

## Tentative Decision After Bench Trial

Case No. 2011-83845

Case Name: *North County Communications Corp. vs. Vaya Telecom Inc.*

Bench Trial: March 9-11, 2015, Dept. 72

### **1. Overview and Procedural Posture.**

This is a rather old case; the complaint was filed in early 2011 and assigned to Judge Foster. She was reassigned (later to retire), and the case was then supervised by Judge Curiel. He granted a pre-judgment attachment, and later was appointed by the President to the US District Court. The case was then reassigned to Judge Hayes. She has made numerous rulings in the case, including the imposition of a crucial issue/evidentiary sanction [upon the recommendation of the discovery referee, Hon. Steven R. Denton (Ret.)]; denial of motions attacking the jurisdiction of the Superior Court (versus that of the CPUC); and elimination of punitive damages claims. There are 12 volumes of court file. When the parties answered ready at the continued trial call, Judge Hayes was in trial in another matter. Thus was the case assigned to Dept. 72 for a bench trial on March 6, 2015.

The dispute involves the complex interplay among private business, regulation imposed by the FCC, and regulation imposed by the CPUC. Compare *Disenhouse v. Peavey*, 226 Cal. App. 4<sup>th</sup> 1096 (2014). Both NCC and Vaya are, in the parlance of post-Bell System world of telephone service, CLECs (competing local exchange carriers). NCC contends Vaya used NCC's "call termination services," for which it should now pay. Vaya contends NCC "does not operate a telephone company;" rather, it operates an arbitrage scheme to facilitate "free adult (often pornographic) entertainment." NCC's only customers are HFT and Jartel, which are owned (as NCC is) by Mr. Lesser.

Plaintiff filed 10 motions *in limine*; all were opposed. Defendant filed one motion *in limine*; it was opposed. The court reviewed the briefs over the March 7-8 weekend, and prepared detailed tentative rulings. These were argued and decided on Monday, March 9, and opening statements were thereafter given. Evidence commenced on March 10. As it turned out, the court heard from only two witnesses, and received more than 30 exhibits into evidence. Many of the exhibits were received without objection by stipulation, and some of these were never again mentioned by either side.

This is the court's tentative decision in accordance with CCP section 632 and CRC 3.1590. The tentative decision will become the Statement of Decision (SOD) unless either party takes the steps called for in CRC 3.1590(d). In this event, the court designates Ms. Taff-Rice to promptly prepare the proposed SOD. It must incorporate this tentative decision *in haec verba* (although the SOD may go beyond the TD), and must be

presented to the court in electronic form, scrubbed for viruses and malware, in Word format with no justified margin.

## **2. Applicable Standards.**

The case came to trial on claims for 1) breach of contract; 2) declaratory relief; 3) quantum meruit (services rendered); 4) breach of implied contract; 5) violation of Pub. Util. Code section 2106; 6) violation of Business & Professions Code section 17200 *et seq.*; and 7) the common counts of open book account and account stated.

**A.** In order to establish a breach of contract, plaintiff must demonstrate the existence of a contract that it performed or was excused from performing; that the contract was breached; and that damages resulted from the breach. *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga*, 175 Cal. App. 4th 1306, 1332 (2009); *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1178.

**B.** Civil Code sections 1619-1621 together provides the rules for implied contracts. Plaintiff claims the conduct of defendant in routing calls to it gave rise to an implied contract, and that the tariff plaintiff had on file with the CPUC provides the terms of the implied contract. See CACI 305.

**C.** The elements of a common count for services rendered (quantum meruit) are set forth in CACI 371.

**D.** The elements of a common count for open book account are set forth in CACI 372.

**E.** The elements of a common count for account stated are set forth in CACI 373.

**F.** In addition to damages, NCC seeks several species of declaratory relief. A threshold requirement for declaratory relief is the existence of a justiciable dispute. The declaratory judgment statute expressly provides that declaratory relief is available to parties to contracts or written instruments "*in cases of actual controversy* relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060, italics added.) Because Code of Civil Procedure section 1060 "makes the presence of an 'actual controversy' a jurisdictional requirement to the grant of declaratory relief" ("*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885), a "court is only empowered to declare and determine the rights and duties of the parties 'in cases of actual controversy'" ("*Pittenger v. Home Savings & Loan Assn.* (1958) 166 Cal.App.2d 32, 36). For this reason, the existence of an "'actual, present controversy'" is "'fundamental'" to an action for declaratory relief. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79; *In re Claudia E.* (2008) 163 Cal.App.4th 627, 639.)

**G.** One of NCC's claims is brought under the much over-used "unlawful", "unfair", and "fraudulent" prongs of Business and Professions Code section 17200. To prevail on a cause of action under the "unlawful" disjunctive prong, a plaintiff must prove a statute, law, or regulation that serves as the predicate for the section 17200 violation. (E.g.,

*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383 [section 17200 permits a cause of action under the “unlawful” prong if the practice violates some other law].) To prevail on a cause of action under the “unfair” disjunctive prong, the cause of action must allege conduct by defendant “tethered to any underlying constitutional, statutory or regulatory provision.” (E.g., *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1366.) To state a cause of action under the “fraudulent” disjunctive prong, the plaintiff must allege that members of the public are likely to be deceived. (E.g., *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1144.)

**H.** NCC bears the burden of proof on all claims by a preponderance of the evidence. CACI 200.

**I.** In the July 15, 2014 Sanctions Order, NCC was conclusively determined to be an “access stimulator/traffic pumper,” and was sanctioned in excess of \$90,000.00. The issue/evidentiary sanction is not on appeal (although the monetary sanctions order is on appeal.) In light of this ruling, the court did not impose an additional inference under CACI 204 for any conduct occurring before trial.

**J.** NCC seeks, in addition to damages, attorneys’ fees. California follows the “American rule,” under which each party to a lawsuit ordinarily must pay his, her or its own attorney fees. *Trope v. Katz*, 11 Cal.4th 274, 278 (1995); *Gray v. Don Miller & Associates, Inc.*, 35 Cal.3d 498, 504 (1984). Code of Civil Procedure section 1021 codifies the rule, providing that the measure and mode of attorney compensation is left to the agreement of the parties “[e]xcept as attorney’s fees are specifically provided for by statute.”

**K.** NCC, while it need not prove the exact amount of damages, must not leave the matter to guesswork or speculation. Civil Code section 3301; CACI 350. For an obligation to pay money, the plaintiff must prove the amount due under the contract. Interest is only payable if the amount due is liquidated – that is, fixed and determinable. *See Weaver v. Bank of America*, 59 Cal. 2d. 428, 436 (1963).

**L.** Section 2106 of the Public Utilities Code provides:

Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt.

### 3. The Evidence.

Plaintiff's first witness at 9:20 a.m. on March 10 was plaintiff's sole owner, Mr. Todd Lesser. He is the PMK of plaintiff, and has been designated a percipient expert. He started in the telecom industry in 1984. Since 1985 he has done "chatlines and conferencing services." He has started several companies, including HFT, Jartel and NCC. Chatlines are open forums for random people to discuss whatever they want, whereas conference calls are for only select participants. HFT does chatlines. Jartel stopped providing 900 services in 2009 or 2010. NCC was an approved CLEC; the license was transferred to an affiliate with a similar name. He designed a digital conferencing machine. He is the sole shareholder of both NCC entities. He is the sole shareholder of HFT.

He clearly had an agenda for what he wanted to say, irrespective of what his counsel asked him. He also volunteered that he has arthritis and "some learning disabilities."

NCC receives calls from Vaya, and has since 2009. NCC has billed Vaya for termination services every month. Because they didn't pay, "I sued them in court." HFT gets dial tone from NCC. He knows to bill Vaya because AT&T is his tandem provider. NCC has issued invoices, i.e. Ex. 12. There was a third party billing vendor, Mid-America. These were based on tapes from AT&T, specifically an EMI field, e.g. Exs. 46/51. The first 9 pages of Ex. 46 are Lesser's analysis meant to meet Mertz' analysis. Pages 10 and 11 are exemplars of what would be on Ex. 51, which if printed out would be millions of pages. In the first 9 pages, his analysis, he found suspicious activity from 619 800-0000, which is a number assigned to Vaya. No chatline receives 29,950 calls from the same number.

Ex. 51 was not received based on hearsay and lack of foundation. Plaintiff failed to prove the reliability of the data used to prepare its bills. Ex. 46 is also hearsay. Vaya's calls are all category 50 records. NCC bills those calls to the originating carrier as local calls. Category 11 records are intra-state or interstate toll calls. No category 11 records are to be billed to Vaya. He has switches with two different capabilities. The only entity that knows who to bill is the tandem operator, in this instance AT&T. "Garbage in, garbage out." CLECs use the tandem provider EMI records as a matter of industry standard. Vaya has its own call records which it produced in discovery. The witness analyzed them. They were monthly Excel spreadsheets. This is not typical for the industry. Ex. 50, page 1 is an example for April 2012. He found invalid calling numbers, such as "0," in the Vaya records. According to his analysis, 22% of the calls were calls for which he could not determine jurisdiction.

NCC billed other carriers 1.1 cents/in. 66 have paid. Some have gone out of business. Vaya has made some payments, starting after the litigation was commenced. (Ex. 3) Vaya paid .0007 per minute. Plaintiff never agreed to this. NCC never agreed to accept these payments as payments in full. Vaya did not dispute MOU except in the Ex. 3 letters. 1.1cent/min is in one of NCC's two tariffs. The witness referred to NCC as "T" repeatedly. Ex. 20 is the tariff for CLECs. Ex. 45 is the intrastate long distance call

tariff. Page 234 of Ex. 45 covers VoIP traffic, effective 3/1/12. This provision has not been applied to Vaya traffic as it has not been identified as VoIP traffic.

HFT receives local exchange service from NCC; NCC bills this service and HFT pays for it. NCC reports its income to the PUC, e.g. Ex. 14. Ex. 15 is the NCC agreement with O-1. O-1 is Vaya's sole customer. Ex. 15 has not been terminated. Ex. 16 is plaintiff's summary of damages, including FCC-mandated rate reductions; page 1 assumes plaintiff's rates and MOU; pages 2-5 are based on the Mertz declaration, and assume the rates and MOU defendant claims are correct. Column 9 on page 1 excludes any interest calculation, assuming 100% local traffic.

After the noon recess on March 10, Mr. Lesser remained on the witness stand for direct. Ex. 45 contains rules requiring a jurisdictional report. Vaya never did this until the Mertz depo. Page 199 has information regarding interest and costs of collection.

Ex. 20 contains charges for local call termination. It also has information for late fees. He thinks "the amounts in my tariff" are the reasonable value of his services. Vaya stopped routing traffic for about 10 months. It is visible in the invoices. Ex. 13 was received over defendant's objection not to negate the finding in the Sanctions Order, but rather to show that some money did change hands. It does not affect the finding that the net payment ran in favor of NCC.

Cross examination commenced at 1:50 p.m. He can't tell if there is a mistake in Ex. 20/45 with regard to late fees. There are no late charges on the bills presented by Mid-America. Their software would not allow it. There is no late charges on the bills he sent from in house, either. "My late charges are really a guess." The tariff attached to the complaint is 1-T, not 2-T. He was billing it all as local traffic.

Ex. 16 is a summary of the invoices in Ex. 12. The data should match. It does not in all instances. Per FCC rules, there were step downs in rates not reflected in Ex. 12 but reflected in Ex. 16. Ex. 16 was prepared in December of 2014.

Ex. 114 is a declaration the witness submitted. Portions of it were not entirely consistent with the witnesses' in-court testimony.

Ex. 20 does not contain a provision for VoIP termination rates, at least not in the first 46 pages.

Ex. 15 is dated in 2007 and is between a non-party and a non-party. The plaintiff did not become a certified carrier until 2008. [This exhibit is apparently the basis of the 17200 count.]

In the State of California, NCC's only customers are HFT and Jartel. He claimed not to recall how many times he was deposed in this case. The court did not believe this testimony.

EMI records: the records come from AT&T to NCC. He used them to make his billing calculations, and later confirmed them by reference to Vaya's CDRs in 2012 or 2013 or 2014. At the time of billing, AT&T was the only source. The records from AT&T "doesn't always include accurate information."

The witness was at times evasive and combative.

Ex. 47: If the to or from number is wrong, then the settlement code will be wrong.

NCC has four switches in California. All have MF capability. SS7 capability is only in LA and San Diego. Those ones can have called and calling numbers, but it is not always accurate. Vaya may have asserted a PVU factor in its dispute letters. He would not necessarily accept it; he would verify it. He does not know if Vaya gave AT&T a PVU factor. He has been unable to determine the jurisdiction or the true nature of the traffic.

Ex. 71, page 1: He does not recognize it. He is the only employee of NCC. He did not receive as it has the wrong address. Ex. 72: He "vaguely" recalls this from his deposition. [The court did not believe this testimony.] He did ultimately acknowledge the general accuracy of the diagram, and it was received in evidence.

Redirect at 3:00 p.m.: Vaya never gave him a percentage of VoIP traffic in its dispute letters. Recross: Ex. 71, pages 2, 4, 9, 11, 12, 14, 15, 18, 21 and following: he received them.

At 3:30 p.m., plaintiff called James Mertz, pursuant to Evid. Code section 776. He has been in the telecom industry since 1979. He has been employed by AT&T, among several others. He has been with O-1 since 2012. He is VP of industry affairs. He conducted an analysis of records on two CDs. He prepared Ex. 94, which is a summary of his review. He was able to read the EMI records. He does not know the process AT&T follows for populating the fields. He set out to determine how much of the traffic was local based on the settlement codes. 619 800-0000 is not a Vaya or O-1 number; it is a number of Bandwidth, a VoIP provider which is not co-located with O-1. The court found Mr. Mertz more credible on this issue than Mr. Lesser.

His analysis was done via computer. 30,000 calls from that number is possible, such as calls from Ipads that have no originating phone number. 323 800-0000 belongs to CF Communications. 415 800-0000 is Comcast. He did his analysis on SQL based on the settlement code. At about 4:00 p.m. on March 10, Mr. Dixon ran out of questions for the day, at court was in recess.

On the morning of Wednesday, March 11, the 776 examination of Mr. Mertz resumed. He used EMI records to prepare his report, using only the settlement code. He did not analyze the accuracy of the EMI records. Ex. 94 was received in evidence.

Call data records are used to audit bills Vaya receives. They are not used to create bills, although they could be. Ex. 71 represents all the disputes.

He does not agree that almost every carrier has engaged in access stimulation. He is not aware of traffic pumping rules in the CFR prior to November 2011. Plaintiff sought to impeach Mertz with a document he filed in 2007 in an FCC proceeding when he worked for a prior employer.

The billing party must provide data supporting its bills when there is a dispute. He looked at one month and saw interstate traffic and has no reason to believe this was the only month where there was interstate traffic.

Plaintiff's examination of Mr. Mertz ended around 9:00 a.m., and plaintiff rested. This was a surprise to the court and to defendant.

Plaintiff made a motion to amend to conform to proof with regard to paragraph 31 of the complaint. There was no opposition, and the motion was granted.

At the conclusion of plaintiff's case in chief, defendant made a motion under CCP section 631.8. A motion under section 631.8 is the bench trial analog of a nonsuit motion under CCP section 581c(a) in a jury trial. Such a motion may only be granted if the court finds, after considering all the evidence presented by plaintiff, that plaintiff has not carried its burden of proof as to at least one element of each cause of action presented for decision. A motion under section 631.8 shortens the trial by dispensing with the need for the moving party to present evidence. *Heap v. General Motors Corp.*, 66 Cal. App. 3d 824, 829 (1977). In ruling on such a motion, the court is entitled to weigh the evidence, and may disbelieve witnesses. *Greening v. General Air-Conditioning Corp.*, 233 Cal. App. 2d 545, 550 (1965); *Roth v. Parker*, 57 Cal. App. 4th 542, 550 (1997). The court is also entitled to draw conclusions that are at odds with expert opinion. *County of Ventura v. Marcus*, 139 Cal. App. 3d 612, 617 (1983). A motion under section 631.8 may be granted as to some, but not all, issues. *Swanson v. Skiff*, 92 Cal. App. 3d 805, 810 (1979). When the court grants such a motion, it must thereafter follow the procedures required by CCP 632 and CRC 3.1590 (as the court has done by preparing this tentative decision).

Following argument on the 631.8 motion, the court took it under submission. The court now decides the submitted matters.

#### **4. Discussion and Rulings.**

The case partially turned, as many cases do, on witness credibility. In assessing witness credibility, the court considered, among others, the factors set forth in CACI 107.

Both sides designated their own principal/officer as an expert witness (Lesser and Mertz). Opinions were elicited from both in plaintiff's case in chief. In considering expert testimony, the court applied the factors of CACI 219-221.

Consistent with the July 15, 2014 Sanctions Order, the court finds that for 100 percent of the traffic at issue in this case, and for all periods in issue, NCC has engaged in access

stimulation (“traffic pumping”) as that term is defined by the FCC (a scheme whereby a CLEC artificially inflates inbound traffic to its network in order to generate termination charges from other carriers, using revenue sharing with an affiliate which results in a net payment to the chatline affiliate). Although the FCC had been addressing interstate access stimulation for several years on a case-by case basis, it was not until December 29, 2011 that the FCC issued a rule on the subject. As already noted, this lawsuit was filed in early 2011, and relates to call termination services between November 2009 and the present.

The motion under CCP section 631.8 is granted as prayed. Plaintiff failed to carry its burden of proof on any of the seven counts of the complaint. Count 6, under B&P Code section 17200, was completely unsupported by any evidence of unfair competition. As to the other counts, while there were other defects in the evidence, the principal defect was plaintiff’s failure to offer evidence of damages beyond asking the court to guess or speculate as to the amount of same.

Count 1, the contract claim, fails. Plaintiff failed to carry its burden to show the existence of any express contract for any of the time periods at issue in this case. CLECs enter into such agreements, sometimes called interexchange agreements, routinely, but no such agreement was in place between these parties according to the evidence.

Further, the court finds that the evidence preponderates in favor of a finding that plaintiff is not a bona fide telephone company, and is therefore not entitled to enforce its tariff as against Vaya. [This finding also disposes of count 5, alleging violation of Pub. Util. Code section 2106, inasmuch as the alleged failure to act is the failure to pay pursuant to the tariff.] It was clear from the evidence that the only customers plaintiff has in California are HFT and Jartel. According to Ex. 13, which is barely legible and was received over plaintiff’s objection, HFT made monthly payments to an entity other than the plaintiff. Those payments were made in exactly the same amount (\$7,205.38), and then only for a portion of the timeframe at issue in this case. The court finds from these facts and from that the inference is strong that this was window dressing meant to give the relationship between HFT and plaintiff an arms-length character it did not have. Plaintiff does not have customers in the sense intended by the statutes authorizing tariffs. Absent the terms of the tariff, the court is left completely in the dark in terms of filling in the terms of the implied contract. This is fatal.

In addition, and as already mentioned, the plaintiff failed to prove damages. The plaintiff’s principal witness volunteered that the AT&T records NCC used to create the bills were “garbage in-garbage out,” and that data was not received in evidence. The hearsay exception for business records was not applicable as the custodian of records was not called, and taken together, the other evidence in the case left the court with the distinct impression that the records which gave rise to the bills were unreliable. Mr. Lesser’s own analysis left too many open questions and too much to speculation.

Count 2, for declaratory relief, also fails. In light of the fact that the court is resolving all disputes between the parties in this decision, there is nothing left justifying declaratory

relief. See *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 648 (2009)(courts have considerable discretion, pursuant to Code of Civil Procedure section 1061, to deny declaratory relief because it “is not necessary or proper at the time under all the circumstances.”)

Count 3, for quantum meruit, also fails. Other than Mr. Lesser’s naked opinion that the “reasonable value” of the call termination services was the amount stated in his tariff, no evidence was offered on this essential element of quantum meruit recovery [CACI 371(4)]. The court did not credit Lesser’s obviously self-serving opinion, so plaintiff failed to carry its burden on count 3.

Count 4, for implied contract, fails for the reasons discussed above with regard to count 1, and for the additional reason that plaintiff failed to carry its burden of proof regarding conduct of Vaya giving rise to an implied contract. Indeed, the evidence preponderated to the contrary. Vaya never paid one of plaintiff’s bills in the period before the FCC acted in late 2011, and later issued a series of dispute letters (Ex. 71). In recent years, it has paid only the rate contemplated by current regulations (.0007 cents per minute).

Count 5 is addressed in the discussion above with regard to count 1.

Count 6 was entirely lacking in merit. Simply put, no credible evidence of unfair competition was adduced at trial. Even the argument that there was unfair competition was weak to non-existent. If there is any unfair business practice in this case, it would be plaintiff’s scheme that would justify scrutiny, not the other way around.

Count 7 fails because, as already discussed, the amounts purportedly owing are not readily calculable and the reasonable value of the services was not established. See CACI 371(4), 372 (4), and 373(5).

The claims for interest and attorneys’ fees fail because of the deficiencies identified above.

The clerk must forthwith serve copies of the foregoing decision on counsel for all parties. The previously attached funds are ordered released. Defendant is the prevailing party and is entitled to file a memorandum of costs. Ms. Taff-Rice is directed to forthwith present a form of judgment consistent with the foregoing.

March 11, 2015

**IT IS SO ORDERED.**