

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING**

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

The Commission states that its primary policy goal in this proceeding is to ensure that law enforcement has all of the resources that CALEA authorizes to combat crime and support homeland security. This is as it should be. But there are less roundabout ways to achieve this result than the collection of tentative conclusions we offer here and there are better ways to build a system that will guarantee judicial approval.

I believe today's item asks many of the right questions, but I also believe that too often it gets the reasoning wrong. It is flush with tentative conclusions that stretch the statutory fabric to the point of tear. If these proposals become the rules and reasons we have to defend in court, we may find ourselves making a stand on very shaky ground. It would be a shame if our reliance on thin legal arguments results in the CALEA rules being thrown out. Neither law enforcement nor the American people would benefit from that result.

To me, it strains credibility to suggest that Congress intended "a replacement for a substantial portion of the local telephone exchange" to mean the replacement of *any* portion of any individual subscriber's functionality. Capturing VoIP under the rubric of substantial replacement, ignoring the Ninth Circuit's decision in *Brand X*, and trying to slice and dice managed and non-managed services is not the way to proceed here. Making the statute bear this heavy burden denies carriers, equipment manufacturers and technology entrepreneurs the clarity they need. But more importantly, our law enforcement authorities need that clarity. Those whose job it is to shield us from harm deserve better. So I don't agree with how we got to this conclusion, but given where we are, we have the responsibility to get a proceeding going. For these reasons, I will concur, but I hope before all is said and done that the record will provide better counsel and our final decisions will put us on a sounder footing.