

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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IN RE:	§	
UPH HOLDINGS, INC.	§	CASE NO. 13-10570
PAC-WEST TELECOMM, INC.	§	CASE NO. 13-10571
TEX-LINK COMMUNICATIONS, INC.	§	CASE NO. 13-10572
UNIPOINT HOLDINGS, INC.	§	CASE NO. 13-10573
UNIPOINT ENHANCED SERVICES, INC.	§	CASE NO. 13-10574
UNIPOINT SERVICES, INC.	§	CASE NO. 13-10575
NWIRE, LLC	§	CASE NO. 13-10576
PEERING PARTNERS COMMUNICATIONS, LLC	§	CASE NO. 13-10577

DEBTORS. § CHAPTER 11

EIN: 45-1144038; 68-0383568; 74-2729541; 20-3399903; 74-3023729; 38-3659257; 37-1441383; 27-2200110; 27-4254637

6500 RIVER PL. BLVD., BLDG. 2, # 200 § JOINT ADMINISTRATION
AUSTIN, TEXAS 78730 § REQUESTED

DEBTORS' OMNIBUS MOTION FOR ORDER APPROVING REJECTION OF UNEXPIRED CONTRACTS NUNC PRO TUNC TO PETITION DATE

TO THE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW UPH Holdings, Inc., ("UPH"), Pac-West Telecom, Inc., ("Pac-West"), Tex-Link Communications, Inc. ("Tex-Link"), UniPoint Holdings, Inc. ("UniPoint Holdings"), UniPoint Enhanced Services, Inc. ("UniPoint Enhanced"), UniPoint Services, Inc., ("UniPoint"), nWire, LLC ("nWire"), and Peering Partners Communications, LLC ("Peering Partners") (collectively the "Debtors"), and debtors-in-possession in the above-captioned Chapter 11 cases and file this their Omnibus Motion for Order Approving the Rejection of Unexpired Contracts *Nunc Pro Tunc* to Petition Date (defined herein) (the "Motion") pursuant to 11 U.S.C. § 365(a).

In support, the Debtors would show:

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I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Motion is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O). The relief requested in this Motion is sought pursuant to 11 U.S.C. § 365(a).

II. FACTUAL BACKGROUND

2. On March 28, 2013 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors continue in possession of their property and management of its business as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

3. A description of the background of the Debtors and the events leading up to the filing of the voluntary petitions by the Debtors, is provided in the Declaration of J. Michael Holloway in Support of First Day Motions, which is incorporated herein by reference.

4. The Debtors are a group of affiliated entities that provide telecommunication services in a variety of contexts including voice over Internet protocol ("VoIP"), local exchange and enhanced telecommunications, and data services. A brief background of each of the Debtors follows:

A. Corporate Organization

i. UPH Holdings, Inc.

5. UPH Holdings, Inc. ("UPH") is a Delaware corporation headquartered in Austin, Texas. UPH is a privately held, non-operating holding company with investments in UniPoint Holdings and Pac-West, and indirect investments in subsidiaries of those two companies. UPH does not currently hold any authorizations to provide telecommunications services. UPH was formed to hold the stock of Unipoint Holdings, and its subsidiaries, Peering Partners, and nWire. UPH then acquired the stock in Pac-West pursuant to a Merger Agreement dated September 7, 2011. As a result of these various transactions and the Pac-West Merger Agreement, UPH is now the holding

company for UniPoint Holdings, Inc. and Pac-West Telecomm, Inc. All other Debtors are subsidiaries of either UniPoint Holdings, Inc. or Pac-West Telecomm, Inc.

ii. UniPoint Holdings, Inc.

6. UniPoint Holdings, Inc., a Delaware corporation, (“UniPoint Holdings”) provides enhanced product and service offering to meet the needs of rapidly evolving communications world, primarily in the wholesale arena. Products and services offered by UniPoint Holdings include: business and residential communications services, IP peering, unbundled VoIP network elements, direct Internet access, virtual private networks, virtual network elements, origination, termination, toll-free, and other cloud-based services. UniPoint Holdings was formed in 2001 to acquire the assets of PointOne Communications, Inc. and its various subsidiaries out of the chapter 11 reorganization case, *In re PointOne Communications, Inc.*, in the United States Bankruptcy Court for the Western District of Texas, Case No. 01-12978-FRM.

iii. Pac-West Telecomm, Inc.

7. Pac-West Telecomm, Inc., a California corporation (“Pac-West”), provides advanced telecommunications and data services, enabling traditional and next-generation carriers to efficiently design, deploy, and deliver integrated communications solutions. Pac-West offers origination, termination, managed modem, co-location, database, and transport services. Pac-West currently operates as a competitive local exchange carrier (“CLEC”) and holds a certificate of public convenience and necessity (“CPCN”) in California, Alabama, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. Pac-West is also certified as a competitive carrier in the District of Columbia. Pac-West currently offers all forms of telecommunications, including: local and long distance origination and termination; switched

and special access; 8YY originating access and 8YY services; managed modem; and collocation services.

iv. Peering Partners Communications Holdings, LLC

8. Peering Partners Communications Holdings, LLC, (“Peering Partners”) is a Texas LLC, qualified to do business in the State of Nevada. Peering Partners was formed for the purposes of acquiring the carrier services division of CommPartners Holding Corporation (“CommPartners”)¹ that provides wholesale origination and termination services to other carriers throughout the United States. Peering Partners has contracts with either enhanced service providers (“ESP”s), who generate IP-based traffic, or other carriers who, in turn, have contracted with ESPs, who generate IP-based traffic, to have the traffic carried across Peering Partners’ network, convert the traffic to TDM, and hand it off to the terminating carrier. Peering Partners operates in a highly competitive and price-sensitive segment.

v. nWire LLC.

9. nWire LLC (“nWire”), a Texas LLC, is a facilities-based CLEC certified to provide services in Texas, Arkansas, and Oklahoma.

vi. UniPoint Services, Inc.

10. UniPoint Services, Inc. (“UniPoint Services”) is a Texas corporation that buys and sells unbundled network communications elements.

vii. UniPoint Enhanced Services, Inc.

11. UniPoint Enhanced Services, Inc. (“UniPoint Enhanced Services”) is a Texas corporation that provides enhanced services.

¹ The acquisition of the CommPartners Carrier Services division closed on December 23, 2010, and was approved in In re CommPartners Holding Corporation, Case No. BK-S-10-20932-LBR; in the United States Bankruptcy Court for the District of Nevada.

viii. Tex-Link Communications, Inc.

12. Tex-Link Communications, Inc. ("Tex-Link") is a telecommunications company that provides customized voice and data services to small- and medium-sized businesses through a facilities-based local exchange and inter-exchange network.

B. Events Leading up to the Petition Date

13. Following the merger with PacWest, the Debtors have struggled to retire overhang debt predating the merger. In addition, carrier services and other wholesale services are subject to increasing downward price pressures that will only increase given recent regulatory pronouncements. In addition, the Ninth Circuit recently reversed the ruling of the California Public Utilities Commission ("PUC") concerning certain CLEC-to-CLEC state access tariff charges that Pac-West had been awarded from Comcast Phone of California and other California CLECs.² This reversal will also potentially affect access tariffs collected in other states. Economically, this ruling means that access tariffs paid to Pac-West five to ten years ago will now have to be refunded to various sister CLECs. Further, although the CLECs are owed the refund, those same CLECs and various affiliates owe the Debtors a roughly equal amount, but refuse to offset these sums and are now threatening disconnection of services to the Debtors or other collection remedies.

14. To avoid the loss of any of its network facilities or functionality, the Debtors determined to initiate these proceedings to maximize the value of the estate for the benefit of all creditors, to provide a forum for resolution of the offsetting accounts, and to treat each of the Debtors' creditors *pari passu*.

² AT&T Communications of California, Inc. v. Pac-West Telecomm, Inc., 651 F.3d 980 (9th Cir. 2011).

15. Although the Debtors continue to struggle with overhang debt and the Ninth Circuit reversal, recent regulatory rulings will provide the necessary certainty that has eluded competitive exchange carriers, enhanced service providers, and VoIP networks for nearly two decades. Without the burden of overhang debt and secured debt service, the Debtors have positive cash flow and anticipate additional revenue growth.

16. The Debtors filed these Chapter 11 cases to pursue a reorganization. The Debtors expect to continue core activities pertaining to each of its business units during the reorganization process, including focusing upon its telecommunication business, and anticipate emerging successfully from Chapter 11. As part of the reorganization process, the Debtors will seek to retain a financial advisor to aid the Debtors in their reorganization efforts. The instant Motion is directed at the Debtors' desire to reject various executory contracts that are burdensome to their estates.

III. RELIEF REQUESTED

17. Pursuant to this Motion, Debtors seek an order from the Court approving the rejection of certain unexpired leases and contracts (the "Contracts") identified in Exhibit "A." Debtors request that the rejection of the Contracts be authorized *nunc pro tunc* to the Petition Date. A list of the Contracts subject to this Motion is attached hereto as Exhibit "A." The Debtors entered into the Contracts with the parties identified in Exhibit "A." The Debtors will provide copies of the Contracts upon the request of any interested party in this matter as the documents are voluminous and production other than on request would be burdensome and expensive.

18. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors may, subject to Court approval, reject unexpired leases and executory contracts. The Bankruptcy Code does not provide a standard for determining when a debtor's rejection of an executory contract is appropriate. *See In re Monarch Tool & Manufacturing Co.*, 114 B.R. 134 (Bankr. S.D. Ohio 1990). Bankruptcy courts, however, generally acknowledge that the business judgment standard should be applied to determine

whether to authorize the rejection of executory contracts and unexpired leases. *See In re Liljeberg Enters., Inc.*, 304 F.3d 410, 438 (5th Cir. 2002); *In re Pilgrim's Pride Corp.*, 403 B.R. 413 (Bankr. N.D. Tex. 2009); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36 (3d Cir. 1989). Notably, the burden or hardship on the non-debtor party to a rejected contract is not a factor to be considered. *See Borman's, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 189 (6th Cir. 1983).

19. In addition, bankruptcy courts are empowered to authorize retroactive rejection of an executory contract or unexpired lease under § 365(a) of the Bankruptcy Code if the equities favor retroactive rejection. *See, e.g., Thinking Machines Corp. v. Mellon Financial Services Corp #1 (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995); *Stonebriar Mall Ltd. P'ship v. CCI Wireless, LLC (In re CCI Wireless, LLC)*, 297 B.R. 133, 138 (D. Colo. 2003).

20. As stated above, after careful review and due deliberation, the Debtors have determined in their business judgment that the Contracts are unnecessary to the continued operation of the Debtors' businesses, have no value to the Debtors' estates, and should be rejected. As a consequence, the Contracts are no longer of use to the Debtors. Moreover, the Contracts have terms that are burdensome on the Debtors and have no residual value for the Debtors. Additionally, because the failure to reject these Contracts could result in the incurrence of unnecessary expense for the Debtors, the rejection of these Contracts is appropriate. The purpose of the rejections requested herein is to reduce the size and costs of the Debtors' operations to be in line with their income, thus, in turn, fostering the Debtors' reorganization.

21. In the business judgment of the Debtors, the rejection of the Contracts identified in Exhibit "A" is in the best interest of the Debtors, their creditors, all other parties in interest, and should be approved. By rejecting the Contracts as of the Petition Date, the Debtors will be relieved from

burdensome terms under the Contracts. The resulting savings from the rejection of the Contracts will increase the Debtors' cash flow and assist in managing their estates, further promoting their reorganization. Furthermore, rejection of the Contracts effective as of the Petition Date is necessary and justified under the circumstances. Thus, the Debtors believe that the *nunc pro tunc* rejection of the Contracts as of the Petition Date is in the best interest of the Debtors' estates, their creditors, and other parties in interest.

WHEREFORE, PREMISES CONSIDERED the Debtors pray that the *nunc pro tunc* rejection of the Contracts identified in the attached Exhibit "A" be approved, and that the Debtors have such other relief as is just.

Dated: March 28, 2013.

Respectfully submitted,

JACKSON WALKER L.L.P.
100 Congress Ave., Suite 1100
Austin, Texas 78701
(512) 236-2000
(512) 236-2002 - FAX

By: /s/ Jennifer F. Wertz
Patricia B. Tomasco
State Bar No. 01797600
(512) 236-2076 – Direct Phone
(512) 691-4438 – Direct Fax
Email address: ptomasco@jw.com

Jennifer F. Wertz
State Bar No. 24072822
(512) 236-2247 – Direct Phone
(512) 391-2147 – Direct Fax
Email address: jwertz@jw.com

**PROPOSED COUNSEL FOR
DEBTORS-IN-POSSESSION**

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March 2013, a true and correct copy of the foregoing has been served either electronically or via United States mail, postage prepaid, or facsimile to the following, and upon the parties listed on the attached.

U.S. Trustee
903 San Jacinto, Room 230
Austin, TX 78701

Stuart Komrower
Ilana Volkov
COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.
25 Main Street
Hackensack, New Jersey 07601

/s/ Jennifer F. Wertz _____

Jennifer F. Wertz

LIST OF CONTRACTS TO REJECT

Customer	Address	Contract Date	Contract Name
Tandem Design, LLC		June 2009	Addendum to 8YY contract
Soundbite		July 28, 2010	8YY Amendment
Reynwood Communication, Inc.		April 23, 2010	Service Order Agreement Addendum – Marketing Fee 8YY Origination
Reliance Communications, Inc.		February 27, 2009	Service Order Agreement Addendum – Marketing Fee 8YY Origination
Novatel, Ltd.		July 1, 2009	Service Order Agreement Addendum – Marketing Fee 8YY Origination
Network Communication International		March 8, 2010	Service Order Agreement Addendum – Marketing Fee 8YY Origination
ITalk Global Communications		June 12, 2009	Service Order Agreement Addendum – Marketing Fee 8YY Origination
InterMetro Communications, Inc.		November 6, 2009	Service Order Agreement Addendum – Marketing Fee Inbound
IBDC Telecom		December 1, 2009	Service Order Agreement

			Addendum – Marketing Fee 8YY Origination
Free Conferencing, Inc.		May 7, 2010	Service Order Agreement Addendum – Marketing Fee Inbound
EarthLink, Inc.		April 27, 2011	Amendment No. 7 to Master Services Agreement
EarthLink, Inc.		July 20, 2009	Amendment No. 5 to Master Services Agreement
WildGate Wireless, Inc.	5280 E Beverly Rd., Bldg. C-274 Los Angeles, CA 90022		Agent Fee Agreement – 8YY Traffic
DIDWW Ireland, Ltd.			Service Order Agreement Addendum – Marketing Fee Inbound
Data Cents	129 West Coast, San Antonio, Texas 78257	April 2, 2009	Revenue Sharing Agreement
Communications Distributions, Inc.	4501 Magnolia Cove Drive, Ste 204, Kingwood, Texas 77345	May 11, 2009	Confidentiality and NonDisclosure Agreement
Broadvox, LLC		March 18, 2010	Service Order Agreement Addendum – Marketing Fee 8YY Origination
Blogtalk Radio		April 22, 2010	Service Order Agreement Addendum – Marketing Fee

			Inbound
Origination Services LLC	11442 Lake Butler Blvd., Windermere, FL 34786	February 25, 2011	Contract Reseller and Referral Agreement
Belgacom International Carrier Services SA		August 7, 2009	Service Order Agreement Addendum – Marketing Fee 8YY Origination
AOL, Inc.	22000 AOL Way, Dulles, Virginia 20166	January 29, 2010	Network Services Agreement
AOL, Inc.	22000 AOL Way, Dulles, Virginia 20166	February 2, 2010	Network Services Agreement
AOL, Inc.	22000 AOL Way, Dulles, Virginia 20166	March 31, 2011	Amendment No. 1 to Network Services Agreement
United Online, Inc.	2555 Townsgate Rd. Westlake Village, CA 91631	January 1, 2003	Service Provider Agreement (and all amendments thereto)
Base Systems, Inc.	8 Penn Center West, Suite 101 Pittsburgh, PA 15276	November 10, 2009	Service Order Agreement
Global Pops, Inc.	325 Mt. Lebanon Blvd. Pittsburgh, PA 15234		Request to Transfer Customer Responsibility
Global Pops, Inc.	325 Mt. Lebanon Blvd. Pittsburgh, PA 15234	November 16, 2005	Addendum to Master Services Agreement
Global Pops, Inc.	325 Mt. Lebanon Blvd. Pittsburgh, PA 15234	June 17, 2003	Amendment to the Managed Modem Services Agreement
Global Pops, Inc.	325 Mt. Lebanon Blvd. Pittsburgh, PA 15234	March 31, 2004	Addendum to Managed Dial Access Service (Hourly)

			Agreement
GatorComm Solutions, LLC		January 20, 2010	Service Order Agreement Addendum – Marketing Fee 8YY Origination
UniChip, LLC	11653 El Sorrel Lane, Scottsdale, AZ 85259	November 1, 2010	Master Services Agreement
UniChip, LLC	11653 El Sorrel Lane, Scottsdale, AZ 85259	July 22, 2010	Service Order Agreement Addendum – 8YY Marketing Fee Rate Amendment
Routed Systems, Inc.		June 11, 2009	Service Order Agreement Addendum – Marketing Fee 8YY Origination
SIPGATE, Inc.		January 27, 2010	Service Order Agreement Addendum – Marketing Fee Inbound
Skype, Inc.	24/24 Boulevard Royal, L-2449 Luxembourg, Luxembourg	May 25, 2010	Reseller Agreement

Steve Hubbard / RBC
P.O. Box 73199
Chicago, IL 60673

One Communications/Earthlink
P.O. Box 415721
Boston, MA 02241-5721

America OnLine
P.O. Box 1450
Minneapolis, MN 55485-8702

Telesense
Cabs Department
P.O. Box 364300
Las Vegas, NV 89133-6430

Cox Communications
ATTN: COX ACCESS BILLING
P.O. Box 1053390
Atlanta, GA 30348-5339

CenturyLink
P.O. Box 2961
Phoenix, AZ 85062-2961

Frontier
P.O. Box 92713
Rochester, NY 14692-0000

Cogent Communications
P.O. Box 791087
Baltimore, MD 21279-1087

Genband, Inc.
P.O. Box 731188
Dallas, TX 75373-1188

Samsara
1250 S Capital of Texas Highway
Bldg 2-235
West Lake Hills, TX 78746

La Arcata Development Limited
ATTN: ACCOUNTS RECEIVABLE
c/o NAI Reco Partners
1826 N. Loop 1604 W, #250
San Antonio, TX 78248

Grande Communications Network
Dept 1204
P.O. Box 121204
Dallas, TX 75312-1204

Telus Corporation
215 Slater Street
Ottawa, Ontario, K1P 5N5
CANADA

Alpheus Communication
Dept 566
P.O. Box 43460
Houston, TX 77210-4346

Hines Reit One Wilshire, L.P.
Dept 34124
P.O. Box 390000
San Francisco, CA 94139

Bandwidth.Com, Inc.
75 Remittance Drive, Suite 6647
Chicago, IL 60675

Pac Bell
P.O. Box 166490
Atlanta, GA 30321-0649

Arent Fox LLP
1050 Connecticut Ave. N.W.
Washington, DC 20036-5339

FPL FiberNet LLC
TJ412-01-0-R
ATTN: FISCAL SERVICES
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Pilot Communications
P.O. Box 77766
Stockton, CA 95267-1066