Decision **DRAFT DECISION OF ALJ THOMAS** (Mailed 3/26/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In Touch Communications, Inc. and Inflexion California Communications Corp., for the sale and purchase, respectively of the customer base, operating authorities and other assets.	Application 03-11-011 (Filed November 10, 2003)
Inflexion California Communications Corp., for a certificate of public convenience and necessity to provide resold and limited facilities-based competitive local exchange service throughout the service territories of SBC California, Inc., Verizon California Inc., Roseville Telephone Company, and Citizens Telecommunications Company of California, Inc.; and resold and facilities-based interexchange service.	Application 03-11-013 (Filed November 19, 2003)

O P I N I O N

I. Summary

This decision denies the applications of Inflexion California Communications Corp. (Inflexion) (1) for approval of the acquisition of the assets of In Touch Communications Inc. (In Touch) pursuant to Pub. Util. Code § 851, and (2) for a Certificate of Public Convenience and Necessity (CPCN) to provide resold and limited facilities-based competitive local exchange service and resold and facilities-based interexchange service.

We find that Inflexion has failed to establish that its management team is qualified to serve California residential customers, in part because a company run by key Inflexion managers was recently fined in excess of $400,000 for misconduct in Pennsylvania. The circumstances surrounding the fine, and the prior company's failure to pay the fine, make it impossible for us to satisfy ourselves that we would have sufficient ability to control Inflexion's behavior in California through our own ability to levy fines or otherwise require compliance with our rules.

II. Background

A. Inflexion's Management's History in other States

1. Pennsylvania Fine

Inflexion's management team consists of Dwayne Goldsmith (CEO and President), Keith Machen (Vice President – Legal/Business Development) and two others. On January 23, 2003, the Pennsylvania Public Utility Commission ordered Ntegrity Telecontent Services (Ntegrity), a company then run by Goldsmith and Machen, to pay $400,550.00 in fines. Machen and Goldsmith founded Ntegrity. At the time of the misconduct, Machen was Ntegrity's Vice President, and Goldsmith was an executive officer (we believe CEO) in the company. Machen and Goldsmith are still shareholders in Ntegrity. (1/21/04 Supplement at 2; Pennsylvania decision at 8.)[1] Ntegrity did not pay the Pennsylvania fine, although it was due 20 days from the date of the Pennsylvania Commission's January 23, 2003 order. (1/29/04 Second Supplement at 2.)

[1] We refer to each of Inflexion's filings by the date it was filed, and to the Pennsylvania Commission's decision as "Pennsylvania decision."

The Pennsylvania Commission's penalty consisted of $339,250.00 for 27 instances of slamming (switching a customer's telephone service without securing proper consent), and $61,300.00 for Ntegrity's failure to cooperate with that Commission's staff inquiries related to 63 informal complaints of slamming by Ntegrity.

Machen was directly involved in discussions with such staff, the latter representing the Pennsylvania Commission's Bureau of Consumer Services (BCS). (Pennsylvania decision at 8.) During a February 18, 1999 meeting with Machen and another Ntegrity vice president, BCS expressed concerns about the slamming and reminded them of Ntegrity's regulatory obligations and their responsibility to address consumer complaints promptly. At various times during 1999, BCS contacted Ntegrity personnel by telephone, fax, and letter to secure information on an ever-increasing number of complaints against the company. On July 23, 1999, BCS sent a letter to Ntegrity regarding the company's failure to timely respond to BCS' requests for information. (*Id.* at 8-9.) The Pennsylvania Commission found that Ntegrity did not cooperate with the BCS' request for information.

Ntegrity unsuccessfully tried to reach a settlement with the Pennsylvania Commission, but when it failed to do so, stopped participating in the case and failed to appear at the hearing. (1/21/04 Supplement at 2.) While Ntegrity alleged in its answer that the slamming resulted from the activities of independent telemarketers, the Pennsylvania Commission gave the answer no weight because it was not supported by witnesses. (Pennsylvania decision at 3.) As noted, Ntegrity never paid the fine, and does not claim it has appealed the fine or that it was otherwise procedurally improper.

2. New Jersey Investigation - Ntegrity

According to Inflexion, the New Jersey Division of Consumer Affairs and Board of Public Utilities opened an investigation into slamming allegations against Ntegrity. According to Inflexion, the investigation was closed without imposition of any sanction.

3. Verizon – New Jersey - Ntegrity

Verizon California, Inc. (Verizon) protested Inflexion's application here, alleging that as of April 2001, Ntegrity had accumulated a past-due balance to Verizon of nearly $4 million for wholesale services Ntegrity purchased from Verizon to serve telephone customers in New Jersey. The New Jersey Commission permitted Verizon to discontinue service to Ntegrity. (Verizon 11/21/03 Limited Protest at 3-4.) Verizon and Ntegrity settled the claim without payment or admission of liability in exchange for mutual releases of litigation each side had filed against the other. (Inflexion 1/5/03 Reply to Limited Protest of Verizon at 2-4.) Inflexion does not deny that the New Jersey Commission allowed Verizon to discontinue service to Ntegrity.

4. Verizon – Virginia – Stickdog Telecom, Inc.

Verizon also alleges that as of February 2003, Stickdog Telecom, Inc., (Stickdog) in which an Inflexion executive was formerly involved, had accumulated a past-due balance to Verizon of $1.1 million, which Verizon never recovered. On February 18, 2003, the Virginia State Corporation Commission issued an order permitting Verizon to disconnect wholesale telecommunications services to Stickdog beginning in April 2003. Stickdog's CEO was Mr. Marion Spina, Inflexion's Vice President of Operations.

According to Inflexion, Stickdog was forced to discontinue operations during very difficult economic times, and Verizon failed to provide evidence that Spina, Stickdog's CEO, "was responsible for Stickdog's problems." Inflexion

does not deny that Stickdog incurred the debt to Verizon or that Verizon discontinued services to Stickdog in Virginia.

B. Parties to the Transaction

In Touch was granted local resale authority and interexchange authority as a switchless reseller in Decision (D.) 98-04-042 (Application (A.) 98-02-010), and was granted local facilities-based authority in D.03-05-005 (A.02-12-023).

Inflexion is a California corporation located at 65 Cadillac Square, Suite 2200, Detroit, Michigan 48226, telephone (866) 291-4392. Inflexion was established for the purpose of completing the acquisition of the In Touch assets, and is a wholly-owned subsidiary of Inflexion Corporation. Inflexion Corporation provides local and interexchange telecommunications services directly or through subsidiaries in several states and on an interstate basis.

Inflexion has used a third party, EZ Phone, as an "intermediary wholesale service provider" pending Inflexion's receipt of § 851 authority and a CPCN. In its *Motion for Emergency Ex Parte Temporary Restraining Order and Additional Interim Relief*, filed on November 10, 2003 (TRO Motion), Inflexion explained that the former customers of In Touch were in jeopardy of losing all telephone service unless Inflexion stepped in, using EZ Phone, to serve these customers.[2] It explained that most of the customers are credit impaired and unable to meet standard credit or deposit requirements of other carriers. EZ Phone was granted interexchange authority as a switchless reseller in D.97-09-090 (A.97-08-024) and

[2] At the TRO hearing, at the assigned administrative law judge's (ALJ) urging, the parties reached agreement on a temporary arrangement to serve the customers. With this decision denying Inflexion's applications, those arrangements must cease. Inflexion, In Touch or EZ Phone shall communicate with all their California customers, inform them of their right to change service to another carrier and otherwise comply with D.97-06-096, which sets forth procedures for carriers discontinuing service.

was granted local resale authority in D.97-12-073 (A.97-08-038). D.98-01-033 (A.97-08-038) modified D.97-12-073.

C. Proposed Transaction

In Touch filed a voluntary Chapter 11 Bankruptcy petition in the United States Bankruptcy Court for the Central District of Texas, Santa Ana Division (Court) on August 1, 2003.[3] On October 23, 2003, In Touch filed a motion to convert the bankruptcy case to Chapter 7 pursuant to 11 U.S.C. § 1112(a), which the Court granted on October 31, 2003. In the context of the Chapter 7 proceeding, Inflexion bought in Touch's assets and wishes to step in and serve In Touch's former customers. The customers are typically low-income consumers who purchase prepaid monthly telephone service.

The Bankruptcy trustee approved Inflexion's purchase of In Touch's assets and sought Court approval of the purchase. The Court granted such approval at a November 7, 2003 hearing, and entered its written order on November 18, 2003.[4]

Inflexion proposes the transactions in order to take over the provision of telephone service to In Touch's customers.

D. Protests

Both Pacific Bell Telephone Company, dba SBC California (SBC) and Verizon have protested the applications. They object to A.03-11-011 on the ground that, (1) Inflexion has not demonstrated the authority to represent and

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[3] Case No SA 03-15793 JR.

[4] *Joint Protest of Pacific Bell Telephone Company (U 1001 C) D/B/A SBC California and Verizon California, Inc. (U 1002 C) to the Application by Inflexion California Communications and In Touch Communications, Inc. (U 5972 C) To Acquire the Customer Base, Operating Authorities and Other Assets of In Touch Communications, Inc.,* filed November 21, 2003, Attachment 1.

bind the bankruptcy estate of In Touch, and (2) the arrangement with EZ Phone – which Inflexion terms a "multi-layered resale serving arrangement" is unclear and unprecedented. They ask the Commission to impose several conditions on the acquisition.

Verizon protests A.03-11-013 due to the debts incurred by Ntegrity and Stickdog, as recited earlier in this decision. Verizon asks the Commission to require Inflexion to post a performance bond, periodically furnish the Commission financial information, and file reports if it anticipates bankruptcy or other insolvency.

III. Discussion

We deny both applications without prejudice to Inflexion's right to reapply for a CPCN in two years from the effective date of this decision. We are most concerned about the very recent one-year-old Pennsylvania fine, Ntegrity's failure to pay it, the fact that the fine was based in part on Ntegrity's failure to cooperate with regulators, and Machen's direct contact with those regulators. Our ability to ensure that Inflexion acts in the public interest in California is directly related to our ability to levy fines, institute proceedings and require that the company cooperate with our requests. The fact that a company that Inflexion's CEO and Legal Vice President founded and ran flouted the Pennsylvania Commission's authority in this way gives us concern about our ability to protect California consumers.

The other alleged wrongdoing -- the closed New Jersey investigation and the debts (one settled) to Verizon in New Jersey and Virginia – would not, standing alone, cause us to deny the applications. It is the presence of these issues coupled with the Pennsylvania events that cause us to deny the applications at this time. We do so understanding full well that our decision will

preclude Inflexion from providing regulated telecommunications service in California. Therefore, we will allow Inflexion to reapply for a CPCN in two years. If it should choose to do so, it shall provide evidence that we need no longer be concerned with our ability to effectively regulate the company's actions. A record of no further investigations, unpaid fines, or of problems concerning cooperation with regulators in other contexts, will be of assistance at that time.

We have the authority to deny a § 854[5] or CPCN[6] application on the ground that it would be against the public interest to grant the application. Part of our public interest determination includes an examination of the financial and managerial qualifications of the company on both counts, and for the foregoing reasons we find that Inflexion has failed to prove its qualifications at this time.

IV. Categorization and Need for Hearings

In Resolution ALJ 176-3123 dated November 14, 2003, the Commission preliminarily categorized this application as ratesetting, and preliminarily

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[5] While Inflexion styles A.03-11-011 as one under Pub. Util. Code § 851, which relates to sale of assets by a utility, it is better viewed as a Pub. Util. Code § 854 application since Inflexion is taking over In Touch's business, and we hereby deem it such. Section 854 requires Commission authorization before a company may "merge, acquire, or control . . . any public utility organized and doing business in this state . . . ." The purpose of this and related sections is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. (*San Jose Water Co.* (1916) 10 CRC 56.)

[6] The Commission has established two major criteria for determining whether a CPCN should be granted. An applicant who desires to operate as a limited facilities-based and resale provider of local exchange and interexchange services must demonstrate that it has a minimum of $100,000 in cash or cash equivalent, which is reasonably liquid and readily available to meet the firm's start-up costs, and additional funds for any deposits that other carriers may require. The applicant is also required to make a reasonable showing of technical expertise in telecommunications or a related business.

determined that hearings were necessary. While a hearing on Inflexion's TRO motion occurred, we may resolve the application on its merits without an evidentiary hearing. Thus, we reverse the preliminary determination and find that no hearing is necessary on A.03-11-011.

V. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Inflexion filed comments on April 15, 2004, and Verizon and SBC filed reply comments on April 20, 2004. On April 29, 2004, Inflexion also filed a "provisional request" for a hearing on its applications, asserting that the Commission cannot adopt the draft decision without hearings. Verizon opposed that request for hearing on May 14, 2004.

Inflexion claims that the Pennsylvania fine is irrelevant to its application here, and seeks a hearing at which to "presen[t] evidence of Messrs. Machen's and Goldsmith's recent successful, untroubled, and non-controversial operation of other multi-state telecommunications companies. . . ." Inflexion claims its due process rights require that it be granted this hearing.

Verizon opposes grant of a hearing and supports the draft decision. It claims that the undisputed record shows that Inflexion is not qualified to do business in California under the Commission's certification standard, pointing to the following undisputed facts:

- Two of Inflexion's founders, Dwayne Goldsmith and Keith Machen, were the former President and Vice-President/General Counsel, respectively, of Ntegrity Telecontent Services.
- In January 2003, the Pennsylvania Public Utility Commission fined Ntegrity $400,550 for slamming 27 local telephone customers and failing to provide that

Commission's staff with information regarding 63 informal slamming complaints within the required time period.

- Goldsmith and Machen held their executive positions at Ntegrity during the time of Ntegrity's misconduct.
- Machen was directly involved in the discussions with the Pennsylvania Commission's staff regarding the slamming allegations.
- The Pennsylvania Commission scheduled a hearing on the matter in July 2002 but Ntegrity failed to appear.
- Ntegrity failed to pay the Pennsylvania fine.

In opposing Inflexion's provisional request for hearing, Verizon states that Inflexion has not cited material disputed facts that would justify an evidentiary hearing despite the ALJ's ruling requiring that Inflexion specifically identify the "material disputed facts that will be tested under cross examination."[7]

Inflexion's offer of evidence of "Messrs. Machen's and Goldsmith's successful and untroubled telecommunications operations for two years prior to founding Inflexion," does not warrant a hearing. Even if true, these asserted facts have no bearing on Messrs. Machen's and Goldsmith's actions in Pennsylvania, which are of recent vintage. Inflexion also makes numerous other factual assertions regarding Inflexion's management's history, but none of these asserted facts impact the factual bases of the draft decision. Thus, there remains no disputed issue of fact warranting a hearing.

"[D]ue process [does not] require a hearing that serves no useful purpose. In the instant case . . . [n]o facts are open to serious dispute, no witnesses'

demeanor need be judged, no policy decisions on which public sentiment might prove useful are before the commission. Within such a context, … a hearing serves no function."[8] Indeed, Inflexion concedes that "[the Commission] may deny a request for hearing in cases where there are no material contested facts."[9]

The United States Supreme Court has repeatedly held that an applicant who seeks a hearing before an administrative body must "meet a threshold burden of tendering evidence."[10] Due process does not require a hearing merely to "sharpen the issues" or "fully develop the facts"; rather, there must be disputed issues of *material* fact in order to merit a hearing.[11] There are no such facts here.

Nor does the Public Utilities Code require that an evidentiary hearing be held in this matter. Section 1005(a) provides that the decision whether to hold a hearing is the Commission's, and that a hearing is required only if the applicant is "entitled" to one: "The commission may, with or without hearing, issue the certificate [of public convenience and necessity] as prayed for, or refuse to issue it, …; provided, however, upon timely application for a hearing by any person entitled to be heard thereat, the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon." As discussed above, Inflexion is

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[7] *See Comments of Inflexion California Communications Crop. On Draft Decision of Administrative Law Judge Sarah Thomas,* filed April 15, 2004, at 14 n.1 (Inflexion Comments).

[8] *Los Angeles v. Public Utilities Com.,* 15 Cal. 3d 680, 703 (1975) (citation omitted).

[9] Inflexion Comments at 13.

[10] *Costle v. Pacific Legal Foundation,* 445 U.S. 198, 214 (1980), citing *Weinberger v. Hynson et al.,* 412 U.S. 609, 620-21 (1973).

[11] *Georgia-Pacific Corporation v. United States Environmental Protection Agency,* 671 F.2d 1235, 1241 (9th Cir. 1982).

not "entitled" to a hearing because it has not shown any disputed facts material to the outcome of this case. Moreover, the Ninth Circuit has made it clear that administrative agencies may deny unsupported evidentiary-hearing requests: "an agency need not conduct a factual hearing if there are no factual questions to resolve."[12]

Several rulings of this Commission have taken the same approach as the ALJ did in her April 2 e-mail instructing Inflexion to support any evidentiary-hearing request by specifically identifying the "material disputed facts that will be tested under cross examination."[13] For example, in one of its first local competition decisions, the Commission was faced with the question of whether to hold evidentiary hearings — as several parties had requested — regarding various implementation issues. The Commission concluded that "evidentiary hearings … are warranted only to the extent there are material factual disputed issues," and that "[a]ny adopted evidentiary hearing … shall be … focused on resolving essential factual disputes."[14]

Another ALJ denied a party's motion for an evidentiary hearing on facts similar to those involved here. In that case, the scoping memorandum required that any party seeking a hearing state a justification for hearing, identify what the moving party would seek to demonstrate through hearing, and state whether

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[12] *Air North America v. DOT*, 937 F.2d 1427, 1433–34 (9th Cir. 1991).

[13] *See, e.g., ALJ's Ruling on Motion for Hearing*, R.00-10-002, dated Feb. 20, 2001, at p. 2; *ALJ's Ruling Setting Aside Submission and Taking Further Evidence Regarding Executive Compensation and Bonuses*, A.02-01-107/I.03-01-012/A.02-09-005, dated Feb. 3, 2004, at p. 6; *Ruling of Assigned Commissioner and ALJ Regarding Motion for Clarification and Amendment of Procedural Schedule*, A.99-09-053, dated Feb. 28, 2000, at p. 3.

[14] D.95-07-054, *mimeo.*, at pp. 21, 29.

the disputed facts were "adjudicative facts" or "legislative facts." The party's motion for an evidentiary hearing failed to provide this information, and instead, as here, merely made conclusory statements suggesting that due process required a hearing. The ALJ denied the hearing, ruling that the party

> does not state with sufficient clarity what disputed fact … would be the subject of hearing …. The motion does not state with adequate clarity the justification for hearing, what [the party] would seek to demonstrate through hearing, and whether disputed facts are "adjudicative facts" or "legislative facts." It is not clear what party would produce a witness if the motion is granted, or what party [the requested party] seeks to cross-examine.[15]

Inflexion here also appeals to vague notions of "due process" while ignoring the judge's instructions to support its evidentiary-hearing request by specifically identifying the "material disputed facts that will be tested under cross examination." The Commission therefore denies Inflexion's unsupported evidentiary-hearing request.

Inflexion has been afforded its due process, and this Commission need not conduct an evidentiary hearing. Nor can Inflexion use an evidentiary hearing in California to collaterally attack the findings of fact against Ntegrity in the recent Pennsylvania decision. That decision is final and considered *res judicata*.[16] Ntegrity had an opportunity to be heard in that forum, but failed to appear at its

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[15] *Administrative Law Judge's Ruling on Motion for Hearing*, R.00-10-002, dated Feb. 20, 2001, at pp. 2-3.

[16] *See, e.g.*, D.03-04-038, *mimeo.*, at p. 10 ("*Res judicata* precludes the relitigation of a final judgment on the merits between the same parties or parties in privity with them. [Citation omitted.] It is applied to promote judicial and administrative economy, bring finality to adjudicated issues, and prevent wasteful multiple litigation.")

own hearing. Ntegrity management, now at Inflexion, should not be given yet another opportunity to challenge the Pennsylvania findings.

Finally, Inflexion challenges the draft decision's discussion of the New Jersey investigation of Ntegrity, the Verizon-Ntegrity dispute in New Jersey, and the Verizon-Stickdog dispute in Virginia. As a threshold matter, the draft decision makes clear that denying Inflexion's applications would be appropriate based solely on the Pennsylvania Commission's actions against Inflexion: "the circumstances surrounding the fine, and the prior company's failure to pay the fine, make it impossible for us to satisfy ourselves that we would have sufficient ability to control Inflexion's behavior in California through our own ability to levy fines or otherwise require compliance with our rules."[17]

Moreover, Inflexion does not dispute the facts the draft decision recites regarding the other three matters. Rather, it simply alleges it should be allowed to introduce other information about these matters. However, the facts we recite, in combination with the undisputed facts surrounding the Pennsylvania fine, support our conclusion that Inflexion has not demonstrated that it is qualified at this time to provide telecommunications service in California.

The draft decision should not change.

VI. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Sarah R. Thomas is the assigned ALJ in these proceedings.

[17] Draft Decision at 2.

Findings of Fact

1. Two of Inflexion's senior executives founded Ntegrity, which furnished telecommunications services in Pennsylvania.

2. In 2003, the Pennsylvania Commission fined Ntegrity $400,550 for slamming and failure to cooperate with regulatory staff.

3. Ntegrity did not pay the Pennsylvania fine, and has furnished no evidence that it has appealed the fine or that the fine is procedurally improper.

4. The New Jersey Commission investigated Ntegrity for slamming, but closed the case without taking further action.

5. Ntegrity incurred, but did not pay, a large debt to Verizon in New Jersey, which was settled without admission of liability. The New Jersey Commission permitted Verizon to discontinue service to Ntegrity.

6. Stickdog's CEO was a current Inflexion executive. Stickdog incurred, but did not pay, a large debt to Verizon in Virginia. The Virginia Commission permitted Verizon to discontinue service to Stickdog.

Conclusions of Law

1. The applications should be denied because they are not in the public interest.

2. Inflexion or its successors in interest may reapply for a CPCN no earlier than two years from the effective date of this decision.

3. In Resolution ALJ 176-3123 dated November 14, 2003, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were necessary. While a hearing on Inflexion's TRO motion occurred, we may resolve the application on its merits without an evidentiary hearing. Thus, we reverse the preliminary determination and find that no hearing is necessary on A.03-11-011.

O R D E R

IT IS ORDERED that:

1. Pursuant to Pub. Util. Code § 854, the joint application of Inflexion California Communications Corp. (Inflexion) and In Touch Communications, Inc. (In Touch), Application (A.) 03-11-011, is denied.

2. Pursuant to Article 1 of Chapter 15 of the Pub. Util. Code, Inflexion's and In Touch's application for a Certificate of Public Convenience and Necessity (CPCN), A.03-11-013, is denied without prejudice.

3. Inflexion's temporary arrangements serving In Touch's former customers must cease. Inflexion, In Touch or EZ Phone shall communicate with all of their California customers, inform them of their right to change service to another carrier and otherwise comply with Decision 97-06-096, which sets forth procedures for carriers discontinuing service.

4. Inflexion or its successors in interest may not reapply for a CPCN earlier than two years from the effective date of this decision. If they should choose to do so, they shall provide evidence that we need no longer be concerned with our ability to effectively regulate the company's actions. A record of no further investigations, unpaid fines, or of problems concerning cooperation with regulators in other contexts, will be of assistance at that time.

5. In Resolution ALJ 176-3123 dated November 14, 2003, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were necessary. While a hearing on Inflexion's TRO motion occurred, we may resolve the application on its merits without an evidentiary hearing. Thus, we reverse the preliminary determination and find that no hearing is necessary on A.03-11-011.

6. These proceedings are closed.

This order is effective today.

Dated _____, 2004, at San Francisco, California.