



Suite 1200  
106 East College Avenue  
Tallahassee, FL 32301

www.akerman.com  
850 224 9634 tel 850 222 0103 fax

Dallas  
Denver  
Fort Lauderdale  
Jacksonville  
Los Angeles  
Madison  
Miami  
New York  
Orlando  
Tallahassee  
Tampa  
Tysons Corner  
Washington, DC  
West Palm Beach

October 23, 2009

RECEIVED-FPSC  
09 OCT 23 PM 4:44  
COMMISSION  
CLERK

**VIA HAND DELIVERY**

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, Hypercube LLC and Hypercube Telecom, LLC**

Dear Ms. Cole:

Please find enclosed for filing an original and seven (7) copies of the above-captioned DeltaCom, Inc., Motion to Amend Petition, including a blackline comparison of the Original Petition and First Amended Petition, along with a diskette containing an electronic version of the filing.

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

Sincerely,

Matthew Feil

COM \_\_\_\_\_  
ECR \_\_\_\_\_  
GCL 2 \_\_\_\_\_  
OPC \_\_\_\_\_  
RCP CO \_\_\_\_\_  
ESC \_\_\_\_\_  
SGA \_\_\_\_\_  
ADM \_\_\_\_\_  
CLK \_\_\_\_\_  
Enclosures

DOCUMENT NUMBER-DATE  
10827 OCT 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, Hypercube, LLC                    )  
and Hypercube Telecom, LLC.                )  
\_\_\_\_\_)

Docket No. 090327-TP

**MOTION TO AMEND PETITION**

Pursuant to Rule 28-106.204, Florida Administrative Code, DeltaCom, Inc. ("DeltaCom") hereby moves the Florida Public Service Commission ("Commission") to permit DeltaCom to amend its petition against KMC Data, LLC and Hypercube Telecom, LLC (collectively, "Hypercube") as set forth below. In support of this motion, DeltaCom states as follows:

1. On June 5, 2009, DeltaCom filed a Petition with the Commission, naming Hypercube, LLC; Hypercube Telecom, LLC; and KMC Data, LLC, as Defendants<sup>1</sup> in an intrastate access charge dispute and seeking an order from the Commission.

2. On June 26, 2009, DeltaCom, with support from Hypercube, filed a Motion for Limited Stay of this proceeding so that DeltaCom and Hypercube could undertake negotiations in an effort to resolve the issues. DeltaCom and Hypercube conducted additional negotiations, but such negotiations did not result in a resolution of

<sup>1</sup> Hypercube, LLC filed a Motion to Dismiss asking the Commission dismiss it from these proceedings. As stated in its response to that Motion to Dismiss, DeltaCom did not oppose dismissal, provided that it is without prejudice. By Order issued September 17, 2009, the Commission granted Hypercube, LLC's Motion to Dismiss, without prejudice. Only Hypercube Telecom was named as counterclaimant, and only Hypercube Telecom and KMC Data are named as defendants in the First Amended Petition.

RECORDING NUMBER - DATE

10827 OCT 23 08

FPSC-COMMISSION CLERK

the dispute between the Parties. By agreement with the parties and approval from the Prehearing Officer, Hypercube filed responsive pleadings (including counterclaims) to DeltaCom's Petition on August 31, 2009, and DeltaCom filed its Answer to Hypercube's counterclaims on September 30, 2009.

3. DeltaCom maintains that it should be permitted to amend its petition. The amendment is necessary to present additional facts, arguments and claims -- all of which are directly related to the dispute between the parties DeltaCom describes in its initial petition. There have been no procedural dates set in this docket, and an Issue Identification Conference has not yet been held. Therefore, DeltaCom's amendment would serve to foster the efficient administration of justice and not prejudice any party to the case.

4. A brief narrative describing the changes DeltaCom makes by the amendment follows in this paragraph. Further, a blackline comparison of the original petition and the first amended petition (excluding petition exhibits) is filed with this motion. The first amendment to the petition includes the following changes:

- (a) Removes Hypercube, LLC as a named party;
- (b) Moves segments of the original petition from footnotes to the numbered text, in particular, those segments taking issue with Hypercube's status as a carrier under Florida law;
- (c) Adds a new count based on the FCC's preemption of the Commission's approval/acceptance of aspects of Hypercube's price lists;
- (d) Adds a new count based on DeltaCom's price list (added as Exhibit E) for corresponding services to Hypercube;
- (e) Adds greater specificity to certain allegations and relief sought and updates the time periods to reflect more recent data; and
- (f) Renumbers paragraphs, corrects typos.

Motion to Amend  
October 23, 2009

5. The undersigned DeltaCom counsel have consulted Hypercube's Tallahassee counsel regarding this motion and the amendment. The undersigned represents that Hypercube's counsel stated Hypercube reserves its response until it has adequate opportunity to review the motion and amendment.

WHEREFORE, DeltaCom respectfully request that this Motion be granted.

Respectfully submitted this 23<sup>rd</sup> day of October 2009.



Matthew Feil, Esq.  
Akerman Senterfitt  
106 East College Avenue, Suite 1200  
Tallahassee, FL 32301  
(850) 425-1614

D. Anthony Mastando, Esq.  
Regulatory Vice President  
DeltaCom, Inc.  
7037 Old Madison Pike, Suite 400  
Huntsville, AL 35806  
(256) 382-5900

*Attorneys for DeltaCom, Inc.*

Motion to Amend  
October 23, 2009

**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 October, 2009.

Charles Murphy, Esq. Timisha Brooks, Esq. Adam Teitzman, Esq. Office of the General Counsel Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 cmurphy@psc.state.fl.us tbrooks@psc.state.fl.us	Michael B. Hazzard, Esq. Jason Koslofsky, Esq. Arent Fox LLP 1050 Connecticut Avenue, NW Washington, D.C. 20036-5339 (202) 857-6029 hazzard.michael@arentfox.com koslofsky.jason@arentfox.com
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
Floyd R. Self, Esq. Messer, Caparello & Self, P.A. P.O. Box 15579 Tallahassee, FL 32317 (850) 425-5213 fself@lawfla.com	Matthew Feil, Esq. Akerman Senterfitt 106 East College Avenue, Suite 1200 Tallahassee, FL 32301 (850) 425-1614 matt.feil@akerman.com

By:   
Matthew Feil, Esq.

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

In re:

DeltaCom, Inc.

Plaintiff,

-v.-

KMC Data LLC and  
Hypercube Telecom, LLC,

Defendant.

Docket No.: 090327-TP

Deleted:

Deleted: Hypercube, LLC

**FIRST AMENDED PETITION OF DELTACOM, INC. FOR ORDER DETERMINING  
DELTACOM, INC. NOT LIABLE FOR ACCESS CHARGES OF  
KMC DATA LLC, LLC, AND HYPERCUBE TELECOM, LLC**

Deleted: HYBERCUBE,

DeltaCom, Inc. ("DeltaCom"), pursuant to Florida Administrative Code Rules 28-106.201 and 25-22.036, and through its undersigned counsel, hereby files this Petition seeking entry of a Commission order against Respondents KMC Data LLC ("KMC") and Hypercube Telecom, LLC (collectively, "Hypercube"). Specifically, DeltaCom requests that the Florida Public Service Commission (the "Commission"), pursuant to its authority under Florida Statutes, sections 364.01(4)(g), and, where applicable, sections 364.03 and 364.04, issue an order finding that Hypercube's attempt to impose charges for intrastate access services it alleges to have provided to DeltaCom is unfair, anticompetitive and otherwise unlawful, barring Hypercube from engaging in such conduct in the future, and requiring Hypercube to refund to DeltaCom any amounts previously remitted with respect to the charges in dispute. Because DeltaCom claims Hypercube has unlawfully billed DeltaCom for what Hypercube claims are intrastate services

Deleted: Hypercube, LLC,

pursuant to price lists on file with this Commission, DeltaCom's substantial interests are affected in this proceeding and the Commission is the proper venue for this matter.

**INTRODUCTION**

1. DeltaCom and Hypercube have a long-running dispute over allegedly intrastate access charges billed by Hypercube to DeltaCom for services apparently provided by Hypercube to wireless carriers whose mobile customers initiate toll-free ("8XX") calls to DeltaCom's customers.

2. Historically, wireless providers have sent such calls – like any others bound for DeltaCom's customers – to the incumbent local exchange carrier ("ILEC") tandem and the ILEC in turn has forwarded the calls to DeltaCom. Calls between wireless carriers and DeltaCom typically have been exchanged on a "bill-and-keep" basis. Indeed, federal law prohibits wireless carriers from imposing access charges on other carriers in the absence of an express contract that provides for such charges. DeltaCom has no such contracts with any wireless carriers.

3. Hypercube appears to have developed a business plan oriented toward helping wireless carriers accomplish indirectly what federal and state law bars them from doing directly. To implement this scheme, Hypercube has contracted with various wireless carriers so that they send 8XX calls originated on wireless networks to Hypercube first, before those calls are sent onto the ILEC for delivery to DeltaCom (and other carriers). With its (needless) insertion into the call-flow, Hypercube in effect replicates that which the wireless carrier otherwise does for itself (sending the call to the ILEC for delivery to DeltaCom and other carriers). One difference, however, is that Hypercube attempts to charge access charges to DeltaCom and other carriers whereas the wireless carriers could not. Another difference is

Deleted: What's different

Deleted: . .

Deleted: . . ¶

that it appears that Hypercube often delivers such calls to an ILEC tandem outside the LATA in which the calls originate. To induce wireless carriers to participate in this scheme, Hypercube offers those wireless carriers a “kick-back” of access charges in the form of substantial percentage of any amounts collected.

4. With this Complaint, DeltaCom seeks entry of a Commission order proscribing Hypercube’s conduct.<sup>1</sup> DeltaCom seeks an order that Hypercube’s imposition of intrastate access charges and related kick-back payments to wireless providers is unfair, unjust and otherwise violates state law.

5. This scheme, to the extent put in price lists by Hypercube, is unlawful and otherwise is preempted by the Federal Communications Commission (“FCC”), which has barred the imposition of tariffed access charges on IXCs for functionalities performed by wireless carriers. The FCC also has preempted the imposition of tariffed access charges on intraMTA wireless traffic which Hypercube makes no attempt to distinguish.

6. DeltaCom also seeks an order that Hypercube was not authorized to provide any intrastate services in Florida and was not permitted to impose charges filed by another entity (namely, KMC), at least with respect to the time prior to which it obtained competitive local exchange carrier (“CLEC”) authority and posted a price list for telecommunications services.<sup>2</sup>

<sup>1</sup> To the extent that KMC is found to be the service provider at issue, DeltaCom seeks the same relief requested herein, with the exceptions of Counts Two and Three.

<sup>2</sup> It is not clear that Hypercube provides any two-way services such that it qualifies as a “telecommunications company” under Florida law. See section 364.02(14), Florida Statutes. Nor is it clear that Hypercube is providing “local exchange telecommunications service” or qualifies as a CLEC under Florida law. See sections 364.02(5) and 364.337(1), Florida Statutes. As asserted in the body of this Petition, Hypercube’s activities in the context of the instant dispute do not involve two-way telecommunications services or local exchange telecommunications services, and pricing/terms for the supposed intrastate services for which Hypercube has billed DeltaCom should not be an enforceable part of a CLEC price list in Florida.

**Deleted:** To the extent the Commission finds that Hypercube is not a “telecommunications company,” or providing a “local exchange telecommunications service,” the Commission may consider action to investigate and rescind the validity of Hypercube’s CLEC authority and price lists. In any event, as

**Deleted:** DeltaCom maintains that

**Deleted:** . .

**Deleted:** . . ¶



7. To the extent that Hypercube is found to have been at relevant times duly certificated and its services properly set forth in a posted price list, DeltaCom also seeks an order that Hypercube unlawfully rejected DeltaCom's reported PIU which establishes that none of the traffic at issue is intrastate in nature.

8. To the extent that it is somehow found that there are any intrastate services at issue, DeltaCom also seeks an order that DeltaCom has not ordered and Hypercube has not provided any of the services set forth in the intrastate price lists at issue. DeltaCom also seeks an order that KMC's and Hypercube's rates and charges are unfair, anticompetitive and otherwise unlawful because the charges imposed include charges for interstate and intraMTA traffic and services not provided and are based upon price list provisions which fail to describe the services and charges with reasonable clarity. DeltaCom seeks a Commission order requiring Hypercube to cease such unfair, anticompetitive and otherwise unlawful conduct and to return any amounts previously remitted by DeltaCom for amounts unlawfully billed.

Deleted: Finally,

9. Finally, to the extent that the Commission finds Hypercube to have provided any intrastate services per its price list to DeltaCom, DeltaCom seeks an order finding Hypercube liable for corresponding charges imposed pursuant to DeltaCom's intrastate access price list.

**PARTIES AND JURISDICTION**

10. DeltaCom is, among other things, a certificated interexchange carrier ("IXC") with its principal place of business at 7037 Old Madison Pike, Huntsville, Alabama. DeltaCom offers, among other services, toll-free calling ("8XX") services to its customers, under which the customer receives telephone calls dialed on a toll-free basis by members of the public. DeltaCom also is a CLEC certificated by the Commission.

Deleted: -

Deleted: - ¶

11. Upon information and belief, Hypercube Telecom, LLC is a Delaware limited liability company with its principal place of business at 3200 West Pleasant Run Road, Suite 260, Lancaster, Texas 75146. It appears that, by virtue of a name change filing Hypercube Telecom, LLC became or at least purports to be a CLEC certificated to provide local telecommunications exchange services or access services in Florida. Hypercube provided the Commission with adhesive labels so that the KMC intrastate access services price list became the Hypercube intrastate access services price list, per a name change order effective October 13, 2008.

12. Upon information and belief, KMC Data LLC ("KMC") was (but has not been since October 2008) a certificated CLEC whose Florida intrastate access services price list is at issue in this complaint. The relationship between KMC and Hypercube, LLC and Hypercube Telecom, LLC is not entirely known. Hypercube maintains that KMC is or was at some point in time affiliated with Hypercube, LLC.

13. The Commission has jurisdiction over this Complaint pursuant to Florida Statutes, sections 364.01(4)(g), 364.03 and 364.04<sup>4</sup> and its inherent powers to interpret and apply statutes within its authority.

#### **FACTUAL BACKGROUND**

14. DeltaCom furnishes toll-free services (8XX) to its customers which allow those customers to receive telephone calls dialed on a toll-free basis by members of the public. The calling parties who dial the 8XX numbers of DeltaCom's customers may subscribe to local phone service from an incumbent local exchange carrier ("ILEC") or a competitive local

<sup>4</sup> Section 364.01(4)(g) applies to "all providers of telecommunications services." Sections 364.03 and 364.04 apply to every "telecommunications company," but section 364.03 does not apply to CLECs per section 364.337(2).

**Deleted:** <#>Upon information and belief, Hypercube, LLC is a Delaware limited liability company with its principal place of business at 3200 West Pleasant Run Road, Suite 260, Lancaster, Texas 75146. Hypercube, LLC is the parent of its wholly owned subsidiary, Hypercube Telecom, LLC. Hypercube, LLC provides management services to Hypercube Telecom, LLC, including billing services. Hypercube, LLC is not a CLEC certificated to provide services in Florida. ¶

<#>Upon information and belief, Hypercube Telecom, LLC is a Delaware limited liability company with its principal place of business at 3200 West Pleasant Run Road, Suite 260, Lancaster, Texas 75146. It appears that, by virtue of a name change filing Hypercube Telecom, LLC became or at least purports to be a CLEC certificated to provide local telecommunications exchange services or access services in Florida. Hypercube provided the Commission with adhesive labels so that the KMC intrastate access services price list became the Hypercube intrastate access services price list, per a name change order effective October 13, 2008. ¶

<#>The Commission has jurisdiction over this Complaint pursuant to Florida Statutes, sections 364.01(4)(g), 364.03 and 364.04. ¶

**Deleted:** - -

**Deleted:** - - ¶

exchange carrier (“CLEC”), or they may be customers of a commercial mobile radio service (“CMRS”) or “wireless” carrier.

15. When the calling parties are customers of a carrier other than DeltaCom, the calls typically are routed to DeltaCom through the ILEC, which in most cases is BellSouth Telecommunications, Inc. dba AT&T Florida. When the calling parties are customers of a wireless carrier, the wireless carrier traditionally has routed the calls to DeltaCom through the ILEC tandem. Wireless carriers and DeltaCom typically do not pay each other compensation for traffic exchanged between them in either direction. Federal law provides that such charges by wireless carriers may be imposed pursuant to contract only (not tariff),<sup>5</sup> and DeltaCom has reached no such contractual arrangements with wireless carriers. Thus, traffic between wireless carriers and carriers like DeltaCom typically is exchanged on a “bill-and-keep” basis. The typical call flow described here is depicted in the diagram appended hereto as **Exhibit A**.

Deleted: redundant transiting

16. Upon information and belief, Hypercube furnishes a transport and routing service to wireless carriers for the 8XX traffic originated on the wireless carriers’ networks for calls placed by the wireless carriers’ customers.<sup>6</sup> With Hypercube inserted into the call flow, the wireless carrier evidently passes the traffic to Hypercube – instead of to the ILEC to which it already is directly connected – and then Hypercube delivers the traffic to the ILEC.

Hypercube does not deliver the traffic to DeltaCom. Upon information and belief, when

<sup>5</sup> In 2002, the Federal Communications Commission (“FCC”) issued a Declaratory Ruling prohibiting wireless carriers from charging originating access charges to IXCs for the mobile carrier’s role in originating long distance calls, including 8XX calls, unless the IXC agrees in a contract with the wireless carrier to pay such charges. *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13192, ¶¶ 8-9, 12 (2002) (“*Sprint PCS*”). This Declaratory Ruling further implemented the FCC’s deregulatory policies with respect to wireless carriers, which include exempting wireless carriers from the process of filing tariffs, granting wireless carriers broad exemptions from many categories of regulation, and encouraging wireless carriers to earn their revenues from their own end user customers and not through access charges collected from other telecommunications carriers.

<sup>6</sup> Hypercube, LLC’s website promotes tandem services only. See <http://www/hypercube-llc.com/corporate/markets.html>

Deleted: -  
Deleted: - ¶

Hypercube delivers 8XX traffic to the ILEC, it delivers a significant percentage of this traffic to an ILEC tandem outside the LATA in which the call originates, making the service interexchange in nature. Upon information and belief, Hypercube does not charge wireless providers for this transport and routing service, but instead seeks to impose access charges on carriers such as DeltaCom for the service. Through its composite rate, Hypercube also unlawfully seeks to charge DeltaCom and other carriers access charges for functionalities performed by a wireless carrier. The call flow described here – with Hypercube inserted – also is depicted in the diagram appended hereto as Exhibit A.

Deleted: transiting  
Deleted: charge

17. Upon information and belief, Hypercube typically contracts to pay a substantial portion of any such revenues collected to the wireless carriers who originate the traffic and route it first through Hypercube, instead of routing it directly to the ILEC for through routing to DeltaCom. Thus, wireless carriers route traffic through Hypercube to accomplish indirectly that which the FCC says they cannot do directly. The FCC rejected as unfair, anticompetitive and otherwise unlawful the arbitrage scheme created by Hypercube: “We reject the argument made by Verizon Wireless that the *Sprint/AT&T Declaratory Ruling* does not limit the ability of a CMRS provider to collect access charges from an IXC if the CMRS provider has a contract with an intermediate competitive LEC. *We will not interpret our rules or prior orders in a manner that allows CMRS carriers to do indirectly that which we have held they may not do directly.*”<sup>7</sup> The FCC also has prohibited the tariffing of access charges for functionalities performed by wireless carriers.<sup>8</sup>

<sup>7</sup> *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262, CCB/CPD File No. 01-19, Eighth Report & Order & Firth Order on Recon., 19 FCC Red. 9108, para. 16, n.57 (internal citations omitted) (emphasis added) (2004) (“*FCC Eighth R&O*”).

<sup>8</sup> *Sprint PCS*, 17 FCC Red. 13192, ¶¶ 7, 9, 11, see also 47 U.S.C. § 332(c)(3)(A) (preempting state commission rate setting for wireless service providers).

Deleted: -  
Deleted: - ¶

18. Upon information and belief, for such wireless-originated 8XX traffic, Hypercube bills DeltaCom (and others) access charges and 8XX data base query charges. When 8XX traffic is exchanged between carriers, a data base “dip” is performed so that the originating carrier can determine where to send the traffic. Typically, the wireless carrier that originates the call is responsible for the 8XX data base dip. As is the case with other access charges, federal law prevents wireless carriers from imposing charges on DeltaCom in the absence of an express contract allowing for them. DeltaCom has reached no contractual agreement with wireless carriers for the mutual billing of access charges, including related data base dips. With Hypercube inserted into the call flow, the wireless carrier contracts with Hypercube to do the data base dip and to charge some other party – DeltaCom included – for the service. Again, Hypercube provides a wireless carrier with a means of attempting to accomplish indirectly what it cannot do directly.

19. From November 2005 to October 2009, Hypercube or its predecessor KMC has charged DeltaCom approximately \$1,325,683.05 in such intrastate access and related charges in Florida. Of this amount, \$1,004,416.93 purportedly has been for “8YY Originating Access Service” charges, \$84,777.33 has been for “800 Data Base Query” charges and approximately \$236,488.79 has been for related late fees. For a time, Hypercube purports to have imposed these charges pursuant to the KMC Intrastate Access Services Price List (“Price List”).<sup>9</sup> DeltaCom is unaware of any authority Hypercube had to provide such services or of any right Hypercube has to charge, bill and collect for services posted in a price list issued by another entity. In August 2008, Hypercube apparently made a filing with the Commission changing the name of the issuing carrier on the Price List from KMC to

Deleted: May  
Deleted: 019,350.33  
Deleted: 786,793.00  
Deleted: 67,430.03  
Deleted: 165,127.30

<sup>9</sup> Access Services Price List – KMC Data LLC Florida Price List No. 3 (filed Aug. 28, 2006) (issuing carrier changed to Hypercube Telecom, LLC by PSC Order dated October 13, 2008) (Hypercube “Price List” or “Price Lists”).

Deleted: -  
Deleted: - ¶

Hypercube. Copies of the Hypercube Price List and the version of the KMC Price List it replaces are appended hereto as **Exhibit B**.

20. DeltaCom also is not aware that it has received any traffic subject to the KMC or Hypercube Intrastate Access Services Price Lists. DeltaCom has neither affirmatively nor constructively ordered such services. Further, DeltaCom is under no regulatory obligation to accept service from KMC or Hypercube. ~~Not admitting that it was a customer of Hypercube or that Hypercube had the authority to bill DeltaCom for such traffic~~ and with all rights reserved, DeltaCom reported a 100% percent interstate usage (“PIU”) to Hypercube indicating that all of the traffic at issue (traffic Hypercube claims to have handled) belonged to the interstate jurisdiction and that none of it is subject to any intrastate tariff or price list. A copy of this letter is appended hereto as **Exhibit C**. On March 28, 2008, Hypercube unilaterally pronounced DeltaCom’s PIU report to be “invalid”. A copy of this letter is appended hereto as **Exhibit D**.<sup>10</sup> DeltaCom has no real-time ability to detect which traffic is being handled by Hypercube and, if appropriate, to block the traffic on a discretionary basis. To DeltaCom's knowledge, all traffic in dispute flows in only one direction – typically, from an originating wireless carrier to Hypercube, then to the ILEC, then to DeltaCom. Hypercube itself neither originates nor terminates traffic.

Deleted: Out

Deleted: an abundance of caution

21. ~~In response to Hypercube’s unlawful intrastate access charge arbitrage scheme, DeltaCom filed a price list modification adding Intermediate Provider Access Service to its Price List. This service includes the origination or termination by DeltaCom of a call~~

<sup>10</sup> The Price List provides for audits as the means of challenging a PIU report and does not permit such rejection by means of unilateral declaration. Price List, § 2.3.3. Hypercube also claims to have billed under the default provision of the Price List section which sets a default PIU of 50% (meaning that half of the traffic it claims to have been originated in Florida is considered interstate and half intrastate). This tactic is advantageous to Hypercube because the rates in the Price List are approximately ten times higher than those billed by Hypercube for traffic it, by default, recognizes as interstate. KMC never had an analogous FCC tariff and Hypercube has had one only since March 2009.

Deleted: - -

Deleted: - ¶

any portion of which traverses the network of an Intermediate Provider, as defined in the price list. These price list modifications went into effect on September 4, 2008. A copy of DeltaCom's price list is appended hereto as Exhibit E. DeltaCom billed Hypercube \$1,217,507.50 under this price list for the time period between September, 2008 and September, 2009. Hypercube has disputed these charges and refused to pay DeltaCom.

22. DeltaCom has disputed all of the charges invoiced by Hypercube pursuant to the KMC and Hypercube Intrastate Access Services Price Lists. DeltaCom inadvertently paid \$2,749.54 of such charges and has withheld the rest. DeltaCom's repeated attempts to resolve this matter privately with Hypercube have not been successful.

**COUNT ONE**

**HYPERCUBE'S SCHEME OF IMPOSING INTRASTATE ACCESS CHARGES FOR WIRELESS ORIGINATED TRAFFIC IS UNFAIR, ANTICOMPETITIVE AND OTHERWISE UNLAWFUL**

23. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

Deleted: Paragraphs 1 through 17

24. Hypercube charges DeltaCom and other IXCs for services performed by and for wireless carriers through its imposition of intrastate access charges. Hypercube then kicks-back a portion of those access charges to wireless carriers who are not entitled to impose those charges on IXCs. This scheme, whereby Hypercube needlessly inserts itself into the call flow so that it can collect and remit in part intrastate access charges to wireless carriers who are not authorized to charge them is an unfair and anticompetitive practice that violates state law. Sections 364.01(4)(g) and 364.03, Florida Statutes.

25. Hypercube is not a "telecommunications company" under state law because the service provided here is solely between carriers, one a non-regulated CMRS

Deleted: -

Deleted: - 1

provider and the other an ILEC. See Section 364.02(14), Florida Statutes<sup>11</sup>. Since Hypercube does not qualify as a telecommunications company, it cannot be allowed to file price lists for the services at issue here as part of a CLEC price list.

26. Hypercube also is not a "competitive local exchange communications company" under state law because Hypercube has no local exchange service or retail end user of its own implicated or affected in any way by the services at issue here. See Sections 364.02(5) and 364.337(1), Florida Statutes.<sup>12</sup> Since Hypercube does not qualify as a CLEC, it cannot be allowed to file price lists for the services at issue here as part of a CLEC price list.

27. In addition, the service provided by Hypercube is not "local exchange telecommunications service", exchange access or any other service that is properly in the price list of a CLEC in this state. Further, Hypercube neither originates nor terminates any of the traffic involved in this dispute, but instead provides an intervening transport and routing service to the wireless providers. To the extent that Hypercube has filed price lists for such services, its price lists violate the law that gives rise to its filing and is not consistent with the filed rate system nor compatible with its effective operation in this State and cannot be enforced against an IXC like DeltaCom.

28. As a result of Hypercube's unfair, anticompetitive and otherwise unlawful conduct, the Commission should order that, to the extent Hypercube provided any intrastate

<sup>11</sup> "Telecommunications company" includes 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. The term "telecommunications company" does not include: (a) An entity that provides a telecommunications facility exclusively to a certificated telecommunications company; (b) An entity that provides a telecommunications facility exclusively to a company which is excluded from the definition of a telecommunications company under this subsection; (c) A commercial mobile radio service provider.

<sup>12</sup> Per section 364.02(5), a "Competitive local exchange telecommunications company" means any company certificated by the commission to provide local exchange telecommunications services in this state on or after July 1, 1995.

Deleted: -  
Deleted: - 1



services to DeltaCom, (a) Hypercube did so unlawfully, (b) its price list is void *ab initio*, (c) it is not entitled to charge for such service, and (d) it is prohibited from further engaging in such conduct.

**COUNT TWO**

**HYPERCUBE'S SCHEME OF IMPOSING INTRASTATE ACCESS CHARGES FOR WIRELESS ORIGINATED TRAFFIC IS PREEMPTED BY FEDERAL LAW**

29. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

30. Hypercube has filed price lists for and imposed intrastate access charges on DeltaCom and other IXCs for services performed by and for wireless carriers. Hypercube's composite rate includes recovery for end office functionality provided by wireless carriers. Hypercube's filed intrastate access charges make no carve-out for intraMTA wireless traffic. The FCC has prohibited the practice of recovering through tariffed access charges for the functionalities performed by wireless carriers and has concluded that intraMTA wireless traffic is not subject to access charges. As such, federal law preempts this Commission from enforcing Hypercube's price lists containing such charges.

31. As a result of Hypercube's unlawful filing price lists for access charges for functionalities performed by wireless carriers and for intraMTA wireless traffic, the Commission should find that (a) it was preempted from accepting or allowing such price lists to go into effect, (b) Hypercube's price list is void *ab initio*, (c) Hypercube is not entitled to impose intrastate access charges for functionalities performed by wireless carriers or for intraMTA wireless traffic, and (d) Hypercube is prohibited from further engaging in such conduct.

Deleted: - -  
Deleted: - ¶

COUNT THREE

PRIOR TO OCTOBER 2008,<sup>13</sup> HYPERCUBE HAD NO RIGHT TO PROVIDE OR IMPOSE CHARGES FOR INTRASTATE SERVICES

32. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

33. Hypercube purports to have imposed charges on DeltaCom for intrastate access services provided within the state of Florida. Upon information and belief, Hypercube was not authorized to provide such services and had not obtained the requisite authority from the Commission to do so prior to October 2008.<sup>14</sup>

34. As a result of Hypercube's unfair, anticompetitive and otherwise unlawful conduct, the Commission should order that, to the extent Hypercube provided any intrastate services to DeltaCom prior to October 2008, Hypercube did so unlawfully and is not entitled to charge for such services. Sections 364.01(4)(g), 364.03 and 364.04, Florida Statutes.

Deleted: Paragraphs 1 through 20

COUNT FOUR

HYPERCUBE HAD NO RIGHT TO PROVIDE OR IMPOSE CHARGES FOR INTRASTATE SERVICES POSTED IN A PRICE LIST BY ANOTHER ENTITY

35. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

36. For a period of time prior to October 2008, Hypercube purports to have imposed charges on DeltaCom for intrastate access services provided within the state of Florida pursuant to the KMC Intrastate Access Services Price List. No Florida statute or rule authorizes Hypercube to provide or charge for services posted in a price list by another entity.

Deleted: THREE

Deleted: Paragraphs 1 through 23

<sup>13</sup> To the extent the Commission finds that Hypercube is not a telecommunications company or is not providing local exchange telecommunications service, Hypercube would have had no right to provide or impose charges for intrastate access services *at any time*.

<sup>14</sup> By Order No. PSC-08-0657-FOF-TP, issued October 13, 2008, the Commission acknowledged a name change for CLEC Certificate No. 7955 from KMC Data LLC to Hypercube Telecom, LLC.

Deleted: -

Deleted: - ¶

Such practice is contrary to state law and deprives customers of the notice and clarity which tariffs and filed price lists are intended to provide.

37. As a result of Hypercube's unfair, anticompetitive and otherwise unlawful conduct, the Commission should order that, to the extent Hypercube provided any intrastate services to DeltaCom pursuant to the KMC Access Services Price List prior to October 2008, Hypercube did so unlawfully and is not entitled to charge for such services. Sections 364.01(4)(g), 364.03 and 364.04, Florida Statutes.

Deleted: FOUR

COUNT FIVE

HYPERCUBE HAS NO RIGHT TO  
DECLARE A REPORTED PIU INVALID

Deleted: Paragraphs 1 through 26

38. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

39. To the extent that Hypercube is authorized to provide intrastate services in Florida, and to provide them at certain times pursuant to another entity's price list, it is not entitled to impose such charges on interstate traffic. While reserving all rights and without any admission whatsoever that DeltaCom was or is a "Customer" of Hypercube or that Hypercube was or is providing posted price list services to DeltaCom, on or about October 11, 2007, DeltaCom reported to Hypercube a 100% PIU for the traffic at issue, thus indicating that, to the extent such traffic is not intra-MTA traffic, which would not be subject to the KMC and Hypercube Access Services Price Lists,<sup>15</sup> it is jurisdictionally interstate in nature.

Deleted: - -

Deleted: - ¶

<sup>15</sup> Federal law bars the imposition of access charges on intra-MTA wireless-originated traffic. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, ¶ 1036 (1996) ("[T]raffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5) [i.e., reciprocal compensation], rather than interstate and intrastate access charges."); see also *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 134 (2005) (stating that the Commission has found "that traffic to or from a CMRS network that originates

Thus, per DeltaCom's PIU report, none of the traffic at issue is intrastate access traffic subject to the KMC and Hypercube Access Services Price Lists.

40. On or about May 28, 2008, Hypercube pronounced DeltaCom's PIU report to be "invalid" and indicated that it would apply a "default jurisdictional rate of 50% interstate use in accordance with Hypercube's interstate and intrastate tariffs." Upon information and belief, Hypercube had no such intrastate price list or tariff prior to October 2008 and it had no interstate tariff prior to March 2009. Section 2.3.3.C of the KMC Access Services Price List provides, in part, that: "If no projected PIU factor is submitted by the Customer, then the projected PIU will be set on the default basis of 50 percent interstate traffic and 50 percent intrastate traffic." To the extent that this price list provision is found to apply, DeltaCom did submit a PIU factor and thus the default provision of Section 2.3.3 does not apply. KMC does not have an FCC tariff. The FCC Access Services Tariff on file at the FCC for other KMC entities (but not KMC Data LLC) and to which Hypercube's name was added in March 2009 does not appear to contain provisions governing PIU reporting.

41. The KMC and Hypercube Access Services Price Lists do not provide for the unilateral rejection of a reported PIU by declaring it to be "invalid" or otherwise. Instead, Section 2.3.3.D provides that the reported PIU factor "will be used until the Customer reports a different projected PIU factor".<sup>16</sup> Section 2.3.4 provides for jurisdictional audits as the means of validating a reported PIU factor. Hypercube has not availed itself of this process and the Price List does not provide it with any other way of rejecting, invalidating or otherwise

---

and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges."); 47 C.F.R. § 51.713 (explaining that "Bill-and-keep arrangements for reciprocal compensation" are appropriate "if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so."). Thus, to the extent intraMTA traffic is not excluded, Hypercube's arbitrary imposition of a "default PIU" violates federal law.

<sup>16</sup> DeltaCom does not admit to being a Customer and instead seeks declaratory relief affirming that it is not a Customer. See Count Seven, *infra*.

Deleted: Five
Deleted: -
Deleted: - 1

challenging a reported PIU factor. Hypercube’s failure to abide by the terms of the Price List – which it purports to govern this controversy – is unfair, anticompetitive and otherwise unlawful.

42. Because Hypercube has engaged in unfair, anticompetitive and otherwise unlawful conduct in violation of the Price List pursuant to which it imposed the charges at issue here, the Commission should order that Hypercube’s pronouncement that DeltaCom’s reported PIU is invalid was unlawful and that no intrastate charges should have been imposed. The Commission also should order that, to the extent Hypercube imposed intrastate access charges on interstate traffic or intraMTA wireless traffic, it did so in violation of federal and state law. Sections 364.01(4)(g), 364.03 and 364.04, Florida Statutes.

Deleted: FIVE

COUNT SIX

HYPERCUBE HAS NOT PROVIDED TO DELTACOM ANY OF THE SERVICES INCLUDED IN THE KMC AND HYPERCUBE ACCESS SERVICES PRICE LISTS

Deleted: Paragraphs 1 through 31

43. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

44. Hypercube has asserted that it has provided and charged DeltaCom for at least two services included in the KMC and Hypercube Access Services Price Lists. To the extent these Price Lists are found to apply, the descriptions set forth therein of these services lack reasonable clarity necessary to support a finding that those services were provided by Hypercube to DeltaCom and that related charges apply.

Deleted: Tariffs.

45. Hypercube has asserted that it has provided to DeltaCom filed “Switched Access Service”. Section 3.1 of the Price Lists contains the following service description:

Deleted: tariffed

Switched Access Service, which is available to Customers for their use in furnishing their services to End Users, provides a two-point communications path between a Customer and an End User. It provides for the use of common terminating, switching and

Deleted: -

Deleted: - ¶

transport facilities. Switched Access Service provides the ability to originate calls from an End User to a Customer, and to terminate calls from a Customer to an End User.

This service description is not applicable and does not clearly describe the service

Hypercube alleges it provides to DeltaCom.<sup>17</sup>

46. The service provided by Hypercube does not provide a “two-point communications path between a Customer and an End User.” DeltaCom is not a Customer of Hypercube.<sup>18</sup> Also, Hypercube does not provide a two-point communications path between DeltaCom and an End User, regardless of whether the End User is considered to be the calling or called party or (by artifice) even the wireless carrier.<sup>19</sup> Instead, Hypercube provides a redundant two-point link between a wireless carrier and an ILEC. *See, Exhibit A.* Under the Price List, such a link does not constitute a two point path between a Customer and an End User.

47. Hypercube does not provide DeltaCom with “the use of common terminating, switching and transport facilities”. Hypercube provides no “terminating” services to DeltaCom.

48. Hypercube does not provide DeltaCom with “the ability to originate calls from an End User to a Customer, and to terminate calls from a Customer to an End User.” DeltaCom is not a Customer. Also, Hypercube provides DeltaCom with no ability to “originate” and “terminate” calls to End Users, whether they be the calling or called party, or even the wireless carrier.

49. The Price Lists also include the following language in Section 3.2.5:

<sup>17</sup> The Hypercube price list may be identical to the last on-file KMC price list.

<sup>18</sup> As explained in Count Seven, *infra*, DeltaCom has neither ordered nor received service provided pursuant to the KMC and Hypercube Access Price Lists and thus is not a “Customer” of KMC or Hypercube. *See* Price List, § 1 Definitions at 1<sup>st</sup> Revised Page 6.

<sup>19</sup> A carrier is not an end user.

Deleted: Six, *infra*  
Deleted: -  
Deleted: - . ¶

Originating 800 FG Access includes the delivery of 8XX traffic that is initiated by a Wireless Provider's End User and is delivered from a CMRS Mobile Telephone Switching Office to the Company switch and then to a Customer. The Company will charge for all elements of service that it provides in routing such traffic.

This service description is not applicable and does not clearly describe the service

Hypercube alleges it provides to DeltaCom.

50. DeltaCom is not a Customer of Hypercube. And, Hypercube does not deliver calls to DeltaCom. Instead, the calls at issue here are delivered to an ILEC.

51. The charges imposed by Hypercube on DeltaCom are based on a "composite rate" which includes costs for elements of service not provided by Hypercube (to anyone) in routing 8XX traffic from wireless carriers to ILECs. It is axiomatic that no carrier is entitled to charge another for services it does not provide.<sup>20</sup> Because the charges are not limited to the "elements of the service" Hypercube allegedly provides when routing 8XX calls from wireless carriers to ILECs (Hypercube does not route calls to DeltaCom), the posted rates used by Hypercube are unfair, anticompetitive and otherwise unlawful. *See* Count Seven, *infra*.

52. The Price Lists also include the following language in Section 3.2.5:

800 Data Base Access Service is a service offering utilizing originating Trunk side Switched Access Service. When an 8XX + NXX + XXXX call is originated by an End User, the Company will utilize the Signaling System 7 (SS7) network to query an 800 data base to identify the Customer to whom the call will be delivered and provide vertical features based on the dialed ten digits. The call will then be routed to the identified Customer over FGD switched access. The 800 series includes the following service access codes: 800, 888, 877, 866, 855, 844, 833 and 822.<sup>21</sup>

<sup>20</sup> For example, the FCC has found that CLECs are not entitled to charge for services they do not provide. *See FCC Eighth R&O*, para. 21.

<sup>21</sup> Section 1 of the Price List, at 1<sup>st</sup> Revised Page 6, contains a different definition for "8XX Data Base Access Service". There appear to be no other provisions of the Price List using this term.

Deleted: -  
Deleted: - ¶

This service description is not applicable and does not clearly describe the service

Hypercube alleges it provides to DeltaCom.

53. DeltaCom is not a Customer of Hypercube and Hypercube does not provide the Switched Access Services described in the KMC Access Services Price List to DeltaCom.

Deleted: Tariff

54. Hypercube does not deliver the traffic at issue to DeltaCom over FGD trunks, but rather sends it to an ILEC. Because Hypercube has not provided any of the services tariffed in the Price Lists to DeltaCom, its attempt to impose charges on DeltaCom for such services violates the Price List and is unfair, anticompetitive and otherwise unlawful. Further, because the Price List does not clearly describe and unambiguously identify the services and applicable charges at issue here, it is unreasonable for Hypercube to seek to impose charges for such services and it cannot lawfully do so. Sections 364.01(4)(g) and 364.04, Florida Statutes.

Deleted: tariff

55. Because Hypercube has engaged in unfair, anticompetitive and otherwise unlawful conduct in violation of the Price List pursuant to which it imposed the charges at issue here and in violation of state law, the Commission should order that Hypercube has not provided to DeltaCom any of the services included in the KMC and Hypercube Access Services Price Lists and that Hypercube may not lawfully impose charges for such services. Sections 364.01(4)(g), 364.03 and 364.04, Florida Statutes.

Deleted: -

Deleted: - . ¶



COUNT SEVEN

Deleted: SIX

DELTA COM HAS NOT ORDERED ANY OF THE SERVICES INCLUDED IN THE KMC AND  
HYPERCUBE ACCESS SERVICES PRICE LISTS AND  
IS NOT A "CUSTOMER" UNDER THOSE PRICE LISTS

Deleted: Paragraphs 1 through 44

56. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

57. DeltaCom is not required to purchase intrastate services from Hypercube. Nor has DeltaCom ever ordered any.

58. DeltaCom has never submitted an access service request ("ASR") or other order to Hypercube for the services at issue here.

59. DeltaCom also has never constructively ordered such services from Hypercube, pursuant to the KMC and Hypercube Access Services Price Lists or otherwise.

60. Section 1 (1st Revised at Page 6) of the Price Lists defines constructive ordering as follows:

Constructive Order: Delivery of calls to or acceptance of calls from the Company's locations constitutes a Constructive Order by the Customer to purchase switched access services as described herein. Similarly the selection by a Company's End User of the Customer as the presubscribed IXC constitutes a Constructive Order of switched access by the Customer.

This definition is not applicable with respect to the services Hypercube alleges it provides to DeltaCom.

61. DeltaCom neither delivers calls nor accepts them from "the Company's locations". And, upon information and relief, in no case has a "Company End User" selected DeltaCom as its presubscribed IXC. Further, because the Price Lists do not clearly describe and unambiguously identify the services and applicable charges at issue here, it is unfair and anticompetitive for it to seek to impose charges for such services and it cannot lawfully do so.

Deleted: -

Deleted: - 1

62. The Price Lists define “Customer” as follows:

Customer: The person, firm or corporation or other entity which orders Service or receives service including through a Constructive Order and is responsible for the payment of charges and for compliance with the Company’s tariff regulations. The Customer could be an interexchange carrier, a local exchange carrier, a wireless provider, or any other carrier that operates in the state.

See Price List, § 1 Definitions at 1<sup>st</sup> Revised Page 6. DeltaCom is not a “Customer” under this definition. As explained herein, DeltaCom has neither ordered service or received service pursuant to the Price Lists.

63. Based on the foregoing, the Commission should order that DeltaCom is not required to order and has not ordered any services from Hypercube – affirmatively or constructively – pursuant to the KMC and Hypercube Access Services Price Lists and that it is not a Customer under those Price Lists. Sections 364.01(4)(g), 364.03 and 364.04, Florida Statutes.

**COUNT EIGHT**

Deleted: SEVEN

**HYPERCUBE’S RATE FOR 8XX ORIGINATING ACCESS IS UNFAIR, ANTICOMPETITIVE AND OTHERWISE UNLAWFUL**

Deleted: Paragraphs 1 through 52

64. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

65. Section 3.2.5 of the KMC and Hypercube Access Services Price Lists provides:

Originating 800 FG Access includes the delivery of 8XX traffic that is initiated by a Wireless Provider’s End User and is delivered from a CMRS Mobile Telephone Switching Office to the Company switch and then to a Customer. The Company will charge for all elements of service that it provides in routing such traffic.

Deleted: -

Deleted: - ¶

The rate imposed by Hypercube for allegedly providing this service to DeltaCom encompasses more than the elements of service Hypercube claims it provides in routing such service and is therefore contrary to the terms of the Price List itself and is unfair, anticompetitive and otherwise unlawful because no carrier is entitled to charge for services it does not provide.<sup>22</sup>

Deleted: tariff

66. The Price Lists do not specify with reasonable clarity which rate applies to Originating 800 FG Access. Section 4.4.1 of the KMC and Hypercube Access Services Price Lists establishes that a “blended rate” will be imposed “per minute” for “originating and terminating access”. Section 4.4.1 establishes a rate of \$0.025 for Originating FG Access and Terminating FG Access, but includes no rate expressly applicable to “Originating 800 FG Access”.

67. Upon information and belief, Hypercube applies the same “blended rate” of \$0.025 per minute regardless of the service it provides. Section 4.2.1 of the Price Lists explains that the “blended rate” is based on “aggregate traffic volumes from the following cost categories” and includes “Switched Transport” and “Switching, End Office, Tandem or both) among those categories. Each category appears to include functionalities and associated costs not provided or incurred by Hypercube when providing the service at issue here. For example, the “Switched Transport cost category” appears to include costs for switched transport actually provided by the wireless carrier with respect to the traffic at issue here. Also, Hypercube provides no switched transport to or from any “designated premise” of DeltaCom. Similarly, the “Switching cost category” appears to include charges for end office switching, which with respect to the traffic at issue here, also would have been provided by the wireless carrier.

Deleted: access

Deleted: Originating 800 FG Access.

<sup>22</sup> For example, the FCC has found that CLECs are not entitled to charge for services they do not provide. See *FCC Eighth R&O*, para. 21.

Deleted: -

Deleted: - ¶

68. Because the “blended rate” imposed by Hypercube includes charges for functionalities not provided by Hypercube, it violates Section 3.2.5 of the Price Lists which states that “The Company will charge for all elements of service that it provides in routing such traffic.”

69. Because the “blended rate” imposed by Hypercube includes charges for functionalities not provided by Hypercube, it is unfair, anticompetitive and otherwise unlawful.

70. Based on the foregoing, the Commission should order that Hypercube’s rate for Originating 800 FG Access is unfair, anticompetitive and otherwise unlawful.

Sections 364.01(4)(g), 364.03, and 364.04, Florida Statutes.

COUNT NINE

HYPERCUBE’S IMPOSITION OF 800 DATA BASE ACCESS SERVICE “DIP CHARGES” ON DELTACOM IS UNLAWFUL

Deleted: EIGHT

Deleted: Paragraphs 1 through 59

71. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

72. Section 1 (at 1<sup>st</sup> Revised Page 6) of the KMC and Hypercube Access Services Price Lists defines a service called “8XX Data Base Access Service” as follows:

8XX Data Base Access Service: The term “8XX Data Base Access Service” denotes a toll-free originating Trunkside Access Service when the 8XX Service Access Code (i.e., 800, 822, 833, 844, 855, 866, 877, or 888 as available) is used.

This definition is ambiguous and the defined term is not used anywhere else in the Price Lists.

The Price Lists, at Section 4.2.2, also include the following provision:

800 Data Base Query

The 800 Data Base Query Charge will apply for each Toll-Free 8XX call query received at the Company’s (or its provider’s) Toll-Free 8XX data base.

Deleted: -

Deleted: - ¶

This provision does not say who gets charged for the query used to determine how to route the wireless traffic which Hypercube has contracted with wireless carriers to direct to its network.

Section 3.2.5 of the Price Lists describes "800 Data Base Access Service" as follows:

800 Data Base Access Service is a service offering utilizing originating Trunk side Switched Access Service. When an 8XX + NXX + XXXX call is originated by an End User, the Company will utilize the Signaling System 7 (SS7) network to query an 800 data base to identify the Customer to whom the call will be delivered and provide vertical features based on the dialed ten digits. The call will then be routed to the identified Customer over FGD switched access. The 800 series includes the following service access codes: 800, 888, 877, 866, 855, 844, 833 and 822.

Hypercube does not route the traffic at issue to DeltaCom over FGD access but instead routes the traffic to the ILEC tandem. Section 4.4.2 of the Price Lists establishes the following rates for

"800 Data Base Access Service Queries":

Per Query	
Basic	\$0.005
Vertical Feature	\$0.0055

This provision does not indicate whether the wireless carrier gets charged for the data base dip used to forward its traffic onto the ILEC or whether the ILEC or IXC gets charged for the service.

73. Because the KMC and Hypercube Access Services Price Lists do not clearly describe and unambiguously identify the services and applicable charges at issue here, it is unfair and anticompetitive for Hypercube to seek to impose charges for such services and it cannot lawfully do so. Sections 364.01(4)(g), 364.03 and .364.04, Florida Statutes. Based on the foregoing, the Commission should order that Hypercube's imposition on DeltaCom of

Deleted: -  
Deleted: - . ¶

charges for dips into a data base of 8XX numbers is unfair, anticompetitive and otherwise unlawful.

COUNT TEN

BREACH OF DELTACOM'S PRICE LIST

74. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

75. In the alternative, to the extent that it is determined that DeltaCom is not entitled to relief on the foregoing counts, DeltaCom is entitled to relief and compensation from Hypercube on a breach of price list theory.

76. In response to Hypercube's unlawful intrastate access charge arbitrage scheme, DeltaCom filed a modification to its own intrastate access service price lists adding Intermediate Provider Access Service to its price list. These price list modifications were accepted by the Commission and went into effect on September 4, 2008. To the extent that Hypercube has provided intrastate services from its price list to DeltaCom, DeltaCom has likewise provided the Intermediate Provider Access Service from its price list to Hypercube. Per Section 3.5 of the DeltaCom Price List, this service includes the origination or termination by DeltaCom of a call any portion of which traverses the network of an Intermediate Provider, as defined in the DeltaCom Price List. The DeltaCom Price List defines Intermediate Provider as follows:

An Intermediate Provider is a provider that:

(A) is not the telecommunications carrier for the customer who is either the originating end user or the terminating end user;

(B) does not have a direct connection with the Company or a written agreement, executed by the Company, for the provision of such services; and,

Deleted: NINE

Deleted: AN ORDER BARRING HYPERCUBE FROM COLLECTING FOR SERVICES BILLED PREVIOUSLY UNDER THE KMC AND HYPERCUBE ACCESS SERVICES TARIFFS, BARRING HYPERCUBE FROM BILLING DELTACOM FOR SUCH SERVICES IN THE FUTURE, AND REQUIRING HYPERCUBE TO REFUND TO DELTACOM ANY SUCH AMOUNTS PREVIOUSLY REMITTED¶

Deleted: Paragraphs 1 through 62

Deleted: - -

Deleted: - ¶

(C) seeks to levy any charge or fee, by tariff or otherwise, against the Company.

Per this definition, Hypercube is an Intermediate Provider. Section 3.7.9 of the DeltaCom Price List sets forth the following rates for Intermediate Provider Access Service:

Rates will be billed at the greater of:

(A) Per Minute Rate \$ 0.025

(B) Per Call Rate\* \$ 0.005

\*The Per Call Rate is in addition to the Per Minute Rate.

Or, the amount charged to the Company by the Intermediate Provider plus an administrative fee equal to 10% of the total amount charged.

Per this section of the DeltaCom Price List, DeltaCom billed Hypercube \$1,217,507.50 for the time period between September, 2008 and September, 2009. Hypercube has unlawfully refused to pay DeltaCom.

77. Based on the foregoing, and to the extent that it is determined that DeltaCom is not entitled to relief on the foregoing counts, the Commission should (a) find that Hypercube has unreasonably, unjustly and unlawfully refused to pay for the services in the DeltaCom Price List provided to it by DeltaCom, and (b) enter an order requiring Hypercube to pay all amounts owed to DeltaCom and barring Hypercube from refusing to pay DeltaCom in the future for such services provided by DeltaCom.

COUNT ELEVEN

**AN ORDER BARRING HYPERCUBE FROM COLLECTING FOR SERVICES BILLED PREVIOUSLY UNDER THE KMC AND HYPERCUBE ACCESS SERVICES PRICE LISTS, BARRING HYPERCUBE FROM BILLING DELTACOM FOR SUCH SERVICES IN THE FUTURE, AND REQUIRING HYPERCUBE TO REFUND TO DELTACOM ANY SUCH AMOUNTS PREVIOUSLY REMITTED**

78. DeltaCom repeats and realleges each and every allegation contained in the preceding paragraphs hereof, as if fully set forth herein.

Deleted: -  
Deleted: - 1

79. Hypercube's practices and actions complained of herein are (a) unfair and anticompetitive, (b) unjust and unreasonable, (c) in bad faith and contrary to the public interest, and (d) otherwise unlawful for the reasons set forth herein, including federal preemption, and in violation of Sections 364.01(4)(g), 364.03 and 364.04, Florida Statutes.

80. Because of Hypercube's unfair, anticompetitive and otherwise unlawful conduct and pursuant to the above-quoted statute sections, DeltaCom is entitled to an order barring Hypercube from collecting for services billed previously under the KMC and Hypercube Access Services Price Lists, barring Hypercube from billing DeltaCom for such services in the future, requiring Hypercube to refund to DeltaCom any such amounts previously remitted.

**ISSUES OF MATERIAL FACT, ULTIMATE FACTS, STATUTES VIOLATED**

81. All material factual allegations which DeltaCom pleads the Commission address are as identified the preceding paragraphs hereof. The issues of material fact which may ultimately be in dispute by the parties in this proceeding cannot be identified with certainty at this time in the pleading process. Based on the foregoing, the ultimate facts alleged are that:

- (a) Hypercube has engaged in an unlawful scheme whereby it facilitates the indirect imposition of intrastate access charges by wireless carriers on IXC's such as DeltaCom;
- (b) Hypercube unlawfully has imposed charges for allegedly providing intrastate services without at all times, if at any, having had the requisite authority, price list or contract;
- (c) Hypercube is not a "telecommunications company" or a "CLEC" and it does not provide "local exchange telecommunications service" or intrastate access services;

Deleted: by  
Deleted: 1 - 65, above.

Deleted: - -  
Deleted: - . 1



(d) Hypercube unlawfully has imposed intrastate access charges on intraMTA and interstate traffic;

(e) Hypercube unlawfully has filed access charges for functionalities performed by wireless carriers;

(f) Hypercube unlawfully has rejected DeltaCom's PIU in violation of the Price List upon which it relies;

(g) Hypercube has not provided nor has DeltaCom ordered any intrastate service set forth in the Price List;

Deleted: f

(h) Hypercube's rate for 8XX Originating Access is unlawful;

Deleted: g

Deleted: and

(i) Hypercube's imposition of 800 Data Base Dip charges on DeltaCom is unlawful;  
and

Deleted: h

Deleted: .

(j) In the alternative, Hypercube has breached DeltaCom's Price List by refusing to pay DeltaCom rates for services provided by DeltaCom per the Price List.

(k) It is anticipated that Hypercube may dispute some or even all of these facts.

(l) The Commission must order that DeltaCom is not liable for the complained-of charges pursuant to Section 364.01(4)(g), Florida Statutes, on all counts. To the extent that Hypercube has filed price lists for the services at issue here, its price list violates any law(s) which may give rise to its filing and is not consistent with the filed rate system nor compatible with its effective operation in this State. Whether or not Hypercube is a "telecommunications company" or a CLEC, it is unfair and anticompetitive for a company to (a) file a CLEC price list to enable it do indirectly what its CMRS customers cannot do directly, while providing the CMRS customers a kick-back, and, (b) even if all or part of such a price list is permissible, attempt enforcement before the price list is

Deleted: -

Deleted: - 1

effective, misconstrue its provisions (including those that are unclear and, hence, inadequately noticed), improperly charge rates, and ignore provisions of the Price List to suit its own interests – where DeltaCom ordered no service and Hypercube provided no service to DeltaCom. To the extent Hypercube is deemed a "telecommunications company" but not a CLEC for purposes of this dispute, section 374.03, Florida Statutes, applies. This section provides that telecommunications company rates and contracts must be fair, just and reasonable and that telecommunications companies furnish services, as demanded, to those who apply for such, on terms approved by the commission.

Deleted: as alleged in Counts 4 - 8  
Deleted: the clear  
Deleted: price list

Hypercube has not acted in compliance with this section; Hypercube has simply dropped into a CLEC price list rates and terms for so-called intrastate services which Hypercube's CMRS customers could not charge DeltaCom, at rates that include charges for services provided by the wireless carriers and a kick-back to the CMRS carriers. Hypercube neither originates nor terminates its own traffic, so it cannot seek to enforce filed access charges against an unregulated Florida IXC under Florida law. There has been no request for service from DeltaCom based on clear and approved terms for service. Hypercube has not provided to DeltaCom any of the services included in its Price List and DeltaCom has not been properly charged per the Price List's terms. Section 364.04 applies to all telecommunications companies, including CLECs, and provides that all companies will file schedules for services to be performed within the state on clear terms, with all charges separately stated. Hypercube has violated this provision in that it has ignored the terms of its own Price List, ignored DeltaCom's reported PIU, and charged DeltaCom a blended intrastate access charge and related data base dip charges on intraMTA and interstate traffic that includes charges for services not performed by Hypercube but by a

Deleted: other

Deleted: for any  
Deleted: . -  
Deleted: - . §

wireless carrier. The FCC has prohibited the practice of recovering through tariffed access charges for the functionalities performed by wireless carriers and has concluded that intraMTA wireless traffic is not subject to access charges. As such, federal law preempted this Commission from accepting or enforcing Hypercube's Price List containing such charges. Accordingly, the judgments and relief sought by DeltaCom are warranted. To the extent that it is determined that DeltaCom is not entitled to such, the Commission should find that Hypercube has unreasonably, unjustly and unlawfully refused to pay for the services provided to it by DeltaCom, in violation of the DeltaCom Price List.

**JUDGMENT AND RELIEF SOUGHT**

WHEREFORE, Petitioner, DeltaCom, respectfully requests that this Commission:

- (a) Issue an order on Count One in favor of DeltaCom that Hypercube's practice of needlessly inserting itself into the call flow so that it can collect and remit in part intrastate access charges to wireless carriers who are not authorized to charge them is an unfair and anticompetitive practice that violates state law, and that to the extent Hypercube provided any such intrastate services to the DeltaCom IXC, (a) Hypercube did so unlawfully, (b) its Price List is void *ab initio*, (c) it is not entitled to charge for such service, and (d) is prohibited from further engaging in such conduct;
- (b) Issue an order on Count Two in favor of DeltaCom that, in light of the FCC's prohibition on the tariffing of access charges for functionalities performed by wireless carriers and for intraMTA wireless traffic, (a) the Commission was preempted from accepting or enforcing Hypercube's Price List, (b) Hypercube's Price List is void *ab initio*, (c) Hypercube is not entitled to impose intrastate access charges for functionalities performed by wireless carriers or for intraMTA wireless traffic, and (d) Hypercube is prohibited from further engaging in such conduct;
- (c) Issue an order on Count Three in favor of DeltaCom that, to the extent Hypercube provided any intrastate services to DeltaCom, Hypercube did so unlawfully and is not entitled to charge for such services;
- (d) Issue an order on Count Four in favor of DeltaCom that, to the extent Hypercube provided any intrastate services to DeltaCom pursuant to the

Deleted: ¶  
Deleted: 23

Deleted: ,  
Deleted: and  
Deleted: s;

Deleted: (b) Issue an order on Count Two in favor of DeltaCom that, to the extent Hypercube provided any intrastate services to DeltaCom, Hypercube did so unlawfully and is not entitled to charge for such services.¶

Deleted: pursuant to the KMC Access Services Price List

Deleted: - -  
Deleted: - . ¶

KMC Access Services Price List, Hypercube did so unlawfully and is not entitled to charge for such services;

- (e) Issue an order on Count Five in favor of DeltaCom that Hypercube's pronouncement that DeltaCom's reported PIU is invalid was unlawful and that, consistent with the Price Lists, no intrastate charges should have been imposed;
- (f) Issue an order on Count Six in favor of DeltaCom that Hypercube has not provided to DeltaCom any of the services included in the Price Lists and that Hypercube may not lawfully impose charges for such services;
- (g) Issue an order on Count Seven in favor of DeltaCom that DeltaCom has not ordered any services from Hypercube – affirmatively or constructively – pursuant to the Price Lists and that it is not a Customer there under;
- (h) Issue an order on Count Eight in favor of DeltaCom that Hypercube's rate for Originating 800 FG Access is unlawful;
- (i) Issue an order on Count Nine in favor of DeltaCom that Hypercube's imposition on DeltaCom of charges for dips into a data base of 8XX numbers is unfair, anticompetitive and otherwise unlawful.;
- (j) Issue an order on Count Ten in favor of DeltaCom finding that Hypercube has unreasonably, unjustly and unlawfully refused to pay for the services provided to it by DeltaCom pursuant to DeltaCom's Price List, requiring Hypercube to pay all amounts owed to DeltaCom, and barring Hypercube from refusing to pay DeltaCom in the future for such services provided by DeltaCom;
- (k) Issue an order with respect to Count Eleven barring Hypercube from collecting for services billed previously under the Price Lists, barring Hypercube from billing DeltaCom for such services in the future, and requiring Hypercube to refund to DeltaCom any such amounts previously remitted, as demonstrated at hearing; and
- (l) Issue an order granting any other relief this Commission deems just and proper because Hypercube has acted unfairly, anticompetitively and in bad faith, has been stubbornly litigious, and has caused DeltaCom unnecessary trouble and expense.

Deleted: e

Deleted: Five

Deleted: f

Deleted: Six

Deleted: (g) Issue an order on Count Seven in favor of DeltaCom that Hypercube's rate for Originating 800 FG Access is unlawful.¶

Deleted: (i) Issue an order with respect to Count Nine barring Hypercube from collecting for services billed previously under the Price Lists, barring Hypercube from billing DeltaCom for such services in the future, and requiring Hypercube to refund to DeltaCom any such amounts previously remitted, as demonstrated at hearing; and ¶

Deleted: -

Deleted: - . ¶

Respectfully submitted this 23<sup>rd</sup> day of October, 2009.

Deleted: \_\_\_\_\_  
Deleted: June

By: \_\_\_\_\_

Matthew Feil  
**AKERMAN SENTERFITT**  
106 East College Avenue, Suite 1200  
Tallahassee, FL 32301  
(850) 425-1614  
(850) 222-0103  
matt.feil@akerman.com

\_\_\_\_\_  
D. Anthony Mastando, Esq.  
Regulatory Vice President  
DeltaCom, Inc.  
7037 Old Madison Pike, Suite 400  
Huntsville, AL 35806  
(256) 382-5900

*Attorneys for DeltaCom, Inc.*

Deleted: -  
Deleted: - ¶

**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 October, 2009.

**Deleted:** ¶  
**Deleted:** this Petition  
**Deleted:** Hand Delivery (\*)  
**Deleted:** \_\_\_\_\_  
**Deleted:** June  
**Deleted:** ¶  
 Adam Teitzman ¶¶  
 Office of the General Counsel¶  
 Room 370, Gunter Building¶  
 Florida Public Service Commission¶  
 2540 Shumard Oak Boulevard¶  
 Tallahassee, FL 32399-0850¶  
 ¶  
 Hypercube Telecom, LLC¶  
 C/O Registered Agent:¶  
 Corporate Service Company¶  
 1201 Hays Street¶  
 Tallahassee, FL 32301 ¶  
 ¶  
 ¶

<p><u>Charles Murphy, Esq.</u>  <u>Timisha Brooks, Esq.</u>  <u>Adam Teitzman, Esq.</u>  <u>Office of the General Counsel</u>  <u>Florida Public Service Commission</u>  <u>2540 Shumard Oak Boulevard</u>  <u>Tallahassee, FL 32399-0850</u>  <u>cmurphy@psc.state.fl.us</u>  <u>tbrooks@psc.state.fl.us</u></p>	<p><u>Michael B. Hazzard, Esq.</u>  <u>Jason Koslofsky, Esq.</u>  <u>Arent Fox LLP</u>  <u>1050 Connecticut Avenue, NW</u>  <u>Washington, D.C. 20036-5339</u>  <u>(202) 857-6029</u>  <u>hazzard.michael@arentfox.com</u>  <u>koslofsky.jason@arentfox.com</u></p>
<p><u>D. Anthony Mastando, Esq.</u>  <u>Regulatory Vice President</u>  <u>Jean Houck</u>  <u>DeltaCom, Inc</u>  <u>7037 Old Madison Pike, Suite 400</u>  <u>Huntsville, AL 35806</u>  <u>(256) 382-5900</u>  <u>tony.mastando@deltacom.com</u>  <u>jean.houck@deltacom.com</u></p>	<p><u>Mr. James Mertz</u>  <u>Hypercube Telecom LLC</u>  <u>Building 300</u>  <u>5300 Oakbrook Parkway</u>  <u>Suite 330</u>  <u>Norcross, GA 30093-6210</u>  <u>james.mertz@hypercube-llc.com</u></p>
<p><u>Floyd R. Self, Esq.</u>  <u>Messer, Caparello &amp; Self, P.A.</u>  <u>P.O. Box 15579</u>  <u>Tallahassee, FL 32317</u>  <u>(850) 425-5213</u>  <u>fself@lawfla.com</u></p>	<p><u>Matthew Feil, Esq.</u>  <u>Akerman Senterfitt</u>  <u>106 East College Avenue, Suite 1200</u>  <u>Tallahassee, FL 32301</u>  <u>(850) 425-1614</u>  <u>matt.feil@akerman.com</u></p>

By: \_\_\_\_\_  
Matthew Feil, Esq.

**Deleted:** \_\_\_\_\_  
**Deleted:** \_\_\_\_\_  
**Deleted:** AKERMAN  
 SENTERFITT¶  
 106 East College Avenue,  
 Suite 1200¶  
 Tallahassee, FL 32301¶  
 (850) 425-1614¶  
 (850) 222-0103¶  
 matt.feil@akerman.com¶  
**Deleted:** -  
**Deleted:** - ¶