UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	SMA Docket No. 03-0002
	)	
Cargill, Inc.	)	
	)	
Petitioner	)	

Decision

In this decision, I deny the Petition of Cargill, Inc. to overturn the decision of the Executive Vice-President of the Commodity Credit Corporation (CCC) that it was not entitled to an allocation of beet sugar as a "new entrant" in the beet sugar processing industry. I find that the decision of the CCC is in accord with the new entrant provisions of the Agricultural Adjustment Act of 1938, as amended by section 1403 of the Farm Security and Rural Investment Act of 2002 (Act)(7 U.S.C. §1359dd(b)(2)(H)). I thus find that Cargill is not entitled to the 80,000 short ton allocation requested in its initial application to the CCC.

Procedural Background

This matter was initiated by Cargill's January 6, 2003 request, to the Executive Vice-President of the CCC, for a determination that Cargill's Dayton, Ohio factory was a sugar processing facility under the Act. A.R. 001.[1] Submitted with the request was an application for a marketing allocation of 80,000 short tons of sugar produced from sugar beets. A.R. 005. On February 28, 2003, Daniel Colacicco, Director of the Dairy and

[1] A. R. refers to the certified administrative record of the proceedings before the CCC.

Sweetness Analysis Group of USDA's Farm Service Agency, denied Cargill's request. A.R. 006-007. On March 10, 2003, Cargill asked the CCC to reconsider the denied application. A.R. 008-012. On June 16, 2003, a hearing on Cargill's reconsideration request (which was consolidated with another reconsideration request not at issue here) was conducted before James Little, the Executive Vice-President of the CCC. On July 17, 2003, Mr. Little formally denied Cargill's Request for Reconsideration. A.R. 065-066.

On August 6, 2003, Cargill filed its Petition for Review and Request for Hearing, asking that it be granted a hearing before an administrative law judge, and that the decision of the CCC be overturned. As per the Rules of Practice Applicable to Appeals of Reconsidered Determinations Issued by the Vice President, Commodity Credit Corporation, the CCC on August 26, 2003, filed its answer, along with a certified copy of the record upon which the Executive Vice President of the CCC made his determination. Pursuant to Rule 5(a), the CCC also filed a list of each person "affected" by the CCC decision. This list consisted of all ten sugar beet processors in the United States.[2] Pursuant to Rule 5(d), the Hearing Clerk served each affected person with a copy of Cargill's petition for review and the CCC's answer, and advised them of their right to intervene in the proceeding.

Southern Minnesota Beet Sugar Cooperative (SMBSC) intervened in favor of Cargill's petition, while Amalgamated Sugar Company, American Crystal Sugar Company, Imperial Sugar, Inc., Michigan Sugar Cooperative, Minn-Dak Farmers

[2] As will be discussed in more detail, each year there is a fixed amount of sugar beets that can legally be marketed for human consumption in the United States, so that any increase or decrease in a company's allotment, or any allotment awarded to a new entrant, directly impacts all sugar beet processors.

Cooperative, Monitor Sugar Company and Western Sugar Cooperative (Joint Intervenors) intervened in opposition to the petition.

On October 16, 2003, Cargill filed an "amended and restated" petition for review and request for hearing. The CCC and the Joint Intervenors moved to strike the amended petition. At a February 12, 2004 conference call, I denied the motion to strike, and directed Cargill to file a revised version of its amended petition indicating what was changed from the initial filing.

I conducted a hearing in this matter on June 15, 16 and 17, 2004 in Washington, D.C. Witnesses were called by Cargill, SMBSC and the Joint Intervenors. The CCC declined to present any testimony, but did cross-examine witnesses called by the other parties. A portion of the first day of testimony concerned confidential business information, and remains under seal.[3]

Statutory and Regulatory Background

The federal government has regulated sugar beets, along with other commodities, for many years. In 2002, Congress passed the Farm Security and Rural Investment Act, 7 U.S.C. § 1359 et seq. This Act required the Secretary to establish, by the beginning of each crop year, the overall allotment quantity (OAQ) of sugar produced from sugar beets and domestically produced sugar cane. The OAQ is divided so that 54.35 percent is allotted to producers of sugar derived from sugar beets, and 45.65 percent is allocated to producers of sugar derived from sugar cane. The marketing allotments for the processing of beet sugar are based on the average weighted quantity of beet sugar produced by a given processor during the 1998 to 2000 crop years. Thus, these allotments are intended

[3] Tr. 78-117, and CX 18, 19 and 20

to apply to processors already in the sugar beet processing business. Adjustments to the allotments of these producers for opening or closing a sugar beet processing facility, for constructing a molasses desugarization facility, or for suffering substantial quality losses on stored sugar beets are also provided for, but are not at issue here.

The Act also makes specific provision for "new entrants" into the sugar beet processing business. 7 U.S.C. § 1359dd(b)(2)(H) provides:

(H) New entrants starting production or reopening factories
(i) In general

Except as provided by 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 the date of enactment of this subparagraph, 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.

(ii) Exception

If a new entrant acquires and reopens a factory that previously produced beet sugar from sugar beets and from sugar beet molasses but the factory last processed sugar beets during the 1997 crop year and the new entrant starts to process sugar beets at such factory after May 13, 2002, the Secretary shall –

(I) assign an allocation for beet sugar to the new entrant that is not less than the greater of 1.67 percent of the total of the adjusted weighted average quantities of beet sugar produced by all processors during the 1998 through 2000 crop years as determined under subsection (b)(2)(C) of this section, or 1,500,000 hundredweights; and

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

Thus, in order to qualify as a new entrant, a company must start processing sugar beets after the date the law was enacted (May 13, 2002). If a company satisfies this condition,

the Secretary “shall” assign it an allocation, but the amount of the allocation, rather than being subject to the rigid criteria established for companies that are already sugar beet processors, must be “fair and equitable.”

The Secretary adopted regulations to implement the statute, several of which are pertinent to this decision.

TITLE 7--AGRICULTURE

CHAPTER XIV--COMMODITY CREDIT CORPORATION, DEPARTMENT OF AGRICULTURE

PART 1435--SUGAR PROGRAM--Table of Contents

Subpart A--General Provisions

Sec. 1435.2 Definitions.

The definitions set forth in this section are applicable for all purposes of program administration.

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.

Sec. 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.

There is not much pertinent legislative history concerning beet sugar allocations. A statement by Senator Conrad, a co-sponsor of the Act, gives some perspective on Congress's intent in establishing the current allocation program, but has nothing specific to say about the new entrant provision.

> 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.
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> . . .

> 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.

107th Cong., 148 Cong. Rec. 10, p. S514 (Feb. 8, 2002).

The Facts

Petitioner 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. A.R. 001. Cargill has considerable experience in marketing edible sugar suitable for human consumption from this facility. Tr. 119. This facility, operating on the site of an idle corn processing plant, begin 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 this facility to handle beet thick juice was dramatically less than the typical cost for starting up a full-scale sugar beet processing facility.

Intervenor SMBSC, a beet sugar processing cooperative located in Renville, Minnesota, and a supporter of Cargill's petition, has indicated that it has unused capacity at its factory. Tr. 144-5, 151-2, 167. Cargill and SMBSC have both testified that some sort of an agreement exists between the two companies, where Cargill is effectively

buying sugar beets from SMBSC, Tr. 45, is paying SMBSC to process the beets into beet thick juice, Tr. 74, and then arranges to have the beet thick juice transported from Renville to Dayton where Cargill performs the final stages of processing into other sugar products. Tr. 34-35, 76, 181-4. Although this agreement was mentioned numerous times during this proceeding by Cargill and SMBSC, and there are several disparities between the two parties as to what the agreement actually provides for, no agreement was ever submitted as part of this record.

According to Cargill and SMBSC, all processing of the sugar beets allegedly owned by Cargill at SMBSC's 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 is a set-up where one processor performs some processing functions on beets owned by another processor. Its usage in the business is not uncommon.

The beet sugar allocation program is a form of "zero-sum game," as the parties readily admit. Thus, when the Secretary issues the annual total allocation, it is divided among all the beet sugar processors according to the formula spelled out in the statute, based on production during the 1998-2000 crop years, and subject to the adjustments for opening or closing a factory, for opening a molasses desugarization facility or for substantial quality losses. Any additions to a processor's allocation result in a proportional reduction of the allocations of the other processors. Cargill has requested that it be allocated 80,000 short tons of beet sugar as a "new entrant" in the sugar beet processing field. A.R. 001-2. If granted, this would result in a combined 80,000 ton reduction of the allocations of the other sugar beet processors, to be shared proportional to their initial allocation. While SMBSC would also share in this reduction, it would at

the same time substantially profit from the additional sales of sugar beets and the payment for the processing of these beets by Cargill, since its farmers would be allowed to grow more beets, and its factory would be more fully utilized.

One of the key factual determinations made by the CCC is that, for the purposes of the Act, beet thick juice is sugar. Since Cargill was already receiving sugar in the form of beet thick juice at its Dayton plant, it could not be processing the juice into sugar, but was rather just refining one form of sugar into another form of sugar. A.R. 006. Indeed, this determination was totally consistent with an earlier determination, sought by SMBSC in September 2002, that beet sugar was sugar for purposes of the Act, and that specifically selling of beet thick juice constituted the selling of sugar. John Richmond, SMBSC's Chief Executive Officer, acknowledged at the hearing that the product his company was shipping to Cargill, even in the form of beet thick juice, was sugar for purposes of the sugar program. Tr. 193.

I heard considerable testimony on the financial impact of granting the proposed allocation to Cargill. Unsurprisingly, Cargill and SMBSC contended that the financial impact would not be significant, even stating that it was de minimus and comparing it to the 2 percent discount for prompt payment that is prevalent in the industry. The Joint Intervenors, equally unsurprisingly, portrayed the losses they would suffer as significant, and the additional revenues SMBSC would receive as "windfall" and worth approximately $138,000,000 over the period from 2004 to 2008 inclusive. While SMBSC would have to suffer the same proportional loss in allotment as the other sugar beet processors if Cargill was granted the requested allocation, it is abundantly clear as

well that, from a financial perspective, they would be far and away the prime beneficiary of the granting of Cargill's petition.

Other financial testimony, including expert testimony, examined the alleged losses that would be suffered by various parties, and the gains that would be experienced by SMBSC, from a marginal cost perspective. In addition to losses in revenues and profits, the Joint Intervenors testified that granting of Cargill's petition would result in "a significant loss of asset values for other allotment holders," JIX 9, p. 8, Report of Patrick M. O'Brien, while SMBSC would achieve significant gains in revenues, profits and asset values.

The Joint Intervenors also contended that if Cargill's petition was granted and SMBSC could have the ability to utilize 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 allotment system into chaos. They contended, as did the CCC, 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 SMBSC—would lead to a situation, counter to the one anticipated by the Act, where the processors of sugar beets would be subject to numerous allocation changes, in a serial fashion, and that the sugar beet 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 marketing allocation as a new entrant. The CCC determination that granting Cargill new entrant status would be inconsistent with the Act is amply supported by the evidence, as well as the statute, the underlying regulations, and the limited legislative history. Although my holding that Cargill is not entitled to new entrant status eliminates the need for me to address some of the other issues brought up by the parties, I make several additional findings in this area in the event my new entrant ruling is overturned subsequently. Thus, I hold that if a party is a new entrant, it is mandatory that the CCC grant it an allocation, but that the CCC may consider a variety of factors in determining the size of the allocation. 7 C.F.R. § 1435.308(f).

Cargill does not process sugar beets as contemplated by the new entrant provisions of the Act. While the downstream conversion of beet thick juice into edible sugar is a part of the overall process of making commercially useful sugar out of the sugar beet, the definitions and determinations of the CCC, A.R. 006, make it clear that beet thick juice is already considered sugar under the Act, 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 new entrant allocation.

While Cargill and SMBSC contend that Cargill is entitled to an allocation based on the fact that it is simply purchasing beets from SMBSC's growers and is having the greater part of the processing performed through a tolling arrangement with SMBSC, there is 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 the two companies 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 SMBSC had ample opportunity to submit such an agreement, and it could have been kept under seal, as were other testimony and exhibits in this case, but they chose not to do so. Further, I heard markedly conflicting testimony from witnesses employed by the two companies as to what the "agreement" stated.

Indeed, in its request that the CCC determine that it was a new entrant sugar beet processor under the Act, A.R. 001-005, Cargill indicated that it had entered into an agreement for the purchase of sugar beets from SMBSC. Daniel Pearson testified before the CCC that the sugar beets were to be purchased from the growers of SMBSC, and that the beet thick juice would "at no time" be the property of SMBSC. Id., at 25. At the hearing before me, no evidence was introduced to substantiate these contentions. On the contrary, John Richmond, SMBSC's CEO and President, testified that it was SMBSC as an entity, not the growers, who would contract with Cargill. Tr. 181-2. Rather than owning beets it specifically purchased from growers, SMBSC might just be selling "some portion of the beets that we have in the pile," Tr. 182, and that beets "owned" by SMBSC and Cargill would likely be commingled. Tr. 183-6. It might be just as likely that the SMBSC growers would receive their payment for the "Cargill" beets from SMBSC as they would from Cargill. Tr. 202-3. Basically, the cumulative written and oral testimony, as well as the failure to produce any written contract, fall far short of convincing me that there is some sort of contract in effect whereby Cargill is buying

beets from the growers, and maintaining ownership, and the inherent risks of ownership, from harvest through the processing of the beets into sugar.

I agree with the CCC 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 entity that has expanded the substantial funds necessary to purchase or build a sugar beet processing facility receives a fair allocation of the OAQ that it would otherwise be shut out of, since the allocation, in the absence of a new entrant, is distributed among sugar beet processing facilities according to their 1998 through 2000 weighted average crop year production. It allows a company the opportunity to benefit from a significant investment, and is not designed to allow a company to bootstrap itself into an allocation by making relatively little or no investment into a small part of the process. Nor is it designed to allow a company, such as SMBSC, to circumvent the statutory process by contracting with another company to perform a small part of the process, and effectively increase its own allocation to utilize excess unused capacity.

In order to be a new entrant, Cargill must show it is a "sugar beet processor." To so qualify, it must commercially produce sugar, directly or indirectly, from sugar beets. 7 C.F.R. § 1435.2. Yet the product it would receive from SMBSC is already "sugar," as SMBSC is well aware, it having requested and received an interpretation from the CCC that beet thick juice constitutes sugar under the Act. Thus, if Cargill is only processing one form of sugar into other forms of sugar, it could not be a sugar beet processor under the Act or regulations. However, Cargill and SMBSC contend that by purchasing beets from SMBSC growers and then having SMBSC handle all aspects of the processing of

the 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 the beets into sugar. Here, Cargill contends it had a contract with SMBSC "to purchase beets to toll through the plant," and that "we have rented the plant for a certain percentage of their capacity" for which they pay a "toll fee." Tr. 48. Cargill and SMSBC have represented that their tolling arrangement is similar to many others in the industry. However, the CCC and Joint Intervenors have pointed out that the agreements of other parties cited by Cargill and SMBSC give little support to the position that a non-sugar beet processor can achieve new entrant status by utilizing tolling agreements as attempted here. SMBSC Opening Brief at 17-19. 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 SMBSC 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 combination of a tolling agreement and contractual agreements that are not even a part of this record, and by its processing of a product that is already sugar, Cargill is no different from any individual, corporation or other entity who could enter into a contract to "toll" sugar beets through SMBSC, 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 an allotment.

It is obvious that the real beneficiary of awarding new entrant status to Cargill would be SMBSC. As was discussed in great detail in In re: Southern Minnesota Beet Sugar Cooperative, 64 Agric. Dec. (July 21, 2004), affirmed by the Judicial Officer at Agric. Dec. 65 (May 9, 2005), SMBSC spent roughly $100,000,000 to renovate its sugar beet processing facility, a significant sum of money, but not inconsistent with funds expended by similar facilities to modernize. Tr. 129. Throughout the litigation of that case, the parties expounded on the major expenditures that were necessary to engage in the sugar beet processing industry.[4] At the same time, it is clear that Cargill's expenditures to attempt to become a sugar beet processing facility were relatively minimal.[5] In the earlier case, and again in this case, it was made clear by SMBSC that it had significant unused capacity as a result of the renovation and expansion, capacity which it obviously seeks to utilize through its dealings with Cargill. While their efforts to increase their allocation in the above-cited case proved unsuccessful, the instant case was proceeding concurrently.

Cargill and SMBSC rely on an "unused capacity" argument—that the capacity added by SMBSC and not used to calculate SMBSC's allotment arguably constitutes a

[4] Thus, American Crystal Company testified that it had committed $134,000,000 to two major expansions between 1996 and 2000, Western Sugar Cooperative spent $22.5 million and Minn-Dak Farmers Cooperative underwent a $93,000,000 expansion. Southern Minnesota, supra, J.O. decision slip op., 10-11.
[5] The costs of setting up operations at Cargill's Dayton plant to accommodate the receipt of beet thick juice were discussed in closed session, with that portion of the transcript under seal. Tr. 115-7. Since Cargill's facility was already handling cane sugar products, the accommodation to handle the beet thick juice was relatively insignificant. Id.

new facility, which Cargill can utilize as a new entrant. Such a contention is unconvincing and inconsistent with the Act. It is exceedingly clear in the Act that a sugar beet processor's allotment is calculated based on its actual production of sugar from sugar beets during the 1998-2000 crop years. Whether the capacity of a processor was used or not, or increased or decreased, is simply not relevant to allotments. The only thing that matters is actual production, subject to the adjustments also permitted in the statute, none of which are at issue here.

It would also be unreasonable to allow Cargill's petition in the face of statutory language requiring that a new entrant be an entity that "starts processing sugar beets after the date of enactment of this subparagraph." 7 U.S.C. § 1359dd(2)(H)(i). While Cargill claims that 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 the passage of the subparagraph in question. Moreover, all the capacity that would be utilized by Cargill under the "tolling" agreements was already in existence two crop years before the subparagraph in question was enacted. That the very excess capacity that SMSBC 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 statute. As the CCC contends in its brief, interpreting the statute in Cargill's (and thereby SMBSC'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." CCC opening brief at 15.

While there is nothing wrong with exploiting a statutory or regulatory loophole for one's benefit, I agree with the CCC that there simply is not the loophole here that

Cargill and SMBSC insist exists. The CCC interpretation of the statute is the only one that properly considers the relationship between the beet sugar marketing allocation provisions and the new entrant provisions. Any other interpretation of the Act would likely lead not to the "certainty and predictability" that was in the minds of the drafters of the Act 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 their allotments and to reduce market share of other processors who are actually in the business of processing sugar beets.

Thus, I agree with the CCC that a finding "that granting Cargill a new entrant allocation under the proposed arrangement with the Southern Minnesota Beet Sugar Cooperative (Southern Minnesota) is not consistent with the beet sugar allocation formula under the sugar marketing allocation program" is mandated by the Act. A.R. 063. Similarly, the CCC's holding that granting Cargill's petition would "subvert the carefully crafted beet sugar allocation formula for existing beet processors," Id., is well supported by this record.

Granting of the petition, and acceptance of the arguments of Cargill and SMBSC, could lead to bizarre outcomes that even more strongly illustrate the correctness of the CCC interpretation. Thus, if Cargill simply purchased SMBSC's entire operation, there is little question that it would be entitled to nothing but SMBSC's current allocation, based on the SMBSC 1998-2000 production of sugar from sugar beets. 7 C.F.R. 1435.308(d). Yet by not buying SMBSC's factory, and effectively buying the unused

capacity of the factory, Cargill and SMBSC would create out of 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 an allocation, there would be nothing stopping SMBSC from purchasing Cargill's "sugar beet processing 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 would wreak havoc on the system carefully crafted by Congress, and would greatly exacerbate the uncertainty that Congress sought to avoid in promulgating the Act.

In affirming the decision of the CCC, I find that the clear language of the statute, the legislative history, the regulations, and the nature of the sugar beet industry mandate a finding that Cargill is not entitled to new entrant status, and that their petition was properly denied. When one reads the requirements for determining the quantity of allocations provisions of the Act in conjunction with the new entrant provisions, the conclusion that a new entrant must be a full-scale sugar beet processor, with the requisite investment in a sugar beet processing facility, in order to achieve new entrant status, is inescapable. While such a construction might not be mandated by looking at the new entrant provision standing alone, when the new entrant provision is read along with the allocation provision, it is clear that construing the new entrant provision to allow Cargill's petition 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," is fully embraced by the CCC decision and would be utterly disregarded if the Cargill/SMBSC 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 CCC.[6]

I do agree with Petitioner and SMBSC that, if Cargill was entitled to new entrant status, the CCC would be required to assign Cargill "a fair and equitable" allocation. However, since neither the CCC nor I find that Cargill qualifies as a new entrant, there is no need to determine what a fair and equitable allocation would be. Thus, although there was significant testimony at the hearing as to the economic impact of granting the requested allocation, the CCC never got to the point of making the regulatory required determination of considering "adverse effects of the allocation upon existing processors and producers." 7 C.F.R. § 1435.308(f)(2). If I had found that Cargill was entitled to new entrant status, I would have remanded this matter to the CCC to make a determination of what a fair and equitable allocation would be.

Findings and Conclusions

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

[6] Even if the statute was subject to multiple interpretations, I find the CCC would be entitled to some deference in its interpretation of a statute which Congress charged it with administering. However, as I discussed in the *Southern Minnesota* case, Supra, slip up at 17. CCC would not be entitled to the full deference accorded in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), because that holding specifically applies to federal judicial review of final agency actions. Since the Judicial Officer acts for the Secretary on appeals from administrative law judge decisions, perhaps the federal courts will give his decision full *Chevron* deference. I still believe that the CCC is the "agency" "charged" with the administration of the statute, *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and that some deference is due the CCC, but because I hold that because the statute itself requires this result, and the legislative history strongly supports this result, I do not rely on deference to sustain the CCC decision.

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

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

4. Intervenor SMBSC is a processor of sugar beets who engaged in a significant and costly renovation of their Renville, Minnesota facility from 1996-2000. This renovation left SMBSC with capacity to process sugar beets in excess of their statutory allocation.

5. Granting of the petition would result in SMBSC being able to grow and process sugar beets which they would not be allowed to grow and process under their own beet sugar allocations, and would constitute a circumvention of the carefully crafted sugar beet allotment program.

6. The preponderance of the evidence does not support a finding that there is a contract between Petitioner and SMBSC under which Cargill purchases sugar beets directly from SMBSC growers, and owns said beets throughout their processing into sugar.

7. In the sugar beet processing industry, a tolling agreement is made between two sugar beet processors where, for a fee, one processor will process the sugar beets of another processor. Since Petitioner 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 of the petition 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 is counter to the statutory provisions, the legislative history, and the regulations governing this industry.

Conclusion and Order

The determinations made by the Executive Vice-President of the CCC on July 17, 2003 denying Petitioner's request for beet sugar allocations as a new entrant under the Act are sustained. The Petition for Review is DENIED.

This decision shall become final 25 days after service on the Executive Vice-President of the CCC, unless a party or an intervenor files an appeal petition to the Judicial Officer pursuant to Rule 11.

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 27th day of June 2005

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MARC R. HILLSON
Chief Administrative Law Judge