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REVIEW OF RECENT EVENTS IN THE TELECOMMUNICATIONS ARENA

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FCC Reiterates its Opposition to Rural ILEC's Access Charge Billing for Calls Placed to a Conference Bridge

In its new "Third Order on Reconsideration" in the long-running *Qwest Communications Corp. v. Farmers and Merchants Mutual Tel. Co.*, the FCC reiterated is November 2009 decision that Farmers violated sections 201(b) and 203(c) of the Communications Act by billing terminating access charges for calls placed by Qwest long distance customers to conference calling companies served by Farmers. *See Qwest Communications Corp. v. Farmers and Merchants Mutual Tel. Co.*, File No. EB-07-MD-001, FCC 10-43 (rel. March 17, 2010).

Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-43A1.pdf The FCC also refused to stay its decision pending further appeal. In its November 2009 decision, the FCC held that Farmers' switched access tariff did not apply to traffic destined for the conference calling providers. In that decision, the FCC found that "Farmers and the conference calling companies did not structure their relationship in a manner consistent with Farmers' [local access] tariff" and thus, these companies could not be considered "end users" within the meaning of Farmers' switched access tariff.

[more]

Farmers sought reconsideration of the FCC's November 2009 decision on several grounds, each of which the FCC rejected: (1) the FCC's action was outside of the 90-day period for reconsideration specified in section 405(b) of the Communications Act, (2) the FCC failed to explain its departure from the prior ruling in its 2007 *Farmers and Merchants* decision that the existence of payments from the conference calling company to Farmers was not dispositive of the question as to whether the conference calling companies were "end users" under Farmers' switched access tariff, and (3) the FCC's 2007 decision that Farmers was "over-earning" under its switched access tariff as a result of revenue from traffic destined for conference calling providers was inconsistent with its 2009 decision that such traffic was not subject to the switched access tariff.

The FCC rejected the first argument, pointing out that its original order granting reconsideration and establishing further proceedings was within the 90-day period specified by section 405(b). Regarding the second argument, the FCC pointed out that evidence previously withheld by Farmers and not available to the FCC in 2007 showed that, contrary to Farmers' Answer, the conference calling companies did *not* purchase End User Access Service from Farmers nor did they pay the federal subscriber line charge. Thus, the factual premise of the FCC's 2007 decision was incorrect, and the FCC's 2009 decision was the result of new evidence, not a reversal of position. Finally, the FCC held that it could have found a violation of section 201 (b) of the Communications Act *either* on the basis of its 2007 over-earning determination or its 2009 finding that the switched access tariff under which Qwest had been billed did not apply to calls destined for conference calling companies.

The FCC indicated that it had no reason to respond to arguments previously made by Farmers and discussed in the 2009 decision: that the FCC had violated the filed rate doctrine, that it had not correctly interpreted Farmers switched access tariff and that there was no basis for the FCC's conclusions that Farmers had improperly withheld evidence.