

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

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DEBTORS' REPLY TO QWEST COMMUNICATION, QWEST COMMUNICATIONS COMPANY, LLC, CENTRAL TELEPHONE COMPANY-NEVADA, AND CENTURYLINK OF WASHINGTON, INC.'S¹ OBJECTION TO 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 LEASES²

TO THE UNITED STATES BANKRUPTCY JUDGE TONY M. DAVIS:

¹ Qwest Communication, Qwest Communications Company, LLC, Central Telephone Company-Nevada, and CenturyLink of Washington, Inc shall be referred to collectively as the CenturyLink Entities.

² On July 17, 2013, the Affiliates of Verizon Communications Inc. filed their Limited, Conditional Joinder in Qwest/CenturyLink's Objection to the Debtors' Sale Motion [Docket No. 348] and Statement Concerning the Consensual Resolution of Verizon's Other Sale-Related Objection ("Verizon Joinder"); this Reply shall serve as a response to the Verizon Joinder as well. As of the date of this draft, the Debtors believe the dispute with Verizon has been resolved.

COME NOW UPH Holdings, Inc., (“UPH”), Pac-West Telecom, Inc., (“Pac-West”), Tex-Link Communications, Inc. (“Tex-Link”), UniPoint Holdings, Inc. (“UniPoint Holdings”), UniPoint Enhanced Services, Inc. (“UniPoint Enhanced”), UniPoint Services, Inc., (“UniPoint”), nWire, LLC (“nWire”), and Peering Partners Communications, LLC (“Peering Partners”) (collectively the “Debtors”), and debtors-in-possession in the above-captioned Chapter 11 cases and file their Reply (“Reply”) to the Objection of the CenturyLink Entities to the Debtors’ Motion for Entry of Orders Authorizing (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 Leases (the “CenturyLink Objection”) and in support thereof would show:

I. INTRODUCTION

1. On March 28, 2013 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors continue in possession of their property and management of their business as debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108. The Office of the United States Trustee has appointed an official committee of unsecured creditors in these cases (the “Committee”). No trustee or examiner has been appointed.

2. On June 20, 2013, the Debtors filed their Motion for Entry of Orders Authorizing (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.(“Hercules”), and (C) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases [Dckt. No. 255] (the “Sale Motion”) of the above-captioned debtors and debtors in possession (the “Debtors”), pursuant to sections 363 and 365

of title 11 of the United States Code (the “Bankruptcy Code”) and Federal Rules of Bankruptcy Procedure 2002, 6004, 6006 and 9014 (the “Bankruptcy Rules”), for entry of an order authorizing and approving, among other things, the sale of certain of the Debtors’ assets free and clear of all liens, claims and liens or other encumbrances and related relief, including the assumption and assignment of certain executory contracts pursuant to the procedures established by the Court in the Bidding Procedures Order and Cure Procedures Order; and the Order Approving Bidding Procedures and Providing Certain Bid Protections and Granting Related Relief [Dckt. No. 280] (the “Bidding Procedures Order”).³ The Bidding Procedures Order and the Cure Procedures Order were entered by the Court on June 28, 2013, and served on all counterparties on June 28, 2013. The hearing to consider and approve the proposed Sale is set for July 22, 2013, at 1:30 p.m. (CDT) (“Sale Hearing”).

3. In particular, the Cure Procedures Order was the product of informal resolution conference between the CenturyLink Entities and Verizon. In the Cure Procedures Order, the various deadlines for providing the Debtors’ cure amounts and objecting thereto were agreed to by the parties and approved by the Court in the Cure Procedures Order.

4. Pursuant to the Sale Motion, the Cure Procedures Order and the Debtors’ Notice of Winning Bidder and Assigned Contracts [Dckt. No. 325], the Debtors provided notice to counterparties of the Buyer’s potential intent to take assignment of certain contracts pursuant to the APA (the “Assigned Contracts”) together with proposed amounts to cure any pre-petition default thereunder (the “Cure Amounts”).

5. On July 15, 2013, the CenturyLink Entities filed their Objection [Dckt. No. 348] to the Debtors’ Sale Motion. In the CenturyLink Objection, the CenturyLink Entities seek hamper the Sale

³ Unless otherwise defined herein, capitalized terms shall have the meanings ascribed thereto in the Sale Motion, the Cure Procedures Order, and/or the Bidding Procedures Order, as applicable

and the value of the Debtors' estates, based on objections that are invalid, both factually and legally, to the Debtors' proposed Sale that boasts considerable creditor approval. In fact, the CenturyLink Objection is the only substantive objection to the Sale Motion—as discussed above, Verizon simply joined part of the CenturyLink Objection. Given the broad support for the Sale, the transparency of the Sale process, and the value that the Sale will yield to the Debtors' estates, the CenturyLink Objection should be overruled in its entirety.

II. JURISDICTION & VENUE

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

7. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The bases for the relief requested herein are §§ 105, 363, 365, and 503 of title 11 of the United States Code (“Bankruptcy Code”) and Bankruptcy Rules 2002, 6004, 6006, and 9014.

III. ARGUMENT & AUTHORITIES

A. The Sale Motion and the APA

8. With the assistance of their advisors, the Debtors have designed and have implemented a fair, inclusive, and transparent sale process that promotes recovery of maximum value for their estates, which has resulted in the Sale. Accordingly, the approval of the relief requested in the Sale Motion is appropriate and necessary to the Debtors' efforts to maximize the value of their estates for the benefit of creditors.

9. Further, and as to the various assertions by the CenturyLink Entities that the Debtors have not provided adequate assurance of future performance under the CenturyLink Agreements (as defined in the Objection), pursuant to the Sale Motion, and as approved by the Court, the Debtors contemplated that at the Sale Hearing, set for July 22, 2013, that the Buyer will present sufficient evidence that it has sufficient assets to continue performance under the Assumed Contracts. In

addition, negotiations concerning Cure Amounts by and among the CenturyLink Entities, and other parties, have been continuing and ongoing. With the exception of the CenturyLink Entities, all cure objections have been or soon will be resolved through negotiations.

B. The Sale Meets the Applicable Standards under the Bankruptcy Code

10. Despite CenturyLink's attempts to paint a different picture of reality, it is quite common and appropriate, for a debtor to conduct a sale of assets under § 363. Furthermore, it is now widely accepted that § 363 permits sales such as the Sale even when no emergency is pending. *See, e.g., Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063 (2d Cir. 1983); *see Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326, 2330 n.2 (2008) (recognizing that "Chapter 11 bankruptcy proceedings ordinarily culminate in the confirmation of a reorganization plan. But in some cases, as here, a debtor sells all or substantially all its assets under § 363(b)(1)"). This is true even in cases in which the debtor is not reorganizing, if such a sale would provide the best return to creditors. *See In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 126 (3d Cir. 2004); *In re GSC, Inc.*, 453 B.R. 132 (Bankr. S.D.N.Y. 2011); *In re Cooper Properties Liquidating Trust, Inc.*, 61 B.R. 531 (Bankr. W.D. Tenn. 1986).

11. The applicable standard under § 363 of the Bankruptcy Code is whether the sale is supported by a "sound business purpose," as the Debtors set forth in the Sale Motion. *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). Courts look to various factors to determine whether to approve a motion under § 363(b), such as: (a) whether a sound business reason exists for the proposed transaction; (b) whether fair and reasonable consideration is provided; (c) whether the transaction has been proposed in good faith; and (d) whether adequate and reasonable notice is provided. *See, e.g., In re Condere*, 228 B.R. 615, 626 (Bankr. S.D. Miss. 1998); *Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063 (2d Cir. 1983).

12. Here, the Sale Motion is supported by a sound business purpose. The Debtors and their estates will realize substantially greater proceeds through the Sale. The maximization of asset value for the benefit of creditors reflects a sound business purpose that warrants authorization of the Sale. The Debtors estimate that had they not commenced these Chapter 11 cases, the value of the Debtors' estates, including the assets they now seek to sell, would have been greatly diminished, and recovery to creditors, substantially reduced. Further, the Sale will result in continued employment for most of the Debtors' employees.

13. In addition, the Sale is also supported by a sound business purpose because it will reduce unsecured claims. The contemplated Sale will have the added benefit of avoiding substantial unsecured claims that would otherwise arise from the rejection of various unexpired leases and executory contracts (that may be eventually assumed by the Buyer). The Sale also maximizes the Debtors' accounts receivables by continuing service to the Debtors' customers and avoiding any resulting network outage claims. Thus, a denial of the Sale would decimate the value of the Debtors' estates, increase the claims of creditors, and hamper, or entirely prevent the Debtors from realizing the maximum sale proceeds that can benefit creditors in these cases. Obviously then, by reducing the potential amount of unsecured claims, the Sale is designed to benefit more creditors than just the Debtors' prepetition secured lender.

14. The CenturyLink Objection ignores that there are substantial Excluded Assets, including all pre-petition accounts receivable that are not associated with an Assigned Contract, the Debtors' patents, cash and cash equivalents, and Chapter 5 causes of action that will be liquidated and distributed in accordance with a liquidating plan and trust. These assets are valued at least \$11 million on the Debtors' books and Schedules. The Sale, in which the estates' constituencies have had significant and ongoing input, preserves these Excluded Assets to provide additional returns to

creditors. The CenturyLink Entities' ephemeral concerns should not scuttle the Sale because they are far outweighed by considerable, tangible benefit.

C. The Debtors Can Sell the Assets Free and Clear of CenturyLink's Purported Right to Setoff and the Sale Does Not Implicate Any Recoupment Rights

15. Under well-established law, the Debtors can sell the accounts receivables free and clear of CenturyLink's purported right to setoff. Although cited for the contrary position by the CenturyLink Entities in the CenturyLink Objection, *Folger Adam Security, Inc. v. DeMattels/MacGregor JV*, 209 F.3d 252 (3d Cir. 2000) supports approval of the Sale. There, the Third Circuit examined whether a § 363 sale could extinguish setoff rights. *See id.* at 262. The Third Circuit began by examining the language in § 553 of the Bankruptcy Code. *See id.* Section 553 of the Code provides in pertinent part as follows:

Except *as otherwise provided* in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case.

(emphasis added). Obviously, then § 553 explicitly states that it is subject to § 363. This, of course, is the same conclusion reached by the Third Circuit in *Folger Adam Security*. In fact, there, the Third Circuit turned to legislative history, which indicated that § 553 generally preserves the right to setoff, but two exceptions exist: (1) the automatic stay of § 362; and (2) the right of a trustee to use property under § 363. *See id.* (citing S. Rep. No. 95-989, 95th Cong., 2d Sess., at 91 (1978)). The Third Circuit then stated that even if all the requirements of setoff were met, "the right of setoff will be extinguished if either sections 362 or 363 are invoked." *Id.* Other courts have also agreed that a sale under § 363 eliminates unexercised setoff rights. *See, e.g., MBNA Am. Bank, N.A. v. TransWorld Airlines, Inc. (In re Trans World Airlines, Inc.)*, 275 B.R. 712, 718 (Bankr. D. Del. 2002); *In re Formtech Industries, LLC*, 439 B.R. 352, 361-62 (Bankr. D. Del. 2010).

16. Aside from the statutory basis, the reasoning is clear based on a simple analysis of the requirements of setoff and the effect of assumption. First, as the Fifth Circuit in *In re Galaz*, No. 11-50761, 2012 WL 2849775, *2 (5th Cir. July 12, 2012) recently noted, pursuant to § 553, “setoff has three requirements: (1) the creditor has both a claim against and owes a debt to the debtor, both of which arose pre-petition; (2) the claim and the debt are mutual; and (3) both claim and debt are valid and enforceable.” Most obviously, as articulated by the Fifth Circuit in *Matter of Greystone III Joint Venture*, 995 F.2d 1274, 1281 (5th Cir. 1991), upon assumption, “the rights created by assumption . . . constitute a *post-petition* administrative claim.” (emphasis added). Accordingly, any right to setoff that existed prior to assumption necessarily is eviscerated after assumption because mutuality is lost and allowing setoff is tantamount to enforcing a cross-default clause in violation of § 365.

17. Furthermore, after assumption, the required element of mutuality for setoff would necessarily be missing. *See, e.g., In re Formtech Industries, LLC*, 439 B.R. at 362; *In re The IT Group, Inc.*, 350 B.R. 166 (Bankr. D. Del. 2006). It is well settled that setoff may only occur on account of mutual debts. As the U.S. Supreme Court noted in *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995), “[t]he right of setoff (also called ‘offset’) allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.” In addition, the mutuality requirement is strictly construed. *In re Cullen*, 329 B.R. 52, 57 (Bankr. N.D. Iowa 2005) (citing *In re Fairfield Plantation, Inc.*, 147 B.R. 946, 952 (Bankr. E.D. Ark. 1992)); *see also In re Lehman Bros. Holdings, Inc.*, 433 B.R. 101, 104 (Bankr. S.D.N.Y. 2010) (observing that setoff and its attendant mutuality requirement are “[among] the Bankruptcy Code’s most fundamental precepts.”). Subsequent to assumption, however, an attempt to exercise a right to setoff necessarily fails because mutuality will always be lacking in such circumstances. *See, e.g., In re The IT Group, Inc.*, 350 B.R. at 174-76 (remarking that the sale of an account receivable to a

third party eliminated requisite mutuality for setoff purposes). Because mutuality will be lacking, any asserted right to setoff must vanish.

18. As to recoupment, § 365 of the Bankruptcy Code plainly requires that the debtor cannot assume an executory contract or unexpired lease unless it (i) cures the default; (ii) compensates the nondebtor party for any actual pecuniary losses resulting from the default; and (iii) provides adequate assurance of future performance under the contract. § 365(b). If a particular executory contract or unexpired lease is assumed and assigned, it must be assumed and assigned *cum onere*. See, e.g., *In re National Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000). Further, unlike the restrictions placed on setoff via § 553, the Bankruptcy Code places no such restriction on recoupment. See, e.g., *In re Black*, 280 B.R. 680, 684 (Bankr. N.D. Ala. 2001). Therefore, any assumption and assignment by the Buyer necessarily includes any recoupment claims held by any counterparty under the assumed and assigned contract, and contrary to the CenturyLink Entities' arguments, are not affected by the Sale, and thus no way impede approval of the Sale. See APA 1.1(f) (limiting assigned accounts receivable to those arising under an Assigned Contract).

D. The Elimination of the 14-Day Stay Pursuant to Federal Rules of Bankruptcy Procedure 6004(h) and 6006(d) is Critical to Maximize Value

19. Pursuant to Federal Rules of Bankruptcy Procedure 6004(h) and 6006(d), an order authorizing the sale or assignment of a debtor's contracts "is stayed until the expiration of 14 days after the date of the entry of the order, unless the court orders otherwise." Here, the Buyer, pursuant to the APA, has to obtain the FCC Consents (as defined in the APA) and the State PUC Consents (as defined in the APA). Elimination of the 14-day stay as requested by the Debtors helps foster the Buyer's ability to immediately commence the regulatory processes required to obtain the FCC Consents and the State PUC Consents, both of which are conditions to closing. Accordingly, waiver of such 14-day

stay serves a vital and important purpose of paving a quicker route to closing, which translates into maximizing value.

IV. CONCLUSION

20. In conclusion, the Sale complies with the requirements of the Bankruptcy Code and is amply supported by sound business purposes. The Debtors believe that the Sale, which is the culmination of robust bidding procedures approved by this Court, will result in the maximization of value of the Debtors' assets. This in turn will benefit the Debtors' estates and creditors. As discussed herein, the objections raised by the CenturyLink Entities wholly miss the mark and should be overruled in their entirety. Simply put, the CenturyLink Entities should not be permitted to dismantle the Sale, which again is the culmination of bidding procedures already implemented after notice and a hearing, and approval by this Court. The CenturyLink Entities should not be permitted to impede approval of the Sale, and their Objection should be overruled. Accordingly, approval of the Sale is appropriate and necessary to the Debtors' efforts to maximize the value of their estates for the benefit of creditors.

WHEREFORE, PREMISES CONSIDERED the Debtors respectfully request that the Court enter an order approving the Debtors' Motion for Entry of Orders Authorizing (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 Leases (herein "Sale Motion"); overruling the CenturyLink Objection; and grant to them all other relief, in law or in equity, to which the Debtors may be entitled.

Dated: July 21, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July 2013, a true and correct copy of the foregoing was served via the Court's CM/ECF electronic notification system on all parties requesting same, and on the 22nd day of July 2013, a true and correct copy of the foregoing was served via US first class mail, post prepaid to the parties listed on the attached service list.

UPH Holdings, Inc.
Pac-West Telecomm, Inc.
Tex-Link Communications, Inc.
UniPoint Holdings, Inc.
UniPoint Enhanced Services, Inc.
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