

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

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

**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) THE PAYMENT OF THE NET PROCEEDS OF SALE TO HERCULES TECHNOLOGY II. L.P., AND (C) THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

TO THE HONORABLE 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"), by and through their proposed, undersigned counsel, pursuant to sections 105(a), 363, and 365 of title 11 of the United States Code (the "Bankruptcy Code") and

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Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), hereby move this Court for the entry of orders (I) Approving Bidding Procedures and Providing Certain Protections and Authorizing the (A) Sale of the Substantially all Debtor's Assets, (B) the Payment of the Net Proceeds of Sale to Hercules Technology II, L.P., and (C) the Assumption and Assignment of Certain Executory Contracts and Unexpired ("Motion"). In support thereof, the Debtors would respectfully show the Court 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), (N), and (O). Venue of the Debtors' Chapter 11 cases is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The relief requested in this Motion is sought pursuant to 11 U.S.C. §§ 105, 363 and 365, and Bankruptcy Rules 2002, 6004, 6006, and 9014.

II. 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 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.

A. Corporate Organization

i. UPH Holdings, Inc.

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

ii. UniPoint Holdings, Inc.

4. 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.

iii. Pac-West Telecomm, Inc.

5. 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.

iv. Peering Partners Communications Holdings, LLC

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

v. nWire LLC.

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

vi. UniPoint Services, Inc.

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

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.

vii. UniPoint Enhanced Services, Inc.

9. UniPoint Enhanced Services, Inc. (“UniPoint Enhanced Services”) is a Texas corporation that provides enhanced services.

viii. Tex-Link Communications, Inc.

10. 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 Assets-based local exchange and inter-exchange network.

B. The Debtors’ Secured Debt.

11. The Debtors and Hercules Technology II, L.P. (“Hercules”) entered into a Loan and Security Agreement and Term Note on April 12, 2011, pursuant to which Hercules loaned the Debtors the original principal sum of \$8,000,000 (the “Loan Agreement”). The Loan Agreement was modified by a First Amendment effective as of August 31, 2012 (the “First Amendment”) and a Second Amendment effective as of November 30, 2012 (the “Second Amendment”). The Second Amendment facilitated certain covenant changes and provided additional borrowing to enable UPH’s acquisition of Pac-West and its subsidiaries. Concurrently with the Second Amendment, the Debtors borrowed an additional principal amount of \$3,594,175.68 from Hercules, repayment of which is evidenced by a Secured Term Promissory Note of even date (which, together with the Loan Agreement, the First Amendment, the Second Amendment, and all other documents and agreements executed in connection therewith and/or in contemplation thereof, are collectively referred to herein as the “Prepetition Loan Documents”).

12. Pursuant to a Second Amended Final Order for Use of Cash Collateral entered on May 9, 2013 (the “Cash Collateral Order”), the Debtors acknowledged, stipulated and agreed that pursuant to Prepetition Loan Documents: (i) as of the Petition Date, the Debtors are indebted to the Lender in the aggregate principal amount of not less than \$10,531,673.68, plus accrued and unpaid

interest, attorneys' fees, costs and expenses (collectively, the "Hercules Prepetition Indebtedness"), all as provided in the Prepetition Loan Documents; (ii) the Hercules Prepetition Indebtedness is due without any claim, defense, counterclaim or offset of any kind; and (iii) the Prepetition Indebtedness is secured by a valid, binding, perfected, enforceable, and non-avoidable blanket first priority security interest and lien on (the "Prepetition Liens") all of the Debtors' property and assets, including the proceeds, products, rents and profits therefrom all as more particularly described in the Prepetition Loan Documents.

C. The Bankruptcies.

13. 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. 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.

14. To avoid the loss of any of its network Assets or functionality, the Debtors determined to initiate these Chapter 11 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*.

15. 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.

16. The Debtors filed these Chapter 11 cases to pursue an 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 Q Advisors LLC (“Q Advisors”) as investment bankers to aid the Debtors in advertising and marketing for sale substantially all of the Debtors’ assets.

17. The Debtors have identified five baskets of assets: (1) the core, operating network assets and related customers, contracts and business (the “Core Business”); (2) a group of jointly owned patents relating to VoIP network design and functionality (the “Patents”); (3) one or more blocks of IP v.4 addresses that can be separated from the Core Business (“the IP4 Assets”); (4) nWire as a shell interconnected CLEC (“nWire”); and (5) software and related copyright owned by Pac-West related to network border control processes (“Telastic™”). This Motion pertains only to the Core Business and such other assets subsequently identified to this Motion as the sales process progresses (the “Assets”).

III. RELIEF REQUESTED AND SUPPORTING AUTHORITIES

A. The Bid Procedures Should be Approved.

18. The Debtors, in their business judgment, have determined that the best method for maximizing the value of the Assets will be realized through a going concern sale through a competitive sale process. That proposed process is described in detail herein. In order to ensure that

the Debtors are able to derive maximum value from the Assets, the Debtors wish to solicit formal offers for the Assets. Given the nature of the assets and the number of potentially interested parties, the Debtors seek to adopt procedures at the outset of these cases that will foster bidding among potential buyers without eliminating or discouraging any qualified bids for the Assets. The Court's adoption of the proposed procedures will help expedite the process of marketing the Assets to potential purchasers. In addition, the Debtors are involved in active negotiations with several bidders that have expressed an interest in being granted stalking horse status and protections. In the event that a stalking horse bidder is selected (the "Stalking Horse"), the Debtors will provide notice of the Stalking Horse's bid, including the Stalking Horse's marked changes to the APA (defined below) in the notice (herein defined as "Auction and Sale Notice") as contemplated in connection with this Motion.

3. By this Motion, the Debtors seek the entry of an order:

- (a) authorizing and scheduling a public auction on July 9, 2013 through July 11, 2013 (the "Auction") for the sale of the Assets, free and clear of all liens, claims, encumbrances, and interests and the assumption and assignment of certain executory contracts (the "Sale");
- (b) approving bid procedures substantially as described herein, for the submission of offers for the Assets;
- (c) approving the manner of notice of the Sale;
- (d) approving the manner of notice of the Winning Bidder & Cure Amounts;
- (e) scheduling a hearing and approving the Sale; and
- (f) authorizing the payment of the net proceeds of sale to Hercules up the full amount of the Hercules Prepetition Indebtedness.

A proposed order shall be uploaded subsequent to the filing of this Motion (the "Bidding Procedures Order"). See Exhibit 1. The relief requested by the Debtors in this Motion is

predicated upon 11 U.S.C. §§ 105, 363, and 365, and Bankruptcy Rules 2002, 6004, 6006 and 9014.

19. Pursuant to Federal Rule of Bankruptcy Procedure 6004(f)(1), a sale of a debtor's assets may be accomplished through public or private auction. The Debtors believe that a public sale would be the most fair, transparent, and profitable method for selling the Assets, and therefore seek authority to conduct a public auction.

20. The Debtors request that the Court authorize the Debtors, in accordance with the Bid Procedures, to solicit Qualifying Bids (as defined below) for the Assets. The Debtors will hold the Auction at which Qualifying Bidders (as defined below), whose Qualifying Bids meet the requirements of the Bid Procedures, may compete to offer bids from which the Debtors, in consultation with the Committee and Hercules, will determine to be the highest and/or best offer for the Assets. Such bids will be submitted to the Court for approval at the hearing to approve the Sale (the "Sale Hearing").

21. Pursuant to the Bid Procedures, the Debtors seek to conduct the Auction according to a schedule that is designed to provide prospective bidders with enough time to (a) conduct due diligence and (b) prepare their bids. As such, the Bid Procedures preserve and maximize value for the benefit of the Debtors' estates and creditors. When bidding for the Assets, all bidders must abide by the Bid Procedures. The Debtors reserve the right, in their reasonable business judgment and in consultation with the Committee and Hercules, to (a) impose, at or prior to the Auction, additional terms and conditions on a sale of the Assets consistent with the Bid Procedures Order, (b) extend the deadlines set forth in the Bid Procedures no more than (5) five business days; (c) adjourn the Auction for no more than three (3) business days; (d) adjourn the Sale Hearing in open court without further notice; (e) withdraw from the Auction all or a portion of the Assets at any time prior to or during the Auction

or cancel the Auction; (f) reject all Qualifying Bids if no bid is, in the Debtors' reasonable business judgment, for fair and adequate consideration; and (g) modify the Bid Procedures, including, without limitation, any and all processes and rules regarding conduct of activities at the Auction, including, among other things, the manner in which bids are submitted and the permitted increments of such bids; provided, however, that if Hercules is participating in the Auction as a Qualified Bidder, the Debtors and the Committee may exclude Hercules from consultation on any of the foregoing topics if the Debtors and the Committee reasonably believe that including Hercules in such consultation would confer an unfair advantage on Hercules to the detriment of other Qualified Bidders or would otherwise chill bidding.

22. The Debtors propose to send a notice ("Auction and Sale Notice"), a copy of which is attached hereto as Exhibit 2, to all parties in interest, including all parties that have expressed an interest, or whom the Debtors, the Committee or Hercules reasonably believe may have an interest, in acquiring all or part of the Debtors' assets by June 24, 2013.

23. The Debtors also propose that the Court hold a hearing to approve the Sale on July 22, 2013 ("Sale Hearing"). The Debtors propose that any objections to the Sale Motion be filed and served such that they are received by counsel for the Debtors, counsel for the Committee and counsel for Hercules no later than seven (7) calendar days prior to the hearing date, by July 15, 2013. The Debtors further propose that they, and any other parties in interest, be permitted, but not be required, to file a reply to any such objection, provided that the reply is filed and served on the objecting parties such that it is received no later than one (1) Court day prior to the hearing on the Sale Motion.

24. The Debtors propose that to become a "Qualified Bidder" and thereby be permitted to present a bid for the Assets at the Auction, a proposed bidder must deliver a written bid containing and

complying with following items (a "Qualified Bid") to counsel for the Debtors, counsel for the Committee and counsel for Hercules, three (3) business days prior to the Auction ("Bid Submission Deadline") provided that the Debtors and Committee may provide information listed in subparagraph (g) to Hercules on a professional eye's only basis if (i) the submitting bidder requires that such information remain confidential or (ii) if the Debtors and the Committee reasonably believe that providing such information to Hercules would provide an unfair advantage on Hercules to the detriment of other Qualified Bidders or would otherwise chill bidding:

- a. the bid must be marked to show changes against the form Asset Purchase Agreement the Debtors shall provide to potential bidders (the "APA");
- b. the bid must include a commitment to consummate the transaction within not more than five (5) calendar days after the entry by the Court of the order approving the sale, subject only to the satisfaction by the Debtors of their respective obligations to close;
- c. the Qualified Bidder's offer must be irrevocable until the Court enters an order denying approval of such Qualified Bidder's bid or an order approving the Qualified Bid of another Qualified Bidder;
- d. if the Debtors have selected a Stalking Horse, the bid must be at a price which exceeds the purchase price to be paid by the Stalking Horse by a specified amount ("Initial Overbid"), to be predetermined by the Debtors in consultation with the Committee and Hercules, but not less than 5%;
- e. the bid must be accompanied by a certified check or wire transfer in the amount of 10% of the purchase price identified in the bid (the "Deposit"), made payable to the Debtors, which Deposit shall be held in a segregated interest-bearing account, with the Deposits of the other bidders. The Deposit of the Winning Bidder (defined below) will be held in such account until the earlier of the closing or termination of the Sale Agreement. If the Debtors do not consummate the Winning Bidder's Sale Agreement for any reason other than the Winning Bidder's failure to consummate the sale, the Debtors' sole obligation will be to refund the Deposit to such Winning Bidder. Any Deposit made by the bidder that does not become the Winning Bidder or a Runner-Up Bidder (defined below) shall be returned, along with any accrued interest, following the completion of the Sale Hearing;
- f. the bid must state that the form of consideration for the Assets being purchased will be paid in cash, without any financing conditions included;

- g. the bid must be accompanied by evidence admissible under the Federal Rules of Evidence demonstrating the competing bidder's ability to consummate the proposed Sale Agreement and to provide adequate assurance of future performance to the non-debtor party under any executory contract or unexpired leases to be assumed, if any, and assigned pursuant to the Sale Agreement. Each Qualifying Bidder shall be deemed to acknowledge and represent in its Qualifying Bid that it has had an opportunity to inspect and examine the Assets and to conduct any and all due diligence regarding the Assets prior to making its bid to the extent it has deemed necessary and appropriate, that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or Assets in making its bid, and that it did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Assets, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in its Qualifying Bid.

25. Prior to the Sale Hearing, the Debtors will determine which bidders have submitted qualified bids based on the above criteria. Hercules is considered to be a Qualified Bidder and is authorized, in its discretion, to credit bid at the auction all or any portion of the Hercules Prepetition Indebtedness under Section 363(k) of the Bankruptcy Code. The Debtors shall conduct the Auction of the Assets on July 9, 2013 through July 11, 2013 at the offices of Jackson Walker, L.L.P., in Austin, Texas, or such other place as may be appropriate under the circumstances. Only Qualifying Bidders shall be entitled to make a bid at the Auction. Qualifying Bidders may participate in the Auction in person prior to the Auction, the Debtors, in conjunction with the Committee and the Debtors' secured lender, shall evaluate each Qualifying Bid received and select the highest and best offer so submitted, which shall constitute the opening bid for the Assets at the Auction. All bids made at Auction for the Assets shall be in increments of at least \$100,000. Upon the conclusion of the Auction, the Debtors shall identify the Winning Bid and the "Runner-Up Bid," if any, as defined below. The Debtors propose to send a notice ("Notice of Winning Bidder & Cure Amounts"), in a form substantially similar to the form attached hereto as Exhibit 3, to all parties in interest, including all contract counterparties, immediately following the conclusion of the Auction on July 12, 2013.

26. At the Sale Hearing, the Debtors shall present to the Court the Winning Bid, and if applicable, the Runner-Up Bid, and request the entry of the Sale Order approving such bid(s) subject to the terms thereof in a form reasonably satisfactory to counsel for the Winning Bidder and Runner-Up Bidder. In the event that no competing bid is presented at the Auction, then the highest and best Qualifying Offer for the Assets shall constitute the "Final Accepted Bid." In the event that no Final Accepted Bid is presented at the Auction, then the Debtors shall be entitled to adjourn, postpone, and/or cancel the Auction, without prejudice to conducting a subsequent auction or taking any other action.

27. The Debtors, after consultation with the Committee and Hercules may, but shall not be obligated to, request that the Court determine at the Sale Hearing the next highest and best bid for the Assets other than the prevailing Bid (the "Runner-Up Bid"). In the event that the party making the Final Accepted Bid refuses or is otherwise unable to close in accordance with the terms thereof within eleven (11) business days after the entry of the Sale Order, then, in such event, the Debtors, in consultation with the Committee and Hercules, may accept the Runner-Up Bid in writing to such bidder within five (5) calendar days thereafter, in which case, the party submitting the Runner-Up Bid ("Runner-Up Bidder") shall be required to consummate the transactions contemplated in the Runner-Up Bid at the purchase price so offered without further act, deed, or order of Court within the following five (5) calendar days after such acceptance. If the Debtors fail to timely notify the Runner-Up Bidder, then the Runner-Up Bid shall be considered null and void and of no legal effect whatsoever upon the Debtors' return of the Deposit to such party which shall occur within two (2) business days after the conclusion of such 5-day notice period, and each party shall otherwise suffer their own losses, costs, expenses or damages arising out of, under or related to the underlying Sale Agreement.

28. If a Stalking Horse is selected, the Debtors may in consultation with the Committee and Hercules, determine that a break-up fee be payable to the Stalking Horse if the Stalking Horse is willing and able to timely close the transaction to which it agreed, the Stalking Horse did not default under the Sale Agreement, and some or all of the Assets are sold to a third party who is not affiliated with the Stalking Horse, provided that the break-up fee will not exceed three percent (3%) of the purchase price of its bid and provided that the Winning Bidder pays more for the Assets than the purchase price in the Stalking Horse's Initial Bid plus the break-up fee.

29. The Debtors believe that the Auction and proposed Bid Procedures will promote active bidding from seriously interested parties and will identify the highest and/or best offer available for the Assets. The proposed Bid Procedures will allow the Debtors to conduct the Auction in a fair and efficient fashion that will encourage participation by financially capable bidders who demonstrate the ability to close a transaction. The Debtors believe that the Bid Procedures are sufficient to encourage bidding for the Assets, consistent with other procedures previously approved by this Court, and appropriate under the relevant standards governing auction proceedings and bidding incentives in bankruptcy cases.

B. Notice of the Bid Procedures, Auction, and Proposed Sale is Proper

30. Federal Rule of Bankruptcy Procedure 2002(a)(2) requires that the debtor, the trustee, all creditors, and indenture trustees receive at least 21 days' notice by mail of a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, "unless the court for cause shown shortens the time or directs another method of giving notice." The Debtors will serve an Auction and Sale Notice, including the proposed form of Sale Agreement, and a summary description of the proposed sale procedure described herein including any non-debtor parties to contracts or leases to be assumed, if any, and assigned under the APA, to any parties, if any, known by the Debtors to assert liens in the property being sold, and to lessors, if any, of non-residential real property in which

any assets are physically located. The Auction and Sale Notice will also be served on any other parties that have been identified by the Debtors as having a potential interest in submitting a competing bid for the Assets that are the subject of the Auction and Sale Notice. Additionally, the Auction and Sale Notice will be served upon the U.S. Trustee, counsel for the Committee, and any parties requesting notice.

C. The Sale Order Should Be Approved.

ix. The Proposed Sale is an Exercise of Sound Business Judgment and Should Be Approved.

31. The Debtor submits that ample authority exists for the approval of the proposed sale of the Assets. Section 363 of the Bankruptcy Code, which authorizes a debtor to sell assets of the estate other than in the ordinary course of business, provides, in relevant part: “[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).

32. The proposed sale represents the reasonable business judgment of the Debtors in consultation with their advisors and should be approved. *See, e.g., Institutional Creditors of Continental Airlines, Inc. v. Cont’l Air Lines, Inc. (In re Cont’l Air Lines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986). The Debtors have satisfied the factors that courts consider under 11 U.S.C. § 363(b), namely: (a) a sound business reason exists for the proposed transaction; (b) fair and reasonable consideration is provided; (c) the transaction is been proposed in good faith; and (d) the transaction is subject to adequate and reasonable notice. *See, e.g., In re Condere*, 228 B.R. 615, 626 (Bankr. S.D. Miss. 1998).

33. First, the Debtors propose the Sale after thorough consideration of all viable alternatives and have concluded that the Sale is supported by a number of sound business reasons. A sale is critical to maximizing the going concern value of the Debtors’ business operations.

In particular, the Debtors' industry is undergoing a consolidation due to regulatory changes that emphasize scale and scope of physical network facilities rather than ephemeral minutes and customers. Further, the size of the overhang debt and regulatory refund claims make reorganization without a sale virtually impossible within the time frames allowed by the Bankruptcy Code. Therefore Debtors submit that the facts described above, which require a sale of the assets to preserve value for this estate, provide a strong business justification for the Sale. The maximization of asset value for the benefit of creditors reflects a sound business purpose that warrants authorization of the proposed sale.

34. Second, the value the Debtors will receive for the Assets as a going concern exceed any value the Debtors could get for the Assets if the Debtors were required to liquidate the Assets piecemeal. Further, the broad solicitation of interest conducted by Q Advisors and the implementation of the Bid Procedures and the Auction insure that the highest and best offers received under the circumstances of this bankruptcy case.

x. The Proposed Sale Should Be Free and Clear of all Encumbrances.

35. The Debtors further submit that it is appropriate to sell the assets free and clear of all claims, liens, interests and encumbrances, pursuant to Bankruptcy Code § 363(f)(3), with any such claim, lien, interest or encumbrance attaching to the net sale proceeds of the Assets, as and to the same extent validity and priority as existed prior to the sale so long as the net proceeds of sale are sufficient to satisfy the Hercules Prepetition Indebtedness in full. Section 363(f) of the Bankruptcy Code authorizes a sale of a debtor's assets free and clear of claims, liens, interests and encumbrances if:

- (1) applicable non-bankruptcy law permits sale of such property free and clear of such interests;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the value of all liens on such property;
- (4) such interest is in bona fide dispute; or

- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). With respect to subsection 363(f)(2), in the event that the net proceeds of the sale do not exceed the total amount of the Hercules Prepetition Indebtedness, Hercules does not consent to the sale.

36. Because Bankruptcy Code § 363(f) is drafted in the disjunctive, satisfaction of any one of its five (5) requirements will suffice to permit the sale of the Debtor's assets "free and clear" of liens and interests. *Michigan Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (stating that Bankruptcy Code § 363(f) is written in the disjunctive; holding that the court may approve the sale "free and clear" provided at least one of the subsections of Bankruptcy Code § 363(f) is met); *In re Dundee Equity Corp.*, 1992 WL 53743, at *4 (Bankr. S.D.N.Y. Mar. 6, 1992) ("[s]ection 363(f) is in the disjunctive, such that the sale free of the interest concerned may occur if any one of the conditions of § 363(f) have been met."); *In re Bygaph, Inc.*, 56 B.R. 596, 606 n.8 (Bankr. S.D.N.Y. 1986).

37. The Court also may authorize the sale of a debtor's assets free and clear of any liens pursuant to section 105 of the Bankruptcy Code, even if section 363(f) did not apply. *See In re Trans World Airlines, Inc.*, 2001 WL 1820325, at *3 (Bankr. D. Del. Mar. 27, 2001) ("bankruptcy courts have long had the authority to authorize the sale of estate assets free and clear even in the absence of § 363(f)"); *see also Volvo White Truck Corp. v. Chambersberg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) ("Authority to conduct such sales [free and clear of liens] is within the court's equitable powers when necessary to carry out the provisions of Title 11").

38. The Debtors believe that one or more of the tests of § 363(f) will be satisfied with respect to the transfer of the Assets pursuant to a Winning Bidder's APA. The Debtors intend to submit

sufficient evidence at or prior to the Sale Hearing to establish that the provisions of § 363(f) have been satisfied and that the transfer of the Assets should be free and clear of all such encumbrances.

.xi. Any APA of the Winning Bidder will have been Negotiated at Arm's Length and in Good Faith.

39. The terms of the Winning Bidder's APA will have been negotiated at arm's length, without collusion, and in good faith. Accordingly, the Debtors request that the Bankruptcy Court determine that the Winning Bidder negotiated and acted at all times in good faith and, as a result, is entitled to the protections of a good faith purchaser under § 363(m) of the Bankruptcy Code. The Debtors intend to submit sufficient evidence at or prior to the Sale Hearing to establish the parties acted in good faith in negotiating the APA for the Winning Bidder.

.xii. The Debtor Should Be Permitted to Enter the Winning Bidder's APA.

40. Courts routinely approve entry into asset purchase agreements. *See, e.g., In re Enron Corp.*, 2002 WL 32154269, at *4 (Bankr. S.D.N.Y. Apr. 24, 2002). Such agreements are approved if they are an exercise of the debtor's sound business judgment. *See, e.g., In re Decora Indus. Inc.*, 2002 WL 32332377, at *5 (Bankr. D. Del, May 17, 2002); *In re Arlco, Inc.*, 239 B.R. 261, 265 (Bankr. S.D.N.Y. 1999). In this case, the Debtors anticipate introducing sufficient evidence at or prior to the Sale Hearing to establish that the Wining Bidder's APA was the subject of arm's length negotiations between the Debtors and the Winning Bidder. The Debtors intend to establish that the terms and conditions of the Winning Bidder's APA are the best that could be obtained under the circumstances, and that entry into the Winning Bidder's APA will have been a sound exercise of the Debtors' business judgment.

.xiii. Assumption and Assignment of Assumed Contracts is Authorized By Bankruptcy Code Section 365.

41. Bankruptcy Code §§ 365(a) and (b) authorize a debtor in possession 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.

11 U.S.C. § 365(b)(1).

42. 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).

43. Courts generally will not second-guess a debtor’s business judgment concerning the assumption of an executory contract. *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.”).

44. As discussed above, the Debtors will provide Notice of Winning Bidder & Cure Amounts, of the potential assumption and assignment of Contracts to each Contract counterparty listed on Exhibit A (such will be provided at a later date) to the Notice of Winning Bidder & Cure Amounts, and identify any Cure Amounts owing such counterparty to be paid by the Winning Bidder upon closing of such sale(s). Because the Debtors cannot obtain the benefits of the Winning Bidder’s APA without the assumption of the Assumed Contracts, the assumption of the Assumed Contracts is undoubtedly a sound exercise of the Debtors’ business judgment.

45. 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(o)(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).

46. 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).

47. Here, the Winning Bidder must agree to pay all Cure Amounts in connection with the Assumed Contracts. The Winning Bidder will present sufficient evidence at the Sale Hearing that it has sufficient assets to continue performance thereunder and that adequate assurance of future performance is present by the promise to perform the obligations of the Assumed Contracts from and after the Closing Date. The Debtors hereby propose that any objects to the Cure Amounts be filed and served such that they are received by counsel for the Debtors and counsel for the Committee no later than seven (7) calendar days prior to the hearing date, by **July 15, 2013**.

48. The objection must state with specificity the amounts that the non-Debtor party believes are necessary to cure the defaults with appropriate documentation in support thereof. If no objection is timely received, the Cure Amounts set forth in Exhibit A attached to the Notice of Winning Bidder & Cure Amounts shall be controlling notwithstanding anything to the contrary in any designated contract or other document and the non-debtor party to the designated contract shall be forever barred from asserting any other claim arising prior to the assignment against the debtor or the proposed purchaser as to such designated contract and such non-debtor party shall be deemed to have consented to the assumption and assignment of such designated contract to the proposed purchaser.

49. 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).

50. 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).

51. 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 [d]ebtors 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).

xiv. Payment of Net Proceeds of Sale to Hercules.

52. The Cash Collateral Order provides that Hercules has valid and perfected first priority liens and security interests in and against all of the Debtors’ assets. An Event of Default under the Cash Collateral Order includes the failure of the entry of an Order on or before August 7, 2013 approving a sale under Section 363 of the Bankruptcy Code, whether or not under a plan, which

provides for the sale of substantially all of the Debtors' assets and the payment of the Net Proceeds² of sale to Hercules on account of the Hercules' claims.

53. Accordingly, payment of the net proceeds of sale to Hercules has already been authorized by the Court and agreed to by the Debtors. Under the Cash Collateral Order, the Committee was afforded until June 30, 2013 to file an adversary proceeding asserting a meritorious challenge to the extent, validity and priority to Hercules' Prepetition Liens. In the event that such an adversary proceeding is timely filed, it will not be adjudicated by the closing of the sale of the Debtors' assets. The Debtors do not believe that a potential challenge by the Committee should cause the estates to risk non-compliance with the Cash Collateral Order or otherwise threaten the sale. Thus, unless Hercules is the successful purchaser, all of the net proceeds of sale, up to the full amount of the Hercules Prepetition Indebtedness, should be paid to Hercules with any excess retained by the Debtors' estates. In the event of a timely and successful challenge by the Committee or other party in interest after the closing of the sale, the parties agree that an appropriate remedy can be fashioned at that time.

xv. Cause Exists for Waiver of the Stay Imposed by Bankruptcy Rule 6004(h)

54. Bankruptcy Rule 6004(h) provides that an "order authorizing the use, sale, or lease of property is stayed until the expiration of fourteen (14) days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). Bankruptcy Rule 6006(d) provides that an "order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of fourteen (14) days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6006(d).

² Net Proceeds means the Purchase Price paid by the Winning Bidder less any sums paid or payable to Q Advisors less the Break Up Fee, if any.

55. The Debtors requests that any order entered pursuant to the Motion authorizing the consummation of a transaction that is deemed a sale of assets and/or an assignment of an unexpired contract or lease be effective immediately by providing that the fourteen (14) day stay under Rules 6004 or 6006, as the case may be, is inapplicable, so that the Debtors may proceed to close on the transaction as expeditiously as possible and within the time frames contemplated by the Debtors and the Winning Bidder. The best interests of their estates require the Debtors to close the sales as soon as possible after all closing conditions have been met or waived. Accordingly, the Debtors hereby requests that the Court eliminate the fourteen (14) day stay period under Bankruptcy Rules 6004(h) and 6006(d).

WHEREFORE, PREMISES CONSIDERED, the Debtors respectfully request that the Court enter an order (a) authorizing and scheduling a public auction for identifying the highest and best offer for the sale of the Assets; (b) approving the proposed Bid Procedures; (c) approving the manner of the Auction and Sale Notice; (d) approving the manner of the Notice of Winning Bidder & Cure Amounts; (e) approving the assumption and assignment of the Assumed Contracts; and (f) approving the Sale and the payment of the net proceeds to Hercules, and granting such other and further relief as the Court may deem just and proper.

Dated: June 20, 2013.

Respectfully submitted,

JACKSON WALKER L.L.P.
100 Congress Ave., Suite 1100
Austin, Texas 78701
(512) 236-2000
(512) 236-2002 - FAX

By: /s/ Patricia B. Tomasco
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**COUNSEL FOR DEBTORS-IN-
POSSESSION**

CERTIFICATE OF SERVICE

I hereby certify that on the 20th 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.

UPH Holdings, Inc.
Pac-West Telecomm, Inc.
Tex-Link Communications, Inc.
UniPoint Holdings, Inc.
UniPoint Enhanced Services, Inc.
UniPoint Services, Inc.
nWire, LLC
Peering Partners Communications, Inc.
6500 River Place Blvd., Bldg. 2, Suite 200
Austin, Texas 78730

Valerie Wenger
Office of the US Trustee
903 San Jacinto, Room 230
Austin, TX 78701

Stuart Komrower
Ilana Volkov
COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.
25 Main Street
Hackensack, New Jersey 07601

/s/ Patricia B. Tomasco
Patricia B. Tomasco

**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

**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) THE PAYMENT OF THE NET PROCEEDS OF SALE TO HERCULES
TECHNOLOGY II, L.P., AND (C) THE ASSUMPTION AND ASSIGNMENT OF
CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

EXHIBIT 1

CAME ON FOR CONSIDERATION on this day the 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) the Payment of the Net Proceeds of Sale to Hercules Technology II. L.P., and (C) the Assumption and Assignment of Certain Executory Contracts and Leases ("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"), pursuant to §§ 105, 363, and 365 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of an order approving the following sale and bidding procedures ("Bidding Procedures"), in connection with the sale of substantially all of the Debtors' assets, and providing certain protections to any identified stalking horse, including the form and manner of service of the notice of sale (the "Auction and Sale Notice") attached hereto as Exhibit A, and granting other relief related thereto; and upon considering the Motion, the Court finds that the Motion should be granted on the terms set forth herein. It is therefore

ORDERED that the following bid procedures ("**Bid Procedures**") are hereby authorized and approved:

1. An Auction (as defined in the Motion), if any, shall be held on **July 9, 2013, through July 11, 2013** at the offices of Jackson Walker, L.L.P., located at 100 Congress Avenue, Suite 1100, Austin, Texas, 78701 (the "Auction").

EXHIBIT 1

2. Each person or entity wishing to participate in the Auction must, no later than 5:00 p.m. (CT), on **July 3, 2013** (“Bid Submission Deadline”), submit a written bid (the “Bid”) containing and complying with the following items (“Qualified Bid”) to counsel for the Debtors, Patricia B. Tomasco, Jackson Walker, L.L.P., 100 Congress Avenue, Suite 1100, Austin, Texas, 78701; counsel for the Committee (as defined in the Motion); and counsel for Hercules (as defined in the Motion) such that it is actually received by the Bid Submission Deadline. Such bids will be submitted to the Court for approval at the hearing the approve the Sale (as defined in the Motion, “Sale Hearing”).

3. The Debtors reserve the right, in their reasonable business judgment and in consultation with the Committee (as defined in the Motion) and the Debtors’ secured lender, Hercules (as defined in the Motion) to (a) impose, at or prior to the Auction, additional terms and conditions on a sale of the Assets consistent with the Bid Procedures Order, (b) extend the deadlines set forth in the Bid Procedures no more than (5) five business days; (c) adjourn the Auction for no more than three (3) business days; (d) adjourn the Sale Hearing in open court without further notice; (e) withdraw from the Auction all or a portion of the Assets at any time prior to or during the Auction or cancel the Auction; (f) reject all Qualifying Bids if no bid is, in the Debtors’ reasonable business judgment, for fair and adequate consideration; and (g) modify the Bid Procedures, including, without limitation, any and all processes and rules regarding conduct of activities at the Auction, including, among other things, the manner in which bids are submitted and the permitted increments of such bids; provided, however, that if Hercules is participating in the Auction as a Qualified Bidder, the Debtors and the Committee may exclude Hercules from consultation on any of the foregoing topics if the Debtors and the Committee reasonably believe that including Hercules in such consultation would confer an unfair advantage on Hercules to the detriment of other Qualified Bidders or would otherwise chill bidding.

EXHIBIT 1

4. When bidding for the Assets, all bidders shall abide by the following Bid Procedures. To become a "Qualified Bidder" and thereby be permitted to present a bid for the Assets at the Auction, a proposed bidder shall deliver a written bid containing and complying with the following items (a "Qualified Bid") to counsel for the Debtors, counsel for the Committee (as defined in the Motion), and counsel for Hercules (as defined in the Motion), three (3) business days prior to the Auction ("Bid Submission Deadline") provided that the Debtors and the Committee may provide information in subparagraph (g) to Hercules on a professional eye's only basis if (i) the submitting bidder requires that such information remain confidential or (ii) if the Debtors and the Committee reasonably believe that providing such information to Hercules would provide an unfair advantage on Hercules to the detriment of other Qualified Bidders or would otherwise chill bidding:

- a. the bid must be marked to show changes against the form Asset Purchase Agreement the Debtors shall provide to potential bidders (the "APA");
- b. the bid must include a commitment to consummate the transaction within not more than five (5) calendar days after the entry by the Court of the order approving the sale, subject only to the satisfaction by the Debtors of their respective obligations to close;
- c. the Qualified Bidder's offer must be irrevocable until the Court enters an order denying approval of such Qualified Bidder's bid or an order approving the Qualified Bid of another Qualified Bidder;
- d. if the Debtors have selected a Stalking Horse, the bid must be at a price which exceeds the purchase price to be paid by the Stalking Horse by a specified amount ("Initial Overbid"), to be predetermined by the Debtors in consultation with the Committee and Hercules, but not less than 5%;
- e. the bid must be accompanied by a certified check or wire transfer in the amount of 10% of the purchase price identified in the bid (the "Deposit"), made payable to the Debtors, which Deposit shall be held in a segregated interest-bearing account, with the Deposits of the other bidders. The Deposit of the Winning Bidder (defined below) will be held in such account until the earlier of the closing or termination of the Sale Agreement. If the Debtors do not consummate the Winning Bidder's Sale Agreement for any reason other than the Winning Bidder's failure to consummate the sale, the Debtors' sole obligation will be to refund the Deposit to such Winning Bidder. Any Deposit made by the bidder that

EXHIBIT 1

does not become the Winning Bidder or a Runner-Up Bidder (defined below) shall be returned, along with any accrued interest, following the completion of the Sale Hearing;

- f. the bid must state that the form of consideration for the Assets being purchased will be paid in cash, without any financing conditions included;
- g. the bid must be accompanied by evidence admissible under the Federal Rules of Evidence demonstrating the competing bidder's ability to consummate the proposed Sale Agreement and to provide adequate assurance of future performance to the non-debtor party under any executory contract or unexpired leases to be assumed, if any, and assigned pursuant to the Sale Agreement. Each Qualifying Bidder shall be deemed to acknowledge and represent in its Qualifying Bid that it has had an opportunity to inspect and examine the Assets and to conduct any and all due diligence regarding the Assets prior to making its bid to the extent it has deemed necessary and appropriate, that it has relied solely upon its own independent review, investigation and/or inspection of any documents and/or Assets in making its bid, and that it did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Assets, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in its Qualifying Bid.

5. Prior to the Sale Hearing, the Debtors will determine which bidders have submitted qualified bids based on the above criteria. Hercules is considered to be a Qualified Bidder and is authorized, in its discretion, to credit bid at the auction all or any portion of the Hercules Prepetition Indebtedness under § 363(k) of the Bankruptcy Code.

6. The Debtors shall conduct the Auction of the Assets on July 9, 2013 through July 11, 2013 at the offices of Jackson Walker, L.L.P., in Austin, Texas, or such other place as may be appropriate under the circumstances. Only Qualifying Bidders shall be entitled to make a bid at the Auction. Qualifying Bidders may participate in the Auction in person. Prior to the Auction, the Debtors, in conjunction with the Committee and Hercules shall evaluate each Qualifying Bid received and select the highest and best offer so submitted, which shall constitute the opening bid for the Assets at the Auction. All bids made at Auction for the Assets shall be in increments of at least \$100,000.

EXHIBIT 1

7. Upon the conclusion of the Auction, the Debtors shall identify the Winning Bid and the "Runner-Up Bid," if any, as defined below. The Debtors propose to send a notice ("Notice of Winning Bidder & Cure Amounts"), in a form substantially similar to the form attached hereto as Exhibit B, to all parties in interest, including all contract counterparties, immediately following the conclusion of the Auction on July 12, 2013.

8. At the Sale Hearing, the Debtors shall present to the Court the Winning Bid, and if applicable, the Runner-Up Bid, and request the entry of the Sale Order (as defined in the Motion) approving such bid(s) subject to the terms thereof in a form reasonably satisfactory to counsel for the Winning Bidder and Runner-Up Bidder. In the event that no competing bid is presented at the Auction, then the highest and best Qualifying Offer for the Assets shall constitute the "Final Accepted Bid." In the event that no Final Accepted Bid is presented at the Auction, then the Debtors shall be entitled to adjourn, postpone, and/or cancel the Auction, without prejudice to conducting a subsequent auction or taking any other action.

9. The Debtors, after consultation with the Committee and Hercules may, but shall not be obligated to, request that the Court determine at the Sale Hearing the next highest and best bid for the Assets other than the prevailing Bid (the "Runner-Up Bid"). In the event that the party making the Final Accepted Bid refuses or is otherwise unable to close in accordance with the terms thereof within eleven (11) business days after the entry of the Sale Order, then, in such event, the Debtors, in consultation with the Committee and Hercules, may accept the Runner-Up Bid in writing to such bidder within five (5) calendar days thereafter, in which case, the party submitting the Runner-Up Bid ("Runner-Up Bidder") shall be required to consummate the transactions contemplated in the Runner-Up Bid at the purchase price so offered without further act, deed, or order of Court within the following five (5) calendar days after such acceptance.

EXHIBIT 1

If the Debtors fail to timely notify the Runner-Up Bidder, then the Runner-Up Bid shall be considered null and void and of no legal effect whatsoever upon the Debtors' return of the Deposit to such party which shall occur within two (2) business days after the conclusion of such 5-day notice period, and each party shall otherwise suffer their own losses, costs, expenses or damages arising out of, under or related to the underlying Sale Agreement.

10. If a Stalking Horse (as defined in the Motion) is selected, the Debtors may in consultation with the Committee and Hercules, determine that a break-up fee be payable to the Stalking Horse if the Stalking Horse is willing and able to timely close the transaction to which it agreed, the Stalking Horse did not default under the Sale Agreement, and some or all of the Assets are sold to a third party who is not affiliated with the Stalking Horse, provided that the break-up fee will not exceed three percent (3%) of the purchase price of its bid and provided that the Winning Bidder pays more for the Assets than the purchase price in the Stalking Horse's Initial Bid plus the break-up fee.

ORDERED that the form and notice of the Bidding Procedures and the Auction and Sale Notice (as defined in the Motion) is hereby approved; it is further

ORDERED that the Debtors shall serve these Bid Procedures and Auction and Sale Notice (as defined in the Motion) on all creditors and parties in interest on or before **June 24, 2013**; it is further

ORDERED that a hearing to approve the Sale (as defined in the Motion) is hereby set for **July 22, 2013** ("Sale Hearing") before the Honorable Tony M. Davis, United States Bankruptcy Court, Western District of Texas, Homer J. Thornberry Federal Judicial Building, 903 San Jacinto Blvd., Suite 322, Courtroom No. 1, Austin, Texas 78701.

###

EXHIBIT 1

Order prepared and is being submitted by:

JACKSON WALKER, L.L.P.
Patricia B. Tomasco
State Bar No. 01797600
Jennifer F. Wertz
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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
	§	
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

NOTICE OF AUCTION AND SALE

PLEASE TAKE NOTICE that on ____, 2013, the above-referenced debtors and debtors in possession (the "Debtors"), filed their 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) the Payment of the Net Proceeds of Sale to Hercules Technology II, L.P., and (C) the Assumption and Assignment of Certain Executory Contracts and Unexpired Lease (the "Motion") [Dkt. No. ____] with the United States Bankruptcy Court for the Western District of Texas (the "Bankruptcy Court"). All parties that may be interested in submitting a bid for the Assets¹ or any portion thereof or taking part in the Auction must read carefully both the Bidding

¹ Unless otherwise defined herein, all capitalized terms shall have the same meaning ascribed to them in the Bidding Procedures.

Procedures and the order approving the Bidding Procedures (the "Bidding Procedures Order"), a copy of which is attached hereto.

PLEASE TAKE FURTHER NOTICE that on [____], 2013, following a hearing held on [____], 2013, the Bankruptcy Court entered the Bidding Procedures Order and scheduled a hearing to consider the Sale Motion for **July 30, 2013**, at ____ a.m. (prevailing Central Time) (the "Sale Hearing").

PLEASE TAKE FURTHER NOTICE that only those parties that submit Qualified Bids may participate in the Auction; if you are interested in determining how to submit such a Qualified Bid, you must comply with the terms of the Bidding Procedures. Any party in interest wishing to receive a complete set of the Motion, the draft APA, and available marketing materials may do so by contacting the Debtors' undersigned counsel.

PLEASE TAKE FURTHER NOTICE that any party that wishes to take part in this process and submit a bid for the Assets must submit its competing bid on, or prior to, **July 3, 2013**, at ____ a.m. (prevailing Central Time) (the "Bid Submission Deadline") to counsel for the Debtors, Patricia B. Tomasco, Jackson Walker, L.L.P., 100 Congress Avenue, Suite 1100, Austin, Texas, 78701, counsel for the Official Unsecured Creditors' Committee ("Committee"), Craig A. Wolfe, Kelley Drye & Warren LLP, 101 Park Avenue, New York, New York, 10178, and counsel for the Debtors' secured creditor, Hercules Technology II, L.P. ("Hercules"), Stuart Komrower, Cole Schotz Meisel Forman & Leonard, PA, 25 Main Street, Hackensack, New Jersey, 07601. The Debtors shall determine whether a bidder is a "Qualified Bidder" as defined under the Bidding Procedures.

PLEASE TAKE FURTHER NOTICE that an auction (the "Auction") with respect to a contemplated transaction shall take place on **July 9, 2013 through July 11, 2013**. (prevailing

Central Time) at the offices of Jackson Walker, L.L.P., 100 Congress Avenue, Suite 1100, Austin, Texas, 78701, or such other place as may be appropriate under the circumstances.

PLEASE TAKE FURTHER NOTICE that only a Qualified Bidder who has submitted a Qualified Bid will be eligible to attend and/or participate at the Auction. At the Auction, Qualified Bidders will be permitted to increase their bids. The bidding at the Auction shall be conducted as set forth in the Bidding Procedures, which may be amended, modified, or supplemented as determined by the Debtors. The Winning Bidder shall be determined by the Debtors.

PLEASE TAKE FURTHER NOTICE that a hearing will be held before the Honorable United States Bankruptcy Judge Tony M. Davis on **July 30, 2013, at _____ a.m.**, prevailing Central Time (the "**Sale Hearing**"), in the United States Bankruptcy Court for the Western District of Texas, Austin Division, Homer J. Thornberry Federal Judicial Building, 903 San Jacinto Blvd., Suite 322, Austin, TX 78701. At the Sale Hearing, the Debtor will present the Winning Bid(s) to the Bankruptcy Court and seek the entry of an order(s) approving the sale of the Assets of the Debtors to the Winning Bidder(s) (the "**Sale Order**").

PLEASE TAKE FURTHER NOTICE that the Debtors will sell their assets subject to the terms of one or more Winning Bid(s) and assign any liabilities or any portion thereof to such Winning Bidder(s) pursuant to the Sale Order. If any Winning Bidder fails to consummate an approved Sale because of a breach or a failure to perform on the part of such Winning Bidder, the Debtor may sell its assets to one or more Runner-Up Bidder(s), without further order of the Bankruptcy Court.

**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**

NOTICE OF WINNING BIDDER & CURE AMOUNTS

PLEASE TAKE NOTICE that pursuant to the Orders (I) Approving Procedures and Providing Certain Protections and (II) Authorizing the (A) Sale of Substantially All the Debtors' Assets, (B) the Payment of the Net Proceeds of Sale to Hercules Technology II. L.P., and (C) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases ("Motion") [Dkt. No. ___] entered by the United States Bankruptcy Court for the Western District of Texas (the "Bankruptcy Court"), the above-captioned debtors and debtors in possession ("Debtors") conducted an Auction¹ for their assets on July 9, 2013 through July 11, 2013.

¹ All capitalized terms used but otherwise not defined herein shall have the meanings set forth in the Bidding Procedures Order [Dckt. No. ___].

PLEASE TAKE FURTHER NOTICE that following multiple rounds of bidding over all days of the Auction, the Debtors, upon closing of the Auction, selected _____ as the Winning Bidder for the Debtors' Assets, with a bid of _____.

PLEASE TAKE FURTHER NOTICE that a hearing will be held before the Honorable Tony M. Davis of the United States Bankruptcy Court for the Western District of Texas, on July 22, 2013, at _____ a.m., prevailing Central Time (the "Sale Hearing"), in the United States Bankruptcy Court for the Western District of Texas, Austin Division, Homer J. Thornberry Federal Judicial Building, 903 San Jacinto Blvd., Suite 322, Austin, TX 78701. At the Sale Hearing, the Debtor will present the Winning Bid(s) to the Bankruptcy Court and seek the entry of an order(s) approving the sale of the Assets of the Debtors to the Winning Bidder(s) (the "Sale Order").

PLEASE TAKE FURTHER NOTICE that the Sale Hearing may be adjourned from time to time in accordance with the Bidding Procedures Order without further notice other than by announcement of such adjournment at the Sale Hearing.

PLEASE TAKE FURTHER NOTICE that pursuant to the Orders (I) Approving Procedures and Providing Certain Protections and (II) Authorizing the (A) Sale of Substantially All the Debtors' Assets, (B) the Payment of the Net Proceeds of Sale to Hercules Technology II. L.P., and (C) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases ("Motion") (the "Assumption Order") [Dkt. No.____] the above-captioned debtors and debtors in possession (herein "Debtors") hereby provide notice that the unexpired leases or

EXHIBIT 3

executory contracts (“Assumed Contracts”) listed on Exhibit A² attached hereto may be assumed and assigned, pursuant to § 365 of the Bankruptcy Code to _____ (“Winning Bidder”). Opposite the name of each non-Debtor party to an unexpired lease or executory contract listed on Exhibit A is the dollar amount that the Debtor believes is necessary to cure any defaults under the Assumed Contracts to which such non-Debtor is a party (“Cure Amount”). If you have received this notice, it is possible that your unexpired lease or executory contract with the Debtors may be a contract or lease to be assumed and assigned to the Winning Bidder.

PLEASE TAKE FURTHER NOTICE that all objections to the assumption and assignment of the Assumed Contracts or to the amounts listed as Cure Amounts on Exhibit A hereto, shall be filed on or before 5:00 p.m. prevailing Central Time on **July 15, 2013**, with the Bankruptcy Court and served so as to be actually received by counsel for the Debtors at or before that time. The objection must state with specificity the amounts that the non-Debtor party believes are necessary to cure the defaults with appropriate documentation in support thereof. If no objection is timely received, the Cure Amounts set forth in Exhibit A attached to this Notice shall be controlling notwithstanding anything to the contrary in any designated contract or other document and the non-debtor party to the designated contract shall be forever barred from asserting any other claim arising prior to the assignment against the debtor or the proposed purchaser as to such designated contract and such non-debtor party shall be deemed to have consented to the assumption and assignment of such designated contract to the proposed purchaser.

PLEASE TAKE FURTHER NOTICE that a hearing will be held before the Honorable

² Nothing contained herein shall be deemed an admission by the Debtors that any contract, lease, or other agreement listed on Exhibit A is, in fact, an executory contract or an unexpired lease. The Debtors specifically reserve their

EXHIBIT 3

Tony M. Davis of the United States Bankruptcy Court for the Western District of Texas, on July 22, 2013, at _____ a.m., prevailing Central Time (the "Sale Hearing"), in the United States Bankruptcy Court for the Western District of Texas, Austin Division, Homer J. Thornberry Federal Judicial Building, 903 San Jacinto Blvd., Suite 322, Austin, TX 78701. At the Sale Hearing, the Winning Bidder will present sufficient evidence that it has sufficient assets to continue performance under the Assumed Contracts and that adequate assurance of future performance is present by the promise to perform the obligations of the Assumed Contracts from and after the Closing Date.

rights to assert that any such contract, lease, or other agreement is not an executory contract or unexpired lease.

EXHIBIT 3

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202 US Route One, Suite 206
Falmouth, ME 04105

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
c/o NAI Reco Partners
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
P.O. Box 166490
Atlanta, GA 30321-0649

Arent Fox LLP
1050 Connecticut Ave. N.W.
Washington, DC 20036-5339

FPL FiberNet LLC
TJ412-01-0-R
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Austin, TX 78711

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101 East 15th Street
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UPH Holdings, Inc./Pac-West Telecomm, Inc./Tex-
Link Communications, Inc./UniPoint Holdings, Inc.
UniPoint Enhanced Services, Inc./UniPoint Services,
Inc./nWire, LLC
Peering Partners Communications, Inc.
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