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090327-TP

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Sent: Wednesday, July 28, 2010 4:56 PM
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Subject: Electronic Filing - Docket No. 090327-TP
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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: 7

Description of Documents: DeltaCom's Motion to Strike Portions of Hypercube's Prefiled Rebuttal Testimony

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July 28, 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 Motion to Strike Portions of Hypercube's Prefiled Rebuttal Testimony.

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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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 28, 2010
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**DELTACOM'S MOTION TO STRIKE PORTIONS OF HYPERCUBE'S
PREFILED REBUTTAL TESTIMONY**

Pursuant to Rules 28-106.204, Florida Administrative Code, and the Order Establishing Procedure entered in this docket, DeltaCom, Inc. ("DeltaCom") hereby files its motion to strike the portions of the prefiled rebuttal testimony of KMC Data LLC and Hypercube Telecom LLC ("Hypercube") identified below. In support of this motion, DeltaCom states as follows:

1. Significant portions of the prefiled rebuttal testimony of Hypercube witnesses McCausland and Sidak, filed July 9, 2010, are completely unresponsive to the prefiled direct testimony of DeltaCom witness Wood, wholly irrelevant or both. Accordingly, DeltaCom moves to strike those portions of the McCausland and Sidak rebuttal.

2. On page 7, line 18, through page 8, line 23, of Mr. McCausland's rebuttal, Mr. McCausland is asked and provides an answer to the following question, "Does Hypercube add value to the telecommunications network?" Hypercube does not even make a cursory attempt to tie this question and answer back to any portion of Mr. Wood's direct, nor is this question and answer in any sense exposition of Mr. McCausland's answer to the prior question on page 5, line 13, regarding whether DeltaCom can

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somehow verify Hypercube's involvement in the disputed traffic, or any later question. In his direct, Mr. Wood does not address what value, if any, Hypercube may add to networks in Florida. With no disguise of being rebuttal, Hypercube improperly supplements Mr. McCausland's direct with this objectionable Q-and-A. In addition, the objectionable Q-and-A does not relate in any way to any issue in the Issue List for this case.¹ No issue, either directly or by logical extension, asks if Hypercube "adds value to the telecommunications network." Therefore, page 7, line 18, through page 8, line 23, Mr. McCausland's rebuttal should be stricken.

3. On page 20, line 8, through page 20, line 20, of Mr. McCausland's rebuttal, Mr. McCausland is asked and provides an answer to the following question: "If the Commission declines to enforce Hypercube's price list, has Hypercube provided DeltaCom valuable services for which Hypercube should be compensated?" Once again, Hypercube does not make even a passing attempt to tie this question and answer back to any portion of Mr. Wood's direct, nor is this question and answer in any sense exposition of Mr. McCausland's answer to any question before or after the objectionable Q-and-A. Indeed, this attempt by Hypercube to improperly supplement Mr. McCausland's direct is more brazen than any prior because Mr. Wood's prefiled direct explicitly states that Mr. Wood leaves argument over quantum meruit to DeltaCom's lawyers in briefing. (Wood Direct at pp. 65-66 (see reference to Issue 9).) Surely, Mr. McCausland does not suppose to rebut that which has been so clearly deferred by the direct witness. Therefore, page 20, line 8, through page 20, line 20, of Mr. McCausland's rebuttal should be stricken.

¹ Order No. PSC-10-0245-PCO-TP, issued April 20, 2010, Attachment A.
(TL250268;1)

4. On page 7, line 12, through page 11, line 13, of Mr. Sidak's rebuttal, Mr. Sidak is asked and provides an answer to the following questions: (1) "Would consumers be better off in aggregate if DeltaCom were required to pay Hypercube . . . ?" and (2) "Is it possible that both 8YY subscribers and wireless end users would . . . benefit if DeltaCom were required to pay Hypercube . . . ?" Hypercube does not even make a cursory attempt to tie these questions and answers back to any portion of Mr. Wood's direct, nor are these questions and answers in any sense exposition of Mr. Sidak's answer to any question before or after the objectionable Q-and-A. Indeed, with almost blind gusto, Hypercube makes **not one** reference to Mr. Wood's direct in any of this so-called "rebuttal;" instead, throughout this segment, Mr. Sidak refers exclusively and repeatedly to Mr. Sidak's own direct. This is neither rebuttal nor exposition: it is unabashed repetition and supplementation of direct. In addition, this objectionable Q-and-A does not relate in any way to any issue in the Issue List for this case. No issue, either directly or by logical extension, asks if Hypercube is somehow helping consumers through perpetration of its arbitrage scheme. Therefore, On page 7, line 12, through page 11, line 13, of Mr. Sidak's rebuttal should be stricken.

5. On page 12, line 8 through page 13, line 8, of Mr. Sidak's rebuttal, Mr. Sidak is asked and provides an answer to the following question: "How does the two-sided nature of demand for 8YY calls affect the public interest?" Hypercube does not even make a cursory attempt to tie this question and answer back to any portion of Mr. Wood's direct, nor is this question and answer in any sense exposition of Mr. Sidak's answer to any question before or after the objectionable Q-and-A. In his direct, Mr. Wood does not address the 'two-sided demand' Mr. Sidak describes. Thus, there is

nothing in Mr. Wood's direct for Mr. Sidak to rebut by the objectionable Q-and-A. In addition, the latter Q-and-A does not relate in any way to any issue in the Issue List for this case. No issue, either directly or by logical extension, asks about two-sided demand. Therefore, page 12, line 8 through page 13, line 8, of Mr. Sidak's rebuttal should be stricken.

6. On page 23, line 8, through page 26, line 14, of Mr. Sidak's rebuttal, Mr. Sidak is asked and provides an answer to the following questions: (1) "Is DeltaCom a 'cost causer' in the sense envisioned by FCC regulations?" and (2) "Is it there an analogy under the common law of contracts that supports the conclusion that Hypercube has an enforceable right to compensation from DeltaCom?" As before, Hypercube does not even make a cursory attempt to tie these questions and answers back to any portion of Mr. Wood's direct, nor are these questions and answers in any sense exposition of Mr. Sidak's answer to any question before or after the objectionable Q-and-A. In his direct, Mr. Wood does not address 'cost causer' principles under FCC regulations, and defers purely legal conclusions to DeltaCom's lawyers for briefing. (See Wood Direct at pp. 65-66.) Thus, there is nothing in Mr. Wood's direct for Mr. Sidak to rebut by the objectionable Q-and-A. In addition, the latter Q-and-A does not relate in any way to any issue in the Issue List for this case. No issue, either directly or by logical extension, asks the parties to explore analogies from the common law of contracts. Therefore, page 23, line 8, through page 26, line 14, of Mr. Sidak's rebuttal should be stricken.

DeltaCom's Motion to Strike
July 28, 2010

WHEREFORE, DeltaCom respectfully requests that the Commission to strike the portions of Hypercube's prefiled rebuttal testimony set forth in the body of this motion.

Respectfully submitted this 28th day of July, 2010.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was served upon the following by Electronic Mail and/or U.S. Mail this 28th day of July, 2010.

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