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

In the matter of	)	
	)	
Alascom, Inc., Tariff FCC No. 11,	)	
Petition for Waiver of Annual Filing	)	WC Docket No. 03-18
Requirement	)	

ORDER

Adopted: August 13, 2003 **Released: August 13, 2003**

By the Senior Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we address Alascom Inc.'s (Alascom) petition for a waiver of the Commission's requirement that it file, on at least 35 days' notice, annual revisions to its Tariff FCC No. 11.[1] This tariff sets transport and switching rates for the origination and termination of interstate, interexchange traffic to and from Alaska. Alascom is a common carrier providing interstate interexchange transport and switching services that are necessary for other interexchange carriers to provide services in Alaska up to the point of interconnection with each Alaska local exchange carrier. For the reasons discussed below, we deny Alascom's *Waiver Petition* and, accordingly, require it to file annual revisions to its Tariff FCC No. 11 no later than September 26, 2003.

II. BACKGROUND

2. In 1994, after a six-year proceeding conducted by the Federal-State Alaska Joint Board (Joint Board), the Commission issued an order adopting almost all of the Joint Board's recommendations for establishing a new market structure in Alaska.[2] One objective of the Joint Board's proceeding, expressly adopted by the Commission, was to allow competitive entry into the market for telecommunications services in Alaska.[3] In adopting the Joint Board's recommendations, the Commission stated: "We conclude that the market structure in Alaska

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[1] *Alascom Petition for Waiver of Commission's Rules Regarding its Annual Tariff FCC No. 11,* WC Docket No. 03-18 (Jan. 7, 2003) (*Waiver Petition*). *See also* 47 C.F.R. § 61.58(e)(3).

[2] *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*, CC Docket No. 83-1376, Memorandum Opinion and Order, 9 FCC Rcd 3023 (1994) (*Market Structure Order*); *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,* CC Docket No. 83-1376, Final Recommended Decision, 9 FCC Rcd 2197 (Jt. Bd. 1993) (*Final Recommended Decision*).

[3] *Market Structure Order,* 9 FCC Rcd at 3023.

should be restructured to promote more competition, open entry, and improve efficiency . . . ."[4] The Commission further found that such a restructured market:

> will enhance competition, thereby increasing the availability of new services at lower prices for Alaska telecommunication consumers . . . . Competitive markets encourage carriers to adopt new technologies, develop new and innovative services, reduce costs by eliminating waste, provide service more efficiently, and improve customer service. Increased competition should ensure that there is continuing investment in the telecommunication infrastructure for Alaska both for existing and new services.[5]

3. The *Market Structure Order* required Alascom to offer "common carrier" services on a non-discriminatory basis at rates that reflect the costs of the services.[6] These Alascom common carrier services are defined as "all interstate interexchange transport and switching services that are necessary for other interexchange carriers to provide services in Alaska up to the point of interconnection with each Alaska local exchange carrier."[7] The *Market Structure Order* further required Alascom to establish two geographic rate zones and to allocate the costs of providing service to these two zones pursuant to a cost allocation plan (CAP) to be developed by Alascom and approved by the Commission.[8] The *Market Structure Order* described the two geographic rate zones as "locations subject to facilities competition (non-Bush) and . . . locations where Alascom has a facilities monopoly (Bush)."[9] The Commission adopted the two-rate-zone and CAP requirements in response to the Joint Board's expressed concern that the cost of providing service to bush areas was substantially higher than the cost of providing service to non-bush areas, thus providing Alascom a possible incentive to discriminate against competitors or cross-subsidize competitive, non-bush services with revenues from non-competitive bush services.[10] Finally, the *Market Structure Order* required Alascom to revise its common carrier

[4] *Id.* at 3025.

[5] *Id.* at 3024.

[6] *Id.*

[7] *Id.* at 3023, n.5.

[8] *Id.* at 3023.

[9] *Id.* Prior to the *Market Structure Order*, a bush community generally had been defined as a rural community of less than 1000 residents isolated from larger cities. *See, e.g., Policies Governing the Ownership and Operation of Domestic Satellite Earth Stations in the Bush Communities in Alaska,* CC Docket No. 80-584, Tentative Decision 92 FCC R2d 736, n.1(1982). In denying petitions to reconsider its approval of Alascom's CAP, the Commission's Wireline Competition Bureau (then the Common Carrier Bureau) (Bureau) interpreted the terms "bush" and "non-bush" to mean areas where Alascom is the monopoly service provider and areas where Alascom faces competition. *Alascom, Inc. Cost Allocation Plan for the Separation of Bush and Non-Bush Costs*, File No. AAD 94-119, Memorandum Opinion and Order on Reconsideration and Order Approving Cost Allocation Plan, 12 FCC Rcd 1991 (Com. Car. Bur. 1997) (*CAP Approval Reconsideration Order*). Alascom's Application for Review of this decision is pending. *See Alascom, Inc., Cost Allocation Plan for the Separation of Bush and Non-Bush Costs,* File No. AAD 94-119, Application for Review (Mar. 12, 1997) (*Alascom CAP Approval Application for Review*).

[10] *Market Structure Order,* 9 FCC Rcd at 3023. *See also Final Recommended Decision*, 9 FCC Rcd at 2205-06.

services tariff annually to reflect current costs.[11]

4. After requiring certain revisions, the Bureau approved Alascom's CAP in 1995.[12] Alascom filed its first common carrier services tariff with rates produced by the CAP, Tariff FCC No. 11, in 1995. Petitioners challenging the tariff raised questions regarding its lawfulness, and, therefore, the Bureau suspended the tariff, imposed an accounting order, and instituted an investigation.[13] The Bureau has similarly suspended all of Alascom's subsequent annual Tariff FCC No. 11 filings and incorporated them into this same investigation, which is still ongoing.[14]

5. In 1997, the Bureau reconsidered its approval of the CAP and decided, among other issues, to prevent Alascom from changing the classification of bush and non-bush areas based solely on the presence of a competitor, whether facilities-based or not.[15] The Bureau expressed concern that, by reclassifying a bush area as non-bush upon entry by a competitor, Alascom could immediately lower its rates and drive the new competitor from that bush area. The Bureau concluded that these competitive concerns justified a requirement that bush and non-bush areas could be reclassified only by petition to the Bureau.[16]

6. Alascom is presently the only provider of facilities-based common carrier services to many of the Alaska bush areas. This situation is an outgrowth of the Commission's "bush policy," developed to regulate the private provision of telephone service to Alaska. The Commission, concerned about the unnecessary costs of constructing duplicate satellite earth station and space segment facilities, decided generally to allow only one facilities-based provider of origination and termination services for interstate, interexchange traffic in Alaska.[17] In a separate proceeding, the Commission recently abolished the Alaska bush policy.[18]

7. Since the Commission's adoption of the *Market Structure Order*, the Bureau's approval of the CAP, and Alascom's filing of its first Tariff FCC No. 11, several of the conditions under which Alascom provides its common carrier services have changed. First, shortly after adoption of the *Market Structure Order* and while the Bureau was reviewing the

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[11] *Market Structure Order,* 9 FCC Rcd at 3027. Until 2002, Alascom filed the annual revisions to its Tariff FCC No. 11 to become effective on the first day of each year. Commission rules require Alascom to file its annual revisions on at least 35 days' notice. 47 C.F.R. § 61.58(e)(3).

[12] *Alascom, Inc. Cost Allocation Plan for the Separation of Bush and Non-Bush Costs,* Order, 10 FCC Rcd 9823 (Com. Car. Bur. 1995).

[13] *Alascom, Inc. Tariff FCC No. 11, Transmittal No. 790,* CC Docket No. 95-182, Order, 10 FCC Rcd 3703 (Com. Car. Bur. 1995).

[14] *Alascom, Inc. Tariff FCC No. 11, Transmittal No. 807,* CC Docket No. 95-182, Order, 11 FCC Rcd 10833 (Com. Car. Bur. 1996); *Transmittal No. 852*, Order, 12 FCC Rcd 3646 (Com. Car. Bur. 1997); *Transmittal No. 921,* Order, 13 FCC Rcd 187 (Com. Car. Bur. 1998); *Transmittal Nos. 921, 937, 941 and 942*, Order, 13 FCC Rcd 4659 (Com. Car. Bur. 1998); *Transmittal No. 1088*, Order, 15 FCC Rcd 6 (Com. Car. Bur. 1999); *Transmittal No. 1184*, Order, 16 FCC Rcd 19 (Com. Car. Bur. 2000); *Transmittal No. 1260*, Order, 17 FCC Rcd 24 (Com. Car. Bur. 2001).

[15] *CAP Approval Reconsideration Order,* 12 FCC Rcd at 2003.

[16] *Id.* at 2004-05.

[17] *Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities,* Docket No. 16495, Memorandum Opinion and Order, 38 FCC 2d 665, 696 (1972). Carriers used satellites to provide most telephone service to Alaska in the early 1970's.

[18] *Policy for Licensing Domestic Satellite Earth Stations in the Bush Communities of Alaska,* IB Docket No. 02-30, RM No. 7246, Report and Order, FCC 03-197 (rel. Aug. 12, 2003).

CAP, Alascom became a wholly-owned subsidiary of AT&T. In authorizing the transfer of Alascom to AT&T, the Commission imposed on the new AT&T Alascom entity all of the *Market Structure Order's* obligations, including the tariff filing requirement. The Commission stated:

> Applicants assert that their proposed transfer is in conformity with these requirements of the *Market Structure Order*. Applicants state that they seek no material modifications of the *Market Structure Order* and that Alascom, under new ownership as "AT&T/Alascom" will continue to exist as a separate subsidiary of AT&T with no change in corporate, legal or *regulatory* status.[19]

8. In addition to obtaining control of Alascom, AT&T separately sought and obtained from the Commission a reclassification of its status as a dominant carrier for the provision of domestic interstate long-distance services to a non-dominant carrier for such services. In granting AT&T's motion for reclassification, the Commission affirmed that the reclassification "does not affect the continuing effectiveness and validity" of the *Market Structure Order* and the lengthy Joint Board proceeding underlying it.[20] The Commission also noted that AT&T had "voluntarily committed . . . to comply with all the obligations and conditions set forth in the *Alascom Authorization Order*, the *Market Structure Order* and the *Final Recommended Decision*."[21] On reconsideration, the Commission confirmed and clarified its holding that AT&T/Alascom's obligations under the *Market Structure Order* would continue after AT&T's reclassification, stating:

> Indeed, the Commission noted in the *AT&T Reclassification Order*, [citation omitted] and we clarify here, that, to the extent AT&T/Alascom has been found to be dominant in the provision of "common carrier" services . . . AT&T/Alascom's regulatory obligations with respect to those services remain unchanged, and therefore AT&T/Alascom is required to file tariffs for such services on a dominant carrier basis.[22]

Thus, despite significantly changing how Alascom's parent, AT&T, is regulated, the Commission has consistently and expressly maintained Alascom's obligation to file a tariff for its interexchange transport and switching services in Alaska.

9. Another change since adoption of the *Market Structure Order* is that General Communication, Inc. (GCI), a carrier providing telecommunications services in Alaska in competition with Alascom, obtained a temporary waiver of the Commission's bush policy and

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[19] *Application of Alascom, Inc., AT&T Corporation and Pacific Telecom Inc. For Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corporation*, File No. W-P-C-7037 *et al*., Order and Authorization, 11 FCC Rcd 732, 741 (1995) (*Alascom Authorization Order*) (emphasis supplied).

[20] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier,* Order, 11 FCC Rcd 3271, 3335 (1995) (*AT&T Reclassification Order*).

[21] *Id.* at 3333-34.

[22] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier,* CC Docket No. 96-61, Order on Reconsideration, Order Denying Petition for Rulemaking, Second Order on Reconsideration, 12 FCC Rcd 20787, 20800-01 (1997) (*AT&T Reclassification Reconsideration Order*).

provides competitive service in about 50 areas originally designated as bush areas.[23] Even more recently, as mentioned above, the Commission repealed the Alaska bush policy, so that GCI and other carriers will now be free to provide facilities-based services in competition with Alascom in all Alaska bush communities. Finally, before repeal of the Alaska bush policy, Alascom petitioned the Commission to remove the conditions imposed on it by the Commission's *Market Structure Order*, including the requirements that it file annual tariffs and allocate costs between bush and non-bush areas in accordance with its CAP.[24] The Commission has not yet addressed this petition, and, therefore, Alascom is still bound by the conditions imposed by the *Market Structure Order*, including the obligation to file annual tariffs.

III. DISCUSSION

A. Initiation of Current Proceeding

10. Commission rules require Alascom to have filed its annual revision to its Tariff FCC No. 11 for 2003 by November 27, 2002. In lieu of filing a tariff by that date, Alascom filed a statement indicating only that it was unable to determine whether rate revisions were warranted because such a determination would be "burdensome."[25] A carrier that believes circumstances warrant a waiver of Commission rules must petition for a waiver of such rules.[26] Accordingly, the Bureau informally directed Alascom to file a petition for a waiver, which Alascom did on January 7, 2003. Alascom's petition asks for a waiver of its November 27, 2002 tariff filing requirement and seeks to freeze Alascom's tariffed rates at their 2002 level.[27]

11. Alascom's petition provides some elaboration of its claim that a tariff filing would be burdensome, claiming that the CAP is increasingly outmoded and the burden on Alascom to collect the cost data required to set new rates pursuant to the CAP has increased.[28] GCI opposes Alascom's petition.[29] In its opposition, GCI argues not only that Alascom's petition should be denied but that Alascom should be fined by the Commission for failure to file its tariff in a

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[23] *See Petition of General Communication, Inc. for a Partial Waiver of the Bush Earth Station Policy*, File No. 122-AT-WAIV-95, Memorandum Opinion and Order, 11 FCC Rcd 2324 (Int'l. Bur. 1996).

[24] *AT&T Corp. and Alascom Inc. Petition for Elimination of Conditions*, CC Docket No. 00-46 (filed Mar. 10, 2000) (*Petition for Elimination of Conditions*).

[25] *Investigation of Alascom, Inc. Interstate Transport and Switching Services, Alascom, Inc., Tariff FCC No. 11*, CC Docket No. 95-182, Statement of Alascom, Inc. (Nov. 27, 2002). Both GCI and ACS Long Distance (ACS-LD), carriers purchasing service under Alascom's Tariff FCC No. 11, opposed allowing Alascom to avoid filing its annual tariff. *Investigation of Alascom, Inc. Interstate Transport and Switching Services, Alascom, Inc., Tariff FCC No. 11*, CC Docket No. 95-182, GCI Response to Statement of Alascom, Inc. (Dec. 10, 2002); ACS-LD's Response to Alascom's Statement (Dec. 12, 2002).

[26] 47 C.F.R. § 1.3

[27] *Waiver Petition* at 11.

[28] *Alascom, Inc. Petition for Waiver of Commission Rule and Orders Requiring Annual Tariff Revision, Tariff FCC No. 11,* WC Docket No. 03-18, Attachment A, Declaration of John C. Klick and Julie A. Murphy (Jan. 7, 2003) (*Klick-Murphy Declaration*).

[29] *Alascom, Inc. Petition for Waiver of Commission Rule and Orders Requiring Annual Tariff Revision, Tariff FCC No. 11,* WC Docket No. 03-18, GCI Opposition to Petition for Waiver (Feb. 5, 2003) (*GCI Opposition*).

timely manner.[30]

B. Access to Supporting Documentation

12. When Alascom filed its *Waiver Petition*, it sought confidential treatment of a declaration supporting the petition.[31] Pursuant to standard practice when filing carriers seek confidential treatment of cost information supporting their tariffed rates, the Bureau adopted a protective order to grant access to the supporting information to commenting parties that execute the requisite nondisclosure agreement, while protecting the information from general public disclosure.[32] GCI promptly executed the requisite nondisclosure agreement and submitted it to Alascom. GCI sought to obtain both the allegedly confidential declaration supporting Alascom's *Waiver Petition*, and, in order to evaluate Alascom's claim that the CAP is outmoded, the CAP and the data underlying it. Alascom released to GCI the allegedly confidential declaration, but it refused to release the CAP and the data underlying it, claiming that this information was too sensitive to be released to its competitor GCI, even subject to a protective order.

13. In response to Alascom's refusal to release the CAP and underlying data in this *Waiver Petition* proceeding, GCI sought to obtain the CAP and its underlying data from the Commission through a Freedom of Information Act (FOIA) request.[33] The Bureau found that GCI needed to review the CAP and its underlying data to respond effectively to the *Waiver Petition* and granted GCI's FOIA request, agreeing to provide GCI the materials in its possession that are responsive to the request subject to a protective order.[34] Alascom sought Commission review of the Bureau's grant of GCI's FOIA request, challenging both the decision to grant GCI access to the requested materials and the sufficiency of the protective order pursuant to which the materials would be released.[35]

14. While Alascom's Application for Review has been pending, Alascom and GCI, with the encouragement of Bureau staff, have agreed to a revised protective order for use in both the FOIA and *Waiver Petition* proceedings that provides additional safeguards to protect from disclosure all of the information that Alascom considers confidential.[36] Nonetheless, Alascom

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[30] *GCI Opposition* at 1, 14, 16 and 19. Alascom filed a reply to *GCI's Opposition*. *Alascom, Inc. Petition for Waiver of Commission Rule and Orders Requiring Annual Tariff Revision, Tariff FCC No. 11,* WC Docket No. 03-18, Reply to Opposition (Mar. 5, 2003) (*Alascom Reply*), and both parties filed numerous subsequent pleadings.

[31] Letter from Charles R. Naftalin, Counsel for Alascom, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated Jan. 7, 2003.

[32] *See Pleading Cycle Established for Alascom, Inc. Petition for Waiver of the Commission's Rules Regarding Its Annual Tariff FCC No. 11*, WC Docket No. 03-18, Public Notice and Protective Order, 18 FCC Rcd 704 (2003). The Bureau uses such standard protective orders not only for tariff filings, but other types of proceedings, such as petitions for pricing flexibility, waiver, or forbearance, where parties submit allegedly confidential data to support their claims.

[33] Letter from Timothy R. Hughes, Counsel for Alascom, to Managing Director, Federal Communications Commission, FOIA Request Control No. 2003-208 (Feb. 26, 2003).

[34] Letter from Joseph T. Hall, Assistant Bureau Chief, Management, Wireline Competition Bureau, to Timothy R. Hughes, Counsel to GCI, FOIA Request Control No. 2003-208 (Apr. 10, 2003).

[35] Letter from Charles R. Naftalin, Counsel for Alascom, to John Rogovin, General Counsel, Federal Communications Commission (Apr. 24, 2003).

[36] *General Communication, Inc., On Request for Inspection of Records*, FOIA Control No. 2003-208, *Alascom Petition for Waiver from the Commission Rule and Order Requiring an Annual Tariff Filing,* WC Docket No. 03-18, Protective Order, DA 03-2278 (WCB July 10, 2003).

continues to refuse to disclose the CAP and its underlying data to GCI unless the Commission denies its Application for Review of the Bureau's grant of GCI's FOIA request. Thus, GCI has never seen, and the Bureau currently cannot release to GCI, the CAP and its underlying data that supports Alascom's *Waiver Petition*. Given Alascom's current position regarding release of this information, GCI will not see it unless and until the full Commission denies Alascom's

Application for Review and Alascom has exhausted any opportunities for judicial review of the Commission's decision.[37]

C. Application of Waiver Standard

15. The Commission has discretion to waive a rule for "good cause" shown.[38] Generally, the Commission may grant a waiver of its rules where the particular facts make strict compliance inconsistent with the public interest if applied to petitioner and when the relief requested would not undermine the policy objective of the rule in question.[39] Petitioner must demonstrate that, in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest.[40]

1. Changed Conditions

16. Alascom bases its waiver request primarily on its contention that market conditions in Alaska have changed since the Commission adopted the *Market Structure Order* in 1995. These changed market conditions, according to Alascom, include the fact that AT&T is now not only Alascom's parent, but the only "substantial" customer purchasing service under Alascom's common carrier services tariff.[41] Further, according to Alascom, "[b]y 1999, at least two interexchange carriers had facilities-based access to more that 90% of all Alaska access lines."[42] GCI has also increased its market share of interstate traffic for all of Alaska, from approximately 33 percent in 1993 to 45.5 percent in 1998, and, according to Alascom, it is strongly positioned to offer bundled interexchange services including Internet access.[43] GCI is serving more than 50 communities originally determined to be bush communities pursuant to its temporary waiver.[44] Finally, Alascom adds that its ownership of undersea fiber-optic cables connecting Alaska to the lower 48 states has declined from almost 90 percent to less than 10 percent.[45] These assertions are the same claims Alascom makes in its separate *Petition for Elimination of Conditions*, in which it seeks relief from the conditions under which it provides service in Alaska.[46] Alascom's desire to be freed from these conditions is not "good cause" for waiving its obligation to file a tariff for services that only Alascom provides. Its allegations raise broad issues that are beyond the scope of this waiver proceeding. The Commission has not yet addressed the merits of Alascom's *Petition for Elimination of Conditions*, and we will not do so in a waiver proceeding.

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[37] *See* 5 U.S.C. § 552(b)(4); 47 C.F.R. §§ 0.457(d), 0.461(i)(4).

[38] 47 C.F.R. § 1.3.

[39] *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (*Northeast Cellular*).

[40] *WAIT Radio*, 418 F.2d at 1159.

[41] *Waiver Petition* at 7.

[42] *Id.*

[43] *Id.*

[44] *See* para. 9, *supra.*

[45] *Waiver Petition* at 7.

[46] *See* para. 9 and n.24, *supra.*

17. Alascom raises its transfer to AT&T as a basis for waiving its annual tariff filing obligation for its common carrier services. Previously, however, in order to obtain the Commission's approval of the transfer of Alascom to AT&T, AT&T assured the Commission that it was seeking no modification of its obligations under the *Market Structure Order*.[47] Further, the Commission expressly retained Alascom's tariff filing obligation when it reclassified AT&T as a non-dominant carrier.[48] The conditions that led the Commission repeatedly to reaffirm Alascom's tariff filing obligation persist today: Alascom is still the only provider of facilities-based transport and switching services for origination and termination of interexchange traffic to and from many Alaska bush communities. The fact that AT&T is the largest purchaser of Alascom's common carrier services does not change the fact that these services remain the only way for wireline carriers other than AT&T to serve their customers in the Alaska bush. Therefore, we conclude that AT&T's acquisition of Alascom is not a basis for waiving Alascom's annual tariff filing obligation.

2. Public Interest

18. Alascom argues that granting its waiver request would serve the public interest.[49] Alascom supports this assertion with a declaration concluding that the CAP model may no longer function as it was intended, the burden to Alascom of running the CAP model to prepare a tariff outweighs the benefit of complying with the tariff filing requirement, and "emerging" problems with the inputs to the CAP model make its output increasingly unreliable.[50] Alascom fails, however, to demonstrate why these purported problems with the CAP result in the public interest being served by releasing Alascom from its obligation to file a tariff.

19. Alascom asserts that the CAP requires adjustment because "there are concerns raised by the nature of the market in which Alascom operates that could affect the way in which the CAP should be conceived and constructed."[51] These "concerns," according to Alascom, are increased cell phone and calling card use, the "explosive demand in Internet access, which can conceivably create non-traditional competition in the long distance market through Voice over Internet Protocol ('VoIP')," and potential competition from cable telephony services.[52] The effects of this increase in "non-traditional" competition, according to Alascom, are exacerbated by the Commission's decision, when it reconsidered its approval of the CAP, to prevent Alascom from changing the classification of bush and non-bush areas without the Bureau's consent.[53]

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[47] *Alascom Authorization Order*, 11 FCC Rcd at 741.

[48] *AT&T Reclassification Reconsideration Order*, 12 FCC Rcd at 20800-01.

[49] *Waiver Petition* at 9.

[50] *Klick-Murphy Declaration* at 2-4, paras. 5-8.

[51] *Id.* at 2, para. 6.

[52] *Id.* at 10, para. 19.

[53] *Alascom Reply* at 5; *Alascom, Inc. Petition for Waiver of Commission Rule and Orders Requiring Annual Tariff Revision, Tariff FCC No. 11,* WC Docket No. 03-18, Reply Declaration of John C. Klick and Julie A. Murphy at 4, para. 9 (Mar. 5, 2003) (*Klick-Murphy Reply Declaration*). *See also Alascom CAP Approval Reconsideration Order,* 12 FCC Rcd at 2003.

20. Even assuming that Alascom's assertions are correct,[54] Alascom has not shown how changes in network demand, however dramatic they may be, cause the CAP to fail to function as it was intended.[55] The purpose of the CAP, from its inception, has been to allocate Alascom's costs of providing service between bush and non-bush communities, or areas without facilities-based competition and areas with facilities-based competition.[56] Yet Alascom provides no precise indication of how changes in overall network demand affect the CAP's ability to allocate costs between bush and non-bush areas in a reasonable manner. While Alascom has shown a change in network demand between two specific years, it has not shown that network demand in bush communities has shifted dramatically relative to non-bush communities, or that such a relative shift in demand has affected the integrity of the CAP's cost allocation process. Finally, Alascom has failed to establish any link between this alleged failure of the CAP to function as intended and how it might serve the public interest to release it from its obligation to file annual tariffs.

21. Alascom also argues that the tariff filing requirement should be waived because the cost and effort of running the CAP model to produce rates has come to outweigh any need for such a process.[57] According to Alascom, "the CAP process . . . require[s] near continuous polling of AT&T switches in Alaska, transmittal of as many as 2 million individual call records a month to cost analysts in New Jersey, and consolidation of call records . . . and significant efforts to check data integrity before the process can even be run."[58] Alascom has not demonstrated that the CAP process is an unwarranted burden. Alascom has two switches in Alaska, and Alascom makes no claim that these switches cannot be polled electronically. The need to transmit the call records to New Jersey appears to stem from Alascom's decision to base its cost analysts in New Jersey. Without additional information, we are unable to determine exactly how burdensome the process of consolidating call records and checking data integrity really is.

22. Thus Alascom has not demonstrated that filing a tariff is unduly burdensome. Further, Alascom has failed to demonstrate that the burden on Alascom outweighs any benefit to the public of filing a tariff.[59] Pursuant to the *Market Structure Order*, Alascom must offer transport and switching services for the origination and termination of interstate calls to and from Alaska bush communities on a non-discriminatory basis at rates that reflect the cost of the

[54] In support of its claims regarding long-term changes in network demand, Alascom cites only national statistics regarding increased calling card and cell phone use, not Alaska-specific statistics, and it provides only a limited comparison of network demand figures for two of the eight years for which the CAP has operated. Alascom provides no statistics for Voice over IP or cable telephony services. *Klick-Murphy Declaration* at 8, para. 16. Therefore, Alascom's assertions and limited demand figures do not evidence long-term network demand trends.

[55] GCI also points to this flaw in Alascom's analysis. *GCI Opposition* at 18. Alascom admits that it has not undertaken "the detailed analysis of the CAP process that would be required to definitively determine how each of these new developments would flow through the CAP and affect the costs that it calculates. . . ." *Klick-Murphy Reply Declaration* at 4, para. 9.

[56] *Market Structure Order*, 9 FCC Rcd at 3023; *Final Recommended Decision*, 9 FCC Rcd at 2205-06.

[57] *Klick-Murphy Declaration* at 11-13, paras. 21-25.

[58] *Id.* at 11-12, para. 22.

[59] While Alascom's petition is not clear, this alleged imbalance appears to be one basis for Alascom's claim that granting its requested waiver is in the public interest.

services.[60] Alascom has failed to establish any link between relieving it of the burden of filing a tariff and the public interest.

23. Alascom's final basis for claiming that a waiver of its tariff filing requirement would be in the public interest is "emerging" problems with the inputs to the CAP model.[61] The three "emerging" problems are that much of the 2002 call data required to prepare inputs to the CAP are missing, many CAP inputs are "hard coded" and cannot be updated, and the percentage of costs that can be directly assigned or directly attributed by the CAP to either bush or non-bush categories has declined.[62]

24. With respect to the missing 2002 call data, Alascom explains that a key employee retired in late 2001, and consequently collection and consolidation of call records to assign or attribute costs to specific cost locations never occurred for nine of the 12 months of the 2003 tariff year.[63] While Alascom attempted to feed network usage data directly to AT&T personnel who were assigned to run the CAP model, these employees were not able to reproduce the summarized input required.[64] Alascom subsequently persuaded the key employee to return from retirement, and the necessary data began to be collected again beginning in August 2002.[65] Alascom asserts that it cannot reconstruct the missing records because, "[i]t would be a monumental task to write the software to search all [365 million AT&T long distance call records per business day] in an effort to identify the relatively small number of Alascom interstate calls that were made during the first 7 months of 2002."[66] Alascom concludes, therefore, that its 2002 tariff filing requirement should be waived, and it should be allowed to continue using the same rates it filed for 2001. Although Alascom mentions this failure to collect data in the context of its public interest case, Alascom does not explain the link between its failure to collect the data and the public interest.

25. In response to Alascom's contentions, GCI asserts that the missing data could be collected without undue burden to Alascom, and it provides a declaration from its expert describing how the collection could be achieved.[67] GCI also claims that Alascom's billing contractor could produce the required data.[68] GCI alternatively suggests that Alascom could annualize the data it has or compute rates using last year's network usage data and this year's costs.[69] Alascom disputes the GCI expert's assessment of the difficulty of reconstructing the

[60] *Market Structure Order*, 9 FCC Rcd at 3023.

[61] *Klick-Murphy Declaration* at 3, para. 8.

[62] *Waiver Petition* at 10-11.

[63] *Klick-Murphy Declaration* at 14, para. 27. Because Alascom's 2002 tariff filing was due 35 days prior to January 1, 2003, 2003 rates should be based on data collected from July 1, 2001 to June 30, 2002.

[64] *Id.* at 15, para. 29.

[65] *Id.*

[66] *Id.* at 15, para. 28.

[67] *GCI Opposition* at 12 and Exhibit 3, Statement of John Leahy.

[68] *Id.* at 12-13.

[69] *Id.* at 12.

missing data and counters that neither method will produce cost-based rates that are as "sound" as Alascom's 2001 rates.[70]

26. We are not persuaded that the failure to collect data was the result of facts entirely outside of Alascom's control, nor that it would serve the public interest to grant Alascom's waiver because of this failure. Alascom has undoubtedly faced employee retirements in the past and could have ensured that the retiring employee transferred sufficient knowledge to other employees to permit Alascom to file a tariff in 2002. Further, Alascom has not demonstrated that no reasonable method for reconstructing the missing data exists. The record here is insufficient for us to determine the precise effort required of Alascom to reconstruct the missing data, or the best method for producing cost-based rates for 2003 based on the data that were collected. Therefore, when filing its 2003 rates, Alascom should determine the method most likely to produce appropriately cost-based rates based on available data, and use it to run the CAP model. When Alascom files its 2003 rates, parties will have an opportunity to challenge the method Alascom chooses to produce its rates in the tariff review process.

27. The second "emerging" problem is Alascom's "discovery" that many of the CAP model's inputs are "hard coded" into the CAP computer program and cannot be updated. This problem, according to Alascom, makes the CAP inputs increasingly stale, and supports its argument that the CAP should be updated.[71] The hard coded inputs include: the classification of each cost location as bush or non-bush; direct assignment of certain network costs to bush and non-bush locations based on outdated information about each location; old network usage data such as dial equipment minutes; "study area loop and trunk circuit miles," some of which are allocated to the interstate portion of Alascom's investment by a "frozen" allocation factor; customer operations expense factors; an interstate and intrastate allocation factor based on the 1994 distribution of interstate and intrastate switching minutes; various outdated allocations for the separations process; and bush and non-bush percentages used to develop the accumulated, deferred federal tax.[72] Alascom contends that it has only recently discovered these allegedly outdated, hard coded inputs because it only recently hired consultants to examine the workings of the CAP.

28. We are hampered in our assessment of the validity of these claims, and their effect if demonstrated, by the fact that Alascom has refused to allow GCI, who opposes its *Waiver Petition*, or any other party, to examine the CAP and its underlying inputs. Therefore, we have no alternative, independent evaluation of the CAP and its functioning to compare with Alascom's claims. Alascom is directly responsible for this lack of an alternative, independent evaluation, because it has refused to release to GCI the CAP and its supporting data, or to permit the Commission to do so. This lack of an alternative evaluation is precisely the situation the Commission sought to avoid when it adopted its policy of allowing parties wishing to examine potentially confidential tariff cost support materials to obtain those materials subject to protective order.[73] Alascom bears the burden of proving that there is good cause to grant its requested waiver, and its refusal to allow GCI to review the CAP and its supporting data contributes to its

[70] *Alascom Reply* at 6-7; *Klick-Murphy Reply Declaration* at 10, paras. 18-19.

[71] *Klick-Murphy Declaration* at 16, 18, paras. 30, 31.

[72] *Id*. at 16-17, para. 30.

[73] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Order, 12 FCC Rcd 2170, 2213-14 (1997).

failure to meet that burden. Based on this record, which includes no alternative, independent evaluation of the CAP and its functioning, we cannot conclude that the CAP and its inputs are outdated, that it no longer functions as it was intended to function, or that allowing Alascom to freeze rates for its common carrier services at their 2002 level would be in the public interest.

29. Finally, Alascom claims that the percentage of costs that can be directly assigned or directly attributed by the CAP to either bush or non-bush categories has declined from about 93 percent in 1995 to a much lower, but unspecified, percentage today.[74] Alascom states that this shift has occurred because, with the passage of time since the CAP was developed, operating expenses and depreciation have become a greater proportion of Alascom's costs, and the CAP books these expenses to administrative accounts that are allocated among all Alascom locations (both bush and non-bush), rather than being directly assigned or attributed to a particular bush or non-bush location.[75] Further, according to Alascom, the percentage of costs that the CAP directly assigns (as opposed to attributing or allocating) to specific locations has declined from 20 percent in the original CAP model to eight percent in 2001.[76] Alascom states that it cannot explain why the CAP model functions in this way because the CAP was designed for Alascom's prior owner, Pacific Telecom, Inc., and Alascom has no institutional memory of the CAP design and development.[77] Therefore, Alascom will be able to understand the CAP's functioning only after a "*de novo* examination of the code and input data in an effort to infer what the model designers originally intended."[78]

30. While the CAP model's alleged failure to assign costs directly to specific locations may be problematic, we do not believe that Alascom's proposed response, a waiver of its tariff filing requirement, is the solution that best serves the public interest. Instead we believe that this problem with the CAP, and the additional problems discussed above, indicate that the public interest is best served by careful scrutiny of the CAP and its functioning through the tariff review process. Therefore, as stated above, we direct Alascom to run the CAP model to the best of its ability, prepare rates for 2003, and file a tariff no later than September 26, 2003.[79]

IV. CONCLUSION

31. In summary, we conclude that Alascom has not demonstrated in its *Waiver Petition* that it meets any of the established standards for grant of a waiver from a Commission rule. First, Alascom has not shown that there is "good cause" for grant of a waiver.[80] Although Alascom has asserted here and in other Commission proceedings that there is no longer any need

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[74] *Klick-Murphy Declaration* at 5-6, para. 12.

[75] *Id.* at 5-7.

[76] *Id.* at 6-7, para. 13.

[77] *Id.* at 7, para. 15.

[78] *Id.*

[79] We note that GCI asserts that we should fine Alascom for failing to file its tariff. *GCI Opposition* at 1, 10, 14, 16, and 19. We deny GCI's request that the Commission assess forfeitures against Alascom in this proceeding. Section 503 of the Communications Act of 1934, as amended, gives the Commission the discretion to assess forfeitures. 47 U.S.C. § 503(b). *See also* 47 C.F.R. § 1.80(e). If the Commission determines that Alascom's failure to file a tariff warrants the issuance of a Notice of Apparent Liability for Forfeiture under section 503 of the Act, it will issue such a notice in a separate proceeding.

[80] *See* 47 C.F.R. § 1.3.

for it to be regulated, the Commission has not decided this question, and we will not attempt to resolve it in a waiver proceeding. Alascom's desire to be freed from the conditions under which it currently operates is not "good cause" for waiving its obligation to file a tariff for services that only Alascom provides. Similarly, Alascom fails to demonstrate that, in view of unique or unusual factual circumstances, application of the tariff filing requirement would be inequitable, unduly burdensome, or contrary to the public interest.[81] As discussed above, Alascom has failed to prove that the CAP no longer functions as intended, that Alascom is unduly burdened by running the CAP model to produce 2003 rates, or that the CAP is increasingly unreliable. Alascom bases its allegation that granting its requested waiver is in the public interest on these unproven claims. Therefore, it has failed to demonstrate that granting a waiver is in the public interest. Further, Alascom has not shown that particular facts make strict compliance with the tariff filing requirement inconsistent with the public interest when applied to Alascom, or that waiver of the tariff filing requirement would not undermine a policy objective of the rule in question.[82]

32. Finally, we decline to grant Alascom a waiver due to its refusal to allow GCI to examine the CAP and its underlying inputs.[83] Alascom has the burden of demonstrating good cause for waiver of Commission rules. Alascom bases its claim of good cause on allegations that the CAP no longer serves its intended purpose, running the CAP is unduly burdensome to Alascom, and the CAP produces increasingly unreliable results. Thus Alascom has made alleged problems with the CAP a primary issue in this proceeding. Nonetheless, it refuses to allow GCI access to the CAP and its inputs, despite having agreed to a protective order affording protection for the material Alascom considers confidential. Without such access, GCI cannot fully evaluate Alascom's claims, dispute their accuracy, or participate meaningfully in any discussion of whether the CAP produces appropriately cost-based rates. Further, as an interested party, GCI, which has duly executed the requisite nondisclosure agreement that adequately protects Alascom's interest in keeping its data confidential, has the right to participate in this waiver proceeding. Therefore, we cannot find that granting Alascom a waiver from its obligation to file a tariff is in the public interest.

33. For all of the foregoing reasons, we deny Alascom's petition asking us to waive the Commission rule requiring Alascom to file a 2002 tariff for its common carrier services.

V. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), (j), 201, 202, and 203 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201, 202, and 203 and sections 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.291 and 1.3, Alascom's petition for waiver of the 2002 annual tariff filing requirement in section 61.58(e)(3) of the Commission's rules, 47 CFR § 61.58(e)(3), IS DENIED.

35. IT IS FURTHER ORDERED that Alascom SHALL FILE 2003 revised rates based on current cost for services offered pursuant to Tariff FCC No. 11 no later than September 26, 2003.

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[81] *WAIT Radio*, 418 F.2d at 1159.

[82] *Id.* at 1157.

[83] *See* paras. 12-13, *supra.*

36. IT IS FURTHER ORDERED that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey J. Carlisle
Senior Deputy Chief
Wireline Competition Bureau