PUBLIC VERSION

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

In the Matter of ESI Complainant, v. AT&T CORP. Respondent.	Proceeding No. 16-407 Bureau ID No. EB-16-MD-005

JOINT STATEMENT OF THE PARTIES

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March 2, 2017

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Pursuant to Section 1.733(b)(1)(i-v) of the Commission's Rules, 47 C.F.R. § 1.733(b)(1)(i-v), and the Commission's December 22, 2016 and February 22, 2017 orders, Express Scripts, Inc. ("ESI") and AT&T Services, Inc., on behalf of its affiliate AT&T Corp. (collectively "AT&T") submit the following joint statement of stipulated facts, disputed facts, and key legal issues, as well as proposals agreed to and remaining disputes regarding settlement prospects, discovery, issues in dispute, and schedules for pleadings.

Stipulated Facts

ESI and AT&T agree that if a document is quoted, it simply represents the parties' agreement that the quote is accurate. Neither party admits that the stipulated facts in this Joint Statement are necessarily relevant or material to the issues that must be decided by the Commission. Subject to this understanding, ESI and AT&T agree to the following stipulated facts:

1. ESI is a Delaware corporation with its principal place of business at One Express Way, Saint Louis, Missouri, 63121. ESI can be reached by telephone at (314) 684-5666 or via the undersigned counsel at (202) 857-2550.
2. AT&T is a Delaware corporation with its principal place of business at 208 S. Akard Street, Dallas, Texas 75202-4206. Its telephone number is (210) 821-4105. AT&T is a common carrier engaged in interstate and foreign communications subject to Title II of the Communications Act of 1934, as amended ("Communications Act"), 47 U.S.C. § 201, *et seq.*
3. This complaint concerns the Commission's Universal Service Fund ("USF") contribution requirements. ESI seeks relief under § 54.712(a), which is the rule adopted by the Commission[1] that limits the amount of USF pass-through/line item charges.[2]

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[1] *See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 1998 Biennial Regulatory Review-Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, CC Docket No. 98-171, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, CC Docket No. 92-237, NSD File No. L-00-72, Number Resource Optimization, CC Docket No. 99-200, Telephone Number Portability, CC Docket No. 95-116, Truth-In-Billing and Billing Format, CC Docket No. 98-170*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, ¶¶ 45-54 (2002) ("*USF Contribution Methodology Order*").

[2] ESI used the term "USF pass-through charge" in its Complaint and Reply. AT&T used the term "USF line-item charge" in its Answer. The parties have agreed to use the term "USF pass-through/line item charge" in this Joint Statement of Stipulated Facts.

4. No suit has been filed with any court by ESI alleging the same causes of action raised herein with respect to AT&T's behavior.

5. The parties engaged in informal settlement discussions regarding the practice at issue at the end of 2015. Those discussions did not resolve the dispute. **[***Begin Confidential***]** [redacted] **[***End Confidential***]**

6. ESI is and has been a purchaser of telecommunications services from AT&T pursuant to a Master Services Agreement ("MSA") executed by ESI and AT&T first in 2007 and then amended and restated in 2011. The MSA contains Pricing Schedules that establish the rates ESI must pay for AT&T's **[***Begin Confidential***]** [redacted] **[***End Confidential***]**

7. The pricing for ESI's **[***Begin Confidential***]** [redacted] **[***End Confidential***]** service includes, inter alia, (1) separate schedules of

charges for various **[***Begin Confidential***]** [redacted] **[***End Confidential***]** service elements and (2) credits that apply on an annual or other periodic basis. The dollar amount of a credit varies according to ESI's total spend on **[***Begin Confidential***]** [redacted] **[***End Confidential***]** services.

8. The **[***Begin Confidential***]** [redacted] **[***End Confidential***]** Service Guide ("Service Guide") provides that customers "may designate up to 250 bill groups" and "[a]ll charges for the billing components associated with a bill group will be identified with that bill group for billing and reporting purposes."[3] ESI established **[***Begin Confidential***]** [redacted] **[***End Confidential***]** sub-accounts/bill groups[4] within ESI's Master Account that generally correspond to the physical locations where ESI uses AT&T's services. Each of ESI's sub-accounts/bill groups has its own individual address and account number.

9. The Service Guide also states that: **[***Begin Confidential***]**

[redacted]

[redacted]

[redacted]

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[3] Service Guide SD 11.5.1, at 195-96.

[4] ESI uses the term "sub-account" while AT&T uses the term "bill group." This Joint Statement will use the term "sub-account/bill group."

[redacted] **[***End Confidential***]**[5]

10. Additionally, the Service Guide provides that ESI may obtain the following billing details on all bill groups:

- Breakdown of all circuits on an account with the associated monthly charge, one-time and partial charges/credits, usage charges, and/or taxes/fees.
- Itemization of circuit activity that occurred since the last bill was generated.
- Summary of usage charges and usage discounts.
- Listing of all circuits in the customer's inventory and associated monthly charge.
- Detailed information on taxes and fees applied to the invoice.
- Itemization of credits incurred as a result of service orders.
- Circuit level city, state, and monthly charge listing.[6]

11. Every month, ESI receives a document from AT&T, the first page of which is labeled "Monthly Invoice, **[***Begin Confidential***]** [redacted] **[***End Confidential***]**. In accordance with the Service Guide, ESI requested that AT&T send one document with the Monthly Invoice for ESI's **[***Begin Confidential***]** [redacted] **[***End Confidential***]** service to a single employee at a single address at

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5 Service Guide SD-11.5.1, at 195-96

6 Service Guide at SD 11.5.1.1. at 196-97.

ESI. ESI did not request that AT&T also send an individual document for each of ESI's sub-accounts/bill groups to the address associated with that sub-account/bill group.

12. Each Monthly Invoice has a unique "Invoice Number" and "Invoice Date."

13. For ease of illustration, certain pages from the document for December 2015 are attached hereto.[7] Page 1 (attached) is labeled "Monthly Invoice" in the upper left-hand corner. That page is followed by a multi-page section labeled "Customer Messages" (pages 2-3 of the December 2015 document, attached), a multi-page section labeled "Summary of Accounts" (pages 4-6 of the December 2015 document, attached), and then separate multi-page sections for each of ESI's sub-accounts/bill groups (pages 7-19,133 of the December 2015 document, provided to FCC staff under separate cover in electronic format). Every page in every one of these sections is marked with the number associated with ESI's Master Account. Every sub-account/bill group has a unique Account Number and a Billing Number that consists of (i) an eight-character combination of letters and digits that is the same for every sub-account/bill group and (ii) a three letter code that is unique to each sub-account/bill group. The first page of the document associated with each sub-account/bill group also contains an individual address.

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7 Due to its voluminous nature, the parties are providing an electronic version of the complete December 2015 document to the staff under separate cover.

14. The Monthly Invoice (page 1 of the December 2015 document) has a section labeled "Remittance Amount." That section consists of a dollar amount that is labeled "Total Payable Upon Receipt." That amount is the total of all charges, taxes, and fees appearing in the December 2015 document's multi-page section labeled "Summary of Accounts" (pages 4-6 of the December 2015 document, attached) and appears at the end of the column entitled "Total New Charges Taxes and Fees" as the Grand Total for "Total New Charges Taxes and Fees" (page 6 of the December 2015 document). The "Summary of Accounts" lists in separate columns the (i) Monthly Charges, (ii) One-Time and Partial Charges/Credits, (iii) Usage Service Charges, (iv) Taxes and Fees ((i) through (iv) are hereafter referred to as "charges, credits, taxes, and fees") with a row for each sub-account/bill group. The "Summary of Accounts" totals each column into "Grand Totals." The charges, credits, taxes, and fees for each individual sub-account/bill group are also displayed on the pages for the sub-account/bill group (pages 7-19,133 of the December 2015 document).

15. The "Summary of Accounts" does not contain a line item labeled "Universal Connectivity Charge" or separately list the individual USF pass-through/line-item charges that appear on the pages for each sub-account/bill group; rather, the USF pass-through/line-item charge for each sub-account/bill group is combined with the non-USF charges and credits for that sub-account/bill group (that are found on the individual pages for that sub-account/bill group in the column labeled "One-Time and Partial Charges/Credits") and the

combined total is listed in the column of the "Summary of Accounts" that is labeled "One-Time and Partial Charges/Credits." [8]

16. The bottom portion of the Monthly Invoice (page 1 of the December 2015 document) is labeled "Remittance Document." The "Remittance Document" specifies an "Amount Due" from ESI, which is the amount labeled "Total Payable Upon Receipt" in the section above it. The "Remittance Document" instructs ESI to "detach this portion and return with remittance." The Monthly Invoice does not include a line item labeled "Universal Connectivity Charge."

17. ESI makes a single payment to AT&T for all charges associated with its **[***Begin Confidential***]** [redacted] **[***End Confidential***]** service in the amount of the "Total Payable Upon Receipt" and "Amount Due" displayed on the Monthly Invoice.

18. In the "Summary of Accounts" (pages 4-6 of the December 2015 document), and the separate multi-page sections for each of ESI's sub-accounts/bill groups (pages 7-19,133 of the December 2015 document), charges or other data for each sub-account/bill group are calculated or displayed separately from those for any other sub-account/bill group. The **[***Begin Confidential***]** [redacted] **[***End Confidential***]** billing system generates a separate "report," "summary," "record," or "detail" for each sub-account/bill group, each with its own addressee. **[***Begin Confidential***]** [redacted]

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8 The USF pass-through/line-item charge is labeled "Universal Connectivity Charge" on the pages for each sub-account/bill group.

[*End Confidential***]** customers have the flexibility to have billing data for each sub-account/bill group sent separately to each addressee, to aggregate them together in a summary form, or both. ESI chose to have a single Monthly Invoice sent to and paid by its headquarters location rather than having invoices for each individual sub-account/bill group sent to each individual addressee for individual payment.

19. The Pricing Schedule specifies that ESI's attainment credit[9] is "to be applied to a single bill group for **[***Begin Confidential***]** [redacted] **[***End Confidential***]** Services." Beginning in **[***Begin Confidential***]** [redacted] **[***End Confidential***]** ESI chose to have AT&T create and apply the attainment credit to a stand-alone sub-account/bill group for **[***Begin Confidential***]** [redacted] **[***End Confidential***]** Services that has no usage charges associated with it. The sub-account/bill group to which those attainment credits are posted is labeled Account Number 8080-29197-30 (Billing Number "H6 398650 CRD"). The pages for this sub-account/bill group are pages 2925 through 2929 of the December 2015 document (attached). Since 2008, AT&T has consistently placed ESI's attainment credits in that same sub-account/bill group, and no one from ESI has directed AT&T to assign ESI's attainment credits to a different bill group.

20. The MSA allows AT&T to impose USF pass-through/line-item charges on ESI in order for AT&T to recover its contributions to the USF. Section 5.1(b) of

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9 The Complaint and Reply refer to "contract credits" which AT&T refers to as "attainment credits" in its Answer.

the MSA provides that 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 third parties or to governmental entities in connection with Services, without any addition or mark-up, provided [AT&T] may pass-through to ESI reasonable administrative costs directly related to such Regulatory Charges to the extent [AT&T] collects such administrative costs from all of its other customers using the same service for associated administrative costs (each a 'Regulatory Charge'). As of the Effective Date, examples of such charges include the primary interexchange carrier charge, federal universal service charges and compensation to payphone providers."

21. Section 5.1(c) of the MSA states that "[t]he Regulatory Charge and Taxes are in addition to the Rates and Charges set forth in a Pricing Schedule, or if not in a Pricing Schedule, in the applicable Service Guide or Tariff."

22. Section 1.1 of the MSA specifically includes credits as part of Rates and Charges:

> "Rates and Charges" means the rates and charges (including discounts and credits) for the Services, as modified from time to time as permitted under or required by the Agreement. Rates and Charges for all Services referred to or described in the Pricing Schedules shall be set forth in the Pricing Schedules. For Services or Service Elements that ESI chooses to use which are not specifically set forth in a Pricing Schedule, the Rates and Charges for such Services shall be those set forth in the applicable Tariff or Service Guide.

23. AT&T uses an automated billing system for **[***Begin Confidential***]** [redacted] **[***End Confidential***]** customers. The **[***Begin Confidential***]** [redacted] **[***End Confidential***]** billing system generates a USF pass-through/line-item charge for each sub-account/bill group based on the interstate telecommunications charges for that sub-account/bill group. If a discount or credit is included in the interstate telecommunications charges for a particular sub-account/bill group, the interstate telecommunications charges in that sub-account/bill group are first reduced by that discount or credit before the automated system calculates the USF pass-through/line-item charge on that sub-account/bill group after the application of that discount or credit.[10]

24. To understand how this works in practice, the sub-account/bill group with Billing Number H6 398650 BLM (Account Number 8080-28255-31) [pages 2683-2781], attached provides an example. On pages 2684 and 2685, certain credits are listed – in this case, these are credits earned pursuant to the **[***Begin Confidential***]** [redacted] **[***End Confidential***]** Usage Volume Pricing Plan," as distinct from the attainment credits at issue in this dispute. The notation next to each credit indicates that the usage charges "include the following discounts." In order to calculate the USF pass-through/line-item charge for this sub-account/bill group, AT&T's automated billing system adds the following charges together: the interstate portion of

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[10] ESI has no knowledge that would allow it to confirm the facts described in this paragraph and the subsequent paragraph regarding AT&T's methodology for taking into account credits that are not the "contract" or "attainment" credits at issue in this complaint.

the usage charges (which have already been reduced by the credits) [pages 2759-61], the total monthly charges [page 2704], the Administrative Expense Fee [page 2705], and the Carrier Line Charge/MULTI [page 2705]. For the 4th Quarter of 2015, the USF contribution factor was 16.7%. Applying that percentage yields the USF pass-through/line-item charge. AT&T calls this charge the Universal Connectivity Charge [page 2706].

25. If a particular sub-account/bill group has no interstate telecommunications charges associated with it – either because no such charges were incurred or because such charges were reduced to zero by application of the credit – there would be no USF pass-through/line-item charge reflected on that sub-account/bill group. The automated system does not calculate a negative USF pass-through/line-item charge (i.e., a reduction in USF pass-through/line-item charges) when the only amount in a sub-account/bill group is a credit, i.e., a negative number.

26. Section 5.6(d) of the MSA provides that "ESI may dispute the accuracy or legitimacy of any Vendor fee, charge, expense or other amount" and that "[AT&T] and ESI shall resolve any such dispute pursuant to the dispute resolution process set forth in Section 17.7 (Dispute Resolution) of the Agreement."

27. Section 17.7(a) of the MSA states that the "following procedures shall be adhered to in any disagreement, dispute, controversy or claim arising out of or relating to the Agreement that the Parties cannot resolve informally (a 'Dispute')." Those procedures require the "claimant" to notify AT&T of the

dispute and briefly "set[] forth the nature of the Dispute and the amount involved, if any." The parties then must designate a "representative with decision-making authority to resolve the Dispute." Section 17.7(a) provides further that if an "amicable resolution cannot be met, the aggrieved Party may refer the Dispute to binding arbitration as set forth below," and provides detailed rules for that arbitration including for: (1) service, timing, and location of the arbitration; (2) the appointment and required qualifications of the arbitrator; and (3) the parties' division of fees and expenses, among other matters. Section 17.7(a) specifies that the parties will appoint a commercial arbitrator who is "well-versed in . . . telecommunications law."

28. Section 17.7(c) of the MSA specifies that the arbitration procedures set forth in Section 17.7(a) and summarized in the paragraph above "shall not apply" to disputes relating to "the lawfulness of rates, terms, conditions or practices concerning Services that are subject to the Communications Act of 1934 as amended, or the rules and regulations of the Federal Communications Commission or other Regulatory Authority." With respect to disputes described in this subsection 17.7(c), "the claimant reserves the right to seek relief from an administrative agency or court of competent jurisdiction, as appropriate."

29. Section 17.16 of the MSA provides that "[t]he validity of the Agreement, the construction and enforcement of its terms, and the interpretation of the rights and duties of the Parties shall be governed by the substantive law of the State of Missouri, excluding its choice of law rules, except to the extent that the

Communications Act of 1934 or other U.S. federal law may control any aspect of the Agreement, in which case the Communications Act or U.S. federal law shall govern such aspect. The United Nations Convention on Contracts for International Sale of Goods shall not apply. The Parties agree to commence any action or proceeding against one another within two (2) years after the cause of action arises, and that any action or proceeding hereunder shall be brought in St. Louis, Missouri and the Parties waive any and all objections to that venue."

30. The USF is funded by contributions from all providers of interstate and international telecommunications. Under the Commission's rules, those providers must pay a percentage of their "projected collected interstate and international end-user telecommunications revenues, net of projected contributions."[11] The percentage is called the contribution factor. The Commission sets the amount of the contribution factor four times a year (on a quarterly basis), increasing or decreasing it depending upon the amount of money required by the USF's various programs.[12]

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11 47 C.F.R. § 54.706(b).

12 *See* "Contribution Methodology & Administrative Filings" at https://www.fcc.gov/general/contribution-methodology-administrative-filings. The contribution factors established by the Commission in the years since the current system began can be found at https://www.fcc.gov/general/contribution-factor-quarterly-filings-universal-service-fund-usf-management-support.

31. Shortly after the Commission created the current USF contribution methodology,[13] carriers created USF pass-through/line-item charges to recover their USF contribution costs from their end users. Many carriers initially imposed USF pass-through/line-item charges on their customers that significantly exceeded[14] the carrier's actual contribution amount, including AT&T.[15]

32. The Commission revisited the contribution issue in its 2002 *USF Contribution Methodology Order*, where it took "steps to address consumer concerns regarding disparate contributor recovery practices."[16] The Commission believed that it was "necessary to provide greater clarity about the practices we deem reasonable to protect consumers."[17] In particular, while "carriers in the past may have marked up their universal service line items above the relevant assessment amount to account for uncollectibles and other factors,"[18] the Commission was concerned that "the flexibility provided under [the Commission's] current rules may have enabled some companies to

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13 *See Federal State Joint Board on Universal Service,* CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (subsequent history omitted).

14 *USF Contribution Methodology Order*, note 1, *supra*, ¶ 46 ("[U]niversal service line items currently vary widely among carriers, and often significantly exceed the amount of the contribution factor").

15 *Id.* and n. 124 (AT&T imposed pass-through charges of 11% and 9.6% when the actual FCC contribution factor was only 7.28%).

16 *Id.* ¶ 40.

17 *Id.* ¶ 49.

18 *Id.* ¶ 47 & n.127.

include other completely unrelated costs in their federal universal service line items."[19]

33. The Commission found the practice of marking up federal universal service line-item charges above the relevant assessment amount to be unreasonable in the *USF Contribution Methodology Order* and prohibited it prospectively.[20] The Commission established a rule which prohibits carriers from collecting more in their USF pass-through/line-item charges than the product of the USF contribution factor and the interstate portion of the customer's bill.[21] It adopted a rule – 47 C.F.R. § 54.712(a) – that provides as follows:

> 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.

34. From 2008 through 2016, ESI qualified for **[***Begin Confidential***]** [redacted]**[***End Confidential***]** in contract or "attainment" credits that reduced the total amount payable by ESI upon receipt of its monthly invoice.

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19 *Id.* ¶ 48.

20 *Id.* ¶ 49.

21 *Id.* ¶¶ 45-54.

Disputed Facts

1. Whether ESI was reasonably on notice of a potential claim at the time the alleged injury occurred.
2. Whether ESI, upon the exercise of reasonable care in reviewing the invoices at the time it received them, could have discovered that the attainment credits reflected in Account Number 8080-29197-30 (corresponding to Billing Number "H6 398650 CRD") were not factored into the calculation of the USF pass-through/line item charges contained in other sub-accounts/bill groups or as reflected in the numbers contained in the "One-Time and Partial Charges/Credits" column listed on the "Summary of Accounts" pages.
3. Whether the legality of AT&T's method of calculating the USF pass-through/line-item charge was readily discoverable by ESI upon the exercise of reasonable care in reviewing the invoices at the time they were received.[22]
4. Whether the "Monthly Invoice" and all supporting documentation that AT&T provides ESI each month collectively constitutes the "customer's bill" within the meaning of 47 C.F.R. § 54.712(a).
5. Whether the pages AT&T generates for each sub-account/bill group constitute a "customer's bill" within the meaning of 47 C.F.R. § 54.712(a).

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[22] AT&T does not agree with the formulation of this "disputed" fact. AT&T's position is that whether or not the "legality" of AT&T's practices was readily discoverable by ESI upon the exercise of reasonable care is irrelevant for purposes of determining when ESI's cause of action accrued. What matters is whether ESI was somehow prevented from discovering how much it was charged, not whether it had the legal expertise to know whether the charge constituted a violation of a Commission regulation.

6. Whether the Monthly Invoice and Summary of Accounts taken together is a "customer's bill" within the meaning of 47 C.F.R. § 54.712(a).[23]

Key Legal Issues

The parties agree that the complaint raises the following key legal issues:

1. Whether AT&T collects a USF pass-through/line-item charge from ESI that exceeds the amount permitted under 47 C.F.R. § 54.712(a).
2. Whether, by agreeing that the attainment credits were "to be applied to a single bill group for . . . **[***Begin Confidential***]** [redacted] **[***End Confidential***]** (as incorporated in the MSA) and directing AT&T to place those credits in a sub-account/bill group with no other charges, ESI consented to the method by which AT&T applied those credits in calculating ESI's USF pass-through/line item charges.
3. Whether provisions in the MSA, if any, that authorize the method by which AT&T applies the attainment credits in calculating the USF pass-through/line-item charge can be enforced if they result in a USF pass-through/line-item charge that exceeds the amount permitted by 47 C.F.R. § 54.712(a).
4. Whether the arbitration provision in Section 17.7(a) of the MSA applies to this dispute and prevents ESI from pursuing its claims in a complaint proceeding before this Commission.

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[23] ESI does not agree that AT&T previously alleged that these two items constitute a customer's bill or raised any defenses or arguments based on it in the parties' pleadings. It is ESI's understanding that AT&T relies on language in its Legal Analysis to support the inclusion of this factual allegation in this section of the Joint Statement.

5. Whether the "carve out" provision in Section 17.7(c) of the MSA applies to this dispute and authorizes ESI to pursue its claims in a complaint proceeding before this Commission.
6. Whether ESI is required, under the terms of the MSA, to commence any action or proceeding against AT&T in St. Louis, Missouri.
7. Whether ESI's cause of action against AT&T first accrued on February 18, 2015, when ESI learned from its consultant that the Commission's rules limit the amount that any carrier may recover through its USF pass-through/line-item charges, or whether ESI has reasonably been on notice since 2008 regarding how AT&T calculates the USF pass-through/line-item charges on ESI's bills.

Agreements and Disputes Regarding Settlement Prospects

The parties do not believe that settlement discussions are likely to be fruitful at this point.

Agreements and Disputes Regarding Discovery

The parties are not seeking any further discovery in this case.

Agreements and Disputes Regarding Pleadings Schedule

The parties have not reached any agreements regarding the scheduling of further pleadings in this case.

PUBLIC VERSION

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March 2, 2017

ATTACHMENT

[Redacted in its entirety]