overlapping boundaries, FNS shall select the tribe most capable of administering a FDP within that service area.

(The information collection requirements contained in paragaph (a) were approved by the Office of Management and Budget under control number 0584–0316)

§ 254.5 Household eligibility.

(a) *Certification Procedures.* All applicant households shall be certified in accordance with the eligibility and certification provisions in § 253.6 and § 253.7.

(b) *Urban places.* No household living in an urban place in Oklahoma shall be eligible for the Food Distribution Program on Indian Reservations. However, an ITO can request the Department to grant individual exemptions from this limitation upon proper justification submitted by the ITO as determined by FNS. Such exceptions shall be available until September 30, 1985.

(c) *Eligible Households.* Only Indian tribal households, as defined in § 254.2, may be eligible for the Food Distribution Program in FNS service areas.

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 0584–0316)

Dated: August 9, 1984.

Robert E. Leard,

Administrator, Food and Nutrition Service.

[FR Doc. 84–21853 Filed 8–15–84; 8:45 am]

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FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket No. 9000]

International Telephone & Telegraph Corporation, et al.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

ACTION: Final order.

SUMMARY: For reasons set forth in the Commission's Opinion, this final order reverses the ALJ's initial decision, denies complaint counsel's appeal, grants appeal of respondents and dismisses the complaint charging a New York City conglomerate and its wholly owned baking company subsidiary with alleged violations of Sec. 5 of the Federal Trade Commission Act and Sec. 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The complaint had alleged that the baking company had attempted to monopolize the white bread product sales market in five geographic areas and had caused competitive injury in those markets, by, among other things, engaging in predatory or discriminatory pricing practices for significant periods of time.

DATES: Complaint issued November 26, 1974. Final Order issued July 25, 1984.*

FOR FURTHER INFORMATION CONTACT: FTC/G 402–1, Jerry A. Philpott, Washington, D.C. 20580, (202) 254–7051.

SUPPLEMENTARY INFORMATION: In the Matter of International Telephone & Telegraph Corporation, a corporation, and ITT Continental Baking Company, Inc., a corporation.

List of Subjects in 16 CFR Part 13

Bakery products, Trade practices.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; Sec. 2, 49 Stat. 1526; 15 U.S.C. 45, 13)

Commissioners: James C. Miller III, Chairman, Michael Pertschuk, Patricia P. Bailey, George W. Douglas, Terry Calvani.

In the Matter of International Telephone & Telegraph Corporation, a corporation, and ITT Continental Baking Company, Inc., a corporation; Docket No. 9000.

Final Order

This matter has been heard by the Commission upon the appeals of complaint counsel and respondent from the initial decision and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to reverse the initial decision. Respondent's appeal is granted and complaint counsel's appeal is denied. Accordingly,

It is ordered, That the complaint is dismissed.

By the Commision, Commissioners Pertschuk and Bailey dissenting in part and concurring in part.

Issued: July 25, 1984.

Benjamin I. Berman,

Acting Secretary.

Commissioner Patricia P. Bailey, Concurring in Part and Dissenting in Part ITT Continental Baking Co. Inc., Docket 9000**

July 25, 1984.

After I presented the draft of this opinion to the Commission for consideration, it became clear that the Commission was unanimous in its view as to the disposition of most of the case. That is, regardless of the cost standard used to define "predatory pricing," those parts of the case involving St. Paul/Minneapolis, Denver, Northern California and Southern California, should be dismissed for failure to establish a violation of either section 2 of the Sherman Act or section 2(a) of the Robinson-Patman Act.

A majority of the Commission, however, disagreed with the cost standard contained in my draft and therefore disagreed also with that section of the draft involving Cleveland because the standard presented resulted in a finding of Robinson-Patman primary line liability in that market.

Thus, I concur in the opinion of the Commission in this case with respect to the dismissal of all Sherman Acts charges and all Robinson-Patman charges outside of Cleveland, although I do not necessarily ascribe to various modifications as to nuance and emphasis in those portions of the opinion. In particular, as I stated in connection with the final decision in *General Foods Corporation*, Docket 9055, I do not agree that product differentiation is only rarely an entry barrier. Nor do I see the necessity for a lengthy discussion of national market trends when the focus of the case is on local markets.

The crux of my dissent concerns the question of how to distinguish a predatory price from a legitimate competitive price. The majority's approach is too rigid and, as we are dealing with a still developing and controversial area of law, their approach is prematurely strict.

Predatory Pricing

Few issues in antitrust law have produced such a gallimaufry [1] of economic theory and legal precedent. Since 1975 there has been "a virtual explosion in the legal and economic literature dealing with predatory pricing." Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 Cornell L. Rev. 738, 740 (1981). At least nine different economic theories for detecting predation have been advanced,[2] and the courts have been

* Copies of the Complaint, Initial Decision, and Opinion of the Commission filed with the original document.

** Commissioner Pertschuk joins in this separate statement.

[1] "This is one of the greatest Gally-maufries that ever I saw; but it was intended as an Antiodote against Plague." Salmon, *Pharm. (1678)*

[2] The seminal discussion recommended a short-run marginal cost pricing rule using average variable cost as a practical surrogate for marginal cost. Areeda & Turner, Predatory Pricing and

Continued

both selective and idiomatic in applying these tests.[3] In these circumstances it is neither fruitless nor presumptious for the Commission to forge its own rule. However, that rule should be a flexible, cautious one, capable of assimilating new learning on the subject and avoiding excessive leniency or harshness to either plaintiffs or defendants. The majority's approach, it seems to me, is less an analytical tool than a conclusory statement which can fairly be characterized as follows: Price discriminations are either harmless or justified, thus, price predation does not exist. I cannot share their confidence on this point; nor do I believe there would be such an outpouring of academic and judicial debate if the issue were all that clear.

Accordingly, my approach, described more fully below, would be a phased series of structural and firm-specific inquiries, incorporating a cost-price benchmark for legality which varies depending on the circumstances of the case. While I agree with the majority that prices above average total cost (ATC) are legal, I disagree strongly with the "often conclusive" presumption of legality they assign to prices below ATC but above average variable cost (AVC). As my analysis of the Cleveland market demonstrates, I believe such prices can be predatory, particularly as they approach the AVC line and if they continue for some time. On the other hand, in some market conditions prices in the zone between ATC and AVC can be legitimate. Therefore, looking at the facts of each case rather than relying on near-conclusive presumptions is, for me, the only responsible way to decide the issue. Finally I would attach a much stronger presumption of illegality to price below AVC than does the majority; I would limit the number of excuses for pricing at that level, and I suspect I would find the conduct to have anticompetitive effects after a much briefer predatory pricing incident than the majority.

Aside from the use of near conclusive presumptions, the majority's tests are no more efficient than the one I propose: cost definitions must be made under either. We are in agreement on the propriety of the "leap-frog" analytic technique as announced in *General Foods Corp*, D. 9085. That is, we all agree on avoiding the time and resource-consuming quagmire of cost-based pricing rules if easier preliminary inquiries reveal that below cost pricing either could not result in successful predation or is shielded by a legal defense. Therefore, I would first examine competition in the alleged market to see whether and what kind of predation is possible. The existence of entry barriers and the strength of respondent's market power are significant factors. Also important are the level of capacity in the market and duration of the alleged predatory incident.

I believe that the relevant measure of capacity utilization is that of the market and not that of the respondent because, in order to predate, a firm must always have some excess capacity. Zerbe and Cooper, *An Empirical and Theoretical Comparison of Alternate Predation Rules*, 61 Texas L. Rev. 655, 682 (1982). Otherwise, it cannot serve its rival's former customers when exit is induced. Thus, finding that the respondent has excess capacity may not be exculpatory. However, if capacity utilization is very low throughout the market, competitive market conditions may have forced respondent to price at or below its short term marginal costs in a desperate effort to avoid the even greater losses of temporarily closing or leaving the market altogether.[4] On the other hand, where the market does not face substantial excess capacity, pricing below marginal cost begins to look suspect, because competition should force prices to at least that level. (Areeda & Turner, *supra*, 88 Harv. L. Rev. at 702). The inference is that prices were lowered, not in response to competition, but rather in anticipation of their destructive effect upon competitiors and consequent enhanced market position of respondent.

Having established the competitive setting, I would then determine the relevant measure of cost. There is a general consensus that pricing below marginal cost gives rise to a presumption of illegality.[5] There is much argument, however, on what accounting definition of cost is the proper evidentiary surrogate for that elusive economic benchmark, which is not recorded on a firm's business records. Some courts and commentators have suggested the a company's prices be compared to its average total cost (ATC) [6], others have suggested average variable cost (AVC);[7] still others have suggested a middle course.[8] In my view, no one cost standard is always appropriate; rather, the market setting dictates the choice. Price below ATC can be predatory where there is a high level of capacity utilization in the market, and pricing below AVC is presumptively predatory. For me, the presumption against legitimate prices below AVC is very strong,[9] but could be

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Related Practices of Section 2 Under the Sherman Act, 88 Harv. L. Rev. 697 (1975). This proposal was challenged for disregarding the risk that a dominant firm can successfully pursue a strategy of sacrificing short-term profit for long-term benefits in order to exclude actual of threatened competition. Scherer, Predatory Pricing and the Sherman Act: A Comment, 89 Harv. L. Rev. 869 (1976) (offering an economic model for testing cost based rules and suggesting a broad rule-of-reason approach). Other commentators proposed long-run pricing rules that emphasized different cost factors. R. Posner, Antitrust Law: An Economic Perspective, 184–196 (1976) (presumptively condemning sales below average total cost with intent to exclude a competitor); Joskow & Klevorick, A Framework for Analyzing Predatory Pricing Policy, 89 Yale L.J. 213 (1979) (proposing a two-tier test: only if monopolistic conditions exist in the market may pricing below the average variable cost be conclusively illegal, or pricing below average total cost be presumptively illegal under specified conditions). Other economists recommend approaches focusing on output changes or the timing of price cuts. Williamson, Predatory Pricing, a Strategic and Welfare Analysis, 87 Yale L.J. 284 (1977) (barring dominant firms from expanding output or selling below full cost to forestall entry); Baumol, Quasi-Permanence of Price Reductions: A Policy of Prevention of Predatory Pricing, 89 Yale L.J. 1 (1979) (barring price increases by a dominant for a specified period after its price cuts drive competitors from the market). Although not proposing a specific legal standard, two commentators have drawn attention to the prerequisites for successful entry-deterrence conduct. Salop, Strategic Entry Deterrance, 69 Am. Econ. Rev. 335 (1979); Spence, Entry, Capacity, Investment and Oligopolistic Pricing, 8 Bell K. Econ. 534 (1977). And finally, at least one commentator has argued that there should be no standard at all, since no problem exists. R. Bork, The Antitrust Paradox 154 (1978).

[3] Hurwitz & Kovacic, Judicial Analysis of Predation: the Emerging Trends, 35 Vanderbilt L. Rev. 63 (1982).

[4] *See, e.g.*, Williamson, *supra*, 87 Yale L.J., 284 (1977); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 461 F. Supp. 410, 418–19 (N.D. Cal. 1978), *aff'd in part and rev'd in part*, 668 F. 2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); ILC Peripherals Leasing Corp. v. IMB Corp., 458 F. Supp. 423 (1978), *aff'd per curiam sub nom.* Memorex Corp. v. IBM Corp., 636 F.2d (9th Cir. 1981), *cert. denied*, 452 U.S. 972 (1981).

[5] *See generally*, Areeda & Turner, *supra*, 88 Harv. L. Rev. at 712, 733.

[6] Posner, *supra;* Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377 (9th Cir. 1983) (prices *above* ATC are not *per se* lawful, but plaintiff must prove predation by clear and convincing evidence), *cert. denied* 104 S. Ct. 370 (1983); *but see* Barry Wright Corp. v. ITT Grinnell Corp., 1980–81 Trade Cas. ¶ 63,862 (D. Mass. 1981) *aff'd* 1984–1 Trade Cas. ¶ 65,787 (1st Cir. 1983) (prices above ATC conclusively lawful).

[7] Areeda & Turner, *supra;* Northeastern Telephone Co. v. AT&T Co., 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); International Air Industries Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 439 U.S. 829 (1978).

[8] Zerbe and Cooper, *supra* (compare prices to ATC unless excess capacity exists; in that case, compare to AVC); Joskow and Klevoric, *supra;* and *compare* William Inglis & Sons Baking Co. v. ITT Continental Banking Co., *supra* (price below ATC is predatory if accompanied by other proof of predatory intent) with MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983) (conclusive presumption of legality for prices exceeding long-run incremental costs; very little weight attached to subjective evidence of intent).

[9] Areeda & Turner would make it a conclusive presumption, 88 Harv. L. Rev. at 733, as do Joskow

Continued

rebutted by a showing of excess market capacity as discussed above. Furthermore, I would take the duration of the alleged predatory incident into consideration. When the more lenient ATC standard is used, the low prices must endure for some significant period of time. As the price level approaches AVC, however, the scope of harmful duration may be shortened. When price falls below AVC an even shorter span of low pricing may be deemed potentially harmful. Of course, the presumptions of harm to competition derived from the level and duration of the price reduction ultimately must be tested against any evidence the record may contain about actual impact of respondent's conduct upon competition.[10] Thus, if it is clear from a preliminary examination of the record that the market continued to function competitively after the alleged predatory incident the case may be dismissed without tracing the elaborate steps of the cost-price quadrille.

I agree with the majority that the issue of pricing below cost is reached in only one of the five markets examined in this case. The Sherman Act counts cannot survive in any city, once a market definition including captive bakers is accepted. I agree that the Robinson-Patman counts are dismissed because of a valid meeting competition defense in Northern California, and lack of data from which to generate accurate cost-price comparisons in Southern California and St. Paul/Minneapolis. In these last two markets I would add my own conclusion that there has been a demonstrable lack of anticompetitive effects. In both markets the sum total of competitors remained practically unchanged after the alleged predatory incidents.

In the Denver market I would dismiss the Robinson-Patman count on the grounds of a valid cost-justification defense. Virtually the only cost data in the record is contained in an accounting study prepared by Continental for the *Old Homestead* litigation. That study shows that for the last eight weeks of 1967 Continental priced the one pound Tender Crust bread loaf below average variable cost. Setting aside the questions of whether the one pound loaf is an adequate vehicle for predation and whether an eight week period is sufficiently long for effective predation, and assuming, *arguendo*, that the study is entirely free from methodological error,[11] the case for predatory intent must still fail. Whatever else it may prove, the *Old Homestead* study clearly shows that the difference in price between Tender Crust and Wonder products was cost justified.

Advertising expenses are a specific line item on the cost study: Wonder Bread had known advertising expenses, while Tender Crust, as a private label brand, had none. The *Old Homestead* cost study consistently shows (1964–1969) that costs of advertising Wonder exceeded the price difference between Tender Crust and Wonder, even when discounts are included in the calculation.[12] The study also shows other specific costs which are generally higher for Wonder than Tender Crust, such as returns and route labor;[13] but the high advertising costs alone can establish a complete cost justification defense. Indeed, it is clear that throughout the relevant period Continental made more money on Tender Crust, or at least lost less in loss periods, than it did on the Wonder label. Since the price differentials were cost-justified, I would dismiss the Robinson-Patman case. This leaves Cleveland as the only market in which to demonstrate our differing approaches. My analysis is as follows.

Cleveland

In this market between 1973 and 1977 ITT-Continental allegedly captured and kept, by means of below cost sales, a large private label white pan bread account, thus causing primary line competitive dislocations which were still observable in 1980.

The preconditions for predation were certainly present in the Cleveland area in the early 1970's. The record shows no new entry between 1970 and 1980, a decade which reaches significantly before and beyond the alleged predatory conduct. On the eve of the incident, almost no baker serving the market had excess production capacity. Millbrook and Ward's, the first and second-ranked wholesale bakers were both running at least two full shifts a day. (IDFs 290, 308) Other bakers were similarly at full capacity, according to several witnesses, including Joseph Signore, Continental's then-Regional Vice President. (Bateman Tr. 5775; Gase Tr. 9375–76; Signore Tr. 9989–90, 10051) The exception was Continental, whose white pan bread plant at Akron was operating at only 50%–60% of capacity (1¼ shifts). (IDF 300)

Joseph Signore, the chief architect of Continental's drive to secure the aforementioned private label contract, recognized that Continental's unique under-capacity situation could be used not only to win the private label account, but also to make Continental the "dominate [sic] factor on the market." (CX 2683B).

In these circumstances, I would infer predatory intent and effect from sales below fully allocated cost (FAC)[14] even if sales were not below average variable cost. The place I find such sales is in the private label contract which Continental negotiated with Pick'N'Pay (PNP), a major grocery store chain in the Cleveland area. That contract was signed on July 13, 1973, and amended September 25, 1974. (IDFs 311, 328) The record contains a variety of data (cost studies, analyses and monthly sales reports) by which the profitability of the contract may be tracked from its inception through August 1977.[15]

Nevertheless there are further definitional questions about the PNP contract which must be answered before one can determine if white pan bread

and Klevoric, under specified market conditions, 89 Yale L.J. at 252.

[10] Post-predation evidence is not a necessary element of a predation case, but often exists, given the slow process of antitrust litigation, as in this case. Where it appears in the record, it should be considered.

[11] Complaint counsel are in the anomalous position of urging that CX 1728, which shows sales above fully allocated costs for 1964 through October, 1967, be disregarded because of faulty methodology—except as it pertains to the last eight weeks of 1967, when sales below average variable cost are shown. (CCAB, 62)

In brief, complaint counsel contend that respondent erred in allocating production costs between Tender Crust and Wonder Bread on the basis of sales price. (CX 1722U–X, Z) For purposes of this allocation, the sales price was assumed to be the same for Wonder as for Tender Crust, in recognition of the fact that the two labels surround identical products. Complaint counsel would have allocated costs "in proportion of units, weights and values". (Memorandum in Support of Complaint Counsel's Application for Sanctions Under Rule 3.38, December 29, 1976, p. 9) For Robinson-Patman purposes we need not decide between these allocation methods, since both sides apparently agree that Wonder and Tender Crust should have identical amounts of allocable costs assigned to them, under any allocation method. Thus all non-specifically allocable expenses cancel out and can be bypassed when evaluating the cost justification defense, which rests on specific expenses, as described above.

[12] The ALJ incorrectly stated that CX 1728 does not show discounts on Tender Crust. (IDF 83; ID at 86) It does show such discounts, on the line headed "Other Selling Expenses." (CX 1722Z–5)

[13] The full rack service offered with Wonder Bread included pick-up of stale bread; no pick up of returns was offered in the private label program. (CX 1722Z–4) Because of a union contract, bakers paid lower commissions to route salesmen on private label bread than they did on advertised label bread. (CX 1722Z–43)

[14] Fully allocated cost, sometimes called full cost, is used as a surrogate for average total cost in this case because Continental's records did not show ATC, an economic concept which in essence is FAC plus a normal return on investment. FAC is thus a more lenient proxy for marginal cost than is ATC. (Areeda & Turner have noted that normal return on investment is "a figure usually not determinable with any precision." 88 Harv. L. Rev. at 709)

[15] The documents do not detail every month of the four year period, but summarize performance at irregular intervals, providing the nine data points which are referenced in the tables, *infra*.

was sold below cost. The written agreement (CX 803) was not the full extent of Continental's obligations. There were also a variety of 'side bar' agreements to lease PNP's trucks, racks, and dollies and rent the PNP warehouse for the early months of the contract. Continental negotiators made such obligations contemporaneously with the formal, written contract and Continental honored those obligations. (IDFs 313, 314) Therefore, where the Continental internal cost studies assign these costs to the account (*e.g.*, CX 2680) I have included these costs in my calculations.

A second issue concerns what costs should be considered variable under the PNP contract. The appeal briefs set up quite a conflict on this point, with complaint counsel arguing that virtually all selling and distribution costs are variable, and respondents' counsel asserting that sales commissions are the only truly variable selling expense. However, Continental's internal cost studies belie the theories of respondents' counsel. Uniformly these studies, supported by testimony of Continental's employees, describe almost all selling and distribution costs as variable. (*See, e.g.*, Gase Tr. 9421–22; RX 309; CX 2661). Accordingly, I have taken the Continental's variable cost calculations as given, and have not subtracted out such items as sales management and vehicular costs, as respondents' counsel advocate.

I have, however, included in my cost calculations one variable not shown in the primary Continental cost records. As noted, Continental made many auxiliary, verbal commitments to the July 13, 1973, written agreement with PNP. (IDFs 313, 314) One was to reimburse PNP for promotions of private label products. (IDF 313). While these payments were known to the Continental management level, they were not disclosed to the accountant who prepared the line profit studies. (Vail Tr. 9971–72, 9981–82; Schmidt Tr. 11163–64; CX 2626A, N, O) Accordingly these studies lack that item. While respondents' counsel made no attempt to argue that the promotional payments are a fixed cost [16]—indeed, the payments are classic examples of a variable cost, since they fluctuate directly with changes in output—they nevertheless made no effort to correct the incomplete contemporaneous variable profit calculations. Such adjustments can be made, since the amount of promotional payments is known. (CX 2682; Breines Tr. 11098–11100) They should be made, since the amount is significant: approximately $210,000 between July 1973 and April 1976. (IDF 313) I have made those adjustments.[17]

This brings me to the relevant cost calculations. It should be emphasized that they are based on the same documents which the ALJ used to reach his cost conclusions (IDFs 320–325, 347). My review, however, had to be more precise inasmuch as I neither accept his ruling that average variable cost (AVC) always amounted to 80% of fully allocated cost (FAC); nor would I find liability on the mere fact of sales below FAC. The degree by which costs of either type exceed prices must be closely observed.

My calculations are set forth in the following tables:

TABLE 1

Month(s) and year	Price as a percent of average variable cost for white pan bread
June 1974	87.0
January 1976	101.0
January–March 1976	101.0
July 1976	99.3
August 1977	110.0

TABLE 2

Month(s) and year	Price as a percent of fully allocated cost for white pan bread
December 1973	(1)
May 1974	81.0
June 1974	77.5
December 1975	82.4
January 1976	81.5
January–March 1976	81.7
July 1976	79.0
August 1977	77.9

[1] Price below FAC on a per-unit basis for each white pan bread product, ranging from 99.99% of FAC to 91.0% of FAC, exclusive of promotion payments.

Thus, between 1973 and 1977 Continental persistently priced far below FAC on the white pan bread items in the PNP contract. For four years the white pan bread price was consistently about 20% less than fully allocated cost. This deep a cut below FAC often approached the AVC level and twice fell below the AVC level. White pan bread was sold at such a loss that the entire private label contract never made a profit on a FAC basis during this time.[18] (IDF 347; Gase Tr. 9402)

The inference of predation raised by cost data is confirmed by a survey of the marketplace before and after Continental won the PNP contract. In 1971 there were five strong independent bakers in the Cleveland market, plus a scattering of smaller bakers. The five top companies were of roughly equal strength, and there was no price leader among them. (IDF 299) Far from being the leader of the pack, Continental shared third rank with American. (IDF 296)

By 1980 Continental shared dominance of the market with Interstate. Those two were the acknowledged price leaders. (IDF 342) Laub, one of the top five firms in 1970 left the market completely after losing its PNP shelf space to Continental. (IDF 318, 341) American, Continental's erstwhile head-to-head competitor, had slipped to sixth place, behind even Nickels and Schwebel, bakers which Continental's regional vice president assessed as "not

[15] See the following tables:

TABLE 3

Month(s) and year	Price as a percent of average variable cost for the private label account
August 1973	98.1
December 1973	98.2
May 1974	92.2
June 1974	89.0
January 1976	106.3
January–March 1976	103.7
July 1976	101.0
August 1977	108.4

TABLE 4

Month(s) and year	Price as a percent of fully allocated cost for the private label account
August 1973	98.6
December 1973	(1)
May 1974	86.1
June 1974	79.8
December 1974	84.5
January 1976	83.9
January–March 1976	82.6
July 1976	79.6
August 1977	81.7

[1] Price below FAC on a per-unit basis for all but two low-volume varieties, therefore price below FAC for entire private label account.

[16] Continental may have had the option of incurring these costs in a lump sum, one-time fixed form as a purchase of PNP's bakery assets. (Vail Tr. 9968, 9972). The promotional payment obligation was subject to an outer limit of the estimated book value of those assets. (IDF 313) However, the fact that these costs could have been structured differently is speculative and irrelevant: no doubt other terms of the contract would have been different if Continental had committed to an upfront payment of $210,000. In the contract as performed, that sum was stretched over three years, and conditioned to bread output. Its effect on the cost of both the total contract and the white pan bread line was variable.

[17] The promotional payments apparently were in support of the white pan bread products only. Therefore, in arriving at the cost figures for white pan bread products I attributed all of the promotional payments to those products.

strong factors, grocery-wise". (Gase Tr. 9533; IDF 342) The market is clearly less competitive in 1980 than it was in 1970.

Having determined that the PNP contract was predatory for as much as four years, I turn to the question of whether Continental has any recognizable defenses.

The tortured history of Continental's negotiations for the PNP private label account is ably set forth by the ALJ at IDFs 305–314. My reading of the record, which consists mainly of testimony of persons involved in both sides of the negotiations, convinces me that the ALJ correctly concluded that Continental has no "meeting competition" defense under Section 2(b) of the Robinson-Patman Act.[19] (ID, p. 85) This is abundantly clear with regard to the renegotiated 1974 contract, as there is not the slightest evidence in the record that Continental believed its offers, which were still far below FAC, to be in good faith response to any competing offers. As for the original July 1973 terms, it appears that the prices were decreased and contractual obligations increased several times in the early part of the year, significantly after competing bidders' offers had lapsed and after Vail, Continental's vice president in charge of national accounts, became confident that Continental would become PNP's supplier of private label bread.[20] (IDFs 309, 310; CXs 803, 809, 839, 884)

A second defense which respondents raise in Cleveland is the argument that Laub was not harmed by the effects of the PNP contract. In other words, they argue that the causes of Laub's demise were business problems unrelated to Continental's low cost sales.

My examination of the record convinces me that Continental's conduct, though not the sole cause, was a major cause of Laub's closing. In the early 1970's Laub had been losing significant restaurant business and some small grocery accounts, often to Continental;[21] but its overall business, especially the grocery side, was definitely operational. It had a fully automated, very efficient plant, an aggressive sales force, and the label rights to a nationally-recognized label, "Sunbeam bread". (Stonbraker Tr. 5529, 5563–66, 5598; Bronczek Tr. 5710–11) In 1973 Laub had approximately 54 grocery routes, which compares favorably with the 68 routes of Interstate, the market's then leading wholesale baker. (IDF 288; Stonbraker Tr. 5588)

In 1973, PNP was Laub's largest customer, and Laub's bread enjoyed the largest share of the branded portion of PNP shelf space. (Stonbraker Tr. 5590–91) As a result of the Continental contract, Laub's all-important white pan bread sales to PNP declined drastically. Laub's white pan bread products were simply edged off the shelf by Continental's private label and advertised brands. (IDFs 317, 318) Moreover, the loss of general exposure to consumers through the PNP stores also hurt Laub's sales through other outlets. (Stonbraker Tr. 5605–5606) The loss of volume associated with exile from the PNP stores had an immediate effect: Laub was forced to consolidate delivery routes, but even that cost-cutting measure was not enough to save the company and within six months the bakery had shut down. "You just can't go on when your volume is not there." (Stonbraker Tr. 5608)

I think this chain of causality is fairly strong, and it becomes more so when we note that Interstate, though considerably larger and healthier than Laub, also suffered from losing PNP shelf space to Continental. (Meehan Tr. 5341) Clearly, the PNP account would be very important to any supplier, and its loss could be the final straw to a smaller bakery such as Laub.

Of course, actual injury and permanent loss of sales need not be proven to show a violation of the Robinson-Patman Act; but such facts are convincing evidence of a violation. *National Dairy Products Corp. v. FTC*, 412 F.2d 605 (7th Cir. 1969). Here Continental's long, deep cuts in the price of white pan bread create such a possibility of harm to competition that a violation of the act must be found, absent some showing that the probable effect did not take place. Respondents have not made such a showing. To the contrary: all the evidence in the record points to a market much less competitive now that it was a decade ago; with Continental's dominance unchallenged by either new entrants or existing competitors. Moreover, the loss of at least one independent baker seems directly related to Continental's predatory pricing between 1973 and 1977. Accordingly, I would have found that Continental's discriminatory prices on white pan bread in the Cleveland market from 1973 to 1977 caused primary line injury in violation of section 2(a) of the Robinson-Patman Act.

Conclusion

The difference between my views on predation and that of the Commission majority was sketched out in my partial dissent to the *General Foods* opinion and earlier in my dissent to the decision not to seek *certiori* in the *Borden (ReaLemon)* matter. The majority opts for a series of assumptions that places the danger zone well below AVC ("properly defiined", of course). It is inconceivable to me that any firm could fail to show prices safely above this line, given the wealth of acceptable excuses listed by the majority, not to mention the requirement of a "significant", wholly continuous period of low prices. (Apparently four years—the time of below cost sales in Cleveland—is not "significant" enough).

The approach I have outlined is assailed principally because it is subject to accounting ledgerdemain. To this I answer, so is any test where the definition of cost is at issue.[22] I do freely admit to one of the criticisms leveled at my approach by the majority: it does not foster as much industry certainty as their AVC test. Certainly, my approach would require a modicum of structural anf firm-specific inquiry. Nevertheless, I believe it is a practical, workable standard. In contrast, the majority's AVC test gives near absolute business certainty after one reading: in the words of Cole Porter, "Anything goes." It would be simpler, and surely a great saving of everybody's time, if the Commission today had simply announced that it does not believe predatory pricing exists.

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BILLING CODE 6750–01–M

[19] It should be noted that, in Cleveland, any meeting competition defense is limited to the competing bids for the PNP contract. It is not an "area-wide" defense such as the Commission considers in the Northern California market.

[20] PNP originally was interested in dock delivery to its warehouse and received several bids on this proposition. (Kravitz Tr. 5394–95) However, when PNP changed its terms to store drop those bids were not renewed. (Kravitz 5393–95, 5408; Schwebel Tr. 5817; Bogolmony Tr. 5869; Bateman Tr. 5777 CX 884) Signore had only the most general belief that other companies might be in the running for the contract; after 1972 he was not aware of any specific competitive offers. (Signore Tr. 9993–9994, 10031)

[21] Complaint counsel devote some time to CBC's "potshotting" of Laub restaurant accounts; the Initial Decision also notes CBC's inroads here. (IDF 301–303) However, since the record contains no indication that these sales were won by predatory means, I have not considered these practices to be part of the case.

[22] For example, the majority would amortize promotional and advertising expenses over a product's goodwill life cycle (presumably established by the promoter's testimony as to his fondest expectations). If this isn't an arbitrary variable, fraught with accounting peril, what is?

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 229

[Release Nos. 33-6545; 34-21225; 35-23390; IC-14091; File No. S7-17-84]

Disclosure of Certain Legal Proceedings Involving Directors, Executive Officers, Promoters and Control Persons

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission today announced the adoption of amendments to Item 401 of Regulation S-K, relating to the disclosure of certain information about management. The amendments add commodities proceedings to the legal proceedings currently required to be disclosed with respect to directors and executive officers and require new registrants to disclose the same legal proceedings involving promoters and control persons that they must disclose with respect to directors and executive officers. In addition, Item 401 is being retitled to reflect its expanded scope. The purpose of the amendments is to improve disclosure to investors, particularly in the case of new registrants.

EFFECTIVE DATE: The amendments to Item 401 of Regulation S-K are effective sixty days after publication in the **Federal Register** for all Securities Act registration statements that do not incorporate by reference the annual report on Form 10-K under the Exchange Act. For all other documents, the amendments are effective January 1, 1985. A registrant may comply with these provisions prior to the effective date, but if it elects to do so, it must comply with all applicable provisions and continue to do so in any subsequent filings.

FOR FURTHER INFORMATION CONTACT: Prior to the effective date, Betsy Callicott Goodell, (202) 272-2589, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. After the effective date, Ann M. Glickman, (202) 272-2573, Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: Item 401 of Regulation S-K[1] sets forth disclosure requirements with respect to the identity and background of management and certain employees of the registrant. The disclosure is required in registration statements filed pursuant to the Securities Act of 1933[2] (the "Securities Act") and registration statements, proxy statements, and annual reports filed pursuant to the Securities exchange Act of 1934[3] (the "Exchange Act"). Among other things, the Item requires disclosure of the involvement of directors and executive officers in specified legal proceedings. The amendments to Item 401 add the disclosure of commodities law proceedings to the list of specified legal proceedings and require new registrants to disclose legal proceedings involving promoters and control persons in addition to those legal proceedings involving executive officers and directors.

I. Background

The proposed Item 401 amendments[4] stemmed from hearings held in December, 1983, by the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, on "Fraud and Abuse in the 'Hot Issues' and 'Penny Stock' Markets" (the "1983 Hearings").[5] The purpose of the 1983 Hearings was to examine the new issues market. Among other matters, the 1983 Hearings indicated that the current provisions of Item 401[6] were inadequate in two respects. First, the 1983 Hearings drew attention to the fact that legal proceedings involving violations of the commodities laws were not among the legal proceedings enumerated in Item 401 and that, therefore, investors may not receive that information. Second, the 1983 Hearings indicated that promoters and control persons, who receive economic benefits from a public offering, also have the potential power to perform or direct the actual management functions of many new registrants. Indeed, in some instances, those persons may have the potential to exert greater management control than the officers and directors, whether or not they exercise that power.

Commentator response to the proposed amendments was favorable.[7] In addition, commentators suggested modifications to the proposed amendments. The Commission is adopting the amendments essentially as proposed, with minor changes to reflect certain of the specific comments. These comments, as well as others not reflected in Item 401, are discussed below.

II. Discussion of Amendments to Item 401

The two categories of amendments to Item 401 are: (1) Disclosure of commodities law proceedings in paragraph (f)(3) and new paragraph (f)(6) of Item 401; and (2) disclosure of legal proceedings involving promoters and control persons in new paragraph (g).[8]

Under revised paragraph (f) of Item 401, all registrants are required to include legal proceedings involving violations of the Commodity Exchange Act[9] in their disclosure of the background of directors and executive officers. The disclosure is required in any filing calling for Item 401 disclosure.[10] The additional requirement, which is patterned after the disclosure now required for securities violations, would include injunctions, civil and criminal penalties, and other sanctions resulting from violations of the Commodity Exchange Act.[11]

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[1] 17 CFR 229.401.

[2] 15 U.S.C. 77a-77aa (1982).

[3] 15 U.S.C. 78a-78kk (1982), *as amended by* Act of June 6, 1983, Pub. L. No. 98-38, 97 Stat. 205 (1983).

[4] Release No. 33-6530 (May 2, 1984) (49 FR 19516, May 8, 1984).

[5] *Fraud and Abuse in the "Hot Issues" and "Penny Stock" Markets Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. (1983).

[6] Prior to 1972, Forms 10 and 10-K required a ten year litigation history with respect to directors. During hearings on the hot issues market in 1972, securities professionals testified that disclosure relating to the background and prior performance of management is material to an investment decision, particularly when a registrant has no operating history. Public Investigation in the Matter of the Hot Issues Securities Markets (File No. 4-148). As a result, the Commission required disclosure of background information with respect to directors and executive officers in registration statements. Release No. 33-5395 (June 1, 1973) (38 FR 17202, June 29, 1973). Subsequently, the disclosure item was moved to Regulation S-K and the time frame was reduced from ten to five years. Release No. 33-5949 (July 28, 1978) (43 FR 34402, August 3, 1978).

[7] The Commission received four comment letters in response to the proposed amendments. The comment letters are available for inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. (*See* File No. S7-17-84).

[8] The terms "control" and "promoter" are defined in Rule 405 (17 CFR 230.405) for Securities Act purposes, and in Rule 12b-2 (17 CFR 240.12b-2) for Exchange Act purposes.

[9] 7 U.S.C. 1-26 (1982).

[10] The Item 401 disclosure is required in registration statements under the Securities Act, such as Forms S-1 (17 CFR 239.11), S-11 (17 CFR 239.18), S-15 (17 CFR 239.29), S-18 (17 CFR 239.28) and S-20 (17 CFR 239.20), and in filings under the Exchange Act, such as Form 10 (17 CFR 249.210), Form 10-K (17 CFR 249.310) and the proxy statement (17 CFR 240.14a-101).

[11] The amendments contain no provisions for commodities proceedings at the state level because, at this time, the states generally do not have specific statutes relating to commodities transactions.

The proposed amendments listed specific commodities professionals regulated by the Commodity Exchange Act, and required the disclosure of legal proceedings against an executive officer or director while acting in such capacity. "Leverage transaction merchant" has been added to the list pursuant to a comment by the Commodity Futures Trading Commission, which regulates those persons.[12]

New Item 401(g) requires registrants, which have not been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for the 12 months prior to the filing, to disclose bankruptcy proceedings, criminal proceedings, securities and commodities violations, and certain other legal proceedings involving control persons, which are material to a voting or investment decision. Registrants organized within the last five years must include the disclosure with respect to promoters. Therefore, all non-reporting registrants and registrants that have been in the reporting system for less than twelve months have to include the disclosure in registration statements, proxy statements and annual reports.[13] In addition, any registrant whose reporting obligations have been suspended previously must include the disclosure when theyreenter the reporting system.[14] New paragraph (g) does not apply to any subsidiary of a company that has been subject to the Exchange Act reporting requirements for the twelve months prior to filing.

The Commission made minor changes to proposed paragraph (g). First, the statement exempting subsidiaries of reporting companies appeared in each subparagraph of proposed paragraph (g). To avoid repetition, the statement was placed as an instruction to paragraph (g). Second, while the proposal required the information if material, it did not specifically relate materiality to any event or action. In order to clarify the materiality standard, the Commission adopted the requirement of disclosure if such information is material to a voting or investment decision.

[12] *See* 49 5498 (February 13, 1984).

[13] In any instance in which a registrant provides the information with respect to a promoter or control person pursuant to the existing requirements, because such person meets the definition of director or executive officer in Rule 405 of Rule 3b–7, the registrant need not repeat the information pursuant to proposed paragraph (g).

[14] *See* 17 CFR 240.12(g)–4, 240.12h–3, 240.15d–1 to –13.

The Commission specifically requested comments with respect to whether the disclosure also should be required for an additional period of time, and whether the disclosure should be required for additional registrants, such as all registrants reporting pursuant to Section 15(d), all 13(a) and 15(d) registrants, or all registrants that have not received revenue from operations during each of the last three fiscal years.

One commentator suggested that paragraph (g) disclosure should not be limited to new registrants, but should be required of all registrants reporting pursuant to sections 13 or 15 as well. Another commentator did not believe any additional registrants should be required to provide the paragraph (g) disclosure. In addition, a commentator suggested limiting the paragraph (g) disclosure to the prospectus covering an initial public offering because the twelve month period was too long, and limiting the disclosure to situations where the event is material to the registrant or the offering of its securities. The Commission believes that paragraph (g), as proposed, will ensure the disclosure of sufficient information for investor protection, without placing unnecessary disclosure burdens on registrants. Therefore, the Commission adopted paragraph (g) as proposed.

In view of the addition of paragraph (g), the Commission also retitled Item 401, previously entitled "Directors and Executive Officers." The new title, "Directors, executive officers, promoters and control persons" reflects the Item's expanded scope.

III. Final Regulatory Flexibility Analysis

In accordance with 5 U.S.C. 604, the Commission has prepared a Final Regulatory Flexibility Analysis with regard to Item 401. The corresponding Initial Regulatory Flexibility Analysis was included in the release proposing revisions to Item 401 at 49 FR 19516. Members of the public who wish to obtain copies of the Final Regulatory Flexibility Analysis of the Item 401 revisions should contact Betsy Callicott Goodell, (202) 272–2589, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

List of Subjects in 17 CFR Part 229

Reporting and recordkeeping requirements, Securities.

IV. Statutory Basis and Text of Amendment

Authority

The Commission hereby adopts amendments to Item 401 pursuant to its statutory authority in Sections 6, 7, 8, 10 and 19(a) of the Securities Act of 1933 and Sections 12, 13, 14, 15(d) and 23(a) of the Securities Exchange Act of 1934. The Commission has considered the impact that these rulemaking actions would have on competition and has concluded that they would impose no significant burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Text of Amendment

In accordance with the foregoing, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

By revising the title, paragraphs (f)(3)(i) and (f)(3)(iii), and adding paragraphs (f) (6) and (g) to § 229.401 as follows:

§ 229.401 (Item 401) Directors, executive officers, promoters and control persons.

* * * * *

(f) * * *

(3) * * *

(i) Acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the Commodity Futures Trading Commission, or an associated person of any of the foregoing, or as an investment adviser, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of any investment company, bank, savings and loan association or insurance company, or engaging in or continuing any conduct or practice in connection with such activity;

* * * * *

(iii) Engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of Federal or State securities laws or Federal commodities laws;

* * * * *

(6) Such person was found by a court of competent jurisdiction in a civil action or by the Commodity Futures Trading Commission to have violated any Federal commodities law, and the judgment in such civil action or finding by the Commodity Futures Trading Commission has not been subsequently reversed, suspended or vacated.

(g) *Promoters and control persons.* (1) Registrants, which have not been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, and which were organized within the last five years, shall describe with respect to any promoter, any of the events enumerated in paragraphs (f)(1) through (f)(6) of this section that occurred during the past five years and that are material to a voting or investment decision.

(2) Registrants, which have not been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report, or statement to which this Item is applicable, shall describe with respect to any control person, any of the events enumerated in paragraphs (f)(1) through (f)(6) of this section that occurred during the past five years and that are material to a voting or investment decision.

Instructions to Paragraph (g) of Item 401. 1. Instructions 1. through 3. to paragraph (f) shall apply to this paragraph (g).

2. Paragraph (g) shall not apply to any subsidiary of a registrant which has been reporting pursuant to Section 13(a) or 15(d) of the Exchange Act for the twelve months immediately prior to the filing of the registration statement, report or statement.

(Sections 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 208, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308(a)(2), 90 Stat. 57; secs. 12, 13, 14, 15(d), 23(a) 48 Stat. 892, 894, 895, 901; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 203(a), 49 Stat. 704; sec. 202, 68 Stat. 666, secs. 3, 4, 5, 6, 78 Stat. 565–568, 569, 570–574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3–5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 18, 89 Stat. 117, 118, 119, 155; sec. 308(b) 90 Stat. 57; secs. 202, 203, 204, 91 Stat. 1494, 1498, 1499, 1500; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 781, 78m, 78o(d), 78w(a))

By the Commission.

August 9, 1984.

George A. Fitzsimmons,

Secretary.

[FR Doc. 84-21788 Filed 8-15-84; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 154

[Docket Nos. RM83-71-001 through 030]

Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions

August 10, 1984.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of Request for Further Comment.

SUMMARY: In Order No. 380–A, issued on July 30, 1984 (49 FR 31259, Aug. 6, 1984), the Commission stayed the effectiveness of § 154.111 of its regulations with respect to minimum physical take provisions in pipeline rate schedules or tariffs until November 1, 1984. The Commission indicated that it would reconsider the question of applying § 254.111 to such minimum take provisions and would issue this Supplemental Notice seeking further comment on the minimum take issue. Accordingly, the Commission hereby requests all interested persons to submit comments on the applicability of § 254.111 of the Commission's regulations to minimum physical take provisions in pipeline rates schedules or tariffs.

DATE: Initial comments must be filed by August 30, 1984. Reply comments must be filed by September 13, 1984.

FOR FURTHER INFORMATION CONTACT: Carol M. Lane, Office of Commissioner Richard, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, (202) 357–8383.

SUPPLEMENTARY INFORMATION: In Order No. 380–A,[1] issued in this docket on July 30, 1984, the Commission stayed the effectiveness of § 154.111 of the Commission's regulations with respect to minimum physical take provisions in pipeline rate schedules or tariffs until November 1, 1984. This action was taken in order to accommodate the concerns of a number of petitioners for rehearing concerning the applicability of § 154.111 to such minimum take provisions. The Commission indicated that is would reconsider the question of applying § 154.111 to such minimum take provisions and would issue a Supplemental Notice in this docket seeking further comment on the minimum take issue. The Commission stated that the comments thus received will be considered and this aspect of Order Nos. 380 and 380–A will be acted upon by November 1, 1984. *See,* Order No. 380–A, *mimeo,* at 5–6. Accordingly, we hereby request all interested persons to submit comments on the applicability of § 154.111 of the Commission's regulations to minimum physical take provisions in pipeline rate schedules or tariffs.

Minimum take provisions were the subject of several requests for clarification or rehearing of Order No. 380.[2] As described in the petition of the California Public Utilities Commission (CPUC), a minimum take provision requires that the customer physically take delivery of contracted-for gas. The type of provision encompassed by the term "minimum take" may also be referred to as a minimum purchase requirement or a take-*and*-pay provision. Under such a provision, there is no option simply to pay for the gas and not take it. Rather, refusal to physically take, in itself, states the CPUC, constitutes breach of the tariff or contract. (CPUC at 2).

Order No. 380 promulgated § 154.111(a)(1), which provides that:

> [A]ny pipeline rate schedule or tariff governing the sale of natural gas shall be inoperative and of no effect at law to the extent it provides for recovery of purchased gas costs for gas *not taken* by the buyer. [Emphasis added.]

Under § 154.111 as promulgated, if a customer refused to take gas at the level required by a minimum take provision, the pipeline would be unable to charge the customer for the gas it did not take.

Some rehearing petitioners asked the Commission to verify that this result was not intended and that Order No. 380 does not apply to minimum take provisions. Other petitioners pointed out that the minimum take issue was not mentioned in the notice of proposed rulemaking in this docket. Furthermore, they asserted that while the subject was substantively addressed by only a few commenters in response to the notice of

[1] Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, 49 FR 31259 (Aug. 6, 1984) (Order Denying Rehearing and Granting in. Part Applications for Stay in Docket No. RM83–71–001 through 030, issued July 30, 1984).

[2] *See, e.g.,* Petitions on rehearing of Order No. 380, Public Utilities Commission of the State of California, Docket No. RM83–71–031; Southern California Gas Company and Pacific Lighting Gas Supply Company, Docket No. RM83–71–006; Pacific Gas Transmission Co./Pacific Gas & Electric Co., Docket No. RM83–71–011 Transwestern Pipeline Co., Docket No. RM83–71–015; Arkansas Louisiana Gas Co., Docket No. RM83–71–001; and Pan-Alberta Gas Ltd./Foothills Pipe Lines (Yukon) Ltd., Docket No. RM83–71–013. *See also* Answers to the California Public Uilities Commission's petition of Transwestern Pipeline Company and Pan-Alberta Gas Ltd., filed in this docket on July 9 and 10, 1984, respectively.