WILTSHIRE & GRANNIS LLP

January 26, 2010

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 January 25, 2010, Jim Lister of Birch, Horton, Bittner and Cherot on behalf of Comtel Telcom Assets LP d/b/a Excel Telecommunications ("Excel"), Mr. D. Anthony Mastando, Vice President, Regulatory Affairs and Senior Regulatory Attorney, DeltaCom, Inc. ("DeltaCom"), Mr. Bill Hunt, Vice President Public Policy, Level 3 Communications, LLC ("Level 3"), and I, on behalf of Level 3, met with the following persons regarding the above-referenced petition[1]:

- Christy Shewman, Legal Adviser to Commissioner Baker;
- Jennifer Schneider, Legal Adviser to Commissioner Copps;
- Priya Aiyar, Legal Adviser to the Chairman;
- Sharon Gillett, Chief, Wireline Competition Bureau, and Marcus Maher, Jennifer Prime, John Hunter, Lynne Engledow and Doug Slotten, all of the Wireline Competition Bureau.

The points we made in our presentation are summarized in the attached document. We also provided several of the FCC attendees with a copy of our ex parte letter of November 12, 2009, including the attachments (also attached), and discussed the points made in that November 12, 2009 filing.

[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*").

We also informed the FCC participants that Hypercube had represented to federal courts or state commissions that, by not issuing a public notice but by proceeding under the Commission's default pleading cycle in existing dockets, the Commission had either denied Level 3's Petition for a Declaratory Ruling or that the Commission did not view the petition as serious. *See e.g.* Hypercube's Response to Excel's Notice of Related Cases, Hypercube LLC and Hypercube Telecom LLC v. Comtel Telcom Assets LP d/b/a Excel Telecommunications, No. 3:08-CV-2298-B, at 2 (N.D. Texas, filed June 17, 2009), *attached to* Letter of James Lister, Counsel for Excel to Marlene Dortch, Secretary, FCC (filed June 18, 2009).

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

Sincerely,

John T. Nakahata
Counsel to Level 3 Communications, LLC

cc (w/o attachments):

Priya Aiyar
Jennifer Schneider
Christy Shewman
Sharon Gillett
Marcus Maher
Jennifer Prime
John Hunter
Lynne Engledow
John Hunter
Anthony Mastando
Jim Lister
Bill Hunt

THE COMMISSION SHOULD DECLARE INSERTED CLEC ACCESS KICKBACK SCHEMES UNLAWFUL

Some CLECs have created a scheme to evade the FCC's prohibition against wireless carriers collecting origination access through tariffs. This practice is inflating costs without any consumer benefits. The key is that Inserted CLECs get wireless carriers to divert toll-free calls to the Inserted CLEC, charge interstate or intrastate access to IXCs under tariffs that wireless carriers are prohibited from filing, and then rebate a portion of those fees to the wireless carriers. The FCC has said that wireless carriers cannot do "indirectly what they cannot do directly."

The Commission should grant Level 3's request to declare this scheme, especially including the payment of rebates, unlawful as an unjust and unreasonable practice. Doing so now will prevent further expansion of access charges into wireless, which will complicate necessary intercarrier compensation reforms if allowed to occur.

Background

- Since 1994, the FCC has created a system of private contract for wireless carrier charges to IXCs, expressly barring wireless carriers from tariffing access charges for the origination or termination of long distance traffic. Congress in 2002 extended this prohibition to intrastate access rates by precluding states from regulating "rates charged by" any wireless carrier.
- The Commission has repeatedly found that wireless carriers may only charge access to IXCs pursuant to a contract between the wireless carrier and the IXC, and not using a tariff. The FCC has also prohibited a CLEC from using its tariffs to assess joint-billed charges with a wireless carrier partner.
- Inserted CLEC schemes circumvent this system of private contract for wireless access charges by having a CLEC use its tariffs to collect access charges from a toll-free provider, and then rebate a portion to the wireless carrier. The rebate is the key component of the scheme, without which it falls apart.
- It is also important to recognize, as the Commission has said in the past, that wireless carriers never used the Calling Party Network Pays system (which is reversed for toll-free traffic), but charges its customers for all calls, whether local or long distance. This has become more true with the rise of all-distance, one-rate calling plans and bucket pricing. Also, wireless has never been subject to interexchange presubscription. This means that unlike wireline calls, toll-free calls reduce what would otherwise be the wireless carrier's obligation to carry the call to the terminating carrier.

Rebates from Inserted CLECs to Wireless Carriers Upend Basic Economic Checks

- The fundamental problem with an Inserted CLEC scheme for toll-free traffic is that, because of the rebate and the fact that access charges for transit to a toll-free provider are paid by the IXC, the wireless carrier that selects the CLEC transit provider has no incentive to minimize transit costs for toll-free traffic. To the contrary, the wireless carrier's incentive is to select the transit vendor providing the greatest rebate. For the same reason, the wireless carrier has

the incentive to reroute toll-free traffic to the highest bidder. The wireless carrier gets the rebate, but the IXC gets the high access charge bill.

- Without the rebate, the wireless carrier would have the incentive to use the most efficient interconnection arrangements for all traffic, including rather than excluding toll-free calls. This could be direct or indirect interconnection. Because the wireless carrier either carries or hires the IXC for non-toll-free traffic, if it does not split toll-free from non-toll-free, it has an incentive to keep transit charges low for all transit traffic. The rebate disrupts this market discipline by incenting the wireless carrier to split toll-free from other traffic.
- *North County* does not affect the analysis here. *North County* was about charges by LECs to CMRS carriers, not "charges by" CMRS carriers, which is what Section 332 preempts as well as what the FCC's prohibition on CMRS tarriffed access charges applies to.

<u>The Time to Act is Now</u>

- This is an industry-wide issue. Level 3, Excel and Deltacom all have been victims of this scheme.
- Hypercube is charging rates exceeding ILEC rates, thereby funding the illegal rebates to the wireless carriers. This is a violation of the rate cap at 47 CFR § 61.26.
    - Disputes are also pending in several states, as well as in federal courts. A national answer is needed.
- Hypercube contributes no value to the telecommunications network. Calls flowed perfectly well without it. Hypercube's involvement only increases the amounts charged to IXCs while interrupting the previously established more-efficient less-expensive traffic routing patterns.
- Intercarrier compensation reform is hard enough given existing access charges, let alone if wireless carriers become significant access charge recipients through Insert CLEC schemes for toll-free traffic.
- The FCC's experience with "traffic pumping" shows that if access arbitrage schemes are not promptly addressed, they create their own stakeholders.
- Level 3's petition for a declaratory ruling provides an appropriate vehicle for providing certainty as to the illegality of the Inserted CLEC toll-free scheme.

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November 12, 2009

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

Re: In the Matter of Level 3 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)

Dear Ms. Dortch:

On November 10, 2009, Comtel Telcom Assets LP d/b/a Excel Telecommunications ("Excel") (represented by its General Counsel Jonathan Dennis and Jim Lister of Birch Horton Bittner and Cherot), Level 3 Communications, LLC (represented by its Assistant Chief Legal Officer John Ryan and John Nakahata of Wiltshire & Grannis LLP) and DeltaCom, Inc. (represented by its Vice President, Regulatory Affairs and Senior Regulatory Attorney Tony Mastando) met with John Hunter and Lynne Engledow of the Pricing Policy Division of the Wireline Competition Bureau regarding the above-referenced petition filed by Level 3 (the "Level 3 Petition"). As November 11 was a Holiday, this ex parte disclosure letter is being timely submitted on the next business day, November 12, 2009.

In addition to discussing the issues raised by the Level 3 Petition, we discussed the individual disputes relating to the facts stated in the Petition that are pending between Hypercube and Level 3, Excel, and DeltaCom. We reviewed Level 3's litigation with Hypercube pending before the state public utility commissions in California, New York and Texas;[1] Excel's litigation with Hypercube pending before the U.S. District Court for the Northern District of Texas;[2] and DeltaCom's litigation with Hypercube pending before the state public utility commissions in Alabama, Florida, Georgia, and Tennessee.[3]

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1 See *Hypercube vs. Level 3 Communications*, California Public Utilities Commission, Docket No. C.09-5-009; *Hypercube v. Level 3 Communications*, New York Pub. Serv. Comm'n (Docket No. not yet assigned); and *Hypercube v. Level 3 Communications,* Texas Public Utilities Commission, Docket No. 37599.

2 *Hypercube LLC and Hypercube Telecom LLC v. Comtel Telcom Assets LP d/b/a Excel Telecommunications*, Case No. 3:08-cv-02298-B (U.S. District Court, Northern District of Texas). We also disclosed but did not discuss the following informal complaint proceeding: Comtel Telcom Assets LP d/b/a Excel Telecommunications v. Hypercube Telecom LLC, FCC Informal Complaint File No. EB-09-MDIC-0028.

3 *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Alabama Public Service Commission Docket No. 31176; *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Florida Public Service

(Footnote Continued)

We explained why Hypercube's scheme of inserting itself into the call path of wireless-originated 1-8YY calls hurts consumers. Hypercube's scheme involves the following conduct. Hypercube has persuaded wireless carriers, who by law cannot tariff access charges, to divert these calls from their normal calling path by routing them to Hypercube. To induce this diversion, Hypercube admits that it kicks back to the wireless carriers a portion of whatever Hypercube collects in alleged access charges from interexchange carriers ("IXCs"). Hypercube asserts that it is a wireline competitive local exchange carrier ("CLEC") entitled to bill LEC access charges and database dip charges. Hypercube's kickbacks encourage the wireless carriers to route calls though Hypercube and removes any incentive for the wireless carriers to route the calls in a more efficient manner (including through the incumbent local exchange carriers ("ILECs") with whom the wireless carriers were and are directly interconnected, or directly to the IXC where the wireless carrier and the IXC are directly interconnected). The kickbacks also remove any incentive for the wireless carriers to route calls through a competing provider (including the ILEC) offering better rates to IXCs than Hypercube. After receiving the calls from wireless carriers, Hypercube routes the calls to ILECs, who then route them to the IXC, and who also charge the IXC for the services they provide.

Hypercube's CLEC-insertion scheme provides absolutely no benefit to the IXCs but instead increases the amount billed to them. Hypercube's rates substantially exceed ILEC rates, and the ILECs also bill the IXCs. Hypercube's insertion greatly harms consumers by increasing the costs billed to IXCs without providing the IXCs any corresponding benefit whatsoever and without adding anything of value to the Nation's telecommunications network. To the extent Hypercube prevails, IXCs must pass on the increased costs to consumers in the form of higher rates. The inefficient routing resulting from Hypercube's insertion also harms the IXCs by increasing transport distances and multiple tandem usage, and by reducing direct-routed traffic.

Hypercube's conduct presents an industry-wide problem affecting multiple IXCs and their customers. Level 3, Excel, and DeltaCom have all had equally bad experiences with Hypercube and their individual attempts to achieve negotiated solutions with Hypercube have all failed.

We also explained why Hypercube's call-insertion scheme is a violation of the Commission's 2002 declaratory ruling order that confirmed that wireless carriers cannot tariff access charges.[4] Hypercube circumvents that order by billing access charges under an alleged tariff and funneling a portion of the collections to the wireless carriers, accomplishing indirectly what the wireless carriers cannot do directly. This circumvention is a thinly disguised violation of the Commission's 2002 order.

Commission Docket No. 090327-TP; *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Georgia Public Service Commission Docket No. 29917; *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Tennessee Regulatory Authority Docket No. 09-00077.

[4] *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC. Rcd. 13192, ¶¶ 8-9, 12 (2002)

Hypercube's scheme also turns back the clock on intercarrier compensation reform by enlarging the access charge system to include a category of carriers (wireless carriers) that the FCC excluded from the access charges system seven years ago. Expanding the access charge system to include wireless carriers (as Hypercube's scheme would do if permitted) will make it more difficult for the FCC to achieve meaningful intercarrier compensation reform. Adding additional categories of carriers to the access charge system would run contrary to the FCC's stated policy goal of reducing the role of access charges.

At the meeting, we provided to Mr. Hunter and Ms. Engledow the documents attached to this letter. One of the documents is a call-flow diagram which concerns Excel's experience with Hypercube. The diagram contrasts the call path before Hypercube became involved (wireless carrier to ILEC to IXC) with the call path after Hypercube became involved (wireless carrier to Hypercube to ILEC to IXC). In addition, Level 3 explained that its experience was slightly different than Excel's. Before Hypercube became involved, at least some wireless carriers routed calls directly to Level 3 without any intermediary parties being involved. After Hypercube became involved, these wireless carriers instead send wireless-originated 8YY calls to Hypercube who forwards them to ILECs who forwards them to Level 3, even though those same carriers still maintained direct interconnections with Level 3 for all other traffic. Notably, wireless carriers are not sending non-toll free calls through Hypercube.

The second document provided to Mr. Hunter and Ms. Engledow at the meeting and attached to this letter is a comparison of (a) Hypercube interstate rates as reflected on seven sample Hypercube invoices to Excel with (b) ILEC rates for equivalent interstate services. The chart shows that Hypercube interstate rates substantially exceed ILEC interstate rates for the functions provided. Accordingly, Hypercube's rates are not lawful, and cannot permissibly be tariffed at the FCC. 47 CFR 61.26(f). As part of this discussion, DeltaCom noted that Hypercube intrastate rates exceed ILEC intrastate rates by an even greater margin.

We noted that each Company was unsuccessful in its attempt to negotiate direct interconnection with Hypercube on reasonable terms in order to avoid the unnecessary routing through ILECs.

We explained that, in addition to the unnecessary routing through ILECs, Hypercube's network is highly inefficient as compared to ILEC networks. The wireless networks are directly interconnected with ILEC networks in many locations, so wireless carriers can and do efficiently route calls to IXCs through ILECs. By contrast, Hypercube has very few switches compared to the ILECs and calls going through it are sometimes routed very long distances. Further, Hypercube routes calls in ways that make it hard to understand and verify the originating locations of the calls. Moreover the relationship between Hypercube tandem switches and wireless local switches are not properly documented in the Local Exchange Routing Guide (LERG).

If Hypercube provides a service to anyone (which is highly doubtful), it would be a service to the wireless carrier. That would be service that, under cost-causer recovery principles, should be paid by its beneficiary, the wireless carrier. It should not be paid for by the IXC who makes no affirmative choice to use Hypercube and cannot prevent receipt of Hypercube's traffic.

We concluded by urging the Commission to act expeditiously on the Level 3 Petition in a manner that addressed the problem while it is still in its infancy. If the Commission does not act quickly, Hypercube's business model will be adopted widely, and multiple courts and agencies other than the Commission (there are eight proceedings already, and the list is growing) will make various decisions in the various Hypercube litigations, potentially resulting in fractured and inconsistent rulings across the country. Similar to the predicament facing the Commission when addressing traffic pumping, the failure of the Commission to act now will also result in other copycat insertion schemes that will exponentially increase the problems outlined above.

The Commission should grant Level 3's Petition for Declaratory Ruling and declare that Hypercube's call insertion kickback scheme is unlawful under existing law.[5] By declaring that Hypercube's scheme is unlawful under existing law, the Commission will discourage the dreaming up of new and varied schemes by arbitragers who hope to profit in the interim between when they dream up their various schemes and when they are shut down.

Sincerely,

/s/ James H. Lister
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Counsel for Excel Telecommunications

/s/ John T. Nakahata/JHL
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D. Anthony Mastando
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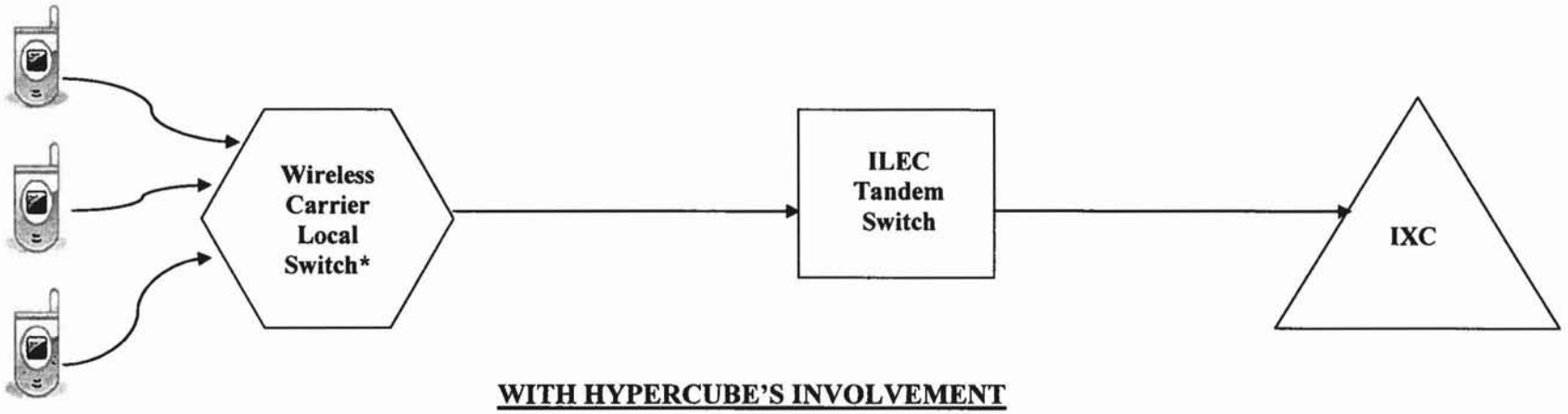
Counsel for DeltaCom

Cc: John Hunter
Lynne Engledow
Jonathan Dennis (Excel)
John Ryan (Level 3)

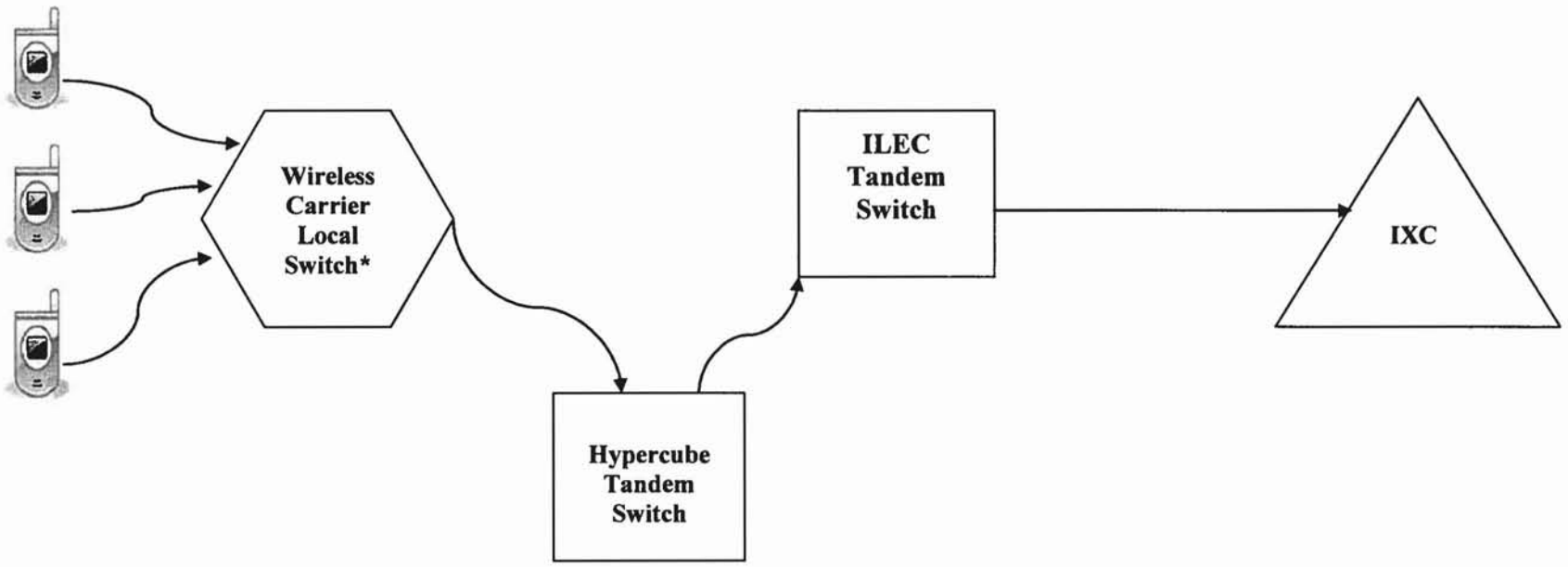
[5] Level 3, Excel, and DeltaCom have not attempted to summarize in this letter all their respective defenses to Hypercube's claims, and reserve all rights.

CALL-ROUTING DIAGRAM

BEFORE HYPERCUBE'S INVOLVEMENT



WITH HYPERCUBE'S INVOLVEMENT



***It is unknown whether there are wireless tandem switches in between the wireless local switch serving the called party and the first non-wireless tandem switch. This diagram is based on current knowledge and may be updated as further information is obtained**

Comparison of Rates on Hypercube Invoices to Excel Telecommunications with ILEC Tariff Rates For 7 Sample Months of Billings

		Avg. Interstate Rate Per Minute	
Invoice Date	Calls During	HYPERCUBE	ILEC
11/07	10/07	$.0031	$.0018
01/08	12/08	.0028	.0017
06/08	05/08	.0028	.0017
09/08	08/08	.0027	.0017
10/08	09/08	.0028	.0018
12/08	11/08	.0031	.0017
04/09	03/09	.0033	.0017

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