

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the Application of)	
)	
Touch America, Inc. (Debtor-in-Possession))	
for Authority Pursuant to Section 214 of the)	WC Docket No. 03-259
Communications Act of 1934, as Amended,)	Comp. Pol. File No. 667
and Section 63.71 of the Commission's Rules,)	
to Discontinue Domestic Telecommunications)	
Services)	

ORDER

Adopted: February 26, 2004

Released: February 26, 2004

By the Chief, Competition Policy Division:

I. INTRODUCTION

1. In this Order, we grant, to the extent described herein, the application of Touch America, Inc. (Debtor-in-Possession) (Touch America DIP) to discontinue the provision of certain domestic telecommunications services, pursuant to section 214(a) of the Communications Act of 1934, as amended (the Act),¹ and section 63.71 of the Federal Communications Commission's (Commission) rules.² For the reasons set forth below, we grant Touch America DIP authority to discontinue service as of February 29, 2004, to permit its customers to complete transition to alternative services.

II. BACKGROUND

2. On December 8, 2003, Touch America DIP filed an application with the Commission requesting authority under section 214(a) of the Act and section 63.71 of the Commission's rules to discontinue certain domestic telecommunications services.³ Specifically, the application states that Touch America DIP seeks authority to discontinue the provision of its domestic, interstate, interexchange Asynchronous Transfer Mode (ATM) and Frame Relay services in the contiguous

¹ 47 U.S.C. § 214(a).

² 47 C.F.R. § 63.71.

³ *See Application of Touch America, Inc. (Debtor-in-Possession) for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, and Section 63.71 of the Commission's Rules, to Discontinue Domestic Telecommunications Services*, WC Docket No. 03-259, Comp. Pol. File No. 667 (filed Dec. 8, 2003) (*Touch America DIP Application*).

United States.⁴ The application indicates that, on June 19, 2003, due to financial difficulty, Touch America Holdings, Inc. and several subsidiaries, including Touch America, Inc., filed voluntary petitions under Chapter 11 of the bankruptcy code in order to reorganize their business and financial structure.⁵ The application states that, accordingly, Touch America DIP proposes to discontinue providing ATM and Frame Relay services on January 31, 2004, and states that, on December 2, 2003, Touch America DIP notified each customer in writing of its plan.⁶

3. By Public Notice dated December 19, 2003, the Commission notified the public that, in accordance with section 63.71(c) of its rules, the application would be deemed to be automatically granted on the thirty-first (31st) day after the release date of the notice, unless the Commission notified Touch America DIP that the grant would not be automatically effective.⁷ In response to the Public Notice, the Commission received five initial comments,⁸ four from customers stating that they could not secure alternative service by January 31, 2004, and requesting that the Commission require Touch America DIP to continue to provide service for an additional period of time.⁹ Qwest, which

⁴ The application indicates that Touch America DIP currently provides domestic, interstate, interexchange ATM and Frame Relay services, on a non-dominant basis, to approximately 350 customers located in Alabama, Arizona, California, Colorado, Florida, Georgia, Iowa, Idaho, Illinois, Indiana, Kansas, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Jersey, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, West Virginia, and Wyoming. Touch America DIP states that it provides these services primarily to commercial customers and to Northrop Grumman, a prime contractor with the U.S. Department of Treasury. *Touch America DIP Application* at 3. According to Touch America DIP, the services it provides to these customers range in capacity from DS-0 to OC-3, but the majority of customers take services in the DS-0 to DS-1 range. *Id.*

⁵ *Touch America DIP Application* at 4-5.

⁶ *Id.* See 47 C.F.R. § 63.71(a).

⁷ *Comments Invited on Application of Touch America, Inc. (Debtor-in-Possession) to Discontinue Domestic Telecommunications Services*, Public Notice, WC Docket No. 03-259, Comp. Pol. File No. 667, DA 03-4058 (rel. Dec. 19, 2003). The Commission also noted that, because Touch America DIP told customers it would discontinue service on January 31, 2004, it could not terminate services before that date. *Id.*

⁸ These initial commenters include Qwest Communications Corporation (Qwest), Northrop Grumman, SUPERVALU INC., NW Handling Systems, Inc., and J.M. McConkey Company, Inc. Qwest filed two comments, an initial "Written Ex Parte Presentation," filed on January 13, 2004 (Qwest Comments), and a "Supplemental Ex Parte Presentation," filed on January 20, 2004 (Qwest Supplemental Comments). Qwest also submitted an *ex parte* communication, on February 2, 2004. See Letter from Andrew D. Crain, Associate General Counsel, Qwest Services Corporation, to Secretary, Federal Communications Commission, WC Docket No. 03-259, Comp. Pol. File No. 667 (dated Feb. 2, 2004) (Qwest Feb. 2 *Ex Parte* Letter).

⁹ See Northrop Grumman Comments at 1 (requesting that the Commission not permit Touch America DIP to discontinue service until Feb. 28, 2004); SUPERVALU INC. Comments at 1-2 (requesting an extension until Feb. 28, 2004); NW Handling Systems, Inc. Comments at 1 (requesting Feb. 29, 2004); and J.M. McConkey Company, Inc. Comments at 1 (requesting an extension until Mar. 1, 2004). Touch America DIP agreed to continue to provide service to these four customers until March 1, 2004. See Letter from Charles Helein, Esq., Counsel for Touch America DIP, to Secretary, Federal Communications Commission, WC Docket No. 03-259, Comp. Pol. File No. 667, (dated Jan. 16, 2004) at 1.

intends to provide alternative service, argues that many other customers are experiencing similar delays transitioning their service or have received insufficient notice from Touch America DIP.¹⁰ Qwest therefore requests that the Commission permit Touch America DIP to discontinue service no earlier than February 28, 2004, for all current customers, not merely the four commenting customers.¹¹

4. In consideration of concerns raised by Qwest and, informally, by other Touch America DIP customers, the Commission issued a second Public Notice, on January 20, 2004, alerting Touch America DIP that its application would not be automatically granted and requesting additional public comment.¹² In response to this second Public Notice, the Commission received comments from approximately sixteen Touch America DIP customers, requesting that the Commission delay grant of Touch America DIP's application in order to permit adequate time to transition to Qwest without suffering loss of service.¹³ Most commenters request that discontinuance authorization be delayed approximately one additional month,¹⁴ although a few asked for more time or were not specific as to how much time they would

¹⁰ Qwest Comments at 2. In support of Qwest's assertions, numerous other customers contacted the Commission to say that they had no assurance that alternative service would be available from Qwest by January 31, 2004.

¹¹ Qwest Comments at 3. Qwest argues that requiring Touch America DIP to continue to serve all customers would not unduly burden Touch America DIP. Qwest Supplemental Comments at 2; Qwest Feb. 2 *Ex Parte* Letter at 2-3. First, Qwest asserts that, for Touch America DIP to continue to serve only the customers it has committed to serve, it would already need to operate all the switches it uses for ATM and Frame Relay services. Qwest Feb. 2 *Ex Parte* Letter at 3. Second, Qwest maintains that it has absorbed much of the cost of this transition process, including transferring to Qwest the facility costs of over 500 circuits and paying, on a going-forward basis after January 31, 2004, to support the backbone networks that interconnect the ATM and Frame Relay switches. *Id.* at 2. Qwest also points out that Touch America DIP continues to collect revenue for its ATM and Frame Relay services. *Id.* at 2-3.

¹² *Application of Touch America, Inc. (Debtor-in-Possession) to Discontinue Domestic Telecommunications Services not Automatically Granted, Further Public Comment Requested*, Public Notice, WC Docket No. 03-259, Comp. Pol. File No. 667, DA 04-126 (rel. Jan. 20, 2004).

¹³ See Archstone-Smith Comments; Brand Services Comments; Burlington Coat Factory Comments; CIMCO Communications Comments; Crane Plumbing Comments; David Frazell Comments; Federal Express Comments; Fifth Third Bank Comments; Jones Enterprise, Inc. (Nephi Rubber Products Corp.) Comments; Lamson & Sessions Company Comments; NetLojix Communications, Inc. Comments; Pindler and Pindler Comments; Puget Sound Truck Lines Comments; Space Imaging Comments; TNS Intersearch Comments; WestCoast Hospitality Corporation Comments; and Whalen Tire Comments.

¹⁴ See CIMCO Communications Comments at 1 (requesting that discontinuance authorization be delayed until February 28, 2004); Crane Plumbing Comments at 1 (requesting until March 1, 2004); David Frazell Comments at 1 (requesting until March 1, 2004); Federal Express Comments at 1 (requesting an additional 30 days); Fifth Third Bank Comments at 2 (requesting until February 28, 2004); Lamson & Sessions Company Comments at 1 (February 28, 2004); Pindler and Pindler Comments at 1 (requesting an additional three weeks); Space Imaging Comments at 1 (February 28, 2004); WestCoast Hospitality Corporation Comments at 1 (February 29, 2004); and Whalen Tire Comments at 1 (requesting one additional month).

prefer.¹⁵ In response, Touch America DIP states that one factor causing delays in some customers' ability to obtain alternative services from Qwest was the inaccuracy or insufficiency of certain customer information that Qwest had furnished to Touch America DIP.¹⁶ In addition, while acknowledging its responsibility to obtain Commission approval prior to discontinuing service to its customers, Touch America DIP notes its responsibility, as debtor-in-possession in bankruptcy, to preserve its assets.¹⁷ Nevertheless, Touch America DIP agrees to extend service to all its customers through February 29, 2004.¹⁸

5. Section 214(a) of the Act states that “[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby.”¹⁹ The primary purpose of this requirement is to reduce the harm to consumers caused by discontinuances of service, which is an important aspect of the Commission's general obligation under the Communications Act to

¹⁵ See Archstone-Smith Comments at 1 (requesting an additional sixty days); Brand Services Comments at 1 (requesting a temporary delay because problems could push cut-over past Touch America DIP's proposed January 31, 2004 discontinuance date); Burlington Coat Factory Comments at 1 (requesting a delay until all its locations can be transitioned to Qwest); Jones Enterprise, Inc. (Nephi Rubber Products Corp.) Comments at 1 (requesting additional time); NetLojix Communications, Inc. Comments at 1 (requesting that discontinuance be postponed because the date when new Qwest circuits would be available is unclear); Puget Sound Truck Lines Comments at 1 (requesting until March 15, 2004); TNS Intersearch Comments at 1 (requesting “more time”).

¹⁶ See Letter from Charles Helein, Esq., Counsel for Touch America DIP, to Secretary, Federal Communications Commission, WC Docket No. 03-259, Comp. Pol. File No. 667, (dated Jan. 30, 2004) (Touch America DIP Jan. 30 *Ex Parte* Letter) at 2. Touch America DIP responded to these customers' concerns by agreeing to continue to provide service to them until they have completed transition to Qwest or through February 29, 2004, whichever is earlier. *Id.* at 2. Touch America DIP indicates that two commenters, WestCoast Hospitality Corporation and HP Management Services, Inc., are not customers of Touch America DIP's ATM and Frame Relay services, and that it could not find records indicating whether several others (*e.g.* David Frazell and TNS Intersearch) were customers or not. *Id.* at 3. Touch America DIP fails to address concerns raised by Pindler and Pindler. See Pindler and Pindler Comments at 1. We note that WestCoast Hospitality Corporation responds that it receives Network-to-Network Interface (NNI) service from Touch America DIP, which enables WestCoast Hospitality Corporation to receive Frame Relay service across LATA boundaries from Qwest. See Letter from David Barbieri, VP, CIO, WestCoast Hospitality Corporation, to Rodney McDonald and Brad Koerner, Federal Communications Commission, WC Docket No. 03-259, Comp. Pol. File No. 667, (dated Jan. 30, 2004) at 1. Similarly, TNS Intersearch maintains that it is a Touch America DIP customer and provides contact and account information to assist Touch America DIP in identifying it as a customer. See Letter from Mike King, Director of IT Services, TNS Intersearch, to Brad Koerner, Federal Communications Commission, WC Docket No. 03-259, Comp. Pol. File No. 667, (dated Jan. 30, 2004) at 1. HP Management Services, Inc. also responds that it receives service through at least one Touch America DIP circuit, in Colorado.

¹⁷ Touch America DIP Jan. 30 *Ex Parte* Letter at 2.

¹⁸ See Letter from Charles Helein, Esq., Counsel for Touch America DIP, to Brad Koerner, Federal Communications Commission, WC Docket No. 03-259, Comp. Pol. File No. 667, (dated Feb. 24, 2004) at 1.

¹⁹ 47 U.S.C. § 214(a).

protect and promote the public interest.²⁰ As the Commission has stated, “we have retained the right to delay grant of a discontinuance authorization if we believe an unreasonable degree of customer hardship would result,”²¹ and we will review each application to determine whether proper notice has been given, whether customers or other end users are able to receive service or a reasonable substitute from another carrier, and whether the public convenience and necessity is otherwise adversely affected.²²

6. The Commission has considerable discretion in determining whether to grant a carrier authority to discontinue service pursuant to section 214.²³ Balancing the interests of the carrier and the affected user community, the Commission considers a number of factors including (1) the financial impact on the common carrier of continuing to provide the service, (2) the need for the service in general, (3) the need for the particular facilities in question, (4) the existence, availability, and adequacy of alternatives, and (5) increased charges for alternative services, although this factor may be outweighed by other considerations.²⁴

III DISCUSSION

7. Considering the five factors identified by the Commission for evaluating applications to discontinue service, we grant Touch America authority to discontinue service as of February 29, 2004.²⁵ As stated above, Touch America DIP indicates that it has agreed to continue providing services to its customers through the end of February. We find that discontinuance by Touch America DIP as of February 29, 2004, will not result in an unreasonable degree of customer

²⁰ See 47 U.S.C. § 201.

²¹ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, CC Docket No. 79-252, 85 FCC 2d 1, 49 (1980).

²² See 47 C.F.R. § 63.71(a); see, e.g., *AT&T Application to Discontinue Interstate Sent-Paid Coin Service Not Automatically Granted*, Public Notice, NSD File No. W-P-D-497 (Aug. 3, 2001) (requiring AT&T to show how it will minimize the negative impact on the affected customers).

²³ *FCC v. RCA Communications, Inc.*, 73 S.Ct. 998, 1002 (1953). See also *Verizon Telephone Companies, Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, Order, WC Docket No. 02-237, FCC 03-256 (rel. Oct. 22, 2003).

²⁴ *Application for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, File Nos. W-P-C-6670 and W-P-D-364, 8 FCC Rcd 2589, 2600, para. 54 (1993); *remanded on other grounds, Southwestern Bell v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994). See *Verizon Telephone Companies, Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, Order, WC Docket No. 02-237, FCC 03-256 (rel. Oct. 22, 2003).

²⁵ To the extent NNI is an element of Touch America DIP’s Frame Relay service, as WestCoast Hospitality Corporation suggests, we expect Touch America DIP to continue to provide NNI to WestCoast Hospitality Corporation through February 29, 2004. To the extent that Touch America DIP would characterize NNI as a separate service, we note that Touch America DIP is required to seek Commission authority to discontinue this service, pursuant to section 63.71. Similarly, to the extent HP Management Services, Inc. may receive service over any Touch America DIP circuits, Touch America DIP may discontinue service only in accordance with this Order. See *supra*, n.16.

hardship and that there will be no adverse effect on the public convenience and necessity.

8. Applying the first of the Commission's factors, the financial impact of continuing to provide the service for the carrier seeking to discontinue, we note that Touch America DIP filed voluntary petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code on June 19, 2003, and has been operating under Chapter 11 protection for over six months.²⁶ We thus find that the financial impact of continuing to provide these services for a period beyond February 29, 2004, could be significantly burdensome. Applying factors two and three, the need for the services in general and for the particular services in question, we note that commenters in this proceeding explain that the ATM and Frame Relay services they receive from Touch America DIP are critical to their businesses or to government operations.²⁷ Finally, considering factor four, the existence, availability, and adequacy of alternatives, the record indicates that some of the commenters were unable to transfer service to alternative providers within the time allowed by Touch America DIP's originally planned discontinuance date.²⁸ We also note that Touch America DIP acknowledges that "deficiencies in [its] information about these customers is [sic] believed to be a cause for the delay in migrating these customers."²⁹ With regard to this concern, we note that Touch America DIP indicates it will continue to provide service to customers until the end of February in order to allow them to migrate. In balancing these factors, therefore, we find that Touch America DIP should be allowed to discontinue its services as of February 29, 2004. We invite the parties to keep us apprised of their progress toward transitioning customers to alternative service. In this regard, we will retain jurisdiction over this matter until we have received confirmation that Touch America DIP's customers have successfully completed this process.

IV. ORDERING CLAUSE

9. Accordingly, pursuant to sections 1, 4(i), and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 214, and sections 0.91, 0.291, and 63.71 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 63.71, IT IS ORDERED that the application of Touch America, Inc. (Debtor-in-Possession) to discontinue domestic telecommunications IS GRANTED to the extent declared herein.

FEDERAL COMMUNICATIONS COMMISSION

²⁶ See *Touch America DIP Application* at 4-5.

²⁷ See *supra*, nn. 8-9, 13-15.

²⁸ *Id.* There is no indication that the fifth factor, increased charges for alternative services, is a concern in this case.

²⁹ Touch America DIP Jan. 30 *Ex Parte* Letter at 2 (noting that "the only information Touch America DIP has on the [customer proprietary network information] of these customers is the information originally furnished by Qwest at divestiture").

Michelle M. Carey
Chief, Competition Policy Division
Wireline Competition Bureau