

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of International Section 214	)	IB Docket No. 23-119
Authorizations to Assess Evolving National	)	
Security, Law Enforcement, Foreign Policy,	)	
and Trade Policy Risks;	)	
	)	
Amendment of the Schedule of Application	)	MD Docket No. 23-134
Fees Set Forth in Sections 1.1102 through	)	
1.1109 of the Commission’s Rules	)	

**COMMENTS OF INCOMPAS**

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**COMMENTS OF INCOMPAS**

INCOMPAS hereby submits these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Proposed Rulemaking that seeks input on a new regulatory framework for entities holding an international Section 214 authorization.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY.**

INCOMPAS is the preeminent national industry association for providers of internet and competitive communications networks, including both wireline and wireless providers in the broadband marketplace. We represent fixed broadband companies, including small local fiber and fixed wireless providers that provide residential broadband internet access service (“BIAS”), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. We also represent companies that are providing

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<sup>1</sup> *In re Review of International Section 214 Authorizations to Assess Evolving National Security, Law Enforcement, Foreign Policy, and Trade Policy Risks; Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 through 1.1109 of the Commission’s Rules*, IB Docket No. 23-119 & MD Docket No. 23-134, Order and Notice of Proposed Rulemaking, FCC 23-28 (rel. April 25, 2023) (“*NPRM*”).

business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes, including regional fiber providers; transit and backbone providers that carry broadband and internet traffic; online video distributors, which offer video programming over BIAS to consumers, in addition to other online content, such as social media, streaming, cloud services, and voice services.

Several of INCOMPAS' members have an interest in the proceeding as they hold international Section 214 authorizations to provide international voice services in the U.S., offering competitive alternatives to consumers and businesses. Some of these members are publicly traded, and others are privately held. Given the makeup of our membership and their interest in the proceeding, we are uniquely positioned to comment on the NPRM's proposals.

The Commission explains in its NPRM that it is proposing "rule changes that will enable the Commission, in close collaboration with relevant Executive Branch agencies, to better protect telecommunications services and infrastructure in the United States in light of evolving national security, law enforcement, foreign policy, and trade policy risks."<sup>2</sup>

INCOMPAS believes that the agency would benefit from reviewing the results of its one-time information collection and assessing the current state of play of current authorization holders prior to implementing an entirely new burdensome regulatory framework that introduces significant new obligations and so much uncertainty and cost on authorization holders. The agency should carefully consider how the new regulatory framework's significant new burdens, costs, and uncertainty impact authorization holders and their ability to raise capital, compete in the marketplace, and the potential long-term consumer impact from adverse consequences that may result from fewer competitive options in the marketplace.

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<sup>2</sup> *NPRM* ¶ 1.

If, however, the Commission adopts its renewal framework (or alternative periodic review), it should exempt all providers who are controlled by U.S. citizens or already have a mitigation agreement with the agencies. And it should refocus its application process so that it only seeks information that has changed since the one-time data collection or the last transfer of control/assignment application, whichever was the most recent filing, every ten years. Moreover, the agency should only refer applications that have a new reportable interest from a foreign adversary that requires review by the national security agencies. INCOMPAS then explains why the Commission should maintain its reportable ownership interests at ten percent or greater and why authorization holders should be permitted to hold more than one authorization based on their business operations and additional requirements should be further tailored to avoid undue burden, costs, or disclosure of competitively sensitive information.

**II. THE PROPOSED REGULATORY FRAMEWORK FOR INTERNATIONAL SECTION 214 AUTHORIZATION HOLDERS MUST BE TAILORED TO AVOID OVERLY BURDENSOME AND COSTLY PROCESSES.**

INCOMPAS supports the FCC's effort to ensure that national security and other federal interests are protected, and we believe that the agency's one-time collection of information to identify foreign owners from all current international Section 214 authorization holders will provide the FCC the information it needs to accomplish its goals. INCOMPAS urges the Commission to balance the new requirements proposed in the NPRM with the potential burden upon international Section 214 authorization holders and their owners and the potential harms that such regulation may cause—even if indirectly—in their ability to raise capital and compete in the marketplace. As we discuss further below, the proposed new renewal framework or (alternative three-year information collection) will be a significant new burden and add substantial costs on authorization holders and their reportable owners, requiring holders to hire

outside counsel for advice and compliance with the requirements, including drafting and submitting major filing(s) with the FCC and perhaps the national security agencies, as well as requiring authorization holders to obtain information from any reportable owners, going up the ownership chain due to the need to report both direct and indirect interests—a task that can be difficult as minority owners may not fully understand the requirements and cooperate with providing information in a timely fashion.

INCOMPAS respectfully requests that the agency reconsider its approach given that the reporting required in its one-time data collection in the Order will be sufficient to supply the FCC and national security agencies up-to-date information, such that national security and other federal interests may be identified and addressed. For example, to the extent that the FCC learns of new 10% or greater foreign owners from the one-time data collection, it can engage with and consult Team Telecom, including inquiring as to whether a mitigation agreement has been entered into and whether it is sufficient to address any federal interests identified. To the extent that additional protections may be required, the agency and Team Telecom will be able to coordinate their efforts with the authorization holders to address any concerns through a new or modified national security agreement and/or further agency action to protect federal interests (such as revocation, for instance). As the FCC duly notes, it maintains the legal authority to review current authorizations to ensure that U.S. security interests are protected. Thus, INCOMPAS believes that a new renewal process is unnecessary given the one-time data collection process, and that future changes in control or assignment will need to undergo prior review and approval by the FCC and Team Telecom.

Control of international Section 214 authorization holders is what the agency's focus should be. In that regard, ownership interests that are based on control rights of the authorization

holder should be the Commission's focal point. There is an ongoing obligation of authorization holders to seek approval prior to any transfer of control of an international Section 214 authorization and to provide the agency the requisite information for the FCC to review and approve (or deny) the request.<sup>3</sup> (The same is true for assignments of authorizations.) This ongoing requirement is sufficient to ensure that potential foreign threats do not control U.S. telecommunications networks and services which is the locus of potential harm.

Moreover, for those authorization holders who already have foreign ownership interests and mitigation agreements with the federal government, the national security agencies can and do engage in more lengthy and detailed review that is confidential and ensures that U.S. national security and other federal interests are protected even when owners have minority interests and possess no control rights over an authorization holder. And according to our members, mitigation agreements typically require authorization holders to provide updated information to the agencies in a timely fashion when there are changes, including new shareholder interests that may not trigger a transfer of control/assignment application at the FCC, allowing the national security agencies an opportunity to review and adjust, as needed, the mitigation agreement. (The agencies, of course, can communicate with the FCC any concerns they believe cannot be adequately addressed through a mitigation agreement for the agency to potentially take action, including revocation proceedings.)

An international Section 214 authorization renewal requirement framework (or its alternative three-year information update) will be a burdensome and costly process, and it is potentially harmful to authorization holders as it adds uncertainty to their status and their ability to continue to offer service which can harm their ability to raise capital and compete in the

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<sup>3</sup> 47 U.S.C. § 214(a); 47 C.F.R. § 63.18.

marketplace. If it is adopted, it must be tailored to address the burdens, costs, and uncertainty. If a renewal framework (or its alternative periodic review) is adopted, INCOMPAS believes that the agency should exclude those authorization holders that are controlled by U.S. citizens given the significant burden of time and cost that a renewal/periodic review framework that is proposed as discussed further below.

*Unreasonable Burden and Costs of the Renewal Framework/Periodic Review.* With respect to burden, costs, and uncertainty, the NPRM proposes a long list of requirements that authorization holders will have to submit for a renewal application or periodic review that are the same as a new applicant,<sup>4</sup> including for example, direct/indirect ownership interests, ownership diagrams, and certifications. These requirements will compel authorization holders to hire outside counsel to prepare and file their renewal/periodic review applications, and it will require in-house counsel, business executives, and reportable owners to spend a substantial amount of time to engage with counsel to prepare and comply with the new renewal/periodic review framework.

Applicants may experience delays and uncertainty with their renewal applications, including comments/petitions to deny that can be filed by third parties. In addition, the FCC intends to resubmit to Team Telecom and the national security agencies the renewal application/periodic filing for its review—which could be a much-delayed process and provide significant uncertainty for authorization holders. As explained in the NPRM, “[f]or these referrals, we propose to apply the same time frames that were adopted in the Executive Branch Process Reform Order, a 120-day initial review period followed by a discretionary 90-day

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<sup>4</sup> NPRM ¶¶ 84-85.



secondary assessment. We anticipate that a referral of a renewal application with reportable foreign ownership may result in a mitigation agreement, or modification of an existing mitigation agreement, or a recommendation by the Committee or other relevant Executive Branch agencies to deny the application.”<sup>5</sup> As the Commission is aware, these types of review often take much longer than the six months described, and are costly, burdensome, and diverting to the businesses undergoing the review process which is challenging in a competitive marketplace.

With respect to uncertainty, the NPRM tentatively concludes that the Commission will apply the same standard of review for renewal applications as initial applications or applications for modification, assignment, or transfer of control<sup>6</sup>—none of which provide any assurance that the authorization will be renewed, and the authorization holder and its owners will not have the necessary certainty that it will be able to continue to offer service. Unfortunately, the proposed categories for its renewal processes that the agency proposes to use for renewal applications in paragraph 63 and the alternative in paragraph 66 of the NPRM also are complex and do not provide assurances that an authorization holder will receive the necessary renewals and Team Telecom approval to continue its offerings such that investors will have the assurances they need to provide capital for a business. This type of uncertainty is difficult for businesses to plan around and can harm their ability to attract capital and effectively compete in the marketplace.

The NPRM refers to the fact that wireless and broadcast licensees have a renewal process and suggests that similar circumstances warrant a renewal for international 214 authorizations.<sup>7</sup> However, a renewal process for wireless and broadcast licensees is inapposite. Spectrum and

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<sup>5</sup> NPRM ¶ 70.

<sup>6</sup> *Id.* ¶ 55.

<sup>7</sup> *Id.* ¶ 40.

broadcasters have renewals because spectrum that they are licensed to use is finite. Renewals are required to ensure that licensees are *using* their licenses to serve the public. That is a very different situation than international Section 214 authorization holders. There is no finite resource that 214 holders are using that must be managed by the agency. To the extent that the agency wants to ensure that the authorization is being used to provide service, then an obligation to surrender the authorization if it is not being used due to a permanent discontinuance of service should be sufficient. INCOMPAS supports the proposal to amend section 63.19 of the Commission's rules to require all authorization holders that permanently discontinue service provided pursuant to their international section 214 authority, to file a notification of the discontinuance and surrender the authorization within 30 days after the discontinuance.<sup>8</sup>

The FCC states that it believes that carriers' compliance with the one-time information collection required in the Order will be crucial for the Commission's efficient administration of a renewal process or, in the alternative, periodic review process.<sup>9</sup> INCOMPAS believes that the agency would benefit from reviewing the results of its one-time information collection and assessing the current state of play of current authorization holders prior to implementing an entirely new burdensome regulatory framework that introduces significant new obligations and so much uncertainty and cost on authorization holders. Such a process harms their ability to raise capital so that they can continue to offer service and compete in the marketplace as we explained above due to the long, costly review process and uncertain outcome of such review.

The agency also has not articulated how minority interests potentially overtake the majority owners' control rights such that an authorization holder does not file a transfer of

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<sup>8</sup> *NPRM* ¶¶ 134-137.

<sup>9</sup> *Id.* ¶ 66.

control application for FCC and the national security agencies to review. To the extent that the U.S. government is concerned that a previously undisclosed ten percent or greater direct/indirect foreign minority interests must be addressed by a mitigation agreement, then the one-time information collection potentially will allow the FCC and national security agencies the opportunity to bring such authorization holders into a mitigation agreement.

In a renewal process (or its alternative 3-year periodic review), the FCC referring all applications with reportable foreign ownership, cross-border facilities use, or Managed Network Service Providers etc. to the national security agencies is excessive and will create a long shadow of uncertainty for authorization holders. If the Commission adopts its renewal framework (or alternative periodic review), it should exempt all providers who are controlled by U.S. citizens or already have a mitigation agreement with the agencies. And it should refocus its application process so that it only seeks information that has changed since the one-time data collection or the last transfer of control/assignment application, whichever was the most recent filing. Moreover, the agency should only refer applications that have a new reportable interest from a foreign adversary that requires review by the national security agencies.

In the alternative to its public interest/new application standard for renewal, the NPRM seeks comment on whether an applicant seeking renewal of international section 214 authority should be granted a renewal expectancy in any circumstance as long it can make a specific showing, and if so, what factors should be included in such a showing.<sup>10</sup> Should the agency adopt a renewal framework, INCOMPAS supports a renewal expectancy based on (a) timely filed renewal application and (b) no violation of FCC rules during the authorization period.

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<sup>10</sup> *NPRM* ¶ 57.

INCOMPAS also supports the agency’s proposal that it would treat timely-filed applicants like Title III licensees pursuant to section 307(c) of the Act, and consistent with the Administrative Procedure Act, and that authorization holders may continue providing service(s) under their international section 214 authority while the renewal application is pending review.<sup>11</sup>

*Alternative Periodic Reporting is Also Burdensome and Costly.* The NPRM proposes an alternative to an authorization renewal of a 3-year periodic review of authorization holders with foreign ownership, but it would require all the same information and fee, but every three years, instead of ten years. Consistent with our discussion above, this would be an increased burden on authorization holders to comply with every three years, including the uncertain outcome of the national security agencies’ review. To the extent that periodic reporting is adopted, it should be based on a ten-year review period (as proposed for renewals) and exempt all providers who are controlled by U.S. citizens or already have a mitigation agreement with the agencies. And for those holders that are obligated to file, it should be reoriented to request updates only of changes since the one-time data collection or the last transfer of control/assignment application, whichever was the most recent filing. Moreover, the agency should only refer applications that have a new reportable interest from a foreign owner that requires review by the national security agencies.

### **III. THE CURRENT REPORTABLE OWNERSHIP DISCLOSURES SHOULD BE MAINTAINED AT TEN PERCENT.**

Lowering the reportable ownership threshold to five percent will increase the burden and costs on authorization holders. As such, INCOMPAS supports maintaining the ownership reporting requirement to direct or indirect ten percent or greater owners in the agency’s approval

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<sup>11</sup> NPRM ¶ 69.

processes.<sup>12</sup> Engaging with owners to obtain their direct/indirect ownership to correctly calculate ten percent and greater ownership interests and disclose them accurately to the FCC already is a difficult and time-consuming task. Lowering the disclosure threshold to five percent will increase the burden and costs of compliance for authorization holders. It will take longer as authorization holders will have to engage with more owners going up the chain of ownership for each reportable owner to calculate both the direct/indirect ownership percentages correctly and obtain all the information required from each reportable owner, including contact information and citizenship. It will cost more because authorization holders typically use outside counsel for this work, but even to the extent that in-house business executives and in-house counsel may be tasked with it, they will be adding to their workload.

The FCC states that a five percent owner or collection of such owners could pose a national security risk, yet a further explanation of exactly how such minority interests pose a risk is not provided.<sup>13</sup> Furthermore, the NPRM offers no evidence that someone who owns a five percent minority stake (or a collection of such owners) can overcome the majority owners' rights and control the direction of a company. While the agency indicates that some minority interests may work together to control an authorization holder,<sup>14</sup> such an arrangement is required to be disclosed and FCC approval obtained prior to the exercise of control pursuant to the statute and FCC requirements;<sup>15</sup> thus, the agency would have a chance to consider any new minority

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<sup>12</sup> *NPRM* ¶ 89 (“We seek comment on whether to adopt a new ownership reporting threshold that would require disclosure of certain 5% or greater direct and indirect equity and/or voting interests with respect to applications for international section 214 authority and modification, assignment, transfer of control, and renewal of international section 214 authority.”).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 47 U.S.C. § 214(a); 47 C.F.R. § 63.18.

shareholders exercise of control that has less than a ten percent interest in such a scenario. Moreover, it is unlikely that minority holders acting in concert can overcome majority holders and their rights. (This seems especially suspect where doing so would be contrary to the authorization holder's best interests, including meeting its legal obligations under the Communications Act to obtain prior approval for any change of control.)

INCOMPAS members are also concerned about disclosing ownership interests that are confidential and would require shareholder agreements to be modified in order for disclosure to be allowed. For example, one filing in the proceeding states:

A sizable number of investors have invested in the U.S. telecommunications sector for decades, and have made these investments with the reasonable expectation that a 10 percent public disclosure threshold would be maintained. Although it is true that certain fora such as the Committee on Foreign Investment in the United States ("CFIUS") and the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector ("Team Telecom") utilize the lower 5 percent threshold, those processes are confidential in contrast to the Commission's ownership public disclosures that historically do not receive confidential treatment. For competitive and other legitimate business reasons, limited partners carefully guard information about their investments from disclosure to the public or other limited partners, and each of the Telecommunications Investors likewise carefully guard the terms on which it deals with its limited partners and co-investors.<sup>16</sup>

The NPRM also asks if presumptive confidentiality for five percent (up to ten percent) owners would minimize the burden<sup>17</sup>—unfortunately, no it would not because the information would still need to be gathered and provided to the FCC. Thus, even those entities who may maintain the information will need to go through the laborious process of checking it—going up the chain of owners—before any major filing with the FCC that requires it.

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<sup>16</sup> Digital Bridge Group et al. Ex Parte Letter, IB Docket No. 23-119, at 3 (filed Apr. 13, 2023).

<sup>17</sup> NPRM ¶ 97.

The agency also notes that the national security agencies have supported the lower five percent threshold,<sup>18</sup> yet the record shows that these agencies have been able to attain more granular ownership information in its review process as needed. This makes the requirement for the five percent direct/indirect ownership disclosure less important as the national security agencies can obtain further information about the owners of an authorization holder with the current ten percent threshold.

The agency's reliance on SEC requirements for the lower threshold does not apply to all authorization holders given that some are privately owned.<sup>19</sup> Thus, the FCC must consider the significant burden lowering the threshold to five percent will place on privately owned companies, including the potential for upsetting standing investment arrangements which could negatively impact the ability of authorization holders to raise capital and compete in the marketplace. It was best explained earlier in the record by private equity owners with managing ownership interests in international Section 214 authorization holders:

A reduced reporting threshold is significantly more burdensome than current rules, is unnecessary to achieve the Commission's national security goals, and would significantly inhibit the ability for the [authorization holders] to solicit capital from legitimate domestic and foreign sources . . . . Rather than upending the longstanding framework for investment in the U.S. telecommunications sector and pursuing minority investors that have an extremely limited set of rights in connection with their investments that could not possibly represent a threat to national security, the Commission should focus its energy on targeting the general partners (or similar entities) that control Commission licensees.<sup>20</sup>

In the alternative to lowering the disclosure threshold, the NPRM seeks comment on whether the FCC “should only require disclosure of foreign ownership at the 5% level by

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<sup>18</sup> *Id.* ¶ 93.

<sup>19</sup> *Id.* ¶ 94.

<sup>20</sup> Digital Bridge Group et al. Ex Parte Letter, IB Docket No. 23-119, at 2 (filed Apr. 13, 2023).

citizens, entities, and government organizations from foreign adversary countries, as defined in the Department of Commerce’s rule, 15 CFR § 7.4.2.”<sup>21</sup> It also asks about whether its precedent on insulated or passive investors should be applied if it adopts the lower ownership disclosures.<sup>22</sup> To the extent that the FCC adopts a five percent reporting threshold, INCOMPAS would support measures to target only those owners that raise the most concern—those who are not passive investors and those who are affiliated with foreign adversaries.

**IV. MORE THAN ONE AUTHORIZATION SHOULD BE PERMITTED AND ADDITIONAL REQUIREMENTS SHOULD BE FURTHER TAILORED TO AVOID UNDUE BURDEN, COSTS OR DISCLOSURE OF COMPETITIVELY SENSITIVE INFORMATION.**

*Number of Authorizations.* INCOMPAS also is concerned by the NPRM’s proposal to potentially restrict a company’s ability to maintain more than one international 214 authorization would be a burden on those entities who have complex ownership structures and operational subsidiaries for business reasons.<sup>23</sup> The Commission should avoid making modifications that would require restructure and ownership changes for authorization holders that may require contract changes, customer notifications of discontinuances, and other steps that would be costly, time-consuming and a burden for authorization holders. Only truly duplicative authorizations within a subsidiary should be affected by the proposed change.

*Additional Information Sought and Revelation of Business Plans.* The FCC also seeks comment on a number of changes to its applications for initial authorization, transfers of control, or assignments, or renewals including information about their current and/or expected future

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<sup>21</sup> NPRM ¶ 90.

<sup>22</sup> *Id.* ¶ 91.

<sup>23</sup> *Id.* ¶ 129.



services and the geographic markets where the authorization holder offers service in the United States under its international section 214 authority:

- (1) identification and description of the specific services they provide and/or will provide;
- (2) types of customers that are and/or will be served;
- (3) whether the services will be provided through the facilities for which the applicant has an ownership, indefeasible right-of use or leasehold interest or through the resale of other companies' services; and
- (4) identification of where they currently and/or in the future expect to market, offer, and/or provide services using the particular international section 214 authority, such as a U.S. state or territory and/or U.S.-international route or globally.
- (5) whether or not they use and/or will use foreign-owned MNSPs and answer Standard Questions (with these routinely being referred to the Executive Branch agencies, including the Committee).
- (6) critical infrastructure that is used by authorization holders to provide service crossing the U.S.-Mexico and U.S.-Canada borders, including the location, ownership, and type of facilities (which it plans to require to be updated every three years and shared with the national security agencies.)
  - Location of each cross-border facility (street address and coordinates);
  - Name, street address, email address, and telephone number of the owner(s) of each cross-border facility, including the Government, State, or Territory under the laws of which the facility owner is organized;
  - Identification of the equipment to be used in the cross-border facilities, including equipment used for transmission, as well as servers and other equipment used for storage of information and signaling in support of telecommunications;
  - Identification of all IP prefixes and autonomous system domain numbers used by the facilities that have been acquired from the American Registry for Internet Numbers (ARIN); and
  - Identification of any services that are and/or will be provided by an applicant through these facilities pursuant to international section 214 authority.
- (7) Certifications to implement and adhere to baseline cybersecurity standards based on universally recognized standards such as those provided by CISA or the Department of Commerce's National Institute of Standards and Technology (NIST) and whether or not they use equipment or services identified on the Commission's "Covered List" of equipment and services deemed pursuant to the Secure and Trusted Communications Networks Act to pose an unacceptable risk to the national security of the United States or the security and safety of United States persons.

Given that information about their business plans, markets to be served and potential customers and how they will serve (through IRUs, cross-border facilities, etc.)— is detailed information that should be treated as competitively sensitive and should be collected by the agency

confidentially and only in the situation where it is absolutely necessary to protect federal interests—INCOMPAS believes that the information should be treated as presumptively confidential and should only be collected where it does not already have the information at hand to avoid adding additional undue burden on applicants.

**V. CONCLUSION**

For the reasons stated herein, INCOMPAS urges the Commission to consider the recommendations in its comments as it examines the issues raised in the *NPRM*.

Respectfully submitted,

A handwritten signature in cursive script that reads "Angie Kronenberg".

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