

VIRGINIA:

FILED
CIVIL INTAKE

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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JOHN T. FREY
CLERK-CIRCUIT COURT
FAIRFAX, VA

SPRINT COMMUNICATIONS
COMPANY L.P.,
6200 Sprint Parkway
Overland Park, Kansas 66251,

Plaintiff,

v.

COGENT COMMUNICATIONS, INC.,
1015 31st Street, N.W.
Washington, D.C. 20007,

Serve: Corporation Service Company
11 South 12th Street
Richmond, Virginia 23218,

Defendant.

Case No. 2008-11367

COMPLAINT

Plaintiff Sprint Communications Company L.P. ("Sprint"), by counsel and pursuant to Rule 3:2 of the Rules of Supreme Court of Virginia, respectfully files this complaint against Defendant Cogent Communications, Inc. ("Cogent"). For its complaint, Sprint states as follows:

PARTIES

1. Sprint is a Delaware limited partnership owned exclusively by Missouri, Kansas, and Delaware corporations, and is registered to do business in the Commonwealth of Virginia. Sprint's principal place of business is located at 6200 Sprint Parkway, Overland Park, Kansas 66251. Sprint is a global communications company that provides telecommunications services to business and residential customers in more than 70 countries. Sprint also resides at, and does business from, its offices located at 12502 Sunrise Valley Drive, Reston, Virginia 20196.

Sprint's internet network has a substantial customer base of large U.S. and international internet service providers ("ISPs").

2. Cogent is a Delaware corporation, and its principal place of business is located at 1015 31st Street, N.W., Washington, D.C. 20007. Upon information and belief, Cogent is an ISP that provides internet access, data transport, collocation, and managed modem services to its customers.

JURISDICTION AND VENUE

3. This Court has potential (subject matter) jurisdiction over this civil case pursuant to Va. Code §§ 8.01-184 and 17.1-513.

4. This Court has actual (personal) jurisdiction over Cogent pursuant to Va. Code § 8.01-328.1, and the exercise of personal jurisdiction over Cogent is consistent with due process. This Court also has general jurisdiction over Cogent because, upon information and belief, it has offices located at 510 Huntmar Park Drive, Herndon, Virginia 20170.

5. Venue is proper in this Court pursuant to Va. Code § 8.01-262.

BACKGROUND

6. This is a breach of contract action based on Cogent's continued failure to pay amounts due under a commercial internet network interconnection agreement. Despite Sprint's repeated demands, Cogent has failed to pay Sprint for its unfettered access to Sprint's vast internet network.

7. The voluntary interconnection of separate internet networks for the purpose of exchanging traffic between, and for the benefit of, the customers of each network is called "peering." Peering requires a physical connection between the two networks. Peering is appealing to an internet network owner because it, among other things, improves perception of

its network, improves performance resulting from alternative pathways to the same internet site, and allows an increased amount of traffic.

8. "Settlement-free, non-transit peering" means that neither network owner pays the other for the exchange of data traffic between the peered networks. Other peering arrangements may involve payment by one ISP to the other to compensate for relative imbalances in the traffic exchange.

9. Sprint maintains one of the most extensive internet networks in the world. Sprint's network inhabits a central place in the global internet hierarchy. Sprint's position in the global internet structure makes it a prime peering target for other network owners.

10. Sprint's and Cogent's networks allow their individual and ISP users to receive and transmit data and other communications to other users within their respective networks and to users of other networks with which each network is interconnected.

STATEMENT OF FACTS

11. In 2006, Cogent sought "settlement-free, non-transit" peering with Sprint, which would allow Cogent's network users to exchange data and communications traffic with Sprint's network users for no charge to Cogent.

12. As a result of its interest in settlement-free peering with Sprint, Cogent approached Sprint to discuss a commercial trial interconnection agreement.

13. To determine whether Cogent was a suitable candidate for settlement-free peering, Sprint and Cogent entered into a commercial Bilateral Network Interconnection Trial

Agreement (Non-Transit) ("Trial Agreement") effective September 19, 2006.¹ Sprint made the Trial Agreement from its Reston, Virginia offices.

14. Paragraph 5.E. of the Trial Agreement sets forth minimum traffic exchange criteria that, if satisfied, would demonstrate that Cogent qualified for settlement-free, non-transit peering. In contrast, Paragraph 6 sets forth the rates and billing framework for Cogent's use (before, during, and after the Trial Period) of Sprint's network.

15. In other words, to qualify for settlement-free peering, the traffic on the interconnections² between Cogent and Sprint had to satisfy an average usage threshold when measured 24-hours per day, 7-days per week on all ports for the entire trial period.

16. Under the Trial Agreement, Sprint and Cogent agreed to conduct a 90-day trial during which their network traffic exchange would be measured to determine whether interconnection traffic with Cogent satisfied the agreed peering qualification requirements set forth in Paragraph 5.E. Although the parties executed the Trial Agreement on or about September 19, 2006, the actual 90-day measurement was June 28, 2007, through September 27, 2007 ("Trial Period"), because there was a delay in establishing the required (six) domestic and (four) international interconnection ports between the two networks. The Trial Agreement stipulated that, at the end of the Trial Period, the parties would continue to exchange traffic with Cogent paying commercial rates set forth in the Trial Agreement on a month-to-month basis unless either party provided thirty (30) days notice of termination.

¹ The Trial Agreement contains Sprint's confidential and proprietary information (including, but not limited to, Sprint's peering criteria and commercial pricing framework), and, therefore, is not attached to this Complaint. Sprint will produce the Trial Agreement subject to an appropriate protective order.

² The Trial Agreement provided that the networks would be interconnected physically at ten points: (1) Paris, France, (2) London, United Kingdom, (3) Amsterdam, Netherlands, (4) Frankfurt, Germany, (5) Ashburn, Virginia, (6) Chicago, Illinois, (7) San Jose, California, (8) Los Angeles, California, (9) Dallas, Texas, and (10) New York, New York.

17. During the Trial Period, the interconnection traffic with Cogent averaged less than the threshold criteria for aggregate utilization across all ports specified in the Trial Agreement. Therefore, the average network traffic exchange did not meet the contractual utilization requirement set forth in Paragraph 5.E. that is a condition precedent to qualifying for a peering agreement with Sprint.

18. Under the Trial Agreement, all network interconnection services provided by Sprint (before, during, and after the Trial Period) are for charge and are not settlement-free. Paragraph 6 of the Trial Agreement provides that Cogent would pay Sprint a variable monthly charge based on Cogent's monthly port utilization for services rendered under the Trial Agreement. Paragraph 6 specifically provided that billing is based on measured values of certain peak usage.

19. Sprint performed its obligations under the Trial Agreement before and during the Trial Period, and has continued to provide network interconnection services to Cogent on a month-to-month basis to date. Cogent used Sprint's network before and during the Trial Period, and Cogent continues to use Sprint's network to date on a commercial basis.

20. Sprint billed Cogent \$1,150,757.83 for services provided to Cogent under the Trial Agreement during and before the Trial Period.

21. On or about October 9, 2007, twelve days after the end of the Trial Period, Sprint verbally notified Cogent that it failed the peering trial because the interconnection traffic with Cogent's network did not meet the threshold criteria for average utilization specified in Paragraph 5.E., and therefore it would not engage Cogent in settlement-free peering. Sprint provided Cogent with written confirmation of its decision on October 10, 2007.

22. In mid-October 2007, Cogent challenged Sprint's conclusion that it did not meet the trial test metrics and, consequently, Sprint's decision to not engage in settlement-free peering. Cogent unreasonably claimed that the amount of interconnection traffic satisfied the utilization threshold requirement in the Trial Agreement because the port utilization peak figures for each of the ten ports (used to calculate billing) exceeded the average utilization criteria across all ports. Cogent ignored that Paragraph 5.E. required a *sustained* threshold average utilization across all ports for the entire period, and instead focused on *snapshot* figures based on the commercial pricing model of peak usage. As a result, Cogent argued that it was entitled to settlement-free peering with Sprint.

23. Cogent challenged Sprint's charges for port services rendered before and after the Trial Period. Cogent claimed that it was not obligated to pay for Sprint's services before the Trial Period because of the delay in commencing the trial. Cogent further claimed that it was not obligated to pay for services rendered after the Trial Period because it is entitled to settlement-free peering with Sprint. Thus, Cogent asserts that it is only obligated to pay for Sprint's services rendered during the Trial Period.

24. By letter dated October 26, 2007, Sprint rejected all of Cogent's challenges to (1) Sprint's conclusion that the average network interconnection traffic failed to meet Paragraph 5.E.'s utilization threshold requirement, and (2) Cogent's past due balance of \$1,150,757.83.

25. Under a cover letter dated October 26, 2007, Cogent paid Sprint \$477,932.84 towards its full balance. Cogent asserted that this amount constituted the full amount due and owing under the Trial Agreement.

26. On November 27, 2007, Sprint notified Cogent that it was continuing to provide its interconnection services to Cogent on a commercial basis as set forth in the Trial Agreement

because the average network interconnection traffic failed to satisfy the minimum requirements in Paragraph 5.E. Sprint further notified Cogent that it still had a past due balance of \$708,266.01. Sprint requested that Cogent pay that amount promptly.

27. Cogent responded to Sprint's November 27, 2007 letter the following day. Cogent continued to claim that it is entitled to settlement-free peering, and that it would not pay to continue to exchange traffic.

28. Cogent's network remains interconnected with, and Cogent continues to use Sprint's network and Cogent has refused to disconnect its network from Sprint's network. Nevertheless, Cogent continues to refuse to pay for its connection to Sprint's network.

29. Sprint invoiced Cogent \$187,402.48 for Cogent's use of Sprint's network from October 1 through October 31, 2007. Sprint invoiced Cogent \$91,863.96 for Cogent's use of Sprint's network from November 1 through November 30, 2007. Sprint invoiced Cogent \$82,418.90 for Cogent's use of Sprint's network from December 1 through December 31, 2007. Sprint invoiced Cogent \$100,139.31 for Cogent's use of Sprint's network from January 1 through January 31, 2008. Sprint invoiced Cogent \$97,806.90 for Cogent's use of Sprint's network from February 1 through February 29, 2008. Sprint invoiced Cogent \$102,504.71 for Cogent's use of Sprint's network from March 1 through March 31, 2008. Sprint invoiced Cogent \$103,093.29 for Cogent's use of Sprint's network from April 1 through April 30, 2008. Sprint invoiced Cogent \$127,504.65 for Cogent's use of Sprint's network from May 1 through May 31, 2008. Sprint invoiced Cogent \$218,962.68 for Cogent's use of Sprint's network from June 1 through June 30, 2008. Sprint invoiced Cogent \$109,187.28 for Cogent's use of Sprint's network from July 1 through July 31, 2008. The total amount due to Sprint from Cogent for Cogent's use of Sprint's network from October 1, 2007, through July 31, 2008, is at least \$1,220,884.00. Cogent

has continued to use Sprint's network after July 31, 2008, and, upon information and belief, will refuse to pay any amounts for such use.

30. Sprint has attempted to resolve its payment dispute with Cogent in good faith. Sprint does not agree that it would be beneficial to mediate or arbitrate this dispute.

31. On or about September 2, 2008, Sprint provided Cogent written notice that it was terminating the Trial Agreement. The Trial Agreement governs the network interconnection arrangement between Sprint and Cogent until Cogent is disconnected.

32. Excluding non-recurring charges, Cogent has not paid Sprint any other amounts beyond the \$477,932.84 it paid Sprint on October 26, 2007.

COUNT I

(Breach of Contract)

(Failure to Pay Amounts Due For Services Rendered Before the Trial Period)

33. Sprint incorporates Paragraphs 1 through 32 above as if fully set forth herein.

34. Sprint and Cogent entered into a valid, enforceable contract whereby Sprint would provide Cogent with, among other things, connectivity and access to its global Internet network for variable monthly charges. The relevant terms of the Trial Agreement are clear and unambiguous.

35. Paragraph 6 of the Trial Agreement provides that Cogent pay Sprint a variable monthly charge based on the monthly utilization for each port. Specifically, Paragraph 6 sets forth the framework for determining the monthly charge based on measurements of peak port utilization.

36. Sprint provided Cogent with access to Sprint's network as contemplated by the Trial Agreement during and before the Trial Period. Cogent used Sprint's network pursuant to the Trial Agreement during and before the Trial Period.

37. Cogent's traffic to and from Sprint's network yielded a total charge of \$1,150,757.83 at rates specified in the Trial Agreement for all services rendered during and before the Trial Period, excluding non-recurring charges.

38. Sprint billed Cogent \$1,150,757.83 for all services rendered under the Trial Agreement during and before the Trial Period, excluding non-recurring charges.

39. Cogent paid Sprint only \$477,932.84 for Sprint's services under the Trial Agreement during the Trial Period.

40. Cogent specifically refused to pay the remaining \$708,266.01 due and owing for Sprint's services rendered before the Trial Period. Cogent's failure to pay Sprint the remaining balance is a material breach of the Trial Agreement.

41. Sprint has satisfied all conditions precedent to payment under the Trial Agreement.

42. As a direct and proximate result of Cogent's breach, Sprint has been actually damaged in an amount of \$708,266.01 for failure to pay amounts past due and owing for services provided before the Trial Period.

COUNT II

(Breach of Contract)

(Failure to Pay Amounts Due For Services Rendered After the Trial Period)

43. Sprint incorporates Paragraphs 1 through 42 above as if fully set forth herein.

44. Since the end of the Trial Period, Sprint has provided Cogent with access to Sprint's network as contemplated by the Trial Agreement. Since the end of the Trial Period, Cogent has continued use Sprint's network on a commercial basis pursuant to the Trial Agreement.

45. Sprint and Cogent have not entered into a settlement-free peering agreement, or any other agreement that would allow Cogent to use Sprint's network without charge.

46. Cogent has failed to pay for *any* of Sprint's continuing services to Cogent after the Trial Period.

47. Sprint has satisfied all conditions precedent to payment under the Trial Agreement.

48. Cogent's failure to pay Sprint for Sprint's services after the Trial Period is a material breach of the Trial Agreement.

49. As a direct and proximate result of Cogent's breach, Sprint has been actually damaged in an amount of at least \$1,220,884.00 from the end of the Trial Period through July 31, 2008, plus additional damages resulting from Cogent's continued use of Sprint's network.

PRAYER FOR RELIEF

WHEREFORE, Sprint respectfully demands judgment in its favor, and against Cogent, as follows:


- (1) For Count I, that this Court award Sprint damages in an amount of \$708,256.01 for failure to pay amounts past due and owing under the Trial Agreement for services provided before the Trial Period;
- (2) For Count II, that this Court award Sprint damages in an amount of at least \$1,220,884.00 plus any other amount to be proven at trial for Cogent's failure to pay Sprint for Sprint's services provided after the Trial Period under the Trial Agreement;
- (3) That this Court award Sprint its attorneys' fees and costs, as well as pre-judgment interest on all outstanding amounts due and owing; and
- (4) That this Court award Sprint any other relief it deems just and proper.

Dated: September 2, 2008

Respectfully submitted,

**SPRINT COMMUNICATIONS
COMPANY L.P.**

By Counsel



Warren E. Zirkle (VSB No. 15321)
Anand V. Ramana (VSB No. 65852)
MCGUIREWOODS LLP
1750 Tysons Boulevard
Suite 1800
McLean, Virginia 22102
Tel: (703) 712-5000
Fax: (703) 712-5220
Email: wzirkle@mcguirewoods.com
aramana@mcguirewoods.com