

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 § JOINTLY ADMINISTERED  
AUSTIN, TEXAS 78730 §

**DEBTORS' EMERGENCY MOTION FOR ORDER AUTHORIZING DEBTORS TO HONOR CREDIT-CARD CHARGEBACKS AND TO COMPLY WITH OBLIGATIONS UNDER PROCESSING AGREEMENT**

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 file this their Emergency Motion for Order Authorizing Debtors to Honor Credit-Card Chargebacks and Comply with Obligations under Processing Agreement ("Motion"). In support thereof, the Debtors would respectfully show as follows:

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## 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, 363(c), 1107, and 1108 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 [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 is 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”)<sup>1</sup> 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 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.

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<sup>1</sup> 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.

(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.<sup>2</sup> This reversal will also potentially affect access tariffs collected in other states. Economically, this ruling means that access 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*.

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

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. As part of the reorganization process, the Debtors have retained a financial advisor to aid the Debtors in their reorganization efforts. *See* Order Granting Application to Approve Employment of Tamarack Associates, Inc. as Financial Advisors to the Debtors [Dckt. No. 172].

### **III. RELIEF REQUESTED AND SUPPORTING AUTHORITIES**

18. By this Motion, the Debtors respectfully request the entry of an order authorizing the Debtors to receive, process, and honor credit card and other non-cash transactions in the ordinary course of business and to satisfy their obligations under the Payment Processing Agreement (as hereinafter defined) and to comply with certain obligations under the Payment Processing Agreement-in particular, that the Debtors be permitted to allow the Credit Card Processor (as hereinafter defined) to automatically debit chargebacks and similar other charges incurred and as provided under the Payment Processing Agreement from one of the Debtors' designated DIP accounts.

19. In the normal course of business, a portion of the Debtors' customers pay for their purchased services from the Debtors, particularly, the Debtor Pac-West Telecomm, Inc. ("Debtor Pac-West"), with credit cards. During the post-petition period, the Debtors have been, and expect to continue accepting credit cards as payments in the normal course of their day-to-day operations. Prior to the Petition Date, the Debtor Pac-West entered into an agreement with UMS Banking and

Global Payments, Inc. ("Credit Card Processor"), governing the terms and conditions of credit card payments, discounts, and commissions, as more specifically described herein ("Payment Processing Agreement").

20. The Credit Card Processor provides the Debtors with processing service for all credit cards accepted by the Debtors. Pursuant to the Payment Processing Agreement, subject to certain fees, commissions, and other costs of administration in processing credit card transactions, the Credit Card Processor processes credit card payments made to the Debtors by their customers. Pursuant to the Agreement, the Credit Card Processor processes credit card transactions, and in so doing, credits the Debtors' account for authorized transactions less applicable fees and automatically deducts from the Debtors' account for credit card credits and "chargebacks" that result from holds or stop payments placed on a payment by a customer.

21. Subsequent to the Petition Date, the Debtors and the Credit Card Processor encountered difficulty in the Credit Card Processor's ability to timely process non-cash transactions. Pursuant to the Order Granting Debtors' Emergency Motion for Order (1) Authorizing Continued Use of Existing Business Forms and Records, and (2) Authorizing Maintenance of Existing Corporate Bank Accounts ("Bank Account Order") [Dckt. No. 31] entered on April 2, 2013, in the first few days of the Debtors' bankruptcy cases, the Debtors were required to create debtor-in-possession accounts ("DIP Accounts") and begin to follow United States Trustee Guidelines concerning their use of same. The transition made the Credit Card Processor no longer able to automatically deduct its fees and credit card chargebacks pursuant to the Payment Processing Agreement as the parties had previously done prior to the Petition Date. The Credit Card Processor represented that although it can receive a monthly check from the Debtors for applicable fees, notwithstanding the Payment Processing Agreement, there is no way to circumvent the automatic deduction from the Debtors' account for the credits and chargebacks,

and further, without the ability to automatically deduct from the Debtors' account amounts for credits and chargebacks, processing of the Debtors' credit card transactions will be stalled, thus resulting in reoccurring delay and other processing issues for the Debtors on an ongoing basis.

22. Following discussions with the Credit Card Processor, the Debtors have agreed to seek Court authority for automatic debits to be deducted from a designated DIP Account by the Credit Card Processor for the credit card credits and chargebacks discussed herein. As for fees due to the Credit Card Processor, the Debtors will remit payment for such fees on a monthly basis separately in the form of a check or wire transfer. The Debtors believe that seeking such authority is the most efficient resolution of the issues. The Credit Card Processor estimated, based upon averages for transactions processed historically for the Debtors, that the average amount for chargebacks is around \$3,200.

23. Counsel for the Debtors and counsel for the United States Trustee have conferred about the relief herein requested by the Debtors, and counsel for the United States Trustee indicated she did not oppose the Debtors allowing automatic deductions for credit card chargebacks deducted from a designated DIP Account by the Credit Card Processor.

24. Without the authority to allow the Credit Card Processor to automatically deduct the credit card credits and chargebacks from the designated DIP Account, the Debtors will likely be unable to maintain an efficient and continuing business relationship with the Credit Card Processor during the pendency of their bankruptcy cases. Attempting to negotiate a new arrangement with a different credit card processor willing and able to accept payments for chargebacks in a manner other than via direct debit of an account could very well be difficult, if not impossible for the Debtors, and at any rate, is certain to consume administrative resources that could otherwise be funneled toward the Debtors' reorganization efforts. A risk also exists that a different credit card processor would require the



Debtors to maintain higher reserves or pay higher fees than as currently provided in the Payment Processing Agreement with the Credit Card Processor.

25. Accordingly, without the authority that the Debtors herein seek, the Debtors stand at risk of suffering immediate and irreparable harm. In fact, without such relief, the Debtors will be forced to alter their ordinary-course business practices and potentially locate a replacement credit card processor. As such, the Debtors face the risk that their operations may be severely impaired if authority is not granted immediately.

26. In light of the foregoing, the Debtors respectfully submit that the relief requested represents an exercise of the Debtors' sound business judgment, is in the best interests of the Debtors' estates and creditors, and is necessary to prevent immediate and irreparable harm to these estates. The Debtors believe that, in most cases, receiving, honoring, and processing non-cash transactions and satisfying their obligations under the Payment Processing Agreements as herein requested are ordinary course transactions that do not require Court approval. *See* 11 U.S.C. § 363(c).

27. To the extent that continuing to receive, honor, and process non-cash transactions and satisfy their obligations under the Payment Processing Agreements does not constitute ordinary course transactions, the Court may authorize the Debtors to honor their obligations under the Payment Processing Agreements under §§ 363(b)(1) and 105(a) of the Bankruptcy Code.

28. Section 363(b)(1) provides, in relevant part, that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate. 11 U.S.C. § 363(b)(1). Additionally, § 105 of the Bankruptcy Code allows this Court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code." 11 U.S.C. § 105(a).

29. Nothing herein should be construed as a request to assume the Payment Processing Agreement under § 365 of the Bankruptcy Code.

30. 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 honor credit card chargebacks pursuant to the Payment Processing Agreement; (ii) authorizing, but not directing the Debtors to comply with their obligations under the Payment Processing Agreement, including permitting the Credit Card Processor to automatically deduct chargebacks and other similar charges from one of the Debtors' designated DIP account (iii) granting such other and further relief to which the Debtors are justly entitled.

Dated: May 17, 2013.

Respectfully submitted,

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**COUNSEL FOR DEBTORS-IN-  
POSSESSION**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of May 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.  
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