

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services, RM-10865, ET Docket No. 04-295, Notice of Proposed Rulemaking and Declaratory Ruling

As set forth in the opening provision of the Communications Act, the Commission has no higher priority than promoting public safety and the national defense. I therefore support initiating this rulemaking regarding the Commission's implementation of the Communications Assistance for Law Enforcement Act (CALEA). The Department of Justice and other law enforcement agencies have raised a number of significant questions regarding the applicability of CALEA to IP-enabled services, compliance timelines, enforcement, and cost recovery, among other things. The Commission must build a thorough record to ensure that, to the extent permitted by statute, law enforcement agencies have the tools they need to conduct surveillance in a changing technological environment.

While the Commission must do its utmost to enable law enforcement agencies to combat crime and promote homeland security, it would be a mistake to gloss over the possibility that the existing statutory framework does not apply to broadband Internet access services or other IP-enabled services that are classified as information services. The NPRM we are issuing proposes a plausible interpretation of the "substantial replacement" provision in CALEA that would extend the assistance-capability requirements to broadband access services and IP telephony. But such an extension clearly would be fraught with legal risk. The Commission thus would benefit greatly from further congressional guidance in this area. While the text and legislative history of CALEA make clear that the march of technological progress should not hamper law enforcement's ability to conduct lawful wiretaps, the statute also explicitly exempts information services from its reach. The Commission has proposed a means of resolving this tension, but it remains to be seen whether our attempts to do so would pass judicial muster.

In addition to the question whether CALEA applies to IP-enabled services, the issues of enforcement and cost recovery also warrant congressional attention. Section 108 of CALEA establishes an enforcement mechanism that requires the Attorney General to bring a civil action in the appropriate federal district court. While law enforcement agencies have noted the shortcomings of this regime, it is unclear whether Congress intended the Commission to assume a central role over enforcement of the statute's requirements. Moreover, upgrading networks to comply with a new packet-mode standard for surveillance will be a costly endeavor, and there are many unanswered questions about how these costs should be recovered.

In sum, I support the Commission's initiation of this rulemaking in response to the petition filed by the Department of Justice and other law enforcement agencies. The issues raised are critical, and the Commission must provide clarity and direction to the

greatest extent possible. But at the end of the day, the federal courts — rather than this Commission — will be the arbiter of whether we are authorized to take the actions proposed in this rulemaking, and we must remain mindful of that fact as we consider final rules.