Ruth Nettles

From: nicki.garcia@akerman.com
Sent: Monday, October 05, 2009 4:14 PM
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Subject: Electronic Filing - Docket No. 090327-TP
Attachments: 20091005160959201.pdf

Attached is an electronic filing for the docket referenced below. If you have any questions, please contact either Matt Feil or Nicki Garcia at the numbers below. Thank you.

Person Responsible for Filing:

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Docket No. and Name: 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.

Filed on behalf of: DeltaCom, Inc.

Total Number of Pages: 14

Description of Documents: Amended Answer of DeltaCom to Counterclaims of Hypercube.

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October 5, 2009

VIA ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 090327-TP – Petition of DeltaCom, Inc. for Order Determining DeltaCom, Inc. not Liable for Access Charges of KMC Data LLC, Hypercube, LLC and Hypercube Telecom, LLC

Dear Ms. Cole:

Enclosed for filing in the captioned docket is the Amended Answer of DeltaCom to Counterclaims of Hypercube. The change is reflected on page two, paragraph five.

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

Sincerely,

Matthew Feil

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

AMENDED ANSWER OF DELTACOM TO COUNTERCLAIMS OF HYPERCUBE

DeltaCom, Inc. ("Deltacom"), pursuant to Florida Administrative Code Rule 25-106.203, Florida Administrative Code, and through its undersigned counsel, hereby files this Answer to the Counterclaims of Hypercube Telecom, LLC (f/k/a KMC Data, LLC) (hereinafter "Hypercube"), and states as follows:

INTRODUCTION

1. Hypercube's counterclaims are not based on any intrastate services lawfully tariffed or provided to Deltacom. Hypercube does not provide intrastate originating access to Deltacom but instead provides certain off-tariff wholesale services to wireless carriers subject to a kickback scheme that depends on Hypercube's success in imposing composite rate access charges on interexchange carriers (IXCs), like Deltacom, for services provided by or to wireless carriers. This scheme, to the extent tariffed 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.

2. To the extent Hypercube's Florida price list is found to be lawful, it does not apply to the traffic at issue. Per the price list, the wireless-originated traffic at issue is 100% interstate in nature, and must be treated as such until the price list provisions for changing the governing jurisdictional factor are implicated.

3. To the extent that any of the traffic at issue is found to be intrastate, it, too, is not subject to Hypercube's price list for a number of reasons. First, Hypercube has not provided to Deltacom any service described in its price list and thus the charges imposed by Hypercube are not supported by the price list. Second, the rate imposed by Hypercube for originating access (a functionality it simply does not provide) includes charges for functionalities not performed by Hypercube – which is in itself unlawful and contrary to the terms of the price list itself. Finally, Hypercube has not at all relevant times had the requisite authority or price list on file.

4. In sum, Hypercube is not entitled to intrastate access charges for the traffic at issue here. To the extent it seeks to recover interstate access charges or charges for interstate traffic, this is not the proper venue, and its claims must be dismissed.

HYPERCUBE'S COUNTERCLAIM INTRODUCTION

5. The allegations in the first sentence of Hypercube's Counterclaims' paragraph 75[1] are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. Further, Deltacom denies that the 8YY calls originate and terminate within the State of Florida. Deltacom admits that it refuses to pay

[1] Unless otherwise indicated, the references that follow to paragraph numbers are to the paragraph numbers in Hypercube's Counterclaims, filed in this docket on August 31, 2009.

Hypercube for the billing and kickback scheme perpetrated by Hypercube and admits the allegations in the second sentence.

6. Deltacom denies the allegations in paragraph 76. Deltacom is responsible only for lawful charges related to calls to Deltacom's 8YY subscribers.

7. Deltacom denies the allegations in paragraph 77. The allegations of the last sentence of the paragraph are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this sentence. With respect to footnote 3, Deltacom admits that its petition concerns wireless calls, but Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, the remainder of the allegations of footnote 3 and, on that basis, denies the allegations.

8. The allegations of paragraph 78 contain legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations set forth in paragraph 78. The first sentence calls for speculation about the knowledge of third-parties. Hypercube neither originates nor terminates 8YY calls. Deltacom denies the allegation in the fourth sentence, as neither Hypercube nor Deltacom are the carrier originating the 8YY call, and Deltacom denies that "the carrier originating an 8YY telephone call ensures that calls have the appropriate features applied and are send to the correct telecommunications carrier and, ultimately, to the correct customer destination."

9. The allegations of paragraph 79 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations set forth in paragraph 79, as, among other things, they run afoul of the FCC's determination that

wireless carriers should recover their costs from their subscribers, regardless of whether the call is an 8YY or any other type of call.

10. The allegations of paragraph 80 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations set forth in paragraph 80. Hypercube does not originate or terminate 8YY calls and does not transport the calls directly to Deltacom.

11. The allegations of paragraph 81 and footnotes 4 and 5 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The statutes and FCC order are legal documents that speak for themselves.

12. The allegations of paragraph 82 and footnote 6 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself. Moreover, Hypercube is not precluded from charging the wireless carrier for Hypercube's alleged services.

13. The allegations of paragraph 83 and footnotes 7 and 8 are legal conclusions, or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself.

14. The allegations of paragraph 84 and footnotes 9 and 10 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom

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

15. The allegations of paragraph 85 and footnotes 11 through 13 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself.

16. The allegations of paragraph 86 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself.

17. The allegations of paragraph 87 and footnote 15 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The order of the FCC and the decision of the NYPSC are legal documents that speak for themselves.

18. Deltacom admits the allegations of paragraph 88.

19. The allegations of paragraph 89 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph.

20. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 90.

21. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 91.

22. The allegations of paragraph 92 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph.

23. Deltacom admits the allegations of paragraph 93 to the extent that such charges are properly assessed.

24. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of the first two sentences of paragraph 94. The allegations of the third sentence of this paragraph and footnote 17 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. The FCC order is a legal document that speaks for itself.

25. The allegations of paragraph 95 and footnote 18 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. The FCC order is a legal document that speaks for itself.

26. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of the first and second sentences of paragraph 96. Deltacom admits the allegations of the third and fourth sentences.

27. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 97.

HYPERCUBE'S ALLEGED FACTS

28. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of the first and third sentences of paragraph 98. Deltacom denies the second sentence.

29. Deltacom denies the allegations in paragraph 99. To the extent that Hypercube provides services, Hypercube provides transit services and data base dip services to wireless carriers.

30. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 100.

31. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 101.

32. The allegations of paragraph 102 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. The service provided by Hypercube is neither originating nor terminating access.

33. Deltacom admits that a Price List bearing the Hypercube name presently is on file with the Commission, but denies the allegations in paragraph 103 to the extent that Hypercube asserts that such terms and conditions apply to Deltacom.

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

35. Deltacom denies the allegations in paragraph 105. Deltacom admits that Hypercube inserted itself into the call flow at some point.

36. Deltacom denies the allegations in the first two sentences of paragraph 106. Deltacom admits the allegations in the third sentence.

37. Deltacom admits the allegations of the first sentence of paragraph 107, except that Deltacom denies that Hypercube transmits calls to Deltacom. Deltacom denies the allegations of the second sentence; Hypercube is not legally obligated to insert itself into the call flow and Deltacom is without knowledge or information at this time sufficient to form a belief as to the nature of Hypercube's costs of providing transit services to wireless carriers.

38. Deltacom denies the allegations of the first sentence of paragraph 108 to the extent that Hypercube asserts it provides services to Deltacom; however, Deltacom admits to the allegation of not paying Hypercube. Deltacom denies the remainder of the paragraph.

39. Deltacom denies the allegations of paragraph 109.

40. Deltacom denies the allegations of paragraph 110. To the extent Hypercube relies on correspondence exchanged between the parties, the correspondence speaks for itself.

41. Deltacom denies the allegations of the first sentence of paragraph 111, as Hypercube does not provide intrastate access services to Deltacom. To the extent Hypercube quotes Hypercube's Price List in this paragraph, the Price List is a legal document which speaks for itself.

42. Deltacom admits the allegations of paragraph 112.

43. Deltacom denies the allegations of paragraph 113.

44. Deltacom denies the allegations of paragraph 114, as Hypercube has not lawfully billed any intrastate access charges to Deltacom.

45. Deltacom denies the allegations of paragraph 115.

46. The allegations of paragraph 116 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

COUNTERCLAIM COUNT I
BREACH OF HYPERCUBE'S PRICE LIST

47. In answer to paragraph 117, Deltacom repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

48. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 118, as Hypercube has asserted that it has contracts with various IXCs.

49. The allegations of paragraph 119 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. To the extent Hypercube references its Price List, the Price List is a legal document which speaks for itself.

50. Deltacom denies the allegations of paragraph 120.

51. The allegations of the first sentence of paragraph 121 contains legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. Deltacom denies the allegations of the second sentence. Further, Deltacom asserts that even if Hypercube's Price List is applicable, which it is not, in rejecting Deltacom's PIU, Hypercube failed to follow the provisions of its own Access Services Price List requiring a jurisdictional audit. *See* section 2.3.4.

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

53. Deltacom denies the allegations of paragraph 123, as Hypercube does not provide intrastate access services to Deltacom.

COUNTERCLAIM COUNT II
QUANTUM MERUIT

54. In answer to paragraph 124, Deltacom repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

55. The allegations of paragraph 125 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

56. Deltacom denies the allegations of paragraph 126.

57. Deltacom denies the allegations of paragraph 127.

58. The allegations of paragraph 128 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

59. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 129.

60. The allegations of paragraph 130 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

COUNTERCLAIM COUNT III
ORDER FOR PROSPECTIVE RELIEF

61. In answer to paragraph 131, Deltacom repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.

62. The allegations of paragraph 132 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

63. Deltacom denies the allegations of paragraph 133, as no public utilities commission should countenance the billing and kickback scheme perpetrated by Hypercube.

DELTACOM'S AFFIRMATIVE DEFENSES TO HYPERCUBE'S COUNTERCLAIMS[2]

1. Any allegation not expressly admitted herein is denied.

2. Hypercube has failed to state a claim upon which relief may be granted.

3. This agency does not have subject matter jurisdiction over claims for relief set forth by Hypercube in its Counterclaim, and, therefore, those claims must be dismissed.

4. Federal law preempts the claims for relief stated in Hypercube's Counterclaim.

5. The Filed Rate Doctrine bars the claims for relief stated in Hypercube's Counterclaim.

6. Hypercube's claim for breach of Price List is barred because the Price List underlying that claim is unlawful or void *ab initio*.

7. Hypercube cannot recover on its claim for *quantum meruit* or any other equitable relief because its hands are unclean.

8. Hypercube cannot recover on its claim for *quantum meruit* or any other equitable relief because it has an adequate remedy at law.

9. Hypercube cannot recover on its claim for *quantum meruit* or any other equitable relief because the Commission does not have authority over such or to award monetary damages.

10. The claims set forth in Hypercube's Counterclaim are barred or diminished by Hypercube's failure to mitigate and to avoid its damages, if any.

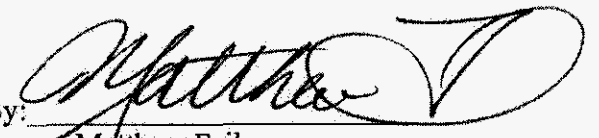
11. Hypercube's own breach(es) of obligations to Deltacom excused the non-performance, if any, of Plaintiff's obligations, if any, to Hypercube.

[2] The inclusion of an Affirmative Defense does not constitute agreement or admission that the matter is one for which Deltacom bears the burden of proof.

12. The Commission does not have jurisdiction to award the relief sought by Hypercube in its Counterclaims and its Prayer for Relief.

WHEREFORE, in consideration of the above, Deltacom pleads for the Commission to deny Hypercube's Counterclaims and its Prayer for Relief.

Respectfully submitted this 5th day of October, 2009.

By: 

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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 5th day of October, 2009.

Charles Murphy, Esq. Timisha Brooks, 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
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By: _____
Matthew Feil