

**Marguerite McLean**

090327-TP

**From:** Ann Bassett [abassett@lawfla.com]  
**Sent:** Friday, July 16, 2010 3:53 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket No. 090327-TP  
**Attachments:** 2010-07-16, 090327, Hypercube's Motion to Strike Jerry Watt's Rebuttal Testimony.pdf

The person responsible for this filing is:

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The Docket No. is 090327-TP - Petition of DeltaCom, Inc. for order Determining DeltaCom, Inc. not liable for access charges of KMC Data LLC and Hypercube Telecom, LLC

This is being filed on behalf of Hypercube Telecom, LLC

Total Number of Pages is 18

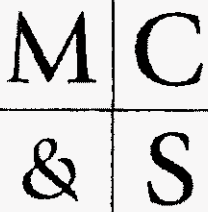
Hypercube Telecom, LLC's Motion to Strike Rebuttal Testimony of Jerry Watts

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July 16, 2010

**VIA ELECTRONIC FILING**

Ms. Ann Cole, Commission Clerk  
Office of Commission Clerk  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

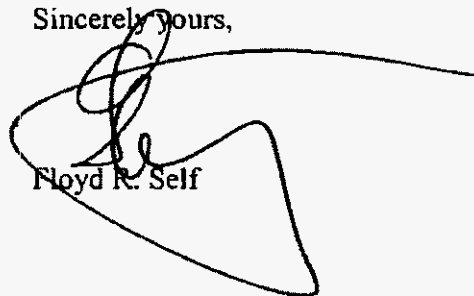
Re: Docket No. 090327-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Hypercube Telecom, LLC is an electronic version of Hypercube Telecom, LLC's Motion to Strike Rebuttal Testimony of Jerry Watts in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,



Floyd R. Self

FRS/amb

Enclosure

cc: Mr. James Mertz  
Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of DeltaCom, Inc. for order determining DeltaCom, Inc. not liable for access charges of KMC Data LLC, and Hypercube Telecom, LLC. DOCKET NO. 090327-TP  
DATED: July 16, 2010

**HYPERCUBE TELECOM, LLC'S MOTION TO STRIKE  
REBUTTAL TESTIMONY OF JERRY WATTS**

Hypercube Telecom, LLC ("Hypercube") hereby requests that the Florida Public Service Commission strike the rebuttal testimony of Jerry Watts, filed on July 9, 2010 on behalf of DeltaCom, Inc. ("DeltaCom"). In support of this Motion, Hypercube states as follows:

**Introduction**

1. A schedule has been in effect in this proceeding for several months. Direct testimony was filed by the parties on June 15, 2010, after Hypercube consented to an extension requested by DeltaCom from the original June 4, 2010 date. On that deadline, DeltaCom only filed the direct testimony of Mr. Don Wood, who is not a DeltaCom employee and who professed to address the "factual assertions" in the pleadings in this case and to provide "facts and analysis" associated with the issues in this proceeding. Wood Direct Testimony, at page 5, lines 17-20.

2. On July 9, 2010, DeltaCom filed rebuttal testimony by Mr. Wood, but also added an entirely new witness, Mr. Jerry Watts, who is a DeltaCom employee. The rebuttal testimony of Mr. Watts purports to respond to the Hypercube witnesses' testimony, but much of it is entirely new and in the nature of direct testimony. Indeed, significant portions of Mr. Watts' "rebuttal" testimony are nearly identical to direct testimony of Mr. Watts that DeltaCom filed in a parallel proceeding pending between the parties in Alabama. Under these circumstances, the

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Watts “rebuttal” testimony should be stricken, or, at the very least, the portions not rebutting Hypercube testimony should be stricken.

### Argument

3. Rebuttal testimony should be stricken when it “it does not rebut any specific assertions of direct testimony.” *In re TDS Telecom*, Docket No. 050125-TP; Order No. PSC-06-0261-PCO-TP, at page 5 (Fla. P.S.C. Mar. 28, 2006). “[P]residing officers in Commission proceedings have significant discretion when ruling on motions to strike testimony.” *Id.* at 3. The party filing testimony “has an obligation to show that the testimony it has presented is legally proper upon a challenge by another party to the case.” *Id.* at 4.

4. Here, significant portions of Mr. Watts’ rebuttal testimony do not respond to any Hypercube testimony, but rather is in the nature of direct testimony on the issues in the proceeding. Specifically, starting on page 6, line 17, Mr. Watts purports to respond to Hypercube’s witness Robert W. McCausland, but in fact spends the next four pages (to page 9, line 10) providing direct testimony on DeltaCom’s network and DeltaCom’s ability to determine whether Hypercube’s network was involved with a call. This testimony addresses DeltaCom’s affirmative position on Issue 1 (What services, if any, are being provided by Hypercube to DeltaCom (or to other carriers in the call flow) and how?) This is direct testimony and should be stricken. It does not respond to any of Hypercube’s direct testimony, which does not at all address DeltaCom’s network. Its only purpose appears to be to bolster the direct testimony of DeltaCom’s witness Don Wood, who discussed these issues in his own direct testimony. Wood Direct Testimony, at page 8, note 4; page 52, line 12 to page 55, line 3. The Watts testimony is not rebuttal testimony, but is direct testimony and should therefore be stricken.

5. Similarly, Mr. Watts’ testimony on page 10, line 17 to page 11, line 12 is also direct testimony and should be stricken. The testimony provided there does not respond to any

testimony of a Hypercube witness. This testimony discusses DeltaCom's direct position on its Percent Interstate Usage, which goes to Issue 3 in this case (What are the proper procedures regarding Percent Interstate Usage under Hypercube's price list and were those procedures followed? Which Percent Interstate Usage should have been applied?) This testimony was appropriate for direct testimony, not rebuttal, which is what Mr. Wood discussed in his direct testimony.

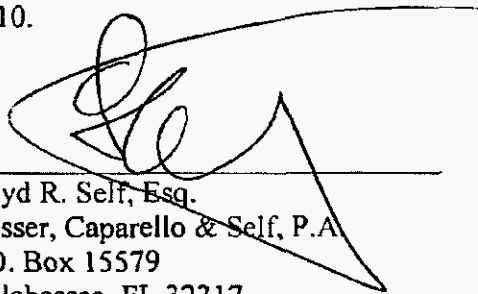
6. Finally, conclusively demonstrating that Mr. Watts' rebuttal testimony should be stricken because it is direct testimony is the fact that DeltaCom filed nearly identical direct testimony on July 7, 2010 in the proceeding between DeltaCom and Hypercube before the Alabama Public Service Commission. The attached direct testimony from Alabama has sections that are nearly identical, apart from minor word changes, to the sections identified above. Mr. Watts' rebuttal testimony in Florida on page 6, line 17 to page 9, line 10 matches up with Mr. Watts' direct testimony in Alabama on page 6, line 21 to page 9, line 4, question-for-question and answer-for-answer. Similarly, Mr. Watts' rebuttal testimony in Florida on page 10, line 17 to page 11, line 12 matches up with Mr. Watts direct testimony in Alabama on page 9, line 20 to page 10, line 15, question-for-question and answer-for-answer. It is evident that Mr. Watts simply repeated his Alabama direct testimony in his Florida "rebuttal" testimony. However, in Florida, Hypercube has no opportunity to respond to Mr. Watts' purported rebuttal testimony and the allegations contained in the rebuttal testimony. DeltaCom's clear effort to circumvent the scheduling order in this proceeding should be rejected.

#### Conclusion

7. Based upon the foregoing, Mr. Watts' rebuttal testimony should be stricken. At the very least, the portions of his testimony identified on page 6, line 17 to page 9, line 10 and page 10, line 17 to page 11, line 12 should be stricken because they are clearly direct testimony.

Those portions do not respond to any Hypercube witness and are nearly identical to what DeltaCom filed as direct testimony in the Alabama proceeding between Hypercube and DeltaCom.

Respectfully submitted, this 16<sup>th</sup> day of July, 2010.



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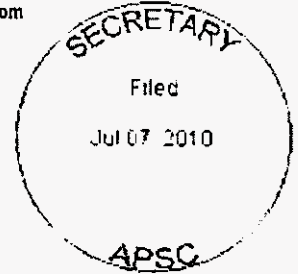
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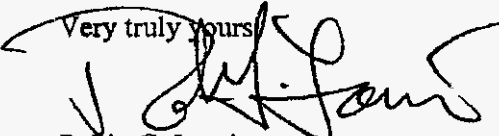
BY HAND DELIVERY

Mr. Walter L. Thomas, Jr.  
Secretary  
Alabama Public Service Commission  
RSA Union Building  
8th Floor  
100 N. Union Street  
Montgomery Alabama 36104

Re: *In re: DeltaCom, Inc. v. KMC Data, LLC, Hypercube, LLC and Hypercube Telecom, LLC*; Alabama Public Service Commission; Docket No. 31176

Dear Mr. Thomas:

Enclosed herewith are the original and one copy of the Direct Testimony of Jerry Watts on behalf of DeltaCom, Inc., in the above-referenced matter. A copy of same has been electronically filed on this date.

Very truly yours  
  
Robin G. Laurie

RGL:dpe  
Enclosures

cc: Counsel of Record w/enclosure

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**BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION**  
**DIRECT TESTIMONY**  
**OF**  
**JERRY WATTS**  
**DOCKET NO. 31176**

**I. Introduction and Qualifications**

**Q. PLEASE STATE YOUR NAME, POSITION AND BUSINESS ADDRESS.**

**A. My name is Jerry Watts. I am Vice President of Government and Industry Affairs for DeltaCom, Inc. ("DeltaCom"). My business address is 7037 Old Madison Pike Huntsville, Alabama, 35806.**

**Q. PLEASE DESCRIBE YOUR BACKGROUND AND EXPERIENCE.**

**A. I am a graduate of Auburn University with a B.S. in Accounting. I have over thirty years experience in the telecommunications industry including positions with Southern Bell, South Central Bell, BellSouth, AT&T, and DeltaCom. Most of my career has been in the area of Government Affairs with responsibility for both regulatory and legislative matters at the state and federal level.**

**I have served as an officer or board member for several industry associations including the Alabama Mississippi Telephone Association, The Georgia Telephone Association, The Alabama Inter-Exchange Carriers Association,**



1           The Southeastern Competitive Carriers Association and The Georgia Center  
2           for Advanced Telecommunications Technology. I am a past President of The  
3           Competitive Carriers of the South, ("CompSouth"), a non-profit association of  
4           11 competitive telecommunications companies operating in the Southeast. I  
5           also serve as a board member of CompTel. CompTel is the leading industry  
6           association representing dozens of competitive facilities-based  
7           telecommunications service providers, emerging VoIP providers, integrated  
8           communications companies, and their supplier partners. CompTel members  
9           are building and deploying packet and IP-based networks to provide  
10          competitive voice, data and video services in the U.S. and around the world.  
11          The association, based in Washington, D.C., includes companies of all sizes  
12          and profiles, from the largest next-generation network operators to small,  
13          entrepreneurial companies.

14  
15   **Q.   WHAT ARE YOUR RESPONSIBILITIES AT DELTACOM?**

16   **A.   I am responsible for DeltaCom's relationship with state and federal**  
17          **government entities, including state public utility commissions, state**  
18          **legislatures, the FCC and the US Congress. I am also responsible for**  
19          **facilitating the working relationship of DeltaCom with other**  
20          **telecommunications companies including incumbent local exchange**  
21          **companies, competitive local exchange companies and other providers.**

22

1 Q. HAVE YOU PREVIOUSLY PRESENTED TESTIMONY BEFORE STATE  
2 REGULATORS?

3 A. Yes. I have testified on telecommunications issues before the regulatory  
4 commissions in the states of Alabama, Florida, Georgia, Louisiana, North  
5 Carolina, and Tennessee.

6  
7 **II. Purpose of Testimony**

8 Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

9 A. My testimony provides an overview of the dispute between DeltaCom and  
10 Hypercube, LLC, Hypercube Telecom, LLC and KMC Data, LLC  
11 (collectively, "Hypercube") that is currently before the Commission.

12  
13 **III. The Nature of the Traffic in Dispute**

14 Q. WHAT TYPES OF CALLS ARE AT ISSUE IN THIS CASE?

15 A. The charges in dispute are related to a single call type, consisting of 8YY calls  
16 to DeltaCom customers originated by wireless carrier customers. The calls are  
17 routed by the originating wireless carrier to Hypercube before continuing on  
18 their call path to their ultimate destination. The calls at issue were not  
19 originated using a 1+ or 011+ or 101XXXX format.

20  
21 **IV. Amounts in Dispute**

22 Q. WHAT ARE THE AMOUNTS IN DISPUTE?

1 A. From April 2006 to June 2010, Hypercube charged DeltaCom approximately  
2 \$288,833.78 in intrastate access and related charges. Of this amount,  
3 \$188,917.86 was identified on the invoices as "8YY Originating Access  
4 Service" charges, \$21,973.75 was indentified for "800 Data Base Query"  
5 charges and approximately \$77,942.17 in related late fees.  
6

7 Q. HAS DELTACOM DISPUTED THE CHARGES RELATING TO  
8 HYPERCUBE'S ACCESS CHARGES FOR 8YY ORIGINATED TRAFFIC?

9 A. Yes, DeltaCom timely and appropriately disputed these intrastate access and  
10 related charges after becoming aware that they resulted from calls originated  
11 by wireless carrier customers.  
12

13 Q. ARE THERE ALSO INVOICES ISSUED BY DELTACOM TO  
14 HYPERCUBE THAT ARE AT ISSUE IN THIS PROCEEDING?

15 A. Yes, there are. DeltaCom has issued invoices to Hypercube under DeltaCom's  
16 tariff for its Intermediate Provider Access Service ("IPAS"). These bills cover  
17 the time period from September 2008 to now.  
18

19 Q. HAS HYPERCUBE PAID THESE INVOICES?

20 A. No. Hypercube has failed to pay any of the invoices issued under DeltaCom's  
21 tariff for IPAS.  
22

1 Q. WHAT IS THE OUTSTANDING AMOUNT OF UNPAID INVOICES FOR  
2 IPAS BILLED FOR ALABAMA?

3 A. For the time period from September 2008 through the June 2010 invoice,  
4 DeltaCom billed Hypercube \$167,406.42 for Intermediate Provider Access  
5 Service pursuant to its Alabama tariff. Hypercube has failed to make any  
6 payments on these outstanding charges.

7

8 **V. Relationship Between DeltaCom and Hypercube**

9 Q. DOES DELTACOM HAVE ANY CONTRACTS WITH HYPERCUBE  
10 THAT APPLY TO OR GOVERN THE TRAFFIC AT ISSUE IN THIS  
11 PROCEEDING?

12 A. No. DeltaCom and Hypercube do not have any contracts relating to the traffic  
13 at issue in this proceeding. Nor does DeltaCom have any contracts with any of  
14 the wireless carriers covering access and database dip charges.

15

16 Q. HAS DELTACOM EVER ORDERED ANY SERVICES FROM  
17 HYPERCUBE?

18 A. No.

19

20 Q. DO DELTACOM AND HYPERCUBE HAVE ANY FACILITIES IN PLACE  
21 DIRECTLY CONNECTING THE TWO CARRIERS?

1 A. No, DeltaCom and Hypercube do not directly interconnect anywhere in  
2 Alabama (or anywhere else). Therefore, Hypercube has never delivered traffic  
3 of any type directly to DeltaCom. Hypercube has – and only can – deliver  
4 traffic to DeltaCom by routing the traffic to another carrier first. The calls in  
5 question are delivered to DeltaCom through an incumbent local exchange  
6 company tandem switch that is direct connected to the DeltaCom network.  
7

8 **VI. Traffic Information**

9 Q. DOES DELTACOM RECEIVE ANY INFORMATION REGARDING THE  
10 TRAFFIC THAT IS DELIVERED TO ITS NETWORK?

11 A. Yes. For each call that is delivered to its network, DeltaCom receives certain  
12 electronic information relating to that call and its routing.  
13

14 Q. BY LOOKING AT THAT CALL INFORMATION CAN YOU DETERMINE  
15 WHETHER THE CALL TRAVELED ON HYPERCUBE'S NETWORK  
16 BEFORE BEING DELIVERED TO YOU?

17 A. No. The information that DeltaCom receives when traffic is delivered to its  
18 network does not show whether the traffic traveled on Hypercube's network  
19 before being delivered to DeltaCom.  
20

21 Q. IS THERE A REAL-TIME WAY FOR DELTACOM TO DETERMINE  
22 WHETHER TRAFFIC DELVIERED TO DELTACOM'S NETWORK

1 TRAVELED ON HYPERCUBE'S NETWORK PRIOR TO ITS DELIVERY  
2 TO DELTACOM?

3 A. No. At the time that the traffic is delivered to DeltaCom's network, DeltaCom  
4 has no way of determining whether that the traffic ever traveled on  
5 Hypercube's network or through its facilities. In fact, DeltaCom was  
6 completely unaware of Hypercube's alleged involvement in the call flow of  
7 these 8YY wireless originated calls until Hypercube began invoicing  
8 DeltaCom.

9  
10 Q. DID DELTACOM EVER ATTEMPT TO OBTAIN MORE DETAILED  
11 INFORMATION REGARDING THE 8YY WIRELESS ORIGINATED  
12 TRAFFIC FOR WHICH HYPERCUBE WAS ISSUING INVOICES?

13 A. Yes. DeltaCom requested call detail records from Hypercube for the 8YY  
14 originated traffic that Hypercube was invoicing to DeltaCom. DeltaCom  
15 requested the records to obtain more information about the traffic that  
16 Hypercube was invoicing to DeltaCom and to determine Hypercube's function  
17 in the call flow.

18  
19 Q. DID HYPERCUBE PROVIDE ALL OF THE REQUESTED CALL DETAIL  
20 RECORDS?

21 A. No. Hypercube provided a sample from the May 2007 and March 2009 usage  
22 periods for selected dates but denied DeltaCom's additional requests.

1

2 Q. WAS DELTACOM ABLE TO VERIFY HYPERCUBE'S ROLE IN THE  
3 8YY WIRELESS TRAFFIC AT ISSUE BY LOOKING AT THE SAMPLE  
4 OF CALL DETAILS RECORDS THAT HYPERCUBE PROVIDED?

5 A. No. DeltaCom's review of those call records revealed no indication of  
6 Hypercube's involvement in the call flow. Even after a thorough review of  
7 these Hypercube-supplied call records, DeltaCom was unable to verify that  
8 Hypercube is performing any functions related to the wireless originated 8YY  
9 calls at issue. These call detail records did demonstrate, however, that  
10 Hypercube was not the originating carrier for any of the calls at issue here.  
11 Consequently, Hypercube could not have been providing end office switching,  
12 which would have been performed by the originating wireless carrier.

13

14 Q. CAN DELTACOM REFUSE OR REJECT THE 8YY WIRELESS  
15 ORIGINATED CALLS THAT HYPERCUBE IS BILLING TO  
16 DELTACOM?

17 A. No. Because, at the time that it receives a call, DeltaCom cannot determine  
18 which calls were routed over Hypercube's network, DeltaCom can neither  
19 refuse nor affirmatively accept any of the 8YY wireless originated calls that  
20 are at issue in this proceeding.

21

1 Q. HOW DOES DELTACOM RECEIVE THE CALLS AT ISSUE IN THIS  
2 PROCEEDING?

3 A. The calls are delivered to DeltaCom's network by Incumbent Local Exchange  
4 Carriers with whom DeltaCom is directly interconnected.

5  
6 **VII. PIU Factors**

7 Q. DID DELTACOM EVER REPORT A PIU TO HYPERCUBE IN  
8 CONNECTION WITH THE 8YY WIRELESS ORIGINATED TRAFFIC AT  
9 ISSUE IN THIS PROCEEDING?

10 A. Yes. In 2007, DeltaCom reported a projected PIU to Hypercube.

11

12 Q. DID HYPERCUBE USE DELTACOM'S REPORTED PIU TO INVOICE  
13 DELTACOM FOR THE 8YY WIRELESS ORIGINATED TRAFFIC AT  
14 ISSUE IN THIS PROCEEDING?

15 A. No. Although never requesting or conducting an audit of DeltaCom's reported  
16 PIU, in May 2008 Hypercube simply declared DeltaCom's reported PIU  
17 invalid and began imposing a PIU of 50% on the traffic at issue in this  
18 proceeding.

19

20 Q. DID DELTACOM EVER UPDATE ITS PROJECTED PIU REPORTED TO  
21 HYPERCUBE?



1 A. No. We have never received any information that would enable us to know the  
2 origination points for the calls, so we have maintained our 100% PIU based on  
3 our inability to determine that any of the calls were intrastate inter-MTA calls.  
4

5 Q. IS HYPERCUBE DISTINGUISHING BETWEEN INTRA AND INTER  
6 MTA TRAFFIC IN ASSESSING THE ACCESS CHARGES AT ISSUE  
7 HERE?

8 A. No. Based on the invoices, Hypercube appears to be making no distinction  
9 between intra and inter MTA traffic. As a result, Hypercube is assessing  
10 access charges for intra-MTA calls.  
11

12 Q. DID HYPERCUBE EVER REPORT A PIU TO DELTACOM WITH  
13 RESPECT TO DELTACOM'S IPAS?

14 A. No. Hypercube has never provided a PIU to DeltaCom for IPAS, resulting in  
15 DeltaCom's use of the default PIU as provided for in the DeltaCom Tariff.  
16

17 Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

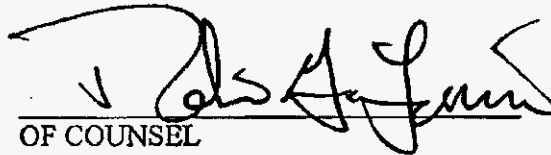
18 A. Yes.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of July, 2010, I did serve a copy of the foregoing on the persons listed below by placing same in the United States Mail, postage prepaid, and properly addressed.

Paul A. Brantley, Esq.  
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OF COUNSEL

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Electronic Mail and/or U.S. Mail this 16<sup>th</sup> day of July, 2010.

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Charles Murphy, Esq.  
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