

Ruth Nettles

090327-TP

**From:** beth.keating@akerman.com  
**Sent:** Wednesday, December 23, 2009 3:59 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket No. 090327-TP  
**Attachments:** 20091223154322596.pdf

Ms. Cole, attached for filing in the referenced Docket on behalf of DeltaCom, please find DeltaCom's Answer to Hypercube's Amended Counterclaim. Thank you for your assistance, and please don't hesitate to contact me if you have any questions at all.

Sincerely,  
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B. 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

C. Filed on behalf of DeltaCom, Inc.

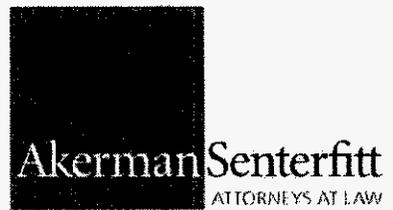
D. Number of Pages: 16

E. Answer of DeltaCom to the Amended Counterclaim of Hypercube

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December 23, 2009

**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:

Attached for filing electronically in the above-referenced Docket, please find the Answer of DeltaCom to the Amended Counterclaim of Hypercube. Thank you for your kind assistance with this filing.

If you have any questions whatsoever, please do not hesitate to contact me.

Sincerely,

  
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Enclosures

cc: Mr. Tony Mastando  
 Parties of Record

DOCUMENT NUMBER-DATE

12199 DEC 23 8

FPSC-COMMISSION CLERK

**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: December 23, 2009

**ANSWER OF DELTACOM**  
**TO AMENDED COUNTERCLAIM OF HYPERCUBE**

DeltaCom, Inc. ("Deltacom"), through its undersigned counsel and pursuant to Florida Administrative Code Rule 28-106.203, Florida Administrative Code, hereby files this Answer to the Amended Counterclaim of Hypercube, LLC and Hypercube Telecom, LLC (f/k/a KMC Data, LLC) (collectively, "Hypercube") and states as follows:

**ANSWER TO AMENDED COUNTERCLAIMS**  
**INTRODUCTION**

1. The allegations in the first sentence of paragraph 90 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. Further, Deltacom denies that the 8YY calls originate and terminate within the State of Florida. Deltacom admits that it refuses to pay Hypercube for the billing and kickback scheme perpetrated by Hypercube and admits offering toll-free calling services to its customers.

2. Deltacom denies the allegations in paragraph 91. Deltacom is responsible only for lawful charges related to calls to Deltacom's 8YY subscribers.

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FPSC-COMMISSION CLERK

3. Deltacom denies the allegations in paragraph 92. The allegations of the last sentence of the paragraph are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this sentence. With respect to footnote 2, Deltacom admits that its petition concerns wireless calls, but Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, the remainder of the allegations of footnote 2 and, on that basis, denies the allegations.

4. The allegations of paragraph 93 contain legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations set forth in paragraph 93. The first sentence calls for speculation about the knowledge of third-parties. Hypercube neither originates nor terminates 8YY calls. Deltacom denies the allegation in the fourth sentence, as neither Hypercube nor Deltacom are the carrier originating the 8YY call, and Deltacom denies that "the carrier originating an 8YY telephone call ensures that calls have the appropriate features applied and are sent to the correct telecommunications carrier and, ultimately, to the correct customer destination."

5. The allegations of paragraph 94 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations set forth in paragraph 94, as, among other things, they run afoul of the FCC's determination that wireless carriers should recover their costs from their subscribers, regardless of whether the call is an 8YY or any other type of call. Hypercube is not originating the call.

6. The allegations of paragraph 95 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations set forth in paragraph 95. Hypercube does not originate or terminate 8YY calls and does not transport the calls directly to Deltacom.

7. The allegations of paragraph 96 and footnotes 3 and 4 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The statutes and FCC order are legal documents that speak for themselves.

8. The allegations of paragraph 97 and footnote 5 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself. Moreover, Hypercube is not precluded from charging the wireless carrier for Hypercube's alleged services.

9. The allegations of paragraph 98 and footnotes 6 and 7 are legal conclusions, or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself.

10. The allegations of paragraph 99 and footnotes 8 and 9 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself.

11. The allegations of paragraph 100 and footnotes 10 through 12 are legal conclusions or arguments to which no response is required, but to the extent a

response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself.

12. The allegations of paragraph 101 and footnote 13 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself.

13. The allegations of paragraph 102 and footnote 14 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The order of the FCC and the decision of the NYPSC are legal documents that speak for themselves.

14. Deltacom admits that the calls described in the allegations of paragraph 103 are among those to be resolved in this case. Deltacom's understanding that the vast majority of traffic pertains to wireless calls but to the extent that Hypercube is involved with unlawful arbitrage and kickback schemes for other types of traffic, then such traffic would fall under the scope of the petition as amended.

15. The allegations of paragraph 104 and footnote 15 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph.

16. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 105.

17. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis, denies the allegations of

paragraph 106. To the extent that the allegations of paragraph 106 are legal conclusions or arguments, no response is required, and to the extent a response is required, Deltacom denies such allegations.

18. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 107.

19. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis, denies the allegations of paragraph 108. To the extent that the allegations of paragraph 108 are legal conclusions or arguments, no response is required, and to the extent a response is required, Deltacom denies such allegations.

20. The allegations of paragraph 109 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph.

21. With regard to paragraph 110, Deltacom admits the allegations of this paragraph, to the extent that such charges are properly assessed.

22. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of the first two sentences of paragraph 111. The allegations of the third sentence of this paragraph and footnote 16 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. The FCC order is a legal document that speaks for itself.

23. The allegations of paragraph 112 and footnote 17 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. The FCC order is a legal document that speaks for itself.

24. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of the first, second and third sentences of paragraph 113. Deltacom admits the allegations of the fourth and fifth sentences.

25. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 114.

#### **FACTS**

26. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of the first and third sentences of paragraph 115. Deltacom denies the second sentence.

27. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis, denies the allegations of paragraph 116. To the extent that the allegations of paragraph 116 are legal conclusions or arguments, no response is required, and to the extent a response is required, Deltacom denies such allegations.

28. Deltacom denies the allegations in this paragraph. To the extent that Hypercube provides services, Hypercube provides transit services and data base dip services to wireless carriers.

29. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 118.

30. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 119.

31. The allegations of paragraph 120 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. The service provided by Hypercube is neither originating nor terminating access.

32. Deltacom admits that a price list bearing the Hypercube name presently is on file with the Commission, but denies the allegations in paragraph 121 to the extent that Hypercube asserts that such terms and conditions apply to Deltacom.

33. The allegations of paragraph 122 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

34. Deltacom denies the allegations in paragraph 123. Deltacom admits that Hypercube inserted itself into the call flow at some point.

35. Deltacom denies the allegations in the first two sentences of paragraph 124. Deltacom admits the allegations in the third sentence.

36. Deltacom admits the allegations of the first sentence of paragraph 125, except that Deltacom denies that Hypercube transmits calls to Deltacom. Deltacom denies the allegations of the second sentence; Hypercube is not legally obligated to

insert itself into the call flow and Deltacom is without knowledge or information at this time sufficient to form a belief as to the nature of Hypercube's costs of providing transit services to wireless carriers.

37. Deltacom denies the allegations of the first sentence of paragraph 126 to the extent that Hypercube asserts it provides services to Deltacom; however, Deltacom admits to the allegation of not paying Hypercube. Deltacom denies the remainder of the paragraph.

38. Deltacom denies the allegations of paragraph 127.

39. Deltacom denies the allegations of paragraph 128. To the extent Hypercube relies on correspondence exchanged between the parties, the correspondence speaks for itself.

40. Deltacom denies the allegations of the first sentence of paragraph 129, as Hypercube does not provide intrastate access services to Deltacom. To the extent Hypercube quotes Hypercube's Price List in this paragraph, the Price List is a legal document which speaks for itself.

41. Deltacom admits the allegations of paragraph 130.

42. Deltacom denies the allegations of paragraph 131.

43. Deltacom denies the allegations of paragraph 132, as Hypercube has not lawfully billed any intrastate access charges to Deltacom.

44. Deltacom denies the allegations of paragraph 133.

45. The allegations of paragraph 134 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

**COUNTERCLAIM COUNT I  
BREACH OF HYPERCUBE'S PRICE LIST**

46. Deltacom repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

47. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 136, as Hypercube has asserted that it has contracts with various IXCs.

48. The allegations of paragraph 137 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. To the extent Hypercube references its Price List, the Price List is a legal document which speaks for itself.

49. Deltacom denies the allegations of paragraph 138.

50. The allegations of the first sentence of paragraph 139 contains legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. Deltacom denies the allegations of the second sentence. Further, Deltacom asserts that even if Hypercube's Price List is applicable, which it is not, in rejecting Deltacom's PIU, Hypercube failed to follow the provisions of its own Access Services Price List requiring a jurisdictional audit. *See* section 2.3.4.

51. The allegations of paragraph 140 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

52. Deltacom denies the allegations of paragraph 141, as Hypercube does not provide intrastate access services to Deltacom.

53. The allegations of paragraph 142 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

**COUNTERCLAIM COUNT II  
QUANTUM MERUIT**

54. Deltacom repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

55. The allegations of paragraph 144 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

56. Deltacom denies the allegations of paragraph 145.

57. Deltacom denies the allegations of paragraph 146.

58. The allegations of paragraph 147 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

59. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 148.

60. The allegations of paragraph 149 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

61. The allegations of paragraph 150 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

**COUNTERCLAIM COUNT III  
ORDER FOR PROSPECTIVE RELIEF**

62. Deltacom repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

63. The allegations of paragraph 152 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

64. Deltacom denies the allegations of paragraph 153, as no public utilities commission should countenance the billing and kickback scheme perpetrated by Hypercube.

**COUNTERCLAIM COUNT IV  
DELTACOM'S "INTERMEDIATE PROVIDER ACCESS" TARIFF**

65. Deltacom repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

66. Deltacom denies the allegations of this paragraph 2, but admits that the Price List modifications to Deltacom's intrastate access price lists were filed in response to Hypercube's unlawful access charge arbitrage scheme. (See Amended Petition at paragraph 76.)

67. To the extent that the allegations of paragraph 3 are legal conclusions or arguments, no response is required, and to the extent a response is required, Deltacom

denies such allegations. Deltacom admits that Hypercube is an "Intermediate Provider" and that it has billed Hypercube for such services pursuant to its Price List.

68. The allegations of paragraph 4 are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.

69. The allegations of paragraph 5 are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.

70. The allegations of paragraph 6 are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.

71. The allegations of paragraph 7 are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.

72. The allegations of paragraph 8 are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.

#### **RELIEF SOUGHT**

The allegations of these paragraphs are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.

### AFFIRMATIVE DEFENSES<sup>1</sup>

1. Any allegation not expressly admitted herein is denied.
2. Hypercube has failed to state a claim upon which relief may be granted.
3. This agency does not have subject matter jurisdiction over claims for relief set forth by Hypercube in its Counterclaim, and, therefore, those claims must be dismissed.
4. Federal law preempts the claims for relief stated in Hypercube's Counterclaim.
5. The Filed Rate Doctrine bars the claims for relief stated in Hypercube's Counterclaim.
6. Hypercube's claim for breach of price list is barred because the price list underlying that claim is unlawful or void *ab initio*.
7. Hypercube cannot recover on its claim for *quantum meruit* or any other equitable relief because its hands are unclean.
8. Hypercube cannot recover on its claim for *quantum meruit* or any other equitable relief because it has an adequate remedy at law.
9. Hypercube cannot recover on its claim for *quantum meruit* or any other equitable relief because the Commission does not have authority to award monetary damages.
10. The claims set forth in Hypercube's Counterclaim are barred or diminished by Hypercube's failure to mitigate and to avoid its damages, if any.

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<sup>1</sup> The inclusion of an Affirmative Defense does not constitute agreement or admission that the matter is one for which DeltaCom bears the burden of proof.

11. Hypercube's own breach(es) of obligations to Deltacom excused the non-performance, if any, of Plaintiff's obligations, if any, to Hypercube.

WHEREFORE, DeltaCom respectfully requests that the Commission deny Hypercube's Amended Counterclaim and its Prayer for Relief.

Respectfully submitted this 23rd day of December, 2009.

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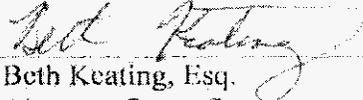
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*Attorneys for DeltaCom, Inc.*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email and/or U.S. Mail this 23rd day of December, 2009.

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