

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. APP-03-0013
)	
Glenn Mealman,)	
)	
Petitioner)	

DECISION

In this decision, I find that Petitioner Glenn Mealman was not responsibly connected to Furr’s Supermarkets, Inc. I find that even though he was a director of Furr’s for the period of time during which violations had been committed, his position as director was nominal.

Procedural History

On October 23, 2002, Petitioner was notified by letter from Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, that an initial determination had been made that Petitioner was “responsibly connected” to Furr’s Supermarkets, Inc., as that term is defined in 7 U.S.C. § 499a(b)9. The PACA Chief made that determination based on records showing him to be a member of the Board of Director of Furr’s from November 1, 1997 through February 23, 2001. Following Petitioner’s December 26, 2002, letter disputing his responsibly connected status, James Frazier, the Chief of the PACA Branch issued a final determination on

April 3, 2003, that Petitioner was responsibly connected to Furr's. On October 29, 2003, Petitioner filed a petition for review of the PACA Chief's determination.

In the meantime, on September 12, 2002, USDA also filed a complaint against Furr's alleging that it had committed "willful, flagrant and repeated" violations of 2(4) of the PACA (7 U.S.C. § 499b(4)). The basis for the complaint was Furr's failure to pay Quality Fruit a total of over \$174,000 for the sale and delivery of perishable agricultural commodities between September 1998 and February 2001. On February 6, 2003, after Furr's filed an answer to the complaint but did not deny that it had failed to pay Quality Fruit, former Chief Judge James Hunt entered a Decision Without Hearing Based on Admissions against Furr's, pursuant to Rule 139 of the Rules of Procedure. At a telephone conference with former Judge Leslie Holt, counsel for Petitioner suggested that he should be allowed to present evidence on the underlying violations, since Furr's failure to contest these violations (they were in bankruptcy) should not deprive Petitioner from asserting that there was no underlying PACA violation—a necessary prerequisite to any responsibly connected liability. Judge Holt set a briefing schedule for the parties on this issue. The matter was subsequently assigned to me on April 7, 2004. At an April 15, 2004 telephone conference, I stated that I would follow the ruling I had recently made in another matter (In re. Brackett & Oliver/Atlanta Egg & Produce Co., Inc., copy attached) where I held that due process considerations necessitated that a party charged with being responsibly connected to a company which had defaulted in a related disciplinary proceeding be allowed to show that the underlying violations did not occur.

Prior to the hearing, I also refused to sign a subpoena requested by Petitioner for records relating to three other individuals who were apparently affiliated with Furr's in

various capacities but who were not the subject of an ongoing responsibly connected proceeding.

On June 8, 2004, I conducted a hearing in this case in Kansas City, Missouri. James P. Tierney represented Petitioner and Andrew Y. Stanton represented Respondent.¹ The parties subsequently filed initial and reply briefs, and proposed findings of fact and conclusions of law.

Factual Background

Glenn Mealman worked for Fleming Companies, Inc. (Fleming) in a variety of capacities for 39 years, beginning with his graduation from college in 1957. Tr. 47. By the time he left the company in 1996, he had worked as a merchandiser, manager, and eventually executive vice-president for Fleming's mid-America region. Tr. 47-48. Since he was only 63 when he retired, and his full retirement benefits did not kick in until he turned 65, he had a financial arrangement with Fleming to consult for and assist the company in various capacities. Tr. 49-50, 54-55, 65. Once he turned 65, he was paid by Fleming at an hourly rate to serve on the Furr's board. Tr. 68.

Fleming was a substantial investor in Furr's. Tr. 70-71. As such, Fleming was entitled to two seats on Furr's Board of Directors. Tr. 21. In August 1998, Fleming asked Mealman to serve as a Director on Furr's board on Fleming's behalf. Tr. 21-22. All fees and expenses associated with this appointment were paid by Fleming. Tr. 34. Mealman had no ownership interest in Furr's, and no role in the day-to-day management of the company. Tr. 27. He had no check writing authority, had no role in the purchase

¹ Petitioner testified on his own behalf and Respondent called two witnesses. I received into evidence Petitioner's Exhibits 1 through 9 (these exhibits are cited as "PEX") and rejected Petitioner's Exhibits 10-13. I also admitted Respondent's (REx) Exhibits 1 through 4. The official agency records that were the basis of the Agency's action are RC1 through 6.

of produce, and no role regarding payment of creditors. Tr. 26. As a director representing Fleming, Mealman attended Furr's board meetings. As a board member, he was required to serve on at least one committee, and so he served on the Real Estate Committee. Tr. 23. This committee met only once or twice during Mealman's tenure, and served essentially as a "rubber-stamp" to sites already approved by Furr's. Tr. 23-24. Mealman visited one site during his tenure. Id. Mealman also nominated an individual to be a board member, but only when he was requested to do so because he was told that someone on the selection committee should not be making a nomination. Tr. 32-33, PX1.

Mealman remained on the Board even after Fleming ceased having an ownership interest in Furr's in June 2000. Tr. 36-37, 72. However, he attended no further meetings of the Furr's board prior to Furr's filing for bankruptcy in February 2001. Tr. 38-39. Mealman had no participatory role in either Furr's decision to file for bankruptcy, nor in any subsequent actions of Furr's. Tr. 41.

The PACA action against Furr's was primarily based on its failure to pay a single creditor—Quality Fruit. When Furr's was proceeding through bankruptcy, apparently Quality Fruit was the only creditor who failed to file a claim with the bankruptcy court. There is no evidence in this record as to why Quality Fruit did not pursue a claim against Furr's.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other

things, it defines and seeks to sanction unfair conduct in the conduct of transactions involving perishables. Section 499b provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499a(b)4.

In addition to penalizing the violating merchant, who in this case would be Furr's, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b).

The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id.*

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)9.

Findings of Fact

1. Glenn Mealman, Petitioner in this matter, served as a member of the Board of Directors of Furr's Supermarkets, Inc. from 1998 until March, 2002.

2. Mealman occupied one of the two seats that his long-term employer, Fleming Companies, Inc., were entitled to fill as a result of their significant ownership interest in Furr's. Mealman had no ownership or employment interest in Furr's, and was never paid anything by Furr's. Between the time of his initial appointment to the Board, and Furr's termination of their ownership interest in June 2000, Fleming paid Mealman for his work on the Board, and also paid his expenses. Tr. 34. While Mealman did not resign from the Board at the time that Fleming's ownership interest terminated, he never attended another Board meeting. Tr. 38.

3. Mealman attended numerous board meetings between 1998 and 2000. As each board member had to serve on at least one committee, he served on the real estate committee. He viewed one potential site as part of his duties for this committee. Tr. 23-24. Also, at the request of another board member, he nominated a pre-selected individual to the board. Tr. 32, PX1.

4. Mealman attended meetings where sales trends and finances were discussed. Individual accounts payable or the failure to pay suppliers were never discussed at meetings attended by Mealman. PX1, PX3, RC5, Tr. 24-25.

5. Mealman was never involved in Furr's day-to-day business activities, had no check writing or document issuing authority, had no role in deciding what bills were to be paid, did not have particularized knowledge of Furr's financial difficulties, and had no knowledge of, nor relationship with, the company's creditors. Tr. 26-27.

6. Quality Fruits, a supplier to Furr's, was not paid in a timely fashion by Furr's, in violation of the PACA. As a result of this failure to pay Quality Fruits, a Decision Without Hearing Based on Admission was issued against Furr's on February 6, 2003. RX3, PX9, RC4.

7. Mealman did not know Furr's was considering bankruptcy until the company actually filed for bankruptcy. Tr. 41. He had no role in the decision to file for bankruptcy, nor did he have any knowledge of individual accounts that were not paid.

Discussion

I reaffirm my earlier rulings that (1) Petitioner can challenge the underlying violation against Furr's which led to Respondent's charges that Petitioner is responsibly connected to a merchant which violated the PACA where such claim has not been litigated before the Agency, and (2) that Petitioner is not entitled to information or to present testimony concerning other individuals who were not pursued by Respondent. I also reject Petitioner's contention that Respondent cannot issue a responsibly connected determination until there has been a final decision in the related disciplinary proceeding. In my principal finding, I find that Petitioner was not responsibly connected to Furr's and that he was only nominally a director of that company. I discuss the basis for these findings in my Conclusions of Law.

Conclusions of Law

1. An individual charged with being a responsibly connected party has the right to challenge the underlying violation even where the party charged with committing the underlying violation fails to challenge the allegations of the original

complaint. While the issue is largely moot in this case, since Petitioner did not produce any evidence indicating that Furr's did not fail to pay Quality Fruits as required by the PACA, Respondent continued to raise an objection to my ruling at the hearing, and has urged me in its opening brief, at pp. 13-15, to reconsider my initial ruling.

I continue to disagree with Respondent's contention that an individual may be deprived of his right to challenge the factual underpinnings of a disciplinary violation of PACA, where he has had no opportunity or authority to participate in that process. The approach urged by Respondent would result in the establishment of one of the facts necessary to prove responsibly connected status—the existence of a violation committed by the merchant—without any opportunity to participate in a proceeding to have that fact adjudicated. Yet both the Act and the Rules of Procedure recognize the very close relationship between disciplinary proceedings and responsibly connected proceedings. In 1996, the Rules were changed to require consolidation of disciplinary and responsibly connected cases where they arise from the individuals' relationship with the company during the time in question. 7 C.F.R. 1.137(b); 61 Fed. Reg. 11501-4 (March 21, 1996).

I find Respondent's reliance on In re Danny L. Brand d/b/a Danny's Food Service, 53 Agric. Dec. 1628, aff'd 66 F. 3d 342 (11th Cir. 1995) unpersuasive. In that case, the Judicial Officer found that res judicata applied because the parties to the case "and their privies" were bound by the final decision of the court. Petitioner was not a party to the disciplinary proceeding relied upon in this case, nor did he have any opportunity to participate, and I have seen no evidence that he was in privity to Furr's in any event. Not allowing the Petitioner to challenge the existence of the underlying

violation in any forum, which is effectively the urging of Respondent here, is inconsistent with the Act, the Rules of Procedure and due process.

2. The USDA's decision not to proceed against other individuals as responsibly connected is immaterial to this case. Petitioner vigorously argues that I should have allowed him to subpoena documents and present evidence with respect to Respondent's treatment of other individuals who allegedly had connections with Furr's but who were not pursued, or whose pursuit was abandoned, by Respondent, as responsibly connected parties. Petitioner has couched its argument as one of constitutional disparate treatment, contending that the USDA applied different standards to Petitioner than to one David Morrow, a contemporary of Petitioner on the Furr's board. At the hearing, I allowed Petitioner's counsel to make a proffer on this issue, after I refused to allow him to question Josephine Jenkins of USDA on this subject.

The principal issue I have before me in this case, which I will discuss in more detail below, is whether Petitioner is responsibly connected to Furr's, assuming Furr's in fact violated the PACA. Whether the government could have sanctioned other individuals as responsibly connected is simply irrelevant to Petitioner's status. It would be most onerous, and inconsistent with the Act if, in order to support a responsibly connected case against an individual, the government had to distinguish that individual from every other shareholder of over 10% of stock, board member, partner or officer. Even if Morrow was responsibly connected to Furr's and was not the subject of government sanction, that would not let Petitioner off the hook if he were otherwise liable. As Respondent has contended on this issue, the Chief of the PACA Branch is

entitled to exercise prosecutorial discretion, which may not be challenged in this proceeding. The issue has been squarely dealt with in USDA case law.

It is axiomatic in administrative law that the agency has prosecutorial discretion to pursue those violators where it can make its case . . . violators are not excused because violations in similar circumstances were not prosecuted, or the violator was not sanctioned in the same fashion as other violators.

In re. Tipco, Inc., 50 Agric. Dec. 871, 900 (1991), aff'd per curiam, 953 F. 2d 639 (4th Cir. 1992), cert. den. 113 Sup. Ct. 84 (1992). The legitimate exercise of prosecutorial discretion does not constitute disparate treatment nor can it be construed as an arbitrary and capricious action.

3. The USDA's timing in pursuing a responsibly connected case against Petitioner before the underlying disciplinary action was resolved is proper.

Petitioner also contends that USDA exceeded its statutory authority by prematurely determining that Petitioner was responsibly connected to a PACA violator. Petitioner argues that an individual cannot even be cited as responsibly connected until there is a determination, after notice and opportunity for hearing, that a disciplinary violation has been committed.

Even if an individual arguably cannot be finally adjudicated as responsibly connected and suffer the consequent employment sanctions without an underlying disciplinary violation against the entity to which the individual was responsibly connected, Petitioner is incorrect in asserting that a responsibly connected proceeding cannot even be commenced until the underlying disciplinary violation is resolved. Indeed, the Rules of Procedure specifically contemplate that, where both a disciplinary and responsibly connected proceedings for a licensee are pending, they be joined for hearing.

(b) Joinder. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. §1.137(b). To require the disciplinary proceeding to come to a full resolution, including possible appeals to federal court, without allowing the responsibly connected cases to proceed would be waste of resources, especially given the close relationship between these two types of actions, and could add years to the process.

4. Furr's violated PACA by its failure to timely pay Quality Fruits for multiple loads of produce. While I allowed Petitioner to challenge the underlying violation alleged to have been committed by Furr's, there is no evidence in the record that Furr's did not in fact commit the violation charged by the PACA Chief. It is undisputed that Quality Fruits did not pursue its claim against Furr's in bankruptcy court when it had the opportunity to do so, and so the findings of former Chief Judge Hunt's Decision Without Hearing Based on Admissions of February 6, 2003 apply to this proceeding. RX3.

5. Petitioner was not responsibly connected to Furr's. While Petitioner was one of the director's of Furr's during the time Furr's committed its PACA violations, Petitioner has met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this

chapter, and (2) was only nominally a director of a violating licensee or entity subject to license.

(a) Petitioner was not actively involved in the activities resulting in a violation of this chapter. There is no serious dispute that Petitioner was not directly involved in the activities relating to Furr's failure to pay Quality Fruit for produce. No evidence was introduced by Respondent as to this issue, and Petitioner testified without contradiction that he never participated in Furr's purchases of perishable agricultural commodities, that he never was involved in any aspect of Furr's day-to-day business activities, that he never saw any departmental breakdowns on fruit and vegetable payables, and that fruit and vegetable purchases were never discussed at board meetings. Tr. 24-26. He not only had no knowledge of whether particular companies were being paid by Furr's, but also had no idea who Quality Fruits was until the commencement of this proceeding. Tr. 27-28. He did not know about Furr's bankruptcy until after it had been filed, and had no role in the bankruptcy proceedings or in the discharge of obligations in the course of those proceedings. Further, he had no check writing or purchasing authority, and would have had no authority to discharge the debt, even if he knew about it.

Respondent, however, contends that Petitioner was "actively involved" within the meaning of the Act. The principal explication of the standard for whether a person is actively involved is stated in In re Michael Norinsberg, 58 Agric. Dec. 604, 610-11(1999)(Decision and Order on Remand). The Judicial Officer stated that " if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the

activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.” Respondent contends that because Petitioner participated in corporate decision making, voting for or against budget resolutions, he should be found to have exercised “judgment, discretion or control” as per the Norinsberg holding. As Petitioner points out though, the board of directors did not have before themselves decisions as to which creditors to pay, but only had jurisdiction over matters brought to the board’s attention by Furr’s management. There is no evidence in this record of any issues concerning the buying or selling of produce, or the payment or failure to pay for produce, that was ever brought to the attention of the board during the period of Petitioner’s service. Tr. 25-28. And it is a considerable stretch to contend, as does Respondent, that the fact that the board considered a refinancing plan intended to restructure Furr’s debt, and to liquidate the shares of Fleming in Furr’s, constitutes “active involvement” in a decision not to timely pay Quality Fruits. Further, Furr’s indebtedness to Quality Fruits had occurred 20 months before the board even considered this refinancing plan, so the violative acts occurred long before any board “involvement” in the decisions regarding financial restructuring. In Maldonado v. USDA, 154 F. 3d 1086 (9th Cir. 1998), the court held that the president of the company was not “actively involved”—even though he was authorized to co-sign checks, because he had not been involved in the particular sale which lead to the violation and did not make the decision as to which bills were paid. Petitioner here was far more removed from the transactions in question than was the officer in Maldonado.

Similarly, the Judicial Officer in In re Lawrence D. Salins, 57 Agric. Dec. 1474 (1998), found several factors to be significant in his decision that Salins was “actively

involved,” including his day-to-day participation in the company, his “long-term, substantial involvement” in weekly staff management meetings, his participation in deciding which individual bills were to be paid, and his frequent participation in managerial decision making activities, including the providing of “financial information to assist in the decision making process.” *Id.*, at 1490. None of these factors are present here.

Unless Respondent contends that a member of the board of a violating corporation is automatically deemed “actively involved” in any transaction that occurs during his time of service on the board—a position plainly not supported by the statute or the case law—there is no basis for me to find Petitioner “actively involved” in the activities leading to the violation that Furr’s committed with respect to Quality Fruit.

(b) Petitioner was only nominally a director of a violating licensee or entity subject to license. Once again, Petitioner bears the burden of demonstrating, by the preponderance of the evidence, that he was only a “nominal” member of the Furr’s board, in order to defeat the proposed finding that he was responsibly connected to Furr’s. Petitioner has demonstrated that he served on the board at the request of Fleming, his employer of over 39 years, as one of their two representatives on the board. Fleming was entitled to two representatives out of the ten-person board as a consequence of their significant ownership of Furr’s stock. The Petitioner himself had no ownership in Furr’s, was being paid by Fleming on a “retainer” type of salary for the period between the time he “retired” from Fleming at age 63 and his reaching the age of 65, at which time he was entitled to full retirement benefits and was paid on an hourly basis by Fleming for his

service on the Furr's board. Petitioner had absolutely no connection with Furr's other than to serve as Fleming's chosen representative on Furr's board.

Respondent has offered a number of reasons to support its contention that Petitioner was responsibly connected to Furr's. Prominent among these reasons are that Petitioner was educated was an "experienced and knowledgeable businessman", Tr. 137, that he was on the real estate committee, that he "did participate in at least one meeting" Id., and that he was present at an October 13, 1999 meeting "at which important financial records were discussed." Id., at 135. These reasons do not elevate Petitioner's role above that of a nominal member of the board. It is undisputed that he only served on the board as a representative of Fleming,² and that only Fleming paid him for his time, travel and other expenses. There is not a shred of evidence that he ever acted in any capacity other than as a representative of Fleming. While he did serve on the real estate committee, the testimony is undisputed that he did so because he had to be on at least one committee as a board member, and that the position was essentially that of a "rubber-stamp." While he once "participated" in a meeting, Petitioner testified without rebuttal that it was only because he was asked to nominate an individual who had already been preselected to be the new CEO. Tr. 32. If anything, these activities confirm the nominal nature of Petitioner's participation.

Likewise, the uncontradicted fact that Petitioner was an "experienced and knowledgeable businessman" does not somehow transform his role on the Furr's board to other than nominal. He clearly served not in his own right but as the designee of Fleming. In Minotto v. USDA, 711 F. 2d 406, 711 F, 2d 406 (D.C.Cir. 1983), the Court

² While he intended to remain on the board after Fleming liquidated its investment at Furr's, he did not participate in any additional meetings, nor get paid anything, from that time until the company was in bankruptcy.

overturned a finding that a board member was responsibly connected, ruling that a director must have an “actual, significant nexus with the violating company,” *Id.*, at 409, and should be in a position where he “knew or should have known of the Company’s misdeeds.” *Id.*, at 408. While one of the factors relied on in both Minotto and Maldonado was the lack of business training and experience of the cited parties, the fact is there is no evidence that Petitioner knew or should have known that Furr’s had not paid Quality Fruits—it was never discussed at a board meeting—and no evidence that he would have had any authority to even inquire into the status of individual unpaid accounts. The unrebutted testimony of Petitioner and the Board’s minutes illustrate that individual accounts payable were never reviewed at any board meetings. Likewise unrebutted is his testimony that he had no power or ability to counteract the actions of Furr’s board members or employees. Tr. 25, 28, Ex., P-1—P-4.

In Salins, supra, the Judicial Officer discussed seven factors affecting whether a person was serving in a nominal capacity under the Act. In Salins, the petitioner had access to corporate records, including access to detailed monthly financial statements, accounts payable, accounts receivable, etc. Likewise, Salins had particularized knowledge of the company’s financial difficulties, and a “sophisticated level of information” inconsistent with nominal status. Salins had a direct relationship with unpaid creditors inconsistent with that of someone in a nominal role. He actively participated in corporate decision-making. He had check-writing responsibilities, and “could be considered the only indispensable officer” of the company. He signed numerous corporate documents, including PACA licenses, answers to reparation

complaints, etc. And his receipt of significant salary and bonuses was inconsistent with that expected to be paid to someone serving in a nominal capacity. *Id.*, at 1492-95.

Mealman, on the other hand, appears to be the prototypical nominal board member. He clearly served at the behest of Fleming. There is no indication that he had access to any Furr's records, he had no particularized knowledge of the company's financial condition until it was brought up at a board meeting, had no knowledge and played no role in the company's decision to file for bankruptcy, had no knowledge of or relations with individual creditors of the company, had no significant participation in the corporate decision process other than to rubber-stamp actions at board meetings, had no check writing responsibilities, signed no corporate documents, and received no salary or other benefits from Furr's. It is difficult to imagine a board member serving in a more nominal capacity than that served by Mealman.

CONCLUSION AND ORDER

Petitioner has shown by a preponderance of the evidence that he was not responsibly connected to Furr's Supermarkets, Inc. Petitioner was not actively involved in the activities resulting in a violation of this chapter and was only a nominal member of the Furr's Board of Directors. Mealman's Petition for Review is granted.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 8th day of February, 2005

Marc R. Hillson
MARC R. HILLSON
Chief Administrative Law Judge