

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



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

v.

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

Defendant.

C.09-05-009

**MOTION OF LEVEL 3 COMMUNICATIONS, LLC (U-5941-C) FOR  
REHEARING OF LEVEL 3 MOTION TO COMPEL**

Level 3 Communications, LLC (“Level 3”) respectfully moves for rehearing of the Administrative Law Judge’s Ruling On Various Motions issued on February 3, 2010 which denied Level 3’s Motion to Compel Responses to Discovery. Level 3 requests that the Commission rehear Level 3’s Motion to Compel and direct Hypercube to respond fully to Level 3’s discovery consistent with permitting Level 3 to prepare its case for hearing in this matter.

**I. The Requests and Their Relevance**

The context of these Requests is essential to understanding why Level 3 needs to obtain this information. This case involves Hypercube filing and seeking to enforce intrastate access charges which are artificially pumped up in order to enable Hypercube to kick back a portion of those access charges to wireless carriers. Not only does this violate federal law, but it is also a violation of Section 532 of the California Public Utilities Code which prohibits remittances of such charges.

Except as in this article otherwise provided, no public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls,

rentals, and charges applicable thereto as specified in its schedules on file and in effect at the time, nor shall any public utility engaged in furnishing or rendering more than one product, commodity, or service, charge, demand, collect, or receive a different compensation for the collective, combined, or contemporaneous furnishing or rendition of two or more of such products, commodities, or services, than the aggregate of the rates, tolls, rentals, or charges specified in its schedules on file and in effect at the time, applicable to each such product, commodity, or service when separately furnished or rendered, **nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals, and charges so specified**, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons. The commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility. (emphasis supplied)

In order for Level 3 to have a fair opportunity to defend itself against Hypercube's multi-million dollar claims for "services" which Hypercube claims to have provided to Level 3, Level 3 must be allowed to conduct discovery into the factual bases for these claims and for its defenses to these claims. As this Commission has said:

The discovery process is a critical underpinning of the evidentiary hearing. It is the device used by one party to obtain facts and information about the case from the other party, in order to assist the party's preparation for trial....**As Rule 10.1 states, except for privileged information, information relevant to a specific proceeding is subject to discovery.** Ideally, the ALJ becomes involved in the discovery process only when the parties, after more informal attempts, have failed to resolve the issue themselves. In these instances, Rule 11.3 applies and parties may file a motion to compel or limit discovery, describing with specificity the relief sought and upon which the ALJ will rule.

Therefore, because the information sought by Level 3 is relevant to Hypercube's claims and Level 3's defenses in this case, Level 3's Motion to Compel should be granted.

Level 3 has demonstrated that the information it is seeking by its discovery and Motion to Compel is relevant to the issues in this case and necessary for the preparation of Level 3's case for hearing. Specifically, Level 3 demonstrated that obtaining the

contracts that Hypercube has with wireless carriers (with the carrier name redacted but the pricing terms not redacted), is relevant to Level 3's defense that Hypercube has artificially inflated its rates and that it is not entitled to collect these charges because it kicks back or remits portions of the inflated charges to wireless carriers with which it has contracts. The manner in which the pricing terms of those contracts are constructed is probative of Level 3's defenses, because they will prove the way in which the network connections and contract payments to wireless carriers are tied to access charge payments received by Hypercube from IXCs including Level 3. In D.05-02-022, this Commission specifically recognized that the amount and link between rates received and payments made to a third party are part of the proof of whether a violation of Public Utilities Code Section 532 has occurred.

To determine whether the payments to G-Five are impermissible rebates or required compensation, we must look at the circumstances surrounding the payments.

Therefore, Level 3 should be permitted to obtain these contracts with the name of the wireless carrier redacted, and the pricing terms non-redacted, and Level 3's motion to compel as to its data request numbers **1, 2, 3, 12 and 20** should be granted.

In like manner, the Commission should re-hear and grant Level 3's Motion to Compel with regard to the contracts which Hypercube has signed with IXCs other than Level 3, so that Level 3 can obtain information relevant to its claim that Hypercube's rates, which it is seeking to enforce here, discriminate against Level 3. This includes both original contracts for these services and agreements entered into following litigation or administrative proceedings, because in both instances, Hypercube has the opportunity to discriminate against Level 3 in the rates which Hypercube charges for such services. For

these reasons, the Commission should re-hear and grant Level 3's Motion to Compel with respect to its data requests numbers **6, 25, 26, and 27**.

## **II. Avoidable Collateral Consequences**

It is inevitable that other discovery disputes will arise as a result of the ruling denying all of Level 3's data requests for which it filed its Motion to Compel. Indeed, the first instance has already occurred. Since the denial of Level 3's Motion to Compel, Hypercube, emboldened by that ruling, has responded to a second set of data requests from Level 3, responding to requests for information relevant to Hypercube's claims and Level 3's defenses with hyperbolic objections and virtually no information. See Level 3's Motion to Compel Responses to Second Set of Data Requests and Requests for Admissions, filed simultaneously with this Motion for Rehearing.

In addition, it is anticipated that at the depositions in this matter which have been permitted, but not yet conducted, there will be disputes about what information is within the proper scope of questions due to the summary denial of Level 3's first Motion to Compel. In light of the manner in which Hypercube appears to have been emboldened by the denial of Level 3's Motion to Compel and has refused to respond to Level 3's written discovery, it is virtually inevitable that additional motions to compel discovery will follow. Further, the need for judicial interventions in the depositions that Level 3 has been permitted to conduct in distant cities will also be necessary.

## **III. Conclusion**

Therefore, the Commission should grant Level 3's Motion for Rehearing and compel the responses to discovery sought by Level 3. In addition, if any discovery which

Level 3 seeks is denied, the Commission should explain the reasons for such denial to guide the parties in additional discovery in this matter and to minimize future disputes.

For these reasons, Level 3 requests that the Commission rehear and grant its motion to compel, as described.

Date: March 3, 2010

Respectfully submitted,

**Level 3 Communications, LLC**

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

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