

OPEN MEETING

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MEMORANDUM

Arizona Corporation Commission

DOCKETED

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TO: THE COMMISSION

FROM: Utilities Division

DATE: December 30, 2003

DEC 30 2003

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AZ CORP COMMISSION
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RE: 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 AND T-03777A-03-0749)

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.¹

360networks is a Nevada corporation. In Arizona, 360networks is authorized to provide competitive facilities-based interexchange services pursuant to a CC&N granted by the Commission in Docket No. T-03777A-99-0496.² 360networks is a wholly-owned subsidiary of 360networks holdings (USA), Inc. which, in turn, is a majority-owned subsidiary of 360networks Corporation, a corporation organized under the federal laws of Canada.

360networks' ultimate corporate parent, 360networks Corporation, Touch America, and Touch America's parent, Touch America Holdings, Inc., have entered into an asset purchase agreement whereby 360networks will acquire certain assets from Touch America. These assets

¹ 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 Applications; however, the matter was pulled from the Open Meeting scheduled for March 4, 2003, at the Applicants' request.

² See Application of Worldwide Fiber Networks, Inc. for a Certificate of Convenience and Necessity to Provide 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 Networks, Inc. notified the Commission of its name change to 360networks (USA) Inc.

include certain lit fiber optic routes in Arizona in which Touch America holds an Indefeasible Right of Use ("IRU"). Specifically, the Arizona physical assets that are being transferred are: (a) dark fiber IRUs in Qwest-owned fiber running from El Paso to Tucson, Tucson to Phoenix, Phoenix to Yuma and Yuma to Brawley, California and (b) optronics that Touch America purchased and installed in the fiber. These fiber assets are currently being used to provide private-line and dedicated internet access communications services to large Arizona business customers. In addition, the customer contracts that specifically depend on those fiber assets for service are being transferred to 360networks.

Touch America is transferring to 360networks the specific subscriber base that is served through the physical assets pursuant to the procedures set forth in 47 C.F.R. § 64.1120(e).³ Touch America and 360networks have provided prior written notice of the change in provider to affected customers pursuant to FCC requirements. That notice also confirmed that the transition will be seamless and that service will continue under the same terms and conditions. The proposed asset transfer also will serve the public interest by enhancing 360networks' existing fiber optic network, which is one of the largest and most advanced on the continent. 360networks' network spans 29,000 route miles, reaches 69 markets in the U.S. and Canada, and includes 13 metro fiber networks in the largest U.S. cities and 23 metro fiber networks in nine Canadian provinces. The addition of Touch America's lit fiber routes in Arizona will enhance 360networks' presence in the market as a competitive provider of network infrastructure and broadband communications services.

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

On April 11, 2001 TASI and Touch America jointly filed an application for approval of the assignment of assets and transfer of its CC&N to provide resold and facilities-based interexchange telecommunications services to Touch America and a waiver of customer notification in Docket Nos. T-04011A-01-0303 and T-03911A-01-0303. On June 31, 2001, the transfer transaction closed and Touch America began serving Arizona customers.

In a Staff Report dated April 15, 2002, Staff reported that Touch America serves approximately 28,000 customers in Arizona. The transfer of assets lacked Commission approval and Touch America provided telecommunication services without a CC&N. On April 24, 2002, Touch American informed the Commission that effective December 31, 2001 a merger was approved merging TASI into Touch America Services Group, Inc. On the same date, a subsequent merger was effective, merging Touch America Services Group, Inc. into Touch America, as the surviving corporation. The Commission did not approve these merger transactions as claimed by Touch America. Since Touch America's annual operating revenues exceed \$1 million under Arizona's jurisdictional operation, Touch America is classified as a

³ 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.

Class A telephone utility and as such is required to comply with Title 14 Article 8 of the Arizona Administrative Code Public Utility Holding Companies and Affiliated Interests R14-2-801 through R14-2-806 ("The Affiliated Interest Rules"). It did not comply with the Affiliated Interest Rules.

The Arizona assets being transferred to 360networks represent about 2.2 percent of the total assets of Touch America. The purchase price for the Arizona assets is estimated to be roughly \$905,000. The Arizona assets that will be purchased by 360 networks will not be encumbered or pledged to satisfy the Asset Purchase Agreement obligations. On June 26, 2003, 360networks and Touch America provided written notice of the change in provider to affected customers pursuant to FCC requirements. That notice also confirmed that the transition will be seamless and that service will continue under the same terms and conditions.⁴

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

On December 5, 2003, Staff, during a conference call meeting with legal representatives of 360networks and Touch America expressed their concerns to Touch America that a) the transfer of assets from TASI to Touch America lacked Commission approval, b) Touch America provided telecommunication services to Arizona customers without a CC&N, and c) the merger phases of the Touch America entities on December 31, 2001 lacked compliance with the Affiliated Interests Rules. Because Touch America is currently going through the bankruptcy process, Staff believes it is unlikely that any fines assessed against them will be collected. Staff's main concern is that Touch America's customers are transferred without disruption. Staff is recommending that the CC&N of Touch America's affiliate be cancelled. In partial response to Staff's concerns, Touch America reported that it is in the process of winding down its telecommunications and other business enterprises as part of its bankruptcy process. The bankruptcy will be ultimately converted to Chapter 7 (liquidation). It intends to exit the telecommunications market in Arizona by January 31, 2004 and elsewhere in the United States following the disposition of the company's assets under the supervision of the bankruptcy court. Neither TASI nor Touch America collected advances, deposits, or prepayments from Arizona customers.

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

⁴ 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.

recommends that 360networks be required to docket proof of the performance bond within 30 days of the date of this Decision.

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

- (a) Touch America follow all the requirements, except publication of legal notice, 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;
- (b) Touch America should reference the Decision number of this Order and 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;
- (c) The Commission cancel Touch America Services, Inc. d/b/a Touch America's CC&Ns within 90 days of the date an Order is effective in this matter; and
- (d) Upon cancellation of its CC&Ns Touch America Services, Inc. d/b/a Touch America will not be authorized to provide alternative operator service and 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.

Staff recommends that the Application for the approval of assets and transfer of CC&N from Touch America Services, Inc. d/b/a Touch America to Touch America in Docket Nos. T-04011-01-0303 and T-03911A-01-0303 be administratively closed.

The interests of the retail consumers require us to continue with the policy adopted in Decision No. 64740 (April 18, 2002) and Decision Nos. 65124 and 66105 which provides Arizona consumers a 90-day period after notice in which they can decide whether to discontinue services with a new service provider without penalty. The competing interests herein are between the entity that purchased assets, including customer accounts, and the consumers in their relationship with their original service provider. The identity of the service provider is wholly material and relevant to consumers and the service providers alike. Existing retail consumers of Touch America should be allowed to find another provider if they do not wish to be transferred to 360networks and should not suffer any contractual penalties, such as termination liability or change charges, for making such a choice. We will, therefore, recommend that prior to the asset transfer Touch America's retail customers must receive notification that they may be allowed to elect, within 90 days of receiving notice, to obtain service from 360networks or a provider of their choice, without prejudice or regard to contractual obligation. We believe that Touch America can design such re-notification to avoid misleading or confusing Touch America's retail customers. Touch America's requested asset transfer will be conditioned upon docketing proof

THE COMMISSION

December 30, 2003

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that Touch America's retail customers in Arizona have received notification that they may be allowed to elect, within 90 days of receiving the notice to obtain service with 360networks or a provider of their choice, without prejudice or regard to contractual obligation.

With the conditions outlined above, Staff recommends approval of the Application as being in the public interest.

A handwritten signature in black ink, appearing to read 'EGJ', with a long horizontal line extending to the right.

Ernest G. Johnson
Director
Utilities Division

EGJ:JFB:hml/CCK

ORIGINATOR: John F. Bostwick

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BEFORE THE ARIZONA CORPORATION COMMISSION

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

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

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.¹

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2 competitive facilities-based interexchange services pursuant to a CC&N granted by the
3 Commission in Docket No. T-03777A-99-0496.² 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.

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18 through the physical assets pursuant to the procedures set forth in 47 C.F.R. § 64.1120(e).³
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.

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

26 ² See Application of Worldwide Fiber Networks, Inc. for a Certificate of Convenience and Necessity to Provide
Facilities-based Interexchange Telecommunications Services and Petition for Competitive Classification, Decision
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Networks, Inc. notified the Commission of its name change to 360networks (USA) Inc.

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services.

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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.

28 ...

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.⁴

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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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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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**

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13 _____
CHAIRMAN

COMMISSIONER

COMMISSIONER

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COMMISSIONER

COMMISSIONER

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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 _____ day of _____ 2004.

22 _____
BRIAN C. McNEIL
Executive Secretary

23 DISSENT: _____

24 DISSENT: _____

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

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19 Lyn Farmer, Esq., Chief Administrative Law Judge
20 Hearing Division
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