

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-10-0480-PCO-TP  
ISSUED: August 2, 2010

ORDER DENYING MOTION

On July 9, 2010, DeltaCom, Inc. ("DeltaCom") filed the rebuttal testimony of Mr. Jerry Watts. On July 16, 2010, Hypercube Telecom, LLC ("Hypercube") filed its Motion to Strike Rebuttal Testimony of Jerry Watts ("Motion"). On July 23, 2010, DeltaCom filed its Response in Opposition to Hypercube's Motion to Strike ("Response").

In support of its Motion, Hypercube provides a brief history and introduction in which it observes that although he had not provided direct testimony in this case, DeltaCom added Mr. Watts as rebuttal witness and that "significant portions of Mr. Watts' 'rebuttal' testimony are nearly identical to direct testimony of Mr. Watts that DeltaCom filed in a parallel proceeding."

Relying on a 2006 order of the Florida Public Service Commission, Hypercube asserts that

- rebuttal testimony should be stricken when it does not rebut any specific assertions of direct testimony
- the presiding officer has significant discretion when ruling on a motion to strike testimony, and,
- DeltaCom has an obligation to show that the testimony it has presented is legally proper.

Hypercube argues that much of Mr. Watts' rebuttal testimony does not respond to any Hypercube Testimony and is actually direct testimony. Specifically, Hypercube asserts that the following is direct testimony: Page 6, line 17 to page 9, line 10 and Page 10, line 17 to page 11, line 12.

HyperCube links Mr. Watts' rebuttal testimony in this case to "nearly identical" direct testimony filed in a parallel case in Alabama and concludes that Mr. Watts' rebuttal testimony should be stricken or, at the very least, the portions of his testimony identified above should be stricken.

In its Response, DeltaCom asserts that the filing of Mr. Watts' testimony in one jurisdiction as direct does not mean that the testimony is not responsive to the prefiled direct testimony of Hypercube's witnesses filed in this proceeding. DeltaCom argues that the matter to be decided is whether Mr. Watts' testimony, filed in this case, rebuts Hypercube's direct testimony. DeltaCom asserts that Mr. Watts' rebuttal testimony was invited when Hypercube filed direct testimony "which excludes important facts, improperly infers or presumes other facts and reaches incorrect conclusions." DeltaCom argues, in detail, that these errors are the subject

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of Mr. Watts' rebuttal testimony and that Hypercube is attempting to prevent DeltaCom from presenting testimony which demonstrates why the Hypercube testimony is wrong.

Upon review, I find the DeltaCom argument to be more persuasive and thus, deny the Hypercube Motion.

Based on the foregoing, it is

ORDERED by Commissioner Nathan A. Skop, as Prehearing Officer, that Hypercube Telecom, LLC's July 16, 2010, Motion to Strike Rebuttal Testimony of Jerry Watts is denied.

By ORDER of Commissioner Nathan A. Skop, as Prehearing Officer, this 2nd day of August, 2010.



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NATHAN A. SKOP  
Commissioner and Prehearing Officer

( S E A L )

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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

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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.