

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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HYPERCUBE TELECOM, LLC)	
(U-6592-C),)	
)	
Complainant,)	
)	
v.)	C.09-05-009
)	
LEVEL 3 COMMUNICATIONS, LLC)	
(U-5941-C),)	
)	
Defendant.)	

**HYPERCUBE TELECOM, LLC (U-6592-C) AMENDMENT TO OPPOSITION TO
MOTION OF LEVEL 3 COMMUNICATIONS, LLC (U-5941-C) TO DISMISS**

Pursuant to Rule 1.12 of the California Public Utilities Commission’s Rules of Practice and Procedure and the permission granted orally by Administrative Law Judge DeAngelis on February 11, 2010, Hypercube Telecom, LLC (“Hypercube”) hereby files this Amendment to Hypercube’s Opposition to Motion of Level 3 Communications, LLC (“Level 3”) to Dismiss. Level 3 filed its original Motion to Dismiss on July 1, 2009 (“Motion to Dismiss”). Hypercube filed its original Opposition to Level 3’s Motion to Dismiss on July 16, 2009 (“Opposition”). This Amendment is concurrently filed with a Motion for Leave to File Amendment of Opposition to Level 3’s Motion to Dismiss.

Level 3’s Motion to Dismiss is based solely on a filing made by Level 3 with the Federal Communications Commission (“FCC”) that seeks new rules prohibiting certain business practices of Hypercube (Level 3’s “FCC Filing”).¹ Information has recently come to light in this

¹ In the nine months that has passed since Level’s FCC Filing, the FCC has declined to either (i) establish the docket sought by Level 3 or (ii) issue a Public Notice seeking comment.

proceeding that further demonstrates that Level 3's FCC Filing is a sham and further supports the denial of Level 3's Motion to Dismiss.

First, Level 3 has admitted in discovery and Hypercube has learned through independent investigation that Level 3 transports 8YY calls from wireless carriers to interexchange carriers ("IXCs") through incumbent local exchange carriers ("ILECs"), pursuant to contracts with those wireless carriers. Level 3 also bills IXCs intrastate access charges pursuant to its intrastate tariffs for that wireless-originated 8YY traffic. Thus, Level 3 is engaged in the exact behavior that Level 3 claims is inappropriate in Level 3's FCC Filing and before this Commission.

Second, Hypercube has learned that the industry providers identified by Level 3 in its Motion to Dismiss and recent Amendment to its Motion to Dismiss have been colluding with Level 3 for many months in an unlawful effort to disrupt Hypercube's business. This demonstrates that the supposed "industry-wide dispute" identified by Level 3 in its Motion to Dismiss is really a concentrated effort by Level 3 to benefit its competing business and harm competition.

I. Level 3's Own Business Practices Involving Wireless 8YY Traffic Demonstrates That Level 3's FCC Filing Is A Sham Designed To Disrupt This Proceeding And Stunt Competition

As discussed in Hypercube's Opposition, Hypercube's tariff and charges have not and cannot be preempted by the FCC for the reasons stated in Level 3's FCC Filing.² Moreover,

² To date, Level 3 has filed multiple *ex parte* letters with the FCC requesting the Petition be put up for public notice, even going so far as to complain that Hypercube has pointed out to this Commission and others that the FCC has so far ignored Level 3's FCC Filing. *See* Jan. 26, 2010 and Jan. 28, 2010 *ex parte* letters of Level 3, Deltacom, and Excel (available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020383687> and <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020384158>, respectively).

These recent letters follow an even earlier November 12, 2009 letter, urging the FCC to "act expeditiously" on Level 3's FCC Filing. *See* Nov. 12, 2009 *ex parte* letter of Level 3,

since the filing of the Opposition, Hypercube has learned through discovery in this proceeding and independent investigation that Level 3's claims that the FCC either has preempted or should preempt the traffic at issue here (8YY calls that begin on a wireless carrier's network, go through Hypercube's network, and then to the IXC) are belied by Level 3's own business practices in tariffing an identical service in intrastate access tariffs across the country.

Through discovery in this proceeding, Hypercube has recently learned that Level 3 admits to having contracts with wireless carriers related to its own identical "Toll Free Inter-Exchange Delivery Service." *See* Level 3 Supplemental and Amended Responses and Objections to Hypercube's First Data Requests and Request for Admissions, Response to Data Request No. 4 ("Level 3 states that it does contract with wireless providers for Level 3 to provide call routing and that its call routing services may include overflow capabilities to route 8YY traffic to IXCs") (excerpt attached as Exhibit 1). Thus, Level 3 has included in its own *intrastate* tariffs a service that does exactly what Hypercube's service does, and Level 3 has contracts with wireless carriers related to that traffic. Further, Level 3 has also admitted that it has charged IXCs intrastate access charges related to these contracts with wireless carriers and Level 3's own identical "Toll Free Inter-Exchange Delivery Service." *See* Level 3 Responses and Objections to Hypercube's Third Data Requests and Request for Admissions, Response to Data Request No.116 ("[I]t is reasonable to assume that some of the 8YY traffic to which Level 3 charges applicable switched access rate elements originates with wireless carriers") (excerpt attached as Exhibit 2).

Moreover, Level 3's FCC Filing is premised on a false claim that "Section 332(c)(3) [of the Federal Telecommunications Act] ... preempts the application of intrastate originating access

Deltacom, and Excel (available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020348002>). The FCC has taken none of the action requested by Level 3.

tariffs to wireless originated toll-free calls when transit is provided by an Inserted CLEC,” which Level 3 defines as “CLECs that are retained by CMRS carriers and inserted into the flow between the CMRS carrier and the ILEC tandem transit provider for reasons other than efficient routing or interconnection.” Level 3’s FCC Filing at 1-2. That supposed preemption advocated by Level 3 is directly contradicted by Level 3’s own business practices in inserting itself between the ILEC and the wireless carrier and in carrying “wireless originated toll-free calls” indirectly to IXCs through an ILEC.

Hypercube has learned through its own investigation of Level 3’s filings across the country that Level 3 does just this and bills intrastate access charges. The attached interconnection agreement between Level 3 and Qwest (*which post-dates Level 3’s FCC Filing*) sets up a billing arrangement by which Level 3 bills intrastate access charges for wireless originated toll-free calls that Level 3 transports to the responsible IXC through an ILEC, Qwest. *See Exhibit 3* (“8XX Third Party Carrier” is defined as “a wireless telecommunications provider whose originating Toll Free Service transits [Level 3’s] network and routes the queried traffic to IXCs served by Qwest....”). And Level 3 bills intrastate access charges for this traffic, wireless originated toll-free calls. *See also Ex. 3* (“The Parties agree that an 8XX Third Party Carrier [*i.e.*, a wireless carrier] wants to route unqueried 8XX traffic to [Level 3] for the 8XX database dip and to route the queried traffic to IXCs served by Qwest as Jointly Provided Switched Access (JPSA) traffic via [Level 3’s local interconnection service] trunks); *id.*, Attachment 1, § 7.5.11 (Qwest and Level 3 “will each prepare and render a separate bill to the IXC in accordance with ... each Party’s respective FCC and state Access tariffs or other contractual arrangements.”).

There can be no doubt that: (i) Level 3 has an identical competing service that it provides through intrastate access tariffs across the country, its “Toll Free Inter-Exchange Delivery

Service,” (ii) Level 3 has contracts with wireless carriers related to that service, and (iii) Level 3 (as a CLEC) bills and collects intrastate access charges for that service, including 8YY traffic that originates on a wireless network.³ Level 3’s Motion to Dismiss and FCC Filing are baseless shams designed to damage Hypercube and discourage other companies from entering the marketplace for these services. Level 3’s Motion to Dismiss should be denied and this case should proceed on the merits.

II. Level 3’s Concealed Coordination With Excel and Deltacom

Level 3 has also claimed that its FCC Filing “has proven to be of interest to a broad range of industry providers” in an effort to show that its FCC Filing is likely to be acted upon by the FCC. Level 3 Motion to Dismiss 3. However, in making this statement, Level 3 has deliberately concealed months of communications with Comtel Telecom Assets LP d/b/a Excel Telecommunications (“Excel”) and DeltaCom, Inc. (“DeltaCom”), several of the “broad range of industry providers” identified by Level 3 as interested in Level 3’s FCC Filing. Besides the multiple joint *ex parte* letters filed with the FCC by these companies identified in footnote 1, as Hypercube has recently learned in litigation with Excel, Level 3, Deltacom, and Excel have been

³ At most, the only difference between what Level 3 does and what Hypercube does concern the economic terms of the voluntarily-negotiated agreements that both Level 3 and Hypercube have with wireless carriers. Hypercube makes payments to wireless carriers for access to the wireless carrier’s network, while Level 3 apparently has negotiated a different economic arrangement. However, Level 3’s attempts to disparage Hypercube’s practice was considered and rejected by the Commission years ago. *See Final Opinion Modifying Intrastate Access Charges*, D.07-12-020, at 12 (Dec. 6, 2007). Hypercube extensively detailed the Commission’s prior consideration of these issues and the Commission’s ultimate refusal to prohibit those types of arrangements in Hypercube’s Opposition to Level 3’s Motion to Compel, filed on December 21, 2009 with the Commission. Level 3’s Motion to Compel was denied February 3, 2010.

Moreover, Level 3 fails to acknowledge (let alone distinguish) the FCC’s finding that “in a detariffed, deregulated environment ... carriers are free to arrange whatever compensation arrangement they like for the exchange of traffic.” *Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192, 13195 (2002).

communicating for months in an effort to disrupt Hypercube's business, even going so far as sharing draft pleadings in this proceeding. *See* Privilege Log for Excel's Response to Hypercube's Second Request for Production of Documents, entry dates June 30, 2009 and July 1, 2009, attached as Exhibit 4.

Moreover, Level 3's *January 2010* Amendment to the Motion to Dismiss, based on Excel's *September 2009* informal complaint at the FCC, is even more suspect, because Level 3 was communicating with Excel contemporaneously with the filing of Excel's informal complaint. Of course, Level 3 chose to conceal its communications with Excel and Deltacom in seeking to dismiss Hypercube's Complaint because it would demonstrate that Level 3's Motion to Dismiss and Level 3's FCC Filing are premised on a manufactured "industry dispute" that is designed to injure a competitor and avoid lawful access charges.

Hypercube is entitled to seek relief on its California intrastate tariff at the Commission, and the Commission should reject Level 3's transparent attempts to avoid Hypercube's access charges. Hypercube has a valid tariff, lawful rates, and provides a lawful service to IXCs like Level 3. Level 3's Motion to Dismiss should be denied.

February 12, 2010

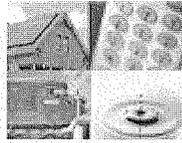
Respectfully submitted,

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California Public
Utilities Commission

CPUC Home

CALIFORNIA PUBLIC UTILITIES COMMISSION Service Lists

PROCEEDING: C0905009 - HYPERCUBE TELECOM, L
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LIST NAME: LIST
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