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JUDGE: M. A. Mahoney

PARTIES: One to One Communications, Inc., Switch Services, Inc., U.S. Access

CHAPTER: 11

ATTORNEYS: T. A. Borowski, Jr., A. R. Maples, Jr.

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KEY WORDS:

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In Re

ONE TO ONE COMMUNICATIONS, INC.

Case No. 95-12383-MAM-11

Debtor.

**ORDER GRANTING IN PART AND DENYING IN PART  
THE MOTIONS OF SWITCH SERVICES, INC. AND U.S. ACCESS  
SEEKING ADMINISTRATIVE EXPENSE STATUS FOR CLAIMS**

T. A. Borowski, Jr., Pensacola, FL, Attorney for the Examiner  
A. Richard Maples, Jr., Mobile, AL, Attorney for Switch Services, Inc. and U.S. Access

This case is before the Court on the motions of Switch Services, Inc., and U.S. Access for payment of administrative claims pursuant to 11 U.S.C. § 503(b). A hearing was held and appearances were noted in the record. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is granting administrative status to the claim of Switch Services, Inc. in the amount of \$6,311.01. As to the remainder of the Switch Services, Inc. claim and the U.S. Access claim, administrative expense status is denied.

**FACTS**

Switch Services, Inc. (SSI), and U.S. Access (USA) filed motions for payment of administrative expenses based upon the Court's order requiring such claims to be filed by January 12, 1997. One to One Communications, Inc. is a Chapter 11 debtor that engages in the sale of telephone services to consumers. In order to provide the services, it in turn is required to purchase access to other carriers' lines to carry calls to whatever locations its customers desire to

call. One to One utilized prebankruptcy SSI's termination services for its customers and USA's circuits. SSI and USA allege that their services were used postbankruptcy as well and that the postbankruptcy filing use should be accorded administrative expense status under 11 U.S.C. § 503(b). One to One filed its Chapter 11 case on July 13, 1995. On February 22, 1996, the Examiner was appointed. One to One's origination service was cancelled on July 28, 1995 by MCI Telecommunications, Inc. (MCI). All services shut down on August 31, 1995. MCI's service provided the ability for One to One customers to commence calls to other parties through use of MCI's network. See Court order of November 14, 1996. With no ability to originate calls, One to One customers could not complete calls.

Switch Services, Inc.

SSI is a provider of wholesale telecommunications termination services to businesses like One to One. Depending upon who a One to One customer was calling, One to One originated the calls of its own customers on its own network or a third party network, and then turned the calls over to SSI or another termination provider for completion if the call was outside One to One's own network. SSI had provided services to One to One pursuant to a written contract since November 1991. SSI billed One to One monthly in arrears for actual minutes of use of SSI's termination services by One to One customers. July 1995 service was billed in August 1995; August service was billed in September 1995. SSI alleged in its motion that \$10,711.48 worth of services were provided to One to One after July 13, 1995. Bills submitted in evidence at trial showed at most \$9220.13 owed as follows:

For services in July 1995 (August bill)

Toll charges	771.17
Other charges	300.00
Finance charges	1,053.04

For services in August 1995 (September bill)

Toll charges	5,711.01
Other charges	300.00
Finance charges	1,084.91

TOTAL 9,220.13

“Toll charges” are the charges for usage of SSI’s termination services by One to One customers. “Other charges” is a \$300 per month charge for a DSI port which connected One to One to SSI’s network. “Finance charges” are computed on One to One’s past due obligations to SSI.

The toll charges One to One incurred from April through August 1995 were as follows:

April	47.14
May	0
June	391.00
July	854.57
August	771.17
September	5711.01

The reason for the increased usage is unknown. One to One did transfer its switches and related fixed assets to its parent entity on February 28, 1995. Switches move calls to other networks.

One to One claims that transfer was a fraudulent transfer.

For the July 1995 bill, SSI cannot break out which calls were made before July 13, 1995 and which were made after that date. SSI has magnetic tapes containing One to One’s call records of SSI services. The usage pre- and post July 13, 1995 could be determined from these tapes.

U.S. Access

USA provided the circuits for One to One calls that run on the telecommunication industry's fiber optic cable network. The circuits allow private line services to be offered to and used by One to One customers. USA claims One to One owes it \$42,080.81 for postpetition services. The billings are as follows:

June (for July services)	21,573.47 <sup>1</sup>
July (for August services)	21,573.47
August (for September services)	4,149.90
September (for October services)	4,132.47
October (for November services)	887.65
TOTAL	52,316.96

The USA bills were mileage based, not usage based. One to One was billed in advance for USA's services. Neither USA nor the Examiner could prove from USA's or One to One's records whether One to One had actually used USA's circuits after filing bankruptcy, but the representative from USA testified that he was "90-95% certain" that USA circuits had been used. He based this upon his review of bills to One to One by termination carriers which would have travelled routes in which USA had circuits. The representative also testified that if One to One had other circuits available, he could not say they were not utilized for the calls he reviewed. The Court file reflects motions for payment of administrative expense by other circuit providers, such as GTE California, Inc., IXC Carrier, Inc., U.S. West Communications, Inc., MCI

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<sup>1</sup> This amount is more than the amount claimed as a postpetition expense because USA prorated the bill and deducted 12/31 of it for the first twelve days of July 1995, when One to One was not in bankruptcy.

Telecommunications Corp., Inc., Western Tele-Communications, Inc., and others, in this case. The representative of USA indicated that he could normally determine if his circuits were used by a review of a customer's records, but One to One's records are in such disarray he cannot. Based on his experience, the representative of USA stated that it was improbable that One to One was so overnetworked that USA's circuits wouldn't be used; however, he could not show any actual use.

### LAW

A creditor is afforded administrative expense status pursuant to 11 U.S.C.

§ 503(b)(1)(A). It states:

[T]here shall be allowed administrative expenses . . . including . . . the actual, necessary costs and expenses of preserving the estate . . .

At issue in this case is how to treat the various different amounts claimed by SSI and USA. The Eleventh Circuit has held there must be an "actual, concrete benefit to the estate" before a claim (other than a rent claim under section 365) is allowable as an administrative expense. *Broadcast Corp. of Georgia v. Broadfoot (In re Subscription Television of Greater Atlanta)*, 789 F.2d 1530 (11th Cir. 1986), *citing*, *Broadcast Corp. of Georgia v. Broadfoot*, 54 B.R. 606 (N.D. Ga. 1985).

The court's rationale is well taken.

The priority of an administrative expense is the highest. 11 U.S.C. § 507(a)(1). The allowance of such a priority is to be carefully considered, only after notice and hearing. 11 U.S.C. § 503(b)(1). That which is actually utilized by a trustee in the operation of a debtor's business is a necessary cost and expense of preserving the estate and should be accorded the priority of an administrative expense. That which is thought to have some potential benefit, in that it makes a business more likely salable, may be allowed as an actual necessary cost and expense of preserving the estate.

789 F.2d 1532.

This Court acknowledges that there are two conflicting theories as to this issue—the *Subscription TV* theory and the theory that the contract price should determine the claim. The second theory is found in cases which follow the rule set forth in *Matter of Fred Sanders Co.*, 22 B.R. 902 (Bankr. E.D. Mich. 1982). The *Subscription TV* theory developed by the Eleventh Circuit has been followed by numerous courts as indicated in the decision of *Kinnan & Kinnan Partnership v. Agristor Leasing*, 116 B.R. 162, 166 (D. Neb. 1990). Although courts in other jurisdictions have disagreed with the *Subscription TV* view, the Eleventh Circuit rule is binding authority in this circuit and the Court believes it applies to this case. The Court also believes it is the more well reasoned view.

Since only actual concrete benefits to One to One may be accorded administrative expense priority, the Court must look at the SSI and USA charges in that light. The burden of proof is on the claimants to prove actual benefit. *In re Bridgeport Plumbing Products, Inc.*, 178 B.R. 563, 569 (Bankr. M.D. Ga. 1994). Although that burden may be a hardship for SSI and USA in this case considering the Examiner's lack of records, equity does not shift the burden. SSI and USA must prove usage.

#### Switch Services, Inc.

There are three problems with SSI's August and September 1995 bills to One to One according to the case law. The August bill for July services does not determine how much of the bill is for prepetition services (pre-July 13, 1995) and how much of the bill is for postpetition services. Second, the bills include finance charges on One to One's past due account balance. Third, the toll charges rose significantly in August 1995 (September 1995 bill).

It is SSI's burden to prove which toll charges were incurred from July 13-31, 1995. Calls placed before that date are prepetition unsecured claims. Even though One to One's records

make this proof impossible, that does not shift the burden. Therefore, the July 1995 (August bill) toll charges of \$711.17 must be disallowed. The port charge of \$300 was shown to be necessary. Although exact toll charges in July could not be shown, the Court finds that some usage occurred or at least it was necessary to maintain the connection for the August 1995 usage.

The August 1995 (September bill) toll charges are a proper claim. Although not shown to be charges of One to One customers with certainty, the Court finds proof of the charges' validity by a preponderance of the evidence. The charges were on One to One's lines. One to One did transfer its switches to its parent, American Telecom Network, on February 28, 1995, but continued to utilize the switches thereafter. One to One tried to show that ATN may have utilized the lines. Without more, this evidence was insufficient to rebut the SSI evidence that charges were incurred. Therefore, in the September bill, the \$5,711.01 and \$300 are allowable.

The finance charges in both bills represent charges added to prepetition debts. Such interest is not allowable as a postpetition expense. It is not necessary nor does the charge provide a benefit to the estate.

#### U.S. Access

USA's bills are flat fees and are not based upon use. Even if no calls travelled across USA circuits in any month, the charges were still incurred. Neither party could prove whether any usage occurred for July-November 1995. The Court knows from the lack of ability to originate calls after August 31, 1995, no billings after August would be allowable. Therefore, no concrete benefit to One to One was proven.

Since actual usage cannot be shown, USA also cannot determine how the June bill (for July services) should be divided based upon usage. The only method by which the bill can be broken down is on a pro rata basis by days. This does not comply with the actual use standard.



CONCLUSION

Therefore, the claim of SSI is allowed to the extent of toll charges and the \$300 per month other charge for August 1995 in the amount of \$6,311.01. The entire claim of USA must be denied administrative expense status.

THEREFORE IT IS ORDERED:

1. Switch Services, Inc. is allowed an administrative expense claim of \$6,311.01;
- and
2. The Motion of U.S. Access for administrative expense status for its claim is DENIED.

Dated: April 23, 1997

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MARGARET A. MAHONEY  
CHIEF BANKRUPTCY JUDGE