

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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LEVEL 3 COMMUNICATIONS, LLC (U-5941-C)  Complainant,  v.  HYPERCUBE TELECOM, LLC (U-6592-C)  Defendant.	Case 10-02-027
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**LEVEL 3 COMMUNICATIONS, LLC RESPONSE TO HYPERCUBE TELECOM,  
LLC MOTION TO TAKE OFFICIAL NOTICE OF D.10-07-030**

**I. Introduction**

Hypercube's Motion to Take Official Notice is the latest effort by Hypercube to pass itself off as just another CLEC seeking to enforce its lawful tariffs. Hypercube tries yet again to conflate its unlawful practice of charging rates for wireless carrier services it does not provide with the lawful tariffs and contracts of other CLECs. The Commission decision cited by Hypercube has no application on the facts of this case. Therefore, while the Commission plainly has the discretion under Rule 13.9 to take official notice of its own decisions, the decision cited by Hypercube has no relevance to the facts of the present case.

**II. Hypercube's Arguments**

A. Discrimination

Hypercube points to D.10-07-30 as authorizing voluntary contracts between Carriers "so long as a valid tariff with an adopted cap was in place."<sup>1</sup> However, Hypercube fails to mention that the Commission in D.10-05-029 has found that Hypercube's tariffs are not valid for or applicable to traffic which originates with wireless carriers. The

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<sup>1</sup> Hypercube Motion, p. 2.

Commission made this finding in D.10-05-029 because Hypercube does not and cannot have a lawful joint billing arrangement with wireless carriers where Hypercube shares the resulting revenues with the wireless carriers. The same wireless originated traffic is at issue here. Because Hypercube does not have a valid tariff which applies to such traffic, it cannot claim that its contracts for such traffic are within the type of contracts which D.10-07-030 covers. The difference between Hypercube and the CLEC defendants in D.10-07-030 is that the tariffs of the CLEC defendants in D.10-07-030 were lawful, and Hypercube's tariff, as applied to the traffic at issue in this case at least, is not. Therefore, D.10-07-030 has no application to Level 3's claims of discrimination by Hypercube.

#### B. Other Claims

Hypercube next claims that its tariffed rates were "not excessive" and for that reason none of Level 3's other claims should be heard. Again, Hypercube ignores the Commission's ruling that Hypercube's tariff under which Hypercube shares access revenues with originating wireless carriers is unlawful and unenforceable. This of course is true whether or not Hypercube's rates fall within or outside of the maximum CLEC access charge rate. Hypercube made the same arguments in C.09-05-009 which the Commission rejected when it issued D.10-05-029.

In D.10-05-029, the Commission found correctly that even though Hypercube bills IXCs originating access charges and kicks back a portion of that revenue to CMRS providers, Hypercube does not actually provide originating access service. Hypercube has not alleged that it has lawful joint billing arrangements with wireless carriers, and D.10-05-029 correctly concludes that "(t)he FCC has long held that CMRS carriers may not file tariffs for call origination or termination but, instead, the CMRS carrier must establish an independent right

to compensation.”<sup>2</sup> Hypercube has not alleged any independent contracts between Hypercube and Level 3 or between the originating CMRS carriers and Level 3 to govern this relationship. The Commission correctly notes that Level 3 does not wish to receive this traffic, but is unable to block it.

Therefore, Hypercube’s attempt to use D. 10-07-030 to avoid the Commission’s decision in D.10-05-029 has no merit at all.

### **III. Conclusion**

Level 3 does not object to the Commission taking official notice of another decision of the Commission as such, but the decision for which Hypercube seeks official notice has no relevance to any issue in this case. The Commission should therefore ignore Hypercube’s continuing effort to equate its practices which the Commission has already found unlawful to the lawful practices of other carriers.

Dated: August 20, 2010

Respectfully submitted,

Level 3 Communications, LLC

By: \_\_\_\_\_/s/ \_\_\_\_\_

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<sup>2</sup> D.10-05-029, p. 10, citing *In the Matter of Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192 (2002). The FCC has also held that “(w)e will not interpret our rules or prior orders in a manner that allows CMRS carriers to do indirectly that which we have held they may not do directly.” *Eighth Report and Order*, 19 FCC Rcd at 9116, n. 57

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