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February 12, 2003

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Written Ex Parte*
UNE Triennial Review – CC Docket No. 01-338
Local Competition – CC Docket No. 96-98
Deployment of Advanced Wireline Services – CC Docket No. 98-147

Dear Ms. Dortch:

Attached for inclusion in the record of the above-referenced proceedings pursuant to 47 C.F.R. § 1.1206(b) is a letter to Chairman Michael K. Powell from Donna Sorgi, Vice President of Federal Advocacy for WorldCom, Inc., expressing support for the NARUC proposal regarding the appropriate roles of the FCC and state commissions in conducting the impairment analysis required by 47 U.S.C. 251(d)(2).

Sincerely,

/s/ Ruth Milkman
Ruth Milkman

Attachment

cc:	Commissioner Abernathy	Commissioner Copps
	Commissioner Adelstein	Commissioner Martin
	Matthew Brill	Michelle Carey
	Jeffrey Carlisle	Jordan Goldstein
	Daniel Gonzalez	Linda Kinney
	Christopher Libertelli	William F. Maher
	Thomas Navin	Brent Olson
	John Rogovin	Lisa Zaina



Donna Sorgi
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February 12, 2003

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington DC 20554

Re: NARUC Proposal Regarding Roles of State Commissions
and FCC in Conducting Impairment Analysis

Dear Chairman Powell:

On February 6, 2003, the National Association of Regulatory Utility Commissioners (NARUC) proposed a compromise solution to the debate in this proceeding regarding the appropriate roles of the Federal Communications Commission and the state commissions in conducting the impairment analysis required by Section 251(d)(2) of the Communications Act of 1934, as amended.¹ Although the NARUC proposal differs in certain respects from WorldCom's position in this proceeding, NARUC's approach represents a reasonable compromise. In particular, the NARUC proposal would enable state commissions to conduct the "granular" analysis required by the *USTA* court² in assessing whether competitive local exchange carriers (LECs) would be impaired without access to unbundled local switching and other unbundled network elements, in accordance with a framework of national standards and principles established by the FCC.

During the past seven years, the state commissions have labored tirelessly to promote local competition and foster new investment in their states through their work in arbitrations, section 271 proceedings, and other pro-competitive initiatives. The NARUC February 6 proposal would allow the FCC to take advantage of, and build on, this wealth of knowledge and expertise within a national regime for local telephone competition, consistent with the federal-state partnership envisioned by Congress in the Telecommunications Act of 1996.

¹ Letter from NARUC President and Michigan Commissioner David Svanda, *et al.*, to Chairman Powell, FCC (Feb. 6, 2003) ("*NARUC Letter*"). (All *ex parte* submissions referenced herein were filed in CC Docket No. 01-338.)

² *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA*").

The NARUC proposal, moreover, is clearly consistent with the holding of the *USTA* decision.³ Deferring the impairment analysis to the states for those elements as to which the Commission is unable to make a national impairment finding is directly responsive to the *USTA* court's repeated and emphatic affirmation of the need for a granular analysis.

In striking down the Commission's use of a national list of UNEs, the *USTA* court criticized the FCC for adopting "a uniform national rule, mandating the element's unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market."⁴ The court made clear that any impairment analysis must consider whether there are granular facts that might indicate the presence or lack of impairment in a particular area, and directed the Commission to adopt "a more nuanced concept of impairment" that would reflect "specific markets or market categories."⁵ The NARUC proposal is consistent with the *USTA* court's admonition, because it would enable a state commission to evaluate, through a fact-based evidentiary proceeding, the wide range of factors relevant to an impairment determination, and to take into account the substantial variations in incumbent LEC costs, processes, network architectures, and other factors across geographic areas.

In its proposal, NARUC has established presumptions for unbundled switching by grouping central offices in zones, rather than LATAs, as suggested by Qwest.⁶ SBC and Qwest have objected to the use of zones for this purpose, on the grounds that zones vary in different states.⁷ In addition, SBC and Qwest mischaracterize NARUC's proposal as one that "would hinge switching decisions solely on zone status without consideration of any other relevant factors."⁸ In WorldCom's view, the use of zones for establishing presumptions for local switching, while not perfect, represents a reasonable approach to the impairment analysis and is superior to the use of LATAs, which typically cover larger geographic areas. Moreover, it bears emphasis that the NARUC proposal only uses zones to establish presumptions, which can be rebutted by a showing in course of the state's detailed impairment analysis. Under the NARUC approach, the state commission, as part of that analysis, will determine the relevant geographic area and make its ultimate

³ "UNE Triennial Review: Principles and Standards for State Commissions," attached to *NARUC Letter*, at 3 ("*NARUC Principles*").

⁴ *USTA*, 290 F.3d at 422.

⁵ *USTA*, 290 F.3d at 426.

⁶ *NARUC Principles* at 1; Letter from R. Steven Davis, Qwest, to Chairman Powell, FCC, attached to Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, FCC (Jan. 30, 2003) ("*Qwest UNE-P Letter*").

⁷ Letter from Gary L. Phillips, SBC, and R. Steven Davis, Qwest, to Chairman Powell, FCC, at 9 (Feb. 12, 2003) ("*SBC/Qwest Letter*").

⁸ *Id.*

determination regarding retention or elimination of the element.⁹ The presumptions proposed by NARUC are rational, and far more likely to be upheld than the alternative proposed by Qwest, which is a finding of non-impairment nationwide¹⁰ notwithstanding a comprehensive record establishing that, given incumbent LEC conditions and charges today, competitive LECs cannot possibly compete for mass market customers using UNE-L.

The NARUC proposal focuses on nationwide guidelines for state commissions conducting the impairment analysis, and does not include a proposal with respect to the rights of carriers if a state commission does not act within a reasonable period of time. The FCC, of course, is free to fill in this gap by establishing a process for notification of a state commission's failure to act, similar to Section 51.803 of the Commission's rules.¹¹

State commission inaction, moreover, appears unlikely. State commissions have an enormous stake in the outcome of the competition policies at issue in the FCC's *UNE Triennial Review* proceeding. The state commissions have done the heavy lifting required to implement the 1996 Act, and they are just beginning to see the fruits of their labors, particularly with respect to competition for residential and small business customers. State commissions have strong incentives both to encourage competition (as a means of providing citizens of their states with a choice of service providers) as well as to foster new investment (as a means of promoting economic growth in their states). Consequently, state commissions have an extremely strong interest in creating the conditions for transition from UNE-P to UNE-L services wherever possible, and managing that transition in a way that promotes investment as well as continued choice for consumers.

The NARUC February 6 proposal represents a sound and moderate approach to a thorny legal and policy issue. The proposal is consistent with both the statute as well as the *USTA* decision. It also maintains roles for the FCC and the state commissions that are consistent with the framework that Congress established in the Act. Because of its many strengths, we believe that the NARUC proposal offers a great opportunity for producing the outcome that Congress, the FCC and the state commissions all desire: robust competition and increased investment.

Sincerely yours,

/s/ Donna Sorgi
Donna Sorgi

⁹ *NARUC Principles* at 1.

¹⁰ *Qwest UNE-P Letter* at 1.

¹¹ 47 C.F.R. § 51.803.