

Decision **PROPOSED DECISION OF ALJ DEANGELIS** (Mailed 4/16/2010)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Hypercube Telecom, LLC (U6592C),

Complainant,

vs.

Level 3 Communications, LLC (U5941C),

Defendant.

Case 09-05-009
(Filed May 8, 2009)

DECISION GRANTING MOTION TO DISMISS

1. Summary

We dismiss the complaint based on the failure to state a claim upon which relief can be granted. The proceeding is closed.

2. Facts

The material facts of this case are not in dispute.¹ Complainant, Hypercube Telecom, LLC² (U-6592-C) (Hypercube) seeks to collect charges

¹ Complaint at 11, "Hypercube contends that the issues underlying Hypercube's claims may be resolved on the basis of the pleadings submitted by the parties and that a hearing may not be required before the issuance of an Order awarding the relief requested by Hypercube."

² Hypercube holds a certificate to provide services as a competitive local exchange carrier (CLEC) granted by this Commission, either in its own name or under the name

Footnote continued on next page

pursuant to its *California Intrastate Access Tariff, Schedule Cal. P.U.C. No. 2*,³ from defendant, Level 3 Communications, LLC⁴ (U-5941-C) (Level 3), for access services, database query service, and the routing of 8YY calls (also referred to as toll-free calls) to Level 3 for termination to Level 3's customers.⁵ Hypercube does not provide the originating access service for these 8YY calls.⁶ The calls, which originate and terminate within the State of California,⁷ originate on the networks of Commercial Mobile Radio Service carriers (also referred to as CMRS carriers or wireless carriers).⁸ Hypercube picks up these calls at the wireless carriers' CMRS switching centers and delivers them to the incumbent local exchange carrier (ILEC) for routing to Level 3.⁹

of its predecessor, KMC Data, LLC. Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 2 at 1.

³ Hypercube provided various tariffs, each having different effective dates during the time period covered by this dispute. These tariffs are located within several Tabs at Exhibit A to the complaint. Exhibit A, Tab 1 contains tariffs in effect post-January 1, 2009. Exhibit A, Tabs 2 and 3 contain tariffs in effect from 2005 through 2009.

⁴ Level 3 holds a certificate to provide intrastate telecommunications services as a CLEC and interexchange carrier granted by this Commission. Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 1 at 1.

⁵ Complaint, para. 1 at 1, para. 5 at 3, para. 9 at 4 and para. 27-28 at 12.

⁶ Complaint, para. 26 at 8.

⁷ Complaint at 1.

⁸ Complaint, para. 26 at 12; Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 9 at 2.

⁹ Complaint, para. 26-28 at 12.

Hypercube has contracts with CMRS carriers pursuant to which Hypercube makes payments to the CMRS carriers.¹⁰ 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,”¹¹ CMRS carriers originate the calls and route the 8YY traffic to Hypercube pursuant to these contracts.¹²

While the call is at Hypercube’s switch, Hypercube performs certain routing functions and additional services, such as running a query of the national 8YY telephone number database to determine where the call should be routed (known as a “database dip”).¹³ The database dip returns information regarding the identity of the interexchange carrier (IXC) whose 8YY customers have been called.¹⁴ Hypercube delivers the calls to the ILEC who then sends the calls to Level 3 for termination at the 8YY customer.

Hypercube relies on its *California Instate Access Tariff, Schedule Cal. P.U.C. No. 2*, to charge Level 3 for access services, including originating access

¹⁰ Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 10 at 2, “Hypercube has contracts with certain CMRS providers pursuant to which Hypercube makes payments to the CMRS providers.”

¹¹ Reporter’s Transcript (Prehearing Conference August 11, 2009) (RT) 29: 15-17.

¹² Complaint, para. 16 at 8 and para. 26 at 12; Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 9 at 2. Complaint, para. 16 at 8 provides “[t]he calls at issue in this case are toll-free calls made by customers using their wireless phones to Level 3’s 8YY subscribers.” Stated otherwise, a CMRS carrier originates the call. Hypercube picks up the call at some point after the origination.

¹³ Complaint, para. 28 at 12.

¹⁴ Complaint at para. 28 at 12.

services even though originating access is provided by the CMRS carrier, and not Hypercube.¹⁵ 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.¹⁶ Level 3 would prefer Hypercube not be involved in the routing of 8YY calls to Level 3's customers.¹⁷ In response to Level 3's expressed preference for Hypercube to cease its involvement with these calls, Hypercube has requested that Level 3 block calls coming from Hypercube to avoid additional billing.¹⁸ As an engineering matter, however, Level 3 contends that blocking is untenable as Level 3 is unable to identify in real time the particular calls that pass through Hypercube on their way to the ILECs and then to Level 3. Hypercube includes provisions in its *California Intrastate Access Tariff, Schedule Cal. P.U.C. No. 2*, requiring IXCs, such as Level 3, to implement blocking as a means of rejecting service from Hypercube.¹⁹ Level 3 has not implemented blocking because blocking remains infeasible.²⁰

¹⁵ Complaint, para. 16 at 8 and para. 26 at 12; Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 9 at 2; RT 18: 14-15.

¹⁶ Answer at 3.

¹⁷ Answer, para. 11 at 19.

¹⁸ RT 25: 13-24.

¹⁹ Hypercube's *California Intrastate Access Tariff, Schedule Cal. P.U.C. No. 2*, 1st Revised Sheet 10, Sec. 2.1.3 (effective Jan. 1, 2009) (filed by Advice Letter No. 7), which provides as follows: "By originating traffic from or terminating traffic to the Company's

Footnote continued on next page

Hypercube continues to route calls to Level 3.²¹

Level 3 paid Hypercube's invoices for a period of time, from approximately November 2005 through October 2007.²² Beginning in November 2007, Level 3 ceased payments.²³ By this complaint, Hypercube seeks to collect from Level 3 intrastate switched access charges in an amount no less than approximately \$5.5 million plus any additional past-due amounts.²⁴

The parties have attempted but failed to resolve this matter informally.²⁵

3. Procedural History

On May 8, 2009, Hypercube filed a complaint. The Commission did not formally serve the complaint on Level 3 until approximately one month later. In the meantime, on May 12, 2009, Level 3 filed with the Federal Communications

network, the Customer will have issued a Constructive Order for Company's switched access service and will be responsible for payment of all applicable charges pursuant to this tariff. Customers seeking to cancel service have the **affirmative obligation to block traffic** originating from or terminating to the Company's network. (Emphasis added.) Prior effective tariffs contain essentially the same provision, Advice Letter 6 (effective September 22, 2008), Sec. 2.1.3 and Advice Letter 5 (effective September 1, 2006), Sec. 2.1.3.

²⁰ RT 25: 13-24.

²¹ Complaint, para. 1 at 2.

²² Complaint, para. 32 at 13.

²³ Complaint, para. 33 at 13.

²⁴ Complaint, para. 41 at 14.

²⁵ Complaint, para. 2 at 2; Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 8 at 2.

Commission (FCC) a Petition for a Declaratory Ruling (FCC Petition)²⁶ seeking to have the FCC declare the payment arrangement between Hypercube and the CMRS carriers pre-empted by federal law.

On June 1, 2009, the Commission formally served Level 3 with instructions to answer. On July 1, 2009, Level 3 filed its answer and a motion to dismiss or stay the complaint due to the pending FCC Petition. Hypercube filed a response in opposition to Level 3's motion. The parties also filed various other motions, the majority consisting of discovery disputes.

The schedule for this proceeding adopted by the December 7, 2009 scoping memo included the finding that formal hearings were needed. The assigned Administrative Law Judge (ALJ) delayed the hearings and later, on January 21, 2010, suspended the hearing dates due to ongoing and unresolved discovery disputes. Hypercube submitted prepared testimony on January 11, 2010. Because hearings were suspended in January 2010 and never rescheduled, this testimony was not entered into the record. Moreover, upon review of the existing pleadings, we found no material facts in dispute and concluded that the case may be resolved on the existing pleadings. We, therefore, change our original determination in the scoping memo regarding the need for hearings.

²⁶ Level 3's FCC Petition is filed in CC Docket No. 96-262 *Access Charge Reform* and CC Docket No. 01-92 *Developing a Unified Intercarrier Compensation Regime*. The Petition is titled "Petition for a Declaratory Ruling" and captioned "In the Matter of: Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS Originated Toll Free Calls," "Docket No. 09-___." Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 11-12 at 2.

The scoping memo also excluded from the scope of the proceeding Level 3's counterclaims. Level 3 filed a separate complaint on February 23, 2010 naming Hypercube the defendant and consisting of the issues previously set forth in its counterclaims. The February 23, 2010 complaint has been docketed as Case (C.) 10-02-027. The Commission will address the matters in C.10-02-027 separately.

With today's decision, this proceeding is closed.

4. Standard of Review

A motion to dismiss essentially requires the Commission to determine whether the party bringing the motion wins based solely on undisputed facts and on matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice.²⁷ *State of California Department of Transportation, Cox California Telecom dba Cox Communications, et. al., v. Crow Winthrop Development and Pacific Bell*, Decision (D.) 01-08-061 at 7, citing to *Westcom Long Distance v. Pacific Bell*, D.94-04-082.

5. Discussion

Hypercube seeks an order from the Commission declaring that it has lawfully charged Level 3 pursuant to its *California Intrastate Access Tariff, Schedule Cal. P.U.C. No. 2*, and directing Level 3 to immediately pay approximately \$5.5 million in intrastate charges plus additional outstanding amounts. Additional relief, including monetary fines, attorney fees and costs, a security deposit, and specific performance directives are sought by Hypercube. We find

²⁷ Civil Code § 437(c).

it unnecessary to discuss such additional relief as our decision today disposes of this matter in its entirety.

The question presented is whether Hypercube has stated a claim against Level 3 upon which the relief sought can be granted.

Our analysis starts with the principle supported by the FCC that rates must be tethered to particular services.²⁸ For example, the FCC has rejected the argument that CLECs “should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end-user to an IEC.”²⁹ In making this statement, the FCC reasoned that the opposite result, “in which rates are not tethered to the provision of particular services would be an invitation to abuse because it would enable multiple competitive LECs to impose the full benchmark rate on a single call.”³⁰ The FCC reached this conclusion by relying on the Supreme Court in *AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998), “rates ‘do not exist in isolation. They have meaning only when one knows the services to which they are attached.’”³¹

²⁸ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd. 9108, para. 14 (2004) (“*Eighth Report and Order*”).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*; The Commission follows the same rule as reflected in the following order from *Order Instituting Rulemaking to Review Policies Concerning Intrastate Carrier Access Charges*, Decision 07-12-020, 2007 Cal.PUC LEXIS at *35 (“Effective January 1, 2009, all California-certificated competitive local exchange carriers shall impose intrastate access charges no greater than the higher of Pacific Bell Telephone Company doing business as AT&T California's (AT&T) and Verizon California Inc.'s (Verizon) intrastate access

Footnote continued on next page

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. “The calls at issue in this case are toll-free calls made by customers using their wireless phones to Level 3’s 8YY subscribers.”³² 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.³³ 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.”³⁴

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

charges per minute of use, plus 10%, and **each access charge rate element that is provided shall be no greater than the higher of AT&T's or Verizon's comparable charge, plus 10%, for that rate element.**”) (Emphasis added.)

³² Complaint, para. 16 at 8; *see also* complaint, para. 26 at 12; Statement of Stipulated Facts of Level 3 and Hypercube (September 4, 2009), para. 9 at 2.

³³ *Eighth Report and Order*, para. at 16.

³⁴ *Id.*

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.³⁵ 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.

As such, the facts alleged by Hypercube, even if true, state no cause of action against Level 3 under applicable law.

Conclusion

Hypercube has failed to state a claim against Level 3 for violation of Hypercube's *California Intrastate Access Tariff, Schedule Cal. P.U.C. No. 2*. For these reasons, the Commission dismisses the complaint with prejudice.

6. Motions

A number of motions were filed in this proceeding. We confirm the rulings of the assigned ALJ. These rulings include the following:

1. Level 3 verbally moved for Hypercube to make available certain deponents on January 25, 2010. This request was granted verbally by the ALJ on January 25, 2010.
2. Level 3 filed a motion to redesignate as non-confidential certain materials filed by Hypercube as confidential on January 19, 2010. The parties resolved this matter informally.
3. Level 3 filed a request to shorten time on January 19, 2010. The parties resolved this matter informally.

³⁵ *In the Matter of Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192 (2002).

4. Level 3 filed a request for expedited telephonic hearing on January 19, 2010. The parties resolved this matter informally.
5. Level 3 filed a motion for leave to file under seal on January 19, 2010. This request was granted verbally by the ALJ on January 19, 2010.
6. Level 3 filed a motion for partial rehearing of ruling modifying schedule on January 14, 2010. This motion was denied by ruling of the ALJ on February 3, 2010.
7. Level 3 filed a motion to amend Level 3's motion to dismiss or stay the complaint on January 7, 2010. This motion was granted by ruling of the ALJ on February 3, 2010.
8. Level 3 filed a motion to request the taking of official notice on January 7, 2010. This motion was granted by ruling of the ALJ on February 3, 2010.
9. Hypercube filed a motion to compel on December 17, 2009. This motion was denied with leave to refile by ruling of the ALJ on February 3, 2010.
10. Level 3 filed a motion to modify the scoping memorandum and order on December 14, 2009. As to Level 3's request to extend the schedule, this request was granted by ruling of the ALJ on January 12, 2010. As to Level 3's request to include counterclaims within the scope of this proceeding, this request was denied by ruling of the ALJ on February 3, 2010.
11. Level 3 filed a motion to compel responses to discovery on December 11, 2009. This motion was denied by ruling of the ALJ on February 3, 2010.
12. Hypercube filed a motion to supplement the record on August 31, 2009. This motion was granted by ruling of the ALJ on February 3, 2010.
13. Hypercube file a motion to enter a confidentiality agreement and protective order on November 13, 2009. This motion was denied by electronic mail from the ALJ on November 16, 2009.
14. Hypercube filed a motion for leave to file a reply to the response on July 24, 2009. This motion was denied by electronic mail from the ALJ on July 24, 2009.

15. Hypercube filed a motion to order Level 3 to escrow charges associated with Hypercube's provision of tariff services on July 8, 2009. This motion was denied by ruling of the ALJ on February 3, 2010.
16. Level 3 filed a motion to dismiss or stay the complaint due to pending FCC proceeding on July 1, 2009. The motion to stay the proceeding was denied by a ruling of the ALJ on February 3, 2010.
17. Hypercube filed a motion for leave to file an amendment to its opposition to the motion of Level 3 to dismiss or stay on February 12, 2010. This motion was granted by electronic mail from the ALJ on February 23, 2010.
18. Level 3 filed a request for the taking of official notice and a motion for leave to file a second amendment to its motion to dismiss or stay on February 17, 2010. This request and motion were granted by electronic mail from the ALJ on February 23, 2010.
19. Level 3 filed a motion to compel response to second discovery on March 3, 2010. By this decision, we deny this motion.
20. Level 3 filed a motion for rehearing of ALJ's ruling on various motions (February 3, 2010) on March 3, 2010. By this decision, we deny this motion.
21. Hypercube filed a motion for summary judgment on March 8, 2010. By this decision, we deny this motion.

7. Statement of Appeal Rights

Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c).

8. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed by both parties on May 6, 2010, and reply comments were filed by both parties on May 11, 2010. On May 12, 2010, complainant requested leave to file sur-reply comments. On the same day, complainant's request was denied.

In its comments, Hypercube argues that, under the "longstanding filed tariff doctrine," Hypercube stated a claim upon which relief may be granted. Hypercube suggests that, under this doctrine, it is entitled to collect rates for services provided. The doctrine referred to by Hypercube rests on the premise that some sort of consensual relationship exists between the customer and the carrier. See *AT&T Corp. v. Midwest Paralegal Services, Inc.*, 2007 U.S. Dist. LEXIS 33546, * 16. No case has used the "filed tariff doctrine" to sanction collection of tariffed rates under the facts presented here. Moreover, use of this doctrine in this manner would be inappropriate because the policy underlying the doctrine would not be furthered in such cases.

In comments, Hypercube also misconstrues the facts of this case and presents them in a manner that falls beyond the standard of review applied here. In this case, we are required to view the facts in the light most favorable to the complainant. We are not required to overlook facts that weigh against the complainant or change the facts, as does Hypercube in its comments, to find a cause of action where none exists. The facts viewed in the light most favorable to complainant are clear. Hypercube pays a CMRS provider some sort of "payments" based on the calls routed to Hypercube by this CMRS provider.

Hypercube then seeks to collect a tariffed rate for a service that necessarily includes the functionality provided by the CMRS provider. This relationship fits squarely within the definition of a “joint billing arrangement” but no such arrangement is alleged. In the absence of a legally permissible billing arrangement, Hypercube’s efforts to collect the amount in question must fail.

Moreover, the comments which focus on the factual, legal or technical errors have been considered and the appropriate changes have been made.

9. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Regina M. DeAngelis is the assigned ALJ in this proceeding.

Findings of Fact

1. We find that no material facts exist in dispute and, as a result, this complaint can be resolved without evidentiary hearings and as a matter of law.
2. The calls subject to this complaint originate and terminate within the State of California.
3. Hypercube has contracts with CMRS carriers pursuant to which Hypercube makes payments to these carriers.
4. Hypercube has not alleged the existence of a joint billing arrangement that provides Hypercube the right to collect rates for the CMRS carrier.
5. Hypercube has not alleged that the CMRS carrier has an independent right to collect access charges from Level 3.
6. 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.

Conclusions of Law

1. The determination in the scoping memo that hearings are necessary should be changed, because we now conclude that no material issues of fact exist and this dispute can be resolved without evidentiary hearings.

2. The facts alleged by Hypercube, even if true and viewed in the light most favorable to complainant, state no cause of action against Level 3 under applicable law.

O R D E R

IT IS ORDERED that:

1. The complaint in Case 09-05-009 is dismissed with prejudice.
2. The determination in the scoping memo that hearings were necessary is changed from yes to no.
3. Case 09-05-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.