

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

In the matter of)
)
 GENERAL COMMUNICATION, INC.) FOIA Control No. 2003-208
)
 On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2004

Released: July 8, 2004

By the Commission:

1. The Commission has before it two applications for review arising from the Freedom of Information Act (FOIA) request filed by General Communication, Inc. (GCI) for records related to Alascom, Inc.'s Annual Tariff FCC No. 11, including materials relied upon by Alascom in formulating and supporting the rates appearing in the tariff. Alascom asserted that the records sought by GCI were confidential and should be withheld from GCI. The Wireline Competition Bureau (WCB or the Bureau) determined that the records located in response to GCI's request should be released to GCI subject to a protective order. Both Alascom and GCI sought review of the Bureau's decision. For the reasons described below, Alascom's application for review is dismissed as moot, and GCI's application for review is granted to the extent indicated herein.

I. BACKGROUND

The Alaska Market Structure Proceeding
And Alascom's Tariff FCC No. 11

2. In 1994 the Commission completed a lengthy rulemaking proceeding concerning Alaska's market structure, approving policies for providing switching and transport services for the origination and termination of interstate traffic to Alaska.¹ Under the Commission's policies, Alascom would be permitted to calculate the rates for its services pursuant to a Cost Allocation Plan (CAP) that apportioned its costs of providing service between bush areas (where Alascom faced no competition) and non-bush areas (where Alascom faced competition).² Alascom was required to file annual revisions to its tariffs to ensure that the rates reflect current costs.³ In 1995, shortly after completion of the Alaska market structure proceeding, Alascom became a wholly owned subsidiary of AT&T Corporation. When Alascom filed its first tariff, Tariff FCC No. 11, in 1995, the Pricing Policy Division (previously the Competitive Pricing Division or the Tariff Division) of WCB (previously the Common Carrier Bureau) suspended the tariff and instituted an investigation.⁴ All of Alascom's subsequent annual tariff filings were likewise suspended and incorporated into the ongoing investigation.

¹ See Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico, and the Virgin Islands, 9 FCC Rcd 3023 (1994).

² Id. at 3023, 3025.

³ Id. at 3023, 3025, and 3027; see also 47 C.F.R. § 61.58(e)(3).

⁴ Alascom, Inc. Tariff FCC No. 11, Transmittal No. 790, 11 FCC Rcd 3701 (Com. Car. Bur. 1995).

3. GCI provides, among other services, interexchange service in Alaska in competition with AT&T, Alascom's parent company. To provide service, GCI purchases from Alascom switching and transport services for interstate traffic originating or terminating in most bush areas pursuant to Alascom's Tariff FCC No. 11. When Alascom's Tariff FCC No. 11 was filed in 1995, GCI petitioned against the tariff and sought information regarding the CAP and Alascom's support for its proposed rates through the FOIA process. The Commission ultimately determined that some of the cost support materials requested by GCI were confidential and could be withheld pursuant to FOAI Exemption 4, 5 U.S.C. § 552(b)(4).⁵ In so ruling, the Commission expressly left to the Bureau to determine whether the confidential materials should be released pursuant to protective order.⁶

Alascom's Waiver Petition

4. On January 7, 2003, Alascom filed a petition for waiver of the Commission's rule requiring Alascom to file annual updates to its Tariff FCC No. 11.⁷ Alascom supported the Waiver Petition with a declaration by its consultants detailing problems with the CAP and the models and inputs underlying it. The Bureau sought comment on the Waiver Petition, and, pursuant to its standard practice when filing carriers seek confidential treatment of cost information supporting their tariffed rates, issued a protective order to allow commenting parties access to the declaration supporting Alascom's waiver petition.⁸ GCI executed the protective order and submitted it to Alascom, but Alascom refused to release the CAP model and inputs.

GCI's FOIA Request

5. GCI filed a FOIA request on February 26, 2003⁹ seeking (1) all versions of the CAP used by Alascom, AT&T, or former owners of Alascom to formulate or support Alascom's Tariff FCC No. 11 or Alascom's annual rate revisions to Tariff FCC No. 11; (2) all versions of any economic models used or relied upon by Alascom to formulate or support Tariff FCC No. 11; (3) all input data used to "populate, formulate, or run the CAP or any input data used in any economic model supporting the CAP;" (4) three versions of the CAP;¹⁰ (5) a list of documents characterized by GCI as having been submitted by Alascom to the Commission on November 29, 1995 in support of its CAP and tariff filings;¹¹ (6) a table on Network Demand by Non-Bush Location and tables containing CAP model results submitted on November 30, 1995; (7) documents submitted on December 4, 1995 by Alascom;¹² and (8) a diskette

⁵ General Communication, Inc., 11 FCC Rcd 5373 (1996) (GCI I), *recon. denied*, 12 FCC Rcd 17143 (1996) (GCI II); General Communication, Inc., 12 FCC Rcd 8484 (1997) (GCI III).

⁶ GCI I, 11 FCC Rcd at 5375; *see also* GCI II, 12 FCC Rcd at 17148.

⁷ Alascom Petition for Waiver of Commission's Rules Regarding Its Annual Tariff FCC No. 11, WC Docket No. 03-18 (filed Jan. 7, 2003) (Waiver Petition), petition denied Alascom, Inc. Tariff FCC No. 11, Petition for Waiver of Annual Filing Requirement, 18 FCC Rcd. 16450 (WCB 2003). Alascom did not seek review of this decision.

⁸ Pleading Cycle Established for Alascom, Inc. Petition for Waiver of Commission Rules Regarding Its Annual Tariff FCC No. 11, 18 FCC Rcd 704 (2003) (attaching a protective order for use in the waiver proceeding).

⁹ Letter from Timothy R. Hughes, Esq., Drinker, Biddle & Reath, to Managing Director, FCC (Feb. 26, 2003) (FOIA Request).

¹⁰ The original CAP (Aug. 29, 1994); the revised CAP (July 3, 1995); and the revised CAP (Nov. 13, 1995).

¹¹ A description of Alascom's "Common Carrier Services Tariff Rate Development;" Table 2 (Alascom's Interstate Prospective Costs for 1996); Table 3 (Alascom Historical Demand); Table 4 (Alascom Prospective Demand Forecast); Table 5 (Alascom 1996 Demand Forecast for Bush and non-Bush); tables continuing information on Total Company Plant in Service Expenses, Total Company Depreciation Reserve; Total Expenses; Total Depreciation Expenses; and the CAP Model (including model results).

copy of the model implementing Alascom's revised CAP. GCI acknowledged that the Commission had previously determined that portions of the 1994 and 1995 CAPs were confidential and could be withheld pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4).¹³ It argued, however, that due to the passage of time, the CAP is no longer commercially sensitive.¹⁴ Nevertheless, GCI stated that it was willing to accept the records sought in its FOIA request under the protective order issued in response to the Waiver Petition.¹⁵

6. Alascom opposed GCI's FOIA request.¹⁶ It relied on the prior Commission decisions determining the materials sought by GCI were confidential, and submitted a declaration in support of its claim that the information contained in the requested materials is competitively sensitive.¹⁷ GCI responded to the Supplemental Alascom Response.¹⁸

The Bureau's Decision and
The Applications for Review

7. The Bureau granted in part and denied in part GCI's FOIA request.¹⁹ The Bureau located the three CAPs, and hard copies of tables showing summaries of inputs to the CAP model.²⁰ It determined that these records should be released to GCI under a protective order, explaining:

the Bureau does not question Alascom's claim that the information is confidential, or disturb prior Commission findings that the information is confidential. Rather, we find that release of the information pursuant to protective order adequately protects Alascom from possible competitive harm, while providing GCI the information it must have to participate in the Commission's consideration of Alascom's request that the rule requiring it to file annual updates to its Tariff FCC No. 11 be waived.²¹

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¹² A description of Alascom's revised Common Carrier Services Tariff Rate Development; tables containing Alascom's Demand Analysis, Alascom's Alaska Terminating Demand, Originating Demand, and Total Alaska Demand; Non-Bush by location; Total Company 1996 separation categories and amounts; Total company pro forma data; and implementation of Alascom's CAP model; a chart of "Development of 1996 Bush and non-Bush Demand;" and Prospective Rate Information (App. D).

¹³ Id. citing GCI II.

¹⁴ FOIA Request at 4, citing Waiver Petition at 12.

¹⁵ FOIA Request, at 4, citing Waiver P/O, 18 FCC Rcd at 707.

¹⁶ Letter from Charles R. Naftalin to Managing Director, FCC (Mar. 13, 2003) (Alascom Response); see also Supplement to Waiver Response; Supplement to Response to FOIA Request (Apr. 4, 2003) (Supplemental Alascom Response).

¹⁷ See Alascom Response at 1-5 and Attachment A (Declaration of John C. Klick and Julie A. Murphy); Supplemental Alascom Response, at 5-6 and attached second Declaration of John C. Klick and Julie A. Murphy.

¹⁸ General Communication, Inc. Response to Supplement to Waiver Request and Supplement to Response to FOIA Request (Apr. 9, 2003) (Supplemental GCI Response).

¹⁹ Letter from Joseph T. Hall, Assistant Bureau Chief, Management, WCB to Timothy R. Hughes, Drinker, Biddle & Reath, LLP (Apr. 10, 2003) (FOIA Decision).

²⁰ Id. at 2 and Attachment III.

²¹ Id. at 5.

A protective order was issued with the FOIA Decision, providing that that records responsive to GCI's FOIA request that are in the Commission's possession would be made available to GCI under the Protective Order to allow GCI "to assess the validity of Alascom's representations in its waiver request."²²

8. The instant applications for review followed the FOIA Decision and protective order. GCI's application for review urges the Commission to renew its search for the records not located by the Bureau.²³ It also asks that the Commission clarify that the protective order generally applies to the Waiver Proceeding.²⁴ Alascom's application for review argues that the Bureau failed to address adequately the competitive harm that would flow from release of the information even under a protective order.²⁵ Alascom asserts that the unique nature of the records at issue requires the withholding of the records.²⁶ Alternatively, Alascom requests that a more stringent protective order be adopted to govern access to the records.²⁷ Each party replied to the other's application for review.²⁸

Subsequent Developments

9. Following the filing of the applications for review, on July 10, 2003, the Bureau adopted a revised protective order incorporating many of the changes sought by the parties.²⁹ The parties were also contacted to determine whether the newly-issued Revised Protective Order resolved the issues raised in their applications for review.³⁰ In the meantime, on August 13, 2003, the Bureau denied Alascom's Waiver Petition.³¹ GCI responded that although the Bureau had denied Alascom's Waiver Petition, the materials it sought remained relevant to the continuing tariff investigations and until Alascom provided the materials under the protective order, GCI would not withdraw its application for review.³² Alascom states that the protective order "was agreed to by Alascom without prejudice to its positions taken in its Application for Review," and that it continued to assert that the grant of GCI's FOIA request pursuant to the protective order should be reversed.³³

²² General Communication, Inc., Protective Order (FOIA Control No. 2003-208 rel. Apr. 10, 2003) (First Protective Order), at 1.

²³ Letter from Joe D. Edge, counsel for GCI, to John Rogovin, General Counsel (Apr. 24, 2003) (GCI Application for Review), at 3-4.

²⁴ Id. at 4-6.

²⁵ Alascom, Inc. Application for Review (Apr. 24, 2003) (Alascom Application for Review).at i, 4-8.

²⁶ Id. at i, 9-10, citing Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, 13 FCC Rcd 24816, 24842 (1998) (Confidentiality Order) (tariff related information may be protected fully from disclosure in the "rarest of circumstances"), recon. den., 14 FCC Rcd 20128 (1999).

²⁷ Id. at 10-12 and Attachment A (proposed protective order).

²⁸ General Communication, Inc. Response to Alascom Application for Review (May 8, 2003) (GCI Response to Application for Review); Alascom, Inc. Reply to Application for Review (May 8, 2003) (Alascom Response to Application for Review).

²⁹ General Communication, Inc., 18 FCC Rcd 14447 (PPD/WCB 2003) (Revised Protective Order).

³⁰ Letter from Laurence H. Schecker, Attorney-Advisor, Office of General Counsel, to Timothy R. Hughes, Esq. (counsel for GCI) and Charles F. Naftalin, Esq. (counsel for Alascom) (July 17, 2003).

³¹ Alascom, Inc., Tariff FCC No. 11, Petition for Waiver of Annual Filing Requirement, 18 FCC Rcd 16450 (2003) (Alascom Waiver Denial). Alascom has not sought review of that decision.

³² Letter from Tina M. Pidgeon, Vice-President, Federal Regulatory Affairs, GCI, to Laurence H. Schecker, Esq., Office of General Counsel (Aug. 15, 2003) (GCI Supplement).

³³ Alascom, Inc.'s Supplement to Application for Review (Aug. 15, 2003).

II. DISCUSSION

10. For the reasons discussed below, we vacate in part the Bureau's FOIA decision, to the extent it has been rendered moot by subsequent events. We also dismiss Alascom's application for review as moot, and grant GCI's application for review to the extent indicated below.

Alascom's Application for Review

11. As outlined above, the reason underlying GCI's FOIA request was to enable GCI's participation in the Waiver Petition proceeding. As a consequence, the Bureau's FOIA decision and protective orders indicated that GCI was afforded access to the records pursuant to a protective order for that purpose.³⁴ Subsequently, the Bureau denied the Waiver Petition.³⁵ Accordingly, the Waiver Petition proceeding is now over, and the sole basis for the Bureau's decision to afford GCI access to the documents under a protective order no longer exists. Insofar as the Bureau's decision directed disclosure under a protective order, it is therefore moot, and we vacate that aspect of the decision.³⁶ Because we vacate the Bureau's decision to the extent it granted access to the records pursuant to the protective order, Alascom's application for review, which challenged the Bureau's decision to disclose the records, is also dismissed as moot. As discussed below, however, we offer guidance on the appropriateness of such a protective order in the event the Bureau concludes these records are relevant to the ongoing investigation of Tariff FCC No. 11.

GCI's Application for Review

12. As to GCI's application for review, it is appropriate to clarify some remaining matters. We note that GCI had asked the Commission to clarify that the Bureau's protective order would apply, not merely in the FOIA proceeding, but also in the Waiver Petition proceeding, pointing out that the FOIA proceeding and the Waiver Petition proceeding are "inextricably intertwined."³⁷ As indicated in paragraph 11 above, however, we find that the protective order applied only in the context of the Waiver Petition and is not applicable in the FOIA context. The FOIA provides that, unless records fall within a FOIA exemption, public disclosure is required. Therefore, although the Commission's rules authorize the disclosure of exempt materials under protective orders, such limited disclosures are not equivalent to the public disclosure required by the FOIA.

13. GCI's second argument on review was that the Bureau did not conduct an adequate search of the records sought in its FOIA request. We have no basis to believe that the Bureau did not conduct an adequate search for these documents. Nevertheless, the Commission has previously indicated that when records cannot be located initially, the Bureau should continue to search for them.³⁸ We also recognize that, subsequent to the filing of the applications for review in the instant proceeding, the Bureau indicated that it would proceed with its investigation of Tariff FCC No. 11.³⁹ If the records cannot be

³⁴ FOIA Decision at 5.

³⁵ See Alascom Waiver Denial, *supra* n.31.

³⁶ The Bureau's decision that the materials sought through the FOIA may be withheld pursuant to FOIA Exemption 4 is not vacated. See GCI I, GCI II, and GCI III, *supra*.

³⁷ GCI Application for Review at 4-6.

³⁸ See Almiria Capital Corp., 11 FCC Rcd 6710, 6711 (1996) (staff directed to continue to search for a record that could not be located); see also 47 C.F.R. § 0.461(k).

³⁹ On October 31, 2003, the Commission issued a Public Notice seeking further comment on Alascom's Tariff FCC No. 11, asking the parties to indicate whether ensuing events have changed their position with respect to the tariff. Further Comment Requested in Investigation of Alascom, Inc. Tariff FCC No. 11, 18 FCC Rcd 22542 (2003),

(continued...)

located, and the Bureau determines that they are necessary to the on-going investigation, it should direct Alascom to provide them to the Bureau.

14. Finally, in supplemental pleadings, GCI argues that it should be afforded access to these documents in order to participate in the Bureau's investigation of Tariff FCC No. 11.⁴⁰ These arguments, however, have never been presented to the Bureau. We decline to rule on them in the first instance, and direct the Bureau to resolve them in accordance with the Commission's established policies. To expedite resolution of any continuing controversy, however, we take this opportunity to offer additional guidance. Alascom is correct that in the Confidentiality R&O we indicated that there are "rare instances" when records are so sensitive that they would not be released pursuant to a protective order. There have been very limited circumstances where we have determined that parties to a proceeding could not have access to especially sensitive material, such as in pricing flexibility petitions for special access and dedicated transport services where information concerning the identity of specific service providers that have collocated their facilities in wire centers is submitted by the petitioning price cap LEC.⁴¹ Alascom claims that the granularity of the data here makes it especially sensitive,⁴² but we note that in other circumstances, we have made available granular market information⁴³ or under enhanced protections other material considered "highly sensitive."⁴⁴ The revised protective order, in our view, adequately precludes use of the materials in a manner that will result in competitive harm. Protective orders are standard mechanisms for affording access to sensitive information, both at this Commission and in judicial settings,⁴⁵ and we retain ample authority to address a misuse of information obtained under a protective order.⁴⁶

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clarified sub nom. Investigation Of Alascom, Inc. Tariff FCC No. 11 Clarification Of Filing Deadlines, 18 FCC Rcd 25681 (2003). Comments were due December 15, 2003, and reply comments were due January 9, 2004.

⁴⁰ See GCI Supplement at 1.

⁴¹ See, e.g., Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services, 19 FCC Rcd 1805 (PPD/WCB 2004) (withholding inspection of collocation data). In the Pricing Flexibility Order, the Commission required a price cap LEC to provide to each party upon which it relies in its pricing flexibility petition any information contained in the petition about that party's collocation arrangements, even if the price cap LEC has sought confidential treatment of that information, certify in its petition that it has done so, and provide to the Commission a copy of the information it provides to those parties. Access Charge Reform, 14 FCC Rcd 14221, 14311 (1999) (Pricing Flexibility Order); 47 C.F.R. § 1.774(e)(1)(ii). The price cap LEC may provide data to the party in redacted form, revealing only that information that relates to that party. See 47 C.F.R. § 1.774(e)(1)(ii)(B).

⁴² See Alascom Application for Review at 4-6.

⁴³ See Federal-State Joint Board on Universal Service, 15 FCC Rcd 8746, 8751-52 (2000) (wire-center line count data).

⁴⁴ See News Corporation, General Motors Corporation, and Hughes Electronics Corporation, Order Concerning Second Protective Order, 18 FCC Rcd 15198, 15199 (2003) (special protections for access to "highly sensitive materials").

⁴⁵ See, e.g., Confidentiality Report, 13 FCC Rcd at 24823-24, 24831-32; see also F.R. Civ. P. 26(c)(7) (issuance of protective orders so that "commercial information not be revealed or be revealed only in a designated way"); Micro Motion, Inc. v. Kane Steel Co., Inc., 894 F.2d 1318, 1324 408, 416 (M.D.N.C. 1991) ("When the material sought involves matters which go to the heart of the case, it is likely that some type of disclosure must be expected."), citing Maritime Cinema Serv. Corp. v. Movies En Route, Inc., 60 F.R.D. 587 (S.D.N.Y. 1973).

⁴⁶ See Revised Protective Order, 18 FCC Rcd at 14452 (sanctions for violations of a protective order).

III. ORDERING PARAGRAPHS

15. IT IS ORDERED that the Bureau's decision is VACATED to the extent described herein and Alascom, Inc.'s application for review is DISMISSED AS MOOT. IT IS FURTHER ORDERED that General Communications, Inc.'s application for review is GRANTED to the extent described herein.

16. General Communications, Inc. may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

17. The officials responsible for this action are the following Commissioners: Chairman Powell, Commissioners Abernathy, Copps, Martin and Adelstein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary