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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92062895
Party	Defendant Switch, Ltd. dba Switch
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Date	06/21/2019
Attachments	TESTIMONY DECLARATION OF SAMUEL CASTOR.pdf(223442 bytes) EXHIBIT 1- AG.pdf(1069216 bytes) EXHIBIT 2.pdf(127126 bytes) EXHIBIT 4.pdf(579073 bytes) Exhibit 3.pdf(815653 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Uptime Institute, LLC.,

Petitioner,

-against-

Switch, LTD.

Registrant.

Cancellation Nos. 92062895 and 92062912
(consolidated)

TESTIMONY DECLARATION OF SAMUEL CASTOR

I, Samuel Castor, declare under penalty of perjury as follows:

1. I am currently the Executive Vice President of Policy and Deputy General Counsel for Registrant Switch, Ltd. (“Switch”). I submit this declaration to provide relevant information regarding Switch’s use of the TIER 5® and TIER “ELITE”® marks in United States’ commerce and the recognition of these marks among consumers. I also provide herein relevant information concerning Uptime Institute, LLC’s alleged claim to trademark rights that are the subject of this proceeding.

2. The facts set forth herein are based on my personal knowledge and on information contained in Switch’s business records regularly maintained by Switch in the normal course of business and to which I have regular access in the course of my employment. Unless otherwise noted, the exhibits to which I refer and that are attached to this declaration are true and accurate copies of documents and other materials from Switch’s business records, kept in the ordinary course of business, and provided by Switch’s custodian of records. If called to do so, I could and would testify to same.

I. Job Responsibilities, Experience, and Education.

3. I have worked for Switch since February 2011.

4. As Switch's Executive Vice President of Policy and Deputy General Counsel, I am tasked with the prosecution and enforcement of Switch's trademarks and other intellectual property, among other duties.

5. Prior to my current position, my work experience includes time under U.S. Senator Orrin Hatch in his Washington Office, as well as time under U.S. Presidents George W. Bush and Barrack H. Obama in the Office of Science and Technology Policy.

II. Switch's Business and Services Offered Under Its TIER "ELITE"® and TIER 5® Marks.

6. Switch is a Nevada-founded technology company that develops and operates data center facilities known as SUPERNAPS®.

7. Switch is a global technology solutions corporation whose core business is the design, construction, and sustainable operation of the world's most advanced data centers, enabling the most powerful technology ecosystems to its clients, which includes, but is not limited to, colocation data center services, cloud computing services, and telecommunication services.

8. Switch is a globally recognized leader in future-proof datacenter design and builds and operates the highest-rated data center ecosystems, and technology infrastructure, in the industry.

9. Historically, data centers were built and operated in-house, in a company's office space. Over time data centers also began to include "enterprise" or dedicated/single user facilities; that is, a data center which was owned and managed for a single entity.

10. "Colocation" facilities are data centers where multiple customers "co-locate" in a facility to share power and cooling.

11. Switch's data center facilities are far beyond traditional data center colocation. Switch's facilities not only allow multiple customers to co-locate, and share space, power, and cooling but also provide technology infrastructure that redundantly and sustainably powers, cools, connects, and protects a customer's servers and technology necessary to engage on the internet.

12. All of these is done with Switch's over 500 patented and patent pending claims and technologies.

13. The growing nexus between Internet connectivity, internet-based services, data and analytics, and the advancement of computational processing power is rapidly expanding the amount of data that people generate, and that enterprises can access and manage. At the same time, the Internet is exponentially expanding the available data sources, as utility grids, automobiles, aircraft, wearable devices, and even home appliances, all connect to the Internet.

14. This is known in the tech industry as the "Internet of Everything."

15. The computer capacity necessary to manage, analyze, and safely and securely preserve this staggering amount of data generated by the Internet of Everything, is advancing, and demands increasing amounts of reliable power needed to operate this computational capacity, which Switch's world-renowned colocation data centers provide to the companies and enterprises which it supports.

16. Switch's clients range from Fortune 100 entities to federal, state, and local governmental agencies, in the States of Nevada, California, Michigan, the District of Columbia, and more. Currently, Switch has more than 800 customers, including some of the world's largest technology and digital media companies, cloud and managed service providers, financial institutions and telecommunications providers.

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17. Some of Switch's distinguished clients include Sony®, Disney®, Microsoft®, FedEx®, Google®, Amazon®, Intel®, AT&T®, ADP®, IBM®, eBay®, Intel®, Intuit®, Marvel®, Fox®, Amazon®, Logitech®, Cisco®, JP Morgan Chase & Co.®, Hulu®, Fujifilm®, MGM Resorts International®, Warner Bros. Pictures®, Allegiant Airlines®, McAfee®, and PlayStation®, to name just a few. A true and accurate copy of Switch's website available at <https://www.switch.com/clients> (last accessed on June 16, 2019) featuring some of its clients is attached hereto as **Exhibit N**.

18. As the list above demonstrates, Switch's clients are among the most sophisticated companies in the world. Switch's clients exercise great care in choosing a data center to house their most valuable business data and trade secrets.

19. Switch's clients pay Switch tens of thousands of dollars a month, and in some cases, millions of dollars, to license the data center and telecommunication technology and services, Switch provides.

20. Although Switch's flagship brand "SWITCH" is easily associated with a vast array of technology brands and offerings and has been declared famous by three separate Federal Judges¹, only a select set of educated and qualified individuals within a business or governmental entity truly understand the complexity of the quality of a data center, and an even smaller set of those individuals have decision making authority over which data center provider to utilize.

21. As such, although Switch's customer base is global in footprint, the decision makers (the actual customers) evaluating Switch's offering itself, are generally the Chief Technical Officer, Chief Technology Office or Chief Information Officer level.

¹ See for example, U.S. District Court of Nevada, District Case No. 2:18-cv-00738-KJD—CWH, and U.S. District Court of Nevada, District Case No. 2:19-cv-00787-J-CM-NJK, and U.S. District Court of Nevada, District Case No: 2:14-cv-01727-APG-NJK.

22. Additionally, given the high cost and necessity for Switch's clients to have an unparalleled quality of services, Switch's clients purchase Switch's services after extensive formal bidding processes, consultation with experts, and careful consideration with client leaders who are highly knowledgeable about the services Switch offers.

23. As a result of such careful consideration, there can be no confusion as to the source of the services Switch provides to its clients under its TIER "ELITE"® and TIER 5® marks.

24. Because provides the "lifeblood" of internet presence for hundreds of mission critical operations, Switch's facilities are at a high risk of espionage, sabotage, cyber-attack, and terrorism. Consequently, Switch employees operate in a manner consistent with a mission-critical environment, Switch's facilities are built to the highest standards and are monitored 24/7/365 by armed security personnel.

25. Due to the extreme sensitive nature of the data stored, Switch provides military-grade physical security to protect its customers, their mission-critical operations, and the sensitive data on their systems, including first responder and emergency services, health records, employment records, and intellectual property.

26. Switch's advanced data centers are the center of its platform and provide power densities that exceed industry averages with efficient cooling, while being powered by 100% renewable energy.

27. Switch's platform has powerful network effects and nurtures a rich technology ecosystem that benefits its participants. Switch further enhances these benefits as it innovates and expands its platform ecosystem.

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28. Greenpeace ranked Switch above Apple®, Facebook®, Amazon®, and Google® – recognized leaders in sustainability– and awarded Switch the highest ranking for any technology company in its 2017 Clicking Clean Report.

29. Switch has also received praise from various local and national environmental groups including Clean Energy Project (CEP), Valley Electric Association, Nevada Conservation League, the Sierra Club, Southwest Gas® Corporation, and Ceres as Switch has advocated for affordable renewable energy for all Nevadans, and Americans.

30. In addition to capturing additional innovations and inventions generated by Switch and its founder Rob Roy, Switch continually reviews its development efforts to assess the existence and protection of new intellectual property.

31. Switch actively protects its intellectual property by pursuing the registration of its trademarks and service marks in the United States and internationally, and actively monitors the trademark activities of others.

32. As of December 31, 2018, Switch owned over 442 trademark registrations and pending applications in the United States and foreign countries.

III. Switch’s TIER “ELITE”® and TIER 5® Trademarks.

A. Switch’s TIER “ELITE”® Mark.

33. On February 2, 2011, Switch filed a use-based trademark application with the USPTO on behalf of Switch for the trademark TIER “ELITE” (Ser. No. 85232439) in International Classes 38 and 42. *See* Switch’s Notice of Reliance **Exhibit A**.

34. To my knowledge, Thomas Morton personally drafted and filed the TIER “ELITE” application using the USPTO’s Trademark Electronic Application System (“TEAS”). *See* Switch’s Notice of Reliance **Exhibit A**.

35. On May 9, 2011, the Examining Attorney issued an Office Action on the TIER “ELITE” application requesting a clarification of the services identified, but stated “[t]he trademark examining attorney has searched the USPTO’s database of registered and pending marks and has found no conflicting marks that would bar registration under Trademark Act Section 2(d).” *See* Switch’s Notice of Reliance **Exhibit A**.

36. On November 23, 2011, the TIER “ELITE” application was approved and subsequently published on December 13, 2011. *See* Switch’s Notice of Reliance **Exhibit A**.

37. On February 28, 2012, the USPTO registered TIER “ELITE” (Reg. No. 4104346) for the following services:

International Class 38: Telecommunication access services; telecommunications access services, namely, providing access to communication links and communication networks; providing access to telecommunications networks for the provision of communications links; transfer of data and information via telecommunications systems; telecommunication services, namely, providing telecommunications networks for transmission of data and information; telecommunications consultation, namely, consultation services relating to telecommunications, communication networks and transmission of data and information; Providing access to telecommunications networks for accessing hosted operating systems and computer applications through the Internet.

International Class 42: Computer services, namely, acting as an application services provider for third parties featuring remote hosting of operating systems and computer software applications of others; cloud computing, namely, providing virtual computer systems and virtual computer environments through cloud computing; computer services, namely, providing a virtual computing environment accessible via the Internet for registered users for the purpose of computing computer server capacity; rental of computing and data storage facilities of variable capacity, namely, database servers, to third parties; providing non-downloadable software accessible over a global computer network for use in managing computer applications of others.

See Switch’s Notice of Reliance **Exhibit A**.

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38. As indicated in the application, Switch began using the TIER “ELITE”® mark at least as early as January 1, 2011.

39. As a specimen of use, Switch submitted a screenshot of Switch’s website located at www.switchnap.com/pages/all-things-switch/tier-elite.php. See Switch’s Notice of Reliance **Exhibit A**.

40. Switch’s prominent use of the TIER “ELITE”® mark on its website is corroborated by the Internet Archive’s Wayback Machine, which captured Switch’s use of the TIER “ELITE”® on January 11, 2011. See Switch’s Notice of Reliance **Exhibit N**.

41. Since the launch of the TIER “ELITE”® brand in January 2011, Switch has been continuously using the TIER “ELITE”® mark in U.S. commerce in connection with the services identified in its application.

42. Switch continues to use its TIER “ELITE”® mark online and in print publications. True and accurate representative samples of Switch’s past and current use of the TIER “ELITE”® mark are attached as **Exhibit N** to Switch’s Notice of Reliance.

B. Switch’s TIER 5® Mark.

43. On July 16, 2013, I personally filed an intent-to-use trademark application with the USPTO on behalf of Switch for the trademark TIER 5 (Ser. No. 86012041) in International Classes 38 and 42. See Switch’s Notice of Reliance **Exhibit A**.

44. I filed the TIER 5 application electronically through TEAS.

45. At the time the TIER 5 application was filed, Switch’s legal office was small with minimal support staff, so I drafted and filed the application myself.

46. On September 24, 2013, the Examining Attorney issued a Priority Action on the TIER 5 application requesting a clarification of the services identified, but stating “[t]he trademark

examining attorney has searched the USPTO's database of registered and pending marks and has found no conflicting marks that would bar registration under Trademark Act Section 2(d)." *See* Switch's Notice of Reliance **Exhibit A**.

47. On May 21, 2014, the TIER 5 application was approved for publication, subsequently published on June 10, 2014, and received a Notice of Allowance on August 5, 2014. *See* Switch's Notice of Reliance **Exhibit A**.

48. On February 16, 2015 and October 23, 2015, I submitted specimens of use consisting of postcards prominently displaying the TIER 5 mark. *See* Switch's Notice of Reliance **Exhibit A**.

49. On December 8, 2015, the USPTO registered the TIER 5 (Reg. No. 4867486) for the following services:

International Class 38: Telecommunications access services; providing access to telecommunications networks for the provision of communications links; transfer of data and information via telecommunications systems; providing telecommunications communication networks for transmission of data and information; telecommunications consultation services relating to telecommunications, communication networks and transmission of data and information; providing telecommunications access to hosted operating systems and computer applications through the Internet.

International Class 42: Computer services, namely, acting as an application services provider for third parties featuring remote hosting of operating systems and computer applications of others; cloud computing services, namely, integration of private and public cloud computing environments; computer services, namely, providing a virtual computing environment accessible via the Internet for registered users for the purpose of computing computer server capacity; third party rental of computing and data storage facilities of variable capacity, namely, rental of database servers to customers of third parties; providing non-downloadable software accessible over a global computer network for managing computer applications of others.

See Switch's Notice of Reliance **Exhibit A**.

50. The TIER 5® mark has not been abandoned.

51. Switch continues to use its TIER “ELITE”® and TIER 5® marks online and in print publications. True and accurate representative samples of Switch’s current use of the mark are attached as **Exhibit N** to Switch’s Notice of Reliance.

52. To my knowledge, Switch is the only data center in the world using the trademarks TIER 5® and TIER “ELITE”®.

53. Switch’s use of the trademarks TIER 5® and TIER “ELITE”® immediately conveys to consumers that Switch and the data center services it provides are distinct and unique among data centers.

54. The trademarks TIER 5® and TIER “ELITE”® are exclusively associated with Switch, and services branded under the TIER 5® and TIER “ELITE”® trademarks are immediately identified by consumers as originating from Switch.

IV. Switch’s Services, Channels of Trade, and Target Consumers.

55. In connection with Switch’s TIER “ELITE”® and TIER 5® brands, Switch offers colocation data center facilities, telecommunications, cloud services, security, power, and content ecosystems, among other services.

56. Switch’s TIER “ELITE”® and TIER 5®-branded services are targeted toward organizations and governmental entities for highly confidential, black-ops projects, spam filtering of the most serious proportions, utility computing projects, data warehousing, modeling, online gaming, and ordinary e-commerce.

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57. Switch's services are highly distinguishable from those offered by Uptime. Unlike Uptime, Switch does not offer training or certification to other data centers or designers, operators, or service providers in the industry. Neither does Switch provide services to other data center owners or operators, or manufacturers of data center components for them to build or design their own services.

58. It is my understanding neither Uptime, nor its affiliates, own or operate any data centers nor offer data center or telecommunication services.

V. Switch's Other TIER-formative Trademark Registrations and Applications.

59. Between July 16, 2013 and December 6, 2017, Switch filed nineteen (19) trademark applications for TIER-formative marks. *See* Switch's Notice of Reliance **Exhibit B**.

60. In all but one case, the USPTO's Examining Attorney's search of the trademark records "found no similar registered marks that would bar registration under Trademark Act Section 2(d)." *See* Switch's Notice of Reliance **Exhibit B**.

VI. Uptime's Use of Its Alleged Marks.

61. Uptime touts itself as an "unbiased advisory organization focused on improving the performance, efficiency, and reliability of business-critical infrastructure through innovation, collaboration, and independent certifications. However, Uptime does not offer *unbiased* or *independent* certifications.

62. I believe Uptime does not offer any of the services identified in its trademark registrations, including, without limitation, the services identified in its registration for the TIER IV UPTIME INSTITUTE CERTIFIED (and Design) (Reg. No. 4446381).

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63. Rather, for a hefty fee, Uptime’s affiliate, Uptime Institute Professional Services (“UIPS”) offers customers an opportunity to obtain “certifications” for the design, facility, and operation of its client’s data centers.

64. Uptime’s consumers are sophisticated data center owners and operators that use extreme care in employing Uptime’s services, particularly so given the high cost of the UIPS certifications.

65. For example, Switch paid Uptime in excess of \$500,000.000 for Uptime’s certification services.

66. Despite UIPS’ use of the marks represented in Uptime’s registrations as *certification* marks, not to offer any services, Uptime acquired the following *service* mark registrations with the USPTO:²



-  – filed on October 24, 2012 (Reg. No. 4446381);
- ACCREDITED TIER DESIGNER – filed on July 23, 2012 (Reg. No. 4503936);
- ACCREDITED TIER SPECIALIST – filed on July 23, 2012 (Reg. No. 4503935);

² As is the case here, registrations issued by the USPTO for a service mark, when the marks are in fact certification marks, are invalid and should be cancelled. The incorrect registration type of Uptime’s marks is a subject of the civil action between the parties. *Switch, LTD. v. Uptime Institute, LLC, et al.*, Case No. 2:19-cv-00631-GMN-NJK, United States District Court for the District of Nevada.



- – filed on April 30, 2014 (Reg. No. 4670382);



- – filed on April 30, 2014 (Reg. No. 4670383); and
- TIER GAP ANALYSIS – filed on November 4, 2014 (Reg. No. 4900276).

See Switch’s Notice of Reliance **Exhibit C**.

67. I believe Uptime does not offer the services it claims it offers under its trademark registrations. In fact, Uptime does not offer any of these services to customers. Rather, according to Uptime, UIPS (not Uptime) uses these marks to offer and award its alleged “certifications” and does not itself offer services in association with these marks.

68. Recipients of Uptime’s and/or Uptime IPS’s “Tier Certification” are awarded a letter, a foil (incorporating the alleged Uptime marks), and/or website listing bearing one or more of the Uptime marks, for use by the recipient to convey to the public the recipient is certified by Uptime.

69. The public perception of the Uptime marks is that they are certification marks, evidencing certification by Uptime, not *service* marks.

VII. Any Rights Uptime Has in Its Alleged Marks Are Very Limited.

70. It is my understanding that Uptime’s Tier I, Tier II, Tier III, and Tier IV vernacular was not created by Uptime, but rather by Sabre, a client of Uptime’s predecessor in interest.

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71. Independent of Uptime, the terms Tier 1, Tier 2, Tier 3, Tier 4, or Tier I, Tier II, Tier III, and Tier IV have been widely used by owners and operators of data centers as a means of conveying information about a particular facility's infrastructure.

72. The terms Tier 1, Tier 2, Tier 3, Tier 4, and Tier I, Tier II, Tier III and Tier IV are widely used by hundreds of non-certified data centers throughout the world. A true and correct copy of the websites of other data centers showing use of the terms Tier 1, Tier 2, Tier 3, Tier 4, and Tier I, Tier II, Tier III and/or Tier IV without reference to Uptime attached as **Exhibit M** to Switch's Notice of Reliance.

73. It is common for data centers to also convey information about the infrastructure of their facilities in a multitude of other ways, including, for example, "Tier II-type", or "as good as Tier IV." *See* **Exhibit M** to Switch's Notice of Reliance.

74. The terms Tier I, Tier II, Tier III, and Tier IV as related to data centers are not, and never have been, exclusively used by Uptime, or exclusively associated with Uptime. My understanding is that this is one of the reasons why Uptime does not have *any* trademark registrations for the word "Tier" or "Tier I", "Tier II", "Tier III" or "Tier IV."

75. The terms Tier I, Tier II, Tier III and Tier IV as related to data centers are not unique and do not serve as a source indicator or identify any singular data center.

76. Moreover, Uptime has protractedly and systemically failed to police its marks and, in at least one case, such abuse caught the attention of the Nevada Attorney General. *See* a true and correct copy of the Nevada Attorney General Bureau of Consumer Protection Letter to ViaWest, Inc., dated February 2, 2015 attached hereto as **Exhibit 1**.

77. Switch has brought the misuse of Uptime's certification marks to Uptime's attention on numerous occasions and has sent Uptime independent third-party publications

regarding the issue. *See* a true and correct copy of article *Two Major Data Center Metrics are On the Way Out and Both Customers and Marketers Deserve Some Blame*, sent by Switch to Uptime on April 6, 2016 attached hereto as **Exhibit 2**.

78. According to USPTO records available online, Uptime has never sought trademark registration for the terms Tier, Tier 1, Tier 2, Tier 3, Tier 4, or Tier I, Tier II, Tier III, or Tier IV. *See* a true and correct copy of the USPTO's TSDR database records list for registrations and applications owned by Uptime attached as **Exhibit D** to Switch's Notice of Reliance.

79. Uptime was aware of Switch's use and registration of the mark TIER "ELITE" at least as early as 2011, and had, at minimum, constructive notice on February 28, 2012 when Switch's TIER "ELITE" was registered by the USPTO.

80. It is very probable Uptime knew of Switch's use of the TIER "ELITE" mark in January 2011, as Uptime was sending numerous marketing materials to Switch promoting its certification services, indicating Uptime had reviewed Switch's website to learn about the services Switch offered that made Switch a candidate for Uptime certification. *See e.g.*, a true and correct copy of marketing material received by Switch from Uptime dated January 1, 2011 is attached hereto as **Exhibit 3**.

81. Despite having knowledge of Switch's use of the TIER "ELITE" mark, Uptime did not oppose Switch's application or otherwise object to Switch's use of TIER "ELITE". Rather, Uptime waited over three years and filed this cancellation proceeding on December 22, 2015, only after Switch complained to Uptime, and to others, about how Uptime was failing to police the widespread misuse of Uptime's registered marks.

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82. My understanding at the time was that when Switch confronted Uptime, Uptime's employees agreed that Uptime's enforcement was lacking as Uptime did not want to offend potential customers of its certification services.

83. In the meantime, Switch has invested significant resources in the development and marketing of its TIER "ELITE"® and TIER 5® marks, including in-house marketing spent in excess of several hundred of thousand dollars, and relied on Uptime's acquiescence to Switch's detriment.

VIII. There Is No Likelihood of Confusion.

84. I do not believe Switch's TIER "ELITE"® and TIER 5® marks are confusingly similar to Uptime's marks.

85. I believe that Switch's TIER "ELITE"® and TIER 5® marks are highly distinguishable from Uptime's alleged marks in appearance, sound, connotation, and commercial impression, including, without limitation, the terms Tier I, Tier II, Tier III, and Tier IV.

86. The parties' respective marks do not look the same, sound the same, or convey the same meaning or overall commercial impression.

87. The differences in the parties' respective marks are even more significant given the parties' use of their strong house brands, namely, SWITCH® and UPTIME INSTITUTE® in all promotional materials and advertising.

88. Further, I believe Switch's respective data center and telecommunication services are very different from the services Uptime's affiliate UIPS offers under Uptime's alleged marks, namely, *certification* services.

89. I do not believe Uptime itself offers *any* of the services identified in its registrations.

90. Switch offers colocation data center services.

91. In contrast, Uptime, through its affiliate UIPS, offers *certification* services, not actual services.

92. Switch does not, and does not intend to, offer any *certification* services related to the certification of data centers.

93. Switch and Uptime's established and likely-to-continue trade channels are dissimilar. Clients of Switch are seeking a suite of services as set forth above, that Uptime and its affiliates do not offer. Similarly, consumers that approach Uptime and UIPS for certifications are competitors to Switch, and seek certain benefits Uptime (through UIPS) purports to provide.

94. Consumer confusion is further avoided due to the high sophistication of the parties' consumers and the care such consumers take when choosing to receive services from Switch and certifications from Uptime.

95. Switch's house mark SWITCH has been declared famous – repeatedly – and is easily disassociated from Uptime's house mark UPTIME.

96. The fact that both parties' respective services cost in the range of hundreds of thousands of dollars weighs heavily against there being any confusion as to the source of the services a consumer receives.

97. The registered and alleged common law marks Uptime relies upon for this proceeding are used by a multitude of unrelated third parties for services identical to Switch's. Accordingly, I believe Uptime's marks are entitled to a very limited scope of protection, if any.

98. Switch is not aware of any other third party using Switch's TIER "ELITE"® or TIER 5® marks.

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99. To my knowledge, Switch has not received any information from a client or potential client that indicates Switch's TIER "ELITE"® or TIER 5® marks have been confused with Uptime's alleged marks.

100. Uptime's two instances of alleged actual confusion in this proceeding do not constitute *actual* confusion. See Petitioner's Trial Exhibits QQ and RR.

101. Uptime's Exhibit QQ does not evidence actual consumer confusion. It is my belief the owner of the website, InterVision Bluelock Solutions ("Bluelock", a Switch client), had the information on the webpage depicted in the exhibit either drafted by a third-party marketing firm, or by someone within the company lacking knowledge of the data center technology and industry. Subsequently, Bluelock's branding language changed to what is now depicted on Bluelock's website (which differs completely from the language reflected in Uptime's Exhibit QQ).

102. Switch believes that Bluelock's technical team identified the inaccuracies quickly and replaced the page with the proper information, as is currently seen at <https://www.bluelock.com/about/facilities/> (last accessed June 20, 2019). A true and correct copy of this current Bluelock webpage is attached hereto as **Exhibit 4**.

103. I have asked Switch to reach out to Bluelock to confirm the foregoing and will supplement this statement as appropriate.

104. Similarly, the article depicted in Uptime's trial Exhibit RR is not evidence of actual consumer confusion. The article appeared on the website of Guerilla Stock Trading and consists of a news article related to Switch's initial public offering of stock. Guerilla Stock Trading is not a Switch client, and to my knowledge, is not involved in the data center industry. The "news" article contains numerous other misstatements and inaccuracies.

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IX. The Data Center Standards Foundation

105. Switch does not offer, and has no intention of offering, certification services to data centers. Alternatively, Switch has worked with an original creator of the tier classification system, John H. Seader, and other original authors on the tiers to establish an independent, non-profit standards body for the data center industry known as the Data Center Standards Foundation (“DCSF”).

106. DCSF has created its own unique set of standards, which do not classify data centers on tiers or use Tier I through Tier IV vernacular.

107. DSCF will not use Switch’s TIER “ELITE”® or TIER 5® trademarks.

108. DCSF will enable data center users, owners, and operators *to self-assess* the rating of their data centers, clearly represent and warrant that rating, and have an independent third-party audit to verify that assessment.

109. The signatory, being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements and the like may jeopardize the validity of this submission, declares that all the statements made of his own knowledge are true and all statements made on information and belief are believed to be true.

Executed this 21 day of June, 2019.

/Samuel Castor/

Samuel Castor

EXHIBIT 1

EXHIBIT 1

**NEVADA ATTORNEY GENERAL
BUREAU OF CONSUMER PROTECTION**

100 North Carson Street
Carson City, Nevada 89701

ADAM PAUL LAXALT
Attorney General



ERIC WITKOSKI
*Consumer Advocate
Chief Deputy Attorney General*

February 2, 2015

ViaWest, Inc.
6400 S. Fiddler's Green Circle, Suite 2000
Greenwood Village, CO 80111

Re: *ViaWest, Inc.*

Dear Sir or Madam:

Enclosed is a complaint sent to this office alleging that ViaWest, Inc. offers consumers a Tier IV data facility when in fact the facility is not Tier IV certified. Information indicates that while ViaWest, Inc. does have a certificate for a Tier IV design for a data facility, in fact the facility that was built was not constructed pursuant to the provisions of the Tier IV design. Thus, by advertising that ViaWest, Inc. has a Tier IV design, ViaWest, Inc. is misleading consumers to believe that ViaWest, Inc. offers a Tier IV facility in Las Vegas when that might be untrue.

NRS 598.0915(15) indicates that it is a deceptive trade practice to knowingly make a false representation in a transaction involving the sale or lease of goods or services in Nevada. NRS 598.0923(2) indicates that it is a deceptive trade practice to fail to disclose a material fact in connection with the sale or lease of goods or services. From the information provided ViaWest, Inc. may be in violation of this or other provisions of Nevada's Deceptive Trade Act.

This office is charged with the duty of investigating and prosecuting deceptive trade practices in Nevada. The purpose of this letter is to provide ViaWest, Inc. the opportunity to respond to the allegations made by Mr. Castor before any decision to prosecute is made. Please make a written reply to this office addressing why ViaWest, Inc. is not in violation of those statutes identified above. Please include in that reply:

- 1) Documentation that ViaWest, Inc.'s datacenter in Las Vegas was built to Tier IV standards;
- 2) If ViaWest, Inc.'s datacenter in Las Vegas was built to Tier IV standards, please provide documentation showing such certification;
- 3) If ViaWest, Inc.'s datacenter in Las Vegas was not built to Tier IV standards, please provide documentation showing the standards for that facility;
- 4) If ViaWest, Inc.'s datacenter in Las Vegas was not built to Tier IV standards why does ViaWest, Inc. advertise that the facility was built to Tier IV standards when instead it was built to another standard; and
- 5) Please explain why ViaWest, Inc.'s advertising concerning its certification that it has a Tier IV design certification is not misleading when in actuality the facility does not meet Tier IV standards.

ViaWest Inc

Re: *Complaint against ViaWest, Inc.*

February 2, 2015

Page 2

The purpose of this letter is to get a full and complete accounting of this matter and to review ViaWest Inc's position with regard to this matter. Brevity is to the benefit of ViaWest, Inc. as the response may be the only opportunity to communicate about this matter prior to initiation of a prosecution. Please note that violations of NRS Chapter 598 represent offenses against the State of Nevada. This office does not personally represent the complainant and cannot negotiate on behalf of the complainant. Failure to respond to this letter in writing by February 23, 2015 may be considered by this office as a refusal to respond and may require legal action.

Sincerely,

ADAM PAUL LAXALT, Attorney General
ERIC WITKOSKI, Consumer Advocate

By: _____

John R. McGlamery
Senior Deputy Attorney General

JRM:
Enclosure

EXHIBIT 2

EXHIBIT 2

From: [Rob Roy](#)
To: ["jkudritzki](#) [": Lee Kirby](#)
Subject: tier rating system junked by Uptime Institute last fall. - this is from the same reporter that just did your podcast.
Date: Wednesday, April 6, 2016 4:44:00 PM

Two Major Data Center Metrics are On the Way Out and Both Customers and Marketers Deserve Some Blame

March 8, 2016 [Kevin O'Neill](#) [Data Center](#), [Efficiency](#), [Energy](#), [LEED](#), [Power](#), [Power Usage Effectiveness](#), [Tier Rating System](#) 0



Data Center Metrics

PUE and Tier Ratings Going Away

In the data center world the technologists and engineers who design, operate, and utilize data centers can frequently be at odds with the real estate money guys and the marketers, who have more interest in accelerating sales, revenue, and investment returns.

Claims to impress investors and customers are frequently not presented in the way the operations pros and the technologists who run the data centers would prefer. As in all fields, that includes using numbers to make your case, and includes the misuse of some well-intentioned metrics.

The claim game is partially to blame for some changes with the measurements that have long been part of the data center conversation. For years, major industry metrics included PUE (power usage effectiveness) to measure how efficiently a data center uses energy, and Tier rating, which measures resiliency in regards to uptime and availability. But over the years both of these metrics were misused by marketers and others with an agenda trying to make an impression.

PUE: PUE will not be a part of the AHRAE data center standard, which is used by many local governments in their permitting and building inspection. Instead ASHRAE (the American Society of Heating, Refrigerating, and Air Conditioning Engineers), will move on to a new metric, Design MLC, [defined in Equation 6.2.1, 1: in the current draft](#), which is available for comment by data center professionals.

When data center operations professionals gathered, you were also likely to hear complaints about PUE claims made by others. Numbers as close to 1.00 (the lowest possible PUE) as possible were frequently used by marketers and developers and to engineers who knew the facilities, those calculations didn't always pass the sniff test. "I've earned the industry's first 0.98 PUE" announced one data center facilities pro from the podium of an industry event, to the laughter of his colleagues. One purpose of questionable PUE claims

was to attract business from end-users eager to highlight their sustainability achievements, and the easiest path was making a purchase from someone who had apparently done the work required.

The bigger problem with PUE was the fact that it was an unfair metric to judge data centers that were not yet full, as well as multi-tenant data centers whose colocation customers didn't use their space optimally, didn't use the most efficient gear, and failed to commit to thermal and airflow best practices within those leased environments.

Misuse of statistics has led to the demise of widely-used measurements in many industries, and we may be seeing the same with PUE. PUE claims were often a source of controversy, and may have contributed to souring people on the use of the metric. But as with with any new metric , it is likely only a matter of time before we see mini-controversies develop over the validity and importance of certain Design MLC claims.

Tier Rating System: Marketers and data center developers deserve more blame for the decline and fall of the tier rating system, which was junked by Uptime Institute last fall.

One persistent issue was the misuse of tier ratings. Providers engaged in self-rating, calling themselves Tier 3 or even Tier 4 without going through the thorough and expensive process of evaluation by Uptime Institute. Uptime's use of roman numerals for Tier I through Tier IV led many to claim things like "Tier 3 design" in their materials. A salesman leading a data center tour was unlikely to go out of his way to delineate the difference to his customers. And why would a provider invest in a tier rating when their competitor across town was making the same claim without the same investment and process?

Could the misuse have been avoided via improved branding? Had Uptime branded the Tier system with something more unique than a simple number, they might still be collecting significant fees for ascertaining the reliability and availability of data centers through the tier system. In contrast, the US Green Building Council (USGBC), has branded their certification quite well. LEED (Leadership in Energy and Environmental Design) is more difficult to claim or mimic. A number (Tier 3 vs. Tier III) is easy to knock off. LEED Gold less so.

The expense of earning a tier rating from Uptime was a factor referenced by providers. But that's the nature of the certification process and achieving LEED is burdensome and pricey as well. Many providers go through the process to obtain LEED and conversations about false LEED claims are not common.

Customers Share Blame: Some knowledgeable customers certainly downgraded some data center options based on self-tiering, but too many claims went unchallenged. Not enough customers pushed back by immediately rejecting the self-rated tier claims of some providers and developers. If they had, it isn't a stretch to think that the Uptime Institute tier rating might still be around.

EXHIBIT 4

EXHIBIT 4

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physical, logical and application and data security practices designed specifically for high-risk, high-performance workloads. Bluelock's secure facilities and accessibility features support our [disaster recovery for sensitive data solution](#), [HIPAA/HITECH](#) and [other compliance frameworks](#) as well as [hosting for HIPAA/HITECH](#).

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Switch facilities are the first and only carrier-neutral colocation data centers to be **certified Tier 4 Gold** in Operations. [Switch data centers](#) are also certified **Tier 4 in both Design and Facility categories**. In addition to the Uptime Institute's Tier 4 Gold standards, [Switch LAS VEGAS – The Core Campus](#) meets and exceeds the standards of IEEE, ANSI, ASHRAE, 24/7, ISO 9001, SOC 2, BICSI, the Green Grid Association and more. It is the most advanced and most efficient data center campus in the world.

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Have a more fruitful, productive conversation between IT management and your business leadership with this guide. Learn the relationship your leadership wants the answers to and how to answer those questions in a way that is easily consumed

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EXHIBIT 3

EXHIBIT 3

From: [David Manning](#)
To: [Melissa Young](#)
Subject: Uptime Institute's Accreditations Program Goes Global in 2011
Date: Tuesday, January 11, 2011 10:38:22 AM

To view this email as a web page, go [here](#).



Uptime Institute is pleased to announce pre-registration for its 2011 Accreditations. The schedule demonstrates a truly global commitment with sessions in South America, Middle East, Continental Europe, Asia, and U.S.

2011 Accredited Tier Designer (ATD) and Accredited Tier Specialist (ATS) courses:

- Sao Paulo, Brazil: 12-14 April
- Dallas, TX: 17-19 May (ATS Only)
- Dubai, United Arab Emirates: 5-7 June
- Madrid, Spain: 19-21 September
- Santa Clara, CA: 8-10 November
- Hong Kong: 6-8 December

The Uptime Institute Accreditations program serves multiple disciplines among data center and IT professionals. In 2 years, Uptime Institute has accredited 152 elite design engineers in 34 countries. Here is what a 2010 ATD designate had to say:

Within a month of receiving the Accredited Tier Designer, we have received a very important commission from a significant US bank. Our Uptime Institute ATD status undoubtedly turned the deal in our favour.
-Vincent Byrne, Vincent Byrne Consulting Ltd., Managing Director,
London/Dublin

And in just the last 2 months, over 60 data center operations professionals from 13 countries have been awarded ATS. This recent ATS graduate plans to have all critical operations staff Accredited to reach higher levels of uptime:

I'm sending two other members of my IT staff to ATS so that our senior team can use the course information to identify more positive changes in the management of our facility, especially in terms of behavioral issues which are key for avoiding human error.
-IS Manager of Data Centers and Operations at a World Leader in
Pharmaceutical and Medical Products

If you have a data center construction project in the works for 2011 (or are in the evaluation stages for a 2012-2013 project), Uptime Institute Accreditations have acute value. The Accreditation curriculums are anchored in tools that will help you and your team to articulate the project objectives and track to successful completion. An informed application of the Uptime Institute Standards can avoid the pain (both human and fiscal) of applied Tier misconceptions, especially those discovered only after it is too late.

Pre-register for 2011 sessions: **ATD** and **ATS**. Or contact David Manning at +1 206.706.4647 or dmanning@uptimeinstitute.com.

Happy New Year to all our Site Uptime Network members, Accredited professionals, Certified sites, colleagues, and friends around the world.

This email was sent to: **myoung@nevadanap.com**

This email was sent by: Uptime Institute Professional Services, LLC
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