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FPSC - COMMISSION CLERK

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

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

PARTIES RECEIVING THIS OMNIBUS MOTION SHOULD LOCATE THEIR NAMES AND THEIR CONTRACTS OR LEASES AND OTHER AGREEMENTS IN THE ATTACHED EXHIBIT A.

TO THE UNITED STATES BANKRUPTCY JUDGE TONY M. DAVIS:

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 Fifth Omnibus Motion for Order Approving the Rejection of Unexpired

COM _____
AFD _____
APA _____
ECO _____
ENG _____
GCL _____
IDM _____
TEL _____
CLK NG

Contracts & Leases *Nunc Pro Tunc* to Petition Date (defined herein) (the “Motion”) pursuant to 11 U.S.C. § 365(a) and Rule 6006 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”). A hearing will be held on the Motion before the Honorable Tony M. Davis, United States Bankruptcy Judge, United States Bankruptcy Court for the Western District of Texas, Austin Division, on **August 8, 2013, at 1:30 p.m. (CDT)**. Any objections or responses to the relief requested herein should be filed on or before **August 2, 2013** with the Bankruptcy Court. In support of the Motion, the Debtors would show:

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. 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 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.

4. 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. The instant Motion is directed at the Debtors' desire to reject various executory contracts that are burdensome to their estates.

III. RELIEF REQUESTED

5. 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." The 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.

6. The Debtors also request that the deadline for filing an objection or other response to this Motion be filed on or before August 2, 2013 with the Bankruptcy Court.

7. Pursuant to § 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).

8. 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).

9. 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. The Debtors believe that the Contracts have not been utilized by the Debtors since the Petition Date. To the extent that any services have been performed by the counterparties or used by the Debtors, the rejection is without prejudice to an appropriate claim under 11 U.S.C. § 503(b) for such actual use.

10. 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: July 9, 2013.

Respectfully submitted,

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COUNSEL FOR DEBTORS-IN-POSSESSION

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July 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.
nWire, LLC
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One Communications/Earthlink
5 Wall Street
Burlington, MA 01803

America OnLine
22000 AOL Way
Dulles, VA 20166

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

Cox Communications
1550 W. Deer Valley Rd.
Phoenix AZ 85027

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.
ATTN: Eric Hinton
2801 Network Blvd
Suite 300
Frisco, TX 75034

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

La Arcata Development Limited
ATTN: ACCOUNTS RECEIVABLE
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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
Attn: SVP – Contract
Administration
1301 Fannin, 20th Floor
Houston, TX 77002

Hines REIT One Wilshire, LP
Attn: Kevin McInerny
624 S. Grand Avenue
Suite 2435
Los Angeles, CA 90017

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

Pac Bell
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Atlanta, GA 30321-0649

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TJ412-01-0-R
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LIST OF CONTRACTS TO REJECT

Vendor	Address	BAN	Circuit ID
AT&T	PO Box 5001 Carol Stream, IL 30197-5001	0720962449782	R007OC48SKTNCACZW01SKTNCA01 R007OC48SKTNCACZW01SKTNCAONW03 R007OC48SKTNCAONW03SKTNCA01
AT&T	PO Box 5001 Carol Stream, IL 30197-5001	713L0220423466	2814773997211 2814978687127 2815790294347 2816048298798 2818679918927 7134644516265 7134656985051 7135926431875 7136337940730 7136581151856 7136888822652 7137762407625 7139573028601
AT&T	PO Box 5001 Carol Stream, IL 30197-5001	0720961503894	20/HFGS/506541/PT
Level 3 Communications	PO Box 910182 Denver, CO 80291-0182	1-113306986	BBFM9148
Cogent	1900 S Norfolk San Mateo, CA 94403	UNIPOINT90001	1-25882951 1-59076003 1-59075955 1-35233021 1-26891551

			1-26891639 1-26891595 1-51972367
Telepacific	General Counsel, 515 S. Flower St 47th FL, Los Angeles, CA 90017	385138	CAL-001-5724
Customer	Address	Contract Date	Contract Name
Voxbone	Avenue Louise 489 Claus Bldg 6th Floor 1050 Brussels Belgium	November 24, 2011	Addendum – Marketing Fee Inbound