

IN SUPREME COURT OF NOVA SCOTIA

Citation: *Sofia Express AG Corporation v. Nautel Limited*, 2025 NSSC 413

Date: 20251222

Docket: Hfx No. 524232

Registry: Halifax

Between:

Sofia Express AG Corporation

Applicant

v.

Nautel Limited

Respondent

Corrected Decision: The text of the original decision has been corrected according to the attached erratum dated January 6, 2026.

Judge: The Honourable Justice D. Timothy Gabriel

Heard: May 5 - 8, 2025, in Halifax, Nova Scotia

Counsel: Meaghan Kells and Sarah Dobson, for the Applicant
James D. MacNeil, for the Respondent

By the Court:**Background**

[1] In this proceeding, the Applicant claims entitlement to a 15% commission on the sale price of three Nautel MF-AM transmitters sold in 2021 – 2023 by the Respondent. There is a lengthy narrative attached to this contention, one which will be explored, first, at a “2000 foot level”. A closer examination will be reserved for those portions of the evidence which are most relevant to the consideration of this claim. With that said, I have carefully considered all of the evidence tendered in this matter.

[2] The Applicant, Sofia Express AG Corporation (“Sofia Express”) describes itself as being “in the broadcast sales business” (*Applicant Brief*, para. 9). Part of its work involves communicating and liaising with various manufacturers in the radio transmitter industry. It has, historically, acted both in the roles of “reseller” and a sales agent in some specific countries in Asia. As will be discussed shortly, for present purposes the term “reseller” is synonymous with the phrase “prime contractor”.

[3] Alain Guay is the Director of Business Development for Sofia Express. He has provided an Affidavit on behalf of the Applicant, dated November 13, 2023 (“the Guay Affidavit”), as well as a rebuttal Affidavit (“Guay Rebuttal Affidavit”). Another Affidavit, that of LE Duy Linh, sworn in Ho Chi Minh City, Vietnam dated February 6, 2024, was filed with this Court on May 24, 2024 (“the Linh Affidavit”). Among other things, Mr. Linh had been an assistant to Mr. Guay in a predecessor company to Sofia Express.

[4] The Applicant had been granted permission to file the Linh Affidavit late, pursuant to *Civil Procedure Rule* 5.15. The permission had been granted with certain conditions attached. One of these conditions was that the Respondent, Nautel Limited (“Nautel”) would have the opportunity to discover Mr. Linh after the Affidavit was filed. However, these discoveries could not take place because of health concerns that Mr. Linh was experiencing. The Respondent was told that Mr. Linh would be present at trial for cross-examination. He was not.

[5] Counsel for the Applicant, when it became apparent that Mr. Linh had not left Vietnam to attend and testify in this proceeding, advised the Court that Sofia Express would not be relying on the Affidavit of Mr. Linh at all. This was a proper concession under the circumstances. As a consequence, the Court has not taken

into consideration or relied upon anything in the Linh Affidavit. Effectively, it has no evidentiary value. Correspondingly, those portions of the Affidavits filed by the Respondent which purport to respond to the contents of the Linh Affidavit, will be treated in the same manner.

[6] Affidavit evidence was provided on behalf of Nautel. This came from Wendell Lonergan, whose Affidavit was dated January 5, 2024 (“the Lonergan Affidavit”), Joseph Cheu, whose Affidavit was also dated January 5, 2024 (“the Cheu Affidavit”), Tom King, whose Affidavit was dated November 14, 2024 (“the King Affidavit”), and Kevin Rodgers, who provided two Affidavits, the first dated January 4, 2024 (“the first Rodgers Affidavit”), and the second dated November 12, 2024 (“the second Rodgers Affidavit”).

[7] Mr. Guay’s evidence is that Sofia Express had a predecessor company. Its name was Sogitec International Telecom Inc. (“Sogitec”). Sogitec, in turn, had two partner companies with whom it consulted on engineering matters: Sofia Express Cambodia Co. Limited and Sogitec Co. Limited (in Vietnam). Due to regulatory legislation in Cambodia and Vietnam, all three companies were needed. For present purposes, however, it is convenient to refer to the three latter companies under the rubric of “Sogitec”.

[8] Mr. Guay’s tenure with Sogitec began in 1992. By 2012, that company’s owner, who was getting on in years, decided to reduce his workload. He and Mr. Guay agreed that the latter would continue the business in the Southeast Asia region. Pursuant to this arrangement, Mr. Guay took over 100% of Sogitec’s customers, contracts, business contracts and historical data from Vietnam and Cambodia, and continued the business as Sofia Express (*Guay Affidavit*, paras. 5-7).

[9] “Sogitec”, while it remains extant in Canada, does not operate in the Cambodian or Vietnamese markets any longer. With that said, as Mr. Guay put it, “[t]he name Sogitec is still to this day associated with me and with Sofia Express in those [latter] markets” and, further, “to the best of my knowledge and belief, no other person or corporation uses the business name Sogitec (or similar) in the Vietnamese and Cambodian markets (*Guay Affidavit*, paras. 8-9).

[10] Mr. Guay’s affidavit and *viva voce* evidence bespoke his extensive experience in the industry, and referenced his involvement in various broadcast projects in Vietnam, Thailand, and Cambodia. During the course of this

experience, he has acquired extensive knowledge of the radio transmitter industry, and developed many contacts in the industry, including contacts in Vietnam.

[11] Specifically, he asserts:

11. In my 30+ years of experience doing business in Southeast Asia, and particularly Vietnam, I have developed an intimate understanding of the work that is required to finalize large projects. A single large-scale sale project in a communist country like Vietnam will typically take approximately four to eight years, from planning, researching, studying, approving, and then finally implementing.

(Guay Affidavit)

[12] Mr. Guay goes on to outline the procedure (in his experience) generally encountered when conducting large-scale projects (such as the ones at issue in these proceedings) in the country of Vietnam:

12. The standard process for a large scale project in Vietnam proceeds through the following stages:
 - (a) Six (6) to twelve (12) months for planning system requirements;
 - (b) Twelve (12) to twenty four (24) months for designing and researching technical solution(s);
 - (c) Six (6) to twelve (12) months for studying solution(s) compared to system requirements;
 - (d) Six (6) to twelve (12) months for reviewing budgetary costs and preparing for submitting conclusions to higher level for approval;
 - (e) Six (6) to twelve (12) months for the PM cabinet to review the proposed project in line with the political guidelines;
 - (f) Six (6) to twelve (12) months for the Ministry of Planning and Investment to approve the proposed project in line with the central annual investment budget;
 - (g) Six (6) to twelve (12) months for the Ministry of Finance to back-up with USD currency; and
 - (h) Six (6) to eighteen (18) months for the Project Owner (the end user) to allow for wiring procurements, calling for bids, contracting with the award bidder, importing equipment, and commissioning equipment/system.
13. After all the above is completed, only then will a project be delivered, and final payment executed by the Buyer.

(Guay Affidavit)

[13] The parties had developed a business relationship over time. It began when Mr. Guay was with Sogitec in the 1990s, and continued when he completely took over the Vietnam region under the aegis of Sofia Express in 2012. Often, the company would act in the role of “prime contractor”, which is basically understood by the parties to mean “a larger scale reseller or system integrator”. This could involve Sofia Express purchasing products from Nautel and reselling them to the end user (in Southeast Asia) directly. It was not uncommon for some of these agreements with Nautel to be consummated by the Regional Sales Manager. Under such an arrangement, Sofia Express would be provided with a 20-40% discount off of the Nautel pricelists, which allowed it to obtain products from Nautel and resell them in the region as prime contractor, for enhanced profit (*Guay Affidavit*, paras. 14–15).

[14] Mr. Guay describes the situation, generally, as one where Sofia Express worked to secure and sign various contracts for the sale of Nautel products. This could take the form of Sofia Express providing the end user with interim financing for the purchase of Nautel products, and also providing technical support including installation, commissioning, training and maintenance to the end user. He says that as recently as April 2021, Sofia Express was still working with Nautel to promote the sale of its products in the region, and that, throughout the bulk of the parties’ prior dealings, the Regional Sales Managers of Nautel were John Abdnour and, later, Chuck Kelly (*Guay Affidavit*, paras. 16-18). Some of these Nautel personnel were changed in or around 2018-2019 under circumstances which will be further discussed below.

[15] Wendell Lonergan has been the Senior Director of Broadcast Sales at Nautel since 2012. In that capacity, he oversaw broadcast sales for the company, including the ones at issue in these proceedings, which will be described shortly. In 2019, Joseph Cheu became a Sales Consultant with the company for the Asia-Pacific region, and he has reported directly to Mr. Lonergan since that time (*Lonergan Affidavit*, paras. 8–10).

Nautel products and how they are marketed

[16] Nautel manufactures AM and FM radio broadcast transmitters. It is a Canadian company located in Nova Scotia. It has developed an NX series of AM broadcast transmitters operating in the medium frequency range, which are used to broadcast radio signals.

[17] In addition to the earlier mentioned products associated with radio broadcasting, Nautel also sells products for navigation, sonar, and industrial applications. As well, it sells additional products for FM transmitters, and for digital radio. It also works with customers to design and develop specific equipment for their specific applications (*Loneragan Affidavit*, para. 11).

[18] Mr. Loneragan continues:

13. Nautel will also use sales agents as authorized resellers of our products. When Nautel uses sales agents, there are written agreements that are in place. These agent agreements have predominantly been non-exclusive. Nautel uses sales agents because we literally see our marketplace as the entire world. Our sales team cannot be on top of every possible opportunity that could arise anywhere in the world. The reason our agent agreements are non-exclusive is because in many cases, more than one agent can be aware of a tender that could require RF products, and/or a business opportunity for Nautel.
14. When an authorized Nautel agent is involved in a potential sale, that agent works closely with our company and receives a Nautel generated quote for whatever the given potential sales opportunity may be. The agent's agreement dictates how sales commissions will work. If the end user (i.e. the ultimate customer of the Nautel product) seeks a discount and/or attempts to negotiate a lower price, then the agent's commission is also renegotiated as well.
15. At times, Nautel will also sell our existing products to our agents and allow them to resell those products on their own. There is no commission for those types of sales, rather the agent can make money by negotiating and selling the product at a higher price than what the agent paid for the product to Nautel. For existing Nautel products, Nautel has a standardized price list.
16. For products that customers want Nautel to design and manufacture, Nautel's research and development team will often work closely with the customer to learn the customers needs and requirements. This development process can take any amount of time. It depends on the size and scope of a particular project. When an agent is involved, the agent is often the customer contact, arranges and attends meetings, communicates regularly with the Nautel sales and development team, and is responsible for taking the sales opportunity from the start through to the final sale.

(Loneragan Affidavit)

[19] Among other things, Mr. Loneragan takes issue with Mr. Guay's characterization of development timelines in Vietnam. While acknowledging that

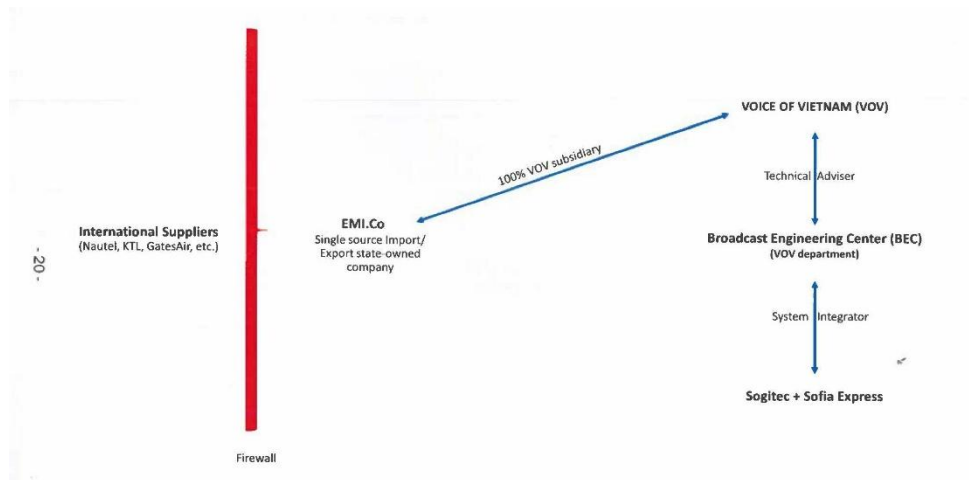
they may be variable depending on a number of factors, as a general statement he takes the position that a conservative estimate of applicable timelines “would be fifty percent of what is set out in Mr. Guay’s Affidavit, and can often be quite less than fifty percent of those timelines” (*Loneragan Affidavit*, para. 20).

The Dispute

[20] On January 18, 2021, an NX400 transmitter was sold by Nautel to “Voice of Vietnam” (“VOV”). Payment in full was received by the Respondent on April 29, 2022. Two other transmitters, both NX200s, were sold to VOV, the first on April 28, 2023, and the second on May 10, 2023. The invoice numbers for all three transmitters are 10027809, 10033081, and 10033180 respectively (*Guay Affidavit*, Tab II).

[21] These transmitters were used in two Vietnamese government projects, one in Ninh Thuan Province, and the other in Da Nang Province (“the Projects”). Sofia Express claims commission on these sales on the asserted basis that it (through the efforts of Mr. Guay) did an extensive amount of “legwork”, introduced Nautel (and KTL) personnel to their counterparts in VOV and, in some cases, to Vietnamese government officials. These efforts are said to include having borne the cost of bringing VOV executives to North America on more than one occasion, in order to make the deal happen (even though it did not come to fruition until 2021 – 2023). In effect, he says that Nautel would not have been in a position to sell its NX products but for Sofia Express’ many previous years of effort in promoting the Respondent’s product for use in these projects.

[22] VOV is the national radio station responsible to the central government of Vietnam. VOV Broadcast Engineering Centre (“VOV BEC”) operates as a technical advisor to VOV. It is a 100% owned subsidiary of VOV, and it controls imports and exports for its parent company (*Guay Affidavit*, para. 19). The Applicant has provided a rough diagram of how he says the VOV organizational structure works. It is reproduced below:



(Guay Affidavit, Exh. B)

[23] The name appearing to the right of the red “firewall” in the above diagram is “VOV EMI.Co”. This company is also owned by VOV, and it acts in a role analogous to that of sales agent for VOV. The only way to get product past “the firewall” to VOV, in Mr. Guay’s testimony, was through VOV EMI.Co, which had strong ties to, and a historical preference for, a Nautel competitor called “GatesAir”. We will return to this shortly.

[24] Mr. Guay’s evidence is that his personal relationship with VOV has been in place since 1995. He says that, from the outset, that relationship has been a profitable one for Nautel. For example, Nautel sold a 200kW MF-AM transmitter in 1997, and two 10kW VHF-FM transmitters in 1998 as a result of his promoting efforts. Mr. Guay’s evidence is that he was (and is) the “face” of Sogitec/Sofia Express in the area.

[25] Because it is related to an issue to be addressed later in these reasons, I will state at this juncture that I am satisfied on the basis of Mr. Guay’s *viva voce* testimony, his affidavit evidence, and, indeed, all of the other evidence, that his South Eastern Asia contacts did not appear to differentiate between Sogitec and Sofia Express. Rather, it was Mr. Guay personally who had built up these relationships, and who was the “face” with whom the relevant individuals identified and dealt.

[26] The Applicant testified that his involvement in the Projects had its genesis or starting point as early as 2006. During a meeting in Hanoi that year, VOV officials

alerted Mr. Guay to the fact of their need to renew and expand their inventory of MF-AM transmitters in the future.

[27] Upon receipt of this information, Mr. Guay undertook to try to secure this business opportunity for Nautel. What follows is a summary of his evidence (both affidavit and *viva voce*) as to the efforts which were expended in this respect.

[28] In 2006, Chuck Kelly was the Respondent's Director of Sales. Mr. Guay arranged a meeting between him and some VOV leaders (Dao Duy Hoa, VOV Vice-President, and LE Dinh Lam, Deputy Director, VOV BEC). In addition to serving as a personal introduction of Mr. Kelly (and, through him, Nautel) to these valuable contacts, this meeting also enabled him to participate in a discussion about VOV's plans to obtain MF-AM transmitters (to meet future Vietnamese requirements), and for him to introduce VOV to Nautel's newly developed high-power NX MF-AM series transmitter, in which the officials appeared keenly interested. As such, Mr. Kelly had an early opportunity to introduce this series of transmitters to VOV, even though it was not scheduled for public release until September of the following year (*Guay Affidavit*, paras. 24-26 and Exh. C).

[29] This led to another development. A demonstration was arranged whereby Nautel 1 kW MF-AM and 1 kW VHF-FM transmitters would be used by VOV for a trial period. The Memorandum of Understanding with respect to this arrangement was dated January 24, 2007 and expressed to be between "Radio the Voice of Vietnam" and "Sogitec International Telecom ... represented by Mr. Guay/Alain, Sales Executive Officer".

[30] The substance of the Memorandum required:

1) Shipment to Hanoi, Vietnam, of Nautel J1000 and V1-D transmitters [re: respectively 1 kW MF-AM and 1 kW VHF-FM IBOC transmitters] accompanied with AM/FM+HD audio processors, a FM+HD dipole antenna, 5/8" coax cable with N connectors, and quantity of vehicular and fixed AM/FM+HD receivers. Equipment remains the property of [Sogitec] unless [VOV] buys those after trial completion. Shipment shall be accompanied by with a combined invoice and packing list for import/re-export formalities.

(*Guay Affidavit*, Exh. D)

[31] Sogitec was also required to provide a plan evaluation for the AM and FM IBOC technologies so as to assist with an evaluation of the performance and compatibility of the equipment, and to assume responsibility for the initial system installation, start-up and measurements, as well as technical and operational

training, and attend a post-trial survey meeting organized by VOV in Hanoi, Vietnam. That company was also to bear the costs associated with fulfilling those obligations.

[32] The Memorandum was signed on behalf of VOV by Hoang Hong Duc, and on behalf of Sogitec by Mr. Guay.

[33] The installation was completed around the fourth quarter of 2007. Some photographs of the installation were tendered by Mr. Guay, and show the involvement of both Messrs. Guay and Kelly in the actual installation in tandem with the Deputy Director of the VOV Broadcasting Engineering Centre (*Guay Affidavit*, Exh. E, p. 29). Another photograph depicts the Mr. Guay and other attendees at Hanoi, Vietnam, at the conclusion of the test run of Nautel's equipment, in February, 2009 (*Guay Affidavit*, Exh. F, p. 35).

[34] As noted above, and despite the wording in the Memorandum (which specified a 6 month trial) the actual trial encompassed a one-year period, between February 2008 and February 2009. One month after the completion of the trial, Mr. Guay arranged and joined a trip to North America with the VOV delegation. The itinerary included attendances in Halifax, Nova Scotia, which enabled the VOV delegation to visit the Nautel factory at Hackett's Cove, as well facilities in Maryland, USA. It also included a stop at Toronto, Ontario to visit CBC broadcasting facilities. Some of the attendees included Peter Conlon, Nautel CEO, Duy Hua Dao, VOV Vice-President, Minh Hien Ngo, VOV International Cooperation Department, Ngoc Dang, VOV Chief of Staff, Mr. Kelly and Mr. Guay (*Guay Affidavit*, Exh. G, p. 38).

[35] A second trip to Canada was arranged by Mr. Guay in late September 2009, and it also involved a VOV delegation. This time, Mr. VU Van Hien, VOV President, and Mr. NGO Xuan Thi, General Director of VOV EMI.Co formed part of it. Also included in the delegation were other people who would be involved in making decisions about contracting the sale of NX400 and NX200 transmitters for VOV.

[36] The agenda for that (second) North American meeting included a visit to the CBC (Sackville) transmission site in Nova Scotia, another visit to the Nautel factory in Hackett's Cove, Nova Scotia, and a demonstration for VOV personnel with respect to the use of the DAM system in their environment. Once again, all of the expenses of the trip, including the flights, meals and accommodation were paid by Mr. Guay and/or Sofia Express/Sogitec (*Guay Affidavit*, paras. 34-38, Exh. H).

[37] There was a relative hiatus with respect to the efforts of Mr. Guay/Sofia Express/Sogitec during the 2010 – 2012 interval because, in Mr. Guay’s evidence, the Vietnamese economy was in financial turmoil. He notes that “[Sofia Express] continued to promote the sale of Nautel transmitters at any opportunity during this time” (*Guay Affidavit*, para. 39). He did not provide any further examples of such promotion during this timespan, however.

[38] In March 2013, VOV contacted Mr. Guay and discussed with him a more fully developed plan to invest in MF-AM transmitters ranging from 100kW and higher. This was part of a project aimed at replacing their old high power MF-AM transmitters, and developing new sites whereby MF-AM could transmit offshore to alert fishermen as to incoming storms, and also create interference with respect to any potential foreign incursions within Vietnam’s territorial waters.

[39] Mr. Guay testified that his promotional efforts on behalf of Nautel redoubled. On March 22, 2013 and June 4, 2013, he provided emails to the aforementioned Mr. Thi (VOV EMI.Co). The latter portion of that correspondence enclosed the Nautel NX series transmitter brochure package. These transmitters were the series eventually sold by Nautel to VOV, and for which Nautel received payment, during the period 2021 – 2023.

[40] Between the dates of March 22, 2013 and June 4, 2013, there occurred the following series of emails between Messrs. Guay, Kelly and Abdnour related to the Nautel products at issue. They are reproduced below (in these and other emails subsequently mentioned, personal contact information has been redacted):

From: Chuck Kelly
Sent: Monday, April 15, 2013 11:21 AM
To: Quang Luong PHAM
Cc: John Abdour; Wendell Lonergan
Subject: RE: MW project in Vietnam

Dear Mr. Pham,

Yes, of course I remember you! Thanks for the message.

I do believe we are already working on this - but will ask our regional sales manager for Asia/Pacific, Mr. John Abdour, to contact you to confirm one way or another.

Warm personal regards,

Charles W. Kelly, Jr.
Director of Sales

Nautel

Making Digital Broadcasting Work.

Email: [REDACTED]

Web: www.nautel.com

Direct Ph: + [REDACTED]

Mobile Ph +1 [REDACTED]

Fax: +1 (902) 823-3183

Skype: [REDACTED] ICQ: [REDACTED] Yahoo: [REDACTED]

From: messages-noreply@bounce.linkedin.com [<mailto:messages-noreply@bounce.linkedin.com>] **On Behalf Of** Quang Luong PHAM via LinkedIn
Sent: Monday, April 15, 2013 1:15 PM
To: Chuck Kelly
Subject: MW project in Vietnam

LinkedIn

Quang Luong PHAM has sent you a message.

Date: 4/15/2013

Subject: MW project in Vietnam

Hi Chuck Kelly

How are you? I don't know if you remember me, I was SM from Thaies Broadcast taking care of Vietnam, and I still have some good relations in Vietnam.

There are a project of MW (2 sets) of 100kW each with perhaps some antennas systems. Do you know this project or can I suggest to be your agent for this project. I will manage the deal with my partners and the lobbying to push the technical specifications on it.

Pls let me know by reply this email

Tks

PHAM Quang Luong

From: Sogitec Vietnam [[mailto:\[REDACTED\]](mailto:[REDACTED])]
Sent: Friday, May 24, 2013 4:09 AM
To: John Abdour
Subject: NX100

Dear John,

We are under the impression that gentleman refers to either one of the projects that we pursue currently. There is no other broadcaster in Cambodia and Vietnam allows to transmit over 50kW on the MF-AM band.

Radio National of Kampuchea "RNK" (Phnom Penh): Not sure yet about which one of 2x100kW or 200kW MF-AM transmitter they might buy in the very near future, depending on the Ministry of Information's decision.

Voice of Vietnam "VOV" (Hanoi): Last week meeting Mr Tuan, Vice-President, he mentioned to have plan buying few 100kW or higher power MF-AM transmitters. All VOV projects are on pending waiting for a decision by the National Assembly to invest.

Voice of HCM city "VOH" (Saigon): The HCM City People Committee declared not to have a budget this year to buy either one of 2x100kW or 200kW MF-AM transmitter; therefore, the management has asked for national budget in Hanoi.

In my viewpoint, VOV is the one who has better chances to get budget to invest in AM transmitters. Keep you posted upon new developments.

Thanks,

Alain

From: John Abdnour [mailto: [REDACTED]]
Sent: April-15-13 23:36
To: [REDACTED]
Subject: FW: MW project in Vietnam

Dear Alain:

Chuck received the following inquiry regarding 100 kW opportunities in Vietnam. I replied saying that we are working on them with our agent. I am sure you and I have discussed these, correct?

--
John Abdnour
Nautel | Regional Manager/Asia-Pacific

Tel: +1.902.823.3900 x [REDACTED]
Direct: + [REDACTED]
Fax: +1.657.202.2992
[REDACTED]

From: John Abdnour [mailto: [REDACTED]]
Sent: May-24-13 19:29
To: Sogitec Vietnam
Subject: RE: NX100

Dear Alain:

These sound like wonderful opportunities. Please let me know how I can help.

--
John Abdnour
Nautel | Regional Manager/Asia-Pacific

Tel: +1.902.823.3900 x [REDACTED]
Direct: [REDACTED]
Fax: +1.657.202.2992
[REDACTED]

From: Sogitec Cambodia < [REDACTED] >
Sent: Monday, May 27, 2013 3:34 PM
To: 'John Abdnour' < [REDACTED] >
Subject: RE: NX100

Dear John,

Do we have photos available on installation of NX100, NX300 and NX2000 (if any shipped).

Thanks,

Alain GUAY

(Guay Affidavit, Exh. L, contact information redacted)

[41] John Abdnour was Regional Sales Manager (Asia-Pacific) for Nautel. Mr. Guay says that the above was only the first of “many discussions with Mr. Abdnour about the Project” (*Guay Affidavit*, para. 43).

[42] On July 14, 2015, VOV BEC was provided by Sofia Express with a quotation for Nautel NX100, NX200 and NX400 transmitters and further testified that, accessories based on Nautel’s “Master International Price List” (at the time). The quotation follows:

RADIO VOICE OF VIETNAM						
Hanoi – VIETNAM						
NAUTEL NX MF-AM SERIES TRANSMITTER						
Price List Effective January 13th, 2015						
ABSTRACT & BUDGETARY QUOTATION						
Date:		14 JUL 2015				
Project Owner:		Radio Voice of Vietnam, Hanoi, VIETNAM Broadcast Engineering Center				
System Integrator:		Sofia Express AG Corp., Quebec, CANADA				
Project Description:		High-power MF-AM Transmitter with Ancillary Parts				
N°	DESCRIPTION OF GOODS & SERVICES	QTY	MODEL	BRAND	U/PRICE	E/PRICE
1.00	HIGH POWER NX MF-AM Series Transmitter	0		NAUTEL		
1.10	100 kW AM Transmitter: a solid state, modular, 100 kW, AM/DRM/HD broadcast transmitter with fast frequency change. Includes a ground switch for the RF output, a complete lock set accompanied by an AC disconnect switch for controlling access to all transmitter panels where dangerous voltage may be present while AC is applied, and an emergency stop button that will remove RF power from the system	0	NX100		\$346,500.00	
1.11	Cable Tray Kit for NX100: Nautel cable tray/wiring assembly for installation of NX100. Consists of cable trays and wiring for overhead installation of interconnection wiring from the transformer to the transmitter. Assumes standard configuration with transformer located 3 meters behind transmitter. Other configurations available; contact Nautel for costing	0	CABLE TRAY		\$4,200.00	
1.12	NX Series Power Module: complete hot pluggable, 2500 watt power module	0	NX-PM		\$2,900.00	
1.13	NX100 Spares Kit: includes fans, fuses, and semiconductors.	0	NX100-KIT		\$4,400.00	
1.14	50kW load: Air cooled 50 ohm dummy load for use in MF frequency band. Maximum Continuous power rating of 75kW with a VSWR less than 1.05:1 across the band	0	NXL50		\$26,260.00	
1.20	200 kW AM Transmitter: a solid state, modular, 200 kW, AM/DRM/HD broadcast transmitter with fast frequency change. Includes a ground switch for the RF output, a complete lock set accompanied by an AC disconnect switch for controlling access to all transmitter panels where dangerous voltage may be present while AC is applied, and an emergency stop button that will remove RF power from the system	0	NX200		\$519,800.00	

1.21	Cable Tray Kit for NX200: Nautel cable tray/wiring assembly for installation of NX200. Consists of cable trays and wiring for overhead installation of interconnection wiring from the transformer to the transmitter. Assumes standard configuration with transformer located 3 meters behind transmitter. Other configurations available; contact Nautel for costing.	0	CABLE TRAY		\$8,100.00
1.22	NX Series Power Module: complete hot pluggable, 2500 watt power module	0	NX-PM		\$2,900.00
1.23	NX200 Spares Kit: includes fans, fuses, and semiconductors.	0	NX200-KIT		\$6,875.00
1.24	NXL100 100kW load: Air cooled 50 ohm dummy load for use in MF frequency band. Maximum Continuous power rating of 150kW with a VSWR less than 1.05:1 across the band	0	NXL100		\$50,160.00
1.30	400 kW AM Transmitter: a solid state, modular, 400 kW, AM/DRM/HD broadcast transmitter with fast frequency change. Includes a ground switch for the RF output, a complete lock set accompanied by an AC disconnect switch for controlling access to all transmitter panels where dangerous voltage may be present while AC is applied, and an emergency stop button that will remove RF power from the system.	0	NX400		\$866,300.00
1.31	Cable Tray Kit for NX400: Nautel cable tray/wiring assembly for installation of NX400. Consists of cable trays and wiring for overhead installation of interconnection wiring from the transformer to the transmitter. Assumes standard configuration with transformer located 3 meters behind transmitter. Other configurations available; contact Nautel for costing	0	CABLE TRAY		\$21,200.00
1.32	NX Series Power Module: complete hot pluggable, 2500 watt power module	0	NX-PM		\$2,900.00
1.33	NX200 Spares Kit: includes fans, fuses, and semiconductors.	0	NX200-KIT		\$6,875.00
1.34	200kW load: Air cooled 50 ohm dummy load for use in MF frequency band. Maximum Continuous power rating of 300kW with a VSWR less than 1.05:1 across the band	0	NXL200		\$56,600.00
2.00	SERVICES				
2.01	Shipment CIF Hai Phong port, Vietnam, 40' FCL (Nos1)	0	Custom	SOFEX	\$16,090.00
2.02	On-site Installation Assistance & Configuration	0	Custom	SOFEX	\$7,500.00
TOTAL PRICE USD CIF Hai Phong port, VIETNAM					\$0.00

GENERAL TERMS & CONDITIONS

Expiry Date: JUL31 2015

Payment & Shipment: TBD

Warranty: 48-month from the date of shipment against limited defects in materials and workmanship under normal use and service

(Guay Affidavit, Exh. M)

[43] During the first three quarters of 2016, Mr. Guay, on behalf of Sofia Express, attended a number of meetings at VOV headquarters in Hanoi during which he continued to promote the Nautel NX MF-AM series transmitters, as well as providing technical information to VOV BEC officials. Information received by him during one of these meetings included VOV's priority list, which (in turn) included refitting the Da Nang Province transmission site, as well as a 400kW MF-AM transmission site in Ninh Thuan Province. Mr. Guay said he realized that these Projects would align with the Nautel NX200 and NX400 transmitters and, through his efforts, this opportunity was what eventually became the Project and led to the sales in 2021 and 2023 which form the subject matter of this litigation (*Guay Affidavit*, paras. 47-48).

[44] After the Hanoi meetings, Mr. Guay shared these details with Mr. Abdnour on behalf of the Respondent. The two men discussed what they felt was necessary to win this Project on behalf of Nautel.

[45] Then, there was a twist. It involved VOV EMI.Co. and VOV BEC. Mr. Guay described it as such:

50. In or around September 2016, I was advised by VOV BEC not to ask VOV to arrange a call for bids for project at the scale of the Nautel Project. At that time, I was informed by VOV BEC that VOV EMI.Co (a GatesAir Sales Agent for Vietnam as competitor) would have found any pretext to disqualify a bid that came from Sofia Express in conjunction with Nautel.
51. I understood that in Vietnam deals are arranged mostly in the background. Based on my history in the region, I relied on this key advice when determining next steps with Nautel.
52. VOV BEC (VOV's technical advisor) told me they agreed to inform VOV EMI.Co at that time of their preference for Nautel NX MF-AM series transmitters over the GatesAir equivalent. In parallel, VOV BEC strongly suggested I connect with VOV EMI.Co to discuss an arrangement in the best interest of the parties.
53. I discussed with VOV EMI.Co whether they would accept purchasing Nautel NX MF-AM series transmitters (rather than the GatesAir equivalent). VOV EMI.Co expressed an interest, but it was conditional that Sofia Express and I take no part in the final stage of the Project between VOV and Nautel. I was willing to agree to that condition because I understood it would increase the likelihood of securing the sale of Nautel transmitters for the Project.
54. I brought this information to the attention of Mr. Abdnour. I suggested Sofia Express should no longer be the Prime Contractor for the Project due to the specific circumstances in dealing with VOV as an organization.
55. We agreed to swap the Prime Contractor position from Sofia Express to Nautel to improve the odds of success and let Mr. John Abdnour quote directly the NX400 and NX200 to VOV. Sofia Express would be an Agent instead, which meant instead of a discounted sale price, Sofia Express would receive commissions from the Project if it was successful, reflecting the large amount of work Sofia Express had executed to bring the Project together.

(Guay Affidavit, emphasis added)

[46] In accordance with the above, Mr. Guay provided Mr. Abdnour's contact information to officials at VOV EMI.Co. As a result of that facilitated contact, Mr.

Abdnour was able to provide the latter with a quotation for the Project, which was to consist of NX400 and NX200 transmitters, and necessary attachments. Also included was technical information with respect to the equipment to be supplied. The quote for a NX400 transmitter, plus cable tray kit, plus UPS interface option, plus NX series power module, plus integrated control interface, plus spare kit for higher power NX transmitter, plus AC line protector, as well as Nautel on-site installation supervision and startup assistance and factory acceptance tests, was \$930,675 in total. The quote for an NX200 transmitter, with similar accessories and on-site supervision and testing, was \$622,495 (*Guay Affidavit*, Exh. O, pp. 84-88).

[47] Each quote had a covering letter which, in addition to being sent by Mr. Abdnour to VOV EMI.Co in care of Mr. LUU Dinh Thao, was also copied to Mr. Guay one day later:

From: John Abdnour [mailto: [REDACTED]]
Sent: Saturday, November 12, 2016 12:52 PM
To: Alain Guay ([REDACTED] <[REDACTED]>)
Subject: MW-AM Transmitters

Dear Alain: This is what was sent.

Dear Mr. LUU Dinh Thao:

Again, I would like to thank you for your inquiry in Nautel MW-AM transmitters. For your budgeting and planning, attached are quotations for the Nautel NX400; 400 kW MW-AM transmitter and NX200; 200 kW MW-AM transmitter with the DRM30 option. Both transmitters are the world's latest design, most compact, feature rich and efficient (with 90% efficiency from AC input to RF output).

Please let me know if I can be of any assistance or answer any questions. Again, thank you for your interest.

(*Guay Affidavit*, Exh. O, pp. 83 and 89)

[48] It will be recalled that the Nautel NX400 is what ended up being sold for installation at Ninh Thuan in 2021 and two NX200s were sold for use in Da Nang in 2023.

[49] Mr. Guay responded to his Nautel counterpart on November 16, 2016, in the following manner:

From: Sogitec Vietnam [mailto:████████████████████]
 Sent: Wednesday, November 16, 2016 10:07 AM
 To: 'John Abdnour' <████████████████████>
 Subject: VOV - MW-AM Transmitters

Dear John,

Just back from a countryside mission. Thanks for that quick respond to Emico. Get back working on that project with VOV Broadcast Engineering Center team (doing best to discard GatesAir).

Best regards,

Alain

(*Guay Affidavit*, Exh. P, emphasis added)

[50] The next development occurred approximately one month later. The difficulty was posed by the fact that the land allocated for the Project in Ninh Tuan Province originally was no longer available for the specific 400kW MF-AM transmission site. As a consequence, VOV had to turn to other land options in the area.

[51] VOV also added an additional requirement around this time. It required that its purchases (400kW MF-AM and 200kW MF-AM) were to be delivered from a single source, which could, however, consist of multiple suppliers working together. In essence, what VOV now indicated it was looking for was a “turnkey” operation for the Projects (*Guay Affidavit*, paras. 58-60).

[52] Mr. Guay’s evidence was he was (obviously) aware that Nautel manufactured transmitters. These transmitters require antenna-feeders to service the entire system. The implication of VOV’s request was that both transmitters and antennae would have to be delivered together.

[53] Since Nautel does not design or supply antenna-feeders, he, as representative of Sofia Express, contacted Kintronic Labs (“KTL” or “Kintronic”), a company located in Tennessee, USA, which had worked with both his company, and Nautel, in the past.

[54] The idea was that KTL would join Sofia Express in designing and supplying 200kW MF-AM multiplexing antennae in service of the Projects. The emails exchanged between Sofia Express/Mr. Guay and Tom King (KTL) with respect to this issue comprise 16 pages and appear at Exhibit Q to the *Guay Affidavit*. Although the Court has considered all of them, only some are reproduced below to convey their gist:

From: Sogitec Vietnam [mailto: [REDACTED]]
Sent: Monday, December 26, 2016 3:39 PM
To: 'tking [REDACTED]'
Cc: 'kti [REDACTED]'
Subject: MW Products Inquiry

Hi Tom,

Hope to find you well at the Eve of Year 2017!

We have a project for which we need some of your products to bid. How can we work under exclusivity. When would you resume business!?

From: Tom King [mailto: [REDACTED]]
Sent: Monday, December 26, 2016 6:13 PM
To: Sofia Express < [REDACTED] >
Subject: RE: MW Products Inquiry

Hi Alain

It is good to hear from you as we near the end of 2016. All is well here, and I hope the same for you. We re-open for business tomorrow and will be open through Dec. 30th. Please proceed with sending details for the MW project. We will look forward to working with you in the new year.

From: Sofia Express < [REDACTED] >
Date: 12/26/2016 7:00 AM (GMT-05:00)
To: Tom King < [REDACTED] >
Subject: MW Products Inquiry

Hi Tom,

A design is required prior to quote.

Project Owner: Voice of Vietnam
Project Description: Rebuild dual stations based on existing 200kW 594mHz AM + 200kW 702mHz AM transmitters:

Requirements:

- 1/ RF patch panel & components for diplexer bypass for TX maintenance
- 2/ 25kW MF-AM test load station
- 3/ Diplexer
- 4/ Coax feeder, 400m, 50Ω
- 5/ Antenna Tuning Unit weatherproof (bottom of antenna)
- 6/ 90m complete antenna (except ground optional), a maximum height due to airport proximity

Thanks,

From: Bobby Cox [mailto: [REDACTED]]
Sent: Tuesday, December 27, 2016 11:51 PM
To: [REDACTED]@sogiteccam.com
Cc: Tom King [REDACTED]; Jim Moser < [REDACTED] >
Subject: Voice of Vietnam project, 594 kHz and 702 kHz

Hello Alain,

I have a couple of questions regarding this project.

1. Can you confirm for me that the new system will continue to diplex 594 kHz / 200kW and 702 kHz / 200kW on the same antenna? **YES**
2. Can you let me know the desired wind rating for the tower? **150km/h survival (at sea level subject to many typhoons)**

Do you have any information on the site conditions that may influence the tower foundation and anchor designs? Also, if GPS coordinates are available for this site, please provide these. **I asked but for the purpose of project take temporarily 16° 03'11.08" N / 108° 12'09.45" E**

- 3.
4. Is a map of the site available showing the space available for the antenna anchors? The antenna that we will propose requires some additional guy anchors separate from those of the tower. I need to know how far from the tower the property boundaries or any other obstructions are that may dictate the placement of the antenna guy anchors. **To come!**

Thank you Alain.

I look forward to your reply.

From: Bobby Cox [mailto: [REDACTED]]
Sent: Saturday, December 31, 2016 5:06 AM
To: Sofia Express < [REDACTED] >
Cc: Tom King < [REDACTED] >; Jim Moser < [REDACTED] >
Subject: RE: Voice of Vietnam project, 594 kHz and 702 kHz

Hello Alain,

I have completed a preliminary design for the diplexing system with good bandwidth performance for both stations. I am in the process of gathering the pricing for all the other components of the equipment package that you requested. Can you confirm the dummy load that you would want for this project? You mentioned a 25kW test load, but this seems small for 200kW transmitters involved. Please clarify.

Also, do you have a preferred size for the two feeders that will connect the diplexing system to the transmitters? Either 4" or 5" air line could be used at this 200kW power level.

Also, note that the diplexing system will be fully installed at the base of the antenna. Both matching networks and both filter networks, as well as a shared pre-matching network will all need to be housed at the base of the 90m tower. I have tentatively estimated a shelter size at 10m x 6m to house the system. For systems of this size, we normally provide a fully factory pre-tested system in the form of a parts kit. It will include all of the necessary tuning components, mounting hardware and insulators, a full scale layout template as well as detailed drawings, etc. to be installed on site in your shelter. We will also include RF shielding screens to be installed between networks to ensure proper isolation between the transmitters. We also can provide both RF input ports and a wall feed-through insulator panel to be installed in a wall cut-out.

From: Sogitec Vietnam [mailto: [REDACTED]]
Sent: Saturday, December 31, 2016 9:47 AM
To: 'Bobby Cox' < [REDACTED] >
Cc: 'Tom King' < [REDACTED] >; 'Jim Moser' < [REDACTED] >
Subject: RE: Voice of Vietnam project, 594 kHz and 702 kHz

Hi Bob,

The project: The Da Nang Airport Authority required VOV to cut down AM antenna at 90m AGL and VOV add a second MW-AM frequency.

1/ Station coordinate: **15°59'27.3"N 108°11'10.4"E**

2/ There is an existing 130m AM antenna within a terrain 300x300m. Note tower foundation and anchor ones are in place for 130m guyed tower.

3/ Test Load: This is only for maintenance where there is no need to transfer full load RF. However, a wattmeter should be required to compare the incoming power to test load versus outgoing from TX. I trust a 50kW max. test load is far enough (budget concerned!)

4/ Feeder: Taking into account frequencies, attenuation, kWrms, and 25% safety factor, I do trust that a 4" air-dielectric would be enough for each 200kW TX.

5/ Shelter: Agree on. No problem for shelter size.

Happy New Year!

From: Bobby Cox
Sent: Friday, January 27, 2017 3:51 PM
To: 'Sofia Express' <[REDACTED]>
Cc: Tom King <[REDACTED]>; Jim Moser <[REDACTED]>
Subject: RE: Voice of Vietnam project, 594 kHz and 702 kHz
Importance: High

Hello Alain,

Thank you for the opportunity to provide you with the attached quotation for supply of the Voice of Vietnam diplexed antenna system for 594 kHz and 702 kHz, each at 200kW. The diplexing system is expected to perform very well, as indicated in the attached design material.

The pricing shown in the proposal is your NET cost and is F.O.B. origin.

I've included attachments showing a preliminary layout of the diplexer tuning house, the proposed tower overview, an overview of the 6-way skirted tower, and the expected system bandwidth performance.

The tower that I have quoted is not the lowest price quote that I received, but it is from the manufacturer I've worked with frequently and that has the most experience working with this special type of antenna skirt. I know their tower will be a top quality solid rod tower and that it will be properly designed to handle the large rhombic antenna skirt. If you choose to use another source for the tower, please be sure that they are familiar with the large antenna skirt that will be installed on the tower.

Among the optional items, I have offered pricing for a basic 120 radial ground system materials package. I can also offer a package of materials for copper shielding in the shelter if you would like a quote for this.

I have been waiting to receive pricing on the 4" and 5" air line options, but wanted to go ahead and send you all that I have now rather than waiting longer for the transmission line pricing.

Note that either 4" or 5" line can be used, but we cannot use 4" line with 3-1/8" EIA connectors as the connectors are not rated for the 200kW operation. I will forward you a quote for transmission line as soon as I have it available.

For a budgetary estimate of freight, you may assume one 40' High Cube container for the tower, one 40' standard container for the diplexing system, and one 40' standard container for the rhombic antenna package, patch panel, and dummy load. These three containers would likely cost approximately \$4,000 each to ship, so I would roughly estimate \$12,000 for freight to Ho Chi Minh Port. Inland freight and handling would be extra.

Thank you again for this opportunity. If you have any questions, or if I can help further in any way, please let me know. I hope to get to work with you on this project soon.

From: Sofia Express [mailto:[REDACTED]]
Sent: Friday, April 14, 2017 4:49 AM
To: Bobby Cox <[REDACTED]>
Cc: Jim Moser <[REDACTED]>; Tom King <[REDACTED]>
Subject: RE: Voice of Vietnam project, 594 kHz and 702 kHz

Hi Bob,

We got a better idea from VOV side today. They foresee a full diplexing system but with implementation in Q2 2018. They do not have enough budget for ATU/Diplexing system shelter in this year unfortunately. Keep you posted upon new development.

From: Bobby Cox <[REDACTED]>
 Sent: Monday, April 17, 2017 6:50 PM
 To: Sofia Express <[REDACTED]>
 Subject: RE: Voice of Vietnam project, 594 kHz and 702 kHz

OK, thank you Alain.

Best Regards,

(Guay Affidavit, Exh. Q, pp. 99-114)

[55] Without repeating them, the above emails were accompanied, in many instances, with comparable inquiries addressed to VOV BEC in order to confirm the precise specifications that would be required for the Project, including the precise geographical coordinates where the equipment would be installed (*Guay Affidavit*, Exh. R).

[56] On January 14, 2017, Mr. Abdnour retired from Nautel. In notifying Mr. Guay of that fact, he also indicated that Chuck Kelly would be returning as Nautel's Asia-Pacific Regional Manager. Mr. Guay sent the latter a congratulatory email, and also took the opportunity to bring Mr. Kelly up to speed on the Projects:

From: Sogitec Vietnam [mailto:[REDACTED]]
 Sent: Monday, January 16, 2017 8:35 AM
 To: Chuck Kelly <[REDACTED]>
 Subject: VOV - MW-AM Transmitters
 Dear Chuck,
 Welcome back home!

...
 Your message did not mention on where will you be managing from now on, the US or The Philippines.

John had surely passed to you VOV requirements for a 200kW MF-DRM and a 400kW MF-AM. This time we made a 180° turn around to work alongside Emi.Co, apart GatesAir. Actually, now the project is on pending the central government to authorize it (budget approval). Nothing will happen in the next month with the Chinese Lunar New Year! We have some time ahead...

(Guay Affidavit, Exh. T, p. 125, emphasis added)

[57] This elicited Mr. Kelly's response:

From: Chuck Kelly <[REDACTED]>
 Sent: Monday, January 16, 2017 8:40 PM
 To: Sogitec Vietnam <[REDACTED]>
 Subject: RE: VOV - MW-AM Transmitters
 Thank you, Alain. I will still be based in the US, but expect to travel in Asia from time to time, and may use Manila as a hub when doing so.
 I look forward to hearing what I can do to help you with the VOV MW requirements.
 Warm regards from chilly Indianapolis!
 Chuck

(*Guay Affidavit*, Exh. T, p. 125)

[58] On April 11, 2017 the Deputy Director of VOV BEC (Mr. Le Dinh Lam) contacted Mr. Guay to advise that VOV leaders had approved the selection of the Nautel NX MF-AM series transmitters over the competition for the Projects. These were to be the NX200 transmitters for Da Nang, and NX400 transmitter for Ninh Thuan (*Guay Affidavit*, Exh. U).

[59] Mr. Guay's evidence was that he viewed this as "... a success following all the effort, money, and time invested in promoting the Nautel NX MF-AM series transmitters since 2006 and specifically promoting Nautel for the Project" (*Guay Affidavit*, para. 68). He proceeded to provide a technical and commercial proposal for a 200kW MF-AM multiplexing antenna system for Da Nang Province to VOV. This occurred on April 15, 2017 (*Guay Affidavit*, Exh. V, pp. 131-139). He included KTL Diplexer tuning house schematics as well as other technical data.

[60] In late 2017, Mr. Guay was requested by Mr. Kelly (on behalf of Nautel) to sign an Agents Sales Agreement. The parties have referred to this as the "Agency Agreement" or "ASA". The ASA was drafted by Nautel, and Mr. Kelly provided it to Mr. Guay on November 29, 2017 with the request that he "make any necessary changes to fields and return".

[61] On January 31, 2018 the signed Agency Agreement was sent back to Mr. Kelly. The draft agreement had indicated that the contracting party was Sogitec. During the process of signing it and sending it back to Mr. Kelly, Mr. Guay corrected it, noting in the email and on the signature pages that the agreement was with the Applicant, Sofia Express, not Sogitec. His email in that respect, as well as the earlier communication from Mr. Kelly which precipitated it, follows:

From: Chuck Kelly [mailto:]
Sent: Friday, December 1, 2017 3:17 AM
To: SOVIE < >
Subject: RE: Please help me update our current information for our representatives in Asia/Pacific

Thank you, Alain.

Please sign and return these two documents (two signatures on each).

Respectfully,

From: SOVIE < >
Sent: Wednesday, January 31, 2018 09:42
To: 'Chuck Kelly' < >
Subject: Agent's Sales Agreements

Dear Chuck,

Sorry for delay in returning Agent's Sales Agreement back to you. I have been quite busy in commissioning an OB van and a broadcast control system lately.

See attached those agreements signed for your kind perusal.

Note that Sofia Express AG Corporation (408 des Albertains, Quebec G2M 0M1) is the sole company who contracts sales in the territory of Cambodia, Laos, and Vietnam for Agents. Current Agent business licenses allow them to service only [e.g. system design, installation, commissioning, training, maintenance].

Hope that is in your entire satisfaction.

(*Guay Affidavit*, Exh. X, p.150, emphasis added)

[62] Due to its length, the ASA itself is not reproduced or attached hereto. It was, however, signed by Mr. Guay as “President and Secretary of Sofia Express AG Corp” (*Guay Affidavit*, Exh. Y).

[63] Several things are immediately apparent, and they are referenced non-exhaustively below.

[64] First, the emails sent by Mr. Kelly with respect to the draft ASA were dated November 29, 2017 and December 1, 2017. They contained a subject line “Please help me update our current information for our representatives in Asia/Pacific” (*Guay Affidavit*, Exh. X, pp. 150-151).

[65] Second, although the ASA itself is dated November 28, 2017, it was initially expressed as between Nautel and Sogitec. This was corrected and signed by Mr. Guay on behalf of Sofia Express, rather than Sogitec, as the contracting party, on January 29, 2018 (*Guay Affidavit*, Exh. Y, pp. 153, 157-158).

[66] Third, and among other things, the ASA calls for promotion and sale of Nautel’s “products, accessories, and spare parts ... collectively referred to as “the Goods” (*Guay Affidavit*, Exh. Y pp. 153-154).

[67] The ASA also requires provision by “the Agent” to the customer of “technical advice both during and beyond equipment installation ... No charge to [Nautel] shall be made in respect of these services” (*Guay Affidavit*, Exh. Y, p. 154).

[68] The ASA provides for compensation as described in the attached “Sales Agent’s Fee” (*Guay Affidavit*, Exh. Y, p. 154). This, “Attachment - Sales Agent’s Fee” is reproduced in its entirety below:

ATTACHMENT - SALES AGENT'S FEE

Nautel Limited, a company incorporated in Nova Scotia, Canada, hereby agrees to the payment of a Sales Agent's Fee to 15% in an amount set forth in Clause (1) hereinafter and subject to the conditions and duly authorized acceptance of the accompanying Agent's Sales Agreement between Nautel Limited and Sogitec Co. Ltd. This offer of fee shall automatically terminate if and when the said Agreement terminates.

1. FEE AMOUNT

If any equipment is sold at the NAUTEL LIST PRICE the fee amount offered shall be 15 percent based on a list price sale. The fee amount applies to any equipment identified in *Clause (2)* of the said Agent's Sales Agreement and actually sold and delivered to the customer in the Agent's territory as a result of the Agent's direct sale activity supported by a Nautel issued quote. The Nautel List Price shall be defined as the EXW, List price as published in the Company's current PRICE LIST. When competitive pricing is required, the Agent must inform the Company of the competitive environment related to the transaction and the Company will determine allowable discounting and the associated fee amount.


Import duties (if applicable), insurance, and transportation or other charges associated to the transaction shall not be included in establishing the selling price for the purposes of Agent's fee determination.

2. DISBURSEMENT

The Agent's fee, as described in *Clause (1)*, shall be disbursed to the Agent within 30 days of the date of receipt by Nautel Limited of the full payment for equipment sold and delivered.

Should a sales contract contain provision for advance payments during the manufacturing, Nautel Limited will only disburse the Agent's fee after final payment and delivery of the equipment.

Signed for the Company:



Date November 30, 2017

Signed by for the Agent:



Date 29 JANUARY 2018

SOFIA EXPRESS AG CORP.



NAUTEL LIMITED
INCORPORATED
79 Nautel Sales Agent's Fee

Nautel Limited 10080 Pogues Cove Road, Hackett's Cove, NS, Canada B3Z 3J4
Tel: 902.665.2233 Fax: 1.902.823.3183 info@nautel.com
SIMPLY THE BEST ENGINEERED TRANSMITTERS



Patent Sogitec
PRESIDENT S. SOGITEC

(*Guay Affidavit*, Exh. Y, p. 158)

[69] The duration of the ASA is expressed in the following terms:

This Agreement supersedes and annuls all previous Agreements (if any) between parties hereto relating to the sales representation for the Goods and shall commence on and shall, unless terminated by either of the parties in accordance with the provisions of **Clause (11)** hereof, continue for one calendar year from this date or until the same shall have been terminated by either of the parties in accordance with the provisions of either **Clause (10) or Clause (11)** hereof.

(*Guay Affidavit*, Exh. Y, p. 155)

[70] Clause 10 of the ASA (referenced in the excerpt above) deals with breaches of the Agreement by either party and/or deemed breaches include things such as insolvency, bankruptcy, or attempted assignment of the agreement by Sofia Express.

[71] Clause 11 of the ASA (also referenced above) permits termination in writing of the Agency Agreement, and allows either party to serve the other with notice to that effect no later than 30 days before the intended termination date (*Guay Affidavit*, Exh. Y, p. 154).

[72] The ASA provides for payment of the Agent's commission after the equipment has been sold and delivered, specifically, within 30 days of the date of receipt by Nautel of its payment for the equipment sold and delivered (*Guay Affidavit*, Exh. Y, p. 158).

[73] No objection or comment was made by Nautel to the fact that Sofia Express was expressed to be the contracting party rather than Sogitec. The signatories on behalf of Sofia Express were Mr. Guay (Alain) and Patrick Guay, President and Secretary of the Applicant.

[74] On March 14, 2018, there occurred the following communication between Messrs. Kelly and Lonergan:

From: Chuck Kelly
Sent: Wednesday, March 14, 2018 10:30 AM

To: Wendell Lonergan <[REDACTED]>
Subject: Vietnam

Hi W,

I need to provide a couple of quotes for Vietnam which Tom King is going to present to VOV for us.

At the request of VOV I am intending to quote directly to VOV, and bypass Alain (but reserve something for him in the background). KTL will not be selling our equipment.

Two variations

Straight up NX400
Two combined NX200

Question – do we need a tender review, and do you have any suggested packages for these?
Respectfully,

Chuck Kelly

(Guay Affidavit, Exh. Z, emphasis added)

[75] This was followed up by an exchange of emails between Messrs. Guay and Kelly which are reproduced below:

From: SOVIE [mailto:[REDACTED]]
Sent: Wednesday, March 21, 2018 12:10 AM
To: Chuck Kelly <[REDACTED]>
Subject: VOV, Vietnam

Dear Chuck,

Tom informed about both meeting Mr Linh VOV at ABU.

MF-AM/DRM projects are not new, starting with attached quotations submitted to VOV/EMI.Co (as per my request to John). Last year, between OCT29 and NOV03, we secured a week survey of 3 VOV sites but Tom failed to get his entry visa, so trip was a last minute cancellation unfortunately.

Now VOV came back asking for Tom to return in VN on SU MAR24 onwards. Since we have been involved in those projects for quite a while, we would like to know who is now leading those to get job done.

From: Chuck Kelly <[REDACTED]>
 Sent: Wednesday, March 21, 2018 6:33 PM
 To: SOVIE <[REDACTED]>
 Subject: RE: VOV, Vietnam

Hi Alain,

First, my apologies for not being the one to inform you of the meeting with VOV at the ABU. I was quite sick upon my return home, and it's taken me a few days to get back on my feet.

Yes, I am aware of your efforts over the years with VOV, and you will be protected if an order is placed by VOV. However, when VOV met Tom initially in Kuala Lumpur, I was not involved, as VOV requested to meet Tom without me. In that meeting, they told Tom that if they were going to work with Nautel, it had to be without the involvement of our local agent. Tom explained to me that they don't seem to have any specific complaints with you or Sogitec, but that VOV prefers to work directly with the manufacturers on projects of this size. I don't know why – perhaps it is ego? I told Tom that I would work directly with VOV, and he informed VOV of that. The next day then, VOV came to our booth, and we had an open meeting. Afterwards, I did tell Tom that Nautel will protect Sogitec with a to be agreed upon commission if an order for VOV occurs.

At this point, it seems like the best approach is to let Tom carry the ball. He is the one who has been invited to VOV, and I intend to provide him with quotations for both a single NX400 and two NX200's combined, as well as significant other technical documentation on the systems. VOV did not request me to come to Vietnam at this time, although I am willing to if needed.

Please let me know if a 10% commission to Sogitec if these orders occur would be fair.

From: SOVIE <[REDACTED]>
 Sent: Friday, March 23, 2018 12:21 AM
 To: Chuck Kelly <[REDACTED]>
 Subject: VOV, Vietnam

Hi Chuck,

Our long experience with VOV is that anyone is welcomed to promote and demo their products/systems. However, they always expect their subsidiary EMI.Co propose the right products/systems. Often, we won convincing VOV to buy our systems. Last one was Davicom telemetry (Sogitec) against EMI.Co promoting Burk Technology. Finally, VOV selected Davicom to deploy a nationwide telemetry system (quite nice project completed in 2017). At the end, we accepted to let EMI.Co ordering directly Davicom for a win-win situation (none was upset).

It seems that we should do the same with current project. We have been involved in this one since 2015 and EMI.Co did not give us any inch... promoting initially GatesAir, offering a complete system. Of course, to get that today level of interest in Nautel by VOV required time, efforts and other considerations. It has been same for KTL. With your understanding, please do not go below 10% to fulfil our duty.

At present it is suggested that KTL shall be the prime contractor but transmitters are much larger amount. Wait and see Tom's visit in VN but should Nautel lead...

From: Chuck Kelly <[REDACTED]>
 Sent: Friday, March 23, 2018 20:09
 To: SOVIE <[REDACTED]>
 Subject: RE: VOV, Vietnam

Thank you, Alain, for the detail.

I look forward to discussing VOV and specifically this project with you after Tom's visit.

(Guay Affidavit, Exh. AA, emphasis added)

[76] On February 14, 2019, an email was sent by Mr. Lonergan to a number of people including Mr. Guay:

From: Wendell Lonergan <[REDACTED]>
Sent: Thursday, February 14, 2019 11:50 PM
Subject: Chuck Kelly

All

This mail is to inform you the we wish all the best to Chuck Kelly who has resigned from Nautel to pursue a career in Television with the Elenos group of companies.

We will look to find a replacement for Chuck but in the interim I will take over his accounts. Please feel free to contact me with questions you may have.

Best regards,

From: SOVIE <[REDACTED]>
Sent: Monday, February 18, 2019 1:22 PM
To: 'Wendell Lonergan' <[REDACTED]>
Subject: RE: Chuck Kelly

Good Day Wendell,

Noted and await for Chuck's replacement.

Thanks,

(Guay Affidavit, Exh. CC)

[77] Further correspondence ensued. On March 29, 2019, Mr. Guay sent an email to Mr. Lonergan which enclosed the quotations issued by Mr. Abdnour in November 2016 and the correspondence which had accompanied it, which has earlier been encountered in connection with Exhibit O, pages 84-88 to the Guay Affidavit, and previously discussed (*supra*, paras. 47-49). This email, and Mr. Lonergan's response appear below:

From: SOVIE <[REDACTED]>
Sent: Friday, March 29, 2019 4:10 AM
To: Wendell Lonergan <[REDACTED]>
Cc: Kevin Rodgers <[REDACTED]>
Subject: RE: VOV - MW-AM Transmitters

Dear Wendell,

See attached John Abdnour quotations issued in NOV 2016 based on our guidance for NX200 and NX400 transmitters for Radio The Voice of Vietnam, Hanoi, Vietnam, for your kind perusal. Those old vantage projects are still alive today [re: competition from BBFF Electronics Group Co. Ltd]. With the potential implementation period in Q4 2019 - Q1 2020, should you re-quote to us [re: SOGITEC Vietnam Co. Ltd. 23 street 6, district 9, HCMC, VN] those items Net-to-NAUTEL. Add to NX400 quote the alternative dual NX200 + NXC combiner.

Is there yet any officer in charge of South-East Asia [re: our territory of Cambodia, Laos, and Vietnam].

Thanks,

From: Wendell Lonergan <[REDACTED]>
 Sent: Tuesday, April 23, 2019 1:57 AM
 To: SOVIE <[REDACTED]>
 Subject: RE: VOV - MW-AM Transmitters

Alain

Please review the attached budgetary quotes to ensure they meet your request.

Best regards,

(Guay Affidavit, Exh. DD, emphasis added)

[78] Mr. Guay explains:

96. I asked for updated quotations because Nautel's quotations to Sofia Express are what the 15% Commission is based upon per the Agency Agreement. Mr. Lonergan responded to the email providing updated quotes on April 13, 2019. A true copy of this email exchange and the quotes are attached hereto as Exhibit DD.
97. Although two NX200 transmitters were ultimately ordered by VOV [for the Da Nang site], on April 23, 2019, Mr. Lonergan quoted for a single NX200 with services at \$595,353.00 USD EXW and the NX400 [for the Ninh Thuan site] was quoted at \$969,003.00 USD EXW.
98. While Mr. Lonergan was filling in for Mr. Kelly, [during the interval between Mr. Kelly's resignation and Mr. Cheu's appointment] we communicated regarding a variety of projects in the Southeast Asian market.
99. One example was provided by Nautel in its disclosure. On July 6, 2019, Mr. Lonergan emailed me regarding another project, asking if Nautel should quote a price directly to Sofia Express or to the customer. Mr. Lonergan asked, "What commission rate do you expect if direct to customer?" A true copy of that email from the Nautel disclosure is attached hereto as Exhibit EE.

(Guay Affidavit)

[79] Mr. Guay recounts a Broadcast Asia show which was held in Singapore in or about June 2019, at which he engaged in a conversation with Mr. Lonergan about the Project and the Applicant's work to date on the VOV MF-AM Project. He recalls that he was introduced at that time to Mr. Cheu, the replacement for Mr. Kelly in the region, and that he was thanked by Mr. Cheu for his "efforts, time, and money in promoting and securing the sale of NX 400 and NX 200 transmitters to VOV for the Ninh Thuan and Da Nang Provinces". Mr. Lonergan, for his part,

“told me not to worry about the commission and that the Project had not been completed” (*Guay Affidavit*, paras. 100-102).

[80] Although COVID-19, and the measures introduced by the Vietnam government to combat it, constrained his ability to meet personally with anybody during 2020-2021, Mr. Guay was able to maintain contact with customers and suppliers electronically. His position was that “[m]y role as agent was completed at this time, after VOV’s email confirmation on April 11, 2017, (attached as Exhibit U) that it would order Nautel’s transmitters when the time came” even though, as has been discussed, and will be further discussed, he continued to do additional things beyond this date in furtherance of the sale (*Guay Affidavit*, para. 104).

[81] Moreover, Sofia Express through Mr. Guay, continued work after this time on other projects with Nautel. For example, in connection with a request for a different project, John Wilton, head of customer service and IT with Nautel, wrote to Mr. Guay on April 22, 2021 as follows:

From: John Wilton <[REDACTED]>
 Sent: Thursday, April 22, 2021 7:34 PM
 To: [REDACTED]
 Cc: Wendy Boutilier <[REDACTED]>; Joe Cheong <[REDACTED]>
 Subject: FW: Nautel Quote 3008487 for V10 H345 parts

Good day Alain,

I hope you are well. I had correspondence with Joe Cheong to confirm if you had exclusivity for Vietnam. We are very happy to quote you however we will quote other firms in Vietnam. Only agents, like yourself, will get a discount on the quote.

Please reach out to Joe, who has been copied, if you have any further questions.

Have a great day,

John

(*Guay Affidavit*, Exh. FF, emphasis added)

[82] On June 1, 2022, Mr. Guay again met Mr. Cheu at the Broadcast Asia exhibition in Singapore. He broached the topic of the NX400 transmitter currently in operation in Ninh Thuan Province and was told that that transmitter had been commissioned successfully, and that Nautel had also contracted the two NX200 transmitters for VOV in Da Nang Province a few weeks prior. When he reminded Mr. Cheu that Nautel engaged Sofia Express for several years to ensure the success of this Project and committed pay and commission in relation to it, Mr. Cheu suggested that he contact Nautel management about it (*Guay Affidavit*, paras .108-109).

[83] The aftermath has been described by Mr. Guay in the following terms:

110. On June 26, 2022, I emailed Mr. Lonergan and Kevin Rodgers a summary of the history of this Project, including an overview of the conversation we had in Singapore in 2019. I reminded Mr. Lonergan that he told me not to worry about the sales agent Commission when we spoke. In the email, I formally requested the Commission on the Project since the NX400 transmitter had been successfully delivered and the upcoming dual NX200 transmitters.
111. On June 27, 2022, Mr. Lonergan replied to me, advising he was “shocked” that I would request a Commission payment. He advised we had no current Agency Agreement but that Sofia Express could “apply” for one.
112. A true copy of this email exchange is attached hereto as Exhibit GG.
113. On January 30, 2023, Mr. Lonergan emailed me advising he had not heard back regarding the above email. He then stated:

In accordance with the Termination of Agreement clause of our standard Agent Contract agreement, I am giving you notice that any explicit or implicit agent agreement between Sogitec and Nautel will be terminated as of 30 days from this notice.

(Guay Affidavit)

[84] Three invoices were generated by Nautel and paid by VOV. The first invoice, No. 10027809 indicates that the NX400 transmitter was ordered in July 2020, shipped on January 18, 2021, and was paid in installments, albeit fully paid as of April 29, 2022. The total invoiced amount was US\$979,264.04.

[85] The second invoice, No. 10033081, indicates that it is in relation to a NX200 transmitter shipped to VOV EMI.Co which was ordered in May 2022, and shipped on or around April 28, 2023, and that Nautel was paid in full as of April 29, 2023 in the total amount of US\$470,700. It was intended for Da Nang.

[86] Finally, invoice No. 10033180 indicates that another NX200 transmitter was shipped to VOV EMI.Co., also intended for Da Nang. It was ordered in May 2022, shipped on May 10, 2023 and was paid in full as of May 15, 2023 in the amount of US\$470,700. (*Guay Affidavit*, Exh. II).

[87] It is these three invoices in relation to which the Applicant claims a 15% commission.

[88] Mr. Guay was the only witness to offer (admissible) evidence on behalf of the Applicant.

Respondent's Evidence

(a) *Kevin Rodgers*

[89] Mr. Rodgers offered both affidavit and *viva voce* evidence. His two Affidavits were dated January 4, 2024 and November 12, 2024 respectively. He is the President and Chief Executive Officer of Nautel. Both Affidavits are brief. The objective of the second Affidavit was with respect to an earlier appreciation for security for costs and will not be further discussed. All subsequent references herein to Mr. Rodgers' Affidavit relate to the first Affidavit.

[90] Mr. Rodgers says he is aware "at a high level" of the company's sales efforts, including those which involve VOV, but is not involved personally in either the sales or design process. He knew when a final price was negotiated and what equipment was involved.

[91] He has been working with Mr. Lonergan for the entire duration of his time at Nautel, which spans the time not only from October 2011 (when he purchased the company from its founder) but also the previous 37 years that he spent as an employee of the company (*Rodgers Affidavit*, paras. 1-4). Since he purchased the company, and specifically since Mr. Lonergan was promoted into the role of overseeing broadcast sales, Nautel required written nonexclusive agency agreements, with a one-year fixed term for each (*Rodgers Affidavit*, para. 5).

[92] He then says this:

6. I know from conversations with Wendell Lonergan, as well as Joseph Cheu, and verily believe the information they have told me to be true, that it was after VoV's visit to our Maine manufacturing facility in 2020, they then decided to purchase equipment from us and helped them with the design of their transmitter system. I know that Alain Guay did not have anything to do with securing that sale, and definitely did not follow the sale through to its ultimate conclusion as required by our agency agreements. Joseph Cheu, through his agency agreement, helped to secure the sale and followed the sale through to its conclusion.
7. With respect to paragraph 100 of Mr. Guay's affidavit, I was physically present at the June 2019 Singapore trade show. I am aware that Mr. Guay knows that I am the owner and CEO of Nautel. If Mr. Guay had an issue

with VoV or felt he had entitlement to a commission, I would have expected him to raise that with me at that point in time, and I can confirm that he did not speak to me about anything to do with VoV, nor did he request or raise any issues about outstanding commission payments.

8. I have carefully reviewed Nautel's records and the only Sales Agency Agreement between Nautel and any party related to Alain Guay is dated November 28, 2017. The parties to that particular Sales Agency Agreement are Nautel and Sogitec Co. Ltd. The duration of that particular agreement is clearly stated as lasting one year. A copy of that particular agreement is attached hereto as Exhibit "A" to this, my affidavit. I know that the sales process with VoV primarily occurred in mid-to-late 2019 into 2020. As of 2020, they were still considering a potential purchase from one of our competitors, Gates Air. It was not until Joe Cheu, with Nautel's oversight, negotiated a Sales Agency Agreement in late 2020 that we knew we secured a sale to VoV. Alain Guay had nothing to do with any of that process.
9. I know that VoV orders are the result of the hard work done by Wendell Lonergan and Joseph Cheu, as well as our Nautel team.

(Rodgers Affidavit)

[93] On cross-examination, Mr. Rodgers confirmed that his understanding of the role of a "reseller" was that they get paid by purchasing Nautel's product at a discount and re-selling it. This is much like the role of a prime contractor, except the scale of the projects in which a prime contractor would be involved would be large-scale ones, such as those at Ninh Thuan and Da Nang. In most cases, a reseller would purchase product at a discount off of Nautel's listed price, and resell it at a profit, whereas an agent's remuneration is derived from commission, which is usually 10-15% based on the ultimate sale price of the products which Nautel would sell directly. If the product is sold at list price, generally the commission would be 15%. If the price at which it was sold to the consumer had to be discounted for any reason, the commission would be less than that and would be negotiated. Overall, typical commissions fell in at 10-15% of the sales price. Nautel uses both resellers and agents, and considers its "market" to be the entire world.

[94] He also indicated that he was not involved in individual sales in different regions, but rather "I look to be updated monthly by my lead of sales ("Blair")". Prior to having purchased the company in 2011, Mr. Rodgers indicated that he had never held any direct sales role while in its employ.

[95] He further testified that Nautel uses both written agency agreements and reseller agreements “now”. His evidence was that Mr. Guay, whether with Sofia Express or Sogitec, only acted as a “reseller” to his knowledge. He also agreed that the only written agreement between the Respondent and Mr. Guay was the one signed in 2017 (what has been earlier referred to as the ASA).

[96] Mr. Rodgers confirmed the substance of the equipment sold to VOV EMI.Co, and that the end user was VOV. To his understanding, Nautel has not been involved in any projects in Asia that were as large as these, within the last decade. He further confirmed that, up to 2016, Sofia Express/Mr. Guay had been heavily involved in projects slated for the Provinces of Da Nang and Ninh Thuan.

[97] He was shown on cross-examination the following correspondence (referenced earlier but reproduced again for ease of reference):

From: Chuck Kelly
Sent: Wednesday, March 14, 2018 10:30 AM

To: Wendell Lonergan <[REDACTED]>
Subject: Vietnam

Hi W,

I need to provide a couple of quotes for Vietnam which Tom King is going to present to VOV for us.

At the request of VOV I am intending to quote directly to VOV, and bypass Alain (but reserve something for him in the background). KTL will not be selling our equipment.

Two variations

Straight up NX400
Two combined NX200

Question – do we need a tender review, and do you have any suggested packages for these?
Respectfully,

Chuck Kelly

(Guay Affidavit, Exh. Z, emphasis added)

[98] Next, he was shown the following, the most salient portions of which are (once again) reproduced for ease of reference:

From: SOVIE [mailto: [REDACTED]]
Sent: Wednesday, March 21, 2018 12:10 AM
To: Chuck Kelly < [REDACTED] >
Subject: VOV, Vietnam

Dear Chuck,

Tom informed about both meeting Mr Linh VOV at ABU.

MF-AM/DRM projects are not new, starting with attached quotations submitted to VOV/EMI.Co (as per my request to John). Last year, between OCT29 and NOV03, we secured a week survey of 3 VOV sites but Tom failed to get his entry visa, so trip was a last minute cancellation unfortunately.

Now VOV came back asking for Tom to return in VN on SU MAR24 onwards. Since we have been involved in those projects for quite a while, we would like to know who is now leading those to get job done.

From: Chuck Kelly < [REDACTED] >
Sent: Wednesday, March 21, 2018 6:33 PM
To: SOVIE < [REDACTED] >
Subject: RE: VOV, Vietnam

Hi Alain,

First, my apologies for not being the one to inform you of the meeting with VOV at the ABU. I was quite sick upon my return home, and it's taken me a few days to get back on my feet.

Yes, I am aware of your efforts over the years with VOV, and you will be protected if an order is placed by VOV. However, when VOV met Tom initially in Kuala Lumpur, I was not involved, as VOV requested to meet Tom without me. In that meeting, they told Tom that if they were going to work with Nautel, it had to be without the involvement of our local agent. Tom explained to me that they don't seem to have any specific complaints with you or Sogitec, but that VOV prefers to work directly with the manufacturers on projects of this size. I don't know why – perhaps it is ego? I told Tom that I would work directly with VOV, and he informed VOV of that. The next day then, VOV came to our booth, and we had an open meeting. Afterwards, I did tell Tom that Nautel will protect Sogitec with a to be agreed upon commission if an order for VOV occurs.

At this point, it seems like the best approach is to let Tom carry the ball. He is the one who has been invited to VOV, and I intend to provide him with quotations for both a single NX400 and two NX200's combined, as well as significant other technical documentation on the systems. VOV did not request me to come to Vietnam at this time, although I am willing to if needed.

Please let me know if a 10% commission to Sogitec if these orders occur would be fair.

From: SOVIE <[REDACTED]>
 Sent: Friday, March 23, 2018 12:21 AM
 To: Chuck Kelly <[REDACTED]>
 Subject: VOV, Vietnam

Hi Chuck,

Our long experience with VOV is that anyone is welcomed to promote and demo their products/systems. However, they always expect their subsidiary EMI.Co propose the right products/systems. Often, we won convincing VOV to buy our systems. Last one was Davicom telemetry (Sogitec) against EMI.Co promoting Burk Technology. Finally, VOV selected Davicom to deploy a nationwide telemetry system (quite nice project completed in 2017). At the end, we accepted to let EMI.Co ordering directly Davicom for a win-win situation (none was upset).

It seems that we should do the same with current project. We have been involved in this one since 2015 and EMI.Co did not give us any inch... promoting initially GatesAir, offering a complete system. Of course, to get that today level of interest in Nautel by VOV required time, efforts and other considerations. It has been same for KTL. With your understanding, please do not go below 10% to fulfil our duty.

At present it is suggested that KTL shall be the prime contractor but transmitters are much larger amount. Wait and see Tom's visit in VN but should Nautel lead...

From: Chuck Kelly <[REDACTED]>
 Sent: Friday, March 23, 2018 20:09
 To: SOVIE <[REDACTED]>
 Subject: RE: VOV, Vietnam

Thank you, Alain, for the detail.

I look forward to discussing VOV and specifically this project with you after Tom's visit.

(Guay Affidavit, Exh. AA, emphasis added)

[99] Mr. Rodgers' reaction to these emails was simply that Mr. Kelly had left out some "key details". When asked about these details, he said Mr. Kelly should have mentioned "you will be protected if an order is placed by VOV within a reasonable time". Upon being pressed further as to whether Mr. Guay/Sofia Express/Sogitec would have been protected had VOV bought within a "reasonable time", Mr. Rodgers answered "probably". He also confirmed that the timing of the payment of the agent's commission would be after Nautel itself had been paid. He relegated the role of Mr. Guay, up to 2016, as that of someone who had been involved in "trying to sell equipment to VOV".

[100] Again, returning to the correspondence of Mr. Kelly noted above, Mr. Rodgers went on to say that, "this is the first time I really read this email. It struck me that what Chuck was saying was if there was a sale as a result of what [Mr. Guay] had done he would get a commission ... But that is not the case, it took a number of years, and other people being involved to complete the sale. It is unfortunate that there was no clarity here, if this had turned into a sale within a couple of months, things would be different".

[101] When asked what happened after March 2018 in terms of completing this deal, Mr. Rodgers alluded to Mr. King (KTL) going over and visiting the end user and helping VOV understand the benefits of Nautel's product versus that of the competition, in addition to a visit from Wendell Lonergan, who took over from Chuck Kelly, and put in a lot of work personally in order to complete the deal.

(b) *Joseph Cheu*

[102] Mr. Cheu owns 5G Quantum International Pte. Ltd. ("Quantum"). It is located in Singapore. Quantum has an agency agreement with Nautel 2019. Each year a new such agreement is signed, but the terms year to year are "essentially the same" (*Cheu Affidavit*, para. 2).

[103] He testified that his job is to generate sales in the Asia-Pacific region for Nautel. In pursuit of this role, he regularly attends trade shows and appearances in Asia with the objective of generating business opportunities for the Respondent.

[104] Mr. Cheu has referred to the Project as "our VoV project" (*Cheu Affidavit*, para. 4). His evidence was that he has been familiar with VOV since 2020, and that he has established business relationships with that company's stakeholders.

[105] Mr. Cheu recounts "direct dealings" with VOV since 2020, and, although he says he was aware of the VOV "team trip" to Nautel's manufacturing facility in 2020, and was in communication with VOV personnel prior to that trip, he himself did not attend.

[106] These communications with VOV personnel related to his provision to VOV of "information about Nautel's projects, determining VOV's needs, and matching up potential products and specifications to meet VOV's needs" (*Cheu Affidavit*, para. 6). He denies that Mr. Guay assisted, in any manner whatsoever, with helping to secure any sales with VOV (*Cheu Affidavit*, para. 6).

[107] In fact, he goes on to state:

7. I directly negotiated the sale of the NX400 transmitter to VoV on Nautel's behalf. These negotiations occurred in the second half of 2020 and while I handled the price negotiations, Nautel had the final say on price. A copy of the detailed quote which became the final invoice is attached hereto as Exhibit "A"

(*Cheu Affidavit*, emphasis added)

[108] Somewhat ironically, the invoice which he has attached as Exhibit A to his Affidavit, and which Mr. Cheu says was sent by him as the “detailed quote which became the final invoice”, does not even bear his name but, rather, that of John Abdnour who was no longer with Nautel by the time Mr. Cheu and his company became involved in an agency capacity with Nautel in late 2019.

[109] Even more ironically, the quote at Exhibit A of Mr. Cheu’s Affidavit is dated November 11, 2016, signed by Mr. Abdnour, and is virtually identical to the quote that Mr. Guay had referenced and which Nautel had sent to VOV (at Mr. Guay’s urging) in 2016, just after Sofia Express’ role had shifted from Prime Contractor to agent (*Guay Affidavit*, Exh. O-P).

[110] In addition, not a single email or other evidence of the communication that Mr. Cheu has claimed to have had with VOV, its personnel, or even Nautel itself, to advance the Project, was attached to his Affidavit.

[111] His Affidavit concluded with the following:

9. With respect to paragraphs 101 and 102 of Mr. Guay’s Affidavit, I completely disagree with Mr. Guay’s statements. I was at the trade show in June 2019 in Singapore, and I was accompanying Mr. Lonergan. At that time, I did not have any contract with Nautel. We did meet Mr. Guay and Mr. Lonergan introduced me as the Nautel sales representative for the Asia-Pacific regional, and while that is what is being discussed with Mr. Lonergan, it had not been finalized (that is, my company taking over the region) at that point in time. I have a clear recollection that I did not discuss the VoV (Project) as referenced throughout Mr. Guay’s Affidavit. I definitely did not thank Mr. Guay, as stated at paragraph 102, for any efforts, time, and/or money that he allegedly contributed to assisting with any sale to VoV. In fact, as of June 2019 there were not any commission sales to VoV, and at that point in time, VoV had not ordered any products, and were still in an information-gathering stage with them to determine what products may be best suited for Vov’s [sic] needs. Nautel had definitely not sold, nor had VoV even considered purchasing, the NX200 and NX400 transmitters to VoV as alleged by Mr. Guay in his Affidavit.
10. With respect to paragraph 107 of Mr. Guay’s Affidavit, I did again see Mr. Guay at the June 2022 Singapore trade show. Mr. Guay did try and ask me questions about Nautel products being used in Vietnam. I suspect he was asking me questions because he was not sure whether Nautel was still doing work with VoV as Mr. Guay had no involvement whatsoever in our project with them. I had been the primary Nautel representative dealing with VoV from mid-2019 onward. Mr. Hai Quang Vu of VoV recommended and

requested that Nautel work with EMICO. EMICO was a local Asian-based company that was familiar with RF products and whom VoV was comfortable working with. Mr. Hai Quang Vu specifically asked Nautel not to use Mr. Guay. He went so far as to state that if we used Mr. Guay and not EMICO, they would go on to one of our competitors for products. From those conversations with Mr. Vu, which I entirely believed everything he stated to be true, I knew that Mr. Guay had clearly lost the confidence of VoV, if he had ever established anything with them. I had already known, at this point in time (which was by June 2022) that Mr. Lonergan had already made the corporate decision to not use Mr. Guay as an agent for Nautel because Mr. Guay, for a number of years, was not providing Nautel with any business leads and/or business opportunities in the Asia-Pacific region. Nautel's decision not to use Mr. Guay had nothing to do with VoV, rather it was his lack of performance overall.

11. With respect to paragraph 108 of Mr. Guay's Affidavit, I can confirm that it was myself and not Nautel that did all of the hard work referenced in that paragraph, not Mr. Guay and not Sofia Express AG Corporation ("Sofia Express"). In fact, during that exact conversation, I told him directly that VoV insisted that they did not want to deal with Mr. Guay.
12. With respect to paragraph 109 of Mr. Guay's Affidavit, I can confirm that during the same conversation, I asked Mr. Guay directly whether he had any sort of agreement with Nautel and he said that there were some emails. I confirmed with Mr. Guay that there were no official emails and no agreements that were signed or provided to me from Nautel related to any sort of sales with VoV. I did tell Mr. Guay that he was obviously not in the know of the development of the projects with VoV because at that time there were already several conference calls between Nautel, VoV and Emico [sic] to discuss the project detail and the scope of the work. I know that Mr. Guay was not part of organizing or participating in any of those calls or with respect to the project detail and/or the scope of work.

(Cheu Affidavit)

[112] Upon cross-examination, Mr. Cheu confirmed that he and his company provide consultancy work for the Respondent and nobody else. He is known in the Asia-Pacific region as a Nautel representative, and reports to Wendell Lonergan.

[113] He said that one of his duties is to manage Nautel resellers. Those are people who, essentially, purchase Nautel materials and sell them to an end purchaser.

[114] Mr. Cheu described another role, that of agency. In the latter type of relationship, the agent acts for Nautel and connects them with a potential consumer. The agent gets paid a commission based upon the sale which ensues.

[115] In the matter under consideration, specifically the Ninh Tuan and Da Nang Projects, the consumer was VOV, its agent was VOV EMI.Co, a 100% owned subsidiary of VOV, and that the negotiation of sale of the products involved in the transaction occurred with VOV EMI.Co. It involved the sale of one Nautel NX400 and two NX200s. The end user, of course, was VOV. He thought that VOV EMI.Co uses an intermediary “Rogenry Distributors”, a Singapore based company whose name appears on the invoices (*Guay Affidavit*, Exh. II) for tax purposes, but he was not sure.

[116] He was asked whether, when he joined Nautel in 2019, there was already ongoing communication between that company and VOV about the Ninh Tuan and Dan Nang Projects, he replied “Wendell [Lonergan] is already talking to them [VOV/VOV EMI.Co]”.

[117] When Mr. Cheu’s attention was once again drawn to the November 11, 2016 quote (the one exhibit attached to his Affidavit, Exhibit A) he agreed that the date of that document preceded his tenure with Nautel.

[118] Nonetheless, he continued to insist that, as of 2019, when he joined the company, VOV had not ordered any products, and were still in what he described as an “information gathering stage”. He added that as of 2019, VOV had not even considered purchasing the NX200 and/or NX400 transmitters in question. Mr. Cheu did not offer any elaboration as to how he had come by this knowledge.

[119] Mr. Cheu acknowledged that he was aware of Mr. Guay/Sofia Express’ involvement in marketing efforts in sales with VOV, but insisted that the Applicant had no involvement with the Projects at issue in these proceedings.

(c) *Tom King*

[120] Mr. King provided an Affidavit, as earlier noted, which was sworn on November 14, 2024, and filed with this Court on November 19, 2024.

[121] Mr. King identifies himself as the “immediate past president and immediate past CEO of Kintronic Labs” (“Kintronic” or “KTL”). He further adds that “I still work with the company in a consulting and advisory role” (*King Affidavit*, para. 1).

[122] He says that KTL is a global leader with respect to “top-quality medium wave radio broadcast antenna systems”, more specifically, in the design,

manufacturing, installation and commissioning of them. They also deal in AM, FM, shortwave and TV products (*King Affidavit*, para. 1)

[123] Mr. King referenced “significant experience working with Nautel” and that he has known Messrs. Rodgers and Lonergan for over 30 years, and Mr. Guay for approximately 8-9 years. With respect to Mr. Cheu, he adds, “I have met Mr. Cheu, but I have not done work with Mr. Cheu and I would say that I do not know him well” (*King Affidavit*, para. 4).

[124] As for Mr. Linh (whose Affidavit in support of the Applicant was not admitted into evidence) Mr. King says that he met him on March 6, 2018 in Singapore, during a “Broadcast Singapore” trade show. He says that it was this meeting which was the catalyst for the “direct communications between Kintronic and Voice of Vietnam”. Moreover, “Mr. Guay and/or his company (either Sogitec or Sofia Express) were not involved in those direct communications” (*King Affidavit*, para. 4).

[125] He gave evidence as to a high degree of familiarity with the products and capabilities of Nautel, and said that he will “often recommend Nautel to our customers” (*King Affidavit*, para. 5).

[126] Mr. King says that he became familiar with Mr. Guay in his capacity as the Vietnam representative for Nautel in 2016. What he referred to as a “rare and intermittent email correspondence” took place from December 26, 2016 to March 29, 2019. During that period “Kintronics [sic] sent in one proposal for a specific antennae systema [sic] for a 50kW station located in Son La Province in Vietnam” (*King Affidavit*, para. 6).

[127] He proceeds to offer the following critique of Mr. Guay’s Affidavit which is summarized below:

- Paragraph 62 of Mr. Guay’s affidavit – Kintronic would not and did not in the specific instance being referenced in Mr. Guay’s affidavit, work with Mr. Guay or whichever company he was with at the time (either Sogitec or Sofia Express) in designing any type of antenna system. To my knowledge, Mr. Guay is not an engineer and does not have any engineering experience. He has never worked with Kintronic in any sort of design capacity for any project of any type, anywhere in the world.
- Paragraph 63 of Mr. Guay’s affidavit – I have carefully reviewed the email messages attached at Exhibit Q to Mr. Guay’s affidavit and you will see from reviewing the full email exchange that Kintronic did the design work for the antenna system. Further,

during that email exchange process in late 2016 and into early 2017, Kintronic believed that Mr. Guay was buying specific products from us to sell to VOV. From the email exchange, it was apparent that Kintronic did a fair bit of design work, provided detailed quotes and information to Mr. Guay, but as of April 2017 VOV had not determined, nor decided how they would proceed with any project, in Kintronic's view.

- Paragraph 64 of Mr. Guay's affidavit – These are emails between Mr. Guay and VOV that Kintronic, nor myself, were ever copied on, nor were we aware of them. These emails appear to be conveying much of the information we had been providing to Mr. Guay and it appears as if he was trying to re-sell our products.
- Paragraph 69 of Mr. Guay's affidavit – The reference to the email attachment at Exhibit V essentially the quote and proposal that we provided to Mr. Guay, and he has removed our letterhead and name from the proposal. As referenced above, it appears that Mr. Guay is trying to re-sell our products to VOV.
- Paragraph 70 of Mr. Guay's affidavit – This paragraph states that I “was interested in being involved as the Prime Contractor”, but that is not accurate. The information contained in this paragraph and paragraph 71 of Mr. Guay's affidavit are not factually accurate. A review of the emails contained at Exhibit W of Mr. Guay's affidavit shows that there are a series of emails with the subject line “Kintronic” in the August and September 2023 timeframe that I am not copied on, nor is anyone from Kintronic or Nautel copied on. There is an email from myself dated August 1, 2017 (found at the bottom of page 142 of the Guay affidavit) with the subject line “Re: Possible AM projects in Vietnam”. I was planning a business trip to Asia at that point in time, but it was not as a result of any sort of invite from Mr. Guay, but from multiple other sources other than Mr. Guay, I was interested in meeting with VOV to gain further information. It should also be noted that by email dated July 27, 2017, I initiated an email with Chuck Kelly (whom I had done business with and known for many years) and Kevin Rodgers of Nautel about a possible project with VOV.

(King Affidavit, para. 8)

[128] Mr. King alleges that Kintronic contracted directly with VOV with respect to the work the latter needed done. He says this was “different from what we had quoted to Mr. Guay in the spring of 2017”. It included “design, supply, and installation of a new large antenna system for VOV” (*King Affidavit, para. 9*).

[129] This leads to his next assertion:

10. As part of our work with VOV, Kintronic recommended VOV to consider working directly with Nautel to purchase the Nautel transmitters. I know from reviewing Mr. Guay's affidavits that the transmitters that VOV ended up needing for their system, and what they purchased from Nautel, are different from the project that Mr. Guay suggests he brought to Nautel's attention. As I referenced, the VOV project definitely evolved and changed

and the work Kintronic did for VOV ended up being different from what we originally quoted to Mr. Guay (for when he was reselling our products to VOV) and this was the same project that Nautel provided transmitters on. Therefore, the transmitters that Nautel sold to VOV were as a result of Kintronic's recommendation to VOV to purchase from Nautel. It was Kintronic that helped VOV understand what specific Nautel transmitters VOV needed.

11. When VOV contracted with Kintronic directly, Mr. Guay learned of this and did make a request for a commission payment from Kintronic alleging that Mr. Guay did the work to secure the project for Kintronic. We, myself and Kintronic, took the position that he did not provide Kintronic with this business opportunity and we did not pay him a commission, or any sort of compensation whatsoever, with respect to our work for VOV. It is Kintronic's position that Mr. Guay did not do any work in securing Kintronic's contract with VOV, did not have anything to do with our design work, he did not have anything to do with our supply and installation of products, he had nothing to do with the commissioning of our installed work. I would go further and confirm that it was Kintronic that played a definitive role in recommending VOV use the Nautel transmitters and we were working with Nautel directly, on behalf of VOV, to confirm the specifications and size of those transmitters.

(King Affidavit)

[130] Mr. King then proceeds to critique Mr. Linh's Affidavit. Since the Linh Affidavit was not admitted into evidence, this portion of Mr. King's Affidavit is superfluous.

[131] He concludes:

13. As a result of my initial meeting with Mr. Linh on March 6, 2018, I was asked to travel, at my own expense, to Vietnam to visit multiple, optional sites that were being considered for the Ninh Thuan transmitting station; and to recommend my preferred location on behalf of Kintronic. This took place over two separate trips before VOV settled on the final location. It was this final location that dictated how Kintronic would do its design work for the antennae system what would eventually be installed at that location. I can confirm that Mr. Guay was not involved in selecting a location nor anything to do with the design, and to my and Kintronic's knowledge, he was not involved in this particular project. I would also state that until Kintronic's design was completed and installed, the transmitter sizes (which were supplied by Nautel) could not have been determined and it was our suggestion to VOV that VOV should contact Nautel to have them determine what size and type of transmitters were needed and required for this project.

(King Affidavit)

[132] On cross-examination, Mr. King maintained Kintronic worked for VOV on the Projects that were ultimately finalized at Da Nang and Ninh Thuan, and insisted that the work done for the latter was different from the work quoted to Mr. Guay, which came at a time that he was trying to resell Nautel's product to VOV.

[133] He elaborated that the differences developed as a result of the site visit that he undertook, which in turn resulted in differences to the design of the tower and its skirting. Additionally, in early 2017, when Mr. King originally communicated with Mr. Guay/Sogitec/Sofia Express, what was envisioned was a steel tower, but that changed as a result of some of the specifications such as "synthetic guy wire" quoted to VOV EMI.Co.

[134] The design envisioned by Mr. Guay, Mr. King continued, was also for a lower wind load than what was eventually installed. Moreover, the transmission line in Da Nang was different too, and was purchased by KTL from a manufacturer in Germany. He agreed that the transmission tie for Ninh Thuan was supplied by KTL.

[135] This was, he insisted, a completely different system, and KTL supplied "multi-tower – directional antenna, which included phasing not power dividing, as well as a watching system".

[136] He was shown the following series of emails between Mr. Guay (Sofia Express) and himself:

From: Sogitec Vietnam [mailto:████████████████████]
Sent: Monday, December 26, 2016 3:39 PM
To: ██████████@kintronic.com' <████████████████████>
Cc: ██████████@kintronic.com' <████████████████████>
Subject: MW Products Inquiry

Hi Tom,

Hope to find you well at the Eve of Year 2017!

We have a project for which we need some of your products to bid. How can we work under exclusivity. When would you resume business!?

Respectfully,

From: Tom King [mailto: [REDACTED]]
 Sent: Monday, December 26, 2016 6:13 PM
 To: Sofia Express < [REDACTED] >
 Subject: RE: MW Products Inquiry

Hi Alain

It is good to hear from you as we near the end of 2016. All is well here, and I hope the same for you. We re-open for business tomorrow and will be open through Dec. 30th. Please proceed with sending details for the MW project. We will look forward to working with you in the new year.

All the best,
 Tom

From: Sofia Express < [REDACTED] >
 Date: 12/26/2016 7:00 AM (GMT-05:00)
 To: Tom King < [REDACTED] >
 Subject: MW Products Inquiry

Hi Tom,

A design is required prior to quote.

Project Owner: Voice of Vietnam

Project Description: Rebuild dual stations based on existing 200kW 594mHz AM + 200kW 702mHz AM transmitters:

Requirements:

- 1/ RF patch panel & components for diplexer bypass for TX maintenance
- 2/ 25kW MF-AM test load station
- 3/ Diplexer
- 4/ Coax feeder, 400m, 50Ω
- 5/ Antenna Tuning Unit weatherproof (bottom of antenna)
- 6/ 90m complete antenna (except ground optional), a maximum height due to airport proximity

Thanks,

From: Bobby Cox [mailto: [REDACTED]]
 Sent: Tuesday, December 27, 2016 11:51 PM
 To: [REDACTED]@sogiteccam.com
 Cc: Tom King < [REDACTED] >; Jim Moser < [REDACTED] >
 Subject: Voice of Vietnam project, 594 kHz and 702 kHz

Hello Alain,

I have a couple of questions regarding this project.

1. Can you confirm for me that the new system will continue to diplex 594 kHz / 200kW and 702 kHz / 200kW on the same antenna? **YES**
2. Can you let me know the desired wind rating for the tower? **150km/h survival (at sea level subject to many typhoons)**

Do you have any information on the site conditions that may influence the tower foundation and anchor designs? Also, if GPS coordinates are available for this site, please provide these. **I asked but for the purpose of project take temporarily 16° 03'11.08" N / 108° 12'09.45" E**

- 3.
4. Is a map of the site available showing the space available for the antenna anchors? The antenna that we will propose requires some additional guy anchors separate from those of the tower. I need to know how far from the tower the property boundaries or any other obstructions are that may dictate the placement of the antenna guy anchors. **To come!**

Thank you Alain.

I look forward to your reply.

(*Guay Affidavit*, Exh. Q, pp. 113-114)

[137] Mr. King described this as a situation where Mr. Guay had reached out to KTL about a potential project. The proposal submitted was based on a request for an antenna system having regard to the specifications provided in the December 26, 2016 email from Mr. Guay.

[138] Notable is the fact that temporary coordinates were bolded in Mr. Cox's letter by Mr. Guay, and returned as answers to the former's questions, with copies provided to Mr. King. These were described by Mr. Guay in the following manner, "I asked but for the purpose of project take temporarily **16° 03'11.08.08" N / 108° 12'09.45" E**" (*Guay Affidavit*, Exh. Q, p. 113).

[139] This evolved:

From: Bobby Cox [\[mailto: \]](mailto:)
 Sent: Saturday, December 31, 2016 5:06 AM
 To: Sofia Express < >
 Cc: Tom King < >; Jim Moser < >
 Subject: RE: Voice of Vietnam project, 594 kHz and 702 kHz

Hello Alain,

I have completed a preliminary design for the diplexing system with good bandwidth performance for both stations. I am in the process of gathering the pricing for all the other components of the equipment package that you requested. Can you confirm the dummy load that you would want for this project? You mentioned a 25kW test load, but this seems small for 200kW transmitters involved. Please clarify.

Also, do you have a preferred size for the two feeders that will connect the diplexing system to the transmitters? Either 4" or 5" air line could be used at this 200kW power level.

Also, note that the diplexing system will be fully installed at the base of the antenna. Both matching networks and both filter networks, as well as a shared pre-matching network will all need to be housed at the base of the 90m tower. I have tentatively estimated a shelter size at 10m x 6m to house the system.

For systems of this size, we normally provide a fully factory pre-tested system in the form of a parts kit. It will include all of the necessary tuning components, mounting hardware and insulators, a full scale layout template as well as detailed drawings, etc. to be installed on site in your shelter. We will also include RF shielding screens to be installed between networks to ensure proper isolation between the transmitters. We also can provide both RF input ports and a wall feed-through insulator panel to be installed in a wall cut-out.

Please let me know if you have any questions on what type of shelter you would need to build to house the diplexing system.

We've provided many of these systems in recent years that are assembled on site by local labor, and all have been very successful.

Thank you Alain and have a very happy new year!

From: Sogitec Vietnam [mailto: [REDACTED]]
Sent: Saturday, December 31, 2016 9:47 AM
To: 'Bobby Cox' < [REDACTED] >
Cc: 'Tom King' < [REDACTED] >; 'Jim Moser' < [REDACTED] >
Subject: RE: Voice of Vietnam project, 594 kHz and 702 kHz

Hi Bob,

The project: The Da Nang Airport Authority required VOV to cut down AM antenna at 90m AGL and VOV add a second MW-AM frequency.

1/ Station coordinate: 15°59'27.3"N 108°11'10.4"E

2/ There is an existing 130m AM antenna within a terrain 300x300m. Note tower foundation and anchor ones are in place for 130m guyed tower.

3/ Test Load: This is only for maintenance where there is no need to transfer full load RF. However, a wattmeter should be required to compare the incoming power to test load versus outgoing from TX. I trust a 50kW max. test load is far enough (budget concerned!)

4/ Feeder: Taking into account frequencies, attenuation, kWrms, and 25% safety factor, I do trust that a 4" air-dielectric would be enough for each 200kW TX.

5/ Shelter: Agree on. No problem for shelter size.

Happy New Year!

From: Sofia Express [mailto: [REDACTED]]
Sent: Monday, January 02, 2017 9:42 PM
To: Bobby Cox < [REDACTED] >
Cc: Tom King < [REDACTED] >; Jim Moser < [REDACTED] >
Subject: RE: Voice of Vietnam project, 594 kHz and 702 kHz

Hi Bob,

A/ VOV wrote on JAN03: We have an old mast 130m height in Hanoi and want to move to Da Nang. However, we are limited at 90m (airport authority) so we are looking for a new mast.

SOGITEC wrote on JAN02: It is said that tower template and guyed anchors foundation for a 130m guyed-mast have been built already but what is about the 130m mast erection!? In any case, would VOV supply mast locally!?

Would it be a pricewise deal to buy guyed-mast made in India.

B/ We assume feeder size HJ11-50 4" but would it be technically safe using the HJ8-50 3" (always budget limitation problem)

Thanks,

(Guay Affidavit, Exh. Q, pp. 110-112)

[140] Moreover, some proposals were conceived and, on their face, were expressed as having been “submitted to Sogitec Vietnam/Sofia Express Cambodia”:

Page No. 1 of 10 Pages

PROPOSAL

KINTRONIC

Mailing Address: Phone: (423) 878-3141
P.O. Box 845 Bristol, TN 37621-0845



LABS, INC.

Fax: (423) 878-4224
E. Mail: ktl@kintronic.com

Shipping Address:
144 Pleasant Grove Rd.
Bluff City, TN 37618

Submitted To: Sogitec Vietnam / Sofia Express Cambodia		Job Description: MW Matching and Filtering System For Diplexed Operation	
Sheet: Of 594 kHz / 200kW and 702 kHz / 200kW on 90m Tower			
City, State, Zip: BC			
Attn: Mr. Alain GUAY	Date: 27Jan2017	Location: Vietnam	

ITEM	DESCRIPTION	NET PRICE
1.	Custom matching and filtering system to allow the simultaneous (diplexed) operation of 594 kHz / 200 kW and 702 kHz / 200 kW onto a single 90 meter, rhombic skirt fed tower (described below).	\$323,175.00
2.	Valmet #24 x 295' (90m) guyed tower package designed to support the 6-way, 400kW Rhombic antenna skirt of item 3 below. Tower designed for 150 km/hour wind speed. Includes primer and paint sufficient for application on site by others. Also includes LED tower lighting kit with controller and conduit. Includes extra high voltage guy insulators. Tower base is to be electrically grounded.	\$67,185.00
3.	Kintronic Wideband Rhombic Antenna Skirt Kit designed for operation with the 90m tower of Item 2. The 6-way antenna skirt is conservatively rated for 400 kW plus 125% modulation.	\$64,635.00
4.	Kintronic model PP-618-5U patch panel to allow manually switching either transmitter to a dummy load port for testing. (Rigid line for connections to transmitters, dummy load and diplexer available, sold separately).	\$6,748.00
5.	Kintronic model DL-50WP-31#EIA weatherproof dummy load rated to 89kW average power (50kW plus 125% modulation). Unit mounts outdoors on a concrete or gravel pad.	\$21,897.00
Total: (NET, F.O.B. Origin)		\$483,640.00

(Optional Features and Items offered below)

WE Propose hereby to furnish material and labor complete in accordance with specifications above for the sum of:

Four Hundred Eighty-Three Thousand, Six Hundred Forty and 00/100 dollars (\$483,640.00)

Payment to be made as follows:

40% Down Payment With Order, 30% at Mid Production, and Balance Due Prior To Shipping.

F.O.B. Origin

Lead Time is Approximately 14 to 16 Weeks After Receipt of Confirmed Order and 40% Down Payment.

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from specifications below involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Actual delivery of proposed equipment will be dependent on component availability and production backlog at time of order. Our workers are fully covered by Workmen's Compensation insurance.

ACCEPTANCE OF PROPOSAL. - The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date of Acceptance _____

Customer Signature _____

Note: This proposal may be withdrawn by us if not accepted within 90 days.

***VOID WITHOUT TWO KINTRONIC SIGNATURES FOR AMOUNTS OVER \$25,000.00

Kintronic Authorized Signatures:

Engineer 1 _____

Engineer 2 

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Page No. 1 of 7 Pages

PROPOSAL

KINTRONIC  LABS, INC.

Mailing Address: Phone: (423) 878-3141 Fax: (423) 878-4224 Shipping Address: 144 Pleasant Grove Rd. Bluff City, TN 37618
 P.O. Box 845 E Mail: ktl@kintronic.com Bluff City, TN 37618

Submitted To: Sogitec Vietnam / Sofia Express Cambodia		Job Description: Installation services, tuning and commissioning for MW Dplx.	
Site: 594 kHz / 200kW and 702 kHz / 200kW on 90m Tower		City, State, Zip: BC / TK	
Attn: Mr. Alain GUAY	Date: 3/3/2017	Location: Vietnam	

ITEM	DESCRIPTION	QTY	PRICE
1	On site supervision and installation work for the 2 x 200kw MW antenna System in Vietnam as detailed on page 2 below.		\$68,175.00
2	On site fine tuning and commissioning of the diplexing system by Kintronic field engineer.		\$18,700.00
Total :			\$86,875.00

Payment terms for supervision and installation work to be as follows:
 30% down with PO; 10% upon foundation work completion; 30% upon completion of rigging work; 10% upon copper interior install work; 20% upon completion of the project. Mobilization to be approximately 1 month after receipt of PO, 30% down payment, and visas.

Payment terms for fine tuning and commissioning work to be as follows:
 100% advance payment required with mobilization to be approximately 1 month after receipt of PO, 100% confirmed payment, and visa.

WE Propose hereby to furnish material and labor complete in accordance with specifications above for the sum of:
Eighty-Six Thousand, Eight Hundred Seventy-Five and 00/100 dollars (\$ 86,875.00)
 Payment terms to be as follows:
 (see above)

F.O.B. Factory

Mobilization shall be one (1) month from the date of receiving the purchase order, down payment and visas.

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from specifications below involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Actual delivery of proposed equipment will be dependent on component availability and production backlog at time of order. Our workers are fully covered by Workmen's Compensation insurance.

ACCEPTANCE OF PROPOSAL: - The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date of Acceptance _____

Customer Signature: _____
 Note: This proposal may be withdrawn by us if not accepted within 90 days.

***VOID WITHOUT TWO KINTRONIC SIGNATURES FOR AMOUNTS OVER \$25,000.00
 Kintronic Authorized Signatures:
 Engineer 1 
 Engineer 2 

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2025 NSSC 413 (CanLIJ)

(Exhibits 4 & 5)

[141] Mr. King testified that it was shortly after this proposal (which referred to the Da Nang site) that he became personally involved in the Project. In fact, as he said, he took a trip in March 2018 to meet with VOV officials.

[142] With that said, Mr. King was referred to his Affidavit, in particular, the following portion:

...There is an email from myself dated August 1, 2017 (found at the bottom of page 142 of the Guay affidavit) with the subject line "Re: Possible AM projects in Vietnam". I was planning a business trip to Asia at that point in time, but it was not as a result of any sort of invite from Mr. Guay, but from multiple other sources other than Mr. Guay, I was interested in meeting with VOV to gain further information. It should also be noted that by email dated July 27, 2017, I initiated

an email with Chuck Kelly (whom I had done business with and known for many years) and Kevin Rodgers of Nautel about a possible project with VOV.

(King Affidavit, para. 8)

[143] From there, he was shown Mr. Guay's Affidavit, in particular, the flight itinerary, arranged for Mr. Guay, Mr. King, and Mr. Chi Dao Vu:

From: Tom King [mailto: [REDACTED]]
Sent: Thursday, July 27, 2017 11:05 AM
To: Chuck Kelly < [REDACTED] >
Cc: Kevin Rodgers < [REDACTED] >; [REDACTED] < [REDACTED]@sogiteccam.com >
Subject: Possible AM projects in Vietnam

Chuck,
I have heard from other sources about the following possible AM project in Vietnam. I thought you should follow up on this with Alain. My understanding is that they wanted to proceed with this project later this year.

VOV AM Project in Ninh Thuan province in Vietnam:

1. Qty. 1 analog-only 400kW AM station
2. Qty. 1 DRM-capable 200kW AM station
3. Two-tower directional AM antenna system with non-directional/directional switching with the main lobe oriented at 145 degrees relative to true north.
4. 400kW AM dummy load
5. Turn key project.

Thanks and Best Regards

From: Chuck Kelly [mailto: [REDACTED]]
Sent: Thursday, July 27, 2017 10:07 PM
To: Alain Guay - Sogitec Company Ltd < [REDACTED] >
Subject: FW: Possible AM projects in Vietnam
Importance: High

Hi Alain,

Please see the below from Tom King. Are you aware of this project? What do we need to do to win it?

This is quite important to me.

Respectfully,

From: Sogitec Vietnam
Date: Mon, Jul 31, 2017 11:20 PM
To: Tom King;ckelly [REDACTED]
Cc: k.rodgers [REDACTED];
Subject: RE: Possible AM projects in Vietnam

Hi Tom,

There are 3 majors RF projects planned by VOV thus the one mentioned below. According to our sources, none of those should be implemented in 2017. In this NOV, we should know better the VOV investment program for year 2018.

Do you plan any visit in the region this year.

Thanks,

From: Tom King [mailto: [REDACTED]]
 Sent: Tuesday, August 1, 2017 6:40 PM
 To: Sogitec Vietnam < [REDACTED] >; ckelly [REDACTED]
 Cc: krogers [REDACTED]
 Subject: Re: Possible AM projects in Vietnam

Hi Alain,
 I am in the process of planning a trip to Asia later this month. I could include a visit to Vietnam in my itinerary. I would like to visit the sites for which the VOV projects are being planned if possible and review with the VOV staff the scope of work planned for each station.

Best Regards

From: Yahoo <vuchidao@ [REDACTED]>
 To: Sogitec Vietnam < [REDACTED] >
 Cc: Vu Dao < [REDACTED] >
 Sent: Thursday, August 3, 2017, 10:46:02 AM GMT+7
 Subject: Re: Possible AM projects in Vietnam

Dear Alain ,

I've talked to Mr LAM VOV . He's very happy if he can receive Mr King of Kintronic to the sites (in Danang and also in Ninh Thuan if Mr King can go there with them) . The time is dependent on Mr King because Mr King has many things to do if can save time to visit these 2 sites it is a great pleasure for him to receive Mr King , please tell him the time (anytime in Oct. Nov. or ...) sothat he can prepare the visits for Mr King .

Regards

VC Đạo

From: Lam Le Dinh [mailto: [REDACTED]]
 Sent: Monday, August 21, 2017 11:23 AM
 To: Sogitec Vietnam < [REDACTED] >
 Cc: 'Vu Dao' < [REDACTED] >; [REDACTED]
 Subject: Re: KINTRONIC

Dear Mr. Alain Guay,

Thank you very much for your letter and we are happy to hear that Ph.D Thomas F. King President of Kintronic Labs. Inc. is going to visit Viet Nam. Having discussed with my Director, Mr. Vu Hai Quang, I would like to advised that the visit to VOV should be on OCT. 29. Please let us know if it is convenience for you and please send us you schedule soonest so as we can arrange our schedule accordingly.

Thank you and we look forward to meet you soon.

With best regards.

Le Dinh Lam (Mr.)
 Deputy Director
 Broadcast Engineering Center
 The Voice of Vietnam

From: Sogitec Vietnam < [REDACTED] >
 Date: 8/21/17 15:48 (GMT+07:00)
 To: 'Lam Le Dinh' < [REDACTED] >
 Cc: 'Vu Dao' < [REDACTED] >; [REDACTED]
 Subject: KINTRONIC

Dear Mr Lam.

Yes we should be in Hanoi on SU OCT29. In the attempt to propose VOV with a reasonable schedule, should you list each transmitting site, their respective nearest airport (airport code), and driving time between airport and site.

Thanks,

(Guay Affidavit, Exh. W, pp. 142-144)

[144] Mr. King proceeded to acknowledge that he had received the assistance of Mr. Guay in 2017 in order to be introduced to VOV personnel. He also testified that he had been involved with (Nautel competitor) GatesAir's predecessor company (Harris) in other earlier projects, and would have had some tangential contact with VOV through this means, and that KTL's primary contract up to that

point, had been with GatesAir/ Harris, not VOV. As a result, Mr. Guay served to “reintroduce” KTL to his contacts in VOV.

[145] But the process of “reintroduction” (scheduled to begin on October 29, 2017) was not smooth, as Mr. King acknowledged. He was referred to the following communication chain:

From: Tom King [mailto: [REDACTED]]
Sent: Sunday, October 29, 2017 8:00 AM
To: Sogitec Vietnam < [REDACTED] >
Subject: I need your urgent help.

Alain,
I am stuck in customs with on [sic "without a"] letter of invitation. I need you to call me at +14233418549. tom

From: Tom King [mailto: [REDACTED]]
Sent: Monday, October 30, 2017 12:05 PM
To: Sogitec Vietnam < [REDACTED] >
Subject: Invitation letter

Dear Alain,

I again apologize for my failure to request a letter of invitation from VOV prior to my arrival. Can you please inform me how soon we can receive this letter to process my visa and if they would be able to re-schedule my visit in mid-December?

Thanks

From: SOVIE < [REDACTED] >
Sent: Monday, October 30, 2017 1:40:29 AM
To: Tom King
Subject: RE: Invitation letter

Tom,

Is DEC10-16 ok with you before calling VOV. Do not be worry about letter by Ministry of Interior (2 days required).

Thanks,

From: Tom King [mailto:]
Sent: Tuesday, October 31, 2017 5:08 AM
To: SOVIE < >
Subject: Re: Invitation letter

Hi Alain,

I need to be on Cyprus the week of Dec 4-8 for a site visit. I can depart from there on Dec. 9 to arrive on Dec. 10 and plan to be available for VOV meeting Dec. 11-14.

Best Regards

From: SOVIE [mailto:]
Sent: Monday, October 30, 2017 11:15 PM
To: Tom King < >
Subject: RE: Invitation letter

Dear Tom,

VOV said that months DEC 2017 (end of fiscal year) and JAN 2018 (forthcoming Lunar New Year) might not be ideal for meetings, people being so busy. I am working on fixing a date. Keep you posted.

Thanks,

From: Tom King [mailto:]
Sent: Thursday, November 2, 2017 5:12 AM
To: SOVIE < >
Subject: RE: Invitation letter

Dear Alain,

We are presently preparing a visa application that we will send to the Vietnamese Consulate in Washington, DC tomorrow. I should have my visa within two weeks. It would work well for me if we could set a time in February that will work for the VOV staff for our re-scheduled meeting.

From: Tom King [mailto:]
Sent: Friday, November 3, 2017 10:51 PM
To: [redacted]@sogitec.com.vn
Subject: Letter of apology

Dear Alain,

I would be most grateful if you would please send the attached letter to Mr. Huy to express my apology for not having the proper visa documentation when I arrived in Vietnam last Sunday. I will inform you when I have received my passport back with a Vietnam visa.

Thanks and Kind Regards,



KINTRONIC LABS INC.

Supporting the AM broadcast industry with quality products and services for over 60 years

November 3, 2017

To: Voice of Vietnam (VOV) Headquarters
58 Quan Su
Ha Noi, Vietnam

Attn: Mr. Nguyen Xuan Huy, Vice President

Subj: My sincere apologies

Ref: Scheduled VOV meetings Oct. 30-Nov 1


Dear Mr. Huy,

I am writing to express my sincere apologies for my failure to arrange for a Vietnam visa in my passport prior to my arrival last Sunday, Oct. 29th. I know that you and your staff had set aside time earlier this week for our joint meetings and site visits in Da Nang and Phan Rang. I apologize for any inconvenience that my sudden change in circumstances may have caused.

When I checked into my flight to Vietnam on Oct. 28th, I was asked by the ticketing agent if I had a Vietnam visa whereupon I informed her that I did not. I informed the ticketing agent that I would be in the country for four days. She checked her computer monitor to determine if I needed a visa after which she presented me with my boarding passes indicating that a visa was not required. Upon my arrival in Ho Chi Minh City Airport when I presented my passport to the customs agent I was informed that I had to have a visa to enter the country. I completed all of the required on arrival visa documents together with a passport photo that I had with me and presented it to the customs officials. They then informed me that in order to receive a visa I had to have a letter of invitation, which was impossible to obtain on Sunday morning. As a result of not being able to provide a letter of invitation within a 30 minute period I was presented with boarding passes to return to my originating airport.

I am now arranging for a Vietnam visa, which I should have within two weeks. I will confirm with Mr. Alain Guay when I have received my passport with my visa after which I would like to re-schedule a trip to meet with you and your staff in a mutually agreeable timeframe.

I am very interested in meeting with you and do hope that we can establish a new meeting schedule once I have received my visa. Thank you for your understanding.

Cardially,

Tom F. King
President and CEO

Page 1 of 2

MAILING ADDRESS: PO Box 845, Bristol, TN 37621-0845

SHIPPING ADDRESS: 144 Pleasant Grove Rd., Bluff City, TN 37681

PHONE: +1 423 878-3141 e-mail: KTL@kintronic.com website: www.kintronic.com

(Exhibit 6, emphasis added)

[146] Mr. Guay wrote back:

From: SOVIE <[REDACTED]>
 Sent: Sunday, November 5, 2017 4:10 PM
 To: 'Tom King' <[REDACTED]>
 Subject: VOV - MF/HF AM/DRM

Dear Tom,

1/ Will pass your letter of apologizes to VOV leaders.

2/ Apply for a Vietnam one (1) year visa with multiple entries valid from MO JAN01 2018. Check on your passport expiry date: JUN 2019 upwards.

3/ Months DEC 2017 (end of fiscal year) and FEB 2018 (Vietnam lunar new year) are not possible. Best would be in JAN 2018 or MAR/APR 2018 or the week prior to BCA2019 (worst case scenario).

February 2018 is booked for what follows. One week period in preparing what is comparable to Christmas/New Year in Americas.

Feb 15	Thursday	Vietnamese New Year's Eve	National holiday
Feb 16	Friday	Vietnamese New Year	National holiday
Feb 17	Saturday	Tet holiday	National holiday
Feb 18	Sunday	Tet holiday	National holiday
Feb 19	Monday	Tet holiday	National holiday
Feb 20	Tuesday	Tet holiday	National holiday

plus one (1) more week to slowly resume business

Thanks,

(Exhibit 6)

[147] Mr. King confirmed that this is what led up to the rescheduled meeting in March 2018, in which he finally met face to face with VOV officials.

[148] In the aftermath of that meeting, two potential quotes were conceived for the Project. Although they were ultimately not sent to VOV, they did start a process by which Kintronic became the “lead” for the Project, which would now contain its antennae, along with the Nautel equipment, for what was conceived as the “turn key” Da Nang and Ninh Thuan Projects. The quotes are reproduced below:

Page No. 1 of 18 Pages

PROPOSAL



KINTRONIC



LABS, INC.

Mailing Address: Phone: (423) 878-3141 **Fax:** (423) 878-4224 **Shipping Address:**
 P.O. Box 845 **144 Pleasant Grove Rd.**
 Bristol, TN 37621-0845 **E Mail:** ktl@kintronic.com **Bluff City, TN 37618**

Submitted To: VOV EMICO		Job Description: VOV 400kW, 999 kHz Antenna System and Accessories	
Street: 5A Thi Sach Str., Hai Ba Trung Dist.		(Revision B)	
City, State, Zip: Ha Noi, VietNam		Quotation # VOV-NTP-400k/999	
Att: Mr. Luong Ngoc Thanh	Date: 12Sep2018	Location: Ninh Thuan Province, Vietnam	

ITEM	DESCRIPTION	NET PRICE
1.	Kintronic Labs Model MWDA-2-400K Custom MW Power Dividing and Phasing System and Two Antenna Tuning Networks	\$446,636.00
2.	Valmont Model #24"x330-ft Base Insulated, Series Fed, AM guyed towers (Qty. 2) -Includes Tower Paint and LED Lighting System	\$128,580.00
3.	Tower Ground System Materials	\$25,496.00
4.	Transmission Line and Transmission Line Support Structures	\$450,940.00
5.	Nautel Transmitter Options	
a.	Qty. 2 Model NX200 Solid State modular 200 kW AM Broadcast Transmitters with Model NXC800 Combiner System. Factory Training and On Site Supervision Included.	\$1,607,452.00
b.	Qty. 1 NX400 Solid State modular 200 kW AM Broadcast Transmitter. Factory Training and On Site Supervision Included.	\$1,133,952.00
6.	Kintronic Labs Model DL-400WP-618EIA Weatherproof dummy load rated for 400kW with 125% modulation	\$121,580.00
7.	On-Site Installation	\$494,000.00
8.	On site engineering for final installation inspection, tuning and commissioning of antenna system.	\$45,250.00
9.	Transmitter Factory and On Site Services and Training	\$43,500.00
10.	Estimated ocean freight	\$84,000.00
Total with transmitter option 5a		\$3,447,434.00
Total with transmitter option 5b		\$2,973,934.00

WE Propose hereby to furnish material and labor complete in accordance with specifications above for the sum of: _____ dollars (\$ _____)

Payment to be made as follows:
See attached payment terms for hardware and services

Hardware: 40% Down Payment, 30% mid-production payment, 30% prior to shipment. Services: Refer to itemized terms at end of price proposal.

To Ship Approximately 20-24 Weeks After Receipt of Confirmed Order And Down-Payment

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from specifications below involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Actual delivery of proposed equipment will be dependent on component availability and production backlog at time of order. Our workers are fully covered by Workmen's Compensation Insurance.

ACCEPTANCE OF PROPOSAL - The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date of Acceptance _____

Customer
Signature _____
Note: This proposal may be withdrawn by us if not accepted within 90 days.


Kintronic Authorized Signatory
Engineer 1 _____
Engineer 2 _____

Optional Items Listed Below

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Page No. 1 of 15 Pages

PROPOSAL

KINTRONIC  LABS, INC.

Mailing Address: P.O. Box 845, Bristol, TN 37621-0845 Phone: (423) 878-3141 E Mail: ktl@kintronic.com Fax: (423) 878-4224 Shipping Address: 144 Pleasant Grove Rd, Bluff City, TN 37618

Submitted To: VOV EMICO		Job Description: VOV 200kW, 594/702kHz Diplexed Antenna System	
Street: 5A Thi Sach Str., Hai Ba Trung Dist.		(Revision A)	
City, State, Zip: Ha Noi, VietNam		Quotation #VOV-DNP-200k-594/702	
Attn: Mr. Luong Thanh	Date: 6 July 2018	Location: Da Nang, Vietnam	

ITEM	DESCRIPTION	NET PRICE
1.	Custom matching and filtering system to allow the simultaneous (diplexed) operation of 594 kHz / 200 kW and 702 kHz / 200 kW onto a single 90 meter, rhombic skirt fed tower (described below).	\$480,522.00
2.	Valmout 24"x295" AM guyed tower package designed to support the 6-way, 400kW Rhombic antenna skirt. -Includes Tower Paint and LED Lighting System	\$118,926.00
3.	Kintronic Wideband Rhombic Antenna Skirt Kit designed for operation with the 90m tower. The 6-way antenna skirt is conservatively rated for 400 kW plus 125% modulation.	\$86,180.00
4.	Transmission Line and Transmission Line Support Structures	\$362,040.00
5.	Weatherproof dummy load rated for 200kW with 125% modulation	\$105,795.00
6.	Kintronic model PP-618-5U patch panel to allow manually switching either transmitter to a dummy load port for testing.	\$8,997.00
7.	On-Site Installation	\$414,246.00
8.	On site engineering for final installation inspection, tuning and commissioning of antenna system.	\$32,866.00
9.	Estimated ocean freight	\$48,000.00
Total: (NET, F.O.B. Origin)		\$1,657,572.00

(Optional Features and Items offered below)

WE Propose hereby to furnish material and labor complete in accordance with specifications above for the sum of:
 One Million, Six Hundred Fifty Seven Thousand Five Hundred Seventy Two and 0/100 dollars (\$1,657,572.00)

Payment to be made as follows:
 See Reference Document Payment Terms for Hardware and Services

F.O.B. Origin

Lead Time is Approximately 20 to 24 Weeks After Receipt of Confirmed Order and Down Payment.


All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from specifications below involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Actual delivery of proposed equipment will be dependent on component availability and production backlog at time of order. Our workers are fully covered by Workmen's Compensation Insurance.

ACCEPTANCE OF PROPOSAL - The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date of Acceptance _____

Customer Signature _____
 Note: This proposal may be withdrawn by us if not accepted within 90 days.

***VOID WITHOUT TWO KINTRONIC SIGNATURES FOR AMOUNTS OVER \$25,000.00 Kintronic Authorized Signatures.

Engineer  _____
 Engineer 2 _____

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(Guay Affidavit, Tab BB, pp. 168 & 185)

[149] The intention was that these would be accompanied by a cover letter:



KINTRONIC LABS INC.

Supporting the AM broadcast industry with quality products and services for over 60 years

Nov. 15, 2018

VOV EMICO

SA Thi Sach Str.

Hai Ba Trung Dist.

Ha Noi, VietNam

Attn: LIUONG Ngoc Thanh, Director of Technical Center

Dear Mr Ngoc Thanh,


This is to inform you that Mr Alain GUAY, business development director, Sofia Express AG Corp., 408 des Albertains, Quebec, Canada, with offices in HCM city [re: Sogitec Vietnam] and Phnom Penh [re: Sofia Express Cambodia], is authorized on our behalf to enter into discussions/negotiations with VOV EMICO about the bidding herein below.

QUOTATION #VOV-NTP-400K/999

QUOTATION #VOV-DNP-200K-594/702

Mr GUAY shall be henceforth a continued support to us in those projects. Thank you so much for your understanding and cooperation on this matter.

Respectfully,


Tom F. King
President and CEO



Page 1 of 1

MAILING ADDRESS: PO Box 845, Bristol, TN 37621-0845
SHIPPING ADDRESS: 144 Pleasant Grove Rd., Bluff City, TN 37681
PHONE: +1 423 878-3141 e-mail: KTL@kintronic.com website: www.kintronic.com

(Guay Affidavit, Tab BB, p. 167, emphasis added)

[150] Mr. King clarified that to the best of his recollection, this came at a time when KTL had asked Mr. Guay to be the Prime Contractor. He testified that around this time, Mr. Guay explained that “he did not want to, or could not do so”, so KTL was put in the position where VOV asked if KTL would fill that role. “That was the position of VOV in a project this size, that they prefer to work directly with the end user / end supplier.”

[151] However, in his Affidavit, Mr. Guay had explained what happened with respect to this “Prime Contractor” issue:

91. On or about December 3, 2018, following a discussion with Mr. Kelly, Sofia Express informed KTL that we would not lead as Prime Contractor, despite KTL’s November 15, 2018 request and letter. This decision resulted from the [earlier discussed] 2016 commitment to Nautel and VOV for Sofia Express not to be involved commercially between Prime Contractor and

VOV EMI.Co. As such, Sofia Express remained in its role as Agent and referred KTL back to Nautel.

(*Guay Affidavit*, para. 91)

[152] So neither the November 15, 2018 letter, nor those proposals, were actually sent to VOV officials.

(d) *Wendell Lonergan*

[153] Wendell Lonergan's Affidavit was dated January 5, 2024. In addition to those aspects of it that were referenced earlier, he deposed that:

- He started in Nautel's Research Department in 1978.
- After a few years, he moved into a "development role", and, in 2005 entered the company's sales department, specifically in the capacity of Technical Sales Manager.
- In addition, from 2006-2012, he took on the role of a broadcast salesperson, handling the geographic region of the Middle East and North Africa for Nautel.
- From 2012 to present, he has been the Senior Director of Broadcast Sales.

(*Lonergan Affidavit*, paras. 3-8)

- From 2006 – 2017 when he retired, John Abdnour was in charge of Nautel's work in the Asia-Pacific region.
- From 2006 – 2012, Chuck Kelly was head of Broadcast Sales in the region.
- In 2019, Joseph Cheu joined Nautel as Sales Consultant for the Asia-Pacific region. He reports to Mr. Lonergan, and has since 2019.

(paras. 9-10)

- Nautel uses sales agents as authorized re-sellers, and when it does there are written agent agreements put in place. They are non-exclusive.
- An authorized Nautel agent works closely with Nautel and receives a Nautel generated quote for the potential sales opportunity.

- The Agent's Agreement dictates how the sales commissions are calculated, but if the end user seeks a discount and/or negotiates a lower price, the agent's commission is also renegotiated as well.
- Sometimes Nautel will sell its existing products to agents and allow them to resell these products on their own. For these types of sales, the agent receives not commission, rather, they make these only by negotiating and selling the product(s) at a higher price than what they paid for it.
- Nautel has a standardized price list for its existing products.
- When an agent is involved, the agent is often the customer contact who arranges and attends meetings, communicates with Nautel sales and development, and is responsible for seeing the sales opportunity from start to finish.

(paras. 11-16)

- As of 2019, there had been only "one small sale" in Vietnam which had occurred in 2014.
- Mr. Lonergan visited VOV in March of 2019. He had decided "prior to this trip that Sogitec (the company that Mr. Guay previously worked for) were not properly serving the region.

(para. 17)

- Nautel did sell a NX50 transmitter to Sofia Express in 2019, and a GV10 transmitter in 2021, but these were not commission sales.
- Mr. Lonergan says that "I have specifically gone through Nautel's complete records", in relation to Mr. Guay's affidavit.
- He then proceeds to take issue with the timelines Mr. Guay ascribes to projects in Vietnam (as noted earlier).
- Where Mr. Guay uses the term "prime contractor", Mr. Lonergan would use the word "reseller" (and not sales agent).

(paras. 18-21)

- In March of 2019, he travelled to Hanoi to meet VOV, and during that visit, met with Tom King "to review some potential, physical sites to install several AM transmitters ... Mr. Guay was not present for any of

these meetings (either with VoV or Mr. King) and had no involvement in setting up any of those meetings” (para. 22).

- After meeting with VOV in March 2019, he introduced “them” to Mr. Cheu who would be acting as Nautel’s agent and primary contact for VOV with Nautel. “...Nautel, primarily through Joe Chue [sic] stayed in touch with VoV and provided them with information about our products and our ability to provide them with the equipment they require” (para. 23).
- Regarding paragraph 100 of Mr. Guay’s Affidavit, he did not recall assuring Mr. Guay that a commission would be paid, and was “not interested in doing any business with him” (para. 24).
- On March 8, 2020, he travelled to meet VOV at Nautel’s Maine, USA facility. It was a visit he arranged himself and Mr. Guay had no involvement with it, and “they” directly expressed that they did not want to deal with Mr. Guay and only wanted to deal with Nautel directly (para. 26).
- After this 2020 trip (which also included a stop at GatesAir in Illinois) VOV said they decided to purchase from Nautel a NX400 transmitter, and the latter designed the transmitter system, and the room layout for it (para. 28).
- On May 3 and 4, 2022, Mr. Lonergan and others from the Nautel team hosted VOV officials at their Nova Scotia facility to show them the progress on the project. Mr. Guay did not organize or attend (para. 29).

[154] He concludes:

30. It should be noted that from the time of Joe Cheu’s contract as being an agent for Nautel, he worked extensively with VoV and handled all final price negotiations with VoV (with Nautel’s oversight and approval; as well as final say on price) face-to-face with VoV. The price negotiations were finalized in 2020 after VoV chose Nautel to supply the product it wanted.
31. With respect to paragraph 122, as well as the entirety of Mr. Guay’s Affidavit, I actually believe that Mr. Guay knows that his assertion of commission percentages is completely wrong. It has been a long standing practice of Nautel, during my entire work history with the company, that any agents who sell Nautel’s products at published list prices with a supporting Nautel issued quote is entitled to a fifteen percent commission. Any discounted sales (i.e. discounted below published below [sic] list prices) supported by a Nautel issue quote,

through an agent, then the agent is entitled to a commission percentage that is negotiated at the time that the discounted price is set. A copy of our standard language from all sale agent agreements is attached hereto as Exhibit "B". It is noteworthy that the agreement specifically states:

If any equipment is sold at the NAUTEL'S LIST PRICE, the fee amount offered should be 15 percent based on a list of price sale. The fee amount applies to any equipment identified in Clause (2) of the said Agent's Sales Agreement and actually sold and delivered to the customer in the Agent's territory as a result of the Agent's direct sale activity supported by a Nautel issued quote.

32. The sale of product to VoV was completed by Joe Cheu and the Nautel team, and did not involve Mr. Guay in any capacity, whatsoever.

(Lonergan Affidavit)

[155] Again, without being exhaustive, on cross-examination, he confirmed that three transmitters were sold, in total, for the Da Nang and Ninh Thuan locations. When asked if he was aware that the Project existed before Mr. Kelly had left the role in 2019, he answered: "I was aware that a project existed". His elaboration was to the effect that lots of companies like VOV have desires they want to fulfill over a period of time, but until it happens, its just "noise in the background", and that when he took over Mr. Kelly's job, that is when he became aware of this ongoing project, and that they did not know at the time that the transmitters would end up going to Da Nang and Ninh Thuan at this point. One of the things he did was to look at the intended sites, and that he knew where they were ahead of time, but when he got over there in 2019, he had to return home because his mother had passed away.

[156] Mr. Lonergan confirmed that they ended up installing the NX400 at Ninh Thuan with the antenna design being created by KTL, and the two NX200's at Da Nang.

[157] He also confirmed that if an agent sells or arranges sale of a system, he will get a commission on that system, as long as the sale is made. A "system" means transmitters.

[158] If an agent brings "an opportunity to Nautel for a system, they get paid by commission on the sale price. If something other than the list price is paid by the end user, then the agent's commission would be scaled back.

[159] Mr. Lonergan also confirmed that the process of requiring agents to sign agreements developed over years, starting in 2012, but some had to be “chased” to sign agreements. He said he was only aware of one agreement signed with Mr. Guay in 2017, there were no others with Mr. Guay after that, to his knowledge. Most agency commitments are 15% of list price, but the moment you sway from the list price, that commission is subject to negotiation.

Issues

- A. Credibility;
- B. Has the Applicant established an entitlement to a commission from the Respondent, and if so on what basis? and
- C. If yes, how is the commission to be quantified?

Analysis

A. Credibility

[160] In this case, a great deal will turn upon findings of credibility and reliability. How one goes about the process of making such assessments has been referenced by this Court, and others across the country, on many occasions; there is no need for an extensive canvas. Most advert to the fact that, while a trier of fact may accept some, none, or all of what a particular witness had to say, it is often somewhat challenging to articulate precisely why someone’s evidence was or was not accorded weight, either wholly or in part.

[161] For example, in *R. v. R.E.M.*, 2008 SCC 51, McLachlin, C.J.C. (as she was then) observed:

[49] While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[162] The same is true in civil matters. For example, in the oft-cited case of *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (BCCA) O'Halloran, J.A., writing for the majority, explained:

[11] The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[163] Self interest, in and of itself, is common. Almost without exception, every party in a Court case has an interest in the outcome. It is not uncommon for non-party witnesses to have an interest in the outcome as well. Virtually all of the individuals who testified in this matter were self-interested, to a greater or lesser degree. This includes Tom King whose company, KTL, shares a close working relationship with Nautel and often collaborates with it on projects around the world, including the Asia-Pacific sphere.

[164] I will say at the outset of my credibility analysis that I had a great deal of difficulty with the thrust and tenor of much of the evidence of the Respondent's witnesses. Almost all started from the premise, in their Affidavits, that Mr. Guay/Sogitec/Sofia Express had some "irons in the fire" with VOV in Vietnam in and around 2016-2017, but none of those projects came to fruition, and the systems which were eventually sold by Nautel, and paid for by VOV, between 2021-2023 did not result from efforts made by Mr. Guay and/or his company, but rather from those of Mr. Cheu and/or Mr. Lonergan, and/or Mr. King.

[165] Indeed, in his Affidavit, Mr. Cheu insists that Mr. Guay "did not assist, in any manner whatsoever, with helping to secure any sales with VoV" (*Cheu Affidavit*, para. 6). He goes on to say that as of June 2019, when he met Mr. Guay in Singapore, VOV "had not ordered any products, and were still in an

information-gathering stage” and had not “even considered purchasing” NX200 and NX400 transmitters (*Cheu Affidavit*, para. 9).

[166] It is nonetheless the case that the “detailed quote which became the final invoice” (*Cheu Affidavit*, para. 7) which Mr. Cheu provided to VOV in the second half of 2020 was the identical November 11, 2016 quote originally provided to VOV by John Abdnour (Nautel) at Mr. Guay’s behest (*Cheu Affidavit*, Exh. A; *Guay Affidavit*, Exh. O and P). Moreover, I see no reason to accord any weight to Mr. Cheu’s hearsay evidence and/or conjecture as to what VOV’s leadership was or was not “considering” either before or after that time.

[167] Another related example occurred in Mr. Lonergan’s evidence. He denied that Mr. Guay had any role in the meeting which he attended in Vietnam in March 2019, where he met with Mr. King among others. He specifically denied that Mr. Guay offered any assistance or played any role in facilitating the attendance of either himself or Mr. King at that meeting (*Lonergan Affidavit*, para. 22). This is despite the acknowledgement of Mr. King himself, who, on cross-examination, admitted to the assistance which Mr. Guay had rendered to “reintroduce him” (as he put it) and Kintronic to VOV.

[168] A striking example of this assistance occurred at the point where, when he was stuck at Hanoi Airport in October 2017, without his visa, or letter of introduction, it was Mr. Guay to whom Mr. King turned to intercede (*Exhibit 6*, pp. 1-2) with VOV officials. He apologized to Mr. Guay personally and sent to the latter a letter of apology to VOV, so that Mr. Guay could deliver that apology to VOV officials on his behalf (*Exhibit 6*, p. 6). It was also Mr. Guay to whom Mr. King/KTL entrusted the arrangements for the rescheduling of the meeting, which ended up being in March 2018.

[169] All of this is notwithstanding that this meeting (March 2018) is said by Mr. King to be in furtherance of a project that was “different from what we had quoted to Mr. Guay in the spring of 2017” (*King Affidavit*, para. 9).

[170] Among other things, this had prompted an internal letter by Nautel just before Mr. King’s visit to meet with VOV in Vietnam, from Mr. Kelly to Mr. Lonergan. It has been referenced earlier, but is repeated here for ease of reference:

From: Chuck Kelly
Sent: Wednesday, March 14, 2018 10:30 AM

To: Wendell Loneragan <[REDACTED]>
 Subject: Vietnam

Hi W,

I need to provide a couple of quotes for Vietnam which Tom King is going to present to VOV for us.

At the request of VOV I am intending to quote directly to VOV, and bypass Alain (but reserve something for him in the background). KTL will not be selling our equipment.

Two variations

Straight up NX400
 Two combined NX200

Question – do we need a tender review, and do you have any suggested packages for these?
 Respectfully,

Chuck Kelly

(*Guay Affidavit*, Exh. Z, emphasis added)

[171] As has been seen, the NX400 noted above was sold to VOV in 2021 and ended up being installed at the Ninh Thuan site. The two NX200's were sold to VOV in 2022 and installed at Da Nang.

[172] In Mr. Loneragan's case, he purported to predicate his disagreement with those portions of Mr. Guay's evidence with which he took exception (at least in part), upon a review of "Nautel's corporate records" (*para. 19*) and/or documents which he says he had undertaken. Despite this, not a single document is attached to his Affidavit which corroborates anything that he had to say, or contradicts anything offered in Mr. Guay's Affidavit or oral testimony. Indeed, Mr. Loneragan's Exhibits A and B consist of (respectively) a screenshot culled from Nautel's corporate website providing generic and publicly available information about Nautel, and an unsigned copy of our "standard language for all sales agent agreements".

[173] This is also despite the fact that in the years after Mr. Guay's most intense involvement with the VOV Projects (which is to say, during the years 2016-2017, and includes much of 2018 when his efforts to assist Mr. King/KTL are factored in), Nautel officials confirmed that Mr. Guay could expect a commission if and when a sale occurred. In March 2018, Chuck Kelly confirmed to Mr. Guay that he was "aware of all your efforts over the years with VOV, and you will be protected if an order is placed by VOV." (*Guay Affidavit*, para. 83 and Tab AA). That email also confirmed to Mr. Guay that he had informed Tom King of KTL that Sogitec [sic] would be entitled to a commission if the (now) KTL-fronted deal with VOV

led to orders, and inquired of Mr. Guay whether 10% would be a fair commission (*Guay Affidavit*, para. 83 and Tab AA). As we have seen, the latter responded:

...We have been involved in this one since 2015 and EMI.Co [VOV's agent] did not give us any inch... promoting initially GatesAir, offering a complete system. Of course, to get that today level of interest in Nautel by VOV required time, efforts and other considerations. It has been the same for KTL. With your understanding, please do not go below 10% to fulfil our duty.

(*Guay Affidavit*, para. 84 & Tab AA).

[174] It is worth noting, at least parenthetically for now, that although this exchange occurred during the currency of the written Agency Agreement, the 10% commission which was apparently acceptable to both sides did not appear to be rooted in the terms of that Agreement. This lends support to the fact that the parties were operating on the basis of a longer-term ongoing relationship, not one restricted to the four corners of the written Agency Agreement, on which the Respondent based so much of its argument. We will discuss the Agency Agreement more extensively later in these reasons.

[175] Notably, on cross-examination, Mr. Rodgers' criticism of the assurances given by Mr. Kelly to Mr. Guay in March 2018 were restricted to the fact that they were not made subject to the proviso that the latter would only receive a commission if an order was placed by VOV "in the reasonable future". I do acknowledge that the Respondent's counsel has suggested, in his oral argument, that Mr. Kelly's communications to Mr. Guay on this point were hearsay. With respect, the significance of the statements relates to the fact they were representations made to Mr. Guay as to Nautel's position, by the Regional Representative of Nautel with whom he customarily dealt. Even if these comments are not party admissions, they do operate as declarations of Nautel's corporate state of mind or intention. It could not be suggested that Mr. Kelly had no authority to make statements of this kind. To repeat, the Court understood Mr. Rodgers' criticism to consist of how Mr. Kelly had worded what he said.

[176] To return to the Agency Agreement, on its face, it purported to expire in either November 2018 or January 2019 (at the latest), the latter date being when the Applicant had signed and returned it to Nautel. In June of 2019, Mr. Guay and Wendell Lonergan discussed Sofia Express' work on the VOV MF-AM Project at a tradeshow in Singapore. According to Mr. Guay, Mr. Lonergan told him "not to worry about the Commission and that the Project had not been completed" (*Guay Affidavit*, para. 100).

[177] Mr. Lonergan denied saying this and claimed, in fact, that he had already decided that Sogitec [sic] “were not properly serving” Nautel’s Asia-Pacific region and that he was “definitely not interested in doing any business with him [Mr. Guay]” (*Lonergan Affidavit*, paras. 17 and 24). Yet there is no indication that Mr. Guay was ever informed of anything remotely like this, and it appears that Mr. Lonergan had provided updated quotes for the Projects, at Mr. Guay’s request, as recently as April 2019 (*Guay Affidavit*, paras. 96-97 and Tab DD).

[178] Moreover, in July 2019, Mr. Lonergan emailed Mr. Guay about a different project and inquired about an expected commission rate (*Guay Affidavit*, para. 99 and Tab EE). In fact, as late as April 22, 2021, John Wilton of Nautel, in correspondence with respect to a different project, referred to Sofia Express as a Nautel agent (*Guay Affidavit*, para. 106 and Tab FF).

[179] This is consistent with what Mr. Guay has asserted, in his Rebuttal Affidavit, which recounts an ongoing “very friendly business relationship” with Mr. Cheu and Nautel, one which persisted into 2022 (*Guay Rebuttal Affidavit*, para. 34). Based upon the conduct and dealings between the parties evidenced in the above referenced emails, Mr. Lonergan’s after-the-fact claims that Nautel was dissatisfied with Mr. Guay and/or Sofia Express in 2019 appear to be self-serving and contrived.

[180] The above reasons are not exhaustive, but will suffice to explain why, where the evidence of any of the Nautel witnesses contradicted that of Mr. Guay, I preferred the evidence of the latter. His evidence was, by far, the most consonant with the evidence adduced and in fact, almost all of the documentary evidence that was made available to the Court was provided in his Affidavit. Despite the fact that the Respondent’s witnesses, purported to categorically disagree with the main tenets of the Applicant’s evidence, they offered substantively little to nothing, in a documentary sense, upon which to base that disagreement.

[181] Rather, the Respondent witnesses continued to simply, and collectively assert that the final agreement with VOV was for a completely different deal than the one in which the Applicant had been involved. In so doing, they offered very little evidence of those differences, and even less evidence of what they themselves, had done, concretely, to consummate the deal with VOV.

[182] It is indeed telling, as noted earlier, that when VOV’s needs evolved to a point where KTL needed to become involved in the ongoing efforts to sell Nautel transmitters for the Projects (as a turn key purchase which included KTL antennae,

etc.), Mr. Guay/Sofia Express still had an important and recurring role. He served, among other things, as a conduit through which Mr. King (KTL) could be connected (or “re-introduced”) to Mr. Guay’s contacts at VOV, which efforts culminated in Mr. King’s ability to meet with VOV officials in March 2018. Considering the fact that Mr. King subsequently became the lead or point of contact with VOV, at least for a time, with respect to the Projects, this was significant.

[183] Despite the insistence of Kevin Rodgers and Joseph Cheu, among others, that as of June 2019, there was no prospect of a sale to VOV, this is unsupportable when the overwhelming preponderance of the evidence is considered.

[184] When viewed as a whole, the most reasonable conclusion, the one at which I have arrived, is that the Da Nang and Ninh Thuan Projects, while not always moving in a linear fashion, eventually came to fruition in the early 2020’s and culminated in the sales reflected in Mr. Guay’s Affidavit at Exh. II. This happened, in very substantial part, due to Mr. Guay/Sofia Express’ considerable efforts dating back as far as 2012, but especially during the years 2015-2018.

B. Has the Applicant established entitlement to a commission from the Respondent, and if so on what basis?

[185] The applicable legal tenets are not controversial. The basic rule is that a principal is required to pay an agent where the obligation has been created by an express or implied contract between the principal and agent. It is a question of construction in each case as to whether it was the intention of the parties that the agent should work gratuitously or should be paid. If there is no evidence of an intent to compensate the agent, or if, in the circumstances, a presumption of gratuitous service can be drawn, no payment may be claimed (Fridman, *Canadian Agency Law*, 3rd ed. (Toronto: Lexis-Nexis, 2017) at 4.3)).

[186] It is also settled law that, absent an express agreement to pay commission, such an agreement can be implied from the conduct of the parties and, moreover, where the evidence discloses (on the balance of probabilities) that payment was intended, it may be recovered on a *quantum meruit* basis. In circumstances where the principal accepts and derives benefit from work done by the agent on the principal’s behalf, the principal is liable to pay, unless there was an agreement to the contrary between the parties. However, where there are express terms that are

valid and operative, nothing may be implied into a contract which is inconsistent with those express terms (Fridman, *Canadian Agency Law*, at 4.5-4.6).

[187] It is difficult to fit this case within the confines of a legal theory premised upon the centrality of a written Agency Agreement. The evidence discloses that Nautel and Mr. Guay (on behalf of both Sogitec and Sofia Express) had a long term, and at times fluid relationship, going back as far as 2012. Mr. Guay was the “face” of these companies, and he had built up an extensive cadre of contacts in Southeast Asia, including Cambodia and Vietnam, through years of work experience in that area.

[188] In the years before this particular project had been conceived, Mr. Guay and his companies had acted primarily, although not exclusively, in the capacity of prime contractor/reseller of Nautel products, which involved them purchasing these products at a discount from Nautel’s list price, and reselling them to the end user at a higher price, and also providing, generally speaking, assistance with the set up and operation of the equipment. An obvious corollary to such a relationship is that Mr. Guay would first have to “sell” the end purchaser on the value of the Nautel products that were, in effect, being resold by one or the other of his companies. In this way, both parties derived benefit from his efforts.

[189] As a result of his extensive contacts in the area, Mr. Guay learned of VOV’s long-term plans for the installation of transmission towers and, immediately upon doing so, set about selling that government agency on the benefits of using Nautel’s products in the implementation of the Project. This was not an easy task, because VOV EMI.Co, another wholly government owned corporate entity, had a relationship with VOV analogous to that of a prime contractor. Moreover, the evidence establishes that VOV EMI.Co favoured GatesAir (or its predecessor, Harris), one of Nautel’s competitors in the region.

[190] This had several important implications with respect to the role of Mr. Guay/Sofia Express and the future of the Projects at Da Nang and Ninh Thuan. First, through that relationship, Mr. Guay learned that VOV EMI.Co would not countenance the involvement of any other company besides itself in the capacity of prime contractor and/or reseller. Because of this, Mr. Guay’s relationship with the Respondent had to change. Through him, the relationship between Sofia Express and the Respondent became one of agent/principal.

[191] The fact that this change occurred recognized both the work already done in furtherance of Nautel’s interests, up to and including 2017, and also the fact that

Nautel still needed Mr. Guay's presence, and the ability to utilize his contacts within both VOV companies, to "bring the deal home", so to speak. Moreover, it recognized that, by this time, a considerable amount of work and effort had been put in by the Applicant (through Mr. Guay) in preparing not only VOV, but also its Prime Contractor, to be receptive to the idea of using the Respondent's (instead of GatesAir's) transmission towers, and the ancillary equipment required.

[192] This "agency period" began in approximately 2016, and was specifically devoted to efforts of Mr. Guay to advance Nautel's relationship with VOV and VOV EMI.Co, and secure the business opportunities represented by what became the Da Nang and Ninh Thuan Projects, for the Respondent, at the expense of GatesAir. As discussed, prior to 2016, the relationship between the parties had primarily been on of reseller/seller, but changed at that time because VOV required VOV EMI.Co to fulfill that role.

[193] The unwritten arrangement under which the parties were operating was ostensibly "supplanted" (for one year) by a written Agency Agreement, but nothing changed between the parties in terms of how they dealt with one another or the Projects. I find that, during that year, the parties continued to discuss and advance the VOV Project, and, in their discussions, contemplated a commission of not less than 10% (as per email from Mr. Kelly dated March 21, 2018, *Guay Affidavit*, Tab AA). As mentioned earlier, the written Agreement itself contemplated a 15% commission on sales at list price. But the *viva voce* evidence was clear that an agent's commission was to be reduced if the sale was less than Nautel's list price.

[194] The written agreement itself (the ASA) and the one-year term encompassed by it, passed ephemerally, and had no discernable effect on how either party conducted itself, either before it was signed, during its currency, or afterward, save only for the fact that it apparently served as an after-the-fact excuse on the part of the Respondent to attempt to avoid the obligations to the Applicant which Nautel's officials had previously and repeatedly recognized over the years.

[195] This is somewhat consistent with the implications of a portion of the evidence of Mr. Lonergan, which was to the effect that Nautel's treatment of written agency agreements was somewhat loose for a period of time, and that even at the time Sofia Express' Agency Agreement was signed, there were still some other agents operating on Nautel's behalf without written agreements.

[196] Moreover, the letter which accompanied the draft ASA, directed to Mr. Guay in late November 2017, had a “Re” line: “Please help me update our current information for our representatives in Asia/Pacific” (*Guay Affidavit*, Exh. X). Such a pretext signals an intention to obtain current information for Nautel representatives, rather than to operate on any basis different to what had existed in the relationship between the parties before the written ASA came into being.

[197] As we have seen, correspondence from Nautel officials was still referring to Mr. Guay as a Nautel agent as late as 2021.

[198] The Respondent, and several of its witnesses, attempted to make much of the fact that the deal with VOV for the sale of the products in the Da Nang and Ninh Thuan Projects did not occur until 2021-2023 which was long after Mr. Guay/Sofia Express had ceased efforts on the Respondent’s behalf. I accepted Mr. Guay’s evidence that his efforts were largely unneeded after he was advised by VOV in 2017 that the Project was being awarded to Nautel (*Guay Affidavit*, para. 104, Exh. U). After that, his efforts in 2018 were largely (although not exclusively) directed toward assisting KTL and Mr. King, whose involvement was now required due to VOV’s desire for the Projects to be “turn key”.

[199] Moreover, given the significant “tail” or lag time on government involved projects conducted in Vietnam (as noted in Mr. Guay’s Affidavit at paras. 12-13) I accept that, often, projects that are “set” must still wait upon a government timetable, which includes later formalization of a deal when the necessary funds are available to be allocated for that purpose. As a matter of law, timing for payment of commissions may occur at a point in time long after the efforts and labour of a salesperson/agent were concluded. I find that, this would have also been consonant with the parties’ reasonable expectations, in these circumstances.

[200] Applicant’s counsel references *Manson v. Fleming-Pedlar Ltd.*, [1951] 3 WWR(NS) 241 (Man KB), and *Hawkins v. Mack Maritime Distributors Ltd.*, (1970), 2 NBR (2d) 427 (NBSC (AD)). In the former, the parties had entered a “commission contract”, whereby the defendant company, which was in the business of selling and installing refrigeration and air-conditioning equipment, employed the plaintiff “on a commission basis” from November 1948 until October 31, 1949 (paras. 1, 6). After working on a project to install the company’s equipment in various army messes, the contract was terminated by mutual consent in August 1949 (paras. 7-10). Negotiations on the project the plaintiff had started were continued, and the company ended up securing several orders (paras. 11-12).

[201] As to the plaintiff's entitlement to commission, the Court said:

[18] There can be no doubt that the purpose of the contract in question was the securing of business for the defendant company.

[19] The plaintiff was to be paid for "all installed sales made in his territory." In my view, the plaintiff would be entitled in respect of sales made in his territory irrespective of where the installations might take place. The word "installed" indicates the kind of sale for which he would be paid, and when the installation had been completed the plaintiff became entitled to payment of the commission earned by the initial introduction of the customer to his principal.

[20] I have no hesitation in finding that the plaintiff was the sole agency through which the defendant secured the large contracts in question. I hold that the plaintiff is entitled to payment of commission thereon upon completion of the installations even though the latter occurred after termination of the contract of service between the parties.

[202] The Court in *Manson* went on to reference *Sellers v. London Counties Newspapers*, [1951] 1 All ER 544, in which the plaintiff claimed he was entitled to commissions on newspaper advertisements that appeared after he was terminated. The majority of the House of Lords held that in the absence of an express term in the contract of employment, to the effect that the plaintiff's right to commission should end with the termination of his employment, he was entitled to commission on any orders obtained while he was employed by the defendants, even though the advertisements to which these orders related were not published until after the termination of his employment (*Manson*, para. 22).

[203] This led the court in *Manson* to apply the following reasoning:

[23] In the instant case there was clearly no express term in the contract that the plaintiff's right to commission should end with the termination of the contract. Further, I can see no point of distinction between a situation where orders have been placed during employment and one where orders are ultimately placed by reason of the efforts of the plaintiff during his period of employment. If it were otherwise, the employer could, in any case, conveniently terminate the employment prior to the placing of orders and thus avoid liability for commission.

[204] In *Hawkins*, the plaintiff was employed by the defendant company to sell transportation equipment. He was remunerated both by way of salary and commission. He claimed entitlement to commissions on sales finalized after the termination of his employment. The Court said:

[5] In the Consolidated-Bathurst Limited transaction, nothing remained to be done after the termination of the plaintiff's employment except delivery of the equipment and payment therefor. In the Canadian National Railways transaction we do not think the fact that the sale was the result of the option to purchase being exercised after the termination of the plaintiff's employment should make any difference as it is clear from the evidence that the plaintiff was the effective cause of the transaction and that the parties contemplated at the time of the agreement the option would be exercised if the equipment proved satisfactory. Moreover, there is no evidence that any other person in the defendant's employ was in any way responsible for the resulting sale. There is no question in our opinion that if the plaintiff had continued in the employ of the defendant he would have been entitled to his commission on the sale when the option was exercised without having performed any further service. We are therefore satisfied that the learned trial Judge was justified on the evidence in holding the plaintiff entitled to commissions on both sales.

[6] It was claimed by the appellant that the method used by the learned trial Judge in calculating the amounts of the commissions was incorrect. In the Consolidated-Bathurst Limited transaction it was contended the value of the trade-ins should have been adjusted downward due to a delay in delivery said to have been caused by the plaintiff and that the commission should have been further reduced on equitable grounds not provided for either expressly or impliedly in the terms of the plaintiff's employment. Having considered fully the submissions of counsel, we are not satisfied that the amounts found owing by the learned trial Judge are unsupported by the evidence.

[205] The Respondent has cited *Kraft v. Firepower Financial Corp.*, 2021 ONSC 4962 which held that a terminated employee was entitled commission on sales closed during the reasonable notice period, but not on sales closing later than that. The Court, in that case, held that the “notice period defines a timeframe after which both the employee and the employer must put the employee’s wages flowing from his termination behind them. Otherwise, an employer and employee would be tied to each other indefinitely. I am of the view that a judgement in a case like this should bring finality to the issues between the parties” (para. 27). The Respondent argues that this is tantamount to the expiry of the written Agency Agreement (*Respondent Brief*, para. 69).

[206] With respect, *Kraft* is distinguishable from the case at bar. It dealt with an employment-based notice period having been provided to the employee in question. More importantly, in the case at bar, there is conduct by Nautel affirming an entitlement to commission not only before, but during and after the term specified in the ASA. As noted earlier, this is not a situation where the agency relationship had a clean and distinct beginning and end rooted in a single contract,

written or otherwise. Indeed, the interpretation of the evidence which I accept is that in which the Applicant/Mr. Guay's status as agent on behalf of Nautel did not end until Mr. Lonergan terminated it in 2023. This was after the sales associated with the Projects had been concluded.

[207] Moreover, as noted earlier, I accepted Mr. Guay's evidence that his and Sofia Express' dealings with the Respondent did not change after the ASA "expired" and that, to repeat, there were very express indications given by Nautel leaders before, during and after the term of the written agreement that amounted to acknowledgements that a commission would be due in the event of a sale to VOV.

[208] Nautel claims that it incurred no obligation arising from the March 2018 correspondence from Mr. Kelly, and that, further, Mr. Guay had "dropped out of the picture" and that the deal ultimately consummated with VOV was different from that being discussed in 2018. Alternatively, Nautel argues that Mr. Kelly had no authority to make such a promise, if one was made, and that there was no certainty of terms to support a finding of an enforceable contract (*Respondent Brief*, paras. 54-62).

[209] Once again I will state that, in my view, Mr. Kelly's remarks were part of a course of conduct by which Nautel repeatedly acknowledged to Mr. Guay that it recognized his significant efforts, and recognized the Applicant's entitlement to a commission.

[210] The Applicant has contended that the Agency Agreement did not terminate in January 2019, in accordance with its terms, but was continued by the conduct of the parties afterward.

[211] In *Coffee Time Donuts v. 2197938 Ontario Inc.*, 2021 ONSC 3109, a franchise agreement had expired, but the defendants, who were the franchisees, continued operating the franchise and paying royalties. The plaintiff franchise owner brought a claim when the defendant stopped paying royalties, while continuing to use the franchise name and suppliers. The Court referenced the following principles for the interpretation of commercial contracts:

[5] The claims rise (or fall) on whether the terms or franchise agreement supersede its expiry on July 31, 2014. Despite counsel submitting our courts commonly have found implied agreements to be enforceable, I was not directed to any specific decision on point. Instead, the plaintiff relied on well known Court of Appeal statements that commercial contracts be:

- a) given meaning in a manner that considers the agreement as a whole and avoids rendering one or more terms ineffective;
- b) determined in accordance with the intention of the parties and the language used;
- c) determined in a manner giving preference to the objective evidence over any subjective intentions, particularly where there is an ambiguity; and
- d) enforced in accord with good business sense and avoid commercial absurdity (see *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 at paragraph 24).

[212] The motions judge held that the expired franchise agreement remained effective until January 25, 2021 on the basis that the entirety of the agreement was being followed by the parties for almost 19 months following its expiry (see para. 7).

[213] In affirming this conclusion, the Ontario Court of Appeal said:

[7] We see no error in the motion judge’s finding that the agreement between the appellants and the respondent was continued by the conduct of both parties after the term of the written agreement expired. The motion judge found that the appellants continued to buy products from the exclusive suppliers under the franchise agreement after the end of the term of the written agreement, continued to use “Coffee Time” branding, and continued to pay franchise royalties to the respondent until February 16, 2016. Even after the appellants ceased paying the franchise royalties, they continued to use the “Coffee Time” branding for their business and to purchase products from authorized suppliers. In the circumstances, we see no basis to interfere with the finding by the motion judge that the agreement was continued by the conduct of the parties after the expiration of the written agreement: *Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd.* [1964] S.C.R. 614, at pp. 621-22.

[214] The Applicant says that it continued promoting Nautel and its products in Vietnam after the “facial” expiry of the Agency Agreement until at least April 2021, just as it had done before, and during the term specified in the ASA, and the Respondent continued to receive the benefit of those efforts. In July 2019, some six months after the ASA (on its face) expired, Mr. Lonergan contacted Mr. Guay respecting a different project, and inquired about his expected commission if Nautel sold the product directly to the consumer. Later, as we have seen (in 2021) Mr. Wilton of Nautel emailed Mr. Guay that “only agents like yourself” would receive discounts on Nautel quotes (*Guay Affidavit*, Exh. EE and FF).

[215] In my view, the only relevance of the ASA was to codify some of the (previously unwritten) aspects of the parties' relationship, which both predated and extended long after (on its face) the document purported to have ended. There was written recognition of a continuing agency relationship between the parties (at the very least) in email correspondence of June 2019 and 2021. I find that the parties' agent/principal relationship did not come to an end until 2023, after Mr. Guay had claimed commission on the VOV Projects, and Mr. Lonergan provided written notice that the relationship had terminated.

[216] The Respondent has contended that even if the Agency Agreement continued beyond January, 2019, the Applicant did not complete the work to earn a commission. According to Nautel, the ASA provides that commission would only be payable "as a direct result of sales activity that ends in a completed sale". The Respondent insists that the sales eventually completed in the early 2020's with VOV were for an entirely separate project from the work in 2016 (*Brief*, para. 75).

[217] Additionally, Nautel says no equipment was sold and delivered as a result of Sofia Express' direct sale activity, and if there was any direct sale activity it was by Sogitec, not Sofia Express (*Brief*, paras. 76-79). Finally, the Respondent argues that none of the work done by the Applicant led to the sales because it was KTL that recommended Nautel to VOV, VOV did not want to work with Sofia Express, and Sofia Express did not work with VOV after 2019 (*Brief*, para. 80).

[218] Several points can be made in relation to these multiple contentions. First, none of them deals with the basic fact that Nautel continued to treat Mr. Guay as its agent over a period beginning in 2016 until at least 2023, and that its officials repeatedly acknowledged Mr. Guay's considerable efforts on the Projects, and that commission would be due on account of his efforts if and when a sale to VOV occurred (*Guay Affidavit*, Exh. EE and FF, and paras. 83, 99, 100, 102, 106, for example).

[219] Second, Sofia Express was an effective cause of the VOV sales. In *Carroll v. Purcee Industrial Controls Ltd.*, 2017 ABQB 211, the plaintiff had received commission on profits in addition to salary as a term of his employment. In holding that the plaintiff was entitled to post-termination commissions, the Court reviewed several lines of authority and concluded that it was appropriate "to imply a term that commissions earned on sales generated before termination but paid to the employer after termination, should still be paid to the employee":

[105] In rationalizing these apparently diverse lines of authority, I consider the following factors to be germane. It is clear from the evidence that Mr. Carroll completed his role for all of the commissions claimed. He was directly involved in each and every one of the sales in question, and the sales can be primarily attributed to his efforts (similar to the case in *Micallef*). Further, it is clear on the evidence that the Defendants have now been paid for all of the sales, although specific dates of payment are not in evidence. While there was evidence from the Defendants that their policy was not to pay commissions following termination of employment, there is no evidence before me that this policy was ever brought to the attention of Mr. Carroll, nor was he ever asked whether he was aware of this policy. Ms. Parra's testimony supports that a general policy was in place, but her testimony does not prove that Mr. Carroll was subjectively aware of the policy.

[106] Even if it is not reduced to writing, credible evidence establishing the existence of a term precluding employees from collecting commissions earned post-termination may well justify denial of commissions on sales paid after termination, as was the case in *Bixby*. Further, it is open to the parties to lead evidence as to a widely known and accepted industry standard. No such conclusive evidence is before me.

[107] Furthermore, the fact that commissions were typically paid only after payment was received from the purchaser does not necessarily imply that such commissions are not payable following termination. Following *Micallef*, a term in an employment contract requiring that an order be paid before the salesperson receives his commission does not necessarily imply that the salesperson's entitlement to that commission crystallizes at the date the customer pays the invoice. Rather, it is entirely reasonable to conclude that the employee's entitlement to receive a commission crystallized at the date the sale was effected, even if payment is delayed until sometime thereafter. At that point, the employee's job has been performed, and the employer is set to reap the benefit of the employee's labour once the customer remits payment.

[108] In my view, this interpretation properly applies the business efficacy test as set out by the Supreme Court in *Grover* and *MJB Enterprises*. The Court should imply terms that are necessary to give effect to the consideration agreed to between the parties. In this case, Purcee agreed to pay Mr. Carroll a base salary plus commissions in exchange for Mr. Carroll effecting sales on Purcee's behalf. It is reasonable to imply a term that Mr. Carroll's entitlement to commissions crystallized at the moment the sale was effected, because that best gives effect to the consideration agreed to between the parties. At that point, Mr. Carroll had performed his duties, and he is entitled to the compensation for his labour that he bargained for. To find otherwise would lead to a windfall for Purcee.

[109] This, in my view, is also consistent with what I term the "modern approach" to this issue. After all, it is recognized that where an employee's compensation is based in whole or in part on commissions, a dismissed employee will be compensated for the loss of the opportunity to earn commissions over the

applicable notice period. *Sparling v. D.H. Howden & Co.* (1968), 68 C.L.L.C. 14,133, [1968] O.J. No. 399 (Ont. S.C.) (QL); *Sublett v. Facit-Addo Canada Ltd.* (1977), 16 O.R. (2d) 791, 79 D.L.R. (3d) 286 (Ont. H.C.); *Goldberg v. Western Approaches Ltd.* (1985), 7 C.C.E.L. 127, [1985] B.C.J. No. 937 (B.C. S.C.) (QL).

[110] I conclude where an employee has been dismissed and the employment contract is silent on this issue, absent evidence of known company policy or accepted industry standard, a Court should not hesitate to imply a term that commissions earned on sales generated before termination but paid to the employer after termination, should still be paid to the employee.

[emphasis added]

[220] For its part, Sofia Express references *Teichmann v. Smilestone* (1974), 10 N.S.R. (2d) 1 (SCAD). In affirming the trial decision, Cooper, J.A. (as he then was) said, for the Court:

[29] The next point urged upon us by the appellants was that, assuming that the respondent was authorized to effect a sale of the shares of Metropolitan Developments Limited, the respondent was not the effective cause of the sale and the trial judge was in error in finding that the respondent did anything to entitle him to a commission.

[30] The classic statement as to entitlement of an agent to commission is that of Erle, C.J., in *Green v. Bartlett* (1863), 14 C.B. (N.S.), 681; 143 E.R. 613, at p. 614:

...if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him.

This statement was referred to with approval by Lord Atkinson in *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, at p. 624. The learned law lord quoted of words of Erle, C.J., appearing above and then added:

Or in the words of the later authorities, the plaintiff must shew that some act of his was the causa causans of the sale (*Tribe v. Taylor* (1876) 1 C.P.D. 505, 510), or was an efficient cause of the sale (*Millar v. Radford* (1903) 19 Times L.R. 575).

The Supreme Court of Canada applied the *Burchell* case in *Stratton v. Vachon* (1911), 44 S.C.R. 395 - see also, *Frank Freeze Co. Ltd., v. Dominion Hotel (Carstairs) Ltd.*, [1953] 2 D.L.R. 333, Appellate Division of the Supreme Court of Alberta.

[221] In *Teichmann*, the appellant had relied on *Campbell Brothers Real Estate Limited v. C.H. Witham Limited* (1959), 28 W.W.R. 420 (Alta SC (AD)) and *Taylor v. Silver Giant Mines Limited*, [1954] SCR 280, both cases where claims of

a similar nature had been dismissed. Cooper, J.A., in *Teichmann*, dealt with the argument this way:

[33] I regard the *Campbell* and *Taylor* cases as merely illustrative of the principle that the agent must establish that his services were the effective cause of the sale. Each of these cases turned on its own facts as indeed must any case involving a claim by an agent: are the facts such as to bring the claim within the applicable principles of law?

[34] The evidence in the instant case has already been reviewed at length and as well findings of the trial judge which included his crucial finding that the respondent was directly responsible for the sale of the shares of Metropolitan Developments Limited to Turf Developments Limited, a wholly owned subsidiary of M.E.P.C. Canadian Properties Limited. Was the trial judge in error in this crucial finding? I do not think so. The initial introduction of the appellants to the M.E.P.C. Company came about as a result of the efforts of the respondent and the only matter that has given me any concern is whether or not the continuity between the original relation brought about by the respondent and the sale of the shares of Metropolitan Developments Limited has been broken.

[35] There was no action taken by the appellants to bring the relationship with the respondent to an end as was done in the *Taylor* case, *supra*, by the letter to which I have referred. The trial judge found that the advent of Mr. Morgan on the scene did not break the continuity; his finding should not be disturbed.

[222] Cooper, J.A. found that continuity between the parties' relationship had been maintained even when the company entered receivership, and concluded that there was nothing "to indicate that the respondent can be said to have abandoned the matter with respect to contacts which he had already made and particularly that with M.E.P.C. Canadian Properties Limited" (pp. 36-37). The evidence satisfied him that "the respondent brought about the relation of buyer and seller between the appellants and Turf Developments Limited, and that the respondent was the effective cause of the sale of the shares..." (p. 38).

[223] This idea of "continuity" was also addressed in *MacDonald Realty (1974) Ltd. v. Saunders (1997)*, 10 R.P.R. (3d) 101 (BCSC). Specifically, the Court addressed the question of whether there was "an unbroken continuity between the efforts of the plaintiff and the 'ultimate' sale" (para. 25).

[224] The Court explained:

[28] Examples of circumstances which have supported a finding that the relationship between the vendor and the purchaser has been broken are numerous: an abandonment of negotiations by the defendant (vendor) when told by the agent

that he could not get a higher price from the prospective purchaser (*Turner, supra*); the termination of negotiations by the vendor after refusing the purchaser's offer, after which the vendor turned its attention to searching for other interested potential purchasers and the rejected purchaser turned its attention to looking for other suitable properties to purchase (*Taylor, supra*).

[29] The approach to be taken in deciding whether there has been a break in continuity was clearly articulated by Hutcheon J. in *Robertson-Neff & Associates Ltd. v. House* (1978), 7 B.C.L.R. 142 (B.C. S.C.), where he said at 145:

The only question that needs to be answered is whether the plaintiff was an effective cause of the sale of the shares from House to Millar and Middleton, and the answer to that question depends on whether the negotiations between the vendor and the purchasers terminated in April 1976 or were postponed.

[30] And he continues, after referring to *Taylor, supra*:

In the present case the evidence of all of the witnesses supports the description made by Robertson of the state of affairs in his letter of 22 April 1976 when he said: “As you are aware, the terms of the offer to purchase have not been fulfilled and the transaction has therefore collapsed.”

The relation between vendor and purchasers was not merely postponed or dislocated at the time that letter was written but broken. Millar and Middleton turned to another project for the investment of their moneys. The negotiations were reopened because of the change in the law which led to a change in terms of purchase not only for the vendor but also for the purchasers.

[31] Clearly the issue is whether the continuity of negotiations was broken, not whether the ultimate sale was sufficiently similar to the original proposal as to constitute effectively the same transaction.

[225] The Respondent argues that Sofia Express did no work with VOV “from at least 2019 – 2022” and therefore the sales could not have been “effected” during the term of the Agency Agreement (*Respondent Brief*, para. 74).

[226] With respect, even the written ASA itself contemplated that a fee would be due for equipment “actually sold and delivered to the customer in the Agent’s territory as a result of the Agent’s direct sale activity supported by a Nautel issued quote...” (*Guay Affidavit*, Exh. Y, p. 158). The parties’ conduct did not contemplate that his work must be the sole cause effecting an eventual sale. After all, it was a given that Mr. Guay was not promoting Nautel products for free, and no one from Nautel suggested to him that he was, until the ultimate decision was made to refuse to pay him a commission, in 2022, after the sales for the Projects at Da Nang and Ninh Thuan had come to fruition.

[227] Sofia Express (through Mr. Guay's efforts) may not have been the sole cause of the sales, but the evidence satisfies the Court that he certainly was not only an effective cause of the sales, but the major cause of them. What follows is a non-exhaustive synopsis of the Court's findings with respect to Mr. Guay's/Sofia Express' efforts which culminated in the sales to VOV for the Projects:

- (a) Between 2006 and 2009, Sofia Express introduced Nautel's new NX MF-AM transmitter series to VOV. VOV had a future need for MF-AM transmitters. This included introducing VOV to Mr. Kelly and arranging a trial of Nautel transmitters;
- (b) Between 2009-2012, Sofia Express arranged trips for VOV delegations to view the Nautel NX MF-AM transmitter series on the understanding that VOV would require these products in the future;
- (c) In 2013, VOV shared with Sofia Express their five year Master Plan to replace transmitters and Sofia Express promoted Nautel products;
- (d) In 2015, Sofia Express submitted a quote to VOV BEC for the NX100, NX200 and NX400 transmitters;
- (e) In 2016, Sofia Express became aware of the specific projects being prioritized by VOV in Da Nang and Ninh Thuan and informed Nautel about the specific Projects;
- (f) In 2016, Sofia Express' role changed from Prime Contractor to the agent for the sales relating to the Projects for the reasons earlier discussed, and connected Nautel and VOV directly regarding the Projects. This was done so as to facilitate VOV/VOV BEC/VOV EMI.Co's ability to purchase from Nautel;
- (g) In 2016, Sofia Express worked to secure an antenna system for the Da Nang site to be delivered at the same time as the transmitters and secured KTL as the vendor after becoming aware that VOV required a "turn key" package;
- (h) In 2017, Sofia Express continued to keep Nautel updated on the status of the Projects, while personnel overseeing the sales changed;
- (i) In 2017, VOV informed Sofia Express that they had approved the selection of Nautel NX MF-AM series transmitters over competition for the Project, including GatesAir;

- (j) In late 2017, Sofia Express attempted to arrange a meeting between Mr. King (of Kintronic) and VOV, which did not occur due to visa restrictions and prompted Mr. King's apology to both VOV officials and to Mr. Guay personally for the error. Mr. Guay personally conveyed Mr. King's written apology to VOV, and was involved in rescheduling what became Mr. King's March 2018 trip to meet with Mr. Guay's contacts in VOV;
- (k) In late 2017/early January 2018, in the context of those recent negotiations, Sofia Express signed an Agency Agreement with Nautel entitling it to 15% commission from sales in Vietnam;
- (l) In March 2018, Mr. King (after having rescheduled his visit originally scheduled for October 2017, largely through Mr. Guay's efforts) met with VOV;
- (m) Following this, Nautel (through Mr. Kelly) confirmed to Mr. Guay that it knew of Sofia Express' significant efforts and would pay commission if an order was placed by VOV;
- (n) In late 2018, KTL was prepared to issue quotations to EMI.Co which included antenna systems and NX transmitters from Nautel and which would have directed EMI.Co to work with Mr. Guay on behalf of the Project had the documentation actually been sent (it was not);
- (o) In 2019, Sofia Express informed Mr. Lonergan about the history of the sale when he took over the account and he acknowledged the Projects and re-issued a Nautel quote to Sofia Express on April 23, 2019;
- (p) Mr. Cheu became involved with the VOV people in 2020. The "detailed quote which became the final invoice" is the quote which Nautel sent to VOV at Mr. Guay's insistence, and is dated November 11, 2016 (*Cheu Affidavit*, para. 7 and Exh. A).

[228] Earlier, I concluded that the ASA simply codified (temporarily) most aspects of the parties' ongoing (previously unwritten) relationship, but it did not change what had been going on either before or after the purported expiry of the document. This relationship, despite Mr. Lonergan's evidence to the contrary, lasted until after Mr. Guay came looking for his commission with respect to these Projects, which led to Mr. Lonergan terminating the Applicant, in writing (in 2023).

[229] In these circumstances, I am satisfied that the parties operated within the milieu of a longer term relationship. The Applicant received a list discounted purchase price from Nautel when it acted as a reseller of Nautel equipment, and was remunerated via the mark up to the end purchaser. When in the capacity of agent, it received a 15% commission when it was the substantial cause of a deal between Nautel and the end purchaser, and the items were purchased at list price. The commission was less, at an amount to be negotiated, when the purchase was for less than list.

[230] I conclude that the Applicant is entitled to be compensated by way of a commission based on the contract price of the sales to VOV, the terms of which are referenced in the invoices found in Mr. Guay's Affidavit at Exhibit II.

[231] But I will go further. Even if I had concluded that there was no written or oral contract between the parties entitling Mr. Guay to a commission at the time the VOV sales were consummated over 2021-2023, I would have concluded that the Respondent has been unjustly enriched by the Applicant's efforts. I will explain.

[232] Sofia Express argues, on the basis of all of the circumstances of this case, some of which were noted above, that it was (at the very least) a material contributor to the eventual sales by which Nautel was enriched, and that there is no juristic reason for the enrichment (*Applicant Brief*, paras. 215-217).

[233] On the other hand, and as has been seen, the Respondent has denied that it received any benefit attributable to the Applicant's efforts, and thus it denies any deprivation. It argues that the expiration of the written Agency Agreement provides a juristic reason for the deprivation, both because the sales occurred after the ASA expired, and because the party named in the agreement was Sogitec (*Respondent Brief*, paras. 81-87).

[234] *Curry v. Athabasca Resources Inc.*, 2024 SKCA 7 is relevant to these contentions. Therein, the Court explained as follows:

[41] The existence of a valid contract is recognized as a juristic reason that will prevent a claim of unjust enrichment from succeeding (*Garland* at para 44). This is because "such a contract reflects the intentions and expectations of the parties and demonstrates that [they] have come to an agreement on how risk will be allocated and how benefits will be received; therefore, it would be unwarranted to allow a claim in unjust enrichment where a contract exists" (*Jans* at para 93).

[42] However, a claim in unjust enrichment will not be precluded just because the parties have had an arrangement that was contractual in nature at some point in their history. Where a contract did not exist at the relevant time, it does not bear on the claim (*Palkowski v Ivancic*, 2016 ONCA 762 at para 8). Further, a contract that is illegal, unenforceable, or otherwise invalid will not amount to a juristic reason for enrichment (*Babstock* at para 71; *Golden Oaks Enterprises Inc. v Scott*, 2022 ONCA 509 at para 83). Nor will a contract whose validity is unclear because the requisite elements are not present (*Sirius Concrete Inc. (Re)*, 2022 ONCA 524 at para 18), or a contract that is unenforceable because its essential terms cannot be determined with a reasonable degree of certainty (see: *Ren v Jin*, 2016 ABCA 80). In short, in order to form a juristic reason for enrichment, a contract must be valid, enforceable, and in existence at the time the benefit was conferred upon the defendant or when the deprivation reason was suffered by the plaintiff.

[emphasis added]

[235] Counsel for the Respondent appears to suggest that *Curry* is distinguishable because it involved work done after the expiry of the contract. This seems to be a distinction without a difference in view of the continuing nature of the relationship between Mr. Guay and Nautel well after the ASA had, on its face, expired, and the continued dialogue about Sofia Express' right to a commission both with respect to the Projects on this, as well as on other unrelated projects.

[236] As has been seen, I have found that the parties were operating on the basis of an unwritten agency agreement, some (but not all) of the pertinent terms of that relationship were codified in the ASA, and that agreement began before, persisted during, and continued after the ASA purports to have expired.

[237] However, even if Nautel had been correct that there was no contractual basis of any sort for Sofia Express to receive commission on the sales, then Nautel has been unjustly enriched in the circumstances by Sofia Express' lengthy and extensive efforts on its behalf which resulted in, and/or materially contributed to, Nautel's sales with respect to the Projects.

[238] As to the Respondent's assertions in relation to an alleged Sogitec/Sofia Express dichotomy, it was not disputed that there was no specific document or precise date identified for the transition of Mr. Guay's activities in Vietnam from the former to the latter. Mr. Guay's evidence was that the new arrangement was inaugurated around 2012 (*Guay Affidavit*, paras. 6-7). Mr. Guay was cross-examined extensively on the apparently fluid relationship between the various Sofia Express and Sogitec entities.

[239] What is clear, however, is that Mr. Guay’s work on behalf of Nautel, at least after 2012, appeared to be, for the most part, under the aegis of Sofia Express, notwithstanding some ambiguity, such as the occasional use of Sogitec email addresses. Most of the important communications, however, such as the quote appearing at Tab M of Mr. Guay’s Affidavit, sent to VOV BEC, dated July 14, 2015, identified Sofia Express as the “system integrator”.

[240] Most importantly, in January 2018, when Mr. Guay returned the written Agency Agreement to Nautel, he had corrected the reference to Sogitec as one of the contracting parties, and brought it specifically to Nautel’s attention that they had been dealing, through Mr. Guay, at least in relation to the VOV Project, with Sofia Express. Not only did Nautel fail to object to this (*Guay Affidavit*, para. 75), on cross-examination Mr. Rodgers accepted that Sofia Express was “heavily involved” in the VOV Project around 2016. Moreover, at least some of the assurances that Mr. Guay would receive a commission – including Mr. Kelly’s remarks in March 2018, and those assurances given in June 2019 by Mr. Lonergan – were made well after Nautel had directly been put on notice that Mr. Guay was acting for Sofia Express in his dealings with them.

[241] I have found on a balance of probabilities that the Applicant, Sofia Express, was the party with whom the Respondent dealt at all relevant times in this matter, and to whom the Respondent owes remuneration.

C. How is the commission to be quantified?

[242] Sofia Express says it was entitled to commission of 15% on the VOV transaction, as “specifically contemplated by the parties and...in line with the commercial realities of the industry” (*Applicant Brief*, para. 218). The Applicant adds that this was the amount contemplated by the written agreement of 2018 – 2019, arguing that this constituted a meeting of the minds (*Brief*, para. 219; *Reply Brief*, paras. 30-37).

[243] With respect, and in my view, a better measure of the appropriate commission is the 10% figure, which was quoted before the written Agency Agreement purported (on its face) to expire, yet is derived from the general practice of Nautel and its agents. Mr. Rodgers testified that generally, an agent’s commission fell on a 10-15% continuum. This 10% figure was proposed by Mr. Kelly in March 2018 and as such, would constitute an appropriate measure of the recognized value of the work that he had put into the Project by that time, and for

which he was to be remunerated when VOV purchased and paid for the materials to be used in the Projects, albeit on the low end of the range cited by Mr. Rodgers.

[244] As earlier noted, if I had found that a contractual model was inapplicable to the parties' dealings, I would nonetheless have been satisfied that the Applicant is entitled to this 10% figure on a *quantum meruit* basis. It is representative of the amount of which the Applicant has been deprived, and the corresponding amount by which the Respondent has been enriched. I have found no juristic reason for that deprivation or enrichment.

Conclusion

[245] The Respondent, Nautel, shall pay to the Applicant, Sofia Express, a commission in the amount of 10% of the total gross amount specified in invoices 10027809, 10033081, and 10033180 (*Guay Affidavit*, Exh. II) which were generated in relation to the systems sold by Nautel to VOV with respect to the Projects at Da Nang and Ninh Thuan, together with prejudgment interest and costs. Obviously, currency conversion will have to be undertaken because the invoice amounts are referenced in American dollars. If the parties are unable to agree as to the "math" involved, or as to either the quantification of the prejudgment interest, or Sofia Express' costs, I will receive written submissions within 30 days.

Gabriel, J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Sofia Express AG Corporation v. Nautel Limited*, 2025 NSSC 413

Date: 20251222

Docket: Hfx No. 524232

Registry: Halifax

Between:

Sofia Express AG Corporation

Applicant

v.

Nautel Limited

Respondent

ERRATUM

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	May 5 - 8, 2025, in Halifax, Nova Scotia
Counsel:	Meaghan Kells and Sarah Dobson, for the Applicant James D. MacNeil, for the Respondent
Erratum Date:	January 6, 2026
Erratum Details:	Para. 229, third sentence, reference to 20% should read 15%