



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

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<p>Hypercube Telecom, LLC (U6592C)</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;">vs.</p> <p>Level 3 Communications, LLC (U5941C),</p> <p style="text-align: center;">Defendant.</p>	<p>C.09-05-009</p>
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**RESPONSE OF LEVEL 3 COMMUNICATIONS LLC
TO APPLICATION FOR REHEARING**

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I. Introduction

In Decision 10-05-029, the Commission refused to enforce an unlawful scheme through which Hypercube bills Level 3 originating access charges on behalf of wireless carriers and shares the resulting revenues with those wireless carriers while claiming its intrastate tariff entitles it to collect these improper charges. As the Commission found, Hypercube has not demonstrated that it has a joint billing arrangement for this revenue collection and sharing arrangement, and could not do so for wireless carriers without violating federal law and Commission policies. The Commission's Decision appropriately rejects Hypercube's attempt to pass itself off as just another CLEC seeking to enforce its tariff.

In its Application for Rehearing, Hypercube reargues the same matters which it previously argued to the Commission. However, under Rule 16.1(c), the only legitimate purpose of an application for rehearing is to "alert the Commission to a legal error, so that the Commission may correct it expeditiously." This is not a chance for a party to reargue positions that already have been rejected. It is also not an opportunity to raise new arguments nor to introduce alleged facts which a party did not submit during the proceeding.

Despite its 51 pages, Hypercube's Application fails to identify any legitimate legal error requiring correction. Instead, Hypercube does precisely what parties may not do in rehearing applications: it reargues the facts and the way in which the Commission dealt with the evidence and conjures up new arguments and alleged facts for the first time. The Commission should reject Hypercube's Application in its entirety.

II. Hypercube Has Not Demonstrated Any Errors of Law

The Commission does not consider arguments on motions for rehearing that allege factual rather than legal error. For example, *In Re Southern California Water Company*,¹ a water company sought rehearing of a Commission decision modifying a rate increase due to mismanagement by the regulated utility. On rehearing, the water company argued that the evidence supported its decisions. However, the Commission denied the application because it did not demonstrate legal error. The Commission explained:

the utility's arguments ...constitute no more than reargument; essentially asking [the Commission] to reweigh the evidence in its favor. Such reargument does not constitute grounds for finding a decision to be unlawful or erroneous.²

Hypercube's Application repeats at length arguments that the Commission has considered and adjudicated and which may not be reheard. To the extent that Hypercube's Application raises new arguments, those arguments do not establish legal error and do not justify reversing the Decision.

III. Hypercube's New Legal Arguments

Hypercube now creates new theories in an attempt to find error in the year of litigation which preceded the Commission's Decision. None of these arguments has merit.

¹ *Re Southern California Water Co.*, Decision No. 06-11-020, Order Granting Limited Rehearing of Decision 06-01-025, Regarding the Calculation of 2005 Gross Capital Additions, Modifying the Decision, and Denying Rehearing of the Decision, as Modified, in All Other Respects, 2006 WL 3328141 (Cal.P.U.C. Nov. 9, 2006), p. *11.

² *Id.* See also *Re Allocation of Gains from Sale of Energy, Telecommunications, and Water Utility Assets*, Decision No. 06-12-043, Order Modifying Decision 06-05-041 and Denying Rehearing of Decision, as Modified, 2006 WL 3831392 (Cal.P.U.C. Dec. 14, 2006), p.*8 (application for rehearing denied because the arguments "address policy issues that are not properly raised in an application for rehearing.").

A. The Scoping Memo Adequately Described the Issues to be Considered

After litigating issues of the legality of charging for and sharing access revenues with wireless carriers for wireless-originated 8YY calls for a year, Hypercube now claims that the Scoping Memo and Ruling did not give it adequate notice that these issues were part of the case.³ In making this assertion, Hypercube truncates the Scoping Memo and Ruling to serve its purposes. In fact, the Scoping Memo and Ruling found that the proceeding included the very defenses of Level 3 of which Hypercube now says it did not have notice:

The calls at issue in the case are 8YY calls (i.e. toll-free calls) placed by customers of wireless carriers to Level 3 toll-free customers. On July 1, 2009, Level 3 timely filed an answer in response to Hypercube's complaint. Level 3 denies any unlawful conduct. Level 3 further alleges, among other things, that Hypercube is acting as a billing agent for wireless carriers and that Hypercube's intrastate tariffs do not contain rates for the services which it claims to have provided to Level 3. Level 3 alleges it has requested that Hypercube not send this 8YY wireless-originated traffic to Level 3, but Hypercube has failed to cease sending said tariff to Level 3....On July 1, 2009, Level 3 filed a motion to dismiss or stay this proceeding based on a May 12, 2009 filing Level 3 made with the Federal Communications Commission. Hypercube filed a response in opposition to Level 3's motion to dismiss or stay on July 16, 2009....As required by Pub. Util. Code § 1701.1(b), this ruling defines the scope of this proceeding to include all issues related to determining whether Level 3 owes Hypercube for amounts due for services lawfully rendered by Hypercube to Level 3 pursuant to a Commission-approved tariff. As a preliminary matter, the scope of the proceeding also includes whether the Commission has jurisdiction under applicable law over the subject matter of the complaint.

Thus, the Assigned Commissioner unequivocally ruled that the proceeding included Level 3's allegations that Hypercube was acting as a billing agent for wireless carriers, that Hypercube's tariffs do not include rates for services allegedly provided to Level 3, and that the Complaint should be dismissed because the Commission does not have jurisdiction over such CLEC billing agency arrangements with wireless carriers.

³ Hypercube denotes this in its Application the "CMRS Service Functionality Determination." Hypercube Application at p.2.

Over the course of a year's litigation, Hypercube has repeatedly pleaded in response to and briefed the issues of whether Hypercube could collect for access charges which it billed on behalf of wireless carriers (which it sometimes mischaracterizes as "fees to access networks" of the originating wireless carriers), without once claiming that these issues were not within the Scoping Memo and Ruling.⁴ Indeed, in successfully opposing Level 3's motion to amend the Scoping Memorandum, Hypercube argued:

[T]he Scoping Memo specifically notes that "Level 3...alleges, among other things, that Hypercube is acting as a billing agent for wireless carriers and that Hypercube's intrastate tariffs do not contain rates for the services which it claims to have provided to Level 3." Scoping Memo at 2..."[T]he scope of the proceeding also includes whether the Commission has jurisdiction under applicable law over the subject matter of the complaint."⁵

The allegations to which Hypercube refers appear in Level 3's answer, defenses, and counterclaims. Hypercube thus cannot claim to be surprised that the unlawfulness of Hypercube's providing billing agency services, under billing arrangements with wireless carriers, was part of this proceeding.

This is unlike the case cited by Hypercube. In *Southern Cal. Edison Co. v. Pub. Utils. Comm'n*,⁶ the scoping memo included only "whether to adopt rules to prohibit 'bid

⁴ See for example: Hypercube Telecom, LLC's Opposition to Level 3 Communications, LLC's Motion to Dismiss, etc., 7/16/09, p. 11 ("[T]he gravamen of Level's argument appears to be that CMRS carriers cannot do indirectly what they may not do directly. Level 3, therefore, suggests (wrongly) that Hypercube is billing Level 3 for work performed by CMRS providers."); Statement of Facts of Hypercube Telecom, LLC, 9/4/09, p. 4, para. 25 ("Hypercube does not bill Level 3 (or anyone else) for the functionality provided by others, including the wireless carriers."); Hypercube Telecom, LLC's Response in Opposition to Level 3 Motion to Compel, 12/21/09, p.1 ("Because Level 3 has no colorable defenses to Hypercube's breach-of-tariff claim, it has trotted out an old, irrelevant, and never-credited excuse to paying Hypercube's tariffed access charges—that Hypercube pays wireless carriers for access to their networks."); Hypercube Telecom, LLC Motion for Summary Judgment, 3/8/10, p. 17 ("Level 3's disparagement of Hypercube for making payments for use of the wireless carriers' networks is a red herring."); Hypercube Telecom, LLC Response to Motion to Compel Responses to Second Discovery of Level 3, 3/15/10, p. 3 ("Hypercube admits to having commercial contracts with wireless carriers for access to their networks, Hypercube further admits that it makes payments to the wireless carriers in accordance with the voluntarily-negotiated terms of those commercial contracts.").

⁵ Hypercube Telecom, LLC's Response to Level 3 Communications, LLC's Motion to Modify Scoping Memorandum and Order, 12/29/09, pp. 2-3.

⁶ (2006) 140 Cal App. 4th 1085, 45 Cal. Rptr. 485

shopping’ and ‘reverse auctions’ in compliance with rules governing public works contracts.” The Commission broadened the proceeding at the behest of labor entities at the last minute, after voluminous comments had been received on the original issues, to include “prevailing wage rates.” As a result, the Court found that, while the Commission may introduce new issues beyond the scoping memorandum with sufficient notice and process, it did not do so in that instance. That case holds that the Commission’s failure to provide parties with reasonable notice of the scope of a proceeding, either through the Scoping Memo or through other notice and process, violates their rights to due process.

In the present case, the Scoping Memo put Hypercube on notice that the legality of its billing arrangements with wireless carriers was part of the case. Hypercube then acknowledged in its own filings that it fully understood the stated scope. Having filed numerous pleadings, motions and briefs addressing these issues over the course of a year of litigation, Hypercube’s claim of lack of notice must fail.

Hypercube’s claim that it was prejudiced by the inclusion of an issue that it briefed and argued throughout is beyond the pale. The prejudice it claims is that “the prepared testimony submitted by Hypercube did not focus on that element (or whether a ‘joint billing arrangement’) was required.” A representative sample of Hypercube’s testimonial submissions disproves that claim. For example, Hypercube’s Senior Vice-President Mr. McCausland provides the following question and response in his testimony.

Q. DOES HYPERCUBE BILL LEVEL 3 FOR THE WORK PERFORMED BY THE WIRELESS CARRIER?

A. No. Hypercube only bills Level 3 for the work that Hypercube performs in order to identify, switch and transport the call for subsequent completion by Level 3, as outlined in Exhibit 3.⁷

The Exhibit 3 to which this Hypercube witness refers is a set of call flow diagrams, similar to those which Hypercube has attached to its Application here, which purportedly support the witness's claims.

At pages 31 to 32 of his testimony, the same witness said the following:

Q. HAS LEVEL 3 MADE ANY OTHER ARGUMENTS REGARDING ITS UNLAWFUL REFUSAL TO PAY HYPERCUBE'S TARIFFED SWITCHED ACCESS CHARGES?

A. Yes. Level 3 makes four other arguments. First, Level 3 claims that payments by Hypercube to wireless carriers for access to their networks are somehow unlawful. Second, Level 3 argues that language in Hypercube's tariff that requires Level 3 to block its own calls is unlawful. Third, Level 3 claims that Hypercube is discriminating against Level 3. Fourth, Level 3 alleges that Hypercube is misusing its Commission-granted license and the Commission's complaint process.

Q. WHY DOES LEVEL 3 CLAIM THAT PAYMENTS BY HYPERCUBE TO WIRELESS CARRIERS ARE UNLAWFUL?

A. This Level 3 claim is a ruse, which Level 3, as one of Hypercube's primary competitors, invokes to disparage Hypercube with terms like "kick-back" and "insertion scheme." Hypercube's arrangements with wireless carriers have no bearing whatsoever on Level 3's obligation to pay switched access charges for the service provided by Hypercube....Level 3's argument that this Commission has no jurisdiction to resolve this proceeding because of its filing of a Petition for Declaratory Ruling against Hypercube at the FCC is likewise unfounded. The FCC's treatment of Level 3's Preemption Petition demonstrates that the FCC has no intention of being brought into a co-carrier collection dispute under the guise of Level 3's self-styled and self-serving "petition for declaratory ruling.".... Level 3 simply had a brief, public conversation with itself; that Level 3 staged its monologue in an FCC docket has no bearing on the Commission's jurisdiction over Hypercube's proceeding here to enforce its California tariff...

⁷ Hypercube Telecom, LLC's Opening Prepared Testimony of Robert W. McCausland (Public Version), 1/11/10, at p. 10. Because Hypercube has made demonstrably false statements about the nature and extent of its testimony on this issue, Level 3 is attaching to its Response the pages of testimony and exhibits to which Level 3 refers in response.

The subject of Level 3's FCC Petition is Level 3's request that the FCC address as a matter of general applicability the unlawfulness of Hypercube and other carriers charging for switched access service provided by wireless carriers.⁸

Capping his testimony, the witness states:

Q. DOES LEVEL 3 ALSO ASSERT THAT PAYMENTS MADE BY HYPERCUBE TO WIRELESS CARRIERS MAKE HYPERCUBE'S SERVICE NON-COMPENSABLE?

A. No. Although Level 3's legal briefs keep shifting somewhat on this point, correspondence between the parties and other Level 3 documents demonstrate that Level 3 knows Hypercube's service is fully compensable, regardless of whether Hypercube pays wireless carriers for access to their networks. Hypercube's tariffed rates do now and always have complied with this Commission's regulations. Nevertheless, as Level 3's dispute notice describes (see 2 Exhibit 4), Level 3 takes issue with Hypercube's tariffed rates. Level 3 likewise represented to the FCC that it would begin paying Hypercube once its private offset calculations were satisfied. In this proceeding, however, its counsel has focused on Hypercube's contractual relationships with the wireless carriers on whose networks Level 3's toll-free calls are originated that Hypercube carries for Level 3, and even gone so far as to suggest that all wireless-originated calls are interstate....⁹

Hypercube's other witness, an economic expert, submitted a sworn declaration in support of his testimony. In that declaration, which is part of the record, the economic expert admits that Hypercube shares its access revenues with wireless carriers which originate the traffic that Hypercube transmits to Level 3 for termination for purposes of defraying the wireless carriers' originating access costs.

By pinning this label on Hypercube, Level 3 attempts to frame Hypercube's revenue-sharing agreements with CMRS carriers as "unlawful" "kickbacks."¹⁰

⁸ See discussion of Level 3's FCC Petition at Section III.D.2, below.

⁹ Hypercube Telecom, LLC's Opening Prepared Testimony of Robert W. McCausland (Public Version), 1/11/10, at pp. 38-39.

¹⁰ Declaration of J. Gregory Sidak, Public Version, 1/11/2010, p. 84, para. 147. Mr. Sidak's Declaration was filed under seal in this case with Judge DeAngelis' permission on January 19, 2010, as an attachment to the Motion of Level 3 to Redesignate Declaration of Hypercube Witness J. Gregory Sidak as Non-Confidential with Exception of Specified Numbers and Tables. The filed Confidential Version of Mr. Sidak's sworn declaration of course includes the non-confidential statements which are in the redacted but otherwise identical Public Version cited here. The Public Version is cited here because confidential material is not necessary as part of this Response.

At least fourteen pages of the Hypercube expert's sworn declaration are devoted to explaining why he and Hypercube believe that the FCC rule barring wireless carriers from filing intrastate access charges is not correct as a matter of economic policy. Therefore, Hypercube's declarant opines, wireless carriers are justified in using Hypercube's tariffs to do an end run around the FCC's rules--by having Hypercube bill Level 3 for the costs the wireless carriers incur in call origination and then sharing in Hypercube's resulting revenues.¹¹

Although **Hypercube and the wireless companies** cannot directly bill 8YY callers for the **cost that they incur, this cost if not recouped from Level 3** would be passed onto the 8YY callers in other forms, such as lower quality calls or higher monthly fees.¹²

The way in which Hypercube accomplishes this billing for wireless company access services, according to the Hypercube declarant, is through "revenue-sharing agreements with CMRS carriers."¹³

The practice of wireless carriers using CLEC tariffs to accomplish indirectly what the wireless carriers are not permitted to do directly was specifically prohibited by the FCC. This of course is the same basis on which the Commission dismissed Hypercube's claims: under its intrastate tariffs, Hypercube is billing for originating access provided by wireless carriers and has not and cannot prove that it has a lawful joint billing arrangement with the wireless carriers. Such joint billing arrangements with wireless carriers are unlawful.

¹¹ *Id.*, pp. 59-72, 84. Copies of those pages are attached to this Response.

¹² *Id.* at p. 63, para. 102 (emphasis supplied).

¹³ *Id.* at p. 84, para. 147.

Hypercube's extensive briefing and submission of testimony on these issues belies both its claim that the Scoping Memo was unclear and its claim that it suffered alleged prejudice as a result. There is no merit to these contentions.

B. Issuance of a Proposed Decision Was Proper

Hypercube next contorts Commission procedure, by arguing that ALJ DeAngelis was required to issue a Presiding Officer's Decision rather than a Proposed Decision, and that it was "prejudiced" as a result. That this is a contrived and strained argument is demonstrated by the fact that Hypercube made no mention of it in either its Opening Comments or Reply Comments on the Proposed Decision.

The effect of this argument, if correct, would be that whenever a Scoping Memo is issued which includes a hearing, the subsequent granting of any motion to dismiss or motion for summary judgment automatically requires that a Presiding Officer's Decision rather than a Proposed Decision be issued. Hypercube's argument conflicts with Commission Rules 14.1(a) and (b), however, which provide:

For purposes of this article, the following definitions shall apply:

(a) "Presiding officer's decision" is a recommended decision that is proposed by the presiding officer in an adjudicatory proceeding **in which evidentiary hearings have been conducted**.

(b) "Proposed decision" is a recommended decision, other than a presiding officer's decision as defined in subsection (a), that is proposed by (1) the presiding officer or (2) where there is not a presiding officer, the Administrative Law Judge or the assigned Commissioner in a ratesetting, quasi- legislative, **or adjudicatory proceeding**. (emphasis supplied)

Since no evidentiary hearing was conducted, the issuance of a Presiding Officer's Decision would not have been appropriate. Instead, the proper procedure was to issue a Proposed Decision. That is what ALJ DeAngelis did in this case.

Hypercube creates this argument out of a contrived reading of a statute, with which, Hypercube argues, Commission Rule 14.1(a) is not consistent (“While Rule 14.1(a) permits the issuance of a proposed decision instead of a POD if evidentiary hearings have not been held, the rule does not comport with the requirements of Section 1701.2(a) which requires a POD”)(emphasis in original). Therefore, Hypercube argues, the Commission should follow Hypercube’s reading of that statute, rather than the Commission’s own rules which do not require--or for that matter *permit*--the issuance of a Presiding Officer’s Decision on a case in which evidentiary hearings have not been held.

Moreover, Hypercube’s claim of prejudice is odd. Hypercube does not claim that it did not have the opportunity to address the issues it raised regarding the Proposed Decision, but instead claims that it could have submitted even more pages of argument if a Presiding Officer’s Decision had been issued instead of the Proposed Decision. But Hypercube made no request for additional pages for its Opening or Reply Comments on the Proposed Decision, and did not raise the propriety of a Proposed Decision.

Finally, Hypercube argues, it did not have the opportunity to address edits of the Proposed Decision which were based upon the comments of the parties. Specifically, Hypercube argues that it did not know that it needed to address the issue of whether “Hypercube seeks to collect a tariffed rate for a service that necessarily includes the functionality provided by the CMRS [i.e., wireless] provider.” Hypercube’s assertion is at odds with the original Proposed Decision and its own comments.

The original Proposed Decision included the following:

Hypercube has contracts with CMRS carriers pursuant to which Hypercube makes payments to the CMRS carriers. The details of these contracts and related

payments are not alleged in the complaint. Because Hypercube does not provide originating access or, stated differently, “full end-to-end functionality,” CMRS carriers originate the calls and route the 8YY traffic to Hypercube pursuant to these contracts. . .Hypercube relies on its California Tariff, Schedule Cal. P.U.C. No. 2, to charge Level 3 for access services, including originating access services even though originating access is provided by the CMRS carrier. The complaint does not allege the existence of any independent contracts between Hypercube and Level 3 or between the originating CMRS carrier and Level 3 to govern this relationship between any of the carriers and Level 3. Level 3 claims the charges are unlawful under Hypercube’s tariff and federal law.¹⁴

In its complaint, Hypercube alleges that it should be permitted to collect its switched access rate for a function, originating access service, provided by a CMRS carrier. In certain situations, Hypercube’s service provided with a CMRS carrier may be permissible. For example, the FCC has explained that a CLEC may collect the full benchmark rate even when the CLEC does not originate or terminate the call to the end-user if the CLEC is collecting the rate pursuant to a “joint billing arrangement” with a carrier that does serve the end-user. Importantly, for purposes of this complaint, the FCC noted that the “validity of these joint billing arrangements is premised on each carrier that is party to the arrangement billing only what it is entitled to collect from the IXC for the service it provides.”

Under the facts alleged in the complaint, Hypercube is arguably seeking to collect originating access charges on behalf of a CMRS carrier. However, Hypercube has not alleged the existence of a joint billing arrangement that provides Hypercube the right to collect rates for the CMRS carrier. Perhaps such a contract exists but Hypercube provided no details on its CMRS contract. Moreover, even if such an agreement existed, Hypercube has not alleged that the CMRS carrier has an independent right to collect access charges from Level 3. The 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. Accordingly, Hypercube has not alleged sufficient facts to establish its right to collect originating access charges from Level 3 on behalf of the CMRS carrier under a joint billing arrangement or under an independent agreement between the CMRS carrier and Level 3.¹⁵

The original Proposed Decision therefore included in its findings:

2. Hypercube has not alleged the existence of a joint billing arrangement that provides Hypercube the right to collect rates for the CMRS carrier.
3. Hypercube has not alleged that the CMRS carrier has an independent right to collect access charges from Level 3.
4. Hypercube has not alleged sufficient facts to establish its right to collect

¹⁴ Proposed Decision, pp. 2-3, footnotes omitted.

¹⁵ *Id.*, pp. 8-9 (footnotes omitted).

originating access charges from Level 3 on behalf of the CMRS carrier under a joint billing arrangement or under an independent agreement between the CMRS carrier and Level 3.

Hypercube filed Opening and Reply Comments on the Proposed Decision. The title and first sentences of its first point of argument in its Opening Comments are:

I. THE PD WRONGLY AND IMPERMISSIBLY ASSUMES THAT HYPERCUBE COLLECTS ACCESS CHARGES FOR WORK PERFORMED BY WIRELESS PROVIDERS

The PD grants a motion to dismiss for failure to state a claim based on the legally and factually incorrect assumption that Hypercube collects access charges for work performed by wireless providers. PD at 8. Hypercube never made that allegation. And, as a matter of fact, that allegation is false. The assumption is so central to the outcome of the PD, so “material,” that a formal finding on the point is required by California Public Utilities Code Section 1705 and 1757(a)(3). (footnotes omitted).

The initial paragraph of Hypercube’s argument in its Reply Comments began:

I. HYPERCUBE DOES NOT BILL OR COLLECT ACCESS CHARGES FOR ANY WORK PERFORMED BY WIRELESS CARRIERS

Level 3 offers no rebuttal for Hypercube’s repeated statement that it only bills access charges to Level 3 for the services that Hypercube provides Level 3 using Hypercube’s network pursuant to Hypercube’s intrastate access tariff. Hypercube only charges for the functions Hypercube provides to IXCs, like Level 3, which fully complies with the Commission’s regulations and the Federal Communications Commission’s order in *In re Access Charge Reform*, Eighth Report and Order, 19 FCC Rcd. 9108, ¶ 17 (2004). Hypercube does not charge for network functions (such as local switching) provided by wireless carriers (or anyone else for that matter). (footnotes omitted).

Hypercube’s claim that it did not know that its collection of a tariffed rate for a service that includes the functionality provided by a wireless carrier was a key issue in the case at the time it filed its comments on the original Proposed Decision is false, and needs no further comment.

C. The Commission Appropriately Applied the Proper Standard

Hypercube does not argue that the standard which the Commission applied to the motion to dismiss was improper, but instead that it was improperly applied. However, the record establishes that there is no dispute as to any material fact. Dismissal was therefore properly granted as a matter of law.

By framing this issue as it does, Hypercube seeks to open the door to an extended re-argument of the evidence in this case, which is not proper on an Application for Rehearing. Hypercube attacks the factual findings by citing to mere assertions it has made without factual support in various filings. But of course, the assertions of pleadings, even if verified, are not sufficient to overcome a motion to dismiss based on facts in the record.¹⁶

Hypercube assails the Decision for not quantifying the amount of its undisputed payments to wireless carriers, or the amount of access charges wireless carriers would charge if permitted to file access charges, or not determining whether the level of access charges had some bearing. Hypercube overlooks that as the complainant, it had the burden of proof, yet chose not to raise these “issues” by remaining silent throughout, including in its own motion for summary judgment and its comments on the Proposed Decision. Moreover, Hypercube does not point to any law or rule which says that the amount of originating access charges which Hypercube collects on behalf of wireless carriers affects the legality of those payments. Hypercube points to no legal support

¹⁶ *Terrell v. Local Lodge 758, Intl. Assn. of Machinists* (1957) 150 Cal.App.2d 24, 309 P.2d 130; *McHugh v. Howard* (1958) 165 Cal.App.2d 169, 331 P.2d 674.

because there is none. Therefore, these additional factual matters have no relevance to the case.

While argument about the facts is not appropriate in this context, due to Hypercube's insistence on weaving factual arguments through its lengthy Application, Level 3 will summarize record evidence which unequivocally supports the Commission's Decision.

D. Decision 10-05-029 is Supported by Substantial Evidence in Light of the Whole Record

There is no doubt in the record that Hypercube charges for originating access provided by wireless carriers. This conclusion is supported not only by the record citations in D.10-05-029, but also in the remainder of the record. The statutory standard in complaint cases requires only that factual findings of the Commission be supported by "substantial evidence in light of the whole record."¹⁷ Hypercube's tariffs, its admissions, and the sworn declaration of Hypercube's expert witness unequivocally support the conclusion that Hypercube bills Level 3 for originating access provided by wireless carriers, and not by Hypercube.

The record is unequivocal that Hypercube does not provide originating access services to Level 3. Hypercube acknowledges that it is an intermediate carrier that only provides intermediate transit. Hypercube admits that the calls in question are placed by the customers of wireless carriers; therefore those calls are originated by the wireless carriers and not by Hypercube.

Hypercube's complaint specifically admits:

¹⁷ Cal. Public Util. Code 1757(a)(4).

The calls at issue in this case are toll-free calls made by consumers using their wireless phones to Level 3's 8YY subscribers.¹⁸

(C)ertain wireless carriers have found it more convenient to route access calls, including 8YY calls, to LECs as early in the call stream as possible. By doing so, the wireless carrier minimizes the amount of work it must perform on the part of the IXC for free.¹⁹

Consistent with this, the joint Statement of Stipulated Facts of the parties states:

“Hypercube provides transit services in the State of California.”²⁰ Hypercube is not a wireless carrier, and therefore cannot be the originating carrier for the calls on which it bases its entire complaint. Instead, it is a carrier “delivering the calls from a wireless carrier’s networks [*sic*] to an IXC’s network”²¹ via the ILEC tandem switch (as is the case with Level 3) or through direct connection with those IXCs that have agreed to such an arrangement. Level 3 has no such direct connection agreement with Hypercube and has informed Hypercube that it does not want to receive these calls through Hypercube since those calls are then routed to the Incumbent Local Exchange Carrier. Level 3 already maintains direct connections with the incumbent provider.

1. Hypercube’s Tariffs

The tariffs which Hypercube had on file until Jan. 1, 2009²² provide that Hypercube charges for originating access as an element of a “blended rate.” Hypercube “bills originating and terminating access per minute as a blended rate. The blended rate includes Switching and Transport.”²³ Hypercube’s tariffs also state that 800 originating

¹⁸ Complaint of Hypercube Telecom, LLC, C.09-05-009, para. 16.

¹⁹ *Id.* at para. 18.

²⁰ Statement of Stipulated Facts, No. 2, C.09-05-009, filed September 4, 2009.

²¹ Complaint of Hypercube Telecom, LLC, C.09-05-009, para. 19.

²² Hypercube’s Complaint was filed on May 8, 2009. Hypercube’s various tariffs are attached to its complaint. Exhibit A, Tabs 2 and 3 are the tariffs which were in effect from 2005 until 2009. Tab 1 is the tariff, effective January 1, 2009, which Hypercube dissects at length in its Application.

²³ KMC Data, LLC Schedule Cal. P.U.C. No. 2-T, Section 4.4.1; Hypercube Telecom, LLC Schedule Cal. P.U.C. No. 2-T, Section 4.4.1 (KMC Data, LLC changed its name to Hypercube Telecom, LLC by Advice

access “is for 8XX traffic that is switched by the Company’s [i.e., Hypercube’s] switches and originated by an End User of an Exchange Carrier.”²⁴ The tariff then states that CMRS and wireless service providers are Exchange Carriers for purposes of originating calls which pass through Hypercube’s intermediate switches.²⁵ Hypercube’s Switched Access Service, for which it charged Level 3, includes within it “access to the network of an Exchange Carrier for the purpose of **originating** or terminating communications.”²⁶

Hypercube’s Switched Access Service

which is available to Customers for their use in furnishing their services to End Users, **provides a two-point communications path between a Customer and an End User...Switched Access Service provides the ability to originate calls from an End User to a Customer** and to terminate calls from a Customer to an End User.²⁷

An End User is

any individual, association, corporation governmental agency or any other entity, other than an Interexchange Carrier which subscribes to local exchange services, interexchange services, CMRS, VOIP services or other telecommunications service provided by an Exchange Carrier, Common Carrier, Wireless Provider, VOIP Provider or other provider of services **that transit the Company’s [i.e., Hypercube’s] facilities.**²⁸

Under Hypercube’s tariff, a Customer is

The person, firm, corporation or other entity which orders service or receives service including through a Constructive Order and is responsible for the payment of charges and for compliance with the Company’s tariff regulations. The Customer could be an interexchange carrier, a local exchange carrier, a wireless provider, or any other carrier that operates in the state.²⁹

Letter filed with this Commission on September 15, 2008, Statement of Stipulated Facts, No. 3, and maintained the same tariff language).

²⁴ *Id.*, Section 2.3.3C.

²⁵ “Exchange Carrier: Any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged in the provision of local exchange telephone service, CMRS, wireless services or VOIP Service.” KMC and Hypercube California Tariffs, *supra*, at Section 1, Definitions.

²⁶ *Id.* (emphasis supplied).

²⁷ KMC and Hypercube California Tariffs, *supra* at Section 3.1 (emphasis supplied).

²⁸ KMC and Hypercube California Tariffs, *supra* at Section 1 (emphasis supplied).

²⁹ *Id.*

Therefore, according to Hypercube's California tariff, Hypercube claims to be empowered to charge its Customers, including carriers like Level 3 who do not want the service, for originating switched access as part of its blended rate because it provides a "two point communications path" between End User subscribers of CMRS or wireless carriers and Level 3. However, because the undisputed facts are that these wireless end user originated calls only transit Hypercube's facilities, FCC and Commission rules and orders prohibit Hypercube's practice of charging carriers for functions it does not perform.³⁰

2. Hypercube Admissions

Hypercube has also admitted that it purchases "access" to wireless providers' customers so that the wireless carriers can then deliver toll-free traffic which they originate to Hypercube;³¹ in other words, Hypercube shares the switched access revenues it collects from routing this wireless originated toll-free traffic to Level 3 with the wireless carriers that originate the traffic. This unlawful access revenue sharing with originating wireless carriers is the subject of Level 3's Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls to the Federal Communications Commission ("FCC Petition"). The FCC Petition requests that the FCC find that Hypercube's and similar carriers' intrastate switched access tariffs are pre-empted as to wireless carrier-originated 8YY (toll-free) calls on which Hypercube and other Inserted CLECs kick back access charges to the originating wireless carriers. Inserted CLECs are CLECs that are retained by CMRS carriers and

³⁰ Level 3 also believes and has alleged that there is no specific rate provided by Hypercube's tariffs effective from 2005-2009 for Hypercube's 8YY service, but argument regarding this issue is not necessary for this Response as the Commission did not need to reach this issue to resolve the case. However, Level 3 of course does not for any purpose abandon, waive or concede this claim.

³¹ Hypercube FCC Response at pp. 14-15, Attachment B to Level 3 Motion to Dismiss.

inserted into the flow between the CMRS carrier and the ILEC tandem transit provider for reasons other than efficient routing or interconnection. The FCC Petition requests that the FCC prohibit Hypercube and other carriers from applying inappropriate switched access charges to this Inserted CLEC traffic. The FCC Petition asks the FCC to find that these kickbacks violate federal law, 47 U.S.C. §§201, 202, 203, and 503, and to pre-empt the application of intrastate originating access tariffs to such traffic pursuant to 47 U.S.C. §332(c)(3).³²

In addition, Hypercube in a filing in this case described its payments to wireless carriers as “commissions.” “Commissions” are a portion of the Hypercube access revenues for 8YY calls which originate with wireless carriers. Analogizing wireless carriers to non-carrier hotels and universities which receive commissions on calls placed by hotel guests and students, Hypercube claimed that its “commissions” to wireless carriers are also permissible. Of course, the FCC does not treat wireless carriers like hotels and universities.³³

³² Attachment A to Level 3 Motion to Dismiss, Official Notice requested therein.

³³ Hypercube’s statement confirms that Hypercube shares revenues with the wireless carriers: ‘As the FCC noted in its Eighth Report and Order, “the IXCs contend [that] some competitive LECs may have agreed to share with some customers generating a high volume of 8YY traffic a portion of the access revenues that it receives in connection with the traffic.” Eighth Report and Order, 19 FCC Rcd. ¶ 70 (footnotes omitted). In response, the FCC found that practice unproblematic:

[W]e are not convinced that the commission arrangements that competitive LECs may have entered into with 8YY generators necessarily affect the level of traffic that these customers, typically universities and hotels, generate. The IXCs have failed to demonstrate that commission payments to 8YY generators such as universities or hotels translate effectively into incentives for the individuals who actually use those facilities to place excessive or fraudulent 8YY calls. The commission payments challenged by the IXCs go to the hotel or university itself, not to the students or hotel guests who place the bulk of the 8YY calls from these institutions. Accordingly, it does not appear that these commissions create any incentive for those actually placing the calls artificially to inflate their 8YY traffic. Rather, as the competitive LECs contend, the primary effect of the commission payments appears to be to create a financial incentive for the institutions to switch from the incumbent to a competitive service provider. Access Charge Reform, Reform of Access Charges Imposed by Competitive Local

While Hypercube's admission is striking, its reliance on the *Eighth Report and Order* is misplaced. CLECs like Hypercube are not permitted to insert themselves in order to collect access charges for service functions provided by wireless carriers. As Hypercube admits:

Unlike LECs (CLECs and ILECs), however, wireless carriers may not file tariffs with the FCC or the state commissions for these services.³⁴

Moreover, the law is clear that wireless carriers cannot do indirectly what they are not permitted to do directly, and cannot use intermediate CLECs like Hypercube to obtain originating access charges.

In cases where the carrier serving the end-user had no independent right to collect from the IXC, industry billing guidelines do not, and cannot, bestow on a LEC the right to collect access charges on behalf of that carrier. For example, the Commission has held that a CMRS carrier is entitled to collect access charges from an IXC only pursuant to a contract with that IXC. **If a CMRS carrier has no contract with an IXC, it follows that a competitive LEC has no right to collect access charges for the portion of the service provided by the CMRS provider.**³⁵

Noting that it had prohibited CMRS carriers from tariffing access charges,³⁶ the FCC ruled,

Exchange Carriers, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108 (2004) ("Eighth Report and Order"). 6Id. (footnotes omitted).

'The same rationale applies here. **Hypercube pays wireless carriers to access their networks to handle these calls as part of its tandem access services business** (not unlike the fact that Hypercube also has to pay ILECs to access their networks to deliver indirectly the calls to the 8YY providers with which Hypercube is not directly interconnected, such as Level 3). Thus, the wireless carriers are no different from the hotels and universities in the FCC's analysis above: because the network-access payments go to the wireless carriers (not their subscribers, the calling parties), there is no incentive for a caller to make more (or fewer) toll-free calls than she otherwise would. But in any event, because the CLECs' access charges must accord with the FCC's rate regime, the FCC found that there is no harm to the IXCs. See id. ¶ 71 ("even if we were persuaded that there was an incentive for 8YY traffic generation, the fact that competitive LEC access rates are now subject to the declining benchmark should eliminate any harm to IXCs from this traffic...."). Hypercube Motion for Summary Judgment, 3/8/10, pp. 18-20 (emphasis supplied).

³⁴ Hypercube Complaint, para. 17 (footnote omitted).

³⁵ *Eighth Report and Order*, 19 FCC Rcd at 9115 ¶ 16 (emphasis supplied).

³⁶ *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, 13197 ¶ 11 (2002): "Following the *CMRS Second Report and Order* [9 FCC Rcd 1411,

We 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.³⁷

Therefore, Hypercube's California intrastate tariffs violate FCC rules because under them Hypercube serves as a competitive LEC which is collecting access charges for CMRS providers.

3. Sworn Declaration of Hypercube's Expert

Finally, as noted above, Hypercube's expert witness, in a sworn declaration, admits that Hypercube shares its access revenues with wireless carriers which originate the traffic that Hypercube transmits to Level 3 for termination for purposes of defraying the wireless carriers' originating access costs.

By pinning this label on Hypercube, Level 3 attempts to frame Hypercube's revenue-sharing agreements with CMRS carriers as "unlawful" "kickbacks."³⁸

Hypercube's expert expresses his belief that the FCC rule barring wireless carriers from filing intrastate access charges is not correct economic policy. Based on this conclusion, he tries to justify Hypercube's use of its tariffs to try to avoid the FCC's rules.³⁹

Although **Hypercube and the wireless companies** cannot directly bill 8YY callers for the **cost that they incur, this cost if not recouped from Level 3** would be passed onto the 8YY callers in other forms, such as lower quality calls or higher monthly fees.⁴⁰

1480 ¶ 179 (1994)] tariffs no longer were available to CMRS carriers; therefore, compensation is available only through an agreement."

³⁷ *Eighth Report and Order*, 19 FCC Rcd at 9116, n. 57.

³⁸ Declaration of J. Gregory Sidak, Public Version, 1/11/2010, p. 84, para. 147.

³⁹ *Id.*, pp. 59-72, 84.

⁴⁰ *Id.* at p. 62, para. 102 (emphasis supplied).

Hypercube bills for wireless company access services, the expert reports, through “revenue-sharing agreements with CMRS carriers.”⁴¹ But the FCC has also ruled that it is unlawful for wireless carriers to use CLEC tariffs for this purpose.

The Decision’s conclusion that the undisputed facts in the record establish that Hypercube bills Level 3 for originating access provided by wireless carriers is fully supported by the record citations in the Decision as well as by the plain language of Hypercube’s tariffs attached to its Complaint, and Hypercube’s admissions and sworn expert declaration. Hypercube’s claim is entirely without merit.

E. The Commission Properly Applied the Filed Rate Doctrine

The original Proposed Decision did not discuss the application of the Filed Rate Doctrine. In response to Hypercube’s comments, the Proposed Decision was revised.

Hypercube in effect argues that once a tariff has been filed with this Commission, even if that tariff or its application conflicts with FCC orders, the tariff and its application nevertheless remain state law. Hypercube is wrong. Decision 10-05-029 recognizes that Hypercube’s billing arrangements with wireless carriers are not acceptable under federal law and regulation, and the existence of a state tariff cannot save those things which the FCC has excluded from state tariffing—that is, collection of access charges by wireless carriers through their own tariffs or through Hypercube’s tariffs.⁴²

The FCC thus has ruled that wireless carriers may not directly file tariffs to collect access charges, and that they cannot avoid the effect of this ruling by having CLECs like Hypercube file such tariffs. For the Commission to apply Hypercube’s tariffs to wireless-originated 8YY traffic would be counter to these FCC rulings. Hypercube cites no

⁴¹ *Id.* at p. 84, para. 147.

⁴² See discussion above at pp. 18-20

authority which would require carriers to pay access charges which may not be filed under federal law because the carrier had managed to slip the charges into an intrastate tariff.

In the present case, Hypercube has filed tariffs under which it collects for originating access on behalf of wireless carriers and shares the resulting revenue with them. Even though the FCC has outlawed such indirect collection of access charges by CLECs on behalf of wireless carriers, Hypercube argues that these tariffs should be enforced under the Filed Rate Doctrine. Hypercube as a CLEC has a right to file access tariffs and bill applicable charges for its own services, but may not do so for services provided by wireless carriers. Tariffs under which Hypercube seeks to collect access charges of other carriers with which Hypercube has not and may not enter joint billing arrangements are plainly not subject to the application of the Filed Rate Doctrine any more than would be intrastate tariffs filed by the wireless carriers themselves.

As this Commission observed in D.04-05-057, in discussing the filed rate doctrine, “no carrier should be able to rely on its filed tariffs for protection against the consequences of its own unlawful or deceptive conduct.”⁴³

Hypercube also argues that Level 3 impliedly consented to Hypercube’s unlawful charges merely by receiving these calls. As the Decision correctly concludes, Hypercube’s filed tariff required Level 3 to block these calls in order not to consent to their receipt, but that blocking was not technically feasible. Hypercube continued to send these calls to Level 3, despite Level 3 requesting that Hypercube stop. Thus, the

⁴³ Order Instituting Rulemaking on the Commission’s Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities, Rulemaking 00-02-004, Interim Decision Issuing General Order 168, Rules Governing Telecommunications Consumer Protection, D.04-05-057, (May 27, 2004), p. 110. While the G.O. 168 Interim Rules adopted in D.04-05-057 were subsequently replaced in D.06-03-013 for other reasons, the Commission’s did not in D.06-03-013 repudiate this observation which is salient and relevant to the issues at hand here.

Hypercube tariff gave Level 3 the right to refuse to receive this wireless originated 8YY traffic, but no feasible means of blocking it.⁴⁴ Level 3 is like the defendant in *AT&T v. Midwest Paralegal Services, Inc.*,⁴⁵ in that it had no customer relationship with Hypercube; Hypercube's tariff offered Level 3 the right to avoid the charges only by a method under which it would not be feasible to do so. Therefore, Hypercube's Filed Rate Doctrine argument has no merit.

F. The Commission Properly Weighed the Evidence in the Whole Record

Hypercube claims that the Commission did not properly analyze and weigh its tariffs. Of course, as explained above, the tariff which Hypercube urges the Commission to analyze was in effect for only a few months preceding the filing of Hypercube's complaint. Hypercube ignores its tariffs which were in effect from 2005 to 2009, the period covered by the claims in Hypercube's complaint. Hypercube instead prefers to discuss at length the later tariff, in which its CMRS kick-back billing scheme was better disguised.

Equally as important is the fact that Hypercube has admitted in declarations and other filings in this case that it shares its originating access revenues with wireless carriers, which it variously characterizes as "revenue-sharing" or "commissions." This access revenue sharing is undisputed, and is a transparent attempt to aid the wireless carriers in an effort to evade the FCC's mandates.

Hypercube's arguments are without merit.

⁴⁴ See also *Blue Casa Communications, Inc. v. Pacific Bell*, D.09-03-016, 2009 WL 724911 (March 12, 2009) in which the Commission enforced provisions of a Commission-approved interconnection agreement providing for payment of third party information services charges against a carrier, where it was feasible to obtaining blocking of the subject calls, but the carrier failed to pursue those feasible actions.

⁴⁵ 2007 WL 1341448 (E.D.Wisc. 2007)

G. Hypercube Did Not Seek Recovery for Calls Placed From Wireline Numbers

In a true measure of desperation, Hypercube asserts that the Commission dismissed its “claim” for calls placed from wireline numbers.⁴⁶ In fact, Hypercube did not make this claim in its Complaint. Instead, Hypercube’s complaint states:

The calls in this case are toll-free calls made by consumers using their wireless phones to Level 3’s 8YY subscribers.⁴⁷

Hypercube then elaborates on the alleged nature of this wireless-originated traffic at paragraphs 17-21 of its complaint.

The Scoping Memo and Ruling therefore found that Hypercube had limited its complaint to wireless carrier-originated calls.

The calls at issue in the case are 8YY calls (i.e. toll-free calls) placed by customers of wireless carriers to Level 3 toll-free customers.⁴⁸

Hypercube did not seek to amend the Scoping Memorandum and Order or its complaint at any point to include wireline calls. Moreover, Hypercube asserted this limitation of its complaint during the course of the proceeding. For example, in its December 17, 2009, Motion to Compel, Hypercube, while disputing Level 3’s defenses, stated that “the 8YY calls at issue begin on a wireless networks (*sic*) and ...Hypercube pays wireless carriers for interconnection.”

Hypercube’s claim of omission of wireline calls is false, as demonstrated by its Complaint and other assertions, as well as the Scoping Memo and Ruling.

IV. **Conclusion**

Not surprisingly, Hypercube is unhappy with the Decision, which correctly rejects Hypercube’s unlawful scheme of using its intrastate tariffs to bill for wireless carrier

⁴⁶ Hypercube Application for Rehearing, note 18.

⁴⁷ Hypercube Complaint, para. 16.

⁴⁸ Assigned Commissioner’s Scoping Memo and Ruling, p. 2.

originating access services and sharing the resulting revenues with the wireless carriers. However, Hypercube's Application for Rehearing abuses the opportunity afforded by an application for rehearing, which is limited to pointing out legal errors the Commission can correct. Instead, Hypercube uses the opportunity to reargue its entire case. Hypercube has failed to identify a single legal error in Decision 10-05-029 that would require correction or reversal of the Commission's Decision. Hypercube's Application should be denied.

Dated: June 18, 2010

Respectfully submitted,

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