

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	WC Docket No. 03-18
Alascom, Inc. Request for)	
Waiver of Commission Rule)	
And Orders Requiring Annual)	
Tariff Revision)	

**GENERAL COMMUNICATION, INC.
MOTION TO DENY PETITION FOR WAIVER**

General Communication, Inc. (“GCI”), by its attorneys, hereby requests that the Commission deny Alascom, Inc.’s (“Alascom”) Petition for Waiver of the Commission’s Rules Regarding Annual Tariff F.C.C. No. 11 (the “Waiver Petition”), filed in the above-captioned proceeding on January 7, 2003. As the party seeking a waiver of the Commission’s rules, Alascom bears the burden of proving its case for waiver. Despite this burden, Alascom has not made available to GCI or the Commission certain critical information necessary to evaluate Alascom’s Waiver Petition. Because Alascom has not met its burden, the Waiver Petition should be denied. In the alternative, GCI requests that the Commission order the disclosure of the information discussed in this pleading, subject to the terms of the Protective Order released by the Commission in this proceeding on April 10, 2003.

I. INTRODUCTION AND SUMMARY

Alascom has requested that the Commission waive the requirement to file the 2003 annual revision to Tariff F.C.C. No. 11 (“Tariff 11”), the tariff under which Alascom provides common carrier services to locations in Alaska, including services to and from the Alaska Bush communities where Alascom retains a legal service monopoly. Alascom’s Tariff 11 filing

requirement was borne of a long-standing Alaska market structure proceeding, by which Alascom is required to provide origination and termination of long distance traffic to Alaska pursuant to tariff.¹ In addition to filing a tariff to be revised annually, the Commission required that Alascom develop a “Cost Allocation Plan for the Separation of Bush and Non-Bush Costs” (“CAP”) to be used to calculate the rates under which Alascom would provide its Tariff 11 services.² Pursuant to Commission and Alaska Federal-State Joint Board (“Joint Board”) directives, the rates for Tariff 11 services are to be cost-based and revised annually to reflect current costs.

Tariff 11 has been the subject of considerable controversy since Alascom first filed the tariff on September 22, 1995, giving rise to three disputes now pending before the Commission. Each of the three disputes focuses in large part on Alascom’s initial representations to the Commission regarding Tariff 11, the CAP, and the economic model implementing the CAP (the “CAP Model”). Nearly eight years ago, in response to a petition by GCI, the Common Carrier Bureau suspended Alascom’s initial Tariff 11 filings (Transmittal Nos. 790 and 797) and instituted an investigation into the lawfulness of Tariff 11.³ In addition, the Commission imposed an accounting order on the rates proposed by Alascom to facilitate refunds to carriers that may have been overcharged by Alascom.⁴ Since 1995, each one of Alascom’s annual Tariff 11 filings also has been suspended and made subject to the Commission’s on-going, but long

¹ Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States of Alaska, Hawaii, Puerto Rico and the Virgin Islands, Final Recommended Decision, 9 FCC Rcd 2197 (Jt. Bd. 1993) (“Final Recommended Decision”); Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States of Alaska, Hawaii, Puerto Rico, and the Virgin Islands, Memorandum Opinion and Order, 9 FCC Rcd 3023 (1994) (“Market Structure Order”).

² Final Recommended Decision, 9 FCC Rcd 2217; Market Structure Order, 9 FCC Rcd at 3027.

³ Alascom, Inc. Tariff F.C.C. No. 11, Transmittal No. 790, 11 FCC Rcd 3703, 3707 (Com. Car. Bur. 1995).

⁴ Id.

pending, investigation.⁵ A second dispute arose when Alascom proposed in 2000 that the Commission altogether relieve Alascom from its Tariff 11 filing requirements.⁶ GCI opposed Alascom's proposal and the matter remains pending before the Commission.⁷ Finally, the Commission now has before it a third dispute borne of Alascom's unilateral decision to cease filing its annual revisions to Tariff 11, essentially self-granting in part its pending 2000 petition. By its Waiver Petition, Alascom has requested, after the fact, that the Commission excuse Alascom's failure to file an annual Tariff 11 revision for 2003 and further to excuse Alascom from filing annual revisions to Tariff 11 in the future.

At the core of the Tariff 11 controversies is Alascom's CAP, which is used to calculate the rates under which Alascom provides its Tariff 11 services, as well as the CAP Model and its inputs. In the instant Waiver Petition proceeding, Alascom has submitted statements from its consultants in support of its request for relief from filing annual revisions to Tariff 11. These statements refer to the CAP and the CAP Model, drawing certain critical conclusions that implicate representations made by Alascom to the Commission as far back as 1995. According to Alascom's Waiver Petition, the CAP is obsolete due to changes in the general marketplace and the nature of the traffic involved.⁸ Alascom's Waiver Petition claims that the CAP is obsolete, stating that data "hard-coded into the CAP" are "increasing[ly] stale with the passage of time"⁹

⁵ See, e.g., Investigation of Alascom, Inc., Interstate Transport and Switching Services, Order, 16 FCC Red 19 (2000).

⁶ Petition for Elimination of Conditions, CC Docket No. 00-46 (Mar. 10, 2000).

⁷ See Opposition of General Communication, Inc., CC Docket No. 00-96 (filed Apr. 17, 2000).

⁸ See Alascom 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").

⁹ Id. at 11.

Alascom's statements about the sudden obsolescence of the CAP serve as the basis for its Waiver Petition, yet the statements provide outside parties only a glimpse of the workings of the CAP, CAP Model, and its support. In order to evaluate Alascom's representations, GCI, the Commission, and any other interested parties require more information from Alascom and its consultants. Specifically, parties must be able to review the CAP, the CAP Model as initially populated with data and run by Alascom, and more current renditions of the CAP Model, as more recently 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, and if so, the proper course of action—which may not be simply waiving Alascom's tariff obligations. As the Commission recently stated, "Because the [Alascom] consultants rely on the CAP and its underlying models and inputs, neither the validity of Alascom's claims in the waiver petition nor the weight of that should be accorded them can be evaluated without access to the CAP and its underlying data."¹⁰ Alascom has continually refused to provide that information—even subject to a protective order—most recently rejecting yet another GCI request on April 22, 2003.

For these reasons, Alascom's continued refusal to share the information upon which the Waiver Petition is apparently based requires that the Waiver Petition be denied without further delay. In addition, the Commission should require Alascom to file a tariff revision without delay, impose sanctions for Alascom's rule violations, and immediately activate the pending Tariff 11 investigation.

¹⁰ Letter from Joseph T. Hall, Assistant Bureau Chief, Wireline Competition Bureau, to Timothy R. Hughes, Counsel for GCI, dated April 10, 2003, FOIA Request Control No. 2003-208 at 4 ("FOIA Decision").

II. ALASCOM HAS DELAYED ITS COMPLIANCE WITH THE COMMISSION'S RULES FOR FAR TOO LONG

Alascom was required under Commission rules to file its 2003 annual tariff revision on November 27, 2003.¹¹ Instead, Alascom filed a “statement,” referring obliquely to an inability “to determine whether changes to its investment, expenses and operations . . . would be sufficient to warrant rate revisions now for 2003.”¹² Based on this unsubstantiated claim, Alascom further alleged the Commission’s own imprimatur on self-granted relief from the tariff filing obligations, stating that “the Commission foresaw that annual reviews might become unnecessary.”¹³ Of course, the Commission has granted no such relief, and Alascom’s failure to file a tariff—or timely seek a waiver or extension—is an incontrovertible violation of the Commission’s rules. Alascom ultimately did not get around to filing an actual request for waiver of the eight-year-old tariff rule until some 40 days later—a week after the revised tariff should have gone into effect.

The burden lies squarely with Alascom to support its Waiver Petition.¹⁴ In assessing a request to waive its rules, the Commission presumes that its rules are valid, and a petitioner for waiver bears a heavy burden to show otherwise.¹⁵ Alascom simply has not presented a case of

¹¹ 47 C.F.R. § 61.58(e)(3).

¹² Statement of Alascom, CC Docket No. 95-182 (dated Nov. 27, 2002) at 1.

¹³ Id. at 2.

¹⁴ See US West’s Petition for Waiver of Operations Support Systems Implementation Requirements, Memorandum Opinion and Order, 12 FCC Rcd 17437, 17441 (Com. Car. Bur. 1997) (rejecting contention that parties opposing waiver petition must show that US West could have met the deadline and affirming that “[t]he burden is on [petitioner] to show that the waiver is justified”); American Telephone and Telegraph Co. and MCI Communications Corporation, Petitions for the Waiver of the International Settlements Policy, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4621 (1990) (applicant seeking waiver bears burden of proof to establish that the public interest would be better served by the grant rather than the denial of the waiver request).

¹⁵ WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“An applicant for waiver faces a high hurdle even at the starting gate.”); see also Orange Park Florida T.V., Inc. v. FCC, 811 F.2d 664, 669 (D.C. Cir. 1987) (“[I]t is elementary that the judiciary may disturb a Commission refusal to waive its rules only in the event of an abuse of discretion.”).

“good cause shown” to justify grant of the requested waiver.¹⁶ The ability to collect and prepare the data necessary to prepare and file Tariff 11 and its revisions is entirely under Alascom’s control. The subject annual revision was required by standing Commission rules and policies, and though GCI has never agreed with the rates filed, Alascom has managed to make such a filing since 1995. Against this background, Alascom’s current claim of sudden CAP obsolescence does not constitute the type of “special circumstances” that would be necessary to warrant deviation from the longstanding tariff filing requirement.¹⁷ It simply cannot be said that Alascom’s claimed burden associated with preparing a standard tariff filing outweighs the public interest of ensuring that cost-based rates are charged for its services, including its monopoly services. How can it be that Alascom, a subsidiary of AT&T, can prepare a tariff one year but not the next? GCI doubts that there would be *any* showing that would support such a claim, and as set forth in its Opposition, the Waiver Petition must be denied.

In the event that the Commission were to give any further consideration to the Waiver Petition, however, GCI has sought the information necessary to assess the validity of Alascom’s claims and, if so justified, to craft an appropriate remedy. Alascom’s continued refusal to provide even the most basic information, however, underscores that Alascom has every incentive to draw out this proceeding. Every day that passes is another day that Alascom’s self-awarded tariff relief is effectively granted. And now Alascom is stonewalling the Commission and GCI. First, Alascom has yet to respond to the specific, direct questions posed by Commission staff to Alascom in connection with GCI’s recent FOIA request.¹⁸ Alascom has provided no reason for its failure to respond to these questions concerning the vintage of CAP data and inputs and the

¹⁶ 47 C.F.R. § 1.3.

¹⁷ See Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

basis for alleging confidentially for data so identified, the answers to which themselves yield absolutely no information that could be deemed confidential. Second, Alascom has repeatedly refused to provide any information concerning the claims in its Waiver Petition, outside the four corners of its pleading. Alascom has now rejected two requests from GCI to provide the information necessary to assess and evaluate Alascom's claims and the appropriate measures to be taken as a result of Alascom's failure to comply with Commission rules. In fact, Alascom's most recent statements on the matter suggest that Alascom seeks to block even the most basic and most aged information available in connection with the CAP.¹⁹ If Alascom will not provide the essential information concerning the fundamental basis for its belated waiver request, then the petition must be denied.

Upon denial, the Commission must also require Alascom finally to file its 2003 tariff revision, with full cost support. GCI notes that with the passage of time, at least one of the "missing" pieces of data from 2002 that Alascom alleged precluded the timely preparation of the tariff revision should no longer present an issue. Alascom claimed that for an eight-month period from October 2001 through July 2002, certain traffic data needed to perform its Tariff 11 calculation was not collected.²⁰ With Alascom's self-granted extension, it should now have collected at least nine months worth of current data with which to prepare its long-delayed revision, so Alascom should not again claim that it is virtually impossible to do that which Commission rules require—prepare and file a tariff. Moreover, now that Alascom has conceded infirmities in the operation and application of the CAP, it is plain that the Commission must

¹⁸ See Email from Deena Shetler, Deputy Chief, Pricing Policy Division, to Charles R. Naftalin, Counsel for Alascom (dated Apr. 2, 2003).

¹⁹ Letter from Charles R. Naftalin, Counsel for Alascom, to Joe D. Edge, Counsel for GCI (dated Apr. 22, 2003) ("the Commission's Wireline Competition Bureau decided to release a small portion of the information you have asked for in your letter. Alascom . . . intends to file an application for review of its decision.").

²⁰ Waiver Petition at ¶ 8.

commence the Tariff 11 investigation without delay. This will permit the establishment of baseline rates from which a price cap methodology may be followed thereafter.

These actions do not end the Waiver Petition inquiry, however. As GCI demonstrated in its Opposition, Alascom should be sanctioned for its blatant disregard for Commission rules and policies, but also its continued refusal to provide any information that, if revealed, might have brought a quicker resolution to this matter, and more broadly, might well have demonstrated what GCI has long suspected—that from its inception, the CAP, the CAP Model, and all Tariff 11 rates based on the CAP have been unjust and unreasonable.

III. AT A MINIMUM, ALASCOM MUST DISCLOSE INFORMATION REGARDING THE CAP, CAP MODEL, AND INPUTS TO THE MODEL

In this case, in-depth review of the CAP, the CAP Model, and its inputs is necessary to evaluate the claims that serve as the basis for the Waiver Petition. Without access to the materials that serve as the basis for the allegations in the Waiver Petition, however, GCI's ability to oppose the Waiver Petition is irreparably constrained, denying the due process rights of GCI and other parties, and the Waiver Petition cannot be granted.²¹ The Commission's April 10, 2003 decision responding to GCI's February 26, 2003 FOIA Request fully supports this approach. There, the Commission concluded that without data regarding the CAP, CAP Model, and related inputs, Alascom's Waiver Petition cannot be given due consideration and certainly should not be granted. According to the Commission, "Alascom has put the CAP, its underlying model and inputs, and the potential obsolescence of those inputs due to the passage of time at issue in the waiver proceeding."²² Furthermore, "[b]ecause the consultants rely on the CAP and

²¹ GCI filed lengthy opposition to the Alascom Waiver Petition, providing ample grounds to deny the Petition and impose sanctions for Alascom's violation of the annual tariff filing requirements. The Commission certainly could not grant the Waiver Petition, however, if GCI has been denied the opportunity to review the CAP materials and data that Alascom put at issue.

²² FOIA Decision at 7.

its underlying models and inputs, neither the validity of Alascom's claims in the waiver petition nor the weight that should be accorded them can be evaluated without access to the CAP and its underlying data."²³ Finally, the Commission stated that "GCI has made a persuasive showing that it needs the information adequately to respond to Alascom's waiver petition."²⁴

Unfortunately, Alascom has repeatedly refused to release the data necessary to evaluate its Waiver Petition. When GCI sent an informal request to Alascom seeking the CAP, CAP model, and "any other models, algorithms, computer programs and input data used to calculate the Tariff 11 rates most recently filed with the Commission,"²⁵ Alascom rejected the request. GCI next offered to receive the information subject to the Protective Order already accepted by the Commission in the proceeding.²⁶ Alascom refused this offer as well. GCI then was left to try to obtain at least the information in the Commission's possession through the FOIA process, even though such information was not likely to include the very information Alascom's consultants relied on in preparing the Waiver Petition.²⁷ Again, Alascom refused to cooperate. When Commission staff suggested that the Protective Order could be modified to address particular concerns of claimed confidentiality and sought Alascom's proposals for this purpose, Alascom provided none.²⁸

On March 26, 2003, in a conference call with the parties, the Commission tasked Alascom with reviewing relevant materials and providing the Commission with the following:

²³ Id. at 4.

²⁴ Id. at 7.

²⁵ Letter from Joe D. Edge, Counsel for GCI, to Charles R. Naftalin, Counsel for Alascom, WC Docket No. 03-18 (Feb. 11, 2003).

²⁶ Letter from Joe D. Edge, Counsel for GCI, to Charles R. Naftalin, Counsel for Alascom, WC Docket No. 03-18 dated Feb. 11, 2003.

²⁷ At the very least, this earlier data would be necessary to assess Alascom's claims that the CAP had become obsolete over time.

²⁸ See FOIA Decision at 5.

(1) the rationale for non-disclosure of the materials requested by GCI in its FOIA request, taking into account the fact that certain of the materials date from as far back as 1994; (2) the vintage of the last data set used to populate and run the CAP and, if Alascom opposed release to GCI subject to a protective order, an explanation for such opposition; (3) the date when the most recent data set for the CAP was developed; and (4) if Alascom continued to oppose the release of certain data pursuant to protective order, what vintage of data would Alascom agree could be released under a protective order. The Commission also invited Alascom to supplement the record in this proceeding with any valid legal arguments militating against disclosure of the requested materials pursuant to a protective order. The Commission requested that Alascom respond in full to its queries on or before March 28, 2003.

On the afternoon of March 28th, Alascom sent an email to the Commission and GCI stating that its response “to the request that Alascom report to the staff its position on providing CAP-related circa 1994-1995 data to GCI under a protective order” would be delayed because Alascom and AT&T “want to make as thorough a response as possible to the staff in connection with this important subject.”²⁹ Alascom further stated that it intended “to accept the staff’s invitation to supplement the record of the waiver request proceeding by providing its dispositive answer to the question posed by the staff and, in addition, offer detailed justification and citations for it.”³⁰ Alascom indicated that it would supplement the record “probably at the end of next week.”³¹

In response to the Commission’s directives, Alascom filed a Supplement to Waiver Request and Supplement to Response to FOIA Request (“Supplement”) on April 4, 2003. The

²⁹ Email from Charles Naftalin, Counsel for Alascom, to Julie Saulnier, Pricing Policy Division, Tina Pidgeon, Vice President of Regulatory Affairs for GCI, and Joe D. Edge, Counsel for GCI, dated Mar. 28, 2003.

³⁰ Id.

Supplement, however, did not directly respond to any of the Commission's queries nor shed any light on the nature of the CAP, the CAP Model, or the inputs to the CAP Model. Furthermore, Alascom did not provide the Commission with an adequate basis for withholding the requested material. Moreover, Alascom did not provide 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.

In its recent FOIA Decision, the Commission now has ruled that the data in its possession will be released to GCI pursuant to the Protective Order approved and released by the Commission on April 10, 2003.³² The Commission reports that it has in its possession the original CAP, dated August 29, 1994, the Revised CAP, date July 3, 1995, the Revised CAP, dated November 13, 1995, and hard copies of summary input tables.³³ GCI looks forward to receiving these materials, though Alascom has now twice indicated its plans to seek review of the FOIA Decision.³⁴ However, as GCI has demonstrated, these materials alone are not enough for GCI or the Commission to assess the Waiver Petition.³⁵

As a threshold matter, GCI will not be able to assess the utility of the documents in the possession of the Commission until it has the items cited by the Commission in its FOIA Decision in hand. Indeed, the utility of those documents in this proceeding may depend in large part on whether the CAP Model is included and whether the CAP versions are available

³¹ Id.

³² See FOIA Decision at 2.

³³ See id.

³⁴ Letter from Charles R. Naftalin, Counsel for Alascom, to Joe D. Edge, Counsel for GCI (dated Apr. 22, 2003); Email from Holly R. Smith, Counsel for Alascom, to Deena Shetler, Deputy Chief, Pricing Policy Division, et al. (dated Apr. 17, 2003).

³⁵ See GCI Opposition, WC Docket No. 03-18; General Communication, Inc. Response to Alascom, Inc. Supplement to Waiver Request and Supplement to Response to FOIA Request, WC Docket No. 03-18, FOIA Control No. 2003-208 (filed April 9, 2003) ("GCI FOIA Response").

electronically. Regardless, even if these documents are usable in the format provided, these documents alone will not provide GCI and the Commission with the necessary information to assess “the validity of Alascom’s claims in the waiver petition nor the weight that should be accorded them.”³⁶

In its FOIA Decision, the Commission concluded that

GCI has made a persuasive showing that it needs the information adequately to respond to Alascom’s waiver petition. Alascom has put the CAP, its underlying model and inputs, and the potential obsolescence of those inputs due to the passage of time at issue in the waiver proceeding. GCI must review the CAP and its underlying data to respond to Alascom’s claims.³⁷

In order to assess “the potential obsolescence” of the CAP, GCI and the Commission must be able to review all versions of the CAP, the CAP Model as initially populated with data and run by Alascom, and more current renditions of the CAP Model, 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, newly obsolete, or whether the CAP has been functioning in the same manner over some number of years.

For Alascom’s claims of sudden obsolescence to be tested, GCI and the Commission must have access to the CAP model, as populated with data sets over time, and resulting output. Certainly, this is precisely the type of data that Alascom’s consultants would have had to rely on to have the information necessary to reach the conclusions they offered in support of the Waiver Petition. Thus, this is not an issue of unavailability, but one of Alascom’s refusal to provide the data.

For these reasons, on April 18, 2003, GCI submitted yet another request to Alascom for the necessary information, to be received by GCI pursuant to the protective order adopted in the

³⁶ FOIA Decision at 4.

FOIS proceeding or the Waiver Petition proceeding,³⁸ both of which have been executed by GCI representatives and employees. As stated in that letter, at a minimum, Alascom should provide the following information to GCI and the Commission:

1. Any and all versions of the CAP used by Alascom or any outside consultant employed by Alascom, to formulate and/or support Tariff 11 rates;

2. Exact copies of any and all versions of the CAP provided by Alascom to the Commission or the Bureau at any time from 1994 through the present;

3. Exact copies of any and all versions of the CAP provided by Alascom to any outside consultants, including John C. Klick and Julie A. Murphy;

4. Any and all versions of any economic models used or relied upon by Alascom to formulate and/or support Tariff 11 rates, any of Alascom's annual rate revisions to Tariff 11, or the CAP;

5. Exact copies of any and all versions of any economic models used or relied upon by Alascom to formulate and/or support Tariff 11 rates, any of Alascom's annual rate revisions to Tariff 11, or the CAP that were provided by Alascom to the Commission or the Bureau at any time from 1994 through the present;

6. Exact copies of any and all versions of any economic models used or relied upon by Alascom to formulate and/or support Tariff 11 rates, any of Alascom's annual rate revisions to Tariff 11, or the CAP that were provided by Alascom to any outside consultants, including John C. Klick or Julie A. Murphy;

³⁷ Id. at 7.

³⁸ Letter from Joe D. Edge, Counsel to GCI, to Charles R. Naftalin, Counsel to Alascom, WC Docket No. 03-18, dated Apr. 18, 2003.

7. Any and all input data used by Alascom and/or any outside consultants employed by Alascom to populate, formulate, or run the CAP, as well as any and all input data and assumptions used in any economic model supporting the CAP;

8. Any and all input data used by Alascom and/or any outside consultants employed by Alascom to populate, formulate, or run the CAP that has been provided by Alascom to the Commission or the Bureau at any time from 1994 through the present, as well as any and all input data used in any economic model supporting the CAP that has been provided by Alascom to the Commission or the Bureau at any time from 1994 through the present;

9. Any and all input data used by Alascom and/or any outside consultants employed by Alascom to populate, formulate, or run the CAP that has been provided by Alascom to any outside consultants, including John C. Klick or Julie A. Murphy, as well as any and all input data used in any economic model supporting the CAP that has been provided by Alascom to any outside consultants, including John C. Klick or Julie A. Murphy;

10. Exact copies of the following materials: (a) the CAP and any supporting materials submitted by Alascom to the Commission or the Bureau on or about August 29, 1994; (b) the revised CAP and any supporting materials submitted by Alascom to the Commission or the Bureau on or about July 3, 1995; and (c) the revised CAP and any supporting materials submitted by Alascom to the Commission or the Bureau on or about November 13, 1995;

11. Exact copies of the following documents submitted by Alascom to the Commission or the Bureau in support of Alascom's CAP and tariff filings on or about November 29, 1995: (a) a description of Alascom's Common Carrier Services Tariff Rate Development; (b) a Table of Alascom's Interstate Prospective Costs for 1996; (c) Alascom Historical Demand information; (d) Alascom's Prospective Demand Forecast; (e) Alascom's 1996 Demand Forecast for Bush and

non-Bush; (f) a Table containing information on Total Company Plant in Service expenses; (g) a Table containing information on Total Company Depreciation Reserve; (h) a Table containing information on Total Expenses; (i) a Table containing information on Total Depreciation Expenses; and (j) Tables containing information on the CAP model, including model results;

12. Exact copies of the following documents submitted by Alascom to the Commission or the Bureau on or about November 30, 1995: (a) Table on Network Demand by Non-Bush Location; and (b) Tables containing CAP Model results;

13. Exact copies of the following documents submitted by Alascom to the Commission or the Bureau on or about December 4, 1995: (a) a description of Alascom's revised Common Carrier Services Tariff Rate Development; (b) a Table containing Alascom's Demand Analysis; (c) Tables containing Alascom's Alaska Terminating Demand, Originating Demand, and Total Alaska Demand; (d) a Table listing Non-Bush Demand by location; (e) a chart of "Development of 1996 Bush and non-Bush Demand; (f) Tables listing Total Company 1996 separation categories and amounts; (g) Tables listing Total Company pro forma data; (h) Tables showing implementation of Alascom's CAP model; and (i) Prospective Rate Information – Appendix D;

14. Exact copies of any and all diskettes containing electronic versions of the CAP or CAP Model that were provided by Alascom to the Commission or the Bureau at any time;

15. All versions of the CAP or CAP Model, identified by date, that were received or relied on by Alascom or its consultants to prepare the Petition for Waiver. Alascom must also identify which, if any, of the identified data sets it contends are competitively sensitive, by data set, along with a detailed explanation and legal support for that contention; and

16. Provide all sets of data, identified by date, that were received or relied on by Alascom or its consultants to prepare the Petition for Waiver.

Even though GCI volunteered to accept the data—most of not all of which GCI believes is *not* competitively sensitive—subject to either of the two Protective Orders, again, Alascom has refused.³⁹ Without the requested information, GCI cannot assess the validity of the statements appearing in Alascom’s Waiver Petition. Since Alascom has put the CAP, the CAP Model and inputs, and the potential obsolescence of those inputs due the passage of time at issue in the waiver proceeding, GCI must review the CAP and its underlying data to respond to Alascom’s claims. If Alascom refuses to provide the requisite information, the Commission must deny Alascom’s Waiver Petition.

IV. TREATMENT OF ALASCOM INFORMATION

When Alascom first provided the CAP to the Commission in 1994 and 1995, it designated portions of the CAP and supporting materials as “confidential,” claiming that that CAP contained commercially sensitive information.⁴⁰ In support of its claims of confidentiality, Alascom stated that the materials submitted as “confidential” contained “location specific demand and cost data from which competitors could determine Alascom’s margins and allow them to develop and price competitive service offerings.”⁴¹ Alascom further stated that the “detailed cost and demand data would permit competitors to determine patterns of resource

³⁹ Letter from Charles R. Naftalin, Counsel for Alascom, to Joe D. Edge, Counsel for GCI, WC Docket No. 03-18, dated Apr. 22, 2003.

⁴⁰ Alascom originally filed its CAP on August 29, 1994. After the Commission determined the CAP to be deficient, Alascom filed a revised CAP on July 3, 1995. Alascom subsequently filed Tariff FCC No. 11, Transmittal No. 790 on September 22, 1995. Alascom then filed a revised CAP on November 13, 1995. On December 14, 1995, Alascom filed Transmittal No. 797 to revise the rates in its Tariff FCC No. 11 to reflect the November 13, 1995 revisions to the CAP. See Alascom, Inc. Tariff FCC No. 11, Transmittal No. 790, Order, 11 FCC Rcd 3703-05 (Com. Car. Bur. 1995). On November 2, 1995, GCI filed a FOIA request seeking *inter alia* the CAP and all supporting economic models and input data. In response, the Common Carrier Bureau granted in part and denied in part GCI’s FOIA request, and the Commission ultimately concluded that certain documents should be withheld under Exemption 4 of the FOIA, which permits withholding of “commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). However, the Commission suggested that the requested information might be provided to GCI under a protective order. See In the Matter of General Communication, Inc.: on Request for Inspection of Records, Memorandum Opinion and Order, 12 FCC Rcd 8484, 8488 (1997).

allocation and strategic Alascom initiatives.”⁴² GCI argued that the disclosure of the requested materials did not pose a competitive threat to Alascom’s business. GCI continues to believe that the CAP and the underlying economic model are not competitively sensitive, as it demonstrated in its Response to Alascom’s Supplement.⁴³

To the extent that the Commission previously may have concluded that the CAP and related data would not be released due to Alascom’s claim of confidentiality, nearly eight years have passed since Alascom first submitted the CAP to the Commission. Alascom itself now characterizes the cost and demand data for which it once sought protection as stale and dated.⁴⁴ The fact of the matter is that the CAP and its underlying data are not (and never were) competitively sensitive because the CAP and its underlying economic model could not reasonably be used by a rival business to compete with Alascom. Regardless, given the passage of time since Alascom first filed Tariff 11 and Alascom’s own concession that the CAP and its underlying data are “stale,” the competitive concerns initially voiced by Alascom in support of protecting the CAP now are moot. As the Commission itself has recognized in its written policy concerning the treatment of confidential materials, “many types of confidential information become less sensitive as time passes.”⁴⁵ Accordingly, GCI should be granted full access to any materials requested in discovery relating to the CAP and its underlying economic model.

GCI already has executed and filed with the Commission and Alascom declarations agreeing to comply with the terms of the Protective Order released by the Commission in this

⁴¹ See Letter from Brian W. Masterson to Tom Quaille, Common Carrier Bureau, dated Oct. 30, 1995.

⁴² Id.

⁴³ GCI FOIA Response at 9-14.

⁴⁴ 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 at 11.

proceeding on April 10, 2003.⁴⁶ The Protective Order protects Alascom's interests in the confidentiality of any of the materials requested by GCI in this pleading. In fact, the Protective Order itself states: "This Protective Order applies to the material designated as confidential in the Alascom Waiver Petition proceeding and claimed as confidential in response to GCI's FOIA Request, as well as material designated as confidential in any subsequent filings in these matters."⁴⁷ Therefore, the Commission contemplated that the Protective Order would be used throughout the Waiver Petition proceeding, and would not be limited to the FOIA context. As written, the Protective Order provides Alascom ample protection in any context.

⁴⁵ 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, 24835 (¶ 30) (1999).

⁴⁶ Alascom's so-called offer to provide access to the CAP model in the office of its Washington, DC, Counsel was an empty gesture. Alascom refused to provide inputs to the model, making it impossible to assess the relationships, which theoretically changes from year to year, and hard-coded data.

⁴⁷ FOIA Decision, Protective Order, adopted and released April 10, 2003 at 2 n.4 (¶ 3).

V. CONCLUSION

Despite repeated requests, Alascom has not made available to GCI or the Commission certain critical information necessary to evaluate Alascom's Waiver Petition. Because Alascom has not met its burden, the Waiver Petition should be denied without further delay. In addition, the Commission should require Alascom to file a tariff revision, impose sanctions for Alascom's rule violations, and immediately activate the pending Tariff 11 investigation. In the alternative, GCI requests that the Commission order the disclosure of the information set forth in this pleading, subject to the terms of the Protective Order released by the Commission on April 10, 2003, so that this proceeding may be resolved without further delay.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Colleen Mulholland, do hereby certify that a copy of the foregoing General Communication, Inc. Motion to Deny Petition for Waiver was sent as indicated this 24th day of April 2003, to the following parties:

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