

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING**

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services, RM-10865, ET Docket 04-295, Notice of Proposed Rulemaking and Declaratory Ruling.

With this Notice of Proposed Rulemaking and Declaratory Ruling, we open a proceeding to examine the application and administration of the Communications Assistance for Law Enforcement Act (CALEA) as the telecommunications industry transitions to so-called packet-mode services, such as broadband Internet access and Voice over Internet Protocol (VoIP). We start this review at the request of the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (“federal law enforcement”), but the outcome of this proceeding will also affect the ability of state and local law enforcement agencies throughout the nation, which conduct roughly half of all wiretaps, to conduct their operations efficiently and effectively.

This item begins to tackle the increasingly important issue of whether CALEA applies to broadband and VoIP services. Federal law enforcement agencies view this capability as essential to their ability to perform their missions in the digital age. It is imperative that we give law enforcement the tools that CALEA affords them and that they need to safeguard public safety and homeland security. This Notice facially accedes to law enforcement’s request, but stops short of developing fully the most defensible basis for these proposed outcomes, which are at the heart of the federal law enforcement agencies’ petition.

Rather than seeking comment on the most stable footing for law enforcement’s request, the item seizes upon notable but thin distinctions between definitions in CALEA and the Communications Act. Moreover, the item does not acknowledge fully and seek comment on existing precedent that is in tension with the tentative conclusions here. For example, whether or not the Commission ultimately appeals the decision in the Ninth Circuit’s *Brand X* case, which concluded that broadband access via cable modem includes a “telecommunications service,” this Notice’s failure to seek comment on a legal analysis that would comport with the Circuit’s holding is an unnecessary failing. For these reasons, I concur in the result, if not the full legal analysis behind the Commission’s tentative conclusions.

I am pleased that the Commission is opening this proceeding and that we can move forward with a full vetting of the issues. While we should not jump to conclusions about the many issues raised here, it is critical that we make this proceeding a priority and that we commit to a speedy resolution of the complex, but time sensitive issues raised here.