Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Joint Application of **IXC Holdings, Inc.,** Assignor, and **TelePacific Managed Services,** Assignee. For Grant of Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, and Sections 63.04 and 63.24 of the Commission's Rules to Complete an Assignment of Assets of an Authorized Domestic and International 214 Carrier	WC Docket No. 11-85 (Filed May 10, 2011) ITC-ASG-20110509-00130

COMMENTS OF STRAITSHOT RC, LLC AND
STRAITSHOT COMMUNICATIONS, INC.

June 2, 2011

Leonard A. Gail
Bruce W. Doughty
Massey & Gail LLP
50 E. Washington St., Suite 400
Chicago, IL 60602
Tel: 312-283-1590
Fax: 312-379-0467
lgail@masseygail.com
bdoughty@masseygail.com

On Behalf of Straitshot RC, LLC and
Straitshot Communications, Inc.

TABLE OF CONTENTS

I. SUMMARY 1

II. BACKGROUND 2

The First Asset Shift: Telekenex to IXCH 3

The Proposed Second Asset Shift: IXCH to TMS 5

III. ARGUMENT 6

A. The Proposed Transfer Should Not Be Allowed Because It Would Disserve the Public Interest 6

1. IXCH and TMS Fail to Show Any Promotion of the Public Interest 7

2. The Proposed Transfer Would Harm the Public Interest By Undermining Competition 8

3. The Proposed Transfer Would Harm the Public Interest By Permitting IXCH to Continue Mistreating Customers 10

4. TelePacific's Failure to Disclose Disserves the Public Interest 14

B. At the Least, the Commission Should Remove this Docket from Streamlined Processing and Instead Should Fully Investigate the Harms to the Public Interest That the Proposed Transfer Would Cause 16

IV. CONCLUSION 17

Straitshot RC, LLC and Straitshot Communications, Inc. (collectively, "Straitshot"), by their attorneys, pursuant to section 63.03(a) of the rules and policies of the Federal Communications Commission (the "Commission" or the "FCC"), 47 CFR §63.03(a), hereby submit these Comments in opposition to the Application ("Application" or "App.") of IXC Holdings, Inc. ("IXCH") and TelePacific Managed Services ("TMS"), a subsidiary of U.S. TelePacific Corp. ("TelePacific"), to obtain authority, on an streamlined basis, to complete a transaction under which IXCH will transfer certain assets, including customers and related network facilities, to TMS (the "Proposed Transfer").

I. SUMMARY

The Proposed Transfer would disserve the public interest, undermining competition and permitting continuation of significant mistreatment of customers. Straitshot is the plaintiff in litigation against IXCH, among others, for illegitimate destruction of Straitshot's competing business. Straitshot seeks damages of $17.5 million, and the case will soon be set for trial. The Proposed Transfer, however, would gut the assets of IXCH, effectively eliminating Straitshot's right to a remedy for the destruction of its business. In effect, IXCH would be getting away with its anti-competitive behavior. Competition is severely compromised when such behavior goes unaddressed. The Commission's approval processes should not be used to facilitate that anti-competitive result.

In addition, the Proposed Transfer would disserve the public interest by allowing IXCH to continue its practice of mistreating customers. IXCH and TMS have made clear that for all intents and purposes, IXCH will continue to run its business under the TelePacific banner, if the Proposed Transfer proceeds, which in turn means that IXCH's practices, such as perpetrating fraud on Straitshot and other customers, will persist. The Commission should not endorse these

anti-customer practices, nor permit their extension to TelePacific.

For these reasons and others, the Commission should reject the Proposed Transfer. In the alternative, it should approve the Proposed Transfer only on the express conditions that TelePacific assume full financial responsibility for paying Straitshot any and all judgments and other relief awarded to Straitshot in the Litigation described herein, and that TelePacific address and remedy the ongoing mistreatment of customers also described herein. In any event, at the very least, the Commission should remove this docket from streamlined processing so that it can fully investigate the multiple harms to the public interest threatened by the Proposed Transfer.

II. BACKGROUND

Straitshot is the plaintiff in litigation filed in the United States District Court (the "District Court") for the Western District of Washington (the "Litigation").[1] In that case, Straitshot alleges a series of unlawful schemes agreed to and perpetuated by IXCH, Telekenex, Inc. ("Telekenex"), IXCH/Telekenex officers and controlling owners Brandon Chaney and Anthony Zabit, and other individual defendants (collectively, the "IXCH/Telekenex Defendants"). These schemes were undertaken in order to steal Straitshot's trade secrets and confidential customer information, to make a series of misrepresentations to Straitshot's customers, and to use the stolen trade secrets and confidential customer information to destroy Straitshot's business and coerce its customers into long-term contracts that favored IXHC/Telekenex. For instance, and as discussed in more detail below, the IXCH/Telekenex Defendants falsely told customers that Straitshot was going out of business, and then pressured them into signing contracts under duress after wrongfully representing that Telekenex was the sole alternative to risking a major interruption.

---

[1] *Straitshot RC, LLC v. Telekenex, Inc., et al.*, No. 2:10-CV00268-TSZ (W.D. Wash.).

Straitshot seeks damages of $17.5 million – the value of the enterprise, as provided by its damages expert, that the IXCH/Telekenex Defendants destroyed. A copy of Straitshot's Fifth Amended Complaint is attached.[2] The District Court has denied IXCH/Telekenex's motion for summary judgment on Straitshot's claims for violation of the Washington Consumer Protection Act, the federal Lanham Act, tortious interference with contract, and misappropriation of trade secrets.[3]

<u>The First Asset Shift: Telekenex to IXCH</u>

The District Court granted leave to Straitshot to add IXCH to the Litigation after it was discovered that Telekenex, the original corporate defendant, had moved substantially all of its assets to another corporate entity, IXCH. Although that transfer occurred in August 2010, the Telekenex Defendants did not reveal it to either Straitshot or the District Court at the time. Instead, the Telekenex Defendants disclosed the asset shift for the first time months later and in a footnote of a pleading stating that "IXC Holdings, Inc. acquired substantially all of the assets of Telekenex, Inc. in August 2010."[4]

The IXCH-Telekenex deal, however, was not a market transaction. In withdrawing its application for Commission approval, IXCH and Telekenex noted that Telekenex, which was 64.8% owned by BPB, LLC, was going to transfer assets to IXCH, which was 100% owned by IXC, Inc., which in turn was 100% owned by BPB, LLC.[5] They thus explained that the asset transfer would not "'result in a change in the ultimate ownership or control of the Telekenex

---

[2] Declaration of Leonard A. Gail in Support of Comments of Straitshot RC, LLC and Straitshot Communications, Inc. ("Gail Decl."), being filed in conjunction with these Comments, Ex. 1.
[3] *See id.*, Ex. 2.
[4] *Id.*, Ex. 3, p. 3 n.1.
[5] *Id.*, Ex. 4, p. 1.

lines or authorization to operate' because it is now controlled by BPB, LLC, and will still be controlled by BPB, LLC after the transaction."[6]

Telekenex likewise acknowledged to the California Public Utilities Commission ("CPUC") that this insider transaction was purely about shuffling assets. In Advice No. 71 of Telekenex (dated June 3, 2010), Telekenex notified the CPUC of the "transfer" (not sale) of Telekenex's assets to IXCH: "…the effect of the proposed transfer will simply be to move the operations currently conducted by Telekenex and its assets into a company that is under the complete ownership and control of Messrs. Zabit and Chaney. There will be no change in day-to-day control and management, nor any change in actual legal control and ownership. Moreover, following the transfer, IXC Holdings will conduct business under the name 'Telekenex,' without any change in the rates, terms, or conditions of service currently enjoyed by Telekenex customers."[7]

IXCH and Telekenex took a similar approach in Nevada. On September 21, 2010, they filed a joint application with the Public Utilities Commission of Nevada to transfer the certificate of public convenience and necessity held by Telekenex to IXCH, d/b/a Telekenex, and to notify the Nevada commission of the transfer of certain Telekenex assets and customer base to IXCH.[8] In their application, the companies asserted that "the effect of the proposed [certificate of public convenience and necessity] transfer is the movement of Telekenex operations, assets and customer base, to 100% complete control of BPB, LLC," which controls Telekenex and is owned by Messrs. Zabit and Chaney.[9] As a result, the companies asserted that with the

---

[6] *Id.*
[7] *Id.*, Ex. 5, p. 1.
[8] *Id.*, Ex. 6.
[9] *Id.*, Ex. 6, p. 3.

certificate transfer, "there will be no change in day to day control or management nor any change in actual legal control."[10]

Thus, for all practical purposes, IXCH is the same entity as Telekenex, engaging in the same business as Telekenex, controlled by the same two people, Messrs. Zabit and Chaney, as Telekenex. Yet by shifting only assets in the August 2010 deal, the Telekenex Defendants tried to leave liabilities – including liability for Straitshot's $17.5 million lawsuit – in the essentially insolvent Telekenex.

Not surprisingly, the District Court did not permit this end-run on the Telekenex Defendants' responsibilities. Accordingly, on December 8, 2010, the District Court permitted Straitshot to add IXCH as a Telekenex Defendant, allowing a claim against IXCH under the Uniform Fraudulent Transfer Act ("UFTA"), RCW 19.40, *et seq.*[11] On May 9, 2011, the District Court denied the IXCH/Telekenex Defendants' motion for summary judgment on this claim.[12]

The Proposed Second Asset Shift: IXCH to TMS

The IXCH/Telekenex Defendants are at it again here. A press release, dated May 5, 2011, found on the TelePacific website, announced "a definitive agreement [for TMS] to acquire all of the assets and customers of IXC, Inc., and IXC Holdings, Inc., which do business as Telekenex."[13] According to its Application here, IXCH and TMS ("Applicants") entered into an asset purchase agreement on April 28, 2011.[14]

---

[10] *Id.*
[11] *Id.*, Ex. 7.
[12] *Id.*, Ex. 8.
[13] *Id.*, Ex. 9. IXC, Inc. used to be called Telekenex IXC, Inc. *Id.*, Ex. 3, p. 3 n.1. Telekenex board member Larry Marcus testified in his deposition that IXC, Inc. "must substantially be the same entity" as Telekenex. *Id.*, Ex. 10, p. 147. According to the Application here, IXCH is 100% owned by IXC, Inc., which is in turn almost 50% owned by BPB, LLC, which, as noted above, is 100% owned by Messrs. Zabit and Chaney. App., pp. 8-9.
[14] App., p. 1.

Once again, the IXCH/Telekenex Defendants did not inform Straitshot of the transaction, despite outstanding discovery requests and their duty to supplement their discovery responses under Federal Rule of Civil Procedure 26(e)(1)(A), leaving Straitshot to learn of the deal through news reports.[15] Once again, the IXCH/Telekenex Defendants are staying integrally involved: not only are 122 Telekenex employees slotted to join TelePacific, but far more critically, "TelePacific plans to operate the business assets of Telekenex – its service offerings and customer operations - as a separate channel led by Chaney."[16] And once again, the transaction is an asset sale, not an acquisition or a merger. It is thus apparently designed to leave IXCH, like Telekenex before, insolvent and incapable of paying a judgment to Straitshot.

III. ARGUMENT

A. The Proposed Transfer Should Not Be Allowed Because It Would Disserve the Public Interest

The Commission is charged with promoting the public interest, including, among other things, fostering competition and protection of consumers.[17] If a transaction would be contrary to the public interest, it should be rejected. *See, e.g., In re Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, CC Docket No. 98-184, FCC OO-221, 15 F.C.C.R. 14032, 14131, 15 FCC Rcd. 14032, 14131, 2000 WL 1707958, **62 (June 16, 2000) (finding public interest harms of proposed merger to outweigh public interest benefits, and approving merger only upon adoption of multiple conditions). As set forth below, the Proposed Transfer is riddled with such public interest concerns. Not only have IXCH and TMS failed to demonstrate any benefit to the public from the Proposed Transfer, but also the transaction will undermine competition and saddle consumers with continuing mistreatment. Accordingly, the Commission

[15] Gail Decl., ¶ 12.
[16] *Id.*, Ex. 9.
[17] *See, e.g., id.*, Ex. 11.

should reject the Proposed Transfer, or, as discussed below, at least remove it from streamlined processing[18] to be investigated thoroughly and then, if approving it, do so only upon certain conditions described herein.

1. ***<u>IXCH and TMS Fail to Show Any Promotion of the Public Interest</u>***

Fundamentally, IXCH and TMS have not demonstrated that the Proposed Transfer would promote the public interest. Section 63.04 of the Commission's rules calls for "[a] statement showing how grant of the application will serve the public interest, convenience and necessity." 47 CFR §63.04(a)(12). IXCH and TMS include a section of their Application entitled "Public Interest Statement,"[19] yet not a single phrase in that section demonstrates anything of the sort. Instead, they roll out a string of bald assertions about continuing the status quo. They claim, for example, that the Proposed Transfer would "ensur[e] that the IXCH customers enjoy continuity of high-quality telecommunications service."[20] But there is no evidence or even explanation showing that they are receiving such service now. They assert that customers "will continue to receive uninterrupted interstate and international services," purportedly because customers and "other assets required to serve those customers" are being transferred.[21] Yet nothing shows that such assets will be sufficient to serve these customers, let alone provide them with "uninterrupted" services. In fact, as shown below, approval of the Proposed Transfer will permit the continued mistreatment of IXCH customers.

IXCH and TMS also assert TelePacific's purported fitness as TMS's sponsor, noting

---

[18] The FCC has found, upon initial review, the Proposed Transfer to be acceptable for filing as a streamlined application. Public Notice, "Domestic Section 214 Application Filed for the Acquisition of Assets of IXC Holdings, Inc. by TelePacific Managed Services," WC Docket No. 11-85, May 19, 2011, p. 2; Public Notice, "Streamlined International Applications Accepted for Filing," Report No. TEL-01499S, May 27, 2011, p. 2.

[19] App., pp. 5-6.

[20] *Id.*, p. 5.

[21] *Id.*

FCC orders approving earlier TelePacific acquisitions.[22] But in this instance, continuity is the focus. Not only will the Proposed Transfer supposedly be "transparent" and all services continue,[23] but IXCH/Telekenex is essentially going to continue to operate its same business. With 122 employees coming over from IXCH/Telekenex, and, far more significant, IXCH/Telekenex officer and owner Mr. Chaney still running everything as a "separate channel," nothing is going to change – same old services, same old employees working on them, same old officer in charge. In these circumstances, TelePacific's experience in other dockets is simply irrelevant.

In short, at best IXCH and TMS have asserted perpetuation of the status quo, and even that claim lacks a full basis. Worse, as noted below, such perpetuation would actually grossly disserve the public interest, given IXCH's practices of undermining competition and harming customers. IXCH and TMS say that they want customers to obtain the purported "benefits,"[24] yet they fail to identify even a single benefit, let alone discuss or document one. In these circumstances, the Application is deficient on its face and should be rejected on that basis alone.

2. *The Proposed Transfer Would Harm the Public Interest By Undermining Competition*

The Proposed Transfer would gravely harm the public interest in competition. Competitive markets depend on fair business practices. Yet as detailed below, IXCH/Telekenex have not followed such practices. For instance, with Straitshot, they resorted to stealing trade secrets and confidential customer information, making misrepresentations to Straitshot's customers, and using the stolen trade secrets and confidential customer information to destroy Straitshot's business and coerce its customers into long-term contracts. In the Litigation,

---

[22] *Id.*, pp. 5-6.
[23] *Id.*, p. 5.
[24] *Id.*, p. 6.

Straitshot is trying to obtain damages for this anti-competitive behavior, in effect forcing IXCH/Telekenex to be accountable for that behavior. The Proposed Transfer, however, would undermine the critical role that litigation plays in combating anti-competitive behavior: by gutting the assets of IXCH, the Proposed Transfer would effectively eliminate Straitshot's right to a remedy for the IXCH/Telekenex Defendants' destruction of its business, as well as the District Court's ability to provide meaningful relief to Straitshot. In effect, IXCH/Telekenex would be getting away with anti-competitive behavior. Competition cannot thrive when such behavior goes unaddressed. Others could be encouraged to act in the same anti-competitive ways. As a result, approval of such behavior would be antithetical to the Commission's goal of promoting competitive markets.

Straitshot's fraudulent transfer claim against IXCH demonstrates this risk of serious injustice. The District Court has already denied the IXCH/Telekenex Defendants' motion for summary judgment on the claim, holding that "plaintiffs are 'creditors' under UFTA."[25] Straitshot has established its UFTA claim under both the first prong of RCW 19.40.041(a)(1) ("actual intent to hinder, delay, or defraud any creditor of the debtor"), *see Douglas v. Hill*, 148 Wn. App. 760, 766-68, 199 P.3d 493 (2009),[26] and the second prong of RCW 19.40.041(a)(2) (absence of "reasonably equivalent value"), *see Clearwater v. Skyline Const. Co., Inc.*, 67 Wn. App. 305, 322-23, 835 P.2d 257 (1992).

---

[25] Gail Decl., Ex. 8, pp. 19-21.

[26] The transfer meets several of the factors for actual intent to defraud, as enumerated in the UFTA. Among other things, Telekenex essentially kept control of the property transferred, as both Telekenex and IXCH are controlled by the same people (Gail Decl., Ex. 5, p.1 and Ex. 6, p. 3); the transfer was to an "insider," given Messrs. Zabit's and Chaney's ownership and control of both Telekenex and IXCH (*see id.*, RCW 19.40.011(7)(iv)); and the transfer occurred in August 2010, but was kept concealed until October 2010 (Gail Decl., Ex. 3, p. 3, n.1).

If Straitshot prevails on its UFTA claim, it will be entitled to unwind the Telekenex-IXCH asset transfer from August 2010, so that the same assets that IXCH now seeks to transfer to TMS will instead be made available for the satisfaction of Straitshot's claims against the Telekenex Defendants. The UFTA specifically authorizes the remedy of "[a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim." RCW 19.40.071(a)(1).

If the Proposed Transfer is consummated, however, the District Court would not be able to unwind the Telekenex-IXCH transaction under the UFTA. The District Court would thus be rendered incapable of providing Straitshot with relief, and Straitshot would be left without recourse. This result would be highly unjust, not only for Straitshot but also for the Court.

The Commission should not allow its approval process to be used to facilitate such an objectionable, anti-competitive outcome. To avoid this grave risk, the Commission should reject the Proposed Transfer. In the alternative, the Proposed Transfer should be approved only on the express conditions described herein, including that TelePacific assumes full financial responsibility for paying Straitshot any and all judgments and other relief awarded to Straitshot in the Litigation.[27]

3. *The Proposed Transfer Would Harm the Public Interest By Permitting IXCH to Continue Mistreating Customers*

Moreover, and independently, the Proposed Transfer would disserve the public interest by allowing IXCH to continue its practice of mistreating customers. The Commission should not endorse this practice, and should not permit its extension to TelePacific.

Initially, IXCH and TMS have made absolutely clear that the Proposed Transfer "will be

[27] This reasonable responsibility should not be a problem, given the "significant financial resources" that TelePacific supposedly has for supporting TMS. App., p. 2.

virtually transparent to the [Telekenex/IXCH] customers in terms of the services that they currently receive," "under the same rates, terms and conditions as the services currently provided pursuant to IXCH's customer contracts and service orders."[28] The Applicants also have made absolutely clear that Telekenex/IXCH will continue to run its businesses after the merger, albeit under the TelePacific banner. Not only is TelePacific inheriting 122 IXCH/Telekenex employees in the Proposed Transfer, but far more importantly, IXCH/Telekenex officer and owner Brandon Chaney will continue to run those businesses through a "separate channel."[29] As a result, the IXCH/Telekenex practices for mistreating customers, led by Mr. Chaney, will continue to fester if the Proposed Transfer is permitted. There is no question that such practices are bad – indeed, very bad – for the public interest.

For example, in the Litigation, Straitshot has identified dozens of instances where Straitshot consumers were victims of fraud perpetrated by the IXCH/Telekenex Defendants.[30] Straitshot also has pled specifics about the false script used by those Defendants' salespeople in trying to poach Straitshot customers, and about such Defendants' overall fraudulent scheme.[31] These paragraphs identify names, dates, places, manners, and the IXCH/Telekenex Defendants' specific roles. Many of these allegations are in fact based on such Defendants' own emails.

Moreover, Straitshot customers were the *intended* victims of the IXCH/Telekenex

---

[28] *Id.*, p. 4.
[29] Gail Decl., Ex. 9.
[30] *See, e.g.*, *id.*, Ex. 1, identifying customers at ¶¶ 84, 88 (Puget Sound Gastroenterology); ¶¶ 90, 111 (Evergreen Healthcare); ¶¶ 91, 115, 161 (U.S. Bearings); ¶ 93 (Super Supplements); ¶¶ 105, 116, 172 (The Ram); ¶¶ 152, 160 (Alpha Packaging); ¶ 154 (Sound Oral & Maxillofacial); ¶¶ 155, 178 (Kruger Bensen Ziemer Architects, Inc.); ¶ 156 (Trumark Companies); ¶ 157 (Pacific Bag); ¶ 158 (San Juan Navigation); ¶ 159 (Chaser Aerodynamics, LLC); ¶ 161 (CMS Enterprises); ¶ 166 (Ace Hardware); ¶ 170 (The Neurology Center); ¶¶ 171, 186 (DuCharme McMillen); ¶ 175 (Norco); ¶ 177 (Vinculum Communications); ¶ 180 (Miller Inc.); ¶ 187 (Nexus IS); ¶ 190 (Mega Hertz); ¶ 192 (Lake Washington Vascular); ¶¶ 208, 212 (A-Dec); ¶ 210 (Steen); ¶ 213 (Boys and Girls Club); ¶ 215 (MacKay & Sposito).
[31] *Id.*, ¶¶ 147, 271.

Defendants' actions. These Defendants first created the circumstances that drove Straitshot to the point that it was no longer able to serve its customers, and then capitalized on the crisis that they had created by pressuring those customers into signing contracts with Telekenex under duress and without affording them the opportunity to consider other options for telecommunications services. The IXCH/Telekenex Defendants wrongfully represented that Telekenex was the sole alternative to risking a major interruption of the customers' telephone, data, and Internet services.[32] Customers such as U.S. Bearings were forced into longer-term contracts with IXCH/Telekenex than they desired.[33] In addition, Straitshot customers were forced into IXCH/Telekenex contracts containing termination fees and other provisions less favorable than their agreements with Straitshot had been.[34] The District Court refused to dismiss Straitshot's claim under the Washington Consumer Protection Act,[35] finding that the above-described conduct directed at consumers would constitute harm to the public interest under that Act.[36]

This behavior is deeply troubling. Misrepresentations and improper business practices gravely harm consumers. Where, as here, the Commission is charged with protecting consumers against these problems, the Litigation should thus raise large red flags about the Proposed Transfer. These concerns are very real, as the IXCH/Telekenex Defendants who have caused them are to continue their involvement if the Proposed Transfer proceeds.[37]

Nor has this problem been confined to the Litigation. The IXCH/Telekenex Defendants' misrepresentations towards consumers and other improprieties in the Litigation are not one-time

---

[32] *Id.*, ¶ 271.
[33] *Id.*
[34] *Id.*
[35] *Id.*, Ex. 2, p. 3.
[36] *Id.*, Ex. 12, pp. 19-23.
[37] *Id.*, Ex. 9.

occurrences. For instance, several additional complaints have been filed in recent years against the IXCH/Telekenex Defendants for misleading or otherwise mistreating customers. Although some of these complaints have been settled, sworn statements describing the IXCH/Telekenex Defendants' improper tactics in each of them remain in the public record. Examples include:

- *Affidavit of Giri Durbhakula*[38] (*Telekenex IXC, Inc.* v. *Charlotte Russe, Inc.*, No. 09-2-224535-8 SEA, (Super. Ct. Wash.)): After Telekenex IXC acquired AuBeta Networks Corporation ("AuBeta"), it told Charlotte Russe, Inc. ("Charlotte"), which had been an AuBeta customer for five years, that it was required to make a commitment to Telekenex within two days or face a service disruption. Two days later, on a Friday, Telekenex, both in email and over the telephone, threatened Charlotte with disconnection under the existing AuBeta contracts unless Charlotte signed a multi-year contract by the end of that very day. The following Monday, Telekenex again insisted that Charlotte sign or have its service shut off. In fact, Telekenex had no right to demand that Charlotte choose between a long-term contract and service shutoff. However, given Telekenex's repeated threats, and with no alternative, Charlotte had no choice but to sign Telekenex's proposed amendment. Charlotte faced significant financial losses, and hundreds of Charlotte stores would have lost their primary method of processing payments.

- *Declarations of Garret D. Murai*[39] *and Geza Paulovits*[40] (*Eric F. Anderson, Inc. v. Telekenex, Inc.*, No. CV 08 3319 (N.D. Cal.)): Having experienced problems with Telekenex's services since at least 2006, Eric F. Anderson, Inc. ("EFA") notified Telekenex in May 2008 that it would be terminating such services and requested that Telekenex port EFA's telephone numbers to EFA's new telecommunications provider. However, on May 28, 2008, EFA received a notice of discontinuance of service and an accompanying letter due to a termination fee that Telekenex had imposed. In June 2008, Mr. Zabit falsely indicated to EFA that Telekenex would switch EFA's telephone numbers to another carrier. Instead, on June 24, 2008, EFA received a second notice of discontinuance of service and an accompanying letter regarding a termination fee. On July 8, 2008, EFA discovered that Telekenex had disconnected its telephones and received an email from Telekenex CFO Bob Finley stating that they would remain disconnected until Telekenex received payment.

---

[38] *Id.*, Ex. 13.
[39] *Id.*, Ex. 14.
[40] *Id.*, Ex. 15.

- *Declaration of Susan Reich*[41] (*Perseus Distribution, Inc., and Perseus Books, LLC v. CF Communications, LLC d.b.a Telekenex, Inc.*, No. CV 08 0044 (N.D. Cal.)): Perseus Distribution, Inc. ("Perseus") had certain telephone numbers with significant value for its business (*e.g.*, customer recognition), for which Telekenex was the local exchange carrier from 2003 to 2007. Due to poor service from Telekenex, including service disruptions, Perseus notified Telekenex in November 2007 of its intent to change carriers. On December 14, 2007, the very day that Perseus was to make the change, Telekenex informed Perseus that it would not release the telephone numbers to the new carrier unless Perseus paid an "early termination fee" of $120,000. Telekenex repeatedly refused or ignored later requests for porting the numbers, and customers attempting to use such numbers only received a busy signal.

- *Declaration of Donald R. Schuck*[42] *(Telekenex IXC, Inc. v. Restaurant Concepts II, LLC*, No. 09-2-25072-3 SEA (Super. Ct. Wash.)): As part of a scheme to force Restaurant Concepts II, LLC ("RCII") to enter into a multi-year extension, Telekenex IXC terminated broadband services to RCII's approximately 81 restaurants, did not restore service to any of them for three days, and never restored service to some. Just the day after service was partially restored, Telekenex IXC threatened by email that RCII had to wire $40,000 that very day or service would again be disrupted. When threatened with another suspension of service, RCII had no choice but to comply with the demand.

The IXCH/Telekenex Defendants' pattern of serious misrepresentation is egregious and ongoing. In these circumstances, the Commission should not allow it to continue, as it gravely disserves the public. To avoid this risk, the Commission should reject the Proposed Transfer. In the alternative, the Proposed Transfer should be approved only on the express conditions described herein, including that TelePacific address and remedy the ongoing mistreatment of customers discussed herein.

4. *<u>TelePacific's Failure to Disclose Disserves the Public Interest</u>*

Misrepresentation is not just an IXCH problem. TelePacific has the same issue. In applying for approval of the Proposed Transfer from the CPUC via its Advice Letter No. 314,

---

[41] *Id.*, Ex. 16.
[42] *Id.*, Ex. 17.

TelePacific stated[43]:

> 6. Other than as noted below, TelePacific attests that no legal complaints have been decided against it, TMS, or against IXCH Inc., 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 violations except as follows: TelePacific has been named as a defendant in a class action lawsuit brought by Journey Brennan d/b/a Journey Financial Corp. in the California Superior Court in and for Orange County, which is designated as Case No. 30-2010-00422317-CU-MC0CXC. This lawsuit involves allegations 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 this lawsuit is without merit and intends to contest the case vigorously.

This paragraph is materially false. By not even mentioning, let alone discussing, the Litigation, TelePacific has omitted significant information about a "complaint[]...against IXCH...pending in any court in...any other state, involving...any misrepresentations to consumers, or any other similar violations...."[44]

TelePacific's misrepresentation is serious on multiple levels. Fundamentally, its failure to mention the Litigation puts its entire regulatory approval process – including the Application here at the FCC – under a cloud. What else is being omitted or obscured? What other statements are not correct? How can the public know whether it is being properly informed? How can this Commission determine whether to approve the Proposed Transfer?

This nondisclosure of the Litigation is especially egregious because Telekenex itself identified the Litigation only a year ago when it submitted its Advice No. 71 to the CPUC regarding the asset shift to IXCH.[45] Since that time, the Litigation has become a more serious threat to IXCH/Telekenex as, not only did their efforts to transfer the exposure to an empty shell

---

[43] *Id.*, Ex. 18, p. 2.

[44] Straitshot filed a Protest to the Proposed Transfer with the CPUC on May 27, 2011, based, in part, on this materially false statement. *Id.*, ¶ 21.

[45] *Id.*, Ex. 5, p. 2.

legally fail when IXCH was added as a party to the Litigation,[46] but also the District Court rejected their Motion for Summary Judgment on numerous claims and the case is being scheduled for trial.[47] Thus, there simply cannot be any dispute whether the Litigation should have been revealed. Of course, IXCH knew about the Litigation, as it is a Defendant in it. And there can be no dispute that TelePacific knew of it as well, as the asset purchase agreement itself demonstrates. (Because the IXCH/Telekenex Defendants designated the agreement as "Attorneys' Eyes Only" in the Litigation, Straitshot is not at liberty to identify the hows and the whys without IXCH/Telekenex's approval to disclose specific portions of the agreement.[48]) In any event, this gross failure, in itself, should preclude the FCC from approving the Proposed Transfer, especially on a streamlined basis.

B. At the Least, the Commission Should Remove this Docket from Streamlined Processing and Instead Should Fully Investigate the Harms to the Public Interest That the Proposed Transfer Would Cause

If the Commission decides not to reject the Proposed Transfer outright, then it should at least remove this docket from streamlined processing and fully investigate these issues. Under Commission regulation 63.03(c), an application can be removed from streamlined processing where "[t]imely-filed comments on the application raise public interest concerns that require further Commission review," as well as where "[t]he Commission, acting through the Chief of the Wireline Competition Bureau, otherwise determines that the application requires further analysis to determine whether a proposed transfer of control would serve the public interest." 47 CFR §63.03(c)(1)(iv)-(v). As discussed above, the Proposed Transfer raises a host of serious public interest concerns.

---

[46] *Id.*, Ex. 7.
[47] *Id.*, Exs. 2, 8, 19.
[48] *Id.*, ¶ 23.

As a public body aiming to promote markets, the Commission should ensure that its actions do not permit harm to competition, which would result if the Proposed Transfer foreclosed Straitshot from obtaining relief in the Litigation and thus sent a message that others could get away with anti-competitive actions. Moreover, prevention of the sorts of misrepresentations to customers and unfair business practices in which IXCH/Telekenex has repeatedly engaged goes to the heart of the Commission's mission. In addition, TelePacific's failure to disclose material about the pending Litigation is a serious omission. Again, given the Commission's strong interest in protecting consumers and promoting a competitive telecommunications marketplace, it should investigate why such a failure occurred. Investigation is all the more critical given the nature of the undisclosed information – for instance, stealing of confidential information, stealing of customers, etc. – which is highly destructive to competition.

Obviously, if these facts are undisputed – as Straitshot believes they should be – then the Commission should readily reject the Proposed Transfer. If, however, these material facts are disputed, then the Commission should fully investigate them. That would be the only way for the Commission thoroughly to understand and judge these circumstances. The Commission's interests in protecting consumers and the robust telecommunications market are too strong to proceed otherwise.

IV. CONCLUSION

For all of the foregoing reasons, Straitshot RC, LLC and Straitshot Communications, Inc. respectfully request that the Commission: (1) reject the Proposed Transfer, or, in the alternative, approve the Proposed Transfer only on the express conditions that TelePacific assume full financial responsibility for paying Straitshot any and all judgments and other relief awarded to Straitshot in the Litigation, and that TelePacific address and remedy the ongoing mistreatment of

customers discussed herein; or (2) at the very least, remove this docket from streamlined processing and instead fully investigate the disservice to the public interest the Proposed Transfer would threaten, and thereafter either reject the Proposed Transfer or approve it only on the foregoing conditions.

June 2, 2011

Respectfully submitted,

By /s/ Leonard A. Gail
Leonard A. Gail

Leonard A. Gail
Bruce W. Doughty
Massey & Gail LLP
50 E. Washington St., Suite 400
Chicago, IL 60602
Tel: 312-283-1590
Fax: 312-379-0467
lgail@masseygail.com
bdoughty@masseygail.com

On Behalf of Straitshot RC, LLC and Straitshot Communications, Inc.

CERTIFICATE OF FILING AND SERVICE

Leonard A. Gail, an attorney, hereby certifies that on June 2, 2011, before 6:00 p.m. EDT, he caused the foregoing Comments of Straitshot RC, LLC and Straitshot Communications, Inc., Declaration of Leonard A. Gail in Support of Comments of Straitshot RC, LLC and Straitshot Communications, Inc., and Exhibits to such Declaration, to be filed with the Federal Communications Commission using the Commission's Electronic Comment Filing System and the Commission's International Bureau Filing System, and a copy of such Comments, Declaration, and Exhibits to be served by electronic mail on:

Best Copy and Printing, Inc.
fcc@bcpiweb.com

Tracey Wilson
Competition Policy Division, Wireline Competition Bureau
tracey.wilson@fcc.gov

Jodie May
Competition Policy Division, Wireline Competition Bureau
jodie.may@fcc.gov

David Krech
Policy Division, International Bureau
david.krech@fcc.gov

Jim Bird
Office of the General Counsel
jim.bird@fcc.gov

Jean L. Kiddoo
Danielle Burt
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, D.C. 20006
jean.kiddoo@bingham.com
danielle.burt@bingham.com

Judith A. Riley, President
Telecom Professional, Inc.
5909 Northwest Expressway, Suite 101
Oklahoma City, Oklahoma 73132
jriley@telecomliance.net

Nancy Lubamersky
Vice President, Public Policy and Strategic Initiatives
U.S. TelePacific Corp.
515 S. Flower Street, 47th Floor
Los Angeles, California 90071-2201
nlubamersky@telepacific.com

/s/Leonard A. Gail
Leonard A. Gail