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

DEBTORS' MOTION FOR AN ORDER AUTHORIZING THE DEBTORS TO RETAIN, EMPLOY, AND COMPENSATE PROFESSIONALS UTILIZED IN THE ORDINARY COURSE OF BUSINESS

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE TONY M. DAVIS:

THIS PLEADING REQUESTS RELIEF THAT MAY BE ADVERSE TO YOUR INTERESTS.

IF NO TIMELY RESPONSE IS FILED WITHIN TWENTY-ONE (21) DAYS FROM THE DATE OF SERVICE, THE RELIEF REQUESTED HEREIN MAY BE GRANTED WITHOUT A HEARING BEING HELD.

A TIMELY FILED RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.

COMES NOW UPH Holdings, Inc., ("UPH"), Pac-West Telecomm, Inc., ("Pac-West"), Tex-Link Communications, Inc. ("Tex-Link") UniPoint Holdings, Inc. ("UniPoint Holdings"), UniPoint Enhanced Services, Inc. ("UniPoint Enhanced Services"), UniPoint Services, Inc., ("UniPoint Services"), nWire, LLC ("nWire"), and Peering Partners Communications, LLC ("Peering Partners") (collectively the "Debtors"), the Debtors-In-Possession in this case, and file this their Motion for an Order Authorizing the Debtors to Retain, Employ, and Compensate Professionals Utilized in the Ordinary Course of Business ("Motion"). In support thereof, the Debtors would respectfully show as follows:

I. JURISDICTION

1. 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 and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The Court has the authority to enter the requested relief under §§ 105(a), 327, 328, and 330 of the Bankruptcy Code.

II. BACKGROUND

2. On March 25, 2013 ("Petition Date"), the Debtors filed their voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et. seq.* (as amended, the "Bankruptcy Code"). The Debtors continue to operate as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

3. On April 15, 2013, the Committee of Unsecured Creditors ("Committee") [Dckt. No. 91] was appointed.

4. 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 ("Declaration") [Dckt. No. 17], which is incorporated herein by reference.

5. 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

(a) *UPH Holdings, Inc.*

6. UPH Holdings, Inc. ("UPH") is a Delaware corporation headquartered in Austin, Texas. UPH is a privately held, non-operating holding company with investments in the 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 in 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.

(b) *UniPoint Holdings, Inc.*

7. 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.

(c) ***Pac-West Telecomm, Inc.***

8. 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.

(d) ***Peering Partners Communications Holdings, LLC***

9. 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

[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.

to the terminating carrier. Peering Partners operates in a highly competitive and price-sensitive segment.

(e) *nWire LLC*

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

(f) ***UniPoint Services, Inc.***

11. UniPoint Services, Inc. ("UniPoint Services") is a Texas corporation that buys and sells unbundled network communications elements.

(g) ***UniPoint Enhanced Services, Inc.***

12. UniPoint Enhanced Services, Inc. ("UniPoint Enhanced Services") is a Texas corporation that provides enhanced services.

(h) ***Tex-Link Communications, Inc.***

13. 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

14. 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

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

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.

15. 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.*

16. 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.

17. 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.

III. RELIEF REQUESTED AND SUPPORTING AUTHORITIES

18. By this Motion, the Debtors respectfully request the entry of an order authorizing, but not directing, the Debtors to retain, employ, and compensate certain professionals utilized in the ordinary course of business.

19. The Debtors customarily retain the services of various accountants and other professionals in the ordinary course of their business operations (collectively, "Ordinary Course Professionals"). The Ordinary Course Professionals the subject of this Motion include accountants and

other tax professionals who will prepare tax returns and provide other tax-related advisory services to the Debtors as well as local counsel to the Debtors for routine legal representation. The Ordinary Course Professionals provide services to the Debtors in a variety of discrete matters unrelated to these Chapter 11 cases, including, but not limited to accounting and tax services, and routine legal representation.

20. The Debtors request that they be permitted to retain and employ the Ordinary Course Professionals, effective as of the Petition Date, on terms substantially similar to those in effect prior to the Petition Date, but subject to the limitations described below. The Debtors represent that the Ordinary Course Professionals are necessary to enable the Debtors to conduct their business operations at minimum expense without disruption. In addition, the expenses of the Ordinary Course Professionals will be kept to a minimum, as further described below. Finally, the Ordinary Course Professionals will not perform services relating to the bankruptcy cases.

21. Although some Ordinary Course Professionals may have a prepetition claim relating to prepetition services performed on behalf of the Debtors, the Debtors not believe that any of the Ordinary Course Professionals have an interest materially adverse to the Debtors, their creditors, or any parties in interest. By this Motion, the Debtors are not requesting authority to pay any prepetition amounts that may be owed to any of the Ordinary Course Professionals.

22. The Debtors propose that the Debtors be authorized, but not directed to, in their sole discretion, without formal applications being filed with the Court, to compensate and reimburse the Ordinary Course Professionals for one-hundred percent (100%) of fees and expenses incurred upon the submission of an invoice setting forth in reasonable detail the nature of the services rendered and the disbursements actually incurred by the Ordinary Course Professionals without prejudice to the Debtors' right to dispute any invoice; provided, however, that subject to further order of the Court, the Debtors

shall not pay more than an aggregate of $10,000 per month to the Ordinary Course Professionals for post-petition compensation and reimbursement of post-petition expenses ("Ordinary Course Professional Cap").

23. In the event that post-petition compensation and reimbursement of post-petition expenses in the aggregate for all Ordinary Course Professionals exceed $10,000 per month, such Ordinary Course Professionals shall be required to file with the Court a fee application for the amount of fees and expenses in excess of the Ordinary Course Professional Cap in accordance with §§ 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any applicable orders of the Court.

24. The Debtors submit that the continued employment and compensation of the Ordinary Course Professionals is in the best interests of their estates, creditors, and other parties in interest. Although some Ordinary Course Professionals may wish to continue to represent the Debtors on an ongoing basis, others may be unwilling to do so if the Debtors cannot pay them on a regular basis, or, given the relatively small fees anticipated to be involved, if they are required to comply with the requirements for retention under § 327 of the Bankruptcy Code.

25. In addition, if the Debtors are unable to continue to employ and retain the Ordinary Course Professionals that have historically provided services to the Debtors, the Debtors will incur additional and necessary expenses related to the services to be provided by such professionals as they acquire familiarity with the Debtors. The Debtors rely on the assistance of the Ordinary Course Professionals for essential business functions and obligations that are not bankruptcy-related. The Debtors will be unable to successfully operate without the services provided by the Ordinary Course Professionals. Accordingly, the Debtors' estates and their creditors, as well as the Debtors'

efforts at reorganization, are best served by avoiding any disruption in the professional services required in the daily operation of their businesses.

26. In determining whether an entity is a "professional" whose retention must be approved by the Court as required by § 327 of the Bankruptcy Code, courts generally consider the following factors: (a) whether the entity controls, manages, administers, invests, purchases, or sells assets that are significant to the debtor's reorganization; (b) whether the entity is involved in negotiating the terms of a plan of reorganization; (c) whether the entity is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations; (d) whether the entity is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate; (e) the extent of the entity's involvement in the administration of the debtor's estate; and (f) whether the entity's services involve some degree of special knowledge or skill, such that it can be considered a "professional" within the ordinary meaning of the term. *In re Riker Indus., Inc.*, 122 B.R. 964, 973 (Bankr. N.D. Ohio 1990) (holding that § 327 approval of the fees of a management and equity firm that only provided routine administrative functions not central to the bankruptcy case was not required); *In re Am. Tissue, Inc.*, 331 B.R. 169, 173 (Bankr. D. Del. 2005); *In re First Merchants Acceptance Corp.*, 1997 WL 873551, at *2 (D. Del. Dec. 15, 1997); *In re Cyrus II Partnership,* No. 05-39857, 2008 WL 3003824, at *2 (Bankr. S.D. Tex. 2008); *In re Johns-Manville Corp.*, 60 B.R. 612 (Bankr. S.D.N.Y. 1986) (holding that a lobbyist retained by the debtor performed services in the ordinary course of the debtor's business because the lobbyist "performed a function completely external to the reorganization process," and thus was not a "professional" under § 327).

27. Considering all of these factors when determining whether an entity is a "professional" within the meaning of § 327 of the Bankruptcy Code, the Debtors believe that the Ordinary Course Professionals are not "professionals" within the meaning of § 327 of the Bankruptcy Code whose

retention must be approved by the Court. Most notably, the Ordinary Course Professionals are not and will not be involved in the administration of these Chapter 11 cases, but, instead, will provide services that they commenced prior to the Petition Date in connection with the Debtors' ongoing business operations. Such services are ordinarily provided by the Ordinary Course Professionals in connection with the Debtors' ongoing business operations.

28. The Debtors and their estates will be benefited by the continued retention of the Ordinary Course Professionals because of their prior experience and relationships with the Debtors and their understanding of the Debtors and their operations. It is in the best interest of all creditors and parties in interest to avoid any disruption in the services provided by the Ordinary Course Professionals, and additionally, to avoid increased expenses likely to be incurred if the Debtors have to retain different such professionals, or seek Court approval of the retention and compensation for the Ordinary Course Professionals, especially when, as discussed herein, the proposed cost of the fees and expenses of the Ordinary Course Professionals is *de minimus*, and will not exceed $10,000 on a monthly basis in the aggregate.

29. No prior request respecting the relief sought herein has been submitted to this or any other Court.

WHEREFORE, PREMISES CONSIDERED, the Debtors respectfully request that the Court enter an order (i) authorizing, but not directing, the Debtors to retain, employ, and compensate certain professionals (as defined herein "Ordinary Course Professionals") utilized in the ordinary course of business; (ii) authorize, but not directing, the Debtors to compensate and reimburse the Ordinary Course Professionals for one-hundred percent (100%) of post-petition fees and expenses incurred, without the necessity of filing formal applications for such compensation and reimbursement with the Court, provided that the Debtors shall not pay the

Ordinary Course Professionals, in the aggregate, in excess of $10,000 per month for such post-petition fees and expenses; and (iii) granting such other and further relief to which the Debtors are justly entitled.

Dated: June 10, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June 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.

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