

**Marguerite McLean**

090327-TP

**From:** nicki.garcia@akerman.com  
**Sent:** Tuesday, July 27, 2010 3:28 PM  
**To:** Filings@psc.state.fl.us  
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**Subject:** Electronic Filing - Docket No. 090327-TP  
**Attachments:** 20100727152242512.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.

**Person Responsible for Filing:**

Matthew Feil  
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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:** 6

**Description of Documents:** DeltaCom's Motion to Quash and for Protective Order

**Nicki Garcia**

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July 27, 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 Quash and for Protective Order.

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

Sincerely,

Matthew Feil

{TL248021;1}

DOCUMENT NUMBER - DATE

06125 JUL 27 09

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**STATE OF FLORIDA**  
**PUBLIC SERVICE COMMISSION**

**In re: Petition of DeltaCom, Inc. for            )**  
**order determining DeltaCom, Inc.            )**            **Docket No. 090327-TP**  
**not liable for access charges of KMC        )**  
**Data LLC and Hypercube Telecom, LLC.)        )**            **Filed: July 27, 2010**  

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**DELTACOM'S MOTION TO QUASH AND FOR PROTECTIVE ORDER**

Pursuant to Rules 28-106.204 and 28-106.206, Florida Administrative Code, and Rule 1.280(c) of the Florida Rules of Civil Procedure, DeltaCom, Inc. ("DeltaCom") hereby moves that the Commission quash Item 4 of Attachment A to the Notice of Deposition served by Hypercube Telecom, LLC ("Hypercube") on July 22, 2010, and issue a protective order barring Hypercube from inquiring into that specified subject area. In support of this motion, DeltaCom states as follows:

1. On July 22, Hypercube served DeltaCom a Notice of Deposition Upon Oral Examination ("Notice"). In the Notice, Hypercube invokes Rule 1.310(6),<sup>1</sup> requesting DeltaCom to designate for deposition a corporate representative to address subjects identified in Attachment A to the Notice. Attachment A lists 32 subject areas over the span of 7 pages.

2. Item 4 on page 3 of Attachment A to the Notice requests DeltaCom produce a deponent to address the following subject:

DeltaCom's revenue received from its 8YY service subscribers for the calls for which Hypercube has billed DeltaCom access charges at issue in this action.

<sup>1</sup> The proper rule reference is 1.310(b)(6).

This DeltaCom motion concerns only Item 4, which, as explained below, DeltaCom maintains is improper. Hypercube's pursuit thereof only serves to annoy, harass and cause DeltaCom to incur undue burden and expense.

3. No issue from the Order Establishing Procedure's Issue List<sup>2</sup> questions, directly or even remotely, whether DeltaCom receives revenue from 8YY subscribers, let alone how much revenue or whether any of that revenue can somehow be traced to calls for which Hypercube alleges involvement. Instead, the core issues in this proceeding concern Hypercube's unlawful scheme to impose access charges on DeltaCom for wireless carrier originated calls based on a defective price list.

4. Hypercube may counter that its initial pleading alleges DeltaCom derives revenue from its 8YY subscribers and refuses to pay Hypercube. Aside from the fact that such claims are not encompassed within the plain terms of the Issue List, DeltaCom asserts this Hypercube argument is to no avail because: (1) DeltaCom acknowledges as self-evident that DeltaCom derives revenue from its 8YY subscribers. No more information that that is reasonably calculated to lead to the discovery of admissible evidence;<sup>3</sup> indeed, it makes no difference to the determination of whether Hypercube's charges are lawful if, for example, DeltaCom derived revenue of \$1, \$5 or \$50 from 8YY customer Jones in March of 2008. Hypercube's Item 4 is, simply, a fishing expedition, and one which implicates highly confidential and proprietary end user information. Such

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<sup>2</sup> Order No. PSC-10-0245-PCO-TP, issued April 20, 2010, Attachment A.

<sup>3</sup> Hypercube's first set of discovery to DeltaCom sought information regarding DeltaCom's subscribers. By its responses served June 3, 2010, DeltaCom objected to such discovery on a number of grounds, including that such discovery was irrelevant. Hypercube did not move to compel any information from DeltaCom on this subject.

a fishing expedition should not be permitted, particularly where Hypercube has not and cannot establish that such information is reasonably necessary to litigate the identified issues in this case. (2) Neither Hypercube's pleadings, nor, significantly, the price list which is the foundation of all of its claims, assign any significance whatsoever to the amount or derivation of revenue that may be associated with DeltaCom's 8YY subscribers. (3) Hypercube's Item 4 asks DeltaCom to somehow do the impossible of matching years of Hypercube's never validated bills to years of DeltaCom's 8YY subscriber records. DeltaCom has not created, and has no affirmative legal duty to create, such evidence -- even if DeltaCom could do so.

5. Rule 1.280(c) of the Florida Rules of Civil Procedure<sup>4</sup> provides in part,

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires . . . .

For the reasons stated above, the Commission should quash Item 4 of the Notice and spare DeltaCom the annoyance, harassment and burden of attempting to respond to questions relating to Item 4.


WHEREFORE, DeltaCom respectfully requests that the Commission to quash Item 4 of Hypercube's Notice and issue a protective order barring Hypercube from deposition inquiry into Item 4.

Respectfully submitted this 27<sup>th</sup> day of July, 2010.

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<sup>4</sup> Incorporated into the uniform administrative procedural rules by Rule 28-106.206, Florida Administrative Code.

DeltaCom's Motion to Quash  
July 27, 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 27th 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
D. Anthony Mastando, Esq. Regulatory Vice President Jean Houck DeltaCom, Inc 7037 Old Madison Pike, Suite 400 Huntsville, AL 35806 (256) 382-5900 tony.mastando@deltacom.com jean.houck@deltacom.com	Mr. James Mertz Hypercube Telecom LLC Building 300 5300 Oakbrook Parkway Suite 330 Norcross, GA 30093-6210 james.mertz@hypercube-llc.com
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By:   
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