WILTSHIRE & GRANNIS LLP

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition for a Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls; *Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 01-92; *Access Charge Reform*, CC Docket No. 96-262

Dear Ms. Dortch:

On June 2, 2009, Mr. Bill Hunt and Ms. Jamie Moyer of Level 3 and Peter Wilson and I, on behalf of Level 3, met with Albert Lewis, Chief, Competitive Pricing Division ('CPD"), Wireline Competition Bureau, Deena Shetler, Deputy Chief, CPD, Jay Atkinson, Lynne Engledow, Victoria Goldberg, and Bill Cook, all of CPD, regarding the above-referenced petition.[1]

Pursuant to 47 C.F.R. § 1.2, Level 3 has filed a petition for a declaratory ruling seeking to have the Commission "terminat[e] a controversy or remov[e] uncertainty" as to the proper application of Section 332 of the Communications Act, Sections 201, 202, 203, and 503 of the Communications Act, and the Commission's orders regarding the rules under which CLECs may tariff federal exchange access rates. This petition raises and seeks a declaratory ruling regarding issues of federal law that are appropriately decided by the Commission. The Commission is the only body that can, in the first instance, definitively rule on issues of federal law, as its reasonable construction of any ambiguous statutes or rules are entitled deference by reviewing courts.[2] Moreover, the fact that there are also other parties concerned about the Inserted CLEC practices (including kickbacks) addressed by Level 3's petition shows that this is not just a bilateral

[1] *See* Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls, WC Docket No. 01-92 and CC Docket No. 96-262 (filed May 12, 2009)("*Level 3 Petition*").
[2] *Nat'l Cable &Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

dispute between Level 3 and Hypercube. Moreover, as Level 3 has previously stated, it does not believe Hypercube is the only carrier engaging in such practices.

In its petition, Level 3 clearly set forth that it was seeking a declaratory ruling with respect to a particular type of abusive intercarrier compensation arbitrage scheme – one in which CLECs that are retained by CMRS carriers are inserted into the flow between the CMRS carrier and the ILEC tandem transit provider, charge rates multiple times higher that the ILEC tandem transit provider for the functions performed by the CLEC, and then "kick-back" a portion of these excessive charges to CMRS carriers (which are prohibited from using tariffs to impose and collect originating access fees directly from the IXC). No matter what Hypercube chooses to call these fees, they are remittances of the access fees received, and it is these remittances that make these charges "charges by" CMRS carriers subject to Section 332. The remittances themselves are also unjust and unreasonable practices, both as facilitating practices for unlawful tying arrangements and as discriminatory practices. As Level 3 has set forth in its petition, Hypercube has constructed a way, using the payment of kickbacks, to attempt to evade the prohibition on CMRS carriers tariffing access charges by doing indirectly that which cannot be done directly, in contravention to the *Eighth Report and Order*.[3] Level 3 does not attempt here to summarize all of the arguments here, as they are already set forth in Level 3's Petition and its Reply Comments.[4]

Level 3 made clear that the core of its complaint is not "double-tandem" architecture per se. The *Eighth Report and Order* permitted double transit where the CLEC charges the same composite rate as the ILEC for the functions being charged.[5] But that is not the conduct described in Level 3's Petition, which described that Hypercube is charging rates above the competing ILEC rates.[6] Even when double tandeming is permissible, Level 3 does not view that it is permissible here to pay kickbacks to originating carriers in order to transit toll-free traffic to an ILEC who transits that traffic to the IXC, when the origination and CLEC transit are tied together. It is the conduct described in Level 3's Petition for which Level 3 seeks a declaratory ruling.

Level 3 pointed out that the ability to levy high access charges by tariff affects other intercarrier negotiations. For example, Hypercube has demanded rates far excess of the competing ILEC's rates as a condition of direct interconnection. Furthermore, in

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[3] *See generally, Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*; *Petition of Z-Tel Communications, Inc., For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9116 n.57 (2004)("*Eighth Report and Order*").

[4] *See* Reply of Level 3 Communications, LLC, CC Docket No. 96-262, WC Docket No. 01-92 (filed June 1, 2009).

[5] *See Eighth Report and Order*, 19 FCC Rcd at 9116 ¶ 17.

[6] *Level 3 Petition* at 8-9.

response to Hypercube's argument that Level 3 could simply directly interconnect with the CMRS carrier, Level 3 pointed out that it does not have a way to compel such an interconnection and traffic exchange agreement.[7] The Commission's *T-Mobile Declaratory Ruling* applied only to CMRS-ILEC interconnection, and not to CMRS-CLEC interconnection.[8] Section 251(a) is not subject to arbitration under Section 252 when one party is not an ILEC.[9]

The key problem is the kickback. It is the kickback that distorts the market structure here and gives CMRS carriers an incentive to select transit providers that will charge high access fees to the IXC so that those fees can be remitted to the CMRS carrier. And, as described in Level 3's petition, Level 3 has no way to avoid those fees.[10] The Commission does not permit Level 3 to block the traffic coming from Hypercube, and Hypercube does not permit Level 3 to not order its services. Once the CMRS carrier delivers traffic to an Inserted CLEC like Hypercube that pays kickbacks, Level 3 is compelled to accept the traffic.

The *Seventh* and *Eighth Reports and Orders* and the *Sprint PCS Declaratory Ruling* did not endorse the conduct at issue here.[11] Contrary to Hypercube's suggestion, those orders did not say that CMRS carriers could contract with other carriers to charge access charges that were then remitted to the CMRS carrier. The *Sprint PCS Declaratory Ruling* says that CMRS carriers can negotiate with IXCs for the charges that IXCs would pay, not that CMRS carriers can negotiate with CLECs for the charges the IXCs will pay.[12]

As explained in Level 3's petition, *Eighth Report and Order* also did not endorse the payment of incentives outside the context of the end user's selection of a carrier. As set forth more fully in Level 3's petition, the access remittances here do not relate to a segment of the network for which there can only be one provider.

Level 3 also disagrees with Hypercube's claim that Level 3 filed its petition to "disrupt" Hypercube's complaint filed with the California Public Utility Commission with respect to collection of intrastate access charges. In the first instance, Level 3 did

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[7] *Level 3 Petition* at 4-5.
[8] *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, CC Docket No. 01-92, 20 FCC Rcd 4855, (2005).
[9] 47 USC § 252.
[10] *Level 3 Petition* at 6-7.
[11] *See generally, Eigth Report and Order; 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*"); *Petitions of Sprint PCS and AT&T Corp., for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd 13192 (2002)(*"Sprint PCS Declaratory Ruling"*).
[12] *Sprint PCS Declaratory Ruling,* 17 FCC Rcd at 13201 ¶21.

not even know of Hypercube's California complaint when it filed its petition; a service copy of Hypercube's California complaint did not reach the designated service party until after Level 3 filed its petition with the FCC, and that was the first Level 3 heard of the California filing. But more to the point, the FCC's consideration of the federal law issues presented by Level 3's petition cannot "disrupt" a State Commission action unless the State Commission decides that it is best for its processes to dismiss or hold its matter in abeyance pending resolution of the federal issues. Such primary jurisdiction or abeyance issues are matters best considered in the first instance by those tribunals.

It does make sense as a matter of judicial economy for the FCC to consider and declare the law with respect to the federal law issues presented in Level 3's petition rather than having those issues addressed on a piece-meal basis by state public utility commissions or state and federal courts around the country as complaints or counterclaims are filed by various carriers. Because the Commission is the expert agency with respect to the Communications Act and its orders, and is the only body that can speak definitively on those authorities, much litigation and uncertainty can be avoided when the FCC declares federal law and terminates disputes before, rather than after, they have been contested in other fora.

Please do not hesitate to contact me if you have any questions.

Sincerely,

John T. Nakahata
Counsel to Level 3 Communications, LLC

cc: Albert Lewis
Deena Shetler
Jay Atkinson
Lynne Engledow
Victoria Goldberg
Bill Cook
Michael Hazzard