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090327-TP

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**Sent:** Monday, July 26, 2010 4:40 PM  
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**Subject:** RE: Electronic Filing - Docket No. 090327-TP  
**Attachments:** DeltaCom's First Motion to Compel (TL248029).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:** 19

**Description of Documents:** DeltaCom's First Motion to Compel

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July 26, 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 First Motion to Compel.

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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{TL248021;1}

DOCUMENT NUMBER-DATE

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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.)**  
\_\_\_\_\_)

**Docket No. 090327-TP**

**Filed: July 26, 2010**

**DELTACOM'S FIRST MOTION TO COMPEL**

Pursuant to Rules 28-106.204 and 28-106.206, Florida Administrative Code, DeltaCom, Inc. ("DeltaCom") hereby moves the Commission to order Hypercube Telecom, LLC and KMC Data, LLC ("Hypercube") to provide complete responses to the DeltaCom discovery requests identified below and, specifically, compel Hypercube to provide such responses to DeltaCom within five (5) days of the Commission's order. In support of this motion, DeltaCom states as follows:

1. On May 24, 2010, DeltaCom served its first set of interrogatories, first set of requests for production of documents and first set of admissions to Hypercube. On June 23, 2010, Hypercube served objections and responses to this set of DeltaCom discovery requests.

2. A number of Hypercube's objections are unsupported, invalid or otherwise unsustainable and many of its answers are evasive, incomplete or otherwise non-responsive. Accordingly, DeltaCom moves the Commission to over-rule Hypercube's objections and to compel Hypercube to provide complete and responsive answers to the DeltaCom discovery requests specified below.

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3. Pursuant to Rule 28-106.206, Florida Administrative Code, discovery is to be obtained through the means and in the manner set forth in Rules 1.280 through 1.400 of the Florida Rules of Civil Procedure. In general, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party."<sup>1</sup> Further, "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>2</sup>

4. The discovery relevancy standard is thus far broader than the relevancy standard for hearing. *See, e.g., Amente v. Newman*, 653 So.2d 1030 (Fla. 1995) (relevancy is broader in discovery than in trial, and a party may be permitted to discover relevant evidence that would be inadmissible at trial if it leads to discovery of relevant evidence.). Courts have described the standard with even greater specificity:

A reasonably 'calculated' causal connection between the information sought and the possible evidence relevant to the issues in the pending action must 'appear' from the nature of both or it must be demonstrated by the person seeking discovery. . . . The mere fact that an inquiry that appears to be irrelevant 'might' lead to evidence that is relevant and admissible to the issues in the pending law suit is not sufficient.

*Calderbank v. Cazares*, 435 So.2d 377, 379 (Fla. 5<sup>th</sup> DCA 1983).

5. While most of Hypercube's objections are based on relevancy, such objections largely ignore DeltaCom's pleadings and the Issue List included in the Order

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<sup>1</sup> Rule 1.280(b)(1), Fla. R. Civ. Pro.

<sup>2</sup> *Id.*

Establishing Procedure in this docket. "It is axiomatic that information sought in discovery must relate to the issues involved in the litigation, as framed in all pleadings." *Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co.*, 629 So.2d 852, 854 (Fla. 1<sup>st</sup> DCA 1993). As discussed in greater detail below, DeltaCom's requests are directly related to claims and issues raised in its pleadings and to issues contained in the Issue List adopted in the Order Establishing Procedure. The causal connection between most of DeltaCom's discovery and its pleadings and the Issue List is patently obvious, and even with respect to requests for which that connection is arguably not plain on its face, the connection is easily ascertained. No amount of Hypercube evasion can overcome this causal relationship to DeltaCom's pleadings or the Issue List, and Hypercube should not be permitted to impermissibly block the discovery of information related to the Commission's review of Hypercube's unlawful conduct.

6. Most of Hypercube's relevancy objections rest on the singular premise that the simple act of Hypercube's having filed a CLEC price list renders that price list and all Hypercube's attendant conduct immune from Commission scrutiny. This premise is fatally flawed; for were it true, the Commission would not be able to effectively regulate and enforce the statutes, rules and orders the Commission is charged with enforcing because it could never scrutinize a price list or tariff already filed.<sup>3</sup> DeltaCom's Amended Petition in this case put at issue Hypercube's status as a "telecommunications company," its status as a "CLEC," Hypercube's legal foundation for filing the price list in this case, the legality and validity of Hypercube's charges to DeltaCom, and the legality of

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<sup>3</sup> The Commission, of course, has the power to do so and has done so in prior dockets.

Hypercube's arbitrage scheme involving access charges and associated kick-back payments to its wireless carrier customers. These issues were listed in DeltaCom's issue list during the issue identification process, and the Issue List for the Order Establishing Procedure certainly encompasses these matters. Hence, the discovery requests at issue are directly related to issues in the case and reasonably calculated to lead to the discovery of admissible evidence.

7. Still other Hypercube relevancy objections are made with respect to DeltaCom discovery requests seeking information regarding Hypercube's agreements with wireless carriers. The Amended Petition and the Issue List put Hypercube's payments to wireless carriers squarely at issue. DeltaCom's pleadings assert that Hypercube is engaged in an unlawful scheme involving wireless carriers and is seeking access charges for services performed for and/or by wireless carriers. DeltaCom alleges that Hypercube's remission of payments to wireless carriers puts Hypercube in the role of the wireless carriers' collection agent/proxy. DeltaCom's requests go to the heart of wireless payment issue, soliciting agreements for the purpose of identifying what payments Hypercube is obligated to make to which wireless carriers, the purported nature and purpose of the payment obligations (contingent or otherwise) and amount of the obligations.

8. Other Hypercube objections claim that documents sought are proprietary/confidential. This argument is without legal foundation. DeltaCom has executed a reasonable nondisclosure agreement with Hypercube and Hypercube will have every opportunity to file for confidentiality requests with the Commission and thereby exempt such documents from Florida's Sunshine Laws.

9. Still other Hypercube responses evade rather than answer DeltaCom's requests. A party has the obligation to answer all lawful discovery, and Hypercube should be compelled to do so. Hypercube's cavalier approach to its discovery obligations lacks good faith and it should not be condoned by the Commission.

**Discovery Requests the Commission Should Order Hypercube to Answer**

**Requests Relating to Hypercube Wireless Contracts (Interrogatories 2-5 & 44, Document Production Requests 2, 3 & 10)**

10. DeltaCom made several requests relating to the Hypercube contracts and arrangements with wireless carriers that form one of the primary bases for DeltaCom's claims here. Specifically, DeltaCom's Interrogatory 2 asked Hypercube to "[i]dentify the services Hypercube provides to wireless carriers in the State of Florida." Interrogatory 3 asks Hypercube to "[i]dentify the contracts pursuant to which Hypercube provides the services described in Hypercube's response to Interrogatory No. 2." Interrogatory 4 asks Hypercube to "[i]dentify the relevant provisions of each contract produced in response to Interrogatory No. 3 pursuant to which Hypercube transports 8YY calls originated by wireless providers." Interrogatory 5 asks Hypercube to "[i]dentify the relevant provisions of each contract produced in response to Interrogatory No. 3 pursuant to which Hypercube shares with wireless providers intrastate access charge revenues billed or collected on wireless-originated 8YY calls." And Interrogatory 44 asks Hypercube to "[s]tate whether or not all services Hypercube provides to wireless carriers for transporting and routing 8YY traffic within in the State of Florida are pursuant to negotiated, written contracts. If not, identify and describe the basis for the service relationship between Hypercube and said wireless carriers."

11. DeltaCom made several document production requests related to the same topic. Document Request 2 asked Hypercube to “[p]roduce all documents referred to in or that support Hypercube’s response Interrogatory No. 2.” and Request 3 asked for “all documents referred to in or that support Hypercube’s response to Interrogatory No. 3” Document Request 10 asked for “all contracts that Hypercube has with wireless providers for access to their networks in the State of Florida.”

12. Hypercube refused to provide any substantive response to all eight of these requests. Instead, Hypercube objected claiming that (1) the requests used terms that were “vague, ambiguous, insufficiently defined, or overly broad such that Hypercube is unable to determine what information is sought by this Request, and is thus likely to lead to confusing, misleading, inaccurate or incomplete responses,” (2) the information requested is not relevant, and (3) the information is a protected trade secret.

13. All of Hypercube’s objections are without merit and Hypercube’s full response should be compelled. Hypercube’s claim as to confusion as to what the requests seek is facially without merit and is an objection that it raises verbatim in response to numerous requests when the plain language of the request is clear. The concept that a telecommunications provider does not comprehend the meaning of the term “services” as used in Request 2 – “services” being the only term Hypercube explicitly mentioned as being an example of the vague language – lacks any credibility. As discussed above in paragraphs 6 and 7, Hypercube’s arrangements and contracts with these wireless providers is clearly relevant to the issues presented to this Commission. As also discussed above, Hypercube and DeltaCom have entered into a protective agreement and



thus, even if trade secrets were implicated, this type of information is fully protected by the protective agreement.

14. Accordingly, Hypercube's objections are without merit and it should be compelled to fully respond to these discovery requests.

**Requests Related to Hypercube's Network (Interrogatories 26 & 27;  
Document Production Requests 19-21)**

15. Interrogatory 26 asked Hypercube to "[i]dentify all points in the State of Florida where Hypercube is interconnected with wireless carriers for the purpose of transporting 8YY traffic" and Interrogatory 27 asked Hypercube to "[i]dentify all points in the State of Florida where Hypercube is interconnected with incumbent LECs for the purpose of transporting 8YY traffic." In its Requests for Production 19, 20 and 21, DeltaCom asked for "all documents, including network maps and route diagrams, depicting network architecture, interconnection or call flow, for intrastate wireless originated 8YY traffic handled by Hypercube"; "all documents referred to in or that otherwise relate to or support Hypercube's response Interrogatory No. 26"; and "all documents referred to in or that otherwise relate to or support Hypercube's response Interrogatory No. 27."

16. Hypercube responded by objecting on the grounds of relevance, repeating the same vagueness objection quoted paragraph 12, and on the grounds that the information is equally available to DeltaCom. Hypercube then went on to state in response to Interrogatory 26 that it "transports calls from the wireless carrier's MTSO to Hypercube's network and switching equipment" and then refers DeltaCom to the CLLI

codes on invoices and the CLONES database. In response to Document Request 19, Hypercube, after objecting on relevance grounds, makes the conflicting claims that the responsive documents are both publicly available on its website and constitute confidential and proprietary information.

17. Both the jurisdiction of the wireless calls at issue and the connections Hypercube has with the originating wireless carriers is undeniably relevant and Hypercube's claims to the contrary cannot survive even the barest of scrutiny. The interconnection points for and routing of 8YY traffic are relevant to the issues in this case, including DeltaCom's claims that Hypercube did not provide any service in its Florida Price List to DeltaCom. The information also is necessary to ascertain whether Hypercube is providing interexchange services rather than exchange access services. Hypercube's response of simply referring DeltaCom to the invoices, CLONES database and Hypercube's website, is simply insufficient. None of those provide the complete information asked for and to which DeltaCom is entitled. Further, Hypercube's conflicting claim that the documents responsive to Document Request 19 are both confidential and available on its website is nonsensical and does not provide a basis for refusing to respond. The information is not available on Hypercube's website and there is protective agreement in place that eliminates any basis for refusing to produce on the grounds that the responsive information is confidential.

18. Accordingly, Hypercube's objections are without merit and it should be compelled to fully respond to these discovery requests.

**Requests Relating to IXC Interconnection (Interrogatories 35 & 36;  
Document Production Requests 29 & 30)**

19. Interrogatory 35 asks Hypercube to “[i]dentify all agreements Hypercube has entered into with any IXCs pursuant to which Hypercube has accepted payment in an amount less than the price listed rate or amount it invoiced for its delivery of wireless-originated 8YY traffic to those IXCs and related data base queries” and Interrogatory 36 asks Hypercube to “[i]dentify all indirect network interconnection or traffic exchange agreements Hypercube has entered into with any IXCs pursuant to which Hypercube delivers wireless-originated 8YY traffic to those IXCs. In responding to this request, please state: a. Whether these agreements contain rates for intrastate access and data base query services that are lower than those contained in Hypercube’s intrastate price lists; and b. Whether Hypercube filed any of these agreements with the Florida Public Service Commission.” DeltaCom then requested in Document Production Requests 29 and 30 that Hypercube produce “all documents referred to in or that support Hypercube’s response Interrogatory No. 35” and “all documents referred to in or that support Hypercube’s response Interrogatory No. 36.”

20. Hypercube responded by objecting and claiming that the requests sought irrelevant and confidential and proprietary information and refusing to provide any substantive responses. The requested agreements and any lesser payments under those agreements is directly related to the viability of Hypercube’s assertion of filed rate doctrine protection. Moreover, the agreements shed light on Hypercube’s unlawful arbitrage scheme.

21. Accordingly, Hypercube's objections are without merit and it should be compelled to fully respond to these discovery requests.

**Annual Report Responses (Document Production Request 37)**

22. In Document Production Request 37, DeltaCom asked for "copies of all annual report responses Hypercube has provided to the Florida Public Service Commission for the last 4 years." Hypercube responded by objecting on the grounds of relevance and refused to provide any substantive response.

23. DeltaCom asserted in its Amended Petition that Hypercube is not for purposes of this proceeding a "telecommunications company" or a "CLEC" as defined by Chapter 364.<sup>4</sup> These claims have been incorporated into Issue No. 1 in this case. Accordingly, DeltaCom is entitled to know what information Hypercube has reported to the Commission regarding Hypercube's carrier status.

24. Accordingly, Hypercube's objections are without merit and it should be compelled to fully respond to these discovery requests.

**Call Flow, Transiting and Jurisdictional Information (Requests for Admission 13-16 & 18; Interrogatory 28)**

25. In Request for Admission 13, DeltaCom asked Hypercube to "[a]dmit that Hypercube does not always deliver 8YY traffic to an incumbent LEC for transiting to DeltaCom in the same state in which the call originated. If you provide any response other than an unqualified admission, please explain and describe the basis for your response." Hypercube's response was to object, claiming the request sought irrelevant information, and then to point to language in *DeltaCom's* price list.

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<sup>4</sup> See Count I, DeltaCom Amended Petition, pp. 10 – 11.

26. Hypercube's response is clearly inadequate. One of the key issues in this proceeding is the "service" Hypercube claims to have provided to DeltaCom. Knowing where Hypercube accepts calls and where it delivers them to is certainly relevant to figuring out just what type of service Hypercube provided. In addition, if Hypercube is accepting traffic in one LATA and delivering it in another LATA or even in another state, that certainly would undercut Hypercube's claim that it is providing some sort of exchange access service. Thus, Hypercube's claim that it is not relevant is without merit. As a result, Hypercube should be ordered to admit or deny this request.

27. Request for Admission 14 asks Hypercube to "[a]dmit that Hypercube did not originate any of the calls for which it has charged originating access to DeltaCom. If you provide any response other than an unqualified admission, please explain and describe the basis for your response."

28. Hypercube objected to the Request as irrelevant and vague (using the same language quoted in paragraph 12 above) and stating that "Hypercube provides switched access service to IXCs as defined in Hypercube's Florida price list."

29. Hypercube's vague and non-responsive answer is insufficient. DeltaCom is entitled to an admission or denial of the actual request for admission posed regarding origination, instead of an unrelated assertion about services in Hypercube's price list. Hypercube should be ordered to respond to the request as written, not the request to which Hypercube prefers to respond.

30. Request for Admission 15 asks that Hypercube "[a]dmit that all traffic in dispute flows in only one direction -- typically, from an originating wireless carrier to

Hypercube, then to the ILEC, then to DeltaCom. If you provide any response other than an unqualified admission, please explain and describe the basis for your response.”

31. Hypercube’s response was to object on vagueness grounds (again using the language quoted in paragraph 12 above) and claim that it did not understand the request because it uses contradictory terms (only and typically). Hypercube went on to state that “DeltaCom has used and continues to use Hypercube’s network as an input to DeltaCom’s 8YY offering that DeltaCom sells to its customers for a profit.”

32. Hypercube’s fatuous objection that it does not understand the request and that it uses contradictory terms should not be sustained. The request is clear: does the traffic typically travel in one direction, with that direction being from an originating wireless carrier to Hypercube, then to the ILEC, then to DeltaCom? Hypercube’s nonsensical response about DeltaCom using Hypercube’s network is irrelevant and insufficient. Hypercube should be ordered to respond to the request as written.

33. Request for admission 16 asks that Hypercube “[a]dmit that Hypercube itself neither originated nor terminated any of the calls for which it billed DeltaCom intrastate access and/or data base query charges and that Hypercube did not otherwise provide call origination or termination services to DeltaCom. If You provide any response other than an unqualified admission, please explain and describe the basis for your response.”

34. Once again demonstrating its will to turn the discovery process into a charade, Hypercube objected to the request as irrelevant and vague and stated “that Hypercube provides switched access service to IXC’s as defined in Hypercube’s Florida price list.”

35. This response is yet another instance in which Hypercube completely disregards the actual request made and makes a largely irrelevant assertion in response rather than responding with an admit or deny as legally required. This request is clearly relevant to whether Hypercube has provided a service from its Florida price list to DeltaCom. DeltaCom is entitled to a response to the request for admission as posed and not some irrelevant contortion by Hypercube.

36. Request for admission 18 asks that Hypercube “[a]dmit that in no case related to the calls and charges at issue in this proceeding has a “Company End User”, as defined in Hypercube’s price list, selected DeltaCom as its presubscribed IXC. If you provide any response other than an unqualified admission, please explain and describe the basis for your response.”

37. Hypercube responded by objecting to the request as irrelevant. Hypercube goes on to state that transporting 8YY traffic does not require a presubscribed IXC, that DelatCom is the RESPORG for the calls, and therefore DeltaCom is the party responsible for paying for routing.

38. Not a single one of Hypercube’s statements responds to the request asked. Once again, the request seeks information relevant to whether Hypercube provided a service in its price list to DeltaCom. Hypercube should be ordered to respond to this relevant request for admission and not engage in misdirection and irrelevant assertions in response.

39. Interrogatory 28 asks Hypercube to “[e]xplain why and under what circumstances Hypercube delivers wireless-originated 8YY calls to an incumbent LEC tandem outside the LATA and outside the state in which the call originates.”

40. Hypercube objected on the grounds of relevance and “to the extent” that the request seeks legal argument. Hypercube then goes on to vaguely state that Hypercube follows the routing patterns as published by the SMS/800 rules and the result of the dip in the SMS/800 database and subject to its network management and that routing is “dynamic” in nature. Hypercube goes on to make an additional non-responsive statement about billing (which forms no part of the question).

41. Again, the type, jurisdiction and routing of 8YY calls is central to the issue of ascertaining what type of service Hypercube provided (if any) and to whom. Thus, Hypercube’s claim of irrelevance here is completely without merit. Moreover, Hypercube’s vague and overly-generalized response is actually not responsive at all. DeltaCom is entitled to and Hypercube should be ordered to provide a full and detailed answer.

**Access Service Requests (Request for Admission 24)**

42. Request for Admission 24 asks Hypercube to “[a]dmit that DeltaCom has never submitted an access service request (“ASR”) or other order for the services at issue in this proceeding. If you provide any response other than an unqualified admission, please explain and describe the basis for your response.” Hypercube refused to admit or deny the actual request made and instead stated that it admitted that DeltaCom constructively ordered access service.

43. Whether DeltaCom constructively ordered access services is not the request posed and Hypercube’s theory on that point is irrelevant and unresponsive to the question of whether DeltaCom submitted an access service request. This is clearly relevant and Hypercube’s obstructive response should not be countenanced.



**Blocking Calls (Interrogatory 40)**

44. Interrogatory 40 asks Hypercube to “[i]dentify any requests Hypercube has received since 2004 to block 8YY traffic routed by Hypercube and describe in complete detail Hypercube’s response to such requests, if any.” Hypercube’s responded by objecting to the request as overbroad and then stating that “it was not aware of any requests by DeltaCom to block 8YY traffic to DeltaCom in Florida.”

45. DeltaCom’s request does not ask whether Hypercube received requests to block only 8YY traffic to DeltaCom, but whether it received *any* requests to block Hypercube 8YY traffic. Hypercube has squarely put the issue of blocking traffic at issue in its pleadings, arguments and pre-filed testimony. Any requests, or lack thereof, by other carriers and Hypercube’s responses to those requests is relevant to Hypercube’s claim that DeltaCom had some type of obligation to try to block the Hypercube 8YY traffic at issue here.

46. Accordingly, Hypercube’s objections are without merit and it should be compelled to fully respond to this Interrogatory.

**Facilities Used (Interrogatory 42; Document Production Request 35)**

47. In Interrogatory 42, DeltaCom asked Hypercube to “[i]dentify and describe the type of facilities used by Hypercube to deliver the 8YY traffic at issue to an ILEC for routing to DeltaCom.” Hypercube responded by objecting to the scope of the request and stating “that it uses the facilities outlined in its price list.” In Document Production Request 35, DeltaCom asked for “all documents referred to in or that support Hypercube’s response Interrogatory No. 42.” In response, Hypercube objected, claiming

the information was available to DeltaCom in the form of invoices, correspondence, and its price lists.

48. Hypercube's non-response is improper. The type of facilities used, per Hypercube's own price list, determine, in part, whether a particular service was provided by Hypercube. The vague and useless reference to its price list and invoices that do not contain Hypercube facility information does not provide the information requested and to which DeltaCom is entitled.

49. Accordingly, Hypercube's objections are without merit and it should be compelled to fully respond to this Interrogatory.

**Conclusion**

WHEREFORE, DeltaCom respectfully moves the Commission to compel Hypercube to respond to the following discovery requests, consistent with the above, within five (5) days of its order: Interrogatory Nos. 2-5, 26-28, 35, 36, 40, 42, and 44, Admission Nos. 13-16, 18, and 24 and Document Request Nos. 2-3, 10, 19, 20, 21, 29, 30, 35, and 37.

Respectfully submitted this 26th day of July, 2010.



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DeltaCom's First Motion to Compel  
July 26, 2010

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*Attorneys for DeltaCom, Inc.*

**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 26<sup>th</sup> day of July, 2010.

Charles Murphy, Esq. Office of the General Counsel Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 cmurphy@psc.state.fl.us	Kevin Bloom Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 kbloom@psc.state.fl.us
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By:   
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