

FILED

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

2015 DEC -8 P 3:58

Cogent Communications, Inc., )

Plaintiff, )

v. )

Deutsche Telekom AG, )

Defendant. )

CLERK US DISTRICT COURT  
ALEXANDRIA, VIRGINIA

Civil Action No. 15CV1632

COMPLAINT

Jury Trial Demanded

LMB/IDD

PLAINTIFF COGENT COMMUNICATIONS, INC.'S COMPLAINT

Plaintiff, Cogent Communications, Inc. (“Cogent”), files this complaint for breach of contract to cause Defendant, Deutsche Telekom AG (“DT”), to cease and desist from practices in violation of the Interconnection Agreements between Cogent and DT, to perform its obligations as required by those Agreements, and to compensate Cogent for lost business and business opportunities that have resulted from DT’s breach. In support thereof, Cogent, through its undersigned counsel, alleges the following:

SUMMARY OF THE CASE

It is an undisputed, but often unappreciated, fact of Internet architecture that the Internet is not a single network. Rather, the Internet is a series of interconnected networks around the globe. As a result of this dispersion, no Internet service provider (“ISP”) is able, on its own, to reach all points on the Internet (*e.g.*, every web site or Internet application). Instead, to provide their customers with ubiquitous Internet connectivity, ISPs “interconnect” with other Internet networks—sometimes directly (called “peering”) and sometimes indirectly (by purchasing “Internet transit” from another network).

An ISP's arrangements for interconnecting with other Internet networks are necessary, but not sufficient, to offer its customers reliable and consistent access to the global Internet. This is because, in the face of ever-increasing Internet traffic, interconnection capacities between two networks can quickly become fully utilized or congested, leading to impaired Internet access for both networks' customers.

In simple terms, interconnections are analogous to a road at rush hour. If six lanes of traffic are trying to move through a three-lane road, then traffic will slow down until either the level of traffic dissipates or the road is widened. In the case of the Internet, to date, traffic has never dissipated and shows no sign of doing so. Consequently, the only way to break the traffic jam is to widen the road (*i.e.*, add more interconnection capacity). That is what Internet networks typically do, and have done since the inception of the commercial Internet, and what DT has failed to do here.

This Complaint arises out of DT's refusal to maintain its interconnection ports with Cogent at levels sufficient to avoid congestion and the resulting packet loss and degradation of Internet service to both networks' customers. Indeed, notwithstanding the dramatic growth in global Internet traffic, DT has declined to expand interconnection capacity with Cogent since 2011. This continuing course of conduct, in which DT has refused over the past several years to augment capacity despite Cogent's request and willingness to augment on its side of the interconnection, has led to congested pathways between the Cogent and DT Internet networks and constitutes a breach of their agreements to facilitate interconnectivity among their respective customers.

Cogent suspects that DT's deliberate congestion-creating strategy is animated by the threat to its legacy video distribution (*i.e.*, pay television) business that is posed by a steadily expanding

roster of innovative streaming-video substitutes (*e.g.*, Netflix) that are in high demand by consumers. Simply put, if DT can impair the quality of those services (by congesting the interconnection paths they use to reach DT's network and ultimately its customers) and/or increase its rivals' costs of doing business (by making them pay for a "fast lane" to bypass congestion), then it may be able to slow consumer abandonment of DT's service for those provided by online rivals.

Notwithstanding that suspicion, it ultimately does not matter *why* DT has chosen to impair the ability of Cogent's and DT's customers to efficiently exchange Internet content. What matters is that they have done so and continue to do so. Consumers cannot fully utilize the Internet service sold to them by DT if DT's network does not have congestion-free links with networks like Cogent that provide access to the global Internet. Likewise, Cogent's customers cannot reliably utilize the connectivity Cogent provides in order to deliver their services to DT's customers.

To fix the problem—that is, to eliminate congestion at the eight locations in the United States and Europe where the Cogent and DT networks interconnect—would require no great feat of engineering. Provisioning additional ports between Cogent's and DT's networks, as the parties' agreements contemplate, is all that is necessary to ensure a high-quality, fast and reliable exchange of traffic between the networks when existing ports become congested, as they are today. Adding these ports requires an immaterial expenditure for companies like Cogent or DT (*i.e.*, approximately \$10,000 per 10-Gbps port). Beyond that, the other expenses Cogent and DT would incur are *de minimis* fees for space rental, electric power, and cross-connect cables, and the personnel and engineering expenses associated with provisioning the new ports.

Consistent with its agreements with DT, Cogent has been, and remains, willing to commit the resources to eliminate congestion on its side of the interconnection facilities. DT has not. That is the reason for the relief sought in this proceeding.

#### **THE PARTIES**

1. Plaintiff Cogent is a Delaware corporation with its principal place of business at 2450 N Street, N.W., Washington, D.C. 20037. Cogent is a facilities-based provider of low-cost, high-speed Internet access and Internet Protocol (“IP”) communications services.

2. Cogent’s IP network spans across North America and Europe extending into Asia, and consists of nearly 56,000 route miles of intercity fiber and more than 27,000 metro fiber miles. Its network provides service to over 180 major markets. The breadth of this connectivity enables Cogent’s customers to reach the entire Internet and, as a result, Cogent now exchanges traffic on a settlement-free basis (*i.e.*, without either party compensating the other monetarily for the exchange of Internet traffic) with peer networks in eleven different countries.

3. Cogent serves two general categories of customers. First, it provides high-speed Internet access service to mostly small and medium-sized businesses. Second, it provides high-bandwidth Internet connectivity (“transit”) to a wide range of “net-centric” customers, including universities, other ISPs, telephone companies, cable television companies, web hosting companies, content delivery networks and commercial content and application service providers. In this context, “transit” means the provision of access to virtually all Internet endpoints (*i.e.*, access to essentially the entire Internet).

4. Cogent has achieved success in the robustly competitive transit market by offering significantly lower prices than its competitors. The business started by offering data transit services at a price of \$10 per megabit-per-second when the prevailing market rate was \$300 per

megabit-per-second in carrier-neutral data centers (*i.e.*, third-party facilities where various Internet networks lease space and physically interconnect and exchange data). Over the past five years, Cogent has lowered its prices for data transit by approximately 22 percent per year, such that today it sells transit for an average price of \$1.00 per megabit-per-second. This pricing model has spurred competition in the transit marketplace and enabled Internet start-ups to develop disruptive services and to grow and scale their businesses to reach hundreds of millions of customers around the world via the Internet.

5. PSINet, Inc. was a Virginia communications company that developed world-wide fiber-optic and Internet-traffic networks prior to its filing for bankruptcy in 2001.

6. In 2002, Cogent acquired certain PSINet assets from bankruptcy.

7. These assets included the July 16, 1999 ISP Peering Agreement between PSINet and ISP-2 (“1999 Agreement”), which identifies DT as “ISP-2” and is the written contract that is one of the agreements at issue here. Accordingly, Cogent is PSINet’s successor in interest to that contract.

8. DT is a German corporation with its principal place of business at Friedrich-Ebert-Allee 140, 53113 Bonn, Germany.

9. DT, among other lines of business, has two types of businesses that are relevant to this litigation. First, DT provides retail Internet services to the general public in Germany. Second, world-wide, DT maintains and operates an extensive fiber-optic network over which it provides transit services for its customers. Upon information and belief, DT’s global revenues in 2014 were €62.7 billion.

#### **JURISDICTION AND VENUE**

10. This court has diversity jurisdiction under 28 U.S.C. § 1332.

11. Cogent is a citizen of the District of Columbia and Delaware. DT is a citizen of Germany. *See* 28 U.S.C. § 1332(a)(2) (providing that district courts have jurisdiction where the parties involve “citizens of a State and citizens or subjects of a foreign state”).

12. The amount in controversy, which includes harm to Cogent’s business and lost business opportunities, as well as the costs associated with DT augmenting the facilities with which it interconnects with Cogent’s network so as to comply with the parties’ agreements, exceeds \$75,000. *See* 28 U.S.C. § 1332(a).

13. This Court is an appropriate venue for this action because, for the purposes of venue, DT resides in the Eastern District of Virginia as a consequence of its decision to subject itself to the personal jurisdiction of the Court. 28 U.S.C. § 1391(b)(1), (c)(2).

14. DT has subjected itself to the personal jurisdiction of this Court by using a carrier-neutral data center in Ashburn, Virginia to interconnect and exchange Internet traffic with Cogent. As part of its use of this facility, DT pays to lease space in Virginia and owns and operates servers and routers used to interconnect with Cogent (among others) in Virginia.

### FACTS

#### **A. Industry Background**

15. The Internet, at its core, is a series of interconnected networks exchanging data. The global Internet encompasses tens of thousands of networks and well over 100 well-recognized interconnection points.

16. A typical Internet transaction starts with a consumer request for particular content. Often, that consumer’s ISP will not have a direct connection to the desired content. Thus, to obtain the content, the ISP will send the request to a transit provider (like Cogent) that forwards the request to the content provider (or “edge provider”). Finally, the transit provider will carry

the content sought back from the edge provider to the ISP, which will then deliver the content to the consumer—the ISP’s customer—who requested it.

17. No ISP or transit provider has direct access to all consumers and all edge providers.

18. Securing connections with other networks is therefore essential to ISPs and transit providers, such as Cogent and DT, seeking to sell their customers access to the entire Internet.

19. A connection between an ISP and transit provider typically entails the placement by each interconnecting party of two routers, one owned by each network, in the same physical location and running a cable that connects with a port in each router. These ports are described by the amount of data they can accommodate, usually measured in Gigabits per second or Gbps.

20. The interconnection points where ISPs and transit providers connect can become major choke points for Internet traffic.

21. If there is insufficient capacity at an interconnection point between two networks, the packets of data attempting to pass through the interconnection ports will be lost. This so-called “packet loss” results in content being delivered at a slower rate and a diminished quality. In some cases, it results in content not being delivered at all.

22. For example, from the consumer’s perspective, packet loss can be experienced as slowed or failed downloads of streaming-video content such as movies or a television episode.

23. The amount of traffic that can pass between two networks at an interconnection point is a function of the interconnection capacity that each has allocated and the degree to which that capacity is being utilized. Put simply, if too much data is attempting to pass through too little interconnection capacity, then the interconnection point becomes congested. It is

equivalent to trying to move six lanes of traffic through a three-lane road, and the result is the same: traffic slows down, sometimes comes to a full stop, and whatever traffic makes it through is delayed. In the case of Internet traffic, that means that the person requesting particular content may not receive it at all, may get less than what they requested, or may have to wait a long time for an application or video to load. In other words, congested interconnection facilities lead to packet loss (*i.e.*, data that cannot get through) and, as a result, consumers and edge providers experience degraded Internet connectivity.

24. Moreover, Internet usage is not static. For the past five years it has steadily increased more than fivefold. This trend is likely to continue for the foreseeable future. As a result, the interconnection capacity used by two interconnecting networks like Cogent and DT often needs to be augmented as the amount of traffic the networks are exchanging approaches the existing interconnection capacity.

25. The technical burdens and costs associated with implementing interconnection upgrades, and thereby avoiding packet loss, are not material for companies like Cogent and DT. Adding a single 10 Gbps port, the industry standard, costs approximately \$10,000. After these costs are incurred, the remaining costs for space rental, electric power and cross-connect cables are *de minimis* and typically shared by the interconnecting parties. In addition, each party incurs costs for personnel and engineering expenses associated with augmenting their respective interconnection facilities.

26. Put differently, eliminating congestion at interconnection ports is neither complicated nor expensive.



27. Accordingly, ISPs and transit providers have historically sought to secure quality Internet access to and from consumers and edge providers through a series of informal and formal agreements to interconnect at certain facilities that are specifically designed for interconnection.

**B. Agreements between Cogent and Deutsche Telekom**

28. Cogent and DT interconnect at eight locations: New York, New York; Ashburn, Virginia; Los Angeles, California; London, England; Paris, France; Amsterdam, Netherlands; Frankfurt, Germany; and Vienna, Austria.

29. These interconnections are governed by two separate interconnection agreements: the New York interconnection is governed by the 1999 Agreement, while the remaining seven interconnections are governed by a separate oral and/or implied-in-fact agreement.

*i) The PSINet Contract Governing the Cogent-DT Interconnection in New York*

30. On July 16, 1999, PSINet and DT entered into an agreement titled “ISP Peering Agreement between PSINet and ISP-2.”

31. The 1999 Agreement was valid for an initial term of two years. Thereafter, it automatically renews for one-year terms unless terminated by either party.

32. Neither party has terminated the 1999 Agreement.

33. Cogent acquired the 1999 Agreement, and the New York, NY interconnection it governs, from PSINet when Cogent bought certain PSINet assets out of bankruptcy in 2002.

34. Pursuant to the 1999 Agreement, the parties “intend[ed] to create greater interconnectivity throughout the Internet” and “each established operational, technical and administrative mechanisms to ensure fair and open communications among Internet Service Providers.” 1999 Agreement, First Recital.

35. Accordingly, Cogent (as the successor in interest to PSINet) and DT “represent[ed] that they are [Internet Service Providers] and, as such, intend to exchange traffic between their respective networks in order to enable their respective customers to communicate more efficiently with each other.” 1999 Agreement, Second Recital.

36. To fulfill these objectives, the parties committed to undertake several actions including:

- a. In Clause 2.1.2, Cogent and DT agreed to “cooperate and coordinate their activities to facilitate interconnectivity among the direct customers of each Party.”
- b. In Clause 2.3.1, they agreed to “accept all individual routes destined for an IP address in its Network announced by the other Party.”

37. In acknowledgement that access to one another’s network was adequate compensation for their interconnection, the parties further agreed to fulfill these promises “settlement free.” Clause 2.2 provides that Cogent and DT “agree not to charge the other Party for interconnection-related matters, including charges based on traffic volume between the Networks, commonly called ‘settlements.’”

38. Furthermore, the parties agreed that their settlement-free arrangement would not contain monetary considerations regardless of whether one party sent or received more data than the other. They stated, again in Clause 2.2, that “No fees will be charged between or among the Parties to pay for digitized information traffic exchanged between Networks regardless of the comparative amounts.”

ii) *Implied-in-Fact and/or Oral Agreement Governing Cogent and DT's Interconnection at Other Locations*

39. As mentioned above, Cogent and DT interconnect at seven locations other than New York: Ashburn, Virginia; Los Angeles, California; London, England; Paris, France; Amsterdam, Netherlands; Frankfurt, Germany; and Vienna, Austria.

40. These interconnections are governed by a non-written agreement defined by a series of oral agreements and/or the parties' course of conduct.

41. For the interconnection at each of these locations, the parties agreed to exchange Internet traffic and to establish and maintain sufficient interconnections to do so.

42. Pursuant to this agreement, the parties have exchanged data in Ashburn, Virginia since February 2005, Los Angeles since December 2004, London since May 2006, Paris since March 2009, Amsterdam since April 2010, Frankfurt since December 2004, and Vienna, Austria since May 2010.

43. Consistent with industry practice, the discussions leading to these interconnections, and augmentation of them, often have been relatively informal and handled by Cogent and DT network management and engineering personnel—rather than between attorneys—responsible for enabling Cogent and DT (and their respective customers) to exchange Internet traffic more efficiently.

44. The parties achieved this objective by agreeing to interconnections at particular locations, and/or augmentations to existing interconnection capacities, between the Cogent and DT networks.

45. The parties' course of conduct in relation to these interconnections has been consistent in at least two important respects.

46. *First*, these interconnections—like the New York interconnection governed by the 1999 Agreement—have always been made and maintained on a settlement-free basis.

47. Accordingly, Cogent and DT have agreed that the acceptance of traffic by one is sufficient consideration for accepting traffic from the other.

48. Moreover, the parties have continued to interconnect with one another settlement-free regardless of any imbalance in the amount of data sent or received by one party.

49. The service provided by each party under the agreement (*i.e.*, the exchange of Internet traffic) is thus not being performed by either party gratuitously, but rather is performed in the expectation of the reciprocal exchange of Internet traffic.

50. *Second*, the collective capacity of the parties' interconnection ports historically was maintained at a level so as to avoid sustained congestion.

51. For example, in March 2009, a 2.5 Gbps port was added in Paris in order to alleviate congestion that was interfering with DT's T-Mobile customers.

52. Overall, between 2004 and 2011, DT and Cogent augmented interconnection capacity between their respective networks at these locations (*i.e.*, everywhere other than New York) by a total of 98.8 Gbps, from 1.2 Gbps in 2004 to 100 Gbps in 2011.

53. Accordingly, the parties' course of dealing (until recently) demonstrates that Cogent and DT have agreed to maintain interconnection capacity sufficient to avoid congestion levels that diminish the quality of service to either party's customers.

### **C. Deutsche Telekom's Breach**

54. Historically, Cogent and DT exchanged Internet traffic without complication. This was not surprising given that (1) as explained above, augmenting capacity at an

interconnection facility is not expensive or difficult, and (2) Cogent and DT already interconnected at multiple locations in the United States and Europe, so that DT could simply add capacity at existing interconnection sites rather than establish interconnections at new facilities (an alternative that, if necessary, Cogent certainly would have worked with DT to implement, and still would).

55. Between 2004 and 2011, DT increased total interconnection capacity with Cogent from 10 Gbps to 110 Gbps. These network upgrades alleviated congestion for a period of time such that service to Cogent and DT customers was not significantly impacted.

56. Starting in late 2011, however, DT stopped upgrading the ports used to interconnect and exchange traffic with Cogent. Indeed, since November 2011, DT has not added *any* capacity at its interconnection points with Cogent.

57. DT has continued this refusal despite network-wide congestion at the Cogent-DT interconnection points over the past several years.

58. To alleviate this congestion, in the summer of 2015 Cogent requested that DT augment capacity.

59. Contrary to its obligations under the 1999 Agreement and the oral and/or implied-in-fact agreement, DT refused to augment capacity and diminish the congestion.

60. Rather than upgrade congested ports, DT has demanded that Cogent pay on a recurring basis for any additional capacity at the parties' interconnection points. DT has made these demands despite the parties' agreements to accept one another's routes and to not charge the other for interconnection-related matters.

61. DT has premised its demand for payment on the basis that Cogent sends more data to DT than DT sends to Cogent—although the parties agreed in the 1999 Agreement that “No fees will be charged . . . regardless of the comparative amounts” of data exchanged and the fact that, for many years, Cogent has sent more data to DT.

62. Notably, Cogent does not deliver a single bit of data to DT that is not requested by a paying DT customer. Consequently, to the extent there is an imbalance in the amount of data Cogent delivers to DT versus the amount of data DT delivers to Cogent, neither Cogent nor any of Cogent’s customers are responsible for that imbalance.

63. DT’s refusal to upgrade its interconnections with Cogent yielded—and continues to yield—degraded connectivity and Internet service to Cogent’s customers and to DT’s own customers.

64. Accordingly, various Cogent-DT connections have remained severely congested. In 2015 alone, Cogent has experienced severe congestion and packet loss at each of its interconnection points with DT.

65. Internal Cogent traffic data show the flow of Internet packets, throughout 2015, between Cogent and DT at the eight locations in the United States and Europe where the parties interconnect: Ashburn, VA; New York, NY; Los Angeles, CA; Amsterdam, Netherlands; Frankfurt, Germany; London, England; Paris, France; and Vienna, Austria.

66. In 2015, each of these locations has experienced congestion and packet loss sufficient to diminish Cogent and DT customers’ Internet access.

67. For example, for significant portions of 2015 at Cogent’s interconnection points with DT in Virginia, Frankfurt, Amsterdam, Paris, and Vienna, many more packets were being

delivered by Cogent than the existing DT peering ports could handle. In each instance and at each location, the result was dropped packets and, thus, degraded service.

68. Packet loss data confirm that Cogent consistently delivers many more packets—in response to requests from paying DT customers—than the existing DT peering ports identified above can accommodate.

69. Cogent measures packet loss in dropped bytes per million (“DPM”). As soon as packet loss is detectable, Cogent begins to receive customer complaints. This is because once packet loss disrupts an Internet subscriber’s ability to access the content or application she requested, that usage is compromised and the desired content or application cannot be used as intended. In other words, virtually any level of packet loss can cause degradation, especially for bandwidth-intensive services like streaming-video or latency-sensitive applications like VoIP calls. As packet loss intensifies, so too does the degree of degradation and its ability to adversely affect a wider range of services used by Internet subscribers.

70. While a DPM rate of 5,000 or less can cause significant user disruption, Cogent’s recent rates of packet loss with Internet traffic destined for DT’s network have been far worse. Over the last three months, weekly packet loss across all Cogent-DT peering points has averaged approximately 14,000 DPMs. Moreover, at various times and Cogent–DT peering locations throughout 2015, the levels of congestion and resultant packet loss have effectively rendered Internet connectivity between Cogent and DT customers so degraded that latency sensitive applications are unusable (*e.g.*, 99,159 DPMs in Frankfurt (week of January 26); 79,732 DPMs in Amsterdam (week of April 6); and 49,511 DPMs in Virginia (week of August 10)).

71. Accordingly, contrary to the parties' agreements, DT has refused to accept all traffic destined for an IP address on its network originating from Cogent by refusing to augment interconnection capacity despite high levels of congestion and Cogent's request to add ports.

72. The continued congestion in New York and the interconnection locations governed by the parties' oral and/or implied-in-fact agreement, besides causing data to be lost, has harmed Cogent's business.

73. DT's conduct has created substantial uncertainty as to the quality of access to customers and content on DT's network that Cogent can provide to its edge provider customers. Similarly, DT's interconnection practices diminish the ability of DT Internet subscribers to access the applications and services of their choosing that traverse the Cogent network.

74. Accordingly, Cogent has lost business and business opportunities as a consequence of DT's refusal to augment capacity.

75. Cogent estimates that resolving—at least in the near term—the congestion between the Cogent and DT networks will require each party to add a minimum of eight (8) 10 Gbps ports. Cogent is, and has communicated to DT that it is, ready and able to add these ports on its side of the relevant interconnection points.

**COUNT I—BREACH OF THE 1999 AGREEMENT**

76. Paragraphs 1 through 75 are hereby re-alleged and incorporated herein by reference.

77. Clause 2.1.2 of the 1999 Agreement provides that "The Parties shall cooperate and coordinate their activities to facilitate interconnectivity among the direct customers of each Party."



78. DT has violated this obligation through its refusal to increase capacity of the interconnection ports between DT and Cogent unless and until Cogent agrees to pay DT for additional capacity and data exchange—a requirement that is contrary to the settlement-free peering clause (Clause 2.2) of the 1999 Agreement.

79. Clause 2.3.1 of the 1999 Agreement provides that “both Parties shall accept all individual routes destined for an IP address in its Network announced by the other Party.”

80. DT’s refusal to mitigate interconnection congestion has caused data to be lost on announced routes between Cogent and DT.

81. DT has thus not “accept[ed] all” routes destined for an IP address on its network.

82. These breaches are material to the 1999 Agreement and result in irreparable harm to Cogent’s ability to offer transit services and its reputation as a transit provider.

**COUNT II—BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING IMPLIED  
IN THE 1999 AGREEMENT**

83. Paragraphs 1 through 82 are hereby re-alleged and incorporated herein by reference.

84. Clause 6.7 of the 1999 Agreement provides that “This Agreement shall be governed by the substantive law of the State of New York, USA without reference to its principles of conflicts of law . . . .”.

85. The common law of New York recognizes that implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance.

86. This implicit covenant includes any promises which a reasonable person in the position of the promisee would be justified in understanding were included in the agreement and

a pledge that neither party shall do anything which will have the effect of destroying or injuring the right to receive the fruits of the contract.

87. The fruits of the 1999 Agreement, as set forth in the contract's recitals, are efficient and unencumbered interconnection between the two parties' Internet networks.

88. These clauses explain that the agreement is intended to ensure "greater interconnectivity" such that there is "fair and open communications among" ISPs, which is furthered by the "efficient[]" communication between the parties.

89. DT's refusal to upgrade the interconnection ports has encumbered the networks' interconnection by artificially restricting the amount of data that can be exchanged between the parties.

90. Moreover, a party to a settlement-free agreement like the 1999 Agreement would reasonably expect that such an agreement is accompanied by a promise to increase capacity at interconnection ports as they become congested.

91. DT, in an effort to extract payment for the exchange of traffic, has failed to increase the capacity of congested ports and thus is in violation of the implicit covenant of good faith and fair dealing.

92. This violation is material to the 1999 Agreement and results in irreparable harm to Cogent's ability to offer transit services and its reputation as a transit provider.

**COUNT III—BREACH OF THE ORAL AND/OR IMPLIED-IN-FACT CONTRACT**

93. Paragraphs 1 through 92 are hereby re-alleged and incorporated herein by reference.

94. The parties' course of conduct since at least 2004 demonstrates that they have operated under an agreement including at least two terms: (1) settlement-free peering at mutually

agreed interconnection points regardless of any imbalance in the amount of data sent or received by one party, and (2) augmentation of interconnection capacity when congestion at the interconnection ports interferes with Cogent's and DT's respective customers' access to customers on the other network.

95. DT has materially breached both of these terms by refusing to augment current interconnection capacity despite high levels of congestion and packet loss in an effort to extract monetary concessions from Cogent and despite Cogent's request to augment capacity sufficiently to avoid congestion.

96. The sustained level of congestion has caused Cogent to lose business and prevented Cogent from pursuing other business opportunities. Moreover, DT's breach has caused irreparable harm to Cogent's ability to offer transit services and its reputation as a transit provider.

**COUNT IV—BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING IMPLIED  
IN THE ORAL AND/OR IMPLIED-IN-FACT AGREEMENT**

97. Paragraphs 1 through 96 are hereby re-alleged and incorporated herein by reference.

98. The oral and/or implied-in-fact agreement between Cogent and DT is controlled by District of Columbia law.

99. District of Columbia law provides that implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance.

100. This covenant provides that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

101. The intended fruit of the parties' oral and/or implied-in-fact agreement is the ability of Cogent and DT to enable their respective customers to efficiently communicate with each other.

102. DT's refusal to upgrade the interconnection ports has encumbered the networks' ability to reach one another's customers by artificially restricting the amount of data that can be exchanged between the parties.

103. Moreover, a party to a settlement-free arrangement like this agreement would reasonably expect that such an agreement is accompanied by a promise to increase capacity at interconnection ports as they become congested.

104. DT, in an effort to extract payment for the exchange of traffic, has failed to increase the capacity of congested ports and thus is in material breach of the implicit covenant of good faith and fair dealing.

105. The sustained level of congestion resulting from this breach has caused Cogent to lose business and prevented Cogent from pursuing other business opportunities. Moreover, DT's breach has caused irreparable harm to Cogent's ability to offer transit services and its reputation as a transit provider.

**PRAYER FOR RELIEF**

WHEREFORE, Cogent respectfully prays for a judgment against DT for:

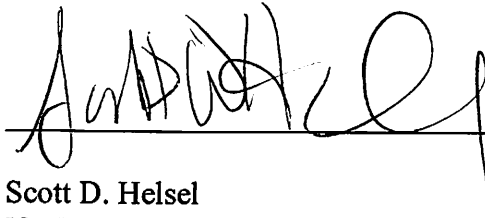
- (a) An injunction requiring DT to (i) perform its obligations under the July 16, 1999 ISP Peering Agreement between PSINet and ISP-2 and the oral and/or implied-in-fact agreement by ceasing its present interconnection practices that are causing congestion and (ii) upgrade its interconnections with Cogent in a manner that eliminates the congestion that currently exists and the harms associated with that congestion;

- (b) Damages for the lost business and lost business opportunities suffered by Cogent as a consequence of DT's breach of the oral and/or implied-in-fact contract, including the implied covenant of good faith and fair dealing; and
- (c) Any other relief deemed appropriate by the Court.

**JURY TRIAL DEMAND**

Cogent demands a jury trial for any and all issues so triable.

Date: December 8, 2015



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