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April 22, 1998

RECEIVED

VIA HAND-DELIVERY

APR 22 1998

Mr. William Caton  
Deputy Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: *In the Matter of Petition of LCI Telecom Corp. for Declaratory Rulings, CC*  
Docket No. 98-5

Dear Mr. Caton:

Enclosed is an original and sixteen (16) copies of the Reply Comments of Level 3 Communications, LLC. in the above-captioned matter. Also enclosed is a copy to date-stamp and return in the self-addressed, stamped envelope.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads 'Terrence J. Ferguson'.

Terrence J. Ferguson  
Senior Vice President and General Counsel

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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Petition of LCI Telecom Corp. )  
for Declaratory Rulings )

CC Docket No. 98-5

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of LCI Telecom Corp.	)	CC Docket No. 98-5
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**REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.**

LCI has identified the inherent conflict of interest that incumbent local telecommunication carriers have and will continue to face: they control essential facilities to which their competitors need access. Because ILECs will not offer access to these facilities on terms that encourage technical development and efficient investment in telecommunications networks, local competition suffers. In particular, incumbents rule the "local loop," the only means of access to most customer premises. Relying on incumbents to provide competitors with full, fair, non-discriminatory, and economically reasonable access to loops becomes especially pivotal as technology develops to utilize these copper wires for ISDN and xDSL. But if the ILECs maintain their current control of bottleneck networks, the prospect of competitive high-speed access for tens of millions of consumers remains in doubt.

Level 3 renews its support for the process that LCI's petition has sparked. LCI seeks to implement a system by which incumbents and CLECs compete on equal terms, each dealing with a wholesale operator of certain network facilities on an arms-length basis. Level 3 also asks the Commission to consider proposals that ensure greater separation and thus go beyond the LCI plan, but are more narrowly tailored in that they primarily address control of local loops. To this end, Level 3 and others have advocated divestiture of an independent loop company, as well as other alternatives such as an independent system operator ("ISO") that would manage local loop facilities but not own them.

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## INTRODUCTION

Rather than welcoming constructive dialogue about an effective means to open local markets to competition, the RBOCs have once again raised their guards. The other commenters arrived at the table in this proceeding with a range of ideas about separating RBOC retail and wholesale functions. CLECs have used LCI's initiative to suggest solutions to achieve parity in accessing local portions of the public switched network. In particular, Level 3 and others advocated divestiture of an independent loop company, "LoopCo," as well as other alternatives such as an ISO that would manage local loop facilities but not own them. Impartial government bodies and consumer advocates urged the Commission to gather additional information, or add certain safeguards to the proposal. Others shared their specific thoughts on molding the LCI plan. The RBOCs, by contrast, having determined that the FCC does not have authority to entertain these ideas, would not even acknowledge that LCI has identified a legitimate concern vis-à-vis control of bottleneck facilities, much less offer a competing

proposal. Instead, the RBOCs took this opportunity to continue their public relations campaign against long distance companies. RBOCs further complained that the separation plan would deny them operating efficiencies and upset consumers. In any case, the RBOCs declared, competition has already arrived.

The RBOCs' hardened position should come as no surprise. It is dictated by the economics associated with continued RBOC control of facilities on which their competitors rely. In terms of day-to-day operations, after all, every successful hot cut means that the RBOC has lost a paying customer. As Level 3 discussed in its Comments, although incumbents have faced some competition for transport, switching, and signaling, they know that no entity can profitably reproduce the local loop. Thus, they are in a position to exploit their captive customers — and discriminate against competitors seeking to serve those same customers — by maintaining their stranglehold over this element of the local network. This is particularly significant because, as the Commission is well aware, the local loop has the potential to carry high-bandwidth, packet-switched services. CLECs have already sought to use loops for this purpose. However, without structural separation — at least of local network infrastructure, as advocated by Level 3 — RBOCs still have incentives to limit competitive access to loops; restrict the use of these loops for new services (such as IP transport) that threaten the RBOCs' retail services; raise the price of these loops above economic levels; and use loop revenues to cross-subsidize the more competitive elements of their businesses.

Real competition in the local telecommunications marketplace is not a matter of RBOC opinion, in terms of Section 271 or anything else. In a competitive arena, consumers choose whose services they want from among many. But consumers cannot do so until they have a choice of viable alternatives. Assuming a typical monopolist stance, the RBOCs believe they are in a superior position to determine what consumers want. (Indeed, in arguing about protecting customers "who may not want to switch local carriers," the RBOCs are assuming that those customers have a choice.)

However, competitive service providers, who have been required to finance their own operations and win every customer with an earnest fight, are neither in a position to offer customers a choice *nor can they be* so long as the fox is guarding the hen house.

RBOCs take for granted the ease, luxury, and power to use network elements and space as they want, when they want, and at costs that they allocate — all the while hindering competitors. Indeed RBOCs' current incentives blind them to appropriate stewardship of equipment that is part of a public switched network and to which others have a right of access. Thus, it is disingenuous for RBOCs to suggest that their retail services would be unfairly disadvantaged if they could not offer "integrated" services over their own facilities. The fact that RBOCs suggest they are somehow entitled to exploit the public switched network differently from competitors underscores their inherent conflict of interest in controlling those facilities.

Separation of loops, of the type that Level 3 has advocated in this proceeding, will curtail the tremendous costs that RBOCs have imposed on consumers. As long as RBOCs are in a position to discriminate against competitors (and the longer they have an incentive to do so), consumers cannot enjoy a market that fully spurs competitive pricing and innovation. In particular, the majority of small and mid-sized businesses and residential customers will be denied direct, high-speed access to IP services that might otherwise be available over local loops. Costs of regulatory oversight in the foreseeable future will also be staggering. To check these costs, and ensure full, fair, non-discriminatory, and economically reasonable access to local loops for the future, Level 3 submits that separation of bottleneck facilities is critical.

Contrary to RBOC assertions, it is quite appropriate for the FCC to address the RBOCs' conflicts of interest, which are very real and continuing obstacles to local telecommunications competition. Indeed, the Commission should broaden the scope of this proceeding to include consideration of remedies such as Level 3's, which focus on local loops.

These Reply Comments respond to RBOC assertions regarding the state of local telecommunications competition, address the flaws of the RBOCs' defiance in attempting to leverage their current power, and reaffirm the appropriateness of restructuring ILECs to ensure competitive service offerings.

**I. Competition in Local Markets Cannot Flourish With Continued RBOC Control of Bottleneck Facilities**

Notwithstanding the RBOCs' glowing portrayal of robust competition in local markets, the vast majority of consumers have yet to realize the benefits of competition. This situation does not promise to change. Incumbents have fought tooth and nail to preserve the status quo, a system which, as LCI has correctly analyzed, maintains RBOC incentives to deny competitors full, fair, non-discriminatory and economically reasonable access to local networks.

The RBOCs cite facts and figures demonstrating, at best, modest CLEC advances for the notion that the entire country now enjoys full and free competition and, therefore, RBOCs can have no conflicts in providing service to CLECs.<sup>1</sup> Obviously, the reality is quite different. As many commenters have discussed in the "706" Petitions, the RBOCs have either refused to provision conditioned loops or have otherwise made it very difficult for CLECs to deploy high-bandwidth services, even as the RBOC itself has offered ISDN or xDSL service in the same market.<sup>2</sup> There are other obstacles to

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<sup>1</sup> Comments in this proceeding will be cited by the shortened name of the commenter. According to Ameritech, CLECs account for 2.6 percent of all local telephone revenues. *See Ameritech* at 4; *see also SBC* at 22, *Bell Atlantic* at 2.

<sup>2</sup> *See generally* comments filed *In the Matter of Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services* (CC Docket No. 98-11), *Petition of U S West Communications, Inc., for Relief from Barriers to Deployment of Advanced Telecommunications Services* (CC Docket No. 98-26), *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability* (CC Docket No. 98-32) (Comments filed April 6, 1998).

competition. Although SBC Communications praises its own OSS,<sup>3</sup> the ability of a CLEC to order or provision services seamlessly has yet to be demonstrated.<sup>4</sup> In addition, the issue of combining network elements and RBOCs' discriminatory pricing remains unresolved and continues to impede competition.<sup>5</sup> Indeed, Ameritech and U S West have taken this proceeding as an opportunity to argue this issue further.<sup>6</sup> Moreover, if Section 271 is any indicator (and Level 3 does not suggest that an RBOC's perverse incentives are cured by compliance with the competitive checklist), it is worth noting that no RBOC that has submitted a Section 271 application has been able to demonstrate to the Commission's satisfaction that local markets have been opened to competition and that competitors have non-discriminatory access to RBOC networks.

To the extent that local competition may be slow in reaching fruition, the RBOCs have offered some self-serving and unconvincing explanations. According to Bell Atlantic (and notwithstanding the considerable CLEC interest in this proceeding), only incumbent long distance companies complain about barriers to entry in the local market.<sup>7</sup> Ameritech states that OSS difficulties are the fault of IXCs.<sup>8</sup> BellSouth posits that local residential competition is developing slowly because of the pace of universal service reform and rate rebalancing.<sup>9</sup> This assertion may be gratuitous. Not only is it unlikely that the RBOCs' constant fight for *higher* wholesale rates generally will spark greater competition, to the extent that loop rates remain artificially low in rural areas and

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<sup>3</sup> SBC at 17.

<sup>4</sup> See, e.g., *Cable & Wireless* at 1.

<sup>5</sup> See, e.g., *Cable & Wireless* at 2, *Excel* at 2.

<sup>6</sup> *Ameritech* at 9–10, *U S West* at 8–11.

<sup>7</sup> See, e.g., *Bell Atlantic* at 4. SBC also added its commentary about IXCs. SBC at 9.

<sup>8</sup> *Ameritech* at 19.

<sup>9</sup> *BellSouth* at 10.

artificially high in urban areas, the RBOC can discourage entry in the more attractive urban markets while keeping rural services profitable. Moreover, as BellSouth well knows, the barriers to building ubiquitous infrastructure remain staggering even with the prospect of universal service subsidies. Finally, RBOCs assert that the snail's pace of local competition is a result of the inability for RBOCs to offer interLATA services and that this "relief" will somehow achieve competition because CLECs will be forced to offer a package of services.<sup>10</sup> Once RBOCs have interLATA authority, however, it is less than clear why they will not become even more obstinate in accommodating the needs of CLECs and their customers.

Current RBOC structures, which give incumbent carriers the incentive to discriminate against CLECs, will continue to impede local competition. As Level 3 discussed in its initial comments, and as the RBOCs recognize, the loop network cannot be provided on a competitive basis. Outside of high-density areas, investment is not feasible. This is particularly true when the copper loop is there to be exploited for sophisticated high-speed access. Thus, the ILEC grip on these loops is ever critical. As long as incumbents can limit access to loops conditioned for high-speed use, price them in a discriminatory way, and use their own revenue to cross-subsidize more competitive aspects of their businesses, the only rational strategy for such incumbents continue to attempt such behavior. The RBOCs could also refuse to provide any customer with conditioned loops capable of transmitting high bandwidths, to protect themselves both against competitive threats and allegations of discrimination.<sup>11</sup> As for Bell Atlantic's assurance that in other retail markets incumbents have acted as wholesalers and retailers without inhibiting competition, Bell Atlantic fails to mention that

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<sup>10</sup> SBC at ii.

<sup>11</sup> Level 3 illustrated in its initial comments why, under LCI's proposal, NetCo could do the same, and thus, why greater separation is appropriate.

such markets were either already competitive or designed from the start to be competitive.<sup>12</sup>

The lingering incentives to disrupt CLEC business plans are all the more disturbing considering the state-of-the-art network equipment in which CLECs have invested. Judging from their drive, as well as ability to get financing, CLEC efforts should directly translate into a greater competitive environment. However, CLEC investment — and viability — is substantially diminished if they cannot utilize their networks to their fullest potential. The Commission must assure that incumbents cannot keep these potential benefits from end-users because of their control of the “last mile.”

## **II. RBOCs Are Not Entitled To Special Benefits Arising From Control of Bottleneck Facilities or Captive Customers**

The RBOCs have revealed their true monopolist stripes with a mentality that knows only to leverage control of bottleneck facilities and exploit captive customers. Assertions that a separation plan would “rob” incumbents of current customer relationships and the ability to integrate services suggests that “RBOCs know best” and that others should defer to monopolist assessments of what is right for consumers. This stance underscores the importance of this proceeding. Level 3’s plan would level the playing field among RBOCs and competitors so that customers would have a true choice of offerings and could vote with their pocketbooks on the services and providers that they want.

If you ask SBC, it will verify that ILECs are doing a fine job of anticipating the needs of residential customers and introducing new services, such as caller ID, call waiting deluxe, ADSL, and ISDN technology.<sup>13</sup> SBC has also alleged that LCI fails to

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<sup>12</sup> *Bell Atlantic* at 9–11.

<sup>13</sup> *SBC* at 7–8.

show how its proposal would improve the introduction of new residential services.<sup>14</sup> If RBOCs will not admit that competition has forced them to innovate and be more responsive to customer demands, they will at least concede the fundamentals: providers with equal access to essential facilities will compete to provide higher-quality and lower-priced services.

RBOC speculation about customer confusion and frustration,<sup>15</sup> even if legitimate, apparently discounts the fact that consumers have long voiced their preferences for a choice in local telecommunications services. Of course, the RBOCs do not address the major public benefits that the plans of Level 3 and others would provide, *i.e.*, with no ILEC incentive to limit competitive access or price in a discriminatory manner, a wide range of innovative new telecommunications services will rapidly advance for all customers. In any case, consumers have done just fine with the divestiture of AT&T and the opportunity to choose a new carrier. If anything, they have tended to stay with the incumbent, and in any restructuring, incumbents would have the clear advantage of name recognition.<sup>16</sup> Contrary to Bell Atlantic's assertions, consumers who want to continue doing business with a particular ILEC would still be able to patronize its retail services. In light of the articulated concerns, RBOCs can scarcely argue that "fresh look" and balloting, as raised by the Connecticut DPUC, are not appropriate mechanisms to jump-start competition.<sup>17</sup>

RBOC complaints that separation will deprive incumbents of the efficiency of integration take account neither the goal of the Telecommunications Act nor the theme

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<sup>14</sup> SBC at 8.

<sup>15</sup> Ameritech at 12, 13, Bell Atlantic at 6, BellSouth at 11, U S West at 4–5.

<sup>16</sup> Even under LCI's plan, the RBOC could use its name for ServeCo. The concern of SBC and others that customers would somehow be confused in a selection process is unclear, and, in any case, the RBOCs could cure such confusion. See *Id.*

<sup>17</sup> Connecticut DPUC at 9; but see SBC at 31 (balloting is inappropriate).

of LCI's proposals in this proceeding.<sup>18</sup> Overhaul of the telecommunications industry was founded on the notion that all providers would have free and full access to network elements at nondiscriminatory prices. To suggest that an RBOC must be in control of facilities to realize efficiencies implies that those who are not in control cannot realize such efficiencies. This leads back to the inevitable RBOC attempts to discriminate against competitors. Furthermore, SBC's argument that *customers would be denied the price benefits of economies of scope* is offered without basis.<sup>19</sup> The notion that customers may be better off if one — but not all — companies can integrate is, of course, ludicrous. The solution suggested by Level 3 and others is that an ISO or a divested "LoopCo" would control the facilities.<sup>20</sup> In this way, the incumbent, like any other carrier, would have the option of using the facilities controlled by the new entity. Contrary to the assertions of Ameritech and Bell Atlantic, RBOCs would be free to build new facilities and thus take advantage of efficiencies of integration to which competitors can supposedly already avail themselves (though in terms of local loops, this is difficult to see).<sup>21</sup>

Because ILECs would continue to retain ownership of the loop network under the ISO option, there would be no issue of "uncompensated taking," as raised by Bell Atlantic.<sup>22</sup> In the case of a divested LoopCo, the RBOC could readily be compensated by offering the stock of LoopCo for sale on the open market, or by spinning it off to its stockholders.

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<sup>18</sup> See *Ameritech* at 14–15; *Bell Atlantic* at 6; *BellSouth* at 7–9; *SBC* at 10.

<sup>19</sup> See *SBC* at 9–10, *Bell Atlantic* at 6.

<sup>20</sup> See *MCI* at 17–19, *RCN and Cleartel* at 13, *KMC* at 12, *Fibernet* at 5–6.

<sup>21</sup> *Bell Atlantic* at 6; see also *Ameritech* at 15.

<sup>22</sup> *Bell Atlantic* at 7. As Level 3 discussed in its Comments, this would be so as long as the ISO continued to charge regulated rates for use of the loop and paid the net proceeds of these rates (less its operating expenses) to the owner of the facilities.

### **III. The Commission Should Consider Measures Beyond LCI's Proposal Which Are Tailored To Separate RBOCs from True Bottleneck Facilities**

As Level 3, MCI, various other CLECs, and state consumer advocates have noted, LCI's plan, while on target, does not adequately achieve the separation required for truly even-handed treatment of entities utilizing the public switched network.<sup>23</sup> Under the LCI plan, NetCo would still have an interest in cross-subsidizing its switching, transport, and other competitive service elements with revenues from loops and, as discussed above, NetCo would still have an interest in preventing or limiting the use of any conditioned loops suitable for high-speed access and in maintaining geographically averaged unbundled loop rates.<sup>24</sup> In light of these possibilities, and after a narrowly tailored analysis of which network elements cannot feasibly be provided on a competitive basis, Level 3 suggests that the loop is the source of both the ILECs' monopoly power and their conflict of interest.

Level 3's two suggestions are straightforward and are described fully in its Comments. In short, the ISO concept would maintain RBOC ownership of facilities, but the ILEC and others would have to lease loops from the ISO for use in providing service to its customers, at the same price and in precisely the same manner for all carriers.<sup>25</sup> Alternatively, a full or partially divested "LoopCo" would, subject to regulatory oversight and a minimum number of outside public directors, provide equal access to the central office or other interconnection points, connection to loops, and perhaps collocation of switched or other equipment in the buildings.

The fact that Level 3's proposals address only access to loops, and perhaps provisions for connection and collocation, should quell RBOC concerns both about

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<sup>23</sup> See *AT&T* at 7–11, *MCI* at 16, *Competition Policy Institute* at 7, *RCN and Cleartel* at 12, *KMC* at 11, *Fibernet* at 5.

<sup>24</sup> See *supra*, page 6.

<sup>25</sup> See also *MCI* at 18.

lessened incentives for building new infrastructure and the possibility that providers would not utilize the services of LCI's proposed NetCo.<sup>26</sup> The loops will not likely be replicated in any case, and all providers can continue to use their switching and transport facilities and build anew. As for whether an entity that controls loops could operate profitably,<sup>27</sup> if RBOC estimates about the evolution of broadband services have any merit, customer demand for loops could double or triple.

The RBOCs assert that it would be illegal for the Commission to take any steps to try to remove the roadblocks to competition.<sup>28</sup> On the contrary, the Commission is not restricted to only one course of action dictated by the interpretation of the RBOCs. One need only point to the numerous occasions, as LCI did in its petition, on which the Commission imposed corporate restructuring on the telephone industry.<sup>29</sup> As stated by other commenters, the Commission is given broad authority by the Communications Act to implement its statutory mandates through compulsory restructuring.<sup>30</sup> The Supreme Court decided long ago that the nature of the telecommunications industry demands of the Commission a flexible administrative process in order to protect the public interest,<sup>31</sup> which in this case, according to the 1996 Act, is in developing true competition in telecommunications. As other CLECs have pointed out, the Commission has asserted that it has the authority on its own to impose additional obligations on telecommunications service providers — including divestiture — in order to enforce

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<sup>26</sup> See, e.g., *BellSouth* at 11, *SBC* at 27–28.

<sup>27</sup> See *Bell Atlantic* at 7, *Ameritech* at 14–15.

<sup>28</sup> See generally *Ameritech* at 7–10, *Bell Atlantic* at 5–6, *BellSouth* at 1–4, *SBC* at 23–26, *U S West* at 7–15.

<sup>29</sup> *LCI Petition* at 37–39.

<sup>30</sup> See, e.g., *RCN and Cleartel* at 14–17.

<sup>31</sup> See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *NBC v. U.S.*, 319 U.S. 190, 225 (1943).

provisions of the Communications Act, e.g., Section 214.<sup>32</sup> The Fifth Circuit explicitly recognized that regulatory authority may trump property interests when considering the public interest.<sup>33</sup> Thus, the Commission is given flexible authority to take action in the public interest and when considering the best route to achieving the public benefit of creating a competitive telecommunications market, the Commission should not be distracted by RBOCs' claims that the mere consideration of proposals such as LCI's is illegal.

Should the Commission determine that it does not have authority to restructure ILECs, the Commission should consider alternative incentives. As Level 3 suggested, in addition to interLATA relief, ILECs could be encouraged to participate in a separation plan with offers of price cap relief, pricing flexibility, forbearance, etc. On the other hand (and as already predicted by some RBOC commenters), the Commission could consider tightening regulatory restrictions for carriers that refuse to participate.

\* \* \*

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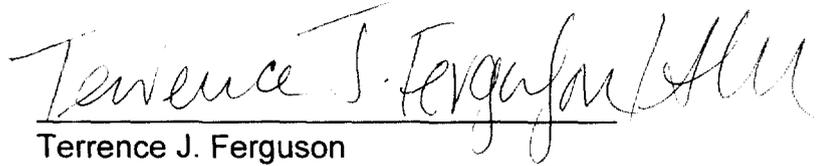
<sup>32</sup> See Section 214 of the Communications Act as amended; *AT&T Divestiture*, 96 FCC 2d 18, 44 (1983)

<sup>33</sup> *General Telephone Co. v. United States*, 449 F.2d 846, 863 (5th Cir. 1971).

## CONCLUSION

Level 3 urges the Commission to take whatever measures it can to ensure that all telecommunications providers have reasonable-priced, technically-efficient and non-discriminatory access to the bottleneck loop network. This proceeding should be expanded to invite further discussion on appropriate methods to pursue this course.

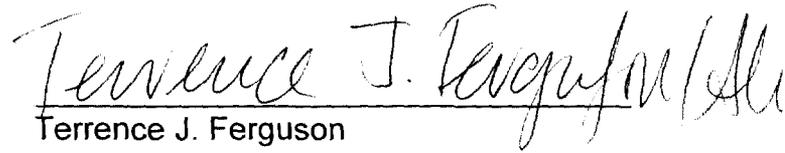
Respectfully submitted,

A handwritten signature in black ink that reads "Terrence J. Ferguson". The signature is written in a cursive style and is positioned above a horizontal line.

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**CERTIFICATE OF SERVICE**

I, Terrence J. Ferguson hereby certify that on this 22nd day of April, 1998, copies of the foregoing Reply Comments of Level 3 Communications were sent via courier (\*) or U.S. mail to the attached service list:

  
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