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

In the Matter of Cass County Telephone Company, Limited Partnership, and LEC Long Distance, Inc. d/b/a CassTel Long Distance Transferors, FairPoint Communications, Inc. FairPoint Communications Missouri, Inc., ST Long Distance Inc., d/b/a FairPoint Communications Long Distance Transferees, Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, as Amended, for Transfer of Control of Blanket Domestic Section 214 Authority and Certain Telecommunications Assets	)	WC Docket No. 06-64

ORDER

Adopted: July 20, 2006 **Released: July 20, 2006**

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant authority to Cass County Telephone Company, Limited Partnership (CassTel) and LEC Long Distance Inc. d/b/a CassTel Long Distance (CassTel LD), FairPoint Communications Missouri, Inc. (FairPoint Missouri or Operator), FairPoint Communications Inc. and ST Long Distance, Inc. d/b/a FairPoint Communications Long Distance (FairPoint LD and, with FairPoint Missouri and FairPoint Communications Inc., FairPoint) (collectively, the Applicants) under section 214 to transfer control of certain telecommunications assets from CassTel and CassTel LD to FairPoint Missouri and FairPoint LD, subject to Applicants' compliance with the conditions discussed herein. Although the FairPoint companies acquiring CassTel assets pursuant to this Order had no involvement with prior criminal activities of certain CassTel principals to commit universal service fraud, we impose conditions to ensure that the transferred assets are operated properly going forward, consistent with universal service statutory and regulatory requirements.

II. BACKGROUND

2. Pursuant to section 214(a) of the Communications Act of 1934, as amended (the Communications Act), the Commission must determine that any proposed transfer of control of

authorizations will serve the public interest before approving any such transfer.[1] Section 63.03 of the Commission's rules outlines the procedures for review of domestic transfer of control applications.[2] Domestic section 214 applications are subject to streamlined treatment, except under certain circumstances.[3]

3. On March 13, 2006, the Applicants filed an application pursuant to section 63.04 of the Commission's rules to transfer certain telecommunications assets from CassTel and CassTel LD to FairPoint Missouri and FairPoint LD.[4] The Wireline Competition Bureau (Bureau) released a public notice accepting the application for streamlined processing on June 1, 2006.[5] In light of the past criminal actions by CassTel's principals,[6] the Bureau removed the application from streamlined processing for further analysis to examine whether the proposed transfer would serve the public interest.[7]

III. DISCUSSION

4. *Transfer of Control.* Consistent with the legal standards of section 214, we must determine whether the proposed transfer would serve the "public interest," weighing the potential public interest harms against the potential public interest benefits.[8] The Communications Act's public interest standard requires us to consider both the possible competitive effects of the proposed transfers and the

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[1] 47 U.S.C. § 214(a); *see also Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030-32, paras. 8-10 (1998) (*WorldCom-MCI Order*).

[2] *See* 47 C.F.R. § 63.03.

[3] *Id.*

[4] *See* 47 C.F.R. § 63.04; *Application of Cass County Telephone Company, Limited Partnership, and LEC Long Distance, Inc. d/b/a CassTel Long Distance, Transferors, and FairPoint Communications, Inc., FairPoint Communications Missouri, Inc., and ST Long Distance, Inc., d/b/a FairPoint Communications Long Distance, Transferees, Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, as Amended, for Transfer of Control of Blanket Domestic Section 214 Authority and Certain Telecommunications Assets,* WC Docket No. 06-64, Application (filed Mar. 13, 2006).

[5] *See Domestic Section 214 Application filed for the Acquisition of Assets of [Cass] County Telephone Company, Limited Partnership and LEC Long Distance, Inc. d/b/a CassTel Long Distance by FairPoint Communications Missouri, Inc., FairPoint Communications, Inc. and ST Long Distance, Inc. d/b/a FairPoint Communications Long Distance*, WC Docket No. 06-64, Public Notice, DA 06-1181 (rel. June 1, 2006). No comments were filed in response to the Public Notice other than by the Applicants.

[6] *See infra* para. 6.

[7] *See Notice of Removal of Domestic Section 214 Applications from Streamlined Treatment*, WC Docket Nos. 06-64 and 06-107, Public Notice, DA 06-1346 (rel. June 28, 2006).

[8] Where necessary, the Commission may attach conditions to the transfer of authorizations or licenses to ensure that the public interest is served by the transaction. *WorldCom-MCI Order*, 13 FCC Rcd at 18030-32, paras. 9-10 (quoting 47 U.S.C. § 214(c)); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14740, para. 52 (1999) (stating that the Commission has the authority to condition a transfer of lines or licenses to ensure that the transfer meets the public interest standard); *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389-90 (D.C. Cir. 1995) (upholding FCC imposition of proportionate return condition on carrier's 214 authorization to provide international service. "[W]e see no basis for concluding that the Commission acted arbitrarily and capriciously when, in the exercise of its judgment of what the public convenience and necessity required, it decided to offset that risk [of the carrier using its ability and incentive to discriminate against competing domestic carriers] by imposing a proportionate return condition.").

broader aims of the Communications Act and federal communications policy.[9] These aims include, among other things, preserving and advancing universal service.[10]

5. The Bureau finds, upon consideration of the record, that grant of the application, subject to compliance with the conditions discussed herein, will serve the public interest, convenience, and necessity. Specifically, subject to the conditions enumerated below, we grant the Applicants authority for: (1) FairPoint Missouri to acquire substantially all of the telephone properties and other telephone-related assets of CassTel necessary for the provision of local exchange services in its exchange areas in Missouri and adjoining exchanges in Kansas; and (2) FairPoint LD to acquire substantially all of the CassTel LD assets related to the provision of interstate long distance. Granting authority to transfer these assets serves the public interest because it will ensure the continuity of service for CassTel's customers.

6. *Conditions to Grant.* Section 254 of the Communications Act states as its principal goal that consumers in all regions of the nation, including consumers in rural, insular, and high-cost areas, have access to affordable telecommunications services.[11] Consistent with section 54.314 of the Commission's rules, an eligible rural local exchange carrier (LEC) may only receive high-cost universal service support if the state in which the carrier is providing service certifies annually to the Commission and the Universal Service Administrative Company (USAC) that the carrier will use the support in accordance with section 254(e) of the Communications Act.[12] On October 15, 2004, the Bureau directed USAC to suspend high-cost support payments to CassTel, based on the Missouri Public Service Commission (MoPSC) September 30, 2004 letter declining to certify that CassTel was using its high-cost support in accordance with section 254(e) and initiating an investigation into the company's use of universal service support.[13] In January and February 2005, Kenneth Matzdorff, who had been President of CassTel, Daniel Martino, who had ownership interests in CassTel's parent corporation, and Richard Martino, who had ownership interests in CassTel's parent corporation and control of CassTel, entered guilty pleas in U.S. District Court for the Western District of Missouri (Missouri District Court), related to CassTel's fraudulent receipt of overpayments from USAC and the National Exchange Carrier Association (NECA) in the amount of $8.9 million.[14] Subsequently, CassTel identified $5,219,156 of

[9] *See* 47 U.S.C. § 214(c); *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31, para. 9.

[10] *See, e.g., WorldCom-MCI Order*, 13 FCC Rcd at 18030-31, para. 9; 47 U.S.C. § 254.

[11] *See* 47 U.S.C. § 254.

[12] *See* 47 C.F.R. § 54.314; 47 U.S.C. § 254(e).

[13] *See* Letter from Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, Federal Communications Commission, to Irene Flannery, Vice President, High Cost and Low Income Division, USAC (dated Oct. 15, 2004) at Attach., Letter from Robert M. Clayton, III, Commissioner, Missouri Public Service Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (dated Sept. 30, 2004); Letter from Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, Federal Communications Commission, to Irene Flannery, Vice President, High Cost and Low Income Division, USAC (dated Oct. 22, 2004); Letter from Irene Flannery, Vice President, High Cost and Low Income Division, USAC, to Kenneth Matzdorff, Chairman, CassTel (dated Nov. 5, 2004).

CassTel timely filed an appeal of the Bureau's decision. CassTel Request for Review of Suspension of High Cost Universal Service Support Payments (filed Jan. 4, 2005); *see Wireline Competition Bureau Seeks Comment on Appeal of Cass County Telephone Company Concerning a Decision of the Universal Service Administrator to Suspend its High-Cost Universal Service Payments,* CC Docket No. 96-45, Public Notice, 20 FCC Rcd 2169 (Wireline Comp. Bur. 2005). CassTel withdrew its request for review on July 18, 2006. Letter from James M. Smith, Attorney for CassTel, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45 (filed July 18, 2006).

[14] *See United States v. Kenneth Matzdorff,* Case No. 05-00020-CR-W-SOW, Plea Agreement (W.D.Mo. Jan. 18, 2005); *United States v. Richard T. Martino,* Case No. 05-00027-01-CR-W-HFS, Plea Agreement (W.D.Mo. Feb. 23, 2005); *United States v. Daniel D. Martino,* Case No. 05-00027-02-CR-W-HFS, Plea Agreement (W.D.Mo. Feb. 23, 2005). As part of these criminal plea agreements, Kenneth Matzdorff and Daniel and Richard Martino collectively

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additional money that CassTel owes the universal service fund (USF) and NECA, bringing the total owed by CassTel to $14,119,156.[15]

7. In light of the past criminal actions by CassTel's principals, Kenneth Matzdorff, Daniel Martino, and Richard Martino, we find it necessary to the public interest to condition the transfer of control of CassTel assets to preserve and advance universal service by deterring waste, fraud, and abuse of the USF. Specifically, our conditions will provide transparency to ensure that CassTel's assets operate consistent with the universal service program rules. In addition, once closing of the transfer of control occurs, CassTel will cease to operate as a LEC, and it may be more difficult to obtain the money necessary to repay the USF (and NECA) fully. Therefore, conditioning the transfer on repayment of the additional money that CassTel owes protects the USF, which in turn serves the public interest. The conditions we adopt here are consistent with safeguards that have been applied to USF recipients in other cases of USF waste, fraud, and abuse.[16] Failure to satisfy any of these conditions in full will subject CassTel and its successors and assigns to all appropriate remedies and enforcement actions.[17] Accordingly, we condition our approval of this transfer of control application on the following:

(a) *Repayment of Monies Owed to USAC and NECA.* In addition to, and apart from, the $8.9 million that the Missouri District Court ordered CassTel's principals to pay to reimburse USAC and NECA, CassTel has determined that it owes additional monies for overpayments received from USAC and from NECA. Specifically, CassTel asserts that it owes $4,260,648 to USAC and $958,508 to NECA, for a total of $5,219,156. Even if USAC's and NECA's Petitions for Remission or Mitigation of

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forfeited $8.9 million to the U.S. District Court for the Western District of Missouri. *See, e.g., United States v. Daniel D. Martino,* Case No. 05-00027-02-CR-W-HFS, Judgment in a Criminal Case at 5 (W.D.Mo. imposed Nov. 23, 2005 and entered Dec. 2, 2005) (imposing restitution in the amount of $8.9 million, jointly and severally upon Daniel Martino, Richard Martino, and Kenneth Matzdorff, and ordering $3.5 million of such restitution to be paid to USAC, and $5.4 million of it to be paid to NECA). USAC and NECA both have petitioned for remission of the forfeited funds. *See United States v. Daniel Martino,* Case No. 05-00027-02-CR-W-HFS, NECA Petition for Remission or Mitigation of Forfeiture (W.D.Mo. filed Dec. 23, 2005); *United States v. Richard T. Martino and Daniel D. Martino,* Case No. 05-00027-CR-W-HFS, USAC Petition for Remission or Mitigation of Forfeiture (W.D.Mo. filed Mar. 1, 2006); *United States v. Richard Martino and Daniel Martino,* Case No. 03-CR-00304 (CBA), NECA Petition for Remission or Mitigation of Forfeiture (E.D.N.Y. filed Mar. 9, 2006); *United States v. Kenneth M. Matzdorff,* Case No. 05-00020-01-CR-W-SOW, USAC Petition for Remission or Mitigation of Forfeiture (W.D.Mo. filed Jun. 22, 2006).

[15] *See* Letter from Randall B. Lowe, Counsel for CassTel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45, Attach., "A Description of Events Surrounding Cass County Telephone Company, the Remaining Problem and a Proposed Solution" at 6 (filed May 4, 2006). Specifically, CassTel owes $7,760,648 to USAC and $6,358,508 to NECA for fraudulent overpayments, for a total of $14,119,156. *See* Letter from Randall B. Lowe, Counsel for CassTel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-45, Attach., "Computation of Cass County Telephone Company's Problem and Solution" (filed May 11, 2006) (CassTel May 11, 2006 Computation). While CassTel's filing rounded the figures to the nearest thousand, our independent review yielded these more precise figures.

[16] *See, e.g., United States v. NextiraOne, LLC,* Docket No. 4:06-cr-40041-LLP, Plea Agreement (D.S.D. filed and entered Apr. 20, 2006) (*NextiraOne Plea Agreement*); *United States v. NextiraOne, LLC,* Docket No. 4:06-cr-40041-LLP, Judgment (D.S.D. entered Apr. 25, 2006); *United States v. NEC-Business Network Solutions, Inc.,* Docket No. 3:04cr00184CRB, Plea Agreement Exh. A, Special Conditions of Probation (N.D.Cal. filed May 27, 2004 and entered Jun. 3, 2004) (*NEC/BNS Plea Conditions*).

[17] Each failure to satisfy any condition of this Order will constitute a separate violation of a Commission order, entitling the Commission to exercise any rights or remedies authorized by law attendant to the enforcement of a Commission order, including, but not limited to, the Commission's forfeiture authority pursuant to section 503 of the Communications Act.

Forfeiture are granted in accordance with the Missouri District Court's recommended disposition of the already-forfeited $8.9 million,[18] these additional monies are necessary to make USAC and NECA whole as a result of CassTel's past misconduct.[19] Therefore, as a condition of this grant, FairPoint shall pay $4,260,648 to USAC and $958,508 to NECA at, and as a condition to, closing under the asset purchase agreement.[20] The payments are intended to be in addition to, and not a replacement for any portion of, the $8.9 million that CassTel's principals have paid pursuant to court order, and were calculated with the understanding that USAC and NECA will continue to seek recovery of those prior payments. We therefore do not require those payments to be made again. Imposing such a requirement at this time would in effect require payment of the same debt twice, which could jeopardize the entire transaction, which, as stated above, we find to be in the public interest (subject to the conditions set forth in this Order). At the closing, FairPoint shall make the required payments to USAC and NECA prior to any payments from FairPoint to CassTel. The payments to USAC and NECA shall be made by wire transfer as directed by the Bureau. Immediately following tender of the payments to USAC and NECA, the Applicants shall submit to the Bureau proof of the wire transfers.

(b) *Annual Audits*. Operator or its successors and assigns shall undergo, at its own expense, an annual independent audit to be performed for three years after closing of the transfer of control approved with this Order. The independent audit shall be an attestation engagement and provide an opinion on the compliance or non-compliance of Operator or its successors and assigns with the conditions set forth herein, and generally with the Commission's requirements relating to the USF. Each audit shall result in an audit report which, at a minimum, must detail this compliance or non-compliance, as well as the steps taken, and those that will be taken, to ensure future compliance. Operator or its successors and assigns shall provide the independent auditor with access to the books, records and operations of Operator or its successors and assigns, as the auditor deems necessary to fulfill the audit. In addition, Operator or its successors and assigns shall provide the Commission, on a timely basis, with the opportunity to review the audit plans and draft audit reports.[21] The Commission, at its discretion, may approve, reject, or modify the audit plans and draft audit

[18] *See supra* note 14.

[19] We note that USAC may complete an audit of CassTel to determine the extent of CassTel's compliance with USF program rules. *See United States v. Kenneth M. Matzdorff*, Case No. 05-00020-01-CR-W-SOW, USAC Petition for Remission or Mitigation of Forfeiture at 6 (W.D.Mo. filed June 22, 2006). If necessary and appropriate, we will address the results of the audit at a future date.

[20] We reject CassTel's proposal to offset the above-stated amounts with certain high-cost support payments withheld since the Bureau learned that the MoPSC was investigating possible high-cost support fraud at CassTel. *See* CassTel May 11, 2006 Computation. The MoPSC, on September 30, 2004, declined to certify that CassTel was using its high-cost support in accordance with section 254(e) of the Communications Act, and on October 15, 2004, the Bureau directed USAC immediately to suspend high-cost support payments to CassTel. The Bureau properly stopped high-cost support payments as soon as it no longer had assurance that CassTel was using the support in accordance with statutory requirements. The MoPSC's letter effectively withdrew its prior 2004 certification that CassTel was using its high-cost support in accordance with section 254(e). CassTel therefore properly did not receive high-cost support payments since September 2004. *See supra* para. 6.

[21] *Cf. GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, Appendix D, Market-Opening Conditions, 15 FCC Rcd 14032, 14327-29 (2000).

reports. The auditor's first report shall cover the year commencing on the date of the transfer of control. The auditor shall issue its first report, and file it with the Commission in this docket, three months after the end of that one-year period. Audit reports covering the second and third years after the transfer of control shall be due twelve and twenty-four months after the due date of the first report.

(c) *Ownership and Operational Interest.* No individual convicted of a felony may have any ownership interest or operational involvement in Operator or its successors and assigns.[22]

(d) *Recovery of Reimbursements Prohibited.* CassTel and its successors and assigns may not recover or attempt to recover any of the $14,119,156[23] directly or indirectly from ratepayers.[24] To this end, CassTel and its successors and assigns shall treat the restitution discussed herein as a non-operating expense for all regulatory purposes in the accounting period in which it is recorded.[25] The regulatory purposes include ratemaking and the calculation of payments from any regulatory support mechanism.

(e) *Managerial and Financial Controls.* Within 90 days after closing of the transfer of control approved herein, Operator or its successors and assigns must submit to the Commission, in this docket, a plan for the managerial and financial controls that Operator or its successors or assigns has in place and/or will put in place within six months of closing of the transfer of control to prevent any future waste, fraud, or abuse of the USF. Such plan shall be subject to review and modification by the Commission. Any changes to the plan made within three years of the closing of this transfer of control also shall be submitted to the Commission in this docket, and subject to the Commission's review and modification.

(f) *Compliance Officer.* Within 60 days after closing of this transfer of control, Operator or its successors and assigns shall appoint a compliance officer to monitor receipt and use of high-cost universal service support, and to design and administer a training program for employees on ethics and proper practices regarding the USF.[26] Within

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[22] *See* 47 U.S.C. § 308(b) (authorizing the Commission to prescribe citizenship, character, and other qualifications for station licensees under Title III of the Communications Act); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-10 (1986), *modified* 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992). Although not directly applicable to common carriers, the character qualifications standards adopted in the broadcast context can provide guidance in the common carrier area as well. *See MCI Telecommunications Corporation Petition for Revocation of Operating Authority*, Order and Notice of Apparent Liability, 3 FCC Rcd 509, 515 n.14 (1988); *see also A.S.D. Answer Service, Inc.*, Memorandum Opinion and Order, 1 FCC Rcd 753, 754, para. 12 (1986) (applying the broadcast character standards in a common carrier case). Furthermore, section 312 of the Communications Act provides that the Commission may revoke a station license or construction permit for violation of 18 U.S.C. § 1343. We note that Kenneth Matzdorff pled guilty to violating 18 U.S.C. § 1343. *See* 47 U.S.C. § 312(a)(6); *United States v. Kenneth Matzdorff*, Case No. 05-00020-CR-W-SOW, Motion of the United States for an Order of Forfeiture, with Supporting Suggestions (W.D.Mo. May 8, 2006).

[23] *See supra* note 15 and accompanying text.

[24] *Cf. MoPSC Staff v. CassTel*, Case No. TC-2005-0357, Order Approving Stipulation and Agreement, at 5-6, 9 (MoPSC May 30, 2006) (ordering that no financial penalty imposed on CassTel by the MoPSC shall ever be recovered from ratepayers).

[25] We do not address in this Order how USAC and NECA shall treat the funds received from the restitution.

[26] *See NextiraOne Plea Agreement* at para. 17; *see generally NEC/BNS Plea Conditions.*

90 days after closing of this transfer of control, Operator or its successors and assigns shall adopt a Compliance Manual, and shall submit a copy of this manual to the Commission in this docket. Personnel of Operator or its successors and assigns shall have ready access to the Compliance Manual and shall follow the procedures contained in it. The Compliance Manual will, among other things, describe the universal service rules and requirements as they apply to Operator or its successors and assigns, and encourage personnel to contact the compliance officer, Legal Department, Chief Executive and/or Chief Financial Officer of Operator or its successors and assigns with any questions or concerns that arise with respect to Commission compliance by Operator or its successors and assigns.

8. Within 30 days from the effective date of this Order, the Applicants may file a written request rejecting this grant as made, as provided by section 1.110 of the Commission's rules.[27]

9. Upon receipt by the Commission of certifications by both the MoPSC and the Kansas Corporation Commission that FairPoint Missouri will use the high-cost universal service support in accordance with section 254(e) of the Communications Act, the Bureau intends to direct USAC to provide high-cost universal service support prospectively, consistent with such certifications.

10. *Effective Date*. This Order shall be effective upon the later of the release date of this Order or receipt by USAC and NECA of the payment of $5,219,156 as discussed *supra* in paragraph 7.a.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that, pursuant to the authority granted by sections 1, 4(i), 4(j), 5, 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155, 214, and 254, and pursuant to the authority delegated in sections 0.91, 0.291, and 63.03 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 63.03, the CassTel and CassTel LD, and FairPoint Missouri and FairPoint LD, Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, as Amended, for Transfer of Control of Blanket Domestic Section 214 Authority and Certain Telecommunications Assets IS GRANTED subject to the conditions set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Julie A. Veach

Julie A. Veach
Deputy Chief
Wireline Competition Bureau

[27] 47 C.F.R. § 1.110.