

NO. A05-1497

State of Minnesota
 In Supreme Court

Onvoy, Inc.,

Respondent,

vs.

ALLETE, Inc., f/k/a Minnesota Power, Inc.,
 d/b/a Minnesota Power & Light Company, and Enventis
 Telecom, Inc.,

Appellants.

RESPONDENT ONVOY, INC.'S BRIEF

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STATEMENT OF LEGAL ISSUE

Does a justiciable controversy exist allowing a trial court to enter declaratory judgment when the factual basis for the jury's verdict on a separate legal claim is unknown?

The Trial Court held: Yes, by implication.

The Court of Appeals Held: Yes, a justiciable controversy existed.

List of the most apposite authority:

- o Rice Lake Contracting Corp. v. Rust Env. and Infrastructure, Inc., 549 N.W.2d 96 (Minn. Ct. App. 1996).
- o State ex. rel. Smith v. Haveland, 223 Minn. 89, 25 N.W.2d 474 (Minn. 1946).
- o Rosendahl v. Nelson, 408 N.W.2d 609 (Minn. Ct. App. 1987).
- o Doan v. Medtronic, Inc., 560 N.W.2d 100 (Minn. Ct. App. 1997).

STATEMENT OF CASE

In May 2003, Onvoy sued Allete under a 1996 lease relating to space in Allete's General Office Building in Duluth, Minnesota ("GOB Lease"). Onvoy's claims included breach of contract and declaratory judgment based upon its right to interconnect telecommunications equipment under the GOB Lease.

On April 26, 2005, after a six-day trial, the jury returned a verdict finding that: (1) Allete did not breach the GOB Lease; and (2) Onvoy suffered no damages arising from its claim for breach of the GOB Lease. The jury made no specific fact findings in support of the legal claim. The jury did, however, return advisory findings related to each party's equitable claims.

On May 19, 2005, the trial court entered its Findings of Fact, Conclusions of Law, Order of Judgment and Judgment. As part of its Order, the trial court declared that based upon the agreements between Onvoy and Allete, Onvoy is entitled to a right of access

sufficient to allow Onvoy to interconnect its telecommunications equipment with the equipment of third parties, without requiring additional agreements or financial payments.

On June 10, 2005, Onvoy moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, on the grounds that the jury's verdict of no breach and no damages was unsupported by the evidence at trial. Also on June 10, in response to the trial court's declarations, Allete moved for Amended Findings, Conclusions of Law and Judgment. The trial court denied both parties' post-trial motions on July 18, 2005. On July 26, 2005, Allete appealed the trial court's order denying its motion to amend findings. On August 8, 2005, Onvoy filed a notice of review of the trial court's order denying their motion for judgment notwithstanding the verdict or, for a new trial. The Court of Appeals affirmed. Allete sought review, and this appeal follows.

STATEMENT OF FACTS

Onvoy, Inc. was formed in 1988 under the name Minnesota Equal Access Network Services, Inc. ("MEANS"). (A.157.) MEANS owned a subsidiary named Minnesota Equal Access Facilities Corporation ("MEAFCO"). (A.79.) MEANS changed its name to Onvoy, Inc. (Id.) In July 2000, Onvoy, Inc. and MEAFCO merged, with the surviving company taking the name Onvoy, Inc. (hereafter collectively "Onvoy") (Id.) Onvoy's business is providing telecommunication services. Onvoy provides independent local telephone companies in Minnesota, Wisconsin, North Dakota, South Dakota, Iowa, and Canada with access to cable and electronics that enables them to connect to national long distance carriers. (A.157-59.) Onvoy also provides private lines,

local and long distance service, voice-over internet protocol (“VOIP”), and operator and directory services. (Id.)

I. Onvoy’s Business Relationship With Allete.

A. The Lease Agreements.

In late 1995, to control costs and increase growth potential, Onvoy began looking for an opportunity to expand its network capacity into the Duluth telecommunications market. (A.165.) At the same time, Allete’s predecessor, Minnesota Power and Light Company (hereafter collectively “Allete”), was planning to build a 24-strand fiber optic cable between Hinckley and Duluth. (RA.21-22.) Because Onvoy had an existing fiber network between Plymouth and Hinckley, Allete’s proposed cable installation provided an opportunity to facilitate Onvoy’s expansion into the Duluth market. (A.165.)

In February 1996, following negotiations between Onvoy’s operations director at the time, Howard Juul, and Allete’s vice president of delivery and transmission, Thomas Ferguson, Onvoy entered into the first of three agreements with Allete -- the Agreement for the License of Fiber Optic Facilities and Services (“Fiber Lease”). (A.164-67; RA.23; A.1-53.) In exchange for an exclusive license to use twelve strands of the 24-strand fiber optic cable, Onvoy agreed to make lease payments to Allete equaling one-half of the total cost of constructing the cable. (A.13-16.) This cable terminates at Allete’s General Office Building in Duluth (“GOB”). (RA.24.)

Four months later, in April 1996, Onvoy and Allete negotiated and signed two additional lease agreements: (1) a ground lease at Allete’s Arrowhead Substation where Onvoy could build a facility to regenerate the optical signal between Hinckley and

Duluth ("Arrowhead Lease") (A.71-77; 173.); and (2) a lease of space in the GOB ("GOB Lease"). (A.54-70.)

Each of these lease agreements was entered into separately by Onvoy and Allete; the rights under each lease are set forth separately in each agreement. Onvoy's breach of contract claim was based on the GOB Lease. (A.85)

B. The GOB Lease.

Four months after signing the Fiber Lease, Onvoy and Allete entered into the GOB Lease. (A.65.) The GOB Lease covered approximately 430 square feet in the GOB "for use and occupancy as a telecommunication equipment room." (A.54.) The GOB Lease required payment of \$6,880 annual rent in exchange for quiet enjoyment of the leased premises. (Id.)

Onvoy leased space in the GOB and placed telecommunications equipment there with the express intent of establishing a point of presence, or "POP." (A.168-69; A181; A.182.) A POP is the point where the traffic from one telecommunication carrier's network is handed off to the network of another carrier, requiring a physical connection between the carriers' networks. (A.168-69; 182.) To allow Onvoy to install and use environmentally sensitive equipment at the GOB, the GOB Lease set out Space Specifications with strict limits for HVAC, ambient temperature and relative humidity. (A.69-70.)

Allete owns the space outside Onvoy's leased space. Approximately one hundred feet outside Onvoy's space is a demarcation point to the outside of the GOB, which serves as Qwest's minimum point of presence or "MPOP." (A.190-91.) The MPOP

consists of a fiber distribution panel owned by Qwest, which by federal regulation, third parties are allowed access to. (A.190.) To allow for the interconnection of Onvoy's network with others, the GOB Lease provided for installation of a new distribution panel on a wall inside Onvoy's telecommunications equipment room. (A.68.)

At trial, Allete's Thomas Ferguson admitted that Allete understood Onvoy wanted the GOB space to use as a point from which it could interconnect with third parties. (RA.25-26; 28-29.) Furthermore, Mr. Ferguson recognized that without the ability to interconnect with third parties, the space would amount to a dead end for Onvoy's network. (RA.26-27.)

1. GOB Lease Negotiations.

Howard Juul made Onvoy's intent to operate a POP at the GOB clear to David West, who negotiated the GOB Lease on behalf of Allete. (RA.7, 9.) To this end, Mr. Juul proposed Paragraph 12 of the GOB Lease, which provides, in part:

Tenant [Onvoy] shall have the right, upon written notice to and consent of Lessor [Allete], which consent will not be unreasonably withheld, to allow collocation of telecommunications equipment of local exchange carriers (LECs), competitive access providers (CAPs) or interexchange carriers (IXCs) in Tenant's leased space provided such collocation of telecommunications equipment is for the purpose of interconnecting Tenant's network with the network(s) of the collocated party(ies). In the event Lessor and Tenant allow such collocation of another party's telecommunication equipment in the leased space, Tenant shall be responsible to Lessor to assure the use of the Premises is consistent with all terms of the Lease.

(A.62.)

Mr. Juul proposed Paragraph 12 with the specific intent of allowing Onvoy to have third parties collocate (the industry term for physically locating telecommunications in

another carrier's space) equipment in Onvoy's space to allow them to interconnect their networks with Onvoy's. (A.170-72.) Mr. Juul testified that if Paragraph 12 did not allow Onvoy to interconnect out of its leased space, the space was nothing more than an "expensive storage facility that's incapable of providing communications services."

(A.172.) In proposing this language to Allete, Mr. Juul wrote to Mr. West:

It is a common and necessary practice for telecommunications carriers to allow other carriers to collocate equipment in a POP for the purpose of interconnecting networks and facilitating the transfer of telecommunications traffic between the carriers' networks. As written, this section could be interpreted to prohibit MEAFCO from allowing another carrier to collocate equipment in the leased space. Adding the following language would specifically recognize this practice and allow it while maintaining the other restrictions against subletting or assignment.

(RA.9.) Based on the representations of Mr. Ferguson and Mr. West, Mr. Juul testified that it was clear Allete understood that Onvoy intended to operate a POP out of the GOB space. (A.176-77.)

In addition, Mr. Juul testified that he used the terms "collocation" and "interconnecting" in Paragraph 12 as terms of art generally understood in the telecommunications industry to mean creation of a physical connection between two networks of different ownership. (A.170-71.) Mr. Juul testified that the Allete employees with whom he negotiated expressed their understanding of these terms and Onvoy's intent in using them in the GOB Lease. (A.176-77.) Julie Murphy, an expert in telecommunications economics, also testified that these are terms of art with special meaning within the telecommunications industry. (RA.30-32.) Indeed, Allete's Mr. Ferguson acknowledged that "interconnecting" has a specific meaning within the

telecommunications industry that implies a physical connection between two networks of different ownership. (RA.19-21.)

2. Testimony of Priscilla McNulty and Ingrid Johnson.

In response to the testimony of Mr. Juul and Mr. Ferguson, Allete called two witnesses: Priscilla McNulty, former in-house counsel for Allete (A.243.) and Ingrid Johnson, current in-house counsel for Allete. (A.228.) On cross-examination, Ms. McNulty admitted that while she participated in drafting the GOB Lease, she did not draft or propose language for Paragraph 12. (RA.36.) Despite Ms. McNulty's lack of involvement in drafting Paragraph 12 of the GOB Lease, she testified that she did not believe that the terms "interconnecting" or "collocation" had specific meanings in the industry. (RA.34-35.) Ms. McNulty also disclaimed any understanding of Onvoy's intention to use its space as a POP, but admitted she had never spoken to Mr. Juul. (RA.36-38.) Instead, Ms. McNulty testified that Allete's intention behind Paragraph 12 was to have control over the potential mess created by having numerous cables in the space. (RA.37.)

Over Onvoy's objection by motion *in limine*, Allete called Ms. Johnson as an expert witness in contract interpretation. (RA.1; A.229.) Ms. Johnson admitted she took no part in drafting the GOB Lease and stated that her entire understanding of the parties' intentions was from the GOB Lease itself and conversations with Allete employees long after the GOB Lease was signed. (A.216-20.) Ms. Johnson testified that the terms "interconnecting" and "collocation" in Paragraph 12 are "self-defining" and not terms of art in the telecommunications industry. (A.221.) Ms. Johnson further testified that there

is nothing in the GOB Lease that indicates that Onvoy intended to use space outside the 430 square foot room Onvoy leased. (A.226-27; 229-31.)

Both Ms. McNulty and Ms. Johnson also testified to the meaning and effect of terms in the separate Fiber Lease between Onvoy and Allete. Ms. Johnson and Ms. McNulty testified that the Fiber Lease's clause forbidding "MEAFCO Extensions" limited Onvoy's interconnection rights under the GOB Lease. (A.239-40; 259-60.) Further, each testified that the "waiver" clause in the Fiber Lease gives Allete the right to exercise its "sole discretion" to allow interconnection from Onvoy's GOB leased space on a case-by-case basis. (A.234-38; 251-57.) Finally, Ms. McNulty testified that the Fiber Lease's limitation on damages applied to the damages Onvoy could seek for breach of the GOB Lease. (A.253-56.)

C. Onvoy Argues Allete Breached the GOB Lease.

At trial, Onvoy presented evidence that Allete refused to consent to Onvoy's requests to interconnect with third parties from its GOB space in breach of the GOB Lease. Gary Kosin, Onvoy's director of engineering, testified that in 1999 Onvoy's existing connection to Qwest at the GOB "MPOP" was at full capacity. (A.183-84.) However, that connection utilized only a fraction of the capacity Onvoy leased on the Duluth-to-Hinckley fiber. (Id.)

In order to fully utilize the Hinckley-to-Duluth fiber, Onvoy needed to interconnect out of its leased GOB space. Onvoy's witnesses, including Janice Aune, Onvoy's chairman and CEO, and Mr. Kosin, testified that Onvoy made repeated requests

to be allowed to run fiber cable out of its GOB space to establish connections to third parties. (A.160-61; 185; 192-93; 195-209.)

In 1999, Onvoy wanted to interconnect with Wisconsin Independent Networks (“WIN”) out of its GOB space in order to create redundant protection¹ for its network. (A.186.) To that end, Onvoy paid Bresnan Communications (“Bresnan”) to run cable from Superior, Wisconsin (where WIN’s network ended) to the GOB. (A.187-91.) In order to complete the connection to Bresnan, and thus WIN as well, Onvoy made multiple requests to Allete to run fiber out of its GOB space to the MPOP to complete the connection. (A.188-92.) Ultimately, Onvoy was able to interconnect with WIN in February 2002, but only after WIN entered in a separate agreement with Allete – on a cost basis – and after political pressure was brought to bear on Allete. (A.210-12; RA.12.)

D. Allete Argues Multiple Bases for no Breach of the GOB Lease.

At trial, Allete argued that there were no fewer than four separate bases for finding that Allete did not breach the lease. Allete’s primary argument was that it did not breach the GOB Lease because it allowed Onvoy to interconnect with other parties. (RA.43-44, 49.) At trial, Allete’s in-house counsel specifically testified that Onvoy only requested permission to collocate for the purpose of interconnecting once, and that the interconnection was ultimately allowed. (RA.18.)

¹ Redundancy is accomplished when a provider has two physically separate fiber routes serving the same network, so that if service is down on one route the other route is able to continue service to the network, resulting in protection of the network. (A.186.)

Second, Allete argued that there was no breach because Onvoy met its budget projections and therefore received the "benefit of the bargain." (RA.41-42; 15.)

Third, Allete argued that Onvoy's right to use portions of the GOB was controlled not by the GOB Lease, but rather the separate Fiber License. (RA.40; A.235-36.)

Finally, Allete argued that there was no breach because the lines had been used to capacity without collocation. (RA.42.) At trial, Allete made reference to an e-mail which contained an alleged admission that the line was being used to capacity. (RA.16-17; 11.)

II. The Jury Verdict.

On April 26, 2005, after a six-day trial, the jury returned a verdict that: (1) Allete did not breach the GOB Lease (Question No. 1); and (2) Onvoy suffered no damages arising from its claim for breach of the GOB Lease. (Question No. 2) (A.133.) There were no findings of fact underlying these legal conclusions.

The jury also returned advisory findings in response to Questions 7-10 related to the parties' equitable claims. (A.134-35.) The parties did not consent to make the advisory jury findings binding pursuant to Minnesota Rule of Civil Procedure 39.02.

III. The Trial Court's Findings of Fact and Declaratory Judgment.

On May 19, 2005, the trial court entered Findings of Fact, Conclusions of Law, Order for Judgment & Judgment. (A.141.) In its Findings of Fact, the trial court found:

8. Onvoy entered into the GOB Lease for the purpose and with the expressed intention of using its leased space as a point of presence, or "POP," at which it could interconnect its telecommunications network with the networks of third parties. Allete knew and understood that Onvoy intended to operate a POP from its GOB space.

9. It was understood and agreed by both Onvoy and Allete that Onvoy would interconnect its network with those of third parties by physically connecting its telecommunications equipment within the GOB lease space with collocated equipment of third parties, which would require a physical connection by cables running into and out of the GOB leased space. This interconnection could be accomplished for a nominal cost by running cables through a conduit passing through common spaces within the GOB or by installing a conduit running from Onvoy's lease space through the GOB's foundation to a manhole outside the GOB in a public right-of-way.

10. Since the parties entered the GOB Lease, Onvoy has made a number of requests to Allete to allow third parties to interconnect with Onvoy.

11. Allete has refused Onvoy's requests to allow interconnection with third parties and has demanded that Onvoy or the third parties enter into separate agreements with Allete and pay fees to Allete and its subsidiary, Enventis Telecom, Inc., in order to accomplish interconnection.

12. The agreements and fees proposed by Allete are not reasonable for the materials and services necessary to accomplish interconnection and would make interconnection in this manner financially impracticable.

13. In making its demands for separate agreements and fees, Allete has relied upon an interpretation of the GOB Lease that is contrary to the parties' expressed intent in entering the GOB Lease and the Fiber Lease.

14. Because Allete has refused to allow Onvoy to interconnect with additional third parties though collocation in Onvoy's lease space, Onvoy has been able to utilize only four of the twelve fiber strands to which it has a license under the Fiber Lease.

15. In its special verdict, the jury found:

Before entering into the General Office Building Lease Plaintiff Onvoy, Inc. and Defendant Minnesota Power, Inc. (had) a valid agreement that Plaintiff Onvoy, Inc. would use the General Office Building space for collocation of equipment in order to interconnect Plaintiff Onvoy, Inc.'s network with other telecommunications

carriers' networks by running cable through the General Office Building and outside of Plaintiff Onvoy, Inc.'s leased space.

The Court accepts this finding based on the evidence presented at trial.

(A.143-44.)

On these facts, the trial court issued its Conclusions of Law, declaring in part:

17. Paragraph 12 of the GOB Lease provides, in relevant part:

Tenant (Onvoy) shall have the right, upon written notice to and consent of Lessor (Allete), which consent will not be unreasonably withheld, to allow collocation of telecommunications equipment of local exchange carriers (LEC's), competitive access providers (CAPs) or interexchange carriers (IXCs) in Tenant's leased space provided such collocation of telecommunications equipment is for the purpose of interconnecting Tenant's network with the network(s) of the collocated party(ies).

18. The term "interconnecting" contained in Paragraph 12 has a technical meaning within the telecommunications industry, which was undisputed at trial, that implies a physical connection between two networks. Under that technical meaning it is clear that Paragraph 12 of the GOB Lease provides Onvoy with a right to run cables into its leased space from outside the GOB in order to connect Onvoy's equipment with collocated equipment of third parties within Onvoy's leased space.

19. Pursuant to Minn. Stat. § 555.03, the Court concludes and declares that, based on the agreements Onvoy and Allete, Onvoy is entitled to a right of access to facilities or conduit space sufficient to allow Onvoy to interconnect its telecommunications equipment located in its lease space within the GOB with the telecommunications equipment of third party telecommunications service providers, without requiring Onvoy or collocated third parties to enter into separate agreements with Allete or make financial payments to Allete or its wholly-owned subsidiary, Enventis Telecom, Inc.

(A.145.)

SUMMARY OF ARGUMENT

The trial court's rulings on declaratory judgment are supported by the record. Allete argues, and cites to multiple cases upholding, the unremarkable proposition that a court's findings on equitable claims cannot conflict with a jury's findings on legal claims. However, because the factual basis for the jury's finding of no breach of the GOB Lease is unknown, and Allete itself argued and presented evidence of multiple bases for a finding of no breach, a justiciable controversy regarding Onvoy's prospective rights under the GOB Lease remained for the trial court to resolve. To the extent that any of the trial court's factual findings are in conflict with the jury's legal findings, they are not necessary to support the trial court's declaratory judgment and any error is harmless. Furthermore, to the extent any of the jury's advisory findings on Onvoy's equitable claim for reformation are in conflict with the trial court's declaration, they are not binding and can be freely disregarded by the trial court. For each of these reasons, the Court of Appeals must be affirmed.

STANDARD OF REVIEW

On appeal from a declaratory judgment, the trial court's findings of fact are subject to a clearly erroneous standard of review. Illinois Farmers Ins. Co. v. Coppa, 494 N.W.2d 503, 505 (Minn. Ct. App. 1993). Under a clearly erroneous standard of review, the court as the trier of fact must be sustained in its findings unless they are palpably and manifestly contrary to the evidence. Id. When a trial court submits issues to an advisory jury, the trial court's findings are regarded as those of a court sitting without a jury and are reviewed subject to a clearly erroneous standard. Hubbard v. United Press Int'l, 330

N.W.2d 428, 441 (Minn. 1983) (citing Minn. R. Civ. P. 52.01). Under this standard, the findings of the trial court will not be disturbed if they are reasonably supported by evidence in the record considered as a whole. Id.

Declaratory judgment determinations on questions of law are reviewed de novo. Rice Lake Contracting Corp. v. Rust Env. and Infrastructure, Inc., 549 N.W.2d 96, 98-99 (Minn. Ct. App. 1996). The existence of jurisdiction to rule on declaratory judgment is a question of law subject to de novo review. Id.

ARGUMENT

I. The Trial Court May Rule on Declaratory Judgment if a Justiciable Controversy Exists.

The issue before this Court is unremarkable. Minnesota courts have long recognized that a district court is vested with authority to enter declaratory relief only where the court is presented with a justiciable controversy. Citing foreign cases, Allete proposes a new rule of law, forbidding a trial court from entering declaratory judgment whenever a breach of contract claim has been submitted to a jury, regardless of the jury's actual findings. However, this Court need not resort to theories of collateral estoppel or constitutionality to resolve the issue before it. Minnesota law is clear that a trial court has jurisdiction to enter declaratory relief where undecided issues remain.

District courts are vested with authority under the declaratory judgment statute, Minn. Stat. § 555.01, "to declare the rights, status, and other legal relations whether or not further relief is or could be claimed," both before and after a breach of the relevant contract is found. Minn. Stat. §§ 555.01, 555.03; Myhre v. Severson, 211 Minn. 189,

190, 300 N.W. 605, 606 (Minn. 1941) (noting declaratory judgment statute gives any party right to have written instrument construed). Under established Minnesota law, “[t]he only prerequisite for a court’s exercise of jurisdiction in declaratory judgment actions is the presence of a ‘justiciable controversy.’” Rice Lake, 549 N.W.2d at 99 (citing Seiz v. Citizens Pure Ice Co., 207 Minn. 277, 290 N.W. 802 (Minn. 1940) and Graham v. Crow Wing County Bd. of Comm’rs, 515 N.W.2d 81, 84 (Minn. Ct. App. 1994).) Justiciability requires 1) a genuine or “present controversy”; 2) presented by persons with truly adverse interests; and 3) capable of specific rather than advisory relief by a decree or judgment. Id.

“In declaratory judgment actions, the ‘present controversy’ requirement of justiciability is viewed leniently and is satisfied if there is a controversy of ‘sufficient immediacy and reality’ to warrant issuance of a judgment.” Id. If a declaratory judgment claimant possesses a bona fide legal interest that has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner, the district court has jurisdiction to decide the claim. State ex. rel. Smith v. Haveland, 223 Minn. 89, 92, 25 N.W.2d 474, 477 (Minn. 1946).

Justiciability is not a novel jurisdictional theory requiring this Court to resort to foreign caselaw or purportedly analogous constitutional analysis. Contrary to Allete’s assertion, Minnesota courts have addressed the issue before this Court. The foreign cases cited by Allete stand for the proposition that where a jury has made a legal finding that resolves all issues on declaratory judgment, there is nothing remaining for the court to

decide, i.e. there is no present, justiciable controversy. This proposition is neither remarkable nor applicable to the facts presented in this case.

Allete's reliance on foreign caselaw is merely an attempt to divert the Court from the simple analysis of whether the District Court had before it a justiciable controversy when it entered declaratory judgment. However, in this case, there is no way to know the factual basis for the jury's legal findings (see Section II, below). Therefore, the issue of whether the trial court was barred from granting equitable relief is not reached, and a justiciable controversy existed at the time of the trial court's order.

II. Because there are Multiple Possible Reasons for the Jury's Finding that Allete did not Breach the GOB Lease, a Justiciable Controversy Existed for the Trial Court to Rule on Declaratory Judgment.

Allete's primary argument in this appeal is that by finding Allete did not breach the GOB Lease, the jury necessarily found that the GOB Lease did not permit Onvoy to interconnect its network. The special verdict form, however, only indicated that Allete did not breach the GOB Lease, it did not provide a factual basis for that conclusion. Allete itself asserted at trial multiple reasons for a finding of no breach. Because the jury could have accepted any one of these arguments, the trial court remained free to grant declaratory relief regarding Onvoy's prospective rights under the GOB Lease.

Allete first argued to the jury that even if the GOB Lease allows Onvoy access to interconnect, the jury could find no breach. In closing arguments Allete argued that it did not breach the GOB Lease because in fact it allowed Onvoy to interconnect with other parties. In his closing arguments, Allete's counsel stated:

Now did Minnesota Power allow them to use their office space? You bet. . . . And though Minnesota Power did not have to under the Lease, they agreed and allowed the Quest [sic] connection. . . and they did not put any evidence on that Minnesota Power refused any other collocation.

(RA.43-44; 49.)

That argument was based on testimony elicited on direct examination from Ingrid Johnson, current in-house counsel for Allete:

Q: With respect to Paragraph 12 where it says they may not sublet the Premises except they may collocate with one of those companies in the Premises if it's for the purpose of interconnecting, how many times has Onvoy requested of Minnesota Power that they be allowed to collocate in the Premises for the purpose of interconnecting?

A: Once.

* * *

Q: And was that connection subsequently - - was that collocation in the leased space subsequently allowed?

A: Not only was the collocation approved by Minnesota Power, Minnesota Power then negotiated this . . . Facilities Access Agreement Entrance . . . to then have fiber access into the lease space.

(RA.18.)

Second, Allete argued that there was no breach because Onvoy met its budget projections and therefore there were no damages. In closing, Allete's counsel argued:

Onvoy admits that every year they've received \$2.78 million in revenue every year (sic). They have exceed their best case analysis. They've received the benefit of their bargain. That's in a macro sense, if when you're looking at this contract what has happened.

(RA.41-42.)

The argument was alluding to the cross-examination of Onvoy's CEO, Janice Aune:

Q: And showing you a page from Exhibit 4, that shows what Mr. Pyykkonen's revenue analysis was for the line between Duluth and Minneapolis, is that true?

A: Yes.

* * *

Q: And his best case analysis was that you would generate revenues of \$2,368,881 a year under the best case, is that true?

A: Yes

Q: And, in fact, isn't it true that you generated over \$2.87 million dollars a year?

A: That number sounds about right, yes.

(RA.14-15.)

Third, Allete argued that Onvoy's right to use portions of the GOB was controlled not by the GOB Lease, but rather the separate Fiber License. In closing arguments, Allete's counsel argued:

Most significantly in the License Agreement was the use of the office space. . . . They said Onvoy is not allowed to use our office space except with our consent, in written consent, under terms we agree to and in Minnesota Power's sole discretion.

(RA.40.)

The argument was referring to the direct examination of Allete's general counsel, Ingrid Johnson, where Ms. Johnson was asked about the Fiber License:

Q: Why would that be significant?

A: Well, this Agreement . . . Section 9.2 says that: With MP's prior - - and MP is Minnesota Power. "With MP's prior written consent and in MP's sole discretion . . ." - - meaning we don't have to give the consent or we can, you know, name the tune, "Meafco may utilize

specified MP substation and office sites as locations for Meafco optoelectronic equipment or as repeater sites, subject to Meafco payment of a fee for such use. . . .”

(A.235.)

Finally, Allete’s counsel argued that there had been no breach because the lines had been used to capacity without collocation:

They admit since the inception the line has been used to capacity. The contract has been fulfilled.

(RA.42.)

Allete’s counsel is referring to the testimony Gary Kosin, Onvoy’s director of engineering, where he testified on cross examination:

Q: Since the line went into operation, it’s basically been used to capacity, is that true?

* * *

A. The first OC-48 system that went in is in use at capacity, but we haven’t been able to use the additional fibers that were put in as part of that project.

Q: So the original OC-48 between Duluth and Hinckley has been used essentially since it went into operation?

A: It ramped (phonetic) up but it’s been full for a significant period of time now.

(RA.17; 11.)

The jury made no findings of fact in support of its legal conclusion that Allete did not breach the GOB Lease. As argued by Allete, there were a number of possible factual bases that would have supported the jury’s legal conclusion. Because the basis for the

finding of non-breach is not known, a justiciable controversy existed for the trial court to enter declaratory judgment on Onvoy's prospective rights under the GOB Lease.

To overcome its own arguments to the jury, and the many possible bases for the jury's legal conclusion that Allete did not breach the GOB Lease, Allete points to Onvoy's assertions that it was refused access to the GOB. If adopted by the jury, Allete claims this fact would be inconsistent with the trial court's declaration. However, Allete's argument is unpersuasive because the jury found against Onvoy on the breach of contract claim, and the Court of Appeals affirmed the trial Court's order denying Onvoy's request for JNOV. Allete should not now be heard to argue that Onvoy established to the jury that it was denied access to the GOB when Allete itself argued the opposite to the jury and prevailed.

Because it is impossible to determine the factual basis for the jury's legal findings, the cases relied upon by Allete are readily distinguishable. In Butler v. Dowd, 979 F.2d 661 (8th Cir. 1992), the case that Allete suggests is most apposite, the plaintiff implicitly admitted that there was no actual controversy left to resolve through declaratory judgment. Id. at 673, fn. 19. The Court held that "The Plaintiffs' only requested declaratory relief mirrored what the jury was told it must find in order to hold the defendant liable." Id. at 673 (emphasis added.) The court then made note that the Plaintiffs' own jury instructions provided that in order to find in favor of the plaintiffs, that the jury must make certain factual findings that conflicted with the requested declaratory judgment. Id. Here, Allete can point to no similar jury instruction, and a bare

finding of no breach did not preclude the court from declaring that the GOB Lease required Allete to allow interconnection.

Appellant also cites to Florists' Nationwide Tel. Delivery Network v. Florists' Tel. Delivery Ass'n, 371 F.2d 263 (7th Cir. 1967), a Sherman Anti-Trust Act action. In Florists', after the jury found a violation of the Act, the trial judge denied injunctive relief, but provided no basis that could be interpreted consistently with the jury's finding. Id. at 271. In this case, Allete alleged multiple bases for the jury's legal conclusions, any one of which would permit the trial court to make its declaration. The court in Florists' recognized just this type of case when it stated: "Of course, considerations peculiar to the award of equitable relief and which are not common to those presented by the . . . damages claim remain within the sole province of the trial judge and are to be resolved by him on the basis of the record of the jury trial . . ." Id.

International Wood Processors v. Power Dry, Inc., 593 F. Supp. 710 (D.S.C. 1984), is also distinguishable. In that case the court refused to provide prospective declaratory and injunctive relief where the jury had already awarded the plaintiff prospective damages on his legal claims. Id. at 736-37. The basis for the court's ruling was that with respect to declaratory relief, "the jury award has compensated plaintiff fully for its losses" and "injunctive relief would afford a double recovery." Id. In contrast, there is no threat of Onvoy receiving double recovery in this case.

Finally, the cases in Allete's string cite on pp. 23-26 of its brief are not applicable. The cases cited by Allete stand for the ordinary proposition that a jury's factual findings are binding on the trial court's determination of parallel equitable claims. Onvoy does

not dispute this proposition. However, as has been described above, the jury did not explicitly, or implicitly, make a factual determination that precluded the trial court's declaratory judgment. Without any contrary factual findings, the trial court was free to make its declaration construing the GOB Lease.

In fact, the trial court's declaration that Onvoy should be allowed to interconnect was supported by one of the factual findings of the jury. In the advisory portion of the special verdict form related to reformation, the jury specifically answered "yes" to the question:

Before entering into the General Office Building Lease did Plaintiff Onvoy, Inc. and Defendant Minnesota Power, Inc. have a valid agreement that Plaintiff Onvoy, Inc. would use the General Office Building space for the collocation of equipment in order to interconnect Plaintiff Onvoy, Inc.'s network with other telecommunications carriers' networks by running cable through the General Office Building and outside of Plaintiff Onvoy's Inc.'s leased space?

(A. 134.)

Because there is no conflict between the jury's legal findings and the trial court's declaratory judgment, the Supreme Court's analysis should end here, and the Court of Appeals should be affirmed.

III. The Trial Court's Findings of Fact Were not Dispositive to its Declaratory Judgment Finding.

Regardless of the lack of conflict between the jury's and trial court's conclusions of law, Allete argues that one or more of the trial court's findings of fact necessarily conflict with the jury's legal conclusion. Allete argues that if the GOB Lease allows Onvoy to interconnect its network, the Court's findings (Nos. 11&14) that Allete refused

that connection necessarily lead to the conclusion that Allete breached the GOB Lease. (A.143-44.) That conclusion, Allete argues, would be in conflict with the jury's finding of no breach.

Even if the trial court's finding of fact could be considered erroneous, it has no affect on its declaration of law. The trial court's declaration that Onvoy is entitled to interconnect its telecommunications equipment is not dependent on a factual finding of prior breach by Allete. Minnesota courts are clear in holding that errors in factual findings that would not affect the legal conclusion need not be considered on appeal. See Rosendahl v. Nelson, 408 N.W.2d 609, 612 (Minn. Ct. App. 1987); McKay v. McKay, 187 Minn. 521, 525-26, 246 N.W. 12, 14 (Minn. 1932). Finally, the nature of the relief granted here was entirely prospective in nature. The Court held that Onvoy had the right to interconnect its telecommunications at the GOB on a going-forward basis, and refused to provide the requested retroactive relief of unjust enrichment.

If this Court determines that the trial court's findings of fact Nos. 11 & 14 are clearly erroneous, the proper relief is to overturn those finding of fact. However, that ruling does not require that this Court overturn the trial court's declaration of law No. 19 that Onvoy is entitled to interconnect its communications equipment.

IV. The Jury's Advisory Findings are Not Binding on the Trial Court.

Questions 7-10 on the Special Verdict Form relate to Onvoy's reformation claim, and the jury's thoughts on the reasons for any failure of the GOB Lease to express a prior agreement on interconnection. (A.134-35.) The Special Verdict Form specifically states that questions 7-10 are only to be answered if the jury found no breach of the contract.

(A.134.) A jury's findings of fact on equitable claims are only advisory in nature, and the trial court is free to disregard them. Doan v. Medtronic, Inc., 560 N.W.2d 100, 105 (Minn. Ct. App. 1997); Shea v. Hanna Min. Co., 397 N.W.2d 362, 370 (Minn. Ct. App. 1986) (Rule 39.02 consent required in order for findings of advisory jury to be binding).

Moreover, the jury's "findings" do not conflict with the trial court's order. Questions 7-10 of the Special Verdict Form address Onvoy's reformation claim, a claim that the Court expressly did not address in its opinion because it granted declaratory judgment. (A.134-35.) Questions 8 and 9 of the Special Verdict Form ask: "Did the General Office Building Lease between Plaintiff Onvoy, Inc. and Defendant Minnesota Power, Inc. fail to express this earlier agreement because of" a mutual mistake or unilateral mistake. (Id.) (emphasis added). The jury's answers are not findings of fact because the questions presume that the GOB Lease failed to express an earlier agreement for purposes of considering Onvoy's reformation claim. The Court of Appeals recognized this fact in its opinion. (A.404-05.) Nowhere is the more general question posed to the jury: "Did the General Office Building Lease fail to express an earlier agreement between Onvoy and Minnesota Power?"

Finally, even if the jury's findings were not simply advisory in nature, and even if a true fact finding could be implied, the trial court's decision on declaratory judgment is still not inconsistent. If the jury found that a prior agreement was not expressed, the trial court could still have concluded that a new agreement was reached in the GOB Lease allowing Onvoy to interconnect. (A.134.) And in fact, that is what the trial court did in its Conclusion of Law at paragraphs 17-19. (A.145.)

Allete has stretched the interpretation of the jury's advisory findings in order to create inconsistency where none exists. The trial court's findings can be squared with the jury's advisory opinions. Furthermore, even if a conflict exists, as a matter of well established Minnesota law, the trial court is free to disregard the jury's advisory findings.

V. The Integration Clause does not Preclude Declaratory Judgment.

Finally, Allete alludes that an integration clause contained in the GOB Lease may preclude declaratory judgment. (Appellant's Brief at p. 9.) Allete's argument is apparently that the trial court's finding of fact No. 15, that a prior agreement existed allowing interconnection, would have been eliminated by the GOB Lease's integration clause. As a legal matter, these findings of fact have no bearing on the trial court's declaration. The existence of an agreement predating the GOB Lease is not necessary to support the trial court's conclusions of law. The trial court found that the right to interconnection was contained in the GOB Lease itself. (A.145, ¶¶17-19.) The trial court quoted paragraph 12 of the GOB Lease that states:

Tenant (Onvoy) shall have the right . . . to allow collocation of telecommunications equipment of local exchange carriers . . . for the purpose of interconnecting Tenant's network with the network(s) of the collocated party(ies)

(A 145, ¶ 17.)

The trial court then went on to conclude:

The term "interconnecting" contained in Paragraph 12 has a technical meaning within the telecommunications industry, which was undisputed at trial, that implies a physical connection between two networks. Under that technical meaning, it is clear that Paragraph 12 of the GOB Lease provides Onvoy with a right to run cables into its leased space from outside the GOB

in order to connect Onvoy's equipment with collocated equipment of third parties within Onvoy's lease space.

(A.145, ¶18.)

The trial court's finding that the GOB Lease contains an agreement allowing interconnection makes the integration clause moot.

Furthermore, the trial court's consideration of a prior agreement, articulated in finding of fact No. 15, was appropriate. On summary judgment, the trial court found the GOB Lease to be ambiguous. Specifically the trial court held that there were legitimate factual disputes over the intent and meaning of the contract. (A.131.) A contract provision is ambiguous if its language is "reasonably susceptible" to more than one interpretation. Rick v. B.D.M.S., Inc., 347 N.W.2d 65, 66 (Minn. Ct. App. 1984). Where an agreement is ambiguous, prior agreements illuminating the parties' intent are admissible in interpreting the subsequent agreement. Material Movers, Inc. v. Hill, 316 N.W.2d 13, 17 (Minn. 1982). The parties have proposed different interpretations of the GOB Lease. The trial court was not wrong in considering a prior agreement while construing the GOB Lease.

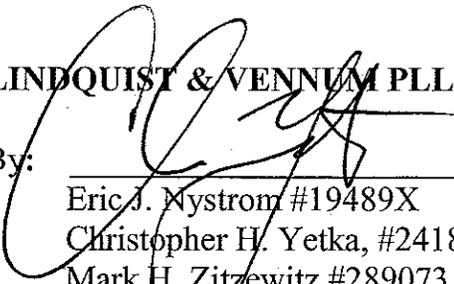
CONCLUSION

The issue posed by Allete and this Court is: Whether the district court is bound on declaratory judgment by jury findings. The answer to the question is "yes," although it has no bearing on the outcome of this case. The factual basis of the jury's verdict of no breach of the GOB Lease is unknown. The trial court's declaratory judgment, therefore, does not conflict with any jury finding and a justiciable controversy remained for the trial

court to decide. Therefore, the decisions of the trial court and Court of Appeals must be affirmed.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).