

**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 AMENDED COUNTERCLAIM OF  
HYPERCUBE**

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

**ANSWER TO AMENDED COUNTERCLAIMS**

**INTRODUCTION**

1. The allegations in the first sentence of paragraph 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 offering toll-free calling services to its customers.

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 5 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 5 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 sent 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. Hypercube is not originating the 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 6 and 7 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The statutes and FCC order are legal documents that speak for themselves.
8. The allegations of paragraph 8 and footnote 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. Moreover, Hypercube is not precluded from charging the wireless carrier for Hypercube's alleged services.
9. The allegations of paragraph 9 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.

10. The allegations of paragraph 10 and footnotes 11 and 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.
11. The allegations of paragraph 11 and footnotes 13 through 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 FCC order is a legal document that speaks for itself.
12. The allegations of paragraph 12 and footnote 16 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph. The FCC order is a legal document that speaks for itself.
13. The allegations of paragraph 13 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 of this paragraph. The order of the FCC and the decision of the NYPSC are legal documents that speak for themselves.
14. Deltacom admits that the calls described in the allegations of paragraph 14 are among those to be resolved in this case. Deltacom's understanding that the vast majority of traffic pertains to wireless calls but to the extent that Hypercube is involved with unlawful arbitrage and kickback schemes for other types of traffic, then such traffic would fall under the scope of the complaint as amended.

15. The allegations of paragraph 15 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 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. To the extent that the allegations of paragraph 17 are legal conclusions or arguments, no response is required, and to the extent a response is required, Deltacom denies such allegations.
18. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 18.
19. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis, denies the allegations of paragraph 19. To the extent that the allegations of paragraph 19 are legal conclusions or arguments, no response is required, and to the extent a response is required, Deltacom denies such allegations.

20. The allegations of paragraph 20 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations of this paragraph.
21. Deltacom admits the allegations of this paragraph, to the extent that such charges are properly assessed.
22. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of the first two sentences of paragraph 22. The allegations of the third sentence of this paragraph and footnote 19 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. The FCC order is a legal document that speaks for itself.
23. The allegations of paragraph 23 and footnote 20 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. The FCC order is a legal document that speaks for itself.
24. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of the first, second and third sentences of paragraph 24. Deltacom admits the allegations of the fourth and fifth sentences.

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

#### **FACTS**

26. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of the first and third sentences of paragraph 26. Deltacom denies the second sentence.
27. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis, denies the allegations of paragraph 27. To the extent that the allegations of paragraph 27 are legal conclusions or arguments, no response is required, and to the extent a response is required, Deltacom denies such allegations.
28. Deltacom denies the allegations in this paragraph. To the extent that Hypercube provides services, Hypercube provides transit services and data base dip services to wireless carriers.
29. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 29.
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 30.

31. The allegations of paragraph 31 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. The service provided by Hypercube is neither originating nor terminating access.
32. Deltacom admits that a tariff bearing the Hypercube name presently is on file with the TRA, but denies the allegations in paragraph 32 to the extent that Hypercube asserts that such terms and conditions apply to Deltacom.
33. The allegations of paragraph 33 are legal conclusions or arguments to which no response is required, but to the extent a response is required, Deltacom denies the allegations. .
34. Deltacom denies the allegations in paragraph 34. Deltacom admits that Hypercube inserted itself into the call flow at some point.
35. Deltacom denies the allegations in the first two sentences of paragraph 35. Deltacom admits the allegations in the third sentence.
36. Deltacom admits the allegations of the first sentence of paragraph 36, except that Deltacom denies that Hypercube transmits calls to Deltacom. Deltacom denies the allegations of the second sentence; Hypercube is not legally obligated to insert itself into the call flow and Deltacom is without knowledge or information at this time sufficient to form a belief as to the nature of Hypercube's costs of providing transit services to wireless carriers.



37. Deltacom denies the allegations of the first sentence of paragraph 37 to the extent that Hypercube asserts it provides services to Deltacom; however, Deltacom admits to the allegation of not paying Hypercube. Deltacom denies the remainder of the paragraph.
38. Deltacom denies the allegations of paragraph 38.
39. Deltacom denies the allegations of paragraph 39. To the extent Hypercube relies on correspondence exchanged between the parties, the correspondence speaks for itself.
40. Deltacom denies the allegations of the first sentence of paragraph 40, as Hypercube does not provide intrastate access services to Deltacom. To the extent Hypercube quotes Hypercube's Tariff in this paragraph, the Tariff is a legal document which speaks for itself.
41. Deltacom admits the allegations of paragraph 41.
42. Deltacom denies the allegations of paragraph 42.
43. Deltacom denies the allegations of paragraph 43, as Hypercube has not lawfully billed any intrastate access charges to Deltacom.
44. Deltacom denies the allegations of paragraph 44.
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.

**COUNTERCLAIM COUNT I**  
**BREACH OF HYPERCUBE'S TARIFF**

46. Deltacom repeats and realleges its responses contained in the prior paragraphs, as if fully set forth herein.
47. Deltacom is without knowledge or information at this time sufficient to form a belief as to the truth or falsity of, and on that basis denies the allegations of paragraph 47, as Hypercube has asserted that it has contracts with various IXCs.
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. To the extent Hypercube references its Tariff, the Tariff is a legal document which speaks for itself.
49. Deltacom denies the allegations of paragraph 49.
50. The allegations of the first sentence of paragraph 50 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 is applicable, which it is not, in rejecting Deltacom's PIU, Hypercube failed to follow the provisions of its own Access Services Tariff requiring a jurisdictional audit. *See* section 2.3.4.
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, as Hypercube does not provide intrastate access services to Deltacom.

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

## **COUNTERCLAIM COUNT II QUANTUM MERUIT**

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

55. The allegations of paragraph 55 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 56.

57. Deltacom denies the allegations of paragraph 57.

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 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 59.

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

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

**COUNTERCLAIM COUNT III  
ORDER FOR PROSPECTIVE RELIEF**

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

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

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

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

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

66. Deltacom denies the allegations of this paragraph 66, but admits that the tariff modifications to Deltacom's intrastate access tariffs were filed in response to

Hypercube's unlawful access charge arbitrage scheme. (*See* Amended Complaint at paragraph 73.

67. To the extent that the allegations of paragraph 67 are legal conclusions or arguments, no response is required, and to the extent a response is required, Deltacom denies such allegations. Deltacom admits that Hypercube is an "Intermediate Provider" and that it has billed Hypercube for such services pursuant to its tariff.
68. The allegations of paragraph 68 are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.
69. The allegations of paragraph 69 are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.
70. The allegations of paragraph 70 are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.
71. The allegations of paragraph 71 are legal conclusions or arguments to which no response is required, and to the extent a response is required, Deltacom denies such allegations.

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

### **RELIEF SOUGHT**

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

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

1. Any allegation not expressly admitted herein is denied.
2. Hypercube has failed to state a claim upon which relief may be granted.
3. This agency does not have subject matter jurisdiction over claims for relief set forth by Hypercube in its Counterclaim, and, therefore, those claims must be dismissed.
4. Federal law preempts the claims for relief stated in Hypercube's Counterclaim.
5. The Filed Rate Doctrine bars the claims for relief stated in Hypercube's Counterclaim.
6. Hypercube's claim for breach of tariff is barred because the tariff underlying that claim is unlawful or void *ab initio*.

---

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

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.

Respectfully submitted,

**BRADLEY ARANT BOULT CUMMINGS, LLP**

By: Henry Walker by dnc

Henry Walker (No. 000272)

1600 Division Street, Suite 700

P.O. Box 340025

Nashville, Tennessee 37203

(615) 252-2363

*Attorneys for DeltaCom, Inc.*

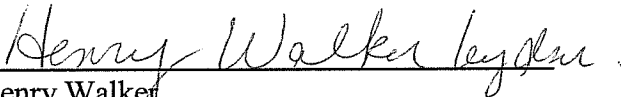
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Answer of DeltaCom to Amended Counterclaim of Hypercube has been served upon the following by U.S. Mail this 23<sup>rd</sup> day of December, 2009.

James Mertz  
Hypercube Telecom LLC  
5300 Oakbrook Parkway  
Building 300, Suite 330  
Norcross, Georgia 300093

Michael B. Hazzard, Esq.  
Arent Fox LLP  
1050 Connecticut Avenue, NW  
Washington DC 20036  
*Attorneys for Hypercube LLC*

H. LaDon Baltimore, Esq.  
Farrar & Bates, LLP  
211 Seventh Ave. N. Suite 500  
Nashville, Tennessee 37219  
*Attorneys for Hypercube LLC*

  
Henry Walker