec. 41-3-210(1) provides actions that are prohibited on the part of a license holder. In relevant part this subjection provides:

> (1) The holder of any license issued under this chapter may not:
> . . .
> (d) violate any law of the state respecting commerce in motor vehicles or any rule respecting commerce in motor vehicles made by any licensing or regulating authority of the state;
> . . .
>
> (g) engage in a business respecting the selling or exchanging of new or new and used motor vehicles for which he is not licensed, including selling or exchanging a new motor vehicle for which the licensee does not have a franchise . . .

The Motor Vehicle Business Regulation Act defines "franchise" at Utah Code Sec. 41-3-102(16) as follows:

[36] Exhibit 11, pg. 13.
[37] Exhibit 11, pg. 2.

> "Franchise" means a contract or agreement between a dealer and a manufacturer of new motor vehicles or its distributor or factory branch by which the dealer is authorized to sell any specified make or makes of new motor vehicles.

Under the Motor Vehicle Business Regulation Act, MVED denies issuance of a license at Utah Code Sec. 41-3-209(1) as follows:

> If the administrator finds that an applicant is not qualified to receive a license, a license may not be granted.

State laws respecting commerce in motor vehicles are also found in the New Automobile Franchise Act. That Act defines "dealership," "franchise" or "franchise agreement," "franchisee," "franchisor" and "new motor vehicle dealer" at Utah Code Sec. 13-14-102 as follows:

> As used in this chapter:
> . . .
> (5) "Dealership" means a site or location in this state: (a) at which a franchisee conducts the business of a new motor vehicle dealer; and (b) that is identified as a new motor vehicle dealer's principal place of business for licensing purpose under Section 41-3-204.
> . . .
> (8) (a) "Franchise" or "Franchise agreement" means a written agreement, or in the absence of a written agreement, then a course of dealing or a practice for a definite or indefinite period, in which: (i) a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic; and (ii) a community of interest exists in the marketing of new motor vehicles, new motor vehicle parts, and services related to the sale or lease of new motor vehicles at wholesale or retail.
> (b) "Franchise" or "Franchise agreement" includes a sales and service agreement.
>
> (9) "Franchisee" means a person with whom a franchisor has agreed with or permits a franchisee to purchase, sell, or offer for sale new motor vehicles manufactured, produced, assembled, represented, or distributed by the franchisor.
>
> (10) "Franchisor" means a person who has, in writing or in practice, agreed with or permits a franchisee to purchase, sell, or offer for sale new motor vehicles manufactured, produced, assembled, represented, or distributed by the franchisor, and includes: (a) the manufacturer, producer, assembler, or distributor of the new motor vehicles; (b) an intermediate distributor; and (c) an agent, officer, or field or area representative of the franchisor.
> . . .
>
> (17) "New motor vehicle dealer" is a person who is licensed under Subsection 41-3-202(1)(a) to sell new motor vehicles.

The New Automobile Franchise Act lists acts that are prohibited by a franchisor at Utah Code Sec. 13-14-201 as follows:

(1) A franchisor may not in this state:

. . .

(u) except as provided Subsection (6), directly or indirectly: (i) own an interest in a new motor vehicle dealer or dealership; (ii) operate or control a new motor vehicle dealer or dealership; (iii) act in the capacity of a new motor vehicle dealer, as defined in Section 13-14-102; or (iv) operate a motor vehicle service facility;

DISCUSSION

Regardless of whether the traditional franchise model for sales of new motor vehicles may not be the best business model for CORPORATION or PETITIONER, or whether it is merely not the sales model CORPORATION has decided to employ, the traditional franchise model is the manner under which new motor vehicles may be sold in this state based on longstanding provisions of Utah law. Under the Motor Vehicle Business Regulation Act at Utah Code Sec. 41-3-201, a person may not act as a motor vehicle dealer without obtaining a license from MVED. Utah Code Sec. 41-3-202(1), makes it clear that a new motor vehicle dealer license permits a dealer to lawfully offer for sale, sell, or exchange new motor vehicles if the dealer possesses a "franchise" from the manufacturer for the motor vehicle offered for sale. Additionally, Utah Code Sec. 41-3-210(1)(g) prohibits a licensee from selling a new motor vehicle for which the licensee does not have a "franchise." With these provisions, the current law requires a franchise arrangement for the sale of new motor vehicles, which is consistent with the traditional dealership sales model pursuant to which new motor vehicles have been sold in this state for years.

Under the Motor Vehicle Business Regulation Act, at Utah Code Sec. 41-3-102(16), a "franchise" is defined as, "a contract or agreement between a dealer and a manufacture of new motor vehicles . . . by which the dealer is authorized to sell any specified make or makes of new motor vehicles." When PETITIONER filed its February Application, it did not provide a written agreement or contract. The Division, after consultation with counsel from the Attorney General's Office, concluded that PETITIONER did not have a franchise and, therefore, found that PETITIONER was not qualified to receive the license. REPRESENTATIVE-1 FOR PETITIONER, Assistant Attorney General, notified PETITIONER on February 26, and March 2, 2015 that MVED would deny the license. Under Utah Code Sec. 41-3-209, if the applicant was found not qualified, MVED may not issue the license.

On April 13, 2015, PETITIONER submitted to MVED a second application for a new motor vehicle dealer's license ("April Application"). With this application PETITIONER included the Dealership Agreement, with an effective date of April 13, 2015.[38] Under this agreement CORPORATION agreed to allocate and sell VEHICLE TYPE to PETITIONER and PETITIONER

[38] Exhibit 4.

agreed to "use its best efforts to comply with all reasonable directives and suggestions of CORPORATION in the marketing and sale of VEHICLE TYPE."[39] Sec. 16.1 of the Dealership Agreement states, "Dealer [PETITIONER] hereby agrees that this Agreement does not form a franchise relationship between Dealer and CORPORATION, and Dealer further agrees that it is not a franchisee (as such term may be defined under UCA 1953 Sec. 13-14-102). CORPORATION hereby agrees that this Agreement does not form a franchise relationship between Dealer and CORPORATION, and CORPORATION further agrees that it is not a franchisor (as such term may be defined under UCA 1953 Sec. 13-14-102)." After reviewing the April Application with the Dealership Agreement, REPRESENTATIVE-1 FOR PETITIONER recommended the denial of the license and MVED formally denied the license, which denial is the subject of this hearing.

At the hearing in this matter, although PETITIONER had entered into the Dealership Agreement and argued that it provided authorization to PETITIONER to sell VEHICLE TYPE, it was PETITIONER'S position that it was not a "franchise agreement." Therefore, it was PETITIONER'S assertion that this agreement was a "franchise" for purposes of the Motor Vehicle Business Regulation Act, but not a "franchise" or "franchise agreement" for purposes of the New Automobile Franchise Act. PETITIONER'S counsel point out the agreement specifically states that PETITIONER may not "use CORPORATION'S trade name, trademark, service mark or related characteristic."[40] It was not explained at the hearing how this would work with the name and trademark already on the building which PETITIONER had designated as its dealership. Additionally PETITIONER'S counsel point to Sec. 16.1 of the Dealership Agreement in which the parties "agree" that the agreement does not form a franchise relationship, that CORPORATION is not a franchisor or PETITIONER a franchisee as that term is defined under Utah Code Sec. 13-14-102.

It appears from review of the arguments presented at the hearing, the reason for the distinction that PETITIONER attempts to make is that under the New Automobile Franchise Act, CORPORATION is prohibited from being a franchisor with PETITIONER as the franchisee, because CORPORATION is the sole, or 100% owner, of PETITIONER. As noted by MVED at the hearing, Utah Code Sec. 13-14-201(1)(u) provides, "a franchisor may not in this state. . . directly or indirectly: (i) own an interest in a new motor vehicle dealer or dealership; (ii) operate or control a new motor vehicle dealer or dealership; (iii) act in the capacity of a new motor vehicle dealer . . ." For this reason PETITIONER argues it has a franchise for purposes of the Motor Vehicle Business Regulation Act, but that there is no Franchise Agreement for purposes of the New Automobile Franchise Act. For support of this claim,

[39] Exhibit 4, pg. 3.
[40] Exhibit 4, pg. 4.

PETITIONER'S counsel makes the assertion that there were different legislative purposes for these two acts. Therefore, he argues they may be subject to differing interpretations. It was his argument that the intent of the Motor Vehicle Business Regulation Act was to protect the public or consumers from unfair practices when they purchased motor vehicles. He argued that the intent of the legislature in adopting the New Automobile Franchise Act was to protect franchisees or dealerships from exploitation by the franchisors. CORPORATION counsel also made the point that the two acts are enforced by different government divisions and asserted that MVED did not have the authority to make determinations regarding violations under the New Automobile Franchise Act.

It is MVED's position at the hearing that PETITIONER must have a franchise to sell the VEHICLE TYPE in order for the Division to issue it a new motor vehicle dealer's license, and if the Dealer Agreement or practice between CORPORATION and PETITIONER rose to the level of a franchise, it violated provisions of the New Automobile Franchise Act because PETITIONER was a wholly owned subsidiary of CORPORATION. MVED argues that PETITIONER must comply with provisions of both the Motor Vehicle Business Regulation Act and the New Automobile Franchise Act, citing for authority Utah Code Sec. 41-3-210(1), which provides that a holder of a license may not violate any law of the state respecting commerce in motor vehicles.

Considering the parties' arguments and the applicable statutory provisions, the New Automobile Franchise Act is certainly made up of laws respecting commerce in motor vehicles. Additionally, the New Automobile Franchise Act specifically references provisions in the Motor Vehicle Business Regulation Act that are relevant in this case. "New motor vehicle dealer,"[41] which is what PETITIONER has requested a license for in Utah, is defined at Utah Code Sec. 13-14-102(17) to be "a person who is licensed under Subsection 41-3-202(1)(a)." Utah Code Sec. 41-3-202(1) provides the actions that may be performed by a "new motor vehicle dealer" which include to sell in this state new motor vehicles if the dealer posses a franchise from the manufacturer. Based on the plain language of these two acts, MVED's position is correct that MVED must consider provisions of the New Motor Vehicle Franchise Act, and if the issuance of the license would cause CORPORATION and PETITIONER to be in violation of the New Automobile Franchise Act, MVED may not issue the license to PETITIONER.

PETITIONER had argued that the legislative intent and basis of these two acts were distinct and should be interpreted based on that distinct intent. However, in regards to statutory interpretation the courts have noted, '"When interpreting statutory language, our primary objective is to ascertain the intent

[41] The definitions of "Dealership" and "Motor Vehicle" provided in the New Automobile Franchise Act, at Utah Code Sec. 13-14-102(5) and (15) respectively also specifically reference provisions in the Motor Vehicle Regulation Act.

of the legislature. To discern legislative intent, we first look to the plain language of the statute."' *Ivory Homes, Ltd, v. Utah State Tax Comm'n*, 2011 UT 54, ¶ 21, Citing *LPI Services v McGee*, 2009 UT 41, 11, 215 P.3d 135. The Court in *Ivory* goes on to note, '"We presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning." However, "our plain language analysis is not so limited that we only inquire into individual words and subsections in isolation; our interpretation of a statute requires that each part of a section be construed in connection with every other part of section so as to produce a *harmonious whole* (Emphasis in Original, Internal Citations Omitted)."' *Id*. at 2011 UT 54, ¶ 21. To reach the interpretation requested by PETITIONER, the Commission would have to ignore the plain language of the applicable provisions in both the Motor Vehicle Business Regulation Act and the New Automobile Franchise Act.

PETITIONER has also asserted in this proceeding that its Dealership Agreement is not a franchise agreement, therefore it should not be construed a violation of the New Automobile Franchise Act. CORPORATION and PETITIONER drafted into their agreement a provision that says, "this Agreement does not form a franchise" and "CORPORATION further agrees that it is not a franchisor (as such term may be defined under UCA 1953 Sec 13-14-102)."[42] Parties may not contract away applicable provisions of law they find inconvenient. If the agreement or the relationship between CORPORATION and PETITIONER meet the requirements of "Franchisor," or "Franchisee" as those terms are defined in Utah Code Sec. 13-14-102, then they are a "Franchisor" and "Franchisee," for purposes of the New Automobile Franchise Act regardless of their written agreement. Utah Code Sec. 13-14-102(10) defines "franchisor" to be "a person who has, in writing or in practice, agreed with or permits a franchisee to purchase, sell, or offer for sale new motor vehicles manufactured . . .by the franchisor." Based on the plain language of these provisions,[43] CORPORATION is a Franchisor because CORPORATION is permitting PETITIONER to purchase, sell or offer for sale new VEHICLE TYPE manufactured by CORPORATION. Utah Code Sec. 13-14-102(9) defines "franchisee" as "a person with whom a franchisor has agreed with or permits a franchisee to purchase, sell, or offer for sale new motor vehicles manufactured . . by the franchisor." PETITIONER is a franchisee under this definition.

As CORPORATION is a "franchisor" its agreement or practice with its franchisee PETITIONER is in violation of Utah Code Sec. 13-14-201(1)(u) because under that section CORPORATION may not in

[42] Exhibit 4, Dealer Agreement, pg. 6.

[43] As noted by the Utah Supreme Court in *Macfarlane v. State Tax Comm'n*, 134 P.3d, 1116, 1118 (Utah 2006), "We look first to the plain language of a statute to determine its meaning. Only when there is ambiguity do we look further." Citing *J. Pochynok Co., Inc. v. Smedsrud*, 2005 UT 39, ¶15, 116 P.3d 353. The Court in *Macfarlane* goes on to state, "Moreover, "[w]hen examining the plain language, we must assume that each term included in the [statute] was used advisedly." Citing *Carrier v. Salt Lake County*, 2004 UT 98, ¶30, 104 P.3d 1208.

this state directly or indirectly own an interest in a new motor vehicle dealer or dealership. Because the franchisor/franchisee agreement or practice is directly in violation of Utah Code Sec. 13-14-201(1)(u), MVED appropriately determined that PETITIONER did not qualify for the license, as under Utah Code Sec. 41-3-210(1)(d) the holder of a license may not violate any law of the state respecting commerce in motor vehicles. The franchise agreement or practice that PETITIONER is participating in is unequivocally in violation of Utah Code Sec. 13-14-201(1)(u). Based on the agreement or practice between CORPORATION and PETITIONER, and the applicable provisions of the Utah Code which are currently in effect, a new motor vehicle dealer license may not be issued to PETITIONER.

PETITIONER argues that MVED's decision to deny PETITIONER a new motor vehicle dealer license violates the Constitution of Utah and the U. S. Constitution and argues that the Commission should avoid an unconstitutional interpretation of the statutes by finding that they do not bar the grant of PETITIONER'S license. PETITIONER cites[44] to *Howe v. Tax Commission*, 353 P.2d 468, 470 (Utah 1960) in which the court had stated "[I]f there is doubt or uncertainty as to the meaning to be given to a statute, one of which would make it unconstitutional and the other constitutional, the latter should be given effect." However, there is not a plain language reading of the applicable laws at issue in this case that would allow a new motor vehicle dealer license to be issued to PETITIONER. Under the Motor Vehicle Regulation Act, PETITIONER needs a franchise in order to sell new motor vehicles in this state. Under the New Automobile Franchise Act, based on the agreement or practice, CORPORATION is a franchisor and the fact that CORPORATION is the sole owner of PETITIONER violates provisions of that act.

PETITIONER argues that MVED's statutory interpretation violates Utah Const. art. XII, Sec. 20, which provides, "It is the policy of the state of Utah that a free market system shall govern trade and commerce in this state to promote the dispersion of economic and political power and the general welfare of the people." PETITIONER points out that the Utah Supreme Court has rejected legislative actions that violate this section, citing[45] to *Gen. Elec. Co. v. Thrift Sales, Inc.*, 301 P.2d 741, 751-52 (Utah 1956); *Pride Oil Co. v. Salt Lake Cnty*., 370 P.2d 355, 355-56 (Utah 1962); *Gammon v Federated Milk Producers Ass'n, Inc.*, 360 P.2d 1018, 1023 (Utah 1961). It was PETITIONER'S argument that MVED's statutory interpretation of the New Motor Vehicle Regulation Act and the New Automobile Franchise Act created artificial state-sanctioned barriers to entry and shielded incumbents from competition.

[44] See PETITIONERPrehearing Brief, pg. 20. For the position that the Commission should avoid an unconstitutional interpretation of the statutes, PETITIONER also cites to *Elks Lodges No. 719 (Ogden) and No. 2021 (Moab) v. Department of Alcoholic Beverage Control*, 905 P.2d 1189, 1202 (Utah 1995); *Society of Separationists, Inc. v, Whitehead*, 870 P.2d 916, 920 (Utah 1993); *Chris & Dick's Lumber & Hardware v. Tax Comm'n*, 791 P.2d 511, 516 (Utah 1990).

[45] PETITIONER'S Prehearing Brief, pg. 20.

In addition, PETITIONER argues that MVED's denial of the license violates the substantive Due Process and Equal Protection Clauses of the U.S. Constitution (U.S. Const. Amend. XIV, Sec. 1) and article I, Sections 2, 7, and 24, and Article VI, section 26 of the Utah Constitution. PETITIONER cites[46] to *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997); *Bartell v. Aurora Pub. Schs*., 263 F.3d 1143, 1149 (10th Cir. 2001); *Palisades FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002). It was PETITIONER'S contention that denying the license did not serve the purposes of the Motor Vehicle Business Regulation Act or the purposes of the New Automobile Franchise Act and the only purpose served was the economic protection of Utah's current new motor vehicle dealers. PETITIONER asserts that the majority of circuits have rejected pure economic protectionism.[47]

PETITIONER has also made the argument that the denial of the license violates the Commerce Clause of the U.S. Constitution, U.S. Const. art. 1, Sec. 8, cl.3, because it imposes a burden on interstate commerce that is excessive in relation to its local benefits,[48] as well as violates its right to freedom of commercial speech under the First Amendment of the U.S. Constitution and article 1 section 15 of the Utah Constitution.[49]

Regarding the state and federal constitutional arguments provided by PETITIONER, as the law in this matter is clear and unambiguous, this is not similar to the findings in *Howe v. Tax Commission*, 353 P.2d 468, 470 (Utah 1960) where there were two possible meanings, one of which would make it constitutional and the other unconstitutional. The statutes in this case provide that the license should be denied. PETITIONER argues that this is an unconstitutional result and argued the constitutional claims in this proceeding as may be required by the courts if this decision is to be appealed. As the Utah Supreme Court in *Jim Nebeker, dba, Jim Nebeker Trucking v Utah State Tax Comm'n*, 2001 UT 74, ¶18, held, "[t]he district court could not have heard the constitutional claims because Nebeker failed to raise these claims in his initial proceeding before the Tax Commission. Having failed to raise the issue in the initial proceeding, Nebeker waived any opportunity to bring it later either before the district court or in another forum." In *Nebeker* at ¶15, the Courts had cited to *State Tax Commission v. Wright*, 596 P.2d 634 (Utah 1979) for the position that '"[I]t is not for the Tax Commission to determine questions of legality or

[46]PETITIONER Prehearing Brief, pg 26.
[47] In its Prehearing Brief, pg 28, PETITIONER cites to *Compare Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013); and *Powers v Harris*, 379 F.3d 1208, 1223-25 (10th Cir. 2004)
[48] PETITIONER Prehearing Brief, pg. 30, citing *Blue Circle Cement, Inc. v. Bd. Of Cnty. Comm'rs of Cnty. of Rogers*, 27 F.3d 1499, 1511 (10th Cir. 1994); *Wendover City v. W. Wendover City*, 404 F. Supp. 2d 1324, 1331 (D. Utah 2005); and *Overstock.com, Inc. v. SmartBargains, Inc.*, No. 040909525, 2006 WL6200977 (Utah Dist. Ct. Dec. 2006).
[49] For this position PETITIONER cites to *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); and *State v. Café Erotica, Inc*., 270 Ga. 97, 99 (Ga. 1998).

constitutionality of legislative enactments.'" The Nebeker court also noted the decision in *Johnson v. Utah State Ret. Office*, 621 P.2d 1234, 1237 (Utah 1980) in which that court held, "while "[a]dministrative agencies do not generally determine the constitutionality of their organic legislation, . . . the mere introduction of a constitutional issue does not obviate the need for exhaustion of administrative remedies."

In this appeal both parties recognized that the Utah State Tax Commission does not have authority to find provisions of the Motor Vehicle Business Regulation Act or the New Automobile Franchise Act to be unconstitutional and the arguments were proffered to preserve them on appeal. The expert witness testimony lays out the direct marketing approach that CORPORATION would like to pursue in Utah, how that approach may be more beneficial to CORPORATION than the traditional franchise model given that CORPORATION is a start up, low volume manufacturer of a new technology. The testimony also indicates that while CORPORATION direct marketing approach may create interbrand competition it may reduce intrabrand competition. There were arguments made as to how the acts provided protections deemed to be needed by the Utah legislature for consumers and franchisees. The Commission does not have authority to find the acts as set out by the Utah Legislature to be unconstitutional and so does not issue a conclusion on the constitutional arguments.

CONCLUSIONS OF LAW

1. Under Utah Code Sec. 41-3-201(2) and 41-3-202(1) PETITIONER needs a new motor vehicle license to sell new motor vehicles in Utah. Utah Code Secs. 41-3-210(1)(g) and 41-3-202(1) provide that new motor vehicles may only be sold by someone with a franchise. PETITIONER argues its Dealership Agreement provides it adequate authorization to sell VEHICLE TYPE and meets the requirements of being a franchise under the Motor Vehicle Business Regulation Act.

2. Utah Code Sec. 41-3-210(1) provides a license holder may not violate any law of the state respecting commerce in motor vehicles. The New Automobile Franchise Act contains laws respecting commerce in motor vehicles. Additionally, under the New Automobile Franchise Act, at Utah Code Sec. 13-14-102(17), a "new motor vehicle dealer" is a person who is licensed under the Motor Vehicle Business Regulation Act. Notwithstanding PETITIONER'S argument that the Division lacked authority to consider the New Automobile Franchise Act, the Division was correct in its interpretation that it must consider whether the licensee violates provisions of that Act.

3. Although PETITIONER argues that they met the franchise requirements under the Motor Vehicle Enforcement Act, they argue they did not have a franchise or franchise agreement under the New Automobile Franchise Act. However, this argument does not have merit. Based on the agreement or practice between CORPORATION and PETITIONER, CORPORATION is a franchisor and

PETITIONER a franchisee as those terms are defined at Utah Code Sec. 13-14-102, of the New Automobile Franchise Act. Because CORPORATION is the 100% owner of PETITIONER, this is in violation of Utah Code Sec. 13-14-201(1)(u).

4. Under Utah Code Sec. 41-3-209(1) MVED may not issue a new motor vehicle dealer license to PETITIONER because to do so would immediately put PETITIONER in violation of Utah Code Sec. 13-14-201(1)(u).

5. PETITIONER has made the arguments discussed above that denial of this license is a violation of the Utah Constitution and the U. S. Constitution. If the Commission had found there was a statutory construction that was consistent with constitutional principles and one that was not, the Commission could take into consideration the constitutional arguments as this was noted in *Howe v. Tax Commission*, 353 P.2d 468, 470 (Utah 1960). However, in this appeal the applicable law requires the license be denied. As the Courts have already noted, '"[I]t is not for the Tax Commission to determine questions of legality or constitutionality of legislative enactments.'"*Jim Nebeker Trucking v Utah State Tax Comm'n*, 2001 UT 74, ¶18, citing *State Tax Commission v. Wright*, 596 P.2d 634 (Utah 1979). The Tax Commission has received these arguments and testimony, but should not issue a conclusion on whether provisions of the Motor Vehicle Business Regulation Act or the New Automobile Franchise Act are in violation of the Utah Constitution or the U.S. Constitution.

Based on the foregoing Findings of Fact and Conclusions of law, the Commission should deny PETITIONER'S appeal.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission upholds MVED's decision to deny PETITIONER a new motor vehicle dealer's license. It is so ordered.

DATED this _____day of _____, 2015.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.