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Arent Fox

MAY 14 2009

May 14, 2009

Federal Communications Commission  
Office of the Secretary

**BY HAND DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o Natek, Inc., Inc.  
236 Massachusetts Avenue, N.E., Suite 110  
Washington, DC 20002

**Michael B. Hazzard**

Attorney  
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**Reference Number**  
**031498.00004**

**Re: Level 3 Communications, LLC's May 12, 2009 Petition**

Dear Ms. Dortch:

I represent Hypercube Telecom, LLC ("Hypercube") in a complaint against Level 3 Communications, LLC ("Level 3") pending before the California Public Utilities Commission ("PUC"), which I filed on May 8, 2009. A copy of this complaint is attached as Exhibit A.

In response, Level 3 filed its May 12 petition. That petition, improperly styled as a request for "declaratory ruling," is a sham effort to: (i) disrupt Hypercube's pending complaint and (ii) provide a veneer for Level 3's unlawful self-help efforts<sup>1</sup> directed against common carriers, like Hypercube, that are obligated to exchange traffic with Level 3.

That Level 3's petition is a sham is plain. *First*, neither the Commission nor any other body ever has found, or remotely suggested, that "section 332(c) preempts the application of intrastate originating access tariffs to wireless toll-free calls." Pet. at 1. Level 3 provides no citation otherwise. *Second*, the Commission established its benchmark mechanism for competitive local exchange carrier interstate access charges over *eight years ago*.<sup>2</sup> Tellingly, Level 3 has *never* challenged any of Hypercube's tariffed interstate access rates as inconsistent

<sup>1</sup> Attached as Exhibit B is a recent filing by Hypercube describing unlawful self-help efforts of interexchange carriers, like Level 3. Under longstanding federal and state rules, Level 3 paid Hypercube's tariffed access charges for years. Since November 2007, however, Level 3 has *refused to pay any compensation* for access services Hypercube has indisputably performed and continues to perform in accordance with its common carrier obligations.

<sup>2</sup> *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) ("*Seventh Report and Order*").

## Arent Fox

with the Commission's interstate benchmark. *Third*, the Commission reviewed and approved revenue sharing arrangements between 8YY call generators and access providers *five years ago*.<sup>3</sup> At best, Level 3's filing amounts to a patently untimely petition for reconsideration.

The Commission is under no obligation to seek comment on sham petitions, such as Level 3's. And the Commission should not indulge Level 3's effort to game the Commission's processes for purposes of disrupting state commission complaint proceedings and attempting to justify unlawful self-help efforts.<sup>4</sup> Indeed, petitions like Level 3's mock the Commission's rules and serve only to waste the resources of the Commission and the industry.

To the extent the Commission is inclined to seek comment on Level 3's petition, which it should not, fundamental fairness requires that the Commission first meet with representatives of Hypercube and Level 3 to get a complete understanding of the context of Level 3's petition and to include in any public notice the full panoply of issues presented (*e.g.*, the proper use of the declaratory ruling process and the impropriety of interexchange carrier self-help efforts).

Towards that end, I will begin working to set up meetings with appropriate Commission representatives on behalf of Hypercube. I also will copy on all correspondence and invite to all meetings representatives of Level 3.

Should you have any questions or need additional information, please contact me.

Sincerely,



Michael B. Hazard  
Counsel to Hypercube Telecom, LLC

### Attachments

cc: (Via Electronic Mail)

Scott Deutchman      Julie Veach  
Al Lewis                John Nakahata, Counsel to Level 3

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<sup>3</sup> *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, ¶¶ 69-72 (2004).

<sup>4</sup> The Commission has recognized that "IXCs appear routinely to be flouting their obligations under the tariff system." *Seventh Report and Order* at ¶ 93. That is precisely what Level 3 is doing here.

**EXHIBIT A**

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



FILED

05-08-09  
04:59 PM

HYPERCUBE TELECOM, LLC  
(U-6592-C),

Complainant,

v.

LEVEL 3 COMMUNICATIONS, LLC  
(U-5941-C),

Defendant.

Case \_\_\_\_\_

C0905008

COMPLAINT OF HYPERCUBE TELECOM, LLC AGAINST  
LEVEL 3 COMMUNICATIONS, LLC FOR LEVEL 3'S  
REFUSAL TO PAY TARIFFED ACCESS CHARGES

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*Counsel for Complainants  
Hypercube Telecom, LLC*

May 8, 2009



toll-free calling services, which are commonly referred to as "800 services" or "8YY services."<sup>1</sup> Hypercube has performed and continues to perform the services that are the subject of this Complaint pursuant to Hypercube's Commission-approved Schedule Cal. P.U.C. No. 2-T ("Hypercube's Intrastate Access Tariff"), which sets forth the rates, terms, and conditions for Hypercube's provision of intrastate access services to Level 3 and others. Relevant copies of Hypercube's Intrastate Access Tariff are attached hereto as Exhibit A.

2. Hypercube has attempted to resolve this matter by negotiation with Level 3, but those efforts have been unsuccessful.

**B. Access Services Provided by Hypercube to Level 3**

3. When Level 3 provides its customer with an 8YY service, other consumers and carriers alike know that Level 3 is responsible for all costs associated with delivering the toll-free call to Level 3's customer.<sup>2</sup> These costs include payment for access services associated with Level 3's use of other carriers' networks to support Level 3's toll-free product offerings. When a carrier handles a call to an 8YY number, the carrier must query a database that maintains a list of telecommunications carriers offering 8YY service. Through performing this database query, also known as a "dip," the carrier handling the 8YY telephone call ensures that calls have the appropriate features applied and are sent to the correct telecommunications carrier and, ultimately, to the correct customer destination. The provisioning of access services creates a cost burden on carriers, like Hypercube, that are involved in the delivery of 8YY traffic to the correct

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<sup>1</sup> The industry term "8YY" recognizes that toll free dialing codes in addition to "800" exist, such as "888" or "866."

<sup>2</sup> Level 3's role in this may also be described as that of the "RESPORG," which is shorthand for "Responsible Organization." The RESPORG is the company responsible for managing 800 database records for particular 8YY telephone numbers. Typically, a carrier, such as Level 3, will serve as the RESPORG for all of the 8YY numbers it assigns to its 8YY subscribers.

interexchange carrier ("IXC"). Carriers providing these access services are entitled to compensation from the IXC, here Level 3, that sells 8YY service to end users.

4. Indeed, when a calling party dials an 8YY number (*i.e.*, a toll-free number), the carriers involved in delivering the call to the IXC are precluded from assessing any charges on the person making the toll-free phone call. Instead, the IXC providing the toll-free service to its customers, here Level 3, is responsible for paying all of the access costs associated with getting 8YY calls from the person making the phone call to the IXC's customer that subscribes to (and pays for) toll-free service.

5. Hypercube has performed its duties as a telecommunications carrier to (i) provide switched access services that allow Level 3 to utilize Hypercube's network to receive 8YY calls destined for Level 3's subscribers and (ii) query the appropriate database to make sure Level 3's traffic is correctly routed to Level 3. Although Level 3 paid Hypercube's tariffed intrastate access charges for years, Level 3 unilaterally began refusing to pay its bills for Hypercube's access service beginning in November 2007 and continuing through the present.

**C. The Commission's Access Charge Regime For CLECs**

6. Over the last several years, this Commission conducted an access charge reform proceeding for CLECs and other LECs. In its December 12, 2007 *Final Opinion Modifying Intrastate Access Charges*, D.07-12-020 (2007), the Commission capped tariffed CLEC access charge rates in a two-step process.

7. First, on or before April 1, 2008, CLECs with tariffed intrastate access rates for transport and switching functions "in excess of \$0.025 per minute" were required to "file and serve an advice letter" conforming their rates to the cap.<sup>3</sup> Because Hypercube's pre-existing

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<sup>3</sup> D.07-12-020 at 16.

Intrastate Access Tariff already had contained this \$0.025 rate for transport and switching since at least September 1, 2006, Hypercube's tariff complied with the Commission's decision well before it took effect.<sup>4</sup>

8. Second, effective January 1, 2009, CLEC intrastate access rates were "capped at the higher of AT&T's or Verizon's intrastate access charges, plus 10% ...."<sup>5</sup> Commission Staff conducted a detailed review of various CLEC compliance filings, and Staff approved Hypercube's revised rates effective January 1, 2009.<sup>6</sup>

9. Even though: (i) Hypercube has provided its tariffed access services to Level 3 on a continuous basis as required by California law and Commission policy<sup>7</sup>; (ii) Hypercube has complied with the Commission's access charge regulations; and (iii) the Commission has reviewed and approved Hypercube's tariffed access charge rates as compliant with the Commission's regulations, Level 3 refuses to pay its bills for Hypercube's access services.

#### **D. The FCC's Access Charge Regime For CLECs**

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<sup>4</sup> Hypercube Intrastate Access Tariff, 1 Revised Sheet Cal P.U.C. Sheet No. 45 (Sept. 1, 2006) (attached hereto as Exhibit A, Tab 3).

<sup>5</sup> D.07-12-020 at 16.

<sup>6</sup> Hypercube Intrastate Access Tariff, 1 Revised Sheet Cal P.U.C. Sheet No. 46-47 (Jan. 1, 2009) (attached hereto as Exhibit A, Tab 1).

<sup>7</sup> The Commission has held that "all carriers are obligated to complete calls where it is technically feasible to do so regardless of whether they believe that the underlying intercarrier compensation arrangements for completion of calls are proper. The obligation to complete calls applies ... equally to all carriers involved in the origination, routing and completion of calls. Whether a call originates or terminations on a carrier's network, the obligation to complete calls is the same. This obligation is a fundamental principle and expectation underlying both state and federal statutes." D.97-11-024, p. 5 (citing P.U.C. Code § 558).

10. In its *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 (2001) (the "*Seventh Report and Order*"), the Federal Communications Commission ("FCC") held that IXCs, such as Level 3, are obligated to purchase tariffed CLEC access services, including those related to toll-free calls made from wireless networks.<sup>8</sup> The FCC found that an IXC's refusal to pay for access services constitutes a violation of Section 201 of the Communications Act.<sup>9</sup> The FCC also held that tariffed CLEC access charges for such services are "conclusively deemed reasonable."<sup>10</sup>

11. In making this finding, the FCC emphasized that calls must flow between carriers in order to ensure universal connectivity among consumers that use the Public Switched Telephone Network.<sup>11</sup> This is particularly important with toll-free service (i.e., "8YY") because carriers, such as Hypercube, that provide access services in support of toll-free services are legally precluded from charging the calling party (i.e., the person making the call) for calling a toll-free number. In offering toll-free service, the IXC, in this case Level 3, commits to paying

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<sup>8</sup> The Commission has repeatedly held that FCC rulings, such the *Seventh Report and Order*, provide "useful guidance" in interpreting intrastate tariffs. See, e.g., D.97-08-076 at 12. Specific to access charges, the Commission noted with approval in the *Final Opinion Modifying Intrastate Access Charges* the FCC's access charge reform effort, which is substantively similar to the regime implemented by the Commission. See D.07-12-020, 15-16.

<sup>9</sup> *Seventh Report and Order* at ¶ 97. In the *Seventh Report and Order*, the FCC established a series of rate caps for CLEC access tariffs associated with interstate access services. Hypercube has complied with the FCC's access charge regulations.

<sup>10</sup> *Id.* at ¶ 60.

<sup>11</sup> *Id.* at ¶ 93. See also *id.* at ¶ 23 (noting that "IXCs appear routinely to be flouting their obligations under the tariff system"); ¶ 24 (IXC traffic blocking "threaten[s] to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion.").

all costs, including access charges, associated with toll-free calls. IXCs may only recoup these costs from their toll-free subscribers (*i.e.*, the called party).

12. Specific to 8YY traffic, the FCC held that it was “not necessary immediately to cap [CLEC] access rates for 8YY traffic at the rate of the competing [ILEC].”<sup>12</sup> “Rather,” the FCC continued, CLECs could “continue to charge the previously established” rate.<sup>13</sup> Thus, access services associated with carrying 8YY traffic to the correct IXC have always been, and are still, fully compensable.

13. The FCC has also held that CLECs may assess tariffed access charges on IXCs when acting as an intermediate carrier delivering calls from wireless carriers to IXCs.<sup>14</sup> CLECs are entitled to assess tariffed charges for the functionalities they perform (*e.g.*, transport, switching, etc.); CLECs may not charge pursuant to their tariffs for the work that wireless carriers perform in carrying these calls. Rather, only the wireless carrier may charge for this work, and wireless carriers may assess such charges based on express or implied contracts.<sup>15</sup>

14. Specifically regarding traffic from wireless service providers, the FCC has stated that while “a competitive LEC has no right to collect access charges for the portion of the service provided by the [wireless] provider,” it can charge for access components at rates comparable to

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<sup>12</sup> *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Red. 9108, ¶ 70 (2004) (“*Eighth Report and Order*”).

<sup>13</sup> *Id.*

<sup>14</sup> *Eighth Report and Order* at ¶¶ 16-17.

<sup>15</sup> *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Red. 13,192, ¶ 12 (2002) (“*Sprint PCS*”).

those charged by the ILEC for the same functions.<sup>16</sup> The FCC added, however, that CLECs “continue to have flexibility in determining the access rate elements and rate structure for the elements and services they provide.”<sup>17</sup> Thus, in contrast to the regulation of ILECs, the “benchmark rate for CLEC switched access does not require any particular rate elements or rate structure; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark.”<sup>18</sup>

15. The FCC’s findings are consistent with that of state public utilities commissions addressing similar issues. For example, in a dispute brought by WilTel against Verizon at the New York Public Service Commission (“NYPSC”),<sup>19</sup> WilTel alleged that Verizon was not entitled to access charges for the traffic it terminated to wireless carriers’ end users because the wireless carriers themselves would not be entitled to compensation from an IXC for access charges unless a contract existed between the two parties. Under the filed tariff doctrine, the NYPSC held that WilTel was required to pay Verizon for the services it performed in completing the call.

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<sup>16</sup> *Eighth Report and Order* at ¶¶ 16-17. See also *id.* at ¶ 21 (“Competitive LECs also have, and always had, the ability to charge for common transport when they provide it, including when they sublend an incumbent LEC tandem switch. Competitive LECs that impose such charges should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate.”).

<sup>17</sup> *Id.* at ¶ 17 and n.58.

<sup>18</sup> *Seventh Report and Order* at ¶ 55. The FCC has declined to regulate the rate charged for database queries associated with 8YY calls. *Eighth Report and Order* at n.251.

<sup>19</sup> New York Public Service Commission, Case 04-C-1548 (May 30, 2006). A copy of this decision is attached hereto at Exhibit B.

**E. Specific Issues Related To Toll-Free Calls That Commence On Wireless Networks**

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

17. Wireless carriers may charge IXCs and others access charges by express or implied contract for use of the wireless carrier's network for call origination and termination.<sup>20</sup> Unlike LECs (CLECs and ILECs), however, wireless carriers may not file tariffs with the FCC or the state commissions for these services.

18. Due in large part to the difficulty of negotiating individual contracts with IXCs, certain 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 behalf of the IXC for free.

19. LECs delivering the calls from a wireless carrier's networks to an IXC's network are entitled to bill the IXC for the work the LEC performs pursuant to filed tariffs.

20. In many instances, LECs provide a cost recovery fee to the wireless carrier for routing the toll free traffic over the LEC's network for delivery to the IXC. The FCC has reviewed these types of arrangements and found no cause to limit them or otherwise restrict the ability of an intermediate carrier to recover tariffed-based access charges for the work performed.<sup>21</sup>

21. This is true even in instances where there is more than one LEC involved in delivering an 8YY call from a wireless carrier's network to the IXC. At any time, an IXC may

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<sup>20</sup> *Sprint PCS* at ¶ 12.

<sup>21</sup> *Eighth Report and Order* at ¶¶ 69-72.

interconnect directly with an intermediate LEC (or in some cases, even directly with the wireless carrier) to minimize the number of carriers involved in handling an 8YY call.<sup>22</sup> When an IXC does so, it avoids entirely the access charges associated with the functionality that previously was provided by an intermediate carrier.

22. Hypercube offers and specifically pursues direct interconnection with all IXCs. Hypercube directly interconnects with all IXCs larger than Level 3, and with a number of IXCs smaller than Level 3. Direct interconnection is Hypercube's preferred method of delivering traffic to (and receiving traffic from) IXCs. In spite of multiple invitations from Hypercube, Level 3 has declined to directly interconnect its network with Hypercube's network for 8YY calls destined to Level 3's customers.

## **II. PARTIES, JURISDICTION, CATEGORY OF PROCEEDING, HEARING REQUIREMENT, ISSUES AND PROPOSED SCHEDULE**

23. Pursuant to Rule 4.2 of the Commission's Rules of Practice and Procedure, Complainants provide the following information:

- a. Hypercube Telecom, LLC is a Delaware limited liability company that is in the business of, among other things, providing interstate and intrastate telecommunications services to various customers, including IXCs. The address and telephone number of the Complainant is as follows:

Hypercube Telecom, LLC  
3200 West Pleasant Run Road  
Suite 260  
Lancaster, Texas 75146  
(469) 727-1510

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<sup>22</sup> *Access Charge Reform, Prairie Wave Telecommunications Inc. Petition for Waiver, et al.*, Order, 23 FCC Rcd. 2556, ¶¶ 26-27 (2008) ("*PrairieWave*").

Complainant is represented in this matter by the following attorneys:

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Gas Company Tower  
555 West Fifth Street, 48th Floor  
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b. On information and belief, Defendant Level 3 Communications, LLC is an entity created under the laws of the State of Delaware that is also in the business of providing interstate and intrastate telecommunications service to various customers. Level 3's service offerings include long distance service and toll-free, 8YY calling services. The address and telephone number of Level 3 is:

Level 3 Communications, LLC  
1025 Eldorado Boulevard  
Broomfield, Colorado 80021  
(720) 888-2512

On information and belief, Defendant is being represented in this matter by:

Gregory L. Rogers  
1025 Eldorado Boulevard  
Broomfield, Colorado 80021  
(720) 888-2512

c. The Commission has jurisdiction over this matter pursuant to Sections 701, 1702, and 1707 of the California Public Utilities Code based on the fact that Hypercube and Level 3 are public utilities subject to the California Public Utilities Code, and Level 3 has violated the California Public Utilities Code and Hypercube's Intrastate Tariff as set forth below.

d. This proceeding should be categorized as an adjudicatory proceeding.

e. **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. To the extent that the Commission determines that there are any material factual disputes, a hearing to resolve any such dispute(s) will be necessary.**

f. **The issues to be resolved in this matter are:**

1. **Whether Level 3 should be ordered to pay the amounts properly due and owing under Hypercube's Intrastate Access Tariff, including attorney's fees.**

2. **Whether Level 3 should be ordered to pay penalties to the State of California for violations of the California Public Utilities Code based on its violation of Hypercube's Intrastate Access Tariff.**

g. **Hypercube proposes the following schedule:**

<b>Service of Complaint</b>	<b>Day 1</b>
<b>Answer</b>	<b>Day 31</b>
<b>Prehearing Conference</b>	<b>Day 38</b>
<b>Discovery Completed</b>	<b>Day 83</b>
<b>Dispositive Motions</b>	<b>Day 90</b>
<b>Oppositions to Dispositive Motions</b>	<b>Day 104</b>
<b>Replies to Opposition to Dispositive Motions</b>	<b>Day 111</b>
<b>Evidentiary Hearing,</b>	

if Necessary	Day 141 and 142
Opening Briefs	Day 157
Reply Briefs	Day 171
Presiding Officer Decision	Day 199

### III. FACTS

24. Complainant incorporates the preceding paragraphs of its Complaint as if fully set forth herein.

25. Hypercube provides interstate and intrastate access services to various customers, including IXCs. Hypercube's claims in the present Complaint concern only its provision of intrastate access services to Level 3 in the State of California pursuant to Hypercube's Intrastate Access Tariff.

26. When wireless customers' toll-free calls are routed through the Complainant's facilities, Complainant provides access services and database query services to the IXC that is being paid by its customers to provide the toll-free service to those customers.

27. When Hypercube provides access services in connection with a call made from a wireless telephone, the call is routed from the wireless carrier's Mobile Telecommunications Switching Office to Complainant's network and switching equipment.

28. While the call is in the Complainant's switch, Complainant 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 (known as a "database dip"). Once the database returns information regarding the IXC whose 8YY customer has been called, Complainant's switch performs the necessary routing to deliver the call to the IXC's network.

29. Common carriers, like Hypercube, have an obligation to route traffic to other carriers, such as Level 3. Cal. P.U. Code § 558. As a result of this obligation and in consideration for work performed, Complainant is entitled to bill and to collect charges for the access services provided to other carriers, including Level 3 for its 8YY customers, at tariffed rates approved by the Commission.

30. Hypercube's Intrastate Access Tariff sets forth the terms and conditions according to which Complainant provides intrastate access services to Level 3 in connection with Level 3's 8YY offering. The tariff sets forth the terms and conditions of these same services where a call originates and terminates in California.

31. From November 2005 through the present, Hypercube has routed calls to Level 3 as part of the 8YY service that Level 3 offers to its customers. On information and belief, no other entity has charged Level 3 for the access services or database query services performed by Complainant's switch and network.

32. From November 2005 through October 2007, with the exception of late payment fees, Level 3 paid Complainant in full for virtually all of the access services performed by Complainant's switch and network.

33. Beginning in November 2007, Level 3 began withholding all amounts owed for access services provided by Complainant.

34. Level 3 has never communicated any claim that it has not received the access services from Hypercube for which it has been invoiced.

35. Level 3 has never communicated any claim that Hypercube has billed Level 3 for an incorrect number of minutes of use for 8YY traffic.

36. Level 3 has never communicated any claim that Hypercube has billed Level 3 for an incorrect volume of database queries.

37. Since November 2007 and continuing through the present, Level 3 has received, accepted, and benefited from intrastate access services provided by Hypercube in connection with Level 3's 8YY offering to its customers. Level 3 accepted the 8YY calls that Hypercube carried on its network and confirmed (through database queries) were destined to Level 3's 8YY customers. Level 3 delivered those calls to its customers as part of Level 3's 8YY service offering. On information and belief, Level 3 has received and continues to receive payment from its 8YY customers for all calls Complainant transmits to Level 3. In short, Level 3 wants to collect revenue from its customers for providing toll-free service without paying the costs that Hypercube – which is legally obligated to deliver calls to Level 3 – incurs in delivering the toll-free calls to Level 3.

38. Since February 2008, Hypercube has been attempting to resolve Level 3's non-payment through negotiations.

39. At all times relevant hereto, Level 3 has had actual and constructive notice of Hypercube's intrastate network and database query access charges for delivering 8YY traffic. Level 3 continues to receive, use, and benefit from Hypercube's intrastate access services.

40. To date, Level 3 has refused to pay an amount not less than \$15,931,351.61 in Hypercube's lawfully billed charges to Level 3 for interstate and intrastate access service.

41. For intrastate calls originating and terminating within the State of California, Level 3 has refused to pay a past-due amount owed of not less than \$5,557,979.97 in Hypercube's lawfully billed charges to Level 3 pursuant to Hypercube's Intrastate Access Tariff.

42. The amount overdue from Level 3 for access services provided by Hypercube represents service provided during the months of November 2007 through April 2009. These amounts continue to grow each month as: (i) Hypercube continues to satisfy its statutory duty as a common carrier to provide access services to Level 3; (ii) Level 3 avails itself of Hypercube's access services; (iii) Level 3 utilizes those services as an input to the 8YY services Level 3 provides to its customers and for which Level 3 receives payment; and (iv) Level 3 refuses to pay for the access services received from Hypercube.

43. Level 3's refusal to pay these charges and associated late fees is without legal justification or excuse.

44. On information and belief, Level 3 has been and continues to be in financial trouble, which may be the source of its refusal to pay its bills. On December 28, 2008, Standard & Poor's rating agency downgraded the corporate credit rating of Level 3's parent to "selective default." Level 3's parent has been reported to be considering bankruptcy, which could alleviate certain of its obligations to debtors. In addition, a number of groups representing Level 3 shareholders have filed securities fraud complaints against Level 3's parent, which were consolidated in federal court on February 27, 2009.

**FIRST CAUSE OF ACTION  
(LEVEL 3'S VIOLATION OF  
HYPERCUBE'S INTRASTATE TARIFF)**

45. Complainant incorporates the preceding paragraphs as if fully set forth herein.

46. Hypercube's Intrastate Access Tariff sets forth the charges that Hypercube imposes on carriers that use its services.

47. The provisions of Hypercube's Intrastate Access Tariff were approved by the Commission and therefore have the force of law, establishing Hypercube's lawful rates for providing the telecommunications services described above.

48. Hypercube has provided services to Level 3 that are compensable under Hypercube's Intrastate Access Tariff as described above.

49. Level 3 has unlawfully refused to pay the Commission-approved tariff charges set forth in the invoices presented to Level 3 by Hypercube.

50. As of May 2009, the total amount of past-due, tariffed charges that Level 3 owes pursuant to Hypercube's Intrastate Access Tariff but that Level 3 has refused to pay is **\$5,214,741.23** plus late payment charges of **\$343,328.74**, totaling **\$5,557,979.97**.

**SECOND CAUSE OF ACTION  
(LEVEL 3'S VIOLATION OF  
SECTION 702 OF THE  
CALIFORNIA PUBLIC UTILITIES CODE)**

51. Complainant incorporates the preceding paragraphs as if fully set forth herein.

52. California Public Utilities Code § 702 provides that "[e]very public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission ... and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

53. Hypercube's Intrastate Access Tariff has the force of law and constitutes an "order, decision, direction, or rule made or prescribed by the commission."

54. Level 3's refusal to pay Hypercube's Commission-approved tariff charges therefore constitutes a violation of § 702 of the California Public Utilities Code.

**THIRD CAUSE OF ACTION  
(LEVEL 3'S VIOLATION OF  
SECTION 761 OF THE  
CALIFORNIA PUBLIC UTILITIES CODE)**

55. Complainant incorporates the preceding paragraphs as if fully set forth herein.

56. California Public Utilities Code § 761 prohibits "unjust" and "unreasonable" practices by public utilities.

57. On information and belief, Level 3 pays certain other carriers' tariffed intrastate access charges in California for delivering 8YY traffic and performing database dips for calls commencing on wireline networks.

58. On information and belief, Level 3 pays certain other carriers' tariffed intrastate access charges in California for delivering 8YY traffic and performing database dips for calls commencing on wireless networks.

59. Level 3's decision to compensate some carriers but not others for performing the same work on Level 3's behalf constitutes an unjust, unreasonable, and discriminatory practice that violates § 761 of the California Public Utilities Code and risks damaging the ubiquity of the Public Switched Telephone Network in California.

60. Level 3's refusal to pay Hypercube's Commission-approved tariff charges also constitutes an unjust and unreasonable practice that violates § 761 of the California Public Utilities Code.

**IV. REQUEST FOR RELIEF**

WHEREFORE, Complainant respectfully requests that the Commission:

a. Issue an Order declaring that Hypercube has lawfully charged Level 3 for intrastate access services pursuant to Hypercube's filed Intrastate Access Tariff.

b. Issue an Order directing Level 3 immediately to pay **\$5,557,979.97** to Hypercube for the access services provided by Hypercube to Level 3 in connection with Level 3's provision of toll-free, "800" or "8YY" calling services to Level 3's customers.

c. Issue an Order under Section 2106 of the California Public Utilities Code directing Level 3 to pay Hypercube's costs in bringing this Complaint and the attorneys' fees and expenses incurred by Hypercube in pursuing this Complaint, as required under Hypercube's tariff.

d. Issue an Order directing Level 3 to pay Hypercube all future charges Level 3 incurs under Hypercube's Intrastate Tariff for services provided by Hypercube in connection with Level 3's provision of toll-free "800" or "8YY" calling services to Level 3's customers.

e. Issue an Order fining Level 3 up to **\$20,000** per day for each day that it continues to violate California Public Utilities Code §§ 702 and 761 from the date of filing of this Complaint pursuant to California Public Utilities Code §§ 2107 and 2108.

f. Issue an Order requiring Level 3 to provide Hypercube with reasonable security of future performance in the form of a cash deposit, irrevocable letter of credit, or bond in an amount not less than **\$2,500,000.00**.

g. Expedite this proceeding to the extent practicable to minimize the risk of non-payment to Hypercube that could result from a decision by Level 3 to file for protection under the bankruptcy laws.

h. Grant such other relief and remedies as the Commission deems just and proper.

Respectfully submitted,

HYPERCUBE TELECOM, LLC



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*Counsel for Complainants  
Hypercube Telecom, LLC*

May 8, 2009

**VERIFICATION**

I am an officer of Hypercube Telecom LLC, one of the complaining limited liability companies herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under perjury that the foregoing is true and correct.

Executed on May 8, 2009, at Lancaster, Texas.

(Date)

(City)

(State)

(Signature)

A handwritten signature in black ink, appearing to read "Clay Myers", is written over a horizontal line.

(Name) Clay Myers

(Corporate title) Executive Vice President and CFO

**CERTIFICATE OF SERVICE**

I, Edilma Carr, certify that I have on this 8<sup>th</sup> day of May 2009, caused a copy of the foregoing

**COMPLAINT OF HYPERCUBE TELECOM, LLC AGAINST LEVEL 3  
COMMUNICATIONS, LLC FOR LEVEL 3'S REFUSAL TO PAY  
TARIFFED ACCESS CHARGES**

to be served upon the party listed below via U.S. Mail.

Gregory L. Rogers  
Level 3 Communications, LLC  
1025 Eldorado Boulevard  
Broomfield, Colorado 80021  
Tel: (720) 888-2512

Executed this 8<sup>th</sup> day of May 2009 at Washington, D.C.



Edilma Carr

**EXHIBIT B**

**Hypercube Telecom, LLC**

Government Affairs  
Room 300, Suite 300  
5000 Oakbrook Place  
Buckhead, Georgia 30301  
Tel 478-387-2801

**FILE STAMP & RETURN**

March 31, 2009

VIA COURIER

Mariana H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
c/o NetScout, Inc.  
276 Massachusetts Avenue, NE, Suite 110  
Washington, DC 20002

FILED/ACCEPTED

APR - 7 2009

Federal Communications Commission  
Office of the Secretary

Re: Informal Request of Hypercube Telecom, LLC With Respect to Carrier "Self-Help" Measures Pursuant to 47 C.F.R. § 1.41

Dear Ms. Dortch:

Hypercube Telecom, LLC ("Hypercube"), pursuant to Section 1.41 of the rules of the Federal Communications Commission, hereby submits an original and four (4) copies of this Informal Request with respect to "self help" practices engaged in from time to time by interexchange carriers ("IXCs") in refusing to pay tariffed switched access charges.

As the enclosed white paper explains, the telecommunications industry remains plagued by a long-standing practice that is already prohibited by existing Commission rules and orders. Specifically, IXCs continue to engage from time to time in "self help" and refuse to pay tariffed access charges, attempting to force the local exchange carriers ("LECs") that provide such switched access services to accept settlements at amounts well below the LEC's lawfully tariffed rates. Such conduct is particularly harmful and onerous in the current economic climate where a smaller LEC, such as Hypercube, may be less able (or altogether unable) to withstand the IXC's withholding of such payments or to bear the cost of collection.

Although the Commission has previously found that "self help" in the form of withholding payments is not a reasonable practice, it continues nonetheless. Thus, as explained further in the enclosed paper, Hypercube respectfully requests that the Commission:

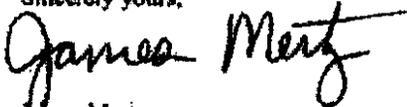
- reiterate in clear and unmistakable terms that an IXC's refusal to pay LECs for lawfully tariffed switched access charges or any other practices on the part of an IXC designed to force reductions in access rates not compelled by Commission or state regulations shall constitute an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act of 1934, as amended (the "Act"); and

Page 2

- revise its base forfeiture schedule pursuant to Section 503 of the Act to make clear that a penalty of \$40,000 will be applied against any IXC for each month (or portion thereof) in which it engages in such "self help" practices.

Thank you for your attention to this Informal Request, and please contact the undersigned should you have any questions. Please date-stamp the enclosed extra copy of this Informal Request and return it in the self-addressed envelope provided.

Sincerely yours,



James Mertz  
Vice President Government Affairs  
Hypercube Telecom, LLC

cc: Julie Ventch, Acting Division Chief, Wireline Competition Policy  
Alex Starr, Enforcement Bureau

**PROPOSALS FOR RESOLVING  
CARRIER "SELF HELP" MEASURES  
WITH RESPECT TO PAYMENT OF  
LAWFUL ACCESS CHARGES**

*Hypercube Telecom, LLC*

**March 31, 2009**

**PROPOSALS FOR RESOLVING  
CARRIER "SELF HELP" MEASURES  
WITH RESPECT TO PAYMENT OF  
LAWFUL ACCESS CHARGES**

**Issue:**

The telecommunications industry is plagued by a practice that is already prohibited by the Federal Communications Commission's ("FCC") rules yet persists. Interexchange Carriers ("IXCs") consistently use "self-help" to force competitors to settle disputes on unfavorable terms. The FCC should make clear that "self-help" is an unacceptable practice and carriers that engage in "self-help" should be subject to meaningful enforcement in the form of forfeitures.

**Background:**

Carriers are required to pay for the use of others' networks to originate and terminate telephone calls. These payments are referred to as to "intercarrier compensation" and can vary based on a myriad of factors including whether the service is classified as local or long distance, interstate or intrastate, or basic or enhanced, and the type of carrier involved in routing the call to its destination, *e.g.*, wireless, local exchange, IXC or an enhanced service provider. While "self-help" may be used in a variety of situations, it frequently occurs in the context of carrier disputes over access charges.

The legal obligation to pay intercarrier compensation typically is established by a local exchange carrier's tariff that is filed with and approved by state public utility commissions or the FCC. IXCs that do not like the rates in these tariffs have legal remedies in the form of tariff protests or complaints to seek lower rates. Rather than pursue these remedies, however, some IXCs simply refuse to pay these lawfully, tariffed charges.

This puts the carrier that is unable to collect its lawfully tariffed charges in a quandary. The IXCs and the local carrier are serving exactly the same customers – the IXC is providing them long-distance service, and the local carrier is providing them local calling. The local carrier cannot simply disconnect a non-paying IXC because this would harm the carrier's relationships with its own customers. Thus, the carrier is effectively forced to provide access service for free until the dispute is resolved.

IXC self-help measures adversely impact the competitive telecommunications landscape and interfere with carriers' ability to focus on providing high quality service to their customers. Moreover, when large, better capitalized IXCs engage in anticompetitive self-help measures and refuse to pay the lawfully tariffed charges, smaller carriers must cut costs, in the form of layoffs, which artificially impedes the growth of these small businesses. To prevent these unreasonable

and anticompetitive practices, the FCC should reiterate that carriers may not engage in “self-help” and may not refuse to pay tariffed access charges at any time.<sup>1</sup>

**Existing Rules:**

The FCC has long prohibited carriers from engaging in “self-help,” finding that “a customer, a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier’s applicable tariffed charges and regulations.”<sup>2</sup> This pay first and dispute later principle<sup>3</sup> was affirmed in *MGC Communications v. AT&T Corp.*<sup>4</sup> There, over the period from August 1998 to July 1999, AT&T advised MGC that it would not pay for MGC’s interstate access services, but kept accepting and using those services. AT&T’s failure to pay for those services was found to be impermissible self-help and a violation of section 201(b) of the Communications Act.<sup>5</sup>

Since MGC, the FCC has reiterated its policy to prohibit “self-help” in numerous proceedings. It has said that IXCs cannot block traffic unilaterally, either to put pressure on other carriers to lower their charges, or to avoid incurring greater liabilities to those carriers. Instead, the FCC has required these common carriers to complete traffic while pursuing their complaints against the interconnecting carriers in appropriate fora.<sup>6</sup>

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<sup>1</sup> This also is important if the Commission adopts a new intercarrier compensation regime where rates glide downward over a period of years. See *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking*, Docket Nos. 05-337, 96-45, 03-109, 06-122, 99-200, 96-98, 01-92, 99-68 & 04-36, FCC 08-262 (rel. Nov. 5, 2008) (“*Order and FNPRM*”).

<sup>2</sup> *Brooten v. AT&T Corp.*, 12 FCC Rcd 13343 at n.53 (Common Car. Bur. 1997) (citing *MCI Telecommunications Corp.*, 62 F.C.C.2d 703, 705-706 (1976)).

<sup>3</sup> The pay first and dispute later policy is based on the filed rate doctrine, also known as the filed tariff doctrine. This doctrine is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act, was later applied to telecommunications common carriers and eventually was codified in Section 203 of the Act. Once filed, tariffs establish the rates IXCs must pay for tariffed services, and “have the force of law.” *Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363 (D.C. Cir. 1980).

<sup>4</sup> *MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11,647 (Comm. Car. Bur. 1999), *affd.*, 15 FCC Rcd 308 (1999) (“*MGC*”).

<sup>5</sup> See *id.*, 14 FCC Rcd at 11659, ¶ 27.

<sup>6</sup> *Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11629, ¶ 1 (Wireline Comp. Bur. 2007) (“*FCC Call Blocking Order*”) (citing Sections 151 and 254 of the Communications Act).

Notwithstanding these FCC findings, certain IXCs continue to withhold access payments as leverage to force competitive local exchange carriers ("CLECs") into accepting lower rates or exact other concessions. For example, many IXCs withheld all access payments to numerous CLECs shortly after the FCC adopted a transition period to bring CLEC interstate access rates down to ILEC levels.<sup>1</sup> And even after the transition period ended and CLECs' interstate access rates matched those of competing incumbent local exchange carriers in their service territories, these IXCs continued to withhold payment on all access charges, even the undisputed interstate access charges, simply because they were not happy with the CLECs' lawfully tariffed and approved intrastate access rates, which typically are higher for all carriers, not just CLECs, than interstate rates.

In many cases, by withholding payment on CLEC access charges, IXCs forced CLECs into access agreements and settlements at rates well below the CLECs' lawfully tariffed rates. CLECs that refused to accede to IXC demands or attempted to terminate services to IXCs for failure to pay often found themselves in protracted and costly litigation with the IXCs. Generally speaking, most of these disputes occur between IXCs that are well capitalized, publicly-traded companies, and CLECs that are typically much smaller by many magnitudes.<sup>4</sup> These IXC self-help measures have real world consequences on small CLECs, forcing these companies to lay off employees and delay growth plans. In the current economic environment, self-help is particularly harmful as it exacerbates unemployment and artificially stunts the growth of innovative small companies. Additionally, these actions not only violate the FCC's rules, but also provide a competitive advantage to IXCs resulting from the considerable financial strain imposed on CLECs forced to accept either below tariff rates or spend valuable resources on litigation and forego plans for expansion and other growth opportunities.<sup>2</sup> Self-help tactics thwart the goals of FCC rulemakings, such as the rules that were created in the CLEC Access Reform Order, and the statutes and FCC rules that permit carriers to file tariffs that have the force of law.

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<sup>1</sup> See *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rod 9923 (2001) ("*CLEC Access Reform Order*").

<sup>4</sup> For example, even in the current environment of market turmoil, IXCs like AT&T and Verizon have market capitalizations of approximately \$148 and \$88 billion respectively, while one of the largest CLECs has a capitalization of \$204 million (roughly 725 and 430 times smaller than AT&T and Verizon as measured by market capitalization).

<sup>2</sup> Many IXCs operate carrier affiliates that compete with other local exchange carriers, such as CLECs. By refusing to pay tariffed access charges and/or litigating disputes, IXCs withhold valuable revenues owed to CLECs creating a competitive advantage for their affiliates.

**Resolution:**

Given the IXCs' repeated failures to heed FCC findings that self-help is an unreasonable practice and violation of Section 201(b), the FCC must not only reiterate that carriers may not refuse to pay competitors for lawfully tariffed charges, engage in traffic discrimination, or undertake any other practices designed to force competitors to transition to lower rates sooner than required by the FCC or state public utility commissions;<sup>10</sup> it must add teeth to those policies by adopting a base forfeiture for self-help violations by customer-competitors.<sup>11</sup>

The FCC should revise the base forfeiture schedule to make clear it will levy penalties against carriers that engage in this discriminatory and anti-competitive practice. "Self-help," like those activities outlined above, is more than a simple customer dispute – it threatens smaller carriers with the loss of their business, results in customer disruptions such as the loss or reduction of service, threatens the ubiquitous connectivity of the telecommunications network generally, thwarts important FCC policies, and wastes agency and carrier resources.

Section 503 of the Act provides that any person that willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the FCC, shall be liable to the United States for a forfeiture penalty.<sup>12</sup> The FCC has wide discretion in determining forfeitures for violations of the Act, and it should issue forfeiture notices for self help actions in an amount consistent with other recent penalties levied for a variety of violations of the Act. For example, for each month in which a carrier has failed to pay required universal service contributions, the FCC has established a base forfeiture amount of \$10,000 (for underpayment) or \$20,000 (for no payment), plus an upward adjustment based on one-half of the company's approximate unpaid contributions to address both the detrimental impact on the Universal Service Fund and the illegitimate competitive advantage the non-payer gains.<sup>13</sup> Similarly, the forfeiture guidelines "establish a standard forfeiture amount of \$40,000 for violations of our rules and orders regarding unauthorized changes of preferred interexchange carriers,"<sup>14</sup> another anti-competitive practice.

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<sup>10</sup> Although some carriers may have legitimate disputes concerning jurisdictional classification of traffic, those disputes should not give a customer a free pass to refuse to pay all intercarrier compensation charges. The carriers have legal remedies other than self-help by which to seek resolution of their claims.

<sup>11</sup> See 47 C.F.R. § 1.80.

<sup>12</sup> 47 U.S.C. § 503.

<sup>13</sup> See, e.g., *Telrite Corporation, Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-05-IH-2348, NAL/Acct. No. 200832080084, ¶¶ 14, 24-25 (rel. Apr. 17, 2008) (imposing \$924,212 forfeiture for failure to pay USF, TRS, NANPA, and other regulatory fees over the course of approximately two years, which contained an upward adjustment of \$417,438, which represented 50 percent of the largest balance due during that period).

<sup>14</sup> *Horizon Telecom, Inc., Apparent Liability for Forfeiture*, File No. EB-07-TC-4006, NAL/Acct. No. 200832170013 (rel. Feb. 29, 2008) (fining Horizon \$5,084,000 for slamming and other violations).

The public interest requires common carriers to complete their customers' calls and pay lawful tariffed compensation rates to their common carrier competitors. The FCC should enforce this requirement with investigations and forfeitures just as it does in other instances of non-payment (USF) and other anti-competitive practices (USF and slamming). And the gravity of these illegal self-help action further dictates expediting any investigations to prevent these activities as soon as practical. Such action is consistent with existing FCC rules and orders and will allow carriers to focus on providing service to their customers, rather than wasting resources on disputes with IXCs. A standard base forfeiture guideline of \$40,000 for each month that an IXC engages in self-help and refuses to pay a CLEC's lawfully tariffed access charges is a reasonable deterrent for such illegal conduct and an amount that is consistent with other FCC forfeitures.