

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In re:

DeltaCom, Inc.

Complainant,

-v.-

KMC Data, LLC, Hypercube, LLC and
Hypercube Telecom, LLC,

Respondent.

Docket No.: 09-00077

**ANSWER OF DELTACOM
TO COUNTERCLAIM OF HYPERCUBE**

DeltaCom, Inc. (d/b/a DeltaCom Business Solutions)] ("Deltacom") files this Answer to the Counterclaim of Hypercube, LLC and Hypercube Telecom, LLC (f/k/a KMC Data, LLC) (collectively, "Hypercube"), and states as follows:

Deltacom agrees to stipulate to the dismissal *without prejudice* of Hypercube, LLC, provided that this entity was or is not involved or participate in, or did not otherwise cause the provisioning or billing of the services that Hypercube purports to have performed for Deltacom that gave rise to the instant proceeding.

INTRODUCTION

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 IXC's 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.

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

To the extent that any of the traffic at issue is found to be intrastate, it, too, is not subject to Hypercube's tariff for a number of reasons. First, Hypercube has not provided to Deltacom any service described in its tariff and thus the charges imposed by Hypercube are not supported by the tariff. 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 tariff itself. Finally, Hypercube has not at all relevant times had the requisite authority or tariff on file.

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.

ANSWER TO COUNTERCLAIM

INTRODUCTION

1. The allegations in the first sentence of paragraph 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 Tennessee. Deltacom admits that it refuses to pay Hypercube for the billing and kickback scheme perpetrated by Hypercube and admits the allegations in the second sentence.

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

3. Deltacom denies the allegations in paragraph 3. 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.

4. The allegations of paragraph 4 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 4. 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."

5. The allegations of paragraph 5 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 5, 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.

6. The allegations of paragraph 6 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 6. Hypercube does not originate or terminate 8YY calls and does not transport the calls directly to Deltacom.

7. The allegations of paragraph 7 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.

8. The allegations of paragraph 8 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.

9. The allegations of paragraph 9 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.

10. The allegations of paragraph 10 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.

11. The allegations of paragraph 11 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.

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

13. The allegations of paragraph 13 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.

14. Deltacom admits the allegations of paragraph 14.

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

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

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

18. The allegations of paragraph 18 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.

19. Deltacom admits the allegations of this paragraph, to the extent that such charges are properly assessed.

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 the first two sentences of paragraph 20. 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.

21. The allegations of paragraph 21 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.

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

first and second sentences of paragraph 22. Deltacom admits the allegations of the third and fourth sentences.

23. 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 23.

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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 and third sentences of paragraph 24. Deltacom denies the second sentence.

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

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 paragraph 26.

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 27.

28. The allegations of paragraph 28 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.

29. Deltacom admits that a tariff bearing the Hypercube name presently is on file with the TRA, but denies the allegations in paragraph 29 to the extent that Hypercube asserts that such terms and conditions apply to Deltacom.

30. The allegations of paragraph 30 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. .

31. Deltacom denies the allegations in paragraph 31. Deltacom admits that Hypercube inserted itself into the call flow at some point.

32. Deltacom denies the allegations in the first two sentences of paragraph 32. Deltacom admits the allegations in the third sentence.

33. Deltacom admits the allegations of the first sentence of paragraph 33, 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.

34. Deltacom denies the allegations of the first sentence of paragraph 34 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.

35. Deltacom denies the allegations of paragraph 35.

36. Deltacom denies the allegations of paragraph 36. To the extent Hypercube relies on correspondence exchanged between the parties, the correspondence speaks for itself.

37. Deltacom denies the allegations of the first sentence of paragraph 37, as Hypercube does not provide intrastate access services to Deltacom. To the extent Hypercube quotes Hypercube's Tariff List in this paragraph, the Tariff List is a legal document which speaks for itself.

38. Deltacom admits the allegations of paragraph 38.

39. Deltacom denies the allegations of paragraph 39.

40. Deltacom denies the allegations of paragraph 40, as Hypercube has not lawfully billed any intrastate access charges to Deltacom.

41. Deltacom denies the allegations of paragraph 41.

42. The allegations of paragraph 42 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 TARIFF LIST

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

44. 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 44, as Hypercube has asserted that it has contracts with various IXCs.

45. The allegations of paragraph 45 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 Tariff List, the Tariff List is a legal document which speaks for itself.

46. Deltacom denies the allegations of paragraph

47. The allegations of the first sentence of paragraph 47 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 tariff list is applicable, which it is not, in rejecting Deltacom's PIU, Hypercube failed to follow the provisions of its own Access Services Tariff List requiring a jurisdictional audit. *See* section 2.3.4.

48. The allegations of paragraph 48 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

49. Deltacom denies the allegations of paragraph 49, as Hypercube does not provide intrastate access services to Deltacom.

COUNTERCLAIM COUNT II **QUANTUM MERUIT**

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

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

52. Deltacom denies the allegations of paragraph 52.

53. Deltacom denies the allegations of paragraph 53.

54. The allegations of paragraph 54 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations.

55. 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 55.

56. The allegations of paragraph 56 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

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

58. The allegations of paragraph 58 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 denies the allegations of paragraph 59, as no public utilities commission should countenance the billing and kickback scheme perpetrated by Hypercube.

AFFIRMATIVE DEFENSES¹

1. Any allegation not expressly admitted herein is denied.

¹ 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.

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 tariff list is barred because the tariff 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 TRA does not have authority to award monetary damages.
10. The claims set forth in Hypercube's Counterclaim are barred or diminished by Hypercube's failure to mitigate and to avoid its damages, if any.
11. Hypercube's own breach(es) of obligations to Deltacom excused the non-performance, if any, of Plaintiff's obligations, if any, to Hypercube.
12. This agency does not have jurisdiction to award the relief sought by Hypercube in its Counterclaims and prayer for relief.

Respectfully submitted this 30th day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and exact copy of the within and foregoing ANSWER OF DELTACOM TO COUNTERCLAIM OF HYPERCUBE on September 30, 2009, via United States First Class Mail, postage paid and properly addressed to the following:

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