



BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER  
CHAIRMAN  
WILLIAM A. MUNDELL  
COMMISSIONER  
JEFF HATCH-MILLER  
COMMISSIONER  
MIKE GLEASON  
COMMISSIONER  
KRISTIN K. MAYES  
COMMISSIONER

Arizona Corporation Commission

DOCKETED

JAN 20 2004

DOCKETED BY [ ]

IN THE MATTER OF THE JOINT )  
APPLICATION OF TOUCH AMERICA, )  
INC. TO SELL AND TRANSFER TO )  
360NETWORKS (USA) INC. CERTAIN )  
LIT FIBER ASSETS IN ARIZONA AND )  
RELATED CUSTOMER CONTRACTS )  
DEPENDANT ON THOSE FACILITIES )

DOCKET NOS. T-04011A-03-0749  
T-03777A-03-0749

66737

DECISION NO. \_\_\_\_\_

ORDER

Open Meeting  
January 13 and 14, 2004  
Phoenix, Arizona

**BY THE COMMISSION:**

On October 9, 2003, Touch America, Inc. ("Touch America") and 360networks (USA) Inc. ("360networks") (together "Applicants") filed a joint application requesting authority for Touch America to sell and transfer to 360networks certain lit fiber assets in Arizona and related customer contracts dependent on those facilities. Touch America is currently operating under the protection of Chapter 11 of the U.S. Bankruptcy Code.

Touch America, a Montana corporation, is a broadband fiber-optic network and product and services telecommunications company, providing customized voice, data and video transport, as well as Internet services, to wholesale and business customers. In Arizona, Touch America states that it operates as a provider of intrastate interexchange services pursuant to interim authority and the filed tariffs of Touch America Services, Inc. ("TASI"), which was granted a CC&N by the Commission.<sup>1</sup>

<sup>1</sup> The Certificate of Convenience and Necessity was granted to TeleDistance, Inc. on June 30, 2000. On August 7, 2000, the Arizona Corporation Commission records officially recognized a name change from TeleDistance, Inc. to Touch America Services, Inc. On April 11, 2002, Touch America, Inc. filed an application with the Commission seeking approval of the assignment and transfer of Touch America Services, Inc.'s Certificate in Docket Nos. T-04011A-01-0303 and T-03911A-01-0303. A Staff Report and Proposed Order recommended approval of these

1 360networks is a Nevada corporation. In Arizona, 360networks is authorized to provide  
2 competitive facilities-based interexchange services pursuant to a CC&N granted by the  
3 Commission in Docket No. T-03777A-99-0496.<sup>2</sup> 360networks is a wholly-owned subsidiary of  
4 360networks holdings (USA) Inc. which, in turn, is a majority-owned subsidiary of 360networks  
5 Corporation, a corporation organized under the federal laws of Canada.

6 360networks' ultimate corporate parent, 360networks Corporation, Touch America, and  
7 Touch America's parent, Touch America Holdings, Inc., have entered into an asset purchase  
8 agreement whereby 360networks will acquire certain assets from Touch America. These assets  
9 include certain lit fiber optic routes in Arizona in which Touch America holds an Indefeasible  
10 Right of Use ("IRU"). Specifically, the Arizona physical assets that are being transferred are: (a)  
11 dark fiber IRUs in Qwest-owned fiber running from El Paso to Tucson, Tucson to Phoenix,  
12 Phoenix to Yuma and Yuma to Brawley, California and (b) optronics that Touch America  
13 purchased and installed in the fiber. These fiber assets are currently being used to provide  
14 private-line and dedicated internet access communications services to large Arizona business  
15 customers. In addition, the customer contracts that specifically depend on those fiber assets for  
16 service are being transferred to 360networks.

17 Touch America is transferring to 360networks the specific subscriber base that is served  
18 through the physical assets pursuant to the procedures set forth in 47 C.F.R. § 64.1120(e).<sup>3</sup>  
19 Touch America and 360networks have provided prior written notice of the change in provider to  
20 affected customers pursuant to FCC requirements. That notice also confirmed that the transition  
21 will be seamless and that service will continue under the same terms and conditions. The  
22 proposed asset transfer also will serve the public interest by enhancing 360networks' existing  
23 fiber optic network, which is one of the largest and most advanced on the continent.

24  
25 Applications; however, the matter was pulled from the Open Meeting scheduled for March 4, 2003, at the  
Applicants' request.

26 <sup>2</sup> See Application of Worldwide Fiber Networks, Inc. for a Certificate of Convenience and Necessity to Provide  
27 Facilities-based Interexchange Telecommunications Services and Petition for Competitive Classification, Decision  
No. 62710, Docket No. T-03777A-99-0496 (June 30, 2000). By letter filed June 26, 2000, Worldwide Fiber  
28 Networks, Inc. notified the Commission of its name change to 360networks (USA) Inc.

<sup>3</sup> The subscriber base that is being transferred includes 54 retail business customers and 15 wholesale customers  
(typically other carriers). The services being provided to the retail business customers are data services, not voice  
services.

1 360networks' network spans 29,000 route miles, reaches 69 markets in the U.S. and Canada, and  
2 includes 13 metro fiber networks in the largest U.S. cities and 23 metro fiber networks in nine  
3 Canadian provinces. The addition of Touch America's lit fiber routes in Arizona will enhance  
4 360networks' presence in the market as a competitive provider of network infrastructure and  
5 broadband communications services.

#### 6 FINDINGS OF FACT

7 1. On June 30, 2000, TASI received a Certificate of Convenience and Necessity  
8 ("CC&N") to provide resold and facilities-based interexchange telecommunications services  
9 and alternative operator services in Decision No. 62672.

10 2. On April 11, 2001, TASI and Touch America jointly filed an application for  
11 approval of the assignment of assets and transfer of its CC&N to provide resold and facilities-  
12 based interexchange telecommunications services to Touch America and a waiver of customer  
13 notification in Docket Nos. T-04011A-01-0303 and T-03911A-01-0303.

14 3. On June 31, 2001, the transfer transaction closed and Touch America began  
15 serving Arizona customers. In a Staff Report dated April 15, 2002, Staff reported that Touch  
16 America serves approximately 28,000 customers in Arizona. The transfer of assets lacked  
17 Commission approval and Touch America provided telecommunication services without a  
18 CC&N.

19 4. On April 24, 2002, Touch America informed the Commission that effective  
20 December 31, 2001 a merger was approved merging TASI into Touch America Services Group,  
21 Inc. On the same date, a subsequent merger was effective, merging Touch America Services  
22 Group, Inc. into Touch America as the surviving corporation. Since Touch America's annual  
23 operating revenues exceed \$1 million under Arizona's jurisdictional operation, Touch America is  
24 classified as a Class A telephone utility and as such is required to comply with Title 14 Article 8  
25 of the Arizona Administrative Code Public Utility Holding Companies and Affiliated Interests  
26 R14-2-801 through R14-2-806 ("The Affiliated Interest Rules"). It did not comply with the  
27 Affiliated Interest Rules.

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Decision No. \_\_\_\_\_

1           5.       The Arizona assets being transferred to 360networks represent about 2.2 percent  
2 of the total assets of Touch America. The purchase price for the Arizona assets is estimated to  
3 be roughly \$905,000. The Arizona assets that will be purchased by 360 networks (USA) Inc.  
4 will not be encumbered or pledged to satisfy the Asset Purchase Agreement obligations.

5           6.       On June 26, 2003, 360networks and Touch America provided written notice of  
6 the change in provider to affected customers pursuant to FCC requirements. That notice also  
7 confirmed that the transition will be seamless and that service will continue under the same terms  
8 and conditions.<sup>4</sup>

9           7.       Touch America currently serves approximately 130 commercial customers in  
10 Arizona. If the proposed transfer of assets by Touch America is approved by the Commission,  
11 Touch America will continue to have approximately 100 ATM/Frame Relay customer accounts  
12 in Arizona. Some of Touch America's assets will be used to provide service to these 100  
13 ATM/Frame Relay customer accounts in Arizona.

14           8.       On December 5, 2003, Staff, during a telephone conference call meeting with  
15 legal representatives of 360networks and Touch America, Inc. expressed their concerns to Touch  
16 America that a) the transfer of assets from TASI to Touch America lacked Commission  
17 approval, b) Touch America provided telecommunication services to Arizona customers without  
18 a CC&N, and c) the merger phases of the Touch America entities on December 31, 2001 lacked  
19 compliance with the Affiliated Interests Rules. Because Touch America is currently going  
20 through the bankruptcy process, Staff believes it is unlikely that any fines assessed against them  
21 will be collected. Staff's main concern is that Touch America's customers are transferred  
22 without disruption. Staff is recommending that the CC&N of Touch America's affiliate be  
23 cancelled.

24           9.       In partial response to Staff's concerns, Touch America reported that it is in the  
25 process of winding down its telecommunications and other business enterprises as part of its  
26 bankruptcy process. The bankruptcy will be ultimately converted to Chapter 7 (liquidation). It

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28 <sup>4</sup> The subscriber base that is being transferred includes 54 retail business customers and 15 wholesale customers (typically other carriers). The services being provided to the retail business customers are data services, not voice services.

1 intends to exit the telecommunications market in Arizona by January 31, 2004 and elsewhere in  
2 the United States following the disposition of the company's assets under the supervision of the  
3 bankruptcy court.

4 10. Neither TASI nor Touch America collected advances, deposits, or prepayments  
5 from Arizona customers.

6 11. 360networks does not currently maintain a performance bond because it was  
7 granted a CC&N prior to the Commission's current bonding requirements. Staff recommends  
8 that 360networks be ordered to procure and maintain a performance bond equal to \$100,000; to  
9 increase the minimum bond amount, in increments of \$50,000 when the total amount of the  
10 advances, deposits, and prepayments is within \$10,000 of the bond amount. Staff further  
11 recommends that 360networks be required to docket proof of the performance bond within 30  
12 days of the date of this Decision.

13 12. Staff recommends approval of the proposed sale and purchase as described in the  
14 application, and further recommends that:

- 15
- 16 (a) Touch America follow all the requirements, except publication of legal notice,  
17 as outlined in A.A.C. R14-2-1107 9 (A) (1) to discontinue  
telecommunications services within 90 days of the Order date of this docket;
- 18 (b) Touch America should reference the Decision number of this Order and  
19 inform the Commission in writing that it has complied with A.A.C. R14-2-  
1107 within 90 days of the date an Order is effective in this matter;
- 20 (c) The Commission cancel Touch America Services, Inc. d/b/a Touch America's  
21 CC&Ns within 90 days of the date an Order is effective in this matter; and
- 22 (d) Upon cancellation of its CC&Ns Touch America Services, Inc. d/b/a Touch  
23 America will not be authorized to provide alternative operator service and  
24 resold and facilities-based long distance telecommunication services in  
Arizona and therefore; will no longer be subject to any of the requirements of  
Decision No. 62672.

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Decision No. \_\_\_\_\_





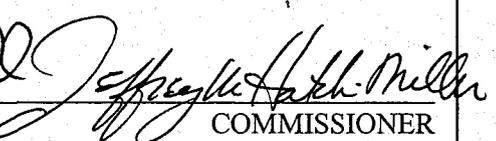
1 service from 360networks or a provider of their choice, without prejudice or regard to  
2 contractual obligation.

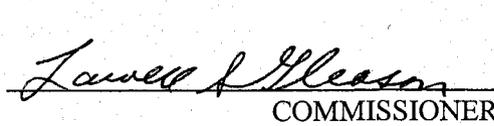
3 IT IS FURTHER ORDERED that should Touch America fail to docket proof that Touch  
4 America's retail customers in Arizona received notification that they may be allowed to elect,  
5 within 90 days of receiving the notice to obtain service with 360networks or a provider of their  
6 choice, without prejudice or regard to contractual obligation, that this Application shall be  
7 deemed denied.

8 IT IS FURTHER ORDERED that the CC&N of TASI shall be revoked without further  
9 Order by the Commission, effective 90 days following the Effective Date of this Order.

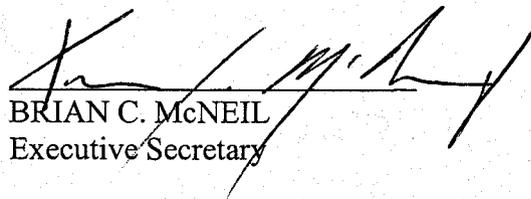
10 IT IS FURTHER ORDERED that this Order shall be effective immediately.

11 **BY ORDER OF THE ARIZONA CORPORATION COMMISSION**

12     
13 CHAIRMAN COMMISSIONER COMMISSIONER

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15 COMMISSIONER COMMISSIONER

16  
17 IN WITNESS WHEREOF, I, BRIAN C. McNEIL,  
18 Executive Secretary of the Arizona Corporation Commission,  
19 have hereunto, set my hand and caused the official seal of  
20 this Commission to be affixed at the Capitol, in the City of  
21 Phoenix, this 20<sup>th</sup> day of January 2004.

22   
BRIAN C. McNEIL  
Executive Secretary

23 DISSENT: \_\_\_\_\_

24 DISSENT: \_\_\_\_\_

25 EGJ:JFB:hml/  
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SERVICE LIST FOR: 360NETWORKS (USA) INC. AND TOUCH AMERICA, INC.  
DOCKET NOS. T-04011A-03-0749 and T-03777A-03-0749

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