

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunicaitons Nor a Telecommunications Service, Memorandum Opinion and Order (WC Docket No. 03-45)

In this Order, we leap before we look. The Commission declares that Free World Dialup is an information service but does not address any of the consequences of its decision. This headlong jump into Title I presents stark challenges for law enforcement and has implications for universal service, public safety and state and federal relationships that we have yet to untangle or assess. Under these circumstances I believe it is reckless to proceed and I cannot support this decision at this time.

Two years ago, when the Commission set out to reclassify wireline broadband Internet access, I suggested it was irresponsible to do so without addressing the larger implications of our decision. Shortly thereafter, the Commission proceeded down the identical path in a declaratory ruling reclassifying cable modem service. My objections were the same. We said we were conferring certainty to business, but the decision has been overturned in court, confusion still reigns and the larger questions remain unanswered.

Yet here we go again. Like before, our approach is backwards. With bugles blaring, we pronounce the classification of a service, but leave the hard part—understanding the consequences—for another day and time.

I would dissent to this item purely on law enforcement and national security grounds. The Communications Assistance for Law Enforcement Act (CALEA) expressly exempts entities providing information services from complying with law assistance capability requirements. No assurances from companies, statements from this Commission or last-minute letters from an Executive Branch agency have yet demonstrated a satisfactory solution to this thorny problem. On January 28, the Federal Bureau of Investigation sent a letter clearly requesting that the Commission complete a rulemaking on CALEA “prior to the other related but non-CALEA specific broadband proceedings.” Otherwise, the letter pointed out, the outcome of our broadband classification decisions “could serve to prejudice” law enforcement’s rights under CALEA. This letter urged us to stop in our tracks. It urged us to resolve national security needs before moving ahead. Even in a more, shall we say forthcoming letter of February 4, the Department of Justice stated that “[w]hile it would obviously be our preference that the FCC decide these issues prior to considering other broadband proceedings, we recognize that this is not practical.” Both letters are part of the public record.

I met with both the Federal Bureau of Investigation and the Department of Justice, but I think anyone who reads this correspondence will be left with the indelible impression that law enforcement strongly prefers that the Commission resolve outstanding CALEA matters *before* proceeding with any further broadband reclassification efforts. I do not understand why it is not practical to pause and resolve these concerns before proceeding to categorize Free World Dialup service. The majority apparently prefers to act now and fix law enforcement issues later—along

with universal service, public safety, disability access and a host of other policies we are only today beginning to address in a related rule-making on IP-enabled services. This rush to reclassify will, I fear, lead us down a road wherein we are compelled to engage in legal calisthenics and contortion of both CALEA and the 1996 Act in order to meet our statutory obligations.

This petition has been in front of the Commission for over a year. It *is* an important decision – but not so important that it cannot wait a little while longer while we conduct an expeditious review of the problems that a too hasty decision could bring.

