

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Hypercube Telecom, LLC (U-6592-C)
Complainant,

v.

Level 3 Communications, LLC (U-5941-C)

Defendant.

C.09-05-009

**RESPONSE OF LEVEL 3 COMMUNICATIONS, LLC TO MOTION TO
COMPEL OF HYPERCUBE TELECOM, LLC**

Level 3 Communications, LLC (“Level 3”) here responds to the Motion to Compel of Hypercube Telecom, LLC (“Hypercube”), served on Level 3 in this matter on December 17, 2009. Level 3 opposes Hypercube’s Motion to Compel because the documents and information sought by Hypercube are improper, irrelevant, overbroad, and ambiguous, as described below. Moreover, as to numerous requests, Hypercube’s motion is premature. Level 3 participated in good faith in a “meet and confer” conference call with Hypercube, and as a result of that call, anticipates supplementing or modifying its responses to certain of these data requests. Level 3 anticipates that it will be able to supplement its responses by January 8, 2009. The supplementation will require this time due to the limited availability of some personnel during the holiday period.¹

Level 3 nevertheless responds to the particular data requests for which Hypercube has moved to compel further responses.

¹ Level 3 notes that when Level 3 requested supplementation of responses from Hypercube on Level 3’s own discovery, Hypercube required written clarification of questions before it would respond and took approximately 25 days after receiving the clarified questions in which to supplement its responses, even without the intervening end of year holiday period.

Data Requests Nos. 54-58

In the guise of asking about Level 3's actual contentions in the case, Hypercube instead has fashioned a set of legal questions which Hypercube believes supports its theory of the case and in effect asked Level 3 to provide its legal opinion and position on Hypercube's assertions of law. This of course is not the function of so-called contention interrogatories, even where they are permitted. The Commission will note that not one of Data Requests Nos. 54-58 refers to any contention made by Level 3 in its answer or counterclaims. For example, Request No. 54 asks "whether you contend that a wireless carrier is obligated to send 8YY traffic to an ILEC, and if you so contend, under what circumstances such obligation exists." The "obligation" on which Hypercube seeks a legal opinion from Level 3 is presumably a legal or regulatory obligation, but is not presented as a contention in Level 3's claims or defenses in this case. Similarly, Request No. 55 asks whether "a wireless carrier is obligated to carry 8YY traffic beyond the end of its network." Again, whether or not a wireless carrier has such an obligation requires legal analysis and is not set forth in pleadings as a contention of Level 3 in this case. Request No. 56 asks whether Level 3 takes the position that "a wireless carrier is obligated to incur the charges related to handling and identifying the destination network for an 8YY call." Again, Hypercube cannot cite to any such contention by Level 3 in this case. Request No. 57 requests Level 3's legal position on the statement "whether you contend that Level 3 has a legal right to direct a wireless carrier to carry 8YY traffic beyond the confines of its network." While this may be part of the legal construct which Hypercube wishes to put forth in this case, Hypercube does not and cannot cite to any such legal contention by Level 3 in this case. Finally, Request No. 58 demands that Level

3 provide its legal position on “whether you contend that Level 3 has a legal right to direct a wireless carrier to send 8YY traffic destined for Level 3 to a carrier other than Hypercube, and if you so contend, under what circumstances such obligation exists.” Hypercube once again fails to cite any such contention by Level 3 in this case.

Level 3 properly objected to each of Request Nos. 54-58:

Level 3 objects that this Request seeks legal analysis and opinions which are improper subjects for discovery and to which Level 3 is not required to respond.

In these requests Hypercube is attempting to cross-examine Level 3’s attorneys or to obtain their legal opinions on matters which have not been asserted by their client. Hypercube is not permitted to conduct legal cross-examination of Level 3’s attorneys as part of its “discovery” in the case. Moreover, this amounts to an improper inquiry into the attorneys’ work product and/or matters subject to attorney-client privilege.²

While Hypercube argues that its data requests would be permissible in Superior Court, Hypercube’s mechanistic take on the way that the Commission utilizes the discovery methods in the California Code of Civil Procedure is not correct. For example, if the provisions of the Code of Civil Procedure govern the nature and extent of drafted special interrogatories propounded by Hypercube, *all of Hypercube’s Data Requests in this case after number 35 are improper*. Code Civ. Pro. § 2030.030(a)(1) limits the number of non-form or special interrogatories to a total of thirty-five in the absence of special application to and approval of a greater number by the Court:

² Cal. Code of Civ. Proc. § 2018.030 provides:

(a) A writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

(b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party’s claim or defense or will result in an injustice.

The attorney-client privilege is set out in Cal. Evid. Code § 954.

(a) A party may propound to another party either or both of the following:

(1) Thirty-five specially prepared interrogatories that are relevant to the subject matter of the pending action.

(2) Any additional number of official form interrogatories, as described in Chapter 17 (commencing with Section 2033.710), that are relevant to the subject matter of the pending action.

(b) Except as provided in Section 2030.070, no party shall, as a matter of right, propound to any other party more than 35 specially prepared interrogatories. If the initial set of interrogatories does not exhaust this limit, the balance may be propounded in subsequent sets.

Of course, in Commission proceedings, the Commission does not follow the discovery provisions of the Code of Civil Procedure slavishly or mechanistically, so this provision is not applied.

In like manner, with but one exception, the cases cited by Hypercube do not deal with matters before this Commission. The only Commission case which Hypercube cites upholds the submission of what it terms contention interrogatories, but which appear to have inquired into positions taken by a party in other litigation, which presumably might contradict the positions taken before the Commission. *In Re Volatile Organic Compounds, Perchlorate, MTBE*, D.00-11-036, Interim Order 98-03-013, 2000 WL 33128284.³ Thus, the discussion of contentions in discovery in that case is not the same point which Hypercube attempts to make in this case. If Hypercube here had asked for copies of pleadings in other cases which had some relevance to the present matter, those would not be contention interrogatories. Therefore, Hypercube's claim that the

³ It is admittedly somewhat difficult to conclude with complete certainty what was actually permitted in that ruling, because the ruling was summarily affirming this aspect of another ruling which is apparently not available. Therefore, while it is clear that the Commission used the term contention interrogatories, one must attempt to glean from context what was actually before the Commission for decision. The Commission did not reject the characterization by the producing party in that matter that the contentions sought were that party's actual contentions in other litigation. Thus, it is reasonable to infer that the "contention interrogatories" in that case went to actual positions taken by that party in litigation, or in effect, discovery into related litigation matters.

Commission has approved discovery of legal opinions and positions not expressed in pleadings or other filings is not supported by the authority it cites.

The fact that the state courts have permitted contention interrogatories under some circumstances is no basis for assuming that they are proper under Commission practice. And, as this case demonstrates, there is good reason for not permitting them, because in Commission proceedings they invite the type of abuse which Hypercube has made of this type of question.

Even the state court cases cited by Hypercube do not support its motion. In California state court practice, contention interrogatories are permitted where a defendant makes a permissible general denial of a complaint. *Burke v. Superior Court of Sacramento County*, (1969) 71 Cal.2d 276, 78 Cal.Rptr. 481. Indeed, the seminal California case on contention interrogatories (which Hypercube does not cite) makes it clear that the availability of contention interrogatories in California state court practice to ascertain facts underlying pleadings is directly due to the availability in state court practice of pleading in general terms:

“[T]his simply means that a defendant may allege that the plaintiff was negligent in and about those matters alleged in the complaint, and that such negligence proximately contributed to his injury. Such allegations, under the cases cited, are not subject to a special demurrer... Such general allegations do not apprise the plaintiff of matters which may lead him ‘to the discovery of admissible evidence’... It follows that, in California, discovery proceedings provide a most important method of obtaining knowledge of such facts as may exist and on which the protagonist relies.”⁴

This Commission, however, does not permit general denials in answers to complaints. Under Rule 4.4 of this Commission’s Rules of Practice and Procedure

⁴ *Singer v. Superior Court of Contra Costa County*, (1960) 54 Cal.2d 318, 323-4, 353 P.2d 305.

The answer must admit or deny each material allegation in the complaint and shall set forth any new matter constituting a defense. Its purpose is to fully advise the complainant and the Commission of the nature of the defense.

Contention interrogatories may be necessary where general denials are permitted in answers. However, because this Commission does not permit such general denials, this basis for contention interrogatories does not exist.

Similarly, the other state court case cited by Hypercube does not support Hypercube's argument. In *Rifkind v. Superior Court*, (1994) 22 Cal.App4th 1255, 27 Cal. Rptr.2d 822, the court considered whether to compel answers to contention questions regarding the factual basis for the legal claims in his complaint asked at a deposition. The court declined to order the deponent to answer these questions. The court indicated that questions which seek the factual basis for legal claims asserted in a complaint may be proper where they are directed to an inquiry into the facts underlying the actual pleadings in the case, citing *Burke* and *Singer, supra*. *Rifkind* therefore is not authority for Hypercube's request for Level 3's position on various statements of purported legal right and obligation which Hypercube has put in the form of data requests.

Hypercube also is incorrect when it states that Level 3 has not objected to the relevance of the requests. In effect, Hypercube claims that Level 3 waived such objection. However, Level 3 stated its objections at the outset in its General Objections which Level 3 explicitly made applicable "to all of the Data Requests."⁵ Hypercube's half-hearted attempt to find some relevance in its requests by trying to relate legal assertions made by

⁵ General Objection D states: "Level 3 objects to each and all of these Requests on the grounds that the documents and information requested are not relevant to the issues between Hypercube and Level 3 under Hypercube's complaint in this proceeding or reasonably calculated to lead to the discovery of admissible evidence, or the burden, expense, or intrusiveness of the discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." Hypercube itself employed similar general objections in its responses to Level 3's discovery; apparently Hypercube believes such general objections are ineffective only when employed by Level 3.

Hypercube in its data requests to vague statements about Level 3's complaint shows just how far afield Hypercube has gone.

For these reasons, Hypercube's Motion to Compel responses to its Request Nos. 54-58 should be denied.

Data Requests Nos. 74, 75, and 78

Once again, Hypercube has no basis for its motion. Data Request No. 74 reads: "Does Level 3 promise its 8YY subscribers that any in-service North American number plan [*sic*] telephone number will be able to reach the properly provisioned 8YY number supplied by Level 3?" As Hypercube knows, Level 3 has federal and state tariffs for its services, and all of the terms and conditions of those services, including 8YY services, are stated in those tariffs. Moreover, Level 3's discussions with its customers have no relevance to any issue in this case.

Data Request No. 75 asks: "If your answer to the prior question is negative, describe all limits on in-service North American numbering plan [*sic*] telephone number ability to reach the properly provisioned 8YY number supplied by Level 3 and produce all documents describing those limitations." As discussed above, Level 3 should not be required to answer Request No. 74, and because No. 75 is premised on a particular hypothetical answer to that question, Level 3 should not be required to respond to number 75 as well. Moreover, as written, the question is ambiguous and unclear.

Data Request No. 78 asks Level 3 to state the "facts" which support the plain language of Hypercube's own tariff. Hypercube does not dispute that its tariff requires call blocking if a carrier does not wish to receive 8YY traffic from Hypercube, and the

facts on which Level 3 relies is the language of that tariff. Therefore, Level 3 has fully answered this data request and no further response should be required.

Data Request Nos. 26-28 and 37

These data requests relate to the billing and payment history between Hypercube and Level 3. Without waiving its objections to these requests, these are among the data requests which Level 3 intends to supplement by January 8, 2010, as discussed above.

Data Request Nos. 38 and 39

These data requests also relate to information requested in Data Request Nos. 26-28 and 37, to which Level 3 has replied above, and which Level 3 intends to supplement as described. The other aspects of Request Nos. 38 and 39 would require Level 3 to repeat information which Hypercube already has in the form of invoices, payments, pleadings, briefing and tariffs.

Data Request Nos. 15 and 82

Data Request No. 15 states: “Has Level 3 asked any wireless carrier to utilize a third party carrier, other than Hypercube, to carry 8YY traffic from the wireless carrier’s Mobile Telecommunications Switching Office (“MTSO”) to Level 3’s switch(es) in California?” This seeks information which is not relevant to this case. Because Hypercube is paying kickbacks to wireless carriers, there is no economic incentive for any wireless carrier which has an agreement with Hypercube to cease using its service.

Data Request No. 82 states: “Has Level 3 explored any options to using Hypercube’s services” Level 3 objected but nevertheless fully replied to this request to the extent Level 3 understands the request, stating: “Level 3 objects that this question is vague and overbroad. Without waiver of its objections, Level 3 denies that it “uses”

Hypercube's "services" for CMRS-originated 8YY services, and wishes Hypercube to abide by its tariffs and cease sending this traffic to Level 3." Because Level 3 is an unwilling recipient of 8YY traffic from Hypercube and cannot identify and block these calls, the premises of the question are faulty, and Level 3 has fully replied.

Data Request No. 1

This is among the data requests which Level 3 intends to supplement by January 8, 2010, as discussed above

Data Request Nos. 4, 6, 10, 17, 18, 21-23, 31-33, 51-53 and 73

As the Commission is aware, this case concerns a very specific service of Hypercube: 8YY calls originated by wireless carriers, transmitted to Hypercube and delivered to Level 3. The case does not involve or concern other services which may be provided by Hypercube. Hypercube in its data requests not only seeks to inquire into services provided by Level 3, which are not at issue in this case, but also seeks to inquire about services other than 8YY calls originated by customers of wireless carriers. While it serves Hypercube's purposes to attempt to obfuscate and confuse the nature of this proceeding, such efforts do not make data requests about Level 3 services relevant to this case.

In Data Request No. 4, Hypercube starts this obfuscation, seeking an admission that "Level 3 has contracts with wireless carriers related to Level 3's related to Level 3's Toll Free Inter-Exchange Delivery Service." Level 3 replied, stating that the Request is not relevant or likely to lead to the discovery of admissible evidence. Level 3's services are not at issue in this case, only Hypercube's service as described above is at issue.

Whether or not Level 3 has agreements with wireless carriers for Level 3's service of some kind has no bearing on the issues in this case.

In Data Request No. 6, Hypercube demands that Level 3 admit that "wireless carriers have directly sent Level 3 8YY traffic related to Level 3's "Toll Free Inter-Exchange Delivery Service." Again, this is a Level 3 service, and is not at issue in this case. Nevertheless, while objecting to the Request, without waiving its objections, Level 3's response to this Request specifically incorporates its response to Data Request No. 3, in which Level 3 describes the differences between Level 3's service and the Hypercube service at issue in this case:

Level 3 states that a direct technical comparison has not been done, and so Level 3 cannot respond as to the differences in equipment or circuits which may exist. Information about Level 3's service is contained in Level 3's tariffs, which Hypercube has demonstrated that it already has in its possession. In the compensation context, there is a distinction between Hypercube's service and Level 3's service, in that Hypercube kicks back a portion of the access charges it receives to CMRS carriers and Level 3 does not do so. Level 3 also does not buy traffic from wireless carriers for the purpose of generating redundant access charges. Unlike Hypercube, Level 3 is not an Inserted CLEC which pays kickbacks to wireless carriers in exchange for which the wireless carriers needlessly divert toll-free wireless traffic to the Inserted CLEC, instead of sending that traffic directly, whether through an ILEC or otherwise. The Inserted CLEC funds its kickbacks by levying originating access charges to IXCs that can be more than five times higher than those paid under normal routing arrangements: routing arrangements that would be chosen if the wireless carrier were actually paying for this transit service. Level 3 charges lawful rates for the functions it provides and does not act as a proxy for wireless carriers to collect access charges to which wireless carriers are not entitled.

Again, Level 3's service has no bearing on the issues in this case, but to the extent that Hypercube requests a comparison, one has been provided.

Data Request No. 10 is another question which seeks to inquire into Level 3's services, instead of the Hypercube services which are at issue in this case. That Request asks: "Does Level 3's "Toll Free Inter-Exchange Delivery Service" benefit the IXCs to

which Level 3 transports 8YY traffic? If so, how? If not, why not?” As Level 3 has demonstrated, Level 3’s services and its customers are not at issue in this case. This case concerns illegal billing by Hypercube to Level 3 for Hypercube services. None of the claims or counterclaims in this case concern billing for Level 3 services.

Data Request No. 17 requests that Level 3 “State all facts and set forth all bases upon which you rely in asserting that Hypercube has tariffed its toll-free origination service the “improper way.” Level 3 answered this request fully by referring Hypercube to Level 3’s “Answer and Affirmative Defenses and Level 3’s Response and Opposition to Hypercube’s Motion to Require Escrow, etc. which contain this information.” Having answered this request completely, no further response is required.

Data Request No. 18 requests that Level 3 “State all facts and set forth all bases upon which you rely in asserting that there is a legally or regulatorily relevant distinction between the “proper way” and the “improper way.” Level 3 objected, but incorporated by reference its response to Data Request No. 17, which fully answered this request as described above.

Data Request No. 21 is incredibly broad: “Does Level 3 have revenue sharing agreements with, or pay a marketing fee to, any carriers? If so, describe those relationships in detail.” Level 3 stated in response that the information sought is not relevant or reasonably calculated to lead to the discovery of admissible evidence. Nevertheless, without waiving its objection, Level 3 answered the question “Without waiver of its objections, Level 3 states that it does not have such agreements or pay such fees to CMRS carriers which originate 8YY traffic.” Thus, while Level 3’s services and revenue arrangements with any carriers have no relevance in this case, Level 3

nevertheless replied with respect to the carriers and class of service provided by Hypercube which are at issue here for Level 3's services. Having answered fully, Level 3 should not be required to further respond. Data Request No. 22 is similar and drew a similar response from Level 3.

Data Request No. 23 is again remarkably broad, ambiguous and irrelevant. It asks: "Does Level 3 have revenue sharing agreements with, or pay a marketing fee to, any of its end users? If so, describe those relationships in detail." Again, Level 3's services, marketing and revenue arrangements with its customers are not relevant to any issue in this case.

Data Request Nos. 31-33 ask about services of Telcove, Inc., a company which Level 3 acquired in 2006 from a predecessor of Hypercube. The services of Telcove have no relevance to the case, and in any event, Level 3 did not own the company before 2006. Level 3 however is seeking additional information about Telcove, and may supplement its response in this regard.

Data Request Nos. 51-53 and 73 again seek information about Level 3's services, which are not part of this case, and Level 3 appropriately objected to these requests on the grounds that these requests are not relevant to the case and seek information which is not reasonably calculated to lead to the discovery of admissible evidence.

For all of the foregoing reasons, Level 3 respectfully requests that Hypercube's Motion to Compel be denied.

December 28, 2009

Respectfully submitted,

Level 3 Communications, LLC

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