

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Alascom, Inc. Request for)	WC Docket No. 03-18
Waiver of Commission Rule)	
And Orders Requiring Annual)	
Tariff Revision; and)	
Freedom of Information Act)	Control No. 2003-208
Request)	

**GENERAL COMMUNICATION, INC.
RESPONSE TO SUPPLEMENT TO WAIVER REQUEST AND
SUPPLEMENT TO RESPONSE TO FOIA REQUEST**

Submitted by:

Joe D. Edge
Timothy R. Hughes
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005
202-842-8809
202-842-8465 Fax

Its Attorney
Tina M. Pidgeon
Vice President, Federal Regulatory Affairs.

April 9, 2003

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	2
II. ALASCOM STILL HAS NOT RESPONDED IN FULL TO THE COMMISSION'S INQUIRIES AND HAS NOT ADEQUATELY IDENTIFIED THE DATA SETS RELIED UPON IN SUPPORT OF ITS WAIVER PETITION	5
III. ALASCOM HAS NOT PROVIDED PERSUASIVE SUPPORT FOR THE PROPOSITION THAT THE DATA REQUESTED IS COMPETITIVELY SENSITIVE	9
IV. THE INFORMATION REQUESTED BY GCI SHOULD BE RELEASED SUBJECT TO A PROTECTIVE ORDER.....	14
V. CONCLUSION.....	18

**Before the
Federal Communications Commission
Washington, D.C. 20554**

_____)	
In the Matter of)	
Alascom, Inc. Request for)	WC Docket No. 03-18
Waiver of Commission Rule)	
And Orders Requiring Annual)	
Tariff Revision; and)	
Freedom of Information Act)	Control No. 2003-208
Request)	
_____)	

**GENERAL COMMUNICATION, INC.
RESPONSE TO SUPPLEMENT TO WAIVER REQUEST AND
SUPPLEMENT TO RESPONSE TO FOIA REQUEST**

General Communication, Inc. (“GCI”), by its attorneys, hereby responds to the Supplement to Waiver Request and Supplement to Response to FOIA Request (“Supplement”) filed by Alascom, Inc. (“Alascom”) on April 4, 2003. Alascom’s Supplement requests that the Commission “reject GCI’s FOIA request and not otherwise require Alascom to provide its CAP information to GCI.”¹ The Supplement, however, fails to respond to the Commission’s request for details regarding the information requested by GCI under the Freedom of Information Act (“FOIA”) and fails to provide persuasive evidence or legal argument in support of the relief it seeks. Based on Alascom’s filing, the Commission should release the materials requested in GCI’s FOIA

¹ Alascom’s Supplement to Waiver Request and Supplement to Response to FOIA Request, Alascom, Inc. Request for Waiver of Commission Rule and Orders Regarding Annual Tariff Revision, WC Docket No. 03-18; Control No. 2003-208 (filed April 4, 2003) at 10 (“Supplement”).

submission. GCI would agree to receiving the information subject to the terms of the protective order already executed by the parties in this proceeding.

I. INTRODUCTION

In this proceeding, Alascom has requested that the Commission excuse Alascom's failure to file an annual Tariff 11 for 2003. GCI has opposed Alascom's Waiver Petition and, in the context of a FOIA submission, GCI requested the release of information provided by Alascom to the Commission relating to Alascom's "Cost Allocation Plan" ("CAP"), which is used in calculating the rates under which Alascom provides its Tariff 11 services, as well as the economic model (and inputs) used to create the CAP (the "CAP Model"). This information is critical to assessing the claims of Alascom and its experts in connection with Alascom's Waiver Petition, which is predicated upon alleged deficiencies in Alascom's "Cost Allocation Plan" ("CAP"). GCI has made it clear that it is willing to receive the materials requested subject to the protective order already issued by the Commission in this case.

GCI's FOIA submission expressly requests the release of certain materials submitted by Alascom to the Commission relating to the CAP and the CAP Model (including inputs) that date from 1994-1995. The FOIA request also seeks other materials, if any exist, that Alascom may have provided to the Commission relating to the CAP or CAP Model. GCI had initially made an informal request to Alascom for the CAP Model and its inputs; however, Alascom rejected GCI's informal request. When Alascom refused to provide information requested, even subject to a protective order, GCI sought to obtain the CAP information in the Commission's possession.

GCI's FOIA request is generally limited in subject matter to information related to the CAP and CAP Model. Alascom has submitted expert testimony in support of its Waiver Petition that draws certain critical conclusions about the CAP related to the passage of time between Alascom's initial CAP calculations and its recent CAP calculations. These statements implicate representations made by Alascom to the Commission as far back as 1995; however, the statements provide outside parties only a glimpse of the workings of the CAP and its support.

According to Alascom's Waiver Petition, the CAP is obsolete due to changes in the general marketplace and the nature of the traffic involved.² Alascom's Waiver Petition states that data "hard-coded into the CAP" are "increasing[ly] stale with the passage of time"³ In order to evaluate Alascom's representations (which serve as the basis for Alascom's waiver request), GCI and the Commission must review both the CAP Model as initially populated with data and run by Alascom, as well as the more current renditions, as populated and run by Alascom. Only through the comparison of these models and inputs over time will GCI and the Commission be able to assess whether the CAP is, as Alascom claims, obsolete. Absent review of the materials submitted to the Commission, including the 1994-1995 submissions, and, to the extent the materials are different, those relied upon by Alascom in support of the statements in its Waiver Petition, GCI cannot reasonably assess the Waiver Petition.

In order to determine precisely what materials Alascom may have relied upon in support of its Waiver Petition and to assess the validity of any exemptions that might

² See Alascom's Petition for Waiver, Alascom, Inc. Request for Waiver of Commission Rule and Orders Regarding Annual Tariff Revision, WC Docket No. 03-18 (filed Jan. 7, 2003)("Waiver Petition").

³ Id. at 11.

preclude the release of the materials requested in GCI's FOIA submission, the Commission sent Alascom the following instructions on April 2, 2003:

. . . I am reiterating what we expect to receive from Alascom on Friday. In particular, on the conference call last Wednesday, March 26, 2003, Pricing Division staff asked a question broader than that which Alascom responded to by e-mail last Friday. Among other things, Alascom was asked to identify by date all sets of data that were used by Alascom and its consultants in the analysis that was submitted in support of the waiver request. Further, staff requested that Alascom identify which, if any, of the identified data sets it contended were competitively sensitive, by data set, along with an explanation and legal support for that contention. This was in addition to the specific inquiry regarding why, despite the passage of time, Alascom continued to contend that the 1994-1995 data remained competitively sensitive. We expect these questions to be answered in full by Friday April 4, 2003, at noon, along with the further information that Alascom identified that it was working on in the March 28, 2003 e-mail. We are especially concerned that this information be provided to staff and GCI by no later than noon on Friday so that GCI may have an adequate opportunity to file any response that it may wish to make.⁴

Based on this statement sent by email from the Commission to Alascom's counsel, the Commission tasked Alascom with the following assignments: (1) identify by date all sets of data that were used by Alascom and its consultants in the analysis that was submitted in support of its Waiver Petition; (2) identify which, if any, of the identified data sets it contended were competitively sensitive, by data set, along with an explanation and legal support for that contention; and (3) indicate why, despite the passage of time, Alascom continues to contend that data requested in GCI's FOIA request dating from 1994-1995 remains competitively sensitive. In addition, the Commission expected Alascom to

⁴ Email from Deena Shetler, Deputy Chief, Pricing Policy Division, to Charles Naftalin, Counsel for Alascom, Inc., dated April 2, 2003, attached as Exhibit 1.

provide “the further information that Alascom identified that it was working on in the March 28, 2003 e-mail.”⁵

In response to the Commission’s directives, Alascom filed its Supplement, which necessitated this responsive pleading. In essence, Alascom’s Supplement amounts to ten pages of mischaracterization and obfuscation. The Supplement does not directly respond to any of the Commission’s three queries nor shed any light on the nature of the CAP, the CAP Model, or the inputs to the CAP Model. Furthermore, Alascom has not provided the Commission with an adequate basis for withholding the requested materials under Exemption 4 to the FOIA. Additionally, Alascom has not provided the Commission with adequate legal or public policy justifications for not releasing the requested materials subject to the protective order already executed by the parties. Indeed, the ultimate premise for Alascom’s Supplement is that material cannot be released under a protective order because it must be presumed that the protective order will be violated. If this were a proper basis for denial, then the Commission could never rely upon protective orders. This plainly is not the case, as the Commission routinely relies on protective orders to ensure that proceedings are fairly conducted and private concerns about sensitive materials are addressed.

II. ALASCOM STILL HAS NOT RESPONDED IN FULL TO THE COMMISSION’S INQUIRIES AND HAS NOT ADEQUATELY IDENTIFIED THE DATA SETS RELIED UPON IN SUPPORT OF ITS WAIVER PETITION

Alascom still has not directly responded to any of the Commission’s queries as to how its claims of confidentiality may differ over the years of CAP data that Alascom

⁵ *Id.* (referencing email from Charles Naftalin, counsel for Alascom, Inc., to Julie Saulnier, Pricing Policy Division; Joe D. Edge, counsel for GCI and Tina Pidgeon, GCI, dated March 28, 2003, attached as Exhibit 2).

presumably has collected and developed. The Supplement does not shed any light on the nature of the CAP, the CAP Model, or the inputs to the CAP Model. Rather, Alascom has chosen to “provide specific examples of the kind of information which should not be provided to GCI.”⁶ This is not what the Commission asked Alascom to do. Rather, the Commission made three specific inquiries to Alascom. Once again, Alascom’s response represents a significant narrowing of those inquiries. Alascom’s continuing failure to connect its general claims of confidentiality with specific types and vintages of CAP information further underscores that there is no valid basis to deny GCI’s FOIA request.

First, the Commission asked Alascom “to identify by date all sets of data that were used by Alascom and its consultants in the analysis that was submitted in support of its Waiver Petition.” In response to this query, Alascom submitted a sworn declaration from its consultants retained for this proceeding stating:

Our Waiver Declaration relied upon two versions of the CAP model. First, we relied upon certain portions of the 1998 CAP Model (which was used to develop the 1999 Tariff 11 rates). Our Waiver Declaration, filed in support of Alascom’s Petition for Waiver, relied upon the portion of this model that develops the Bush/non-Bush allocation. Our Waiver Declaration also relied upon the 2001 CAP Model (which was used to develop 2002 rates). We reviewed the entire model, including the Bush/non-Bush allocation, separations model and revenue requirement development portions.⁷

Based on this statement, it appears that Alascom’s experts professed to have used portions of the “1998 CAP Model” and the “2001 CAP Model.” This is a non-responsive answer to the Commission’s query. Here, Alascom’s experts are conflating the “sets of data” requested by the Commission with “CAP Model versions,” without any explanation

⁶ Supplement at 4.

⁷ Declaration of John C. Klick and Julie A. Murphy, attached to Supplement, at 1-2.

of what constitutes a “version” of the CAP Model. This approach avoids altogether any recitation of vintage of the inputs used in the “1998 CAP Model” and the “2001 CAP Model,” or whether the data for the model at any particular time includes inputs of varying vintage. For example, the “1998 CAP Model” and the “2001 CAP Model” could be virtually identical, but for the change of a single input, like projected demand for the period. In treating the entire CAP Model as a single item, Alascom’s consultants ignore the Commission’s call to “identify by date all sets of data that were used by Alascom and its consultants” in their analysis submitted in support of the Waiver Petition. As GCI has explained, however, a direct response to this inquiry is necessary to assess the consultants’ claims and Alascom’s claims of confidentiality.

As a second task, the Commission asked Alascom to “identify which, if any, of the identified data sets it contended were competitively sensitive, by data set, along with an explanation and legal support for that contention.” Once again, Alascom responded with a non-answer. This time, Alascom’s experts stated, “This is a difficult task because it assumes we can successfully predict all of the uses to which a competitor, such as GCI, could put the detailed information that exists in the CAP.”⁸ The Alascom experts continue by providing “a list of some of the competitively sensitive information that we have within the CAP.”⁹ This was not, however, the assignment given by the Commission. Alascom’s list does not “identify which, if any, of the identified data sets it contended were competitively sensitive, by data set, along with an explanation and legal support for that contention.” Indeed, having failed to identify the vintage of data sets, Alascom

⁸ Id. at 2.

⁹ Id. at 3.

further precluded itself from making any specific allegations of confidentiality. Alascom does not provide anything approaching a full accounting of the data sets that it contends are competitively sensitive. Once again, Alascom provides no information regarding the vintage of data sets relied upon.

Finally, the Commission asked Alascom to “indicate why, despite the passage of time, Alascom continues to contend that data requested in GCI’s FOIA request dating from 1994-1995 remains competitively sensitive.” Here, Alascom’s experts offer no explanation whatsoever. Instead, according to Alascom, there are three fundamental reasons for not disclosing 1994-1995 data to GCI. First, GCI could use 1994-1995 information to “assess comparative market share at location-specific level of detail” and to “produce reliable projected estimates of Alascom’s costs in the years after 1995.” Second, GCI could use 1994-1995 information to “assess how effective its past competitive offerings were in specific geographic areas, and how to shape its future competitive offerings in order to target Alascom’s market share in specific geographic areas.” And third, by means of the 1994-1995 data, “GCI would have access to the number of private line customers that Alascom has maintained in each of the 33 non-Bush locations” thereby creating “a business opportunity for GCI to gain additional marketshare.”

Each of Alascom’s contentions is easily dismissed. As shown below in Section III, GCI already possesses a variety of traffic data including market share data by location from sources including the Alaska Exchange Carriers Association and the Regulatory Commission of Alaska. Likewise, as discussed below, Alascom’s cost data is of little relevance because GCI already serves locations 95% of the access lines in the state and

has already designed its facilities for the remaining locations and GCI is intimately familiar with the equipment (and cost thereof) that Alascom uses to serve these locations. Finally, any information regarding private line service opportunities is likely already known by GCI's own sales force and disclosure of such information is prohibited under the protective order in any event.

III. ALASCOM HAS NOT PROVIDED PERSUASIVE SUPPORT FOR THE PROPOSITION THAT THE DATA REQUESTED IS COMPETITIVELY SENSITIVE

Neither Exemption 4 to the FOIA, which permits withholding of “commercial or financial information obtained from a person and privileged or confidential,”¹⁰ nor any other FOIA exemption supports the withholding of the CAP and supporting materials from disclosure. First and most importantly, any potential competitive harm is entirely ameliorated by the imposition of a protective order to which GCI has already agreed. All of Alascom's arguments presume that the protective order either does not exist or will be violated. The Commission cannot base its decisions on a presumption that its own orders will be violated, yet that is effectively what Alascom's Supplement suggests. That alone is reason to grant GCI's FOIA request.

Alascom's sensitivity to disclosure appears to be highly selective and intended specifically to defeat careful examination of the CAP. In other contexts, Alascom has shared much of the information that it now claims to be confidential without the concerns it has professed in this proceeding and much of it is available from public sources. Most absurd is Alascom's claim that disclosure of the CAP will give competitors information

¹⁰ 5 U.S.C. § 552(b)(4).

about the location of Alascom's facilities.¹¹ Of course, GCI already knows the location of Alascom's facilities because it has operated in Alaska for twenty years. If GCI did not already know the location of Alascom's facilities, it could rely upon one of the attractive, color-coded large-scale maps that Alascom's marketing personnel freely distribute. These maps show the location of every one of the following Alascom facilities in the state: (1) Toll Center; (2) Gateway Earth Station; (3) International Gateway Earth Station; (4) Major Earth Station; (5) Small Earth Station; (6) Transmitter/Repeater Site; (7) Marine Radio Site; (8) Fiber Optic Cable Terminal; (9) Fiber Optic Cable; (10) Microwave Link; (11) Microwave Link (leased or foreign circuits); (12) VHF/UHF Radio Link; and (13) Cable. Exhibit 3 is an excerpt from this map, showing the microwave, earth station fiber, and other Alascom facilities in Southeast Alaska. The entire map shows facilities throughout the state, and GCI will provide the full map to the Commission upon request.

Even without this map, GCI could determine the location of all Alascom's earth station and microwave facilities by reference to the Commission's licensing files and databases that show the geographical coordinates of these facilities accurate to one second. Moreover, the LERG shows the location of every Alascom interconnection point with a local exchange carrier since Alascom provides trunking and facilities to every LEC end office. Alascom's assertion that this kind of information is secret is ridiculous on its face.

¹¹ Supplement at 4, 6.

No less absurd is the claim that location-specific demand information is secret.¹² First, GCI already has its own location-specific demand information for every market in the state because it either serves the location directly or reaches the location via another carrier. Moreover, GCI also receives location specific demand data for Alascom through the state's access charge bulk bill system. The Alaska Exchange Carrier Association ("AECA") administers a bulk billing process for non-traffic sensitive access charges. These charges are based upon the respective market shares of the long distance carriers. AECA sends each IXC not only its own access bill, but also the access bills of the other IXCs as well in case an IXC wishes to challenge its assessment. The IXC bills are individually calculated for each ILEC. The monthly bill is approximately two inches thick. Excerpts from the AECA bill to AT&T for March 2002 are attached as Exhibit 4. The first excerpt consisting of six pages shows the AECA bill to ATT Alascom for the ACS-Glacier State study area. The bill shows originating and terminating minutes of use for Feature Group C and Feature Group D trunks, as well as dedicated and common transport minutes, originating 800 minutes, wholesale minutes, state and interstate percentage of use, trunking breakdowns by wire center and minutes of use for each remote switch. Most of the Glacier State locations are served competitively by GCI and Alascom. The next six pages of the exhibit provide similar detail for ACS-Sitka. With the exception of Sitka itself, this ILEC serves a number of locations where Alascom is presently the sole facilities-based carrier. Thus the AECA billing provides detailed Alascom demand information for both competitive and non-competitive locations.

¹² Id. at 6.

Alascom's position is also inconsistent with its day-to-day practice of sharing information with other carriers. GCI and Alascom operating personnel have a need to share certain information from time to time and understand that it has little competitive significance in the real world. For example, with the advent of 800 number portability, certain small Alaska LECS were unable to do the necessary sorting to support portability. They asked GCI and Alascom to provide this function and the two carriers exchanged information on 800 traffic sorted by NXX code and carrier in order to determine which carrier GCI or AT&T would provide the lookup function and route misdirected traffic in each case. The first page of that data exchange is attached as Exhibit 5.

The Regulatory Commission of Alaska also makes available a wealth of information regarding location-specific demand for telecommunications services in Alaska. Exhibit 6 is a breakdown of access lines by location divided into residential, single-line businesses, and multi-line businesses. Exhibit 7 is an excerpt from a report showing minutes of use detail by NXX code for residential and business customers, sorted by size of customer. Exhibit 8 is a breakdown of traffic by company, showing minutes of use for local, state toll, and interstate toll.¹³ The data sets will undoubtedly prove useful in reviewing the accuracy of the data inputs used by Alascom in its model.

Finally, Alascom suggests that location specific investment data in the CAP will provide GCI with a competitive advantage. Alascom suggests that GCI will make investment and marketing decisions based on this information.¹⁴ However, GCI has already made investments to serve locations throughout Alaska representing

¹³ See www.state.ak.us/rca.

¹⁴ Supplement at 4-5.

approximately ninety-five percent of the lines in the state. Information regarding the way in which Alascom serves these areas is of little usefulness to GCI because it has already established facilities in each of these markets. The remaining locations represent almost exclusively locations for which GCI has already designed facilities, but which GCI is precluded from serving due to the Commission's Alaska Bush Policy. It is inconceivable that data in the CAP regarding the way in which Alascom serves these locations would be useful to GCI.

Alascom seems to have forgotten that the Alascom small earth station network was designed under the direction of GCI's former Vice Chairman and co-founder, Robert Walp, when he worked for the State of Alaska. The network was designed by the State of Alaska because Alascom refused to adopt a small earth station approach to serve these locations.¹⁵ Under Mr. Walp's direction, the State of Alaska actually purchased the earth station equipment for the first one hundred sites. Accordingly, Mr. Walp knew the exact costs of the facilities when they were originally installed. The sites were later upgraded with Hughes DAMA equipment. The Hughes equipment was designed in cooperation with GCI's chief engineer, Richard Dowling, and he is fully familiar with its capability and cost. Indeed, it was this familiarity that led GCI to choose Scientific Atlantic and not Hughes equipment for its own Bush earth station design inasmuch as Scientific Atlantic's equipment had superior performance and lower cost. These design efforts are described in Exhibit 9.

¹⁵ See RCA Global Communications, Inc., 56 FCC 2d 660 (1975).

Thus, the vast majority of locations where GCI has not already committed investment dollars and installed facilities represent locations in which GCI's principals specified, designed, purchased and/or assisted in developing the very facilities that Alascom uses to serve these locations, as well as the facilities which GCI uses and would use. To suggest that the CAP would somehow reveal information that GCI does not already know is plainly absurd; GCI simply seeks to know how Alascom used the information in its CAP and CAP Model.

IV. THE INFORMATION REQUESTED BY GCI SHOULD BE RELEASED SUBJECT TO A PROTECTIVE ORDER

Alascom's Supplement states that the information requested by GCI should not be released because the Commission "already ruled on an identical FOIA request made by GCI and determined that the requested information is confidential under Exemption 4."¹⁶ This statement is incorrect. GCI's current FOIA submission requests the release of certain materials submitted by Alascom to the Commission relating to the CAP that date from 1994-1995. However, the FOIA request also seeks any other materials that Alascom may have provided to the Commission relating to the CAP or CAP Model since 1995. GCI's 1995 FOIA request was more limited in scope and timing. First, it sought only the materials provided by Alascom to the Commission in response to certain Commission inquiries. Second, GCI's 1995 FOIA request did not contemplate the release of materials submitted by Alascom to the Commission after 1995. Thus, the two FOIA requests are not identical in nature or scope. Regardless, nearly eight years now have passed since GCI made its 1995 FOIA request for materials submitted by Alascom to the Commission in 1994-1995. In any event, to the extent that any earlier FOIA ruling

¹⁶ Supplement at 5.

rests upon competitive sensitivity, that rationale would plainly disappear with the passage of time.

Regardless of the nature or scope of GCI's FOIA requests, GCI consistently has made it clear that it is willing to receive the materials requested subject to the protective order already issued by the Commission in this case. This is wholly consistent with Commission precedent. The Commission itself suggested that the requested information might be provided to GCI under a protective order, stating that the Bureau's FOIA determination "did not address the issue of possible discretionary disclosure of this information under a protective order."¹⁷

The existing protective order in this proceeding provides Alascom with adequate protection against disclosure of information in the CAP or the CAP Model. The existing protective order allows parties to designate information as "Confidential" and limits the disclosure of materials to a small class of individuals.¹⁸ The protective order also provides sanctions for violation of its terms. As such, the existing protective order is sufficient to protect Alascom's interests in confidentiality. By arguing against the disclosure of the requested materials, Alascom implicitly presumes that any protective order will be violated. This is an presumption for which Alascom has no basis.

In an apparent effort to direct attention from its unreasonable refusal to share the information under the existing protective order, Alascom cites its offering of a brand new

¹⁷ In the Matter of General Communication, Inc.: on Request for Inspection of Records, Memorandum Opinion and Order, 12 FCC Rcd 8484, 8488 (1997)("FOIA Order").

¹⁸ GCI does not propose that personnel with sales, marketing or related responsibilities be permitted to review the requested material and would be willing to amend the protective order to this effect.

protective order.¹⁹ Though Alascom “offered to provide appropriate representatives of GCI access to the CAP Model in the offices of Alascom’s counsel” and “subject to a protective order previously used before the Commission,”²⁰ the terms and logistics offered are so strict as to effectively deny GCI access under the circumstances of the proceeding. First, Alascom would provide information only to an outside consultant hired by GCI, rather than any of GCI’s in-house employees. By this offer, Alascom is attempting to impose a unnecessary and considerable financial burden on GCI. Second, Alascom offered to provide only the current CAP Model and none of the supporting inputs. If availability of information related to the CAP was limited in this way, neither GCI nor the Commission would have the information necessary to assess Alascom’s claims that the CAP is obsolete. Third, Alascom declined to provide any of the 1994-1995 data that it previously provided to the Commission. Again, this information is critical to determining whether the CAP is, indeed, obsolete. This information is not competitively sensitive. Finally, Alascom offered to provide the information only at the Washington, D.C. offices of Alascom’s counsel. However, GCI is an Alaskan company with personnel located in Alaska. GCI must have the ability to review the information on its own timeframe and in its own offices. Not surprisingly, GCI rejected Alascom’s offer.

As indicated above, the Commission suggested in 1997 that information related to the CAP might be provided to GCI under a protective order.²¹ In its Supplement,

¹⁹ Supplement at 7-8.

²⁰ Id.

²¹ FOIA Order at 8488.

Alascom argues that the CAP “warrants full confidentiality of tariff cost support data, without disclosure under a protective order.”²² Alascom cites two precedents in this regard. First, Alascom references in passing the Commission’s written policy concerning the treatment of confidential materials.²³ Importantly, this policy does not stand for the proposition that Alascom’s CAP model must be withheld from GCI due to its ultra-sensitivity. Rather, the Commission’s policy states that the Commission will address requests for confidential treatment of materials on a “case-by-case basis.”²⁴ The policy also includes as Appendix C a “model protective order” that is nearly identical to protective order already in place in the Waiver Proceeding. Furthermore, the policy speaks directly to the issue of staleness in the context of claims of confidentiality, stating: “we recognize that many types of confidential information become less sensitive as time passes.”²⁵

Alascom also analogizes its CAP submissions to the Commission to “audit data” submitted to the Commission, arguing that CAP data, like audit data, should be “presumed to be exempt from disclosure.”²⁶ To begin, the CAP data is not audit data. Nonetheless, in support of its position, Alascom cites the D.C. Circuit Court of Appeal’s decision in Qwest Communications v. FCC.²⁷ This case, however, does not stand for the proposition a protective order will not adequately protect Alascom’s interests in

²² Supplement at 8.

²³ In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order, 13 FCC Rcd 24816 (1999).

²⁴ Id. at 24829, 24835, 24840-41, 24842, (¶¶ 17, 30, 37, 40).

²⁵ Id. at 24835 (¶30).

²⁶ Supplement at 9.

confidentiality. Rather, in the Qwest case, the D.C. Circuit opined that, with respect to audit information, the FCC may deviate from its standard practice of nondisclosure in "rare cases" and must articulate its public policy rationale if release is made.²⁸ If anything, the case stands for the proposition that FOIA exemptions can be overcome. In our case, which can be distinguished because it is not an audit case, the Commission easily can articulate why GCI needs to review the requested materials inasmuch as GCI cannot reasonably evaluate the claims made in Alascom's Waiver Petition without such a review.

V. CONCLUSION

At bottom, Alascom's effort to conceal the CAP information is a cynical, but not uncommon, effort to deprive a regulator of information that would materially affect the outcome of a proceeding. Alascom knows that GCI has the necessary background knowledge and incentive and therefore is likely to identify the defects in the CAP and Alascom's Waiver Petition. GCI expects that these defects will be revealed when the CAP materials are made available. It is important to note, however, that the materials responsive to GCI's FOIA request tell only half the story. In order to assess the merits of the Waiver Petition, GCI and the Commission must also have the materials relied upon by Alascom's experts in preparing the Waiver Petition.

Based upon the revelations made to date by Alascom's experts thus far in this proceeding, it is apparent that the CAP contains frozen factors and other inappropriate devices that call into question the results of the CAP from the beginning. Only through

²⁷ Qwest Communications International, Inc. v. FCC, 229 F.3d 1172 (D.C. Cir. 2000).

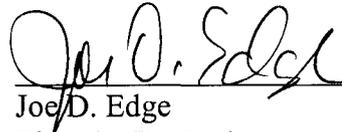
²⁸ Id. at 1183.

comparison of the original CAP Model, inputs, and products with the materials reviewed by the experts can the Alascom's assertions regarding stale data and obsolescence be assessed. Even then, the question is how to resolve those issues, rather than excusing Alascom from the type of regulatory oversight that apparently has been necessary all along. It is ironic that for Alascom to succeed in its plan to escape oversight, it must avoid scrutiny and meaningful review of the CAP. That is why it has opposed release of dated information by relying upon frivolous and unsubstantiated claims of competitive harm.

For the reasons set forth above, GCI requests that the Commission release all of the materials requested in GCI's FOIA request. In addition, GCI agrees to receive the materials subject to the terms of the protective order already executed by the parties in this proceeding.

Respectfully submitted,

GENERAL COMMUNICATION, INC.



Joe D. Edge

Timothy R. Hughes

DRINKER BIDDLE & REATH LLP

1500 K Street, N.W., Suite 1100

Washington, D.C. 20005

202-842-8809

202-842-8465 Fax

Its Attorney

Tina M. Pidgeon

Vice President, Federal Regulatory Affairs.

CERTIFICATE OF SERVICE

I, Carolyn Marshall, do hereby certify that a copy of the foregoing General Communication, Inc. Response to Supplement to Waiver Request and Supplement to Response to FOIA Request was sent as indicated this 9th day of April 2003, to the following parties:

William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
Room 5-C450
445 12th Street, S.W.
Washington, D.C. 20554
(by electronic mail)

Deena Shetler
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by electronic mail)

Tamara Preiss
Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
Room 5-A223
445 12th Street, S.W.
Washington, D.C. 20554
(by electronic mail)

Julie Saulnier
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by electronic mail)

Jeffrey Dygert
Deputy Division Chief, Pricing
Policy Division
Wireline Competition Bureau
Federal Communications Commission
Room 5-A223
445 12th Street, S.W.
Washington, D.C. 20554
(by electronic mail)

Rhonda Lien
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(by electronic mail)

Judith A. Nitsche
Assistant Division Chief, Pricing
Policy Division
Wireline Competition Bureau
Federal Communications Commission
Room 5-A121
445 12th Street, S.W.
Washington, D.C. 20554
(by electronic mail)

Charles R. Naftalin
Holly R. Smith
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006
(by first-class mail)

Elizabeth A. Ross
Birch, Horton, Bittner and Cherot
1150 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036
(by first-class mail)

Qualex International
445 12th Street, S.W.
Washington, D.C. 20554
(by electronic mail)


Carolyn Marshall

Carolyn Marshall