

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 ORDER NO. PSC-10-0050-PCO-TP ISSUED: January 20, 2010
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ORDER GRANTING DELTACOM, INC.'S OCTOBER 23, 2009, MOTION TO AMEND PETITION AND DECEMBER 14, 2009, MOTION TO SET DATE

This Order addresses two outstanding motions that have been filed in this docket: DeltaCom, Inc.'s ("DeltaCom") October 23, 2009, Motion to Amend Petition and also that company's December 14, 2009, Motion to Set Date for DeltaCom to File Responsive Pleadings to Hypercube Telecom's Amended Counterclaims. Neither Motion has been opposed by Hypercube.<sup>1</sup>

History

On June 5, 2009, DeltaCom filed a Petition with this Commission against KMC Data, LLC, Hypercube, LLC and Hypercube Telecom, LLC ("Petition"). At the request of the parties, by Order No. PSC-09-0472-PCO-TP, issued on July 2, 2009, the Commission granted a temporary stay of the proceedings to provide the parties time to attempt to resolve the case. On August 25, 2009, the parties filed a Joint Report and Motion to Dissolve Limited Stay and Schedule Responsive Pleading Date in which they asked the Commission to move forward with this matter, and that any responsive pleadings to the DeltaCom Petition be filed by August 31, 2009.

On August 31, 2009, Hypercube, LLC and Hypercube filed a Motion to Dismiss for Lack of Jurisdiction ("Motion to Dismiss") and separately filed an Answer and Counterclaims to the DeltaCom Petition. On September 8, 2009, DeltaCom filed its timely Response to the Motion to Dismiss. By Order No. PSC-09-0633-PCO-TP, issued on September 17, 2009, the Commission granted the Motion to Dismiss Hypercube, LLC from this proceeding without prejudice.<sup>2</sup>

On September 21, 2009, DeltaCom filed its unopposed Motion to Set Date for DeltaCom to File Responsive Pleadings to Hypercube's Counterclaims ("Motion to Set Date"). By Order No. PSC-09-0644-PCO-TP, issued on September 23, 2009, the Commission granted DeltaCom's Motion to Set Date.

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<sup>1</sup> Although both parties have made reference to "Hypercube Telecom, LLC f/k/a KMC Data, LLC" in various filings made in this docket, and DeltaCom has styled filings in this docket as relating to simply "Hypercube" or "Hypercube Telecom", DeltaCom has also identified both Hypercube Telecom, LLC and KMC Data, LLC as defendants in this docket. It is my understanding that DeltaCom may raise, as an issue in this proceeding, the question of whether Hypercube Telecom, LLC and KMC Data, LLC are one in the same. It is not my intent to prejudge that issue; thus, references in this Order to "Hypercube" extend to KMC Data, LLC as well as Hypercube Telecom, LLC, whether the companies are the same or separate entities.

<sup>2</sup> Hypercube, LLC, which was dismissed from this proceeding, is the parent company of Hypercube Telecom, LLC.

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On September 30, 2009, DeltaCom filed its Answer to Counterclaims of Hypercube. On October 5, 2009, DeltaCom filed its Amended Answer to Counterclaims of Hypercube. On October 23, 2009, DeltaCom filed its **Motion to Amend Petition**, which is the subject of this Order, and its First Amended Petition. On November 23, 2009, Hypercube filed an Answer to DeltaCom's Amended Petition and an Amended Counterclaim.

On December 14, 2009, DeltaCom filed its unopposed Motion to Set Date for DeltaCom to File Responsive Pleadings to Hypercube's Amended Counterclaims ("**Second Motion to Set Date**") which is also the subject of this Order. On December 18, 2009, Commission Staff filed its Notice of Issue Identification Meeting. On December 23, 2009, DeltaCom filed its Answer to Amended Counterclaim of Hypercube.

### **Review and Decision**

#### **DeltaCom Motion to Amend Petition**

In its October 23, 2009, Motion to Amend Petition, which was filed pursuant to Rule 28-106.204, Florida Administrative Code, DeltaCom asks that this Commission permit DeltaCom to Amend its Petition. In support of this Motion, DeltaCom asserts that amendment is needed to present additional facts, arguments and claims directly related to the dispute between the parties and that there have been no procedural dates set in this docket. DeltaCom concludes that amendment of its Petition "would serve to foster the efficient administration of justice and not prejudice any party to this case." DeltaCom represents that Hypercube "reserves its response until it has adequate opportunity to review the motion and amendment." I note that on November 23, 2009, Hypercube filed its Answer to the Amended Petition.

Having reviewed DeltaCom's October 23, 2009, Motion to Amend Petition, I find it appropriate that it be granted.

#### **DeltaCom Second Motion to Set Date**

In its unopposed December 14, 2009, Motion to Set Date, which was filed pursuant to Rule 28-106.204, Florida Administrative Code, DeltaCom asks that its pleadings in response to Hypercube's November 23, 2009, Amended Counter Claims be due on December 23, 2009. In support of its Motion to Set Date, DeltaCom recounts the history of pleadings in this Docket and asserts the following: the DeltaCom responsive pleadings are important to refine the issues in this proceeding; the December 23, 2009, response date is agreeable to Hypercube; and, Hypercube does not oppose DeltaCom's Second Motion to Set Date.

Having reviewed DeltaCom's unopposed Second Motion to Set Date, I find it appropriate that it be granted.

Based on the foregoing, it is

ORDERED by Commissioner Nathan A. Skop, as Prehearing Officer, that the DeltaCom, Inc. October 23, 2009, Motion to Amend Petition is hereby granted. It is further

ORDERED that the DeltaCom, Inc. December 14, 2009, Motion to Set Date for DeltaCom to File Responsive Pleadings is hereby granted.

By ORDER of Commissioner Nathan A. Skop, as Prehearing Officer, this 20th day of January, 2010.



NATHAN A. SKOP  
Commissioner and Prehearing Officer

(SEAL)

CWM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.