REDACTED FOR PUBLIC INSPECTION

September 7, 2005

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

Re: WC Docket No. 05-65 (SBC/AT&T Merger Application)

Dear Ms. Dortch:

This letter will briefly reply to the latest filing from Broadwing/SAVVIS (dated August 12, 2005) regarding Internet Backbone ("IB") issues. These commenters, and their expert Dr. Wilkie, continue to rely on unsupported accusations and assertions. To the extent they purport to introduce new evidence, they omit crucial elements, which – as we will show – rather than supporting their allegations, further buttress the compelling evidence the Applicants have already provided that the proposed merger of SBC and AT&T will not threaten the vigorously competitive IB business.

At bottom, the Broadwing/SAVVIS Letter ("B/S Letter") reveals that their real purpose is to use this proceeding to achieve commercial objectives. SAVVIS seeks to be subsidized by SBC/AT&T post-merger with guaranteed settlement-free peering rather than having to comply with a market-based peering policy – developed in a fiercely competitive environment – that SAVVIS itself employs and, in any event, long pre-dates the proposed transaction. That obviously is an inappropriate use of the Commission's process for private gain and should be summarily rejected.

The B/S Letter boils down to their argument (at 2) that SBC/AT&T will be able credibly to threaten other backbones with "targeted de-peering" for "two reasons." They first contend that SBC/AT&T's share of IB traffic will grow disproportionately because of the conversion of analog voice traffic to IP-based traffic. Their second assertion is that SBC/AT&T will have a disproportionate share of residential broadband customers who are "sticky" and thus less sensitive to service quality issues.

1. The first assertion, based on conversion of voice traffic, is simply wrong. Voice traffic is not bandwidth intensive, so even if *all* of SBC's and AT&T's current voice traffic were converted to IP traffic overnight, which is of course physically impossible and a commercially unreasonable assumption to make, the share

increase would be very small (about 3-4 percentage points). But even that overstates any competitive issue, as it does not account for the reality that (i) SBC (and Verizon) continue to lose voice traffic to cable, wireless, and other providers, so their share of traffic to be converted is decreasing, and (ii) conversion of voice traffic from other ILECs like Qwest and Bell South, as well as wireless providers like Sprint/Nextel and T-Mobile and cable companies, will increase the total IB traffic so as to dwarf any increase in SBC/AT&T's IP voice traffic. It is simply not credible to assert that SBC/AT&T (or Verizon/MCI for that matter) will see their backbone traffic grow "explosively" or see their relative share rise so much that they will be "insulated" from competitive forces. (B/S Letter at 2-3.)[1]

2. Nor is there any merit to the contention that SBC/AT&T will serve a "disproportionate share" of "sticky" residential customers. SBC/AT&T (even if considered together with Verizon/MCI, which it should not be) will not serve anywhere close to a majority of residential broadband users. The undisputed evidence is that over two thirds are controlled by other large ISPs which can and do switch backbone providers. *See* Schwartz Reply Declaration at Table 4.[2]

The B/S Letter (at 10) then seeks to bootstrap this flawed "sticky customer" assertion into an equally flawed argument that targeted de-peering would be profitable. But, Broadwing and SAVVIS ignore a key point – SBC/AT&T will not control anything approaching a majority of "eyeballs." There are today, and will remain post-merger, leading IBPs (like Sprint, Level 3, Qwest and Global Crossing) to which the large broadband ISPs (which control the significant majority of eyeballs, and which are not parties to these mergers) would turn in the event of attempted anti-competitive conduct by the merging firms. Thus, any attempt by

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1 Contrary to the complaint in the B/S Letter (at 4 & n.10), the IB traffic data used by Professor Schwartz is from 2004, the most current available. *See* Schwartz Reply Declaration at ¶¶ 9-10.

2 Broadwing and SAVVIS seek to avoid the obvious significance of this evidence only by citing the self-serving statement by Cox that it faces high switching costs. They continue to ignore the evidence from other cable providers like Comcast which, in fact, are building their own backbones. *See* Schwartz Reply Declaration at ¶ 20 & n.17.

SBC/AT&T to de-peer a selected rival such as SAVVIS for anti-competitive reasons – even if it caused relatively more harm to the target – would still cause SBC/AT&T to lose customers to the remaining backbones that maintain connectivity with all backbones (the merged firms, as well as the target), and thus offer superior quality.[3] *See* Schwartz Reply Declaration at ¶ 31.

The most telling point in the B/S Letter is its failure to address the dispositive evidence provided by the Applicants previously that such targeted de-peering is *not* profitable because it is *not* happening today. AT&T now peers with IBPs *one tenth* its size. *Id.* at ¶ 32. And SBC/AT&T together will have far less than the 37% share held by MCI WorldCom, Complaint at ¶ 32, *United States* v. *WorldCom, Inc.*, No. 1:00-cv-01526-RMU (D.D.C. filed June 27, 2000), yet that IBP still accepted 11 peers.[4] The B/S Letter (at 10) can only flail at these undisputed facts with assertions that there are "many reasons" for peering with a "few select small networks" (none of which it mentions) and that these must be "outlier examples." But ignoring the record evidence in favor of what an objecting party asserts is "commonsense" [sic] is something the Commission cannot legally do.

3. Finally, revealing that their true purpose here is to advance their own private interest rather than the public interest, both the B/S Letter and Dr. Wilkie's

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[3] Dr. Wilkie overlooks this key fact when he argues (at ¶ 17) that the remaining non-targeted backbones will be reluctant to take on content-heavy customers for fear that this would upset their in/out ratios with the merging firms and thus put them at risk of being de-peered. The plain fact is that such other backbones would have access to the majority of eyeball customers and the merging firms thus could not afford to de-peer them.

[4] The 11 peers figure is derived as follows: in its decision in the MCI WorldCom/Sprint merger, the European Commission identified 17 "top-level" networks; subtract from that figure the four networks added by the European Commission that did not peer with both MCI WorldCom and Sprint; and subtract the two merging parties. *See* Commission Decision No. 2003/790/EC of 28 June 2000, Declaring a Concentration Incompatible with the Common Mkt. & the EEA Agreement (Case COMP/M.1741 – MCI WorldCom/Sprint), 2003 O.J. (L300) 1, at ¶ 105.

statement conclude by asking the Commission to condition merger approval on elimination of traffic in/out ratios as a peering criterion. They make elaborate assertions about how the Internet *should* work, citing theoretical economic literature but no hard evidence. Not only is such regulatory re-engineering well beyond the bounds of this proceeding, but their assertions lack any credibility in the face of the undisputed evidence that, in today's highly competitive environment, numerous IBPs – *including both Broadwing and SAVVIS*[5] – have in/out ratios as part of their peering policies, Schwartz Reply Declaration at ¶ 34, and AT&T has utilized one for years, *see generally* Martens Reply Declaration at ¶ 7.

Recognizing that its peers' traffic patterns may change from month to month, AT&T has not in the past generally enforced the 2 to 1 traffic ratio requirement against carriers that only temporarily or sporadically fall out of balance. **[Begin Highly Confidential]**

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[5] SAVVIS's peering policy is 2:1, http://www3.savvis.net/peering/peering_usa.doc (last visited Sept. 6, 2005), and Broadwing's is 2.5:1, http://www.broadwing.com/peering/InterconnectPolicy_2004_.doc (last visited Sept. 6, 2005). Qwest's peering policy is a more restrictive 1.5:1. http://www.qwest.com/legal/peering_na.html (last visited Sept. 6, 2005). *See also* Opposition of Broadwing Communications, LLC and SAVVIS Communications Corp. at 40 (acknowledging an in/out ratio as one element of each company's peering policy) ("Broadwing/SAVVIS Opposition"). SBC does not utilize a traffic ratio because its traffic volumes are relatively small and balanced, so it has seen no need to do so.

[6] **[Begin Highly Confidential]**

(continued...)

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[7] **[Begin Highly Confidential]**

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[8] **[Begin Highly Confidential]**

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Thus, contrary to the claims of SAVVIS and Broadwing, the in/out ratio criterion plainly is not some "pretext" for anticompetitive behavior by the merged parties. It existed long before this transaction was contemplated and is used by IBPs that have neither ILEC affiliation nor asserted "market power." In/out ratio criteria are common precisely because "there are cost-based reasons for requiring a peering partner not to send much more traffic than it receives." Schwartz Reply Declaration at ¶ 34.[9] The Commission should reject this inappropriate invitation to interfere in a competitive marketplace by forcing one (or two) IB providers to change peering policies while others are free to continue theirs.

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In sum, the Broadwing/SAVVIS Letter contains no evidence or other basis for any competitive concerns regarding Internet Backbone. The record in this proceeding conclusively establishes that the proposed combination of SBC and AT&T will not adversely affect this vigorously competitive business.

Sincerely,

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[9] While Dr. Wilkie criticizes Professor Schwartz for assuming that the network sending traffic uses "Hot Potato Routing" (at ¶¶ 6-10), only a few months ago, Broadwing and SAVVIS listed hot potato routing as one of "three basic provisions" "typically" contained in peering agreements. Broadwing/SAVVIS Opposition at 39. In any event, to the extent that marginal cost-based pricing may not be a first-best outcome because of positive network externalities, and not market power, a merger proceeding is not the proper forum for considering policies designed to address any network externality issues.