

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NORTH COUNTY
COMMUNICATIONS CORPORATION,
Plaintiff,
v.
SPRINT COMMUNICATIONS
COMPANY, L.P.,
Defendant.

Case No.: 09-cv-2685-CAB (JLB)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter is before the Court for the determination of contract claims involving the provision of telephone service by North County Communications Corp. (“NCC”) to Sprint Communications Co., L.P. (“Sprint”). The dispute arises out of connection fees NCC charged Sprint for delivering calls from Sprint’s long-distance network to NCC’s customers.

I. Procedural Background

NCC filed a complaint against Sprint for breach of contract and breach of the implied covenant of good faith and fair dealing, along with several other causes of action, alleging Sprint failed to pay NCC for terminating access services that NCC provided to Sprint. [Doc. No. 3; Second Am. Compl., Doc. No. 56.] Sprint answered and counterclaimed for

1 breach of contract (along with several other causes of action), alleging NCC billed for non-
2 reimbursable access service, at incorrect rates, and for services not rendered. [Doc. No.
3 19.]

4 As the result of numerous motions, the Court dismissed certain claims and
5 counterclaims of both parties. [Doc. Nos. 123 and 165.] Under the doctrine of primary
6 jurisdiction, the Court dismissed equitable claims that require a determination from the
7 Federal Communications Commission (“FCC”) as to whether NCC is entitled to payment,
8 and if so, the reasonable rates NCC could charge Sprint. The parties were directed to
9 submit questions to the FCC for administrative ruling. [Doc. No. 195.] The FCC case is
10 still pending.

11 After entry of the dismissals, what remained were NCC’s contract claim, Sprint’s
12 contract counterclaim, and the parties’ affirmative defenses. Although these claims are
13 based on a contract between the parties, Sprint argued that the FCC also had primary
14 jurisdiction to determine certain rights and obligations of the parties during the contract
15 period (January 1, 2002 through May 7, 2010) that would be germane to issues of contract
16 interpretation. The Court was persuaded and referred the question of whether FCC
17 regulations govern terms of the contract to the FCC. The Court then stayed the litigation
18 of this contract dispute. [Doc. No. 195.] That was in May 2013. Over a year later,
19 however, the parties reported that the FCC complaint for determination of the referral
20 questions had not yet been filed, so on June 18, 2014, on NCC’s motion, the Court lifted
21 the stay as to the contract claims. [Doc. No. 230.]

22 On August 3, 2015, the matter proceeded to a bench trial on the contract claims.
23 Based upon the testimony and exhibits received into evidence at trial, and after full
24 consideration of the parties’ legal arguments, the Court issues the following Findings of
25 Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52(a).¹
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28 ¹ Any portions of this opinion expressed as factual findings that should be considered conclusions of law
are so designated, and any legal conclusions that should be considered factual findings are so designated.

II. Findings of Fact and Conclusions of Law

A. Switched Access Service

The entities in this case are telecommunications carriers. When a caller originates a long-distance or toll call, the caller's local exchange carrier ("LEC") transmits the call to an interexchange carrier ("IXC"). The IXC then transmits the call via its long-distance network and hands it off to the LEC at the terminating location to deliver the call to the recipient, that LEC's local subscriber. There are incumbent LECs ("ILECs") in local service areas, and competitive LECs ("CLECs") that provide services to local area subscribers in competition with the ILECs. The LEC, whether an ILEC or a CLEC, charges the IXC for providing the originating and/or terminating connection, known as switched access service.

LECs are required to publish tariffs that identify the LEC's rates, terms, and conditions for providing telecommunications service to the public. An LEC's tariff for interstate switched access service is filed with the FCC. For intrastate switched access service, a tariff is commonly filed with the appropriate state commission. Unless an IXC and an LEC have an agreement otherwise, the LEC charges the IXC at its tariff rate for the service area and according to the specific functionality provided.²

In 2001, the FCC examined the rates CLECs charged for terminating access for interstate calls and found that, because the IXC paid the terminating access fee but had no control over the terminating access provider or the rate being charged, the CLECs had an incentive to charge excessive rates for terminating access service. *See In re Access Charge Reform*, Seventh Report & Order, 16 FCC Rcd. 9923 (2001) at ¶¶10-11 ("the CLEC Access Charge Order"). The FCC also found that, in response to what was perceived to be excessive billing by CLECs, some IXCs were unilaterally recalculating the CLEC rate to match the ILEC rate for the same service area and paying the lesser amount, resulting in

² Determination of the proper switched access rate depends on the functional elements the LEC provides, as well as the call direction (originating or terminating).

1 litigation between the carriers. Of even greater concern, some IXCs stopped delivering
2 phone traffic to CLECs that the IXC perceived to be overpriced. *Id.* at ¶¶23-24.

3 Concerned with the potential disruption of the country's telecommunications
4 network, *id.* at ¶ 24, the FCC set the ILEC's interstate access charge for a service area as
5 the benchmark level for the interstate access service rate. Citing the historic, extensive
6 regulatory process that determined the ILEC interstate rates, the FCC concluded that the
7 ILECs' rates were presumptively just and reasonable. Therefore, a CLEC could charge the
8 IXC for access service at or below the ILEC benchmark, absent a negotiated agreement
9 with the IXC for a different rate. The FCC further observed that, should a CLEC seek a
10 higher return for its access services, it could do so as a surcharge on its own subscribers,
11 who in turn could elect to pay the charge or find an alternative provider. *See id.* at ¶¶38-
12 43.

13 To avoid unduly burdening the CLECs, the 2001 FCC order set forth a compliance
14 plan for CLECs to reduce their access service charges to the competing ILEC's benchmark
15 rate over a three-year period. By the third year, the CLEC was required to charge at or
16 below the ILEC's rate. If the CLEC was already charging less than the competing ILEC's
17 benchmark rate, whether by tariff or pre-existing contract, the CLEC was prohibited from
18 raising its rate to the benchmark rate. In addition, CLECs entering new markets had to
19 charge the competing interstate ILEC benchmark rate or lower, unless they had an
20 agreement with the IXC for different terms.

21 **B. The Parties' Switched Access Service Agreement**

22 Sprint is an IXC. NCC is a registered CLEC for various local service areas,
23 including areas in California, Arizona, Oregon, and Illinois. NCC invoices Sprint for
24 interstate and intrastate terminating access services.

25 When the FCC was reviewing switched access service rates, Sprint was disputing
26 NCC's rates for switched access service as significantly higher than those of the ILECs
27 serving the same service areas. (Trial Ex. 8.) In 2001, NCC and Sprint settled their rate
28 dispute regarding past invoices. And as to the rates NCC would bill Sprint for interstate

1 and intrastate access going forward, NCC and Sprint entered into a contract, the Switched
2 Access Service Agreement (“Agreement”), effective January 1, 2002. (Trial Ex. 1.)

3 The Agreement requires NCC to offer switched access service to Sprint under the
4 Agreement’s terms, conditions, and pricing principles, within each geographic area in
5 which NCC, directly or through an affiliate,³ provides local exchange services. (*Id.*, Sec.
6 B, ¶2.)

7 With regard to interstate switched access charges, NCC contracted to charge Sprint
8 the rates for switched access service as set forth in the FCC’s CLEC Access Charge Order,
9 outlined above. Consistent with the Order, NCC was obligated by 2004 to charge Sprint
10 no higher than the rate that the competing ILEC in the same service area charged for the
11 same functionality. Both parties also agreed to abide by any future changes in the rights,
12 duties, limitations, and obligations created by modification of the CLEC Access Charge
13 Order. (*Id.*, Schedule A, ¶1.)

14 As for intrastate rates, NCC and Sprint agreed that NCC’s rate in each service area
15 would be no higher than the higher of the current ILEC intrastate rate in the serving area
16 for the same functionality, or the fixed rate set forth in Schedule A. (*Id.*, Schedule A, ¶2.)
17 The Agreement’s fixed rates expired on June 19, 2005, after which presumably the ILEC
18 rate would apply.

19 The Agreement also includes a “most favored nations” clause, which states that,
20 should NCC provide switched access service to another IXC at a price less than the
21 applicable terms of the Agreement, Sprint would receive the same pricing. (*Id.*, Sec. B,
22 ¶6.C.)

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24
25 ³ The president and sole shareholder of NCC is Todd Lesser. Mr. Lesser is also the president and sole
26 shareholder NCC’s affiliates: North County Communications Corp. of California (“NCC of CA”); North
27 County Communications Corp. of Arizona (“NCC of AZ”); North County Communications Corp. of
28 Illinois (“NCC of IL”); and North County Communications Corp. of Oregon (“NCC of OR”). During the
term of the contract with Sprint, either NCC or one of its affiliates, could provide switch access service.
The contract with Sprint expressly permitted NCC to provide local exchange services and switched access
through an affiliate. (Trial Ex. 1, ¶¶2, 8.)

C. The 2008 Dispute

NCC contends that, from 2002 through May 7, 2010, it invoiced Sprint for interstate and intrastate switched access service under the terms of the Agreement. The parties continued to have rate disagreements during that time period. Until 2008, the parties were apparently able to resolve their disputes. But in March 2008, Sprint notified NCC in writing that it was withholding payment of NCC's February 2008 invoice for all terminating switched access charges, because the nature of NCC's exchange service did not obligate Sprint to compensate NCC for terminating calls. (Trial Ex. 9.) Thereafter, Sprint provided NCC written notice each month that it was continuing to withhold payment on the same basis. Sprint formally terminated the Agreement, effective May 7, 2010,⁴ and has not paid NCC invoices for terminating switched access service for the months of February 2008 through May 2010. NCC's complaint in this litigation seeks payment for those services.

Sprint, in its breach-of-contract counterclaim, contends it is not obligated to pay NCC's terminating switched access charges because NCC was not acting as a local exchange service provider and therefore was not providing compensable switched access service. Thus, Sprint seeks reimbursement for terminating switch access service payments made to NCC from April 2006 through February 2008, when Sprint began withholding payment. Sprint also asserts that NCC's invoices did not comply with the terms of the Agreement because NCC overcharged Sprint and billed for services not provided. Thus, Sprint maintains, NCC did not present Sprint with a "reasonably acceptable bill" as required by the Agreement, so Sprint was not obligated to pay any charges. (Trial Ex. 1, Sec. B, ¶6.B.)

⁴ Sprint's obligations, if any, for payment withheld after termination of the Agreement are not subject matter of this litigation. Claims related to the post-termination obligations of the parties were referred to the FCC for administrative ruling.

D. The Applicable Law

The Agreement provides that “California law governs all substantive matters pertaining to the interpretation and enforcement of the terms of the Agreement. In addition, this Agreement is expressly subject to the Communications Act of 1934, as amended, and rules promulgated thereunder.” (*Id.*, Sec. B, ¶11.C.)

To prevail on its breach-of-contract claim, NCC must prove by a preponderance of the evidence that: (1) NCC and Sprint entered into a contract; (2) NCC did all, or substantially all, of the significant things that the contract required it to do; (3) all conditions required by the contract for Sprint’s performance had occurred; (4) Sprint failed to do something that the contract required it to do; and (5) NCC was harmed by that failure. *See* Judicial Council of California Civil Jury Instructions (2011), No. 303.

“It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part, or that it was excused from performance. Similarly, where defendant’s duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired.” *Consolidated World Investments, Inc. v. Lido Preferred Ltd*, 9 Cal. App. 4th 373, 380 (1992) (internal citations omitted).

E. NCC’s Performance under the Agreement

1. NCC Did Not Provide Local Exchange Service

The Agreement provides that NCC will offer switched access service to Sprint within each geographic area in which NCC provides local exchange service, but the Agreement does not define “local exchange service.” The Communications Act of 1934, as amended, defines “telephone exchange service” as “service within a telephone exchange . . . by which a **subscriber** can originate and terminate a telecommunications service.” *See* 47 U.S.C. §153(54) (emphasis added).⁵ The Agreement provides that NCC can charge Sprint terminating switched access fees when it terminates calls from Sprint to an NCC

⁵ The Agreement states that it is expressly subject to the Communications Act of 1934, as amended, and rules promulgated thereunder. Therefore, to interpret terms of the Agreement not expressly defined in the Agreement, the Court relies upon the industry definitions set forth in the federal statute.

1 local exchange subscriber. Sprint contends that NCC has no “subscribers” as that term is
2 applied by the FCC, and thus NCC’s terminating traffic does not qualify as compensable
3 switched access service.

4 NCC terminates calls to a single entity, known as HFT. The president and sole
5 shareholder of HFT is NCC’s owner, Todd Lesser.⁶ (Pretrial Order, Doc. No. 307, ¶3.)
6 HFT is a conference bridge service comprised basically of computer servers and software
7 that connect dozens, even hundreds, of callers to a “virtual meeting room.” HFT’s lines
8 are inbound only, and it lacks 911 service, operator service, and any ability to make
9 outbound calls. (*Id.*, ¶25.)

10 In each of the areas in which NCC or its affiliates operates as a CLEC, HFT’s
11 conference bridge equipment is located in the same building as NCC’s switch and is
12 connected to the switch by a short cable, or jump cord. (*Id.*, ¶¶10-13.) When NCC
13 connects calls from the Sprint long-distance lines to the HFT conference bridge, NCC
14 charges Sprint an interstate or intrastate terminating switched access fee.

15 There are no written contracts between HFT and NCC or its affiliates for the
16 provision of local exchange services. (*Id.*, ¶26.) Mr. Lesser testified that services between
17 his various entities are based on oral arrangements (presumably with himself) that are not
18 memorialized. NCC represented however in verified interrogatory responses that it bills
19 HFT monthly in accordance with its filed tariffs in Arizona, California, and Illinois (Trial
20 Exs. 142, 143), and NCC is bound by its interrogatory responses.⁷ Mr. Lesser’s attempt on
21 the stand to repudiate or alter that response is rejected.

24 ⁶ Based on the evidence presented at trial, the Court finds that Mr. Lesser is also the only employee of
25 NCC, its affiliates, and HFT. (Pretrial Order, ¶1.) Mr. Lesser obliquely alluded to some technical and
26 sales support staff he used at unidentified times, but his testimony was vague and generally lacked
27 credibility. The Court concludes that these companies are all owned and operated solely by Mr. Lesser
28 for his personnel financial advantage.

⁷ NCC does not have a tariff in Oregon and did not provide evidence or a formula for its purported
monthly invoices to HFT for telephone services to Oregon exchanges. NCC’s arrangement for services
to HFT in Oregon is a matter of pure speculation.

1 NCC claims it sent monthly invoices to HFT for the provision of telephone services
2 for each service area. (Trial Exs. 97-101.) The invoices NCC produced to verify its
3 monthly billing practice, however, were discredited as generated post-litigation to create
4 the appearance of a record of an arms-length *bona fide* business arrangement between NCC
5 and HFT. Although NCC provided checks as evidence of payments from HFT to NCC,
6 the checks do not corroborate the monthly generation of invoices from NCC, as they do
7 not refer to any invoice by number or other corresponding billing record. (Trial Ex. 18.)
8 The checks show that Mr. Lesser moved funds from HFT to NCC, but they do not
9 demonstrate that the payments were made in relation to invoices for the provision of
10 monthly telephone services as required by NCC's tariffs, or in accordance with the tariffs.

11 When compared, the invoice amounts (Trial Exs. 100, 101) do not match the terms
12 and tariff rates NCC represented comprised those amounts. For example, NCC represented
13 that in California it provided 252 lines to HFT at a minimum tariff rate of \$10.32 per line,
14 per month.⁸ (Trial Exs. 142, 143.) Before applicable taxes and surcharges, this should
15 have resulted in monthly invoices of at least \$2,600.64. But according to NCC's invoices,
16 it billed HFT \$2,241.75 each month, before taxes and surcharges. (Trial Ex. 100.)

17 As to Illinois, NCC represented it provided 96 lines to HFT at the tariff rate of \$15.00
18 per line, per month. (Trial Exs. 100, 101.) Before applicable taxes and surcharges, this
19 should have resulted in monthly invoices of \$1,440.00. But according to NCC's invoices,
20 it billed HFT \$852.00 each month, before taxes and surcharges. (Trial Ex. 101.)

21 In Arizona, the tariff rate was set as a range of \$5.00 to \$50.00 a month. (Trial Ex.
22 143.) Listing a range for charges on a tariff is a disapproved practice as it does not allow
23 a potential customer to determine, based on the face of the tariff, what it will be charged.
24 See 47 C.F.R. §61.2(a) (tariffs must contain clear and explicit statements regarding rates).
25 Specifically as to HFT, NCC did not identify the actual rate it contends it charged HFT in
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28 ⁸ For certain specific California exchanges the tariff provides monthly rates per line that are greater than
\$10.32. (Trial Ex. 143, pg. 1219, fn.1.)

1 Arizona. NCC represented it provides 216 lines to HFT in Arizona (Trial Ex. 142) and
2 claimed to invoice HFT in Arizona a total of \$2,212.83 a month (Trial Exs. 98-99), which
3 averages a monthly fee of \$10.24 per line. While this falls within the range set forth in the
4 tariff, the number of lines NCC claims to provide HFT is not credible, as examined below,
5 so the real business arrangement between NCC and HFT in Arizona is at best uncertain.

6 Additionally, on the purported monthly invoices, the surcharge and tax calculations
7 are not broken out with any specificity. The total is identical for each invoice each month,
8 but there should have been at least minor variations of the tax and surcharge calculations
9 over the represented time period. The invoices are false, post-litigation creations. They
10 only serve to demonstrate that, contrary to NCC's verified discovery response, HFT was
11 not paying NCC's tariff rates, as any unaffiliated subscriber would have been required to
12 do. NCC provided no credible evidentiary support that HFT is a *bona fide* subscriber to
13 NCC's services.⁹

14 Based on the number of minutes NCC billed to Sprint for terminating switched
15 access to HFT, the Court also finds that the number of lines NCC claims it provided HFT
16 understates the number it needed to provide the service. For example, NCC represented it
17 provided HFT with 216 lines in Arizona. (Trial Ex. 142.) In October 2009, NCC billed
18 Sprint for 10,069,354 usage minutes for interstate and intrastate switched access
19 connections. (Trial Ex. 2.) There are 1440 minutes in a day and 31 days in October,
20 yielding a maximum of 44,640 minutes of potentially available connection time per line in
21 October 2009. If each of the 216 lines NCC claims HFT subscribed to at tariff rates
22 operated at full capacity, NCC could have connected a total of 9,642,240 usage minutes to
23 HFT in October 2009. Even accepting the unlikely scenario that Sprint was the only IXC
24 that NCC billed for terminating switched access in Arizona during October 2009, there are
25 still 427,114 minutes NCC billed to Sprint that NCC did not have the capacity to deliver
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28 ⁹ NCC also stipulated that, due to its failure to preserve relevant billing information, the Court may
presume that HFT was not billed in accordance with the rates in NCC's tariffs. [Doc. No. 201.]

1 (10,069,354 – 9,642,240 = 427,114). Nine more lines would have been necessary just to
2 deliver the Sprint calls. It is therefore reasonable to infer that NCC underrepresented the
3 number of lines provided to HFT in its interrogatory response at least in part to make the
4 HFT payment records it submitted at trial appear to reconcile with NCC's tariff rates for
5 monthly service.

6 These discrepancies and misrepresentations all demonstrate that NCC and HFT were
7 not in a true carrier-customer relationship in accordance with NCC's (or its affiliates')
8 tariffs. NCC generated false and misleading documents, and provided false discovery
9 responses in this case, to create a record to suggest NCC provides local exchange service
10 to HFT in accordance with its tariffs.¹⁰ It does not. Nor does it provide local exchange
11 service to any local resident or unaffiliated business in any exchange areas. NCC has no
12 subscribers purchasing tariffed services. NCC is not operated as a CLEC providing local
13 exchange service to local residents and local businesses in an exchange area to compete
14 with the ILEC.

15 Mr. Lesser operates NCC and its affiliates to terminate calls to Mr. Lesser's adult
16 chat line company, HFT. Through this internal, undocumented arrangement, NCC at a
17 minimum provides HFT with exchange service at rates not available to other potential
18 subscribers. The evidence strongly supports a finding that the whole payment arrangement
19 between NCC and HFT is a sham business deal designed to create the illusion of a *bona*
20 *fide* carrier-customer relationship in compliance with NCC's regulatory and tax obligations
21 (as an authorized CLEC) and its contractual obligation with Sprint.

22 Mr. Lesser has orchestrated a business plan that allows him to generate telephone
23 traffic to his own businesses, with the goal of triggering switched access terminating
24 service for which he demands payment from IXC's, like Sprint. Mr. Lesser is exploiting a
25 _____

26 ¹⁰ Mr. Lesser's testimony that NCC provides exchange service to HFT based on oral contracts not its
27 tariffs is disregarded in its entirety. It contradicts NCC's previous verified representation it bills in
28 accordance with its tariffs. Further there was no credible corroborating evidence that such purported oral
contracts with terms, conditions and rates for the provision of local exchange service were ever formed
between NCC and HFT.

1 market opportunity, and was described by NCC's counsel at trial as an arbitrageur, taking
2 advantage of an "arbitrage opportunity." The FCC has stated, however, that the purpose
3 of introducing CLECs to the regulatory system was to promote competition for the benefit
4 of end-users, not to create arbitrage opportunities for the carriers. *See generally, CLEC*
5 *Access Charge Order*, ¶33.

6 More specifically, the FCC has held that such artificial business practices designed
7 to exploit the regulatory framework do not generate compensable terminating switched
8 access service. *See Qwest Commc'ns Corp v. Farmers & Merchants Mut. Tel Co.*, Second
9 Order on Reconsideration, 24 FCC Rcd. 14801 (2009). In *Qwest*, the FCC examined the
10 business relationship between Farmers, a CLEC, and conference call companies that
11 Farmers asserted were subscribers to its local exchange service. The FCC determined that
12 Farmers structured its service to the conference call companies to avoid strict adherence to
13 the terms of its filed tariffs. Concluding that Farmers' business arrangement with the
14 conference call companies was not a subscriber relationship in accordance with Farmers'
15 tariff, the FCC determined that Farmers was not entitled to charge Qwest, the IXC,
16 switched access service charges. The access charges to Qwest were deemed unjust and
17 unreasonable in violation of the Communications Act, 47 U.S.C. §201(b). *Id.* at ¶¶10, 26.

18 NCC correctly contends that the FCC did not find that terminating switched access
19 service to a chat line or conference calling company *always* results in unjust and
20 unreasonable charges in violation of the Communications Act. In a *bona fide* local
21 exchange subscriber relationship, the fact that the CLEC's subscriber is a chat line provider
22 does not *per se* make the provision of terminating switched access service non-
23 compensable. But when the relationship between the CLEC and the purported subscriber
24 is a subterfuge and does not adhere to the terms of the CLEC's filed tariffs, the FCC has
25 found charges to the IXC for access service to be a violation of the Communications Act
26 and non-compensable. Such are the facts of this case.

27 NCC argues that the Agreement's language that Sprint will pay "for all traffic Sprint
28 terminates to North County" makes irrelevant whatever NCC's arrangement is with HFT.

1 This argument is not persuasive. The Agreement is premised on NCC acting as a local
2 exchange carrier, providing local exchange service. NCC made a wilfully false attempt to
3 demonstrate a business arrangement with HFT in accordance with its tariffs to create the
4 impression HFT is a legitimate subscriber. NCC's attempt failed, and the record shows it
5 is not acting as a local exchange service provider.

6 The Agreement between NCC and Sprint states it is expressly subject to the
7 Communications Act of 1934, as amended, and rules promulgated thereunder. The
8 Agreement requires that NCC provide local exchange service. Having considered the FCC
9 interpretation and application of the Act to the meaning of providing local exchange
10 service, the Court finds that NCC's arrangement with HFT does not constitute the provision
11 of local exchange service. The provision of local exchange service is a condition NCC
12 must meet to trigger Sprint's obligation to pay terminating switched access service.

13 NCC therefore has failed to prove it did all, or substantially all, of the significant
14 things that the Agreement required it to do. The condition that NCC provide switched
15 access service as a local exchange carrier is a precondition to Sprint's performance (i.e.,
16 payment of terminating switched access service charges), and it did not occur. NCC's
17 claim for breach of contract therefore fails.

18 **2. NCC Did Not Provide Bills Under the Terms of the Agreement.**

19 The Agreement requires that NCC offer Switched Access Service to Sprint under
20 the Agreement's terms, conditions, and pricing principles. (Trial Ex.1, Sec. B, ¶2.)
21 Schedule A to the Agreement sets forth the rates and charges. (*Id.*, Sec. B, ¶5.A, Schedule
22 A.) With regard to interstate switched access service, NCC's switched access service rate
23 was capped by the rate of the competing ILEC in the service area. Even if the Court found
24 Sprint responsible under the Agreement to pay terminating switched access charges for
25 calls NCC terminated to HFT, Sprint was not presented with a bill in accordance with the
26 terms of the Agreement.

27 NCC acknowledged that it invoiced Sprint at interstate rates well in excess of the
28 benchmark competing ILEC rates in Arizona, Oregon, and California. Yet NCC did not

1 offer a rational explanation for the significant overbilling. Mr. Lesser testified he billed
2 what “someone” told him was the appropriate rate. Further, he was aware of the overbilling
3 but did not take steps to correct it.¹¹

4 From February 2008 through May 2010, NCC billed Sprint \$0.005803 per minute
5 in Arizona and Oregon, when the proper composite ILEC rate for the elements purportedly
6 performed¹² was \$0.002985 per minute. (Trial Ex. 133.) In California, NCC billed Sprint
7 \$0.009547 per minute, when the proper composite ILEC rate for the elements purportedly
8 performed was \$0.007592 (from February 2008 through July 2009) and \$0.007504 (from
9 August 2009 through May 2010). (*Id.*)

10 With regard to interstate switched access service in Illinois, NCC billed \$0.024435
11 per minute from February 2008 through July 2008, \$0.028085 per minute from August
12 2008 through July 2009, and \$0.033045 per minute from August 2009 through May 2010,
13 for an average of \$0.028522 per minute. NCC claims this was the benchmark rate of the
14 Leaf River Telephone Exchange, a rural LEC, which NCC asserts was the competing ILEC
15 for its Illinois service.

16 Although NCC assigned HFT a Leaf River exchange number, HFT is not located in
17 Leaf River, Illinois. HFT’s bridging equipment is located at NCC’s switch location in
18 DeKalb, Illinois. The ILEC for DeKalb is Verizon, with a benchmark rate of \$0.019653
19 per minute. (*Id.*)

20 Mr. Lesser contended at trial that the assigned exchange number, not the location of
21 the subscriber, determines the competing benchmark rate. He testified that NCC could
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23 ¹¹ Mr. Lesser claimed the overbilling was offset by NCC’s purported *underbilling* of intrastate rates, and
24 therefore was not a material breach. The intrastate rates however were billed in accordance with the “most
25 favored nations” clause of the Agreement. (Trial Ex. 1, Sec.B, ¶6.C.) [Doc. No. 257.] NCC had no
26 legitimate basis to claim it regularly underbilled Sprint such that it justified its knowing overbilling of
27 Sprint every month.

28 ¹² NCC admitted it did not perform tandem switching, even though it charged at rates incorporating that
function. Tandem switching is excluded from the composite rate proposed as the correct ILEC interstate
rate. Although NCC offered no evidence regarding whether it provides all the other functional elements
that constitute the composite rate, the calculations include all the other functional elements that comprise
terminating switched access service and therefore assume the highest rate NCC could have properly billed.

1 charge the competing ILEC rate for a rural exchange, regardless of where HFT was located,
2 if HFT was assigned an exchange number in that rural service area.

3 The FCC's CLEC Access Charge Order, which is the guide for the interstate rates
4 under the Agreement, does not support this proposition. The FCC's order discusses at
5 length the limitations to qualify as a rural exchange carrier. The CLEC's subscribers'
6 physical locations are relevant to establishing access charges. If any portion of a CLEC's
7 access traffic terminates to an urbanized area as defined by the Census Bureau, a CLEC is
8 ineligible for the rural exemption to the benchmark rule. *See* CLEC Access Charge Order,
9 ¶76; 47 U.S.C. § 153(37); 47 C.F.R. § 61.26(a)(6). NCC terminates 100% of its Illinois
10 access traffic to DeKalb, the physical location of HFT. DeKalb is an urbanized area as
11 defined by the U.S. Census Bureau. *See* [www.census.gov/geo/maps-](http://www.census.gov/geo/maps-data/maps/ua2kmaps.html)
12 [data/maps/ua2kmaps.html](http://www.census.gov/geo/maps-data/maps/ua2kmaps.html). Thus, NCC does not qualify as a rural CLEC.

13 NCC's competing ILEC for its traffic terminating in DeKalb is Verizon, not the Leaf
14 River Telephone Exchange. NCC's billing practice of applying a rural exchange rate is a
15 violation of the CLEC Access Charge Order, which governs the pricing principles under
16 the Agreement for interstate access charges in Illinois. Thus, NCC overcharged Sprint
17 every month in Illinois as well.

18 As NCC stated, it was "required to charge Sprint access rates in accordance with the
19 FCC's rules." NCC's Trial Brief, Doc. No. 285, at 9. NCC's regular and significant
20 monthly overcharges did not meet its contract obligation to bill Sprint under the terms,
21 conditions and pricing principles of the Agreement, which incorporates the FCC's rules.
22 On a monthly basis, NCC charged Sprint approximately 27% more than the Agreement
23 allowed for terminated calls in California, 45% more for terminated calls in Illinois, and
24 94% more for terminated calls in Arizona and Oregon. These charges violated the
25 Communications Act of 1934, which prohibits a regulated carrier from imposing an
26 unreasonable charge. 47 U.S.C § 201(b). Thus, NCC's bills neither conformed to the
27 FCC's rules nor satisfied NCC's contractual obligation to present a reasonably acceptable
28 bill.

On this separate ground, the Court finds NCC failed to demonstrate that it did all or substantially all of the significant things that the contract required it to do. The Agreement required NCC to provide a reasonably acceptable bill in accordance with the terms of the Agreement as a precondition to Sprint's performance (i.e., payment of terminating switched access service charges), and this precondition did not occur. "A bedrock principle of California contract law is that '[h]e who seeks to enforce a contract must show that he has complied with the conditions and agreements of the contract on his part to be performed.'" *Brown v. Dillard's Inc.*, 430 F.3d 1004, 1010 (9th Cir. 2005). NCC's failure to perform excuses Sprint's performance. Thus, NCC's breach-of-contract claim fails on this basis as well.

For the reasons stated above, the Court finds for Sprint on NCC's Breach of Contract Count.

F. NCC's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

NCC has not established a claim for breach of the implied covenant of good faith and fair dealing. First, NCC did not plead breach of the implied covenant as a separate count. Instead, it exists only as part of the caption of Count One for Breach of Contract in NCC's Second Amended Complaint. [Doc. No. 56.] NCC does not allege facts separate from those in support of its breach-of-contract claim, nor does it seek different damages. [*Id.*, ¶¶36-44.] The Court finds that no additional claim is actually stated. *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1395 (1990).

Additionally, NCC failed to establish the elements of a claim for breach of the implied covenant of good faith and fair dealing. For instance, NCC did not demonstrate that it performed under the contract or that all conditions required for Sprint's performance had occurred, which are both necessary elements of a breach-of-the-implied-covenant claim. *See* Judicial Council of California Civil Jury Instructions (2011), No. 325. NCC failed to demonstrate that Sprint unfairly interfered with NCC's right to receive benefits under the contract. NCC provided no evidence of harm resulting from Sprint's conduct,

1 other than its claim for contract damages. Thus, the Court finds for Sprint on NCC's claim
2 for breach of the implied covenant of good faith and fair dealing.

3 **G. Sprint's Counterclaim for Breach of Contract**

4 As of February 2008, Sprint began withholding payment of NCC's invoices for
5 switched access service, based on its assertion that NCC was not providing compensable
6 service. Prior to February 2008, Sprint paid NCC for such charges. On April 26, 2010,
7 Sprint filed its counterclaim for breach of contract, on grounds that NCC billed for traffic
8 not subject to switched access service. [Doc. No. 19.] Sprint seeks to recover payments it
9 made to NCC prior to February 2008. [*Id.*]

10 Sprint demonstrated at trial that NCC was not operating as a local exchange carrier
11 when it billed Sprint for terminating switched access service provided to HFT. NCC's bills
12 for such service were a material breach of the Agreement, and NCC was not entitled to the
13 monies collected from Sprint under the Agreement. Further, Sprint's payment of the
14 tendered invoices does not constitute a waiver of its right to claim that the invoices
15 breached NCC's contractual obligation and to seek recovery of its payments as damages.
16 (Trial Ex. 1, Sec. B, ¶11.A.)

17 The determinative issue here is whether to apply California's four-year statute of
18 limitations for breach of a written contract, or the Communications Act's two-year
19 limitations period for actions seeking recovery of damages or overcharges. Cal. Code Civ.
20 Proc. § 337; 47 U.S.C. § 415(b), (c). Under the California limitations period, Sprint could
21 recover for payments made beginning April 26, 2006. But under the Communications
22 Act's limitations period, Sprint could not recover for payments made prior to April 26,
23 2008.

24 The Agreement states that it is governed by California law. (*Id.*, Sec. B, ¶11.C.) Yet
25 it also states, as to interpretation and enforcement, that it is expressly subject to the
26 Communications Act of 1934, as amended, and rules promulgated thereunder. (Trial Ex.
27 1, Sec. B, ¶11.A.)
28

1 Sprint argues that because this is a breach-of-contract action, the California statute
2 of limitations governs, so Sprint may recover payments it made for services billed in breach
3 of the Agreement from April 26, 2006 until Sprint stopped paying in February 2008.
4 Absent the language in the Agreement expressly subjecting it to the Communication Act's
5 rules for the interpretation and enforcement, the Court would agree. However, the parties
6 expressly incorporated the Communications Act's rules, which the Court considered and
7 applied in other aspects of the Agreement's interpretation. The Court finds the Act's
8 limitations period controls in light of the Agreement's language. Sprint therefore has no
9 recoverable payments within the statutory period, as it ceased making payments for
10 switched access service as of February 2008.

11 **III. Conclusion**

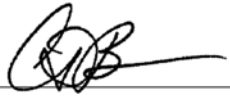
12 For the reasons set forth above, the Court finds for Sprint on Count I of NCC's
13 complaint for Breach of Contract and Breach of the Implied Covenant of Good Faith and
14 Fair Dealing. The Court finds for Sprint on Count VI of Sprint's Counterclaim for Breach
15 of Contract, but finds Sprint has no recoverable damages within the applicable statute of
16 limitations.

17 Judgment is entered in accordance with this order. All other causes of action having
18 been dismissed, the Clerk is directed to close this case.

19 The parties shall each bear their own attorney's fees and costs incurred in this action,
20 except that the Sprint may submit a Bill of Costs pursuant to 28 U.S.C. § 1920 within the
21 time allowed by law.

22 **IT IS SO ORDERED.**

23 Dated: September 11, 2015

24 
25 Hon. Cathy Ann Bencivengo
26 United States District Judge
27
28