

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Petition for Declaratory Ruling that)
Inflexion Communications) **WC Docket No. 04 - ____**
ExtendIP VoIP Service is exempt from)
Access Charges)

**PETITION FOR DECLARATORY RULING THAT
INFLEXION COMMUNICATIONS' ExtendIP VOIP SERVICE
IS EXEMPT FROM ACCESS CHARGES**

Keith Machen
Daniel Berninger
Inflexion Communications Corporation
645 Griswold Street, Suit 1800
Detroit, MI 48226

February 27, 2004

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
Petition for Declaratory Ruling that)
Inflexion Communications) **WC Docket No. 04 - ____**
ExtendIP VoIP Service is Exempt from)
Access Charges)

**PETITION FOR DECLARATORY RULING THAT INFLEXION
COMMUNICATIONS ExtendIP VOIP SERVICE
IS EXEMPT FROM ACCESS CHARGES**

Inflexion Communications Corporation (“Inflexion”) respectfully petitions the Commission for a declaratory ruling pursuant to 47 C.F.R. § 1.2 that voice communication applications of the Internet and related networks (*e.g.* Voice over Internet Protocol or VoIP) developed by Inflexion for the underserved market under the brand name ExtendIP are exempt from the access charges applicable to circuit switched Telephone Toll Service calls and can be lawfully provided over end user local services. Inflexion seeks this ruling to clarify uncertainty weighing against Inflexion’s investment in developing services for the underserved market. The Commission has jurisdiction over this matter under 5 U.S.C. § 554 and 47 C.F.R. § 1.2.

Identification of Party

Requestor is Inflexion Communications Corporation. Its address is:

Inflexion Communications Corporation
645 Griswold Street, Suite 1800
Detroit, MI 48226
313.962.9435 | Telephone 313.962.9481
<http://www.ifxc.com>

Requestor is represented by the following counsel:

W. Scott McCollough
Texas State Bar No. 13434100
e-mail: wsmc@aus.scmplaw.com

David Bolduc
Texas State Bar No. 02570500
e-mail: dbolduc@aus.scmplaw.com

STUMPF CRADDOCK MASSEY & PULMAN, P.C.
1250 Capital of Texas Highway South
Building One, Suite 420
Austin, TX 78746
(512) 485-7920 (Voice)
(512) 485-7921 (Facsimile)

Introduction

ExtendIP Service Description. ExtendIP provides customers in underserved markets substantially the same functionality as Plain Old Telephone Service, plus more. It fits only in part within the functional test for telecommunications service proposed in the Stevens Report.¹ The differences arise in the host of information technology tools used make it possible for Inflexion to reduce the costs sufficiently to serve customers presently unable to afford traditional telephone service.

At scales above 1000 users, the vast majority of costs arise from providing connectivity and not the basic voice application. Providing popular enhanced calling services like Caller ID, voice mail, and call waiting do not add substantially to the cost of service. The primary challenge in delivering communications for underserved markets arises in the task of delivering basic connectivity – hence the name “ExtendIP.” Inflexion will draw from the growing list of tools

¹ Report to Congress, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 13 FCC Rcd 11501 (“Stevens Report”) (1998) at ¶ 88.

available for delivering Internet Protocol connectivity, such as (among other things) free space optics, point-to-point and point-to-multipoint unlicensed wireless, coaxial cable, fiber, and dry copper.

The situation today. Incumbent Local Exchange Carriers (“ILECs”) increasingly and retroactively assert that access charges apply to use of local facilities utilized in conjunction with VoIP. ILECs such as BellSouth, for example, expressly refuses to provide local connections to Enhanced Service Providers (ESP’s) that provide VoIP.² Similarly, ILECs are increasingly contesting the delivery of VoIP traffic over local trunks by CLECs that serve ESPs. The ILECs are attempting to force CLECs to pay the ILEC *intrastate* access charges for traffic processed by VoIP service providers and then handed to CLECs for termination by an ILEC.³ The long standing persistence of access fees, the continued overwhelming political clout of ILECs, and recent history leads the investment community to resolve the uncertainty in favor of the ILECs and against VoIP providers and the competitive LECs that want to provide service to them.

The controversy weighs against Inflexion’s efforts to leverage VoIP as the best platform to bring communication services to the five million people that remain on the *periphery* of the Universal Service Program. To the extent ILEC interconnection means imposition of access charges, it establishes a cost floor that prevents Inflexion from deploying the ExtendIP VoIP Service to low-income and underserved customers – the very group supposedly served by the Universal Service Program.

² See, e.g., BellSouth September 2, 1998 Customer Letter/Announcement SN91081365 (Attached to BellSouth *Ex Parte* Presentation dated January 27, 2004 in Docket 02-361).

³ See, e.g., Amended Complaint, *Sugar Land Telephone Company’s Complaint And Request For Expedited Ruling Against Focal Communications Corporation*, Texas PUC Docket 28951 (filed Dec. 17, 2003).

The current debate over applying access charges to VoIP traffic fails to distinguish between the *goal* of **universal service** and the traditional subsidy *program* associated with the **Universal Service Fund** (USF) even though approximately 10% of citizens in some states do not have regular access to basic telephone service. VoIP can serve the goal of universal service even if it does not get incorporated into existing subsidy mechanisms. The lower cost basis and flexibility of Internet communication applications offer significant promise to accelerate progress in reaching the underserved market. Advocates for regulation of VoIP nonetheless list support for universal service as the first among their arguments for regulating VoIP. For example, House Energy and Commerce Committee Chairman Tauzin stated in a January 29, 2004 letter to Chairman Powell:

“I am extremely concerned that the Commission’s continued failure to clarify the rules governing traffic over AT&T’s IP backbone could jeopardize our ability to keep telephone rates in rural areas affordable.”

Michael Brunner, CEO, National Telecommunications Cooperative Association, expressed a similar concern in a January 29, 2004 letter to the Senate encouraging pressure on the FCC to apply access charges on VoIP traffic as outlined in their press release:

“Specifically, the association raised concerns about the potential threat that unregulated VoIP poses to the access revenue of its member companies and, perhaps most importantly, universal service support in rural and high cost areas.”

At the present rate of progress, it will take 40 more years for the Universal Service Program (USP) to move telephone service within reach of **three-nines** or 99.9% of the population. Applying access charges destroys the prospects for Inflexion’s ExtendIP service without truly benefiting underserved consumers in any targeted way.

This petition does not address the issue of VoIP service providers contributing to the USF. As a revenue based cross-subsidy, the USP does not pose as great a threat to the viability of Inflexion's ExtendIP service as access fees, but the same issues arise regarding low cost basis VoIP services contributing to support the high cost basis traditional USP where VoIP remains an unauthorized service. It may make sense to have VoIP service providers contribute to a VoIP USF. In any event, Congress directed the FCC to remove implicit subsidies 8 years ago,⁴ so it seems unreasonable to justify expanding the class of subsidizing payors. The imposition of regulation on VoIP, in particular, access charges, destroys the pricing and implementation flexibility necessary to accomplish the goal of universal service. Granting this Petition will directly serve the interests of low-income and underserved consumers, and is consistent with § 254.

Background

USP Accountability and the Periphery Market. Even given the long standing Universal Service Program, FCC data⁵ reveals as many as 10% of citizens in some states remain without telephone service. The number of people unable to afford telephone service can run over 25% in some regions and cities. The numbers indicate a significant portion of the 12% of Americans living in poverty⁶ have limited or no access to telephone service. The telephone density rates rise and fall each year with economic conditions, because the data reflects lack of **affordability** and not a conscious decision to go without telephone service. The nominal rate of improvement of

⁴ 47 U.S.C. § 254(b)(3),(d), (e), (k). There is a substantial argument that access subsidies were statutorily required to be removed by May 8, 1997. Section 254(a)(2).

⁵ FCC, Trends in Telephone Service, August 2003.

⁶ Census data for a family of four defines poverty as an income of less than \$18,392 annually.

one percent per decade reflected in the data means it could take another forty years for telephone service to reach **three-nines** or 99.9 percent of the population.

Unlike on going value improvements achieved by vendors of long distance, cellular, and other information technologies, FCC data⁷ shows that the cost of local telephone service rises along with the Consumer Price Index in a manner that largely keeps pace with any incremental increases in income among people in these underserved periphery markets. Universal Service Program subsidies reduce the cost of service for some customers, but these customers suffer the price increases along with everyone else. Access charge revenues are not targeted to low-income or underserved consumers. The ILEC's are not held accountable to show access fees benefit underserved markets.

The lack of regular access to telephone service significantly increases the obstacles people face in their attempts to escape poverty. It is difficult to imagine how someone can obtain and keep a job without a telephone. The concept of universal service (little "u") enjoys broad support, because the inability of people to escape poverty raises other costs for government and society in the form of assistance programs and crime. Unlike in the case of broadband, the relatively large number of people without telephone service does not reflect a lack of availability. It reflects idle capacity caused by the fact that people still cannot afford traditional telephone service even given the USP. ILEC practices concerning deposits, credit terms, and collections raise additional barriers for people in underserved markets to obtain and keep telephone service.

Inflexion ExtendIP Service. Inflexion uses communication applications of the Internet to address periphery markets not served by the Universal Service Program. Inflexion's ExtendIP

Service contributes to universal service by creating products and services addressing the needs of the over 5 million America citizens without regular access to telephone service, as well as the enterprises and government entities serving them. In order to address the needs of customers that remain beyond the reach of the USP, Inflexion utilizes service and pricing options that go well beyond Plain Old Telephone Service (POTS) delivered by the ILECs.

VoIP and other information technology tools offer the best means of reducing the cost of communications and matching the service offer to the special needs of the periphery market. Inflexion can more easily aggregate customers and pursue economies of scale using VoIP and the Internet. All of the underlying technologies associated with VoIP get “faster and cheaper” consistent with the larger information technology industry.

Using VoIP and other information technology tools, Inflexion can offer the periphery market:

- Service without long term contracts
- Instant provisioning
- Flexible prepaid calling
- Non-traditional voice mail
- Service without requiring a home address
- Disposable customer premise equipment
- Aggregation to address credit risk
- Alternative billing

The Internet. A significant source of public policy confusion arises from the misperception that the Internet is an overlay network of the PSTN (Public Switched Telephone Network.) The Internet and PSTN have no more in common than automobiles and trains. They depend on the entirely distinct underlying technologies of packet and circuit switching. One could turn off all of the equipment used to support traditional circuit-switched telephone calls

⁷ FCC, Trends in Telephone Service, August 2003.

without any impact on the operation of the Internet itself. The Internet and PSTN interconnect only through VoIP-PSTN gateways designed to bridge packet switched networks with circuit switched networks.

There is no uncertainty in the demarcation between Internet and PSTN at the network level, but there are no reliable points of demarcation at the application level. This means the traditional approach of maintaining separate regulatory treatment for voice, video, and data fails. Attempts to assert distinctions where none exist can not be accomplished without altering the architecture and underlying efficiency that serves as the basic strength of the Internet. The task of PSTN-like metering of Internet traffic for time associated with access fees could easily cost far more than delivering the traffic. The notion of making Internet traffic sensitive to time and location completely alters the value proposition of the Internet and by extension the many possible applications of the Internet that can benefit the periphery market.

Who Benefits from Access Charges? The policy allowing ILECs to impose access fees arose at the time of the breakup of AT&T in 1984 in order to have heavy users of interexchange calling subsidize local rates.⁸ Access fees produced a growing source of revenue for ILECs as reductions in the per minute access charge lagged the growth of usage associated with falling long distance rates. Controversy about access fees persist because they exist as a creature of political forces and not market forces. ILECs collect the fees without regard to their performance or the cost of delivering the service. All of the expenses, except access fees, associated with

⁸ In some respects, consumers are subsidizing themselves. Many low-income families are heavy toll users, especially those with family in other countries. Local calling areas are smaller in rural areas, and rural customers must pay toll (the price for which presumably includes access charges) and in order to reach doctors, schools, places of employment and other persons and entities that are ordinarily "local" in urban areas. It seems inconsistent to impose the subsidy on the very group that is allegedly subsidized.

delivering a telephone service can be reduced through innovation and network investments. The per minute nature of the fees makes it risky to offer end users flat rate unlimited usage service, so it limits the types of viable business models. Access fees destroy the market because non-ILECs end up with collapsing margins as the fixed access fees and competition induced end user price reductions converge.

Public policy decisions allowing access fees to persist have produced a situation where ILECs enjoy 80% of telecom industry profits and market capitalization. This is antithetical to the goals of increasing competition and requiring cost-based prices and explicit, competitively-neutral subsidy mechanisms.

Discussion

- 1. The imposition of access charges on VoIP would prevent Inflexion from addressing the communication needs of people stuck in the periphery market outside the reach of the USP, and will cause the United States to not achieve three-nines (99.9%) universal service.**

Access fees can raise the cost of interconnection by a factor of 10 or more⁹. Access fees establish a floor for the cost of service well above the ability of customers in the periphery market to pay even if there were no other costs involved in delivering Inflexion's ExtendIP VoIP Service. The usage based access fees destroy the efficiencies available through economies of scale and unnecessarily diminish implementation flexibility made possible through VoIP and other communication applications of the Internet. The lack of credit and other issues unique to low income environments make it even more expensive to service the periphery market

⁹ The 24 end user lines associated with a T1 can carry up to one million minutes of traffic per month. Asserting access and egress fees totaling 1.5 cents per minute means this T1 can cost up to \$15,000 per month. The per minute nature of the fee prevents economy of scale associated with aggregating capacity. A T3 which represents

customer. The advantages obtained through the flexibility and lower cost basis of VoIP and the Internet are lost if a usage based per minute access fee is imposed.

The access fee cross-subsidy mechanism presumes there exists only one way to provide service. The imposition of access charges to support ILEC POTS service presumes one-service-fits-all and benefits only incumbent providers and legacy technologies. Inflexion's ability to serve the periphery market depends on finding a means to reduce the cost basis of the service far below the ILECs cost basis for POTS.

2. Access fees are counter productive with respect to achieving universal service and the serving the public interest.

The numerous industry, market, and technology changes, as well as lessons learned over the last twenty years completely challenge the public policy foundations underlying the creation of access fees. Competition led the interexchange carriers to reinvent their networks with digital technology shortly after the breakup of AT&T. ILEC networks remain largely analog copper based between users and central offices. ILECs collected nearly two trillion dollars in revenues during the last 20 years, while rate increases and falling costs per line for both labor and equipment produced over 40% gross profit margins. The more than \$300 billion in access fees contributed to high profit margins, but above-cost access fees did not produce the desired investment in network upgrades necessary for advanced services. To the extent investments lowered cost basis of service, the ILECs did not pass the savings on to end users in the form of lower rates. Basic local telephone service remains essentially unimproved since the arrival of Touch Tone phones in 1963. Plain Old Telephone Service delivered by ILECs stands alone in

³⁰ T1's does not cost 30 times as much as a T1 to implement, but it might generate as much as \$450,000 per month in access costs even though the costs of implementation do not track directly with capacity.

resisting the norm of information technology based industries to deliver more value for less cost year over year. These realities make the access charge regime wholly inappropriate as to VoIP.

3. Imposing access charges on Inflexion violates antitrust principles.

The ability to collect access fees removes the incentive of ILECs to invest in their networks as profits do not depend on out performing competitors. Imposition of access fees eliminates **incremental strategies** that might produce a more efficient network. Competitors must either deploy an entirely separate and ubiquitous network or suffer the ILECs' ability to extract most of the value in the form of access charges. The status quo leaves everyone paying too much, and people in the periphery market find themselves completely disconnected.

4. Imposing access charges on communication applications of the Internet destroys the basic elements underlying the success of the Internet.

Even if there existed a public policy imperative for allowing ILECs to collect access fees on intra-PSTN calls, the imperative does not exist for Internet applications that use the PSTN. The Internet and the PSTN remain separate physically, technologically, and in terms of the underlying business model. Treating some applications of the Internet like a voice call on the PSTN requires interventions that violate the basic nature of the Internet: the network is agnostic as to the application that rides on it. Imposition of access fees on VoIP traffic alters the provision of Internet capacity. Providers of capacity will have to distinguish between VoIP and non-VoIP uses. The lack of application level demarcations leaves the parties in a quandary that will likely get resolved with one of two thinly justified blanket assumptions – the capacity does serve VoIP or the capacity does not serve VoIP. There exist only two workable options: Apply access fees to all applications of the Internet or apply access fees to no applications of the Internet. Any

attempt to find a middle ground and apply access to “some” VoIP and not “other” VoIP will only increase uncertainty, and lead to more litigation and controversy. All of these factors support continuing the policy of Internet un-regulation, including continuing the current exemption from access charges.

Conclusion

Based on the foregoing, Inflexion Communications respectfully submits that the Commission can best serve the public interest by issuing a declaratory ruling that Inflexion's ExtendIP VoIP Service is exempt from access fees, at least to the extent it directly or indirectly serves periphery markets defined as regions with an aggregate telephone density below the national average, low-income consumers, other authorized recipients of state or federal USP grants and discounts, and entities that in turn provide service to the target population.

Respectfully submitted,
Inflexion Communications

Keith Machen
Daniel Berninger
645 Griswold Street, Suit 1800
Detroit, MI 48226

Dated: February 27, 2004

Certificate of Service

I hereby certify that on this 27th day of February 2004, copies of the foregoing *Petition for Declaratory Ruling that Inflexion Communications ExtendIP VoIP Service is Exempt from Access Charges* were served on the following:

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

Daniel Berninger