

130000-0T

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

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

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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 § JOINTLY ADMINISTERED UNDER
AUSTIN, TEXAS 78730 § CASE NO. 13-10570-TMD

**DEBTORS' MOTION FOR ORDER
AUTHORIZING (1) THE PAYMENT OF PRE-PETITION
CONTRACT AMOUNTS TO CONTRACT LABOR; AND (2) THE
PAYMENT OF CERTAIN PRE-PETITION EMPLOYEE BENEFITS**

TO THE HONORABLY 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")

COM	_____
AFD	_____
APA	_____
ECO	_____
ENG	_____
GCL	_____
IDM	_____
TEL	_____
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(collectively the "Debtors"), by and through their proposed, undersigned counsel, file this
Motion for Order Authorizing (1) the Payment of Pre-Petition Contract Amounts to Contract

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Labor; and (2) the Payment of Certain Pre-Petition Employee Benefits (“Motion”), and in support, would show the Court as follows:

I. SUMMARY OF THE MOTION

1. Through this Motion, the Debtors seek authority to (1) pay prepetition wages to various of its contract laborers; and (2) pay certain prepetition employee benefits, specifically unpaid vacation pay, to certain terminated employees. In particular, the Debtors seek authority to pay seven of its contractor laborers prepetition amounts that did not receive their scheduled compensation due to an inadvertent error prior to the filing of the Debtors’ Petitions and authority to pay unpaid vacation pay to certain terminated employees.

2. The relief requested by the Motion is necessary to maintain the Debtors’ operations, particularly in California; the Debtors believe that without the requested relief, the Debtors will experience great difficulty in retaining their current contract staff. Maintenance of the Debtors’ current contract labor staff is necessary for the Debtors to be able to continue their operations while in Chapter 11 and additionally, is necessary to promote the Debtors’ reorganization.

3. As of the Petition Date, the Debtors owed approximately \$25,780.56 in compensation to seven of its contractor labor staff, who, pursuant to the Debtors’ business practices, are paid as contractors, but who work for the Debtors. In addition, as of the Petition Date, the Debtors owe \$23,183.05 in accrued pre-petition obligations relating to vacation pay to certain terminated employees. The Debtors seek authority to pay such amounts in the ordinary course of business and pursuant to their rights, powers, and duties as debtors in possession.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O). Venue of the

Debtors' Chapter 11 case is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The relief requested in this Motion is sought pursuant to 11 U.S.C. §§ 105, 363, 507(a)(3), and § 1107(a).

III. BACKGROUND

5. On March 25, 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 their business as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108. No trustee, examiner, or committee has yet been appointed in these cases.

6. As discussed above, as of the Petition Date, the Debtors owed approximately \$25,780.56 in compensation to seven of its contract laborers, who, pursuant to the Debtors' business practices, are paid as contractors, but who work for the Debtors. In addition, as of the Petition Date, the Debtors owe \$23,183.05 in accrued pre-petition obligations relating to vacation pay to certain terminated employees.

IV. THE PAYMENT OF PREPETITION CONTRACT AMOUNTS TO CONTRACTORS

7. As of the Petition Date, the Debtors owed approximately \$25,780.56 to certain of their contract laborers, who are paid as contractors, but who work for the Debtors ("Unpaid Contractors"). The list of Unpaid Contractors and the amounts due to them are included on attached Exhibit "A." The Unpaid Contractors were due to be paid immediately before the Petition Date, but through an inadvertent error, were not timely paid by the Debtors for work already performed prepetition. Notably, as illustrated by the chart contained in Exhibit 'A,' none of the Unpaid Contractors are owed amounts over the limits in 11 U.S.C. § 507 (a)(4).

Moreover, all of the amounts owed to the Unpaid Contractors listed on Exhibit A were earned within the 180 days before the Petition Date.

8. The Debtors believe that failure to pay the amounts due to the Unpaid Contractors will have an immediate and negative effect on employee morale, especially in their California-based operations. As shown on Exhibit A, the majority of the Unpaid Contractors provide necessary services on a contract basis to the Debtors in Stockton, California, and the balance of the Unpaid Contractors provide services on a contract basis to the Debtors in Austin, Texas. Without the authority to pay the Unpaid Contractors, the Debtors believe that morale will be severely diminished among the Unpaid Contractors, and such diminished morale may very well harm the Debtors' operations. Stability and maintenance of the Debtors' current staff, including those paid as contractors, is essential to the Debtors' ability to continue their operations as normally as possible while in Chapter 11 and thus, is necessary to support the Debtors' reorganization efforts.

V. THE PAYMENT OF CERTAIN PRE-PETITION EMPLOYEE BENEFITS

9. As of the Petition Date, the Debtors owed approximately \$23,183.00 in unpaid vacation to nine of its prior employees ("Unpaid Vacation"), as provided on the attached Exhibit "B." Under California state law, earned vacation time is considered to be wages and vacation time is earned as labor is performed. *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 784 (Cal. 1982); *Owen v. Macy's Inc.*, 175 Cal. App. 4th 462, 468 (Cal. Ct. App. 2009); CAL. LABOR CODE § 227.3 (West 2012). Moreover, under California law, vacation pay cannot be forfeited, even upon termination of employment, regardless of the reason for the employee's termination. *Id.* Upon the employee's termination, all earned and unused vacation pay must be paid to the employee, at that employee's rate of pay as of the date of termination. *See* CAL. LABOR CODE § 227.3.

10. Through this Motion, the Debtors request authority to pay the Unpaid Vacation as shown on Exhibit "B." The Debtors believe that any failure to pay the Unpaid Vacation to the terminated employees will have an immediate and negative effect on current employee morale, particularly in their California-based operations. The Debtors believe the manner in which they treat terminated employees, especially by paying unpaid vacation pay in compliance with California law and in line with employee expectations, will have a great and direct impact on their ability to retain current staff in California. Moreover, as illustrated in the chart on Exhibit B, none of the Unpaid Vacation amounts are over the limits in 11 U.S.C. § 507 (a)(4).

11. As discussed above, failure to pay unpaid vacation pay after an employee has been terminated is akin to failing to pay ordinary wages to an employee under California law. *See* Cal. Labor Code § 227.3. Obviously, the failure to pay even terminated employees in accordance with state law and in line with employee expectations will result in decreased confidence in the Debtors and reduced loyalty on the part of the Debtors' current employees. Without the authority to pay the terminated employees their Unpaid Vacation, the Debtors believe that employee morale and loyalty will be severely diminished among the Debtors' current staff in California, and such diminished morale may very well result in grave attrition problems, precisely at the time when such morale and loyalty is of critical importance to the Debtors. Maintenance of the Debtors' current staff in California is essential to the Debtors' ability to continue their operations as normally as possible while in Chapter 11 and thus, is an essential element in the Debtors' reorganization efforts.

VI. RELIEF REQUESTED

12. The Debtors seek authority to pay (1) unpaid amounts due to the Unpaid Contractors and (2) unpaid amounts due that constitute Unpaid Vacation, as described above.

13. The relief requested is appropriate under the circumstances. With respect to payment to the Unpaid Contractors and payment for the Unpaid Vacation, the amounts that the Debtors are seeking to pay would be entitled to priority status under the aggregate caps set forth in § 507(a)(4) of the Bankruptcy Code. Under § 1129(a)(9), a plan of reorganization cannot be confirmed unless each holder of a claim under §§ 507(a)(4) is paid in full in cash on the effective date of the plan (unless any class of such claims votes to accept less favorable treatment). Accordingly, given that payment due to the Unpaid Contractors and payment for the Unpaid Vacation will be entitled to priority status, paying amounts due under such claims has no effect on future distribution to unsecured creditors. In fact, the Debtors will likely have to pay these claims in full in order to confirm a plan of reorganization. See 11 U.S.C. § 1129(a)(9)(B). Accordingly, granting the relief sought herein would affect primarily only the timing, and not the amount of payment, to the Unpaid Contractors and for the Unpaid Vacation, to the extent that they constitute priority claims.

14. With respect to analogous requests to pay similar prepetition claims, courts have granted debtors in possession the requisite authority on motion and outside of a plan of reorganization. See, e.g., *In re CEI Roofing, Inc.*, 315 B.R. 50 (Bankr. N.D. Tex. 2004); *In re Crafts Precision Industries, Inc.*, 244 B.R. 178 (B.A.P. 1st Cir. 2000). For example, in *CEI Roofing, Inc.*, the bankruptcy court, after a thorough discussion, decided whether the debtors there should be permitted to pay certain prepetition wages and commissions, and continue certain employee benefits, including vacation. *Id.* at 53. The debtors in *CEI Roofing* argued that because the payments for which they sought court authority to make would be priority claims under § 507(a)(3) and (4), the issue of paying such claims was nothing more than a timing issue. *Id.* The bankruptcy court then observed that “the payment of prepetition wage claims of

employees that qualify as priority wage claims under § 503(a)(3) does not trigger the same concerns (i.e. upsetting priorities under the Code and unfair discrimination among general unsecured claims).” *Id.* at 60. Summing up Fifth Circuit law on the subject, the court in *CEI Roofing* further observed that “there has evolved a rule for the payment of prepetition wages and benefits which is based on both common sense and the express provisions of the Bankruptcy Code. If employees are not paid, they will leave. If they leave the Debtor’s business, the bankruptcy case fails shortly after the filing. No one will benefit from the process.” *Id.* at 61. The bankruptcy court thus found that it had the authority under §§ 105 and 507(a)(3) and (4) to authorize the debtors to pay the priority wages and employee benefits prior to confirmation of a plan of reorganization. *Id.*

15. These similar common-sense based concerns also resounded in *In re Equalnet Communications, Corp.*, 258 B.R. 368 (Bankr. S.D. Tex. 2000). There, the bankruptcy court granted the debtor’s motion to pay an independent contractor prepetition compensation and expenses. *Id.* at 369. In so holding, the court observed that the debtor’s “need to pay these claims in an ordinary course of business time frame is simple common sense. Employees are more likely to stay in place and to refrain from actions which could be detrimental to the case and/or the estate if their pay and benefits remain intact and uninterrupted.” *Id.* at 370. The court then found that the contract employee was necessary to the estate and her claim would be equal to a priority wage claim, thus allowing it in the amount of the statutory cap. *Id.*

16. The relief requested in this Motion is also supported by several other provisions of the Bankruptcy Code. For example, courts have found a basis for allowing debtors to make payments to pre-petition creditors under § 363 of the Bankruptcy Code. *See, e.g., In re UAL Corp.*, Case No. 02-48 191 (ERW) (Bankr. N.D. Ill. Dec. 11, 2002); *In re Equalnet Comms.*

Corp., 258 B.R. 368 (S.D. Tex. 2011). Allowing relief to the Debtors and authorizing these types of payments is based on the recognition that individuals such as the Debtors' employees are indispensably necessary to the continued operations of the Debtors, and accordingly, the payment will ultimately benefit all creditors. *See In re Oxford Mgmt., Inc.*, 4 F.2d 1329 (5th Cir. 1993); *In re Boston & Main Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980). Authority for such payments can also be found in §§ 1107(a) and 1108 of the Bankruptcy Code, which vest debtors-in-possession with (i) the authority to continue operating their businesses and (ii) the fiduciary duty to maximize value for their estates. *See. e.g., In re Mirant Corp.*, 296 BR. 427 (Bankr. N.D. Tex. 2003); *In re CoServ. L.L.C.*, 273 BR. 487, 498 (Bankr. N.D. Tex. 2002).

17. The Debtors' immediate payment of both the Unpaid Contractor claims and the Unpaid Vacation claims in the ordinary course of business is fundamental to the Debtors' success in these chapter 11 cases. As stated above, the Debtors believe that failure to pay the Unpaid Contractor payments to those employees paid on a contract basis and the failure to pay Unpaid Vacation as discussed above will provoke an immediate and negative reaction from the Debtors' current staff, which will likely cause immediate and irreparable harm to the Debtors' operations and their ultimate reorganization. *See In re Equalnet Communications Corp.*, 258 B.R. at 370.

VII. RELIEF FROM RULES 6003(B) AND 6004(H)

18. Pursuant to Rules 6003(b) and 6004(h) of the Federal Rules of Bankruptcy Procedure, the Debtors seek (i) immediate entry of an order granting the relief sought herein and (ii) a waiver of any stay of the effectiveness of such an order. Rule 6003(b) provides, in relevant part, that "[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding . . . a motion to pay all or part of a claim that arose before the filing of the petition." Rule 6004(h)

provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.”

19. As set forth above, the payment of the amounts due to the Unpaid Contractors and the amounts due for Unpaid Vacation to the terminated employees is necessary to prevent the immediate and irreparable damage to the Debtors’ operations and going-concern value. As such, the Debtors submit that ample cause exists to justify (i) the immediate entry of an order granting the relief sought herein and (ii) a waiver of the fourteen-day stay imposed Rule 6004(h), to the extent that it applies. Accordingly, the Debtors seek authorization, in their discretion and in the exercise of their business judgment, to pay the amounts due to the Unpaid Contractors and the amounts due for Unpaid Vacation to the terminated employees.

20. Importantly, the Debtors, through their proposed independent financial advisor, will submit a revised cash flow projection for the final hearing, set for April 15, 2013, on the Debtors’ use of cash collateral, which will include provisions for the payments for which the Debtors herein request authority to make, which revised cash flow projection has been approved by the Debtors’ secured creditor, Hercules Technology II, L.P. (“Lender”).

21. No prior Motion for the relief requested herein has been made to this or any other Court.

WHEREFORE, PREMISES CONSIDERED the Debtors request that the Court enter an order (i) authorizing the payment of wages to the Unpaid Contractors, identified on Ex. A, as set forth above; (ii) authorizing the payment of Unpaid Vacation to those employees identified on Ex. B, as set forth above; (iii) and granting such other relief to the Debtors as is just.

Dated: April 4, 2013.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April 2013, a true and correct copy of the foregoing was served via the Court's CM/ECF electronic notification system on all parties requesting same, and via US first class mail, post prepaid to the parties listed below, and on the attached service list.

UPH Holdings, Inc.
Pac-West Telecomm, Inc.
Tex-Link Communications, Inc.
UniPoint Holdings, Inc.
UniPoint Enhanced Services, Inc.
UniPoint Services, Inc.
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25 Main Street
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/s/Patricia B. Tomasco
Patricia B. Tomasco

Unpaid Contractors

<u>Name</u>	<u>Role</u>	<u>Location</u>	<u>Unpaid Amount</u>	<u>Status</u>
Javier Ridley	Network Ops	Austin	4,050.00	Active
Blaine Gilles	Executive/Ops	Stockton	10,000.00	Active
Steven Andrade	Provisioning	Stockton	1,200.00	Active
Matt Berger	Provisioning	Stockton	1,200.00	Active
Kihm Schroeder	Facilities	Stockton	5,700.00	Active
Robert Jackson	Network	Austin	3,054.56	Terminated
Karen Thompson	Contractor	Stockton	576.00	Active
			25,780.56	

Unpaid vacation

Employees	3/29/2013 PTO hours (Balance)	\$ per hr	Total Balance
Burke, Kevin	54.00	49.36	\$ 2,665.39
Meltzer, Eric	110.00	44.87	\$ 4,935.90
Carlson, Wayne	207.82	43.44	\$ 9,028.18
Weil, Richard	70.00	37.39	\$ 2,617.52
Lambeth, Brian	21.25	31.73	\$ 674.28
Millender, Marilyn	42.00	30.99	\$ 1,301.75
Vela, Al	53.38	20.80	\$ 1,110.42
Garcia, Lauren	14.18	19.23	\$ 272.69
Kashakhi, Naven	40.00	14.42	\$ 576.92
			<u>\$ 23,183.05</u>