

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.	)	

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**HYPERCUBE TELECOM, LLC (U-6592-C) RESPONSE TO MOTION FOR REHEARING OF LEVEL 3 COMMUNICATIONS, LLC (U-5941-C)**

Hypercube Telecom, LLC (“Hypercube”), pursuant to Commission Rule 11.1, hereby files this Response to the Motion for Rehearing of Level 3 Communications, LLC (“Level 3”), filed in this matter on March 3, 2010 (“Motion”). Level 3 seeks rehearing on the first motion to compel it filed on December 11, 2009, which the Commission denied on February 3, 2010. Hypercube had previously filed an Opposition to Level 3’s motion to compel on December 21, 2009 (“Opposition”) in which Hypercube showed that the materials sought by Level 3 were irrelevant and highly sensitive, especially in light of the fact that Level 3 is a direct competitor of Hypercube.

**I. LEVEL 3 OFFERS NO REASON TO IGNORE A YEARS-OLD BINDING COMMISSION ORDER THAT PRECLUDES LEVEL 3’S DISCOVERY**

Although Level 3 styles this as a motion for rehearing of just its first motion to compel, in truth, the Motion seeks rehearing of the Commission’s access charge reform, R.03-08-018, that culminated in the *Final Opinion Modifying Intrastate Access Charges*, D.07-12-020 (Dec. 6,

2007) (“*Final Opinion*”). As Hypercube explained in its original opposition, the Commission has already considered Level 3’s complaints about certain commercial contracts that Hypercube has with wireless carriers and addressed them through access charge reform in the *Final Opinion*. Thus, there is nothing for the Commission to decide here, despite Level 3’s attempts to distract the Commission from the *Final Opinion*.

In that rulemaking, interexchange carriers (“IXCs”) complained about contracts between competitive local exchange carriers (“CLECs”) and wireless carriers, even going so far as to identify Hypercube by its former name KMC Data, LLC. Incredibly, Level 3 does not even attempt to address the Commission’s access charge reform or the *Final Opinion*. Level 3 makes no effort to explain why the *Final Opinion* does not end the matter as a matter of law. Instead, the only explanation that Level 3 offers for the relevance of the wireless contracts is that they are 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.” Motion for Rehearing 3. This was, of course, the exact same rationale Level 3 gave in its denied motion to compel.

As explained in Hypercube’s Opposition, the Commission has already addressed these identical arguments in the *Final Opinion*. For example, Qwest Communications Company complained to the Commission in R.03-08-018 that, in the context of so-called “wireless insertion” cases, “[t]he CLEC then, in many cases, *remits* a portion of the substantial ‘switched access’ revenues it obtains from the IXC to the wireless carrier, which by law is not entitled to charge originating switched access on its own.” Opening Comments of Qwest Communications Corporation on the Proposed Decision of ALJ Bushey, R.03-08-018, at 2, 5-6 (filed April 2, 2007) (emphasis added); *see also* Comments of InterMetro Communications, Inc. (U-6974-C) on

Adoption of Caps to Prevent Imposition of Unjust and Unreasonable Intrastate Access Charges by CLECs, R.03-08-018 (filed June 29, 2007). This complaint by Qwest from 2007, resolved in R.03-08-018, is identical to the complaint made by Level 3 here nearly three years later. *See* Motion for Rehearing 3 (“Hypercube ... *remits* portions of the inflated charges to wireless carriers with which it has contracts”) (emphasis added).

Among the hundreds of proposals for new rules filed by various parties and coalitions in R.03-08-018, the Commission specifically acknowledged (but declined to adopt) InterMetro’s and Qwest’s proposals in its *Final Opinion*. The Commission adopted rate regulation, which Hypercube has followed. Thus, Level 3’s complaints about remittances and CLEC-wireless carrier contracts have already been heard and addressed by this Commission. Level 3 has not even attempted to explain why the *Final Opinion* does not end this matter, a fatal omission to Level 3’s motion for rehearing. Nor does Level 3 point to any other regulation of CLEC-wireless carrier contracts by the Commission or the FCC. The Commission correctly denied Level 3’s first motion to compel and should not revisit the issue.<sup>1</sup> The documents sought by Level 3 are irrelevant as a matter of law.

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<sup>1</sup> Level 3 also does not even attempt to rebut the assertions in Hypercube’s Opposition about the highly confidential and proprietary nature of the materials sought by Level 3. As noted in Hypercube’s Opposition, Level 3, a competitor of Hypercube, cannot show the requisite need for discovery of these highly sensitive, competitive materials. Hypercube submitted the Declaration of Robert W. McCausland to show that Hypercube’s contracts with its wireless carrier customers constitute a trade secret and should not be disclosed. These materials are extremely sensitive and should not be turned over to Level 3 on dubious grounds of relevancy as shown in the Declaration of Robert W. McCausland. Level 3 offers no rebuttal.

And, as noted in Hypercube’s Opposition to Level 3’s Motion to Compel Responses to Second Discovery of Level 3 (filed March 15, 2010), in related litigation Level 3 has fought the production of its own contracts with wireless carriers stating such a production “would divulge confidential and proprietary information” and “[d]isclosure of this information even just to Hypercube would be particularly harmful because Level 3 and Hypercube are competitors in the market for telecommunication services.” *See* Declaration of Andrea L. Pierantozzi, Exhibit E to Deponent Level 3 Communications, Inc.’s Motion to Quash Subpoena *Ad Testificandum*, *Hypercube, LLC et al v. Comtel Telcom Assets LP*, 1:10-cv-00513-CMA-CBS (D. Colo. filed

## II. SECTION 532 DOES NOT SAVE LEVEL 3'S IRRELEVANT DISCOVERY

Level 3 cites Section 532 of the California Public Utilities Code as a basis for the supposed relevance regarding the contracts that Hypercube has with wireless carriers. Level 3 also relies on the decision *Mpower Communications Corp. v. Pacific Bell Telephone Co.*, C.02-09-045, D.05-02-022, 2005 WL 396095 (Ca. P.U.C. Feb. 10, 2005). Level 3 misreads these authorities.

Section 532 provides that no public utility shall charge other than its tariffed rates and prohibits refunds and remittances of tariffed charges to entities *purchasing* tariffed services. Here, for Section 532 to apply, Level 3 would have to claim that Hypercube is remitting portions of Level 3 payments of tariffed services back to Level 3. Hypercube, however, is not doing anything prohibited by Section 532. Hypercube is not offering a refund or remittance of the access charges to the carrier that is being charged by Hypercube's tariff. The issue here is entirely different: Level 3 is refusing to pay for the tariffed services it takes from Hypercube because Hypercube has contracts with third parties for an entirely different arrangement – access to the wireless carriers' networks.

The *Mpower* decision cited by Level 3 further supports Hypercube. There, Pacific Bell was unlawfully refunding certain tariffed charges back to the *charged* carrier through a commission payment. 2005 WL 396095, \*5. The *Mpower* decision does not describe or support any prohibition on using revenue from tariffed access charges to pay third-parties for work they perform. If that were the case, Hypercube and other CLECs could not use the revenue they gained from switched access charges to pay third parties for electricity, rent, or even their own employees. Under Level 3's limitless reading of Section 532, paychecks would be unlawful

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March 4, 2010). Level 3's "do as I say, not as I do" philosophy should not be condoned by the Commission.

“remittances” of tariffed switched access charges. Section 532 should not be read so illogically. The use of “refund or remit” in Section 532 clearly supports an interpretation of the statute that prohibits paying charges *back* (i.e., “refund or remit”) to the purchaser of tariffed services, and nothing to do with third parties.

Long standing analogous precedent even supports the proposition that a public utility may enter exclusive contracts for compensation. In evaluating contracts between a taxi company and a railroad for the taxi company to have the “exclusive privilege of soliciting ... patronage on the station grounds” in exchange for a “fixed rental” to the railroad, the California District Court of Appeal stated, “[t]he various statutory prohibitions against discriminatory agreements and practices by common carriers only relate to their *public duty as carriers*, and *do not relate to incidental relationships they may enter into with third parties* in carrying on their public service activity.” *Demeter v. Annenson*, 80 Cal. App.2d 48, 49, 57 (Cal. App.1. Dist. 1947) (emphasis added). Thus, under the predecessor of Section 532, the railroad (a common carrier) was not precluded from entering an exclusive contract with the taxi company for compensation because it was an incidental relationship. Similarly, the public utility Hypercube abides by its duty to only charge its tariffed rates of Level 3 for the service Hypercube provides Level 3. The incidental agreements between Hypercube and wireless carriers are not impacted by Section 532 in any way. What Hypercube does with the money it receives from an IXC is not limited in anyway by Section 532, except that Hypercube cannot refund or remit that money *back* to the IXC that Hypercube billed tariffed access charges.

### **III. THE IXC CONTRACTS REMAIN IRRELEVANT**

As explained in Hypercube’s Opposition to Level 3’s first motion to compel, Hypercube has no contracts with IXCs that it can produce to Level 3. The services at issue here are pursuant to tariff and are an indirect connection, which is quite different from the contracts that Level 3

seeks. Level 3 attempts to compare the tariffed services for which Level 3 owes Hypercube intrastate access charges with the contractual direct connection services that Hypercube has with other IXCs. These services are very different and the direct connect contracts vary based on the negotiated agreement between Hypercube and the IXC. For example, the contracts are individualized based on the specific physical place – or places – where interconnection will occur; the size of the interconnection facilities, how the facilities will be groomed, whether trunking will be one- or two-way, whether the facilities will be fiber-optic (*i.e.*, optical) or traditional copper wire (*i.e.*, electrical); the format to be used for passing the 8YY traffic (*e.g.*, Internet Protocol, Time Division Multiplexing, etc.), and whether and to what extent other traffic might be passed over the same facilities, among other factors. And, as Hypercube explained, Level 3 has rejected every opportunity to enter a direct connect contract with Hypercube. Level 3 cannot be discriminated against when it rejects that very direct connection. Therefore, Level 3's does not need these contracts and they remain irrelevant.

Moreover, Level 3 omits any mention of the fact that it had filed with the CPUC an entirely new complaint against Hypercube that mimics all of Level 3's counterclaims in this proceeding, C.10- 02-027 (filed Feb. 23, 2010). Level 3 actually claims in that new complaint proceeding that it believes its counterclaims are *no longer* pending in this proceeding. Yet, after making this statement in its new complaint, just days later Level 3 filed its motion for rehearing, claiming to need discovery on those counterclaims in this proceeding. Level 3 makes no mention of this fact in its Motion for Rehearing.

Level 3's discrimination allegations are meritless in either event, but Level 3's failure to mention its new complaint in its motion to compel demonstrates the lengths Level 3 is willing to

go to present an incomplete story to the Commission in order to obtain irrelevant information, harass Hypercube, and otherwise waste the Commission's resources and delay this proceeding.

#### **IV. THE COLLATERAL CONSEQUENCES OF GRANTING THE MOTION FOR REHEARING ARE CONTINUAL DELAY BY LEVEL 3**

Finally, Level 3 identifies a number of supposed collateral consequences that would result if Level 3's motion for rehearing is denied. These supposed collateral consequences all relate to Level 3's failure to accept the denial of its motion to compel and its desire to press for irrelevant discovery in order to delay the case. Rather than resolve this case on the merits, Level 3 would rather engage in over-the-top rhetoric by claiming Hypercube has been "emboldened" by the denial of Level 3's motion to compel. Motion for Rehearing 4. Level 3 claims (twice) that Hypercube was emboldened by the *February 3, 2010* denial of Level 3's motion to compel when it refused to answer many of Level 3's improper discovery requests on *January 28, 2010*, several days earlier. In other words, Level 3 oddly claims that Hypercube was emboldened by an order that was not yet issued.

Setting aside Level 3's overblown rhetoric, Hypercube has not been emboldened by the denial of Level 3's first motion to compel. Instead, Hypercube has simply refused to answer irrelevant discovery requests that seek highly confidential information of a competitor consistent with the clear Commission precedent of the *Final Opinion*. The Commission has agreed with Hypercube. Hypercube has been entirely consistent on this point, as it refused to answer many of the same irrelevant requests in Level 3's second discovery requests.

Level 3 also raised supposed collateral consequences regarding the depositions that Level 3 claimed it needed, but has yet to take. In accordance with Judge DeAngelis' ruling, Hypercube has made no fewer than four separate offers to Level 3 to schedule the depositions, and thus far Level 3 has declined to schedule even one deposition. Instead, Level 3 intends to

“re-initiate the discussion of scheduling the depositions” at some unspecified later date, again demonstrating that delay and harassment are Level 3’s true goals. In any event, the only collateral consequences that have risen in this proceeding are the result of Level 3’s refusal to accept that its motion to compel was denied and that certain documents and information are irrelevant to this proceeding. Level 3’s efforts at delay should be denied as should this motion for rehearing.

March 18, 2010

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

I, Michele Melick, certify that I have on March 18, 2010, caused a copy of the foregoing:

**HYPERCUBE TELECOM, LLC (U-6592-C) RESPONSE TO MOTION FOR  
REHEARING OF LEVEL 3 COMMUNICATIONS, LLC (U-5941-C)**

to be served by electronic email on all known parties listed on the official updated service list for C.09-05-009 available on the California Public Utilities Commission website. All parties on the attached service list have consented to service by email.

I also caused courtesy copies to be sent via overnight mail as follows:

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Executed March 18, 2010 at Washington, D.C.

          /s/            
Michele Melick



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