

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0187575 CAF**

**DEBORAH K. TRANT,
Complainant**

v.

**NISSAN NORTH AMERICA, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Deborah K. Trant (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2017 Nissan Rogue. Complainant asserts that the vehicle is defective because the FM radio broadcast will intermittently have static. In addition, the vehicle stalls on takeoff as if the transmission is going out, when the vehicle is turned on the radio screen sometimes shows the vehicle's previous shut off time, the radio screen blacks out (turns off) on its own and has to be turned back on, sometimes the radio does not turn back on and shows menu or just flashes, the radio screen sometimes goes from dark to light, and the air conditioner blows hot air sometimes without adjusting any settings. Nissan North America, Inc. (Respondent) argued that the vehicle does not have a defect or nonconformity and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect and Complainant is not eligible for relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on October 11, 2018, in Houston, Texas before Hearings Examiner Edward Sandoval. Deborah K. Trant, Complainant, represented herself at the hearing. Respondent was represented by Neal Barnes, Dealer Technical Specialist. Jason Gonzalez, Internal Auditor for Texas Department of Motor Vehicles (Department) was present as an observer. The hearing record was closed on October 21, 2018, after Respondent's submission of a document previously entered into the record as an exhibit.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by

repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have provided written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2017 Nissan Rogue on October 2, 2017, from Central Houston Nissan (Central) in Houston, Texas.⁷ The vehicle's mileage at the time of delivery was 15.⁸ Respondent provided a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first. On the date of hearing the vehicle's mileage was 22,271. The vehicle's warranty was still in effect at the time of hearing.

Complainant testified that soon after purchasing the vehicle she began to notice static intermittently on some of the FM radio stations that she listened to. Complainant took the vehicle to Central for repair for the issue on November 7, 2017. Central's service technician removed and inspected the vehicle's radio and determined that the radio was connected properly to the modules and antenna.⁹ The technician also inspected the vehicle's radio antenna and determined

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁷ Complainant Ex. 2, Retail Installment Sales Contract dated October 2, 2017.

⁸ Complainant Ex. 3, Vehicle Service Contract dated October 2, 2017.

⁹ Complainant Ex. 4, Repair Order dated November 7, 2017.

that it met specifications.¹⁰ The technician then compared the vehicle's radio's performance with other similar vehicles' radios and experienced the same issue.¹¹ The technician determined that he could find no problem with the radio.¹² The vehicle's mileage when Complainant took it to Central on this occasion was 1,230.¹³ Complainant was provided with a loaner vehicle while the vehicle was being inspected. The vehicle was in Central's possession for one (1) day.

Complainant testified that she continued to hear static on the radio intermittently. She took the vehicle to Central for repair for the issue on March 29, 2018. Central's service technician verified the issue and informed Complainant that she would be notified when a repair for the issue was available.¹⁴ Complainant was informed that the issue was not repairable. The vehicle's mileage on this occasion was 9,559.¹⁵ The vehicle was in Central's possession for two (2) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant mailed a letter to Respondent on June 2, 2018, outlining her dissatisfaction with the vehicle.¹⁶ In addition, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on June 12, 2018.¹⁷ On July 10, 2018, Complainant mailed a second letter to Respondent advising them of other issues regarding the vehicle.¹⁸ These additional issues were: the vehicle stalls as if the transmission is going out, when turning on the vehicle the radio screen reads the vehicle's previous shut-off time, the radio screen blacks out (turns off) and the radio has to be turned back on, intermittently the radio does not turn back on and will show the menu or will flash, and the air conditioner sometimes blows hot air and then revert back to cold air.

Upon request by Respondent, Complainant took the vehicle to Baytown Nissan (Baytown) in Baytown, Texas for repair on July 20, 2018. Neal Barnes, Respondent's dealer technical specialist, inspected the vehicle on this occasion. During the inspection and repair, Mr. Barnes had the vehicle's audio/visual software updated pursuant to a service bulletin in order to address the radio issues complained of by Complainant.¹⁹ The vehicle's transmission was also checked since Complainant indicated the vehicle seemed to be stalling. Mr. Barnes could not find no

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Complainant Ex. 5, Repair Order dated March 29, 2018.

¹⁵ *Id.*

¹⁶ Complainant Ex. 9, Letter to Nissan Consumer Affairs dated June 2, 2018.

¹⁷ Complainant Ex. 1, Lemon Law Complaint dated June 12, 2018. Although Complainant signed the complaint on June 2, 2018, the effective date of the complaint is the day it was received by the Texas Department of Motor Vehicles (Department) which was June 12, 2018.

¹⁸ Complainant Ex. 6, Amended Complaint Letter to Nissan N. America dated July 10, 2018.

¹⁹ Complainant Ex. 7, Repair Order dated July 20, 2018.

problem with the transmission.²⁰ In addition, he compared the vehicle to another vehicle and determined that they drove similarly.²¹ The vehicle's air conditioning system was inspected because Complainant indicated that it was not working properly. The vehicle's intelligent power distribution module (IPDM) was replaced in order to resolve the issue with the air conditioner blowing hot air at times.²² The vehicle's mileage at the time of repair was 17,991.²³ Complainant testified that the vehicle was in Baytown's possession for approximately eight (8) days. Complainant was provided with a rental vehicle while her vehicle was being repaired.

Complainant testified that she continued to have problems with static on the vehicle's radio. She took the vehicle to McDavid Nissan (McDavid) in Houston, Texas for repair on September 25, 2018. Complainant does not know if any repairs were performed to the vehicle's radio during this repair visit. The vehicle's mileage at the time was 21,306.²⁴ The vehicle was in McDavid's possession for two (2) to three (3) days. Complainant paid for a rental vehicle while her vehicle was in McDavid's possession.²⁵

Complainant testified that she heard static on the radio on the morning of October 11, 2018, the date of hearing. Complainant only listens to FM radio. She does not know whether the AM bands on the vehicle's radio have similar issues. She stated that she hears static on the radio at least once on most days. The static lasts usually for a few seconds.

Complainant stated that several of the issues that she complained of have been resolved. She stated that air conditioning issue that she raised in the amended letter to Respondent has been repaired. Complainant also stated that the issues with the radio screen reading the same information as when the vehicle was turned off and the radio screen blacking out (turning off) have also been repaired. She stated that the weekend prior to the hearing date that the radio screen twice went from dark to light for a few seconds.

During cross-examination, Complainant stated that she was not aware that the vehicle's radio screen has daylight and night time settings which will affect the brightness of the screen. She did state that sometimes the radio screen will go dark, but not totally black. Complainant also stated that sometimes the static is so severe that she cannot understand or hear the radio transmission. The problem can occur anytime and at any location.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Complainant Ex. 8, Repair Order dated September 25, 2018. The repair order did not indicate that any repairs were performed to the vehicle's radio, despite the fact that it was in McDavid's possession for a few days.

²⁵ *Id.*

C. Respondent's Evidence and Arguments

Neal Barnes, Dealer Technical Specialist, testified for Respondent. Mr. Barnes has worked in the automotive industry for 40 years. He is an Automotive Service Excellence (ASE) Certified Master Technician. Mr. Barnes also has received all available Nissan technical training. He's worked for Respondent for 20 years. He's been in his present position June of 2004. His primary role for Respondent is to provide technical support to dealers with vehicles which they are having problems diagnosing or repairing.

Mr. Barnes testified that he inspected the vehicle on July 20, 2018, at Baytown. Mr. Barnes was informed that Complainant's primary concern with the vehicle was that Complainant would intermittently hear static on the radio. Mr. Barnes met with Complainant at Baytown and discussed her experiences with the vehicle. Mr. Barnes testified that he felt that some of the problems Complainant described to him fit within the guidelines of a service bulletin which Respondent had issued on June 25, 2018.²⁶ Mr. Barnes testified that he updated the vehicle's radio's software as per the recommendation of the service bulletin. Mr. Barnes stated that he felt that the radio's signal strength improved after the update was performed. He also stated that there is no way to measure a radio's signal strength. Mr. Barnes also testified that prior to updating the radio software, he had driven Complainant's vehicle in the Baytown area and did not experience the static issue complained of by Complainant.

Mr. Barnes testified that radio reception can be a problem, although he's never met any other customers with an issue similar to Complainants. Radio reception can be affected by the location of the radio transmitter and repeater towers. It can also be affected by the strength of the radio signal, weather conditions, and the location of the receiver.

In regards to the vehicle's radio screen going from dark to light, Mr. Barnes indicated that the vehicle has a button on the radio screen which can change the setting and affect the screen's brightness.

Mr. Barnes stated that the problem with radio static is difficult to verify because it is an intermittent issue. He does not feel that the issue substantially affects the usage or the value of the vehicle and that it does not warrant replacement or repurchase of the vehicle.

²⁶ Respondent Ex. 1, Nissan Technical Service Bulletin NTB18-031b dated June 25, 2018.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainant is entitled to have the vehicle repurchased or replaced.

1. Radio static issue

The primary concern raised by Complainant was that she intermittently hears static for a few seconds on the vehicle's FM radio. Repairs were attempted for the issue and the vehicle's audio/visual software was updated on July 20, 2018. Complainant's testimony is that the issue still occurs despite the repair. However, the evidence also indicated that outside factors (*i.e.*, strength of the radio station signal, location of the transmitter or repeater towers, weather conditions) could be contributing to the problem. The hearings examiner is aware that the problem could be annoying. However, the problem does not create a serious safety hazard nor does it substantially impair the use or market value of the vehicle. As such, the hearings examiner must hold that repurchase or replacement relief is not warranted by the issue. In addition, repair will not be ordered as the problem may be created by outside factors as described above.

2. Vehicle Stalling/Transmission Issue

Complainant indicated that the vehicle would intermittently stall on takeoff as if the transmission was going out. The issue was investigated on July 20, 2018, at Baytown. The evidence indicates that there is no issue with the transmission as the problem was not duplicated, the issue was raised only one time for repair, and Complainant did not indicate at the time of hearing that the issue was still occurring. Since the concern is no longer occurring, the hearings examiner must hold that the issue does not constitute grounds to order repurchase or replacement of the vehicle.

3. Vehicle's Radio Screen Issues

Complainant also raised several issues regarding the vehicle's radio screen: when turning on the vehicle, the radio screen shows the vehicle's previous shut off time; the radio screen blacks out (turns off) on its own and has to be turned back on; sometimes the radio does not turn back on and shows the menu or just flashes; and the radio screen will go from dark to light for no reason. Complainant stated in the hearing that the first two of the radio screen issues listed above have been repaired and have not recurred since the July 20, 2018 repair. Complainant never raised the issue of the radio not turning back on and showing menu or flashing as an issue to be repaired at any of the repair attempts. As such, there was no investigation into the issue to see if it could be resolved. In addition, at the time of hearing Complainant did not indicate that the issue was still occurring. Finally, the screen going dark and then light could have been caused by Complainant pressing the button controlling the daylight and night time settings for the radio display as she did twice during the test drive taken at the time of hearing. In addition, Complainant never raised this issue prior to the hearing and Respondent was never given an opportunity to resolve the issue. As such, the hearings examiner must hold that since two of these issues were repaired and the other two were never raised by Complainant to the dealer to be repaired, they do not constitute grounds to order repurchase or replacement of the vehicle.

4. Air Conditioner Issue

Complainant stated that the vehicle's air conditioner would intermittently blow hot air. This issue was raised once to the dealer (Baytown) for repair on July 20, 2018. The vehicle's IPDM was replaced at the time and the issue has not recurred. As such, the hearings examiner must hold that the issue has been repaired and does not constitute grounds to order repurchase or replacement of the vehicle.

On the date of hearing, the vehicle's mileage was 22,271 and it remains covered under Respondent's warranty. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainant's request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Deborah K. Trant (Complainant) purchased a new 2017 Nissan Rogue on October 2, 2017, from Central Houston Nissan (Central) in Houston, Texas with mileage of 15 at the time of delivery.

2. The manufacturer of the vehicle, Nissan North America, Inc. (Respondent), issued a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 22,271.
4. At the time of hearing the vehicle's warranty was still in effect.
5. Complainant concerns are that: intermittently she hears static on the vehicle's FM radio, it feels as if the vehicle stalls on takeoff as if the transmission is going out, that when turned on the radio screen shows the vehicle's previous shut off time, the radio screen blacks out (turns off) on its own and has to be turned back on, sometimes the radio does not turn back on and shows the menu or just flashes, the radio screen sometimes goes from dark to light for no reason, and the air conditioner blows hot air sometimes without adjusting any settings.
6. Complainant took the vehicle for repair to Respondent's authorized dealer, Central, on the following dates in order to address her concerns regarding intermittently hearing static on the vehicle's radio:
 - a. November 7, 2017, at 1,230 miles; and
 - b. March 29, 2018, at 9,559 miles.
7. On November 7, 2017, Central's service technician inspected the vehicle, its radio, and its antenna and could not find any problem to repair. No repairs were performed at the time.
8. On March 29, 2018, Central's service technician verified the concern, but did not perform a repair as no repair was available at the time.
9. On June 12, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On July 20, 2018, Complainant filed an amended complaint with the Department as she raised additional issues with the vehicle beyond the issue concerning intermittent static on the vehicle's radio.
11. On July 20, 2018, Respondent's Dealer Technical Specialist, Neal Barnes, inspected the vehicle at Baytown Nissan in Baytown, Texas.

12. During the repair visit described on Findings of Fact #11, Mr. Barnes updated the vehicle's audio/visual software in order to address Complainant's concerns regarding the vehicle's radio pursuant to a technical service bulletin (NTB18-031b) issued by Respondent.
13. During the repair visit described on Findings of Fact #11, Mr. Barnes determined that the vehicle's transmission was operating normally after conducting test drives in Complainant's vehicle and another similar vehicle.
14. Also during the repair visit described on Findings of Fact #11, Mr. Barnes had Baytown's service technician replace the vehicle's intelligent power distribution module (IPDM) in order to resolve the concern with the vehicle's air conditioner intermittently blowing hot air.
15. On September 25, 2018, Complainant took the vehicle to McDavid Nissan in Houston, Texas for repair for the radio static issue. No repair was performed at the time.
16. On August 9, 2018, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
17. The hearing in this case convened on October 11, 2018, in Houston, Texas before Hearings Examiner Edward Sandoval. Deborah K. Trant, Complainant, represented herself at the hearing. Respondent was represented by Neal Barnes, Dealer Technical Specialist. Jason Gonzalez, Internal Auditor for Texas Department of Motor Vehicles was present as an observer. The hearing record was closed on October 21, 2018, after Respondent's submission of a document previously entered into the record as an exhibit.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the

issuance of a final order. Tex. Occ. Code § 2301.704.

3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.
6. Complainant failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for replacement or repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED October 31, 2018.



EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES