

## SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

*Re: Investigation of Tariffs Filed by ACS of Anchorage, Inc., and the National Exchange Carrier Association; December 17, 2001 MAG Access Charge Filings, CC Docket No. 02-36, CCB/CPD No. 01-23 (adopted May 31, 2002)*

The question of how to allocate the costs of carrying ISP-bound traffic presents a complex set of issues. On the one hand, carriers have made persuasive arguments that intrastate revenues may be insufficient to allow full recovery of the costs associated with the growth in ISP-bound traffic. Most subscribers pay flat rates, and thus pay no additional charge when they spend hours connected to the Internet. On the other hand, because the revenues collected from ISPs are intrastate in nature — ISPs purchase service out of local business tariffs and do not pay interstate access charges (under the longstanding “ESP exemption”) — the Commission has held that accompanying costs also must be recovered from the intrastate jurisdiction. The D.C. Circuit recently upheld that decision, finding it reasonable to conclude that costs and revenues should be subject to the same jurisdictional allocation.<sup>1</sup>

While I recognize ACS’s interest in establishing a different cost-recovery approach for ISP-bound traffic — and I look forward to considering that issue in proceedings pending before the Commission — there is no question that our *existing* rules do not permit carriers to allocate the traffic-sensitive costs of carrying ISP-bound traffic to the interstate jurisdiction. The tariff at issue thus is clearly unlawful. Carriers are not free to disregard our rules simply because they believe those rules should be changed. Accordingly, any decision upholding this tariff would undermine respect for our rules and thus would be unacceptable regardless of how ISP-bound traffic should be treated on a going-forward basis.

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<sup>1</sup> *ACS of Anchorage, Inc. v. FCC*, No. 01-1059 (D.C. Cir. Decided May 21, 2002).