



# COMMONWEALTH of VIRGINIA

Department of Motor Vehicles

2300 West Broad Street

**Richard D. Holcomb**  
Commissioner

Post Office Box 27412  
Richmond, VA 23269-0001

## **HEARING DECISION**

November 30, 2016

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**Re: Formal Evidentiary Hearing: Tesla Motors, Inc., File No. 2016-001 - Request for a Hearing Pursuant to Va. Code §§ 46.2-1572(4) and 46.2-1573 to be a Dealer**

Counsel:

This matter is before the Department of Motor Vehicles (DMV) pursuant to a request of Tesla Motors, Inc. (Tesla) under *Va. Code* § 46.2-1572(4) to determine whether Tesla, a DMV licensed manufacturer, is eligible to operate as both a manufacturer and a dealer of its electric motor vehicles under Virginia law.

## **PROCEDURAL BACKGROUND**

On January 13, 2016, Tesla, a licensed manufacturer in the Commonwealth of Virginia, requested an administrative hearing pursuant to *Va. Code* § 46.2-1572(4) to open a manufacturer owned and operated dealership in the community or trade area of Richmond, Virginia. The Virginia Automobile Dealers Association (VADA), an association that represents franchised new motor vehicle dealers, filed a Request to Intervene on behalf of its member dealers on March 9,

2016. On March 17, 2016, and March 24, 2016, notices of the administrative hearing ran in the *Richmond Times Dispatch*. The notices alerted readers of a hearing at DMV to determine whether Tesla may be licensed as a dealer and that the hearing would address whether any other dealer is available to operate the dealership in a manner consistent with the public interest. I assigned the case to Hearing Officer Daniel P. Small for an administrative hearing. An evidentiary hearing was held over three days: March 31, 2016, April 25, 2016, and July 1, 2016.

Prior to the instant case, in 2012, Tesla sought approval for a license for a manufacturer owned and operated dealership in Northern Virginia, pursuant to *Va. Code* § 46.2-1572(4). In an April 22, 2013 Hearing Decision, I denied Tesla's request stating that I was "unable to determine that no dealer independent of Tesla [was] available in the community or trade area to own and operate a dealership franchise in a manner consistent with the public interest." Tesla appealed that Hearing Decision to the Fairfax County Circuit Court. Prior to resolution of the appeal, DMV, Tesla, and VADA entered into a Settlement Agreement on September 18, 2013. As a result of that Settlement Agreement, Tesla obtained a dealer license and opened a Tesla dealership in Fairfax County, Virginia.

The Hearing Officer issued a recommended decision in the instant case on September 6, 2016, recommending that Tesla's request for licensure be denied and finding that Tesla failed to meet its burden under *Va. Code* §§ 46.2-1572(4) and 46.2-1573 in demonstrating that there is no dealer independent of Tesla in the community or trade area of Richmond, Virginia to own and operate a Tesla franchise in a manner consistent with the public interest. I issued an order dated September 13, 2016, in which the parties agreed to a specified schedule for the filing of exceptions to the hearing officer's recommendation and the issuance of the agency decision. Tesla filed exceptions to the recommended decision; and VADA filed a brief in support of the recommended decision. In the process of rendering my decision in this matter, I have carefully reviewed and considered the entire record of this proceeding forwarded by the Hearing Officer. After full examination of the entire record in this case, including (1) all evidence and documentation presented to the Hearing Officer; (2) the Recommended Decision of the Hearing Officer, which is accepted herein as to its findings of fact and conclusions of law; and (3) the exceptions and briefs filed by both parties, of which the exceptions of Tesla are accepted herein, my final decision is set forth below.<sup>1</sup>

### **DISCUSSION**

At issue in this case is whether Tesla is eligible to operate as both a manufacturer and a dealer of its electric motor vehicles under Virginia law. As a defense, Tesla asserts that the

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<sup>1</sup> On October 19, 2016, DMV received Tesla's Response to VADA's contentions regarding the September 9, 2016 Opinion Letter and Order filed in the instant case. Since both parties agreed to the October 3, 2016 exceptions deadline, which was memorialized in my September 13, 2016 scheduling order, I granted VADA's October 24, 2016 Motion to Strike Tesla's October 19, 2016 Response as untimely. Therefore, Tesla's Response was not considered for this decision.

statutory prohibition on manufacturer-owned dealerships, *Va. Code* § 46.2-1572, does not apply to Tesla's direct-to-consumer sales model. In the alternative if the statute does apply, Tesla argues that there are no independent dealers available in the Richmond, Virginia community or trade area to own and operate a Tesla franchise in a manner consistent with the public interest.

**I. *Virginia Code* § 46.2-1572 is applicable to Tesla.**

In its exceptions to the Hearing Officer's recommended decision, Tesla asserted that *Va. Code* § 46.2-1572, the statutory provision which prohibits motor vehicle manufacturers from owning motor vehicle dealerships, is not applicable to its situation because Tesla is a "non-franchising manufacturer[] who sell[s] **only** direct-to-consumer[s]" (emphasis in the original); and Tesla believes the purpose of the statute "is to prevent manufacturers from taking undue advantage over **their existing franchised dealers**" (emphasis in original). To support its argument, Tesla claims that the Fourth Circuit in *Am. Motors Sales Corp. v. Div. of Motor Vehicles of Comm. of Va.*, 592 F.2d 219 (4<sup>th</sup> Cir. 1979) found that franchise laws in general "were enacted to remedy the 'disparity in bargaining power between automobile manufacturers and **their dealers**' and to 'protect[] the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas **of existing franchisees**, where the effect of such **intra-brand competition** would be injurious to the existing franchisees and to the public interest'" (emphasis in original). *Am. Motor Sales*, 592 F.2d at 222 (quoting *New Motor Vehicle Board v. Orrin W. Fox Co.*, 99 S.Ct. 40, 407-408). However, in *Am. Motor Sales*, the Fourth Circuit was interpreting one specific statute in effect at the time, *Va. Code* § 46.1-547(d), which is similar to current § 46.2-1569(4). The Fourth Circuit Court was not interpreting the Code section in question in this case. Specifically, the Court neither interpreted *Va. Code* §§ 46.1-547.2 or 46.1-550.5:31, the predecessors of *Va. Code* § 46.2-1572, nor did it equate the purpose of *Va. Code* § 46.1-547(d) to all franchise laws.

Moreover, an analysis of the text of the statute itself leads me to a different conclusion than Tesla's argument. *Virginia Code* § 46.2-1572 makes it "unlawful for any motor vehicle manufacturer . . . to own, operate, or control any motor vehicle dealership in the Commonwealth" unless the situation falls into one of six exceptions. When the language of a statute is unambiguous, one is bound by the plain meaning of the text. *Antisdel v. Ashby*, 279 Va. 42 (2010). The "rule in Virginia [is] that 'when the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language was intentional.'" *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 654 (2004) (quoting *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100 (2001)). Section 46.2-1572(4) refers to "any motor vehicle dealership." The General Assembly is aware of the word "franchised" since that word is a part of terms defined in *Va. Code* §§ 46.2-1500; and the legislature stated "any motor vehicle dealership," not "franchised motor vehicle dealership" in *Va. Code* § 46.2-1572. Since "franchised motor vehicle dealership" was not employed in the statute, it is clear that the General Assembly intended for *Va. Code* § 46.2-1572 to apply to all motor vehicle manufacturers, including non-franchising manufacturers like Tesla, that wish to own, operate, or control a motor vehicle dealership in Virginia.

**II. No dealer independent of Tesla is available in the Richmond, Virginia community or trade area to own and operate a Tesla dealership in a manner consistent with the public interest.**

*Virginia Code* § 46.2-1572 states that it is unlawful for any motor vehicle manufacturer to own, operate, or control a motor vehicle dealership in the Commonwealth, but also sets forth exceptions for which ownership, operation, or control is not prohibited. One such exception is set forth in *Va. Code* § 46.2-1572(4), which provides that:

The ownership, operation, or control of a dealership by a manufacturer, factory branch, distributor, distributor branch, or subsidiary thereof if the Commissioner determines, after a hearing at the request of any party, that there is no dealer independent of the manufacturer or distributor, factory branch or distributor branch, or subsidiary thereof available in the community or trade area to own and operate the franchise in a manner consistent with the public interest.

If there is no such dealer, the manufacturer may be able to own and operate its own dealership.<sup>2</sup> Pursuant to the statute, my determination rests on two primary factors: (1) whether any dealer independent of the manufacturer is available in the community and (2) whether such an “available” dealer can own and operate a dealership in a manner consistent with the public interest.

Tesla received letters from 11 dealers expressing interest to open a Tesla franchised dealership in the Richmond, Virginia community or trade area: Carter Myers Automotive, Asgard Automotive, Charlie Obaugh Chevrolet, Michael Huff, Haywood Hyman, Jr., Ourisman Automotive of Virginia, The Page Auto Group, Priority Automotive Group, RK Auto Group, Rosenthal Automotive Group, and Ted Britt Automotive Group. In his Recommended Decision, the Hearing Officer incorrectly found that because of those letters there were “at least eleven” dealers independent of Tesla available to operate a Tesla dealership in the Richmond, Virginia community or trade area in a manner consistent with the public interest. Of note is the fact that these 11 dealers expressed their interest in a Tesla dealership within ten days of a February 17, 2016 e-mail from Donald Hall, the President of VADA, asking them to notify Tesla that they “have an interest in talking about the potential of a business opportunity as a Tesla dealer in

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<sup>2</sup> It should be noted that obtaining approval from DMV under *Va. Code* § 46.2-1572 is only the first step in the process of a manufacturer operating a motor vehicle dealership. Once approval has been obtained from DMV under *Va. Code* §46.2-1572(4), the manufacturer must still apply for a license from the Motor Vehicle Dealer Board and must meet all the statutory prerequisites for such a license. This decision does not express any opinion regarding whether Tesla is entitled to such a license since the issuance of such a license is in the sole discretion of the Motor Vehicle Dealer Board.

Virginia” in order to make Tesla’s argument “unsupportable.”<sup>3</sup> The hearing record shows that Charlie Obaugh Chevrolet, Michael Huff, Ourisman Automotive of Virginia, Priority Automotive Group, RK Auto Group, and Rosenthal Automotive Group provided no evidence at the hearing, and that the Hearing Officer merely relied on their respective letters expressing interest in a Tesla franchise to find “availability.” However, in the November 22, 2002 Hearing Decision in *Altec Industries, Inc.*, then DMV Commissioner Quillian found that interest letters alone are insufficient to demonstrate dealer availability under *Va. Code* § 46.2-1572(4). Therefore, consistent with precedence on this issue, these six independent dealers are not “available in the community,” pursuant to *Va. Code* § 46.2-1572(4).

Additionally, the remaining five dealers that provided witness testimony—Carter Myers Automotive, Asgard Automotive, Haywood Hyman, Jr., The Page Auto Group, and Ted Britt Automotive Group—did not provide evidence that they were immediately available to operate a Tesla franchise. Testimony from these witnesses “communicated little more than a willingness” on their part to own and operate a Tesla dealership; and according to *Altec Industries, Inc.* that is not enough to establish availability. Liza Borches, CEO of Cater Meyers Automotive, stated that she sent in her letter of interest to own a Tesla dealership the same day she received VADA’s appeal in order to “start a conversation.” When Haywood Hyman, the owner of several dealerships in Newport News and Richmond, was asked if would be willing to make property available for a Tesla dealership, he stated, “possibly.” Also, Dave Perno, the owner of several Richmond area dealerships, testified that he submitted his letter of interest to Tesla because he wanted “to gain more information about what would be involved for” him to own and operate a Tesla dealership. Notably, all five witnesses admitted that they had not performed any economic analysis to establish whether or not a Tesla dealership would be financially possible. Even VADA’s expert stated that the dealers had not taken the next step of preparing a staffing, financing and operating plan for a Tesla dealership. Although VADA argued that the dealers were unable to create any type of plan because Tesla refused to provide specific financial information about their business, these dealers did not create any sort of plan based on their multiple years of experience in the industry. Moreover, if a dealer “does not currently, nor could it any time soon, have in place the capabilities of selling and/or servicing” Tesla products, then, according to *Altec Industries, Inc.*, they also are not available. These five dealers did not provide evidence that they are capable of adequately performing service work on a Tesla. VADA’s own expert testified that “there are no instruction manuals available to enable an independent mechanic to work on a Tesla car.” One dealer conceding that “what the engineers of Tesla have put into [the Tesla I] is nothing short of evolutionary.” Additionally, Larry Page, President of Page Auto Group, testified that he does not sell any electric cars and currently does not have property to open a Tesla dealership.

Even if I found that the remaining five dealers that testified are “available” to own and operate a Tesla dealership, I do not find that they or any other dealers independent of Tesla are available to own and operate a Tesla dealership in the public interest. The General Assembly has

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<sup>3</sup> See Tesla Ex. 8.

provided what could be considered to be guidance on the meaning of “public interest” in *Va. Code* § 46.2-1572(4). *Virginia Code* § 46.2-1501 directs the Commissioner to “promote the interest of the retail buyers of motor vehicles and endeavor to prevent unfair methods of competition and unfair or deceptive acts or practices.”

I disagree with the Hearing Officer’s assertion that “whether an independent dealer makes money is irrelevant under *Va. Code* § 46.2-1572(4).” Such an inquiry is relevant if a dealership is to be owned and operated in a manner consistent with the public interest, namely, to promote the interest of the retail buyers of motor vehicles. A dealership must be capable of remaining in business in order to service existing customers and provide product for future customers. Tesla’s business model differs from traditional car dealerships in many ways; but specifically, Tesla sells its vehicles at uniform prices whether a customer purchases through the Tesla website or at a Tesla store. Tesla could not or would not offer “dealer discounts” or “wholesale pricing” on new cars to a prospective dealership. VADA’s own experts agreed that it would be very hard or impossible for a dealership to be profitable unless Tesla offered their cars at wholesale prices. Although many of the dealers testified that they could eventually make a profit with a Tesla dealership, they admitted that it would not be from new car sales. Those dealers indicated they could make a profit through other departments; and those areas, like sales of parts and used cars or profits on service and financing mark-ups, run counter to the Tesla business model. Moreover, such assertions regarding profitability are not credible since, as mentioned above, the dealers testified that they had not performed any economic analysis.

The public has also expressed support for a Tesla-owned dealership in the Richmond area, as evidenced by the multiple Tesla customers who testified at the administrative hearing or submitted letters and e-mails to DMV. Much of that support revolves around the fact that Tesla’s business model is unique and outside the traditional model of motor vehicle dealerships in Virginia. Indeed, among other accolades, a 2015 *Consumer Reports* survey ranked Tesla service centers number one in the United States over other service centers—independent and franchised dealers—for “on-time repairs, courtesy, price, quality, and overall satisfaction.”<sup>4</sup> I believe it would be unreasonable and not in the public interest to require the removal of that relationship—Tesla to Tesla’s customers—and require the interjection of a third party which could possibly create distance from Tesla’s already proven successful concept. Moreover, if Tesla is precluded from opening a dealership in the Richmond community or trade area, prospective and existing Tesla customers would need to travel great distances to the stores located in Fairfax, Virginia, or Raleigh, North Carolina. Travelling such a distance is certainly not in the interest of the retail motor vehicle buyer.

In his Recommended Decision, the Hearing Officer, quoting the April 22, 2013 Hearing Decision from the previous Tesla case, stated that “Tesla still has done nothing to demonstrate ‘an effort to identify or solicit candidates in the relevant market that could operate a Tesla

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<sup>4</sup> <http://www.consumerreports.org/cro/magazine/2015/03/best-places-to-get-your-car-repaired/index.htm>

dealership . . . .” However, that decision did not specifically require Tesla to perform that task. Although Tesla bears the burden of demonstrating that there is no dealer independent of Tesla in the community or trade area of Richmond, Virginia, to own and operate a Tesla franchise in a manner consistent with the public interest, the task the Hearing Officer imputed to Tesla is not required in the statute. Nevertheless, in the instant case, VADA did solicit candidates, which confirmed the absence of qualified dealers under the statute. Therefore, I disagree with the Hearing Officer’s finding that Tesla failed to meet its burden under *Va. Code* §§ 46.2-1572(4) and 46.2-1573.

**III. The September 9, 2016 Fairfax County Circuit Court Order and Opinion Letter in the matter of *Va. Automobile Dealer’s Ass. V. Tesla Motors, Inc.*, Case No. CL-2016-03672 does not provide additional bases to deny Tesla’s request to own and operate a Tesla dealership in the community or trade area of Richmond, Virginia.**

As previously discussed, on September 18, 2013, Tesla, VADA, and DMV entered into a Settlement Agreement (Agreement). This Agreement authorized Tesla to own and operate one dealership in the trade area of Fairfax County, Virginia, for 30 months; the 30-month period would begin when Tesla secured a license from the Virginia Motor Vehicle Dealer Board. Tesla received that license on February 25, 2015, commencing the 30-month period, and opened a dealership that day in Fairfax County, Virginia.

On January 13, 2016, Tesla requested an administrative hearing in this matter to determine if it is eligible to operate as both a manufacturer and a dealer of its electric motor vehicles under Virginia law. As a result of Tesla’s request, VADA brought an action against DMV and Tesla for Breach of Contract and Declaratory Judgment on March 29, 2016, in the Fairfax County Circuit Court (*Va. Automobile Dealer’s Ass. V. Tesla Motors, Inc.*, Case No. CL-2016-03672). On September 9, 2016, the Court issued an Order and Opinion Letter in that matter (Order) dismissing the case with prejudice because, among other things, VADA failed to state a cause of action upon which relief may be granted. On October 3, 2016, VADA submitted its Brief in Support of the Hearing Officer’s September 6, 2016 Recommendations (Brief) requesting that I find, pursuant to the September 9, 2016 Order, that: (i) Tesla is prohibited from owning and operating a second dealership during the 30-month period prescribed in the Agreement; and (ii) Tesla is disqualified from a second Virginia dealership because Tesla’s current franchise agreement in Fairfax, Virginia, does not meet the statutory definition of “franchise” under *Va. Code* § 46.2-1500. VADA’s requests are denied for the reasons outlined below.

In the Fairfax County Circuit Court decision, the Court found that DMV had sovereign immunity and granted DMV’s Demurrer. As for the claims against Tesla, the Court found that VADA failed to state a claim upon which relief could be granted. The legal basis of the Court’s decision was that the 2013 Settlement Agreement was not a bar to any application or request for a second dealership. The Court’s decision was not based on other grounds, including whether Tesla was entitled to “own” a second dealership. Tesla was free to request an administrative hearing in the instant matter and may apply for a second dealership during the 30-month period.

Moreover, my authority under *Va. Code* § 46.2-1572(4) is limited to determining whether there is no dealer independent of Tesla available in the Richmond community or trade area to own and operate a Tesla franchise in a manner consistent with the public interest, not whether an independent settlement agreement prohibits Tesla from owning and operating a second dealership. Therefore, it would appear that the Fairfax County Circuit Court decision does not control my decision in this case as VADA suggests.

Additionally, VADA asserted in its Brief that the Court's September 9, 2016 Order found that Tesla's current franchise agreement did not meet the statutory definition of "franchise" under *Va. Code* § 46.2-1500. However, VADA's interpretation of the Court's Order is erroneous as the Order only stated in a footnote that VADA failed to address whether "Tesla's agreement with itself meets the statutory definition of 'Franchise.'" Nevertheless, VADA would need to challenge this under a different statute, not *Va. Code* § 46.2-1572(4). Moreover, as stated above, my authority in this matter is limited under *Va. Code* § 46.2-1572(4). Therefore, whether or not Tesla's current franchise agreement with an existing dealership in Fairfax, Virginia, not the trade area at issue in this case, meets the statutory definition of "franchise" under *Va. Code* § 46.2-1500 is irrelevant and outside the scope of this decision.

### CONCLUSION

After careful review of the entire record, I find that there is no dealer independent of Tesla in the community or trade area of Richmond, Virginia, to own and operate a Tesla franchise in a manner consistent with the public interest. Therefore, Tesla is eligible to operate as both a manufacturer and a dealer of its electric motor vehicles under *Va. Code* § 46.2-1572(4). This decision does not express any opinion regarding whether Tesla is entitled to a license issued by the Motor Vehicle Dealer Board.

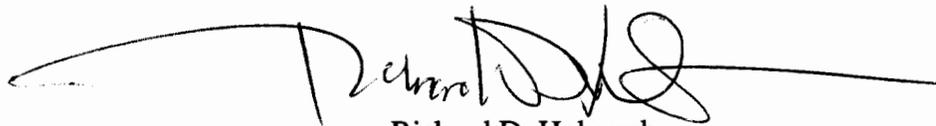
Any party has the right to appeal this decision to an appropriate Virginia Circuit Court, in accordance with *Va. Code* § 2.2-4025, *et seq.*, and Part 2A of the Rules of the Supreme Court of Virginia. In order to do so, the party must file a notice of appeal with the Agency Secretary, Werner Versch II, Department of Motor Vehicles, Post Office Box 27412, Richmond, Virginia 23269-0001, within 33 days from the date of this decision, and then file a petition for appeal in the circuit court within the time set out in Part 2A of the Rules. Filing an appeal does not automatically prevent the decision from becoming effective. If no party files a notice of appeal in a timely manner, this decision will become final and unappealable.

Pursuant to *Va. Code* § 2.2-4023.1, you also have the right, instead, to file a petition for reconsideration to this decision with me, at the same address. In order for the petition for reconsideration to be considered, it must be signed by you and received by the Department of Motor Vehicles within 15 days from the date of the service of this decision. The petition for reconsideration should contain a full and clear statement of the facts pertaining to the reasons for reconsideration, the grounds in support thereof, and a statement of the relief desired. Within 30 days of receipt of your petition for reconsideration, the petition will be reviewed by the Commissioner or his designee; and a written decision on the petition will be issued. However,

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please be aware that the written decision on the petition for reconsideration is not a separate agency decision and shall not, on its own merits, be subject to judicial review. Further, the filing of a petition for reconsideration does not toll the time for filing a notice of appeal of the agency decision under Rule 2A:2 of the Rules of the Supreme Court of Virginia.

Issued in the Office of the Commissioner of the Department of Motor Vehicles in  
Richmond, Virginia.



Richard D. Holcomb

RDH:dma

Enclosures

c: Daniel P. Small, Esq., Hearing Officer