MONMOUTH CHRYSLER-PLYMOUTH, INC.,
Petitioner,
v.
CHRYSLER CORPORATION,
Respondent.

Decided December 6, 1983

Initial Decision

SYNOPSIS

Pursuant to the Motor Vehicle Franchise Committee Act, *N.J.S.A* 56:10-16, *et seq.*, petitioner filed a protest after respondent gave notice of its intention to establish a dealership for the sale of Chrysler and Plymouth automobiles within the eight-mile radius of petitioner's place of business.

The administrative law judge assigned to the case rejected respondent's argument that the statute did not apply in this case, determining that any agreement to open the dealership took place after the statute's effective date. After assessing the evidence, the judge determined that the establishment of the new dealership would have no effect upon the stable, adequate and reliable sales and service to purchasers of Chrysler products but that it would have a significant and adverse effect upon the stability of the existing dealership.

Accordingly, the judge determined that the protest should be upheld.

Warren W. Wilentz, Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

Dennis R. LaFiura, Esq., for the respondent (Pitney, Hardin, Kipp & Szuch, attorneys)

James H. Gorman, Esq., for the intervenor Rittenhouse Chrysler-Plymouth (Carton, Nary, Witt & Arvanitis, attorneys)

GINDIN, ALJ:

This matter arises under the Motor Vehicle Franchise Committee Act, *N.J.S.A.* 56:10-16, *et seq.* Respondent, having declared its inten-

tion to establish a dealership for the sale of Chrysler and Plymouth automobiles within an eight-mile radius of the petitioner's place of business, gave notice to the petitioner. Within 30 days of the receipt of said notice, in accordance with the provisions of *N.J.S.A.* 56:10-19, the petitioner filed a protest with the Motor Vehicle Franchise Committee. The chairman of the Motor Vehicle made for other interests with corresponding results demonstrating that it was strongly in the interest of Chrysler Realty Corporation to keep control of the property.

On July 9, 1983, Chrysler Corporation (Chrysler) notified Monmouth of its intention to franchise a dealership to be known as Rittenhouse Chrysler-Plymouth, Inc. (Rittenhouse) located less than eight miles from Monmouth Chrysler-Plymouth. The Monmouth dealership has been moderately successful over the years, and in June 1981 was selling approximately 30 cars per month. At that time, Kenneth James Dawson, Jr. became general manager of the franchise. Mr. Dawson is a very young man. As general manager, he brought enthusiasm, intelligence, and very hard work to the dealership. Based upon his analysis, the break-even point for the dealership is now 45 new cars per month and he is selling between 50 and 55 new cars per month. Mr. Dawson indicated that one of the most important aspects of improvement for the dealership is the upgrading of service. By his analysis there is a utilization factor of 60 to 65 percent. He has obtained good mechanics and good credibility. He testified that in order to get the best mechanics, he must be able to guarantee them a certain amount of work since they all work on the basis of piece work. They are guaranteed 37-1/2 hours per week of work. In order to make enough money to justify staying with a dealership such as Monmouth, they must get 50 to 55 hours per week. If Mr. Dawson loses his top mechanics, his dealership would suffer, and as a result the public would suffer.

In recent months he has experienced difficulty in obtaining cars from Chrysler. He is aware that this is a wide-spread problem within the industry, but this has hurt him significantly. He carries a stock which he claims to be about 100 cars, although testimony from Chrysler indicated that he had approximately 150 cars in inventory. Some of the discrepancy may have to do with record keeping and the timing of reports.

Statements of the company produced and relied on by the respondent show total assets of $2,056,352. Capital stock shows $30,000 and there is a negative retained earnings figure of $168,129. When current

assets ($1,645,047) are compared with current liabilities ($1,586,113) and the amount due on the mortgage ($367,398) is compared to the real value of the building, however, the dealership is in reasonably good financial condition.

In addition, Mr. Dawson has caused the company to make investments of approximately $50,000 to give the showroom a face-lift and upgrade the dealership.

Chrysler Corporation presented Marvi B. Connor, a dealer operations specialist, who has been in the automobile business since 1947. He has been with Chrysler since 1955 and is best described as an "old pro." He has been involved in the analysis of dealerships for many years, and he undertook to analyze Monmouth. He was only able to analyze the Financial Statement, but he found that the break-even point was 43 units per month, and Monmouth looked "like a healthy situation." He felt that this dealership was adequately capitalized with a working capital figure of $182,259. While he would like to see that increased by another $86,000 or $87,000, he did not consider it a problem. As to what the dealership is currently selling, there was a slight discrepancy between his testimony and Mr. Dawson's, with Mr. Connor finding the average monthly sale of new cars to be approximately 48 cars. Mr. Dawson emphasized the more recent increases and his higher figure must be accepted as consistent with the growth which has gone on for the past two and one-half years. Mr. Connor felt that the net profit received at the average of 48 new cars per month was $9,192 per month.

He analyzed the effect of any decrease in sales by reason of the proposed new dealership finding that there would be "very little effect" if there were a 5 percent decrease. This would reduce the net figure to $6,926 per month, while a 10 percent decrease in sales would have less of an effect because there would be some expenses which could be cut. That reduction would only be to $7,431 per month. A 15 percent reduction, again, would not show too much of a difference reducing the net earnings to $6,868 per month, but a 20 percent reduction would begin to have a significant effect reducing net earnings to $2,402 per month. His overall conclusion was that Monmouth is a viable dealer and has the potential of producing substantial profits. He felt that it would be seriously crippled by a reduction in sales but would not be put out of business. He did not compute the figures which he gave in terms of return on investment.

The respondent also presented a witness, Stanley W. Rappel, Jr., for the purpose of analyzing the utilization of its facilities by Mon-

mouth. He found that there was a 96 percent utilization of manpower against a 90 percent industrywide standard, so that Monmouth was doing very well. The body shop, however, was only utilizing 40 percent of its capacity.

With respect to the real estate transaction, Harry Thomas testified on behalf of Chrysler Realty. He is the zone real estate manager and has been workig in this area for 15 years. He felt that the transaction was put in for the protection of the dealer at the time of the transaction, but conceded that the rent basis was based upon 7 to 8 percent return on the purchase price. The basis in use today is 12 percent. Furthermore, while Mr. Thomas said that the sale was at the request of the dealer, there was no evidence that the price was anything less than the fair market value at the time.

The respondent relied on the area supervisor for Chrysler, William C. Zepp, Jr. Mr. Zepp is clearly an efficient and careful supervisor. His analysis of sales localities indicated the manner in which Chrysler makes its determination for sales localities. The areas in question in this case were set forth on a series of overlays to a map of Monmouth County. One overlay showed two sales localities, Eatontown and Asbury Park. The petitioner is located in Eatontown and the Asbury Park sales locality is not serviced by a Chrysler-Plymouth dealer. At one time there was a dealership in the Asbury Park area, in Belmar (a point which the map shows to be about eight miles from Monmouth), but that dealership went out of business in 1979. It was coincidentally owned by a corporation whose principal shareholder was the same person who principal shareholder of Monmouth.

The sales localities were identified by the use of census figures and arbitrarily divided into two parts. In looking at the various locations, one overlay showed the location of Monmouth and the proposed new location. Within the same areas, the various regional shopping malls were shown. What Mr. Zepp felt was highly significant were the various dealer clusters, as well as the dealers in other areas. The various sales localities were analyzed based upon population figures and material published by R.L. Polk, a company that obtains information by census figures for various market areas.

In analyzing the overlays mentioned above what becomes readily apparent is that the choice of these areas is dictated as much by the availability and organization of the R.L. Polk material and the U.S. census material, as by any other single factor. Thus, in examining the documents it is necessary to realize the nature and extent of that material Chrysler analyzed the population, both in the Asbury Park

and Eatontown sales localities, and showed that the Asbury Park area had a larger population and grew by 9 percent from 1970 to 1980, while the Eatontown sales localities declined over 6 percent. Projections from the National Planning Data Corporation suggested a roughly equal growth to 1987. By income analysis, however, Eatontown is clearly a more prosperous area. Asbury Park has significantly more people in the income levels below $15,000 per year and in the $15,000 to $35,000 category. The two areas are almost equal in the over $35,000 income level.

Analysis of market penetration in the two areas were also presented. These were measured against the percentage of the industry in the entire New York Metropolian zone. In the case of Eatontown, the sale locality in which Monmouth is located, it had run below the zone average until 1982. Since 1982 it has been above the zone average and the gap is widening slightly. The Asbury Park sales locality shows a different trend for it too has run consistently below the zone average. However, since 1982 it has run even more below the zone average, and the gap appears to be widening. Chrysler translates this data into a figure called "lost sales analysis" and uses this as a figure which should be recaptured in order to be consistent with the entire metropolitan New York area zone. Under that analysis, in 1982 and 1983, the Eatontown zone has gained sales, while the Asbury Park locality has significantly lost sales.

Analysis was also made of the "cross sell" or number of sales by Monmouth in the Asbury Park sales locality. It showed a variation between 8.5 percent and 20.5 percent, but no consistent pattern. R.L. Polk analyzed the number of buying make cars (*i.e.*, Chrysler-Plymouth), in the Asbury Park sales locality as against the Eatontown sales locality. Both localities had similar numbers of cars less than five years old, but the Asbury Park sales locality had a significantly larger number of cars more than five years old. According to the testimony of Mr. Zepp, this suggests that the latter group might represent a larger number of used cars.

In dealing with various studies performed by Chrysler, Mr. Zepp pointed out that he considered Monmouth bound by its Direct Dealer Agreements. He introduced a Chrysler Direct Dearler agreement, a Plymouth Import Direct Dealer agreement, and a Plymouth Direct Dealer Agreement. Each one of those agreements defines a sales locality by a description of various municipalities. The Chrysler Direct Dealer Agreement and the Plymouth Direct Dealer Agreement covered Allenhurst, Deal, Eatontown, Fort Monmouth, Long Branch,

Monmouth Borough, Neptune, Oakhurst, Oceanport and West Long Branch, while the Plymouth Import Dealer Agreement covered only Eatontown, Fort Monmouth, Long Branch, Monmouth Beach, Oakhurst, Oceanport and West Long Branch. The current sales locality description of Eatontown covers Eatontown, Fort Monmouth, Long Branch, Monmouth Beach, Oakhurst, Oceanport, Tinton Falls and West Long Branch. The original Chrysler and Plymouth agreements covered different municipalities, but they were changed by amendment in 1982. The testimony of Mr. Zepp is clear and leads to only one possile inference. That inference is that Chrysler Corporation defines its sales locality in an arbitrary fashion and inserts it into existing dealer agreements. The definition in Section I of each of the agreement simply says that the dealer has a "non-exclusive right, subject to the provisions of this agreement." It really cannot support any inference of rights conferred upon either Chrysler or the dealer in terms of any exclusivity or limitation.

The petitioner submitted the Chrysler and Plymouth Direct Dealer Agreements in which the dealership, which was located in what is described as the Asbury Park sales locality, covered Avon-By-The-Sea, Belmar, Bradley, Neptune City, Ocean Grove, Spring Lake, and Spring Lake Heights. That dealership, which was the one that Mr. Zepp testified that Chrysler was now seeking replace by putting in the Rittenhouse dealership, is now defined, as Allenhurst, Asbury Park, Avon-By-The-Sea, Belmar, Bradley Beach, Deal, Neptune, Neptune City, Ocean Grove and Wanamassa. Thus, the overlaps and gaps cannot support any inference that the sales locality be binding.

An analysis of the exhibits submitted by the petitioner, giving a map of the area showing distances from Monmouth and the maps submitted by the respondents showing the location of Monmouth and Rittenhouse make it clear that the existing dealership and the proposed dealership are within eight miles of one another measured in radius from the location of Rittenhouse. This distance is approximately 4.25 miles. Since the scale as listed on the overlay as approximate, the distance of 4.25 miles is accepted as a sufficient approximation.

Further evidence was produced on behalf of the intervenor, Rittenhouse. Thomas W. Rittenhouse is the president and general manager of Rittenhouse Lincoln-Mercury. This dealership was established in 1959 by Mr. Rittenhouse's father and Mr. Rittenhouse operates it with his brother-in-law, Douglas Kerr. Continuity is being preserved by the recent incorporation into the business of Mr. Rittenhouse's

son. The operation of Rittenhouse Lincoln-Mercury is a longstanding and successful operation. There are seven mechanics with 14 stalls, because Mr. Rittenhouse feels that a 2-to-1 ratio of stalls to mechanics gives more complete service. The dealership has received awards for service excellence, and the inventory maintained by the company exceeds $200,000 in parts. Rittenhouse operates as a supplier of parts to other Lincoln-Mercury dealers, and Mr. Rittenhouse hopes that if his dealership can be established on behalf of Chrysler-Plymouth, he will be able to perform the same function for Chrysler-Plymouth. The business is substantial and permanent in nature.

In June 1980 Chrysler-Plymouth, in the person of Jose Perez, contacted Mr. Rittenhouse and asked if he would be interested in applying for a franchise. Mr. Rittenhouse and Mr. Kerr each filed applications with the same dealership under date of July 15, 1980. Those applications indicated little or nothing about the manner in which the business would be operated, but Mr. Rittenhouse stated that it was intended by him to be operated as part of the same building in which the present Lincoln-Mercury dealership is conducted.

Mr. Rittenhouse was interested in the dealership because he felt that there was a market demand in the Asbury Park area. He stated that years ago the concentration was in the downtown areas of the larger cities within the county, but in the early 1970s, most dealership moved out to concentrations clustering on the highways. There are clusters of dealerships which are like malls. Mr. Rittenhouse pointed out that Asbury Park moved out to the area in which Rittenhouse Lincoln-Mercury is located, while Long Branch moved out to the Eatontown area, where Monmouth is located. Therefore, duplicates of other line make dealerships between those two points include Chevrolet and Dodge. Mr. Rittenhouse stated that it is important for a dealer to be within a cluster and, that to be successful, a Chrysler-Plymouth agency would have to be in the area where Rittenhouse Lincoln-Mercury is located.

Interestingly enough, when Mr. Rittenhouse's testimony in support of clusters and proximity is compared with the overlay, one can see that the nearest Lincoln-Mercury dealer is over eight miles away in Red Bank. Furthermore, other competitors such as Ford, Buick and Oldsmobile dealerships are separated by the statutory "relevant market area" (eight miles).

Mr. Rittenhouse further testified extensively as to the kind of investment he would make in order to accept the dealership, which would include an additional 3,000 square feet of showroom area, office

facility, parts and, eventually, six additional bays each to the mechanical shop and the body shop. Much time was consumed arguing over whether or not he was committed to make these changes, but it was clear from Mr. Rittenhouse's testimony that he is prepared to make a significant investment in the new franchise. He has already made major improvements in his telephone system and has a computer costing some $60,000 waiting to be delivered.

It is clear from the testimony that some discussion was conducted between the application date in July 1980 and June 20, 1983, when Chrysler Corporation sent a letter to Mr. Rittenhouse. At that time, for the first time, Chrysler committed to writing a conditional acceptance of the project with the words "we would like to proceed with your project." Even after that, however, on June 29, 1983 Chrysler was still seeking a commitment from Rittenhouse that there would be no dual operation. Gary Steven Samboy, Bureau Placement Manager for the New York zone for Chrysler, and the writer of both I-4 and I-5, testifed that the intention to fill the "open point" in the Asbury Park sales locality was based upon a determination by Chrysler that they needed an "open-point blitz" beginning in February 1980. The determination to go with Rittenhouse, however, was always conditional upon the establishment of an individual dealership, and no evidence was submitted indicating that the intention to proceed with an independent dealership was formed prior to October 27, 1982, the effective date of the act. In fact, no writing signed by both parties came into existence before October 4, 1983. This was a conditional agreement requiring Rittenhouse to do certain things in order to qualify. Between June 1983 and October 1983, Rittenhouse moved forward, but this litigation prevented full and complete action.

Subsequent to the hearing, Rittenhouse submitted an affidavit by Douglas Kerr which was accepted into evidence, indicating that the October 4 letter was the establishment of a commitment which would permit them to intervene in this case. No improper motive can possibly be inferred by this sequence of events, but reference must be made to paragraph 3 of the memo in which Mr. Kerr indicated that "we did not view this letter as a binding commitment on the part of Chrysler." This referred to the June 20, 1983 letter.

Thus, it may be inferred that Chrysler Corporation had an intention to fill the sales locality if it could properly do so, but that there was no evidence of an intention to grant the franchise to Rittenhouse Lincoln-Mercury much before June 1983.

Mr. Dawson testified that he felt that the establishment of a deal-

ership only 4.2 miles from his present location would affect his total sales figures. In recent months, there have been significant reductions in "product" and he is concerned that a new dealership will ultimately result in less availability to him as there will be more dealers in the area to share the cars available to the entire area. If he has a lower inventory, he will lose sales.

In addition, Mr. Dawson feels the proximity itself would cut into his sales as he does make a certain amount of sales in what Chrysler regards as the Asbury Park sales locality.

In contrast, Mr. Rittenhouse argued that sales would be good for both Monmouth and his new company. He cited no facts to support his position, and it was based solely on speculation. While Mr. Samboy testified that the allocation for new dealership would not come form the zone and would not effect the allocation available to Monmouth, it may be inferred that ultimately the zone allocation would effect Monmouth, even though the intial allocation might be somewhat different. Another inference may be drawn from the testimony and exhibits of the respondent. In Mr. Connors' analysis showing the financial effects of loss on Monmouth, there is an inherent acceptance that the opening of a new dealership would, at least in the beginning, have an adverse upon the sales upon Monmouth. A careful analysis of the "lost sales" exhibits support the inference drawn from Mr. Connors' testimony. Since the beginning of 1982, the Eatontown sales locality has been gaining rather than losing sales when measured against the overall New York/New Jersey zone. In contrast, the Asbury Park locality has been losing more sales measured against the same "standards." Superimposed upon that is the showing in one overlay that Monmouth's sales in the Asbury Park locality have increased. In 1982 there were 101 sales in the Asbury Park locality, and in the first six months of 1983 there were 38 sales in the same locality (76 for 1983 on an anualized basis). It may be inferred, since the numbers are significantly larger than those of earlier years, that a certain number of those sales would not be made by Monmouth, and as a result their gross number of sales would be less than it has been in the last two years. Thus, while the number of sales losses for Monmouth in the event of the establishment of a Rittenhouse Chrysler-Plymouth agency, is speculative, an examination of all of the evidence and all of the exhibits presented by the respondent clearly lead to the inference that there would be an adverse effect upon the sales of Monmouth.

Based upon the foregoing, I **FIND:**

1. Monmouth is a dealer in Chrysler products located on Route 36 in Eatontown, New Jersey.
2. In the summer of 1983, Chrysler sought to grant a franchise to Rittenhouse Chrysler-Plymouth at a location approximately 4.25 miles from Monmouth.
3. Said location is within the "relevant market area" of Monmouth, it being less than 8 miles measured in a radius from Monmouth Chrysler-Plymouth.
4. Monmouth is the owner of the property upon which its dealership is located, having purchased same from Chrysler Realty Corporation in 1972 for the sum of $553,000.
5. The said $553,000 was a fair market value price in 1972.
6. The petitioner leased the property at the same time as ownership was conveyed to it by Chrysler for a period of 15 years plus five-year options granted to Chrysler as tenant only.
7. Chrysler in turn sublet the property to Monmouth, but without the said options and with the further condition that the property had to be used as a place for the sale of Chrysler products.
8. In addition to the purchase of the property, the petitioner has made significant investments including personal property and inventory and, in addition, in recent years has invested an additional $50,000 in real property improvement.
9. At the present time, Monmouth is a moderately successful dealership selling 55 to 60 cars per month.
10. Monmouth gives to its customers and consumers in general, competent and adequate service in its service area.
11. Monmouth at the present time is in a healthy financial condition, but a reduction in sales in the future would have an adverse affect upon its financial condition.
12. Chrysler has established a certain number of "sales localities" including one in the Eatontown area served by Monmouth and one in the Asbury Park area, which, at the present time, is not served by any dealership.
13. The aforesaid sales localities are arbitrarily established by Chrysler and consist of different post office localities at different times.
14. The sales localities are referred to in various contractual documents, but are arbitrarily revised by Chrysler, are non-exclusive by their own terms and are arbitrary with respect to the provisions of the New Jersey statute.
15. The establishment of Rittenhouse Chrysler-Plymouth would

have some adverse affect on the business of Monmouth and would reduce its sales.

16. Rittenhouse Chrysler-Plymouth is proposed to be operated by the same personnel who operate Rittenhouse Lincoln-Mercury, an established, successful and permanent dealership.
17. Rittenhouse Lincoln-Mercury has excellent mechanical and service facilities and maintains a large inventory, and it may be inferred that they would operate a Chrysler-Plymouth agency in the same manner.
18. In June 1980, Chrysler approached the owners of Rittenhouse Lincoln-Mercury to see if they would undertake the establishment of a Chrysler-Plymouth dealership in the Asbury Park sales locality.
19. Thomas Rittenhouse and Douglas Kerr applied to Chrysler for a dealership, but one which would be operated on a dual basis with Rittenhouse Lincoln-Mercury.
20. Chrysler refused to franchise any dual dealership.
21. On June 20, 1983, Chrysler indicated that it would go ahead with the granting of a franchise provided same was a separate dealership.
22. As of June 29, 1983, there was still no firm agreement with respect to the operation of a separate dealership by Rittenhouse and Kerr.
23. The first agreement affirmatively demonstrating mutuality was evidenced on October 4, 1983.

CONCLUSIONS OF LAW

The threshold question raised by Chrysler Corporation is whether or not the act requiring notice even applies to the instant situation. Chrysler Corporation argued that its initial contact with Rittenhouse in June 1980 occurred before the enactment of the statute (*L.* 1982, *c.* 156, eff. October 27, 1982) and, as a result, they did not even have to give notice. They relied upon *Garden State Ford, Inc. v. Ford Motor Company, et al*, OAL DKT. NO. MFC 4266-83 (September 21, 1983) and *Seven M Corp. et al v. Kawasaki Motors Corp. USA*, OAL DKT. NO. MFC 1591-83 (June 3, 1983). Each of those cases relied upon a careful reading of section 4 of the act (*N.J.S.A.* 56:10-19). That section provides:

> A Motor Vehicle Franchisor shall give its existing franchisees in the same line make within the relevant market area, 90 days

> advanced written notice of its *intention* to grant, relocate, reopen, or reactivate a franchise of the same line make. . . [emphasis added.] In the cases cited, the word "intention" was considered the key question.

In each of those cases, however, certain facts made it clear that the specific intention for the establishment of the dealership had been formed by the franchisor. In *Garden State Ford*, Finding No. 2 states:

> At the end of 1981, a market study by respondent Ford Motor Company, recommended relocation of the dealership presently owned by respondent, Don Toresco Ford, Inc.

The opinion indicated that that intention was not sufficient but concluded in Finding No. 7:

> In August 1982, the foregoing discussions and negotiations were virtually completed, and at that time it was specifically understood between Don Toresco Ford, Inc. and Ford Motor Company that . . . the dealership would be relocated.

Similarly, in the Kawasaki case, approval of a location was made in June 1982 (Finding No. 5) and Finding No. 9 stated:

> Pendine's plan to relocate to the Route 22 Pompton Plains location was begun in earnest in June 1982, when they received a proposed form of lease from the property owner . . . Pendine went ahead with these plans in reliance on Kawasaki's oral approval given in May and June.

The instant case does not fall into that pattern. There was clearly no agreement, written or oral, which occurred before the effective date of the act. In fact, as late as June 1983, a careful reading of both of the letters from Mr. Samboy to Mr. Rittenhouse leave open the question of whether or not Mr. Rittenhouse was willing to establish a totally separate dealership. There was no testimony of any oral agreement prior to that date, and the only evidence which was presented in support of action prior to the effective date of the act, was the testimony concerning the conversation with Mr. Perez and the filing of the application. Other than the generalized conclusion by Chrysler that it wished to have a dealer in that particular sales locality, there was no commitment either to Rittenhouse nor to a specific location. An examination of the evidence makes it clear that there are physical areas more than eight miles from Monmouth and located in the Asbury Park sales locality.

Thus, I **CONCLUDE** that there was no intention to establish a dealership prior to the effective date of the act and the transaction involved in this case is subject to the provisions of the act.

The statute in *N.J.S.A.* 56:10-23 sets forth the items which may be considered by the committee. They are:

a. The effect that the proposed franchise or business would have on the provision of stable, adequate and reliable sales and service to purchasers of vehicles in the same line make in the relevant market area;
b. The effect that the proposed franchise or business would have on stability of existing franchisees in the same line make in the relevant market area;
c. Whether the existing franchisees in the same line make in the relevant market area are providing adequate and convenient consumer service for motor vehicles of the line make in the relevant market area, which shall include in adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts and qualified staff personnel;
d. The effect on a relocating dealer of a denial of its relocation into the relevant market area.

These standards are not exclusive and, in the instant case, it is also important to consider both the nature and permanency of the investment by Rittenhouse and the nature and permanency of the investment of Monmouth.

Each of the items in the statute is subject to a factual analysis and presents a conflicting view. Section "a" concerns itself with the proposed franchise and its affect on the provision of "stable, adequate, and reliable sales and service." This provision is based on an attempt by the drafters to avoid the "stimulator operation." (*See, Statement,* A.636). The sponsor of the bill was concerned that a dealership would be established which would not be able to adequately service the vehicles which it sold. Clearly, this is not the case. Rittenhouse has no intention of coming in as a "stimulator" operation. It is a long-established dealership spanning three generations and the testimony of Mr. Rittenhouse leaves no question but that it is his intention to make a substantial investment and to offer service which, in his opinion, would be even better than that offered by Monmouth. Thus, the test set forth in section "a" of that section of the statute suggests a result in favor of Rittenhouse on that issue.

When one looks at section "b", however, the situation is quite different. The testimony of Monmouth together with the inferences

to be drawn from the testimony on behalf of Chrysler and Rittenhouse, leaves no doubt but that the existing franchisee, Monmouth, would be substantially injured by the establishment of the Rittenhouse dealership within 4.25 miles.

The test set forth in section "c" concerns whether or not Monmouth is doing a good job. The answer is that it is uncontradicted that Monmouth is servicing its customers, providing adequate sales, and picking up any slack that might exist in the arbitrary sales locality set by Chrysler. When one looks at the gains in the last one and one-half years by Monmouth, they more than outweigh the losses exhibited by the Asbury Park sales locality. By the standards of any objective viewer, as well as the standards of the experts brought in by Chrysler, the "service facilities, equipment, supply of motor vehicle parts, and qualified service personnel" are not only adequate but superior to that which can be expected from a dealership. On that basis, no argument can be made by Chrysler that there is a need for another dealership within the "relevant market area."

The provisions of section "d" of *N.J.S.A.* 56:10-23d are irrelevant to the instant inquiry. Those provisions deal with a relocating dealer and do not affect Rittenhouse since it is a contingent corporate structure and the bulk of its investment (other that in the prosecution of this legal proceeding) is minimal. In substitution of the test *N.J.S.A.* 56:10-23d, since Rittenhouse is not, in fact, relocating, it is important to consider the actual investment made. Rittenhouse has made certain improvements in its own business which would be better utilized by the establishment of a second dealership, but the bulk of its investment is contingent upon the approval of the franchise. Under the circumstances, investment of Rittenhouse is of little consequence in this matter.

On the other hand, the financial position of Monmouth must be taken into account. It is here, perhaps, that the serious underlying difficulty arises. The one matter which has been determined by an appellate court and which directly involves a statute of this type, is *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 *U.S.* 96 (1978). That case involved a statute similar to that of New Jersey which had been passed by California. The issue before the Court dealt with the constitutionality of the preliminary limitations set forth both in the California statute and in the New Jersey statute, but the rationale of Justice Brennan applies as well to the instant case. Justice Brennan referred to a Congressional Committee Report of 1956. The section was quoted as well by the sponsor's statement, *supra*. It stated:

> Dealers are, with few exceptions, completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer, all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer. *S. Rep. No.* 2073, 84th Cong. 2d Sess, 2 (1956).

In the instant case, the real property situation outlined by the petitioner is the type of evil against which the statute was intended to act. Chrysler has Monmouth totally and completely under its control. If it is allowed to set up competition of a destructive nature, it has no concern with the outcome. If Monmouth succeeds, it will have two viable dealerships; if Monmouth fails, it will have an empty location over which it has total and complete control. If both dealers fail, Chrysler has absolutely nothing to lose because it has an economically valuable piece of land, while Monmouth can only use it for the sale Chrysler products. Chrysler can do whatever it wishes with the property. As Justice Brennan stated in *New Motor Vehicle Board, supra*, at 100:

> The disparity and bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 states to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers.

At the request of the judge, the attorney for Chrysler submitted as an appendix to its brief, a list of all cases involving similar statutes and determined in administrative tribunals.[1] The appendix contains some 19 cases, three of them from New Jersey, and 16 from other states. Two of the New Jersey cases, *Garden State Ford, Inc. v. Ford Motor Co., supra*, and *7M Corp. v. Kawasaki Motors Corp., supra*, were determined to have involved matters which were not subject to the statute. These cases have been discussed above. *Potter v. Hillman Ford & Kennedy-Haldeman Ford v. Ford Motor Company*, OAL DKT. NO. MFC 1589-83 (June 3, 1983) involved a relocating dealer. In the factual determinations made in that case, Judge Lavery found, as a

matter of fact, that it was a "reasonable expectation" that both dealers would benefit from an allowed relocation. What is more important in that case and, in fact, in every case in which relocation is an issue, is that the court must also consider and weigh heavily the effect upon the relocating dealer. In his findings, Judge Lavery specifically stated in Finding No. 7 that the profits of the dealer who was attempting to relocate are "low and unstable" at his former location. This major factor specifically stated in the statute, under subsection "d" must be taken into account. Thus, in analyzing the other cases submitted by respondent, all the California cases considered the effect upon the relocating dealer.

Only in the case of *In re Protest of Southland Cycle Center, Inc.* (Cal. New Motor Vehicle Board, September 25, 1979) did the court uphold the protest. That case balanced the relocating dealer against the protestor and found that the protestor's position should be upheld. That case also specifically found that the relocation would serve to reduce Southland's earnings. In every other one of the California cases, there was a specific finding that the protestor's earnings would not be injured, but that the relocating dealer would be injured if compelled to remain where it was. Ohio was represented by two cases: *In re the Protest of Jack Maxton, Inc.* (Ohio Motor Vehicle Board, Sept. 22, 1981) and *In re the Protest of Nassief Ford-Mercury, Inc.* (Ohio Motor Vehicle Board, March 11, 1981). Again, both of these cases were relocation cases and involved situations where there would be an adverse effect upon the relocating dealer if that dealer were compelled to remain at its existing location. In addition, in both the Ohio cases, specific findings determining that the protestor was not meeting its obligation to service its own area were included in the findings.

Texas was represented by two cases: *North Park Ford v. Miracle Ford, Inc.* (Texas Motor Vehicle Commission, April 19, 1978) and *Cliff Peck Chevrolet, Inc. v. Capital Chevrolet, Inc.* (Texas Motor Vehicle Commission, June 23, 1976). One case involved a relocation *Northpark Ford v. Miracle Ford, Inc.* (Texas Motor Vehicle Commission, April 19, 1978), and in that case there was a finding of inadequate representation in the new area. In the other Texas case, *Cliff Peck Chevrolet, Inc., v. Capital Chevrolet, Inc.* (Texas Motor Vehicle Commission, June 23, 1976), the application was for a new car dealership. In that case, protestants were held to not be adequately representing the intervenor in the "sale and service of its new motor vehicles" in the area, and the comapny was held to have established a specific need for a new dealership.

In Wisconsin, a protest was upheld in *Kennedy Chrysler-Plymouth, Inc. v. Chrysler Corp.* (Wisconsin Transportation Commission, April 4, 1983). Several dealers had protested the establishment of a new dealership and the evidence submitted to the Commission was similar to that in the instant case. Against the argument advanced by Chrysler that competition would be constructive, the court found that an aggressive sales program throughout the area might well take substantial sales from the protesting dealers and, in extreme cases, might even drive one or more of them out of business. The Commission found:

> Chrysler-Plymouth is not uder represented in the Metro market. No public interest is served in adding another dealership at this time. Indeed, the public interest could be injured if the other dealers, faced with further reductions of sales, are forced to lay off employees.

While the burden of proof is on the protestant in the instant case, as well as in all of the cases quoted, it is still necessary to examine and balance the evidence presented by the respondent as well as the petitioner.

One case determined in New Jersey is *House of Suzuki, Inc. v. U.S. Suzuki Motor Corp.*, OAL DKT. NO. MFC 1590-83 (August 26, 1983). In that case the respondent sought to establish a new dealership within six miles of an existing dealership. Judge Dwyer, in a thorough analysis of the facts, found, as in the case of Monmouth, that the protestor, in fact, "renders stable, adequate and reliable sales and service within its market area," and further found that if the protestor did go out of business or was seriously damaged, it would injure the public.

Based upon the foregoing, I **CONCLUDE:**

1. The establishment of Rittenhouse would have no effect upon the "stable, adequate and reliable sales and service" to purchasers of Chrysler Products.
2. The establishment of Rittenhouse would have a significant and adverse effect upon the stability of Monmouth.
3. Monmouth is "providing adequate and convenient consumer service for motor vehicles of the line make in the relevant market area."
4. The protest filed by Monmouth must be upheld.

The final item for determination is raised by the provisions of *N.J.S.A.* 56:10-24. At the request of the court, each of the parties submitted Affidavits of Services setting forth their litigation costs and attorneys' fees. Upon examination of the affidavits which have been

admitted into evidence, I **FIND** all of the amounts set forth therein to be fair and reasonable under the circumstances, and fully supported by the work demonstrated before this court.

The statute provides that the attorneys' fees shall be awarded to the person "ultimately prevailing, and that same shall be assessed from the person ultimately not prevailing. The prevailing part in the instant case in Monmouth and the party ultimately not prevailing is Chrysler. I, therefore, **CONCLUDE** that Chrysler shall pay to Monmouth, through its attorney, the sum of $8766.50 for the services of Wilentz, Goldman & Spitzer, plus $249.03 in costs.

The claim of Martin G. Margolis presents a serious problem. While the amount set forth in his certification, a total of $8,637.00, is reasonable, his right to receive same as an attorney represents a duplication of effort. Mr. Margolis is a major shareholder in Monmouth and his presence when duplicative of the efforts of his attorney cannot be allowed as litigation costs. There must be subtracted from the total services claimed by Mr. Margolis sums beginning with September 9, 1983, which represent conferences with Warren Wilentz, Esq. and attendance in court. The total amount includes items 4431, 4892, 4891, 5154, 5153, 5156, 5155, 5328, 5493, and 4749, on his work sheets, and $5,089.37 should be deducted therefrom. The allowed claim is, therefore, $3,547.63. I **CONCLUDE** that Chrysler shall pay to Monmouth through its attorney, the sum of $3,547.63 for the services of Martin G. Margolis, attorney.

The intervenor was neither the prevailing party nor the losing party and no fee award is due it under the terms of the statute.

In addition, the Committee is directed to assess the costs of hearing of the Office of Administrative Law. The costs of the Office of Administrative Law are as follows:

	Hours
Preparation for hearing	4-1/4
Prehearing conference and Order	1-1/2
Hearing time	17
Research and Preparation of decision	5-3/4
TOTAL	56

The billing rate for the Office of Administrative Law is $93.50 per hour and the total due from Chrysler to the Office of Administrative Law is $5,236.

It is, therefore, **ORDERED:**

1. That the protest of Monmouth be and the same is hereby allowed.
2. Chrysler Corporation shall be prohibited from issuing a franchise to Rittenhouse Chrysler-Plymouth to be located at 900 State Highway 35, Asbury Park, New Jersey.
3. Chrysler Corporation shall pay to Monmouth Chrysler-Plymouth through its attorney, for the services of Goldman & Spitzer, the sum of $8,766.50 and $249.03 in costs.
4. Chrysler Corporation shall pay to Monmouth Chrysler/Plymouth through its attorney Wilentz, Goldman and Spitzer, for the services of Martin G. Margolis, P.A., the sum of $3,547.63.
5. Chrysler Corporation shall pay to the Office of Administrative Law the sum of $5,236.00.

I hereby file my Initial Decision with the Motor Vehicle Franchise Committee for consideration.

After reviewing this Initial Decision, the Motor Vehicle Franchise Committee on December 6, 1983, issued the following Final Decision:

The Motor Vehicle Franchise Committee hereby determines the matter concerning petitioner's protest against respondent's proposed establishment of a Chrysler-Plymouth automobile dealership within an eight mile radius of petitioner's place of business, pursuant to *N.J.S.A.* 56:10-16 *et esq.* Prior to this final determination, the Committee has reviewed and considered the administrative law judge's initial decision, the exceptions thereto filed by counsel for respondent and by counsel for intervenor, the reply to said exceptions by counsel for petitioner, and the briefs, exhibits and documentation submitted counsel for each of the respective parties. Based upon the record presented, the Committee concurs with the administrative law judge's findings and conclusions concerning the validity of said protest and shall therefore affirm his recommendation that petitioner's protest be upheld. However, the Committee shall remand this matter to the Office of Administrative Law in light of our conclusion, *infra*, that respondent and intervenor be held jointly liable for the payment of costs and fees in the instant case pursuant to *N.J.S.A.* 56:10-24. With the aforementioned exception, the administrative law judge's findings of fact and conclusions of law are incorporated into this decision as if the same were set forth herein fully and at length.

Respondent initially contends that the New Jersey Motor Vehicle Franchise Act, *N.J.S.A.* 56:10-16 *et seq.*, should not be applied to the proposed establishment of intervenor (Rittenhouse) as a Chrysler-Plymouth automobile dealership. This exception is devoid of merit. The Committee concurs with the administrative law judge's discussion concerning this issue, and agrees with his conclusion that there was no intention on the part of respondent to establish the dealership in question at the specific location in question prior to the effective date of the act, i.e., October 27, 1982. Hence, the instant matter falls within the purview of *N.J.S.A.* 56:10 *et seq.*

Respondent and intervenor each assert that petitioner failed to carry its burden of proving that the establishment of Rittenhouse as a Chrysler-Plymouth automobile dealership will be injurious to petitioner's interests. This exception to the administrative law judge's initial decision is without merit. The administrative law judge concluded that "[t]he testimony of Monmouth together with the inferences to be drawn from the testimony on behalf of Chrysler and Rittenhouse, leaves no doubt but that the existing franchisee, Monmouth, would be substantially injured by the establishment of the Rittenhouse dealership within 4.25 miles." In reviewing this determination, the Committee must consider whether the administrative law judge's findings and conclusions could reasonably have been reached on sufficient credible evidence present in the record, viewing the record in its entirety, with due regard to the administrative law judge's opportunity to hear the witnesses testify and asses their credibility. *Garden State Farms, Inc. v. Mathis*, 61 *N.J.* 406, 427 (1972); *Jackson v. Concord Co.*, 54 *N.J.* 113, 117-118 (1969); *Clsoe v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965). Upon reviewing the record as a whole, it is the Committee's conclusion that sufficient credible evidence exists to support the administrative law judge's determination that petitioner would be injured by the establishment of the Rittenhouse dealership. Accordingly the Committee shall not disturb the administrative law judge's findings on this issue.

Respondent and intervenor each contend that petitioner failed to carry its burden of proving that the establishment of Rittenhouse will be injurious to the public interest. This exception is without merit. The administrative law judge found that "Monmouth gives to its customers and consumers in general, competent and adequate service in its service area." Based upon the evidence before him, the administrative law judge concluded, *inter alia*, that "[t]he establishment of

Rittenhouse would have no effect upon the 'stable, adequate and reliable sales and service' to purchasers of Chrysler Products." The administrative law judge's conclusion concerning this issue is based upon sufficient credible evidence in the record and shall not be disturbed by the Committee. *Close v. Kordulak Bros., supra.*

Since the Committee concurs with the administrative law judge's recommendation that petitioner's protest in the instant matter be upheld, the sole remaining issue concerns the assessment of reasonable litigation and administrative hearing costs against the parties "ultimately not prevailing" pursuant to *N.J.S.A.* 56:10-24. The administrative law judge concluded that "[t]he intervenor was neither the prevaili party nor the losing party and no fee award is due it under the terms of the statute." The administrative law judge recommended that litigation costs, counsel fees, and administrative hearing costs be assessed against respondent alone. Respondent takes exception to said recommendation, contending that respondent and intervenor should be deemed jointly liable for the payment of the aforement costs and fees pursuant to *N.J.S.A.* 56:10-24 since neither was a "prevailing" party.

Respondent's exception concerning the assessment of fees and costs is meritorious. An Office of Administrative Law procedural rule, *N.J.A.C.* 1:1-12.1(h), sets forth that "[p]ersons or entitles permitted to intervene shall have all the rights *and* obligations of a party to the proceeding." (Emphasis supplied.) In *Potter and Hillman Ford et al. v. Ford Motor Company*, OAL Docket No. MFC 5492-83 (October 31, 1983), *modified*, N.J. Motor Vehicle Franchise Comm. (December 5, 1983), the Committee concluded that an intervening dealer should not have been denied an award of costs and fees following its successful defense against a protest under the Motor Vehicle Franchise Act. It logically follows that an intervening dealer should bear the responsibility to contribute toward the payment of litigation costs, counsel fees, and administrative hearing costs where, as in the instant case, its opposition to a protest under the act has been unsuccessful. Accordingly, respondent and intervenor shall be held jointly liable for the payment of said costs and fees since neither was a "prevailing" party within the context of *N.J.S.A.* 56:10-24.

It is, therefore, on this *24* day of *February*, 1984, **ORDERED** that petitioner's protest against the proposed establishment of Rittenhouse as a Chrysler-Plymouth automobile dealership within an eight mile radius of petitioner's place of business be, and hereby is, upheld, and

the administrative law judge's recommendation concerning same is hereby affirmed.

It is further **ORDERED** that this matter be remanded to the Office of Administrative Law for a determination as to what portion of the litigation costs, counsel fees, and administrative hearing costs should be borne by respondent as non-prevailing party, and what portion thereof should be borne by intervenor as a non-prevailing party, in accordance with *N.J.S.A.* 56:10-24.