PRICING TECHNIQUES†

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This article will take up in some detail the specific pricing rules or techniques used in the GCPR (General Ceiling Price Regulation),¹ their application, and the problems arising thereunder.

I

FREEZE OF BASE PERIOD PRICES

The basic freeze technique adopted in the GCPR was the Section 3 provision freezing the seller to the highest price at which he had delivered the same commodity during the base period to a purchaser of the same class. In the early draft stages of the GCPR, consideration was given to other possible formulae, such as the seller's prevailing price in the base period (defined as the price at which he delivered the largest number of units of the commodity during the base period to purchasers of the same class). These alternative concepts, however, were abandoned in the GCPR as finally issued.

Any base period freeze, by its very nature, is bound to result in some individual hardships or distortions. Some typical cases where a seller’s base period price might not have been representative were: (1) The situation where the seller's base period price was one first established long prior to the base period under a long-term contract; (2) the situation where the seller was selling a seasonal commodity and the base period established in the GCPR was not the representative season for that particular commodity; (3) the seller's base period deliveries of the commodity were part of an introductory offer and accordingly the base period price was not one which would have been charged under normal conditions. Ultimately, special relief was provided for some of these situations by subsequent regulations of a limited nature.

Other kinds of individual distortions, of course, existed under a general freeze of such wide scope as the GCPR. However, the use of the highest base period price was the most flexible technique and minimized these distortions as much as possible. For example, if ceilings had been frozen on the basis of the lowest, or the last, base period price, the inequities or distortions would have been much greater. The use of the highest price gave the seller greater leeway to avoid being held to unrepresentative prices.

Under the basic freeze technique, embodied in Section 3 of the GCPR, effect was given only to the end price at which an actual delivery was made during the base period and not to the formula or pricing method under which such delivered price was computed. This meant that ceiling prices under Section 3 could not be de-

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termined by applying the same pricing method which the seller used in the base period, or by adding to his present costs the same markup which he enjoyed during the base period. The result was that provisions in a base period contract calling for price increases, such as escalator clauses, or cost-plus provisions, could not be given effect after the GCPR was issued.

A. Requirement of Base Period Delivery

The formula of the highest price at which base period delivery was made stressed the concept of actual delivery. Base period offering prices were recognized and given effect only if the seller made no base period deliveries of the same commodity. This involved a basic decision, and followed the precedent set by OPA under the GMPR. It seemed a tighter technique from a price stabilization viewpoint, although it created problems of distortion which will be discussed later.

For the purpose of defining what constituted base period “delivery,” Section 22 of the GCPR provided that a commodity was deemed to have been delivered during a specified period if during that period it was received by the purchaser or by any carrier, including a carrier owned or controlled by the seller, for shipment to the purchaser.

B. Offering Prices

In cases where a commodity was not delivered at all during the base period to a given class of purchaser, Section 3 provided that the seller’s ceiling price would be the highest price at which he offered it for base period delivery to a purchaser of the same class. Certain criteria were set forth governing the requirements for an effective offer within the meaning of the regulation. Section 3 provided that the offer must have been made in writing and communicated to a substantial number of customers. In addition, Section 22 defined “offering price” as the price quoted in the seller’s price list, or if he had no price list, the price which he regularly quoted in any other manner. However, in the case of a retailer, it was stated that an effective offer may have been made by display, provided it was made at the immediate point of sale (i.e., the shelves or counters). Under these provisions, it was clear that a price quoted merely in an individual base period contract, and not quoted otherwise to a substantial number of customers, was not an offering price within the meaning of the regulation.

The Section 22 definition also stated that the term offering price did not include a price intended to withhold a commodity from the market, or a price offered as a bargaining price by a seller who usually sold at a price lower than his asking price.

In order to have been effective, the offer must have been one for base period delivery, and this requirement was held not to be satisfied if the seller could not possibly have made and did not contemplate or intend to make deliveries at the offer price prior to expiration of the base period.\(^2\)

The base period delivery formula as originally set forth in Section 3, GCPR, technically permitted sellers to establish a ceiling price even on the basis of an

isolated base period delivery at a high price, and it was recognized shortly after
the issuance of the GCPR that some limitation was desirable in this respect. It
became apparent that some wholesalers and manufacturers toward the end of the
base period had made isolated deliveries at prices substantially higher than their
regular level of base period prices in anticipation of the expected freeze, and for
the purpose of thereby obtaining a higher ceiling price.

An attempt was made to correct this situation by amending Section 3 to provide
that a manufacturer or wholesaler could not use a base period price as a ceiling
price to a class of purchasers unless he had made at least 10 per cent by dollar
volume of his total base period deliveries of that commodity to that class of pur-
chaser at that price or at a higher price.\footnote{Amendment 2 to GCPR, 16 Fed. Reg. 1789 (1951); later clarified by Amendment 5, 16 Fed. Reg. 1994 (1951).}

The 10 per cent limitation was not imposed upon retailers for a number of
reasons. It was felt that the limitation would impose an undue administrative
burden on retailers whose records were not generally kept in such fashion as to
allow them easily to make the necessary determinations. Furthermore, since retailers
were at the end of the chain of distribution and therefore might not have had an
opportunity to make deliveries at the new price to the extent of the 10 per cent re-
quirement prior to the end of the base period, it was believed the limitation would
not be fair to them. And, of course, any increased ceiling price which a retailer
might obtain by virtue of the absence of the 10 per cent requirement would not
have the price-pyramiding effect which would flow from a higher ceiling price in the
case of a manufacturer or wholesaler.

At the time of the amendment inserting the 10 per cent requirement in the case
of manufacturers and wholesalers, it was recognized that this new rule should not
operate to prejudice sellers who in the base period had put into effect a genuine in-
crease in prices. In addition, it was felt that some provision was required to avoid
price distortions resulting from the fact that some manufacturers and wholesalers
announced and attempted to put into effect a bona fide general increase in prices
during the base period, but were not able prior to the end of the base period to
make deliveries of all commodities to all classes of purchasers at the increased prices.
In these situations, the original Section 3 provision froze ceilings for some com-
modities and for some purchasers at the level of the seller's old price list, and for
other commodities or purchasers at the level of the new price list. This resulted
in ceiling prices which did not reflect the seller's normal differentials between differ-
ent classes of purchasers, or his normal differentials between various related com-
modities.

In an effort to solve these problems, Amendments 2 and 5 to the GCPR, which
added the 10 per cent requirement, also simultaneously added, in Section 3(b), an
elaborate series of provisions applicable to manufacturers and wholesalers who before
or during the base period announced general price increases in writing.

Thus the new Section 3(b)(1) relieved a seller of the 10 per cent limitation under
certain circumstances. If before or during the base period the seller had announced in writing and put into effect a price increase for a class of purchasers by making some deliveries to that class at the higher price, and if his only deliveries at a lower price were pursuant to written firm commitments made before the price increase, the increased prices became the seller's ceiling price for that class of purchaser even though the 10 per cent requirement was not satisfied.

Section 3(b)(2) attempted to deal with the problem of frozen ceiling prices which did not reflect the seller's normal differentials between different classes of purchasers. It provided that if before or during the base period the seller announced in writing and communicated to the trade a general increase of prices for base period delivery to more than one class of purchasers, the announced increased prices were his ceiling prices to all classes of purchasers covered by the announcement, under certain conditions. These conditions were that the seller made deliveries successfully establishing the new price as his ceiling to all purchasers of one or more classes, and that he made no deliveries to the other classes except pursuant to written firm commitments made before the price increase.

Section 3(b)(3) attempted to restore normal pricing relationships as between related commodities. It provided that if the seller before or during the base period announced in writing price increases on a list of commodities, the price list prices would become the seller's ceiling prices under certain stated conditions. These conditions were that the seller must have made deliveries successfully establishing the new prices as his ceilings to all classes of purchasers on one or more of the commodities on the price list, and that the commodities thus delivered at the new prices must have been important enough to account during the year 1950 for at least 30 per cent of the seller's dollar sales of all commodities on the price list.

C. Same Commodity

In view of the endless variety of fact situations arising in different businesses, one of the problems most frequently presented under the GCPR and other freeze-type regulations was the question as to what constituted the "same" commodity. In the GCPR, this problem arose under Section 3 in connection with the provision freezing the seller to the highest price at which he made base period delivery of the same commodity to the same class of purchaser. The problem also arose in connection with comparison commodity pricing under Sections 4 and 5, and competitive pricing under Section 6.

Section 3 used the concept of "same" commodity, rather than the broader concept of "same or similar" commodity. It was felt that use of the latter term in a section providing for self-determination by the seller would lead to the calculation of higher prices than were warranted, and in a manner which could not reasonably be controlled.

The Section 3 problem of "same commodity" arose in the case of a seller who sold a number of similar or related items during the base period. Such a seller might attempt to use as his ceiling price for item X a high price at which he had
made base period deliveries of a similar or related commodity, although he had not in fact delivered item X itself at that price during the base period. This situation could arise where the seller had made base period deliveries or offers of item X, although at a lower price. It could also arise where item X itself had not been delivered in the base period or offered for base period delivery. In all these cases the question whether the seller could properly apply to item X his base period ceiling price established for the other items depended on whether all the items in question were regarded as the "same commodity."

Although many of these situations necessarily required decision on a case-by-case basis, OPS laid down certain general criteria for the use of sellers and agency personnel in resolving such problems. Under these criteria, two commodities were considered the "same" if there was physical identity so that anyone examining the two items objectively would have no doubt that they were identical. Some leeway was also provided by the further principle that where two items varied slightly in minute physical details and therefore did not meet the above test, they might nevertheless be considered the "same" if the following four conditions were satisfied:

1. All basic elements of the two commodities were identical.
2. Both commodities were made from the same materials.
3. Both commodities were regarded as identical by the trade.
4. In actual practice, both commodities, when sold by the same seller, were invariably sold at the same price under the same conditions.

It will be noted that the criteria set forth above stressed trade practice and customer acceptance as important factors.

A somewhat different problem arose in situations where a manufacturer, subsequent to issuance of the GCPR, switched to production of a slightly different item from the commodity he produced during the base period, with a change either in exterior characteristics such as the package or container, or size, or in basic characteristics of the product, such as quality, color, construction or design. The question then arose whether the new item should be regarded as the same commodity as the base period commodity, and therefore subject to the same ceiling price, or whether instead it should be treated as a new commodity which could be priced under Section 4, the comparison commodity pricing section for manufacturers. A similar problem arose under Section 5, the comparison commodity pricing section applicable to resellers, where a reseller after issuance of the GCPR commenced to stock an item which was the same as his base period commodity except for differences of the type outlined above.

In some situations treatment of the commodity as a new product under Sections 4 and 5 resulted in higher ceiling prices than the base period price established under Section 3. Accordingly, some sellers by making minor changes in base period commodities attempted to avoid the Section 3 freeze of base period prices. In order to prevent evasions of this type, OPS took the position that minor changes in a base

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*GCPR Interpretation 19, 16 Fed. Reg. 4192 (1951).*
period commodity did not result in a new commodity unless such changes substantially affected the utility of the commodity to the customer. If, for example, coffee of a particular brand and quality was packed in paper during the base period, and subsequently was sold in a vacuum tin container which preserved the contents more satisfactorily and for a longer period of time, and if this difference was recognized in the trade as one substantially affecting the utility of the commodity, the coffee in the vacuum tin container was regarded as a new commodity subject to Section 4 or 5 pricing. On the other hand, in the case of bottled milk where a change from a wide mouth to a narrow mouth glass bottle did not substantially affect utility to the consumer, it was regarded as the same commodity, subject to Section 3 pricing. 5

Where the manufacturer subsequent to the base period sold a commodity in a different sized container or in different quantities than he supplied in the base period, such different sizes were regarded as sales of more or less of the same commodity, unless the new size served a distinctly different merchandising function, such as an “economy size.” Where the commodity was regarded as more or less of the same commodity, the Section 3 ceiling price for the base period quantity was adjusted proportionately in accordance with the change in size or weight.

D. Class of Purchaser

The provision in Section 3 that a seller’s ceiling price was the highest price at which he delivered the same commodity during the base period to a purchaser of the same class meant that the seller had a ceiling price for sales of the commodity to each separate class of purchaser, depending upon his base period price to that particular class. Where the seller had a number of different classes of purchasers, a high base period price used to establish the ceiling for one class of purchaser could not, therefore, be applied to other classes of purchasers.

The term “class of purchaser” was defined in Section 22 as referring to “the practice adopted by a seller in setting different prices for sales to different purchasers or kinds of purchasers . . . or for purchasers located in different areas or for purchasers of different quantities or grades or under different terms or conditions of sale or delivery.”

The concept of “class of purchaser” resulted in a wide variety of interpretative problems, in which it became necessary in varying fact situations to determine whether a seller’s customers constituted one class of purchaser or several different classes. Sellers frequently sought a ruling to the effect that all their customers constituted one class, in order to justify the application to all their customers of a higher price charged to one customer, or to one group of customers, during the base period.

In considering this problem, OPS did not attempt to establish a new practice for the seller. It merely took the seller’s own actual base period pricing practice, as it existed prior to controls, and froze the seller to that practice.

6 Also, see Interpretations, OPS Loose Leaf Service, 42 Reg. 11:204.11.
The problem was not a difficult one to resolve in cases where the customers to whom different prices were charged were objectively different, as where various customers differed functionally. For example, many sellers had an objectively identifiable base period practice of selling to wholesalers at a lower price than to retailers. The GCPR required them to continue this.

The problem became more difficult, however, where the seller charged different prices to different customers during the base period on the basis solely of the seller's own subjective reasons, and where there were no apparent objective differences between such customers. In such cases, OPS took the position that if the seller customarily charged different prices to two different customers in sales made at the same time, with an established pattern of normally charging a lower level price to customer A than to customer B (regardless of the seller's motive), A and B were thereby established as separate classes of purchasers. Accordingly, the higher price charged during the base period to B became the seller's ceiling price for B alone, and not for A.6

A somewhat different type of situation arose in the case of some small retailers who normally had no generally prevailing price level of any kind, but simply charged each different customer whatever the traffic would bear with that particular customer at any given moment. In such cases, the seller had no customary practice of necessarily charging different prices to different customers in sales made at the same time. Under these circumstances, a reasonable position was that the seller had only one class of purchaser, and that his ceiling price for all his customers was the highest base period price he charged any of them, provided it met the 10 per cent requirement.

Where individual base period customers to whom the seller had charged different prices for purely subjective reasons were found to constitute separate classes of purchasers, the question arose as to how the seller's ceiling price should be determined for sales to new customers. In such a situation, in the absence of objective criteria, there often was no basis for determining which class a new customer would fall into, and accordingly in the absence of a specific provision in the regulation the only solution was to permit the seller to charge new customers the highest price charged to any purchaser during the base period. The services regulation, CPR 34,7 handled this particular problem by a specific provision to the effect that in such cases the seller's ceiling price to a new purchaser would be the arithmetic average of his base period ceiling prices to all purchasers of the same commodity as to whom individually negotiated prices were maintained in the base period.

E. Customary Differentials, Terms, and Conditions of Sale

Section 9 of the GCPR provided that the seller's ceiling prices, when determined, should reflect his customary price differentials, including discounts, allowances, premiums, and extras, based upon differences in classes or location of purchasers, or

in terms and conditions of sale or delivery. This provision meant that a seller's ceiling price as determined for the sale of a given commodity to a specific class of purchaser was the maximum price which he might charge for a sale of that item, including all his base period customary terms and conditions of sale. If the commodity was sold at the seller's ceiling price, the customer had to be given all the customary terms and conditions of sale and any change in those terms was regarded as a violation.

A typical base period "terms and conditions of sale" situation was one in which a seller during the base period required payment only within 30 days and made no carrying charge during that period. Under Section 9, such a seller could not subsequently change to a cash basis while maintaining the same ceiling price, since this would in effect represent a higher price to the buyer. Another typical situation under Section 9 was one in which a clothing store provided free alteration service during the base period, or a manufacturer provided his customers with freight allowances during the base period. In all these cases, the seller could not properly discontinue the base period term or condition of sale while maintaining his base period ceiling price. However, there was no prohibition against the seller giving the customer more than the base period terms, while maintaining the base period price. For example, if the seller in the base period permitted payment within 30 days, an extension of free credit to 60 days was, of course, no violation.

OPS interpreted Section 9, GCPR, as permitting a seller to discontinue a base period term or condition of sale if he reduced his ceiling price correspondingly. This interpretation was not required by the language of Section 9, which stated, "Your ceiling prices, when determined, shall reflect your customary price differentials...." However, it was felt that there might be legitimate situations in which a seller might find it unduly onerous or burdensome to continue providing certain base period terms, and therefore would prefer to effect a reduction in his ceiling price in return for an elimination of such terms or conditions. It was felt that it would be unnecessarily harsh to freeze the seller irrevocably to his base period practices in such circumstances.

However, this position created certain complications. It raised a difficult problem as to how an appropriate reduction in ceiling price should be computed under such conditions. There were two possible alternatives:

1. That the required reduction in ceiling price should be measured by the amount of the saving to the seller which resulted from discontinuing the base period service; or

2. that the required reduction should be measured by what it would cost the customer to have the same service performed elsewhere. This problem was never satisfactorily resolved.

In addition, this position opened the door to possible abuse on the part of the seller, in that Section 3 included no reporting requirement and the seller was therefore left to determine unilaterally the amount of the required reduction in his ceiling price.
Better results might have been obtained by amending such provisions as Section 9, GCPR, to provide that where a seller desired to discontinue a base period term or condition on the ground that it was unduly burdensome, he must apply to OPS for a letter order approving such action and establishing the reduced ceiling price to govern such a situation. An amendment of this kind would have provided a mechanism for relief to the seller in hardship situations, while at the same time permitting OPS to control the exercise of such relief.

A somewhat different type of Section 9 situation arose in cases where the seller of a commodity decided to substitute a new and allegedly more valuable service in place of his base period term or condition of sale, with an additional charge for such new service. An illustrative situation was one in which a manufacturer of television sets, whose base period selling price included a 90-day warranty, subsequently decided to substitute a longer warranty on a mandatory basis and with an additional charge. It was held that this was not permissible on a mandatory basis. There were two reasons for this position. It was felt that such a practice represented a violation because it involved a departure from the seller’s base period terms and conditions of sale, resulting in a higher price to the buyer. In addition, the transaction was regarded as a tie-in sale in violation of Section 18, because it required the customer to buy something in addition to the television set which he had not been required to buy in the base period.

However, it was agreed that if the purchaser was given the full option to take or leave the additional item, there would be no violation if a purchaser who elected to take the additional item was charged an appropriate and reasonable price for it.8

Where the seller of a commodity desired to introduce a new term or condition of sale, at the option of the customer, as a service incidental to the sale of the commodity itself, the question arose as to how the ceiling price for such new incidental service should be determined. This problem could arise as to sellers whose ceiling prices had initially been established under any one of the different pricing provisions of the GCPR.

Since the new term or condition of sale was a service incidental to the sale of the commodity itself, and since the commodity itself had been priced under the GCPR, the sensible procedure seemed to be to require the seller to apply to OPS under Section 7 for a letter order establishing a ceiling price for such new term or condition. Under that section, consideration could be given to the applicant’s ceiling price on the commodity itself and to his pricing practices in general.

F. Separate Sellers

The definition of “seller” in Section 22 of the GCPR provided that “Where a seller . . . makes sales or supplies services through more than one selling unit (other than salesmen making sales at uniform prices) each such separate place of business shall be deemed to be a separate seller.”

This provision was designed to insure that each separate selling outlet or branch

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of a company would have separate ceiling prices depending upon its own separate base period history. It prevented a company from using high base period prices charged by one of its outlets or branches as a means of establishing the same high price level for its other outlets which had sold at a lower price level during the base period. It also meant that if such a company opened a new outlet after the base period, the new outlet would be regarded as a new seller and would therefore have to establish its ceiling prices by competitive pricing under Section 6, or by letter order under Section 7. This general principle was applicable even in cases where the central office of a company, during the base period, gave no discretion to its branch outlets in the fixing of prices.

The only exception to this principle was set forth in Section 12, dealing with a group of retail sellers under common control. Section 12 provided that a group of retail sellers under common ownership or control, which had an established practice of centrally determining uniform prices during the base period for some or all of its categories of commodities or services, could treat the entire group of retail sellers as one seller for the purpose of computing ceiling prices for the commodities as to which such practices existed.

II

Techniques for New Commodities, New Sellers, and New Classes of Purchasers

Ceiling prices for new commodities, new sellers or new classes of purchasers were determined under either

(a) the comparison pricing provisions of Sections 4 or 5, where the seller was in-lined with his own prices for similar commodities in the same category;

(b) the competitive pricing provisions of Section 6, where the seller was in-lined with the prices of a direct competitor selling the same item to purchasers of the same class; or

(c) if the seller's ceiling price could not be determined under any of the above provisions, he was required to apply under Section 7 for the establishment of a ceiling price by the Director, to be in line with the level of ceiling prices otherwise established by the regulation. Section 7 contained no pricing formula of any kind, leaving the price to the discretion of the Director.

A. Comparison Commodity Pricing

Where a seller desired to establish a ceiling price for a commodity which he did not deliver during the base period or offer for base period delivery, but which was in the same category as other commodities he dealt in during the base period, he was required to use Section 4, if a manufacturer, or Section 5, if a wholesaler or retailer. The technique used in these sections was to apply to the seller's current cost of the new item the markup he was currently receiving on a similar commodity which he handled during the base period. This technique was an important one, in that it made possible the self-calculation of ceiling prices by a seller even in new commodity areas.
1. **Section 4—Manufacturers.** A manufacturer of a new commodity was directed to apply to the current unit-direct-cost of the item the percentage markup he was currently receiving on a “comparison commodity” of the same category which he did handle during the base period. The term “category” was simply defined as “a group of commodities which are normally classed together in your industry for purposes of production, accounting, or sales.” Illustrative categories listed in this section included such lines as “textile machinery, house and barn paints, motor oils.” There was an inclination on the part of some sellers to apply the concept of “category” in a narrow and limited manner in situations where they wished to avoid the use of a given item as a comparison commodity because its markup was relatively low. In deciding whether two items were in the same category in the case of a manufacturer, OPS considered whether the two articles were made by the same manufacturing processes and of materials which were of the same type or of equivalent value. Two items made of different materials might be considered in the same category if the industry recognized them as the same type of product, and in this connection the fact that manufacturers normally received approximately the same markup on both articles would be a relevant consideration.

Under Section 4, the manufacturer’s current unit-direct-cost for both the new commodity and the comparison commodity was described as meaning the total unit direct labor and direct material cost for each, and this was interpreted as meaning the manufacturer’s present replacement cost, rather than the incurred cost of the item presently in his inventory.\(^9\)

Section 4 laid down precise steps for selection of the appropriate comparison commodity. In addition to the requirement that it be in the same category as the new item, the comparison commodity had to be an article which was dealt in during the base period and whose ceiling price was therefore determined under Section 3. Furthermore, subject to an exception which will be mentioned shortly, it had to be an item which the seller was still manufacturing. From the commodities which met these tests, the seller was required to select the one with lower current unit-direct-costs which was most nearly like the new item being priced. If no commodity meeting those tests had a lower current unit-direct-cost, the seller had to select the one with the same or higher current unit-direct-cost which was most nearly like the item being priced. Finally, if the seller was no longer manufacturing any commodity which met the above tests, his comparison commodity was the item of the same category, which he dealt in during the base period, and which was most nearly like the item being priced, even though he was no longer producing such comparison item. In that case, the current unit-direct-cost of the comparison commodity which was no longer being manufactured was computed by applying current material prices and wage rates.

In order to find that the seller was currently manufacturing a comparison commodity it was not necessary that he actually be engaged in the manufacturing process

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on the very day that the new commodity was being priced. It was required only that he must not at that time have abandoned the intention to manufacture it, and the fact that a manufacturer had temporarily stopped making a commodity did not necessarily eliminate it from selection as a comparison commodity.\(^\text{10}\)

2. Section 5—Wholesalers and Retailers. Comparison pricing for wholesalers and retailers under the GCPR was governed by Section 5 of that regulation, and the technique used was to apply to the seller's net invoice cost of the new commodity the percentage markup he was currently receiving on a comparison commodity.

The comparison commodity had to be in the same category as the new commodity being priced, with a ceiling price determined under Section 3, and it was required that of the commodities in that category with lower costs it must be the one most nearly like the new article being priced. If the seller had no commodity in the category with a lower cost, he was directed to select as his comparison commodity the article with the same or higher cost which was most nearly like the commodity being priced.

The percentage markup currently received on the selected comparison commodity was determined by comparing its Section 3 ceiling price with the seller's most recent net invoice cost for that commodity. Actually, the Section 5 provision made no express reference to ceiling price of the comparison commodity in connection with this computation. However, Section 4, the comparison pricing provision for manufacturers, stated expressly that the percentage markup for the comparison commodity should be determined by comparing its current unit-direct-cost "with its ceiling price," and Section 5 was interpreted in the same way. This was clearly intended at the time the GCPR was drafted. At that time, consideration was given to an alternative proposal that for comparison pricing purposes the markup on a comparison commodity should be determined by relating its cost to the actual selling price, rather than ceiling price. However, this proposal was not adopted because it was felt that it would be administratively unworkable to base such a computation upon selling price, which was subject to fluctuation from time to time. This position was consistent with that taken in Section 6, relating to competitive pricing, and Section 7, relating to letter order pricing, which also in-lined the seller with ceiling prices rather than selling prices.

The requirement that the comparison commodity be one currently handled, with a ceiling price which had been established under Section 3, created complications in the second year of the freeze, when wholesalers and retailers came to establish their ceiling prices for the new 1953 models. At that time, the seller was no longer handling any comparison commodity with a Section 3 ceiling price, since the 1951 model was no longer being carried. Furthermore, he could not use his 1952 model, which was still being carried, as a comparison commodity, because its ceiling price had not been determined under Section 3, but rather under Section 5.

\(^{10}\)Interpretations, OPS Loose Leaf Service, 42 Reg 11:204.9; OPS Manual Pt. 4, c. 3, §11.6D, subdivision 2a(2).
The result was that the seller in such a situation was required to price his new commodity under the more burdensome pricing provisions of Section 6 or Section 7. This difficulty could have been avoided by an amendment to Section 5 providing that where a seller was no longer handling any commodity in the same category for which his ceiling price had been determined under Section 3, he could use as a comparison commodity an item for which his ceiling price had been established under Section 5 itself. In that case, he could have been directed to determine his ceiling price on the new commodity by applying to its net invoice cost the same percentage markup which he had previously used in establishing the ceiling price of such comparison commodity under Section 5.

B. Competitive Pricing—Section 6

Ceiling prices for new sellers, or for old sellers dealing with commodities in new categories, were governed by Section 6, GCPR, which provided that where a seller was pricing a commodity in a different category from any dealt in by him during the base period, his ceiling price was the same as the ceiling price of his most closely competitive seller of the same class selling the same commodity to the same class of purchaser. This technique was similar to the competitive pricing technique used by the OPS under the General Maximum Price Regulation and worked reasonably well in most cases, although it presented its share of problems.

The pricing technique of Section 6 required that the seller determine who was his most closely competitive seller of the same class, and his ceiling price was the same as the ceiling price of that competitor for the commodity in question. If that competitor did not have a ceiling price for the particular commodity involved, the applicant passed to the next most closely competitive seller who did have a ceiling price for that particular commodity. If there was no competitive seller of the same class with a ceiling price for the same commodity, the ceiling price was established by letter order under Section 7.

1. Same or Substantially Same Commodity. In determining whether the seller's commodity and that of his competitor were "the same commodity" for this purpose, the same criteria were used as those which have been previously discussed as applicable in Section 3 pricing.11

Frequently, although a new seller could find a competitor who had a ceiling price for a similar commodity, he was unable to find a competitor with a ceiling price for the same commodity. The limited concept of "same commodity" in Section 6 forced a new seller in such situations into Section 7 pricing. This was burdensome upon the seller in that he was unable to commence sales until after he had filed an application with OPS and a ceiling price had been established by letter order. It was also burdensome upon the agency from an administrative standpoint in that it greatly increased the number of cases in which letter orders had to be issued.

The number of cases presenting this problem could have been reduced if Section 6 had included a provision permitting the seller to borrow the ceiling price of his

most closely competitive seller of the same class on a substantially similar commodity, where that competitor did not in fact have a ceiling price for the same commodity. However, it was recognized that such a provision had certain disadvantages in that it opened the door to possible abuse by the seller, since the question as to what constituted a "substantially similar" commodity presented a wide range of choice. Abuses occurring under such a provision could not be corrected until the agency was able to examine the Section 6 report filed by such a seller. In view of the tremendous workload of the agency, such an examination might not take place until long after the report had been filed and the seller had commenced to make sales at his proposed Section 6 price. By that time a great deal of damage might already have been done, and as a practical matter it was more difficult to require corrections long after a price was put into effect.

When CPR 22, the Manufacturers' General Ceiling Price Regulation, was issued in April 1951, its competitive pricing provisions (Section 33) included a provision permitting the borrowing of a competitor's ceiling price on a "substantially similar" commodity where such a competitor did not have a ceiling price for the same commodity. Based upon the relatively satisfactory experience with this provision in CPR 22, Section 6 of the GCPR was subsequently amended in November 1951 to include a similar provision, restricted to manufacturers only. However, no such provision was added to Section 6 with regard to wholesalers or retailers. Although consideration was subsequently given to a similar amendment of Section 6 covering wholesalers and retailers, there was a divergence of opinion within the various Commodity Divisions as to the desirability of opening the door to such a practice in the case of distributors, and the proposed amendment was never adopted.

2. Most Closely Competitive Seller of the Same Class. The term "most closely competitive seller of the same class" presented many problems. This term was defined in Section 22 as follows:

Most closely competitive seller of the same class. Your most closely competitive seller of the same class is the seller with whom you are in most direct competition even though he may perform a different function with respect to the commodity or service (e.g., if you are a wholesaler of a commodity, your most closely competitive seller may be a manufacturer; or, if you are a retail supplier of a service, your most closely competitive seller may be a wholesaler). You are in direct competition with another seller who sells the same types of commodities or services to the same classes of purchaser in similar quantities, on similar terms, and, if you are selling a commodity, you supply approximately the same amount of service.

The intent was that a new seller pricing under Section 6 should first determine which competitive sellers dealing in the same commodity were "sellers of the same class." The next step was for the new seller to determine which of those competitors was in fact his most closely competitive seller. In determining whether a competitor was a seller of the same class, the applicable criteria were whether the two sellers

sold the same types of commodities to the same classes in similar quantities, on similar terms, and with approximately the same amount of service. The overriding consideration in this connection was whether the two sellers customarily sold or would have sold the same commodity at the same or approximately the same price under the same conditions of sale, to the same class of customers. There were some situations in which these tests were satisfied even though the two sellers were on a different functional level—i.e., one being a wholesaler and the other a manufacturer.

Situations commonly arose in which there were a number of different competitors of the same class selling the same commodity, so that the new seller had several possible choices in determining his most closely competitive seller. In such cases, there was a natural temptation on the part of the new seller to select the competitor with the highest ceiling price. In processing Section 6 reports, the Commodity Divisions were instructed that if this appeared to be the case they should ascertain the prices of two other sellers who were closely competitive with the applicant. If it was found that the other two sellers had significantly lower prices than the one chosen by the applicant, the applicant was given an opportunity to defend his choice. It was sometimes found that there were valid reasons why the competitor selected by the applicant was in fact more like him and more closely competitive than the other two sellers. On the other hand, if it appeared that the applicant's only reason for choosing the first seller was that he was the competitor with the highest price, and if one of the other sellers was actually more closely competitive, an order was issued revising the applicant's proposed price accordingly.

3. Selection of Competitor Selling to Same Class of Purchaser. The ceiling price to be borrowed from a competitor under Section 6 was the ceiling price of the latter for sales of the same commodity to the same class of purchaser. The concept of "class of purchaser" has been discussed in detail in an earlier part of this article.

The definition of "purchaser of the same class" in Section 22 stated that the term referred, among other things, to the practice adopted by a seller in setting different prices for purchasers located in different areas. In the case of manufacturers, customers in different geographical areas were frequently charged different price levels, or priced on a different pricing basis. Where this was true, such customers in different geographical areas constituted different classes of purchasers. Under such circumstances, a new manufacturer pricing under Section 6 might find that competitor X was his most closely competitive seller of the same class selling the same commodity to customers in Zone A, and he would therefore use as his ceiling price X's ceiling price for sales to Zone A. However, if competitor X did not have a ceiling price for sales to Zone B, the new seller would have to find a competitive seller of the same class who did sell to Zone B, and the ceiling prices of that competitor would be borrowed for sales to that zone. If no competitive seller of the same class had a ceiling price for sales to Zone B, the new seller would be required to apply for a letter order price under Section 7 for his sales to that zone.
4. Reporting Provision of Section 6. Sellers pricing under Section 6 were required to file a report of their proposed ceiling prices with certain prescribed information. It was provided that after the expiration of a stated waiting period the seller might proceed to sell the commodity at his proposed ceiling price "unless and until notified by the Director of Price Stabilization that your proposed ceiling price has been disapproved or that more information is required." The waiting period in the case of manufacturers was 10 days, in the case of wholesalers 30 days, and in the case of retailers there was no waiting period after mailing of the required report. The theory was that the imposition of a waiting period would be unduly burdensome in the case of retailers, and that it was not crucially necessary in such cases since the selling price of a retailer did not have a pyramiding effect upon other levels of distribution.

The waiting period provision raised a problem in situations where subsequent to expiration of that period the seller, having heard nothing to the contrary from OPS, proceeded to make sales at the reported price. Some time later, after examination of the seller's report, OPS decided that the ceiling price reported by the seller was incorrectly computed and therefore established the correct ceiling price by letter order issued to the seller. In these situations, the question was raised whether such a seller should be regarded as liable for overcharges on sales made at the incorrectly computed price after expiration of the waiting period and prior to issuance of the corrective letter order.

OPS took the position, that if the seller did not act in good faith or with due care and diligence in computing and reporting his proposed ceiling price, the report filed under such circumstances should not be regarded as an effective filing under the reporting provision of the regulation, and it should therefore not be regarded as conferring any protection upon him.

On the other hand, where the ceiling price reported by the seller was computed in good faith, and with due care and diligence and without any intention to violate the regulation, it was felt that the seller should not be regarded as liable for overcharges for sales made at the reported ceiling price prior to notification of disapproval by OPS. This position was based upon the fact that the reporting provision seemed to hold out to the seller that under certain conditions he might safely act unless and until he received notice to the contrary from OPS. It was felt that if any other result was desired, the pricing provision should include a specific statement warning the applicant to this effect.

C. Letter Order Pricing—Section 7

It was hoped that ceiling prices for most transactions would be determined under Sections 3, 4, 5, and 6. However, if the seller was unable to determine his ceiling prices for a new commodity under any of these sections, he was required to apply for establishment of a ceiling price by letter order under Section 7, and he could not commence sales of the item until such a letter order was issued.

The application was required to contain all pertinent information describing the
commodity, the nature of the seller's business, his proposed ceiling price and the method used to determine it, and the reason he believed it would be in line with the level of ceiling prices otherwise established by the regulation. The seller was also required to explain why he was unable to determine his ceiling prices under any other provisions of the regulation.

Since Section 7 was a catch-all provision, covering those transactions which did not lend themselves to any of the precise formulae set forth in the regulation, the establishment of ceiling prices under that section necessarily involved an exercise of broad discretion on the part of the Director, or his delegatee. The only standard mentioned was that the proposed ceiling price should be in line with the level of ceiling prices otherwise established by the regulation.

However, for the assistance of the Commodity Divisions in exercising such discretion, the OPS Manual contained a discussion of several methods which could be used in determining the in-lineness of a ceiling price proposed under Section 7.14

The first technique amounted to an adaptation of the principles of competitive pricing. It required the finding of a similar seller of the same class in another, but similar, trading area. Once the comparability of the trading areas had been established, the criteria of Section 6 could be used even though the parties were not actually in competition with each other.

Another technique amounted to a combination of the concepts involved in both comparison commodity pricing and competitive pricing. It required the finding of a close competitor who handled other commodities in the same category as the item which the applicant desired to price. The measurement of in-lineness of the applicant's requested price was then made by comparing it with the ceiling price of his competitor's comparison item, and the Manual suggested the method to be used in determining the price difference which was appropriate to compensate for the difference between the two commodities.

Where such comparisons were not available, it was possible to compare the markup over direct cost reflected in the ceiling price proposed by the applicant with the markups generally prevailing in the industry for similar products. Also, in the case of an applicant who was not a new seller, if the new commodity and the other items sold by him were more or less homogeneous, he might be given the same markup over direct cost on the new product which he received on the other items.

Cases sometimes came to the attention of OPS in which the literal application of Sections 4, 5, or 6 did not result in a ceiling price which was regarded as appropriate under all the circumstances, and in which a ceiling price more responsive to the specific situation could have been arrived at under Section 7, if it were applicable. However, a literal interpretation of the language of Section 7 did not permit its use so long as a ceiling price could be determined under any of the prior provisions of the regulation. Although recourse to Section 7 in some of these cases might have been desirable, such a procedure would have resulted in serious administrative problems.