

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| |) | |
| In the Matter of |) | |
| |) | |
| Petition for Declaratory Ruling that |) | WC Docket No. 04-52 |
| Inflexion Communications |) | |
| ExtendIP VoIP Service is Exempt from |) | |
| Access Charges |) | |
| |) | |

COMMENTS OF AT&T CORP.

Pursuant to the Commission’s Public Notice, DA 04-627, released March 8, 2004, AT&T Corp. (“AT&T”) submits these comments on the February 27, 2004 petition of Inflexion Communications Corporation (“Inflexion”) seeking a declaratory ruling 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 at 1.

The Commission’s longstanding policy has been that phone-to-phone IP telephony services are exempt from access charges.¹ That policy was sound when developed – and remains so today. Based on that policy and, assuming the Commission will reach the same result on AT&T’s own petition for declaratory ruling on phone-to-phone IP telephony,

¹ Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Service are Exempt from Access Charges, WC Docket No. 02-361, filed October 18, 2002, at 1-17; Reply Comments of AT&T Corp., WC Docket No. 02-361, filed January 24, 2003, at 7-18.

AT&T supports the Inflexion petition. However, there is no lawful basis on which the Commission could reach disparate results on AT&T's and Inflexion's petitions because both seek to confirm that VoIP services should remain free of access charges, consistent with the Commission's existing policy on this issue. While the exact nature of Inflexion's service is not clearly identified in its petition, it appears that the VoIP calls that Inflexion supports are Internet applications that use the PSTN on both ends (or what Inflexion labels as "intra-PSTN calls") and thus would be considered phone-to-phone IP telephony under the Commission's definitions.² Inflexion at 12. The best and most reasonable course of action would be for the Commission to consider the intercarrier compensation issues attendant to phone-to-phone IP telephony, as presented in the AT&T and Inflexion petitions, in its recently announced *VoIP NPRM*.³

If the Commission elects to treat the AT&T and Inflexion petitions independently of the *VoIP NPRM*, then any adverse decision on AT&T's petition must extend equally to Inflexion.⁴ As AT&T demonstrated in its March 31, 2004 Letter, there is no lawful basis for

² *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11,501, ¶¶ 88-89 (1998) ("Report to Congress" or "Stevens Report"). The FCC defined phone-to-phone IP Telephony as a service that enables "real-time voice transmission using Internet protocols" (*id.* ¶ 84) and meets a four-part test:

- (1) the provider holds itself out as providing voice telephony or fax;
- (2) no special CPE is required beyond that used for calls over the PSTN;
- (3) the service allows calls to telephone numbers assigned under North American Numbering Plan and international agreements; and
- (4) the service transmits customer information without a net change in form or content. *Id.* ¶ 88.

³ *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, rel. March 10, 2004 ("VoIP NPRM").

⁴ Letter from Judy Sello, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 02-361, dated March 31, 2004 ("AT&T March 31 Letter"), which AT&T incorporates by reference herein.

the Commission to make distinctions between carriers that are providing phone-to-phone IP telephony services. Courts have repeatedly held that agencies must justify disparate treatment of similarly situated parties, and there is no conceivable justification for treating IXCs carrying identical traffic differently.⁵ The fact that Inflexion claims to be providing service to underserved areas is not a distinguishing fact because there is no Commission policy that one can avoid access charges in underserved areas. Of course, the right answer is a Commission ruling that *all* phone-to-phone IP telephony services remain exempt from access charges and subject to the more cost-based intercarrier compensation afforded to information service providers. But if AT&T must pay access charges on its phone-to-phone IP telephony calls, then so must Inflexion.

⁵ See, e.g., *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994) (“We have . . . reminded the FCC of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment” (internal quotation marks omitted)); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (to justify disparate treatment of parties, FCC “must explain its reasons and do more than enumerate factual differences, if any, between [them]; it must explain the relevance of those differences to the purposes of the Federal Communications Act”); *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) (“[A]n agency’s unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.”).

For these reasons, AT&T supports the continued exemption of all VoIP traffic from bloated access charges and any modifications of that exemption should be undertaken, if at all, in the context of the *VoIP NPRM* where the Commission will consider intercarrier compensation issues associated with VoIP. If the Commission elects to deny AT&T's phone-to-phone IP telephony petition independently of that rulemaking, it must likewise deny Inflexion's petition.

Respectfully submitted,

AT&T Corp.

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CERTIFICATE OF SERVICE

I, Judy Sello, do hereby certify that on this 7th day of April, 2004, a copy of the foregoing "Comments of AT&T Corp." was served by U.S. first class mail, postage prepaid, on the parties named below.

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/s/ Judy Sello
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