

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
	§	
	§	
<b>DEBTORS.</b>	§	<b>CHAPTER 11</b>
	§	
	§	
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	§	<b>JOINTLY ADMINISTERED UNDER CASE NO. 13-10570</b>

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13 OCT -4 AM 9:25  
COMMISSION CLERK

**DEBTORS' MOTION FOR ORDER APPROVING REJECTION OF CONTRACTS WITH RIVERROCK SYSTEMS, LTD., NUNC PRO TUNC TO PETITION DATE**

**THIS PLEADING REQUESTS RELIEF THAT MAY BE ADVERSE TO YOUR INTERESTS.**

**IF NO TIMELY RESPONSE IS FILED WITHIN TWENTY-ONE (21) DAYS FROM THE DATE OF SERVICE, THE RELIEF REQUESTED HEREIN MAY BE GRANTED WITHOUT A HEARING BEING HELD.**

**A TIMELY FILED RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.**

TO THE HONORABLE U.S. 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"),

[Clerk note: original pg 4 missing written material.] *AMcLean*

nWire, LLC (“nWire”), and Peering Partners Communications, LLC (“Peering Partners”) (collectively the “Debtors”), and debtors-in-possession in the above-captioned Chapter 11 cases and file this their Motion for Order Approving Rejection of Contracts with RiverRock Systems, Ltd. (the “Motion to Reject”) pursuant to 11 U.S.C. § 365(a). In support, the Debtors would show:

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Motion is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O). The relief requested in this Motion is sought pursuant to 11 U.S.C. §§ 105(a) and 365(a), and Rule 6006 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”).

**II. FACTUAL BACKGROUND**

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

3. A detailed description of the background of the Debtors and the events leading up to the filing of the voluntary petitions by the Debtors, is provided in the Declaration of J. Michael Holloway in Support of First Day Motions (“Declaration”) [Dckt. No. 17] which is incorporated herein by reference.

### **III. RELIEF REQUESTED**

4. Pursuant to this Motion, Debtors seek an order from the Court approving the rejection of all contracts to which the Debtors and RiverRock Systems, Ltd. ("RiverRock Contracts") are parties, which are identified in Exhibit "A." The Debtors request that the rejection of the RiverRock Contracts be authorized *nunc pro tunc* to the Petition Date. A list of the RiverRock Contracts subject to this Motion is attached hereto as Exhibit "A." The Debtors will provide copies of the RiverRock Contracts upon the request of any interested party in this matter as the documents are voluminous and production other than on request would be burdensome and expensive.

5. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors may, subject to Court approval, reject unexpired leases and executory contracts. The Bankruptcy Code does not provide a standard for determining when a debtor's rejection of an executory contract is appropriate. *See In re Monarch Tool & Manufacturing Co.*, 114 B.R. 134 (Bankr. S.D. Ohio 1990). Bankruptcy courts, however, generally acknowledge that the business judgment standard should be applied to determine whether to authorize the rejection of executory contracts and unexpired leases. *See In re Liljeberg Enters., Inc.*, 304 F.3d 410, 438 (5th Cir. 2002); *In re Pilgrim's Pride Corp.*, 403 B.R. 413 (Bankr. N.D. Tex. 2009); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36 (3d Cir. 1989). Notably, the burden or hardship on the non-debtor party to a rejected contract is not a factor to be considered. *See Borman's, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 189 (6th Cir. 1983).

6. In addition, bankruptcy courts are empowered to authorize retroactive rejection of an executory contract or unexpired lease under § 365(a) of the Bankruptcy Code if the equities favor retroactive rejection. *See, e.g., Thinking Machines Corp. v. Mellon Financial Services*

*Corp #1 (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995); *Stonebriar Mall Ltd. P'ship v. CCI Wireless, LLC (In re CCI Wireless, LLC)*, 297 B.R. 133, 138 (D. Colo. 2003).

7. After careful review and due deliberation, the Debtors have determined in their business judgment that the RiverRock Contracts are unnecessary to the continued operation of the Debtors' business, have no value to the Debtors' estate, and should be rejected. As a consequence, the RiverRock Contracts are no longer of use to the Debtors. Moreover, the RiverRock Contracts have terms that are burdensome on the Debtors and have no residual value for the Debtors. Additionally, because the failure to reject these RiverRock Contracts could result in the incurrence of unnecessary expense for the Debtors, the rejection of these RiverRock Contracts is appropriate. The purpose of the rejections requested herein is to reduce the size and costs of the Debtors' operations to be in line with its income, thus, in turn, fostering the Debtors' reorganization. To the extent that any services have been performed by the counterparties or used by the Debtors, the rejection is without prejudice to an appropriate claim under U.S. § 503(b) for such actual use.

8. In the business judgment of the Debtors, the rejection of the RiverRock Contracts identified in Exhibit "A" is in the best interest of the Debtors, their creditors, all other parties in the estate, and the estate as a whole. The rejection is also approved. Through the rejection of the RiverRock Contracts, the Debtors will be relieved from maintaining insurance on the equipment, and other charges associated with the RiverRock Contracts. By rejecting the RiverRock Contracts as of the date of the filing of the Chapter 11 petition, the Debtors will avoid incurring unnecessary administrative charges that will provide no tangible benefit to the Debtors' estate. The resulting savings from the rejection of the RiverRock Contracts will increase the Debtors' cash flow and assist in managing its estate, further promoting its reorganization. Moreover, rejection of the RiverRock Contracts effective



as of the Petition Date is necessary and justified under the circumstances. Thus, the Debtors believe that the *nunc pro tunc* rejection of the RiverRock Contracts as of the Petition Date is in the best interest of the Debtors' estate, its creditors, and other parties in interest.

WHEREFORE, PREMISES CONSIDERED the Debtors pray that the rejection of the RiverRock Contracts identified in the attached Exhibit "A" be approved, and that the Debtors have such other relief as is just.

Dated: October 1, 2013.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: /s/ Patricia B. Tomasco

Patricia Baron Tomasco  
State Bar No. 01797600  
Jackson Walker LLP  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
(512) 236-2076 – Direct Telephone  
(512) 691-4438 – Direct Facsimile  
Email: [ptomasco@jw.com](mailto:ptomasco@jw.com)

Jennifer F. Wertz  
State Bar No. 24072822  
(512) 236-2347 – Direct Telephone  
(512) 391-2147 – Direct Facsimile  
Email: [jwertz@jw.com](mailto:jwertz@jw.com)

**COUNSEL FOR THE DEBTOR-IN-  
POSSESSION**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of October 2013, a true and correct copy of the foregoing has been served either electronically or via United States mail, postage prepaid, or facsimile to the following, and upon the parties listed on the attached service list.

RiverRock Systems, Ltd.  
14881 Quorum Drive, Suite 220  
Dallas, Texas 75254  
Attn: David E. Thompson

/s/ Patricia B. Tomasco  
Patricia B. Tomasco

**LIST OF CONTRACTS TO REJECT**

<b>Vendor</b>	<b>Address</b>	<b>Contract</b>
RiverRock Systems, Ltd.	14881 Quorum Drive, Suite 220 Dallas, Texas 75254	Application Service Provider Agreement, dated May 1, 2013
RiverRock Systems, Ltd.	14881 Quorum Drive, Suite 220 Dallas, Texas 75254	Third Amendment to Application Service Provider Agreement, dated August 1, 2012
RiverRock Systems, Ltd	14881 Quorum Drive, Suite 220 Dallas, Texas 75254	Application Service Provider Agreement, dated January 16, 2013

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Steve Hubbard / RBC  
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, 20<sup>th</sup> Floor  
Houston, TX 77002

Hines REIT One Wilshire, LP  
Attn: Kevin McNerny  
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  
ATTN: FISCAL SERVICES  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Pilot Communications  
P.O. Box 77766  
Stockton, CA 95267-1066

Arthur A. Stewart  
William A. Frazell  
Assistant Attorneys General  
Bankruptcy & Collections Division  
P.O. Box 12548  
Austin, Texas 78711-2548

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

Valerie Wenger  
US Trustee  
903 San Jacinto Blvd., room 230  
Austin, Texas 78701

Internal Revenue Service  
P. O. Box 7346  
Philadelphia, PA 19101-7346

United States Attorney  
816 Congress Avenue, Suite 1000  
Austin, TX 78701

United States Attorney General  
Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530

Texas Comptroller of Public Accounts  
Revenue Accounting Division –  
Bankruptcy Section  
P.O. Box 13528  
Austin, TX 78711



Texas Workforce Commission  
TEC Building – Bankruptcy  
101 East 15th Street  
Austin, TX 78778

James Ruiz  
Andrew J. Schumaker  
Winstead P.C.  
401 Congress Avenue, Suite 2100  
Austin, Texas 78701

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

A. Kenneth Hennesay  
**ALLEN MATKINS**  
1900 Main Street, 5th Floor  
Irvine, CA 92614-7321

Mitchell W. Katz  
1801 California Street, 9th Floor  
Denver, CO 80202

Timothy Bortz  
Commonwealth of Pennsylvania  
Dept. of Labor and Industry  
Reading Bankruptcy & Compliance Unit  
625 Cherry Street, Room 203  
Reading, PA 19602-1152

John Dillman  
Attorney in Charge for Taxing Authority  
Linebarger Goggan Blair & Sampson, LLP  
PO Box 3064  
Houston, Texas 77253-3064

Joseph R. Dunn  
Mintz Levin Cohn Ferris Glovsky and  
Popeo, PC  
3580 Carmel Mountain Rd., Suite 300  
San Diego, CA 92130

Dun & Bradstreet  
c/o Ronald Rowland  
307 International Circle, Ste 270  
Hunt Valley, MD 21030

Elizabeth Weller  
LINEBARGER GOGGAN BLAIR &  
SAMPSON, LLP  
2323 Bryan Street, Suite 1600  
Dallas, TX 75201

Hercules Technology II, LP  
31 St. James Avenue, Suite 790  
Boston, MA 02116

Kelly M. Crawford, Esq.  
Peter C. Lewis, Esq.  
Scheef & Stone, L.L.P.  
500 N. Akard, 27th floor  
Dallas, Texas 75201

Melissa A. Haselden  
HOOVER SLOVACEK LLP  
5847 San Felipe, Suite 2200  
Houston, Texas 77057

David F. Brown  
Ewell, Bickham, & Brown LLP  
111 Congress Avenue, Suite 400  
Austin, Texas 78701

Philip G. Eisenberg  
W. Steven Bryant  
Locke Lord LLP  
600 Travis Street, Suite 2800  
Houston, Texas 77702

IBM Corporation  
Bankruptcy Coordinator  
Roger Laviolette  
275 Viger East, Suite 400  
Montreal, QC H2X 3R7  
Canada

Kate P. Foley  
Christine E. Devine  
Mirick O'Connell, DeMallie & Lougee  
1800 West Park Drive, Suite 400  
Westborough, MA 01581

Courtney Harris  
Aldine ISD  
14910 Aldine-Westfield Rd.  
Houston, Texas 77032

James V. Hoeffner  
GRAVES, DOUGHERTY, HEARON  
MOODY, P.C.  
401 Congress Avenue, Suite 2200  
Austin, Texas 78701

Hercules Technology Growth  
Capital, Inc.,  
31 St. James Avenue, Suite 790  
Boston, MA 02116

Jason S. Brookner  
**LOOPER REED & MCGRAW  
P.C.**  
1601 Elm Street, Suite 4600  
Dallas, TX 75201

Kurt F. Gwynne  
Reed Smith  
1201 N Market Street, Suite 1500  
Wilmington, DE 19801

Linda Boyle, Esq.  
tw telecom inc.  
10475 Park Meadows Drive, # 400  
Littleton, CO 80124

Craig A. Wolfe, Esq.  
Kelley Drye & Warren LLP  
101 Park Avenue  
New York, New York 10178

Richard E. Mikels  
Mintz Levin Cohn Ferris Glovsky  
and Popeo, PC  
One Financial Center  
Boston, MA 02111

Kay D. Brock  
Travis County Attorney's Office  
PO Box 1748  
Austin, Texas 78767-1748

David Aelvoet  
Linebarger Goggan Blair &  
Sampson  
711 Navarro Street, Suite 300  
San Antonio, Texas 78205

Laura Garfinkel  
CABS Billing Division  
GSAssociates  
5400 Laurel Springs Parkway, Suite 404  
Suwanee, GA 30024

BOXER F2, LP  
c/o Tracy Fink  
720 N Post Oak Blvd., Suite 500  
Houston, Texas 77024

Frank N. White  
Arnall Golden Gregory LLP  
171 17th Street NW, Suite 2100  
Atlanta, Georgia 30363-1031

David I. Swan  
Lori M. Scott  
J Robertson Clarke  
McGuire Woods LLP  
1750 Tysons Boulevard, Suite 1800  
Tysons Corner, Virginia 22102  
Margarita Gevondyan  
Southern California Edison Company  
2244 Walnut Grove Avenue, 3rd Floor  
Rosemead, CA 91770

Leslie E. Trout  
Director of Finance and Administration  
ATER WYNNE LLP  
1331 NW Lovejoy Street, Suite 900  
Portland, OR 97209

Stephen W. Lemmon  
Sam Chang  
Brown McCarroll, LLP  
111 Congress Avenue, Suite 1400  
Austin, Texas 78701

Christopher H. Trickey  
Brian T. Cummings  
Graves, Dougherty, Hearon & Moody, P.C.  
401 Congress Avenue, Suite 2200  
Austin, Texas 78701

Elizabeth G. Smith  
Law Offices of Elizabeth G. Smith  
6655 First Park Ten, Suite 250  
San Antonio, Texas 78213

Charles E. Richardson, III, Esq.  
Vice President and General Counsel  
Momentum Telecom  
2700 Corporate Drive, Suite 200  
Birmingham, AL 35242

Darryl S. Laddin  
Arnall Golden Gregory LLP  
171 17th Street NW, Suite 2100  
Atlanta, Georgia 30363-1031

Pamella A. Hopper  
McGuire Woods LLP  
815 Congress Avenue, Suite 940  
Austin, Texas 78701

Samuel Castor  
Legal Dept.  
Switch, Ltd.  
7135 Decatur Blvd.  
Las Vegas, NV 89118