

**Dorothy Menasco**

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**From:** Ann Bassett [abassett@lawfla.com]  
**Sent:** Monday, August 31, 2009 3:32 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** Docket No. 090327-TP  
**Attachments:** 2009-08-31, 090327, Hypercube's Answer to DeltaCom's Complaint.pdf

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The Docket No. is 090327-TP - Petition of DeltaCom, Inc. for order Determining DeltaCom, Inc. not liable for access charges of KMC Data LLC, Hypercube, LLC and Hypercube Telecom, LLC

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

Total Number of Pages is 37

Hypercube, LLC and Hypercube Telecom, LLC (f/k/a KMC Data, LLC) Answer to DeltaCom's Complaint

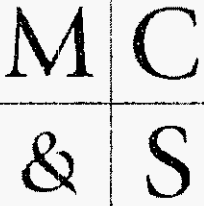
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DOCUMENT NUMBER-DATE

09037 AUG 31 8

FPSC-COMMISSION CLERK



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August 31, 2009

**VIA ELECTRONIC FILING**

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

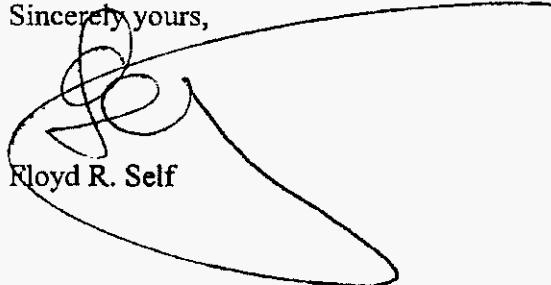
Re: Docket No. 090327-TP

Dear Ms. Cole:

Enclosed for filing on behalf of Hypercube, LLC and Hypercube Telecom, LLC (f/k/a KMC Data, LLC) is the Answer to Petition of DeltaCom, Inc. and Counterclaim of Hypercube Telecom, LLC f/k/a KMC Data, LLC in the above referenced docket. Exhibit "B" to Hypercube's Answer is not included and will be provided as soon as possible.

Thank you for your assistance with this filing.

Sincerely yours,



Floyd R. Self

FRS/amb  
Enclosure  
cc: Mr. James Mertz  
Parties of Record

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DOCUMENT NUMBER-DATE

09037 AUG 31 09

FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of DeltaCom, Inc. for )  
order determining DeltaCom, Inc. not )  
liable for access charges of KMC )  
Data LLC, Hypercube, LLC, and )  
Hypercube Telecom, LLC. )  
\_\_\_\_\_ )

Docket No. 090327  
Filed: August 31, 2009

**ANSWER TO PETITION OF DELTACOM, INC. AND  
COUNTERCLAIM OF HYPERCUBE TELECOM, LLC f/k/a KMC DATA, LLC**

Hypercube Telecom, LLC f/k/a KMC Data, LLC ("Hypercube"), pursuant to Florida Administrative Code Rule 28-106.203, hereby files its Answer to the Petition of DeltaCom, Inc. ("DeltaCom") filed on or about June 5, 2009 with the Florida Public Service Commission ("Commission"). In addition, Hypercube files counterclaims against DeltaCom.<sup>1</sup>

**HYPERCUBE INTRODUCTION**

1. Despite the allegations of DeltaCom's Petition, this case actually involves DeltaCom's unreasonable, unjust, and unlawful refusal to pay for services provided by Hypercube. Hypercube, a competitive local exchange carrier ("CLEC"), has lawfully charged DeltaCom for telecommunications services performed by Hypercube in connection with DeltaCom's for-profit provision of toll-free (*i.e.*, "800" or "8YY") calls that originate and terminate within the State of Florida. DeltaCom offers on a for-profit basis to certain of its customers toll-free calling services, which are commonly referred to as "800 services" or "8YY

<sup>1</sup> DeltaCom's Petition also named Hypercube, LLC as a party defendant. Hypercube, LLC is simply the parent company of Hypercube Telecom, LLC f/k/a KMC Data, LLC. Hypercube LLC is not a licensee of the Commission and is not subject to the jurisdiction of the Commission. By a separate motion being filed simultaneously with this Answer, Hypercube, LLC has moved that it be dismissed from this proceeding.

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FPSC-COMMISSION CLERK

services.”<sup>2</sup> As the for-profit provider of 8YY services, DeltaCom is responsible for paying for the services provided by CLECs like Hypercube and other telecommunications providers to complete the call. However, DeltaCom has refused to pay Hypercube for the services it has provided and continues to provide to DeltaCom. Hypercube simply seeks payment for the services it provided and for which Hypercube is authorized to collect.

### **HYPERCUBE RESPONSE TO SPECIFIC ALLEGATIONS**

2. The opening paragraph contains DeltaCom’s characterization of the Petition and, therefore, requires no response. To the extent a response is required, Hypercube denies the allegations in the opening paragraph.

### **DELTACOM INTRODUCTION**

3. Hypercube denies the allegations in Petition Paragraph No. 1. Hypercube provides the access services at issue in DeltaCom’s Petition to DeltaCom, not wireless carriers.

4. Petition Paragraph 2. Hypercube admits that wireless providers have the option of sending 8YY traffic to the ILEC tandem, but denies any “historical” practice in this regard. Hypercube denies DeltaCom’s characterization of federal law, which speaks for itself. Hypercube lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph concerning DeltaCom’s contracts or typical billing arrangements with wireless carriers and those allegations are therefore denied. Hypercube further adds that companies that sell 8YY services, like DeltaCom, are responsible for paying access charges incurred as a result of those companies use of other carriers’ networks as an input to their for-profit toll-free 8YY offerings.

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<sup>2</sup> The industry term “8YY” recognizes that toll free dialing codes in addition to “800”

5. Petition Paragraph 3. Hypercube denies that it “help[s] wireless carriers accomplish indirectly what federal and state law bars them from doing directly.” Hypercube admits that it lawfully transports 8YY calls from wireless carriers to the ILEC tandem and may lawfully charge for the services it provides DeltaCom in doing so. Hypercube admits that it has contracts with wireless carriers to transport 8YY calls. Hypercube denies the remaining allegations of this paragraph.

6. Petition Paragraph 4. The allegations of this paragraph and Footnotes 1 and 2 are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

#### **DELTACOM PARTIES AND JURISDICTION**

7. Petition Paragraph 5. Hypercube lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph, and those allegations are therefore denied.

8. Petition Paragraph 6. Hypercube admits the allegations in this paragraph. Hypercube further states that Hypercube, LLC acquired KMC Data, LLC in 2005. In 2008, KMC Data, LLC changed its name to Hypercube Telecom, LLC.

9. Petition Paragraph 7. Hypercube admits the allegations in this paragraph. Hypercube Telecom, LLC, is a CLEC certified in Florida and is authorized to provide intrastate exchange access services within the State of Florida. Hypercube, LLC is not a carrier; rather it is Hypercube Telecom, LLC’s parent company.

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exist, such as “888” or “866.”

10. Petition Paragraph 8. Hypercube admits the allegations in this paragraph. Hypercube further states that it also is authorized to provide intrastate exchange access services within the State of Florida.

11. Petition Paragraph 9. Hypercube denies the allegations in this paragraph and Footnote 3 as to Hypercube, LLC because Hypercube, LLC is not a licensee of this Commission and is not subject to the jurisdiction of the Commission. Hypercube, LLC is simply the parent company of a regulated telephone company, Hypercube Telecom, LLC formerly known as KMC Data, LLC. Hypercube Telecom, LLC is authorized to provide intrastate exchange access services in the State of Florida. Hypercube, LLC has simultaneously filed a separate request to be dismissed from this proceeding.

#### **DELTACOM FACTUAL BACKGROUND**

12. Petition Paragraph 10. Hypercube admits the allegations in this paragraph.

13. Petition Paragraph 11. Hypercube admits that wireless providers have the option of sending 8YY traffic to the ILEC tandem, but denies any “traditional” practice in this regard. Hypercube denies DeltaCom’s characterization of Federal Communications Commission (“FCC”) rulings, which speak for themselves. Footnote 4 cites to an order of the FCC, which speaks for itself, and otherwise contains legal conclusions to which no response is required. If a response is required, the allegations are denied. Hypercube lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph concerning DeltaCom’s contracts or typical billing arrangements with wireless carriers and those allegations are therefore denied. Hypercube denies that the diagram attached as Exhibit A to DeltaCom’s Petition accurately reflects a “typical call flow.” Hypercube further adds that nothing precludes DeltaCom from directly interconnecting with

wireless carriers or with Hypercube. Exhibit Hypercube-A, Slides 1 and 2, attached hereto, illustrates the services provided by Hypercube and the alternatives available to DeltaCom.

14. Petition Paragraph 12. Hypercube denies the services it provides are redundant or that Footnote 5 fully encompasses the services provided by Hypercube. Hypercube admits that it lawfully transports 8YY calls from wireless carriers to the ILEC tandem and may lawfully charge for the services it provides DeltaCom in doing so. As the 8YY provider, DeltaCom (and no other carrier) is responsible for paying access charges associated with DeltaCom's provision of toll-free, 8YY service to its customers. Hypercube denies that the diagram attached as Exhibit A to DeltaCom's Petition accurately reflects its role in delivering a call for termination. Hypercube further adds that to the extent DeltaCom argues that Hypercube's tandem is unnecessary or duplicative of the ILEC's tandem, nothing precludes DeltaCom from directly interconnecting with wireless carriers or with Hypercube. Exhibit Hypercube-A, Slides 1 and 2, attached hereto, illustrates the services provided by Hypercube and the alternatives available to DeltaCom.

15. Petition Paragraph 13. Hypercube admits that it has contracts with wireless carriers to transport 8YY calls. Hypercube denies the remaining allegations of this paragraph. Hypercube denies DeltaCom's characterization of FCC rulings in this paragraph and Footnote 6. Those are legal documents which speak for themselves.

16. Petition Paragraph 14. Hypercube admits that Hypercube may lawfully charge for the services it provides DeltaCom in the form of access charges and database dips. Hypercube denies the remaining allegations of this paragraph. Hypercube denies DeltaCom's characterization of federal law, which speaks for itself.

17. Petition Paragraph 15. Hypercube admits that it properly and lawfully billed DeltaCom for the services it provided DeltaCom and that DeltaCom has not paid what it owes Hypercube. Hypercube's Price List is attached hereto as Exhibit Hypercube-B.

18. Petition Paragraph 16. Hypercube admits the letters attached as Exhibit C and D to the Petition were exchanged between the parties, but denies any suggestion that these two letters accurately reflect all correspondence between the parties. Footnote 8 contains DeltaCom's characterization of Hypercube's Price List, which is a legal document that speaks for itself. Footnote 6 also contains legal conclusions to which no response is required, but to the extent an answer is required Hypercube denies the allegations of this paragraph. Hypercube denies the remaining allegations of this paragraph.

19. Petition Paragraph 17. Hypercube admits DeltaCom has unlawfully refused to pay for the services it received from Hypercube. Hypercube admits it and DeltaCom have not been able to resolve this dispute outside of litigation.

#### **DELTACOM COUNT I**

20. Petition Paragraph 18. Hypercube repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

21. Petition Paragraph 19. Hypercube admits that it properly and lawfully billed DeltaCom for the services it provided DeltaCom. Hypercube admits that it has contracts with certain wireless carriers for access to their networks. Hypercube denies the remaining allegations in this paragraph.

22. Petition Paragraph 20. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.



## **DELTACOM COUNT II**

23. Petition Paragraph 21. Hypercube repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

24. Petition Paragraph 22. Hypercube admits that it properly and lawfully billed DeltaCom for the services it provided DeltaCom. Footnote 9, in the title of this Count, contains legal conclusions legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of the footnote. Footnote 10 references a Commission order, which is a legal document that speaks for itself. Hypercube denies the remaining allegations in this paragraph.

25. Petition Paragraph 23. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

## **DELTACOM COUNT III**

26. Petition Paragraph 24. Hypercube repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

27. Petition Paragraph 25. Hypercube admits that it properly and lawfully billed DeltaCom for the services it provided DeltaCom. Hypercube denies the remaining allegations in this paragraph.

28. Petition Paragraph 26. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

#### **DELTACOM COUNT IV**

29. Petition Paragraph 27. Hypercube repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

30. Petition Paragraph 28. Hypercube denies the allegations in this paragraph. To the extent DeltaCom relies on correspondence exchanged between the parties, the correspondence speaks for itself. To the extent DeltaCom characterizes FCC rulings in Footnote 11, those are legal documents that speak for themselves. To the extent a response is required, the allegations in Footnote 11 are denied.

31. Petition Paragraph 29. To the extent DeltaCom relies on correspondence exchanged between the parties in this paragraph, the correspondence speaks for itself. To the extent DeltaCom quotes Hypercube's Price List in this paragraph, the Price List is a legal document which speaks for itself. The remaining allegations of this paragraph are denied.

32. Petition Paragraph 30. Hypercube denies the allegations in this paragraph and Footnote 12. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

33. Petition Paragraph 31. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

#### **DELTACOM COUNT V**

34. Petition Paragraph 32. Hypercube repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

35. Petition Paragraph 33. Hypercube admits it has provided the services at issue in DeltaCom's Petition to DeltaCom pursuant to Hypercube's Price List. The remaining

allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

36. Petition Paragraph 34. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. To the extent DeltaCom quotes Hypercube's Price List or characterizes Hypercube's Price List in Footnote 13, the Price List is a legal document which speaks for itself.

37. Petition Paragraph 35. The allegations of this paragraph and in Footnotes 14 and 15 are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

38. Petition Paragraph 36. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

39. Petition Paragraph 37. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

40. Petition Paragraph 38. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

41. Petition Paragraph 39. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

42. Petition Paragraph 40. The allegations of this paragraph and Footnote 16 are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. Hypercube further adds that it only bills for services it provides.

43. Petition Paragraph 41. The allegations of this paragraph and Footnote 17 are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

44. Petition Paragraph 42. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

45. Petition Paragraph 43. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

46. Petition Paragraph 44. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

#### **DELTACOM COUNT VI**

47. Petition Paragraph 45. Hypercube repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

48. Petition Paragraph 46. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

49. Petition Paragraph 47. Hypercube admits DeltaCom has not submitted an access service request to Hypercube. Hypercube denies that DeltaCom has not ordered service from Hypercube otherwise. The remaining allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

50. Petition Paragraph 48. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

51. Petition Paragraph 49. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

52. Petition Paragraph 50. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

53. Petition Paragraph 51. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

54. Petition Paragraph 52. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

## DELTACOM COUNT VII

55. Petition Paragraph 53. Hypercube repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

56. Petition Paragraph 54. The allegations of this paragraph and Footnote 18 are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

57. Petition Paragraph 55. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

58. Petition Paragraph 56. Hypercube denies the first sentence of this paragraph. The remaining allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

59. Petition Paragraph 57. Hypercube denies the allegations in this paragraph. Hypercube admits that it properly and lawfully billed DeltaCom for the services it provided DeltaCom. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

60. Petition Paragraph 58. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

61. Petition Paragraph 59. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

#### **DELTACOM COUNT VIII**

62. Petition Paragraph 60. Hypercube repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

63. Petition Paragraph 61. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph. To the extent DeltaCom quotes Hypercube's Price List, the Price List is a legal document which speaks for itself.

64. Petition Paragraph 62. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

#### **DELTACOM COUNT IX**

65. Petition Paragraph 63. Hypercube repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

66. Petition Paragraph 64. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

67. Petition Paragraph 65. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

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

68. Petition Paragraph 66. The allegations of this paragraph and the accompanying subparagraphs are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

69. Petition Paragraph 67. The allegations of this paragraph are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

**DELTACOM JUDGMENT AND RELIEF SOUGHT**

70. Petition Page 25. The allegations of these paragraphs and Footnote 19 are legal conclusions to which no response is required, but to the extent a response is required, Hypercube denies the allegations of this paragraph.

**HYPERCUBE DEFENSES**

- 71. Any allegation not expressly admitted herein is denied.
- 72. DeltaCom has failed to state a claim upon which relief may be granted.
- 73. DeltaCom is not entitled to retroactive relief.

**HYPERCUBE COUNTERCLAIMS**

- 74. Hypercube states as follows in support of its Counterclaims:

**HYPERCUBE COUNTERCLAIMS INTRODUCTION**

75. These Counterclaims are based on DeltaCom's unlawful refusal to pay Hypercube, a competitive local exchange carrier ("CLEC"), for DeltaCom's use of Hypercube's network in connection with DeltaCom's provision of 8YY calls that originate and terminate within the State of Florida. DeltaCom offers on a for-profit basis to certain of its customers toll-free calling services, or 8YY services.



76. DeltaCom is responsible for paying for all costs related to transporting a call to DeltaCom's 8YY subscribers.

77. Hypercube has provided services to DeltaCom related to transporting calls from wireless callers and others to DeltaCom's 8YY subscribers.<sup>3</sup> Hypercube has performed and continues to perform the services that are the subject of this Petition pursuant to Hypercube's Commission-approved Price List, which sets forth the rates, terms, and conditions for Hypercube's provision of intrastate access services to DeltaCom and others. In the alternative, DeltaCom is obligated to compensate Hypercube under a quantum meruit theory when DeltaCom accepted valuable services of Hypercube without compensating Hypercube.

**A. Switched Access Service Provided By Hypercube To DeltaCom**

78. When DeltaCom provides its customers with an 8YY service, customers placing 8YY calls and carriers alike know that DeltaCom is responsible for all costs associated with delivering the toll-free call to DeltaCom's customer. These costs include payment for the use of other carriers' networks to originate and transport a toll-free call and the process by which other carriers query industry databases to make sure the 8YY call is routed correctly. When a carrier transports and switches a call to an 8YY number, the carrier must query a database that maintains a list of telecommunications carriers offering 8YY service. Through performing this database query, also known as a "dip," 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. Maintaining this database and processing queries creates a cost burden on carriers involved in transporting and switching 8YY traffic.

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<sup>3</sup> DeltaCom's Petition only concerns wireless toll-free calls. Hypercube transports these types of calls, but its business also includes transporting other types of calls, such as wireline calls of cable operators, among others.

Carriers performing this work are entitled to compensation from the carriers, here DeltaCom, that sell 8YY service to end users.

79. Indeed, because the calling party is dialing an 8YY number (*i.e.*, a toll-free number), the wireless carrier and any intermediate LEC are precluded from assessing any charges on the person making the phone call. Instead, DeltaCom is responsible for the costs associated with calls to DeltaCom's 8YY customers, and DeltaCom recovers those charges from its customers.

80. Hypercube has performed its duties as a telecommunication carrier (i) by performing a query to the 8YY database to make sure only 8YY calls destined for DeltaCom's end users are routed to DeltaCom and (ii) by switching and transporting the 8YY calls to DeltaCom so that DeltaCom can deliver the 8YY calls to its end user customers who in return pay DeltaCom for the 8YY telephone number. *See* Exhibit Hypercube-A, Slide 2. However, DeltaCom refuses to pay Hypercube's lawfully assessed access charges and database queries for transmitting the 8YY calls.

**B. The FCC's Access Charge Regime For CLECs**

81. In its *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, ¶¶ 90-97 (2001) (the "*Seventh Report and Order*"), the FCC held that interexchange carriers ("IXCs"), such as DeltaCom, are obligated to purchase tariffed CLEC access services, including those related to toll calls that originate on wireless networks. The FCC found that an IXC's refusal to do so constitutes a violation of Section 201 of the

Communications Act.<sup>4</sup> The FCC also held that tariffed CLEC access charges for such services are “conclusively deemed reasonable.”<sup>5</sup>

82. In making this finding, the FCC emphasized that calls must flow between carriers in order to ensure universal connectivity among consumers that use the Public Switched Telephone Network.<sup>6</sup> This is particularly important with toll-free service (*i.e.*, “8YY”), where carriers, such as Hypercube, are precluded from charging the calling party (*i.e.*, the person making the call) for calling a toll free number. In offering toll-free service, the IXC, in this case DeltaCom, commits to paying all costs, including access charges, associated with toll free calls. IXCs may only recoup these costs from their toll-free subscribers (*i.e.*, the called party).

83. Specific to 8YY traffic, the FCC held that it was “not necessary immediately to cap [CLEC] access rates for 8YY traffic at the rate of the competing [ILEC].”<sup>7</sup> “Rather,” the FCC continued, CLECs could “continue to charge the previously established” benchmark rate.<sup>8</sup> Thus, at the federal level, 8YY traffic has always been compensable at the FCC benchmark rate.

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<sup>4</sup> *Seventh Report and Order* at ¶ 97. In the *Seventh Report and Order*, the FCC established a series of rate caps for CLEC access tariffs associated with interstate access services. Hypercube has complied with the FCC’s access charge regulations.

<sup>5</sup> *Id.* at ¶ 60.

<sup>6</sup> *Id.* at ¶ 93. *See also id.* at ¶ 23 (noting that “IXCs appear routinely to be flouting their obligations under the tariff system”); ¶ 24 (IXC traffic blocking “threaten[s] to compromise the ubiquity and seamlessness of the nation’s telecommunications network and could result in consumer confusion.”).

<sup>7</sup> *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, ¶ 70 (2004) (“*Eighth Report and Order*”).

<sup>8</sup> *Id.*

84. The FCC has also held that CLECs may assess tariffed access charges on IXCs when acting as an intermediate carrier delivering calls from wireless carriers to IXCs.<sup>9</sup> CLECs are entitled to assess tariffed charges for the functionality they perform (e.g., tandem switching); CLECs may not charge pursuant to their tariffs for the work that others, such as wireless carriers, perform in delivering 8YY calls to an IXC. Rather, carriers may only charge for the work they perform, and wireless carriers may assess such charges based on express or implied contracts.<sup>10</sup>

85. Specifically regarding traffic from wireless service providers, the FCC has stated that while “a competitive LEC has no right to collect access charges for the portion of the service provided by the [wireless] provider,” it can charge for access components at rates comparable to those charged by the ILEC for the comparable functions.<sup>11</sup> The FCC added, however, that CLECs “continue to have flexibility in determining the access rate elements and rate structure for the elements and services they provide.”<sup>12</sup> Thus, in contrast to the regulation of ILECs, the federal “benchmark rate for CLEC switched access does not require any particular rate elements or rate structure; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark.”<sup>13</sup>

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<sup>9</sup> *Eighth Report and Order* at ¶¶ 16-17.

<sup>10</sup> *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192, ¶ 12 (2002) (“*Sprint PCS*”).

<sup>11</sup> *Eighth Report and Order* at ¶¶ 16-17; *see also id.* at ¶ 21 (“Competitive LECs also have, and always had, the ability to charge for common transport when they provide it, including when they subtend an incumbent LEC tandem switch. Competitive LECs that impose such charges should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate.”).

<sup>12</sup> *Id.* at ¶ 17 and n.58.

<sup>13</sup> *Seventh Report and Order* at ¶ 55.

86. LECs may collect access charges even where there is more than one LEC involved in transporting the call to the IXC. At any time, an IXC may interconnect directly with an intermediate LEC to minimize the number of carriers involved in originating an 8YY call.<sup>14</sup>

87. The FCC's findings are consistent with that of state public utilities commissions addressing similar issues. For example, in a dispute brought by WilTel against Verizon at the New York Public Service Commission ("NYPSC"),<sup>15</sup> WilTel alleged that Verizon was not entitled to access charges for the traffic it terminated to wireless carriers' end users because the wireless carriers themselves would not be entitled to compensation from an IXC for access charges unless a contract existed between the two parties. Under the filed tariff doctrine, the NYPSC held that WilTel was required to pay Verizon for the services Verizon performed in completing the call.

**C. Specific Issues Related To The Origination Of Toll Free Calls Made By Consumers Over Wireless Networks**

88. The calls at issue in this case are toll-free calls made by consumers using their wireless phones to DeltaCom's 8YY subscribers.

89. Wireless carriers may only charge IXCs and others access charges by express or implied contract for use of the wireless carrier's network for call origination and termination.<sup>16</sup> Unlike LECs (CLECs and ILECs), however, wireless carriers may not file tariffs with the FCC or the state commissions for these services.

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<sup>14</sup> *Access Charge Reform, Prairie Wave Telecommunications Inc. Petition for Waiver, et al.*, Order, 23 FCC Rcd 2556, ¶¶ 26-27 (2008) ("*PrairieWave*").

<sup>15</sup> A copy of this decision is attached hereto at Exhibit Hypercube-C. *Wiltel Communications, LLC v. Verizon New York Inc.*, Case 04-C-1548, 2006 WL 1479507 (N.Y.P.S.C. May 30, 2006).

<sup>16</sup> *Sprint PCS* at ¶ 12.

90. Wireless carriers faced difficulty in negotiating individual contracts with IXCs, and the prohibition on wireless carriers filing tariffs artificially increased the costs to the wireless carriers of carrying their customers' calls to landline-based customers, even those that were purportedly "toll-free" calls to IXCs like DeltaCom.

91. Thus, certain wireless carriers have found it more convenient to route access calls, including 8YY calls, to LECs as early in the call stream as possible. By doing so, the wireless carrier minimizes the amount of work it must perform on behalf of the IXCs in cases where the IXC either: (i) does not directly interconnect with the wireless carrier or (ii) otherwise will not enter into a contract with the wireless carrier for network access.

92. LECs, like Hypercube, *are* entitled to bill the IXC for the work the LEC performs in delivering the calls from a wireless carrier's network to an IXC's network pursuant to filed tariffs.

93. On information and belief, DeltaCom pays ILEC access charges for DeltaCom's use of ILEC tandem switching in routing 8YY calls to DeltaCom's network.

94. In many instances, LECs contract with wireless carriers for access to the wireless carriers networks. And pursuant to such agreements, wireless carriers hand off toll-free calls to LECs for delivery to the IXC. The FCC has reviewed these types of arrangements and found no cause to limit or otherwise restrict the ability of an intermediate carrier to recover tariffed-based access charges for the work performed.<sup>17</sup>

95. This is true even in instances where there is more than one LEC involved in delivering an 8YY call to an IXC, such as DeltaCom. At any time, an IXC may interconnect

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<sup>17</sup> *Eighth Report and Order* at ¶¶ 69-72. With regard to agreements between wireless carriers and LECs related to access, the FCC has held that "carriers are free to arrange whatever compensation arrangement they like for the exchange of traffic." *Sprint PCS* at ¶ 7.

directly with an intermediate LEC (or in some cases, even directly with the calling party's carrier, which may be wireless or wireline) to minimize the number of carriers involved in originating an 8YY call.<sup>18</sup> When an IXC does so, it avoids entirely the access charges associated with the functionality that previously was provided by an intermediate carrier. *See* Exhibit Hypercube-A, Slides 1 and 2.

96. Hypercube offers direct interconnection to all IXCs. Direct interconnection is Hypercube's preferred method of delivering traffic to (and receiving traffic from) IXCs. Despite multiple invitations from Hypercube, DeltaCom has declined to directly interconnect its network with Hypercube's network for 8YY calls destined to DeltaCom's customers. If DeltaCom directly interconnected with Hypercube, Hypercube would not need to route the call through an ILEC, but could send the call directly to DeltaCom. *See* Exhibit Hypercube-A, Slide 1.

97. DeltaCom could also interconnect directly with wireless carriers (and others), and thereby avoid using third-party networks for receiving its 8YY traffic (and other traffic). *See* Exhibit Hypercube-A, Slide 2.

#### **HYPERCUBE FACTS**

98. Hypercube provides interstate and intrastate access services to various customers, including IXCs, CLECs, and commercial mobile radio service carriers (commonly referred to as wireless carriers). Hypercube Telecom, LLC operates pursuant to Hypercube's Commission-approved Price List. Hypercube's claims in this Counterclaim concern only its provision of intrastate access services to DeltaCom in the State of Florida.

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<sup>18</sup> *Prairie Wave* at ¶¶ 26-27.

99. When wireless customers' toll-free calls are routed through the Hypercube's facilities, Hypercube provides access services and database query services to the IXC that is being paid by its customers to provide the toll-free service to those customers.

100. When Hypercube provides access and associated database query services in connection with a call made from a wireless telephone, the call is routed from the wireless carrier's Mobile Telecommunications Switching Office to Hypercube's network and switching equipment.

101. While the call is in the Hypercube switch, Hypercube performs switching and routing functions and additional services, such as running a query of the national 8YY telephone number database to determine where the call should be routed (known as a "database dip"). Once the database returns information regarding the IXC whose 8YY customer has been called, Hypercube's switch performs the necessary routing to deliver the call to the IXC's network. The services provided by Hypercube are illustrated in Exhibit Hypercube-A, Slide 2.

102. Common carriers, like Hypercube, have an obligation to route traffic to other carriers, such as DeltaCom. As a result of this obligation and in consideration for work performed, Hypercube is entitled to bill and to collect charges for the access services and database query charges provided to other carriers, including DeltaCom for its 8YY customers, at tariffed rates approved by the Commission.

103. Hypercube's Price List sets forth the terms and conditions according to which Hypercube provides intrastate access charges and database query charges to DeltaCom in connection with DeltaCom's 8YY offering. The Price List sets forth the terms and conditions of these same services where a call originates and terminates in Florida.



104. Hypercube's Price List encompasses the services it provided DeltaCom in routing calls to DeltaCom's 8YY subscribers. Specifically, Hypercube has provided DeltaCom access service and has performed database dips in order to route calls to DeltaCom's 8YY subscribers.

105. From December 2004 through the present, Hypercube has routed calls to DeltaCom as part of the 8YY service that DeltaCom offers to its customers. On information and belief, no other entity has charged DeltaCom for the access services or database query services performed by Hypercube's switch and network.

106. Since December 2004 and continuing through the present, DeltaCom has received, accepted, and benefited from intrastate access services and database query services provided by Hypercube in connection with DeltaCom's 8YY offering to its customers. DeltaCom accepted the calls destined to DeltaCom's 8YY customers that Hypercube originated and confirmed (through database queries). DeltaCom delivered those calls to its customers as part of DeltaCom's for-profit 8YY service offering.

107. On information and belief, DeltaCom has received and continues to receive payment from its 8YY customers for all calls Hypercube transmits to DeltaCom. In short, DeltaCom wants to collect revenue from its customers for providing toll-free service without paying the costs that Hypercube (which is legally obligated to deliver calls to DeltaCom) incurs in delivering the toll-free calls to DeltaCom.

108. DeltaCom has refused to pay Hypercube for the services Hypercube provided DeltaCom in routing 8YY calls to DeltaCom. DeltaCom owes **\$1,271,439.49 as of August 7, 2009** for intrastate switched access charges in Florida, which includes \$938,585.33 for switched access services, \$79,457.35 in database query charges, and \$253,396.81 in late penalty charges as provided for in the Price List. In addition to the foregoing intrastate charges, DeltaCom owes

Hypercube \$217,468.38 in Florida interstate switched access charges. Overall, DeltaCom owes Hypercube approximately \$2.9 million for interstate and intrastate switched access charges across the country.

109. DeltaCom has also attempted to manipulate the amount it owes Hypercube in violation of the Price List by claiming that none of its toll-free calls originate and terminate in Florida and by reporting a 100% PIU<sup>19</sup> to Hypercube on or about October 11, 2007. *See* DeltaCom Petition, Ex. C.

110. Hypercube asked DeltaCom to support its 100% PIU claim with data through a traffic study. DeltaCom refused to provide Hypercube any data to support DeltaCom's 100% PIU. DeltaCom did not base this PIU report on any data; and, instead, DeltaCom reported a 100% PIU based upon (i) a nonexistent "compromise and settlement agreement" between the parties, (ii) "regulatory uncertainty," and (iii) because "the jurisdiction of wireless calls to tollfree numbers cannot be determined with certainty." *Id.* Because DeltaCom refused to support its PIU claim with any data, Hypercube's Price List sets a default PIU of 50%, which means half the traffic is considered intrastate and half interstate.

111. Hypercube's bills to DeltaCom for intrastate access charges have reflected this default PIU. DeltaCom has provided no data to support any other PIU. *See* Price List § 2.3.3(F) ("For Switched Access Service, if a billing dispute arises ..., the Customer [DeltaCom] will provide the data issued to determine the projected PIU factor.").

112. Hypercube has attempted to resolve DeltaCom's non-payment through negotiations, but negotiations have been unsuccessful.

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<sup>19</sup> PIU stands for "percent interstate use."

113. At all times relevant hereto, DeltaCom has had actual and constructive notice of Hypercube's intrastate access and associated database query charges for originating 8YY traffic. DeltaCom continues to receive, use, and benefit from Hypercube's intrastate access service and database query services.

114. DeltaCom has refused to pay an amount not less than **\$1,271,439.49** as of **August 7, 2009** in Hypercube's lawfully billed charges to DeltaCom for Florida intrastate switched access service.

115. The amount overdue from DeltaCom for access services provided by Hypercube represents service provided during the months of December 2004 through August 7, 2009. These amounts continue to grow each month as: (i) Hypercube continues to satisfy its statutory duty as a common carrier to provide services to DeltaCom; (ii) DeltaCom avails itself of Hypercube's services; (iii) DeltaCom utilizes those services as an input to the 8YY services DeltaCom provides to its customers and for which DeltaCom receives payment; and (iv) DeltaCom refuses to pay for the services received from Hypercube.

116. DeltaCom's refusal to pay these charges and associated late fees is without legal justification or excuse.

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

117. Hypercube incorporates the preceding paragraphs 74 to 116 as if fully set forth herein.

118. Hypercube's Price List sets forth the charges that Hypercube imposes on carriers that make use of its services.

119. The provisions of Hypercube's Price List were approved by the Commission and therefore have the force of law, establishing Hypercube's lawful rates for providing the telecommunications services described above.

120. Hypercube has provided telecommunications services to DeltaCom within Hypercube's Price List as described above.

121. DeltaCom has refused to provide Hypercube with any data to support its claimed PIU and, therefore, Hypercube is entitled to rely on the default procedures of the Price List and set a 50% PIU. Hypercube's bills to DeltaCom have reflected the default PIU and DeltaCom has provided no supported alternative PIU.

122. DeltaCom has unlawfully refused to pay the Commission-approved charges set forth in the invoices presented to DeltaCom by Hypercube.

123. As of August 7, 2009, the total amount of the lawful charges that DeltaCom owes pursuant to Hypercube's Price List but that DeltaCom has refused to pay is **\$1,271,439.49**.

**HYPERCUBE COUNTERCLAIM COUNT II**  
**QUANTUM MERUIT**

124. Hypercube incorporates the preceding paragraphs 74 to 116 as if fully set forth herein.

125. In the alternative, should it be determined that the services performed by Hypercube were not pursuant to the Price List, Hypercube is entitled to compensation from DeltaCom under a quantum meruit theory.

126. Hypercube conferred a benefit on DeltaCom when Hypercube performed valuable services for DeltaCom in routing calls to DeltaCom's 8YY subscribers over Hypercube's network.

127. DeltaCom knowingly requested and accepted the benefit conferred by Hypercube's services when it accepted wireless calls routed by Hypercube to DeltaCom's toll-free number subscribers.

128. DeltaCom has refused to pay Hypercube for the services provided by Hypercube.

129. It would be unjust and inequitable for DeltaCom to retain the benefits of Hypercube's services without compensating Hypercube. Hypercube is lawfully entitled to bill DeltaCom for the services Hypercube provides.

130. Hypercube expected payment for the services it provided to DeltaCom. Because DeltaCom is offering on a for-profit basis 8YY services, LECs like Hypercube expect DeltaCom to pay for access charges incurred as a result of DeltaCom's use of the LEC's network to route calls to DeltaCom's toll-free 8YY subscribers. Hypercube fully expected payment for routing calls to DeltaCom's toll-free 8YY subscribers.

**HYPERCUBE COUNTERCLAIM COUNT III**  
**ORDER FOR PROSPECTIVE RELIEF**

131. Hypercube incorporates the preceding paragraphs as if fully set forth herein.

132. DeltaCom has unreasonably, unjustly, and unlawfully refused to pay for services provided by Hypercube and will continue to refuse to pay Hypercube.

133. Hypercube is entitled to an order requiring DeltaCom to pay all amounts owed to Hypercube and barring DeltaCom from refusing to pay Hypercube in the future for services provided by Hypercube.

**WHEREFORE**, Hypercube respectfully requests that the Commission issue an Order:

- a. Dismissing DeltaCom's Petition;

- b. Requiring DeltaCom to pay all sums due and owing to Hypercube, plus interest and late fees, immediately, but no later than 5 business days from the final order in this matter;
- c. Barring DeltaCom from refusing to pay future sums due and owing to Hypercube;
- d. Granting Hypercube attorneys' fees and other costs as provided for in Hypercube's Price List;
- e. Granting such other and further relief as the Commission may deem just and proper.

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



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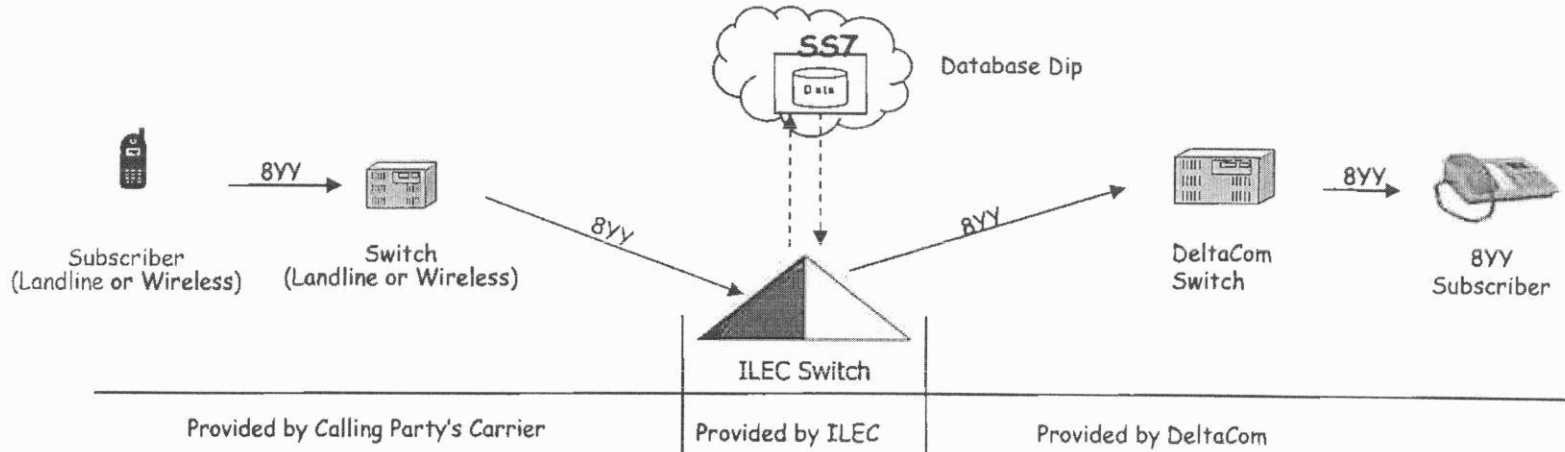
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# Toll-Free Call Flow – Slide 1

## Direct Interconnection Between DeltaCom and ILEC



## Direct Interconnection Between DeltaCom and Hypercube

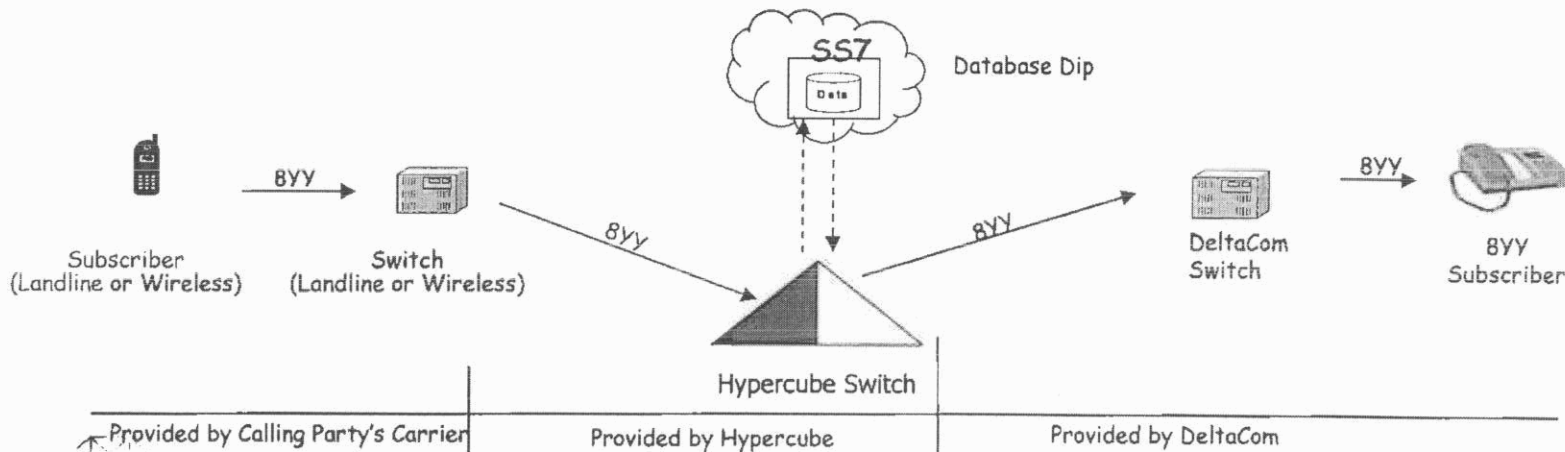
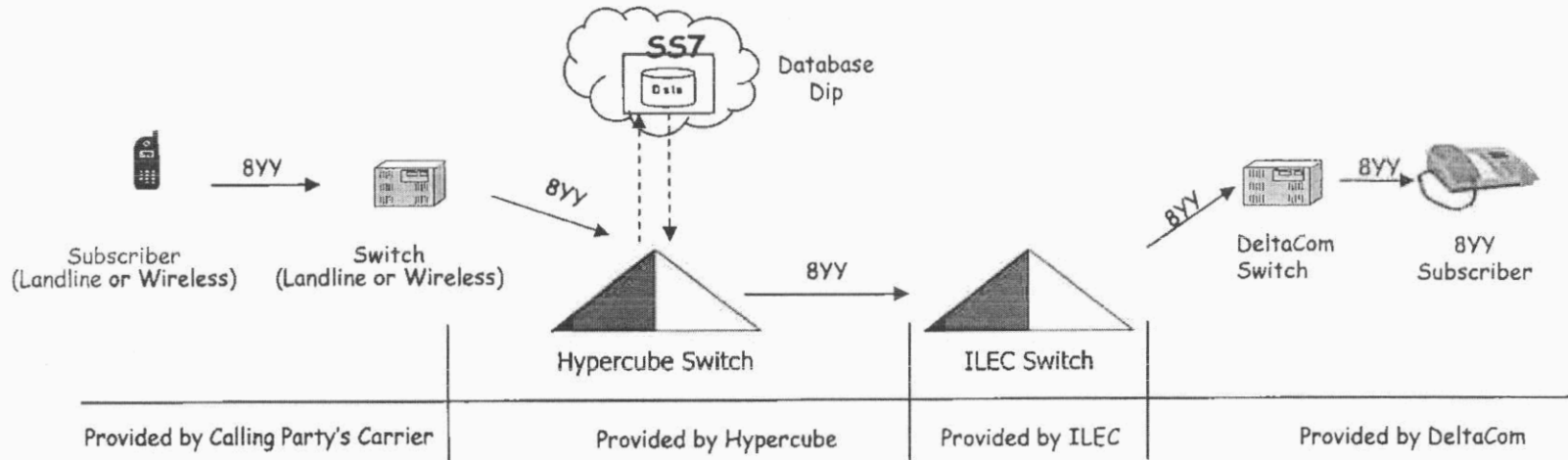


EXHIBIT HYPERCUBE-A

# Toll-Free Call Flow – Slide 2

## Indirect Interconnection Between DeltaCom and Hypercube



## Direct Interconnection Between DeltaCom and Calling Party's Carrier

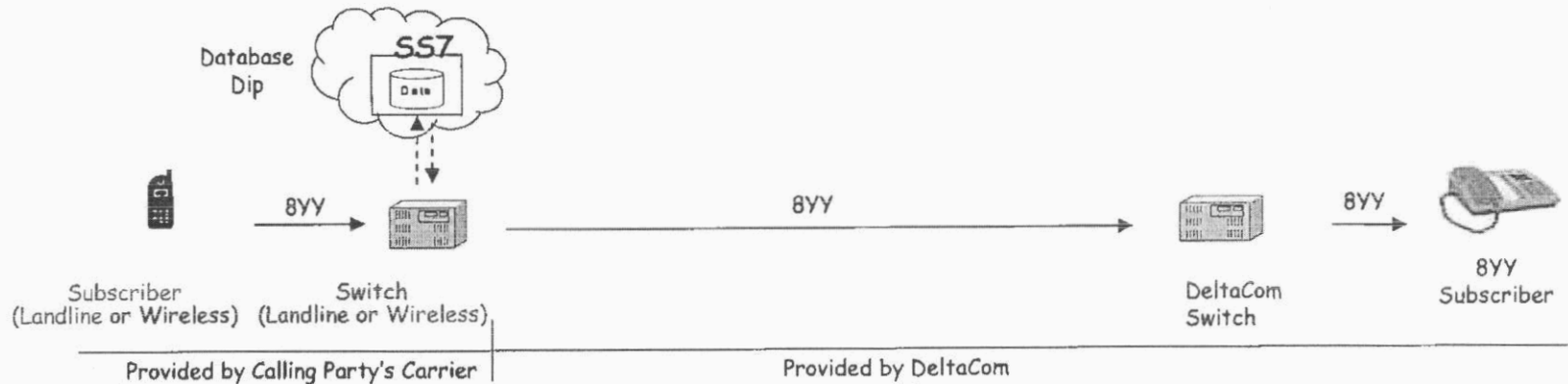




Exhibit Hypercube-B

Hypercube Telecom, LLC Price List

**C**

PUR Slip Copy

WilTel Communications, Inc.

v.

Verizon New York Inc.

Case 04-C-1548

New York Public Service Commission

May 30, 2006

BY THE COMMISSION:

*INTRODUCTION*

In a complaint against Verizon New York Inc. (Verizon), WilTel Communications, LLC (WilTel) requests that the Commission prohibit Verizon from imposing unlawful access charges and require Verizon to amend its PSC Tariff No. 11 to bring it into compliance with the rules and regulations of this Commission and the Federal Communications Commission (FCC). WilTel complains that it is inappropriate for Verizon to charge carrier common line (CCL) and local switching rates for intrastate calls originated by WilTel, but carried by Verizon for termination at radio telephone utilities (RTU).<sup>FN1</sup> Verizon argues that the existing tariff provision that allows such charges is appropriate and urges the Commission to reject WilTel's demands and dismiss its complaint.

We find that for intrastate calls terminated to an RTU, it is appropriate for Verizon to be compensated pursuant to the tariff language because the rate is consistent with the balance struck in Opinion No. 98-10 and the tariff is being applied properly. Therefore, WilTel's complaint is dismissed.

*PLEADINGS*

On December 6, 2004, WilTel filed a complaint against Verizon requesting that the Commission prohibit Verizon from imposing unlawful access charges upon WilTel and requiring Verizon to amend PSC Tariff No. 11 to bring it into compliance with the rules and regulations of the Commission and the FCC.<sup>FN2</sup> WilTel further requests that Verizon be ordered to credit WilTel for disputed charges imposed by Verizon under its tariff. WilTel claims that, in some instances, its New York intrastate traffic is terminated to a wireless carrier's network over facilities owned by the wireless carrier's rather than Verizon's network. WilTel argues that even though Verizon does not provide the local switching or CCL service<sup>FN3</sup> in such instances, Verizon, nevertheless, bills WilTel for such services and has done so since November 10, 2002 pursuant to PSC Tariff No. 11 - Access Service. WilTel claims that the existing tariff language which allows such charges is flawed and should be modified. Specifically, WilTel disputes section 2.4.8, which states:

When Switched Access Service involves intrastate traffic which originates or terminates at RTU Services, where the local transport is provided by the Telephone Company and the end user connection is provided by an RTU Carrier, the Telephone Company will provide its portion of the Switched Access Service in accordance with Section 6 following.

For traffic which originates or terminates at RTU Interconnections, Carrier Common Line Service and Switched Access Service Local Switching rates and charges as specified in Sections 3.9 and 6.8 following respectively, will apply.

WilTel asserts that both state and federal law support its claim that Verizon is prohibited from charging WilTel access charges for wireless services. According to WilTel, the FCC has sole jurisdiction

over the rates charged by wireless carriers and wireless carriers are not entitled to compensation from an IXC for access charges unless a contract exists between the two parties that specifically require the IXC to compensate the wireless carrier.<sup>FN4</sup> Further, WilTel argues that recent FCC rules prohibit LECs from assessing access charges on behalf of wireless carriers.<sup>FN5</sup> In contrast, WilTel does not dispute the imposition of transport and tandem switching charges, as Verizon clearly provides those services, pursuant to tariff, when an intrastate call is terminated by an RTU carrier. WilTel also argues that, consistent with Section 91 of the Public Service Law (PSL), Verizon may only assess charges that are just and reasonable and is prohibited from demanding compensation for a service it does not actually perform.

Verizon argues that Section 2.4.8, which has been in effect since 1998, allows it to impose access charges in any situation where it handles intrastate traffic that is terminated to a wireless carrier's end user in New York, whether Verizon provides the local switching component or not, by virtue of the filed rate doctrine. Verizon rebuts WilTel's argument that the FCC prohibits it from charging for local switching when a wireless carrier terminates the call. First, Verizon argues that the FCC's ruling applied only to interstate traffic, while the charges that are the subject of WilTel's complaint apply only to intrastate traffic. Second, Verizon claims that the wireless carrier attempting to impose a payment obligation in the FCC's Sprint/AT&T Declaratory Ruling had no tariff permitting it to do so. Verizon claims that in the ruling, the FCC noted that a tariff, even without a contract, would permit a carrier to impose such a charge.<sup>FN6</sup> Third, the Sprint/AT&T Declaratory Ruling is not applicable because it applies only to a wireless carrier's ability to impose such charges, and Verizon is not a wireless carrier. Lastly, Verizon claims that the CLEC Access Reform Order should not apply here because it applies only to interstate traffic and the

charges in dispute here are not part of any joint billing arrangement with a wireless carrier.

In a subsequent filing, Verizon further argues that Section 2.4.8 of the Switched Access tariff was approved pursuant to a 1998 rate proceeding,<sup>FN7</sup> and that nothing has occurred since that proceeding to justify a rate change. Verizon argues that application of section 2.4.8 complies with overall rate level mandated in Opinion No. 98-10. Verizon claims that modifications to that section of the tariff cannot be looked at in isolation, but only in the context of overall switched access revenues and any rate changes by the Commission should be subject to a full hearing. Verizon further claims that the change in rate structure being sought by WilTel, absent any other changes, will reduce Verizon's overall switched access revenues by approximately \$40 million annually. Verizon argues that reductions to switched access rates are less appropriate now than they were in 1998 and that the Commission must consider Verizon's financial health when determining rate changes that could potentially cause revenue loss.

WilTel disagrees with Verizon's additional filing. It argues that Verizon seeks to obfuscate the issues in its complaint by introducing a 1998 Commission Opinion on intrastate access charges. However, WilTel submits that the Commission's Opinion in fact supports WilTel's argument here. In Opinion No. 98-10, WilTel contends, the Commission found that access charges apply to only services actually provided by Verizon over its network. Therefore, Verizon cannot charge for services it does not provide. Moreover, WilTel argues that even if the Commission finds that Verizon's tariff allows it to charge for services it does not provide, the CCL charge should not apply because Verizon's tariff incorrectly refers to a rate that does not exist in the tariff. Verizon's response, that it was a typographical error, according to WilTel, is inadequate. WilTel submits that Verizon should not be allowed to go outside the tariff to impose a rate that is not clearly

set forth in the tariff.

Finally, WilTel argues that Verizon's application of the tariff is not equal in that when access charges paid by Verizon Long Distance accrue to another Verizon company, costs incurred by the long distance carrier are offset by revenues from other Verizon affiliates. Ultimately, WilTel asserts that because the rate at issue here is unjust and unreasonable, the Commission must order Verizon to withdraw it from its tariff. At that time, WilTel submits, Verizon can seek a tariff change to increase other rates to account for lost revenues.

#### *DISCUSSION*

Based on the pleadings from both parties regarding Verizon's recovery of costs when a wireless carrier terminates an intrastate call, we find that Verizon's charges are consistent with our prior determination in Opinion No. 98-10 and the tariff language is clear and unambiguous.

When Verizon terminates an intrastate call to a Verizon end-user, traffic is delivered by the IXC to the access tandem, and Verizon utilizes all three components of switched access service to complete the call. Intrastate calls from an IXC to an entity other than Verizon are also routed through the Verizon access tandem, however, the terminating carrier is responsible for delivery of the traffic thereafter. Wireless carriers interconnect with Verizon at the access tandem office (Type 2A Interconnection) or at a Verizon end office (Type 2B Interconnection).

The fundamental issues in this case involve whether Verizon's tariffed rate assessed to the IXC for handling traffic that terminates at a wireless RTU is just and reasonable and being applied properly.

Initially, with regard to whether the charge is just and reasonable, Verizon correctly points out that the subject charge was approved pursuant to Opinion No. 98-10. That proceeding ordered Verizon to

reduce overall Switched Access revenues by approximately \$85 million in a manner consistent with a rate design ordered by the Commission. The charge at issue here was developed pursuant to that overall rate design and instituted during the compliance phase of that proceeding. Nothing in the record here demonstrates that the rates were not properly implemented consistent with Opinion 98-10. WilTel simply asserts that Verizon cannot charge for a service it does not perform. WilTel's complaint amounts to a collateral attack on that rate design. WilTel does not provide any support that the rate design developed pursuant to Opinion No. 98-10 fails to comply with the Public Service Law in some material aspect. Because we conclude that the rate at issue complies with Opinion No. 98-10, granting WilTel's request would require that we alter the balance that was established there, which we decline to do.

Thus, WilTel's complaint turns on whether the tariff language is clear and unambiguous and being properly applied. Based on the plain reading of the language in the tariff, Section 2.4.8 allows Verizon to charge the disputed rate when switched access service involves intrastate traffic that terminates at a wireless RTU where the local transport is provided by Verizon. Nothing in the tariff language assumes that Verizon performs all of the stated functions including the CCL and local switching. The tariff simply implements the rate design ordered by the Commission in Opinion No.98-10. The language of the tariff is, therefore, clear and unambiguous and is being applied properly consistent with Opinion No. 98-10.

We also find that WilTel's reliance on the FCC's rulings is not dispositive here because those rulings involved interstate services that may only have been applicable to competitive LECs and not ILECs. At the time they became effective, those rulings were not grounds for Verizon to change its intrastate Access Service tariff.

WilTel's assertion that the rate is misplaced in the tariff due to a typographical error is also unpersuasive. A review of the tariff language at issue would allow a customer to ascertain the applicable rate despite the alleged error.

Finally, as to WilTel's complaint regarding past bill credits, because we find Verizon's rate to be in compliance with the PSL, that aspect of WilTel's complaint is also denied.

#### CONCLUSION

Based on the foregoing, we deny WilTel Communications, LLC's complaint against Verizon New York Inc.

The Commission orders:

1. WilTel Communications, LLC's complaint is denied.
2. This proceeding is closed.

#### FOOTNOTES

FN1 The acronym 'RTU' means 'radio telephone utilities', which Tariff No. 11 defines as radio common carriers and cellular carriers.

FN2 WilTel is an interexchange carrier (IXC) purchasing switched exchange access service from Verizon, an incumbent local exchange carrier (ILEC), in order to terminate intrastate telephone calls to customers in New York.

FN3 Carrier Common Line (CCL) access provides for the use of telephone company common lines by customers for access to end users to furnish customer intrastate communications. CCL is the charge that

IXCs pay to LECs to connect to the end user through LEC local loop facilities. The local switching rate category provides the local end office switching and end user termination functions necessary to complete the transmission of Switched Access communications to and from the end users by the local end office.

FN4 *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd. 13192 (2002) ('Sprint/AT&T Declaratory Ruling'), petitions for review dismissed, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003).

FN5 *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, para. 16 (2004) (the 'CLEC Access Reform Order').

FN6 *Sprint/AT&T Declaratory Ruling*, para. 8, noting that '[t]here are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges pursuant to (1) [FCC] rule; (2) tariff; or (3) contract.'

FN7 *Cases 28425 and 94-C-0095, Opinion and Order Establishing Access charges for New York Telephone Company and Instituting a Targeted Accessibility Fund* (issued June 2, 1998) (Opinion No. 98-10).

END OF DOCUMENT

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 31<sup>st</sup> day of August 2009 served a true and exact copy of the within and foregoing **Answer to Petition of DeltaCom, Inc. and Counterclaim of Hypercube Telecom, LLC f/k/a KMC Data, LLC** via United States First Class Mail, postage paid and properly addressed to the following:

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

Floyd R. Self



Exhibit Hypercube-A – Call Flow Slides  
Exhibit Hypercube-B – Florida Price List  
Exhibit Hypercube-C – *WillTel* decision from NYPSC