# EXHIBIT 6

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

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| In the Matter of<br><br>Native American Telecom, LLC | FCC Tariff No. 2<br><br>Transmittal No. 3 |

# NATIVE AMERICAN TELECOM, LLC'S RESPONSE TO THE JOINT PETITION OF AT&T, VERIZON, QWEST, SPRINT AND T-MOBILE TO REJECT OR, IN THE ALTERNATIVE, SUSPEND AND INVESTIGATE

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Native American Telecom, LLC ("NAT"), through counsel and pursuant to 47 C.F.R. § 1.773(b)(1)(iii), hereby responds to the Joint Petition of AT&T, Verizon, Qwest, Sprint, and T-Mobile (collectively, the "IXCs") filed November 22, 2010 ("Joint Petition"). The Joint Petition presents no credible basis to request the rejection or suspension of the NAT FCC Tariff No. 2, Transmittal No. 3 filed September 3, 2010 ("Tariff").

NAT's Tariff was filed in an effort to address concerns that have been raised by the IXCs for many years contending that it is inappropriate to apply higher rural access rates in circumstances when the volume of traffic terminated by the LEC has increased as a result of providing service to certain high volume end users. While the Commission has repeatedly declined to find it to be an unjust or unreasonable practice for a rural CLEC to provide service to these types of end users (or to assess full access rates on the traffic terminating to these end users), the Tariff nevertheless addresses the IXCs' concerns while maintaining the integrity of the rural exemption. It allows rural LECs to compete with non-rural LECs while not disadvantaging either. The new tariff provides significantly reduced rates to the IXCs over the existing effective NAT tariff and is a genuine attempt to implement a market resolution that moves past the stalemate that the IXCs have created through their illegal self help. Their

continued objections speak only to the desire to continue taking the valuable services provided by NAT for free and perhaps a sense that the Commission's inaction is a signal that it is no longer interested in enforcing its long-standing policy against IXC self help abuses.

Indeed, the Joint Petition must be understood in context, as it is no more than the latest in a series of unsuccessful attempts to avoid paying Competitive Local Exchange Carriers ("CLECs"), such as NAT, for the terminating access service on which the IXCs' long distance services rely. While the IXCs suggest that the Commission has allowed "most" of the recently-contested tariffs to become effective, (Joint Petition at 2), the reality as NAT understands it, is that the Commission has allowed ***all*** of the tariffs using the definitions in NAT's FCC Tariff No. 2 to become effective and has declined to reject or suspend any tariffs on the grounds asserted by the IXCs (and the Joint Petition offers no counter-example). Indeed, as the Joint Petition seemingly concedes, the Commission has not "issued ***any*** suspension or rejection order" that adopts the arguments that the IXCs lodge against NAT in their Joint Petition. *Id.* (emphasis added).

The record clearly establishes that the arguments presented in the Joint Petition are not sufficiently compelling so as to warrant the rejection, or suspension and investigation, of NAT's Tariff. It should be noted that one or more of the IXCs have objected on nearly identical grounds to: (1) Northern Valley Communications, LLC, Tariff No. 3; (2) Bluegrass Telephone Company, LLC d/b/a Kentucky Telephone Company, Tariff No. 2; (3) Bluegrass Telephone Company, LLC d/b/a Kentucky Telephone Company, Tariff No. 3; (4) Tekstar Communications, Inc. Tariff No. 2; and (5) Comity Communications, LLC FCC Tariff No. 1, Transmittal No. 3. On each occasion the IXCs argued that the tariff or transmittal was unlawful because it clarified that the IXCs could no longer engage in unlawful self help by refusing to pay for traffic that they

were delivering to LECs, even if that traffic was ultimately destined for termination to a conference calling service provider. On several occasions the IXCs also argued, as they do again here, that a provision requiring IXCs to reimburse LECs for reasonable attorneys' fees in the event that the IXCs continued to engage in prohibited withholdings is unlawful.

On four different occasions,[1] the Pricing Policy Division ("Division") of the Wireline Competition Division released a Public Notice concluding that objections were then, as they are now, simply unfounded. Specifically, the Division stated:

> Based on this review, we conclude that the parties filing petitions against the tariff transmittals listed in this Report have not presented compelling arguments that these transmittals are so patently unlawful as to require rejection. Similarly, we conclude the parties have not presented issues regarding the transmittals that raise significant questions of lawfulness that require investigation of the tariff transmittals listed in this Report.

*See* Public Notice, Protested Tariff Transmittal Action Taken, WCB/Pricing File No. 10-08, DA 10-1783 (Sept. 20, 2010) (rejecting argument regarding Kentucky Telephone Tariff No. 2); Public Notice, Protested Tariff Transmittal Action Taken, WCB/Pricing File No. 10-09, DA 10-1917 (Oct. 6, 2010) (rejecting arguments regarding Tekstar's tariff); Public Notice, Protested Tariff Transmittal Action Taken, WCB/Pricing File No. 10-10, DA 10-1970 (Oct. 14, 2010) (rejecting Sprint's argument regarding Kentucky Telephone Tariff No. 3); Public Notice, Protested Tariff Transmittal Action Taken, WCB/Pricing File No. 10-11, DA 10-2186 (Nov. 16, 2010. Nevertheless, the IXCs continue to persist in their protest and are unrelenting in their willingness to absorb both the time and resources of the Commission and the competitive carriers in responding to their frivolous arguments. The conclusion, however, has not changed and the

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[1] The Northern Valley tariff became effective and was "deemed lawful" by operation of law, but no written notice was issued by the Division.

IXCs have not presented arguments so compelling as to require rejection or suspension of the Tariff.

## BACKGROUND

NAT is a full-service, tribally-owned CLEC organized as a limited liability company under the laws of the State of South Dakota. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) ("Tribe"), Native American Telecom Enterprise, LLC (25%) ("NAT ENTERPRISE"), and WideVoice Communications, Inc. (24%) ("WideVoice").[2]

NAT provides high-speed Internet access, basic telephone, and long-distance services on and within the Crow Creek Sioux Tribe Reservation ("Reservation"). NAT's services take place exclusively within the exterior boundaries of the Reservation. NAT does not provide services within the State of South Dakota outside the exterior boundaries of the Reservation. As a result of its efforts, NAT has created jobs and provided much-needed economic opportunities on the Reservation.[3]

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[2] For sake of clarity, it should be noted that NAT ENTERPRISE is a telecommunications development company and is a separate and distinct entity from NAT. The Tribe is a federally recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation in Fort Thompson, South Dakota.

[3] The lack of sufficient telephone and other telecommunications services upon Native American reservations has been a long-standing problem. While 94% of all Americans have at least one telephone in their home, the Federal Communications Commission ("FCC" or "Commission") has found that only 47% of Native Americans living on reservations or other tribal lands have telephone service. The FCC has determined that this lower telephone subscribership is "largely due to the lack of access to and/or affordability of telecommunications services in these areas." *In re Federal-State Joint Board on Universal Services; Promoting Development and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, 15 FCC Rcd. 12208, ¶¶ 20, 26 (2000).

The FCC has also found that "by enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase tribal communities' access to education, commerce, government and public services." *Id.* ¶ 23; *see also* Tracey A. LeBeau, Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development, 12 Stan. L &

In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority ("Tribal Utility Authority") for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents." On August 19, 2008, the Tribe issued its "Crow Creek Indian Reservation – Telecommunications Plan to Further Business, Economic, Social, and Educational Development."

On October 28, 2008, the Tribal Utility Authority entered its "Order Granting Approval to Provide Telecommunications Service" ("Approval Order"). Under this Approval Order, NAT was "granted authority to provide telecommunications service on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe." As a result of the Approval Order, NAT properly filed two Access Service Tariffs governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.

In September 2009, pursuant to the Approval Order, and after over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States. The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The Tribe describes its advanced telecommunications system as a vehicle for "paving the way for much-needed business, economic, social and educational development on the Crow Creek

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Pol'y Rev. 237, 238 (2001) ("Reservation infrastructures, including basic services such as water, electricity, gas and telecommunications, are currently incapable of supporting tribal populations").

Reservation." Specifically, the broadband network supports high-speed broadband services, voice service, data and Internet access, and multimedia.

NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone service to tribal members. In December 2010, NAT will open a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes.

Specifically, NAT's activities on the Reservation include:

- NAT provides 110 high-speed broadband and telephone installations at residential and business locations on the Reservation. Additional installations are taking place on a daily basis.
- NAT has established an Internet Library with six (6) work stations that provide free computer/Internet access for residents that do not otherwise have access to computers.
- The demand for the Internet Library's services is so great that NAT built an additional facility on the Reservation that will serve as a full-service communications center offering free Internet, online education classes, computer classes and instruction, and free telephone access to individuals who would otherwise not have access to even these basic services. This state-of-the-art facility will open in December 2010.
- NAT subsidizes these telecommunications services by providing them free-of-charge to Tribal members. Without NAT's subsidies, most of the Tribal members would not be able to afford these telecommunications services.
- NAT has enabled the Reservation to escape the unfortunate and long-standing circumstances that have prevented economic growth. Before NAT's efforts, the Tribal members' inability to pay for telecommunications services was the primary reason that they were not provided with access to these modern services. As such, without the ability to pay for these modern services, economic growth and viability were impossible. Now, however, because of NAT, residents are building their own websites to sell their unique native crafts over the Internet. These unprecedented economic opportunities will continue to grow as Tribal member's familiarity with modern telecommunications services increases.

- NAT has created seven jobs (three full-time and four part-time) and an office location on the Reservation. These employment opportunities are substantial considering the well-documented fact that the Reservation's unemployment rate is estimated to be between eighty (80) and ninety (90) percent.

- NAT's business structure is composed of both Tribal and private entity ownership. As a result of this unique "tribal-private entity" partnership, NAT has attracted unprecedented financial and capital investment to the Reservation. This unique business model has replaced the "old model" of non-Tribal service providers providing limited services (at best) and having no economic incentive to ensure the Tribe's services grow, prosper, and become profitable. This "old model" has proven to be a failure. Under NAT's business model, however, the more successful NAT becomes, the more economically successful the Tribe becomes.

In sum, NAT's efforts provide the Tribe with a vehicle to "pave the way" for much-needed business, economic, education, and social development on the Crow Creek Reservation.

## DISCUSSION

### I. THE TARIFF'S DEFINITIONS ARE CLEAR AND COMPORT WITH FEDERAL LAW

The IXC Petition asserts that the Tariff contains definitions that are somehow improper or unclear. The position rests on deliberate shortsightedness, as well as a legal theory that contradicts the Commission's analysis in the *Farmers & Merchants* case, on which much of the Joint Petition appears to rely.[4] Simply put, the Tariff definitions contain the exact information that the IXCs claim is lacking, and it is this clarity that causes the IXCs to now abandon longstanding arguments that the terms of a LEC's tariff, and not federal law, determine when call traffic is compensable under the access regime. Unfortunately, the Joint Petition reveals nothing more than a continued desire to refuse to compensate LECs who complete the calls that the carrier's long-distance customers willingly place.

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[4] *Qwest Communications Corp. v. Farmers & Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Memorandum Opinion and Order, 22 FCC Rcd. 17973 (2007) ("*Farmers I*"); Order on Reconsideration, 23 FCC Rcd. 1615 (2008) ("*Farmers II*"); Second Order on Reconsideration, 24 FCC Rcd. 14801 (2009) ("*Farmers III*").

### A. The Commission Made Clear Throughout the *Farmers & Merchants* Case That Access Is Governed by a LEC's Tariff

The pervasive theme of the Joint Petition is that NAT is not permitted to define its own access services. This theme, however, contravenes the Commission's reasoning throughout *Farmers & Merchants* in which it repeatedly stated that the question of whether traffic is compensable is answered in *Farmers' access tariff*, and not in precedent arising from investigations of completely different carriers.

To determine whether calls placed to Farmers' conference bridge customers generated compensable terminating access, the Enforcement Division and the Commission read Farmers' access tariff. *Farmers I*, 22 FCC Rcd. at 17988-89 ¶¶ 36-38. The definitions of "end user" and "customer" were analyzed in that tariff by reference to a standard dictionary. *Id.*, 22 FCC Rcd. at 17988 ¶ 38 (quoting Webster's New Collegiate Dictionary, G. & C. Merriam Co. 1981, p. 1152). The Enforcement Division and the Commission did not seek answers in previous orders regarding other LECs' tariffs, because the sole question was whether "Farmers' access charges have been imposed in accordance with its tariff." *Id.*, 22 FCC Rcd. at 17988 ¶ 35.

Later, in stating that the holding of *Farmers I* was under reconsideration, the Enforcement Division and the Commission again emphasized that the question under review was whether the calls at issue qualified for terminating access "'under Farmers' tariff.'" *Farmers II*, 23 FCC Rcd. at 1617 ¶ 7 (quoting *Farmers I*). And in the later Commission order, the analysis was confined to "the tariff language at issue here," and "the services described in the tariff." *Farmers III*, 24 FCC Rcd. at 14807 ¶ 15, at 14810 ¶ 22. Neither the Enforcement Division nor the Commission stepped outside the terms of Farmers' access tariff to decide how to characterize the call traffic.

The Joint Petition resorts to inappropriate precedent regarding the terms of other LEC tariffs. For example, the Joint Petition cites to *Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184, Order Designating Issues for Investigation, 22 FCC Rcd. 16109 (2007). Joint Petition at 2 n.4. That case, however, regarded incumbent rate-of-return LECs, such as Reasnor Telephone Company, LLC. *See, e.g.*, 22 FCC Rcd. at 16110-11 ¶¶ 2, 4. That case also has nothing to do with a CLEC such as NAT. Rate-of-return carriers are subject to entirely different access rules. *Compare Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd. 17989, 17992 ¶¶ 6-7 (2007) (rate-of-return access regime) *with* 22 FCC Rcd. at 17994 ¶ 10 (CLEC access regime). The authority cited in the Joint Petition is thus irrelevant to the proper scope of the Division's review of NAT's Tariff.

The IXCs ignore the language of NAT's Tariff, and instead compare it to irrelevant LEC tariffs, precisely because the Tariff's terms are in fact clear and require the IXCs to pay for terminating long-distance calls to NAT customers. In fact, the Joint Petition is replete with *ad hominem* barbs about "traffic stimulation" and claims of "schemes" to "bilk" the IXCs (Joint Petition at 2), in order to distract the Enforcement Division from the plain terms of the Tariff. This language is unnecessary and unhelpful, and the Division should grant it no weight.

In sum, the IXCs are annoyed that NAT amended its access tariff to acknowledge the hyper-semantic litigation tactics that the IXCs have employed as a means to avoid paying for lawfully tariffed access services. These changes in the new Tariff cannot be construed as a concession by NAT that its previous access tariff was unenforceable, but rather the changes are made in an effort to once again avoid addressing the unfortunate lengthy and convoluted

"gotcha" arguments that certain IXCs continually submit while refusing to pay for the use of the LEC's networks.

**B. The Tariff Properly Defines Its Terms**

The Joint Petition challenges several definitions in the Tariff as being "unlawful." (Joint Petition at 11-15). This argument is curious because many of the definitions adopt the Commission's definitions verbatim, a fact that the IXCs repeatedly ignore while contending that the definitions are unlawfully vague. .NAT is aware that the terms of its Tariff must be clear, and it worked diligently to produce clear terms. As such, NAT's definitions are clear, appropriate, and comply with federal law.

**1. NAT has properly defined "Switched Access."**

The IXCs argue that NAT has adopted an improper definition of "Access Service." However, that assertion ignores the clear language of the Tariff.

The Tariff defines "Switched Access Service" as "**Access** to the Network of the Company for the purpose of receiving or delivering Calls." Tariff, Original Page 9 (emphasis added). "Access" and "Access Service", in turn, are defined as follows:

> **includes services and facilities provided for the origination or termination of any interstate or foreign Telecommunication** regardless of the technology used in transmission. This includes, but is not limited to, local exchange, long distance, and data communications services that may use either TDM or Internet Protocol ("IP") or other technology. Access Service includes the functional equivalent of the incumbent local exchange carrier interstate exchange access services typically associated with following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched Transport Termination (fixed); tandem switched Transport Facility (per mile); tandem switching.

Tariff, Original Page 7 (emphasis added).

The portion of the "Access" definition that appears in bold exactly mirrors the Commission's definition of "access service" in Rule 69.2:

> Access service includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication.

47 C.F.R. § 69.2(b). The IXCs fail to acknowledge that NAT has precisely the same definition in the Tariff. The additional language is offered by NAT to clarify, pursuant to the Commission's rules governing CLECs, that NAT's services may be the "functional equivalent" of the elements provided by the ILEC. Thus, it is difficult to understand how the Tariff violates the Commission's rules, when it merely sets forth the applicable definitions offered by the Commission.

**2. The Tariff clearly defines "End User."**

The IXCs also argue that the Tariff inappropriately expands the definition of "end user." The Tariff, however, defines "end user" very clearly and in language that in large part is identical to the Commission's own definition.

The Tariff defines "End User" as

> **[A]ny Customer of an Interstate or Foreign Telecommunications Service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "End User" when such carrier uses a Telecommunications service for administrative purposes and a person or entity that offers Telecommunications services exclusively as a reseller shall be deemed to be an "End User" if all resale transmissions offered by such reseller originate on the premises of such reseller.** Other carriers, including IXCs, are not considered to be End Users under the terms of this Tariff, unless the Company, at its sole discretion, consents to such classification in writing. An End User need not purchase any service provided by the Company.

Tariff, Original Page 8.

The bolded portion of this definition matches the Commission's definition exactly:

> End user means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller.

47 C.F.R. § 69.2(m).

What NAT has added to the "end user" definition is simply a clarifying sentence stating that an IXC is not to be deemed an end user in the normal course of business. NAT has found this clarification to be necessary, having realized through its analysis of other access tariffs that the term "end user" appeared to define both the user of access services and the user of retail telecommunications service. It is obvious that using one term to refers to two classes of person results in confusion. But nothing in the sentence of NAT's definition expands the definition of "end user." An end user is the recipient of a long-distance call.

The suggestion that the Tariff inappropriately expands the class of "end users" is thus baseless. It is another instance of the IXC's refusal to thoroughly read, analyze, and study the plain language of the Tariff. Rather, the IXCs appear to be unwilling to invest any effort in reviewing the terms of the tariffs applicable to the services that they receive, preferring instead to simply continue to taking these services for free.

## II. THE TARIFF'S "VOLUME END USER" CLASS OF TRAFFIC IS LAWFUL AND APPROPRIATE

The Joint Petition also challenge the "Volume End User" ("VEU") provision in the Tariff (Section 7.2.2, Original Page 47) on the ground that IXCs are unable to determine the exact rate that they will be charged because they will not know whether the volume to a particular VEU will exceed the threshold or whether they obtain services "in order to provide high-traffic services." (Joint Petition at 14). The IXC's concerns are unfounded and contrary to much of

their past advocacy in support of rules that utilize similar metrics to determine the level of access charges that are due.[5]

First, the position is without merit because the tariff makes clear when the lower composite rate applies: "when the MOUs originated or terminated by the Company on behalf of a particular Buyer [*i.e.*, an IXC] exceeds 5,000,000 MOU per month to a particular Volume End User." (Tariff Section 7.2.2, Original Page 47). Thus, the tariff distinguishes between: (1) the traffic that is being originated and terminated by "traditional" residences and businesses located on the Reservation, of which NAT serves over 100, and to which the full access rates apply;[6] and (2) the high volume end users served by NAT, such as conference calling providers, to which the lower composite access rates apply.

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[5] *See Aventure Commc'ns Tech., LLC v. Iowa Utils. Bd.*, 10-cv-4074, Sprint Resistance to Request for Preliminary Injunction, ECF No. 47, at 8 (N.D. Iowa, Aug. 12, 2010) (supporting rules adopted by the Iowa Utilities Board that triggered negotiation requirements and separate access rates for so-called high volume access services and arguing that, "The key term 'high volume' has a very objective definition: 'any service that results in an increase in total billings for intrastate exchange access for a local exchange utility in excess of 100 percent in less than six months.'").

In fact, Sprint, AT&T, Qwest, and Verizon each intervened in that proceeding specifically for the purpose of supporting new rules adopted by the Iowa Utilities Board designed to create special rates for so-called "high volume access services," apparently geared towards bringing down the rates for terminating traffic to conference calling and similar services. The effect of that rulemaking was to require LECs serving these customers to file a revised tariff that made clear that traffic to these high volumes services was compensable (apparently, therefore, requiring a modification to the tariff's definitions), but at a rate lower than the LEC's other end user traffic. Perhaps, therefore, these carriers continue to protest with the hope that it will cause the Commission to adopt a lower rate, but these carriers' contradictory position of simultaneously protecting the Iowa system while arguing that NAT's tariff is patently unlawful serves only to highlight the curious nature of their objections.

[6] It bears repeating that NAT is a full service CLEC providing "comparable" services, both in terms of services and in NAT's commitment to serve residents throughout the reservation. Indeed, the Tribal Utility Authority Order approving NAT as a CLEC specifically states that NAT has made a commitment to serve the entire reservation, a commitment which NAT is now fulfilling through the deployment of next generation technologies on the reservation.

In order to determine whether the lower composite rate applies to a given call, the IXCs need only look at their own billing records to determine whether, for example, a particular conference calling provider has received or originated 5,000,000 minutes of calls in that month. Clearly the IXCs have been able to make this assessment when they were doing so for purposes of withholding monies from LECs throughout the country, so any suggestion that they would now be unable to work with NAT to know which of NAT's customers fit within the confines of the VEU are without merit and must be rejected.

Moreover, the process of billing and paying for access services is necessarily a cooperative effort between LECs and IXCs. Carriers, if they are acting in good faith, routinely exchange background and supporting information for access invoices. Unfortunately, many of the IXCs have declined to engage in such efforts, preferring instead to withhold payment and later send cursory notices of billing disputes. NAT nonetheless remains willing to work with these or any other IXCs to provide information about access services provided under its tariffs. It can supply the IXCs with information about the entities subject to VEU access services and the telephone numbers assigned to those entities in order that subsequent access bills are predictable and clear. To attack the Tariff *a priori*, however, is simply not appropriate.

The VEU rate, which can go as low as $0.0055 per MOU, (Tariff Section 7.2.2, Original Page 47), (far below the applicable NECA rate that NAT lawfully could charge), demonstrates an effort by NAT to address the IXCs' concerns about the access amounts they owe. The IXCs should welcome this effort rather than contort it into grounds for rejecting the Tariff. The IXCs' challenge to the VEU rate is in any event unfounded and provides no basis on which to reject or investigate the Tariff.

## III. NAT'S TARIFF DOES NOT VIOLATE THE COMMISSION'S CLEC ACCESS CHARGE RULES

The IXCs' next attack on the Tariff is even less availing than the previous arguments. Specifically, after recognizing that the Commission's benchmark rules enable a CLEC to charge the equivalent ILEC rates, if the CLEC is "providing a functionally equivalent service," the Joint Petition argues that NAT's tariff is somehow inextricably linked to the *definitions* contained in the competing-ILEC tariff. Under this analysis, if Midstate (NAT's ILEC competitor) could not bill access charges for call terminating to conference call providers, NAT is forever barred from doing so. (Joint Petition at 17) ("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."). This argument is flawed for two independent reasons: (1) it erroneously assumes that the benchmark systems requires CLECs to adopt ILEC tariffs verbatim, thereby eliminating the CLEC's ability to modify the terms and conditions of tariff (or, for that matter, the configuration of their network); and (2) it erroneously assumes that Midstate could not provide service to conference call providers pursuant to its tariff, a decision which neither this Commission or any court has ever made.[7]

The Commission and the courts have unequivocally concluded that a CLEC need not configure its network in the same manner as an ILEC in order to be able to charge the full ILEC benchmark rate.[8] The court in *PAETEC* also correctly noted that the Commission has rejected

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[7] The Commission's decision in *Farmers and Merchants* is a fact-specific inquiry that does not impose a blanket prohibition against service conference call providers.

[8] *See, e.g., PAETEC Commc'ns, Inc. v. MCI Commc'ns Servs., Inc.*, 712 F. Supp. 2d 405, 414 (E.D. Pa. 2010) (concluding that a CLEC may bill the "full switched access services and may charge the full benchmark rate" when the IXC is not directly connected and the calls are

the contention that a CLEC must have a "any particular rate element or rate structure . . . so long as the composite rate does not exceed the benchmark," and that a CLEC is "providing the functional equivalent of [the ILECs'] services" "[w]hen a competitive LEC originates or terminates traffic to its own end-users." *Id.*

Thus, the Commission's precedent is clear that a CLEC, such as NAT, is not required to copy the ILEC's tariff verbatim and that, as long as it is providing service to "its own end-users," it is providing a service that is the "functional equivalent" of Midstate's service and is entitled to charge the same rate as Midstate, pursuant to the benchmark rules. Accordingly, because NAT does provide service to its end-users, as previously described and as defined in the Tariff, suggesting that NAT is violating the CLEC access charge rules is without merit.

## IV. NAT'S TARIFF AND BILLING DISPUTE PROVISIONS DO NOT VIOLATE COMMISSION PRECEDENT

### A. NAT'S Written Dispute Provision

The IXCs contend that NAT's Tariff is defective and unlawful because it requires customers to notify NAT of billing disputes in writing within a 90-day period. The IXCs allege that this provision is unlawful because it conflicts with the two-year statute of limitations period provided at 47 U.S.C. § 415. This position should be rejected for two independent reasons.

First, the 90-day written dispute provision is not preempted by statute. And second, because AT&T has successfully argued the opposite position to its benefit, the Commission should be exceedingly skeptical of this argument.

As an initial matter, cases such as *MFS International, Inc. v. International Telcom, Ltd.* (E.D. Va. 1999) have addressed a carrier's ability to require written notice within a specified

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being routed through two switches, even if the CLEC does not own both switches) (citing *In re Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108 (2004)).

time period. 50 F.Supp.2d 517, 522-23. In *MFS International*, the district court found that the contractual provision barred the defendant-customer's counterclaim, despite the longer limitations period of 415(b). Specifically, the court concluded that "there is no justification for disallowing the relevant contractual provision simply because an explicit federal statute of limitations exists when that statute does not prohibit such shortening, either explicitly or by clear implication." *Id.* at 523. Although the court's decision rested primarily on a negotiated agreement, it expressly noted that "even were the counterclaims not time-barred under ¶ 11.3 of the Agreement, ***the terms of the tariff would prevent Telcom from prosecuting the claims.*** Paragraph 3.1.4(G) of MFS's filed tariff, effective February 22, 1996, states: Any claim of whatever nature against the Company shall be deemed conclusively to have been waived unless presented in writing to the Company within thirty (30) days after the occurrence that gave rise to the action." *Id.* at n.14 (emphasis added). The court correctly noted that "a filed tariff has the force of law," thus if the tariff provided a requirement that customer file a written dispute within a specified time period, it was effective and had the force of law. *Id.*

In a similar case, *Powers Law Offices, PC v. Cable & Wireless USA, Inc.*, 326 F. Supp. 2d 190, 192-93 (D. Mass. 2004), the district court in Massachusetts enforced a provision in the carrier's tariff that required customers to bring billing disputes to the carrier's attention within 45 days. In *Powers*, a class action, the plaintiffs alleged that the defendant charged more than allowed under its filed tariffs. The court noted that "the tariff governs 'not only the nature and extent of [the provider's] liability, but also the nature and extent of the [customer's] right of recovery.'" *Id.* at 192 (quoting *N. Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233 (2d Cir. 1978)).

Finally, in *Viking Communications, Inc. v. AT&T Corp.*, No. 05-1078, 2005 WL 2621919 (D.N.J. Apr. 27, 2006), the court granted summary judgment to AT&T against Viking. The court reasoned that "there is no genuine dispute that Plaintiff remained subject to the . . . terms specified in Tariffs 1, 9, and 11, including the written notice requirement." *Id.* at *3. As the court noted, this "written notice requirement ***set forth in the applicable [AT&T] tariffs . . .*** requires that Plaintiff give written notice of any overcharge within six months of the charge." *Id.* at *10.

Curiously, AT&T summarized its argument in its Motion for Summary Judgment as follows:

> Under AT&T's tariffs for the long distance "UniPlan" voice service and T-1 access service provided to Viking, a customer is required to give written dispute notice within six months of the invoice date or the charges are deemed uncontested. . . . Viking can produce no evidence that it provided AT&T with the requisite written dispute notice for *any* of the invoices it now claims contained overcharges. Viking's failure to provide the requisite notice means that, as a matter of law, it has waived any claims that the invoices contained overcharges. Accordingly, AT&T is entitled to summary judgment on Viking's [Federal Communications Act] claim.

*Viking Communications, Inc. v. AT&T Corp.*, No. 05-1078 , Brief of AT&T Corp. in Support of its Motion for Summary Judgment (D.N.J. Dec. 1, 2005) (ECF No. 11-2) (emphasis added); *see also id.* at 10 (arguing that AT&T's charges are "deemed correct" and Viking's claims for overcharges are waived and citing *MCI WorldCom, Inc. v. Teletower, Inc.*, 2002 U.S. Dist. LEXIS 3911 (S.D.N.Y. 2002) (failure to give written notice under similar provision in the filed tariff entitled carrier to payment as a matter of law)); *MCI Telecomms. v. Ameri-Tel, Inc.*, 852 F.

Supp. 659, 666 n.5 (N.D. Ill. 1994) (failure to abide by written dispute provision in a tariff meant the invoice was correct and binding).[9]

In sum, AT&T has submitted and successfully argued that a tariff provision that requires a customer to file a written dispute in a specified period of time is not only lawful, but that *as a matter of law,* it is binding and enforceable. The IXCs should not now be heard to complain that NAT has violated the law by following AT&T's course of conduct.

**B. NAT's Provision Against Self Help**

The IXCs also argue that NAT's Tariff is unlawful because it attempts to put an end to the unlawful self help campaigns of AT&T and the nation's other largest carriers – actions which have been and remain unlawful. The right of a CLEC, such as NAT, to collect its tariffed access charges has been settled for nearly a decade.

The regulatory structure that governs CLEC access charges was established by the Commission in its 2001 *Seventh Report and Order.* In that Order, the Commission struck a compromise. It strictly regulated CLEC access rates to ensure that they were set at reasonable levels, and it deemed those tariffed rates to be conclusively reasonable, to ensure that IXCs could not refuse payment. In establishing this system, the Commission expressly noted its concerns over the IXCs' repeated use of self-help by simply refusing to pay tariffed access charges:

> Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates

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[9] *See also* Teleport Communications Atlanta, Inc., Access Services Tariff, Georgia P.S.C. No. 3, Original page 21, available at: http://serviceguide.att.com/tariff/business/ext/buss_tariffs.cfm?state=GA&stype_id=62& category=1 ("In the event of a billing dispute, the Customer may dispute a bill only by written notice delivered to the Company within 90 days after the invoice date and must include sufficient documentation. . . . Unless such notice and documentation are received in the timely fashion indicated above, the bill statement shall be deemed to be correct and payable in full by Customer."). Teleport Communications Atlanta is an AT&T subsidiary.

> has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate. AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable. We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute.[10]

The Commission's position on this matter has been stated repeatedly and unequivocally: "[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties...."[11] Particularly relevant to NAT's ongoing disputes with the non-paying IXCs, the Commission has stated that:

> a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations.[12]

The Commission has found that self-help refusals to pay access charges violate two sections of the Communications Act. Both the Commission and the courts have found that self-help constitutes a violation of Section 201(b) of the Communications Act, which prohibits

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10 *In re Access Charge Reform,* Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, 9932, ¶ 23 (Apr. 27, 2001) (citations omitted).

11 *In re Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone of Missouri, Inc.*, 4 FCC Rcd. 8338, 8339, ¶ 9 (1989) (*"Tel-Central"*). *See also Communique*, 10 FCC Rcd. at 10405, ¶ 36.

12 *Business WATS, Inc., v. AT&T Co.*, 7 FCC Rcd. 7942, ¶ 2 (1989) (citing *MCI Telecomms. Corp., Am. Tel. & Tel. Co. & the Pacific Tel. & Tel. Co.*, 62 FCC.2d 703, ¶ 6 (1976) (*"MCI Telecommunications Corp."*); *see also, Nat'l Commc'ns Ass'n v. AT&T Co.*, No. 93 CIV. 3707, 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001) (citing both cases).

"unreasonable practices."[13] In *MCI Telecommunications Corp.*, the Commission has also found that MCI's "self-help approach" violates Section 203 of the Act and "existing case law."[14] The Commission explained:

> Section 203(c) of the Act specifically forbids carriers from charging or collecting different compensation than specified in an effective tariff. Tariffs which are administratively valid operate to control the rights and liabilities between the parties. Rates published in such tariffs are rates imposed by law. Withdrawal from this position would invite unlawful discrimination.[15]

The Commission noted that its "finding that self-help is not an acceptable remedy does not leave MCI without recourse."[16] It directed MCI to Sections 206-209 of the Act "which set forth a complaint procedure to be used by persons who believe that a carrier is violating the Act."[17] Similarly, the IXCs' ability to seek relief from the Commission would not be barred if they complied with the requirements to pay and then dispute the charges assessed by NAT. Indeed, they should be required to do just that.

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13 *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007); *MGC Commc'ns, Inc. v. AT&T Corp.*, 14 FCC Rcd. 11647 (1999); *Tel-Central*, 4 FCC Rcd. At 8338.

14 *MCI Telecommunications Corp.*, 62 F.C.C.2d at 705-6.

15 *MCI Telecommunications Corp.*, 62 F.C.C.2d at 706, ¶ 6.

16 *Id.*

17 *Id.*; Similarly, the Commission, on its own motion, has declared that carriers are not at liberty to block or choke traffic directed to rural carriers, generally, or to conference calling services, specifically. *See In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers*, Call Blocking by Carriers, WC 07-135, 22 FCC Rcd. 11629, 11631, ¶ 5 (2007) ("Call Blocking Order") ("we seek to alleviate any possible confusion by clarifying that carriers cannot engage in self help blocking traffic to LECs [providing service to conference call companies].") ; *id.* ¶ 6 ("Specifically, Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way.") (citations omitted).

### C. The Tariff's Attorneys' Fees Provision is Lawful

In a last ditch effort to try to continue taking NAT's services for free, the Joint Petition argues that the tariff's attorneys' fees provision is unjust and unreasonable and presents grounds for which the tariff may be rejected. *See* Joint Petition at 24-25 (describing the attorneys' fee provision as a "shake down"). Despite these assertions of unlawfulness, the Joint Petition includes not even the smallest bit of legal support for this argument and it should give the Commission little pause.

Several courts have awarded carriers attorney fees pursuant to their state and federal tariffs[18] and the Joint Petition fails to cite to a single rule or FCC analysis that prevents carriers from including attorneys' fee provisions in their tariffs. Indeed, this provision is especially appropriate here, where the nation's largest telecommunications carriers have been intentionally withholding payments from small, competitive carriers such as NAT, in violation of long-standing precedent, specifically for the purpose of applying economic pressure to these carriers. Certainly, an attorneys' fee provisions will not stop these IXCs from continuing their unlawful behavior, but it will help prevent small carriers from being forced out of business merely for asserting their legal rights.

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[18] *See, e.g., WorldCom, Inc. v. Commc'ns Net. Int'l, Ltd.*, 386 B.R. 496, 515-16 (S.D.N.Y. April 30, 2008) (awarding attorney fees, in part, because "The Tariffs also contemplate an award of attorneys' fees."); *AT&T Corp. v. JMC Telecom, LLC*, No. Civ. 99-2578, 2005 WL 2086194 (D. N.J., Aug. 26, 2005), at *2 (awarding attorney fees to AT&T because "...Tariff No. 1, which provides in Section 2.5.3: "In the event [AT&T] incurs fees and expenses, including attorney's fees, in collecting or attempting to collect, any charges owed by [JMC], [JMC] shall be liable to [AT&T] for the payment of all such fees and expenses incurred." (alternation in original)); *Worldcom Techs., Inc. v. Sequel Commc'ns, Inc.*, No. 00 Civ. 1598, 2001 WL 1346178, at *1 (S.D.N.Y. Nov. 1, 2001) (awarding attorney fees and observing that "paragraph 2.5.4. of the FCC Tariffs incorporated by reference into the contract provided that '[i]n the event the Company incurs fees or expenses, including attorneys' fees, court costs, costs of investigation and related expenses in collecting or attempting to collect, any charges owed the Company, the customer will be liable to the Company for the payment of all such fees and expenses reasonably incurred.").

As with each of the fallacious arguments asserted by the IXCs, the attorneys' fees provision provides no basis to suspend or reject the Tariff.

## CONCLUSION

For these reasons, the Division should reject the IXCs' request to reject or suspend NAT Tariff No. 2, Transmittal No. 3. The transmittal should be allowed to become effective as of 12:01 am Eastern on November 30, 2010.

Dated: November 24, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Scott Swier, hereby certify that on this *24rd day of November, 2010*, a true and correct copy of the foregoing *NATIVE AMERICAN TELECOM, LLC'S RESPONSE TO THE JOINT PETITION OF AT&T, VERIZON, QWEST, SPRINT AND T-MOBILE TO REJECT OR, IN THE ALTERNATIVE, SUSPEND AND INVESTIGATE* was filed via *First Class mail, hand delivery *, and electronic mail *** on the following persons:

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