

Michelle E. Shriro
State Bar No. 18310900
GERARD SINGER LEVICK & BUSCH, P.C.
16200 Addison Road, Suite 140
Addison, Texas 75001
Tel. (972) 380-5533
Fax (972) 380-5748

W. Scott McCollough
State Bar No. 13434100
STUMPF CRADDOCK MASSEY & PULMAN
1250 Capital of Texas Highway South
Building One, Suite 420
Austin, Texas 78746
Tel. (512) 485-7920
Fax (512) 485-7921

ATTORNEYS FOR DAN LAIN, TRUSTEE

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

DATAVON, INC., et al.,

DEBTORS.

§
§
§
§
§

CASE NO. 02-38600-SAF-11

Hearing Set:

September 29, 2003 at 1:30 p.m.

**PLAN TRUSTEE'S MEMORANDUM OF LAW IN SUPPORT
OF THE PLAN TRUSTEE'S RULE 12(b)(6) MOTION TO DISMISS
SOUTHWESTERN BELL TELEPHONE, L.P.'S ADMINISTRATIVE CLAIM**

DAN B. LAIN, Plan Trustee under the confirmed Joint Plan of Reorganization (with Technical Amendments dated June 2, 2003) (the "Plan Trustee"), files this Memorandum of Law in Support of the Plan Trustee's Rule 12(b)(6) Motion to Dismiss Southwestern Bell Telephone, L.P.'s Administrative Claim and respectfully represents as follows:

I.

STATEMENT OF CASE AND OVERVIEW

On August 12, 2003, Southwestern Bell Telephone, L.P. ("SWB") filed a request for payment of an administrative expense priority claim (the "Administrative Claim"). In support of its entitlement to the Administrative Claim, SWB claims that the Debtor participated in a scheme with telecommunication carriers to avoid payment of access charges.

SWB's Administrative Claim fails to state a claim upon which relief can be granted. As a result, the Court should dismiss the Administrative Claim. Even if SWB proves the allegations made in its pleading, SWB has not set forth the essential elements necessary to state a claim upon which relief can be granted.

In the alternative and without waiving the foregoing argument, the Plan Trustee would further show the Court that SWB is not entitled to payment of its Administrative Claim because it was of no benefit to the Estate. Alternatively, such claim should be treated as an unsecured claim and such claim should be disallowed because SWB has received notice of the bar date and failed to file a proof of claim for such amounts.¹ SWB should not be afforded an administrative priority claim for damages for which it is too late to get on an unsecured basis.

II.

BACKGROUND FACTS

DataVoN is an Enhanced Service Provider ("ESP") also known in the telecommunications industry as an Information Service Provider ("ISP").² Prior to the sale of its assets, DataVoN provided Voice over Internet Protocol ("VoIP")³ services to its customers,

¹ SWB's real problem is its failure to include the amounts sought in its proofs of claim. SWB received notice of the bar date and filed a claim in the amount of \$1,510.41. SWB later filed a second claim in the amount of \$714.39. Since SWB has not filed a proof of claim for the amounts sought, SWB's claim is barred.

² It is possible to be an Information Service Provider, but not an Enhanced Service Provider. As a supplier of VoIP services to its customers, DataVoN was an Enhanced Service Provider *and* an Information Service Provider.

³ Some authorities refer to VoIP as "Internet telephony" or "Internet Protocol (IP) telephony." The phrases "Internet telephony" and "IP telephony" refer to similar, but distinct concepts. IP telephony involves the provision of a telephony service or application using Internet Protocol. IP telephony may be provided over the public Internet or over a private IP network. In contrast, Internet telephony is a subset of IP telephony that is distinguished by the fact that it is provided over the public Internet and uses the domain-name system for routing. *See, e.g.*, In the Matter of Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd. 11501, 11541-51 ¶¶ 83-104 ("Stevens Report") (discussing Internet and IP telephony); HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 364, 369 (17th ed. 2001). DataVoN did not use the public Internet so it did not provide Internet telephony. This pleading, however, will generally use the term "VoIP."

including interexchange carriers (“IXCs”). In providing this information service⁴, DataVoN obtained telecommunications service from a carrier vendor and then transformed the aural content of its customers’ calls into “data” packets of information. DataVoN added, deleted or changed some of the original subscriber-generated content; transferred the information (as changed) to a new location; reassembled the packets (as changed); converted the packets (as changed) into “circuit-switched” format; and sent the content (as changed) for transmission to a competitive local exchange carrier (“CLEC”).⁵ The CLEC then sent the call (with the changed content) to the recipient or redirected it to SWB for termination to the intended recipient.

The difference between the services provided by DataVoN and that which is provided by telecommunication carriers is simple: DataVoN changes the form and content of the telecommunication; telecommunication carriers switch and transport the form and content of the information *without change*.⁶

DataVoN did have contracts with its customers and it also had contracts with competitive local carriers and other telecommunications vendors as necessary to provide VoIP service to its customers. An information service provider by definition uses telecommunications, but does not

⁴ Section 153(20) of the Federal Communications Act defines “information service”: (20) INFORMATION SERVICE. The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

⁵ Verizon took a deposition of Chad Frazier, DataVoN’s technical officer on May 14, 2003. Mr. Frazier conclusively demonstrated that there was a change in both form and content, and that DataVoN’s services offered the capability to generate, acquire, store, transform, process, retrieve, utilize and make information available. *See, e.g.,* Frazier Deposition, p. 12, lines 20-25; p. 14, line 4 to p. 25, line 12; pp. 26 to 36; p. 53, line 24 to p. 54, line 7; p. 65, line 3 to p. 69, line 3; p. 72, line 19 to p. 73, line 7; p. 84, lines 17-20; p. 85, lines 11-17; p. 88, line 4 to p. 90, line 1. It is clear from the Frazier Deposition, that “what went in is not what came out.” Some of the original content that “went in” was deleted or altered; new and additional content “came out” that was generated by the system. Mr. Frazier also demonstrated that the difference is perceptible to a discerning listener.

⁶ Section 153 (43) of the Federal Communications Act defines “telecommunications”: (43) TELECOMMUNICATIONS. The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.

provide telecommunications. Some of DataVoN's vendors may also have contracts with SWB. However, other than some routine phone service contracts, DataVoN and SWB have no contractual or trade relationship.

DataVoN is not a telecommunications carrier. DataVoN never provided any telecommunications service.⁷ Instead, DataVoN used telecommunications to provide information service. As an ESP, DataVoN was a customer that obtained telecommunications service from carriers. As an end user and a consumer (customer) of telecommunications service, DataVoN is exempt from the access charges that SWB seeks to recover in its Administrative Claim. Even if SWB proves the allegations stated in its Administrative Claim, the pleading clearly demonstrates that SWB cannot prove any set of facts that would entitle it to relief sought. DataVoN cannot be liable for the access fees that SWB seeks to recover in its Administrative Claim because DataVoN is exempt from such charges under applicable law.

III.

DEBTORS WERE EXEMPT FROM ACCESS CHARGES AND COULD NOT HAVE ENGAGED IN ANY "SCHEME" TO "UNLAWFULLY AVOID ACCESS CHARGES"

SWB's Claim.

In its pleading, SWB claims that DataVoN assisted in the unlawful avoidance of tariffed access charges that were due to SWB for long distance traffic that SWB terminated to its end users.⁸

As stated above, DataVoN is not a telecommunications carrier. DataVoN never provided any telecommunications service. DataVoN never provided long distance services. DataVoN used

⁷ Telecommunications Service is defined as follows: (46) TELECOMMUNICATIONS SERVICE. The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used. Federal Communications Act, Section 153 (46).

⁸ See, Administrative Claim at ¶ 5.

telecommunications to provide information service. As an ESP, DataVoN was a customer that obtained telecommunications service from carriers. As an end user and a consumer (customer) of telecommunications services, DataVoN is exempt under the applicable statutes and rules from the tariffed switched access charges that SWB claims were unlawfully avoided. How can DataVoN unlawfully avoid a charge that it is exempt from having to pay? It cannot and, as a matter of law, SWB cannot recover those same charges in its Administrative Claim.

SWB further alleges that DataVoN participated in a scheme with *other carriers* to send long distance traffic (to SWB) or other intermediary carriers through a switch or on trunks or through other methods to make the calls appear local calls exempt from the tariffed access charges.⁹

SWB makes the ridiculous assumption that any traffic processed by DataVoN that SWB terminated to its users was “long distance” and therefore subject to tariffed access charges. As an end user and a consumer (customer) of telecommunications service, DataVoN is exempt under the applicable statutes and rules from the tariffed switched access charges that SWB claims were unlawfully avoided. In any event, the traffic that was passed as local was local and SWB acknowledges it was paid for terminating this local traffic at the local termination rate. SWB was not damaged in any way, since it received all that it was entitled to receive.

DataVoN was an enhanced/information service provider. VoIP is an enhanced or information service that uses telecommunications, but is not itself a telecommunications service.

DataVoN provided VoIP services to its customers. Some of the traffic originated from the Public Switched Telephone Network (“PSTN”) and ultimately terminated to the PSTN.¹¹

⁹ See, Administrative Claim at ¶ 6

¹⁰ Intentionally omitted.

¹¹ Presumably, it is the traffic that both originated on the PSTN and was terminated by Southwestern Bell on the PSTN that is in issue in this case. To the extent that Southwestern Bell claims an access entitlement for traffic

Some of the traffic did not either originate or terminate on the PSTN. Some of the traffic “touched” the PSTN at only one end of the call. All of the VoIP services, however, were enhanced and/or information service.

The Federal Communications Commission (“FCC”) has historically differentiated between “telecommunications” (regulated) and “enhanced services” and/or “information services” (unregulated), starting with its holding in the *Computer I* proceeding that data processing services were not telecommunications.¹² Later, in the *Computer II* proceeding, the FCC elaborated on this concept, devising two categories of services: “enhanced” and “basic.”¹³ “Basic service” was defined as the provision of “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information.”¹⁴ “Enhanced service” was defined as

services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.¹⁵

In the *Frame Relay* case, the FCC considered a service combining data transmission over a frame relay network and protocol conversion.¹⁶ It concluded that the transmission service, which included accepting data with protocol information already attached by the customer, and

that touched the PSTN at only one end, it is much more mistaken. Such traffic (“PC to phone”) is even more clearly exempt from access. Southwestern Bell should be required to state whether it claims an access entitlement to anything other than “phone to phone” VoIP traffic that it terminated.

¹² *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 21 RR 2d 1591, 28 FCC 2d 267 (1971) (“*Computer I*”).

¹³ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 44 RR 2d 669, 77 FCC 2d 384, (1980) (“*Computer II*”).

¹⁴ *Id.*, at 420.

¹⁵ *Id.*

¹⁶ *Independent Data Communications Manufacturers Association and AT&T Petition*, 1 CR 409, 10 FCC Rcd 13717 (1995) (“*Frame Relay*”).

merely transporting that data across its frame relay network, was a basic service with raw transmission only. On the other hand, the protocol conversion was an enhanced service, and thus the two services had to be unbundled. The basic frame relay service was to be offered on a common carrier basis under tariff, while the protocol conversion itself was deemed an unregulated enhanced service.¹⁷

In the *Sections 271 and 272* case, the FCC rejected the proposition that the term “information service” referred only to a net conversion of content between two ends of a transmission. The FCC reasoned that “information services” do not merely refer to “services that transform or process the content of the information transmitted by the end-user,” finding that “the statutory definition makes no reference to the term ‘content,’ but requires only that an information service transform or process ‘information.’”¹⁸

The clear implication is that even if a message has the same meaning to the end user as was intended by the sender, the underlying processing could still be considered an information service, *so long as the data is processed in some manner between sender and receiver.* (Emphasis added.)

With the enactment of the Telecommunications Act of 1996, the relevant terms became “information” and “telecommunications”¹⁹ as defined in the Act, rather than “enhanced” and “basic” services. However, we can rely on the FCC’s characterization of “information services”

¹⁷ *Id.* at ¶ 35.

¹⁸ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 5 CR 696, 11 FCC Rcd 21905, at 104 (1996) (“*Sections 271 and 272*”). On the other hand, as will be seen below, if there is a change in form or content, it is not “telecommunications.”

¹⁹ The definition of “telecommunications” also for the first time expressly provided that it must not include a “change in form or content” of “the information as sent or received.”

as a broader category than “enhanced services.”²⁰ If something is an enhanced service it is clearly also an information service.

DataVoN’s VoIP services were “enhanced” and therefore also “information” services. Mr. Frazier demonstrated that DataVoN would process data, convert it from one form to another, add protocol information, process protocols, and perform a number of other tasks that fall squarely in the FCC’s definition of enhanced service. These services are clearly neither “pure transmission capability” nor “transparent in terms of ... interaction with customer-supplied information.”

The distinction between basic and enhanced services is whether the service provider offers a transparent communications path, or whether the provider uses computer processes to add value. VoIP systems add value by increasing efficiency and by providing a capability for integrating voice services with other forms of data and to redirect content (data) to other devices such as computers or pagers.²¹ Accordingly, they are “enhanced,” or “value added,” services.

VoIP providers are end users and are not subject to access charges.

The only entities that are subject to switched access (“carrier’s carrier”) charges are carriers.²² Unless any given entity is a carrier, it is treated as an end user.²³ The FCC has made it clear that ESPs are not carriers.²⁴ ESPs end users are entitled to subscribe to basic local service from incumbent or competitive local exchange carriers in order to provide their information or

²⁰ Sections 271 and 272 at 103.

²¹ Frazier Deposition, p. 12, lines 20-25; p. 18, lines 1-6.

²² See, 47 C.F.R. § 69.5.

²³ See, 47 C.F.R. § 69.2(m).

²⁴ First Report and Order, *In the Matter of Access Charge Reform*, 12 FCC Rcd 15982, 16133-16135, ¶¶ 344-48 (“Access Charge Reform Order”); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, ¶ 789 (released May 8, 1997) (“*Universal Service Order*”). The FCC reviewed the definition of “information service” in FTA96 and concluded that ISPs are neither “telecommunications carriers” nor “other providers of interstate telecommunications.”

enhanced services.²⁵ Their traffic is retail rated as local, e.g., not access.²⁶ The FCC has directly indicated that VoIP is not subject to access charges.²⁷

In the *Access Charge Reconsideration Order*,²⁸ the FCC for the first time explicitly considered applying carrier (rather than end user) access charges on ESPs. It declined to do so:

Were we at the outset to impose full carrier usage charges on enhanced service providers ... who are currently paying local business exchange rates for their

²⁵ *In re GTE Telephone Operators GTOC Tariff No. 1 GTE Transmittal No. 1148, Memorandum Opinion And Order*, CC Docket No. 98-79, 13 FCC Rcd. 22466, ¶ 7 (October 30, 1998), *recon. denied* (February 26, 1999) (“*GTE ADSL*”):

Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges. Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. They also pay the special access surcharge on their special access lines under the same conditions applicable to end users.

²⁶ Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing and Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 91-213, 94-1, 96-263, 96-262, FCC 96-488, ¶ 285 (Rel. Dec. 24, 1996) (“*ISP NOI*”):

As a result of these decisions, ESPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users, by paying business line rates and the appropriate subscriber line charge, rather than interstate access rates. Those business line rates are significantly lower than the equivalent interstate access charges, in part because of separations allocations and the access charge per-minute rate structure, and in part because the business lines that ESPs now purchase generally do not include usage-sensitive charges for receiving local calls. ESPs, consequently, typically pay incumbent LECs a flat monthly rate for their connections regardless of the amount of usage they generate.

²⁷ Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, ¶6. CC Docket No. 01-92, FCC 01-132 (Rel. Apr. 2001) (“*Carrier Compensation NPRM*”):

Existing intercarrier compensation rules may be categorized as follows: *access charge rules*, which govern the payments that interexchange carriers (“IXCs”) and CMRS carriers make to LECs to originate and terminate the long-distance calls; and *reciprocal compensation rules*, which govern the compensation between telecommunications carriers for the transport and termination of local traffic. *Such an organization is clearly an oversimplification, however, as both sets of rules are subject to various exceptions (e.g., long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption).* (Emphasis added)

²⁸ *MTS and WATS Market Structure*, 93 F.C.C.2d 241 (1983) (“*Access Charge Order*”), *modified on reconsideration* 97 F.C.C.2d 682 (1983) (“*Access Charge Reconsideration Order*”), *modified on further reconsideration*, 97 F.C.C.2d 384 (1984), *aff’d in part and remanded in part*, *National Association of Regulatory Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on second further reconsideration*, 101 F.C.C.2d 1222 (1985), *aff’d sub nom*, *AT&T v. FCC*, 832 F.2d 1285 (D.C. Cir. 1987).

interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.²⁹

In addition to “rate shock” resulting from imposing high access charges, the FCC recognized practical problems, such as differentiating between “interstate” and “intrastate” traffic.³⁰ Further, imposing carrier access charges would raise discrimination problems since, as noted, ESPs are not carriers. Assessing carrier access charges on only one subclass of end users would be discriminatory. Applying access charges to ESPs would also require that telephone companies distinguish between ESPs and other end users like large corporations that use private networks and use local facilities in the same way as ESPs.³¹

The decision to not impose access charges on ESPs is sometimes referred to as an “exemption.” It is not a true exemption, however, because ESPs are not and have never been classified by the FCC as carriers. Imposition of access charges on ESPs would logically require reclassification of ESPs as carriers rather than end users. Since ESPs are not telecommunications carriers, they cannot demand interconnection or directly benefit from any of the provisions of §§ 251 or 252 of the Communications Act as amended in 1996, that carriers enjoy.³² The FCC has considered, and rejected, applying access charges on ESPs and has maintained the distinction between ESPs and carriers (and the ESP Exemption) as the market has matured.³³

²⁹ *Access Charge Reconsideration Order*, 97 F.C.C.2d at 715.

³⁰ *Id.* at 713-714.

³¹ *See, Amendments of Part 69 of the Commission’s Rules Related to the Creation of Access Charge Subelements for Open Network Architecture*, 4 F.C.C.R. 3983, 3993, n. 67 (1989) (“*ONA Access Order*”).

³² *See, Universal Service Order*, *supra* at ¶ 789. The FCC reviewed the definition of “information service” in FTA96 and concluded that ISPs are neither “telecommunications carriers” nor “other providers of interstate telecommunications.” Only carriers can request interconnection or UNEs under §§ 251 and 252 of the Federal Act. *GTE ADSL* at 7.

³³ *See, e.g.,* (in chronological order) *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Services Providers*, 2 F.C.C.R. 4305, 4306 (1987); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Services Providers*, 3 F.C.C.R. 2631 (1988) (“*Enhanced Services Access Order*”); *ONA Access Order* at 4535; *Access Charge Reform First Report and Order*, CC Docket No. 96-262, FCC-97158, ¶ 344 (released May 16, 1997) (“*Access Charge Reform Order*”).

For example, the FCC held:

ISPs should not be subjected an interstate regulatory system designed for circuit-switched interexchange voice telephone solely because ISPs use incumbent LEC networks. ... it is not clear that ISPs use the public switched network in a manner analogous to IXCs.³⁴

In conclusion, DataVoN would show the Court that VoIP is an enhanced or information service and not a telecommunications service. As an ESP, DataVoN is not subject to access charges. Accordingly, DataVon could not have acted or participated in a scheme to “avoid” access charges that it is exempt from paying as a matter of law.

Southwestern Bell is misusing the resources of this Court, the parties and the Liquidating Trust.

The Plan Trustee contends that SWB has no real interest in actually seeking payment of any money from the Liquidating Trust. Instead, the Plan Trustee would respectfully show the Court that SWB is conducting a discovery fishing expedition to obtain information that will be used in other *fora*. The Court will recall that Verizon made similar claims and demands, and obtained discovery under an agreed order. Note that Verizon has not filed an administrative claim, and Verizon never quantified its previous claim. Verizon, frankly, has disappeared from this forum. What Verizon did do, however, is selectively use some of the information it obtained here to make similar wild assertions against MCI in the press, in MCI’s bankruptcy case, and recently at the FCC.³⁶ The Court will recall that DataVoN asserted that this is precisely what Verizon would do.³⁷

³⁴ *Access Charge Reform Order*, ¶¶ 343 - 345 (May 16, 1997); *See also, ISP NOI*, Docket 96-263, ¶ 288. (December 24, 1996).

³⁶ Verizon’s actions have been widely reported in the press. Verizon chose to not serve DataVoN with a copy of its FCC filing which has also been reported in the press. The Plan Trustee will endeavor to obtain a copy if necessary.

The Plan Trustee and the Liquidating Trust do not agree to provide SWB with the requested information at this time since it would significantly delay wind-down and deplete the limited resources that are available for distribution to valid creditors. SWB needs to fight its illegitimate regulatory and market place battles with MCI and Focal in another forum, and this Court should refuse to allow SWB to waste the limited resources of the Court, other parties and the Liquidating Trust to support an illegitimate fishing expedition that is not relevant to any present or potential sustainable claim in this case. The Administrative Claim should be stricken because it has no basis in fact or law and SWB's request for discovery should be summarily denied.

If Southwestern Bell's claim is allowed to go forward and discovery is allowed, the Plan Trustee will need to conduct discovery against Southwestern Bell.

A. Discovery on the issue of the ESP "exemption."

The Plan Trustee has reason to believe that Southwestern Bell (including its affiliates) has acknowledged the applicability of the ESP Exemption in its own internal documents. The Plan Trustee also has reason to believe that Southwestern Bell (and/or one of its affiliate companies) is taking advantage of the ESP exemption and is not paying access charges to itself and/or other local exchange carriers when it provides IP Telephony, other enhanced services, and long distance to its end user customers.

SWB's Administrative Claim should be stricken because SWB is simply wrong in its assumption that exchange access applied. SWB's fishing expedition should be halted because further pursuit of this issue will unreasonably drain the precious and limited resources of the Liquidating Trust, other parties and this Court. Should SWB be allowed to go forward, however, then the Plan Trustee will have some discovery to conduct. Any resulting order by the Court

³⁷ Datavon, Inc.'s Motion For Continuance of Hearing on and Objection to Verizon's Motion For Order Authorizing Bankruptcy Rule 2004 Examination of Datavon, Inc. (April 16, 2003), pp. 8, 14-15.

should expressly allow the Plan Trustee to conduct discovery as well. For example, if this matter is pressed, the Plan Trustee will have the right and need to inquire into SWB's (and its affiliate companies) own use of the ESP Exemption that it seeks to deny to the Liquidating Trust, and to further inquire into the extent to which Southwestern Bell (and/or its affiliates) has itself acknowledged the applicability of the ESP Exemption.

B. Southwestern Bell's "damages" calculation.

Southwestern Bell admits in paragraph 6 that it was paid for the traffic in issue on a "local" basis. It then asserts that "local-type charges are generally less than the tariffed access charges for long distance calls." Paragraph 7 then goes on to give an example damages calculation on one alleged "charge number."

SWB's Administrative Claim should be stricken because SWB is simply wrong in its assumption that exchange access applied. Any resulting order by the Court should expressly allow the Plan Trustee to conduct discovery as well. For example, if this matter is pressed, the Plan Trustee will have the right and need to inquire into the compensation that Southwestern Bell did receive for the traffic in issue, whether in the form of basic local charges, "reciprocal compensation" (including "bill and keep") or some other compensation, including possible switched access charge revenues from others. To do this, the Plan Trustee will require Southwestern Bell records, as well as depositions.

IV. SWB IS NOT ENTITLED TO A CLAIM AS MATTER OF FEDERAL BANKRUPTCY LAW

A. SWB Provided No Benefit to the Estate so it Should Not Receive Administrative Priority Treatment.

SWB's request does not set forth facts or legal theories, which qualify for administrative priority treatment under the applicable statutory provision. Section 503(b)(1)(A) of the

Bankruptcy Code affords an administrative priority to entities, which provide “an actual and necessary cost of preserving the estate.” Moreover, courts construe the phrase “actual and necessary” narrowly. *NL Industries v. GHR Energy Corporation*, 940 F. 2d 957, 966 (5th Cir. 1991). The Fifth Circuit requires a claimant seeking administrative priority prove a benefit to the estate and its creditors. *Id.*

SWB did not provide any benefit to the Estate. Incredibly, SWB does not even allege that it supplied any goods and services to the Estate. In fact, the Debtors’ only vendor relationship with SWB was limited to certain regular phone service contracts, which are not described in the request. No other contractual or other commercial relationship between the Debtors and SWB exists. Even SWB recognizes that the Debtors and SWB did not have a vendor or contractual relationship concerning the flow of the Debtors’ traffic. The request clearly states that the Debtors’ traffic was sent not to SWB but to carriers to “eventually terminate on SWB’s network.” See Para. 5. Simply put, SWB is a third party with only a minimal commercial relationship with the Debtors and who provided no benefit to the Estate.³⁸

Instead of proving a benefit to the estate as required for administrative priority treatment, SWB accuses the Debtors of participating in a “scheme” to send long distance traffic in a manner to make local calls appear to be exempt from tariffed access charges. The Trustee denies that any such “scheme” existed. As a provider of VoIP services, the Debtors’ estate is exempt from access charges and does not have any liability for any access charges under any circumstances. However, even in the unlikely event that the estate is liable to SWB, the request

³⁸ In addition to its limited contact with the Debtors’ business operations, SWB did not participate in the Debtors’ bankruptcy case. Although SWB received notice of the Debtors’ bankruptcy filing, SWB did not file its notice of appearance until after the confirmation of the Plan. SWB did file a proof of claim which excluded the damages sought in its request for administrative claim. SWB did not appear at any hearings and did not file any other pleadings. SWB has arrived at the last minute and should not be allowed a claim to the detriment of other legitimate creditors.

should not be afforded an administrative priority, but should be given the status of an unsecured claim.

B. SWB's Claim, If Any, Is Unsecured and Should Be Disallowed Because SWB Missed the Bar Date.

Treating SWB's claim as unsecured rather than a claim for costs of administration is consistent with the definition of claim in the Bankruptcy Code. The Bankruptcy Code utilizes the term "claim" in a broad manner. Section 101(5) provides that a claim is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." The drafters of the Bankruptcy Code intended that even the most remote unliquidated and unproven claims be treated as a "claim." As set forth in the legislative history, "the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 595, 95th Cong., 2d Sess. 309, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5963. The definition of claim is so broad that the occurrence of postpetition events does not transform a prepetition claim into a cost of administration. In fact, courts consistently characterize claims as unsecured even if postpetition events made such claims ripe for payment.

For example, in the context of tort cases, claims can be deemed as general unsecured even though the accident giving rise to the damages sought occurred postpetition. *In re Piper Aircraft Corporation*, 169 B.R. 766 (Bankr. S.D. Fla. 1994). In the *Piper Aircraft* case, an airplane crashed postpetition. The plaintiff filed an administrative claim for damages arising out of the postpetition crash. In *Piper Aircraft*, the court notes that section 101(5) does not preclude the Court from looking at postpetition events to determine the existence of a claim. *Id.* at 773. Although the claim did not become ripe until the plane crashed, the court held that the claim was

not entitled to administrative priority status because the plane was manufactured before the bankruptcy filing.

In another example, in the context of indemnity claims, it is well settled, indemnification claims arise at the time when the tort occurred rather than when the settlement is paid. *In re Food Barn Stores, Inc.*, 175 B.R. 723 (Bankr. W.D. Mo. 1994); *In re Highland Group, Inc.*, 136 B. R. 475 (Bankr. N. D. Ohio 1992). In the *Food Barn* case, both a chapter 11 debtor and its neighbor were sued on a personal injury claim. The neighbor paid the claim after the filing of the debtor's bankruptcy petition and filed an administrative claim for indemnification. The court considered the claim to be a prepetition general unsecured claim because the tort itself, rather than the payment, was the conduct that gave rise to the claim.

In other situations, courts will not allow a creditor administrative priority treatment just because the claim did not become ripe until after the petition date. *In re Phones for All, Inc.*, 288 F.3d 730 (5th Cir. 2002) (Employee who was terminated postpetition not entitled to administrative claim for severance pay from a prepetition employment agreement). *In re T&T Roofing and Sheet Metal, Inc.*, 156 B.R. 780 (Bank. N.D. Tex. 1993) (Taxes assessed postpetition did not qualify for administrative priority treatment where such assessment is effective prepetition). *In re Godwin Bevers Co., Inc.*, 575 F.2d 805 (10th Cir. 1978) (Case under the former Bankruptcy Act in which broker who produced buyer prepetition was not entitled to an administrative claim when sale did not close until after the filing).

In this case, any facts giving rise to the SWB claim are tied to prepetition events. Prior to the filing of its bankruptcy petition, the Debtors provided VoIP service. As part of the service, the Debtors entered into contracts with interexchange carriers and competitive local carriers. The Debtors' network and manner of doing business were established prior to the filing of the

bankruptcy case. The traffic from the Debtors' customers was processed through the Debtors' network and to a competitive carrier, who then entered into a contract between SWB and the competitive carrier. To the extent that any "scheme" was hatched, such scheme would have its genesis in the prepetition conduct of the Debtors. Just like the plane, which crashed postpetition and indemnification obligations which are ultimately paid postpetition, SWB's claim is a general unsecured claim because the conduct of the Debtors leading to the claim occurred prepetition.

SWB cannot meet the statutory requirements for an administrative priority so it is seeking to transform its general unsecured claim into a cost of administration by limiting its claim to postpetition events. As an unmatured, unliquidated claim, SWB's request is specifically the type of claim that the drafters of the Bankruptcy Code included in the definition of claim.⁴⁰ SWB is not entitled to be paid ahead of other unsecured creditors by carefully wording its claim to only cover postpetition events. To the extent SWB has a valid claim (which the Plan Trustee strongly disputes), the claim should be afforded the same status as unsecured creditors.

Finally, SWB should not be afforded any claim at all because it has missed the bar date. As SWB provided some routine phone service to the Debtors, SWB was listed as a creditor and

⁴⁰ Indeed, if SWB was to sue its own vendor Focal Communications Corporation ("Focal") for such damages as it has asserted in this Administrative Claim, SWB would only be entitled to a general unsecured claim. Focal is in its own bankruptcy proceeding in Delaware under case no. 02-13709. SWB has a contract with Focal. Breaches of a contract are considered to have occurred prepetition. 11 U.S.C. §365(g). Also, SWB may have settled with Focal on this issue. On June 6, 2003, Focal filed a Motion For Approval of Settlement Agreement Between the Debtors and the SBC ILEC's. On the same day, Focal filed a Motion Authorizing the Debtors to File Under Seal Settlement Agreement. Focal has apparently settled with SWB. However, due to the filing under seal, the Plan Trustee cannot ascertain whether the settlement includes the amounts sought in SWB's Administrative Claim. The Plan Trustee objects to SWB receiving a double recovery and would need discovery on this issue as well.

did receive notice of the claims bar date. Indeed, SWB filed two claims, one in the amount of \$1,510.41 and the other in the amount of \$714.39. SWB did not include the type of damages described in its Administrative Claim in its proofs of claim. Federal Rule of Bankruptcy Procedure 3003 requires creditors to file a claim no later than the bar date. Section 502(b)(9) provides that claims should be disallowed if not timely filed. To the extent, SWB has a claim, it should be disallowed as untimely.

V. CONCLUSION

SWB's request should be dismissed because the Estate is not liable for access charges under any circumstances. SWB is simply wrong that exchange access applies. SWB is misusing the resources of the Court in an effort to obtain discovery. SWB provided no benefit to the Estate and claim should be classified as unsecured. SWB failed to participate in the case and failed to include these damages on the proof of claim it filed. SWB has missed the bar date and should not have an allowed claim. For all these reasons, the request should be dismissed.

Respectfully submitted,

GERARD SINGER LEVICK & BUSCH, P.C.

By: /s/ Michelle E. Shriro
Michelle E. Shriro
State Bar No. 18310900

16200 Addison Road, Suite 140
Addison, Texas 75001
Tel. (972) 380-5533
Fax (972) 380-5748

— and —

