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May 22, 2009

VIA HAND DELIVERY

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

FILED/ACCEPTED
MAY 22 2009
Federal Communications Commission
Office of the Secretary

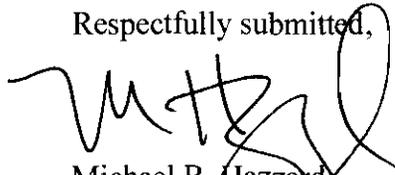
Re: CC Docket Nos. 96-262 and 01-92

Dear Ms. Dortch:

Enclosed please find an original and four (4) copies of Hypercube Telecom, LLC's Comments in Opposition to Level 3 Communications, LLC's May 12 Filing to be submitted in the above-referenced dockets. Per Rule 1.419(c), an additional two copies are included for the filing in the additional docket.

Also enclosed is a duplicate copy of this filing. Kindly date-stamp the duplicate copy and return it to the courier. If you have any questions regarding this filing, please contact the undersigned counsel.

Respectfully submitted,



Michael B. Hazzard
Counsel to Hypercube Telecom, LLC

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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Office of the Secretary

In the Matter of
Access Charge Reform

CC Docket No. 96-262

Developing a Unified Inter-carrier
Compensation Regime

CC Docket 01-92

**COMMENTS OF HYPERCUBE TELECOM, LLC IN OPPOSITION TO
LEVEL 3 COMMUNICATIONS, LLC'S MAY 12 FILING**

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May 22, 2009

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**Before the
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Washington, D.C. 20554**

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Access Charge Reform

CC Docket No. 96-262

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**COMMENTS OF HYPERCUBE TELECOM, LLC IN OPPOSITION TO
LEVEL 3 COMMUNICATIONS, LLC'S MAY 12 FILING**

Hypercube Telecom, LLC ("Hypercube"), by its undersigned counsel, hereby files its comments in opposition to Level 3's May 12, 2009 filing ("May 12 Filing"), which has been included in the record of the above-reference dockets.¹

I. INTRODCUTION AND SUMMARY

Level 3's May 12 Filing is a sham designed to: (i) disrupt Hypercube's efforts to collect interstate and intrastate access charges long-owed by Level 3; (ii) justify Level 3's unlawful self-help efforts; (iii) advantage Level 3's competing product in the market; and (iv) misuse the Commission's processes in an attempt to instill fear and doubt into Hypercube's customers. Far from identifying an issue of "industry wide" importance needing clarification, the May 12 Filing is a bald effort by Level 3 to: (i) establish new rules; (ii) seek untimely reconsideration of established Commission holdings; and (iii) evade the formal complaint process designed to handle co-carrier tariff disputes. For these reasons, and as set forth below, Level 3's May 12 Filing should be rejected out of hand.

¹ Level 3 captioned its May 12 Filing as a "Petition for a Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls." May 12 Filing at 1. Under the Commission's rules, oppositions to pleadings labeled by anyone as a "petition" are due within 10 days of filing. 47 C.F.R. § 1.45(b).

A. Regulatory Background

Access charges are generally charges paid by a carrier for use of another carrier's network. Typical functionality associated with access charges includes but is not limited to the switching and transport of calls and querying databases. For calls that originate and terminate in the same state (*i.e.*, intrastate calls), state public service commissions ("PSCs") are responsible for regulating access charges. For calls that originate and terminate in different states (*i.e.*, interstate calls), this Commission is responsible for regulating access charges. Local Exchange Carriers ("LECs") typically establish their access charges by filing tariffs with the PSCs for intrastate access services and with the Commission for interstate access services. Commercial Mobile Radio Service ("CMRS") providers are entitled to charge other carriers for access to their network by express or implied contract, but they are not permitted to file tariffs. PSCs are precluded from regulating access charges assessed by CMRS providers to other carriers for intrastate (and interstate) calls.

1. *The 2001 Seventh Report and Order.* Prior to 2001, interstate access charges assessed by Competitive Local Exchange Carriers ("CLECs") were essentially unregulated. In 2001, the Commission adopted *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*"). There, the Commission held that Interexchange Carriers ("IXCs"), such as Level 3, are obligated to purchase tariffed CLEC access services, including those related to toll-free calls made from wireless networks.² The FCC found that an IXC's refusal to pay for access services provided

² *Seventh Report and Order* at ¶¶ 90-97.

constitutes a violation of section 201 of the Communications Act (“Act”).³ The FCC also held that tariffed CLEC access charges that are consistent with the benchmarks established for such services are “conclusively deemed reasonable.”⁴

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.⁵ This is particularly important with the traffic associated with toll-free service (*i.e.*, “8YY”) that is the subject of the May 12 Filing because all downstream 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 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).

2. *The 2002 Sprint PCS Declaratory Ruling.* In response to a primary jurisdiction referral, the Commission in 2002 re-affirmed that wireless carriers may not file *tariffs* for purposes of assessing charges on other carriers.⁶ The Commission stated that there “are three ways in which a *carrier* seeking to impose charges on *another carrier* can establish a duty to pay

³ *Id.* at ¶97. In the *Seventh Report and Order*, the FCC established a series of regulations for CLEC access tariffs associated with interstate access services. Hypercube has complied with the FCC’s access charge regulations.

⁴ *Id.* at ¶60.

⁵ *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.”).

⁶ *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13,192, ¶12 (2002) (“*Sprint PCS*”).

such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract.”⁷ Following this Commission determination, wireless carriers began seeking contractual arrangements with network providers with whom they interconnect. The Commission has never found unlawful or unreasonable any network access charge assessed by a CMRS provider to another carrier pursuant to a private contract.

3. *The 2004 Eighth Report and Order.* In 2004, the Commission held that a CLEC may assess tariffed access charges on IXCs when acting as an intermediate carrier delivering calls from wireless carriers to IXCs.⁸ 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.⁹

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 those charged by the [ILEC] for the same functions.¹⁰ The FCC added, however, that CLECs

⁷ *Id.* at ¶8 (emphasis added).

⁸ *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, ¶¶16-17 (2004) (“*Eighth Report and Order*”). Hypercube does not now and never has charged anyone for the functions performed by CMRS providers. Hypercube only charges for the access functions that Hypercube performs.

⁹ *Sprint PCS* at ¶12.

¹⁰ *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 subtend an incumbent LEC tandem switch. Competitive LECs that impose such charges

“continue to have flexibility in determining the access rate elements and rate structure for the elements and services they provide.”¹¹ 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.”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].”¹³ “Rather,” the FCC continued, CLECs could “continue to charge the previously established” rate.¹⁴ Thus, access services associated with carrying 8YY traffic to the correct IXC have always been, and are now, fully compensable. The Commission also reviewed, and had no quarrel with, “commission payments to 8YY generators,” as the “primary effect” of such an arrangement is to “create a financial incentive ... to switch from the incumbent to a competitive service provider.”¹⁵

Finally, the Commission found that, to the extent an IXC believes “that any particular competitive LEC *rate or practice* is unlawful,” the IXC should “bring a challenge under section 208 of the Act.”¹⁶

should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate.”).

¹¹ *Id.* at ¶17 and n.58.

¹² *Seventh Report and Order* at ¶55. The FCC has declined to regulate the rate charged for database queries associated with originating 8YY calls. *Eighth Report and Order* at n.251.

¹³ *Eighth Report and Order* at ¶70 (2004).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at ¶72 (emphasis added).

B. Hypercube and Level 3

Upon Hypercube's founding in 2005, the aforementioned regulatory background was well established. As a new entrant, Hypercube had to work extremely hard to get other network providers to interconnect with Hypercube's network. Part of this endeavor involved negotiating commercial agreements with CMRS providers to access their networks. Due in large part to the difficulty and cost of negotiating individual contracts with IXCs, certain wireless carriers have found it more convenient to enter commercial access agreements with other carriers, like Hypercube. With fair, commercially-negotiated contracts in place with CMRS providers and others, Hypercube has been able to establish itself as an important competitive alternative to ILEC tandem services for the CMRS industry and others.

The Hypercube offering that is the source of the dispute between Level 3 and Hypercube is called "Toll Free Origination Service."¹⁷ Toll Free Origination Service is an access service that delivers toll-free calls to the IXC for termination to their 8YY subscribers. For example, 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.¹⁸ These costs include payment for the use of other carriers' networks to carry the toll-free call to Level 3's network and the process by which other carriers query industry databases to make sure the 8YY call is routed correctly. For its Toll Free Origination Service, Hypercube picks up traffic at the CMRS provider's switch (known as a Mobile Telephone

¹⁷ As described below Level 3 has offered since at least 2007 a competing offering that it calls "Toll Free Inter-Exchange Delivery Service."

¹⁸ 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.

Switching Office), and transports it to the Hypercube switch. In addition to performing aggregation and switching functions, Hypercube has infrastructure in place to query industry databases that maintain lists of telecommunications carriers offering 8YY service. Through performing these database queries, also known as a “dips,” Hypercube ensures that the 8YY telephone calls that it processes have the appropriate features applied, are sent to the correct telecommunications carrier, and ultimately, to the correct customer destination. Accessing these databases and processing queries creates a cost burden on carriers, like Hypercube, that are involved in the delivery of 8YY traffic to the correct IXC. Carriers providing these access services are entitled to compensation from the IXC, here Level 3, that sell 8YY service to end users.

From late 2005 through October 2007, Hypercube billed, and Level 3 paid for, the access services provided by Hypercube associated with 8YY calls made by wireless subscribers. Beginning in November 2008, Level 3 began disputing 100% of Hypercube’s access bills. At that same time (Hypercube has recently learned), Level 3 had filed intrastate access tariffs for its competing product in 18 states, and Level 3 was angry that it was losing business to Hypercube.¹⁹ Beginning in February 2008 and continuing through much of April 2009, Hypercube worked to engage Level 3 in settlement negotiations to resolve the dispute between the parties.

On April 20, 2009, Hypercube sent a demand letter to Level 3. After it was clear that the parties had reached an impasse, Hypercube electronically filed a complaint to enforce its intrastate access tariff before the California Public Utilities Commission (“CPUC”) on May 8.

¹⁹ In filings with the Commission, Hypercube has included materials generated by Level 3 regarding its competing product, which goes entirely unmentioned in its May 12 Filing. *See, e.g.,* May 20, 2009 Letter from Michael B. Hazzard to Julie A. Veach (attached hereto as TAB A).

The following week, Level 3 filed its self-styled “petition for declaratory ruling” on May 12. Although purporting to speak to some “industry-wide” issue, the May 12 Filing is a direct attack on Hypercube²⁰ (mentioned no less than 50 times) and its commercial access arrangements with CMRS providers (referred to as a “kick-back” nearly 30 times). Of equal note, the May 12 Filing contains no evidence. It is nothing more than a series of *ipse dixit* assertions by Level 3’s outside counsel. The goal of Level 3’s May 12 Filing is plain: defame Hypercube, disrupt Hypercube’s CPUC complaint, and make it as difficult and time consuming as possible for Hypercube to collect interstate and intrastate tariffed access charges owed by Level 3 for its undisputed and on-going use of Hypercube’s network.

If Level 3 were serious about its assertions, it would follow the remedy provided for in the *Eighth Report and Order* and pursue a section 208 complaint against Hypercube for any “rate or practice” that Level 3 believes is “unlawful.”²¹ Level 3 has never attempted to challenge any of Hypercube’s tariffs.

II. THE MAY 12 FILING IS AN INAPPROPRIATE EFFORT TO CREATE NEW RULES AND HAVE THE COMMISSION UNTIMELY RECONSIDER PAST DECISIONS

As described above, through its filing, Level 3 is attempting to convert a dispute between two co-carriers into some “industry-wide” issue. By its terms, however, the May 12 Filing is inappropriate as it urges the Commission to: (i) adopt a new rule defining a class of carrier, apparently styled as an “Inserted CLEC,” (ii) fashion and alchemistic interpretation of section 332(c)(3) of the Act, and (iii) reconsider the findings made in rulemaking orders years ago.

²⁰ Level 3 also indirectly attacks Hypercube’s rates. If Level 3 wants to challenge Hypercube’s rates, it should do so directly with a complaint to the Commission on Hypercube’s tariffs. Hypercube stands by each and every single one of its rates, and has no need or obligation to respond to unsupported assertions by Level 3’s outside counsel regarding Hypercube’s tariffed rates.

²¹ *Eighth Report and Order* at ¶72.

Because it seeks the adoption of new rules, new statutory interpretations, and reconsideration of past Commission findings, “a declaratory ruling is not the proper vehicle for the relief sought by [Level 3].”²²

A. Adoption of Level 3 “Inserted CLEC” System Requires New Rules

Level 3’s petition is entirely premised on the Commission adopting of a new class of carrier, which Level 3 terms “Inserted CLEC.”²³ This term never has been adopted, let alone defined by the Commission. The Commission would have to adopt such a new classification by rule. Of course, the effect of adopting yet another unique regulatory classification of carrier for intercarrier compensation purposes would serve only to further complicate, rather than simplify, the Commission’s decade-long odyssey to unify intercarrier compensation regimes.

Level 3 defines “Inserted CLEC” as “CLECs that are retained by CMRS carriers and inserted into the flow between the CMRS carrier and the ILEC tandem transit provider for reasons other than efficient routing or interconnection.”²⁴ Level 3 also provides a diagram at

²² *BellSouth’s Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Build Out (LBO) Functionality as a Component of Regulated Network Interface Connectors on Customer Premises*, Memorandum Opinion and Order, 6 FCC Rcd 3336 at ¶26; *see also Public Service Commission of Maryland and Maryland People’s Counsel Application for Review of a Memorandum Opinion and Order by the Chief, Common Carrier Bureau Denying the Public Service Commission of Maryland Petition for Declaratory Ruling Regarding Billing and Collection Services; the Public Utilities Commission of New Hampshire Petition for Rule Making Regarding Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd 4000, ¶30 (1989) (Petitioners “should not attempt to use a petition for declaratory ruling as a substitute for a petition for reconsideration.”); *Federation of American Health Systems; Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver*, Memorandum Opinion and Order, 12 FCC Rcd 2668 ¶30 (1997) (inappropriate petitions seeking declaratory relief “must either be treated as a petition for reconsideration or a petition for rulemaking.”).

²³ May 12 Filing at 1.

²⁴ *Id.*

Attachment 2 describing an “Inserted CLEC” call flow.”²⁵ Oddly, this call flow diagram comes from Level 3’s intrastate access tariffs, where Level 3 describes its competing “Toll Free Inter-Exchange Delivery Service.” So apparently, Level 3 is the archetype “Inserted CLEC.”

In any event, the adoption of Level 3’s new concept of the “Inserted CLEC” is problematic for many reasons. For example, Level 3 does not even attempt to explain what it means by its “retained by” condition – *i.e.*, the CMRS carrier apparently “retains” a CLEC. By its terms, Level 3’s “retained by” language suggests a situation where the CMRS carrier pays for – *i.e.*, “retains” – a CLEC to transport its traffic. This again appears to be Level 3’s business practice – *viz.*, to be retained by CMRS providers. Of course, the rest of its petition complains of purported “kick-backs,” which seems to be a pejorative for situations where a CLEC enters a contractual arrangement with a CMRS provider for access to its network.

Further, Level 3’s next phrase – “inserted into the call flow between the CMRS carrier and the ILEC tandem for reasons other than efficient routing or interconnection” – would seem to govern all competitive tandem providers. When Hypercube entered the market in 2005, it had to take the nation’s 100 year old telephone network and all of its evolution as a given. ILEC tandem offerings obviously were in place, which is why they are known as “incumbents.” The fact that many, many carriers from the nation’s largest to smaller entrants have established voluntary commercial arrangements with Hypercube for its competitive tandem services demonstrates Hypercube’s offerings are grounded in “efficient routing [and] interconnection.” In any event, Level 3 offers no suggestion for how to determine whether any traffic exchange arrangement exists “for reasons other than efficient routing or interconnection.”²⁶

²⁵ *Id.* at Attachment 2.

²⁶ *Id.* at 1.

At bottom, there is no basis in the Commission's existing rules for the "Inserted CLEC" concept that Level 3 introduces for the first time in its May 12 Filing. This is obviously the stuff of rulemaking, and not of declaratory ruling.

B. Level 3's Section 332(c)(3) Claims Rest On Pure Alchemy

Level 3 seeks to have the Commission declare that section 332(c)(3) of the Act "preempts the application of intrastate originating access tariffs to wireless originated toll-free calls when transit is provided by an Inserted CLEC, such that the FCC's CLEC access charge tariffing rules apply to all wireless-originated toll-free traffic handled by the Inserted CLEC."²⁷ The Commission has never adopted Level 3's construction of section 332(c)(3), and accordingly, any effort to do so would have to be by rule rather than through Level 3 May 12 Filing.

At the outset, for some reason Level 3 does not reveal that it provides its competing "Toll Free Inter-Exchange Delivery Service" pursuant to its intrastate access tariffs for calls that originate and terminate in the same state. If Level 3's May 12 Filing was accurate (and it is not), this would mean that Level 3, a publicly-traded company, has been knowingly and unlawfully maintaining illegal tariffs and charging other IXCs illegal rates based on ostensibly "preempted" tariffs.

Section 332(c)(3) limits that ability of states to regulate charges assessed by CMRS providers. Level 3 never identifies any charge by any CMRS carrier that has been or is being regulated by a PSC. Moreover, the PSCs' inability to regulate CMRS charges (which are non-existent here), does nothing to change the plain fact that calls that originate and terminate within a state are – and always have been – *jurisdictionally intrastate*. And when LECs provide access service for intrastate calls, LECs are permitted to charge intrastate access charges pursuant to their intrastate access charges, regulated by the PSCs. Level 3 recognizes as much in its meek

²⁷ *Id.* at 1-2.

effort to distinguish ILEC tandem services provided pursuant to intrastate tariffs for these exact same calls. Level 3's claim thus proves too much, as principled application of the new regime it proposes would preempt all intrastate access charges any time a CMRS provider is in a call flow.

Although Level 3's argument appears to be shifting with every filing it makes with the Commission (*see, e.g.*, Level 3's May 22 Ex Parte Letter), the gravamen of Level 3's argument appears to be that CMRS carriers cannot do indirectly that which they may not do directly.²⁸ Apparently, Level 3 is suggesting that Hypercube is billing Level 3 for work performed by CMRS providers. That, however, is simply not the case. Hypercube's tariffs and its invoiced access charges are for work that Hypercube – and no one else – performs. When access calls originate and terminate in the same state, Hypercube bills Level 3 pursuant to Hypercube's intrastate access tariffs, just as Level 3 does when it sends out bills to IXCs pursuant to its intrastate access tariffs for its competing Toll Free Inter-Exchange Delivery Service.

Level 3's section 332(c)(3) argument is pure alchemy. The PSCs' lack of authority over charges made by CMRS providers is no basis for converting an intrastate call into an interstate call. The Commission has *never found* that section 332(c)(3) preempts LECs from billing interexchange carriers for intrastate access services performed pursuant to filed intrastate access tariffs.

C. Level 3's "ILEC Rate Cap" Claim Is An Untimely Request For Reconsideration Of The *Eighth Report And Order*

Next, Level 3 seeks to have the Commission reconsider its finding in the *Eighth Report and Order*, which held that CLECs may bill for the access services they perform. As Level 3

²⁸ *Id.*

would have it, CLECs would only be entitled to bill for charges that the ILEC would have billed the IXC if the CLEC did not exist.²⁹ This is not and has never been the law.

In the *Eighth Report and Order*, the Commission clarified “the meaning of the term ‘competing ILEC rate.’”³⁰ In so doing, the Commission noted that the “primary objective” of its reform efforts was to “ensure that [CLEC] access charges are more closely aligned with [ILEC] access rates.”³¹ The Commission noted that its “long-standing policy” is that carriers “should charge only for those services that they provide,” and clarified that “a similar policy should apply to [CLECs].”³²

Level 3 attempts to supersede past Commission findings by converting the Commission’s long-standing policy of enabling carriers to charge for the work they performed, benchmarked to competing ILEC rates, to a hard cap based on what an IXC may have paid the ILEC before the competing tandem provider entered the market. Not only would such an effort amount to a new rule, it would greatly limit the incentive of carriers to directly interconnect with one another, giving a monopoly advantage to incumbent tandem providers.

But even worse, in the wake of the *Eighth Report and Order*, this ship has long sailed. Level 3 does not even begin to address the situation where competitors have won substantial business in the marketplace, and are now in effect the incumbent provider. Level 3 offers no means of calculating “shadow rates” of how the world looked years before the onset of competition in the tandem services market. In short, Level 3 would have the Commission

²⁹ March 12 Filing at 2.

³⁰ *Eighth Report and Order* at ¶20.

³¹ *Id.* at ¶21.

³² *Id.*

contort its long standing principle – carriers get paid for the work they perform – into an administrative nightmare of carriers arguing over what rate would have applied if a different tandem provider or set of tandem providers were in the call flow.

To be absolutely clear, Hypercube charges IXCs for the work that Hypercube, and no one else, performs. Hypercube’s interstate tariffed rates fully comport with the Commission’s *Seventh Report and Order* and *Eighth Report and Order*.

D. The Commission Has Never Limited Contract-Based Charges By CMRS Providers To Other Carriers

Level 3 spends the remainder of its May 12 Filing assailing privately negotiated agreements between CMRS providers and other carriers as “kick-backs” that the Commission should declare “an unjust and unreasonable practice in violation of [s]ection 201(b).”³³ The FCC has never remotely made such a finding, and Level 3 does not say otherwise. In fact, the FCC has done the opposite in finding that a CMRS provider may charge carriers for access to the CMRS carrier’s network pursuant to contract.³⁴ Indeed, the Commission’s finding is consistent with the FCC’s long-standing preference for co-carriers to work out privately-negotiated arrangements. Once again, Level 3 is impermissibly attempting to have the Commission fashion a brand new rule pursuant through Level 3’s May 12 Filing. The Commission should reject this transparent effort.

As Level 3 well knows (but does not reveal), the alternative tandem business is hotly competitive, and CMRS providers routinely interconnect with a variety of LECs, IXCs, and others. Level 3’s issue, however, appears to be that *Level 3* (when acting as a LEC, an IXC, or

³³ May 12 Filing at 15.

³⁴ *Sprint PSC* at ¶12.

both) is unwilling to pay CMRS providers for accessing their networks, although Level 3 certainly expects other carriers to pay Level 3 for accessing its network.

Level 3's "tying" argument is pure makeweight. No court ever has found that a LEC-CMRS agreement for network access constitutes a tying, and for good reason – it is simply not true. Like all LECs, Hypercube's tariffed interstate access charges are subject to the Commission's regulations, and Hypercube's tariffed intrastate access charges are subject to the PSCs' regulations. Hypercube bills Level 3 for the work Hypercube performs, not for the work that a CMRS provider performs. There is no "tie." Hypercube's tariffed rates for interstate and intrastate access simply do not vary based on whether or to what extent Hypercube has a negotiated arrangement for access to the downstream network providers (*e.g.*, CMRS provider, VoIP provider, etc.). Level 3's proper response should be to roll up its sleeves and compete in the marketplace. But to the extent it would rather spend money on lawyers, and it actually believes that a Hypercube "rate or practice is unlawful," Level 3 should "bring a challenge under section 208 of the Act."³⁵

Level 3 similarly is wrong when it says that there is no "procompetitive justification" for alternative tandem arrangements, such as those offered by Hypercube.³⁶ Whenever Hypercube wins business in marketplace it "ousts" the pre-existing provider, which sometimes is an ILEC and other times is a CLEC. Indeed, Level 3 has *affirmatively admitted* that it began its practice of disputing 100% of Hypercube's bills only after Hypercube competed and won business away from Level 3's Toll Free Inter-Exchange Delivery Service product. And as Level 3's own intrastate tariffs show, Level 3 is every much an "Inserted CLEC" as anyone. Moreover, Level

³⁵ *Eighth Report and Order* at ¶72.

³⁶ May 12 Filing at 18.

3's "Inserted CLEC" fiction only works in instances where the IXC refuses to interconnect directly with the alternative tandem provider. Hypercube, for one, has been extremely successful in establishing direct interconnection arrangements with the nations largest IXCs and many smaller ones as well. Hypercube provides enormous procompetitive benefits to CMRS providers, IXCs, and, ultimately, to consumers with its alternative tandem offerings and its related competitive services, including Toll Free Origination.

Level 3's remaining statutory arguments – that Hypercube's contractual arrangements with CMRS providers violate sections 201(a), 201(b), 202, 203, and 503(a)³⁷ of the Act – are worth responding to only because these provisions support Hypercube, not Level 3. Boiled down, Level 3's claim is that a Hypercube voluntary contractual payment obligation to a downstream network provider (*e.g.*, CMRS carrier) for network access amounts to discrimination by Hypercube against Level 3. Level 3 has it all backwards.

In providing service to Level 3 in accordance with its tariffed interstate rates, Hypercube *is satisfying* its obligations under sections 201(a) and 201(b). Sections 202 and 203 also stand for the proposition that Hypercube may *only* charge the customers of its interstate switched access offerings at the rates set forth in its tariffs. Again, that is exactly Hypercube's practice. Hypercube's arrangements with CMRS providers and other downstream network providers have absolutely no impact on Hypercube's obligation to charge IXCs that utilize Hypercube's tariffed interstate switched access offerings the rates contained in Hypercube's filed interstate switched access tariff.

What Level 3 calls the "anti-rebate" rule is simply more of the same. The anti-rebate rule precludes Hypercube from offering a rebate to *customers* that purchase Hypercube's tariffed

³⁷ March 12 Filing at 19-24.

interstate switched access offering.³⁸ Like sections 201-203, it has absolutely nothing to do with any arrangement that Hypercube has with its vendors for inputs that support its offering. The same is true of the Supreme Court's decision in *AT&T v. Central Office Telephone*, 524 U.S. 214 (1998). There, the Supreme Court re-affirmed that the *only rates* that a common carrier may charge for a tariffed service are the rates contained in a filed tariff.³⁹ And that is exactly what Hypercube has done: charged Level 3 the rates in Hypercube's filed tariffs for the work the Hypercube, and no one else, has performed.

III. CONCLUSION

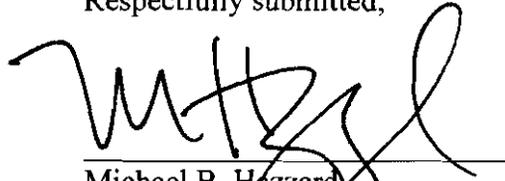
Level 3's May 12 Filing is a sham and should be rejected as such. In the event that the Commission wishes to entertain Level 3's requests, Hypercube respectfully submits the issues raised be addressed in the context of the Commission global intercarrier compensation reform rulemaking effort.⁴⁰

³⁸ Level 3 admits that the Commission has never one time found "revenue sharing" to be an unjust or unreasonable practice. *Id.* at 22.

³⁹ 524 U.S. at 222 (holding that "the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext.... This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.") (quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)); *see also id.* at 223 (holding that "[w]hile the filed rate doctrine may seem harsh in some circumstances, its strict application is necessary to 'prevent carriers from intentionally "misquoting" rates to shippers as a means of offering them rebates or discounts,' the very evil the filing requirement seeks to prevent.") (internal quotations and citation omitted)).

⁴⁰ As the Commission already has found, any new "any new rule regarding rates that may be charged when a competitive LEC is an intermediate carrier will apply on a prospective basis." *Eighth Report and Order* at ¶17 (citing 5 U.S.C. § 551(4); *Bowen v. Georgetown University Hosp.*, 448 U.S. 204, 208 (1988)).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MHazzard', written over a horizontal line.

Michael B. Hazzard
Arent Fox, LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
Counsel to Hypercube Telecom, LLC

May 22, 2009

RPP/315688.1

CERTIFICATE OF SERVICE

I, Edilma Carr, hereby certify that on this 22nd day of May 2009, I caused a true and correct copy of the foregoing:

**COMMENTS OF HYPERCUBE TELECOM, LLC IN OPPOSITION
TO LEVEL 3 COMMUNICATIONS, LLC'S MAY 12 FILING**

to be served by electronic mail and U.S. Mail to the party listed below:

John T. Nakahata
Wiltshire & Grannis, LLP
1200 18th Street, NW
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Washington, D.C. 20036
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Edilma Carr



Arent Fox

May 20, 2009

BY EMAIL AND HAND DELIVERY

Ms. Julie A. Veach
Acting Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Michael B. Hazzard

Attorney
202.857.6029 DIRECT
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Re: Level 3's May 12 Filing

Dear Ms. Veach:

This letter responds to Mr. John Nakahata's May 15 letter. Level 3's May 12 Filing is a sham, and the Commission should not issue a Public Notice seeking comment on it.¹ The Commission instead should open an investigation into Level 3's self-help efforts and its lack of candor before the Commission.

As explained in my May 14 letter, Level 3 seeks to have the Commission create new law, not clarify existing law. Mr. Nakahata does not dispute that:

- The Commission has never found that section 332(c) preempts local exchange carriers from billing interexchange carriers for intrastate access services performed pursuant to filed intrastate access tariffs;
- The Commission established its benchmark mechanism for competitive local exchange carrier ("CLEC") interstate access charges over *eight years ago*;
- The Commission held that the wireless carriers may enter contractual arrangements with other carriers for network access over *seven years ago*; and
- The Commission reviewed and approved revenue sharing arrangements between 8YY call generators and access providers *five years ago*.

In short, Level 3's May 12 Filing urges the Commission to: (i) adopt a new rule defining a class of carrier, apparently styled as an "Inserted CLEC," and (ii) reconsider the findings made in rulemaking orders years ago. Because it seeks the adoption of a new rule and reconsideration of

¹ A timeline leading up to Level 3's May 12 Filing is attached hereto as Exhibit 1.

Arent Fox

past Commission findings, “a declaratory ruling is not the proper vehicle for the relief sought by [Level 3].”²

Further evidencing that its petition is a sham, Level 3 has failed to disclose to the Commission that it offers, pursuant to *filed intrastate access tariffs*, a product it calls “Toll Free Inter-Exchange Delivery Service,” which competes with Hypercube’s tariffed intrastate switched access offering. In order to credit Level 3’s May 12 Filing, one would have to believe that Level 3 – a publicly traded company – designed, developed, tariffed, and is selling a product that it believes to be “proscribed.” May 12 Filing at 2.

Level 3 does not say one way or another whether it has agreements with wireless carriers for accessing their networks. Apparently Level 3 does not, as Level 3’s May 12 Filing disparages Hypercube’s commercially negotiated access arrangements with wireless carriers as unlawful “kick backs” *nearly 30 times*. But that is just mudslinging. The FCC has found unequivocally that wireless carriers can charge other carriers for accessing their networks by contract.³ Hypercube values the networks of wireless carriers and, as a result, has been successful in working out voluntarily negotiated commercial arrangements for such network access. In any event, even were it proper to call access arrangements between wireless carriers and others “revenue sharing,” the FCC reviewed and approved these arrangements five years

² *BellSouth’s Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Build Out (LBO) Functionality as a Component of Regulated Network Interface Connectors on Customer Premises*, Memorandum Opinion and Order, 6 FCC Rcd 3336 at ¶26; see also *Public Service Commission of Maryland and Maryland People’s Counsel Application for Review of a Memorandum Opinion and Order by the Chief, Common Carrier Bureau Denying the Public Service Commission of Maryland Petition for Declaratory Ruling Regarding Billing and Collection Services; the Public Utilities Commission of New Hampshire Petition for Rule Making Regarding Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd 4000, ¶30 (1989) (Petitioners “should not attempt to use a petition for declaratory ruling as a substitute for a petition for reconsideration.”); *Federation of American Health Systems; Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver*, Memorandum Opinion and Order, 12 FCC Rcd 2668 ¶30 (1997) (An appropriate petition seeking declaratory relief “must either be treated as a petition for reconsideration or a petition for rulemaking.”).

³ *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13,192, ¶21 (2002).