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FPSC - COMMISSION CLERK

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

AGREED MOTION FOR CONTINUANCE OF HEARING ON APPROVAL OF DEBTORS' DISCLOSURE STATEMENT

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

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 pursuant to FED. R. BANKR. PRO. 9006(b)(1), files their Agreed Motion for Continuance of the Hearing on Approval of Disclosure Statement currently set for November 6, 2013 (the "Motion"). In support of this Motion, the Debtors state as follows:

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

I. BACKGROUND

1. 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.

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

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.

4. On September 23, 2013, the Debtors filed their Chapter 11 Plan of Reorganization ("Plan") [Dckt. No. 516] and their Disclosure Statement in Support of Chapter 11 Plan of Reorganization ("Disclosure Statement") [Dckt. No. 515]. A hearing on approval of the Disclosure Statement is currently set for November 6, 2013.

5. The Debtors have been in communication with Hercules Technology II, L.P., their secured lender, and the Committee about the Debtors' Plan and Disclosure Statement. To foster resolution concerning the Debtors' Plan and Disclosure Statement, the Debtors and the Committee request that the hearing on approval of the Disclosure Statement be continued for at least thirty days. Good cause therefore exists for the requested continuance, which is not sought for delay, but rather, that justice may be done. In addition, the Debtors request that the exclusive periods under 11 U.S.C. § 1121 be correspondingly extended to permit the hearing on the Disclosure Statement to be so continued. Such extension will not extend beyond the time periods in 11 U.S.C. § 1121(d)(2). The Debtors and the Committee thus believe that such continuance will foster continued negotiations between the parties concerning various issues related to the Debtors' Plan and Disclosure Statement.

WHEREFORE, PREMISES CONSIDERED, the Debtors respectfully request that the Court enter an order continuing the hearing on approval of the Debtors' Disclosure Statement for at least thirty days, extending exclusivity correspondingly; and granting such other and further relief to which the Debtors are justly entitled.

Dated: October 22, 2013.

Respectfully submitted,

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**COUNSEL FOR DEBTORS-IN-
POSSESSION**

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with counsel for Hercules Technology II, L.P., and counsel for the Committee regarding the continuance requested herein, and both support such requested continuance.

/s/ Patricia B. Tomasco

Patricia B. Tomasco

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October 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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Tex-Link Communications, Inc.
UniPoint Holdings, Inc.
UniPoint Enhanced Services, Inc.
UniPoint Services, Inc.
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**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
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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 AUSTIN, TEXAS 78730	§	JOINTLY ADMINISTERED UNDER CASE NO. 13-10570

**ORDER GRANTING AGREED MOTION FOR CONTINUANCE
OF HEARING ON APPROVAL OF DEBTORS' DISCLOSURE STATEMENT**

CAME ON FOR CONSIDERATION the Agreed Motion for Continuance of Hearing on Approval of Disclosure Statement (the "Motion") filed by 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") and the Court, after notice and hearing, having considered the Motion, finds that the Motion should be granted as set forth below. It is therefore:

ORDERED that the hearing on approval of the Debtors' Disclosure Statement [Dckt. No. 515] is hereby set for the time and date above; it is further

ORDERED that the exclusive periods under 11 U.S.C. § 1121 are hereby correspondingly extended.

###

Submitted by:

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Jennifer F. Wertz
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COUNSEL FOR THE DEBTORS

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
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	§	
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

DEBTORS' MOTION TO ASSUME AND ASSIGN CERTAIN CONTRACTS

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.

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 Debtors’ Motion to Assume and Assign Certain Contracts § 365(d)(4) of the Bankruptcy Code (“Motion”). In support of the Motion, the Debtors would show:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are sections 105, 363(b), and 365(a) and (b) of the Bankruptcy Code.

II. PROCEDURAL 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 detailed 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. On April 15, 2013, the Committee of Unsecured Creditors (“Committee”) [Dckt. No. 91] was appointed.

5. On July 23, 2013, the Court entered its Order Granting Debtors’ Motion for Entry of Orders (I) Approving Procedures and Providing Certain Protections and (II) Authorizing the (A) Sale of Substantially All the Debtors’ Assets, (B) Payment of the Net Proceeds of Sale to

Hercules Technology II, L.P., and (C) Assumption and Assignment of Certain Executory Contracts and Unexpired Leases (“Sale Order”) [Dckt. No. 446]. Pursuant to the Sale Order, the Court approved the sale of substantially all of the Debtors’ assets to TNCI Operating Company, LLC (“Buyer”). In addition, pursuant to the Sale Order, the Court authorized the assumption and assignment to the Buyer of certain of the Debtors’ executory contracts and unexpired leases.

6. In addition, on July 31, 2013, the Court entered its Order Granting Debtors’ Motion for Extension of Time to Assume or Reject Unexpired Leases of Real Property Pursuant to Section 365(d)(4) of the Bankruptcy Code (“Order Extending Time to Assume or Reject”) [Dckt. No. 463]. Pursuant to the Order Extending Time to Assume or Reject, the Court extended the period within which the Debtors must assume or reject unexpired nonresidential real property leases through and including October 24, 2013.

III. RELIEF REQUESTED

7. The Debtors have identified certain unexpired nonresidential real property leases or executory contracts (“Contracts”) that they wish to assume and assign to TNCI Operating Company, Inc. or its designee (herein “Buyer”). Counter-parties to those Contracts with the Debtors are identified in the attached Exhibit A.¹ Exhibit A hereto also sets forth amounts, according to the Debtors’ books and records, or filed claims, necessary for the Debtors to “cure” (each, a “Cure Amount”) in order to assume and assign the identified leases pursuant to 11 U.S.C. § 365.

IV. BASIS FOR RELIEF REQUESTED

8. Sections 363(a), (b), and (f) permit the Debtors to assume and assign an executory contract or unexpired lease. Bankruptcy Code §§ 365(a) and (b) authorize a debtor in possession

¹ Identification on the attached Exhibit A does not constitute an admission by the Debtors that any contract is executory, and the Debtors and Purchaser reserve all rights with respect to the Leases identified on the attached Exhibit A.

to assume, subject to the court's approval, executory contracts or unexpired leases of the debtor. 11 U.S.C. § 365(a) and (b); *In re Jamesway Corp.*, 201 B.R. 73, 76 (Bankr. S.D.N.Y. 1996). Under Bankruptcy Code § 365(a), a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. 11 USC § 365(a) Bankruptcy Code § 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee:

- (A) cures or provides adequate assurance that the trustee will promptly cure, such default;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provide adequate assurance of future performance under such contract or lease.

9. The standard applied by a court in determining whether the assumption or rejection of an executory contract or unexpired lease pursuant to § 365(a) should be approved is the "business judgment" test, which requires a debtor to determine that the requested assumption or rejection would be beneficial to its estate. *See, e.g., In re Group of Institutional Investors, Inc. v. Chicago, Milwaukee St, Paul and Pac. R.R. Co.*, 318 U.S. 523, 550 (1943) ("the question [of assumption] is one of business judgment"); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098-99 (2d Cir. 1993) (to decide a motion to assume the court must put itself in the position of the trustee and determine whether such assumption would be a good decision or a bad one).

10. Courts generally will not second-guess a debtor's business judgment concerning the assumption of an executory contract or unexpired lease. *See In re Paolo Gucci*, 193 B.R. 411, 414 (S.D.N.Y. 1996); *see also Sharon Steel Corp. v. National Gas Fuel Distrib. Corp. (In re Sharon Steel Corp.)*, 872 F.2d 36, 40 (3d Cir. 1989); *In re III Enter., Inc.*, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994) ("Generally, a court will give great deference to a debtor's decision to assume or reject an executory contract. A debtor need only show that its decision to assume or reject the contract is an exercise of sound business judgment a standard which we have concluded many times is not difficult to meet.").

11. Further, a debtor in possession may assign an executory contract or an unexpired lease of the debtor if it assumes the agreement in accordance with § 365(a), and provides adequate assurance of future performance by the assignee, whether or not there has been a default under the agreement. *See* 11 U.S.C. § 365(f)(2). Significantly, among other things, adequate assurance may be provided by demonstrating the assignee's financial health and experience in managing the type of enterprise or property assigned. *See, e.g., In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (stating that adequate assurance of future performance is present when the prospective assignee of a lease from the debtor has financial resources and has expressed willingness to devote sufficient funding to the business in order to give it a strong likelihood of succeeding).

12. The meaning of "adequate assurance of future performance" depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." *EBG Midtown South Corp. v. McLaren/Hart Environmental Engineering Corp. (In re Sanshoe Worldwide Corp.)*, 139 B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted) *aff'd*, 993 F.2d 300 (2d Cir. 1993).

13. The Debtors' decision to assume and assign the Contracts listed on attached Exhibit A to the Buyer is based on sound business judgment. Subsequent to the sale of their assets to the Buyer, the Contracts have little value to the Debtors, and such assumption and assignment of the Contracts to the Buyer is sound exercise of the Debtors' business judgment.

14. To assist in the assumption, assignment and sale of the Assumed Contracts, the Debtors will request that the Bankruptcy Court enter an order providing that any anti-assignment provisions in the Assumed Contracts shall not restrict, limit or prohibit the assumption, assignment and sale of the Assumed Contracts and are deemed and found to be unenforceable anti-assignment provisions within the meaning of Bankruptcy Code § 365(f).

15. Section 365(f)(1) of the Bankruptcy Code permits a debtor to assign unexpired leases and contracts free from such anti-assignment restrictions, providing, in pertinent part, that:

Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection. . . .

11 U.S.C. § 365(f)(1).

16. Section 365(f)(1), by operation of law, invalidates provisions that prohibit, restrict, or condition assignment of an executory contract or unexpired lease. *See, e.g., Coleman Oil Co., Inc. v. The Circle K Corp. (In re The Circle K Corp.)*, 127 F. 3d 904, 910-11 (9th Cir. 1997) ("no principle of bankruptcy or contract law precludes us from permitting the Debtors here to extend their leases in a manner contrary to the leases' terms, when to do so will effectuate the purposes of section 365"). Section 365(f)(3) goes beyond the scope of § 365(f)(1) by prohibiting enforcement of any clause creating a right to modify or terminate the contract or lease upon a proposed assumption or assignment thereof. *See, e.g., In re Jamesway Corp.*, 201 B.R. 73 (Bankr. S.D.N.Y. 1996) (section 365(f)(3) prohibits enforcement of any lease clause creating

right to terminate lease because it is being assumed or assigned, thereby indirectly barring assignment by debtor; all lease provisions, not merely those entitled anti-assignment clauses, are subject to court's scrutiny regarding anti-assignment effect).

WHEREFORE, PREMISES CONSIDERED, the Debtors respectfully request that the Court enter an order granting the relief requested herein and granting such other and further relief to which the Debtors are justly entitled.

Dated: October 22, 2013.

Respectfully submitted,

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**COUNSEL FOR DEBTORS-IN-
POSSESSION**

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October 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.	Valerie Wenger
Pac-West Telecomm, Inc.	Office of the US Trustee
Tex-Link Communications, Inc.	903 San Jacinto, Room 230
UniPoint Holdings, Inc.	Austin, TX 78701
UniPoint Enhanced Services, Inc.	
UniPoint Services, Inc.	Cogent
nWire, LLC	P.O. Box 791087
Peering Partners Communications, Inc.	Baltimore, MD 21279-1087
6500 River Place Blvd., Bldg. 2, Suite 200	CCI Brazos
Austin, Texas 78730	C/O Stream Realty Partners- Austin, LP
	720 Brazos Street Suite 101
	Austin, TX 78701
Stuart Komrower	Boxer Properties
Ilana Volkov	P.O. Box 4737
COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.	Houston, TX 77210-4737
25 Main Street	Level 3 Communications, LLC
Hackensack, New Jersey 07601	PO Box 910182
	Denver, CO 80291-0182
Taylor Street Ventures LP	FiberCloud
C/O AREA Real Estate, LLC	P.O. Box 329
2013 Broadway	Langley, WA 98260-0329 USA
San Antonio Texas 78215	

/s/ Jennifer F. Wertz

Jennifer F. Wertz

LEASES TO BE ASSUMED AND ASSIGNED

Lease Address	Tenant	Lessor	Cure Amounts
1624 Franklin Franklin Building Oakland, CA 94612	Pac-West	Cogent	\$0.00
800 Brazos Austin, Texas 78701	Pac-West	Stream Realty	\$17,384.00
13601 Preston Road Dallas, Texas 75240	Pac-West	Boxer Properties	\$15,624.00
100 Taylor Street San Antonio, Texas 78205	Pac-West	Taylor Street Ventures	\$3,747.00
851 Coho Way Bellingham, WA 98225	Pac-West	Fiber Cloud	\$392.00
12001 IH 45 Houston, Texas 77060	Point One	Level 3 Communications	\$0.00

9715681v.1 142851/00001

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

ORDER GRANTING DEBTORS' MOTION TO ASSUME AND ASSIGN CONTRACTS

CAME ON TO BE HEARD the Debtors' Motion to Assume and Assign Certain Contracts ("Motion") filed by 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"). The Court, having considered same, any response(s) thereto, and found that notice of the Motion was proper, is of the opinion that the Motion should be, and is hereby GRANTED in its entirety; it is therefore

ORDERED ADJUDGED and DECREED that the Motion is GRANTED; it is further

ORDERED that the Debtors are hereby authorized to assume and assign the Contracts (as defined in the Motion, and as listed on Exhibit A to the Motion) to TNCI Operating Company, LLC ("Buyer"); any anti-assignment provisions in any of the Contracts shall not restrict, limit, or prohibit the assumption, assignment, and sale of the Contracts, and are hereby deemed and found to be unenforceable anti-assignment provisions within the meaning of 11 U.S.C. § 365(f).

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Order prepared and is being submitted by:

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