

Diamond Williams

090327-TP

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Sent: Friday, July 23, 2010 4:20 PM
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Subject: RE: Electronic Filing - Docket No. 090327-TP
Attachments: DeltaCom's Response in Opposition to Motion to Strike (TL246788).PDF

Attached is an electronic filing for the docket referenced below. If you have any questions, please contact either Matt Feil or Nicki Garcia at the numbers below. Thank you.

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Docket No. and Name: Docket No. 090327-TP - Petition of DeltaCom, Inc. for Order Determining DeltaCom, Inc. not Liable for Access Charges of KMC Data, LLC, Hypercube, LLC and Hypercube Telecom, LLC.

Filed on behalf of: DeltaCom, Inc.

Total Number of Pages: 8

Description of Documents: DeltaCom's Response in Opposition to Hypercube's Motion to Strike

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July 23, 2010

VIA ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 090327-TP - Petition of DeltaCom, Inc. for Order Determining DeltaCom, Inc. Not Liable for Access Charges of KMC Data, LLC and Hypercube Telecom, LLC

Dear Ms. Cole:

Enclosed for electronic filing in the above-referenced docket on behalf of DeltaCom, Inc., please find DeltaCom's Response in Opposition to Hypercube's Motion to Strike.

Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Matthew Feil
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{TL246772;1}

cc: Parties of Record
PSC Counsel

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STATE OF 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.)))))) <hr/>	Docket No. 090327-TP Filed: July 23, 2010
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DELTACOM'S RESPONSE IN OPPOSITION TO
HYPERCUBE'S MOTION TO STRIKE

Pursuant to Rules 28-106.204, Florida Administrative Code, DeltaCom, Inc. ("DeltaCom") hereby files its response in opposition to the motion to strike the prefiled rebuttal testimony of DeltaCom witness Jerry Watts ("Motion to Strike") filed in this docket by Hypercube Telecom, LLC and KMC Data, LLC ("Hypercube") on July 16, 2010. In support of this response, DeltaCom states as follows:

1. Contrary to assertions in Hypercube's motion,¹ whether a party chooses to file all, or a portion, of a witness's testimony in one state as direct testimony is irrelevant as to whether its submission of similar testimony in another as rebuttal testimony is proper. The issue to be decided is whether the rebuttal testimony filed in this proceeding responds to the opposing party's pre-filed direct testimony. Here, the rebuttal testimony of DeltaCom witness Jerry Watts is clearly responsive to the prefiled direct testimony of Hypercube's witnesses. Moreover, no part of the Order Establishing Procedure issued in this case requires the parties to follow the same prefiled testimony pattern they follow in other states. This Commission's case schedule and decisions in this matter are independent from those of other state commissions handling similar disputes between

¹ Hypercube Motion to Strike, p. 1 and p. 6.

Hypercube and DeltaCom,² and the parties are free to choose for themselves how they comply with the states' various case schedules.

2. Thus, the matter to be decided here is whether the prefiled rebuttal testimony of Mr. Watts **rebuts** the prefiled direct testimony of Hypercube's witnesses. As explained below, it clearly does.³ Accordingly, Hypercube's motion to strike should be denied.

3. Hypercube invited Mr. Watts' rebuttal by filing direct testimony which excludes important facts, improperly infers or presumes other facts and reaches incorrect conclusions.⁴ These errors are the subject of Mr. Watts' rebuttal. Hypercube cannot now be heard to cry foul and cover its errors by mis-labeling Mr. Watts' rebuttal as "direct" when Hypercube itself chose to file direct replete with flawed premises and presumptions.

4. Hypercube's fall-back position (from its general argument that all states' testimony must be identically filed) is to ask the Commission to strike specific portions of Mr. Watts' rebuttal wherein Mr. Watts explains why Mr. McCausland is wrong for

² It should come as no surprise that the parties are familiar with each other's positions. They are litigating these very same issues in several forums with different schedules. For instance, direct and rebuttal testimony in Florida was due on June 15 and July 9, respectively. Direct and rebuttal in Alabama was due on July 7 and July 28, respectively. Georgia and Tennessee have not established case schedules yet.

³ Only because Hypercube itself mislabels Mr. Watts' rebuttal as "direct" does Hypercube assert it is somehow harmed. However, it is true for all rebuttal testimony that there is typically no sur-rebuttal round under Florida Commission practice. Thus, both parties are in the same position regarding rebuttal as the last round of prefiled testimony.

⁴ The Commission will note that improper inference and faulty conclusion are a significant part of Hypercube's case, whether Hypercube is re-writing its price list through its testimony or just incorrectly stating the basis for DeltaCom's billing disputes.

asserting (1) that DeltaCom does not dispute Hypercube provided DeltaCom switched access service and (2) that DeltaCom never reported a PIU.⁵

5. Mr. Watts' rebuttal must be looked at in context, and in relation to Mr. McCausland's direct. Beginning on page 6, line 7, of his rebuttal (and citing to McCausland's Direct at p. 5), Mr. Watts addresses Hypercube witness McCausland's assertion that DeltaCom did not dispute whether Hypercube provided DeltaCom service. As written, Hypercube's Motion to Strike asks the Commission to permit Mr. Watts to say only that Mr. McCausland is wrong, **but not explain why he is wrong**, which Mr. Watts does from page 6, line 17, to page 9, line 10 (only for Hypercube to falsely claim this is not responsive to Hypercube's direct). In the questions and answers which follow the lead in the series, Mr. Watts explains that DeltaCom does indeed deny receiving Hypercube service and has no means to validate that Hypercube provided DeltaCom service **because:** (1) Hypercube traffic does not reach DeltaCom's network with electronic information revealing Hypercube's involvement with the call and its routing; instead, the disputed traffic is undetectable to DeltaCom in real time; (2) DeltaCom's review of limited call detail records ("CDRs") did not reveal Hypercube's involvement with the disputed calls (Hypercube refused to provide DeltaCom all of the CDRs DeltaCom requested); (3) there is no way for DeltaCom to verify Hypercube's role in routing the wireless traffic at issue based on the information DeltaCom has; (4) there is no way for DeltaCom to affirmatively accept or refuse the disputed traffic; and (5) there

⁵ Hypercube moves to strike Watts rebuttal page 6, line 17, to page 9, line 10, and page 10, line 17, to page 11, line 12. Hypercube does not assert that other sections of Mr. Watts's testimony are not responsive to Hypercube's direct. Rather, contrary to sound jurisprudence and Commission practice, Hypercube simply does not want the Commission to hear Mr. Watts provide exposition of why Hypercube is wrong.

is no direct interconnection between the parties.⁶ If Hypercube did not want the Commission to hear **why** Mr. McCausland was wrong, then Mr. McCausland should not have presumed to know DeltaCom's position in the first place: DeltaCom does deny receiving Hypercube's alleged service. Now, Hypercube attempts to recover from its (false) presumption by muzzling Mr. Watts' explanation and foreclosing the Commission from hearing relevant evidence.

6. Hypercube's request to mute Mr. Watts further by striking his rebuttal on pages 10 – 11 is even more egregious. Starting at line 4, page 10, Mr. Watts is asked what important details were left out of Hypercube's testimony regarding PIU. This rebuttal refers to Mr. McCausland's direct on pages 31 – 34. There, Mr. McCausland espouses the bizarre theory that DeltaCom did not submit a PIU to Hypercube because Hypercube did not agree with the PIU DeltaCom provided or the reasons for it. Mr. McCausland (on page 33, lines 2 – 3) then blames DeltaCom for not having data for its PIU, even though, as explained in the prior segment of Mr. Watts rebuttal which Hypercube not surprisingly wishes to strike, the disputed traffic is undetectable in real time, Hypercube did not provide relevant data to DeltaCom, and DeltaCom cannot validate the traffic. Then, wrapping things up with the ultimate irony for the undetectable, unverifiable traffic in dispute, Mr. McCausland states (on page 33, lines 14 – 15) Hypercube could not audit the PIU because DeltaCom did not report a PIU. On pages 10 – 11 of his rebuttal, Mr. Watts explains that Mr. McCausland's direct testimony

⁶ This testimony also bolsters Mr. Watts' earlier rebuttal testimony regarding disputed Hypercube bills. Since the traffic in dispute is undetectable in real time and there is no means for DeltaCom to validate the traffic, the alleged services cannot be parsed for detailing disputes. There is nothing to parse. Thus, the entirety of Hypercube bills were disputed.

fails to mention that DeltaCom did not receive **any** data from Hypercube to allow DeltaCom to validate the disputed traffic's origination points, which would have been necessary for an assessment of intra- or inter-MTA status and jurisdictionalization of the inter-MTA traffic. Mr. Watts next points out that, in stark contrast to DeltaCom's providing a PIU to Hypercube, Hypercube actually did not provide DeltaCom with a PIU for DeltaCom's IPAS service. In its Motion to Strike, Hypercube attempts to prevent Mr. Watts from pointing out Hypercube's insouciant pattern of conduct, giving DeltaCom no information relative to PIU or jurisdiction or bill support. Again, if Hypercube did not want Mr. Watts to make these rebuttal points, Mr. McCausland should not have invited them by pretending that DeltaCom's reported PIU did not exist, arguing that DeltaCom had the burden to produce supporting data which DeltaCom could not possibly produce, and contending that there was no reported PIU for Hypercube to audit even if it wanted to determine a proper PIU, which apparently it did not.

WHEREFORE, DeltaCom respectfully requests that the Commission to deny Hypercube's Motion to Strike in its entirety.

Respectfully submitted this 23rd day of July, 2010.

DeltaCom's Response in Opposition
July 23, 2010



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon the following by Electronic Mail and/or U.S. Mail this 23rd day of July, 2010.

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