

**Dorothy Menasco**

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**From:** Ann Bassett [abassett@lawfla.com]  
**Sent:** Monday, August 31, 2009 3:33 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket No. 090327-TP  
**Attachments:** 2009-08-31, 090327, Hypercube's Motion to Dismiss.pdf

The person responsible for this filing is

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The Docket No. is 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

This is being filed on behalf of Hypercube, LLC and Hypercube Telecom, LLC (f/k/a KMC Data, LLC)

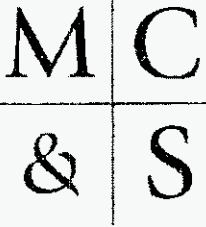
Total Number of Pages is 6

Hypercube, LLC and Hypercube Telecom, LLC (f/k/a KMC Data, LLC) Motion to Dismiss for Lack of Jurisdiction

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August 31, 2009

**VIA ELECTRONIC FILING**

Ms. Ann Cole, Commission Clerk  
Office of Commission Clerk  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 090327-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Hypercube, LLC and Hypercube Telecom, LLC (f/k/a KMC Data, LLC) is the Motion to Dismiss for Lack of Jurisdiction in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb

Enclosure

cc: Mr. James Mertz  
Parties of Record

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FPSC-COMMISSION CLERK

**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, Hypercube, LLC, and )  
Hypercube Telecom, LLC. )  
\_\_\_\_\_ )

Docket No. 090327  
Filed: August 31, 2009

**HYPERCUBE, LLC'S MOTION TO  
DISMISS FOR LACK OF JURISDICTION**

Hypercube, LLC, pursuant to Rule 28-106.204, Florida Administrative Code, moves the Florida Public Service Commission ("Commission") for an order dismissing Hypercube, LLC from this docket for lack of jurisdiction, and in support states as follows:

**Factual Allegations**

1. On or about June 5, 2009, DeltaCom, Inc. ("DeltaCom") filed its Petition initiating this docket naming Hypercube, LLC along with Hypercube Telecom, LLC f/k/a KMC Data, LLC as Defendants. By Order No. PSC-09-0472, issued July 7, 2009, the Commission granted a temporary stay of the proceedings to provide the parties additional time to seek a resolution of the matter. On August 25, 2009, the parties filed their Joint Report and Schedule Request and requesting that the Commission move forward with the docket and that any response pleadings to the Petition be filed on or before August 31, 2009.

2. Hypercube Telecom, LLC, is a competitive local exchange carrier (CLEC) certified in Florida and is authorized to provide intrastate exchange access services within the State of Florida. By separate pleading being filed simultaneously with this Motion, Hypercube Telecom, LLC is filing its answer, defenses, and counterclaims to the Petition.

3. Hypercube, LLC is not a licensee of this Commission and, as such, is not subject to the jurisdiction of the Commission. Hypercube, LLC is simply the parent company

of a regulated telecommunications company, Hypercube Telecom, LLC. Accordingly, Hypercube, LLC should be dismissed from this docket.

#### **Florida Public Service Commission Jurisdiction**

4. Section 364.01(1), Florida Statutes, provides that this Commission “shall exercise over and in relation to telecommunications companies the powers conferred by this chapter.

Further Section 364.01(2) provides:

It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies, and such preemption shall supersede any local or special act or municipal charter where any conflict of authority may exist.

5. Section 364.02(14) defines a “telecommunications company” as follows:

every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision in the state, offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility.

6. Hypercube, LLC is not a telecommunications company under the definition provided in Section 364.02(17). Hypercube, LLC does not have a certificate or any other authorization by this Commission to provide telecommunications services within Florida. Hypercube, LLC does not have on file with the Commission any tariffs or price list. Hypercube, LLC does not hold itself out to the public as a provider of telecommunications services and does not make available to the public, via the Internet or any other means, tariffs or price lists. Moreover, in its Petition, DeltaCom does not make any claim or assertion that Hypercube, LLC is a telecommunications services provider subject to the jurisdiction of this Commission. Indeed, in paragraph 7 of its Petition, DeltaCom admits that “Hypercube, LLC is not a CLEC certificated to provide services in Florida.”

7. Hypercube, LLC, does not fall within the exclusive jurisdiction granted to the Commission by the Legislature of the State of Florida under Section 364.01 over “telecommunications companies,” and as such Hypercube, LLC should be dismissed from this docket.

#### **Improper Joinder of Hypercube, LLC**

8. While the rules governing decisions determining substantial interests do not have a specific rule regarding the dismissal of parties, Rule 1.250(b) of the Florida Rule of Civil Procedure provides that “parties may be dropped by order of court on its own initiative or the motion of any party at any stage of the action on such terms as are just.” Under Rule, 28-106.204, Florida Administrative Code, the rule governing motions, this Commission has the authority to dismiss a party as is provided for in the Rules of Civil Procedure.

9. The Commission has previously dismissed a named party from a proceeding where the party was an improperly joined party. In that case, the Commission dismissed KMC Data, LLC as a party because there was “no nexus between KMC Data and the transactions that were the subject of the petition.”<sup>1</sup> The Commission went on to state that “though KMC Data LLC had entered into an interconnection agreement with Sprint, it never exchanged any traffic with Sprint in Florida, and was in no way involved in facilitating the transactions that were the subject of the petition.”

10. Hypercube, LLC has not in any manner participated in the transactions that are the subject of the matters identified in the Petition filed by DeltaCom. If dismissal of a

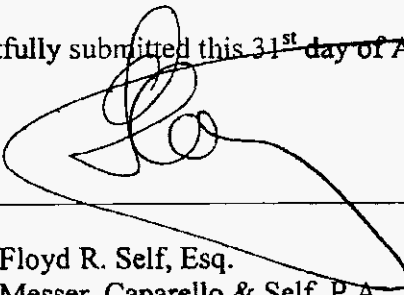
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<sup>1</sup> *In re: Complaint against KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for alleged failure to pay intrastate access charges pursuant to its interconnection agreement and Sprint's tariffs and for alleged violation of Section 364.14(3)(a), F.S., by Sprint-Florida, Incorporated*, Docket No. 041144, Order No. PSC-05-1234-FOF-TP, at 11-13 (Dec. 19, 2005) (2005 Fla. PUC LEXIS 592). The KMC Data entity at issue in Docket No. 041144 was not at that time a part of Hypercube, LLC.

certificated telecommunications company is appropriate where that CLEC has not had any relationship to the matters complained of in the petition, then certainly an entity that is not certificated by this Commission and lacks any nexus to the subject matter of the petition should be dismissed. As such, Hypercube, LLC has been improperly joined as a party to the petition and, therefore, should be dismissed as a party to this docket.

WHEREFORE, since the Commission does not have proper jurisdiction over Hypercube, LLC, and Hypercube, LLC has been improperly joined as a party to this Petition, Hypercube, LLC respectfully requests that the Commission enter an order dismissing it from this matter.

Respectfully submitted this 31<sup>st</sup> day of August 2009.



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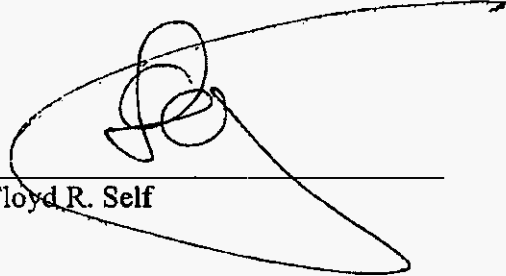
**CERTIFICATE OF SERVICE**

I hereby certify that I have this 31<sup>st</sup> day of August 2009 served a true and exact copy of the within and foregoing **Motion to Dismiss for Lack of Jurisdiction** via United States First Class Mail, postage paid and properly addressed to the following:

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By:   
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