

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

**Communications Division  
Carrier Oversight & Programs**

**RESOLUTION T-17344  
February 1, 2012**

**R E S O L U T I O N**

**RESOLUTION T-17344. Disposition of Protest of Straitshot RC, LLC for U.S. TelePacific (U-5721-C) Advice Letter No. 314, Filed May 6, 2011 and Approval of U.S. TelePacific Advice Letter No. 314.**

**SUMMARY**

In Advice Letter No. 314, U.S. TelePacific notified the Commission of the proposed acquisition of the assets, including the customer base and Certificate of Public Convenience and Necessity of IXCH, Inc., by TelePacific's wholly-owned subsidiary, TelePacific Managed Services (TMS). Straitshot RC LLC and Straitshot Communications, Inc. (collectively referred to as Straitshot) protested this advice letter.

This Resolution denies the protest of Straitshot because (1) Straitshot can take steps in its ongoing litigation in federal district court in Washington State to protect its ability to collect on a judgment there, if one should be ordered, and (2) the declarations currently before us establish that the allegedly bad actors who are principals of IXCH, and who were principals of the predecessor company Telekenex, will not have any decision making role in TelePacific after consummation of the transaction. Thus, based on the extensive record now before us, we conclude that there are no material disputed issues of fact and therefore not a need for additional comprehensive review of TelePacific's Advice Letter 314 at this time; thus it is not necessary to require TelePacific to file an application.

Therefore, based on our disposition of the protest, we approve U.S. TelePacific Advice Letter 314 and the proposed acquisition of the assets, customer base and operating authority of IXC Holdings, Inc. by TelePacific's subsidiary, TelePacific Managed Services.

**BACKGROUND**

U.S. TelePacific (TelePacific) filed Tier III Advice Letter (AL) 314 on May 6, 2011, pursuant to General Order (G.O.) 96-B, Decisions (D.) 04-10-038, D.97-06-096, and D.94-05-051, to notify the Commission of its proposed acquisition of the assets, including the

customer base and Certificate of Public Convenience and Necessity (“CPCN”), of IXC Holdings, Inc. (U-6647-C) (“IXCH, Inc.”) by TelePacific’s wholly-owned subsidiary, TelePacific Managed Services (“TMS”). In the AL, TelePacific advised the Commission that:

- TMS will acquire the customer base and assets of IXCH,
- TMS will provide service to IXCH customers at the same rates, terms, and conditions that currently apply to their services which are only offered pursuant to contract,
- The transaction does not have the potential to result in either direct physical damage in the environment or a reasonably foreseeable indirect physical change in the environment pursuant to CEQA Guideline 15378,
- TMS will obtain any necessary approvals from ILECs related to the assignment of IXCH’s interconnection agreements,
- TMS commits to continued compliance with CPUC reporting and remittance requirements as a certificated carrier in the State of California,
- TelePacific attests that no legal complaints have been decided against it, TMS, or against IXCH, or are pending in any court in California or any other state, involving an alleged violation of Sec. 17000 et seq. of the California Business and Professions Code, any misrepresentation to consumers, or any similar violation except that TelePacific has been named a defendant in a class action lawsuit in the California Superior Court in and for Orange County (Case No. 30-2010-00422317-CU-MC0CXC). This lawsuit alleges that TelePacific has engaged in unfair business practices by imposing improper early termination fees and failing to follow appropriate number porting procedures. TelePacific believes that the lawsuit is without merit and will contest the case vigorously.

On May 27, 2011, Straitshot RC LLC and Straitshot Communications, Inc. (collectively, “Straitshot”), submitted a timely protest to AL 314. The protest was filed pursuant to G.O. 96-B General Rule 7.4.2. (3), alleging that TelePacific failed to disclose in Advice Letter 314 pending litigation in the United States District Court for the Western District of Washington (hereafter referred to as the Washington District Court litigation). According to Straitshot, the failure to reveal the pending litigation represents a material error or omission in the Advice Letter. Straitshot alleges a series of unlawful schemes agreed to and perpetuated by IXCH, Telekenex, Inc. (Telekenex)<sup>1</sup>, IXCH/Telekenex officers and controlling owners Brandon Chaney and Anthony Zabit, and other individual defendants (collectively, the “IXCH/Telekenex defendants”) for the purposes of the following: 1) stealing Straitshot’s trade secrets and confidential customer information, 2) making a series of misrepresentations to Straitshot’s customers, and 3) using the stolen trade secrets and confidential customer information

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<sup>1</sup> Telekenex was authorized by the Commission to provide Competitive Local Exchange and Interexchange services and operated under utility number (U-6664-C).

to destroy Straitshot's business and coerce its customers into long-term contracts that favored IXCH/Telekenex. Straitshot is seeking damages in the amount of \$17.5 million, which is the alleged value of the Straitshot enterprise destroyed by IXCH/Telekenex.

The original litigation was between Straitshot and Telekenex until Straitshot discovered that in August 2010, the assets of Telekenex had been moved to another corporate entity, IXCH, which is owned by, and under the control of Brandon Chaney and Anthony Zabit. Pursuant to a request from Straitshot, on December 8, 2010, the Washington District Court allowed Straitshot to add IXCH as a party to the litigation. Telekenex had notified the Commission of this transfer in Advice Letter 71, dated June 3, 2010. Straitshot alleges that through this transfer of assets, the Telekenex defendants Brandon Chaney and Anthony Zabit attempted to leave the liabilities of Telekenex, including the \$17.5M lawsuit, in the essentially insolvent company, Telekenex.

Straitshot maintains that TelePacific's failure to disclose in AL 314 the pending litigation in Washington state constitutes an error and omission under G.O. 96-B §7.4.2(3) and is grounds for protest.

Straitshot also alleges that IXCH/Telekenex Defendants have mistreated California consumers where some of the court cases have been settled and provided citations to four instances where Affidavits and Declarations were made in the respective complaint cases.

Straitshot believes that granting the proposed transfer of assets from IXCH, Inc. to TelePacific would have the following effects: 1) potentially eliminate Straitshot's ability to collect a judgment should it prevail in the afore-mentioned litigation, and 2) be unjust and unreasonable. Straitshot requests that the Commission both: 1) not permit AL 314 to become effective, and 2) disapprove the Proposed Transfer, or in the alternative approve the Proposed Transfer only with the express condition that TelePacific assume full financial responsibility for paying Straitshot any and all judgments and other relief awarded to Straitshot in the Litigation between Straitshot and IXCH in Washington State. In addition, Straitshot asks that, at the very least before granting permission or approval in response to AL 314 and the Proposed Transfer, the Commission should fully investigate and conduct an evidentiary hearing regarding the IXCH/Telekenex Defendants' failure to disclose the Litigation to the Commission, their misrepresentations to consumers, and the unjust and unreasonable effects that the Proposed Transfer could cause.

On June 3, 2011, TelePacific responded to Straitshot's protest recommending that the Commission disregard the protest because it does not raise issues that the Commission can or should address. Specifically, TelePacific maintains that Telekenex is not a party to the transaction. The Commission approved the transfer of Telekenex assets to IXCH

over a year ago, TelePacific notes, and Telekenex is no longer a certificated utility under the Commission's jurisdiction. TelePacific also offers the following arguments:

- 1) the District Court in Washington state provides the appropriate venue for Straitshot to resolve its complaints against Telekenex;
- 2) the addition of IXCH to the Washington District Court litigation does not adversely affect the public interest in carrying out the proposed transfer;
- 3) approving the transaction will be of benefit to Straitshot because IXCH will receive compensation from the transaction which may put Straitshot in a better position to collect any judgment awarded by the Washington Court;
- 4) omitting reference to the Washington District Court litigation was not a deviation from the Commission's rules with respect to providing information relevant to TelePacific's acquiring IXCH's assets and customers because D.04-10-038 does not provide clear guidance on the scope of litigation to be disclosed; and
- 5) allegations about complaints filed against the IXCH/Telekenex defendants are without merit. To the best of TelePacific's knowledge, the companies referenced in the Straitshot's response to AL 314 are cases concerning Telekenex, Inc. and were filed prior to IXCH acquiring the assets and customers of Telekenex. As such, TelePacific asserts, the Commission's rules do not require TelePacific and TMS to disclose such actions.

On July 15, 2011, pursuant to G.O. 96-B §7.6.1, the Communications Division (CD) issued a Written Disposition of the protest of Straitshot informing Straitshot of the approval of AL 314 and that AL 314 was deemed effective pursuant to Decision (D.) 04-10-038, Appendix A, Paragraph 1 and 2.

On July 22, 2011, Straitshot made a timely request for Commission review of the July 15, 2011 CD Written Disposition of its protest pursuant to G.O. 96-B General Rule 7.7.1. Straitshot alleged that CD's disposition of AL 314 is "unlawful and erroneous," and "will harm consumers and the public interest." Straitshot maintains that the Written Disposition deprived them of due process because the disposition did not state the basis for rejecting the protest, and that it does not discuss or evaluate the substance of the protest. Straitshot argues that the Commission should review and reverse CD's disposition of AL 314. Straitshot maintains that the IXCH/Telekenex Defendants, including 122 Telekenex employees and one of the principal owners, Brandon Chaney, intend to continue their involvement if the transfer goes forward. Straitshot further alleges that the continued involvement by IXCH/Telekenex Defendants will perpetuate IXCH's improper practices, such as fraud against Straitshot and other customers.

On July 29, 2011, TelePacific responded to Straitshot's request for Commission review of the CD Written Disposition of AL 314. TelePacific countered that: a) D.04-10-038 governs the type of acquisition and/or transfer transaction before the Commission, and G.O. 96-B rules to the contrary are inapplicable, b) CD correctly approved the AL, based on the framework in D.04-10-038, governing acquisitions, and c) Straitshot's request was improper because D.04-10-038 does not provide for a Resolution Request. TelePacific claims that G.O. 96-B General Rule 7.7.1 does not apply to Advice Letter 314, but if it were to apply, the Commission can, and should, grant an exception to the rule pursuant to G.O. 96-B General Rule 1.3.

On September 6, 2011 a Notice of Availability (NOA) of Draft Resolution T-17344 was posted on the Commission website informing parties that the Draft Resolution was available for public comment. The Draft Resolution would suspend the Communication Division's Written Disposition of AL 314 and direct the parties to the transaction to file an application seeking Commission approval of the proposed acquisition of assets. The NOA limited the Opening and Reply comments to 5 pages in length, respectively. Opening Comments were due by 5:00 pm, September 21, 2011 and were to focus on factual, legal, and/or technical errors in the Draft Resolution. Reply Comments were to be filed by 5:00 pm on September 26, 2011 and were limited to identifying misrepresentations of law, fact, or condition of the record contained in the comments of other parties.

By letter dated September 21, 2011, Straitshot informed the Commission's Executive Director and the Director of the Communications Division that Straitshot supported the Draft Resolution T-17344 and would not be submitting comments on the Draft Resolution, but reserved all rights to submit reply comments.

On September 21, 2011, TelePacific and TMS timely filed joint Opening Comments, which exceeded the page length limit identified in the NOA. TelePacific's submission consisted of: a) Comments - 15 pages, b) Proposed Revised Draft Resolution T-17344 - 13 pages (Attachment 1), c) Declaration of Kenneth Bisnoff - Senior V.P. of TelePacific and TMS - 3 pages (Attachment 2), Declaration of David Zahn - V.P. of Marketing of TelePacific and TMS - 2 pages (Attachment 3),: FCC Public Notice re: approval of TelePacific Acquisition of Assets of IXCH - 5 pages (Attachment 4), and excerpts from a transcript from the Washington District Court litigation - 4 pages (Attachment 5).

In its comments, TelePacific recommends that the Commission reverse Draft Resolution T-17344 and approve the acquisition. TelePacific submits that:

- The Draft Resolution incorrectly states that a principal of IXCH will become a Principal of TelePacific,
- The transaction is in the public interest, based on the factors in D.98-08-068 used in a public interest analysis of a proposed acquisition,

- Straitshot seeks relief that the Commission should not and cannot grant,
- TelePacific's failure to identify the Washington District Court litigation does not preclude the Commission from approving AL 314.

TelePacific submits that the Draft Resolution contains a material factual error regarding one of the principals of IXCH remaining a principal in the continuing entity, stating that this is not true. As stated in the declaration of Kenneth Bisnoff, Senior Vice President of both TelePacific and TMS, attached to TelePacific's comments, Mr. Bisnoff states that the two principals of IXCH, Brandon Chaney and Anthony Zabit, that were discussed in the Draft Resolution will not in any way be owners, employees, officers, board members, or principals of TelePacific, TMS, or any affiliated entity, but as a condition of the acquisition will be engaged as consultants for a one-year period. As consultants, they would not be authorized to make policy, management, or other operational decisions on behalf of TelePacific.

TelePacific advises the Commission that the FCC approved TelePacific's acquisition of IXCH assets<sup>2</sup>, rejecting a protest by Straitshot. TelePacific states that the FCC rejected Straitshot's protest on the grounds that the protest was not relevant to the acquisition and that approval of the acquisition would not preclude Straitshot from obtaining the relief that it was requesting from the Washington Court.

On September 26, 2011, Straitshot timely filed Reply Comments supporting Draft Resolution T-17344. Straitshot submits that:

- TelePacific's comments violated the procedure in the NOA for comments by exceeding the page limit designated for comments. This violation underscores the need to use the Application process for AL 314,
- TelePacific's failure to disclose the Washington District Court litigation has vitiated the Advice Letter process,
- Conflicting statements about IXCH principal, Chaney's continuing role further renders the AL process inappropriate. Straitshot cites a TelePacific press release on May 5, 2011 that states Chaney will operate the business assets of Telekenex as a separate channel.

On October 5, 2011 TelePacific sent a letter asking the Director of the Communications Division acknowledging that the September 21, 2011 Opening Comments exceeded the page limit set forth in the NOA and requested that the Commission accept the joint comments as submitted, but reformatted to be 10 pages in length. TelePacific reasoned

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<sup>2</sup> WC Docket No. 11-85 *Domestic Section 214 Application Filed for the Acquisition of Assets of IXC Holdings, Inc. by TelePacific Managed Services*, DA 11-1347 Released August 3, 2011 Approving the acquisition.

that since they filed joint comments with their subsidiary, TMS, and each entity could have filed separate, 5 page comments.

On October 5, 2011, the Assistant General Counsel informed both TelePacific and Straitshot by email that Straitshot may submit an additional 10 pages of comments to respond to the 15 pages of comments filed on behalf of TelePacific and TMS. These additional comments were due by the close-of-business on Friday, October 14, 2011.

On October 7, 2011, the Director of the Communications Division denied TelePacific's October 5, 2011 request to accept the 10 page reformatted version of the October 5, 2011 Opening Comments on Draft Resolution T-17344 filed jointly by TelePacific and TMS as Straitshot had been allowed to supplement its reply comments with an additional 10 pages as a means to provide equal opportunity to comment on the Draft Resolution.

On October 14, 2011, Straitshot timely filed 10 page additional reply comments, recommending that the Commission adopt Draft Resolution T-17344 as proposed by the Communications Division and asserted that:

- TelePacific's proposal raises serious public interest concerns due to continuing involvement by IXCH employees, including two IXCH principals Chaney and Zabit, that are alleged to have engaged in anti-consumer and anti-competitive practices,
- TelePacific's declarations and unsupported assertions only underscore the complexities of the transaction and the inappropriateness of the advice letter process and the need for the application process. The declarations contained multiple single spaced statements that discussed a wide range of topics which should be scrutinized in the application process, including:
  - The statement that no IXCH or IXC employees that are Litigation defendants are being offered employment at TelePacific,
  - The discussion of no fewer than four different types of transition agreements for acquisitions, but no explanation of why consulting contract were chosen for Chaney and Zabit, particularly since the May 5, 2011 TelePacific press release stated that Chaney will lead the Telekenex business within TelePacific,
  - The expected span of supervisory relationships for Chaney and Zabit, and all IXCH employees coming to TelePacific,
  - The claimed purported benefits of the acquisition to certain business customers of TelePacific and IXCH, as well as other California customers, but no discussion of what those benefits may be.
- TelePacific's nondisclosures, inconsistencies, and procedural failures further amplify the need for the application process,
  - Public interest concerns remain regarding the continuing involvement of IXCH employees in the post-acquisition operation,
  - Failure to disclose the Washington District Court litigation,

- Conflicting statements regarding what role Chaney and Zabit will have in the post-acquisition operation,
- Conflicting statement that no litigation defendant will be offered employment post-acquisition operation when the senior manager, Karen Salazar, who is the wife of Mr. Zabit will apparently receive an offer,
- Exceeding the 5-page limit on Comments,
- Failing to include a table of authorities and a subject index with recommendations to the Draft Resolution ,
- TelePacific has distorted multiple proceedings at the FCC and at the Washington District Court, and has mischaracterized what Straitshot is requesting of the Commission.

## DISCUSSION

Under the Advice Letter process adopted in G.O. 96-B, an Advice Letter is subject to disposition by the reviewing Industry Division whenever such disposition would be a “ministerial” act even through the subject matter is technically complex, so long as a technically-qualified person could determine objectively whether the proposed action has been authorized by the statutes or Commission orders cited in the advice letter. Whenever such determination requires more than ministerial action, the disposition of the advice letter on the merits will be by Commission resolution, as provided in General Rule 7.6.2. <sup>3</sup>

The Commission issued D.04-10-038, which adopted criteria for transfers and acquisitions for Nondominant Interexchange Carriers (NDIECs) and Competitive Local Exchange Carriers (CLECs). This decision expanded the scope of the advice letter process to allow CLECs to use ALs to seek prospective authority to transfer control or assets of non-controversial transactions subject to Public Utilities Code §§ 851 through 854, and in Appendix A, sets forth specific criteria that the requesting party must meet. Appendix A condition 1.a (3) requires that the Advice Letter “identify any decided or pending legal complaints against the involved entities, in California or other states.”<sup>4</sup>

Straitshot has alleged improper behavior by the IXCH/Telekenex Defendants in its litigation in the State of Washington, and has also alleged that IXCH/Telekenex Defendants have mistreated California consumers, providing citations to four complaint cases in California where Affidavits and Declarations were made in the respective complaint cases. TelePacific should have disclosed the Washington District Court litigation in AL 314, as required by D.04-10-031 Appendix A, because TelePacific has requested this Commission to grant it authority to acquire the assets, customer base,

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<sup>3</sup> G.O. 96-B § 7.6.1

<sup>4</sup> D.04-10-038, App. A.

and operating authority of IXCH, and IXCH is one of the entities involved in the proposed transaction and a party to the Washington District Court litigation. TelePacific contends that omitting reference to the Washington District Court litigation was not a deviation from the Commission's rules with respect to providing information relevant to TelePacific acquiring IXCH's assets and customers because D.04-10-038 does not provide clear guidance on the scope of litigation to be disclosed. We find TelePacific's contention unpersuasive. The Washington District Court litigation alleges bad behavior by the two principals of the entity that proposes to sell its assets, and one of the principals in the selling entity was touted in a TelePacific press release as having a key role in the continuing entity. More specifically, the litigation alleges that a predecessor to IXHC, while controlled by two principals, one of whom was touted in the TelePacific press release, engaged in unlawful behavior to steal customers from Straitshot. Notwithstanding silence in D.04-10-038 regarding the specific type of litigation that must be reported, it should be readily apparent that the particular litigation ongoing in the Washington District Court alleging bad behavior by an individual who TelePacific had touted for his continuing role post-acquisition, could be of interest to this Commission and therefore should have been disclosed. That omission was material and not in compliance with the Commission's rules as set forth in D.04-10-031 Appendix A. Those rules expressly require the entity filing the advice letter to disclose *pending* litigation involving *all* parties to the proposed transaction. This requirement exists for a reason, to inform the Commission of litigation that *may be* relevant to our consideration of the proposed transaction. The Commission should not, as we did here, have to rely on a protestant to reveal the existence of such litigation. Accordingly, we admonish TelePacific for its failure to reveal the Washington District Court litigation in its advice letter, and remind other applicants for authority under D.04-10-031 of their duty to be fully forthcoming in reporting on the existence of pending litigation. TelePacific's failure to report this litigation was not a harmless error. On the other hand, given that Straitshot has informed of this litigation, TelePacific's non-compliance should not now bar our consideration of the advice letter on its merits.

TelePacific asserts that General Rule 7.7.1 of GO 96-B (which provides for the review of an Industry Division disposition of an Advice Letter by means of a Commission resolution) does not apply here. In support of this contention, TelePacific asserts that the procedural transfer rules contained in Appendix A to D.04-10-038 "[g]overn Advice Letter 314 [a]nd [c]onflicting [r]ules in GO 96-B [d]o [n]ot [a]pply". Assuming for the sake of discussion, that that proposition is true, TelePacific has not shown any conflict between General Rule 7.7.1 and Appendix A to D.10-04-038. We find nothing in D.04-10-038, to suggest that the Commission intended to foreclose its review of a staff disposition of an advice letter filed under that decision, where it is contended that the staff disposition was in error. Indeed, D.10-04-38 (Finding of Fact No. 5) notes that the portion of the proposal adopted by the Commission in that decision "would retain the Commission's discretion to initiate a formal review of competitive telecommunications carriers' proposals to transfer control or assets." Similarly, we reject TelePacific's

request to grant an exemption from General Rule 7.7.1, pursuant to General Rule 1.3. This request is apparently based on the contention that the Commission has already determined that transactions eligible for processing under Appendix A to D.10-04-038 “do not raise issues of consumer protection.” The Commission did no such thing; rather it stated that issues of fitness that might be raised by pending litigation are issues that the Commission would need to consider even under the expedited procedures that were adopted.

IXCH is a certificated CLEC in California, and acquired the assets of Telekenex in August 2010 pursuant to Commission approval of Telekenex Advice Letter (AL) 71. This AL was dated June 3, 2010, and was noticed on the June 11, 2010 Commission Calendar. Straitshot could have protested this AL at that time and raised allegations that Telekenex has mistreated California customers and request that the Commission look into the matter. A review of the record shows that Straitshot did not submit such a protest. AL 71 was effective July 3, 2010.

IXCH is currently doing business in California under the dba Telekenex and we understand that on December 8, 2010, IXCH was added as a defendant to Straitshot’s suit against Telekenex before the Washington District Court. Accordingly, IXCH is a party to the Washington District Court litigation and is one of the entities (the transferor) involved in the transfer of assets. For these reasons, as explained above, TelePacific should have disclosed in AL 314 the pending litigation in Washington State against IXCH and Telekenex. No mention has been made by either TelePacific or Straitshot as to whether TelePacific and/or its affiliate TMS has been added as a defendant to the litigation.

We do not consider the potential for the Washington District Court to grant Straitshot an award to be an appropriate basis for either: a) denying TelePacific’s request to acquire the assets, customer base and operating authority of IXCH, or b) approve the proposed transaction with the express condition that TelePacific assume full financial responsibility to pay Straitshot any and all judgments and other relief awarded to Straitshot by the Washington District Court. That court has rejected Straitshot’s requests for interim relief intended to preserve Straitshot’s ability to collect on any judgment that may be rendered in the Washington District Court litigation. Among the court’s grounds for rejecting the requested interim relief was its conclusion that “Plaintiffs [i.e. Straitshot] have failed to provide the Court with any compelling evidence that damages, if any, were caused by the action of the Defendants.”<sup>5</sup> In light of this conclusion by the Court, which is much more familiar with the litigation than this Commission, we conclude that it would be inappropriate for this Commission to grant interim relief for the purpose of protecting Straitshot’s ability to collect on any judgment that might be rendered in the litigation.

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<sup>5</sup> Order of the Honorable Thomas S. Zilly, dated December 1, 2011, at p.6.

Straitshot has not established a sufficient likelihood that, if the proposed transaction is approved, TelePacific will engage in the kinds of wrongdoing alleged against the IXCH principals in the Washington District Court litigation and in California to warrant a formal proceeding to look into that possibility. Conversely, TelePacific included in its Comments on Draft Resolution T-17344, a declaration dated September 21, 2011 that sworn under the penalty of perjury by TelePacific's Senior Vice President that none of the IXCH/Telekenex Defendants, including the Telekenex executives, Chaney and Zabit, will be offered employment with TelePacific or any of its affiliates. This declaration does note, that as a condition of the acquisition, Chaney and Zabit will be offered one-year consulting contracts. However, as consultants, they would not be authorized to make policy, management, or other operational decisions on behalf of TelePacific.

Straitshot does note that in a May 5 [2011] TelePacific press release it is stated that Chaney will lead the Telekenex business within TelePacific. However, we find that older press release unpersuasive of what is now proposed to happen, in light of the more recent declaration made under penalty of perjury by TelePacific and TMS Senior Vice President Kenneth Bisnoff. This Commission has rules against misleading or making false statements to the Commission and has the authority to impose strict penalties on entities engaging in such behavior. We believe that these rules provide a substantial deterrent to making false statements and therefore rely on the representations made by TelePacific through the declaration of Kenneth Bisnoff regarding the role of the IXCH/Telekenex Defendants, including Chaney and Zabit, in the post-transaction operation.

We take official notice of the FCC Public Notice of the FCC's approval of the application of TelePacific Managed Services to acquire the assets of IXCH<sup>6</sup>. In that proceeding, Straitshot protested the application raising essentially the same arguments with the FCC as it has in its protest to TelePacific's AL 314 which is before us now.

The FCC concluded that the concerns raised by Straitshot were not sufficient to deny the transaction or to impose conditions on the terms of the transfer. The FCC found that the transaction may result in certain public interest benefits, such as the continued provision of telecommunications services to the customers of IXCH. The FCC also found that Straitshot's claims were not merger-specific and are based on prior conduct of Telekenex and are more appropriately resolved in the pending litigation. The FCC disagreed with Straitshot's argument that TMS will continue the misconduct that is alleged in the Washington District Court litigation because TMS is acquiring IXCH's

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<sup>6</sup> WC Docket No. 11-85 *Domestic Section 214 Application Filed for the Acquisition of Assets of IXC Holdings, Inc. by TelePacific Managed Services*, DA 11-1347 Released August 3, 2011 Approving the acquisition.

assets and employees. The FCC stated that it does not make decisions on the character or fitness of an applicant based on allegations of misconduct where those allegations are in the process of being adjudicated by another agency or court.

We note the findings and rationale of the FCC in approving the acquisition and believe that we have independently arrived at the same conclusion as the FCC: that the allegations raised by Straitshot are not sufficient to deny the transaction, and that the Washington District Court litigation is the appropriate venue for Straitshot to resolve its complaint against IXCH.

Despite the fact that TelePacific did not comply with the requirement of D.04-10-038 Appendix A to disclose in the advice letter any decided or pending legal complaints against the entities involved in the transaction in California or other states, we believe that the numerous submissions filed in this matter have provided us with a substantial record on which to rely. In light of the extensive record now before us, we conclude that there are no material disputed issues of fact and there is no need for additional comprehensive review of AL 314 at this time, thus it is not necessary to require the filing of an application to consider the proposed transfer. As explained above and based on the record before us, the protest of Straitshot should be denied. Therefore, we will deny the protest of Straitshot and grant the advice letter and approve the acquisition by TelePacific of the assets, customer base, and CPCN of IXCH.

Should any customers or entity, including Straitshot, believe that post-acquisition that TelePacific (under whatever dba it operates under) is engaging in inappropriate behavior, including the type of behavior alleged in the Washington District Court litigation, a complaint can be filed with this Commission to resolve the matter.

## COMMENTS

Public Utilities Code section 311(e) generally requires this resolution be served on all parties, and be subject to a public review and comment period of 30 days or more, prior to a vote of the Commission on the resolution. A draft of this resolution was served on TelePacific and Straitshot and posted for public comment on the Commission's web site.

On October 31, 2011, the Communications Division issued a Notice of Availability (NOA) of Alternate Resolution T-17344. Parties were directed to file comments no later than 5:00 pm on November 14, 2011. Reply comments were due no later than 5:00 pm on November 21, 2011. The NOA had an error that incorrectly stated: On November 10, 2011, the Commission may vote on this resolution, or it may postpone a vote until later. On November 7, 2011, the Communications Division issued a correction to the NOA to read: On December 1, 2011, the Commission may vote on this resolution, or it may postpone a vote until later.

On November 14, 2011 Straitshot timely filed comments on DRAFT Alternate Resolution T-17344, urging the Commission to reject the Alternate Resolution and approve the CD Resolution for the following reasons:

1. Straitshot has raised substantial issues of material fact that relate directly to protection of California customers and other market participants, and call into question TelePacific's fitness to provide public utility service in California.
2. The Alternate Resolution would reach incorrect, incomplete and unjustified factual findings regarding the future role of the alleged "bad actors" and believes that further proceedings are necessary to scrutinize the level and scope of power that the alleged "bad actors" will have in the post-merger organization, and the possible imposition of conditions on the acquisition.
3. The Alternate Resolution would improperly resolve disputed issues solely on the basis of an untested declaration, and thereby raise due process issues. This approach contravenes well-established Commission policy and California law, citing decision (D.) 11-07-033 which ordered a hearing to address disputed issues of fact.
4. The Alternate Resolution would violate the Commission's own rules by improperly approving this transfer of control by advice letter. Decision (D.)04-10-038 and General Order 96-B allow the advice letter process to be used for transfers of control when certain conditions are met, and TelePacific's AL 314 does not meet these conditions.

On November 16, 2011, Straitshot submitted a Corrected copy of the November 14, 2011 comments on Draft Alternate Resolution T-17344 to delete a phrase on page 3 that was inadvertently included in the November 14 comments.

We do not find that Straitshot has presented material issues of fact in this case that demonstrates that there is a question of TelePacific's fitness to provide public utility service in California. TelePacific is an established carrier in California and other states, and has its own corporate business practices. We do not find that Straitshot has provided a sufficient showing that TelePacific will modify its established business practices in the post acquisition entity to engage, in California, in the type of behavior that Straitshot has alleged in its Washington District Court Litigation against IXCH/Telekenex. Consequently, we do not believe that it is appropriate to deny TelePacific's acquisition of the assets, employees, and customer base of IXCH.

We disagree with Straitshot that this Resolution would reach incorrect, incomplete and unjustified factual findings regarding the future role of "alleged bad actors" Chaney and Zabit. As we stated earlier, we rely on the more recent declaration of TelePacific's Senior Vice President, Kenneth Bisnoff, that was made under the penalty of perjury, rather than on the May 2011 TelePacific press release. Straitshot has not made any additional showing in its comments on the Alternate Resolution to cause us to change our reliance on the declaration.

On page 4 of its Comments, Straitshot refers to decision (D.)11-07-0337 to support its argument concerning the need for hearings to address disputed issues of fact, citing footnote 2 on page 2 of the decision. Straitshot represents that in that decision the Commission reaffirmed that it could not lawfully consider evidence offered in testimony that was never entered into the record without a hearing. Indeed, in a formal complaint proceeding, purported "testimony" submitted in response to an application for rehearing, cannot be considered as evidence upon which the Commission can rely to decide disputed issues of fact. Here, however, we do not have a formal proceeding, but an informal advice letter proceeding. More, importantly, as we explain elsewhere in this resolution, we do not see any material disputed issues of fact that require testimony to resolve them.

We understand Straitshot's position to be that because TelePacific failed to disclose the Washington District Court Litigation in AL 314, and because in that litigation Straitshot alleges that the two IXCH principals have engaged in improper behavior, therefore the AL request should be transferred to the formal application process. However,

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<sup>7</sup> Complaint Case (C.)09-05-009 Hypercube Telecom LLC (U6592C) Complainant, vs. Level 3 Communications, LLC (5941C) Defendant.

Straitshot has provided only allegations based on speculation that the two IXCH principals will cause TelePacific to engage in improper behavior. In opposition to that speculation, we have the declaration of TelePacific's Senior Vice President, made under penalty of perjury, that those two individuals will only serve as consultants for one year in the post-acquisition entity, and that in that role they would not be authorized to make policy, management, or other operational decisions on behalf of TelePacific. Reviewing this material, we conclude that where a protest to an advice letter is supported by speculative allegations that are controverted by a declaration made under penalty of perjury that is also submitted as part of the informal advice letter process, there is not a material disputed issue of fact that requires an evidentiary hearing.

Straitshot believes that granting the acquisition would violate the Commission's own rules because AL 314 did not meet the conditions contained in D.04-10-038 and G.O. 96-B for the expedited advice letter process for approval of acquisitions of the assets of noncompetitive telecommunications carriers by other carriers that already possess operating authorities. Straitshot cites D.04-10-038 as restricting the advice letter process to transfers of control that do not raise concerns regarding the protection of consumer interests or the interests of other market participants.

It is not disputed that TelePacific heretofore has provided service to the public in a manner consistent with the laws and regulations of the State of California and the allegations of misconduct by IXCH in the Washington litigation, especially in light of the declaration of Bisnoff submitted by TelePacific to this Commission, do not create any doubt about t TelePacific's continued fitness for service as a consequence of acquiring the assets of IXCH. Straitshot in this case has not demonstrated that the acquisition of IXCH by TelePacific will render TelePacific unfit for service to the public in the future, or otherwise will result in harm to California consumers. As for the interests of other market participants regarding the proposed transaction, no entity other protested AL 314. Therefore we do not believe that Straitshot has demonstrated that there are concerns about the proposed acquisition by other market participants that are authorized to operate in California. Consequently, we do not find that approving AL 314 through this Resolution, based on the record now before us, violates the conditions contained in D.04-10-038.

## **FINDINGS**

1. TelePacific (U-5721-C) filed Tier III Advice Letter (AL) 314 on May 6, 2011, requesting approval to acquire the assets, customer base, and operating authority of IXC Holdings, Inc. (U-6647-C).
2. Straitshot RC LLC and Straitshot Communications (collectively referred to as Straitshot) timely filed a protest to AL 314 on May 27, 2011, on the grounds that approving AL 314 would eliminate Straitshot's ability to collect a judgment from

IXC Holdings (IXCH) and/or its predecessor, Telekenex, in litigation before the United States District Court for the Western District of Washington in Washington State and that approving the AL would be unjust and unreasonable.

3. No entity other than Straitshot protested TelePacific AL 314.
4. IXCH is a party to the Washington District Court litigation as well as one of the entities involved in the transfer of assets.
5. IXCH acquired the assets of Telekenex in July 2010. Telekenex filed AL 71 in June 2010, requesting authority to be acquired by IXCH. This AL was noticed on the Commission's June 11, 2010 Daily Calendar. Straitshot did not protest this AL. That AL was effective July 3, 2010.
6. TelePacific is not a party to the Washington District Court litigation.
7. It is not disputed that TelePacific heretofore has been fit to render service to the public in the State of California, and the allegations of misconduct by IXCH in the Washington litigation especially in light of the declaration of Bisnoff submitted by TelePacific to this Commission, do not create any doubt about TelePacific's continued fitness for service as a consequence of acquiring the assets of IXCH.
8. Decision (D.) 04-10-038 requires that any Non Dominant Interexchange Carrier (NDIEC) or Competitive Local Exchange Carrier (CLEC) that files an advice letter for authority to transfer control or assets must meet all of the conditions of Appendix A of the decision. Appendix A.1.a(3) requires that the advice letter identify any decided or pending legal complaints against the involved entities, in California or other states.
9. TelePacific did not disclose the Washington District Court litigation in AL 314 and is therefore not in compliance with D.04-10-038 Appendix A.
10. TelePacific should have disclosed in AL 314 the Washington District Court litigation between Straitshot and IXCH because IXCH is a party to both the Washington District Court litigation and AL 314. However, in light of Straitshot's disclosure of the litigation, and our disposition of the issues raised by that litigation, we do not find this omission to require the filing of an application.

11. On July 15, 2011, pursuant to G.O. 96-B § 7.6.1, the Communications Division issued a Written Disposition of Straitshot's protest of TelePacific's AL 314 informing Straitshot that AL 314 was approved and was deemed effective pursuant to D.04-10-038, Appendix A, Paragraph's 1 and 2.
12. On July 22, 2011, Straitshot timely filed a request for review of the Communications Division's Written Disposition regarding TelePacific's Advice Letter 314.
13. Draft Resolution T-17344 was made available for public comment on September 6, 2011.
14. Draft Alternate Resolution T-17344 was made available for public comment on October 31, 2011.
15. The Notice of Availability for Alternate Resolution T-17344, issued on October 31, 2011, while correctly stating the due date for comments, incorrectly stated: "On November 10, 2011, the Commission may vote on this resolution, or it may postpone a vote until later." On November 7, 2011, the Communications Division issued a corrected NOA to read: "On December 1, 2011, the Commission may vote on this resolution, or it may postpone a vote until later."
16. On November 14, 2011 Straitshot timely filed comments on DRAFT Alternate Resolution T-17344,
17. Straitshot requests that if the Commission approves the proposed transaction that it do so only with the express condition that TelePacific assume full financial responsibility for paying Straitshot any and all judgments and other relief awarded to Straitshot in the Litigation between Straitshot and IXCH in Washington State.
18. We do not consider the possibility of the Washington District court granting Straitshot an award against IXCH/Telekenex to constitute an appropriate basis for denying TelePacific's request to acquire the assets, customer base and operating authority of IXCH, or to impose the condition that Straitshot has requested. The Washington District court has rejected Straitshot's requests for interim relief intended to preserve Straitshot's ability to collect on any judgment that may be rendered in the Washington District Court litigation. Among the court's grounds for rejecting the requested interim relief was its conclusion that

Straitshot had “failed to provide the Court with any compelling evidence that damages, if any, were caused by the action of the Defendants.” In light of this conclusion by the Court, which is much more familiar with the litigation than this Commission, it would be inappropriate for this Commission to grant interim relief for the purpose of protecting Straitshot’s ability to collect on any judgment that might be rendered in the Washington District Court litigation.

19. Straitshot has not established sufficient likelihood that, if the proposed transaction is approved, TelePacific will engage in the kinds of wrongdoing alleged against the IXCH principals in the Washington District Court litigation in California, to warrant a formal proceeding to look into that possibility.
20. TelePacific included in its Comments on Draft Resolution T-17344, a declaration sworn under the penalty of perjury of TelePacific and TMS Senior Vice President Kenneth Bisnoff that none of the IXCH/Telekenex Defendants, including the Telekenex executives Chaney and Zabit, will be offered employment with TelePacific or any of its affiliates. However, Chaney and Zabit will be offered one-year consulting contracts as a condition of the acquisition, but as consultants, will not be authorized to make policy, management, or other operational decisions on behalf of TelePacific.
21. Straitshot notes a May 5, [2011] TelePacific press release that states that Chaney will lead the Telekenex business within TelePacific.
22. We find the May 5 TelePacific press release unpersuasive of what is now proposed to happen, in light of the September 21, 2011 declaration of TelePacific and TMS Senior Vice President Kenneth Bisnoff that was made under penalty of perjury.
23. The Commission has rules against misleading or making false statements to the Commission and has the authority to impose strict penalties on entities engaging in such behavior. These rules provide a substantial deterrent to making false statements and therefore rely on the representations made by TelePacific regarding the role do the IXCH/Telekenex Defendants, including Chaney and Zabit, in the post-transaction operation.
24. G.O. 96-B General Rule 7.7.1 does apply to Advice Letter 314; there is no conflict between that General Rule and the provisions of Appendix A of D.04-10-038.
25. TelePacific should not be granted an exception to General Rule 7.7.1 pursuant to General Rule 1.3 for its Advice Letter 314 because: a) the Commission should have an opportunity to review the staff dispositions of this advice letter where it is contended that the staff disposition was in error and (b) D.04-10-038 did not

intend to foreclose Commission consideration of fitness issues raised by pending litigation.

26. Straitshot has not demonstrated that the acquisition of IXCH by TelePacific will result in damage to California consumers.
27. Straitshot has not demonstrated that other market participants have shown concerns about the proposed transaction.
28. No other entity protested AL 314. We do not believe that Straitshot has demonstrated that there are by other market participants operating in California. Consequently, we do not find that approving AL 314 through this Resolution violates the conditions contained in D.04-10-038.
29. Should any customers or entity, including Straitshot, believe that post-acquisition that TelePacific (under whatever dba it operates under) is engaging in inappropriate behavior, including the type of behavior alleged in the Washington District Court litigation, a complaint can be filed with this Commission to resolve the matter.
30. We find that all of the submissions filed in this matter have provided us with a substantial record to rely. In light of the extensive record that we have before us, we conclude that there are no material issues of disputed fact and therefore there is no need for additional comprehensive review of AL 314 at this time; thus it is not necessary to require the filing of an application to consider the proposed transfer.
31. Based on the record now before us, the protest of Straitshot should be denied and we should grant the advice letter 314 and approve TelePacific's acquisition of the assets, customer base, and operating authority of IXCH.

**THEREFORE, IT IS ORDERED** that:

1. The protest of Straitshot RC LLC and Straitshot Communications, Inc to U.S. TelePacific Advice Letter 314 is denied and the Advice Letter is approved.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on February 1, 2012, the following Commissioners voting favorably thereon:

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PAUL CLANON  
Executive Director