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April 29, 2010

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)**

**Domestic Section 214 Application Filed for the Acquisition of Assets of Comtel Telecom Assets L.P. and Comtel Virginia LLC by Matrix Telecom, Inc. and Matrix Telecom of Virginia, Inc. (WC Docket No. 10-82)**

Dear Ms. Dortch:

On November 10, 2009, Comtel Telecom Assets LP d/b/a Excel Telecommunications (“Excel” or “Comtel”), represented by Jerry Ou, its Chief Operating Officer, Jon Dennis, its General Counsel, and the undersigned, met with Marcus Maher, John Hunter, and Doug Slotten of the Wireline Competition Bureau regarding the above-referenced Petition for a Declaratory Ruling filed by Level 3 Communications, LLC (“Level 3” and the “Level 3 Petition”). The Level 3 Petition was filed on May 12, 2009 and is pending in WC Docket No 01-92 and CC Docket 96-262. The points made by Excel in support of the Level 3 Petition were consistent with those made in Excel’s reply comments and in its prior ex parte presentations in this matter.

We also discussed the individual dispute relating to the facts stated in the Level 3 Petition that is pending between Hypercube and Excel before the U.S. District Court for the Northern District of Texas and the individual disputes between Hypercube and Level 3 pending before three (now two) state public utility commissions.<sup>1</sup> Excel’s informal complaint against Hypercube is also pending before the FCC’s Enforcement Bureau (File No. EB-09-MDIC-0028).

<sup>1</sup> See *Hypercube LLC and Hypercube Telecom LLC v. Comtel Telecom Assets LP d/b/a Excel Telecommunications*, Case No. 3:08-cv-02298-B (U.S. District Court, Northern District of Texas); *Hypercube vs. Level 3 Communications*, California Pub. Util. Comm., Docket No. C.09-5-009; *Hypercube v. Level 3 Communications*, New York Pub. Serv. Comm., Docket No. 09-C-0784; and *Hypercube v. Level 3 Communications*, Texas Pub. Util. Comm, Docket No. 37599 (complaint withdrawn by Hypercube on April 16, 2010).

Several similar disputes between Hypercube and another interexchange carrier, DeltaCom, Inc. (“DeltaCom”), are pending before four other state public utility commissions.<sup>2</sup> Excel, Level 3, and DeltaCom all are interexchange carriers (“IXCs”), in addition to providing other services.

Separately, we also briefly discussed Excel’s Section 214 transfer proceeding referenced above pending in WC Docket 10-82 and described the reply comments that Excel submitted on April 20, 2010 in that proceeding in response to comments filed by Hypercube on April 14, 2010. We provided copies of those reply comments.

We also discussed Recommendation 8.7 in the FCC’s National Broadband Plan dated March 16, 2010.<sup>3</sup> Recommendation 8.7 explains that an interim rule regarding access charge arbitrage should be adopted to address arrangements in which the local exchange carrier (“LEC”) take steps to artificially “stimulate” the number of “terminating” access minutes. Hypercube’s scheme to impose access charges for unnecessary additional services on wireless-originated 1-8XX calls is a more virulent strain of the same broader arbitrage problem that Recommendation 8.7 addresses. There are many similarities between the terminating minutes/stimulation arbitrage schemes that the Recommendation 8.7 briefly refers to and Hypercube’s scheme, but Hypercube’s variation more clearly contravenes existing law, as well as public policy.<sup>4</sup> In its CLEC-insertion scheme, which is addressed in the Level 3 Petition, Hypercube stimulates originating access charges through causing wireless-originated 1-8XX traffic to unnecessarily pass through its tandem switch on the way to the IXC carrying the call.

In the typical scheme to stimulate *terminating* access minutes, a conference call company advertises dial-in numbers for “free conference calls.” This produces a high volume of calls to telephone numbers belonging to LECs in rural parts of the country where access charges are particularly high. The result is that the LEC bills more access charges, the IXC bills its own customers for more calls, and the LEC benefits to the detriment of the IXC because the higher rural access rates generally exceed the nation-wide averaged rates that the Commission allows IXCs to charge their own customers. The LEC also often took advantage of quirks in rate regulation that cap charges based on the lower past traffic volumes rather than higher stimulated

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<sup>2</sup> *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Alabama Pub. Service Comm., Docket No. 31176; *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Florida Pub. Service Comm., Docket No. 090327-TP; *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Georgia Pub. Service Comm., Docket No. 29917; *DeltaCom, Inc v. KMC Data, LLC and Hypercube Telecom, LLC*, Tennessee Regulatory Authority, Docket No. 09-00077.

<sup>3</sup> Connecting America, The National Broadband Plan, Federal Communications Commission, at page 148 (“Broadband Plan”) ([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296935A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf)). Recommendation 8.7 includes the following: “As part of comprehensive ICC [inter-carrier compensation] reform, the FCC should adopt interim rules to reduce ICC arbitrage. The FCC should, for example, prohibit carriers from eliminating information necessary for a terminating carrier to bill an originating carrier for a call. Similarly, the FCC should adopt rules to reduce access stimulation and to curtail business models that make a profit by artificially inflating the number of terminating minutes. The FCC also should address the treatment of VoIP traffic for purposes of ICC.” *Id.*

<sup>4</sup> Originating 1-8XX calls are similar to terminating 1+ calls in that the LEC or LECs on the originating side of 1-8XX calls have no relationship with the customer of the IXC (the called party), just as the LEC or LECs on the terminating side of 1+ calls have no relationship with the customer of the IXC (the calling party). In both cases, the lack of any business relationship between the LEC and the IXC’s customer reduces any incentive on the part of the LEC to refrain from trying to raise the IXC’s costs through arbitrage behavior.

traffic volumes.<sup>5</sup> To Excel's knowledge, the FCC has not issued orders regarding the duties and obligations of the conference call companies to whom the LECs pay a portion of the access charges they collect.

In the Hypercube variation, Hypercube inserts itself into the call path on the *originating* leg of 1-8XX calls dialed by subscribers of wireless carriers. Before Hypercube became involved, the wireless carriers generally routed these calls to the IXC through the incumbent local exchange carriers (ILECs), whose ubiquitous networks directly interconnected with both the wireless carriers and IXCs. Contrary to the FCC's prior orders which prohibit wireless carriers from imposing tariffed access charges on IXCs,<sup>6</sup> and prohibit CLECs from billing such access charges on the wireless carriers' behalf,<sup>7</sup> Hypercube agreed to pay the wireless carriers a share of whatever tariffed access charges it collected from IXCs, in order to induce the wireless carriers to route these 1-8XX calls through it. Hypercube then routes the calls through ILECs to the IXC, resulting in an extra carrier (Hypercube) being involved in the call path, as compared to before Hypercube became involved, without the extra carrier adding any value to the access service allegedly being provided to the IXC.<sup>8</sup>

Under the Hypercube scheme, the IXC receives two sets of access charges bills (from Hypercube and the ILEC) rather than one (from the ILECs). Hypercube's access rates also exceed those charges by the ILECs, contrary to the cap on CLEC access rates set forth in 47 CFR 61.26(f).<sup>9</sup> Unlike in the conference call traffic stimulation situation, the IXC who falls into Hypercube's clutches does not get to bill any additional minutes to its own customers. Rather the access charges billed to the IXC on existing minutes increases, with the IXC receiving no additional revenue and no additional service. If the scheme succeeds, the consumers who purchase the IXCs' service will ultimately have to pay increased rates for no additional value.

Also unlike the conference call / terminating access stimulation situation, in which the duties and obligations of the conference call companies which receive the revenue sharing payments from LECs have never been defined by the FCC, the FCC has already issued orders defining the obligations of wireless carriers and CLECs working with them. The FCC's *Sprint PCS Order* (2002) prohibited wireless carriers from billing tariffed access charges to IXCs.<sup>10</sup> In

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<sup>5</sup> Fixed LEC costs were divided by the small number of minutes the LECs had historically terminated for IXCs, yielding a high regulated rate.

<sup>6</sup> *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC. Rcd. 13192, 13196-97 (2002) ("*Sprint PCS Order*").

<sup>7</sup> *Access Charge Reform*, CC Docket No. 96-262, *Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd 9108, 9116 and n. 57 (2004) ("*8<sup>th</sup> Report and Order*").

<sup>8</sup> Excel understands that, where the wireless carriers were directly connected with the IXC before Hypercube became involved, now the wireless carriers route the same calls through two additional steps (a Hypercube switch and an ILEC switch) rather than use their direct connection with the IXC.

<sup>9</sup> Hypercube refuses to directly interconnect with Excel (which would at least eliminate the ILEC charges) unless Excel agrees to pay Hypercube access rates higher than that cap, and Excel understands other IXCs have had similar experiences attempting to work out direct connections with Hypercube.

<sup>10</sup> *Sprint PCS Order*, 17 FCC.Rcd. 13192, 13196-97.

its 8<sup>th</sup> *Report and Order* (2004), the FCC clarified this ruling by prohibiting CLECs from billing tariffed access charges on the wireless carriers' behalf.<sup>11</sup>

As this discussion indicates, prohibiting Hypercube's scheme is certainly within the broader intent and purpose of Broadband Plan Recommendation 8.7. Level 3's ex parte letter filed in WC Docket No. 01-92 and CC Docket No. 96-262 on March 17, 2010 provides additional reasons why Hypercube's actions are inconsistent with the objectives set forth in the Broadband Plan.

However, because Hypercube is violating the 2002 *Sprint PCS Order*, the 8<sup>th</sup> *Report and Order*, and 47 CFR 61.26(f), Hypercube's scheme can more readily and efficiently struck down through issuance of a clarifying declaratory ruling or an adjudicatory decision than through a more drawn-out rulemaking process. To avoid even more litigation, any rulemaking order which declares the scheme unlawful should specify that the declaration in the rule that Hypercube's scheme is unlawful does not somehow imply that it was lawful before the date of the rulemaking order.

Recent events bear out the point that Hypercube's scheme violates existing law. On April 16, 2010, Administrative Law Judge DeAngelis of the California Public Utility Commission issued a Proposed Decision dismissing Hypercube's collection complaint against one IXC (Level 3) based on his finding that Hypercube's scheme is a prohibited end run around the FCC's *Sprint PCS Order* prohibition against wireless carriers imposing tariffed access charges, as clarified in the FCC 8<sup>th</sup> *Report and Order*.<sup>12</sup> On March 29, 2010, the Staff of the Texas Public Utility Commission issued an identical recommendation. Hypercube then promptly withdrew its collection against Level 3 pending before the Texas Commission.<sup>13</sup> On September 25, 2009, the U.S. District Court of the Northern District of Texas ruled that the 8<sup>th</sup> *Report and Order* does not require IXCs to purchase services from CLECs who are charging rates exceeding ILEC rates or whose insertion into the call path does not add value to the telecommunications network.<sup>14</sup> Hypercube and Excel are litigating whether Hypercube's rates exceed ILEC rates (Excel's traffic studies show that they do) and whether Hypercube adds value to the network (it doesn't).

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<sup>11</sup> 8<sup>th</sup> *Report and Order*, 19 FCC Rcd 9108, 9116 and n. 57.

<sup>12</sup> *Proposed Decision Granting Motion to Dismiss, Hypercube Telecom, LLC v. Level 3 Communications, LLC*, at 9, Case No. 09-05-009 (Cal. Public Utility Commission, April 16, 2010). A copy of this proposed decision is Exhibit C to the Reply Comments filed by Excel (Comtel Telecom Assets LP, d/b/a Excel Telecommunications) on April 21, 2010 in WC Docket No. 10-82 ("Section 214 Reply Comments").

<sup>13</sup> *Commission's Staff Response to Order No. 5 and Recommendation*, Complaint of Hypercube Telecom, LLC and Level 3 Communications, Texas Public Utility Commission Docket No. 37599 Item 24 at 2 (March 29, 2010) (Item No. 24). A copy of this recommendation is Exhibit B to the Section 214 Reply Comments filed on April 21, 2010 in WC Docket No. 10-82.

<sup>14</sup> *Hypercube, LLC v. Comtel Telecom Assets LP*, 2009 WL 3075208 at \*6-7, No. 3:08-CV-2298-G-AH (N.D. Tex., Sept. 25, 2009) (Hypercube's motion for reconsideration is pending). A copy of this decision is Exhibit A to the Section 214 Reply Comments filed on April 21, 2010 in WC Docket No. 10-82. See also, 8<sup>th</sup> *Report and Order*, 19 FCC.Rcd. 9108, 9137-38 (2004).

Litigation pleadings filed by Hypercube in the various proceedings also bear out the point that Hypercube will predictably attempt to turn any rulemaking order declaring its conduct unlawful into an implied declaratory ruling that Hypercube's conduct was lawful prior to the effective date of the rulemaking order. Excerpts from a sample of these Hypercube pleadings are attached as Exhibit 1 to this letter.

Excel concluded the meeting by urging the Commission to grant Level 3's Petition for a Declaratory Ruling, which is by far the most efficient and just way to resolve this dispute between Hypercube and the IXCs.

Sincerely,

/s/ James H. Lister

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James H. Lister

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