HARRIS, WILTSHIRE & GRANNIS LLP

1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

October 21, 2005

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street SW
Washington DC 20554

Re: WC Docket No. 05-65 (SBC-AT&T merger application)
WC Docket No. 05-75 (Verizon-MCI merger application)

Dear Ms. Dortch:

Broadwing Communications, LLC ("Broadwing"), SAVVIS, Inc. (f/k/a "SAVVIS Communications Corp.") ("SAVVIS"), and other parties have explained why these proposed mergers would harm the special access and Internet backbone markets.[1] Broadwing and SAVVIS recently joined with a group of companies urging the Commission to limit the harm these mergers would cause to the special access market by, at a minimum, (1) requiring SBC and Verizon to reduce their special access base rates by 50 percent, which will lead to rates that approximate the levels charged by AT&T and MCI today; (2) allowing parties with existing contracts with any of the applicants to extend those contracts at least for a five-year period; (3) prohibiting SBC and Verizon from restricting customers' ability to use competitors' services; and (4) adopting safeguards against discrimination and collusion.[2]

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[1] *See* Opposition of Broadwing Commmunications, LLC, and SAVVIS Communications Corporation to the Merger Application Filed by SBC Communications, Inc., and AT&T Corp., WC Docket 05-65 (April 25, 2005), at 21-35, 42-47 ("Broadwing-SAVVIS SBC-AT&T Comments"); Opposition of Broadwing Commmunications, LLC, and SAVVIS Communications Corporation to the Merger Application Filed by Verizon Communications, Inc. and MCI, Inc., WC Docket 05-75 (May 9, 2005), at 20-37, 44-50 ("Broadwing/SAVVIS Verizon-MCI Comments"); Ex Parte Letter to M. Dortch from Broadwing Communications LLC and SAVVIS, Inc., WC Docket Nos. 05-65 & 05-75 (Aug. 12, 2005) ("Broadwing-SAVVIS Internet Ex Parte"); Ex Parte Letter to M. Dortch from Broadwing Communications LLC, WC Docket Nos. 05-65 & 05-75 (Sept. 14, 2005); Ex Parte Letter to M. Dortch from SAVVIS Communications LLC, WC Docket Nos. 05-65 & 05-75 (Oct. 4, 2005).

[2] Ex Parte Letter to M. Dortch from C. Boothby *et al*., WC Dockets 05-65 & 05-75 (Oct. 14, 2005) ("Joint Special Access Remedies Letter").

In this submission, Broadwing and SAVVIS elaborate on those proposals from their perspective. To prohibit discrimination in the provision of special access, the Commission should require the Bell Operating Company ("BOC") to maintain the interexchange carrier ("IXC") it is acquiring as a separate entity and provide special access to other companies on the same terms and prices that it provides special access to its affiliated IXC until the Commission completes the pending special access rulemaking. To prevent backsliding, the Commission should order the Applicants to honor the terms and conditions of existing special access contracts for both existing and new circuits for at least five years and require them to be made available to other companies.

With respect to the Internet backbone, there is a danger that the mergers will result in the creation of two "mega peers" that will destroy the current competitive market. To prevent that result, the Commission should require the Applicants to publish their peering policies, apply them in a non-discriminatory manner, and provide the industry with visibility into the Applicants' peering arrangements so as to deter anti-competitive and discriminatory behavior. In addition, the merging parties should be prohibited from reducing the number of backbone providers they currently peer with and from terminating peering agreements based on traffic ratios.

SPECIAL ACCESS HARMS

The mergers will cause two different sorts of harm to the special access market. As an initial matter, the mergers will result in a loss of competition in that already highly concentrated market because AT&T and MCI are by far the largest alternative sources of special access circuits and they offer circuits on a national basis.[3] The mere presence of AT&T and MCI as suppliers has a disciplining effect on SBC and Verizon – both for price and performance. If the mergers are approved as proposed without any conditions, the market will lose two major competitors, and the disciplining impact that they have on the market will disappear.[4]

In addition to eliminating significant competitors, the mergers will give SBC and Verizon a motive to discriminate against companies that serve business customers. For

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[3] Assertions by the Applicants that AT&T and MCI only have a small percentage of buildings on-net in the SBC and Verizon territories, respectively, are red herrings. The argument that a competitor is not significant because it has built its own connections into a relatively small percentage of buildings is a misleading argument. Instead of focusing on "lit" buildings and competitors present in wire centers, the analysis should instead focus on taking into account the reach of AT&T's and MCI's networks. These networks are extensive in the widest range of local areas throughout the United States. This ubiquitous reach makes AT&T and MCI uniquely positioned to provide special access services even where they buy one segment of the service (*i.e.*, a tail from end user premises to an AT&T or MCI PoP, so called "Type 2" circuits) from the incumbent local exchange carrier. Type 2 circuits provided by AT&T and MCI are significantly cheaper and are provisioned more quickly. There is no competitor even close to being in a position to replace AT&T and MCI once they are removed from the market.

[4] As a general matter, the volume and term commitments that AT&T and MCI are uniquely capable of making enable them to negotiate better prices and terms than other special access consumers, especially taking into account end-of-year rebates.

the first time, SBC and Verizon will be major players in the market to serve business customers. SBC and Verizon currently have little reason to provision special access circuits to companies like Broadwing and SAVVIS on worse terms than they provision circuits to AT&T and MCI. Moreover, when SBC or Verizon do try to discriminate in the current market, entities such as SAVVIS and Broadwing rely on the major competitors, AT&T and MCI, to counter any discriminatory behavior. In addition, although SBC and Verizon currently have reason to discriminate in favor of themselves, their relatively small share of the market to serve business customers makes that discrimination much less important than it will be after the mergers. Similarly, although SBC and Verizon currently obtain unreasonably high rates of return on their special access services, the record shows that they charge unreasonably high rates to all companies – indeed, in 2002 AT&T petitioned the Commission to dramatically reduce special access rates.[5] After the mergers, however, SBC and Verizon will have a greater incentive to treat companies like Broadwing and SAVVIS worse than they treat AT&T and MCI – which, post-merger, will be part of SBC and Verizon rather than separate companies.

Divestitures will not alleviate the danger that SBC and Verizon will discriminate against competitors. Even if those BOCs divest all the local assets currently owned by AT&T and MCI, they will still have a motive to provide their special access services to their newly acquired IXC on better terms and at lower prices than they provide special access services to other companies. Accordingly, conditions designed to prevent discrimination in pricing and provisioning by SBC and Verizon are necessary whether or not divestitures are imposed. Moreover, conditions preventing discrimination cannot await resolution of the pending special access rulemaking, because the mergers will cause immediate harm to competition in the territories served by SBC and Verizon. Therefore, if the Commission approves these mergers, it should impose specific conditions designed to mitigate the harms the mergers will cause by giving SBC and Verizon motivation to discriminate against companies that serve business customers.

It is worth emphasizing again that, prior to the announcement of these mergers, the special access issues AT&T raised in its 2002 petition for rulemaking were not business priorities for SAVVIS or Broadwing. But because these mergers threaten to eliminate what limited competition that exists today, SAVVIS and Broadwing believe it is critical that the Commission impose conditions on the mergers to mitigate harm to the special access market.

SPECIAL ACCESS REMEDIES

The Commission should take steps to preserve competition as it exists pre-merger and until it issues pricing and provisioning rules that approximate those that would exist if there were a fully competitive market for special access services. One way to

[5] *AT&T Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Petition for Rulemaking, RM-10593 (filed Oct. 15, 2002) ("*AT&T Petition for Rulemaking*").

accomplish that result would be to require as an interim measure that each BOC maintain the IXC it is acquiring as a separate entity until special access is reformed. In addition, the Applicants should be required to continue to honor the terms and conditions of existing contracts for both existing and new circuits, and make their terms available to other companies, which will preserve the benefits of the present level of competition.[6]

A temporary separate affiliate requirement. Requiring the acquiring BOC to maintain the IXC as a separate entity makes it possible to examine transactions between that IXC and the BOC that acquired it. That would make it possible to determine the price at which the acquired IXC obtains special access circuits and the terms on which those circuits are provisioned. That information could then be used to ensure that other companies are permitted to acquire special access circuits at the same prices and without potentially discriminatory terms and conditions. It should also be used to provide the basis for rules the Commission adopts in its ongoing special access rulemaking.

Thus, the Commission could ensure that the mergers do not result in discrimination by requiring the BOCs to keep the acquired IXC separate for a somewhat longer period than would occur in any event, which would provide an opportunity to monitor the transactions between the newly-affiliated entities. Section 272 established structural and accounting safeguards for just this purpose.[7] As the Commission stated, "The structural and nondiscrimination safeguards in section 272 ensure that competitors of the BOC's section 272 affiliate have access to essential inputs … on terms that do not discriminate against the competitors in favor of the BOC's affiliate."[8] The Commission could use the safeguards Congress enacted while it completes its special access rulemaking.

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6 *See* Joint Special Access Remedies Letter; *see also* Ex Parte Letter to M. Dortch from Qwest Communications, WC Docket Nos. 05-65 & 05-75 ("Qwest Special Access Remedies Letter"). Broadwing and SAVVIS also support Qwest's pricing proposal that there be no minimum or maximum demand levels for adding or deleting circuits and that wholesale carriers have sole discretion to terminate existing contracts. *Id.* at 7.

7 Section 272(c) creates a general duty of nondiscrimination and provides that a BOC "may not discriminate" between its section 272 affiliate and "any other entity in the provision or procurement of goods, services, facilities and information, or in the establishment of standards." Section 272(c)(1). For the more specific nondiscrimination obligations, Section 272(e) requires, *inter alia*, that BOCs may not discriminate with respect to: (1) the fulfillment of requests for telephone exchange and exchange access (§ 272(e)(1)); (2) the provision of facilities, services, or information concerning exchange access (§ 272(e)(2)); (3) the amount charged or imputed for access to telephone exchange and exchange access (§ 272(e)(3)); and (4) the provision of interLATA or intraLATA facilities or services (§ 272(e)(4)). Finally, in recognition of the BOCs' incentives to engage in price squeezes and improper cost misallocation, BOCs 272 affiliates must "operate independently" from the BOC (§ 272(b)(1), "maintain books, records, and accounts" that are "separate" from those of the BOC (§ 272(b)(2)), use "separate officers, directors and employees" from the BOC (§ 272(b)(3)), may not obtain "credit under any arrangement" that provides a creditor with "recourse to the assets" of the BOC (§ 272(b)(4), and must "conduct all transactions" with the BOC "on an arm's length basis with any such transaction reduced to writing and available for public inspection" (§ 272(b)(5)).

8 *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, FCC 96-489 ¶ 13 (1996).

We recognize that the Commission has routinely permitted the Section 272 affiliate requirement to sunset three years after a BOC obtained authority to provide interLATA service. These mergers, however, dramatically change the practical effect of those sunset decisions. As the Applicants stated in explaining their reasons for merging, SBC and Verizon were not able on their own to acquire substantial numbers of business customers. Therefore, as a practical matter, permitting the Section 272 affiliate requirement to sunset made little difference to either company. But once a BOC acquires a major IXC that serves a significant number of business customers, it becomes vitally important to be able to examine the prices and terms on which the BOC provides essential special access circuits to itself to serve the business customers acquired by means of the merger.

A temporary requirement that the BOCs maintain their merger partners as a separate affiliate will not work any hardship on the parties nor will it prevent consumers from realizing the efficiency benefits the merging parties cite as the grounds for completing these mergers. As a practical matter, SBC will not be able to fully integrate AT&T into its operations immediately after approval of its application. Nor will Verizon be able to fully integrate MCI immediately. Requiring a separate affiliate until the special access rulemaking is completed simply allows for an orderly transition to whatever new regime is ordered by the Commission in that rulemaking.

As noted above, studying transactions between the BOC and the IXC it acquires will assist the Commission in reforming its special access rules. In our view, the special access rates of all incumbent local exchange carriers should be lowered, as AT&T proposed in 2002.[9] But reasonable rates will mean nothing without performance requirements, and therefore the Commission should adopt rules governing provisioning and maintenance of special access services. The Commission will not need to start from scratch, since AT&T and MCI themselves were active members of the Joint Competitive Industry Group ("JCIG"), which proposed useful performance measures.[10] But it is also

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[9] *AT&T Petition for Rulemaking* at 39-40.

[10] *See* Written *Ex Parte* Presentation, Joint Competitive Industry Group to Marlene H. Dortch, CC Docket No. 01-321 (filed Sept. 3, 2004). The JCIG proposal should be modified in two ways. First, the performance measurements in the JCIG plan should include measurements for all special access circuits, including OCn circuits. Second, ordering performance measures should be keyed to the design layout record ("DLR") date rather than the firm order commitment ("FOC") date. Despite its name, FOCs are often not an accurate measure of when the BOC will commit to provisioning a special access circuit. For instance, when a BOC finds that it must build out a new special access circuit for an ordering carrier, it frequently refuses to return a FOC date, or if it does, it notifies the carrier that the FOC date is a "soft" automatic target date, not an actual firm order commitment. In contrast, a BOC typically issues a DLR date after it has completed the design phase, capacity check phase, and engineering work associated with an order. At this point, the BOC is better able to let the ordering carrier know when the special access circuit will actually be provisioned.

We also note that Qwest has also proposed several "service quality" conduct remedies. *See* Qwest Special Access Remedies Letter at 11. We would suggest a few slight modifications: (1) change the FOC date reporting metric to a DLR date metric for the reasons described above; (2) mean time to restore service reports should be required for both "dispatched" and "non-dispatched" repairs, reflecting the fact that a problem that requires crews to be dispatched can take much longer and could be prone favorable self-dealing (such a refinement will give a better measure of the Applicants' vital that competition not wither while the special access rulemaking is pending – and keeping the BOC and the IXC it acquires separate until the Commission issues new special access rules is necessary to prevent harm as a result of these mergers.[11]

Retain existing contracts. As Broadwing and SAVVIS urged the Commission together with other companies, SBC and Verizon should be required to reduce their base DS1 and DS3 rates by 50%, which would bring those rates approximately in line with rates offered today on account of the presence of AT&T and MCI as independent providers of special access services. In addition, as the group also proposed, the Applicants should be required to honor the terms and conditions of their existing contracts, for both new and existing circuits, for at least five years regardless of the term length set forth in such contracts. This is consistent with the recent conclusion of the Virginia State Corporation Commission (SCC) that it could approve the Verizon-MCI merger only if MCI continues to offer wholesale customers pre-merger terms and prices.[12]

Two points concerning that proposal warrant elaboration. First, existing contracts include services other than DS1s and DS3s. Although DS1 and DS3 services are the most competitively sensitive, the removal of AT&T and MCI from the market will affect other services as well, and there is no reason why SBC and Verizon should be permitted to raise rates for those services in cases where AT&T and MCI provided price discipline. Thus, competitors should be allowed to extend all existing special access contracts that include DS1 and DS3 services even if they also cover other special access services. Second, the Commission should make clear that circuits purchased as "Type 2" circuits from AT&T or MCI should be priced as "Type 1" circuits after the mergers where the acquiring BOC owns the circuit. For example, where AT&T currently leases a circuit from SBC and combines it with its own facilities, it increases the price compared to

response to restore service); and (3) circuit failure reporting should be in two parts, "repeat" (*i.e.*, when a circuit fails twice within 30 days) and "chronic" (*i.e.*, when a circuit fails three times within 60 days). These refinements reflect measurements that are common industry practice and often included in contracts. We agree with Qwest that there should be no limit upon the number of grooming orders during a calendar year and that SBC and Verizon should be required to provide wholesale carriers with a list of fiber-lit buildings. *Id. at 12-13.*

11 It is vital that the merged entities report on the terms and conditions on which they are providing special access to their IXC affiliates (or to themselves, if the Commission does not require the use of a separate affiliate) separate from reports on pricing and provisioning to third parties. Otherwise, it will be much more difficult to determine whether the merged entity is discriminating. Similarly, the merged entities must also be required to separately report the pricing and provisioning of circuits between themselves (*i.e.*, Verizon selling to SBC and SBC selling to Verizon). Otherwise, the reports on pricing and provisioning to third parties will be next to useless because they will conflate the terms that the merged entities deal with each other with the (potentially much different) terms on which they deal with the rest of the market.

12 *Joint Petition of Verizon Communications Inc. and MCI, Inc. for Approval of Agreement and Plan of Merger*, Order Granting Approval, Case No. PUC-2005-00051, at 28-29 (Va. State Corp. Comm. Oct. 6, 2006). As the SCC explained, "[t]here is significant evidence . . . [that] departure from the market of an independent MCI may ultimately impact the provision of local services to Virginia customers, especially mid-size business customers that rely upon T1/DS1 and greater connectivity." *Id.* at 28.

circuits it owns end-to-end – but after the merger AT&T's successor will own the circuit end-to-end, and the price of the circuit should reflect that fact.

It is difficult to imagine how a requirement to retain and extend existing contracts could harm the Applicants. Thus, unless the Applicants intend to raise rates for services not covered by the corrective pricing adjustment after the mergers are approved, they should have no quarrel with such a condition.

Moreover, preserving the benefits of the competition currently provided by AT&T and MCI should lead the Commission to require the merged entities to offer other companies terms and conditions comparable to those provided in existing contracts. For example, a company might not currently have a contract with SBC or AT&T covering a particular metropolitan area. But absent the merger, it would be able to negotiate a contract for that market similar to that obtained by other companies on account of the competition provided by AT&T, and the merged company should be required to offer service on those terms to other companies.[13]

INTERNET BACKBONE HARMS

The market for Internet backbone services is currently composed of eight to twelve similarly sized "Tier 1" networks that engage in settlement-free peering. End-user customers receive low-cost and high-quality access to the entire Internet – without government regulation – because the existing networks compete against each other for customers.

For two reasons, the mergers will unravel the currently competitive market of similarly sized peers by creating two "mega peers" – networks with the ability and incentive to put their rivals out of business. *First*, the mergers will create two networks that carry far more IP traffic than any single network carries today, leaving them substantially larger than any of their current competitors. *Second*, the mergers will create two vertically integrated BOC-IXC networks that have customer relationships with millions of residential and small business broadband consumers, as well as even greater numbers of wireless and circuit-switched voice customers who are likely to adopt IP-based 3G and VoIP technologies in the very near future. The combination of sheer size and a captive (*i.e.*, "sticky") customer base will allow the mega peers to credibly threaten to end settlement-free traffic exchanges with many, if not all, of the other existing Tier 1 networks.

[13] These conditions, including the 50% price reduction, are all similar to conditions imposed by the Commission in the SBC-Ameritech merger. *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, FCC 99-279 (1999). For example, the Commission ordered the merging companies to continue to offer network elements provided under any interconnection agreement (¶ 394) and ordered discounts of 25 percent on loops (¶ 391).

INTERNET BACKBONE REMEDIES

The Applicants deny that there is any possibility that they will be able to exert market power as a result of these mergers. However, they have failed to provide up-to-date information and projections concerning their market share – and the Commission has failed to require them to do so.[14] If the Applicants really believe they will not be in a position to change the nature of the Internet backbone market from its current highly competitive state to one dominated by two mega peers, they will not object to the conditions we propose.

Publish and abide by nondiscriminatory peering policies. The Commission should require the Applicants to publish and abide by nondiscriminatory peering policies. This can be accomplished through two simple and minimally intrusive reforms.

First, the Applicants should be required to maintain public peering policies on their Web sites – as SBC and MCI (like SAVVIS and Broadwing) already do.[15] This will give fair notice to other Internet backbone providers of what they must do in order to qualify (or continue to qualify) for settlement-free peering. It will also discourage the Applicants from incorporating pretextual conditions into their peering policies designed to take advantage of their market power.

Second, the Commission should require the Applicants to apply the terms of their peering policies in a nondiscriminatory fashion. This means that the Applicants cannot turn away peers that meet their published criteria, and cannot waive their peering requirements for some backbone providers but not others. In order to verify that the Applicants are abiding by their published policies, the Commission should require the Applicants to publish anonymous usage statistics concerning the backbones with which they maintain settlement-free peering relationships. This will allow the Internet backbone industry to police itself, and will require Commission involvement only if the Applicants elect to discriminate unfairly against their rivals.

Maintain at least the same number of peers. To prevent the Applicants from establishing peering policies that only they can meet, the Commission should require the Applicants to design their peering policies in such a way that they continue to peer with as many networks as is currently the case for the acquired IXC (the larger Internet backbone in both mergers). In other words, the merged entities would remain free (with one exception, discussed below) to set the specific terms of their own peering policies. But they must not set their peering policies so as to eliminate peers and to stifle competition. If the Applicants are not interested in engaging in anti-competitive behavior, this requirement will cause them no harm.

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14 *See* Broadwing-SAVVIS Internet Ex Parte at 4-7 & App. A.

15 *See* global.mci.com/uunet/peering/; http://www.sbcbackbone.net/peering/#public; http://www.broadwing.com/peering/InterconnectPolicy_2004_.doc; http://www.savvis.net/NR/rdonlyres/16A6C413-5D9F-405D-B157-BC6DC9A01B52/8264/peering_usa2.doc.

From a regulatory perspective, this condition is desirable because (like the condition described above) it does not require the Commission to become directly involved with designing or approving the Applicants' peering policies. Instead, the Applicants remain free to include the criteria in their peering policies that they wish, provided that there are a sufficient number of networks capable of meeting these criteria. For instance, as Internet speeds and traffic volumes increase over time, the Applicants will be free to upgrade their technical peering requirements (thus increasing the quality of service enjoyed by end-user customers). They are barred only from amending their policies in a manner that would stifle competition.

Prohibit de-peering based on traffic ratios. The Commission should prohibit the Applicants from terminating peering agreements based on the ratio of incoming to outgoing traffic exchanged with their current peers. SAVVIS and Broadwing have shown that AT&T is already attempting to de-peer rivals by using peering traffic ratios as the sole reason. SAVVIS and Broadwing have also explained why the Applicants are especially likely to use the ratio issue as a convenient pretext for exercising their newly-found, post-merger ability to de-peer their current competitors.[16] Verizon and SBC have responded by asserting that a traffic ratio requirement is cost-justified (and also mistakenly contend that SAVVIS currently employs a ratio requirement).[17] But as Simon Wilkie has explained, the Applicants' claim of a cost basis for the ratio requirement is without basis in sound economic theory and instead reflects older theories that are not appropriate for Internet traffic.[18]

SBC also relegates to a footnote the important fact that its own peering policy lacks a ratio requirement, and purports to explain this inconsistency by asserting that it "does not utilize a traffic ratio because its traffic volumes are relatively small and balanced, so it has seen no need to do so."[19] But this explanation is clearly a post hoc rationalization, as shown by the explanation that *SBC's own peering policy* (prepared before the proposed mergers) gives for the lack of a ratio requirement: "No requirement for a balanced traffic exchange ratio due primarily to the asymmetric nature of current broadband metallic transmission systems such as ADSL and cable modems."[20] Of course, the asymmetric nature of ADSL and cable modem service is not due to any engineering necessity, but instead reflects how traffic flows in the real world between "eyeball" and "content provider" customers – a point Broadwing and SAVVIS have explained in detail in earlier pleadings.[21] In other words, SBC's existing peering policy

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16 *See supra* at n.1.

17 Ex Parte filing by Verizon and MCI, WC Docket No. 05-75, at 7-8 (Sept. 12, 2005); ex parte filing by SBC and AT&T, WC Docket No. 05-65, at 1 (Sept. 7, 2005) ("SBC/AT&T Internet Ex Parte"). SAVVIS' peering policy does not contain a ratio requirement. *See supra* at n.11.

18 Broadwing-SAVVIS Internet Ex Parte at App. B, ¶¶ 4-9.

19 SBC/AT&T Internet Ex Parte at 4 n.5

20 *See* http://www.sbcbackbone.net/peering/#public.

21 *See supra* n.1.

(in contrast to its filings in this docket) supports exactly the point Broadwing and SAVVIS have made all along – because of asymmetric traffic flows, peering policies should ensure that the two parties to the transaction are receiving comparable economic benefit rather than focusing only on the number of packets exchanged.

In these circumstances, SBC should not be permitted to change its peering policy post-merger in a manner that will allow it to de-peer competitors based on traffic ratios. Nor should Verizon be permitted to use criteria that will permit it to de-peer competitors after it acquires MCI based on peering traffic ratios, since the use of a ratio is an arbitrary criterion without any substantiated basis.

Respectfully submitted,

By:_________/s/___________

Kim D. Larsen
Lawrence E. Strickling
BROADWING COMMUNICATIONS, LLC
1122 Capital of Texas Highway South
Austin, TX 78746
512-742-4141

Joanna S. Lowry
Cathleen K. Wasilewski
SAVVIS, INC.
12851 Worldgate Drive
Herndon, VA 20170
703-667-6757

Christopher J. Wright
Timothy J. Simeone
Bruce L. Gottlieb
HARRIS, WILTSHIRE & GRANNIS, LLP
1200 18th Street, N.W.
Washington, DC 20036
202-730-1300
202-730-1301 (FAX)