

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| <p>Hypercube Telecom, LLC (U6592C),</p> <p style="text-align: right;">Complainant,</p> <p style="text-align: center;">vs.</p> <p>Level 3 Communications, LLC (U5941C),</p> <p style="text-align: right;">Defendant.</p> |  | <p>Case 09-05-009<br/>(Filed May 8, 2009)</p> |
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**ORDER GRANTING REHEARING  
OF DECISION (D.) 10-05-029**

**I. INTRODUCTION**

In Decision (D.) 10-05-029 (or “Decision”), we dismissed with prejudice a complaint filed by Hypercube Telecom, LLC (“Hypercube”) against Level 3 Communications, LLC (“Level 3”). Hypercube is a competitive local exchange carrier (“CLEC”). The calls at issue in this case are toll-free calls (also referred to as 8XX or 8YY calls) made by customers using their wireless phones to Level 3’s 8YY subscribers. The complaint sought collection of charges pursuant to Hypercube’s intrastate tariffs for access services, database query service, and the routing of 8YY calls to Level 3 for termination to Level 3’s customers. Hypercube has contracts with certain Commercial Mobile Radio Service carriers (“CMRS carriers” or “wireless carriers”) pursuant to which it makes payments. Level 3 does not have contracts with either Hypercube or the CMRS carriers relating to the calls at issue in this case.

Hypercube filed its complaint with the Commission on May 8, 2009. On May 12, 2009, Level 3 filed with the Federal Communications Commission (“FCC”) a

Petition for Declaratory Ruling (“FCC Petition”) seeking to have the FCC declare that the payment arrangements between Hypercube and the CMRS carriers are pre-empted by federal law.<sup>1</sup> On July 1, 2009, Level 3 filed its answer to Hypercube’s complaint and a motion to dismiss or stay the proceeding due to the pending FCC Petition.

The scoping memo issued in this case on December 7, 2009 determined that evidentiary hearings were needed. The assigned Administrative Law Judge (“ALJ”) delayed and later suspended the evidentiary hearing dates due to ongoing and unresolved discovery disputes. Although Hypercube submitted prepared testimony on January 11, 2010, this testimony was not entered into the record due to the suspension of the hearings.<sup>2</sup> Evidentiary hearings were not held in this case because we found that upon review of the existing pleadings, no material facts were in dispute and that the case could be resolved on the existing pleadings. In the Decision, we determined that “[t]he 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.” (D.10-05-029, p. 15 [Conclusion of Law (“COL ”) 2].) On this basis, we dismissed the complaint with prejudice.<sup>3</sup>

Hypercube filed a timely rehearing application of the Decision. Hypercube alleges the following legal errors: (1) the Scoping Memo violates Public Utilities Code section 1701.1(b)<sup>4</sup>; (2) the Commission erred in not issuing a Presiding Officer’s Decision, and failed to comply with section 1701.2(a); (3) the Commission did not follow the proper procedure or apply the correct standard for a motion to dismiss; (4) COL 1 does not comply with section 1705; (5) the Decision does not contain legally adequate

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<sup>1</sup> Pursuant to 47 U.S.C. § 332(c)(3), the FCC regulates the rates of CMRS carriers.

<sup>2</sup> Level 3’s response to the rehearing application cites to this testimony submitted by Hypercube. (Level 3 Response to Rehr. App., pp. 20-21.) However, we cannot consider this testimony in rendering a decision because the testimony was never entered into the record.

<sup>3</sup> This ground for dismissal was not raised by Level 3 in its motion to dismiss or stay the proceeding filed on July 1, 2009.

<sup>4</sup> All subsequent section references are to the Public Utilities Code unless otherwise specified.

findings of fact and conclusions of law, as required by section 1705; (6) the Commission erred in its lack of application of the filed tariff doctrine; and (7) the Decision erred in not considering Hypercube's tariff in reaching its determination that Hypercube seeks to collect a tariffed rate that necessarily includes the functionality provided by the CMRS provider (the so-called "CMRS Service Functionality Determination").

Level 3 filed a response opposing Hypercube's rehearing application.<sup>5</sup>

## II. DISCUSSION

### A. CMRS Service Functionality Determination

The Decision states that "Hypercube ... seeks to collect a tariffed rate for a service that necessarily includes the functionality provided by the CMRS provider." (D.10-05-029, p. 14.) Hypercube refers to this as the "CMRS Service Functionality Determination," and alleges that it is erroneous and unsupported by the record. (Rehrg. App., p 27.) There is merit to Hypercube's allegation that the CMRS Service Functionality Determination is unsupported by the record. Therefore, we grant Hypercube's application for rehearing of the Decision.

The calls at issue in the complaint are toll-free calls made by consumers using their wireless phones to Level 3's 8YY subscribers. (Complaint, p. 8, ¶ 16.) The calls are routed from the wireless carrier's Mobile Telecommunications Switching Office ("MTSO") to Hypercube's network and switching equipment. (Complaint, p. 12, ¶ 27.) Hypercube claims that when the call is in Hypercube's switch, it performs switching and 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. (Complaint, p. 12, ¶ 28.)

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<sup>5</sup> Hypercube also filed a motion seeking leave to file a reply to Level 3's response. The Commission's Rules of Practice and Procedure do not provide for replies to responses to applications for rehearing and the Commission does not ordinarily accept such replies. In any event, Hypercube has not demonstrated good cause why the Commission should accept such a filing in this case. Therefore, we deny Hypercube's motion.

Hypercube's complaint seeks to collect charges from Level 3 for "switched access services" and for "query[ing] the appropriate database to make sure Level 3's traffic is correctly routed to Level 3" (database query services) in connection with 8YY calls that are terminated to Level 3's customers. (Complaint, p. 3, ¶ 5.) Elsewhere, Hypercube characterizes its services as the provision of "switching and routing functions and additional services." (Complaint, p. 12, ¶ 28.) Hypercube asserts that its intrastate access tariff sets forth the terms and conditions for these services, but its complaint never specifically identifies the tariff sections to which it refers – a fact that may have caused confusion in the Commission's initial consideration of this case. (*Compare, e.g.,* Complaint ¶¶ 30, 46.)

The Decision reasons that since the calls at issue in this case are toll-free calls made by consumers using their wireless phones, and since Hypercube is not a wireless provider, Hypercube could not have provided full originating access. Therefore, the Decision concludes that in seeking charges for originating access: "Hypercube ... seeks to collect a tariffed rate for a service that necessarily includes the functionality provided by the CMRS provider." (D.10-05-029, p. 14.) Hypercube admitted that it has contracts with certain CMRS providers pursuant to which it makes payments to the CMRS providers. (Statement of Stipulated Facts of Level 3 and Hypercube, dated September 4, 2009, p. 2, ¶ 10.) Relying on the FCC's *In the Matter of Access Charge Reform et al., Eighth Report and Order and Fifth Order on Reconsideration* (2004) 19 FCC Rcd 9108 ("*Eighth Report and Order*"), the Decision holds that Hypercube may only collect originating access charges from Level 3 on behalf of the CMRS carrier pursuant to a joint billing arrangement or pursuant to an independent agreement between the CMRS carrier and Level 3. (D.10-05-029, p. 10.) Since Hypercube does not allege the existence of either, the Decision finds that Hypercube has failed to state a cause of action against Level 3 and dismisses its complaint with prejudice.

Hypercube disputes that it is charging for functionalities provided by CMRS carriers. Hypercube alleges that the Commission mistakenly viewed "originating access service" as a single function when it is a service that consists of multiple elements

and functions. (Rehrg. App., p. 36.) Hypercube also alleges that the Decision rests on the erroneous assumption that originating traffic from Hypercube's network must mean only traffic sent there directly by an end-user rather than traffic sent to Hypercube from the MTSO. (Rehrg. App., p. 27.) Hypercube claims that with regard to traffic originated on Hypercube's network from the MTSO, Hypercube billed Level 3 for Commission approved charges for the functionalities it provided. Hypercube alleges that there is no evidence that Hypercube billed Level 3 for functionalities provided by CMRS providers. (Rehrg. App., p. 27.) According to Hypercube, the CMRS carriers do not have facilities on the other side of the MTSO. (Rehrg. App., p. 7.)

There is merit to Hypercube's allegation that there is a lack of evidence that Hypercube billed Level 3 for functionalities provided by CMRS providers. The record in this case was not fully developed because the Commission dismissed the complaint before any evidentiary hearings were held. Although testimony was served, it was never entered into the record. The Decision states that no material facts are in dispute and that 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. (D.10-05-029, p. 15 [COLs 1 & 2].) However, we find that there is still a dispute regarding the nature of the services that Hypercube provided. Level 3 claims that Hypercube is merely a billing agent for CMRS carriers. (See e.g. Level 3 Response to Rehrg. App., p. 3.) However, Hypercube alleges that it is charging only for the functionalities it provides, and is not acting a billing agent.

Hypercube has a Certificate of Public Convenience and Necessity ("CPCN") with this Commission as a limited facilities-based and resale provider of competitive local exchange service. (*Application of KMC Data, LLC for a Certificate of Public Convenience and Necessity to Provide Competitive Local Exchange Services on a Combined Resale and Limited Facilities Basis and Resold Interexchange Service in the State of California* [D.01-11-049] (2001) \_\_ Cal.P.U.C.3d \_\_, p. 10 [Ordering Paragraph 1] (slip op.) (granting CPCN to KMC Data, LLC); see also *Joint Application of Hypercube, LLC and KMC Data LLC (U-6592-C) for Grant of Authority to Complete a*

*Series of Transactions Resulting in the Transfer of Control of KMC Data LLC* (“*Decision Granting Application*”) [D.06-04-069] (2006) \_\_ Cal.P.U.C.3d \_\_ (transferring control of KMC Data to Hypercube.) We find that there is an insufficient record in this case to determine whether Hypercube is acting merely as a billing agent, or actually providing switched access services for which it is entitled to bill. Accordingly, we grant rehearing on this issue.

### **B. Hypercube’s Tariffs**

Hypercube’s intrastate tariffs, which the Commission has approved, include charges for “Originating 800 FG Access” for toll-free calls made by consumers using their wireless phones. Hypercube’s complaint seeks charges for access services and database query services provided since November 2007 pursuant to its California Intrastate Access Tariff, Schedule Cal. P.U.C. No. 2. Hypercube and its predecessor KMC Data, LLC, had three different tariffs in effect since November 2007, the relevant time period for purposes of its complaint.<sup>6</sup> The switched access services in Hypercube’s tariffs include Originating 800 FG Access, which provides for “the delivery of 8XX traffic that is initiated by a Wireless Provider’s End User and is delivered from a CMRS Mobile Telephone Switching Office to the Company switch and then to a customer.” (Hypercube Tariff A1, § 3.2.5; Hypercube Tariff A2, § 3.2.5; Hypercube Tariff A3, § 3.2.5.) The tariffs further provide that Hypercube “will charge for all elements of service that it provides in routing such traffic.” (Hypercube Tariff A1, § 3.2.5; Hypercube Tariff A2, § 3.2.5; Hypercube Tariff A3, § 3.2.5.)

Within the category of Originating 800 FG Access, Hypercube Tariff A1 differentiates rates for “local switching,” which are assessed when an 8XX call is originated by an end user subscribing to Hypercube’s services, and rates for “switched

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<sup>6</sup> These tariffs are included as Exhibit A to Hypercube’s complaint. Exhibit A, Tab 1 contains Hypercube’s current tariffs in effect since January 1, 2009 (“Hypercube Tariff A1”). Exhibit A, Tab 2 contains tariffs in effect from September 15, 2008 (“Hypercube Tariff A2”). Exhibit A, Tab 3 contains tariffs in effect from September 1, 2006 (“Hypercube Tariff A3”).

transport,” which are assessed when the 8XX call is originated by an end user not subscribing to Hypercube’s local exchange services. (Hypercube Tariff A1, § 3.2.5.) Hypercube’s prior tariffs had a different rate structure that billed originating access as a blended rate, which included both switching and transport. (Hypercube Tariff A2, § 4.4.1; Hypercube Tariff A3, § 4.4.1.)

Hypercube correctly notes that the rate structure in its tariffs has conformed to the Commission order regarding intrastate access charges, *Final Opinion Modifying Intrastate Access Charges* [D.07-12-020] (2007) \_\_ Cal.P.U.C.3d \_\_. (See Rehrgr. App., p. 42.) D.07-12-020 provides the following regarding CLEC intrastate access charges: (1) effective April 1, 2008, CLECs should charge no more than \$0.025 per minute to originate or terminate intrastate access; and (2) effective January 1, 2009, CLECs should charge no more than the higher of AT&T California’s or Verizon California, Inc.’s intrastate access charges, plus 10%, and each rate element provided should also be limited to the higher of AT&T’s or Verizon’s comparable rate element, plus 10%. (*Id.* at pp. 23- 24 [Ordering Paragraphs 3 & 4] (slip op.).)

For the first time period covered under D.07-12-020, between April 1, 2008 and December 31, 2008, the Commission did not necessarily prohibit CLECs from charging a blended access rate. The Commission’s only restriction imposed was the \$0.025 per minute cap. D.07-12-020 did also contain a conclusion of law which stated that: “To the extent practical, intrastate access charges should be cost-based and competitive carriers should charge only for functions provided to transport a call.” (*Id.* at p. 21 [COL 2] (slip op.).) However in *Order Denying Rehearing of Decision (D.) 07-12-020* [D.08-02-037] (2008) \_\_ Cal.P.U.C.3d \_\_, the Commission declined to modify D.07-12-020 to include the following proposed ordering paragraph: “Effective immediately, a competitive local exchange carrier shall charge an interexchange carrier only for functions it provides to the interexchange carrier.” (*Id.* at 3 (slip op.).) Therefore, the Commission did not necessarily prohibit CLECs from charging blended access rates. Further, the Commission approved Hypercube’s tariffs charging blended access rates, which did not exceed the cap established in D.07-12-020.

As stated above, the rehearing should address the nature of the services Hypercube actually provided to Level 3. If Hypercube provided services included in its intrastate tariffs, the rehearing should also address whether there is any reason Hypercube should not be able to collect the charges set forth in its tariffs.

We also note that Hypercube's complaint also seeks charges for database query services. These services are listed as a separate service in Hypercube's tariffs. (Hypercube Tariff A1, § 4.2.2; Hypercube Tariff A2, § 4.2.2; Hypercube Tariff A3, § 4.2.2.) The rehearing should also address whether Hypercube is entitled to collect these charges.

### **C. Applicability of FCC's Orders**

The Decision relies on the FCC's *Eighth Report and Order*. However, this order deals with rates for interstate switched access services, as opposed to the intrastate services at issue in this case. Although the FCC has jurisdiction over rates for interstate access, the states have jurisdiction over rates for intrastate access. (47 U.S.C. § 152.) In its *Eighth Report and Order*, the FCC held that a CLEC may collect the full benchmark rate 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. (*Eighth Report and Order*, *supra*, at ¶ 15.) However, as explained above, prior to January 1, 2009, the Commission did not necessarily prohibit blended access rates for intrastate calls. Furthermore, at least with regard to charges pursuant to Hypercube Tariff A1, it is not clear that Hypercube is attempting to collect a "full benchmark rate."<sup>7</sup>

The FCC, not this Commission, has jurisdiction over the rates of CMRS carriers. (47 U.S.C. § 332(c)(3).) The FCC has held that CMRS carriers are entitled to

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<sup>7</sup> The "full benchmark rate" that the *Eighth Report and Order* references is the interstate switched access rate established by the FCC in *In the Matter of Access Charge Reform et al., Seventh Report and Order and Further Notice of Proposed Rulemaking* (2001) 16 FCC Rcd 9923. The *Eighth Report and Order* does not prohibit a CLEC from charging for access components. Rather, it only prohibits CLECs from charging the full benchmark rate when they provide any component of the interstate switched access services.

collect access charges from an interexchange carrier (“IXC”) only pursuant to a contract with that IXC. (*Petitions of Sprint PCS and AT&T Corp., for Declaratory Ruling Regarding CMRS Access Charges* (2002) 17 FCC Rcd 13192.) The FCC has also held that CMRS carriers cannot charge indirectly for that which they cannot charge directly. Therefore, if a CMRS carrier has no contract with an IXC, a CLEC has no right to collect access charges for the portion of the service provided by the CMRS provider. (*Eighth Report and Order, supra*, at ¶ 16.)

The fact that Hypercube makes payments to certain CMRS carriers does not necessarily signify that Hypercube is collecting access charges on behalf of those carriers. If Hypercube would be entitled to collect the same charges, regardless of whether it was making any payments to CMRS carriers, arguably Hypercube may not be collecting access charges for functionalities provided by the CMRS carriers.<sup>8</sup> There is a lack of information in the record regarding whether Hypercube’s payments to certain CMRS carriers affect all the calls at issue in this case.

Moreover, there is a lack of information in the record regarding whether the charges assessed by Hypercube against Level 3 are inflated when compared to Hypercube’s charges for similar services for calls not originated by wireless subscribers or for calls originated by wireless subscribers for which Hypercube does not make payments to CMRS carriers. Therefore, the rehearing should also address the effect, if any, of payments Hypercube made to CMRS carriers on Hypercube’s ability to collect intrastate access charges.

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<sup>8</sup> As acknowledged in the Decision, we currently lack information regarding the nature of Hypercube’s payments to the CMRS carriers. (D.10-05-029, p. 3.) However, if Hypercube is only attempting to collect intrastate access charges for the functionalities it provides, any payment it may make to the CMRS carriers may be irrelevant to the question of whether Hypercube is entitled to collect these charges. (See *Eighth Report and Order, supra*, at n. 253 [noting party comments that a commission-paying CLEC may simply be willing to have a lower profit margin].) Further, since it is the FCC that regulates the rates of CMRS carriers, it is for the FCC to determine whether Hypercube’s payments to the CMRS carriers are lawful. This issue is the subject of Level 3’s FCC Petition.

### III. CONCLUSION

For the reasons stated above, we grant Hypercube's application for rehearing, and vacate D.10-05-029. The rehearing should include, but is not necessarily limited to, the following issues: (1) whether Hypercube is charging for functionalities provided by CMRS carriers; (2) the nature of the services Hypercube provided to Level 3; (3) if Hypercube is entitled to bill for originating access, whether there is any reason Hypercube should not be able to collect the charges set forth in its intrastate tariffs; and (4) the effect, if any, of payments Hypercube made to CMRS carriers on Hypercube's ability to collect intrastate access charges. Since there is a basis for granting rehearing, we find it unnecessary to address the remaining allegations set forth in Hypercube's rehearing application.

**THEREFORE, IT IS ORDERED** that:

1. Rehearing of D.10-05-029 is granted.
2. The rehearing shall include, but is not necessarily limited to the following issues:
  - a. Is Hypercube charging for functionalities provided by CMRS carriers?
  - b. What is the nature of the services Hypercube provided to Level 3?
  - c. If Hypercube provided services included in its intrastate tariffs, is there any reason Hypercube should not be able to collect the charges for these services set forth in its intrastate tariffs?
  - d. What effect, if any, do Hypercube's payments to CMRS carriers have on Hypercube's ability to collect intrastate access charges?
3. The assigned Administrative Law Judge will issue a ruling setting forth the schedule for the rehearing ordered herein.
4. D.10-05-029 is hereby vacated.

5. The Executive Director shall serve this decision on all parties in Case 09-05-009.

This order is effective today.

Dated July 14, 2011, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

Commissioners