UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	SMA Docket No. 03-0002
	)	
Cargill, Inc.,	)	
	)	
Petitioner	)	**Decision and Order**

PROCEDURAL HISTORY

On January 6, 2003, Cargill, Inc. [hereinafter Cargill], requested that the Commodity Credit Corporation, United States Department of Agriculture, determine Cargill is a sugar beet processor entitled to an allocation of the beet sugar marketing allotment. On February 28, 2003, Daniel Colacicco, Director, Dairy and Sweeteners Analysis Group, Farm Service Agency, United States Department of Agriculture, denied Cargill's request. On March 10, 2003, Cargill requested that the Executive Vice President, Commodity Credit Corporation, United States Department of Agriculture [hereinafter the Executive Vice President], reconsider the February 28, 2003, decision. On July 17, 2003, the Executive Vice President determined on reconsideration that Cargill is not a sugar beet processor entitled to an allocation of the beet sugar marketing allotment.

On August 6, 2003, Cargill filed a Petition for Review and Request for Hearing [hereinafter Petition for Review]. Cargill filed the Petition for Review pursuant to the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 [hereinafter the Agricultural Adjustment Act of 1938]; the Sugar Program regulations (7 C.F.R. pt. 1435); and the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Executive Vice President, Commodity Credit Corporation, Under 7 U.S.C. §§ 1359dd and 1359ff [hereinafter the Rules of Practice].

On August 26, 2003, the Executive Vice President filed an Answer, a certified copy of the record upon which the Executive Vice President based the July 17, 2003, determination, and a list of "affected persons."[1] The Hearing Clerk served the Petition for Review and Answer upon each affected person. One affected person, Southern Minnesota Beet Sugar Cooperative, intervened in favor of Cargill's Petition for Review. Seven affected persons, Amalgamated Sugar Company, American Crystal Sugar Company, Imperial Sugar, Inc., Michigan Sugar Company, Minn-Dak Farmers Cooperative, Monitor Sugar Company, and Western Sugar Cooperative [hereinafter the

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[1]Beet sugar allocations are a zero-sum situation. Any allocation of the beet sugar marketing allotment to Cargill would mean a corresponding reduction in allocations to existing sugar beet processors. Rule 2(c) of the Rules of Practice defines an "affected person" as a sugar beet processor, other than the petitioner, affected by the Executive Vice President's determination and identified by the Executive Vice President as an affected person. Rule 5(a) of the Rules of Practice requires that any answer filed by the Executive Vice President shall be accompanied by the names and addresses of affected persons.

Joint Intervenors], intervened in opposition to Cargill's Petition for Review. On September 16, 2003, the Joint Intervenors filed a response to Cargill's Petition for Review.

On October 16, 2003, Cargill filed an Amended and Restated Petition for Review and Request for Hearing. The Executive Vice President and the Joint Intervenors moved to strike the Amended and Restated Petition for Review and Request for Hearing. At a February 12, 2004, conference call, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] denied the motion to strike and directed Cargill to file a revised version of its Amended and Restated Petition for Review and Request for Hearing specifically indicating the provisions of the August 6, 2003, Petition for Review that had been amended. On February 17, 2004, Cargill filed Petitioner's Notice of Filing Describing Additional Material in Amended and Restated Petition for Review and Request for Hearing. On March 8, 2004, the Executive Vice President filed a response to Petitioner's Notice of Filing Describing Additional Material in Amended and Restated Petition for Review and Request for Hearing, and on March 9, 2004, the Joint Intervenors filed a response to Petitioner's Notice of Filing Describing Additional Material in Amended and Restated Petition for Review and Request for Hearing.[2]

[2]Cargill's operative pleading is Cargill's August 6, 2003, Petition for Review as amended by the Petitioner's Notice of Filing Describing Additional Material in Amended and Restated Petition for Review and Request for Hearing filed February 17, 2004. I refer to Cargill's operative pleading as Cargill's Amended Petition for Review.

On June 15-17, 2004, the Chief ALJ conducted a hearing in Washington, DC. John M. Gross and John J. Richard, Powell, Goldstein, Frazer & Murphy, LLP, Atlanta, Georgia, represented Cargill. Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, represented the Executive Vice President. Phillip L. Fraas, Washington, DC, and Matthew J. Clark, Arent Fox, PLLC, Washington, DC, represented the Joint Intervenors. Steven A. Adducci and Gina L. Allery, Dorsey & Whitney, LLP, Washington, DC, represented Southern Minnesota Beet Sugar Cooperative.

On September 10, 2004, the Executive Vice President filed Brief of Commodity Credit Corporation and Southern Minnesota Beet Sugar Cooperative filed Initial Post-Hearing Brief of Southern Minnesota Beef Sugar Cooperative. On September 13, 2004, Cargill filed Petitioner's First Post-Hearing Brief and Closing Statement. On September 17, 2004, the Joint Intervenors filed Initial Post-Hearing Brief of the Joint Intervenors in Opposition to the Petition for Review. On October 13, 2004, the Executive Vice President filed Reply Brief of Commodity Credit Corporation; the Joint Intervenors filed Brief of the Joint Intervenors in Response to the Initial Briefs Filed by the Petitioner, the Commodity Credit Corporation, and the Southern Minnesota Beet Sugar Cooperative; and Cargill filed Petitioner's Final Post-Hearing Brief and Closing Statement.

On June 27, 2005, the Chief ALJ filed a Decision [hereinafter Initial Decision]: (1) sustaining the Executive Vice President's July 17, 2003, denial of Cargill's request for a beet sugar allocation as a new entrant under the Agricultural Adjustment Act of 1938; and (2) denying Cargill's Amended Petition for Review (Initial Decision at 21).

On August 4, 2005, Cargill appealed to the Judicial Officer. On August 24, 2005: (1) the Executive Vice President filed a response in opposition to Cargill's appeal petition; (2) Southern Minnesota Beet Sugar Cooperative filed a response in support of Cargill's appeal petition; and (3) the Joint Intervenors filed a response in opposition to Cargill's appeal petition. On September 9, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's June 27, 2005, Initial Decision. Therefore, except for minor modifications, I adopt the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's findings and conclusions, as restated.

The Joint Intervenors' exhibits are designated by "JIX." Exhibits from the certified copy of the record upon which the Executive Vice President based the July 17, 2003, determination are designated by "AR." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1938

. . . .

SUBPART VII—FLEXIBLE MARKETING ALLOTMENTS FOR SUGAR

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§ 1359dd. Allocation of marketing allotments

(a) Allocation to processors

Whenever marketing allotments are established for a crop year under section 1359cc of this title, in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment.

(b) Hearing and notice

. . . .

(2) Beet sugar

(A) In general

Except as otherwise provided in this paragraph and sections 1359cc(g), 1359ee(b), and 1359ff(b) of this title, the Secretary shall make allocations for beet sugar among beet sugar processors for each crop year that allotments are in effect on the basis of the adjusted weighted average quantity of beet sugar produced by the processors for each of the 1998 through 2000 crop years, as determined under this paragraph.

. . . .

(H) New entrants starting production or reopening factories

(i) In general

Except as provided in clause (ii), if an individual or entity that does not have an allocation of beet sugar under this subpart (referred to in this paragraph as a "new entrant") starts processing sugar beets after May 13, 2002, or acquires and reopens a factory that produced beet sugar during previous crop years that (at the time of acquisition) has no allocation associated with the factory under this subpart, the Secretary shall—

(I) assign an allocation for beet sugar to the new entrant that provides a fair and equitable distribution of the allocations for beet sugar; and

(II) reduce the allocations for beet sugar of all other processors on a pro rata basis to reflect the new allocation.

7 U.S.C. § 1359dd(a), (b)(2)(A), (H)(i) (Supp. III 2003).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

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CHAPTER XIV—COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

. . . .

PART 1435—SUGAR PROGRAM

Subpart A—General Provisions

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§ 1435.2 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration. Terms defined in part 718 of this title are also applicable.

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Beet sugar means sugar that is processed directly or indirectly from sugar beets or sugar beet molasses.

Beet sugar allotment means that portion of the overall allotment quantity allocated to sugar beet processors.

. . .

In-process sugar means the intermediate sugar containing products, as CCC determines, produced in the processing of domestic sugar beets and sugarcane. It does not include raw sugar, liquid sugar, invert sugar, invert syrup, or other finished products that are otherwise eligible for a loan.

. . .

Overall allotment quantity means, on a national basis, the total quantity of sugar, raw value, processed from domestically produced sugarcane or domestically produced sugar from sugar beets, and the raw value equivalent of sugar in sugar products, that is permitted to be marketed

by processors, during a crop year or other period in which marketing allotments are in effect.

. . .

Raw sugar means any sugar that is to be further refined or improved in quality other than in-process sugar.

. . .

Sugar means any grade or type of saccharine product derived, directly or indirectly, from sugarcane or sugar beets and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, liquid sugar, edible molasses, and edible cane syrup. For allotments, *sugar* means any grade or type of saccharine product processed, directly or indirectly, from sugarcane or sugar beets (including sugar produced from sugar beet or sugarcane molasses), produced for human consumption, and consisting of, or containing, sucrose or invert sugar, including raw sugar, refined crystalline sugar, edible molasses, edible cane syrup, and liquid sugar.

Sugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year.

. . . .

Subpart D—Flexible Marketing Allotments For Sugar

. . . .

§ 1435.308 Transfer of allocation, new entrants.

. . . .

(f) New entrants, not acquiring existing facilities, may apply to the Executive Vice President, CCC, for an allocation.

(1) Applicants must demonstrate their ability to process, produce, and market sugar for the applicable crop year.

(2) CCC will consider adverse effects of the allocation upon existing processors and producers.

7 C.F.R. §§ 1435.2, .308(f)(1)-(2) (2004).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Decision Summary

The July 17, 2003, determination issued by the Executive Vice President is in accord with the new entrant provisions of the Agricultural Adjustment Act of 1938. Cargill's Amended Petition for Review, in which Cargill seeks to overturn the July 17, 2003, determination issued by the Executive Vice President concluding Cargill is not a new entrant entitled to an allocation of the beet sugar marketing allotment, is denied.

Statutory and Regulatory Background

The United States government has regulated sugar beets, along with other commodities, for many years. In 2002, Congress passed the Farm Security and Rural Investment Act of 2002, which requires the Secretary of Agriculture to establish, by the beginning of each crop year, the "overall allotment quantity" of sugar produced from sugar beets and domestically-produced sugar cane. The "overall allotment quantity" is divided so that 54.35 percent is allotted to producers of sugar derived from sugar beets and 45.65 percent is allotted to producers of sugar derived from sugar cane. The allocations for beet sugar among sugar beet processors for each crop year that allotments are in effect are based on the weighted average quantity of beet sugar produced by each sugar beet processor during the 1998 through 2000 crop years. Thus, these allocations are intended to apply to processors already in the sugar beet processing business.

The Farm Security and Rural Adjustment Act of 2002 provides for adjustments to the weighted average quantity of beet sugar produced by a sugar beet processor during the 1998 through 2000 crop years for opening or closing a sugar beet processing factory, for constructing a molasses desugarization facility, or for suffering substantial quality losses on stored sugar beets,[3] but these adjustments are not at issue in this proceeding. The Farm Security and Rural Investment Act of 2002 also makes specific provision for "new entrants" into the sugar beet processing business.[4] In order to qualify as a new entrant, an individual or entity must start processing sugar beets after the date the Farm Security and Rural Investment Act of 2002 was enacted, May 13, 2002, or acquire or reopen a factory that produced beet sugar during previous crop years that has no allocation associated with the factory. If an individual or entity satisfies this condition, the Secretary of Agriculture "shall" assign the new entrant an allocation for beet sugar that provides a fair and equitable distribution of the allocations for beet sugar.[5] The Secretary of Agriculture adopted the Sugar Program regulations to implement the Farm Security and Rural Investment Act of 2002.[6]

The legislative history concerning beet sugar allocation adjustment provisions is sparse. A statement by Senator Conrad, a co-sponsor of the Farm Security and Rural

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[3]7 U.S.C. § 1359dd(b)(2)(D)(i) (Supp. III 2003).

[4]7 U.S.C. § 1359dd(b)(2)(H) (Supp. III 2003).

[5]7 U.S.C. § 1359dd(b)(2)(H)(i)(I) (Supp. III 2003).

[6]7 C.F.R. pt. 1435 (2004).

Investment Act of 2002, gives some perspective on Congress's intent in establishing the current allocation program, but has nothing specific to say about the new entrant provisions.

> The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future. This is an amendment that enjoys widespread support within the sugar beet industry. Producers in that industry recall, as I do, the very difficult and contentious period just a few years ago when the Department of Agriculture last attempted to establish beet sugar allotments with very little direction in the law.
>
> That experience left us all believing that there must be a better way, that we should seek a method for establishing allotments that is fair and open and provides some certainty and predictability to the industry. On that basis, I urged members of the industry to work together to see if they could agree on a reasonable formula.
>
> I am pleased to say the amendment I am offering today with the Senator from Idaho reflects producers' efforts to forge that consensus. It provides that any future allotments will be based on each processor's weighted-average production during the years 1998 through 2000 with authority for the Secretary of Agriculture to make adjustments in the formula if an individual processor experienced disaster related losses during that period or opened or closed a processing facility or increased processing capacity through improved technology to extract more sugar from beets.

148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad).

Facts

Cargill is a large processor of agricultural commodities into food products. Among many other business interests, Cargill operates a sugar processing facility in Dayton, Ohio (AR-001). Cargill has considerable experience in producing sugar suitable for human consumption at the Dayton, Ohio, facility (Tr. 118-20). This facility, located on the site of an idle corn processing plant, began operating in August 2000 and primarily

was used to manufacture sugar products from intermediate sugar products such as liquid cane molasses (Tr. 30-31). Although details of the cost of this facility were testified to in closed session, it is fair to state that the cost of adapting the Dayton, Ohio, facility to handle beet thick juice was dramatically less than the typical cost for starting up a full-scale sugar beet processing factory.

John Richmond, chief executive officer and president of Southern Minnesota Beet Sugar Cooperative, a beet sugar processing cooperative located in Renville, Minnesota, testified that Southern Minnesota Beet Sugar Cooperative has unused capacity at its sugar beet processing factory (Tr. 144-45, 151-52, 167). Cargill and Southern Minnesota Beet Sugar Cooperative representatives testified that an agreement exists between Cargill and Southern Minnesota Beet Sugar Cooperative under which Cargill effectively buys sugar beets from Southern Minnesota Beet Sugar Cooperative, pays Southern Minnesota Beet Sugar Cooperative to process the sugar beets into beet thick juice, and then arranges to have the beet thick juice transported from Renville, Minnesota, to Dayton, Ohio, where Cargill processes the beet thick juice into other sugar products (Tr. 34-35, 44-45, 73-74, 76-77, 180-84). Although this agreement was mentioned numerous times during the proceeding by Cargill and Southern Minnesota Beet Sugar Cooperative, and there are several disparities between Cargill and Southern Minnesota Beet Sugar Cooperative as to what the agreement actually provides, no agreement was ever submitted as part of the record.

According to Cargill and Southern Minnesota Beet Sugar Cooperative, all processing of the sugar beets allegedly owned by Cargill at Southern Minnesota Beet Sugar Cooperative's sugar beet processing factory would be accomplished under the terms of a "tolling" agreement (Tr. 48-52, 58). Traditionally, in the sugar beet processing business, a tolling agreement provides for one processor to perform some processing functions on sugar beets owned by another processor. Tolling agreements are not uncommon in the sugar beet processing business.

The beet sugar allocation program is a form of zero-sum game, as the parties readily admit. Thus, when the Secretary of Agriculture issues the annual total beet sugar allotment, it is allocated among all the sugar beet processors according to the formula in the Agricultural Adjustment Act of 1938, based on beet sugar production during the 1998 through 2000 crop years and subject to the adjustments for opening or closing a sugar beet processing factory, for opening a molasses desugarization facility, and for substantial quality losses on stored sugar beets. Any addition to a sugar beet processor's allocation results in a proportional reduction of the allocations of the other sugar beet processors. Cargill has requested an allocation of 80,000 short tons of beet sugar as a "new entrant" in the sugar beet processing field (AR-001-AR-005). If granted, this allocation to Cargill would result in a combined 80,000 ton reduction of the allocations of the other sugar beet processors, to be shared on a pro rata basis. While Southern Minnesota Beet Sugar Cooperative would also share in this reduction, it would at the same time substantially

profit from a beet sugar allocation to Cargill, since Southern Minnesota Beet Sugar Cooperative's sugar beet processing factory would be more fully utilized.

One of the key factual determinations made in the Executive Vice President's July 17, 2003, determination is that, for the purposes of the Agricultural Adjustment Act of 1938, beet thick juice is sugar. Since Cargill is receiving sugar in the form of beet thick juice at its Dayton, Ohio, facility, Cargill is merely refining one form of sugar into another form of sugar. (AR-065.) Indeed, this determination is totally consistent with an earlier determination, sought by Southern Minnesota Beet Sugar Cooperative in September 2002, that beet thick juice is sugar for purposes of the Agricultural Adjustment Act of 1938 and that specifically selling of beet thick juice constitutes the selling of sugar (AR-006). John Richmond, Southern Minnesota Beet Sugar Cooperative's chief executive officer and president, acknowledged that the product his company is shipping to Cargill, in the form of beet thick juice, is sugar for purposes of the sugar program (Tr. 193).

The record contains considerable testimony on the financial impact of granting the requested beet sugar allocation to Cargill. Cargill and Southern Minnesota Beet Sugar Cooperative contended that the financial impact would not be significant, even stating that it would be de minimus and comparing the financial impact to the 2 percent discount for prompt payment that is prevalent in the industry. The Joint Intervenors portrayed the losses they would suffer as significant and asserted Southern Minnesota Beet Sugar Cooperative would receive approximately $138,000,000 of additional revenues over the period from 2004 to 2008 inclusive. While Southern Minnesota Beet Sugar Cooperative

would have to suffer the same proportional loss in its allocation as the other sugar beet processors if Cargill were granted the requested allocation, the record establishes that, from a financial perspective, Southern Minnesota Beet Sugar Cooperative would benefit from the assignment of an allocation for beet sugar to Cargill.

Other financial testimony, including expert testimony, examined the alleged losses that would be suffered by various sugar beet processors and the gains that would be experienced by Southern Minnesota Beet Sugar Cooperative from a marginal cost perspective. In addition to losses in revenues and profits, the Joint Intervenors contended that granting Cargill's Amended Petition for Review would result in "a significant loss of asset values for other allotment holders" (JIX-9 at 8), while Southern Minnesota Beet Sugar Cooperative would achieve significant gains in revenues, profits, and asset values.

The Joint Intervenors also contended, if Cargill's Amended Petition for Review were granted and Southern Minnesota Beet Sugar Cooperative could have a tolling arrangement with someone who was only a processor of a product that was already sugar, such as beet thick juice, everyone else in the industry could easily execute similar agreements, throwing the entire carefully crafted beet sugar allocation system into chaos. The Joint Intervenors contended, as did the Executive Vice President, that the ease of such "copycatting"—and there was no dispute that any of the Joint Intervenors who had available capacity and the ability to grow more sugar beets could enter into a similar arrangement to the one Cargill had with Southern Minnesota Beet Sugar Cooperative—would lead to a situation counter to the one anticipated by the Agricultural

Adjustment Act of 1938, where sugar beet processors would be subject to numerous allocation changes, in a serial fashion, and the beet sugar allocation program would operate in a manner quite the opposite of the "certainty and predictability" anticipated by Senator Conrad.

Discussion

Cargill is not entitled to a beet sugar allocation as a new entrant. The Executive Vice President's July 17, 2003, determination that granting Cargill new entrant status would be inconsistent with the Agricultural Adjustment Act of 1938 is amply supported by the evidence, as well as by the Agricultural Adjustment Act of 1938, the Sugar Program regulations, and the limited legislative history.

Cargill does not process sugar beets as contemplated by the new entrant provisions of the Agricultural Adjustment Act of 1938. While the conversion of beet thick juice into edible sugar is a part of the process of making commercially useful sugar out of the sugar beet, the definitions and determinations of the Executive Vice President (AR-065) make clear that beet thick juice is already considered sugar under the Agricultural Adjustment Act of 1938, so that the processing of beet thick juice at a remote facility cannot be considered the processing of sugar beets so as to entitle Cargill to a beet sugar allocation as a new entrant.

While Cargill and Southern Minnesota Beet Sugar Cooperative contend Cargill is entitled to a beet sugar allocation based on the fact that Cargill is simply purchasing sugar beets from Southern Minnesota Beet Sugar Cooperative's growers and is having part of

the processing performed through a tolling agreement with Southern Minnesota Beet Sugar Cooperative, the record contains no documentary evidence supporting this contention and the testimony supporting the existence of such an agreement, not to mention its specific terms, is less than convincing. No agreement between Cargill and Southern Minnesota Beet Sugar Cooperative was ever introduced into evidence, and I have some doubt as to whether such a written agreement, with definite terms and fixed obligations, even exists. Cargill and Southern Minnesota Beet Sugar Cooperative had ample opportunity to submit such an agreement, and the agreement could have been kept under seal, as were other testimony and exhibits in this proceeding, but they chose not to do so. Further, the record contains markedly conflicting testimony from witnesses employed by Cargill and Southern Minnesota Beet Sugar Cooperative as to the terms of the agreement.

Indeed, in its request that the Executive Vice President determine that it is a new entrant sugar beet processor under the Agricultural Adjustment Act of 1938 (AR-001-AR-005), Cargill indicated it had entered into an agreement for the purchase of sugar beets from Southern Minnesota Beet Sugar Cooperative. Daniel R. Pearson, Cargill's assistant vice president for Public Affairs, testified before the Executive Vice President that the sugar beets were to be purchased from the growers of Southern Minnesota Beet Sugar Cooperative and that the beet thick juice would "[a]t no time" be the property of Southern Minnesota Beet Sugar Cooperative (AR-025). At the hearing, no evidence was introduced to substantiate these contentions. On the contrary, John Richmond, Southern

Minnesota Beet Sugar Cooperative's chief executive officer and president, testified that it was Southern Minnesota Beet Sugar Cooperative as an entity, not the growers, who would contract with Cargill (Tr. 181-82). Rather than Cargill owning sugar beets it specifically purchases from growers, Southern Minnesota Beet Sugar Cooperative might just be selling "some portion of the beets that we have in the pile" and beets "owned" by Southern Minnesota Beet Sugar Cooperative and Cargill would likely be commingled (Tr. 182-86). Mr. Richmond further testified that it might be just as likely that the Southern Minnesota Beet Sugar Cooperative growers would receive their payments for the "Cargill" beets from Southern Minnesota Beet Sugar Cooperative as they would from Cargill (Tr. 202-03). The evidence, as well as the failure to produce any written contract, falls far short of convincing me that there is a contract in effect whereby Cargill is buying sugar beets from growers and maintaining ownership and the inherent risks of ownership from harvest through the processing of the sugar beets into sugar.

I agree with the Executive Vice President and the Joint Intervenors that Cargill does not meet the statutory criteria for new entrant status. The new entrant provisions are designed so that an individual or entity that starts processing sugar beets after May 13, 2002, receives an allocation of the beet sugar marketing allotment to which the individual or entity would otherwise not be entitled, since the allotment, in the absence of a new entrant, is distributed among sugar beet processors on the basis of the adjusted weighted average quantity of beet sugar produced by the processors for each of the 1998 through 2000 crop years. The new entrant provisions are not designed to allow an entity, such as

Southern Minnesota Beet Sugar Cooperative, to effectively increase its own allocation to utilize excess capacity by contracting with another individual or entity to perform a small part of the process.

In order to be a new entrant, Cargill must show it is a "sugar beet processor." To so qualify, Cargill must commercially produce sugar, directly or indirectly, from sugar beets (7 C.F.R. § 1435.2 (2004)). Yet, the product Cargill would receive from Southern Minnesota Beet Sugar Cooperative is already sugar, as Southern Minnesota Beet Sugar Cooperative is well aware, it having requested and received an interpretation that beet thick juice constitutes sugar under the Agricultural Adjustment Act of 1938. Thus, if Cargill is only processing one form of sugar into another form of sugar, Cargill could not be a sugar beet processor under the Agricultural Adjustment Act of 1938 or the Sugar Program regulations. However, Cargill and Southern Minnesota Beet Sugar Cooperative contend that, by purchasing sugar beets from Southern Minnesota Beet Sugar Cooperative growers and then having Southern Minnesota Beet Sugar Cooperative handle all aspects of the processing of the sugar beets through the beet thick juice stage by means of a tolling agreement, Cargill still qualifies as a new entrant. I disagree.

In the sugar beet industry, tolling is a process by which one processor pays another to handle a portion of the processing of sugar beets into sugar. Here, Cargill contends it had a contract with Southern Minnesota Beet Sugar Cooperative "to purchase beets to toll through the plant," and that "we have rented the plant for a certain percentage of their capacity" for which Cargill pays a "toll fee" (Tr. 48). Cargill and Southern Minnesota

Beet Sugar Cooperative have represented that their tolling agreement is similar to many others in the industry (Initial Post-Hearing Brief of Southern Minnesota Beet Sugar Cooperative at 17-19). However, the Executive Vice President and the Joint Intervenors have pointed out that the agreements of other entities cited by Cargill and Southern Minnesota Beet Sugar Cooperative give little support to the position that a non-sugar beet processor can achieve new entrant status by utilizing a tolling agreement as attempted here. None of the three examples cited involved a company seeking a new entrant allocation. Indeed, none of the three examples even took place in a time period where both new entrant and similar allocation provisions were present.

No evidence presented by Cargill or Southern Minnesota Beet Sugar Cooperative demonstrates that tolling has ever been utilized to bootstrap a non-sugar beet processor into processor status. Since Cargill, by processing beet thick juice, is only processing a product that has already been classified as sugar, the only real question is whether a tolling agreement can, in and of itself, propel Cargill into new entrant status. By attempting to classify itself as a sugar beet processor, through a tolling agreement that is not even a part of the record, and by its processing of a product that is already sugar, Cargill is no different from any entity which could enter into a contract to "toll" sugar beets through Southern Minnesota Beet Sugar Cooperative, and thereby be entitled to new entrant status. In other words, if I were to find that Cargill is entitled to new entrant status, there would be no bar on anyone entering into a tolling agreement with an existing

sugar beet processor with unused capacity to grow and process sugar beets, and thereby attain a beet sugar allocation.

The real beneficiary of awarding new entrant status to Cargill would be Southern Minnesota Beet Sugar Cooperative. As discussed in *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. ___ (May 9, 2005), Southern Minnesota Beet Sugar Cooperative spent roughly $100,000,000 to renovate its sugar beet processing factory, a significant sum of money, but not inconsistent with funds expended by other sugar beet processors to modernize sugar beet processing factories (Tr. 129). The parties in *In re Southern Minnesota Beet Sugar Cooperative* expounded on the major expenditures necessary to engage in the sugar beet processing industry.[7] At the same time, Cargill's expenditures to attempt to become a sugar beet processor were relatively minimal.[8] In *In re Southern Minnesota Beet Sugar Cooperative* and again in this proceeding, Southern Minnesota Beet Sugar Cooperative made clear that it had significant unused capacity as a result of the renovation and expansion, capacity which Southern Minnesota Beet Sugar

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[7]American Crystal Company committed $134,000,000 to two major expansions during the period 1996 through 2000; Western Sugar Cooperative spent $22,500,000 on an expansion project; and Minn-Dak Farmers Cooperative underwent a $93,000,000 expansion. *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. ___, slip op. at 10-11 (May 9, 2005).

[8]The costs of setting up operations at Cargill's Dayton, Ohio, facility to accommodate the receipt of beet thick juice were discussed in closed session, with that portion of the transcript under seal. Since Cargill's Dayton, Ohio, facility was already handling cane sugar products, the accommodation to handle the beet thick juice was relatively insignificant. (Tr. 115-17.)

Cooperative obviously seeks to utilize through its dealings with Cargill. While Southern Minnesota Beet Sugar Cooperative's efforts to increase its allocation in *In re Southern Minnesota Beet Sugar Cooperative* proved unsuccessful, the instant case was proceeding concurrently.

Cargill and Southern Minnesota Beet Sugar Cooperative rely on an "unused capacity" argument—that the capacity added by Southern Minnesota Beet Sugar Cooperative and not used to calculate Southern Minnesota Beet Sugar Cooperative's beet sugar allocation arguably constitutes a new facility, which Cargill can utilize as a new entrant. Such a contention is unconvincing and inconsistent with the Agricultural Adjustment Act of 1938, which provides that a sugar beet processor's allocation is calculated based on its actual production of beet sugar from sugar beets during the 1998 through 2000 crop years. Whether the capacity of a sugar beet processor was used or not, or increased or decreased, is simply not relevant to beet sugar allocations.

Cargill's Amended Petition for Review cannot be granted in the face of statutory language requiring that a new entrant be an individual or entity that "starts processing sugar beets after May 13, 2002[.]"[9] While Cargill claims it is just entering the sugar beet processing business, the entity that would be doing all the sugar beet processing for Cargill was operating for several decades before May 13, 2002. Moreover, all the capacity that would be utilized by Cargill under the tolling agreement with Southern

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[9]7 U.S.C. § 1359dd(b)(2)(H) (Supp. III 2003).

Minnesota Beet Sugar Cooperative was already in existence two crop years before May 13, 2002. That the very excess capacity that Southern Minnesota Beet Sugar Cooperative was not allowed to use in its own right could be used to entitle a non-sugar beet processor like Cargill to generate an allocation is inimical to the Agricultural Adjustment Act of 1938. As the Executive Vice President contends, interpreting the Agricultural Adjustment Act of 1938 in Cargill's (and thereby Southern Minnesota Beet Sugar Cooperative's) favor, "would totally undermine the statutory formula for making beet sugar allocations, opening up a free-for-all as all processors under various guises file for new entrant status on the basis of their unused capacity." (Brief of Commodity Credit Corporation at 13.)

While there is nothing wrong with exploiting a statutory or regulatory loophole for one's benefit, I agree with the Executive Vice President that there simply is not the loophole here that Cargill and Southern Minnesota Beet Sugar Cooperative insist exists. Cargill's and Southern Minnesota Beet Sugar Cooperative's interpretation of the Agricultural Adjustment Act of 1938 would likely lead not to the "certainty and predictability" that was in the minds of the drafters of the Farm Security and Rural Investment Act of 2002 as summarized by Senator Conrad, but would instead lead to a constant flow of petitions for adjustment of allocations as sugar beet processors with unused capacity and sugar beet farmers with unplanted land could engage in round after round of "contracts" with entities that are not even sugar beet processors to increase beet

sugar allocations and to reduce market share of other sugar beet processors who are actually in the business of processing sugar beets.

Thus, I agree with the Executive Vice President "that granting Cargill a new entrant allocation under the proposed arrangement with the Southern Minnesota Beet Sugar Cooperative . . . is not consistent with the beet sugar allocation formula under the sugar marketing allotment program" (AR-063). Similarly, the Executive Vice President's holding that granting Cargill's petition would "subvert the carefully crafted beet sugar allocation formula for existing beet processors" (AR-063), is well supported by this record.

Granting Cargill's Amended Petition for Review and accepting Cargill's and Southern Minnesota Beet Sugar Cooperative's arguments could lead to bizarre outcomes that even more strongly illustrate the correctness of the Executive Vice President's interpretation. Thus, if Cargill simply purchased Southern Minnesota Beet Sugar Cooperative's entire operation, there is little question that Cargill would be entitled to nothing but Southern Minnesota Beet Sugar Cooperative's current beet sugar allocation, based on the Southern Minnesota Beet Sugar Cooperative 1998 through 2000 crop year production of beet sugar.[10] Yet, by not buying Southern Minnesota Beet Sugar Cooperative's sugar beet processing factory and effectively buying the unused capacity of the factory, Cargill and Southern Minnesota Beet Sugar Cooperative would create out of

[10]See 7 C.F.R. § 1435.308(d) (2004).

whole cloth an additional 80,000 tons of sugar production out of the exact same factory that has already been ruled not entitled to any additional allocation. Alternatively, if Cargill were awarded new entrant status and given a beet sugar allocation, there would be nothing stopping Southern Minnesota Beet Sugar Cooperative from purchasing Cargill's Dayton, Ohio, facility and its allocation, and thus, by gaming the system, effectively gaining an allocation for its unused capacity at the expense of the other sugar beet processors. This outcome would wreak havoc on the system carefully crafted by Congress and would greatly exacerbate the uncertainty that Congress sought to avoid in enacting the Farm Security and Rural Investment Act of 2002.

I find the clear language of the Agricultural Adjustment Act of 1938, the legislative history, and the Sugar Program regulations mandate the conclusions that Cargill is not entitled to new entrant status and the Executive Vice President properly denied Cargill's request. When one reads the requirements for determining the quantity of beet sugar allocations in conjunction with the new entrant provisions, the conclusion that an individual or entity must be a full-scale sugar beet processor, in order to achieve new entrant status, is inescapable. Construing the new entrant provisions to allow Cargill's Amended Petition for Review would undercut the detailed and balanced allocation system devised by Congress.

Moreover, while the legislative history is sparse, its principal theme, that the allocation process must be one that is "fair and open and provides some certainty and

predictability to the industry,"[11] is fully embraced by the Executive Vice President's July 17, 2003, determination and would be utterly disregarded if the Cargill-Southern Minnesota Beet Sugar Cooperative interpretation prevailed. The uncertainties imposed upon the system, condoning artifice and encouraging bootstrapping, would be just the opposite of the system carefully crafted by Congress and managed by the Secretary of Agriculture.

Findings and Conclusions

1. Cargill, a large processor of agricultural commodities into food products, operates a sugar processing facility in Dayton, Ohio.

2. Among many products received for processing at Cargill's Dayton, Ohio, facility is beet thick juice, which is a form of sugar.

3. Cargill does not qualify as a new entrant under the Agricultural Adjustment Act of 1938 because it does not process sugar beets within the meaning of the Agricultural Adjustment Act of 1938.

4. Southern Minnesota Beet Sugar Cooperative is a processor of sugar beets which engaged in a significant and costly renovation of its Renville, Minnesota, sugar beet processing factory during the period 1996 through 2000. This renovation left Southern Minnesota Beet Sugar Cooperative with capacity to process sugar beets in excess of its beet sugar allocation under the Agricultural Adjustment Act of 1938.

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[11]148 Cong. Rec. S514 (daily ed. Feb. 8, 2002) (statement of Sen. Conrad).

5. Granting Cargill's Amended Petition for Review would result in Southern Minnesota Beet Sugar Cooperative being able to grow and process sugar beets which it would not be allowed to grow and process under its own beet sugar allocation and would constitute a circumvention of the carefully crafted beet sugar allocation program.

6. The preponderance of the evidence does not support a finding that there is a contract between Cargill and Southern Minnesota Beet Sugar Cooperative under which Cargill purchases sugar beets directly from Southern Minnesota Beet Sugar Cooperative growers and owns the sugar beets throughout their processing into sugar.

7. In the sugar beet processing industry, a tolling agreement is made between two processors where, for a fee, one processor will process the sugar beets of another processor. Since Cargill is not a sugar beet processor, it cannot bootstrap itself into new entrant status through a tolling agreement with an entity that is a sugar beet processor.

8. Granting Cargill's Amended Petition for Review would cause great uncertainty in the sugar beet processing industry, would inevitably result in significant copycatting by other processors who find they have unused capacity, and would be counter to the Agricultural Adjustment Act of 1938, the legislative history, and the Sugar Program regulations.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Cargill raises six issues in Petitioner Cargill, Inc.'s Appeal Petition to the Judicial Officer [hereinafter Appeal Petition] and Petitioner Cargill, Inc.'s Brief in Support of Its Appeal Petition to the Judicial Officer [hereinafter Appeal Brief]. First, Cargill contends

the Chief ALJ erroneously found Cargill's tolling agreement with Southern Minnesota Beet Sugar Cooperative is insufficient to attain new entrant status. Cargill asserts, under its tolling agreement with Southern Minnesota Beet Sugar Cooperative, Cargill is a "sugar beet processor," as defined in the Sugar Program regulations because Cargill is "a person who commercially produces sugar, directly or indirectly, from sugar beets" (7 C.F.R. § 1435.2 (2004)). (Appeal Pet. at first unnumbered page; Appeal Brief at 5.)

I disagree with Cargill's contention that it is a "sugar beet processor" as defined in the Sugar Program regulations (7 C.F.R. § 1435.2 (2004)), based on its tolling agreement with Southern Minnesota Beet Sugar Cooperative. The Chief ALJ correctly found that Cargill does not process sugar beets, but, instead, at its Dayton, Ohio, facility, processes beet thick juice. Beet thick juice is sugar (AR-006). Thus, Cargill's Dayton, Ohio, facility processes sugar, not sugar beets, and Cargill is not entitled to an allocation of the beet sugar marketing allotment under the new entrant provisions of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1359dd(b)(2)(H) (Supp. III 2003)).

Second, Cargill contends the Chief ALJ erroneously found Cargill would be processing only beet thick juice received from Southern Minnesota Beet Sugar Cooperative. Cargill asserts the evidence establishes that, prior to processing by Southern Minnesota Beet Sugar Cooperative, Cargill owns the sugar beets; therefore, Cargill is a sugar beet processor from the outset. (Appeal Pet. at first unnumbered page; Appeal Brief at 5.)

I agree with the Chief ALJ that the evidence falls far short of that necessary to establish Cargill's contention that it owns the sugar beets prior to processing by Southern Minnesota Beet Sugar Cooperative. The evidence establishes that Cargill never entered into contracts directly with Southern Minnesota Beet Sugar Cooperative's growers. Further, Cargill failed to produce any contract between it and Southern Minnesota Beet Sugar Cooperative and there is no other documentary evidence to support Cargill's contention that it owns the sugar beets processed by Southern Minnesota Beet Sugar Cooperative. Moreover, testimony by John Richmond, the chief executive officer and president of Southern Minnesota Beet Sugar Cooperative, does not establish that Cargill purchases sugar beets directly from sugar beet growers and Southern Minnesota Beet Sugar Cooperative merely processes Cargill-owned beets, as follows:

> [BY MR. FRAAS:]
>
> Q. You heard Cargill's witness testify that they have not entered into contracts with individual growers. How is that going to work?
>
> [BY MR. RICHMOND:]
>
> A. The concept is for to contract for those beets on Cargill's behalf.
>
> Q. You would be agent for Cargill?
>
> A. I don't know that I understand the meaning of that word. Contractually --
>
> . . . .
>
> A. We have agreed to contract the sugar beets for Cargill.

Q. So, the grower, do they have any contact with Cargill at all?

A. They may or may not have contact with Cargill.

Q. What do you mean, may or may not?

A. That the contract that we have with Cargill allows us to have two different ways of obtaining sugar beets, which --

. . . .

Q. You said may or may not.

A. I did. Obviously you'd like to learn a lot more about the contract that we have between ourselves and Cargill for the beets. And I'll try to tell you what it is that I remember, if I remember it. But as I recall that the contract would call for us to either acquire on Cargill's behalf, in other words, act as an agent, or to sell them some portion of the beets that we have in the pile. Whichever they select. That, I believe, is what the arrangement would be.

Q. Yeah, it would be, do you have the contract with you? Did you bring it with you?

A. I did not, no.

Q. Would you be agreeable to supply it to the Administrative Law Judge?

A. I might be agreeable to show it to the Administrative Law Judge; we'll discuss that between Cargill and ourselves.

. . . .

Q. I may have to switch to the tolling contract, would you consider making the tolling contract available also?

A. Those contracts are one and the same.

Q. That's right, they're all - and do any growers sign those contracts as growers?

A. I don't believe that that's called for.

Q. Does the contract specify as to how Cargill's beets are to be segregated from Southern Minnesota beets?

A. I believe the contract specifically says they can be co-mingled.

Q. What does that mean, explain that, co-mingle.

A. That means if we bought sugar beets from someone else then we could co-mingle them with our own beets in a storage place.

Q. So, once that Cargill beet comes into the plant you can't - it doesn't have a C on it as it goes through?

A. That's correct.

Q. You have no idea what is going through that plant is Cargill and what's going is Southern Minnesota's?

A. Unless we elect to run those beets separately that would be correct.

Q. Is your assumption you will run the beets separately?

A. We haven't made that determination.

Q. Would this contract provide for Cargill's beets to be processed at a particular time of the year with the whole plant or the whole factory is just dedicated to Cargill beets?

A. It does not.

. . . .

Q. . . . Cargill says they own these things from the time these beets come out of the ground, or something to that effect. Yet what I hear you say, and correct me if I'm wrong, these are going to be beets harvested by Southern Minnesota growers, delivered to a Southern Minnesota factory, co-mingled with Southern Minnesota beets, processed without any separation, how could anybody determine, should they need to, where are

the Cargill beets? How is USDA going to oversee this and determine if Cargill is meeting its allocation, exceed it and so on?

A. The contract that we have with Cargill allows us a quite a lot of flexibility in it, how we are going to process those beets. But essentially what happens is they share the risk of those beets disappearing in storage because those beets will most probably be co-mingled. Doesn't say that, I don't believe that the contract - but they could be co-mingled. For instance, half of the beets go bad, half of them belong to Cargill, half of the beets - they would lose half of the beets.

Is that what you're asking?

Q. That's - you've made your point, the risk of loss, for example, how is that handled?

A. That's it.

Q. How is that again, how the risk of loss?

A. If we choose to co-mingle the beets and if in co-mingling those beets in the pile disappears, and if those beets were half purchased by us and half purchased by Cargill, then we each will have lost half the beets. That's - -

Q. But you can't determine that until the end of the year, I guess?

A. Of course not, or can we now.

. . . .

Q. . . . .

. . . When the negotiations were conducted between Cargill and people in Minnesota over this contract and this tolling arrangement, were growers at the table or did you do the negotiations?

A. I did the negotiations, but certainly other growers were involved in the discussions.

Q. Under this contract do you envision the Cargill paying the growers directly for their beets?

A. Under this provision Cargill will pay the growers for the sugar beets, whether it's [sic] directly or indirectly through us, I don't know what's been determined.

Q. So you don't know if they will get a check in the mail from Cargill? They might get a check from Southern Minnesota?

A. They will.

Q. Which is more likely?

A. I don't know that I know the answer to that.

Tr. 181-86, 202-03.

Therefore, I reject Cargill's contention that the Chief ALJ's finding that Cargill would be processing only beet thick juice received from Southern Minnesota Beet Sugar Cooperative, is error.

Third, Cargill contends the Chief ALJ's reliance on the Executive Vice President's and the Joint Intervenors' assertions that Cargill's agreement with Southern Minnesota Beet Sugar Cooperative would threaten the continuity of the beet sugar allocation structure, is error (Appeal Pet. at second unnumbered page). Cargill does not elaborate on this contention in its Appeal Brief.

I do not find the Chief ALJ erred by relying on the Executive Vice President's and the Joint Intervenors' arguments regarding the effect of granting Cargill's Amended Petition for Review on the beet sugar allocation structure. I agree with the Chief ALJ's discussion of the effect of granting Cargill's Amended Petition for Review.

Fourth, Cargill contends the Chief ALJ erroneously determined, without setting a standard, that Cargill did not spend enough money to become a new entrant. Cargill asserts there is no provision in the Agricultural Adjustment Act of 1938 or the Sugar Program regulations requiring an individual or entity to spend money in order to qualify as a new entrant. (Appeal Pet. at second unnumbered page; Appeal Brief at 8-9.)

I agree with Cargill's contention that the Agricultural Adjustment Act of 1938 does not require an individual or entity to spend money in order to be assigned a beet sugar allocation as a new entrant. The Chief ALJ states the new entrant provisions of the Agricultural Adjustment Act of 1938 "are designed so that an entity that has expanded [sic] the substantial funds necessary to purchase or build a sugar beet processing facility receives a fair allocation of the [overall allotment quantity]" and finds "Cargill's expenditures to attempt to become a sugar beet processing facility were relatively minimal." (Initial Decision at 13, 15 (footnote omitted).) However, the Chief ALJ did not conclude that the expenditure of money was a necessary prerequisite to the assignment of a beet sugar allocation as a new entrant, and the Chief ALJ did not deny Cargill's Amended Petition for Review based upon the sum of money Cargill spent in an attempt to become a sugar beet processor. I find the Chief ALJ's discussion of Cargill's expenditures supported by the record. Therefore, I retain much of the Chief ALJ's discussion regarding Cargill's expenditures, but I do not conclude that Cargill is required by the Agricultural Adjustment Act of 1938 to expend a specific sum of money in order to be assigned a beet sugar allocation as a new entrant.

Fifth, Cargill contends the beet sugar allotment is not a "closed shop." Cargill contends the Agricultural Adjustment Act of 1938 explicitly provides that the Secretary of Agriculture shall assign an individual or entity that qualifies as a new entrant a beet sugar allocation. (Appeal Brief at 9-10.)

I agree with Cargill that the Agricultural Adjustment Act of 1938 explicitly provides that the Secretary of Agriculture shall assign an individual or entity that qualifies as a new entrant a beet sugar allocation; however, I also agree with the Chief ALJ's conclusion that Cargill does not qualify as a new entrant.

Sixth, Cargill contends its requested allocation of 80,000 short tons of beet sugar is reasonable and the resulting pro rata reductions of the allocations of the beet sugar allotment for all other sugar beet processors cannot be used to justify denial of Cargill's application to be designated as a new entrant (Appeal Brief at 10-13).

I conclude Cargill does not qualify as a new entrant. Therefore, the issue of the reasonableness of Cargill's requested allocation of 80,000 short tons of beet sugar and the resulting pro rata reductions of the allocations of the beet sugar allotment for all other sugar beet processors, is moot.

For the foregoing reasons, the following Order should be issued.

ORDER

1. The Executive Vice President's July 17, 2003, denial of Cargill's request for a beet sugar allocation as a new entrant under the Agricultural Adjustment Act of 1938 is sustained.

2. Cargill's Amended Petition for Review is denied.

3. This Order shall become effective on the day after service on Cargill.

RIGHT TO JUDICIAL REVIEW

Cargill has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Cargill must seek judicial review within 60 days after entry of the Order in this Decision and Order.[12] The date of entry of the Order in this Decision and Order is December 8, 2005.

Done at Washington, DC

December 8, 2005

_____

William G. Jenson
Judicial Officer

[12]See 28 U.S.C. § 2344.