EXHIBIT 5

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

In the Matter of	)	
Native American Telecom, LLC	)	**Transmittal No. 3**
Tariff F.C.C. No. 2	)	

JOINT PETITION OF AT&T, QWEST, SPRINT, T-MOBILE, AND VERIZON TO REJECT, OR, IN THE ALTERNATIVE, TO SUSPEND AND INVESTIGATE NAT'S TARIFF F.C.C. NO. 2

For AT&T Corp.:
David L. Lawson
Christopher T. Shenk
Sidley Austin LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8088

M. Robert Sutherland
Gary L. Phillips
Paul K. Mancini
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2057

For Verizon:
Michael E. Glover, Of Counsel
Karen Zacharia
Christopher M. Miller
1320 North Courthouse Road, 9th Floor
Arlington, VA 22201-2909
(703) 351 3071

For Sprint Communications Company L.P.:
Michael B. Fingerhut
900 7th Street, N.W., Suite 700
Washington, D.C. 20001
(703) 592-5112

For T-Mobile USA Inc.:
Luisa L. Lancetti
David R. Conn
401 Ninth Street, N.W., Suite 550
Washington, D.C., 20005
(202) 654-5900

For Qwest Communications Company, LLC:
Craig J. Brown
Robert B. McKenna
Meshach Rhoades
607 14th Street, N.W., Suite 950
Washington, D.C. 20005
(303) 383-6650

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TABLE OF CONTENTS

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Pursuant to Sections 201, 203 and 204 of the Communications Act, 47 U.S.C. §§ 201, 203, 204, and Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, Joint Petitioners[1] respectfully request that the Bureau reject, or in the alternative suspend, Transmittal No. 3, Tariff F.C.C. No. 2 ("Tariff No. 2") filed by Native American Telecom LLC ("NAT").[2] The Bureau also has authority to prescribe just and reasonable tariff terms pursuant to 47 U.S.C. § 205.

INTRODUCTION AND SUMMARY

NAT's Tariff No. 2 is the latest in a flood of patently unlawful tariff filings transparently designed to evade Commission precedent and rules in order to promote traffic stimulation schemes that the Commission has recognized as mere "arbitrage" that "ultimately cost[s] consumers money."[3] In 2007, when the Commission was faced with a large number of

[1] The Joint Petitioners are: AT&T Corp. ("AT&T"), Qwest Communications Company, LLC. ("Qwest"), Sprint Communications Company L.P. ("Sprint"), T-Mobile USA Inc. ("T-Mobile"), and Verizon.

[2] Native American Telecomm LLC, Transmittal No. 3, Tariff FCC No. 2 (issued Nov. 15, 2010, on fifteen (15) day's notice) ("Tariff No. 2").

[3] Connecting America: The National Broadband Plan, Federal Communications Commission, at 142 ("National Broadband Plan"). In traffic stimulation schemes, a "rural" local exchange

incumbent local exchange carrier ("ILEC") tariff filings designed to facilitate these schemes, it took decisive action that prevented those tariffs from taking effect and that has largely deterred ILECs from filing similar tariffs.[4] But as quickly as the unscrupulous ILECs abandoned this field, they were replaced by unscrupulous new "competitive" local exchange carriers ("CLECs"), many of which compete with no one and were created *solely* for the purpose of bilking interexchange and interconnected wireless carriers through traffic stimulation schemes.

Emboldened by Commission inaction, these CLECs recently came up with a new scheme: rather than continuing to attempt to fit the square peg of traffic stimulation schemes into the round hole of traditional switched access tariffs, the CLECs would file new "switched access" tariffs that purport to define away that problem. Under these new tariffs, "switched access service" could include activities that involve neither switching nor access to any true local exchange network, the LEC would "terminate" traffic that is merely routed through its network, and the "end users" to whom the LEC purports to terminate calls need not purchase anything from the LEC. These tariffs are, of course, patently unlawful, and when Joint Petitioners discovered them before they became effective, we urged the Commission to reject or suspend them. But the Commission has allowed most of these tariffs to become effective, and it has not yet issued any suspension or rejection order that specifically addresses the CLECs' unlawful attempts to redefine access services.

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carrier with high switched access rates premised on low traffic volumes provides telephone numbers to a calling service provider ("CSP"). The CSP uses those numbers to offer free and low cost calling services (*e.g.*, chat, conference, international calling) that often generate millions calls to those numbers. The LEC bills interexchange carriers ("IXCs") and interconnecting wireless carriers switched access charges for these calls and shares the access revenues with the CSPs under various kick-back arrangements. *See Qwest Commn'cs Corp.* v. *Superior Tel. Coop.*, 2009 WL 3052208 (Iowa Utils. Bd. Sept. 21, 2009); *Qwest Commc'ns Corp.* v. *Farmers & Merchants Mut. Tel. Co.*, 23 FCC Rcd. 1615, ¶¶ 10-25 (2009) ("*Farmers*").

[4] *See* Order, *Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184; WCB/Pricing No. 07-10 (Nov. 30, 2007).

Not surprisingly, what was a trickle is now a flood with new tariffs now surfacing weekly. The CLECs no longer even bother to disguise their efforts to legitimize their assessment of access charges on non-access traffic. When customers point out the obvious legal defects in these tariffs, the CLECs no longer bother even to defend them, and instead simply boast that many other tariffs with the same or similar provisions have sailed through the Commission. And why not? Unless and until the Commission actually issues a detailed written order rejecting or suspending one or more of these tariffs that states with specificity that these tariff provisions raise substantial questions of lawfulness, CLECs will continue to follow their "anything goes" approach.

NAT is a putative CLEC in South Dakota that was set up for the express purpose of engaging in traffic stimulation schemes. As its founder has admitted, NAT was established for the purpose of participating in what the Commission has referred to as "traffic stimulation" arrangements with "FreeConferenceCall" and similar entities.[5] As its name suggests, FreeConferenceCall generally does not charge for its services. Instead, it enters into arrangements under which it sells traffic generated by its widely advertised calling services to a LEC for a share of the access charges that the LEC is able to collect from IXCs and interconnecting wireless carriers for purported access services associated with that traffic.[6]

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[5] Ted Gotsch, *Firms Pitching FCC In Favor of Current Access Charge Regime*, TR Daily (Mar. 8, 2010) (*quoting* NAT founder Gene DeJordy) (NAT's "business model is largely dependent on the use of FreeConferenceCall and other services that use its networks to terminate calls").

[6] *See, e.g.,* Letter from David C. Erickson (President and CEO of FreeConferenceCall) to Nicholas Alexander (FCC, Associate Bureau Chief, Wireline Competition Bureau) (Apr. 15, 2010); Notice of Proposed Rulemaking, *In re Establishing Just and Reasonable Rates for Local Exch. Carriers*, 22 FCC Rcd. 17989, ¶ 12 (2007).

NAT initially applied for a certificate to operate as a CLEC in South Dakota, but withdrew the request when discovery was sought into its business plans.[7] NAT instead made arrangements with the Crow Creek Sioux Tribe that purport to allow it to operate on that tribe's Reservation even in the absence of state authority.[8]

NAT began operations in the fall of 2009. In the intervening months, NAT's access billings have soared. The traffic is all one direction – to NAT numbers. Analysis and test calls conducted by AT&T show that 99% of the minutes billed to AT&T are generated by only five telephone numbers – all assigned to FreeConferenceCall.

Based upon NAT's bills, its entries in the Local Exchange Routing Guide ("LERG") and its public statements, it does not appear that NAT provides wireline local exchange services to *any* actual residences or businesses located on the Crow Creek Reservation or that NAT owns or operates any wireline local exchange networks there (or anywhere else).[9] NAT's LERG entries indicate that its single "Point of Interconnection" (or "POI") is served by a switch located in California that is operated by its CLEC owner WideVoice. And WideVoice, which is majority-

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[7] *See* Application for Certificate of Authority, *Application of Native American Telecom, LLC for Certificate of Authority To Provide Local Exchange Service On The Crow Creek Indian Reservation*, Docket TC 08-110, Exhibits A & B (S.D.P.U.C. Sep. 8, 2008); Intervenors' Motion to Compel, Docket No. TC08-110 (Jan. 16, 2009); Order Granting Motion To Dismiss And Closing Docket, Docket No. TC08-110 (Feb. 5, 2009).

[8] Order Granting Approval to Provide Telecommunications Service, *Native American Telecom, LLC Request to Provide Telecommunications Service Within the Exterior Boundaries of the Crow Creek Reservation* (Crow Creek Utility Authority, Oct. 28, 2008). According to NAT, its owners are Native American Telecom Enterprise, LLC, "a telecommunications development company," WideVoice Communications, Inc., a "CLEC," and the Crow Creek Sioux Tribe. Respondent Native American Telecom LLC's Reply Brief in Support of Motion to Stay/Motion to Dismiss South Dakota Public Utilities Commission's Docket No. TC10-026, at 1 (S.D. PUC, filed October 26, 2010), available at http://puc.sd.gov/commission/dockets/telecom/2010/tc10-026/102610.pdf ("*NAT SD Reply*").

[9] In filings with the S.D. PUC, NAT claims that it provides "wireless IP (Internet Protocol) voice and data communications" "free-of-charge" to approximately 100 "residential and business locations on the reservation" using Wimax wireless technology. *NAT SD Reply* at 6, 14.

owned by the family trust of FreeConferenceCall principal David Erickson,[10] has admitted in sworn testimony that the disputed traffic "is transported to a WideVoice . . . switch in Los Angeles" which "then transmits the call to NAT's subscribers and subscriber equipment located on the Crow Creek reservation" at NAT's "radio hut."[11]

NAT recognized from the outset that its plan to bill tariffed switched access charges for traffic pumping calls merely routed through its exchange could not be reconciled with the established definitions and limits of originating and terminating switched access charges. In litigation before courts, state public utility commissions and the Commission, it was abundantly clear that traffic associated with schemes in which a LEC pays a calling service partner a portion of access revenues and traffic is merely routed through the LEC's facilities, en route not to any real end user subscribers of the LEC, but to bridging equipment that might be located anywhere, lack the essential elements of tariffed switched access services. The Commission has since confirmed that a LEC engaged in traffic stimulation schemes is not providing switched access functionality, because the LEC does not terminate the calls to actual end user subscribers or deliver them to actual end user premises.[12]

Rather than conform its conduct to the law, NAT continues to look for ways to skirt it. This is NAT's third attempt to write a tariff that it hopes will insulate its unlawful billing of switched access services for calls to its traffic stimulation partners. NAT filed two versions of its

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[10] *See* Application of WideVoice for a Certificate of Public Convenience and Necessity (S.D. PUC. August 10, 2009), available at http://puc.sd.gov/commission/dockets/telecom/2009/tc09-083/081109.pdf ("*WideVoice SD Application*").

[11] *NAT SD Reply*, Attached Affidavit of Keith Williams at ¶¶ 4-5. *See also WideVoice SD Application.*

[12] *Qwest Commc'ns Corp.* v. *Farmers and Merchants Mut. Tel. Co.*, Order on Reconsideration, 23 FCC Rcd. 1615, ¶¶ 10-25 (2009) ("*Farmers*").

Tariff No. 1 in late 2009. But AT&T recently filed an Informal Complaint against that tariff,[13] and just two days after that Informal Complaint was transmitted to NAT, NAT filed this revised tariff (Tariff No. 2) purporting to replace the tariff challenged by AT&T.

NAT's new tariff is, if anything, even more manifestly unlawful. NAT did not fix the unlawful provisions that existed in its prior tariff. It merely tried to disguise them by renaming them, moving them around, splitting them up, and connecting them with a patchwork of confusing cross references. While it was at it, NAT also added *additional* unlawful provisions that did not exist in its prior tariff.

1. NAT's tariff still violates 47 U.S.C. §§ 203 & 201(b) and the Commission's rules that require tariffs to specify in clear and unambiguous language the circumstances under which a customer will obtain service and the precise charges that will apply.[14] Now, even NAT's definition of "Access Services" is impenetrable. "Access Service" now "includes, but is not limited to" distinctly *non*-access functionality including "local exchange, long distance, and data communications services that may use TDM or Internet Protocol ('IP') or other technology" – in other words, apparently anything and everything on which NAT may decide it wants to assess access charges.

NAT has likewise expanded the definition of "Local Exchange" beyond all bounds – the tariff does not specify how the geographic area of its local exchange will be determined, but it does emphasize that NAT "is not bound" by "the definition of 'exchange' or 'local exchange' as

[13] *See* Informal Complaint of AT&T Corp., Letter from David L. Lawson to Marlene H. Dortch (Nov. 1, 2010).

[14] 47 C.F.R. § 61.2; *Bell Atlantic-Delaware* v. *Global NAPs*, 15 FCC Rcd. 20665, ¶ 23 (2000) ("[A] tariff must be clear and explicit on its face as to when it applies, in order to give fair notice to carriers or other customers about the terms under which they might be taking service and incurring charges."); *Amendment of Part 61 of the Commission's Rules*, 40 FCC 2d 149, ¶ 5 (1973) ("failure to comply with [the Part 61] rules has always been recognized as grounds for rejection").

defined by the [NECA tariff], by IXCs, or by the ILECs whose tariffed rates the Company matches" or apparently anything else. Here, too, NAT purports to grant itself complete discretion. The tariff provides "unless otherwise defined by the Company" (and how will an access customer know when or if that happens?), NAT's local exchanges will be the geographic areas where it "provides service to End Users," but that too is meaningless, because NAT has defined "End User" as a customer of *any* "Interstate or Foreign Telecommunications Service" that need not "purchase any service provided by the company" (and thus how will an access customer know who these "End Users" are and where they are located?).

Indeed, NAT's attempt to disguise the many unlawful terms it has retained from its prior unlawful tariff (and those that it added) has served no purpose other than to create complex tapestry of nested Russian doll-like service definitions and descriptions that are inconsistent and meaningless. For example, NAT's tariff creates a new type of End User called a "Volume End User." To determine the meaning of Volume End User, one must wade through at least five other nested and cross-referenced definitions, and the end result is a dead end: a Volume End User is an End User that purchases "Services" that, by definition, cannot be purchased by End Users, but only by IXCs (which cannot be End Users under the tariff). In addition, NAT defines Volume End User in terms of subjective criteria (such as whether the End User obtains service from NAT "in order to provide high-traffic services") and facts that cannot be known to anyone but NAT (such as whether the End User has installed equipment in NAT's central office). To make matters worse, NAT's failure to properly define End User makes it impossible for a purported customer to determine from the tariff the rates it will be billed (the tariff provides separate rates for calls to or from "regular" end users and those to or from "Volume End Users"). The tariff is replete with other omissions, ambiguities and inconsistencies that render it

impossible for a putative access customer to predict whether and how much it will be billed. As just one other example, NAT's tariff lists a rate for "Information Surcharge (if applicable)," but nowhere explains the circumstances under which it will be applicable.

2. NAT's tariff and billing practices also violate 47 U.S.C. § 201(b) and the Commission's implementing CLEC access charge rulings. It is settled law that tariffed rates have meaning only in relation to the services to which they are "attached."[15] Thus, the Commission has emphasized that although its rules authorize CLECs to tariff and assess rates that "mirror" the rates charged by the "competing" ILEC, a CLEC may do so only to the extent it actually provides "the functional equivalent of the ILEC [service]."[16] NAT's tariff purports to mirror the rates of Midstate Communications, Inc. ("Midstate"), which uses the National Exchange Carrier Association ("NECA") tariff. But NAT is applying Midstate's tariffed rates to functions for which Midstate does not – and cannot lawfully – apply those rates. For example, NAT assesses MidState's access rate elements on calls routed to FreeConferenceCall even though the Midstate/NECA tariff does not allow access charge billing to IXCs for calls routed to such conference service providers that do not subscribe to a Midstate service (the holding in *Farmers III*). In addition, NAT's tariff appears to permit NAT to assess switched access charges on calls destined to other states and foreign countries, and for calls destined to equipment collocated in NAT's offices, which is not permitted by the Midstate/NECA tariff. By "attaching" Midstate's rates for the end office switching and other switched access services to its own very different activities, NAT is violating the Commission's CLEC access charge rulings and committing an unreasonable practice.

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[15] *AT&T* v. *Central Office Tel. Co.*, 524 U.S. 214, 223 (1998).

[16] 47 C.F.R. § 61.26; *CLEC Access Charge Order,* 16 FCC Rcd. 9923 (2001).

3. NAT has also added ludicrously one-sided dispute resolution provisions, including one that purports to deprive customers of their statutory right to file overcharge actions under the two-year statute of limitations in Section 415 of the Act and another that purports to entitle NAT to attorneys' fees any time it elects to bring a collection action – even an unsuccessful one. Further, NAT's tariff provides NAT with unilateral and unfettered discretion to demand a deposit from any access customer for any (or no) reason, which, as explained below, the Commission has previously recognized is unlawful.

LEGAL STANDARDS APPLICABLE TO NAT'S TARIFF NO. 2

The Commission and the courts have long recognized that tariffs that, like NAT's Tariff No. 2, fail to make clear and explicit the applicability of the tariff rate and its terms, that facially conflict with provisions of the Act or the Commission's implementing rules or orders, and that have technical or procedural flaws are "patent nullities as a matter of substantive law" and should be "rejected" outright.[17]

Section 204 of the Communications Act, 47 U.S.C. § 204, also grants the Commission broad authority, on its own initiative or upon request, to suspend and investigate tariff filings that propose rates that are of questionable lawfulness. Suspension and investigation of tariffs is an essential element of the core mandate to ensure just and reasonable rates where highly suspect

[17] *Capital Network System* v. *FCC,* 28 F.3d 201, 204 (D.C. Cir. 1994) ("The Commission's authority to reject filings extends to those . . . with technical or procedural flaws"). *See also RCA American Communications, Inc.*, 89 FCC 2d 1070, n.12 (1982) ("Failure to comply with prior Commission orders, policies or prescriptions may warrant rejecting a tariff as a patent nullity as a matter of substantive law"); *AT&T Revisions to Tariff FCC Nos. 258 and 267*, 69 FCC 2d 1696, n.2 (1978) ("We may find a tariff revision null and void if, as here, it patently conflicts with the provisions of the Communications Act"); *All American Telephone Company, Inc. Tariff F.C.C. No. 3*, 25 FCC Rcd. 5661, ¶ 4 (2010) (rejecting "tariff revisions [that] violate the Commission's rules requiring tariffs to clearly establish a rate"); *ITT World Communications, Inc.*, 73 FCC 2d 709, n.4 (1979) ("Where the Commission can determine that the tariff is unlawful on its face, it may be rejected without further investigation").

tariffs that raise substantial questions of lawfulness are filed on a streamlined basis.[18] As such, the Bureau (*see* §§ 0.91, 0.291), acting on delegated authority, clearly has independent authority pursuant to 47 U.S.C. § 204 to suspend and investigate tariffs on its own motion where, as here, there are significant questions concerning the lawfulness of the tariffs.[19]

The Bureau also has authority to suspend and investigate tariffs under Rule 1.773(a)(1)(ii), 47 C.F.R. § 1.773(a)(1)(ii), if it determines (1) "there is a high probability that the tariff would be found unlawful after investigation"; (2) "the alleged harm to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing;" (3) "irreparable injury will result if the tariff is not suspended"; and (4) "the suspension would not otherwise be contrary to the public interest."

These elements are clearly satisfied here. First, as demonstrated below, NAT's tariff is facially unlawful in numerous respects. Second, the substantial harm caused by allowing NAT's tariff to go into effect – *e.g.*, overcharges to IXCs and interconnected wireless carriers, diversion of resources away from customer-oriented investment to dealing with NAT's misconduct, increased uncertainty and attendant decreased in investment in customer-oriented services – are substantial costs that are ultimately born by consumers, whereas there is little or no potential that a suspension will make any NAT service "unavailable." The only services at issue here are

[18] *See, e.g.*, Memorandum Opinion and Order, *July 1, 2004, Annual Access Charge Tariff Filings*, 19 FCC Rcd. 23877, ¶ 7 (2004) ("*NECA Investigation Order*") ("When tariffs . . . are filed pursuant to the 'deemed lawful' provisions of the statute . . . it is incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates").

[19] *See* Memorandum Opinion and Order, *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, FCC 84-70, 1983 FCC LEXIS 396, ¶ 8 n.6 (1983) (rejecting argument that a "request for suspension should be denied as premature and not in compliance with Section 1.773" and finding that the Commission "need not reach these arguments, since the Commission has the authority on its own motion to suspend and investigate tariffs, 47 U.S.C. § 204(a), and we [the Commission] have concluded that the circumstances of this case warrant such suspension").

provided to IXCs and interconnected wireless carriers (which are challenging the tariff), not any services that NAT may provide to one of its actual customers. Third, irreparable injury will result if the tariffs are not suspended because the tariff terms may be "deemed lawful," which may foreclose refunds for excessive and improper charges.[20] Fourth, suspension is clearly in the public interest because it will help to prevent millions of dollars in overcharges that, as the Commission has found, are ultimately borne by consumers.

NAT'S UNLAWFUL TARIFF PROVISIONS

NAT's Tariff No. 2 contains terms that are not "clear and explicit," that facially conflict with provisions of the Act or the Commission's implementing rules or orders, and that have numerous technical and procedural flaws, and the Commission should exercise its ample authority (described above) to reject tariffs with these types of defects.

I. NAT's TARIFF NO. 2 IS UNLAWFULLY VAGUE AND AMBIGUOUS.

Section 201(b) prohibits unjust and unreasonable rates, classifications and practices.[21] Section 203 states that a tariff must show a carrier's charges and "the classifications, practices, and regulations affecting these charges,"[22] and that carriers cannot deviate from the rates that are "specified" by the tariff.[23] The Commission's rules implementing these provisions thus require carriers to provide tariff terms that "remove all doubt as to their proper application."[24] NAT's tariff violates these requirements. The definitions and structure of Tariff No. 2 make it impossible for IXCs and interconnected wireless carriers (or anyone else) to determine from the

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[20] *NECA Investigation Order*, ¶ 7 ("Rates that are 'deemed lawful' are not subject to refund").

[21] 47 U.S.C. § 201(b).

[22] *Id.* § 203(a).

[23] *Id.* § 203(c).

[24] 47 C.F.R. 61.2. *See also id.* § 61.1 ("Failure to comply with any provision of these rules may be grounds for rejection . . ., a determination that it is unlawful, or other action").

tariff what services it provides, where such services are provided, or the rates applicable to such services.

Even the definition of "Access Service"[25] in Tariff No. 2 is unlawfully vague. Under Tariff No. 2, "Access Services" now "include" decidedly *non*-access services, such as "local exchange, long distance, and data services." Local exchange services are governed by states pursuant to state tariffs, not federal access tariffs; long-distance services were mandatorily detariffed years ago; and many "data services" are "information services" that cannot be tariffed. To add more confusion, Access Service "is not limited" to these "local exchange, long distance, and data services," but the tariff never states what other services might be included.[26] Similarly, Access Service "includes" the "functional equivalent of the ILEC access services," indicating that it might also include services that are *not* the functional equivalent of the ILEC access service, which, as demonstrated in Part II, below, would be patently unlawful.

NAT has likewise expanded the definition of "Local Exchange" in such a way that makes it literally impossible to know where NAT's Tariff No. 2 is applicable. The tariff defines "Local Exchange" as the "geographic area established by [NAT] for the administration and pricing of Telecommunications Service."[27] This definition is circular. It states that the prices in Tariff No. 2 are applicable where NAT applies the prices in Tariff No. 2. This definition also contains no bounds limiting what or where NAT may choose as a Local Exchange. The tariff expressly states that NAT "is *not* bound by the definition of 'exchange' or 'local exchange' as defined by [NECA], by IXCs, or by the ILECs whose tariffed rates the Company matches."[28] And, until

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[25] Tariff No. 2, Original Page 7.

[26] *Id.*

[27] *Id.*, Original Page 8.

[28] *Id.* (emphasis added).

NAT unilaterally chooses the bounds of its Local Exchange (and it is unclear how a putative customer will know when NAT does so), the tariff states that NAT's Local Exchange is where "NAT provides service to End Users."[29] But there is no way for a putative customer to know where all of NAT's End Users are located; only NAT can know that. Under the tariff, End Users need not even be customers of NAT. An "End User" can be anyone that "sends or receives a an interstate or foreign Telecommunications Service" that is, at some point along the way, merely "transmitted" over NAT's facilities.[30]

Similarly vague provisions pervade Tariff No. 2. NAT has created multiple new definitions, renamed old ones, and divided various definitions and service descriptions into piece-parts that are now spread throughout the tariff and that are attached by endless cross-references. The effect is a complex nested Russian doll-like set of definitions and descriptions that defy meaningful interpretation.

A perfect example is NAT's attempt to create a new type of "End User," called "Volume End User."[31] The tariff defines a Volume End User as "[a]n End User that obtains *Service* from NAT."[32] To understand what this means, it is necessary to look to the tariff's definition of "Service," which is a "service provided to a *Buyer* by [NAT] pursuant to this Tariff."[33] To understand what this means, it is necessary to look to the definition of "Buyer," which is an "Interexchange Carrier utilizing [NAT's] Access Service."[34] Thus, after walking through this

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[29] *Id.*

[30] *Id.*, Original Pages 7-8 (definitions of "End User" and "Customer of an Interstate of Foreign Telecommunications Service").

[31] *Id.*, Original Page 10.

[32] *Id.* (emphasis added).

[33] *Id.*, Original Page No. 9 (emphasis added).

[34] *Id.*, Original Page No. 7.

maze of definitions, it turns out that NAT has defined a Volume End User as an End User that purchases "Services" that only IXCs, not End Users, can purchase under the tariff.[35] NAT's definition of Volume End User describes an entity that *cannot exist* under the terms of the tariff.

In addition, according to Tariff No. 2, a Volume End User is an entity that obtains service from NAT "*in order to provide* high-traffic services,"[36] thus requiring one to know the subjective purpose of an entity generating high traffic volumes to know whether that entity is a Volume End User. If an entity obtains service from NAT "in order to" be a high-traffic provider, it is apparently a Volume End User, but if it just happens to have high volumes, it is not. A putative customer would also have to know the configuration of a high volume entity to know whether it is a Volume End Users. Only entities that "designate[] [NAT's] central office as its [End User Designated Premises ("EDP")], and accordingly, installs equipment in the [NAT's] central office"[37] can be Volume End Users. But there is no way to determine from reading the tariff (or typically by any other reasonable means) whether an entity has designated NAT's central office as its EDP or whether it has installed equipment there.

The fact that it is impossible to determine from the face of NAT's tariff whether a particularly entity is a Volume End User also makes it impossible to determine the tariffed rates that will be applied under the tariff. NAT's Tariff No. 2 contains different rates for "regular" End Users and Volume End Users.[38] Consequently, the inability of putative customers under Tariff No. 2 to determine from the face of tariff which entities are Volume End Users also makes it impossible for them to determine the applicable rates under the tariff.

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[35] *Id.*, Original Page 8 ("The term 'End User' means any Customer of an Interstate or Foreign Telecommunications Service *that is not a carrier*. . . .") (emphasis added).

[36] *Id.*, Original Page No. 10 (emphasis added).

[37] *Id.*

[38] *Id.* § 7.2.2.

Another example where NAT has made it impossible for putative customers to determine the applicable rates in Tariff No. 2 is NAT's "Information Surcharge."[39] The tariff contains a rate element called "Information Surcharge" that will be assessed "if applicable." But Tariff No. 2 nowhere explains what this surcharge is, or when it is "applicable."

II. NAT's TARIFF VIOLATES THE CLEC ACCESS CHARGE RULES.

Under the Commission's CLEC access charge rules, a CLEC violates § 201(b) and § 203,[40] if it imposes access charge rates that exceed the rates that the "competing" ILEC charges for its functionally equivalent services.[41] NAT's Tariff No. 2 violates this rule because it has mirrored the access rates of a competing ILEC, but has applied these rates to activities that are *not* functionally equivalent to the "access services" of that ILEC to which the rates are attached. In effect, it is applying this ILEC's rates for "apples" to NAT's "oranges."

The Commission adopted its CLEC access charge rules to prevent CLECs from tariffing excessive access charges. The Commission recognized that CLECs have monopoly power over the calls placed to their telephone numbers.[42] Under the CLEC access charge rules, the rate that an ILEC charges for its functionally equivalent service is the "benchmark" that establishes the rate that CLECs can lawfully tariff.[43] These rules allow a CLEC to charge the ILEC's access

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[39] *Id.* § 7.2.1(g) & § 7.2.2.

[40] 47 U.S.C. §§ 201(b), 203.

[41] 47 C.F.R. § 61.26; *CLEC Access Charge Order*, 16 FCC Rcd. 9923 (2001); *CLEC Access Charge Recon. Order*, 19 FCC Rcd. 9108 (2004). *See Global Crossing Telecomm., Inc.* v. *Metrophones Telecomm., Inc.*, 550 U.S. 45, 52-55 (2007) (to violate a regulation that lawfully implements the substantive requirements of Sections 201-205 of the Communications Act "is to violate the statute.")

[42] *CLEC Access Charge Order*, ¶¶ 28-31.

[43] 47 C.F.R. § 61.26.

rates only when CLEC's services are "the functional equivalent of the ILEC interstate exchange access services."[44]

Conversely, the rules prohibit CLECs from charging the competing ILEC's rate if the CLEC is not actually providing a functionally equivalent service.[45] As the Supreme Court has held, rates have meaning only in relation to the services to which they are "attached."[46] Thus, the rules provide that a CLEC may tariff a rate at the ILEC benchmark only to the extent that the CLEC's rate is attached to a functionally equivalent service. As explained by the Commission,

> we . . . reject the argument made by some [C]LECs that they should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end-user to an IXC. Th[is] approach, . . . in which rates are not tethered to the provision of particular services, would be an invitation to abuse. . . .[47]

Under the Commission's rules, CLEC charges that exceed the benchmark are "mandatorily detariffed and may be imposed only pursuant to a negotiated agreement," and tariffs that impose rates that exceed the benchmark are unlawful.[48]

Accordingly, the Commission's rules prohibit CLECs from applying the ILEC's access rates for services that are not equivalent to the "competing" ILEC's tariffed services. But that is what NAT has done. NAT's Tariff No. 2 purports to mirror the "equivalent rates" in the tariff of Midstate Communications, Inc. ("Midstate"), which provides service pursuant to National

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[44] *Id.* Since 2004, the "benchmark" has been the "rate charged for similar services by the competing ILEC." 47 C.F.R. § 61.26(c).

[45] 47 C.F.R. § 61.26; *CLEC Access Charge Recon Order*, ¶¶ 17-21.

[46] *AT&T* v. *Central Office Telephone Co.*, 524 U.S. 214, 223 (1998) ("Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached").

[47] *CLEC Access Charge Recon. Order*, 19 FCC Rcd. 9108, ¶ 14 (2004).

[48] *See id.*

Exchange Carrier Association ("NECA") Tariff No. 5.[49] The definitions of switched access services in NAT's tariff, however, purport to authorize NAT to impose the Midstate/NECA rates for services that are *not* functionally equivalent to the switched access service functions to which those rates are attached.

Rather, NAT's tariff was drafted in a transparent attempt to eliminate the features and limitations of the NECA tariff that caused the Commission to bar the assessment of access charges on calls to FreeConferenceCall and other CSPs in *Farmers*. Thus, NAT's tariff purports to apply Midstate's access rates to services – the delivery of calls to CSPs under traffic pumping deals – for which Midstate cannot assess access charges under the terms of the Midstate/NECA tariff. In many instances, NAT's tariff further purports to authorize it to assess local switching and other access charges on services that are functionally equivalent not to those ILEC switched access services but to ILEC "transiting" services that typically are not tariffed at all.

Most fundamentally, based upon its own descriptions of its services, NAT does not appear to be providing exchange access services at all. As NAT describes it, the only services it provides to any actual persons or businesses resident on the Crow Creek Reservation are wireless broadband and VoIP services for which it could not unilaterally tariff exchange access services. And with regard to FreeConferenceCall, NAT contends only that it has allowed "subscriber equipment" to be housed in its "radio hut" with WideVoice – which has no certificate of public convenience and necessity even to operate in South Dakota – handling the switching and routing to that hut. NAT's provision of space in its radio hut is hardly the functional equivalent of the exchange access services for which Midstate charges tariffed switched access rates.[50]

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[49] *See* Tariff No. 2, § 1.1.

[50] *See NAT SD Reply*, ¶¶ 4-5.

There are additional features of NAT's tariff that have the effect of authorizing charges that are higher than the benchmark rates for Midstate's/NECA's functionally equivalent services in violation of the Commission's CLEC access charge rules and 47 U.S.C. §§ 201(b) & 203.

Under the Midstate/NECA tariff that NAT purports to mirror, a service cannot be an access service unless it transmits a call between a Customer (normally an IXC) and an "End User." The NECA tariff defines End User as follows: "any customer of an interstate or foreign telecommunications service that is not a carrier," where a "customer" is an entity that "subscribes to the services offered under this tariff."[51] In *Farmers*, the Commission held that a "subscriber" is a purchaser of tariffed LEC services who makes payments to the LEC for the Subscriber Line Charge and other fees, whose relationship with the LEC is governed by the tariff, and who obtains service in the same manner as other local exchange customers who subscribe to tariffed services.[52] Because CSPs that receive payments from LECs under traffic pumping agreements are not such entities, the Commission held that access charges cannot apply to calls to numbers assigned to them.[53]

To evade this limitation, and apparently to disguise its attempt to do so, NAT has changed the definition of "Switched Access Services," and tied that definition to a newly added term, "Buyer" (which is similar to the previous NAT tariff's definition of "Customer"). NAT then ties the term "Buyer" to a new definition of End User, which in turn refers to a newly created definition for "Customer of an Interstate or Foreign Telecommunications Service" (which is essentially defined as what NAT's prior tariff defined as an "End User"). Untangling

[51] NECA FCC Tariff No. 5, § 2.6.

[52] *Farmers*, ¶¶ 10-26.

[53] *Id.*

these provisions, however, confirms that NAT's Tariff No. 2 applies its switched access rates to functions that cannot be billed as such under the Midstate/NECA tariff it purports to mirror.

NAT's Tariff No. 2 states that "Switched Access Service provides for the use of switching and/or transport facilities or services to enable a Buyer to utilize the Company's Network to accept Calls or to deliver Calls."[54] This definition standing alone is limitless. To determine what if any limitations there are on this service, it is necessary to examine the definition of the term "Buyer." The tariff states that the "term 'Buyer' refers to an Interexchange Carrier utilizing the Company's Access Service to complete a Call to or from End Users,"[55] where the term "End User" is separately defined as "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier. . . . An End User need not purchase any service provided by [NAT]."[56] Thus the final piece in this puzzle is the definition of the term "Customer of an Interstate or Foreign Telecommunications Service," which Tariff No. 2 defines as "any . . . entity who sends or receives an interstate or foreign Telecommunications service transmitted to or from a Buyer across the Company's Network, without regard to whether and how much payment is tendered to either [NAT] or the Buyer for the interstate or foreign Telecommunications Service. . . . [And] may include, but is not limited to, conference call providers, chat line providers, calling card providers, call centers, help desk providers, and residential and/or business service subscribers."[57]

Taking these definitions together, the tariff states that "Switched Access Service" occurs whenever a "Buyer" "utilizes" NAT's network to accept calls or deliver calls; "Buyers" are IXCs

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[54] Tariff No. 2, § 5.1.

[55] *Id.*, Original Page No. 7.

[56] *Id.*, Original Page No. 8.

[57] *Id.*, Original Page 7.

that "complete a Call to or from an End User"; and an End User is any non-carrier entity, including CSPs, that "sends or receives" traffic "transmitted to or from a Buyer," regardless of whether that non-carrier entity purchases any service from either NAT or the IXC. Thus, in contrast to the Midstate/NECA tariff it purports to mirror, under NAT's Tariff No. 2 an "End User" does not have to be the calling or the called party that subscribes to NAT's local telephone service and that makes payments to NAT, and Tariff No. 2 expressly includes as "End Users" conference call and chat providers, whether or not they are subscribers to LEC service and whether or not they make payments to NAT for NAT local services.

There are many ways in which this definition can result in the assessment of access charges on services that are not the functional equivalent of the access services within the meaning of the Midstate/NECA tariff. Most obviously, this definition was drafted to permit the assessment of access charges for the delivery of calls dialed to a CSP that has a business relationship with NAT that is materially indistinguishable from the LEC-CSP business relationship in *Farmers*. But *Farmers* held that the NECA tariff does not permit the assessment of access charges on calls to such a CSP.[58]

In addition, because the NAT tariff defines End User as any "entity" that "sends or receives" a telecommunications service that is "transmitted across" NAT's network, NAT will undoubtedly contend that it permits access charges to be assessed if a call was routed through NAT's facilities en route to another part of the country (or even a foreign country). This feature of the tariff violates the CLEC access charge rules because the Midstate/NECA tariff does not

[58] *Farmers*, ¶¶ 11-25.

(and could not) impose access charges on such a "transiting" service.[59] As the Commission has recognized, transiting services are established by agreements or other contracts, not by tariff.[60]

Indeed, consider the implications of the NAT definition of End User when NAT delivers a call to an entity that provides "free international telephone service." In that scenario, NAT would be delivering the call to an intermediate "platform" that prompts the caller to dial a second telephone number and then routes the call to the final destination. But under the Commission's "end to end" analysis, access charges can only be imposed at the two "end points" and not for NAT's role of routing the call to an intermediate platform.[61]

NAT's tariff's definition of "End User Designated Premises" ("EDP") also violates the CLEC access charge rules. NAT's Tariff No. 2 defines the EDP as "[a] location designated by the End User for the purposes of connecting to the Company's services" and specifically allows that "[i]n some instances, the EDP may be located in [NAT's] central office."[62] By contrast, the Midstate/NECA tariff permits access charges only when calls are delivered to the separate premises of customers who subscribe to service under LEC tariffs at their separate premises.[63] Subscribers cannot reside in a LEC's central office or make and receive long-distance calls from

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[59] Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685, ¶ 120 (2005).

[60] Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *Universal Service Support,* 24 FCC Rcd 6475, ¶ 347 & n. 888 (2008).

[61] *See, e.g., In re Long Distance/USA*, 10 FCC Rcd. at ¶¶ 12, 15; *id.* ¶ 13 ("the configuration is a single interstate communication that does not become two communications because it passes through intermediate switching facilities"); *id.* ¶ 13 (a call "extends from the inception of a call to its completion, regardless of any intermediate facilities"); *Teleconnect Co.* v. *Bell Tel. Co.*, 10 FCC Rcd. 1626 (1995) (communication analyzed as a single call where caller first dials an 800 number and then a long-distance number).

[62] Tariff No. 2, Original Page 8.

[63] NECA Tariff F.C.C. No. 5, § 6.1 ("Switched Access Service . . . provides a two-point communications path between a customer designated premises and an *end user's premises*") (emphasis added).

there. Rather, it is other *carriers* and *business partners* of a LEC that have collocation arrangements.[64]

The definition of "Local Exchange" adopted by NAT in Tariff No. 2 also violates the CLEC access charge rules. Tariff No. 2 expressly purports to allow NAT to apply the rates in Tariff No. 2 outside of the area served by the "ILEC whose tariffed rates [NAT] matches."[65] As such, Tariff No. 2 permits NAT to apply the rates in its tariff in areas where the competing ILEC has rates below those in NAT's tariff, which is a stark violation of the Commission's access charge rules, which mandatorily detariffs CLEC access rates that are above those of the competing ILEC.[66]

III. NAT's UNLAWFUL DISPUTE RESOLUTION PROVISIONS.

NAT's tariff unlawfully purports to (1) require customers to pay all disputed bills and to waive any rights to challenge those bills unless a bill is formally disputed within 90 days and (2) deny its customers the right to withhold payment of disputed charges where the customer claims that NAT did not provide the services that were billed, and require its customers to pay late fees on any withheld amounts (even if the dispute is resolved in their favor) and to pay NAT's *attorneys fees* for any action NAT may file to recover charges (regardless of whether NAT

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[64] Further, delivering calls to collocated equipment is not the equivalent of end office switching or other access services under the Midstate/NECA tariff. To the contrary, ILECs offer separate services for such connections, that typically include "collocation" charges for allowing equipment to be placed in their offices and "cross-connect" charges to recover the cost of connecting that equipment to switches, using relatively short cables. Therefore, to the extent that NAT connects calls to equipment collocated in its central offices, NAT would be, at best, providing collocation, not switched access, services to the CSP.

[65] Tariff No. 2, Original Page 8.

[66] *CLEC Access Charge Recon. Order* ¶ 14.

prevails in such cases or how frivolous a court or agency may find NAT's claims).[67] These provisions are patently unlawful.

Unlawful Waiver & Dispute Resolution Provisions. Congress provided that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this Act may either make a complaint to the Commission [under Section 208] or may bring suit . . . in any district court of the United States of competent jurisdiction."[68] Congress further provided that such actions are subject to a 2 year statute of limitations, depending on the nature of the claim.[69]

NAT's tariff, however, purports to severely truncate this statute of limitations:

> All bills are presumed accurate, and shall be binding on the Buyer unless written notice [sic] a good faith dispute is received by [NAT] within 90 days. . . . The bill shall be deemed to be correct, and Buyer shall be deemed to have waived any and all rights and claims with respect to both the bill and the underlying dispute, if a good faith dispute is not timely received.[70]

This provision unlawfully purports to bar a customer from exercising its statutory right to file a complaint within the 2 year statute of limitations enacted by Congress and to challenge bills issued under an unlawful tariff. Indeed, this provision is indistinguishable from a tariff provision that has already been rejected by two district courts and a federal appeals court:

> All bills are presumed accurate, and shall be binding on the Customer, and such Customer shall be deemed to have waived the right to dispute the charges unless written notice of the disputed charge(s) is received by the Company within 90 days of the invoice date listed on the bill.[71]

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[67] *See* Tariff No. 2, § 3.1.7.

[68] 47 U.S.C. § 207.

[69] *Id.* § 415.

[70] Tariff No. 2, § 3.1.7.1(a).

[71] *Paetec Communications, Inc.* v. *MCI Communications Services, Inc.*, Civil Action No. 09-1639, 2010 U.S. Dist. LEXIS 41644, *11 (E.D.Pa. 2010).

The United States District Court for the Eastern District of Pennsylvania, following a prior ruling by the Eastern District of Virginia, which was upheld by the Fourth Circuit, correctly explained that:

> the [Eastern District of Virginia] issued an order wherein it found that the 90-day dispute resolution provision in [the] tariff could not preempt the federal statute of limitations in the context of a tariff because the terms of a tariff are not negotiated like the terms of a contract. If a term in the tariff could supersede the statute of limitations, it would mean that a carrier could unilaterally void federally codified consumer protections simply by filing a tariff. The Fourth Circuit affirmed. . . . [W]e . . . find that the Fourth Circuit's ruling on this matter was persuasive.[72]

Unlawful Anti-Withholding Provisions. NAT's Tariff No. 2 also unlawfully purports to force everyone to pay its bills, no matter what, even if it is facially absurd (*e.g.*, $100 trillion): "Any disputed charges must be paid in full prior to or at the time of submitting a good faith dispute and failure to tender payment for disputed invoices or portions thereof is a sufficient basis for [NAT] to deny a dispute. . . ."[73] This provision, is clearly unjust and unreasonable in violation of Section 201(b) of the Act. Moreover, it is settled that such provisions are unlawful as applied to claims that NAT did not provide the services for which it has billed an IXC, which is typically the case for bills related to NAT's traffic stimulation schemes.[74]

NAT's Tariff No. 2 also purports to punish those that withhold payment: (1) Late Payment Fees that, under the terms of the tariff, apparently apply even if the access customer

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[72] *Id.* *32-34.

[73] Tariff No. 2, § 2.10.4(B).

[74] *See, e.g., Advamtel, LLC* v. *AT&T Corp.*, 118 F. Supp. 2d 680, 683 (E.D. Va. 2000) (CLECs are not entitled to collect tariffed charges until they "demonstrate (1) that they operated under a federally filed tariff and (2) that they provided services to the customer pursuant to that tariff."); *Iowa Network Servs., Inc.* v. *Qwest Corp*, 385 F. Supp. 2d 850 (S.D. Iowa 2005), aff'd, 466 F.3d 1091 (8th Cir. 2006) (rejecting the argument that impermissible "self-help" occurred when the services provided were not within the scope of the tariff).

ultimately prevails on a claim that the billed service was not provided[75] and (2) "[i]n the event [NAT] pursues a claim in Court or before any regulatory body arising out of a Buyer's refusal to make payment pursuant to this Tariff, . . . Buyer shall be liable for the payment of [NAT's] reasonable attorneys' fees expended in collecting those unpaid amounts."[76] Thus, where NAT severely overbills customers or bills customers for tariffed services that NAT never provided, the customer/victim of the overcharges must come up with the money and pay it to NAT, or NAT will start charging penalties and initiate a lawsuit which will be paid for by the customer/victim of the overcharges, regardless of how frivolous NAT's lawsuit might be. Such "shake down" provisions are also facially unjust and unreasonable in violation of 47 U.S.C. § 201(b).

IV. NAT's UNLAWFUL CUSTOMER DEPOSITS PROVISIONS.

The provision in NAT's Tariff No. 2 allowing it unlimited discretion to collect a deposit from customers is patently unlawful.[77] The Commission addressed deposits in access tariffs in 2002, and it explained that such provisions should be "narrowly tailored" to address specific risks of nonpayment and to eliminate broad authority to require deposits without objective criteria.[78] The Commission explained that "broad, subjective triggers" for deposit provisions, that allow a LEC "considerable discretion in making demands, such as a decrease is 'creditworthiness' or 'commercial worthiness' falling below an 'acceptable level,' are particularly susceptible to discriminatory application.[79] NAT's tariff does not even have these

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[75] Tariff No. 2, § 3.1.7.1(c).

[76] Tariff No. 2, §§ 2.10.5.

[77] Tariff No. 2, § 3.1.5.

[78] Policy Statement, *Verizon Petition for Emergency Declaratory And Other Relief*, 17 FCC Rcd. 26884, ¶ 21-22 (2002).

[79] *Id.* ¶ 21; *id.* ¶ 22 (tariffs are not properly drafted when they provide LECs a "great deal of discretion in determining which customers will or will not be subjected to these [deposit] burdens").

limitations. It permits NAT to collect a deposit "[t]o safeguard its interests,"[80] with no limitations whatsoever as to how NAT can or will make deposit determinations for any particular customer. Because NAT could surely apply such a provision on a discriminatory basis – for example, against customers that are involved in litigation against NAT – it is patently unlawful.

[80] Tariff No. 2, § 3.1.5.

CONCLUSION

For the foregoing reasons, the Commission should (1) reject NAT's Tariff No. 2, or (2) in the alternative, suspend and investigate it.

Respectfully Submitted,

/s/ Luisa L. Lancetti
Luisa L. Lancetti
David R. Conn
401 Ninth Street, N.W., Suite 550
Washington, D.C., 20005
(202) 654-5900
Attorneys for T-Mobile USA, Inc.

/s/ Michael B. Fingerhut
Michael B. Fingerhut
900 7th Street, N.W., Suite 700
Washington, D.C. 20001
(703) 592-5112
Attorney for Sprint Communications Company L.P.

/s/ Robert B. McKenna
Craig J. Brown
Robert B. McKenna
Meshach Rhoades
607 14th Street, N.W., Suite 950
Washington, D.C. 20005
(303) 383-6650
Attorneys for Qwest Communications Company, LLC

/s/ M. Robert Sutherland
David L. Lawson
Christopher T. Shenk
Sidley Austin LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8088

M. Robert Sutherland
Gary L. Phillips
Paul K. Mancini
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2057
Attorneys for AT&T Corp.

/s/ Karen Zacharia
Michael E. Glover, Of Counsel
Karen Zacharia
Christopher M. Miller
1320 North Courthouse Road, 9th Floor
Arlington, VA 22201-2909
(703) 351-3071
Attorneys for Verizon

Please Send And Fax Replies To:

David L. Lawson
Sidley Austin LLP
1501 K St., N.W.
Washington, D.C. 20005
Tel. (202) 736-8088
Fax. (202) 736-8711

Dated: November 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2010, I caused true and correct copies of the foregoing Petition of Joint Petitioners to be served on all parties as shown on the attached Service List.

Dated: November 22, 2010
Washington, D.C.

/s/ Christopher T. Shenk

SERVICE LIST

Marlene H. Dortch Secretary, Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 (one original and three copies by hand delivery)	Larry Barnes Wireline Competition Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Larry.Barnes@fcc.gov (by hand delivery and email)
Sharon Gillett Chief Wireline Competition Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Email: Sharon.Gillett@fcc.gov (by hand delivery and email)	John Hunter Wireline Competition Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 John.Hunter@fcc.gov (by hand delivery and email) Best Copy and Printing, Inc. Portals II 445 12th St., S.W., Room CY-B402 Washington, D.C. 20554 Email: FCC@BCPIWEB.COM (by email)
Albert Lewis Division Chief Pricing Policy Division Wireline Competition Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 Tel. (202) 418-1520 Email: Albert.Lewis@fcc.gov (by hand delivery and email)	Scott R. Swier 133 North Main Street PO Box 256 Avon, South Dakota 57315 Email: scott@swierlaw.com Phone: (605) 286-3218 Fax: (605) 286-3219 (by facsimile and first class mail)
Pamela Arluk Assistant Division Chief Pricing Policy Division Wireline Competition Bureau Federal Communications Commission 445 12th Street, S.W., Room 5-A225 Washington, D.C. 20554 Tel. (202) 418-1520 Email: pamela.arluk@fcc.gov (by hand delivery and email)	