

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, § CASE NO. 13-10574
INC. §
UNIPOINT SERVICES, INC. § CASE NO. 13-10575
NWIRE, LLC § CASE NO. 13-10576
PEERING PARTNERS § CASE NO. 13-10577
COMMUNICATIONS, LLC §

DEBTORS.

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

**DEBTORS' OPPOSITION TO MOTION BY THE UNIVERSAL SERVICE
ADMINISTRATIVE COMPANY FOR ENTRY OF AN ORDER (I) ALLOWING AND
DIRECTING THE IMMEDIATE PAYMENT OF UNIVERSAL SERVICE FEES
ACCRUED AND ACCRUING POST-PETITION AND (II) COMPELLING
COMPLIANCE WITH PAYMENT AND REPORTING REQUIREMENTS**

TO THE UNITED STATES BANKRUPTCY JUDGE TONY M. DAVIS:

COME 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 their Opposition to the Motion by the Universal Service Administrative Company for
Entry of an Order (I) Allowing and Directing the Immediate Payment of Universal Service Fees

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Accrued and Accruing Post-Petition and (II) Compelling Compliance with Payment and Reporting Requirements (“Motion”) [Dckt. No. 647] filed by Universal Service Administrative Company (“USAC”), and in opposition thereto would show:

I. INTRODUCTION

1. 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 their business as debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108. The Office of the United States Trustee has appointed an official committee of unsecured creditors in these cases (the “Committee”). No trustee or examiner has been appointed.

2. 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. Additional factual background concerning the Debtors, as well as 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, President and Chief Executive Officer of the Debtors, in Support of their First Day Motions (“Holloway’s Declaration”) [Dckt. No. 17], which is incorporated herein by reference.

3. 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”) [Docket No. 446]. Pursuant to the Sale Order, the Court approved

the Asset Purchase Agreement (“APA”)¹ and the sale (“Sale”) of substantially all of the Debtors’ assets to TNCI Operating Company, LLC (“TNCI” or “Buyer”). The Sale Order provides that Hercules’ liens and claims attached to the proceeds of sale and all such proceeds are to be paid directly to Hercules on account of its claims.

4. On December 11, 2013, USAC filed its Motion, seeking payment of fees and compliance by the Debtors with alleged reporting requirements. *See* Motion, ¶¶ 22 and 43. As set forth herein, pursuant to the APA following the Sale, the amounts sought by USAC, and compliance with reporting requirements, are the liability and responsibility of the Buyer, not the Debtors. Accordingly, USAC’s Motion should be denied.

II. JURISDICTION & VENUE

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

III. ARGUMENT & AUTHORITIES

6. In its Motion, USAC seeks payment of various fees and to compel compliance by the Debtors with certain alleged reporting requirements. *See* Motion, ¶21. With respect to its request for payment of alleged obligations, in the Motion, USAC seeks allowance and payment of its post-petition claim that it asserts is in the aggregate amount of \$35,937.23. In the Motion, USAC seeks particular amounts from various Debtors, as follows: (1) with respect to the Debtor Pac-West, USAC asserts that Pac-West owes post-petition amounts that total \$21,607.22, of which USAC asserts \$14,700.26 is past due as of November 15, 2013; (2) with respect to the Debtor Tex-Link, USAC asserts that Tex-Link owes post-petition amounts that total \$10,482.28, of which USAC asserts \$7,813.75 are past-due; (3) with respect to the Debtor Unipoint Enhanced, USAC asserts that Unipoint Enhanced owes post-petition amounts that total \$3,190.43, of which USAC asserts \$2,557.87 is past due as of November

¹ A copy of the APA is attached hereto as Exhibit 1.

15, 2013; (4) with respect to the Debtor nWire, USAC asserts that nWire owes post-petition amounts that total \$457.30, of which USAC asserts \$332.26 is past due as of November 15, 2013; and (5) finally, with respect to the Debtor Peering Partners, USAC asserts that Peering Partners owes post-petition amounts that total \$200.00, of which USAC asserts \$100.00 is past due as of November 15, 2013.

7. In particular, with respect to its quest for compliance with reporting requirements, USAC asserts in the Motion the following: (1) that Pac-West has failed to file a quarterly report USAC asserts was due in November 2013; (2) that Tex-Link has failed to submit a 2013 annual revenue report due in April 1, 2013; (3) that UniPoint Enhanced has failed to submit a 2012 annual revenue report and a quarterly report purportedly due in November 2013; (4) that nWire has failed to resolve an alleged unresolved issue with respect to a 2012 annual revenue report, has a "2011 Annual Revenue Report Outstanding," and quarterly reports purportedly due in November 2012, February 2013, and November 2013 that are still outstanding; and (5) that Peering Partners has not submitted an annual revenue report for 2013 that was purportedly due on April 1, 2013.

8. As stated above, and relevant to the Motion, on July 23, 2013, the Court entered the Sale Order [Docket No. 446]. Pursuant to the Sale Order, the Court approved the APA and the Sale of substantially all of the Debtors' assets to the Buyer. Pertinent to the resolution of the Motion, the APA provides that the Buyer is responsible for regulatory fees after the Initial Closing Date (as defined in the APA). *See* Ex. 1, p. 11. In particular, § 3.2(c) of the APA provides that the Buyer is liable for "Regulatory Fees that have accrued in connection with revenue received since the Petition Date for which Buyer is liable pursuant to Section 2.1 of this Agreement." *See* Ex. 1, p. 12. Further, the APA defines the term "Regulatory Fees" in section 3.2(iv) as follows:

The term Regulatory Fees shall mean fees and other contributions required pursuant to state or federal telecommunications laws

(including without limitation, state and federal universal service support mechanisms, intrastate or interstate telecommunications relay services, administration of the North American Numbering Plan, shared costs of local number portability administration) and regulatory fees imposed by quasi-governmental or non-governmental entities.

See Ex. 1, p. 11. In turn, section 2.1 of the APA is entitled “Liabilities Assumed.” *See* Ex. 1, p. 7. Section 2.1 of the APA sets forth that the Buyer assumes “all post-Petition Date accounts payable that relate to the conduct of the Business or any of the Assigned Contracts (collectively the ‘Assumed Accounts Payable).” *See* § 2.1 of the APA. *See* Ex. 1, p. 7. Certain liabilities, obligations, claims, and commitments are carved out of the purview of section 2.1. of the APA, but Regulatory Fees are not, and none of these include the obligations for which USAC seeks an administrative claim. *See* Ex. 1, p. 7-8.

9. In the Motion, USAC asserts that it “is funded through mandatory contributions from all U.S. telecommunications carriers based on, *inter alia*, a percentage of their interstate and international end-user telecommunication revenue. 47 C.F.R. § 54.709(a).” *See* Motion, ¶ 9. Further, USAC states in its Motion that “federal regulations require USAC to assess USF Obligations and issue invoices based on available information, including historical interstate and international end-user telecommunication revenue. 47 C.F.R. § 54.709(d).” *See* Motion, ¶ 11. Clearly, then, USAC seeks an administrative claim that is a Regulatory Fee for which the Buyer assumed liability pursuant to the APA. Because the Buyer assumed such liability, USAC’s Motion should accordingly be denied.

10. Furthermore, as stated herein, USAC asserts that the Debtors should be compelled to comply with various reporting requirements, some of which USAC asserts were delinquent prior to the Sale. With respect to the reporting requirements that USAC states are unfulfilled, the Debtors deny that such reports were not completed or filed prior the closing of the Sale. In fact, the Debtors ensured that such reporting requirements had been completed prior to the closing of the Sale. USAC also asserts that the Debtors should be compelled to comply with various reporting requirements that have

purportedly become due after the Sale. But, in accordance with the Sale, and subsequent to the Sale, the Buyer hired the Debtors' personnel who performed and completed such reporting, previously on behalf of the Debtors. Obviously, hiring personnel familiar with the reporting requirements necessary for operation of the Debtors' business was necessary for the Buyer in order to operate the Debtors' businesses subsequent to the Sale. The Debtors thus should not be compelled to comply with the various reporting requirements asserted by the USAC in its Motion, and such responsibilities are the Buyer's responsibilities. Accordingly, USAC's request in its Motion that the Debtors be compelled to comply with those reporting requirements alleged by USAC should be denied.

11. In addition, allowance of administrative claims is governed by § 503(b) of the Bankruptcy Code. Section 503(b) provides a basis for payment as an administrative expense for the "actual, necessary costs and expenses of preserving the estate." *See* 11 U.S.C. § 503(b)(1)(A). The Fifth Circuit has interpreted § 503(b)(1)(A) to mean that "[i]n order to qualify as an 'actual and necessary cost' . . . a claim against the estate must have arisen post-petition and as a result of actions taken by the trustee that benefitted the estate." *Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 387 (5th Cir. 2001) (citing *Toma Steel Supply, Inc. v. Transamerican Natural Gas Corp. (In the Matter of Transamerican Natural Gas Corp.)*, 978 F.2d 1409, 1416 (5th Cir. 1992) (stating that a "prima facie case under § 503(b)(1) may be established by evidence that (1) the claim arises from a transaction with the debtor-in-possession; and (2) the goods or services supplied enhanced the ability of the debtor-in-possession's business to function.")). In fact, in *Jack/Wade Drilling*, the Fifth Circuit observed that administrative claims under § 503(b)(1)(A) "generally stem from voluntary transactions with third parties who lend goods or services necessary to the successful reorganization of the debtor's estate." *Id.* (citing *Toma Steel Supply*, 978 F.2d at 1415)). Further, the party claiming that its claim should be entitled to payment as an administrative claim bears

the burden of proof. *See, e.g., In re Am. Plumbing & Mech., Inc.*, 323 B.R. 442, 464 (Bankr. W.D. Tex. 2005).

12. Accordingly, USAC bears the burden to prove that the obligations for which it seeks payment as an administrative claim arose as a result of actions taken by the trustee that benefitted the estate, consistent with § 503(b)(1)(A) and Fifth Circuit law. USAC cannot meet its burden of proof with respect to this issue because, as set forth herein, the Buyer assumed such liabilities as part of the Regulatory Fees assumed pursuant to the APA in connection with the Sale. Furthermore, even if the Sale had not occurred or the Buyer had not assumed such liabilities, USAC has not provided any binding authority to support its assertion that the fees it seeks should be entitled to administrative priority. Indeed, from USAC's own description in its Motion of the basis for the amounts it alleges qualify as administrative claims, such amounts certainly are outside of the scope of "voluntary transactions with third parties who lend goods or services necessary to the successful reorganization of the debtor's estate." *See Jack/Wade Drilling*, 258 F.3d at 387. USAC has not made a sufficient showing of how such amounts it seeks contributed to the preservation of the Debtors' estate in the context of these bankruptcy cases. Thus, USAC's Motion should be denied.

IV. CONCLUSION

13. In conclusion, USAC's Motion should be denied in its entirety. First, the APA plainly provides that the Buyer is liable for Regulatory Fees, not the Debtors. By USAC's own description in its Motion of the fees it seeks, "Regulatory Fees" under the APA encompasses the fees sought in the Motion by USAC for amounts due after the Sale. In accordance with the Sale Order and APA, then, any liability for Regulatory Fees owed to USAC is not an obligation of the Debtors' estates, but rather is an obligation and liability of the Buyer, and USAC's Motion should be denied. In addition, with respect to USAC's request that the Debtors be compelled to comply with alleged reporting requirements, such request should be denied as the Debtors have complied with the reporting

requirements to which they were obliged prior to the Sale, and all post-Sale reporting requirements should not be the Debtors' responsibility. Furthermore, USAC is not able to meet its burden of proof sufficient to entitle it to payment of the amounts sought as an administrative claim, as it has not provided any binding authority for the proposition that the fees it seek should be entitled to payment as an administrative claim, and has also made no showing that such fees enhanced the ability of the debtor-in-possession's business to function in any way, as required by § 503(b)(1)(A) and under Fifth Circuit precedent. Accordingly, USAC's Motion should be denied.

WHEREFORE, PREMISES CONSIDERED the Debtors respectfully request that the Court enter an order denying the Motion by the Universal Service Administrative Company for Entry of an Order (I) Allowing and Directing the Immediate Payment of Universal Service Fees Accrued and Accruing Post-Petition and (II) Compelling Compliance with Payment and Reporting Requirements ("Motion") [Dckt. No. 647] filed by Universal Service Administrative Company ("USAC"); and grant to them all other relief, in law or in equity, to which the Debtors may be entitled.

Dated: January 2, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January 2014, 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 on the 2nd day of January 2014, a true and correct copy of the foregoing was served via US first class mail, post prepaid to the parties listed on the attached service list.

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EXHIBIT 1

AVAILABLE UPON REQUEST.