

Before the
Federal Communications Commission
Washington, D.C. 20554

Express Scripts, Inc.,)	
)	Proceeding Number 16-407
Complainant,)	
)	Bureau ID Number EB-16-MD-005
v.)	
)	
AT&T Corp.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 2018

Released: January 31, 2018

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a formal complaint filed by Express Scripts, Inc. (ESI) against AT&T Corp. (AT&T).¹ In its Complaint, ESI alleges that AT&T, which provides interstate telecommunications services to ESI, violated Commission rule 54.712(a) and Section 201(b) of the Act² by failing to apply certain credits to ESI's interstate telecommunications charges before calculating a Universal Service Fund (USF) pass-through charge on ESI's bills. As discussed below, we find that AT&T's calculation of ESI's USF pass-through charge did not violate either Commission rule 54.712(a) or Section 201(b) of the Act.

II. BACKGROUND

A. Legal Background

2. The Commission established the USF in accordance with Section 254(b) of the Act to "ensur[e] the delivery of affordable telecommunications services to all Americans, including consumers in high-cost areas, low-income consumers, eligible schools and libraries, and rural health care providers."³ The USF is funded by contributions from providers of interstate and international

¹ Complaint, Proceeding No. 16-407, Bureau ID No. EB-16-MD-005 (filed Dec. 13, 2016) ("Complaint"). ESI filed the complaint pursuant to Section 208 of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 208.

² 47 C.F.R. § 54.712(a); 47 U.S.C. § 201(b).

³ See *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002) (subsequent history omitted) ("*USF Contribution Methodology Order*") at 24957, para. 7.

telecommunications, such as AT&T, who must pay a specified percentage (called the “contribution factor”) of their “projected collected interstate and international end-user telecommunications revenues, net of projected contributions.”⁴ The Commission sets the amount of the contribution factor every quarter.⁵

3. Soon after the USF was established, the Commission concluded that providers should be allowed “to decide for themselves whether, how, and how much of their universal service contributions to recover from their customers.”⁶ As a result, many carriers chose to pass-through their USF contributions via a separate line-item charge on their customers’ bills.⁷ In the *2002 USF Contribution Methodology Order*, the Commission addressed concerns about the way carriers calculated these USF line-item charges on customer bills.⁸ The Commission noted that, “[a]lthough the contribution factor is uniform for all [carriers], universal service line items [on customers’ bills] currently vary widely among carriers, and often significantly exceed the amount of the [C]ontribution [F]actor.”⁹ The Commission adopted rule 54.712(a) to ensure that “the amount of a carrier’s federal universal service line item will not exceed the relevant interstate telecommunications portion of the [customer’s] bill times the relevant contribution factor.”¹⁰ Rule 54.712(a) states:

Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end-users. If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor.¹¹

⁴ 47 C.F.R. § 54.706(b). See *USF Contribution Methodology Order*, 17 FCC Rcd at 24954, paras. 1-2.

⁵ See “Contribution Methodology & Administrative Filings” at <https://www.fcc.gov/general/contribution-methodology-administrative-filings>.

⁶ *USF Contribution Methodology Order*, 17 FCC Rcd at 24958, para. 10 (citing *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) (subsequent history omitted) (1997 *USF Order*) at 9211, para. 853). The Commission warned, however, that “carriers may not shift more than an equitable share of their contributions to any customer or group of customers,” 1997 *USF Order*, 12 FCC Rcd at 9199, para. 829, and must indicate on their bills that the carrier “has chosen to pass through the contribution or part of the contribution to its customers” and “include complete and truthful information regarding the contribution amount.” *Id.* at 9211, para. 855.

⁷ See *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 16 FCC Rcd 9892, 9894, para. 4 (2001).

⁸ *USF Contribution Methodology Order*, 17 FCC Rcd at e.g., 24955, 24976-983, paras. 2, 45-63.

⁹ *USF Contribution Methodology Order*, 17 FCC Rcd at 24976, para. 46.

¹⁰ *USF Contribution Methodology Order*, 17 FCC Rcd at 24978, para. 50 and Appendix A; 47 C.F.R. § 54.712(a). Thus, to use an example from that *Order*, if the interstate telecommunications charges on a customer’s bill total \$100, and the contribution factor is 7.28%, the customer’s line-item charge for the USF pass-through may not exceed \$7.28. See *id.* at 24979, para. 51 (“if the contribution factor is 7.28 percent, a carrier’s federal universal service line-item cannot exceed 7.28 percent of the total amount of the interstate portion of charges for telecommunications service...”).

¹¹ 47 C.F.R. § 54.712(a). The language quoted above is the current text of rule 54.712(a). As the Commission noted in the *USF Contribution Methodology Order*, Section 201(b) of the Act is also part of the statutory framework governing the recovery of universal service contributions by telecommunications carriers. 17 FCC Rcd at 24974, para. 41. Section 201(b) states: “All charges [and] practices...for and in connection with [interstate or foreign communication by wire or radio] service, shall be just and reasonable, and any such charge [or] practice...that is unjust and unreasonable is hereby declared to be unlawful....” 47 U.S.C. § 201(b).

B. Factual Background

4. Complainant ESI describes itself as “the nation’s largest stand-alone full-service pharmacy benefit management company, handling more than one million prescriptions every day through its network of retail pharmacies and home delivery facilities.”¹² Defendant AT&T is a common carrier engaged in interstate and foreign communications subject to Title II of the Act.¹³

5. ESI purchased telecommunications and information services from AT&T under an Agreement executed in 2007 (Agreement).¹⁴ The Agreement entitled ESI to a number of credits, including an “Attainment Credit,” which was based on ESI’s total annual spending not only on interstate telecommunications, but also on intrastate telecommunications, information, and other AT&T services.¹⁵

6. The Agreement stated that ESI “may designate up to 250 bill groups” and that “[a]ll charges for the billing components associated with a bill group will be identified with that bill group for billing and reporting purposes.”¹⁶ The Agreement specified that the Attainment Credit was “to be applied to a single bill group.”¹⁷ In accordance with these provisions, ESI requested that AT&T establish approximately fifty bill groups, each of which generally corresponded to a physical location where ESI used AT&T services.¹⁸ In addition, ESI directed AT&T to create a separate, stand-alone bill group comprised solely of the Attainment Credit and containing no usage charges whatsoever (the Credit Bill Group).¹⁹ ESI never asked AT&T to assign the Attainment Credit to a different bill group.²⁰

7. The Agreement gave ESI the option to have a separate monthly invoice for each bill group sent to and paid by an employee at the address for that bill group. Alternatively, the Agreement gave ESI the option to have a single monthly invoice including all the bill groups sent to and paid by an employee

¹² Complaint at 1, para. 2.

¹³ Joint Statement of the Parties, Proceeding No. 16-407, Bureau ID No. EB-16-MD-005 (filed Mar. 2, 2017) (“Jt. Statement”) at 2, para. 2.

¹⁴ Jt. Statement at 3, para. 6. The Agreement was amended and restated in 2011. *Id.* The Agreement consisted of a Master Services Agreement (“MSA”), Pricing Schedules, and the AT&T Business Service Guides pertaining to each Pricing Schedule. *See* Jt. Statement at 3, para. 6, 4, para. 8; AT&T’s Answer to ESI’s Formal Complaint, Proceeding No. 16-407, Bureau ID No. EB-16-MD-005 (filed Jan. 27, 2017) (“Answer”), Bereyso Dec’n Ex. 1 (2007 MSA) at 1 section 1.1, Ex. 4 (2011 MSA) at 2, 8. The Agreement allowed AT&T to impose a line-item charge for the USF pass-through. Jt. Statement at 9, para. 20; Answer, Bereyso Dec’n Ex. 4 (2011 MSA) at 30, § 5.1.

¹⁵ Jt. Statement at 3, para. 7, 9, para. 19 and n.9; Answer, Legal Analysis at 30; Reply at 19, para. 39 (“AT&T is correct that the MSA allows ESI to earn credits . . . by purchasing both telecommunications and non-telecommunications services from AT&T.”). AT&T did not award the Attainment Credit as a lump sum; rather, part of the annual credit was reflected in the invoices AT&T issued in December, March, June and September of each year. Answer, Bereyso Dec’n at 3-4, para. 10.

¹⁶ Jt. Statement at 4, para. 8; Answer, Bereyso Dec’n Ex. 2 (Service Guide) at 195-196, SD 11.5.1. ESI refers to the bill groups as “sub-accounts.” *E.g.*, Complaint at 6, para. 18. For ease of reference, we use the term, “bill group.”

¹⁷ Jt. Statement at 9, para. 19; Answer, Bereyso Dec’n Ex. 5 (Pricing Schedule) at *e.g.*, 13.

¹⁸ Jt. Statement at 4, para. 8.

¹⁹ Jt. Statement at 9, para. 19. The account number for this bill group ends in “CRD.” *See* Jt. Statement Attachment (Monthly Invoice sample pages) at bates no. 31 (page for bill group H6 398650 CRD). For ease of reference we refer to it here as “the Credit Bill Group.” The record does not establish why ESI chose to place the Attainment Credit in a stand-alone bill group.

²⁰ Jt. Statement at 9, para. 19.

at a single ESI location. ESI chose the latter option.²¹

8. The invoices AT&T sent to ESI (Monthly Invoices) had three main parts.²² The largest part, which we call here the Bill Group Portion, spanned thousands of pages.²³ The Bill Group Portion was broken down into the fifty bill groups selected by ESI (that is, the fifty bill group locations), and calculated, separately for each bill group, the amount due for that bill group. Thus, the Bill Group Portion displayed, for each bill group: the bill group's address and account number; a detailed calculation of the telecommunications and information service charges, regulatory fees, federal, state and local taxes, and any credits and discounts associated with that bill group; and the total amount due for the bill group.²⁴ The Bill Group Portion also included the Credit Bill Group which, per ESI's instruction, was comprised solely of the Attainment Credit and contained no interstate or other usage charges whatsoever.²⁵

9. Because the Credit Bill Group contained no interstate charges, AT&T did not calculate a USF pass-through charge for that bill group.²⁶ If one of the other bill groups had interstate telecommunications charges, the pages for that bill group showed a line-item for the USF pass-through charge.²⁷ AT&T calculated the USF pass-through by multiplying the bill group's interstate charges (which had already been reduced by any discounts or credits included in that bill group) by the contribution factor.²⁸ AT&T did not apply the Attainment Credit to reduce the interstate charges in these other bill groups (to which the Attainment Credit was not assigned) before calculating the USF charges for those bill groups.²⁹

10. The second part of the Monthly Invoice, called the "Summary of Accounts," comprised only a few pages. As the name suggests, it summarized the billing data from the Bill Group Portion by displaying the total amount due for each bill group.³⁰ For the Credit Bill Group, the Summary of Accounts displayed the amount of the Attainment Credit.³¹ The Summary of Accounts did not separately

²¹ Jt. Statement at 4-5, paras. 8-11, 8, para. 18, and Attachment (Monthly Invoice sample pages); Answer, Bereyso Dec'n Ex. 2 (Service Guide) at 195-96, para. SD-11.5.1 ("Invoices may be issued at the bill group level (a separate...Invoice for a single bill group) and/or at the summary level (a separate ... Invoice for a combination of two or more bill groups)"); Answer, Bereyso Dec'n Ex. 2 (Service Guide) at 195-96, para. SD-11.5.1. See Answer, Veverka Dec'n at 2, para. 6.

²² Jt. Statement at 5-6, paras. 11-14.

²³ Jt. Statement at 6-7, paras. 13-14, 8, para. 18, Attachment (Monthly Invoice sample pages); Complaint at 6, para. 18.

²⁴ Jt. Statement at 4, para. 8, 6-7, paras. 13-15, 8, para. 18, 11-12, paras. 23-25, Attachment (Monthly Invoice sample pages) at bates nos. 9-32; Complaint, Gardner Dec'n at 3, para. 6, 4, paras. 8-10.

²⁵ Jt. Statement at 9, para. 19.

²⁶ Jt. Statement at 9, para. 19, 12, para. 25; See Answer, Veverka Dec'n at 3-4, para. 10.

²⁷ Jt. Statement at 11, paras. 23-24, Attachment (Monthly Invoice sample pages) at bates no. 15; Complaint at 6-7, paras. 19-20. The Monthly Invoice refers to the USF pass-through as the "Universal Connectivity Charge." Jt. Statement at 8 n.8, 11, para. 24.

²⁸ Jt. Statement at 11-12, para. 24. See Answer, Veverka Dec'n at 2, para. 5, 3, para. 9.

²⁹ Complaint at 6-7, paras. 19-20, Gardner Dec'n at 4, paras. 8-9; Answer, Legal Analysis at 11-13; Reply at 3, para. 5.

³⁰ Jt. Statement at 6-7, paras. 13-14, Attachment (Monthly Invoice sample pages) at bates nos. 5-7. ESI's assertion that AT&T calculated taxes and fees at the Summary of Accounts level, Complaint, Gardner Dec'n at 5, para. 11, is not supported by the record. See Jt. Statement Attachment at bates nos. 5 and 28.

³¹ Jt. Statement at 9, para. 19, Attachment (Monthly Invoice sample pages) at bates nos. 28-32. The pages of the Bill Group Portion and the Summary of Accounts had separate columns for "Monthly Charges," "One-Time and Partial (continued....)

list, or contain a line-item for, the USF charge for any bill group.³² The last page of the Summary of Accounts showed a “grand total,” which was the sum total of the amounts due for all the bill groups, with the Attainment Credit treated as a negative number.³³ (In effect, then, the Summary of Accounts subtracted the Attainment Credit from the sum total of the other bill groups to determine the “grand total.”) The third part of the Monthly Invoice was a one-page “Remittance Amount” which stated the “Total Payable Upon Receipt.”³⁴ This amount matched the “grand total” on the last page of the Summary of Accounts.³⁵

III. DISCUSSION

11. In its Complaint, ESI alleges that AT&T “inflated” ESI’s USF pass-through charges by failing to reduce ESI’s interstate charges by the Attainment Credit before multiplying those charges by the contribution factor.³⁶ ESI states, “The flaw in AT&T’s [billing] system is that it... multiplies the relevant USF contribution factor times [interstate telecommunications service] dollar charges *at the [bill group] level* on ESI’s bill, which is before the system applies the [Attainment] credits that [should] reduce those [interstate] charges.”³⁷ ESI maintains that AT&T therefore violated Commission rule 54.712 and Section 201(b) of the Act.³⁸

12. To support this contention, ESI turns to the language of the Agreement, arguing that its terms required AT&T to reduce ESI’s interstate charges by the Attainment Credit before calculating the USF pass-through charge.³⁹ ESI notes that the Agreement defines “Rates and Charges” as “the rates and charges (including discounts and credits) for the Services,” and provides that, “The Regulatory Charges [such as the USF pass-through charge] are in addition to the Rates and Charges.”⁴⁰ ESI maintains that, “[b]y including credits in Rates and Charges and defining Regulatory Charges as fees ‘in addition to’

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Charges/Credits,” “Usage Charges,” and “Taxes and Fees.” Jt. Statement at 7, para. 14, Attachment (Monthly Invoice sample pages) at *e.g.*, bates nos. 5 and 10. Totals from columns on bill group pages were transferred to the Summary of Accounts columns. *See e.g.*, Jt. Statement Attachment at bates nos. 5, 25.

³² Jt. Statement at 7, para. 15. The USF pass-through charge for each bill group was combined with the non-USF charges and credits for that bill group under a column on the Summary of Accounts labeled, “One-Time and Partial Charges/Credits.” *Id.* at 7-8, para. 15.

³³ Jt. Statement at 7, para. 14, Attachment (Monthly Invoice sample pages) at bates no. 7.

³⁴ Jt. Statement at 7, para. 14, 8, para. 16, Attachment (Monthly Invoice sample pages) at bates no. 2.

³⁵ Jt. Statement at 7, para. 14, 8, para. 16, Attachment (Monthly Invoice sample pages) at bates nos. 2, 7.

³⁶ *See* Complaint at 4, para. 9. For example, if ESI’s interstate charges were \$100; the Attainment Credit was \$50 and the contribution factor was 18%, then, according to ESI, AT&T should have subtracted the \$50 Attainment Credit from the \$100 in interstate charges, and then multiplied the difference (\$50) by 18%, so that ESI would owe \$9 in USF pass-through charges. Instead, however, under the same example, AT&T multiplied \$100 of interstate charges by 18%, so that ESI owed \$18 in USF pass-through charges. *See* Complaint at 7, para. 20. ESI contends that, alternatively, AT&T should have adjusted the Monthly Invoices at the Summary of Accounts level to “recapture[]” the amount by which the USF charges were allegedly overstated. Gardner Dec’n at 5, para. 11.

³⁷ Complaint at 6, para. 19 (emphasis in original).

³⁸ ESI does not allege that AT&T multiplied ESI’s interstate charges by an incorrect contribution factor. ESI also does not allege that AT&T profited from ESI’s USF pass-through charges by collecting more in such charges than it contributed to the Universal Service Fund.

³⁹ Complaint at 9, para. 25; Reply at 4-6, paras. 7-11.

⁴⁰ Reply at 4-5, paras. 7-8 (citing Answer, Bereyso Dec’n at Ex. 4 (2011 MSA) at 7, 8). *See* Jt. Statement at 10, paras. 21, 22; Answer, Bereyso Dec’n Ex. 4 (2011 MSA) at 7, §1.1; 30, §5.1.

Rates and Charges, the [Agreement] requires AT&T to include the [Attainment] credits in its Rates and Charges which, as a matter of simple mathematics, requires Rates and Charges to be reduced before they can be used as a building block for the calculation of any Regulatory Charges.”⁴¹

13. While we agree that the question of whether AT&T violated rule 54.712(a) or Section 201(b) is informed by the terms of the Agreement, ESI’s selective citation of the Agreement’s terms is unpersuasive because it ignores the principle that a contract must be read as a whole.⁴² ESI ignores language in the Agreement stating that ESI “may designate up to 250 bill groups” and that the Attainment Credit must “be applied to a single bill group.”⁴³ ESI also overlooks language establishing that all charges pertaining to a particular bill group – including therefore, the USF charge – would be separately and independently calculated for that bill group. Specifically, the Agreement stated that “[a]ll charges for the billing components associated with a bill group will be identified with that bill group for billing and reporting purposes.”⁴⁴ These provisions make clear that the Agreement did not require AT&T to apply the Attainment Credit before calculating ESI’s USF charge. The USF charge was calculated separately for each bill group; yet the Attainment Credit could only apply to one bill group, and could not be divided and applied to multiple bill groups. Therefore, the Attainment Credit could reduce ESI’s interstate telecommunications charges before those charges were multiplied by the contribution factor only if the credit were placed in a bill group containing interstate charges, and could not reduce interstate charges in other bill groups.⁴⁵

14. Thus, ESI’s reliance on selected language of the Agreement is unavailing. ESI asked AT&T to apply the Attainment Credit to a separate, stand-alone bill group that contained no interstate charges against which the credit could be applied. ESI never revoked that request.⁴⁶ As a result, ESI’s interstate

⁴¹ Reply at 5, para. 8.

⁴² See 17A *Am. Jur. 2d Contracts* § 374 (May 2017 Update) (“all clauses and provisions of a contract should, if possible, be so construed as to harmonize with one another...”). Missouri law, which appears to govern, *Answer, Bereyso Dec’n Ex. 4* (2011 MSA) at 72, § 17.16 (“The Agreement...shall be governed by the substantive law of...Missouri”), is in accord. See *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 44 (Mo. banc 2017) (“Each clause [of a contract] ‘must be read in the context of the entire contract’”) (citations omitted); *Storey v. RGIS Inventory Specialists, LLC*, 466 S.W.3d 650, 654 (Mo. App. E.D. 2015) (in construing a contract, court must “consider the document as a whole” and “harmonize all provisions”) (citing *Nodaway Valley v. E.L. Crawford Const., Inc.*, 126 S.W.3d 820, 825 (Mo. App. W.D. 2004)).

⁴³ *Jt. Statement* at 4, para. 8; *Answer, Bereyso Dec’n, Ex. 2* (Service Guide) at 195, para. SD-11.5.1.

⁴⁴ *Id.* That charges and regulatory fees such as the USF pass-through were calculated separately for each bill group is further demonstrated by the fact that, had ESI so chosen, a separate invoice for each bill group could have been sent to and paid by the location to which that bill group pertained. The Agreement stated that “invoices may be issued at the bill group level (a separate invoice . . . for a single bill group).” Further, summary level invoices, such as the Monthly Invoices ESI chose to receive, were described by the Agreement as just a “combination of . . . bill groups.” *Jt. Statement* at 4, para. 9; *Answer, Bereyso Dec’n Ex.2* (Service Guide) at 195-96, para. SD-11.5.1.

⁴⁵ ESI has misconstrued the language on which it relies. ESI mistakenly reads the Agreement’s statement that “The Regulatory Charges are *in addition to* the Rates and Charges” to mean that Regulatory Charges are *calculated after* the Rates and Charges. The phrase “in addition to” simply means that ESI must *pay* the Regulatory Charges “in addition to” the Rates and Charges. The context in which the language is found makes this clear: “ESI shall pay for...use of the Services at the Rates and Charges.... [AT&T] may adjust or impose additional charges on ESI to recover amounts [AT&T] is required by regulatory or other governmental authorities to collect on behalf of or pay to governmental authorities.... The Regulatory Charges are in addition to the Rates and Charges.” *Answer, Bereyso Dec’n Ex. 4* (2011 MSA) at 30, §5.1(a), (b), (c). Further, we are not convinced that the Agreement’s definition of “Rates and Charges” delineates how any particular credit is to be applied to any particular charge.

⁴⁶ ESI could have minimized its USF line-item charges by placing all its interstate telecommunications charges into a single bill group, and then instructed AT&T to place the Attainment Credit in that bill group. *Answer, Legal* (continued....)

telecommunications charges were not reduced by the Attainment Credit before they were multiplied by the contribution factor. Indeed, ESI does not explain how AT&T could, on one hand, comply with ESI's request, made pursuant to the Agreement, that AT&T apply the Attainment Credit to a separate bill group containing no usage charges and, on the other hand, reduce ESI's interstate telecommunications charges by the Attainment Credit before calculating the USF pass-through. For these reasons, ESI's contractual argument must fail.

15. We also reject ESI's attempt to support its claim that AT&T violated rule 54.712(a) by asserting that the Summary of Accounts portion of the Monthly Invoice was the "interstate telecommunications portion of [ESI's] bill" within the meaning of rule 54.712(a). ESI notes that the Summary of Accounts included the Attainment Credit, and reasons that AT&T should therefore have reduced any USF pass-through charges to reflect the Attainment Credit.⁴⁷ We disagree with ESI's reasoning. The "Summary of Accounts" was not the "interstate telecommunications portion" of ESI's bill. The Summary merely listed the totals due for each of the bill groups (with the Attainment Credit treated as a negative number). It did not separately list ESI's interstate telecommunications charges or contain a line-item for the USF pass-through.⁴⁸ In contrast, as provided in the Agreement, the bill groups set forth separately, for each bill group, any telecommunications charges, regulatory fees, federal, state and local taxes, credits, discounts, and other billing information pertaining to that bill group. If a particular bill group had interstate telecommunications charges, the pages for that bill group also contained a line-item for the USF charge.⁴⁹

16. Thus, those individual bill groups that contained interstate telecommunications charges—not the Summary of Accounts—were the "interstate telecommunications portion of [ESI's] bill" containing the "federal universal service line-item charge" within the meaning of rule 54.712(a). Because, under the Agreement, the Attainment Credit could apply only to one bill group, and ESI directed that it be applied to its own stand-alone bill group, the credit did not reduce the interstate charges contained in the other bill groups before those charges were multiplied by the contribution factor. Accordingly, AT&T's calculation of ESI's USF charges was in accordance with rule 54.712(a), because the charges did not "exceed the interstate telecommunications portion of [ESI's] bill" – that is, the interstate telecommunications charges found in the individual bill groups – "times the relevant contribution factor."

17. ESI argues in the alternative that AT&T violated rule 54.712(a) and Section 201(b) even if the Agreement allowed AT&T to calculate ESI's USF charge without first applying the Attainment Credit to ESI's interstate charges, and even if the Summary of Accounts was not the "interstate telecommunications portion of [ESI's] bill" within the meaning of rule 54.712(a). According to ESI, "the Commission does not have to reach any conclusions about the [Agreement] or AT&T's invoicing format in order to conclude that AT&T's USF pass-through charge violates the rule" because rule 54.712(a) and Section 201(b) "impose[] independent compliance duties on AT&T that it cannot contract away."⁵⁰

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Analysis at 13.

⁴⁷ See Complaint at 6, para. 19, 8, para. 22 (citing 47 C.F.R. § 54.712(a)).

⁴⁸ Jt. Statement at 7, para. 15. See Jt. Statement Attachment (Monthly Invoice sample pages) at bates nos. 5-7.

⁴⁹ ESI's Monthly Invoices, including its Summary of Accounts and Bill Group Portion, were issued in accordance with the Agreement. As discussed, the Agreement required that the Attainment Credit "be applied to a single bill group," and established that each bill group represented a complete calculation and display of all charges, including the USF charge, pertaining to that bill group. The Agreement stated, "[a]ll charges for the billing components associated with a bill group will be identified with that bill group for billing and reporting purposes."

⁵⁰ Reply at 6, para. 9. See Reply at 3, para. 5 ("Neither AT&T's [bill group] system nor ESI's separate [bill group] for [the Attainment] credit prevented AT&T from including the [Attainment] credits to compute the actual

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18. This conclusory argument also fails. The only “compliance duty” imposed upon AT&T by rule 54.712 is not to assess a USF charge that “exceed[ed] the interstate telecommunications portion of [ESI’s] bill times the relevant contribution factor.” AT&T complied with that duty, because it calculated ESI’s USF charges by multiplying the “interstate telecommunications portion of [ESI’s] bill” – which, as discussed, was the portion of any bill group containing interstate telecommunications charges⁵¹ -- by “the relevant contribution factor.” ESI seems to assume that rule 54.712(a) regulates the way in which credits are applied, and therefore required AT&T to apply the Attainment Credit to ESI’s interstate charges. But ESI cites no language in rule 54.712(a) or the order promulgating it that purports to do so, and we are aware of none. ESI also fails to meet its burden of proving that AT&T violated Section 201(b).⁵² We do not believe it was unjust or unreasonable within the meaning of Section 201(b) for AT&T to agree with ESI, a large business customer, that the Attainment Credit would apply only to one bill group (of ESI’s choosing), and would reduce ESI’s interstate telecommunications charges prior to calculation of the USF charge only if ESI assigned the credit to a bill group containing interstate charges.⁵³

19. Finally, ESI argues that, because the Attainment Credit reduced the sum total of the amounts due for all the bill groups, it effectively reduced ESI’s interstate charges, and, therefore, ESI’s USF charges also should have been reduced. ESI states that AT&T “should have ‘adjust[ed] down the USF pass-through charge to reflect the shrinkage in the base amount [*i.e.*, the interstate charges] caused by the [Attainment] credits.’”⁵⁴ We find no merit in this argument. ESI cites no language from Commission rules or orders imposing such an obligation on AT&T. Moreover, ESI’s argument is inconsistent with the terms of the Agreement. As discussed, under the Agreement, the USF pass-through charge was calculated at the bill group level, and the Attainment Credit could apply only to one bill group. Therefore, even if the Attainment Credit indirectly reduced ESI’s interstate charges by reducing ESI’s total charge, the credit could reduce ESI’s interstate charges *for the purpose of calculating the USF charge* only if the credit were applied to a bill group containing interstate charges.

20. In sum, ESI, a large, sophisticated business enterprise, asked AT&T to place the Attainment Credit in a stand-alone bill group containing no interstate charges. AT&T’s calculation of ESI’s USF

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‘interstate telecommunications portion,’ as Section 54.712(a) refers to it, of ESI’s bill as part of calculating a USF pass-through charge. Applying the [Attainment Credit] to reduce ESI’s charges is what...the FCC rule provides...”).

⁵¹ See paras. 15-16, *supra*.

⁵² We assume without deciding that AT&T could violate Section 201(b) even though it did not violate rule 54.712(a).

⁵³ ESI states that AT&T’s bills were “complex”. Complaint at 6, para. 18. But ESI is a large, sophisticated company, and requested that the Attainment Credit be placed in a bill group containing no usage charges. Moreover, the Summary of Accounts, which was only a few pages long, made clear that A&T was applying the Attainment Credit to reduce the sum total of all the bill groups: The Summary of Accounts listed the total amount due for each bill group, and then showed the grand total of all the bill groups, treating the Attainment Credit as a negative number. It stands to reason that, if AT&T was applying the Attainment Credit to reduce the total of all the bill groups, it was not *also* applying the Attainment Credit to reduce ESI’s interstate charges before calculating the USF charge, because AT&T would not have applied the same credit twice.

⁵⁴ Complaint, Gardner Dec’n, at 5, para. 12. See *id.* at 9, para. 20; Reply at 8 n.19 (“[The Attainment Credit] does in fact offset the charges from the...bill groups because AT&T applies it to reduce the total amount due on the Summary of Accounts page.”). Similarly, ESI argues, without citing language in the Agreement, that AT&T should have “subtracted from the final amount due...the dollar value of the [Attainment] credits times the relevant USF [C]ontribution [F]actor.” Complaint, Gardner Dec’n at 5, para. 11.

charges in accordance with that request did not violate rule 54.712(a) or Section 201(b).⁵⁵

IV. ORDERING CLAUSE

21. Accordingly, **IT IS ORDERED**, pursuant to sections 4(i), 4(j), and 201 of the Act, 47 U.S.C. §§ 154(i), 154(j), and 201, and Commission rules 0.111, 0.311, 1.711-1.736 and 54.712, 47 C.F.R. §§ 0.111, 0.311, 1.711-1.736, and 54.712, that the Complaint is **DENIED** and this proceeding is **TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief, Enforcement Bureau

⁵⁵ AT&T asserts as an affirmative defense that the Agreement requires the parties to arbitrate their dispute. Answer at 9, para. 28. But the Agreement's arbitration provisions are permissive rather than mandatory. *See* Jt. Statement at 12, para. 17 (citing the 2011 MSA at §17.7(a) ("the aggrieved Party *may* refer the Dispute to binding arbitration...")) (emphasis added). In addition, the Agreement provides that arbitration "shall not apply to Disputes relating to: ...the lawfulness of rates, terms, conditions or practices concerning Services that are subject to the [Act], or the rules and regulations of the Federal Communications Commission...". Reply at 11, para. 20 (citing 2011 MSA at §17.7(c)); Jt. Statement at 13, para. 28 (same). ESI's Complaint falls within this carve-out because it "relate[s] to" AT&T's "practices concerning" its provision of interstate services (*i.e.*, calculation of the USF pass-through), and "relate[s] to" the rules and regulations of this Commission (*i.e.*, rule 54.712(a)).